

# Sham Peer Review: Malicious Prosecution

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In a previous editorial, I reviewed the various breach of contract and tort claims victims of sham peer review often use in litigation against wrongdoers.<sup>1</sup> In this editorial, I will discuss a relatively new application of the tort claim of malicious prosecution, which is available in litigation involving sham peer review.

The information presented below is based on my study and observations. I am not an attorney and do not provide legal advice or opinion. Physicians are encouraged to consult with their attorneys for legal advice and opinion.

Sham peer review *is* malicious peer review, and those who instigate and participate in it are engaging in malicious prosecution of a physician. It represents an abuse of the peer review process for reasons other than the furtherance of quality medical care.

According to *Legal Dictionary*, "Malicious prosecution is a legal term that refers to the filing of a civil or criminal case that has no probable cause, and is filed for some purpose other than obtaining justice."<sup>2</sup>

Malicious prosecution is a tort that derives from common law (judicial precedent/case law) as opposed to legislative law, with the goal of preventing abuse of the legal system.<sup>2</sup> *Legal Dictionary* goes on to explain: "When a person files a civil lawsuit, or a prosecutor brings criminal charges against an individual without good cause, maliciously, or for an inappropriate reason, the defendant may have the right to seek justice by filing a malicious prosecution lawsuit against him."<sup>2</sup>

The laws pertaining to malicious prosecution and the specific elements of malicious prosecution that must be met to pursue the claim vary by state.<sup>2</sup> Underlying reasons for a party filing an action against another person without probable cause and with malice can include: "...to intimidate, harass, defame, or otherwise injure the other party."<sup>3</sup>

The tort of malicious prosecution is sometimes characterized as a *disfavored* tort. In the case of *Zamos v. Stroud*, the California Supreme Court stated:

The tort of malicious prosecution is disfavored "both because of its 'potential to impose an undue "chilling effect" on the ordinary citizen's willingness to report criminal conduct or to bring a civil dispute to court' [(*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 872 (*Sheldon Appel Co.*))] and because, as a means of deterring excessive and frivolous lawsuits, it has the disadvantage of constituting a new round of litigation itself (id. at p. 873)."<sup>4</sup>

The Court cautioned, however, that the phrase disfavored tort should not result in automatic dismissal of legitimate cases.

On the other hand, we have cautioned that this "convenient phrase," i.e., the characterization of malicious prosecution as a disfavored cause of action, "should not be employed to defeat a legitimate cause of action or to invent new limitations on the substantive right, which are without support in principle or authority." (*Bertero v. National General Corp.* (1974) 13 Cal.3d at p. 53; *Crowley v. Katleman* (1994) 8 Cal.4th at p. 680).<sup>4</sup>

The *Zamos* Court also made it clear that malicious prosecution applies not just to the initiation of a lawsuit/prosecution without probable cause, but it also applies to situations where the lawsuit/prosecution is continued despite discovering that it lacked probable cause.<sup>4</sup>

Malicious prosecution is also sometimes referred to as a *dignatory* tort because it injures the human dignity of the victim. This is particularly applicable in the case of sham peer review where the physician's reputation, honor and core identity as a physician are damaged along with ruin or end of the physician's medical career.<sup>2,3,5</sup> A dignatory tort is one which inflicts severe emotional distress on the victim and often involves abuse of process.<sup>3</sup>

## Malicious Prosecution Applies to Administrative Proceedings

The application of malicious prosecution originated with criminal proceedings and was subsequently expanded to include civil lawsuits. As explained by the U.S. Court of Appeals for the D.C. Circuit, sometimes considered the most important court other than the U.S. Supreme Court, in *Melvin v. Pence*:

The action for malicious prosecution was originally one for prosecution in the technical sense, that is, institution of criminal proceedings. Prosser, *Torts* (1941) § 96, at 860-1.... it has been extended generally to include civil suits, when they result in the special consequences stated in the quotation from *Peckham v. Union Finance Co.* 60 App. D.C. p. 105, 48F.2d p. 1017.<sup>6</sup>

With the expanding role of various administrative entities, and the penal-like consequences that arose therefrom, malicious prosecution was found to be applicable to quasi-judicial administrative proceedings. The application of malicious prosecution to administrative proceedings dates back to 1932. As the Rhode Island Supreme Court in the *Hillside* case stated:

Whereas historically such causes of action arose from misuse of court proceedings or judicial processes, the continually expanding role of administrative bodies that perform quasi-judicial functions created the

setting for the abuse of administrative proceedings.... Courts in other jurisdictions have also recognized the increasing role and importance of administrative agencies in adjudicating individual rights and interests. As early as 1932, liability for the tort of malicious prosecution was found to arise from a proceeding outside the traditional judicial process.<sup>7</sup>

The 1932 case cited was that of *National Surety Co. v. Page*, where the U.S. Court of Appeals for the Fourth Circuit held: [t]o revoke the license of an insurance agent is not, strictly speaking, either a criminal or a civil action. It is an anomalous proceeding, *penal in its nature*, prosecuted, not for the benefit of an individual, but the interest of the public.<sup>8</sup>

The *Melvin* Court noted that it doesn't really matter to the victim whether injuries occurred in a criminal proceeding or at the hands of an administrative body or official. Both situations call for an appropriate remedy.

When malice motivates a groundless claim and results in special injury beyond what assertion of rights ordinarily entails, remedy is afforded....

We agree with plaintiff that these principles are clearly applicable to administrative proceedings. Much of the jurisdiction formerly residing in the courts has been transferred to administrative tribunals, and much new jurisdiction involving private rights and penal consequences has been vested in them....

The same harmful consequences may flow from the groundless and malicious institution of proceedings in them as does from judicial proceedings similarly begun. When one's livelihood depends upon a public license, it makes little difference to him whether it is taken away by a court or by an administrative body or official. Nor should his right to redress the injury depend upon the technical form of the proceedings by which it is inflicted. The administrative process is also a legal process, and its abuse in the same way with the same injury should receive the same penalty.<sup>6</sup>

The *Hillside* Court came to the same conclusion:

[Citing *Melvin*], "In a broad sense [the creation of administrative bodies that carry out quasi-judicial functions] involves the emergence of a new system of courts. The same harmful consequences may flow from the groundless and malicious institution of proceedings in them as does from judicial proceedings similarly begun...."

We are of the opinion that when a party invokes an administrative proceeding with malicious intent and without probable cause, that party should be subject to the same sanctions that would obtain if the action were brought in the judicial branch. Consequently, we conclude that the misuse of an administrative proceeding may give rise to claims for malicious prosecution and/or abuse of process.<sup>7</sup>

It should be noted that a peer review hearing in a hospital is a quasi-judicial proceeding. The Rules of Evidence that would apply in a court of law generally do not apply in a peer review

hearing in a hospital. It is also noted that severe harm arises when a hospital uses sham peer review to remove a physician's privileges. Medical staff privileges are a property interest.

Hospitals and their peer reviewers enjoy nearly absolute immunity under the Health Care Quality Improvement Act (HCQIA) of 1986. The *Rainier's Dairies* New Jersey Supreme Court made clear, however, that wrongdoers should not be allowed to escape liability by claiming absolute immunity to the extent that they maliciously interfered with someone's business. As a dissenting judge explained in that case while supporting even "broader grounds than embraced by the majority":

It is true that administrative agencies are now a vital part of American life and perform important public duties, but in my opinion it is not yet part of the American way of life that one may falsely and with malice aforethought be permitted to slander and libel another and then successfully claim absolute immunity for his acts.<sup>9</sup>

The tort of malicious prosecution is widely recognized throughout the nation. Favorable precedents have been set in New Jersey, Wisconsin, California, Texas, and other states.

The claim of malicious prosecution in the hospital peer review setting has, unfortunately, not yet been recognized in Missouri. In the *Misischia* case, the Missouri Court of Appeals declined to extend a claim of malicious prosecution to hospital peer review, finding that "The term 'administrative proceeding' means a proceeding before a public agency or public corporation for purposes of malicious prosecution claims, and disciplinary proceedings by private employers do not constitute such."<sup>10</sup>

However, hospitals are licensed by the state and are subject to state and federal (HCQIA) laws. In performing their functions under these laws, hospitals have essentially taken on the role of a public agency purportedly to act in the public's interest. Hospitals are required by law to report adverse actions taken against a physician's privileges in a hospital to the state medical board, which is a public agency. Thus, hospitals work in conjunction with state medical boards for the stated purpose of maintaining quality care. Hospitals often wield power like that of a state medical board in that hospitals can take away a physician's constitutionally protected property interest (hospital privileges).

Malicious prosecution has been applied in a wide variety of situations including real estate licenses,<sup>11-13</sup> termination of academic employment,<sup>14</sup> a complaint filed with Director of the Office of Milk Industry,<sup>9</sup> a zoning board complaint,<sup>7</sup> a private detective license,<sup>6</sup> an insurance agent license,<sup>8</sup> cattle sales,<sup>15</sup> a complaint filed with an optometry board,<sup>16</sup> a complaint filed with pharmacy board,<sup>17</sup> and a hospital peer review action against a dentist.<sup>18</sup>

## Elements of Malicious Prosecution

The elements required for a malicious prosecution claim are similar from state to state. Generally, six elements are required.<sup>3,13,15,19,20</sup> In some instances, four elements are listed, typically combining some of the six basic elements.<sup>2,16,17</sup>

The standard elements of a malicious prosecution claim are: (1) the prior institution or continuation of a civil or criminal legal proceeding against the plaintiff who subsequently brings the malicious prosecution claim; (2) by, or abetted by, the defendant (the prosecutor or plaintiff in the malicious action); (3) termination of the prior proceeding in favor of the plaintiff (for instance, the case was dismissed); (4) absence of probable cause for instituting the prior proceeding; (5) malice as the primary purpose for the prior action; and (6) injury or damage to the plaintiff as a result of the prior action.<sup>3</sup>

#### **Element 1**

Element 1 broadly applies to administrative proceedings that are quasi-judicial (e.g., peer-review hearings) and which can adversely affect legally protected property interests (e.g., medical staff privileges). As noted by the New Jersey Supreme Court in the *Rainier's Dairies* case:

[T]he weight of authority in this country... supports the view that under certain circumstances a malicious prosecution may be predicated upon the institution of other than a judicial action, at least where such proceedings are adjudicatory in nature and may adversely affect legally protected interests.<sup>9</sup>

It is well accepted in most jurisdictions that a physician's medical staff privileges represent a legally protected property interest.<sup>21-25</sup>

As the Court noted in the *Osuagwu* federal court case:

Of course, what minimum procedural process is due under HCQIA must also be adjudged in light of constitutional due-process protections. The Eleventh, Sixth, and Fifth Circuits have explicitly held that a physician has a constitutionally-protected property interest in medical-staff privileges where the hospital's bylaws detail an extensive procedure to be followed when corrective action or suspension or reduction of these privileges is going to be taken.<sup>22</sup>

#### **Element 2**

Element 2 applies to individuals who initiated or abetted the action, and to those who, after discovering that the action lacked any legitimate basis (probable cause), chose to continue the prosecution/lawsuit.<sup>4</sup>

#### **Element 3**

Element 3 provides that the proceedings must be terminated in favor of the aggrieved party. Physicians, who are victims of sham peer review, can meet this requirement based on the totality of the peer review process.

In the circumstance of a summary suspension lasting more than 30 days or a final adverse action against a doctor's hospital privileges, notification of the adverse action is sent to the National Practitioner Data Bank (NPDB) and to the state medical board.

If the medical board then conducts its own investigation and finds no quality of care, standard of care, or professional conduct issues, it determines that no adverse action against the physician's license is warranted by the facts. In that

circumstance, the totality of the peer review process has terminated in favor of the physician who was a victim of sham peer review.

#### **Element 4**

Element 4 requires that there must be an absence of probable cause for initiating or continuing the proceeding (e.g., peer review), meaning that there was no objective, legitimate basis for initiating or continuing the proceeding.

The Court in the *Nicholson* case reviewed probable cause analysis as follows:

Probable cause has classically been defined as "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable person in the belief that the charge is true." (*Jensen v. Leonard* (1947) 82 Cal.App. 2d 340, 351, 186 P.2d 206; *Kassan v. Bledsoe* (1967) 252 Cal.App.2d 810, 816, 60 Cal.Rptr. 799; *Davis v. Local Union No. 11, Internat etc. Elec. Workers* (1971) 16 Cal.App.3d 686, 692, 94 Cal. Rptr. 562.) "Probable cause does not depend on the actual state of the case, but rather on whether the one instigating the proceeding is possessed of knowledge, information, or facts sufficient to cause a reasonable, or a reasonably prudent, person to believe honestly that the charge is true." (6 Cal.Jur.2d, Assault and Other Willful Torts, § 330, p. 845, fns. omitted.) This is an objective standard. (*Sheldon Appel Co. v. Albert & Olier, supra*, 47 Cal.3d at p. 883, 254 Cal.Rptr. 336, 765 P.2d 498; *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 567, 264 Cal. Rptr. 883.)<sup>18</sup>

#### **Element 5**

Element 5 requires that malice must be established as the primary purpose for the proceeding.

The Texas appellate court in the *Luce* case discussed what is required to establish malice:

Malice has been defined as ill will or evil motive, or such gross indifference or reckless disregard for the rights of others as to amount to a knowing, unreasonable, wanton, and willful act. See *Ellis County State Bank v. Keever*, 870 S.W.2d 63 (/opinion/1496394/ellis-county-state-bank-v-keever/), 69 (Tex.App.-Dallas 1992), *aff'd in part and rev'd in part on other grounds*, 888 S.W.2d 790 (/opinion/1493784/ellis-county-state-bank-v-keever/) (Tex. 1994). "To establish malice, it is not necessary to prove that the defendant acted with personal spite or ill will; it is sufficient to show the defendant committed wrongful acts in reckless disregard of another's rights and with indifference as to whether the party would be injured." *Id.* This element of malice may be inferred from a lack of probable cause. See *Fisher v. Beach*, 671 S.W.2d 63 (/opinion/2366680/fisher-v-beach/), 67 (Tex.App.-Dallas 1984, no writ).<sup>19</sup>

Although malice can be inferred from a lack of probable cause, the contrary is not true—lack of probable cause may not be inferred from malice.<sup>19</sup>

Evidentiary standards vary from state to state, but proving

the wrongdoer's state of mind (e.g., ill will or evil intent) often depends on circumstantial evidence.

In the *Lipsky* case the Texas Supreme Court noted:

All evidentiary standards, including clear and convincing evidence, recognize the relevance of circumstantial evidence. In fact, we have acknowledged that the determination of certain facts in particular cases may exclusively depend on such evidence. See, e.g., *Bentley*, 94 S.W.3d at 596 (noting in a defamation case, that claims involving an element of a defendant's state of mind "must usually be proved by circumstantial evidence").<sup>26</sup>

Likewise, in the *Smith* case, the Louisiana Supreme Court noted:

In a disciplined doctor's action against peer review committee members, like this one, the doctor will seldom, if ever, be able to uncover direct evidence of the peer review committee members' improper motive or intent. Instead, the disciplined-doctor's proof will consist of a broad array of circumstantial evidence regarding alleged defects in the peer review process, the committee members' knowledge, and the reasons touted for the disciplinary action taken.<sup>27</sup>

It is also noted that "if actual malice is established, the jury may also allow punitive damages."<sup>11</sup>

#### **Element 6**

In order to discourage excessive, never-ending, frivolous lawsuits, the tort of malicious prosecution generally requires that the physician prove special injury/damages.<sup>15</sup> That is, damages beyond ordinary losses, such as having to defend against the initial action and all costs associated with having to file a malicious prosecution claim, inconvenience, stress, and damage to the physician's good reputation associated with the initial action, must be demonstrated.

In the *Sharif-Munir Davidson* case, the Court stated:

The rule in Texas denies an award of damages for the prosecution of civil suits, with malice and without probable cause, unless the party sued suffers some interference, by reason of the suits, with his person or property. *Pye v. Cardwell*, 110 Tex. 572 (/opinion/4161172/pye-v-cardwell/), 222 S.W.153 (/opinion/4161172/pye-v-cardwell/) (1920). Thus, Texas law requires special injury for malicious prosecution, that is, actual interference with the defendant's person (such as an arrest or detention) or property (such as an attachment, an appointment of receiver, a writ of replevin or an injunction). *St. Cyr v. St. Cyr*, 767 S.W.2d 258 (/opinion/2451322/st-cyr-v-st-cyr/), 259 (Tex. App. – Beaumont 1989, n.w.h.) (citing *Moiel v. Sandlin*, 571 S.W.2d 567 (/opinion/2443790/moiel-v-sandlin/) [Tex. Civ.App. – Corpus Christi 1978, no writ], and *Martin v. Trevino*, 578 S.W.2d 763 (/opinion/1783916/martin-v-trevino/) [Tex.Civ.App. – Corpus Christi 1978, writ ref'd n.r.e.]).<sup>28</sup>

Another recent case in Texas found that summary suspension of a physician's hospital privileges "constitutes

interference with a property right, akin to an injunction, and therefore satisfies the special damages requirement."<sup>29</sup>

#### **Pisharodi Case**

In January 2020, a Texas Court of Appeals found that the physician, Dr. Madhavan Pisharodi, satisfied all six elements of malicious prosecution, and his case could move forward to trial.<sup>29</sup>

The Court reviewed the following facts alleged by Dr. Pisharodi in his original petition:

This lawsuit arises out of the actions taken by [VRMC] in response to [Pisharodi]'s legitimate concerns regarding a fellow physician's treatment of and communications with two patients. In the context of these two patients, [Pisharodi] was advised by [VRMC]'s Chief of Staff to reduce his concerns into writing. Once it received the writing, however, [VRMC] failed to meaningfully investigate his allegations and instead, started a campaign against [Pisharodi] in conjunction with [Gaitan] to not only discredit him in Cameron County, but also to the Texas Medical Board [TMB] and the [National Practitioner Data Bank (NPDB)]. [Gaitan] made false and misleading statements intending to cause harm to [Pisharodi]. These statements were made to peers, hospital staff as well as patient family members.

[VRMC] initiated a series of peer reviews in violation of the bylaws against [Pisharodi]. [VRMC] cut [Pisharodi]'s access to the patient medical records for which it was conduc[t]ing the peer reviews for. Realizing that it was not going to be successful in discrediting [Pisharodi] with an accurate set of medical records, [VRMC and Gaitan] then altered patient medical records, well after the fact, to justify its imposition of a thirty day suspension of privileges. [VRMC] not only used the altered medical records in its sham peer review proceedings but also made two reports to the [TMB] and transmitted altered medical records to them with the intent that they take enforcement action against [Pisharodi]. [VRMC] also discredited [Pisharodi] by making a report to the [NPDB]....

In the time following Pisharodi's written complaint, VRMC reported Pisharodi to the [TMB] on two (2) separate occasions; VRMC conducted three (3) separate sham peer reviews, and at one point, suspended Pisharodi's hospital privileges for thirty-one (31) days. The 31-day suspension of his hospital privileges was maliciously imposed by VRMC in order to surpass the threshold required to enable VRMC to file an adverse action report with the [NPDB]....

VRMC falsely alleged that Pisharodi had altered patient medical records, when in fact, VRMC altered the medical records in order to protect Gaitan....The allegation of altered medical records was the basis of VRMC's reporting to the [NPDB] and was, likewise, the basis of VRMC's 31-day suspension imposed against



Pisharodi. VRMC had also made the same allegation against Pisharodi to the [TMB], but that complaint was ultimately dismissed.<sup>29</sup>

The Court found that Dr. Pisharodi satisfied the special damages requirement of malicious prosecution.

Pisharodi contends that he suffered special damages because his admitting privileges at VRMC were suspended for thirty-one days as a result of the peer reviews that appellants initiated. We agree. Pisharodi alleged in his affidavit that the suspension was set at thirty-one days specifically because that length of suspension required reports to be made to the TMB and NPDB; he claims that, had the suspension been for thirty days or fewer, VRMC would not have been empowered to make such reports. In any event, the suspension of Pisharodi's admitting privileges does not constitute "ordinary losses" incident to defending an administrative proceeding such as the peer reviews undertaken in this case. Instead, it constitutes interference with a property right, akin to an injunction, and therefore satisfies the special damages requirement.<sup>29</sup>

Dr. Pisharodi overcame a motion to dismiss brought under the powerful Texas Citizens Participation Act (TCPA) in this case, a noteworthy victory in pursuing his malicious prosecution claim.<sup>29</sup>

## Conclusion

The claim of malicious prosecution represents a relatively new option in the tort toolbox for physicians, which can be used in an attempt to hold wrongdoers accountable for their actions. Although elements of malicious prosecution present a relatively high bar, it is possible to satisfy the requirements as demonstrated in the *Pisharodi* case. Given the horrendous lifetime damage caused by sham peer review, the dignatory tort of malicious prosecution seems particularly appropriate.

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