Retaliatory lawsuits against plaintiff attorneys

When a PI case is lost, the defendant may seek to retaliate against plaintiff's lawyer

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When a plaintiff loses a personal injury case, especially a medical malpractice case, there is always the threat of a retaliatory lawsuit against his lawyer. Many people do not realize that the main cause of action in such lawsuits is not covered by insurance. The theories of recovery will either be slander/libel or malicious prosecution or, usually, both. Although there are statutory safeguards against a slander/libel case known as the litigation privilege, there are none to protect against malicious prosecution claims.

Why no coverage for malicious prosecution?

Malicious Prosecution in a civil context is properly known as Wrongful Use of Civil Proceedings (See CACI 1501 et seq). It is an intentional tort and therefore is never covered by insurance, including Legal Malpractice Insurance, although a defense obligation may exist. The defendant must engage his own counsel. If the complaint also contains allegations which are covered by insurance, such as slander/libel, then the carrier may provide coverage or normally just hire the defendant's attorney to defend on all claims to avoid paying two sets of lawyers.

The private attorney is known as Cumis counsel pursuant to the fountainhead case of *San Diego Navy Federal Credit Union v. Cumis Ins. Society Inc*. (1984) 162 Cal.App.3d 358. A Cumis situation arises when the alleged defamation may be negligent and the Malicious Prosecution is intentional and hence not covered. The attorney selected by the carrier would then have a conflict of interest because he would want the case to be resolved as an intentional tort and private counsel would want it to be resolved as a negligent tort. The first step for the defendant is to hire private counsel to deal with the carrier and, generally, he will eventually take over as the only defense lawyer paid by the carrier, subject to an agreement on rates.

Litigation privilege

Civil Code section 47(b), which is generally known as the litigation privilege, is a misnomer. It is really not a privilege, but a complete bar to suits that are covered by its provisions. It protects lawyers, litigants and even witnesses by completely eliminating any cause of action. The leading case that discusses the "privilege" is *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948.

In *Jacob B*. the California Supreme Court extended the privilege to claims based on a violation of the right of privacy and held that the "privilege" is absolute regardless of malice. It applies to any publication required or permitted by law in the course of judicial proceedings to achieve the objects of litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. As the Court stated in *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1063: "The purposes of section 47, subdivision (b) are to afford litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative tort actions, to encourage open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments and to avoid unending litigation." In other words, the law is manifestly opposed to retaliatory lawsuits.

Malicious prosecution

Unfortunately, the litigation privilege does not extend to claims for Malicious Prosecution. *Hagberg v. California Fed. Bank* (2004) 32 Cal.4th 350,361. Nonetheless, one who asserts such a claim must overcome two key elements:

1. That no reasonable person would have believed that there were reasonable grounds to bring the underlying lawsuit.
2. That the defendant in the Malicious Prosecution case acted primarily for a purpose other than succeeding on the merits.

The first of these elements is a question of law for the judge. (See Witkin, Torts, § 506.) This gives the attorney, litigant or witness a tremendous advantage if there is any basis at all for initiating the underlying case. Any case can be lost and there is always a winner and a loser; but, the test for the court is whether there are any reasonable grounds at all. The attorney who brings a claim is not an insurer to his client's adversary that his client will win. Nonetheless, in a medical negligence case, it is absolutely essential to obtain a favorable opinion from a qualified expert in the applicable medical specialty. Without such an opinion, the plaintiff's attorney can be very vulnerable to the subsequent Malicious Prosecution case.

The second key element basically requires proof that the underlying litigation was brought for some ulterior purpose other than to collect damages for some alleged wrong. In other words, it was a spite suit to vex and annoy.

Anti-SLAPP motion

There is a highly expedited method for getting rid of these disfavored retaliatory cases. Within 60 days of the service of the Complaint, the defendant may file a motion under Code of Civil Procedure sections 425.16-425.18. A hearing is held not more than 30 days after service of the motion and all discovery is stayed. The motion can be filed in Malicious Prosecution cases (*Jarrow Formulas Inc. v. La Marche* (2003) 31 Cal.4th 728), as well as cases alleging defamation (*Briggs v. Eden Council* (1999) 19 Cal.4th 1106).

Applicable statutes of limitations

It is important to note that the statute of limitations for slander/libel is only one year (Code Civ. Proc., § 340) as compared to the standard personal injury statute of two years (Code Civ. Proc., § 335.1).

However, the applicable statute for Malicious Prosecution falls under the two-year ban (Code Civ. Proc., § 335.1; *Stravropolous v. Superior Court* (2006) 141 Cal.App.4th 190, 197).

The bringing of the lawsuit in the underlying case or some testimony therein may trigger the slander/libel limitation period, even though the Malicious Prosecution statute does not begin to run until the case is decided.

Venue

Another advantage to the defendant is that the case must be brought where the defendant resides. (Code Civ. Proc., § 395.) These are not considered bodily injury cases which can be brought either where the tort occurred or where the defendant resides.


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