

## How David beat Goliath: History of physicians fighting frivolous lawsuits

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### ABSTRACT

*Legal and medical professions are intertwined in an intimate and complex relationship. Medical malpractice arguably constitutes the biggest point of contention between the two professions. While a significant proportion of medical malpractice complaints are not frivolous and are based on appropriate research and screening criteria, most of these complaints are ultimately settled or taken to trial, with a fairly good chance that the outcome will be favorable or at least satisfactory to the involved physician. At times, the legal system fails to 'filter out' frivolous cases. Such cases can and, at times, do end up in court. Although majority of them are ultimately decided in favor of the defending physician, the emotional anguish and the potential damage to the physician's reputation can be significant. In addition, the spiraling costs of malpractice insurance and the fear of further malpractice insurance rate increases following a legal complaint cause many doctors to engage in costly and sometimes dangerous practice of **defensive medicine**. Due to the overall magnitude of the malpractice lawsuit **misuse** and the devastating consequences of such **misuse**, frustrated physicians have resorted to initiating countersuits in response to abusive and frivolous lawsuits. This review presents cases where physicians who were unfairly sued filed successful countersuits against the plaintiff's attorneys. A review of relevant medical and legal literature is also included.*

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### INTRODUCTION

Legal and medical professions are intertwined in an intimate and complex relationship. Medical malpractice arguably constitutes the biggest point of contention between the two professions. While a significant proportion of medical malpractice complaints are not frivolous and are based on appropriate research and screening criteria, most of these complaints are ultimately settled or taken to trial, with a fairly good chance that the outcome will be favorable or at least satisfactory to the involved physician.<sup>1-3</sup> At times, the legal system fails to 'filter out' frivolous cases.<sup>1-4</sup> Such cases can and, at times, do end up in court. Although majority of them are ultimately decided in favor of the defending physician, the emotional anguish and the potential damage to the physician's reputation can be significant.<sup>1-2</sup>

While the exact percentage of frivolous medical malpractice claims is not known, it is generally agreed that a significant overall percentage of lawsuits filed are baseless.<sup>3</sup> The greatest challenge lies in the difficulty in determining what constitutes a

frivolous medical malpractice claim.<sup>4,5</sup> One indirect measure of the frequency of baseless claims may be the fact that only 25% to 50% of all claims result in payment to the plaintiff.<sup>6</sup> Moreover, some of the ultimately successful cases may indeed be frivolous, but they are settled by insurance companies because of the **hassle factor** and the perceived costs of continuing without settlement.<sup>3</sup>

Following a period of relative passiveness among physicians, during which most lived in trepidation of a malpractice action being filed against them, a new era of physician activism emerged. This activism, in addition to supporting active political and tort reform, has taken the form of countersuits, based most commonly upon malicious prosecution either as a single cause of action or in conjunction with abuse of process or defamation suits.<sup>3,7</sup>

We present a collected literature review of cases in which physicians filed successful countersuits against the plaintiff's attorneys. Not only did these cases result in moral vindication of the physician, but also frequently provided him or her with a monetary compensation for the mental anguish and damaged reputation associated with frivolous malpractice lawsuits. Although difficult to litigate and even harder to win, properly selected physician countersuits in response to unfounded medical malpractice claims may bring some consolation to those who were unjustly sued. This article analyzes relevant legal theories behind physician countersuits, emphasizing successful actions based on malicious prosecution and abuse of process.

### METHODS

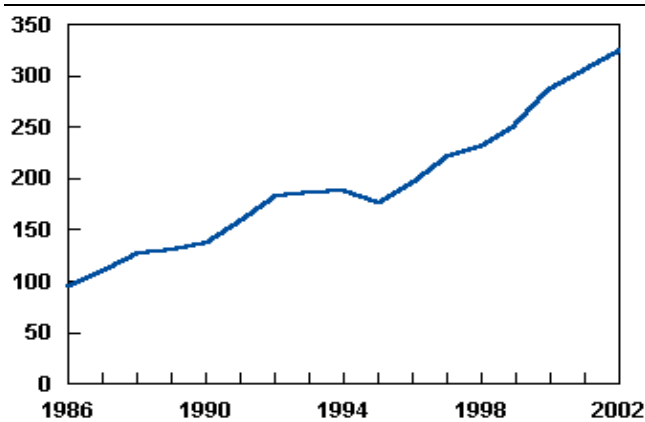
A critical literature review of newspapers, professional journals, and internet-based resources was conducted. Internet resources included medical- and non-medical search engines, including Medline<sup>TM</sup><sup>8</sup>, ScientificCommons<sup>9</sup>, and Google<sup>TM</sup><sup>10</sup>. A collection of legal cases in which physicians were able to successfully litigate the plaintiff's attorneys for bringing forth frivolous lawsuits was assembled. Decisive factors behind each case's success were then analyzed (**Table 5**). Review of relevant medical and legal literature is also presented.

### DISCUSSION

Significant changes in the health care system have occurred during the past decade.<sup>6</sup> Unfortunately, these changes led to the disruption of the traditional patient-physician relationship, contributing to growing dissatisfaction and frustration among both patients and physicians.<sup>11-16</sup> Physician surveys demonstrate increasing frustration associated with the practice of medicine. The reasons behind this phenomenon are multiple and include concerns over spiraling increases in overhead expenses coupled with eroding incomes, the near-constant threat of malpractice claims, and the extensive regulatory oversight and intrusion of

third parties into the clinical decision-making process – the *hassle factor*.<sup>15</sup>

The dramatic growth of medical malpractice litigation in recent decades has contributed significantly to an overall increase in health care costs in this country. Costs of medical malpractice insurance are soaring, major insurers are refusing to write policies, and physicians are struggling to pay their malpractice insurance premiums.<sup>17</sup> Although lawmakers, physicians, and other responsible citizens have proposed numerous solutions in an effort to curb the crisis, these proposals have generally been ineffective. The current health care system is being redesigned – physicians are now *providers* and patients are *consumers* of healthcare.<sup>6</sup> Moreover, this environment adds fuel to the well-established engine of litigation, by allowing its inherent ambiguities to be exploited.<sup>16</sup>



**Figure 1.** Average insurance payment (in thousands of dollars) for closed malpractice claims, 1986 to 2002. Much like claims payments, legal-defense costs grew by about 8% annually during the same period, from around \$8,000 per claim to more than \$27,000. Source: <http://www.cbo.gov/ftpdocs/cfm?index=4968>.

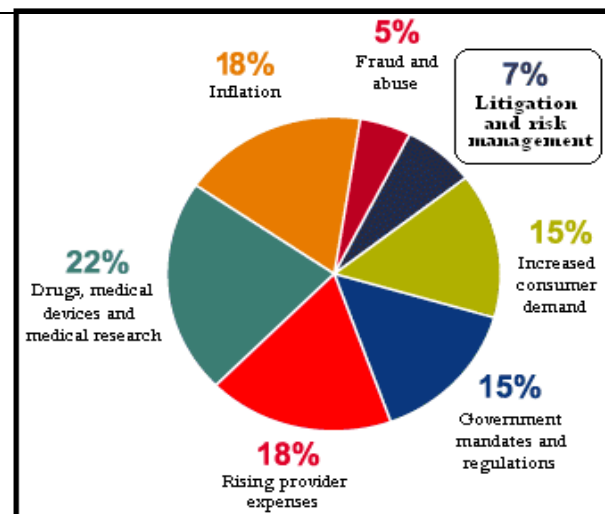
While less than 3% of negligent medical errors ever result in a malpractice claim<sup>4, 18-19</sup>, close to 20% of medical malpractice lawsuits are definitely related to adverse events due to negligence.<sup>19</sup> Moreover, the legal costs of simply *extricating* or *dropping* one of the named physicians from the lawsuit can be anywhere between \$20,000 and \$90,000. As a result, disillusioned physicians occasionally resort to filing countersuits in response to frivolous medical malpractice actions. Since there is currently no other recourse for unfairly sued physicians, one plausible means of legal recourse is countersuits against lawyers and their clients based on legal theories of recovery for malicious prosecution or abuse of process.

Several factors are thought to be contributory to the current malpractice problem. Numerous recent technological and treatment advances have increased the opportunity for physician error in an environment where negligence is often assumed if an outcome does not live up to expectations.<sup>20</sup> The concurrent erosion of the patient-physician relationship and patient trust in the medical system further exacerbates the magnitude of this problem. Of interest, only about 25% to 50% of all negligence lawsuits result in a verdict for the plaintiff.<sup>6</sup>

The current medical malpractice and tort law crisis begs the question that few have considered: What about the rights of

physicians? The courts state that all persons must have free and unrestricted access to the courts and that "...the importance of free access demands that this access be maintained even though occasionally some innocent person must suffer".<sup>5</sup> Therefore, physicians appear to have little, if any, legal recourse.<sup>3, 21</sup> To show an abuse of process, for example, the physician must prove that the plaintiff or attorney made improper or unauthorized use of the legal process, that the plaintiff had an ulterior motive in bringing the suit, and that the physician was damaged as a result of the action.

The adversarial character of the tort system is counterproductive to establishing a fair and balanced legal environment. The current tort system targets individual physicians and organizations, focusing on punishment, blame, and compensation based on the foundation of negligence in patient care.<sup>22</sup> The economic motivation of insurers to settle claims quickly, combined with the contingent fee system, provides incentives for plaintiffs and their attorneys to pursue frivolous claims or to embellish valid ones.<sup>6</sup> In addition, the fear of overly sympathetic jury verdicts fosters the 'culture' of early settlement of cases for their *nuisance value* and continued litigation costs.<sup>23</sup>



**Figure 2.** Breakdown of factors contributory to health care premium cost increases. Source: The Factors Fueling Rising Healthcare Costs. Washington, DC: PricewaterhouseCoopers; 2002.

In response, many physicians practice defensive medicine, which may account for as much as 10 percent of total medical care cost.<sup>24-25</sup> In its extreme form, *defensive medicine* also costs society as a whole, as exemplified by doctors who have stopped practicing medicine altogether as a direct result of their frustration with the current medico-legal environment.<sup>26</sup> Other costs to be considered are those of increasing malpractice insurance premiums (often translated into higher physician and hospital charges) and the lost productivity due to the time and effort devoted to defending legal actions instead of providing much needed patient care.<sup>27</sup> Moreover, physicians subjected to medical malpractice suits, regardless of the ultimate outcome of the litigation, are more likely to have experienced depression, anger, frustration, suicidal ideation, and excessive use of alcohol than non-litigated physicians.<sup>6, 27</sup> Sued physicians are more likely to stop seeing certain groups of patients, to practice defensively, to

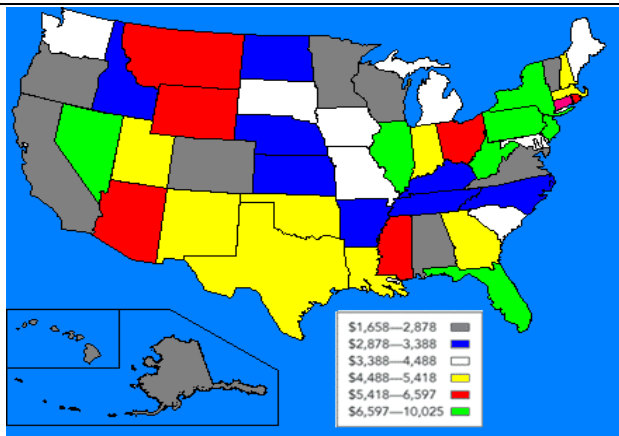
think about early retirement, and to discourage others from pursuing medicine as a career.<sup>27</sup>

### FRIVOLOUS LAWSUIT: DEFINITIONS

A *frivolous lawsuit* may be defined as one in which any reasonable review of medical records shows the lawsuit to have no factual or legal basis.<sup>49</sup> United States courts usually define *frivolous litigation* as a legal claim or defense presented even though the party and the party's legal counsel had reason to know that the claim or defense had no merit.<sup>50</sup>

### PHYSICIAN COUNTERSUITS

The current medical malpractice and tort law system appears to largely ignore physicians' rights to equal consideration. Because of the very nature of our legal system, as explained in previous paragraphs, physicians appear to have little legal recourse.<sup>3, 21</sup> Some physicians fought for legal justice by bringing forth countersuits against malpractice plaintiffs and their attorneys who have unjustly and frivolously brought suit against them.<sup>3, 28</sup> There are several different legal theories of recovery that physicians have attempted to argue in countersuits. These theories include malicious prosecution, abuse of process, negligence, defamation, infliction of emotional distress, invasion of privacy, and prima facie tort.<sup>6</sup> These theories will be described in the paragraphs that follow.



**Figure 3.** Medical malpractice awards per doctor in the United States, 1999-2001 average amounts. Mean awards range from a low of \$1,688 in Wisconsin to a high of \$10,025 in Pennsylvania. Source: [http://www.manhattan-institute.org/html/cjr\\_10.htm#03](http://www.manhattan-institute.org/html/cjr_10.htm#03).

### MALICIOUS PROSECUTION

*Malicious prosecution* is the most frequent legal theory of recovery for physicians in countersuits. In order to prove *malicious prosecution* the plaintiff physician must show the following essential elements: (a) the defendant instituted or caused to be instituted (or continued) a prior judicial proceeding against the plaintiff physician; (b) the prosecution was instituted without a probable cause; (c) the defendant acted maliciously in instituting the action; (d) the prosecution terminated in the physician's favor; and (e) the plaintiff physician was damaged by the action.<sup>6</sup> Moreover, some legal jurisdictions further require that the plaintiff physician prove a *special injury* (i.e., arrest, seizure of property, or other injury) that is different from the traditional circumstances of defending a lawsuit.<sup>3, 5, 20-23, 28-30</sup>

A lack of *probable cause* may arise from an intentional disregard of the facts or from failure to reasonably investigate these facts. However, the courts have previously ruled that *probable cause* is determined on the basis of the facts known to the attorney at the time the malpractice complaint is filed and that lack of *probable cause* cannot be based solely upon an attorney's apparent failure to conduct prompt and thorough discovery.<sup>29</sup> In addition, the courts often consider the malpractice plaintiff's use of expert witness testimony as proof of *probable cause*.<sup>20</sup> *Malice*, which includes proof of an intentional or willful act that attempts to bring about a wrongful result, can be inferred by proving a lack of *probable cause*.<sup>5, 28-29</sup>

A prior favorable termination of the malpractice action requires a judgment in favor of the physician or a voluntary dismissal of the case.<sup>21, 29</sup> Furthermore, the courts have not recognized the expense, annoyance, and inconvenience of defending a suit, or the loss of income, increase in malpractice insurance premiums or cancellation of insurance, damage to personal and professional reputation, or mental suffering as damages that satisfy the special injury requirement mentioned above.<sup>3, 5, 20-23, 28-30</sup>

To date, the courts have not held attorneys liable for malicious prosecution except in a few isolated cases (**Table 5**). Of interest, even violation of the American Bar Association Rules of Professional Conduct which prohibits a lawyer from using "...means that have no substantial purpose other than to embarrass, delay, or burden a third person..." has not been upheld within the context of a legal action based on the *malicious prosecution* theory.<sup>23</sup>

### ABUSE OF PROCESS

*Abuse of process* can be defined as the use of legal process for illegal or malicious means. The essential elements for proof of *abuse of process* are as follows: the patient or attorney made improper and unauthorized use of the legal process; the malpractice plaintiff had an ulterior motive in bringing forth the suit; and the physician must have incurred damage as a result of the abuse of process. However, the courts support the notion that the institution of a baseless civil suit is not sufficient for the reason that the "process" itself does not include a civil complaint and a summons to appear in court.<sup>3, 5, 20-23, 28-30</sup>

### NEGLIGENCE

*Negligence* can be defined as failure to exercise the degree of legal service considered reasonable under the circumstances, resulting in an unintended injury to another party. Attempting to prove attorney negligence has not been a successful strategy for physician countersuits because the courts have held that an attorney can be liable for professional *negligence* only to a client and that an adverse party does not constitute the intended beneficiary.<sup>3</sup> This court interpretation ignores the rule, which prevents a lawyer from asserting a client's position unless there is a non-frivolous basis for doing so, and the rule stipulating that a lawyer shall withdraw from representation of a client if the representation will result in violation of the rules of professional conduct or other law(s).<sup>21, 23</sup>

### DEFAMATION AND LIBEL

*Defamation* is defined as a false statement that injures someone's reputation and exposes that person to public contempt, hatred,

ridicule or condemnation. If the false statement is published in print or through broadcast media, such as radio or TV, it is called *libel*. If it is only spoken, it is called *slander*. The legal theory of *defamation* has also been largely unsuccessful for physician countersuits due to the inability to overcome the doctrine of *judicial privilege*. This doctrine provides that statements made in judicial proceedings, including allegations made in the pleadings, will be immune from a defamation suit.<sup>3, 5, 20, 29-30</sup>

### INFLECTION OF EMOTIONAL DISTRESS

The tort of intentional infliction of *emotional distress* has four elements. First, the defendant must act intentionally or recklessly. Second, the defendant's conduct must be extreme and outrageous. Third, the conduct must be the cause of severe *emotional distress*. Infliction of *emotional distress* is unlikely to ever be argued successfully in a malpractice countersuit because the physician must prove that he/she was damaged by conduct so extreme and so outrageous in character that it goes beyond all possible bounds of decency.<sup>3, 5-6, 29</sup>

### INVASION OF PRIVACY

The advancement of an *invasion of privacy* theory involves the proof of an intrusion upon the plaintiff's solitude or seclusion, public disclosure of private information, or unwanted publicity that places the physician in a false light in the public eye. This theory of recovery has not been successful in physician countersuits, largely due to the *judicial privilege* rule, much as in most cases of alleged *defamation*.<sup>21, 29</sup>

**Table 1.** Facts about tort liability and its impact on consumers

#### Overall Impact: The United States Economy

- The cost of the U.S. tort system for 2003 was \$246 billion, or \$845 per citizen or \$3,380 for a family of four. This is equivalent to approximately 2.2% of the U.S. GDP.
- U.S. tort costs increased 35.4 percent from 2000 to 2003. It is estimated that tort costs increase by about 5% to 8% every year.
- The Growth of U.S. tort costs have exceeded the Gross Domestic Product (GDP) by 2-3 percentage points in the past 50 years.
- The U.S. tort system is inefficient, returning < 50 cents on the dollar and < 22 cents for actual economic loss to claimants.

Sources: (1) [http://www.atra.org/wrap/files.cgi/7963\\_howtortreform.html](http://www.atra.org/wrap/files.cgi/7963_howtortreform.html). (2) [http://www.legalreforminthenews.com/speakers/cost\\_of\\_abuse/cost\\_1.html](http://www.legalreforminthenews.com/speakers/cost_of_abuse/cost_1.html)

### PRIMA FACIE TORT

*Prima facie* is Latin for 'at first sight' or 'on first consideration.' A *prima facie* case is where the plaintiff presents enough evidence to win outright barring any defenses or additional evidence presented by the defendant. The essential elements of *prima facie tort* include intent on the part of the original plaintiff to injure the defendant, a lack of justification, and special damages.<sup>3, 5, 21, 29-30</sup> In order to recover damages from the defendant using this legal theory, the plaintiff physician must show that: (a) the defendant intentionally acted or failed to act; (b) the defendant intended that the act or failure to act would cause harm to the plaintiff or that the defendant knew with certainty that the act or failure to act would cause harm to the plaintiff; (c) the defendant's act or failure

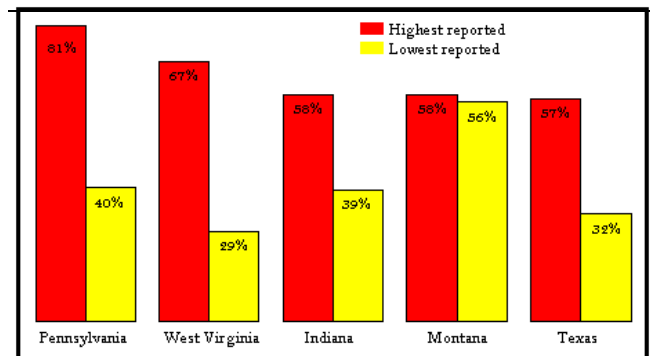
to act was a cause of plaintiff's harm; and (d) the defendant's conduct was not justifiable under all the circumstances.<sup>3, 5, 21, 29-30</sup> Advancement of this legal theory has been unsuccessful for physician countersuits because the courts have viewed *prima facie tort* as an attempt to present a defective action of malicious prosecution.<sup>20</sup>

### COUNTERSUITS: THE REALITY

It is unlikely that any legal theory of recovery other than *malicious prosecution* will ever prove successful in physician countersuits because the historical pattern of various court decisions has been to repeatedly refer the plaintiff back to this very theory of recovery. However, because the courts have made the threshold for establishing lack of *probable cause* so high, it becomes very difficult to prove *malicious prosecution*. In a way, a frivolous lawsuit becomes a "just cause" without subsequent action.<sup>20</sup>

The reality of the current legal environment is that physician countersuits pose little threat to malpractice plaintiffs or their attorneys. At present, the mere existence of the theory of recovery through a *malicious prosecution* action serves as a mere "window dressing" – it is designed to convey the false appearance of equal justice under the law.<sup>6</sup> Moreover, a physician who initiates a frivolous countersuit can also be countersued, further exacerbating his or her legal problems.

On the other hand, by winning a countersuit, the physician can achieve two fundamental goals – obtaining monetary compensation as well as moral vindication for being wrongfully sued. The physician can recover compensatory monetary damages for the time and income lost while defending against the frivolous lawsuit. The doctor can also recover for the anguish, frustration and embarrassment that resulted from unjustly being named a defendant. Further, legal costs of defending against the frivolous lawsuit may be recoverable. Finally, one may be able to seek as damages any malpractice premium increases attributable to the frivolous claim.



**Figure 4.** Rise in physicians' malpractice insurance premiums in selected states, 2001-2002. Source: <http://www.nejmjobs.org/rpt/physician-malpractice-premiums.aspx>.

The system designed to protect malpractice plaintiffs and their attorneys can produce potentially harmful consequences on both societal and economic levels (Table 1). Given the multiple adverse effects of the unequal treatment of doctors in our medical malpractice system, it is not unreasonable to call for more definitive legal and legislative action to protect physicians from baseless malpractice suits.<sup>30</sup> The law should be able to provide a

remedy for each and every wrong and there should be no tolerance toward any forms of legal harassment.<sup>20, 31</sup> A moderate position which would give physicians at least some protection while not being so broad as to jeopardize the free access to the judicial process may be obtainable under some of the current proposals for tort reform.<sup>21</sup>

**BRIEF REFLECTION**

The term *countersuit* is taking on an enchanting status to physicians, as if it were a miracle drug to cure the malpractice malady. Despite the fact that insurance industry studies show few nefarious malpractice suits, many physicians are convinced that there would be fewer legal complaints if patients and their attorneys knew they might be back in court as defendants for instituting a non-meritorious suit.

**Table 2.** Median annual malpractice premiums by specialty (FY 2000)

<i>Neurosurgery</i>	\$33,101
<i>Cardiovascular surgery</i>	\$28,328
<i>Obstetrics/Gynecology</i>	\$21,446
<i>General surgery</i>	\$19,860
<i>Orthopedic surgery</i>	\$17,812
<i>Otorhinolaryngology</i>	\$10,793
<i>Urology</i>	\$9,903
<i>Cardiology</i>	\$8,751
<i>Anesthesiology</i>	\$8,004
<i>Ophthalmology</i>	\$6,934
<i>Hematology/Oncology</i>	\$6,520
<i>Radiology</i>	\$6,202
<i>Internal medicine</i>	\$6,144
<i>Gastroenterology</i>	\$6,138
<i>Family practice</i>	\$6,125

Source: Tracking turmoil in malpractice insurance. *Modern Physician*, August 2002.

Eliminating these few spurious suits, which are very difficult to establish at best, would have little impact on the overall problem. Although a few physicians have been successful (**Table 1**), most countersuits have ultimately gone against the physician.<sup>1-3, 32, 34-43</sup> Additional problems arise when doctor groups attempt to alleviate the physician's financial burden by fostering countersuit funds. The funds may relieve the legal expenses, but in turn are fraught with potentially formidable legal consequences, including accusations of conspiracy to intimidate prospective litigants and appearance of encouraging litigation.<sup>32-33</sup> Physicians should proceed with deliberate caution in creating such funds and undertaking countersuits.<sup>32</sup> Once the physician and his/her lawyer decide to pursue a countersuit, they have to carefully consider whom to name as defendants. One potential option is to sue the lawyer who filed the original baseless lawsuit. Another option is to name the law firm where the malpractice lawyer works.<sup>34</sup> Other countersuits name the so-called *medical expert* who lends his or her name to the frivolous allegations. In almost all malpractice lawsuits, an *expert witness* will 'help' establish that

the defending physician's care failed to meet the standard of care and contributed to the alleged injury.<sup>34</sup>

Due to the "chilling effect" of countersuits, attorneys are rarely willing to sue other attorneys in these types of legal cases. Moreover, since physician countersuits are rarely prosecuted in court, many attorneys are unfamiliar with the nuances of these cases and may not be able or willing to provide adequate legal representation.

**Table 3.** Coping with medical malpractice suit – The facts

**Overview**

- More than 95% of physicians react to being sued by experiencing periods of emotional distress during all or portions of the lengthy litigation process. This may begin immediately upon receiving the legal complaint by a sense of outrage, shock, or dread about the personal/financial effects of the eventual outcome. These reactions are similar to those seen during any major life event. Feelings of anger, frustration, inner tension, and insomnia are also frequent.
- Symptoms of major depressive disorder (prevalence, 27%-39%), adjustment disorder (20%-53%), and the onset or exacerbation of a physical illness (2%-15%) occur, although fewer than 2% acknowledge drug or alcohol misuse.

**Attributes that help clinicians cope with the reality of being sued**

- Competent practice, good risk-management procedures
- Adequate self-knowledge
- Balanced personal and professional life
- Capacity for intimacy and sharing
- Good relationships with patients, patient families, and other healthcare professionals

**Common emotional and coping responses to being sued**

- Symptoms may develop during any stage when adequate coping fails
- The complaint is served: surprise, shock, outrage, anxiety, and/or dread
- Consultation with lawyer: depending on the initial assessment of the case, reactions of anger, denial, concern, reassurance, panic
- Lengthy period of denials and intrusions: active attempts to erase thoughts about the case, followed by automatic reminders and intrusive thoughts about it; becoming preoccupied by ruminating excessively—exacerbated whenever case-related activity increases, such as before the deposition, when experts testify, and before and during the trial
- Working through the lengthy process, during which physicians psychologically and intellectually come to terms with the meaning of the case, their role in it, and their approach to their own defense
- Relative completion of response: physicians change in many ways as a result of being sued. Ideally, adaptations lead to greater competence and a more satisfying personal and professional life

Source: Charles SC. Coping with a medical malpractice suit. *West J Med.* 2001;174:55-58.

Due to the difficulties of retaining legal representation within the time constraints of the statute of limitations, the only reliable way for countersuits to become more common may be for physicians to initiate them as *pro se* litigants. *Pro se* refers to an individual who represents himself or herself, without a lawyer, in a court proceeding.

The right to file a *pro se* lawsuit is an important right under the constitution. *Pro se* litigants enrich the law by raising

controversial issues which lawyers are reluctant to pursue. Filing a *pro se* lawsuit is not difficult. The physician can use the plaintiff's complaint from the original malpractice case as a template to craft the countersuit complaint. The physician must be sure to include the necessary elements of the legal action in the complaint. For useful legal advice and assistance, physician *pro se* litigants should make use of their associations with their malpractice and hospital attorneys. The use of certain references may also be beneficial.<sup>34, 35</sup> Once the lawsuit is actually filed, it is easier to find legal representation, although it is often very expensive.<sup>34, 35</sup> Even though *pro se* litigant physicians may actually represent themselves adequately while managing to avoid the added financial burden of attorneys' fees, attempting to advance a case as a *pro se* litigant becomes time-consuming, logistically challenging, and probably unrealistic in most instances. Alternatively, the physician could investigate the possibility of pursuing an abusive litigation counterclaim.<sup>35</sup>

**Table 4.** Phases of the medical malpractice litigation process

**The complaint phase**

- The charge detailing what the physician allegedly did or failed to do to cause the injury. This may be associated with a public notice

**Discovery phase**

- **Interrogation:** written questions regarding facts that are thought relevant to the case
- **Depositions:** oral testimony under oath that may be used in court proceedings
- **Expert witness testimony:** offers opinions by both sides that are related to the facts of the case and their relevance to the standard of care

**Trial phase**

- **Settlement:** a series of pre-trial maneuvers that may lead to a resolution of the case by a monetary or some other agreement
- **Trial:** a procedure governed by an established set of rules that allows each side to argue their view of the case
- **Verdict:** decision by either judge or jury

**Appeal phase**

- The losing party may request a review of the trial record to determine if the letter and intent of the law was met

Modified from: Charles SC. Coping with a medical malpractice suit. West J Med. 2001;174:55-58.

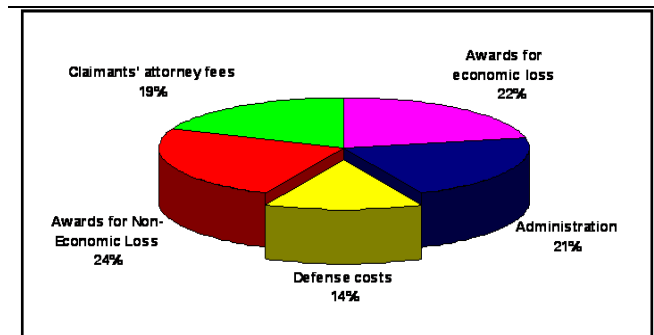
**THE BURDEN OF MEDICAL MALPRACTICE**

Medical malpractice awards per doctor in the United States, during the period from 1999 to 2001 ranged from a low of \$1,688 in Wisconsin to a high of \$10,025 in Pennsylvania (**Figure 3**).<sup>44</sup>

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**Table 1** shows the magnitude of the existing tort liability system and its global impact on the United States economy.<sup>46</sup> The median amounts of annual medical malpractice premiums for various medical and surgical specialties can be seen in **Table 2**. The reality of the current legal environment is that physicians in the so-called high-risk specialties (neurosurgeons, anesthesiologists, obstetricians, gynecologists, orthopedic surgeons, and general surgeons) are almost guaranteed to be sued during their careers.<sup>47</sup> In fact, the average obstetrician/gynecologist starting out today can expect to be sued at least three times in their professional career.<sup>47</sup> One major problem with regards to malpractice insurance costs following any malpractice complaint is the possibility that the doctor's medical malpractice insurance company can impose a surcharge – at times as much as 30% to 50% of the basic policy premium – and apply such surcharge for up to five years following the complaint.<sup>47</sup>



**Figure 5.** Only 46% of the costs associated with tort liability are given to plaintiffs to compensate them for their injuries. The majority of the costs of the tort system go to defense costs (14%), plaintiffs' attorney fees (19%), and administrative costs (21%). Source: [http://www.legalreforminthenews.com/speakers/cost\\_of\\_abuse/cost\\_1.html](http://www.legalreforminthenews.com/speakers/cost_of_abuse/cost_1.html).

**AN OUNCE OF PREVENTION**

What can physicians do to minimize the headaches of entanglement in the legal system? First, try preventive measures, including effective and detailed documentation, error-prevention strategies, good patient education and rapport, maintenance of adequate physician-patient communication, as well as avoidance of the 'flight response' when patient outcome is less than optimal. Other strategies potentially useful in preventing medical malpractice lawsuits have been described in detail elsewhere.<sup>36-37</sup>

**CONCLUSIONS**

Physician countersuits are a manifestation of much larger problem – the medical malpractice crisis faced by all of us. The legal system continues to favor the plaintiffs' attorneys when it comes to the burden of proof and fair and equal process in medical malpractice lawsuits. Although difficult to litigate and even harder to win, properly selected physician countersuits in response to unfounded medical malpractice claims may help bring consolation to those who were unjustly sued. While there are several different legal theories of recovery that physicians have attempted to argue in countersuits, very few such legal actions have been ultimately successful.

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**Table 5.** Summary of representative cases of physician countersuits following frivolous medical malpractice and related lawsuits.

Source, Date/State	Case summary	Outcome and award	Comment
40 2005 / MO	The physician was served with three lawsuits by former patients for whom he had prescribed fen-phen. The judge declared that the physician had been "fraudulently joined" to the lawsuit. Given that, the physician sued the lawyer who unfairly filed a lawsuit against him	The case is in the court system	In order to overcome the statute of limitations, the attorney alleged "fraudulent concealment" – a strategy that allows the case to be filed despite the physician not having seen the patients for over five years
42 2004 / PA	Physician sues a personal injury lawyer who sued him following performance of successful surgery and accurately diagnosing the patient	Attorney admitted to wrongfully suing the physician <i>Undisclosed settlement</i>	
34 2003 / PA	Neurosurgeon with no factual or legal connection to the patient's demise was named in a lawsuit. The physician's legal team repeatedly advised the plaintiff's attorney about the fact that there was no basis for the lawsuit against the neurosurgeon. A countersuit was filed after the initial deposition.	The lawyer's supervising partner called the physician's attorney and offered to drop the original lawsuit. <i>Following that, the supervising partner called again and offered to fire the lawyer who started the suit.</i>	
48 2002 / CA	A physician is sued by a patient in response to being turned over to a collection agency for medical bill non-payment. The patient's brother, an attorney, filed a lawsuit on behalf of the patient and obtained a third-party legal representation.	Physician won the case <i>The patient filed for bankruptcy. The patient's brother (attorney) offered a settlement</i>	Several years later, the same physician is frivolously sued by the same attorney. In this case, the attorney filed the lawsuit without obtaining expert opinion. The physician won again, and countersued for malicious prosecution, with continuing resistance from the courts.
43 2002 / TX	Physician sued for prescribing a drug he never prescribed	Physician won the case <i>\$50,000</i>	
38 2002 / WV	Wrongful death case was filed against physician who never saw the patient. The physician filed a countersuit on his own after he could not find a lawyer to represent him	Physician won the case <i>Undisclosed award</i>	The physician and his insurance company spent \$81,000 before the case was settled
2 2000 / KY	Neurosurgeon sued plaintiff's attorney for malicious prosecution	Physician won the case <i>\$72,000 including \$60,000 punitive damages</i>	
39 1999 / TX	Physician claimed abuse of process when a worker's compensation insurer attempted to pressure him to testify against co-defendants	Judgment in favor of the physician <i>\$125,000</i>	While the physician did not sue the plaintiff's attorney, the case is important due to its precedent
41 1995 / MO	In the original case, one physician provided expert testimony for the plaintiff that did not conform to majority or respectable minority opinion. The other physician filed a complaint with the American Association of Neurologic Surgeons (AANS)	AANS concluded that the expert witness provided "inappropriate" and "unprofessional" testimony and suspended him for 6 months. <i>No award</i>	The expert witness filed a suit against AANS, unsuccessfully. Although the complaint did involve the plaintiff's attorney, the case warrants mention due to its precedent and potential consequences
1 1983 / TN	An internist was sued by a patient who alleged that an episode of viral encephalopathy following a herniorrhaphy was due to surgeon negligence. The internist did not participate in the patient's surgery. Moreover, the diagnosis of viral encephalopathy was made by a neurosurgeon before the internist named in the lawsuit ever saw the patient.	The physician was vindicated by a jury trial <i>\$10,000 compensatory / \$20,000 punitive damages against the patient</i>	The patient's attorney filed the malpractice claim before obtaining relevant hospital records.
3 1980 / NV	The plaintiff's attorney failed to obtain the patient's medical records, did not consult a physician either for obtaining information or retaining a medical expert for trial, and did not submit his client's claim to the appropriate screening panel (which was established by state statute). Despite that, the plaintiff's attorney offered to settle the case for a fee.	The physician argued that process was misused for the ulterior purpose of coercing a nuisance settlement. <i>The physician was awarded \$35,000 in compensatory damages and \$50,000 in punitive damages.</i>	<i>Very rare, this case represents successful prosecution based on an abuse of process claim.</i>
3 1980 / TN	A countersuit was brought based on theories of malicious prosecution and abuse of process after the attorney who filed the malpractice suit was found to have failed to investigate the case, to determine the standard of medical care in the community, and to take depositions.	<i>The physician was awarded \$3,000 compensatory damages and \$8,500 in punitive damages.</i>	The court found that the attorney continued to pursue a groundless appeal without his client's consent or knowledge, and made certain allegations in the new complaint that were based on pure speculation.
1 1975 / KY	After a patient suffered a heart attack at his home, he was examined at the hospital and found to have a broken shoulder. After the patient recovered, he sued the hospital for allegedly breaking his shoulder. One year later, his attorney amended the complaint, naming as defendants the radiologist and the orthopedist involved in the care of the shoulder injury. The case was complicated by the fact that the attorney was counsel to another hospital. As a result, the attorney's associate signed the original and amended complaints without reading them. The attorneys agreed to a voluntary dismissal of the changes against the two physicians.	The physicians filed a suit against both lawyers, alleging malicious prosecution and abuse of process. The doctors claimed damages based on embarrassment, humiliation, mortification, and mental anguish. <i>In a jury trial, the physicians were each awarded \$5,000 for physical/mental pain and suffering, \$5,000 for humiliation and loss of reputation, and \$15,000 in punitive damages.</i>	On appeal, the court upheld the compensatory damages against the attorney who prepared the complaints, but reversed the judgment against the attorney who had signed them without reading them. Punitive damages also were dismissed. However, on further appeal, the state Supreme Court upheld both the compensatory and punitive damages, finding that the attorney had assailed the physicians' reputations when he alleged negligent treatment.
32 1963 / CA	After a malpractice action for wrongful death against the defending physician was filed, the plaintiffs' attorneys made defamatory statements about the physician. After these statements were published in a newspaper, the doctor filed a lawsuit alleging defamation. The physician alleged the loss of at least one patient as a result of the publication.	Both the newspaper and the patient-plaintiff's attorney were found liable for defamation (libel and slander). <i>The physician was awarded \$13,000 compensatory and \$5,000 punitive damages</i>	One of few cases of successful defamation countersuit