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THE MOVEMENT FROM VIGOROUS TO MALICIOUS DEFENSE AS AN EXAMPLE OF THE EVOLUTION OF LEGAL PRINCIPLES

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I. INTRODUCTION

Most torts develop slowly, evolving through changing social conditions and shifting political winds. This article presents malicious defense as an example of a tort in the process of evolution from insignificance to prominence in the legal community. Malicious defense, although currently only the stuff of dicta and the faint praise of frustrated plaintiff's attorneys, lurks at the edge of the judicial consciousness. Consternation with dilatory tactics, procedural abuses and motion wars should overcome traditional judicial resistance to change and force the final revolutionary moment of official recognition.

Judicial recognition of the tort of malicious defense represents the final stage in a long evolutionary process. The genesis of the process arose out of the problematic legal right that a defendant enjoys to a vigorous defense. This right embraces a fundamental legal concept to which the current legal community is closely tied. But, abuses of vigorous defense create a crisis in the legal community. Some defense attorneys purposely delay litigation[1] and generate unnecessary expense to discourage lawsuits or to encourage settlements.[2] Some defense attorneys use dilatory tactics as a matter of course[3] and are obstinate as a matter of practice.[4] Such wanton and vexatious abuse of the judicial process forces a reassessment of vigorous defense as a viable legal concept. The tort of malicious defense presents a proposed solution to procedural abuses which incorporates and balances vigorous defense while limiting "excess advocacy."[5] Malicious defense evolves from the natural progression of the right of vigorous defense into modern circumstances. And, its development poses a classic example of how legal theories overcome powerful resistance and evolve into commonly accepted principles of law.

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1. Seaman's Direct Buying Serv. v. Standard Oil Co., 36 Cal. 3d 752, 771, 686 P.2d 1158, 1167, 206 Cal. Rptr. 354, 364 (1984).
2. Parker Rust Proof Co. v. Ford Motor Co., 23 F.2d 502, 506 (E.D. Mich. 1928).
3. First Nat'l Bank v. Dunham, 471 F.2d 712, 713 (8th Cir. 1973).
4. City Bank v. Rivera Davila, 438 F.2d 1367, 1371 (1st Cir. 1971).
5. Van Patten and Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 936 (1984).

II. A Model for Tort Evolution

Progress in law, like progress in science or history, is quantifiable and inevitable. Legal principles evolve against a background of social upheaval and circumstance. Thomas Kuhn, in his critique of the history of science, *The Structure of Scientific Revolutions*,[6] transforms the Hegelian dialectic of thesis-antithesis-synthesis into a framework for scientific and political change that serves as a model for the evolution of legal principles. Kuhn considers the paradigm, "the entire constellation of beliefs, values, techniques and so on shared by a given community,"[7] as the fixed reference point in the flux of history. The paradigm is the strong and well established central principle that guides and motivates the present professional community. In this legal analogy, the paradigm is the right of vigorous defense, the right of the defendant to protect himself without judicial interference.

The paradigm, for Kuhn, is deeply rooted in the professional community and resistance to its reformation is well organized.[8] The legal community has long held sacred the right of vigorous defense.[9] Vigorous defense is, after all, a fundamental legal right and established defense attorneys can hardly be expected to complacently relinquish a right and strengthen their opponents' arsenals.

The paradigm, the right of vigorous defense, ages ungracefully. The weight of unresolved problems creates a crisis in the professional community when some defendants unnecessarily prolong litigation, increase expenses and force plaintiffs into premature settlement postures.[10]

A paradigm shift[11] occurs where competing theories seek reso-

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6. T. Kuhn, The Structure of Scientific Revolutions 92 (2d ed. 1970).
7. *Id.* at 175.
8. *Id.* at 64.

> In the development of any science, the first received paradigm is usually felt to account quite successfully for most of the observations and experiments easily accessible to that science's practitioners. Further development, therefore, ordinarily calls for the construction of elaborate equipment, the development of an esoteric vocabulary and skills, and a refinement of concepts that increasingly lessens their resemblance to their usual common-sense prototypes. That professionalization leads, on the one hand, to an immense restriction of the scientist's vision and to a considerable resistance to paradigm change. The science has become increasingly rigid . . . . By ensuring that the paradigm will not be too easily surrendered, resistance guarantees that scientists will not be lightly distracted and that the anomalies that lead to paradigm change will penetrate existing knowledge to the core.

Id.

9. Eastin v. Bank of Stockton, 66 Cal. 123, 127, 4 P. 1106, 1109-10 (1884).
10. *See generally supra* notes 2-5 and cases cited.
11. Kuhn, *supra* note 6, at 116.

lution of the problems. Various solutions have been offered in federal statutes, Supreme Court decisions, and state actions and then patched together by courts and legislative bodies to confront the "abuses of excess advocacy."[12]

Paradigm development culminates when reformists discover a strong and stable solution. The vision of the professional community shifts from the former paradigm toward a new paradigm that more effectively solves "the problems that had led the old one to a crisis."[13] In the Hegelian sense, the community incorporates the old paradigm into the new paradigm as an essential element. Some aspects of the right to a vigorous defense can be problematic and may be subsumed into the tort of malicious defense. Malicious defense offers an efficient solution to defendants' procedural abuses yet maintains their right to vigorously defend themselves.

III. The Old Paradigm: The Right of Vigorous Defense

The legal community has long respected a defendant's right to a vigorous defense free from judicial interference.[14] "The defendant stands only on his legal rights,—the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege."[15] The legal community justifies vigorous defense, because the plaintiff initiates the action and the defendant responds instinctively: "self-defense is the first law of nature."[16] Vigorous defense advocates the freedom of the individual to defend actions in good faith.[17] It protects good faith defendants with limited financial resources from being forced into premature settlement postures by the threat of sanctions or judicial reprisals.[18] It encourages defendants with "colorable, albeit

12. Van Patten and Willard, *supra* note 5, at 936.

13. Kuhn, *supra* note 6, at 153. "Probably the most prevalent claim advanced by the proponents of a new paradigm is that they can solve the problems that have led the old one to a crisis."

14. *Eastin*, 66 Cal. at 127, 4 P. at 1109-10.

15. *Id.*

16. Baxter v. Brown, 83 Kan. 302, 305, 111 P. 430, 431 (1910).

17. Bauguess v. Paine, 22 Cal. 3d 626, 638, 586 P.2d 942, 949, 150 Cal. Rptr. 461, 468 (1978). "This court has repeatedly stressed the importance of permitting counsel to be a vigorous advocate . . . ."

18. Young v. Redman, 55 Cal. App. 3d 827, 835-36, 128 Cal. Rptr. 86, 91 (1976). "The American Rule is based upon the philosophy that 'one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel.' " (citing Fleischmann Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967)).

novel," legal defenses to test those defenses in court.[19]

The right of vigorous defense protects good faith and financially disadvantaged defendants as well as defendants with novel defenses. But, taken to its logical extreme, vigorous defense allows any feasible tactic, even one that is "willful, intentional, malicious or fraudulent."[20] These abuses of the judicial system have created a crisis in the legal community. Courts must draw a line between unrestrained advocacy and the well reasoned pursuit of justice. Vigorous defense must be balanced against the right to bring a lawsuit with minimal delay and expense.

IV. A Patchwork of Solutions for Problems in the Old Paradigm

Attempts to resolve the problems of vigorous defense, though lacking cohesion, enjoy limited success. A federal statute awards expenses and attorney fees to parties injured by unreasonable and vexatious multiplication of legal proceedings.[21] Traditionally, courts followed the American rule which embodied the principle that attorney fees could only be awarded if they were mentioned in the original agreement in contractual disputes or if they were permitted by statute. The United States Supreme Court rejected this American rule and allowed attorney fees as a punitive measure where a party acted in "bad faith, vexatiously, wantonly, or for oppressive reasons."[22]

The California Supreme Court, in *Young v. Redman*,[23] acknowledged the problem of "frivolous, 'bad faith,' matters" but refrained from judicially legislating a new tort. In *Bauguess v. Paine*,[24] the California court expressed its fear of unfettered judicial discretion in the imposition of sanctions.[25] The California Legislature responded with a procedural mechanism which awards attorney fees and reasonable expenses to victims of frivolous and unnecessarily dilatory "tactics or actions not based on good

19. Browning Debenture Holders Comm. v. Dasa Corp., 560 F.2d 1078, 1088 (2d Cir. 1977).

20. Ritter v. Ritter, 381 Ill. 549, 555, 46 N.E.2d 41, 44 (1943).

21. 28 U.S.C. § 1927 (1983). "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory there of [sic] who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

22. Hall v. Cole, 412 U.S. 1, 5 (1972) (quoting Moore, Federal Practice ¶ 54.77[2], at 1709 (2d ed. 1972)).

23. 55 Cal. App. 3d 827, 128 Cal. Rptr. 86.

24. 22 Cal. 3d 635, 586 P.2d 942, 150 Cal. Rptr. 461.

25. *Id.* at 638, 150 Cal. Rptr. at 468.

faith."[26]

These statutory and judicial responses to the problems inherent in the right of vigorous defense effectively control abuses in limited areas but fail to achieve a complete solution. For example, Rule 11 of the Montana Rules of Civil Procedure provides sanctions to partially remedy abuses in pleading practice.[27] It requires reasonable investigation[28] and discourages shotgun pleadings.[29] But, the rule only affects a narrow range of abuses. Rule 37 of the Montana Rules of Civil Procedure remedies discovery abuses but is limited by judicial discretion.[30] Summary judgment has been recommended as a test of the sufficiency of improper defensive pleadings[31] but, like Rule 11 and Rule 37 sanctions, it requires a proper plaintiff's motion and supporting brief, and statutes and judicial discretion constrain the scope of the remedy.[32]

The United States Supreme Court, in *National Hockey League v. Metropolitan Hockey Club, Inc.*,[33] supported sanctions for discovery abuses. But, the Court addressed only a narrow range of abuses. Each case, according to the Court, must be carefully analyzed to determine its appropriateness for the application of sanctions. The California Supreme Court, in *Bertero v. National General Corp.*,[34] recognized the tort of malicious prosecution in bad faith cross pleadings but failed to establish a cause of action for malicious defense.[35]

Confronted with ever increasing abuse, federal and state judicial and statutory solutions have been patched together. But judi-

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26. CAL. CIV. PRO. CODE § 128.5 (West 1985).

(a) Every trial court shall have the power to order a party or a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay. Frivolous actions or delaying tactics include, but are not limited to, making or opposing motions without good faith.

(b) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the conduct.

27. MONT. R. CIV. P. 11.

28. *See, e.g.*, Kinle v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975, 983 (E.D. Pa. 1973).

29. *See, e.g.*, Miller v. Schweickhart, 413 F. Supp. 1059, 1061 (S.D.N.Y. 1976).

30. MONT. R. CIV. P. 37(a) - (g).

31. Comment, *Controlling the Malicious Defendant*, 2 STAN. L. REV. 184, 192 (1949).

32. MONT. R. CIV. P. 56(c).

33. 427 U.S. 639, 643 (1976).

34. 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1975).

35. *Id.* at 52-53, 529 P.2d at 615, 118 Cal. Rptr. at 191 (The court failed to recognize a new tort of malicious defense in deference to the right of vigorous defense).

cial and legislative change is gradual; it is slow to challenge fundamental legal principles like the right of vigorous defense. Vigorous defense remains deeply entrenched in the current legal community. Yet, the weight of the problems associated with vigorous defense demands acceleration of the evolutionary process. It is time to recognize the tort of malicious defense.

V. Revolution and the Birth of the New Tort of Malicious Defense

The tort of malicious defense presents a solution to problems created by blind adherence to the right of vigorous defense. The tort provides a remedy against defense tactics which employ "malice coupled with lack of probable cause."[36] Malice allows a subjective measure of the intent of the defendant to delay or otherwise interfere with the litigation process.[37] Probable cause provides an objective test of the merits of the defendant's defense.[38] A defense brought in good faith with some basis in law and fact is a vigorous defense, easily distinguished from a malicious defense.[39]

Arguably, the creation of a new tort may lead to a proliferation of appeals[40] or an even greater volume of complicated litigation.[41] These possibilities must be weighed against the favorable policy considerations of the deterrence of bad faith conduct by defendants and the maintenance of the integrity of the judicial process.[42] Most American jurisdictions enjoy freedom from controlling precedent which could delay adoption of the new tort.[43] They wait on the traditional reluctance of the legal community to modify established legal principles.

Modification of established legal principles is a painful process but recognition of malicious defense will solve many of the problems that have plagued the legal community. The tort would curb defense abuses by threatening punitive damages and large jury awards. Potentially malicious defendants will be forced to measure their malice against the immeasurable uncertainty of a jury's deliberations rather than the relatively stable statutory sanctions. Bad faith conduct will be deterred and the integrity of the

36. Van Patten and Willard, *supra* note 5, at 935.
37. *Id.* at 931.
38. *Id.* at 930.
39. *Id.*
40. *Young*, 55 Cal. App. 3d at 839, 128 Cal. Rptr. at 93.
41. Van Patten and Willard, *supra* note 5, at 917.
42. *Id.*
43. *Id.* at 916.

judicial process will be preserved.

VI. Conclusion

The tort of malicious defense offers an effective response to "abuses of excess advocacy."[44] Its eventual acceptance depends on the erosion of the legal community's resistance to change. Such erosion is natural, inevitable, unpredictable. The apologists for the right of vigorous defense fear the discouragement of "forceful advocacy"[45] and a new weapon to cripple defense strategies. They appeal for legislative solutions with proper procedural protections rather than "unfettered and unbridled" judicial discretion.[46] In pursuit of fairness and procedural safeguards, however, the legislature might create a solution considerably more rigid and ineffective than the situation demands. The interpretive filter of the courts, flushed with a steady stream of significant cases, would allow for gradual development and implementation of the tort of malicious defense after the first revolutionary recognition.

The Montana Supreme Court recently recognized new torts in the areas of insurance[47] and employment.[48] The court should expand the covenant of good faith and fair dealing to include the litigation process. Attorneys and their clients should be held to the same good faith standards as those required of insurers and employers.

The tort of malicious defense deserves the acceptance of the legal community. The tort counteracts abuses of the right to a vigorous defense. This strong, young legal principle should prevail over the patchwork of problem-riddled remedies now available. Consternation with defendants' delay and abuse of the legal system should hasten the evolution of the tort of malicious defense.

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44. Van Patten and Willard, *supra* note 5, at 936.

45. *In re* Marriage of Flaherty, 31 Cal. 3d 637, 653, 646 P.2d 179, 189, 183 Cal. Rptr. 508, 518 (1982).

46. *Young*, 55 Cal. App. 3d at 839, 128 Cal. Rptr. at 931.

47. Klaudt v. Flink, ___ Mont. ___, 658 P.2d 1065 (1983) (The court recognized a remedy in tort for breach of the covenant of good faith and fair dealing where a defendant's insurer failed to settle with a third party claimant).

48. Gates v. Life of Mont. Ins. Co., ___ Mont. ___, 668 P.2d 213 (1983) (The court extended tortious breach of the covenant of good faith and fair dealing to wrongful discharge of an employee by an employer).