

10-1-1978

Malicious Prosecution Counterclaims Now Allowable in the Principal Action—Implicit Abandonment of the Doctrine of Strict Limitation—Wash. Rev. Code § 4.24.350 (Supp. 1977)

Richard D. Vogt

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Civil Procedure Commons](#)

Recommended Citation

Richard D. Vogt, Recent Developments, *Malicious Prosecution Counterclaims Now Allowable in the Principal Action—Implicit Abandonment of the Doctrine of Strict Limitation—Wash. Rev. Code § 4.24.350 (Supp. 1977)*, 53 Wash. L. Rev. 805 (1978).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol53/iss4/12>

This Recent Developments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

MALICIOUS PROSECUTION COUNTERCLAIMS NOW ALLOWABLE IN THE PRINCIPAL ACTION—IMPLICIT ABANDONMENT OF THE DOCTRINE OF STRICT LIMITATION—WASH. REV. CODE § 4.24.350 (Supp. 1977).

Washington courts have traditionally disfavored actions for malicious prosecution.¹ Where the action has been asserted for malicious prosecution of a prior *civil* suit,² that disfavor has resulted in judicially imposed restrictions so severe as to effectively guarantee failure of the claim.³

With the enactment of R.C.W. § 4.24.350,⁴ however, the Washington State Legislature has made the malicious plaintiff an endangered species in this state. The statute eliminates two major common law roadblocks—one procedural, the other substantive⁵—to successful assertion of an action for malicious prosecution of an ordinary civil

1. *E.g.*, *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn. 2d 485, 496, 125 P.2d 681, 687 (1942); *Terusaki v. Matsumi*, 106 Wash. 538, 541, 180 P. 468, 469 (1919); *Simmons v. Gardner*, 46 Wash. 282, 286, 89 P. 887, 888 (1907). For a general treatment of the subject of malicious prosecution, see F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 4.1-.12 (1956) [hereinafter cited as HARPER & JAMES]; M. NEWELL, *MALICIOUS PROSECUTION* (1892); W. PROSSER, *THE LAW OF TORTS* §§ 119-120 (4th ed. 1971) [Hereinafter cited as PROSSER].

2. The action of malicious prosecution arose as a remedy for the malicious commencement, without probable cause, of criminal proceedings. PROSSER *supra* note 1, § 119, at 835. With the extension of the tort in most jurisdictions to various wrongful civil actions, the term "malicious prosecution" has been generally retained and used to refer to actions both criminal and civil in origin. PROSSER *supra* note 1, § 120, at 851-53. *But see* RESTATEMENT (SECOND) OF TORTS §§ 653, 674 (1977). Occasionally phrases such as "malicious use of process" are used to distinguish the civil suit from criminal actions. PROSSER *supra* note 1, § 120, at 853. Where such hybrid phrases are used, particular care must be taken not to confuse malicious prosecution with the conceptually similar but legally distinct tort of "abuse of process." See notes 27-28 and accompanying text *infra*.

In both civil and criminal cases the essence of the tort of malicious prosecution is the same—namely, malice and want of probable cause. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn. 2d 485, 497, 125 P.2d 681, 687-88 (1942) (criminal); *Smits v. Hogan*, 35 Wash. 290, 294, 77 P. 390, 391 (1904) (civil).

3. Only five malicious prosecution cases based upon prior actions of a strictly civil character have ever reached the Washington Supreme Court; no plaintiff has prevailed. *Petrich v. McDonald*, 44 Wn. 2d 211, 266 P.2d 1047 (1954), noted in 30 WASH. L. REV. 187 (1955); *Gilmore v. Thwing*, 167 Wash. 457, 9 P.2d 775 (1932); *Manhattan Quality Clothes, Inc. v. Cable*, 154 Wash. 654, 283 P. 460 (1929); *Smits v. Hogan*, 35 Wash. 290, 77 P. 390 (1904); *Abbott v. Thorne*, 34 Wash. 692, 76 P. 302 (1904). See also *Child v. Western Lumber Exchange*, 133 Wash. 49, 233 P. 322 (1925) (addressing the issue of malicious civil prosecution in dictum).

4. Act of June 6, 1977, ch. 158, § 1, 1977 Wash. Laws, 1st Ex. Sess. 592 (codified at WASH. REV. CODE § 4.24.350 (Supp. 1977)).

5. Whether R.C.W. § 4.24.350, viewed as a whole, will be characterized by federal courts as substantive or procedural for purposes of the rule announced in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), is by no means certain. Resolution of that question is beyond the scope of this note.

suit.⁶ Unfortunately, because the new law is so intimidatingly expansive in its apparent scope, potential plaintiffs with arguably valid claims may also be deterred from seeking legal redress.

The statute provides in its entirety,

In any action for damages, whether based on tort or contract or otherwise, a claim or counterclaim for damages may be litigated in the principal action for malicious prosecution on the ground that the action was instituted with knowledge that the same was false, and unfounded, malicious and without probable cause in the filing of such action, or that the same was filed as a part of a conspiracy to misuse judicial process by filing an action known to be false and unfounded.⁷

On its face, the statute appears innocuous. Indeed, to all but those presently engaged in trial practice in Washington, it may come as something of a surprise to learn that R.C.W. § 4.24.350 is anything more than a codification of common law. However, the statute represents a major departure from prior state law and, for plaintiffs and plaintiffs' attorneys, the news is almost all bad.

For civil defendants R.C.W. § 4.24.350 is potentially a tool of immense usefulness as a general deterrent to would-be plaintiffs.⁸ It may also serve as a source of leverage in pre-trial negotiations⁹ and as a means for actually recovering damages.¹⁰ The statute does not guarantee that success with a malicious prosecution counterclaim will be a simple task, but it does suggest that many such claims which under prior law would have been summarily rejected as a matter of law will now reach juries.¹¹ Because R.C.W. § 4.24.350 is not entirely free of ambiguity, however, its ultimate impact will depend on construction by the courts. Some possible grounds for a narrow construction of the statute—and for an attack upon its constitutionality—are suggested later in this note.¹²

6. The phrase "ordinary civil suit" describes an action "which does not directly affect person or property, but results if successful only in a judgment debt." HARPER & JAMES § 4.8, *supra* note 1, at 326 (citing, *inter alia*, Abbott v. Thorne, 34 Wash. 692, 76 P. 302 (1904)). Also excluded are quasi-criminal proceedings. See Olson v. Haggerty, 69 Wash. 48, 124 P. 145 (1912) (wrongful instigation of search proceedings will sustain an action for malicious prosecution even without an arrest or seizure of property); PROSSER *supra* note 1, § 120, at 851.

7. WASH. REV. CODE § 4.24.350 (Supp. 1977).

8. See text accompanying notes 32-33 *infra*.

9. See note 34 *infra*.

10. See note 36 and accompanying text *infra*.

11. See note 41 *infra*.

12. See notes 48-54 and accompanying text *infra*.

Malicious Prosecution Counterclaims

One thing is certain: if the courts substantially defer to the apparently expansive import of R.C.W. § 4.24.350, the initiation of a civil suit in Washington will have become a significantly riskier proposition than before.

I. WASHINGTON'S PRIOR COMMON LAW REQUIREMENTS FOR MAINTENANCE OF AN ACTION FOR MALICIOUS PROSECUTION

Prior to the enactment of R.C.W. § 4.24.350, a plaintiff seeking to maintain a suit in Washington for malicious prosecution was required to prove (1) that the action complained of was instituted or continued by the defendant with malice and (2) without probable cause, (3) that the action was either abandoned or terminated on its merits in favor of the plaintiff (defendant in the first action), and (4) that damages resulted.¹³ Furthermore, it has long been the rule in Washington that commencement of a civil suit, even if maliciously motivated and without probable cause, does not give rise to an action for malicious prosecution unless the plaintiff suffered arrest or a seizure of property, and unless the latter injury was one which would not necessarily result from the prosecution of like suits.¹⁴ Known as the "doctrine of strict

13. *E.g.*, *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn. 2d 485, 497, 125 P.2d 681, 687 (1942); *Terusaki v. Matsumi*, 106 Wash. 538, 540, 180 P. 468, 468-69 (1919); *Ton v. Stetson*, 43 Wash. 471, 474, 86 P. 668, 670 (1906).

14. The requirements of a personal arrest or seizure of property and special injury, were adopted by the Washington Supreme Court in *Abbott v. Thorne*, 34 Wash. 692, 76 P. 302 (1904). The court relied principally upon a well-known Iowa case, *Wetmore v. Mellinger*, 64 Iowa 741, 18 N.W. 870 (1884), and was particularly impressed by *Wetmore's* suggestion that unless malicious civil prosecution actions were strictly discouraged, then logically, some additional remedy ought to be afforded the plaintiff who is compelled to sue one who defends maliciously and without probable cause. *Abbott v. Thorne*, 34 Wash. at 694, 76 P. at 303.

The meaning of "special injury" was explained in *Petrich v. McDonald*, 44 Wn. 2d 211, 266 P.2d 1047 (1954). The defendant in *Petrich* was the plaintiff's creditor and mortgagee of plaintiff's ship. In a prior action arising out of a dispute over repayment terms, the defendant sought to foreclose the mortgage, in the process causing the issuance of an attachment in rem against the ship and its seizure by a United States marshal. The action was dismissed and the shipowner responded with a suit for malicious prosecution, alleging injury from the seizure of his vessel. A jury verdict in favor of the plaintiff was reversed by the Washington Supreme Court. The court held that proof of malice, lack of probable cause, and damages flowing from an attachment of property were insufficient to support plaintiff's claim because attachment was an ordinary and necessary part of any proceeding to foreclose upon a preferred ship mortgage; the plaintiff, therefore, had not suffered any "special injury" which would not result in similar prosecutions. *Id.* at 221, 266 P.2d at 1052-53. The practical result of the *Petrich* decision was the demise of malicious civil prosecution as a cause of action in Washington.

limitation,"¹⁵ this approach has meant in effect that an action for malicious prosecution could not be founded on any proceeding of a strictly civil character.¹⁶

II. CHANGES UNDER R.C.W. § 4.24.350

Though inartfully worded, and despite the inclusion of the ominously ambiguous phrase, "conspiracy to misuse judicial process,"¹⁷ R.C.W. § 4.24.350 retains as the essence of the tort of malicious civil prosecution¹⁸ the elements of malice¹⁹ and lack of probable

15. *Petrich v. McDonald*, 44 Wn. 2d 211, 217, 266 P.2d 1047, 1050 (1954). Washington's doctrine of strict limitation, with its additional requirement of special injury, is a narrower version of the so-called English rule which denies recovery for malicious prosecution in the absence of a personal arrest or seizure of property *i.e.*, in "ordinary" civil suits), and which is adhered to in a substantial but dwindling minority of states. PROSSER *supra* note 1, § 120, at 851.

16. *Abbott v. Thorne*, 34 Wash. 692, 76 P. 302 (1904), was a warning to potential claimants that success with an action for malicious civil prosecution would be difficult. Success became virtually impossible with *Petrich v. McDonald*, 44 Wn. 2d 211, 266 P.2d 1047 (1954). *See* note 3 *supra*.

17. The phrase is ominous because it will very likely have the effect of encouraging malicious prosecution counterclaimants to implead plaintiffs' attorneys or to name them as non-party conspirators. Furthermore, conspiracy is always an elusive concept and, at least in criminal law, a frequently abused crutch. As noted by Judge Learned Hand, conspiracy is the "darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 263 (2d Cir. 1925). "That there are opportunities of great oppression in such a doctrine is very plain . . ." *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940). Unfortunately, malicious prosecution counterclaimants, like prosecutors, may find the conspiracy tool delightfully useful.

"Conspiracy to misuse judicial process" is ambiguous; it is not clear whether the legislature really meant "conspiracy to prosecute maliciously," "conspiracy to abuse process," or whether the creation of some new tort was intended. *See* note 2 *supra*. Moreover, the statute, if read literally, suggests that if a conspiracy is alleged the usual necessity of proving malice and lack of probable cause is not required. That an appellate court would accord such a meaning to the statute, however, is doubtful. *See* notes 48-54 and accompanying text *infra*.

The mystery as to why the drafters felt compelled to mention conspiracy is heightened by the fact that an allegation of conspiracy has never required any statutory authority in Washington. *See Abbott v. Thorne*, 34 Wash. 692, 76 P. 302 (1904). Perhaps the drafters were reacting to the holding in *Manhattan Quality Clothes, Inc. v. Cable*, 154 Wash. 654, 283 P. 460 (1929), that the "special injury" aspect of the doctrine of strict limitation may not be subverted simply by alleging a conspiracy to prosecute maliciously. *Id.* at 658, 283 P. at 461.

18. The statute applies to "any action for damages"; it does not, on its face, purport to affect existing common law with respect to criminal, quasi-criminal, or equitable proceedings.

19. The Washington Supreme Court has stated,

The word "malice" may simply denote ill will, spite, personal hatred, or vindictive motives according to the popular conception, but in its legal significance it includes something more. It takes on a more general meaning, so that the requirement that malice be shown as part of the plaintiff's case in an action for malicious prosecution may be satisfied by proving that the prosecution complained of was

Malicious Prosecution Counterclaims

cause.²⁰ The statute also adds the possibly more demanding requirement of “knowledge that the [action] was false, and unfounded.”²¹ Conspicuously absent, however, is the common law requirement that the suit alleged to have been maliciously instituted must have been abandoned or terminated on the merits in favor of the party asserting the new action for malicious prosecution. Now, counterclaims for ma-

undertaken from improper or wrongful motives or in reckless disregard of the rights of the plaintiff.

Peasley v. Puget Sound Tug & Barge Co., 13 Wn. 2d 485, 502, 125 P.2d 681, 689 (1942). *Accord*, Creelman v. Svenning, 1 Wash. App. 402, 461 P.2d 557 (1969). Intent to cause a wrongful result is the essence of malice. HARPER & JAMES *supra* note 1, § 4.6, at 320. The requisite impropriety of purpose in wrongful civil proceedings consists of their initiation or continuance “primarily for a purpose other than that of securing proper adjudication of the claim on which they are based.” RESTATEMENT (SECOND) OF TORTS § 676 (1977). For a more esoteric treatment of the concept of malice, *see generally* M. NEWELL, MALICIOUS PROSECUTION, at 236-49 (1892).

20. According to the *Restatement (Second) of Torts*,

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either

(a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or

(b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

RESTATEMENT (SECOND) OF TORTS § 675 (1977).

Prevailing in the principal action, while not a necessary prerequisite, is, of course, conclusive of probable cause. If probable cause is shown, the issue of malice becomes irrelevant. *See* note 39 and accompanying text *infra*. While difficult to articulate with precision, some sort of “greater latitude” ought to be permitted in bringing civil as compared to criminal actions because of the potentially graver criminal sanctions. HARPER & JAMES, *supra* note 1, § 4.8, at 329.

It would be unfortunate if the probable cause provision of R.C.W. § 4.24.350 were to inhibit good faith attempts to change bad law. Correctly applied, it should not. According to the *Restatement*,

To hold that the person initiating civil proceedings is liable unless the claim proves to be valid, would throw an undesirable burden upon those who by advancing claims not heretofore recognized nevertheless aid in making the law consistent with changing conditions and changing opinions. There are many instances in which a line of authority has been modified or rejected. To subject those who challenge this authority to liability for wrongful use of civil proceedings might prove a deterrent to the overturning of archaic decisions.

RESTATEMENT (SECOND) OF TORTS § 675, Comment f (1977).

21. In normal usage, “knowledge” implies certainty, and would seem to simply suggest a stricter version of “lack of probable cause.” In libel cases reckless disregard of the truth is regarded as substantially the same as knowledge of falsity and, in that context, becomes synonymous with “malice.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 287-88 (1964). In the criminal law “knowledge” is frequently used to suggest “intent.” W. LAFAYE & A. SCOTT, CRIMINAL LAW § 28 (1972). According to the Model Penal Code, however, “knowledge” of a particular fact is conclusively precluded by actual belief to the contrary. MODEL PENAL CODE § 2.02(7) (1962). The term’s future definition by the Washington appellate courts in malicious prosecution cases is a matter of conjecture.

licious prosecution may²² be litigated in the principal action. By so providing, the state legislature has apparently created a rule wholly unique to Washington.²³

Because of its novelty as well as its inevitably immediate impact upon the procedural conduct of civil trials, the counterclaim provision of R.C.W. § 4.24.350 has received the most attention from critics and practitioners.²⁴ The most far-reaching impact of the statute, however, is likely to come from its implicit abandonment of the doctrine of strict limitation—the requirements of an arrest of the person or seizure of property, and of special injury.²⁵

Under prior common law in Washington, for example, a doctor sued by a patient for malpractice, even if the suit was commenced maliciously and without probable cause, was without recourse for damage to his or her professional reputation or practice. The doctor could not sue for libel because statements made in pleadings are privileged.²⁶ The doctor almost certainly could not successfully assert a claim or counterclaim for abuse of process because that action requires a showing that there was an improper use of process after its issuance. As noted by the court of appeals in *Fite v. Lee*,²⁷ “[t]he mere institution of a legal proceeding even with a malicious motive does

22. Indeed, malicious prosecution counterclaims, arising as they must “out of the transaction or occurrence that is the subject matter of the opposing party’s claim,” would seem to be compulsory. WASH. CIV. R. SUP. CT. 13(a). For a discussion of the “metaphysical” question whether a cause of action for malicious prosecution may be properly deemed “mature” in time to support a counterclaim, see 58 YALE L.J. 490, 492 nn.8 & 9 (1949).

23. That maintenance of an action for malicious civil prosecution requires favorable termination or abandonment of the principal suit is hornbook law. HARPER & JAMES, *supra* note 1, § 4.8, at 328; PROSSER *supra* note 1, § 120, at 853. Research reveals only one modern decision, by a New York trial court, which permitted a malicious prosecution counterclaim. *Herendeen v. Ley Realty Co.*, 75 N.Y.S.2d 836 (Sup. Ct. 1947), noted in 58 YALE L.J. (1949). The holding in that case has been universally rejected by courts which have taken note of it, e.g., *Farmers Elevator v. David*, 234 N.W.2d 26, 33-34 (N.D. 1975); *Babb v. Superior Court of Sonoma County*, 3 Cal. 3d 841, 846, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971) (physician’s response to medical malpractice suit); The *Herendeen* decision has not even been followed in New York. E.g., *Rosemont Enterprises, Inc. v. Random House, Inc.*, 261 F. Supp. 691 (S.D.N.Y. 1966) (applying New York law); *Ametco, Ltd. v. Beltchev*, 5 A.D.2d 631, 174 N.Y.S.2d 378 (1958), *aff’d mem.*, 7 N.Y.2d 783, 163 N.E.2d 339, 194 N.Y.S.2d 517 (1959).

24. SEATTLE-KING COUNTY B. BULL., September 1977, at 8; Tape of testimony before the Senate Social and Health Services Committee (Feb. 1, 1977) (on file in 435 Public Lands Building, Olympia, Washington).

25. See note 14 *supra*.

26. To be immune from allegations of libel, averments in pleadings need only have some relation to the subject matter of the litigation. *McClure v. Stretch*, 20 Wn. 2d 460, 147 P.2d 935 (1944); *Johnston v. Schlarb*, 7 Wn. 2d 528, 110 P.2d 190 (1941); RESTATEMENT (SECOND) OF TORTS § 587 (1977).

27. 11 Wn. App. 21, 521 P.2d 964 (1974).

Malicious Prosecution Counterclaims

not constitute an abuse of process.”²⁸ And, of course, a subsequent action for malicious prosecution could not be maintained because the doctor invariably would not have suffered a personal arrest or seizure of property.

R.C.W. § 4.24.350 gives the doctor his remedy.²⁹ Moreover, because the doctor’s claim for malicious prosecution may be asserted in the form of a counterclaim, and litigated in the principal (malpractice) action, the doctor may presumably avail himself of the legal services provided by his insurer rather than personally bear the cost of a subsequent suit. Finally, as if the threat to the would-be malpractice plaintiff of having to defend a potentially devastating counterclaim were not chilling enough, the statute, with its inclusion of “conspiracy” as an alternative basis for a malicious prosecution counterclaim, will probably encourage defendants to join plaintiffs’ attorneys or to name them as non-party conspirators.³⁰ Not surprisingly, enactment of R.C.W. § 4.24.350 was vigorously urged by the Washington State Medical Society, and was opposed by the Washington State Bar Association and the Washington State Trial Lawyers Association.³¹

III. POTENTIAL PROBLEMS ENGENDERED BY THE STATUTE

A. *Deterring Legitimate Suits*

Foremost among the possible negative results of R.C.W. § 4.24.-

28. *Id.* at 27–28, 521 P.2d at 968. See also *Rock v. Abrashin*, 154 Wash. 51, 280 P. 740 (1929); RESTATEMENT (SECOND) OF TORTS § 682 (1977). Abuse of process generally requires an “ulterior purpose,” usually taking

the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.

PROSSER *supra* note 1, § 121, at 857.

29. Clearly, the remedy provided by the statute is not confined to members of the medical profession. Indeed, an informal telephone survey of several Seattle area trial lawyers conducted in April, 1978 (five months after the effective date of R.C.W. § 4.24.-350), indicated that malicious prosecution counterclaims in King County were showing up with significant frequency in civil actions of many different kinds, including even domestic relations and landlord-tenant cases. There can be no doubt, however, that a major purpose of the drafters was to strike fear in the hearts of would-be medical malpractice plaintiffs. See text accompanying note 32 *infra*.

30. See note 17 *supra*.

31. Tape of testimony before the Senate Social and Health Services Committee (Feb. 1, 1977) (on file in 435 Public Lands Building, Olympia, Washington).

350 is that it will have a chilling effect upon sincere as well as malicious or frivolous plaintiffs. The Washington Supreme Court in *Abbott v. Thorne*,³² explaining the premise upon which the court's general disdain for malicious civil prosecution actions was based, stated what was probably imagined at the time to be a well-settled proposition:

Courts are instituted to grant relief to litigants, and are open to all who seek remedies for injuries sustained; and unnecessary restraint, and fear of disastrous results in some succeeding litigation, ought not to hamper the litigant or intimidate him from fully and fearlessly presenting his case. If the charges prove to be unfounded, costs have been prescribed by the legislature as the measure of damages.³³

The unmistakable message of R.C.W. § 4.24.350, however, is that even one contemplating the commencement of an ordinary civil suit in Washington must now proceed with caution. Potential plaintiffs may no longer rest assured that the price of defeat at trial³⁴ will be confined to personal legal expenses and an assessment of costs.³⁵ Particularly in emotionally charged suits involving matters such as professional malpractice, the prospect of having to defend simultaneously a counterclaim alleging damages in the form of legal fees, harm to reputation, injury to business, humiliation, and mental suffering, must be regarded as a very real possibility.³⁶

32. 34 Wash. 692, 76 P. 302 (1904).

33. *Id.* at 694-95, 76 P. at 303.

34. The vast majority of civil disputes, of course, are disposed of in out-of-court settlements. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 312 (Tent. ed. 1958). It is reasonable to expect that, because of R.C.W. § 4.24.350's generally intimidating impact upon plaintiffs, and specifically because of the negotiating leverage accorded defendants by the statute's counterclaim provision, plaintiffs will tend to become more receptive than ever to compromise. Further, with plaintiffs concerned about minimizing the now greater risks of litigation, settlements will probably be smaller.

35. An assessment of litigation costs to be paid by the losing party will not include attorney fees "[i]n the absence of a contract, statute, or recognized ground of equity." *Public Utility District v. Kottsick*, 86 Wn. 2d 388, 389, 545 P.2d 1, 3 (1976). Bad faith or malice on the part of the losing party, however, may give rise to an equitable exception to the no-attorney-fees rule. *State ex rel. Macri v. Bremerton*, 8 Wn. 2d 93, 111 P.2d 612 (1941).

36. Washington's appellate courts have had no occasion to address the issue of damages recoverable for malicious prosecution of an ordinary civil suit, *see note 6 supra*, for the simple reason that no plaintiff in such a case has ever prevailed in the appellate system. *See note 3 supra*. However, in *Gilmore v. Thwing*, 167 Wash. 457, 9 P.2d 775 (1932), a malicious prosecution case arising out of a prior attachment of property (not an ordinary civil suit as that term is used), the court held that there could be no recovery for such harms as injury to credit, reputation, pride, peace of mind, or resultant impairment to health. Recovery, noted the court in dictum, would be confined in cases arising

*B. Erosion of the Strict Standards of Proof Ordinarily
Required in Malicious Prosecution Actions*

The burden in malicious prosecution actions of proving malice and lack of probable cause rests, of course, upon the party asserting the claim,³⁷ and the requisite standards of proof have traditionally been formidable.³⁸ Moreover, though a rebuttable inference of improper motive may arise from proof of the lack of probable cause, the latter may never be inferred simply from the presence of malice.³⁹ One may, in other words, always assert a legally valid claim regardless of the motive for doing so.

By permitting a counterclaim for malicious prosecution to be tried in the principal action, however, the new statute invites a subtle erosion of these strict standards of proof. Despite instructions to the contrary, juries in particular may be tempted to draw improper inferences from an outcome in favor of the defendant on the primary substantive issues.⁴⁰ Furthermore, because malice and probable cause are con-

out of a prior interference with property, to "(1) . . . loss of ascertainable profits flowing from an established business; (2) . . . the reasonable value of the use of property during the period of detention; and (3) damages for injury to property, if any." *Id.* at 459-60, 9 P.2d at 776. With the enactment of R.C.W. § 4.24.350, however, the precedential value of the *Gilmore* dictum must be regarded as tenuous. Nevertheless, in the area of damages lies at least one hope for obtaining a narrow judicial construction of the statute. See text accompanying notes 48-54 *infra*. According to the *Restatement*, however,

When the essential elements of a cause of action for wrongful civil proceedings [the Restatement's term for malicious civil prosecution] have been established, the plaintiff is entitled to recover for

- (a) the harm normally resulting from any arrest or imprisonment, or any dispossession or interference with the advantageous use of his land, chattels or other things, suffered by him during the course of the proceedings, and
- (b) the harm to his reputation by any defamatory matter alleged as the basis of the proceedings, and
- (c) the expense that he has reasonably incurred in defending himself against the proceedings, and
- (d) any specific pecuniary loss that has resulted from the proceedings, and
- (e) any emotional distress that is caused by the proceedings.

RESTATEMENT (SECOND) OF TORTS § 681 (1977).

In malicious prosecution cases arising out of criminal or quasi-criminal actions, the Washington courts have taken a liberal approach to damages. *E.g.*, *Odom v. Williams*, 74 Wn. 2d 714, 446 P.2d 335 (1968) (mental and emotional distress); *Olson v. Haggerty*, 69 Wash. 48, 124 P. 145 (1912) (disgrace, humiliation, public suspicion); *Jones v. Jenkins*, 3 Wash. 17, 27 P. 1022 (1891) (injured credit, legal fees, peace of mind, mental suffering).

37. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn. 2d 485, 498, 125 P.2d 681, 688 (1942).

38. See *HARPER & JAMES supra* note 1, § 4.8, at 329; *PROSSER supra* note 1, § 120, at 854-5; 58 *YALE L.J.* 490, 493 n.14 (1949).

39. *Ton v. Stetson*, 43 Wash. 471, 475, 86 P. 668, 670 (1906).

40. Even where the verdict is for the plaintiff, vigorously contested counterclaims—especially with the attendant opportunities for defendants to introduce evidence with

cepts fundamentally calling for conclusions of fact based upon conflicting testimony, appellate review of malicious prosecution verdicts is likely to be narrow in scope.⁴¹

C. *Potential Confusion and Delays in the Conduct of Trials*

R.C.W. § 4.24.350 appears well designed to accomplish its supposed purposes of discouraging unnecessary litigation and promoting judicial economy at the trial level by permitting litigants to settle all issues in one action. Reality, however, may turn out to be a different matter entirely. First, the deterrence of unnecessary litigation was one of the primary avowed purposes behind the strict approach to malicious prosecution actions taken in the past by Washington courts.⁴² Furthermore, that R.C.W. § 4.24.350 may create more havoc than economy is suggested by (1) the necessity at trial of dealing with additional issues peculiar to the counterclaim,⁴³ (2) the likelihood that the statute may also be interpreted to permit the original plaintiff to respond to the counterclaim by asserting that the counterclaim itself was malicious,⁴⁴ and (3) the probability in at least some cases that at-

respect to the inconveniences, costs, and fees already incurred in defending the action—will likely give rise to greater pressures in the jury room for compromise, resulting in smaller verdicts. *See generally* S. McCART, TRIAL BY JURY 120-32 (2d ed. 1964).

41. Beyond the directed verdict threshold the issue of malice is always one for the jury in a jury trial. HARPER & JAMES *supra* note 1, § 4.5, at 319; RESTATEMENT (SECOND) OF TORTS § 673 (1977). The general rule is that the probable cause issue is for the court. RESTATEMENT (SECOND) OF TORTS § 673 (1977). The presence of genuine factual disputes with respect to probable cause, such as whether all facts and circumstances were fairly revealed to counsel prior to commencement of a legal action, however, will result in the probable cause issue also being entrusted to the jury subject to instructions from the court. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn. 2d 485, 500, 125 P.2d 681, 689 (1942). (citing *Baer v. Chambers*, 67 Wash. 357, 121 P. 843 (1912)); *Finigan v. Sullivan*, 65 Wash. 625, 118 P. 888 (1911); *Simmons v. Gardner*, 46 Wash. 282, 89 P. 887 (1907).

42. An early Washington Supreme Court opinion stated.

If the rule were established that an action could be maintained simply upon the failure of a plaintiff to substantiate the allegations of his complaint in the original action, litigation would become interminable

. . . .
 . . . In this litigious age [1904!], when speculative law suits are rapidly multiplying, we think that considerations of sound public policy will not justify courts in announcing a doctrine which tends to encourage this character of litigation.

Abbott v. Thorne, 34 Wash. 692, 695, 699, 76 P. 302, 303, 305 (1904).

43. *See* text accompanying notes 17-21 *supra*.

44. R.C.W. § 4.24.350 allows "a claim or counterclaim" (emphasis added) for malicious prosecution to be litigated in the principal action. The words "a claim or" are nonsensical unless interpreted to mean that original complaints may be amended for the purpose of asserting that a defendant's counterclaim was malicious. *Cf.* 58 YALE L.J. 490, 493 n.12 (1949) (examining the implications of *Herendeen v. Ley Realty Co.*, 75

torneys will be joined, requiring substitution of counsel.⁴⁵

IV. POSSIBLE SOLUTIONS TO THE PROBLEMS OF R.C.W. § 4.24.350

A. *At the Trial Level*

Most of the procedural problems likely to arise at trial because of the impact of R.C.W. § 4.24.350 will be minimized if trial judges take a liberal approach to the granting of motions for separate trials under Civil Rule 42(b).⁴⁶ While a practice of automatically granting such motions might conceivably be construed by an appellate court as violative of the spirit of R.C.W. § 4.24.350's counterclaim provision, trial judges are nevertheless vested with a great deal of discretion in this area.⁴⁷ Motions for separate trials should certainly be granted in all cases where the threat of obscuring the primary issues appears real. Also, in order to prevent interminable delays or a circus-like atmosphere at trial, separate trials should be routinely permitted whenever the parties' attorneys have been joined, or whenever a plaintiff's response to a malicious prosecution counterclaim has been to counter with a claim that the counterclaim is malicious.

B. *At the Appellate Level*

R.C.W. § 4.24.350 is so contrary on its face to at least seventy-five years of common law tradition in Washington⁴⁸ that the appellate

N.Y.S.2d 836 (Sup. Ct. 1947) (*see note 23 supra*). *See generally* Annot., 65 A.L.R.3d 901 (1975).

45. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-101. A situation certain to occur even more frequently than those in which the plaintiff's attorney is joined, is where the plaintiff, subject to a malicious prosecution counterclaim, wishes to establish probable cause by showing that suit was commenced on advice of counsel only after a complete disclosure by plaintiff of all surrounding facts and circumstances. *See note 20 supra*. In such a case the plaintiff's attorney is a logical candidate for being called as a witness, and withdrawal as counsel may again be mandated. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-102.

46. WASH. CIV. R. SUPER. CT. 42(b). The rule states, "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue . . ." *Id.*

47. *E.g.*, *Slippert v. Briggs*, 66 Wn. 2d 1, 394 P.2d 299 (1964), *aff'd per curiam*, 66 Wn. 2d 1, 401 P.2d 216 (1965); *Sage v. Northern Pac. Ry.*, 62 Wn. 2d 6, 11, 380 P.2d 856, 859 (1963).

48. *See notes 3, 13-16 and accompanying text supra.*

courts may be receptive to arguments urging a narrow construction of the statute.⁴⁹

One eviscerating argument in support of a narrow construction of the statute is that it does nothing more than permit an action, otherwise maintainable, to be asserted in the form of a counterclaim. Arguably the legislature, in its selective silence on that point, has left unchanged the common law necessity in malicious civil prosecution actions of showing that there has been an arrest of the person or seizure of property, and special injury.⁵⁰

There may also be a constitutional dimension to the problems of R.C.W. § 4.24.350. Because of its potentially inhibiting impact upon legitimate plaintiffs, the statute arguably violates due process.⁵¹ More

49. See *In re Estate of Tyler*, 140 Wash. 679, 250 P. 456 (1926) (statutes in derogation of the common law should be strictly construed); *Kuehn v. Faulkner*, 136 Wash. 676, 241 P. 290 (1925) (statutory changes in the common law must be accomplished with clarity). *But see* *State v. Public Util. Dist. No. 1 of Douglas County*, 83 Wn. 2d 219, 517 P.2d 585 (1973) (a statute clearly designed as a substitute for prior common law must be given effect), *appeal dismissed, cert. denied*, 419 U.S. 808 (1974). See also Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950) (comparing 28 so-called canons of statutory construction with 28 contrasting canons).

Any narrow judicial treatment of R.C.W. § 4.24.350 may well be couched in terms of construction. Whether the statute will be strictly construed, however, will probably depend upon just how offended the appellate courts are by the following: (1) the statute is oppressive in its impact upon plaintiffs and plaintiffs' lawyers; (2) it was plainly conceived to primarily benefit a special interest group—the medical profession; and (3) if the drafters did intend to effect major *substantive* changes in the law, they did so surreptitiously. Testimony on behalf of Senate Bill 2159, the legislative predecessor of R.C.W. § 4.24.350, strongly suggested that the proposed statute was simply designed to promote procedural economy. Tape of testimony before the Senate Social and Health Services Committee (Feb. 1, 1977) (on file in 435 Public Lands Building, Olympia, Washington).

50. There are at least two arguments which could be made:

(1) The essential requirements for successful assertion of an action for malicious civil prosecution prior to the enactment of R.C.W. § 4.24.350 were (a) proof of malice, (b) proof of lack of probable cause, (c) termination of the original proceeding in the complaining party's favor, and (d) a showing that there was a personal arrest or seizure of property, and special injury. The legislature explicitly retained (a) and (b), explicitly eliminated (c), and was silent with respect to (d). Arguably, elimination of an element of existing law is a more conspicuous act than reaffirmation of an element of existing law. Thus, if the legislature had intended to exclude *two* elements, it would have proceeded to do so in a consistently conspicuous manner—it would have excluded both explicitly. Legislative silence with respect to item (d), therefore, suggests its implicit retention.

(2) Because actions for conspiracy to prosecute maliciously were theoretically maintainable without the new statute, specific legislative inclusion of conspiracy as an alternative ground for maintenance of a malicious prosecution counterclaim must have been a response to the holding in *Manhattan Quality Clothes, Inc. v. Cable*, 154 Wash. 654, 283 P. 460 (1929), that one who is subject to a conspiracy to prosecute maliciously does not, by virtue of that fact alone, suffer "special injury." See note 15 *supra*. Explicit elimination of only one aspect of the common law special injury rule, therefore, implicitly suggests retention of the rest of the rule. See Llewellyn, *supra* note 49. See generally, MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966).

51. In *Carter v. University*, 85 Wn. 2d 391, 536 P.2d 618 (1975), the Washington

likely, the statute's counterclaim provision would be regarded by the courts as an encroachment on their procedural rulemaking authority.⁵²

Less dramatically, it is reasonable to expect that a strict approach to the burden of proving "knowledge"⁵³ may be imposed by the appellate courts upon malicious prosecution counterclaimants. Finally, strict judicially imposed requirements with respect to demonstrability of harm and the type of damages recoverable for malicious civil prosecution could reduce the deterrent impact of the statute upon legitimate plaintiffs.⁵⁴

V. CONCLUSION

That victims of malicious prosecution, even in the context of an ordinary civil suit, may sometimes suffer serious and irreparable harm is too obvious to be doubted. The practical impossibility under prior common law in Washington of obtaining redress for such harm suggests that reform of some sort was warranted. Legislative abandonment of the doctrine of strict limitation was not an entirely unreasonable response to the problem. However, enactment of the

Supreme Court, after concluding that it was unclear whether a general right of access to the courts is guaranteed by the fourteenth amendment to the United States Constitution, nevertheless held in sweeping terms that such a right was fundamental under the Washington constitution. *Id. Carter* was overruled, however, by *Housing Authority of King Co. v. Saylor*, 87 Wn. 2d 732, 557 P.2d 321 (1976). Today, therefore, an argument that R.C.W. § 4.24.350 violates due process merely because of its "chilling effect" upon potential plaintiffs is probably a losing one.

52. The Washington Supreme Court is vested with authority to promulgate and adopt rules of procedure to be followed in state courts. WASH. REV. CODE § 2.04.190 (1976). Although that section is not an exclusive grant of rulemaking power by the legislature, *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 267 P. 770 (1928), R.C.W. § 2.04.200 provides that "[w]hen and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect." WASH. REV. CODE § 2.04.200 (1976). Thus, it seems within the power of the state supreme court, should it be so disposed, to repeal the counterclaim provision of R.C.W. § 4.24.350 with a simple stroke of its rulemaking brush.

It is also conceivable that the court, without resort to rulemaking, may regard R.C.W. § 4.24.350 as a hindrance to the orderly administration of justice in the trial courts, and therefore an intrusion on the separation of powers required by general constitutional principles, as well as by the Washington constitution, WASH. CONST. art. IV, § 1 ("The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide."). *See In re Juvenile Director*, 87 Wn. 2d 232, 552 P.2d 163 (1976), noted in *Judicial Power—The Inherent Power of the Courts to Compel Funding for Their Own Needs*, 53 WASH. L. REV. 331 (1978); Paul, *The Rule-Making Power of the Courts*, 1 WASH. L. REV. 223 (1926).

53. See note 21 and accompanying text *supra*.

54. See note 36 *supra*.

counterclaim provision of R.C.W. § 4.24.350 was ill-advised. Permitting counterclaims for malicious prosecution to be litigated before the trial court has even determined that the principal suit is or is not valid will have a chilling effect upon potential plaintiffs with legitimate as well as frivolous grounds for suit. By confusing the issues and creating delays, it will also obstruct the orderly administration of civil trials.

Richard D. Vogt