

INTENTIONAL DESTRUCTION OF EVIDENCE: WHY PROCEDURAL REMEDIES ARE INSUFFICIENT

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The authors argue that civil procedure sanctions and traditional common law procedural remedies are often insufficient or unavailable to deter tortfeasors from intentionally destroying evidence related to their wrongdoing and to compensate victim-plaintiffs. They explain why a civil cause of action is appropriate and necessary to address this serious threat to the viability of the court's fact-finding process and ability to properly compensate injured persons.

Les auteurs soutiennent que les sanctions de la procédure civile et les recours traditionnels de la common law, dans les cas de destruction intentionnelle de la preuve reliée à leurs méfaits, quand ils sont disponibles, sont souvent insuffisants pour jouer un rôle dissuasif sur les auteurs de ces actes et pour indemniser les victimes-damanderesses. Ils expliquent pourquoi une cause d'action civile est non seulement appropriée mais nécessaire pour s'attaquer à cette menace sérieuse pour la survie de la mission des tribunaux de rechercher les faits et pour leur capacité d'indemniser adéquatement les personnes ayant subi un préjudice.

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Introduction

The destruction or “spoliation” of evidence by a tortfeasor intending to defeat pending or potential lawsuits is a form of obstruction of justice, and could prevent an injured person from even seeking redress in a court of law.¹

Intentional destruction of evidence can be particularly devastating to medical malpractice plaintiffs. The patient is often unconscious during the impugned procedure. He or she may be a minor or otherwise under a disability. There are often numerous health care providers involved in a single procedure or in the patient’s care during his or her hospital admission; hospitals and their nurses, general practitioners and specialists have different duties, and must meet different standards of care. A plaintiff is typically not in a position to offer evidence, based on his or her own knowledge, as to whether the caregiver failed to meet the requisite standard of care, or otherwise breached a duty.

The highly technical nature of such litigation often demands extensive expert evidence. Plaintiffs’ experts must have accurate records to assess liability and damages.² If key documents ‘disappear’, the plaintiff may not be able to obtain critical expert reports. Consequently, a spoliating tortfeasor could prevail at trial; indeed, could successfully move for summary judgment.³

In relation to mass consumer product liability litigation, corporate tortfeasors engaged in document shredding calculated to eliminate evidence of intentional or reckless wrongdoing could effectively ensure continued profiting therefrom, notwithstanding widespread injury, death, or environmental degradation.

For example, a mass consumer products liability lawsuit may inquire into the manufacture, sale and promotion of a product over many years. The standard of care that the manufacturer must meet, in relation to each pleaded cause of action, may change over time as scientific, medical and other knowledge expands.

¹ See, for example, *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Cal.App. 2d Dist. 1984) at 835.

² Liability in the medical malpractice context is often dependent upon a plaintiff establishing a precise chronology of events involving multiple parties. Doctors and nurses treat hundreds of patients annually. Unless the injury is manifest, and the circumstances unusual at the time the care was provided, a doctor or nurse may subsequently have no independent recollection of the patient. Moreover, without notes, monitor strips (*i.e.*, print-outs) and other records, it is often very difficult — typically years later — for a nurse or doctor to provide accurate and comprehensive evidence regarding a procedure and its participants.

³ See, for example, *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984), rev. denied, 484 So.2d 7 (Fla. 1986). The plaintiff sued an anaesthetist and hospital for malpractice. It was later revealed that the anaesthetic record had ‘disappeared’. As a result, the plaintiff was unable to obtain any expert liability reports. The defendants then successfully moved for summary judgment. The Florida Court of Appeal subsequently allowed the estate plaintiff to amend its claim to include the tort of spoliation of evidence.

The manufacturer may, based on its own internal research, have a more sophisticated understanding of certain product dangers than do scientists, physicians and other experts, generally. Accordingly, if the manufacturer can suppress evidence of its own knowledge (and decisions it took or intentionally refrained from taking, having regard to this internal knowledge) at various material times, the plaintiff may be left with little option but to ask the court to assess the defendant's alleged acts and omissions having regard to the *general* state of scientific, medical or other expert knowledge. The tortfeasor could thus escape liability.

Without the availability of a spoliation tort remedy, Canadian courts may not be able to adequately compensate victim-plaintiffs of wilful, bad faith destruction of evidence, or effectively deter — with punitive damages and equitable relief (*i.e.*, carefully-tailored prohibitory or mandatory injunctions) — tortfeasors from engaging in schemes to suppress the truth.

1. *Traditional Remedies in Canada*

Canadian courts have long recognized that the destruction or "spoliation" of evidence carries a presumption that the evidence destroyed would have been unfavourable to the party who destroyed it, but that presumption may be rebutted.⁴

This evidential principle, also known as the Latin maxim *omnia praesumuntur contra spoliatores* ("all things are presumed against the despoiler or wrongdoer"),⁵ was described by the Mr. Justice Duff of the Supreme Court of Canada almost a century ago in *Lamb v. Kincaid*:⁶

[I]f a man by his deliberately tortious act destroys the evidence necessary to ascertain the extent of the injury he has inflicted, he must suffer all the inconvenience which is the result of his own wrong. *Armory v. Delamirie*⁷ (1). In such a case, to quote the language of Sir Lancelot Shadwell, V.C., in *Duke of Leeds v. Amherst* (2) at 596:

... the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself. * * * "All those who take the sword shall perish by the sword." "The mischief-maker shall suffer for the mischief he has created."

Since Confederation, at least twenty reported and unreported Canadian cases have dealt with parties who invoked this rebuttable spoliation inference or

⁴ Taschereau J. in *St. Louis v. The Queen*, [1896] 25 S.C.R. 649 at 652.

⁵ J.R. Nolan *et al.*, eds., *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990) at 1087.

⁶ [1907] 38 S.C.R. 516 at 540-541.

⁷ [1721] 1 Strange 504. In *Armory*, a chimney-sweep found a ring, and took it to a goldsmith to have it appraised. The latter removed the gem and the boy sued in trover. The jury was directed to presume, in respect of the measure of damages, that unless the jewel was produced and shown to be otherwise, it was "of the finest water that would fit the socket".

sought an analogous spoliation sanction from the court.⁸ Such analogous sanctions may include the preclusion at trial of expert evidence based upon destroyed physical evidence,⁹ an award of costs against the spoliating party,¹⁰ or the denying of a successful spoliating party's trial costs.¹¹

The scope of application of the spoliation inference, related remedies and sanctions is broad: these various forms of relief may be invoked against both defendant¹² and plaintiff,¹³ and may even be relied upon where the party itself

⁸ For example, *Attorney General v. Halliday* (1867), 26 U.C.Q.B. 397 (Ont. Q.B.), application for leave to appeal dismissed (1867) 26 U.C.Q.B. 415n (C.A.); *Hunter v. Launder* (1872), 8 U.C.L.J. (N.S.) 17 (Ont. Q.B.); *Ockley v. Masson* (1881), 6 Ont. App. R. 108 (C.A.); *St. Louis v. The Queen*, [1896] 25 S.C.R. 649; *Lamb v. Kincaid*, [1907] 38 S.C.R. 516; *Lindsay v. Davidson*, [1911] 1 W.W.R. 125 (Sask. S.C. en banc); *Brandon Electric Light Co. v. City of Brandon* (1912), 2 W.W.R. 22 (Man. Q.B.); *Grenn v. Brampton Poultry Co. Ltd.* (1958), 13 D.L.R. (2d) 279 (Ont. H.C.J.); *Champlain Ship Supply Ltd. v. The Vessel Felicia V et al.*, [1984] 1 F.C. 476 (T.D.); *Farro v. Nutone Electrical Ltd.* (1990), 72 O.R. (2d) 637 (C.A.); *Sturrock v. Ancona Petroleums Ltd.*, [1990] A.J. No. 738 (Q.B.); *Telenga v. Raymond European Car Services Ltd.* (1991), 3 C.P.C. (3d) 79 (Ont. Gen. Div.), leave to appeal refused (1992), 3 C.P.C. (3d) 79n (Ont. Div. Ct.); *Mark James Ltd. v. Collins* (1994), 96 B.C.L.R. (2d) 87 (S.C.); *Leach v. David*, [1995] A.J. No. 328 (Prov. Ct.); *Kaiser v. Bufton's Flowers Ltd.*, [1995] B.C.J. No. 622 (S.C.); *Dawes v. Jajcaj* (1995), 15 B.C.L.R. (3d) 240 (S.C.); *Ahmedullah v. Gentili*, [1995] O.J. No. 3828 (Gen. Div.); *Werner v. Warner Auto-Marine Inc.* (1995), 35 C.P.C. (3d) 215 (Ont. Gen. Div.), rev'd in part (1996), 3 C.P.C. (4th) 110 (C.A.); *Kral et al. v. Fairchild Hiller Corporation et al.* (March 25, 1997), Vancouver Doc. No. A942190 (B.C. S.C.); *D. Fogell Associates Ltd. v. Esprit De Corp. (1980) Ltd.*, [1997] B.C.J. No. 1060 (S.C.); and *Dyk v. Protec Automotive Repairs* (1997), 41 B.C.L.R. (3d) 197 (S.C.).

⁹ *Werner v. Warner Auto-Marine Inc.*, *supra* note 8.

¹⁰ *Ibid.*

¹¹ *Telenga v. Raymond European Car Services Ltd.*, *supra* note 8.

¹² For example, the spoliation inference was successfully invoked by the plaintiff or prosecutor in the *Halliday*; *Ockley*; *Lamb*; *Lindsay*; *Grenn*; *Sturrock*; *Mark James Ltd.*; *Leach*; and *Fogell* cases, *supra* note 8. On the facts, it was unnecessary to apply the presumption in the *Hunter* case, *supra*, though it would have been were it not for other dispositive evidence. In *Ahmedullah*, *supra*, the plaintiffs failed to establish that evidence was destroyed. In *Dawes*, *supra*, the plaintiff was unsuccessful in having a defence report, based on destroyed evidence, ruled inadmissible at trial (on the facts, there was no evidence of bad faith; rather the defendant's insurance adjuster permitted the destruction as a result of inexperience. The plaintiffs' solicitor was also held partly to blame).

¹³ The spoliation inference was successfully advanced by the respondent in the *Brandon Electric* case, *supra* note 8, in relation to the assessment of damages. In *Werner*, *supra* note 8, the Ontario Court of Appeal prohibited the plaintiff from adducing expert evidence based upon a destructive test intentionally carried out in violation of an evidence preservation order. Madame Justice Boland, below, had dismissed the plaintiff's lawsuit. The Court of Appeal reversed on this point in light of the fact that the plaintiff himself was innocent; it was his solicitors who were guilty of unapologetic contempt of court. The Court of Appeal did not foreclose the possibility of 'substantive' spoliation remedies such as dismissal of a plaintiff's case or the striking of a statement of defence, in appropriate cases (see *Endean* case discussion, *infra* note 17). In the *Kral* case, *supra* note 8, the defendant was permitted to amend its statement of defence to plead the spoliation doctrine. The plaintiffs had destroyed physical evidence and delayed the commencement of litigation.

was not engaged in, or aware of, evidence destruction.¹⁴ Moreover, procedural sanctions and more 'substantive' remedies¹⁵ are available even when evidence destruction occurred as a consequence of an unauthorized 'search for the truth'.¹⁶

The aim of the spoliation inference and analogous common law sanctions and remedies would appear to be fairness as between parties. The court does not delve into the merits of the case, asking itself whether the plaintiff's claim is false or whether the defendant is indeed a tortfeasor. As between parties, the spoliation principle or doctrine is only concerned with ensuring an even playing field. At the same time, by inference, the court is concerned with the viability and credibility of its own fact-finding process. As one American court noted:

Although a potential litigant is under no obligation to preserve every document in its possession, whatever its degree of relevance, prior to the commencement of a lawsuit,

In *St. Louis*, *supra* note 1, the Supreme Court of Canada held that the (otherwise well-established) spoliation inference had been successfully rebutted by the plaintiff (see *Endean* case discussion, *infra* note 17).

In *Champlain*, *supra* note 8, the defendant unsuccessfully advanced the spoliation inference. While the burden was on the plaintiff to prove damages, it was not required to provide a receipt for each of the 600 items invoiced. Rather, damages would be assessed summarily on an equitable basis, on a balance of probability. There was no evidence of fraud or bad faith destruction.

In *Farro*, *supra* note 8, the Ontario Court of Appeal held that, "on the facts", the destruction of physical evidence could not be raised as a successful defence. The plaintiff-appellants had *no opportunity* to preserve certain physical evidence destroyed by a non-party safety laboratory. The plaintiffs' insurance adjustor's failure to notify the defendant was not sufficient, on equitable grounds, to deny the plaintiffs their damages. However, the Court did order that the successful plaintiff-appellants be deprived of their costs in light of the fact that had the evidence been preserved, the case would likely have settled. The plaintiffs established their case on the evidence presented. Similarly, in *Telenga*, *supra* note 8, third parties unsuccessfully sought to have claims against them struck, or to prevent the plaintiff from introducing any expert evidence in respect of certain destroyed physical evidence (an automobile involved in an accident). The plaintiff's solicitors had failed to notify the police of a potential suit against the vehicle's manufacturer (and the vehicle was subsequently scrapped). Hollingworth J. refused to consider, what he thought to be inapplicable American spoliation *principles*, holding that Canadian law requires a plaintiff to use reasonable care and nothing more. The court's analysis has been criticized by at least one writer (see R. Harris, "Destruction of Evidence" (1995), 41 C.P.C. (3d) 372).

In *Dyk*, *supra* note 8, a third party defendant unsuccessfully sought to exclude from the trial a plaintiff's expert report based on destroyed physical evidence. The Court held that, based on American jurisprudence, mere negligence was insufficient to draw the spoliation inference (as was true in the *Dyk* case). Moreover, there was no element of fraud or suggestion that there was an attempt to suppress the truth. Rather, the testing was done *in search of the truth*. The court concluded that while "it is clear" that the spoliation inference can be drawn by a Canadian court, such an inference would not be drawn on the facts presented.

In *Kaiser*, *supra* note 8, the plaintiff was successful in having the jury notice struck, in light of the fact that the defendants sought to rely upon the spoliation principle (to dismiss the case) in respect of *negligent* destruction of physical evidence by the plaintiff's expert.

¹⁴ *Werner v. Warner Auto-Marine Inc.*, *supra* note 8.

¹⁵ See discussion of civil procedure sanctions below.

¹⁶ *Ibid.*

see *United States v. International Business Machines Corp.*, 66 F.R.D. 189, 194 (S.D.N.Y. 1974), some duty must be imposed in circumstances such as these lest the fact-finding process in our courts be reduced to a mockery.”¹⁷

The British Columbia Court of Appeal in the *Endean* case¹⁸ (critiqued below) recently suggested that Canadian law *only* provides for procedural, not “substantive”, remedies in respect of intentional destruction of evidence. The British Columbia Court of Appeal seemed to suggest that the striking of a statement of defence or the dismissing of a plaintiff’s action is a substantive¹⁹ (and unavailable) remedy.

Assuming, for the sake of argument, that common law spoliation remedies include striking statements of defence in appropriate cases, is this ‘ultimate sanction’ sufficient to deter a *tortfeasor* set on destroying evidence to suppress the truth and to prevent litigation from ever proceeding to trial?

In 1991, Harvard Law Professor Charles Nesson wrote:²⁰

Courts’ mistaken impression that they are imposing punitive sanctions is epitomized by the common description of default and dismissal as the “ultimate sanction.” Thus the courts have maintained that defaulting a defendant or dismissing a plaintiff deters future spoliation. This is sophistry. There is nothing punitive in imposing default or dismissal in a case where the spoliator would have lost anyway. Default merely follows from the reasonable inference that if a party willfully and repeatedly destroyed irreplaceable evidence which is essential to his opponent’s case, that evidence would have proved devastating. Dismissing a spoliating plaintiff means that the plaintiff loses, as he should have. Defaulting a spoliating defendant leaves damages to be assessed. In such a case even default may not fully compensate the plaintiff; the defendant may have profited to the extent that he spoliated evidence which would have aroused the jury’s ire and resulted in inflated and possibly punitive damages for the underlying tort. [Emphasis added, citations omitted]

Indeed, it is conceivable that large corporate tortfeasors could handsomely profit from spoliation if courts are prevented from considering a tort remedy tailored to meet the problem, in appropriate cases.

¹⁷ *Bowmar Instrument Corp. v. Texas Instruments, Inc.* 1977 U.S. Dist. LEXIS 16078 ([U.S. Dist. Ct.] N.D.Ind.1977) at 10-11 [25 F.R.Serv.2d 423]. This passage was quoted with approval in *General Atomic Co. v. Exxon Nuclear Co., Inc.*, 90 F.R.D. 290 (S.D.Cal.1981) at 304 (discussed below). Similarly, in *Willard v. Caterpillar, Inc.*, 48 Cal.Rptr.2d 607 (Cal.App.5 Dist. 1995) (discussed below), the court stated at 625, having regard to *Atomic, supra*, that while every document must not be preserved prior to litigation, some duty must be imposed in circumstances such as these lest the fact finding process in our courts be reduced to a mockery.

¹⁸ *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C. C.A.), leave to appeal granted November 19, 1998: [1998] S.C.C.A. No. 260 [Q.L.] (a framework agreement was reached by the parties following the Supreme Court of Canada’s granting of leave. See further comments at footnote 85, *infra*.)

¹⁹ Presumably, because such an order would effectively dispose of the case. In particular, see the British Columbia Court of Appeal’s treatment of the *Werner* appellate decision, *supra* note 8.

²⁰ C. Nesson “Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action” (1991), 13 Cardozo L.R. 793 at 801-802.

To illustrate, XYZ Co. manufactures and markets a highly profitable, but inherently defective mass consumer product. For decades, XYZ has known that its product is dangerous, inherently defective and its promotions misleading.

To suppress evidence of its negligent, reckless or intentional wrongdoing it regularly destroys internal documents. XYZ knows that its product (consumed mainly by less formally educated, low income earners) will typically kill a user after a period of twenty to thirty years of consumption. By the time potential plaintiffs are diagnosed with serious, often terminal illness, they are nearing or have entered retirement. XYZ knows that many potential plaintiffs would die before the company is even required to produce evidence in litigation.

Notwithstanding financial, procedural and other barriers faced by such potential plaintiffs (significantly diminishing the threat of litigation), if XYZ successfully eliminates all traces of evidence destruction, plaintiffs may only be able to advance negligence theories and recover modest compensatory damages.²¹

Even if XYZ fails to hide all of its spoliation, and if the ultimate sanction (*i.e.*, striking all or parts of the statement of defence) is imposed, the most a plaintiff may recover, again, are compensatory damages if the underlying wrongdoing was merely negligent and the injury was not aggravated by the spoliation (notwithstanding the fact that the attempt to thwart legitimate potential claims was intentional and carried out in bad faith).

Damages realistically recoverable in either scenario may be so modest that most lawyers would be seriously dissuaded from litigating or continuing litigation (after the discovery stage) against XYZ, again putting justice beyond the reach of disadvantaged, injured persons.

If XYZ's profits, derived from continued wrongdoing, exceed the quantum of projected modest compensatory damages awards, there is no incentive for the rogue company to change its tortious practices.

II. *Established Tort and Fiduciary Law Remedies*

By destroying evidence, a defendant may breach a statutory, common law, or even fiduciary duty to preserve evidence.

In the medical malpractice context, for example, provincial regulations²² require physicians to create, and hospitals to maintain and preserve certain health records. However, even if a breach of the duty of care were proven

²¹ For example, damages for loss of future income earning capacity will be modest. If the plaintiff dies prior to judgment, the estate is prevented from claiming damages in respect of, *inter alia*, loss of expectation of life (*e.g.*, see s. 38(1), *Trustee Act*, R.S.O. 1990, c. T.23). See also discussion at 724 ff., K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2d ed. (Toronto: Carswell, 1996).

²² For example, O.Reg. 965, R.R.O. 1990, pursuant to the *Public Hospitals Act*, R.S.O. 1990, c. P.40 *as am.*

pursuant to established torts, or fiduciary law approaches, this would not necessarily translate into *compensation* for a victim of intentional bad faith destruction of evidence.

To illustrate, assume that an anaesthetist destroys the anaesthetic record to cover up critical evidence of negligence. The plaintiff may establish that the spoliation reflects a breach of a duty, and that the physician fell below the standard of care in respect of the document destruction.²³ However, pursuant to established torts, the plaintiff must demonstrate that the breach of the duty caused or materially contributed to his or her *physical or mental* injury. Such theories could provide compensation to a plaintiff if the complaint is that *a subsequent health care provider misdiagnosed or mismanaged the plaintiff's condition because of the destruction of the medical record*.²⁴

However, if the complaint is that the anaesthetist was negligent because he or she mismanaged the plaintiff's condition, and this alone caused the injury, and that the spoliation was to suppress the truth (e.g., negligent mismanagement of the plaintiff's condition — as reflected in the destroyed medical record), established torts are of no assistance: the plaintiff may be able to establish a breach of duty and failure to meet the requisite standard of care (in relation to the issue of proper document creation or retention). However, since the loss of the medical record did not cause or materially contribute to the physical or mental injury, the plaintiff will fail to meet the causation test.

If party witnesses to the procedure have little or no recollection thereof, or non-party witnesses are unwilling to furnish pre-trial evidence, the plaintiff could lose on a summary judgment motion because, relying on established torts, the loss of the evidence did not cause the physical or mental injury complained of.

Thus, if only established torts are available, the tortfeasor may escape liability, and, accordingly, avoid punitive damages and/or equitable obligations.

²³ For example, *Johnston v. Murchison* (1995), 127 Nfld. & P.E.I.R. 1 (P.E.I. C.A.) wherein McQuaid J.A. for the Court observed at 10, para. 17:

These medical records ... are notes, in some instances handwritten, kept by each of the doctors on the occasion of each consultation with the respondent. The notes chronicle the complaint made by the respondent, the doctor's observations as a result of his examination, and the treatment prescribed, if any. The doctors were under a duty to keep such records so there would exist, for the patient's future care, an accurate record of her medical history. To have failed to keep such a record, or make such notations, would clearly have been negligence on the part of the doctor. [Emphasis added]

²⁴ A physician may incur liability even if the procedure for which he or she was responsible was properly carried out, if that doctor negligently destroyed critical documentation preventing a subsequent care provider from administering proper care.

It is also conceivable that if a physician was negligent, destroyed evidence thereof, and then, as a result, a subsequent care provider improperly administered care, the plaintiff could recover further aggravated damages.

Likewise, where a defendant-fiduciary engages in intentional, bad faith destruction of its own property to thwart a beneficiary's lawsuit, the latter may not be entitled to compensation in respect of the spoliation's effect on the 'main' action (which is also likely to be framed as a breach of fiduciary duty), for reasons related to the causation test as discussed above, unless the victim's ability to recover damages in a court of law is recognized as a legally-protected proprietary or propriety-like interest (as suggested herein).

III. Available Statutory Sanctions: Provincial Rules of Civil Procedure

Provincial rules of civil procedure potentially provide for remedies when *documentary* evidence is destroyed.²⁵ However, such remedies may be available in only a limited number of situations, as between parties.

For example, sub-rule 30.08(2) of the *Ontario Rules of Civil Procedure*²⁶ provides:

Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the rules under 30.02 to 30.11, the court may, ...

- (b) ... *strike out the statement of defence*, if the party is a defendant; and
- (c) *make such other order as is just.* [Emphasis added]

Similarly, Ontario sub-rule 30.08(1) provides:

Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules or an order of the court, ...

- (b) *if the document is not favourable to his or her case, the court may make such order as is just.* [Emphasis added]

However, sub-rule 30.03(2)(c), which establishes the underlying obligations in respect of the affidavit of documents considered under r. 30.08, does not oblige a defendant to produce destroyed documents:

The affidavit [of documents] shall list and describe, in separate schedules, all documents relating to any matter in issue in the action,

...

- (c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control, or power ... together with a statement of when and how the party lost possession or control or power over them and their present location.

These subrules do not seem to provide redress for pre-litigation spoliation, where the spoliator has listed and (apparently) described the destroyed documents.

²⁵ For example, *obiter* reference to Ontario sub-rule 30.08 in *Robb Estate v. St. Joseph's Health Centre*, [1998] O.J. No. 1144 (Gen. Div.) at paras. 8 to 9, discussed below.

²⁶ R.R.O. 1990, Reg. 194.

Thus, tortfeasors who destroy evidence on a regular basis to thwart *potential* lawsuits²⁷ may escape sanctions under provincial rules.

Similarly, there would appear to be little legal (or, indeed, practical) recourse under such rules against a tortfeasor-defendant whose offshore parent or *non-controlled* affiliate company destroyed documents no longer in the defendant's possession. Off-shore parent and affiliate companies may 'loan' sensitive policy and research documents to subsidiaries under contracts that provide for the documents' return upon demand, as a contrived means of avoiding documentary production in liberal discovery jurisdictions such as Canada and the United States. In this era of increased globalization, such practices could cause widespread harm.

Even where provincial sub-rules do provide for sanctions²⁸ (e.g., where a defendant destroys, but lists and describes, documents *after* the commencement of litigation), the ultimate sanctions available under Ontario 30.08(2) and its equivalents may not be sufficient to deter tortfeasors set on suppressing the truth for reasons already discussed.

²⁷ This may be a particular problem in the mass consumer products liability context where undisclosed internal epidemiological, engineering and other research may indicate an inherent design defect in a product used by millions of unknown, and unsuspecting consumers. Under existing rules, it would appear that the tortfeasor is free to destroy such evidence with impunity (although the tortfeasor does face potential liability for its failure to disclose the *information* contained in the documents: see *Hollis v. Birch*, [1995] 4 S.C.R. 634). If the tortfeasor succeeds in destroying the internal documents, the plaintiff may not be able to establish his or her claim, particularly if the general state of knowledge about the hazard in issue is less advanced than that of the tortfeasor.

²⁸ It would appear that there have been no reported or unreported cases involving Ontario sub-r. 30.08(1), or former Rule 352(1); or sub-r. 30.08(2), in relation to the destruction of documentary or other evidence.

However, the case *293818 Ont. Ltd. v. Forest Glenn Shopping Centre Ltd.* (1981), 22 C.P.C. 291 (Ont. Div. Ct.), decided under former Ontario R. 352, suggests that where a document is identified in an affidavit of documents, but is no longer in the possession, custody or control of a party, it is unlikely that that party's defence will be struck.

Former Ontario R. 352(1) provided:

If a party fails to comply with any notice or order for production or inspection of documents, he is liable to attachment and is also liable, if a plaintiff, to have the action dismissed, and, if a defendant, to have his defence, if any struck out.

Former Ontario R. 347 also provided:

Each party, after the defence is delivered or an issue has been filed, may by notice require the other within ten days to make discovery on oath of the documents that are or have been in his possession, custody or power relating to any matters in question in the action, and to produce and deposit them with the proper officer for the usual purposes and a copy of such affidavit shall be served forthwith after filing.

IV. *Available Statutory Sanctions: Criminal Code Provisions*

Sections 139(2) and 341 of the Criminal Code of Canada,²⁹ respectively provide:

Every one who willfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Every one who, for a fraudulent purpose, takes, obtains, removes or conceals anything is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

While indictments under these provisions are theoretically possible in a civil action,³⁰ it would appear that neither section 139(2) and its predecessor s. 127, nor section 341 and its predecessor s. 301 have been considered in relation to a civil action.

The absence of jurisprudence may simply reflect the fact that prosecutors (and the police) may not have the resources or motivation to pursue criminal convictions in relation to destruction of evidence by private litigation defendants. Under the criminal law, the state — not the private litigation plaintiff — is the deemed victim. Considered in this context, overburdened Crown prosecutors may feel that the degree of state ‘victimization’ does not rise to a level that would justify pursuit of a civil tortfeasor, particularly in light of other pressing cases.

The Crown may also be dissuaded from prosecuting or maintaining a ‘spoliation’ prosecution by the fact that (1) the spoliator cannot be compelled to testify; and (2) the standard of proof is beyond a reasonable doubt, not on a balance of probabilities. If a “plea bargain” is entered into, the victim-plaintiff would have little recourse.

Even if a criminal prosecution were to proceed, the ‘white collar’ nature of the crime of evidence suppression (in a civil context) may result in a modest fine or short period of incarceration. If the spoliation netted the tortfeasor a handsome profit, and allowed him to avoid (1) a liability judgment; (2) punitive damages; (3) complete restitution to a plaintiff (or more significantly, a large group of plaintiffs in a class proceeding);³¹ and (4) the imposition of effective equitable restrictions on blameworthy conduct, such modest criminal sanctions may not be deterring. This may be particularly true in respect of a corporation engaged in spoliation, since it cannot be jailed. It might also be difficult to pursue offshore acquiescing

²⁹ R.S.C. 1985, c. c-46, *as am.*

³⁰ *R. v. Wijesinha*, [1995] 3 S.C.R. 422.

³¹ Québec, Ontario, and British Columbia have enacted legislation to facilitate class proceedings.

shareholders³² who have profited from the corporation's wrongdoing and spoliation.

Notwithstanding the availability of criminal sanctions, any punishment meted out to the spoliating tortfeasor will not compensate the victim-plaintiff, who may have suffered permanent physical injuries. Society may, in the end, be 'victimized' in the sense of having to bear the cost of care that should have been borne (and could be borne by) the profiteering tortfeasor or its insurer.

V. Reversal of the burden of proof

In *Snell v. Farrell*, Sopinka J. for the Court, in *obiter*, noted:

If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives.³³

and proceeded to state at 327 that:

Reversing the burden of proof may be justified where two defendants negligently fire in the direction of the plaintiff and then by their tortious conduct destroy the means of proof at his disposal. In such a case it is clear that the injury was not caused by neutral conduct. [Emphasis added]

It is suggested that the intentional, bad faith destruction of evidence relevant to civil (and potentially, criminal) proceedings, and in particular, evidence related to intentional and reckless wrongdoing, is tortious conduct. The *Snell* case raises the possibility that, but does not determine whether, such tortious conduct may reverse the burden of proof in a civil case.

³² This may be of particular concern where the shareholder(s) is a related corporation engaged in the same business, effectively operating the local firm as a division of one global company.

³³ [1990] 2 S.C.R. 311 at 326-27. The two alternative theories of causation arising out of *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.) were described at 326 as follows: "They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation."

At 323 of *Snell*, *ibid.*, these two theories of causation were described as follows:

The first, firmly espoused by Lord Wilberforce, is that the plaintiff need only prove that the defendant created a risk of harm and that the injury occurred within the area of the risk. The second is that in these circumstances, an inference of causation was warranted in that there is no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself.

VI. *Civil Contempt*

Mr. Justice Donald Cameron of the Ontario Court (General Division) recently held in *Spasic v. Imperial Tobacco et al.*,³⁴ at 9 to 10 that:

The common law permits a superior court to exercise its inherent jurisdiction over its proceedings by finding a contempt not in the face of the court. The conduct must be designed to impede access to the courts or the proper administration of justice. ... The contempt proceedings should be invoked by ... a party to the proceedings ...

A contempt which is neither in the face of the court nor in breach of an order could be either criminal contempt or civil contempt. ...

...

Civil contempt is directed to the protection of the interests of individuals and the sanction is directed to remedying or compensating the private character of the harm done. ...

I see nothing to prevent a motion for contempt claiming private compensation where a party, with the intent of frustrating a claimant in an action of which he or she has notice, intentionally destroys evidence material to the claimant's case. Spoliation may constitute a common law civil contempt of court not in the face of the court.

However, Cameron J. went on to note that "[t]he basic procedure of a criminal hearing would apply which may limit this remedy as a practical preventative." His Honour also indicated that civil contempt requires proof of *mens rea*, and proof of contempt beyond a reasonable doubt. Moreover, the person cited cannot be compelled to testify. For reasons already discussed, *supra*, this alternative spoliation remedy may have little practical value to spoliation-victim plaintiffs.

VII. *The Novel Tort of Intentional Spoliation of Evidence*

The tort of intentional destruction of evidence was first recognized in 1984, in the California case, *Smith v. Superior Court*.³⁵ The state Court of Appeal, in recognizing the tort drew an analogy between the proposed tort and that of intentional interference with a prospective business advantage (the assessed damages being the expectation interest of the plaintiff). The Court

³⁴ (November 25, 1998), Doc.C17773/97 (Gen. Div.). On November 9, 1998, the plaintiff delivered its notice of appeal to the Ontario Court of Appeal. The defendant Imperial Tobacco ("ITL") served a notice of cross-appeal on December 18, 1998. Defendant Rothmans, Benson & Hedges likewise served a notice of cross-appeal on December 22, 1998.

³⁵ *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Cal.App. 2d Dist. 1984) at 837. Note, however, *Cedars-Sinai Medical Center v. Superior Court of Los Angeles*, 1998 Cal. LEXIS 2624, discussed *infra*.

analogized that a plaintiff's right to sue and recover damages from a tortfeasor is a valuable asset that the law protects. Thus, by implication, the requisite tort duty is a duty of care not to intentionally and in bad faith (1) thwart an injured person's right of access to the court; and (2) interfere with an injured person's valuable proprietary or proprietary-like right to just compensation. It seems axiomatic that a *tortfeasor* engaged in intentional spoliation anticipates his victim (or class of victims) and is thus on notice that future litigation is likely. The court, however, is presented with a *defendant*, and, accordingly, must determine whether that person *qua* defendant had reasonable notice of injury and future litigation. The proposed 'reasonable notice' test is discussed under the heading "*The proposed tort's interference with the defendant's general right to dispose of its own property*" (below).

Ontario courts likewise recognize the "rare" and "emergent" tort of "unlawful interference with business expectancy", also referred to as "unlawful interference with economic relations".³⁶ This cause of action protects plaintiffs from interference with, *inter alia*, their valid business expectancy interests.

The California Court of Appeal,³⁷ and other state courts that have followed the *Smith* decision,³⁸ recognized that, in certain circumstances, intentional destruction of evidence can prevent a plaintiff from seeking compensation in a court of law.

As observed by Professor William L. Prosser,³⁹ and applied by the California Court of Appeal in *Smith, supra*:

New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. ... The law of torts is anything but static, and the limits of its development are never set. *When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant*, the mere fact that the claim is novel will not of itself operate as a bar to a remedy.⁴⁰ [Emphasis added by the Court]

³⁶ For example, *Dufferin Real Estate Ltd. v. Giralico*, [1989] O.J. No. 1525 (H.C.J.), aff'd [1992] O.J. No. 947 (C.A.); and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [1998] O.J. 2194 (Gen. Div.).

³⁷ *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Cal.App. 2 Dist. 1984) at 835.

³⁸ *Bond v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984), rev. denied, 484 So.2d 7 (Fla. 1986).

³⁹ W.L. Prosser, *Handbook of The Law of Torts*, 4th ed. (St. Paul, Minn.: West Publishing, 1971), §1, at 3-4.

⁴⁰ *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Cal.App. 2d Dist. 1984) at 832. Professor Prosser's observations, as set out in *Smith*, were adopted in Ontario, in *Bhadauria v. Board of Governors of Seneca College* (1979), 27 O.R. (2d) 142 (C.A.) at 149 [reversed on other grounds, [1981] 2 S.C.R. 181].

Following the *Smith* decision, the states of Alaska,⁴¹ Kansas,⁴² Ohio,⁴³ New Mexico,⁴⁴ Florida,⁴⁵ and, until recently, Texas⁴⁶ recognized the tort of intentional spoliation. As the District of Columbia⁴⁷ even recognizes a tort for negligent or reckless destruction of evidence, it would likely recognize the tort of intentional spoliation.

Similarly, the states of North Carolina and New Jersey have recognized torts analogous to that of intentional spoliation of evidence.⁴⁸ In New York state, where a plaintiff can establish with some evidence that a defendant has intentionally destroyed materials with the intention of obstructing a potential third party claim, then a cause of action may be established.⁴⁹

In order to prevail on an intentional spoliation of evidence theory, a plaintiff must plead facts supporting, and prove the following elements:⁵⁰

1. the existence of a potential lawsuit;
2. the defendant's knowledge of the potential lawsuit;
3. the destruction, mutilation, or significant alteration of potential evidence;
4. intent on the part of the defendant to disrupt or defeat the lawsuit;
5. a causal relationship between the act of spoliation and the inability to prove the lawsuit; and
6. damages.

Some American courts have held that a plaintiff must first lose the so-called underlying or 'main' cause of action before it can claim injury in relation to the

⁴¹ *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska 1986) at 463.

⁴² *Foster v. Lawrence Memorial Hospital*, 809 F.Supp. 831 (D.Kan. 1992) at 838.

⁴³ *Smith v. Howard Johnson Co., Inc.*, 615 N.E.2d 1037 (Ohio 1993) at 1038.

⁴⁴ *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995) at 189-90.

⁴⁵ For example, *St. Mary's Hosp., Inc. v. Brinson*, 685 So.2d 33 (Fla.App.4 Dist. 1996) at 35. Since the case of *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984) at 1310, rev. denied, 484 So.2d 7 (Fla. 1986), the Florida Court has implicitly recognized the tort of intentional spoliation, having recognized therein the tort of negligent spoliation of evidence.

⁴⁶ As of June 5, 1998, Texas no longer recognizes the tort of intentional spoliation as between parties, but has left open the question of whether such a claim can be made where a non-party destroys evidence. *Ortega v. Trevino*, [1998] Tex. LEXIS 91 (S.C.), reversing 938 S.W.2d 219 (Tex.App. - Corpus Christi 1997) at 223.

⁴⁷ See *Holmes v. Amerex Rent-a-Car*, 710 A.2d 846 (D.C. App. 1998).

⁴⁸ *Henry v. Deen*, 310 S.E.2d 326 (N.C. 1984) [common law offence of obstructing public justice]; and *Viviano v. CBS, Inc.*, 597 A.2d 543 (N.J.Super.A.D. 1991) at 549-50, cert. denied 606 A.2d 375 (N.J. 1992) [willful destruction and fraudulent concealment of evidence]. New Jersey may, in fact, recognize the tort of *negligent* spoliation of evidence: *Callahan v. Stanley Works*, 703 A.2d 1014 (1997 N.J. Sup.).

⁴⁹ *Weigl v. Quincy Specialties Co.*, 601 N.Y.S.2d 774 (Sup. 1993) at 777, and 778.

⁵⁰ *Coleman v. Eddy Potash, Inc.*, *supra* note 44.

spoliation.⁵¹ However, other United States courts have pointed out that there are sound, practical reasons for allowing the spoliation action to be tried at the same time as the underlying causes of action: preventing needless duplication of effort, two trials involving much the same evidence, and preventing a waste of time and expense imposed on litigants and the judicial system.⁵²

The latter approach seems more compelling since it allows the defendant to raise a causation defence to the spoliation allegation before the same trier of fact (who will have regard to, and must weigh defence evidence in response to the so-called underlying claim). If the destroyed documents are allegedly relevant and material to the main cause of action, the trier of fact will have to consider these anyway. The court may determine that sufficient facts were presented to prove the main action and that the intentional bad faith destruction of certain potential evidence is merely a factor supporting aggravated damages. The court may decide that the spoliation inference is sufficient to dispose of the liability issue in light of other *available* supporting evidence, and that resort to the tort is, thus, unnecessary. It seems to make sense that a single court be given the *option* of considering all concurrent remedies in the same proceeding in

⁵¹ *Fox v. Cohen*, 406 N.E.2d 178 (Ill.App. 1980); *Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990); and *Baughner v. Gates Rubber Co., Inc.*, 863 S.W.2d 905 (Mo.App. E.D. 1993) at 910, 913 and 914.

⁵² For example, *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Cal. App. 2 Dist. 1984) at 837; *Miller v. Allstate Insurance Company*, 573 So.2d 24 (Fla. App. 3 Dist. 1990) at 28 (footnote), rev. denied 581 So.2d 1307 (Fla. 1991); and *St. Mary's Hosp., Inc. v. Brinson*, 685 So.2d 33 (Fla.App.4 Dist. 1996) at 35. In *Holmes v. Amerex Rent-a-Car*, 710 A.2d 846 (D.C. App. 1998) at 851 and 852. Senior Judge Gallagher, on behalf of the Court held:

[T]he requirement that a plaintiff either pursue and lose the underlying claim or demonstrate that the underlying claim is precluded is too harsh. Requiring plaintiffs to pursue futile lawsuits to completion and withholding relief from those plaintiffs whose lawsuits have been severely hampered, but not precluded, by spoliation of evidence ignores the plaintiff's interest in securing a reasonable recovery for a lost or impaired expectancy.

....

[W]e believe we should require that the plaintiff show that the underlying lawsuit enjoyed a significant possibility of success [as contrasted with a "reasonable probability"]. We choose this term as it implies a showing higher than the already recognized standard of "significant evidence" but lower than the standard of "preponderance of the evidence." The plaintiff must demonstrate a substantial and realistic possibility of succeeding, but need not cross the threshold of demonstrating that such success was more likely than not, something that would be realistically impractical of proof. We also adopt the Ohio concept of requiring a nexus between the spoliated evidence and the impairment of the underlying lawsuit.

We hold, therefore, that in order to demonstrate causation, a plaintiff must demonstrate that (1) the underlying claim was significantly impaired due to the spoliation of evidence; (2) a proximate relationship exists between the projected failure of success in the underlying action and the unavailability of the destroyed evidence; and (3) the underlying lawsuit would enjoy a significant possibility of success if the spoliated evidence were still in existence.

order to determine which of these is most appropriate and effective given the facts and existing evidence.

Courts in a number of states, including Arizona, New York, Maryland, and Missouri have, for various reasons, *declined* to recognize the tort of intentional spoliation on the facts presented.⁵³

The Georgia Court of Appeal, in a one page decision,⁵⁴ in a case where, on the facts, there was no indication that evidence was tampered with, held that Georgia law does not recognize spoliation of evidence as a separate tort. This may be the only state where the spoliation tort has been explicitly rejected for *all* purposes.⁵⁵

Recently, a majority of the California Supreme Court, in *Cedars-Sinai Medical Center v. Superior Court of Los Angeles*,⁵⁶ held that, contrary to more

⁵³ Arizona

La Raia v. Superior Court, 722 P.2d 286 (Ariz. 1986) at 290 [Defendant's spoliation of physical evidence and concealment of the truth worsened plaintiff's health; therefore a cause of action in negligence had been stated, and thus there was no need to recognize new tort on the facts]

New York

Spano v. McAvoy, 589 F.Supp. 423 (U.S. Dist. Ct. [N.Y.] 1984) at 427 [Plaintiff failed to state a constitutionally protected interest in respect of the destroyed materials]

Pharr v. Cortese, 559 N.Y.S.2d 780 (Sup. [Supreme Court, New York County] 1990) [There was no need to recognize the tort on the facts: the plaintiff could show no injury (*i.e.*, that the loss of the evidence was almost dispositive of her case)]

Maryland

Miller v. Montgomery County, 494 A.2d 761 (Md. App. 1985) at 767-68, *certiorari* denied 498 A.2d 1185 (Md. 1985) [The Court held that there was no need to recognize the tort of spoliation as between parties; the spoliation inference would suffice. The court specifically left open the possibility that the tort may be recognized as between a party and a non-party]

Missouri

Baughner v. Gates Rubber Co., Inc., 863 S.W.2d 905 (Mo.App. E.D. 1993) at 910, 913 and 914 [The Court held that the injury element was missing, that resolution of the underlying action was prerequisite. If the tort were recognized, a higher "but for" causation standard would apply.]

⁵⁴ *Gardner v. Blackston*, 365 S.E.2d 545 (Ga.App. 1988) at 546.

⁵⁵ For example, in *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky.1997), the state supreme court *declined* to recognize a new spoliation tort, and stated that it would not *now* allow such a claim. In *Burke v. Steen*, 1998 U.S. Dist. LEXIS 9560 (E.D.Penn.), the district court dismissed a plaintiff's spoliation claim on the basis that it *predicted* that the Pennsylvania Supreme Court would not recognize this new tort. In *Lucas v. Christiana Skating Center, Ltd.*, 1998 Del. Super. LEXIS 300, the lower court emphasizes the availability of criminal sanctions as a reason to refuse recognition of the proposed tort. In *Regency Coachworks, Inc. v. General Motors Corp.*, 1996 WL 409339 (Conn.Super.), the lower court declined to recognize the tort of spoliation, citing a lack of authority, and noting the availability of traditional remedies.

⁵⁶ *Cedars-Sinai Medical Center v. Superior Court of Los Angeles*, 1998 Cal. LEXIS 2624.

than a decade of developing jurisprudence in California, "it is preferable to rely on existing non-tort remedies rather than creating a tort remedy" in respect of intentional *first party* spoliation (*i.e.*, spoliation by a party to the action). In so doing, the majority disapproved of the California Court of Appeal's *Smith* decision to the extent that it was inconsistent with its reasons. However, the majority specifically noted that:

We do not decide here whether a tort cause of action for spoliation should be recognized in cases of "third party" spoliation (spoliation by a nonparty to any cause of action to which the evidence is relevant) or in cases of first party spoliation in which the spoliation victim neither knows or should have known of the spoliation until after a decision on the merits of the underlying actions.⁵⁷

Shortly following the California Supreme Court's ruling, the Court of Appeal of California, Fourth Appellate District in *Dale v. Dale*,⁵⁸ distinguished *Cedars-Sinai* on a questionable basis,⁵⁹ and allowed an intentional spoliation claim, noting at *29-*30:

We agree that public policy supports permitting rather than prohibiting tort actions in circumstances such as those alleged here. Allowing a spouse who intentionally concealed the existence of community assets during the course of a dissolution proceeding to avoid liability for punitive damages likely would encourage such tortious behaviour. A spouse would be able to practice concealment with little, if any, risk. ... Traditional tort remedies, including the risk of punitive damages, should have a greater deterrent effect than the remedies available in family court.

The California Supreme Court notably declined to review the *Dale* decision.

VIII. Arguments against recognizing a new tort

One of the principal arguments relied upon by United States judges who have declined to recognize the tort of intentional spoliation of evidence is the availability of traditional procedural and criminal sanctions. The Texas Supreme Court recently held in the *Ortega*⁶⁰ case:

Trial judges have broad discretion to take measures ranging from jury instruction on the spoliation presumption to, in the most egregious case, *death penalty sanctions*. [Emphasis added]

⁵⁷ *Cedars-Sinai Medical Center v. Superior Court of Los Angeles*, 1998 Cal. LEXIS 2624 at 3 and 11, respectively.

⁵⁸ *Dale v. Dale*, 1998 Cal. App. LEXIS 805 (Cal. App. 4 Dist), rev. denied 1999 Cal. LEXIS 162 (January 13, 1999).

⁵⁹ In *Dale*, *ibid.*, the court held that while destruction of evidence is generally considered "intrinsic" rather than "extrinsic" fraud, in this case the spoliation was "extrinsic" to the main proceeding. It is submitted that the drawing of such a distinction is legal hair-splitting, and seems to disclose a strong reluctance to eliminate plaintiffs' resort to the spoliation tort.

⁶⁰ *Ortega v. Trevino*, [1998] Tex. LEXIS 91.

Notwithstanding the availability of such extreme American sanctions, for reasons already set out above, traditional Canadian procedural and substantive civil and criminal sanctions and remedies are insufficient to deter spoliating *tortfeasors* and adequately compensate victim-plaintiffs. Other unique Canadian procedural obstacles to discovering bad faith spoliation are discussed *infra*.

It is not disputed that traditional procedural and substantive remedies may be appropriate where there has been negligent, undisputed non-bad faith spoliation or unauthorized evidence destruction in search of the truth.

The Texas Supreme Court, in declining to recognize the spoliation tort in *Ortega, supra*, also pointed to the concern of duplicative litigation. As noted above though, other United States courts have addressed this concern by recommending that all issues be tried in one proceeding.

Another argument raised by the Texas Supreme Court in *Ortega, supra*, is that since there is no cause of action for perjury, there should be no separate tort recognized for spoliation (both involving acts of truth suppression). However, unlike the crime of perjury where there is actual evidence adduced under oath which can be tested (e.g., credibility assessed), successful intentional destruction of evidence prevents the court from considering *any* material evidence. This may prevent the plaintiff from ever proceeding to trial (and, in certain cases, assessing the credibility of non-party witnesses, especially corporate employees and agents, under oath).⁶¹

Notwithstanding the difficulty of exposing destruction of evidence in any jurisdiction, Canadian plaintiffs face obstacles in respect of pre-trial investigations of suspected spoliation not encountered by American litigants. In the United States, parties to an action can examine any person⁶² thought to have information about a matter in issue prior to trial *as of right*. For example, a plaintiff could examine ten of a corporate defendant's employees or former employees without having to show cause⁶³ (in Canada, a plaintiff must bring a motion seeking leave to examine each non-party).⁶⁴ Furthermore, at an American examination for discovery (*i.e.*, deposition) plaintiff's counsel can ask such witnesses any question related to suspected spoliation, and receive a *spontaneous* answer on the spot, notwithstanding objections by witness' counsel.⁶⁵ In Canada, the plaintiff must bring further proceedings, and respond to interlocutory appeals to compel answers to each refusal, thus giving a tortfeasor further time to obscure its spoliation activities and increasing the plaintiff's litigation costs.

⁶¹ As contrasted with the access to witnesses under U.S. discovery procedures, discussed below.

⁶² For example, Fed.Rules.Civ.Proc. Rule 30(a)(1), 28 U.S.C.A.

⁶³ *Ibid.*, Rule 30(a)(2)(A).

⁶⁴ For example, sub-r. 31.10(1), Ontario *Rules of Civil Procedure*.

⁶⁵ For example, Fed.Rules.Civ.Proc. Rule 30(c), 28 U.S.C.A.

IX. *The proposed tort's interference with the defendant's general right to dispose of its own property*

An argument might be raised that the proposed tort unreasonably interferes with a defendant's general right to dispose of its own property. As explained below, such concern is unwarranted. Indeed, the issue has been comprehensively explored and answered in the context of the spoliation doctrine.

The proposed imposition of a tort duty on alleged wrongdoers not to intentionally and in bad faith destroy evidence relevant to an underlying cause of action presupposes a number of conditions.

First, the factual pleadings related to the underlying cause of action must establish that the defendant owed the plaintiff a duty of care or other legally recognized obligation (e.g., fiduciary duty). It is trite law that at the pleadings stage of an action the alleged facts are to be taken as proved. When so taken, the question is simply: do these disclose a reasonable cause of action — *i.e.* a cause of action with some chance of success. Thus, if a cause of action is properly stated, and set out with sufficient particularity, the facts will disclose a *prima facie* underlying duty of care or other special obligation (e.g., fiduciary duty). It is also well-established that a duty of care can be owed to a broad class of potential litigants by a defendant, notwithstanding the defendant's lack of acquaintanceship with the plaintiff.⁶⁶

Assuming the defendant owes potential litigants, including the plaintiff, a special duty (or concurrent duties) the next issue is, practically speaking, whether it is reasonable to have expected this alleged wrongdoer to preserve certain types of evidence having regard to all the relevant circumstances.⁶⁷

More accurately, the issue is whether the defendant, in addition to the presumed underlying duties, had a further obligation to potential litigants, including the plaintiff not to intentionally and in bad faith destroy evidence relevant to the alleged underlying misconduct.⁶⁸ However, because of the clandestine nature (or contrived manner) of *bad faith* evidence destruction, plaintiffs must, typically, prove intentional and bad faith spoliation through

⁶⁶ For example, *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.); *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569 at 574; and *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at 652-53, para. 20.

⁶⁷ Such evidence could include various types of physical, documentary and electronic evidence, including the defendant's own property. The critical issue, as explained below, will be the defendant's *control* over the thing destroyed.

⁶⁸ Notwithstanding, the defendant may also owe an obligation to the court not to undermine its fact-finding process.

circumstantial evidence — by establishing, *inter alia*,⁶⁹ that the defendant had notice of (1) pending or likely litigation affecting its interests; and (2) the relevancy of the type of evidence destroyed.

Indeed, it should be noted that a defendant may have a concurrent duty to preserve certain types of evidence in accordance with the standard of care applicable in respect of the *underlying* cause of action.⁷⁰ This may include liability related specifically to the defendant's exacerbation of the plaintiff's injuries.⁷¹

In relation to parties to an action, it is suggested that the duty of care in respect of the proposed spoliation tort arises, at a minimum, from the alleged underlying special relationship. Other considerations may be appropriate in

⁶⁹ The plaintiff would want to explore, for example, the character of the means used by the defendant to destroy the evidence, the timing of the destruction, the motives a reasonable person would have to preserve the evidence (*i.e.*, having regard, for example, to any duty to disclose health or safety information to a class of persons including the plaintiff), motives the defendant may have (or have had) to destroy evidence, as well as the nature of the underlying impugned conduct and the type of harm allegedly caused thereby. Where, for example the risk of harm caused by the impugned activity is great, a higher standard of care may apply in respect of document retention practices. The reasonableness of the manner, timing, and extent of the evidence destruction will be assessed having regard to this higher standard.

⁷⁰ For example, *Johnston v. Murchison* (P.E.I. C.A.), *supra* note 23, at 10, para. 17.

⁷¹ For example, *La Raia v. Superior Court*, *supra*, in which the Arizona Supreme Court, in declining to recognize a new spoliation tort held at 289, and 290:

More recently, Master McCallum in *Wilkes v. Maung*, [1991] B.C.J. No. 467 (Q.L.), held that a defendant hospital and pathologist may be held liable for negligent spoliation of physical evidence pursuant to traditional negligence theory, and thus allowed an amendment to the statement of claim. The defendants have not sought leave to appeal the Master's order, and, thus, this issue will proceed to trial.

[P]laintiff seeks damages from the tortfeasor for physical injuries which she sustained by reason of the actions of its employees. There is no need to involve esoteric theories or recognize some new tort. It may be true that "for every wrong there is a remedy" ... but we believe the remedy for the problem before us is well within the realm of existing tort law.

....

[W]e need say only that because defendant poisoned plaintiff it had a duty to minimize the resulting harm after it discovered what had occurred.

Thus, there is no need to recognize a new tort. ... In failing to provide [accurate information in respect of the pesticide used (and inhaled by plaintiff)], and intentionally providing false information, defendant did not spoil the evidence, it caused a new or future injury to the plaintiff.

We hold, therefore, that plaintiff has stated a cause of action against defendant for the exacerbation of her injuries. [Emphasis added]

respect of third party claims.⁷² The proposed tort's standard of care expects a tortfeasor not to intentionally and in bad faith worsen the injured plaintiff's position by attempting to prevent, through dishonest, unfair (and arguably illegal) means, the latter from seeking just compensation in respect of his or her injuries.

In this regard, the trial court will also have to satisfy itself (having regard to all the circumstances, as disclosed by the evidence—including the defendant's interference with the plaintiff's means of establishing certain facts) that the type of evidence destroyed was relevant. It would be unreasonable to expect even a tortfeasor to preserve irrelevant evidence.

Because plaintiffs will in many, if not most, cases have to adduce circumstantial evidence of bad faith conduct, the court's most difficult challenge will be in deciding whether it is reasonable to infer an obligation to preserve evidence (including the defendant's own property) prior to the formal commencement of litigation.

As noted above, the issue of whether it was reasonable for a defendant to have intentionally destroyed evidence (often its own property) is not limited to the proposed tort, but arises in respect of the well-established spoliation inference and related procedural remedies.

American spoliation jurisprudence— notably cases in which traditional spoliation sanctions were sought— provide some helpful guidance in determining the circumstances under which, and to what extent, the common law imposes obligations on a defendant to preserve its own property, or that over which it exercises control.

⁷² Where a third party has allegedly destroyed evidence, establishing a duty of care in respect of the main action may be impossible. A third party may have had no contact with or reasonably contemplated the plaintiff *in relation to the underlying cause of action*. The defendant to the main action may simply conspire with the third party to have the latter destroy evidence.

By definition, a co-conspiring third party does not control the defendant, and therefore cannot be said to be vicariously liable for the acts or omissions of the defendant in respect of the underlying action. If there is no vicarious liability (because of an absence of control) a duty must be found elsewhere.

The object of the 'spoliation' conspiracy may simply be to prevent the plaintiff from maintaining an action against the defendant. Thus, even under the first type of conspiracy referred to by Mr. Justice Estey in *Canada Cement LaFarge v. B.C. Lightweight Aggregate* (1983), 145 D.L.R. (3d) 385 (S.C.C.) at 398-99, the third party would escape liability if no harm other than the loss of access to just compensation resulted, if intentional, bad faith spoliation is not recognized as tortious conduct.

Similarly, if a plaintiff can only establish the second type of conspiracy referred to by Mr. Justice Estey in *Canada Cement*, that the third party and defendant should have known in the circumstances that, as a result of the third party's spoliation, the plaintiff would likely lose the opportunity to seek just compensation— that plaintiff will fail if the law does not recognize bad faith spoliation as (1) an illegal act (*i.e.*, tortious conduct) that (2) causes harm (*i.e.*, the loss of an opportunity to seek and obtain just compensation).

Though it would appear that in traditional spoliation doctrine cases, the obligation to preserve evidence ultimately flows from the litigant's duty to the court and the latter's power to ensure an effective and credible fact-finding process,⁷³ the general principles enunciated in those cases, by way of analogy, are equally applicable in the spoliation tort context, having regard to the underlying duties owed to potential litigants, including the plaintiff.

In relation to the underlying rationale for imposing a duty on defendants to preserve particular documents under certain circumstances prior to the commencement of litigation, the court noted in *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, *supra*:⁷⁴

The most extreme legal position taken by the defendant is that the court is powerless to punish the wholesale, wilful destruction of relevant evidence where the destruction takes place prior to the specific court order for their production. Surely this proposition must be rejected. The plaintiffs are correct that such a rule would mean the demise of the real meaning and intent of the discovery process provided by the Federal Rules of Civil Procedure.

It has long been recognized that sanctions may be proper where a party, before a lawsuit is instituted, wilfully places himself in such a position that he is unable to comply with a subsequent discovery order. Cf., e.g., *Société Internationale v. Rogers*, 357 U.S. 197, 208-09 (1958).⁷⁵ Although a potential litigant is under no obligation to preserve every document in its possession, whatever its degree of relevance, prior to the commencement of a lawsuit, see *United States v. International Business Machines Corp.*, 66 F.R.D. 189, 194 (S.D.N.Y. 1974), some duty must be imposed in circumstances such as these lest the fact-finding process in our courts be reduced to a mockery.⁷⁶

Having regard to this passage, under what circumstances can it be said that a defendant has wilfully and wrongfully placed itself in a position such that it is subsequently unable to comply with a discovery order? In *General Atomic Co. v. Exxon Nuclear Co., Inc.*,⁷⁷ the court noted that:

The evidence clearly supports a finding that Gulf [a defendant by counter-claim] followed a deliberate policy of storing cartel documents in Canada with the expectation

⁷³ Which, inferentially, is exercised in a manner that recognizes a plaintiff's right to a fair and effective process.

⁷⁴ 1977 U.S. Dist. LEXIS 16078 ([U.S. Dist. Ct.] N.D.Ind.1977) at 10-11 [25 F.R.Serv.2d 423].

⁷⁵ In *Société Internationale v. Rogers*, 1958 U.S. LEXIS 819 [357 U.S. 197 (1958)], the U.S. Supreme Court held that, "[c]ertainly these contentions, if supported by the facts [that the plaintiff courted legal impediments to production of documents in anticipated future litigation by allegedly conspiring with a Swiss bank and others to take advantage of Swiss banking laws to cloak the relationship between certain corporations], would have a vital bearing on justification for dismissal of the action, but ... [t]he findings below reach no such conclusions" [pp. 208-9 LEXIS, emphasis added].

⁷⁶ This passage was quoted with approval in *General Atomic Co. v. Exxon Nuclear Co., Inc.*, 90 F.R.D. 290 (S.D.Cal.1981) at 304 (discussed below). Similarly, in *Willard*, *supra* note 17, the court stated at 625, having regard to *Atomic*, *supra*, that while every document must not be preserved prior to litigation, "some duty must be imposed in circumstances such as these lest the fact finding process in our courts be reduced to a mockery."

⁷⁷ 90 F.R.D. 290 (S.D.Cal.1981) at 299.

that they would be unavailable for discovery in anticipated litigation in the United States. *For this conduct to amount to "courting legal impediments" to production under Société*,⁷⁸ *supra*, it is not required that the actual litigation in which the documents are ultimately ordered produced must either be pending or specifically contemplated at the time the housing policy was initiated and followed. *United Nuclear Corp. v. General Atomic*, 629 P.2d 231, 308-309 (N.M.1980) [Emphasis added]

In *General Atomic Co.*, the defendant, Gulf, was ultimately sanctioned not only for intentional and bad faith shipment of cartel documents to Canada (where legislation prevented their forced release in foreign litigation), but also destruction of cartel-related documentation prior to the commencement of the lawsuit. At page 304, the court held that:

Although this lawsuit had not yet been filed and *may not have been specifically anticipated at the time of the [document] destruction*, it is likely that the destruction was in bad faith to preclude discovery in other similar litigation pending.⁷⁹ ...

The destruction or disappearance of the ... cartel book when combined with Gulf's housing of documents in Canada constitutes a sufficient basis of fault under *Société Internationale v. Rogers*, *supra*, to conclude that harsh sanctions against Gulf are not precluded. [Emphasis added]

Similarly, in *Carlucci v. Piper Aircraft Corp.*,⁸⁰ the defendant engaged in document destruction to prevent *potential* litigants from obtaining documents that might be detrimental to the defendant. The initial purging involved hundreds of documents. Thereafter, the destruction of all potentially harmful documents was an ongoing process. The court concluded at pages 485-486 that, on the evidence:

[T]he defendant engaged in a practice of destroying engineering documents with the intention of preventing them from being produced in lawsuits. Furthermore, I find this practice continued after the commencement of this law suit and that documents relevant to this law suit were intentionally destroyed. ...

I am not holding that the good faith disposal of documents pursuant to a *bonafide*, consistent and reasonable document retention policy can not be a valid justification for a failure to produce documents in discovery. That issue never crystallized in this case because [defendant] has utterly failed to provide credible evidence that such a policy or practice existed.

Having determined that [defendant] intentionally destroyed documents to prevent their production, the entry of a default is the appropriate sanction. *Deliberate, willful and contumacious disregard of the judicial process and the rights of opposing parties justifies the most severe sanction* [Emphasis added]

⁷⁸ *Société Internationale v. Rogers*, 357 U.S. 197 (1958); 1958 U.S. LEXIS 819.

⁷⁹ The court held that defendant by counterclaim, Gulf, anticipated or ought to have anticipated anti-trust type litigation as early as 1975 when the partnership of which it is a member was required to produce certain documents in a pending case. A similar action was commenced in 1976. Gulf was also aware in 1975 of a grand jury investigation into an alleged cartel which implicated the company's operations.

⁸⁰ 102 F.R.D. 472 (S.D.Fla.1984).

In *Lewy v. Remington Arms Co., Inc.*,⁸¹ the court provided some guidance in respect of determining whether a given document retention policy⁸² is *bona fide* and reasonable, and whether, notwithstanding, it is a valid justification for a defendant's inability to produce certain documents:

First, the court should determine whether [defendant's] ... record retention policy is reasonable considering the facts and circumstances surrounding the relevant documents. For example, [on the facts presented] the court should determine whether a three year retention policy is reasonable given the particular document. A three year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints. Second, in making this determination the court may also consider whether lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of the complaints.

Finally, the court should determine whether the document retention policy was instituted in bad faith. ... In cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs, it may be proper to give an instruction similar to the one requested by the ... [plaintiffs]. Similarly, *even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy. For example, if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy. Gumbs*⁸³ ... [Emphasis added]

Other cases have similarly held that a defendant is under a duty to preserve documents where it knows or ought to know that the documents would be relevant to likely future litigation.⁸⁴ American courts have adopted a similar approach in relation to evidence destruction which occurs *after* the commencement of litigation.⁸⁵

It is axiomatic that bad faith intentional spoliation will not occur unless the spoliator anticipates likely legal action by injured persons. And as noted above, a bad faith spoliator need not necessarily have direct contact with its victim prior to the act of evidence destruction before the law recognizes a pre-existing duty of care.

For example, a manufacturer of a mass market good will likely not anticipate any particular consumer lawsuit but may have notice, through its own research, consciousness of its own deceit, or otherwise of the likelihood of such litigation.

⁸¹ 836 F.2d 1104 ([U.S. App.]8th Cir.1988) at 1112 [rehearings and rehearings *en banc* denied March 14, 1988].

⁸² Such policies may, for example, be advanced by sophisticated corporate defendants as a justification for non-production of evidence.

⁸³ *Gumbs v. International Harvester, Inc.*, 718 F.2d 88 (3rd Cir.1983) at 96.

⁸⁴ For example, *Capellupo v. FMC Corp.*, 126 F.R.D. 545 ([U.S. Dist. Ct.] D.Minn. 1989) at 551; *Akiona v. U.S.*, 938 F.2d 158 ([U.S. App.]9th Cir.1991) at 161; *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68 ([U.S. Dist. Ct.]S.D.N.Y. 1991) at 71; and *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19 (E.D.N.Y. 1996) at 24.

⁸⁵ For example, *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F.Supp. 1443 (C.D.Cal.1984) at 1455.

The likelihood of consumer lawsuits increases as serious public allegations are directed towards the manufacturer and its product, or consumer litigation is commenced against other like companies. Similarly, the likelihood that certain types of documents are relevant and material to potential litigation involving the defendant's product increases as comparable documents are requested in other proceedings involving associates of the defendant, and of which the defendant has (or ought to have) notice.

In summary, it is really immaterial whether the wrongdoer actually owned the eliminated 'smoking gun'. The issue is whether, under the circumstances, the evidence of intentional evidence destruction discloses (or one may infer) bad faith conduct that should be subject to liability.

As the American jurisprudence indicates, the limits and contours of this novel, evolving tort have yet to be authoritatively and conclusively defined.

X. Consideration of the spoliation tort in Canada

It would appear that a mere five reported and unreported Canadian cases⁸⁶ have concerned claims that include a pleading or proposed pleading of the tort of

⁸⁶ See *Hinton v. Engineering Products of Canada Ltd.* (1986), 16 C.P.C. (2d) 283 (Ont. Dist. Ct.) at 286 [The defendant brought a motion, after the time prescribed in the Rule, seeking to issue a third party claim for intentional spoliation of evidence. The court dismissed the motion on the basis of prejudice to the plaintiff. District Court Judge Mossop, raised but explicitly declined to answer "the interesting legal question as to whether "intentional spoliation of evidence" constitutes a wrong for which there is a remedy in Ontario". The court held that it "will have to be dealt with on another occasion."]; *Spasic v. Imperial Tobacco Ltd. et al.*, [1998] O.J. No. 125 (Master), aff'd in relation to different issues (March 17, 1998) Toronto Doc. C17773/97 (Gen. Div.) [Master Peterson struck, with leave to amend, a brief one sentence spoliation pleading, as not complying with sub-rule 25.06(1) (at least one element under the *Coleman* test, *supra*, was not properly pleaded). The legal question as to whether such a pleading discloses a cause of action was explicitly left to a judge considering a R. 21 motion.]; *Spasic v. Imperial Tobacco Ltd. et al* (November 25, 1998), Doc.C17773/97 (Gen. Div.) [Cameron J., in striking the plaintiff's spoliation tort pleading indicated that he was bound, as a matter of *stare decisis*, by the Divisional Court majority's ruling in *Rintoul v. St. Joseph's Health Centre* (October 15, 1998), Toronto Doc. 423/98 (Div. Ct.). Cameron J., however, ruled that the plaintiff could amend its Claim and set out spoliation allegations tied specifically to the underlying causes of action, and noted the possibility of including a civil contempt pleading in respect of spoliation. The plaintiff filed a notice of appeal to the Ontario Court of Appeal on December 9, 1998. The defendants served notices of cross-appeal on December 21, 1998, and January 12th, 1999, respectively]; *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (S.C.), rev'd (1998), 157 D.L.R. (4th) 465 (B.C. C.A.); leave to appeal granted November 19, 1998: [1998] S.C.C.A. No. 260 [Q.L.]. A framework agreement was reached by the parties in the *Endean* case following the Supreme Court of Canada's granting of leave. Accordingly, if a formal settlement is reached and approved by the B.C. Supreme Court prior to the yet-to-be-scheduled S.C.C. hearing, the spoliation tort pleading issue will, in all likelihood, not be resolved by the Supreme Court of Canada in this action.]; *Robb*

intentional spoliation. Only three such tort cases, *Rintoul/Robb Estate*,⁸⁷ *Spasic*, and *Endean* have considered such a pleading under Ontario Rule 21⁸⁸ or its equivalent. The British Columbia Court of Appeal's decision in *Endean* is discussed in greater detail than the other judgments as it is the highest appellate pronouncement on the proposed spoliation tort specifically, to date.

In the *Rintoul/Robb Estate* case, Feldman J. (as she then was) twice⁸⁹ dismissed defence motions to strike such a pleading as disclosing no cause of action. In so doing, Her Honour had specific regard to developments in the United States, and the *ratio* in *Hunt v. Carey*,⁹⁰ noting:

This area is in the early days of its process of development in the courts of the United States. Although a separate tort of spoliation of potential evidence in an action has been rejected in certain states, it has been accepted or left for future decision in several others.

The issue on this motion is whether this claim should be struck out at the pleading stage as disclosing no cause of action.

...

Estate v. St. Joseph's Health Care Centre, [1988] O.J. No. 1144 (Gen. Div.), review denied (May 27, 1998), Doc. 92-CU-54356A (Gen. Div.), rev'd *Rintoul v. St. Joseph's Health Centre* (October 15, 1998), Toronto Doc. 423/98 (Div. Ct.); and *Coriale et al. v. The Sisters of St. Joseph of Sault Ste. Marie et al.* (March 19, 1999), Toronto Doc. 94-CU-79713 (Hartt J. [Div. Ct.]), dismissing motion seeking leave from (1999), 41 O.R. (3d) 347 (Gen. Div.), cross-motion to reconsider earlier reasons dismissed (January 25, 1999), Toronto Doc. 94-CU-79713 (Molloy J.) [Madam Justice Molloy effectively dismissed an appeal (and subsequently, a cross-motion requesting reconsideration of that ruling) from: (June 24, 1998), Toronto Doc. 94-CU-79713 (Master). Master Peppiatt, following the reasons of Feldman J. (as she then was) in *Robb Estate*, allowed the plaintiffs to plead material facts in support of both the proposed spoliation tort and the well-established spoliation inference. Molloy J. held that material facts in support of the tort pleading are effectively the same as those to be pleaded in support of the well-established spoliation doctrine].

⁸⁷ Two companion cases in which the resolution of the spoliation issue in one case was, pursuant to an agreement of the parties, binding on the other.

⁸⁸ Sub-rule 21.01(1)(b) of the *Ontario Rules of Civil Procedure* provides that:

(1) A party may move before a judge,

...

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action ...

(2) No evidence is admissible on a motion,

...

(b) under clause (1)(b). [Emphasis added]

⁸⁹ Madame Justice Feldman was asked, and declined, to reconsider her refusal to strike such a pleading after the British Columbia Court of Appeal rendered its decision in *Endean*, *infra*.

⁹⁰ *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

A motion such as this is not the place to set out a detailed treatise on the tort of spoliation for many reasons, chief among them being that as with virtually all legal analysis, a factual nexus is needed to properly assess the consequences of the various conclusions.⁹¹

A majority of the Ontario Divisional Court reversed Madame Justice Feldman, following the British Columbia Court of Appeal's decision in *Endean*, *infra*. Madame Justice Corbett wrote a strong dissenting judgment in *Rintoul*. The Ontario Divisional Court majority, like the British Columbia Court of Appeal, indicated that "[w]hether a third party can be liable for spoliation is left for another day."⁹²

More recently, Mr. Justice Donald Cameron, in the *Spasic* case, *supra*, struck out a plaintiff's spoliation pleading, noting that he was bound by the Divisional Court majority's decision in *Rintoul* as a matter of *stare decisis*. Notwithstanding, the plaintiff was given leave to amend its Claim to plead spoliation allegations specifically tied to the underlying causes of action, such as conspiracy and deceit. His Honour also noted that the plaintiff could initiate a civil contempt proceeding in respect of any intentional, bad faith spoliation of evidence. The Court of Ontario will hear the plaintiff's appeal and defendants' cross-appeals from Cameron J.'s order on September 1, 1999.

In *Coriale et al. v. The Sisters of St. Joseph of Sault Ste. Marie et al.*, *supra*, Madam Justice Molloy, notwithstanding the Divisional Court majority's *Rintoul* decision, declined to reconsider an earlier ruling in which she allowed the plaintiffs to plead material facts in support of both the proposed spoliation tort and well-established spoliation principle.⁹³

In the proposed class action, *Endean*, *supra*, Mr. Justice K. Smith of the British Columbia Supreme Court refused to strike the representative plaintiff's tort pleading of intentional spoliation of evidence holding that:

There is no tort recognized in Canada as "spoliation". However, such a tort has been recognized in at least one of the United States and the intentional destruction of evidence has been held in other American jurisdictions to give rise to procedural sanctions. The possibility that the intentional destruction of relevant evidence may give rise to remedies in this jurisdiction has been recognized in *Dawes v. Jajcaj* (1995), 15 B.C.L.R. (3d) 240 (S.C.) and *Kaiserv. Bufton's Flowers Ltd.*, [1995] B.C.J. No. 878.

⁹¹ *Robb Estate v. St. Joseph's Health Care Centre*, [1988] O.J. No. 1144 (Gen. Div.) at paras. 5-6, and 7, respectively.

⁹² At paragraph 20, p. 8.

⁹³ (January 25, 1999), Toronto Doc. 94-CU-79713 (Molloy J.), reconsideration of earlier reasons reported at (1999), 41 O.R. (3d) 347 (Gen. Div.) refused. Defence motions seeking leave to appeal Molloy J.'s orders were dismissed (March 19, 1999), Toronto Doc. 94-CU-79713 (Hartt J. [Div. Ct.]).

... the Supreme Court of Canada [in *Hunt v. Carey, supra*] said, at 297:

... where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

Applying those principles here, I conclude that the statement of claim discloses a cause of action for spoliation for purposes of this requirement of the Act.⁹⁴ [Emphasis added]

The British Columbia Court of Appeal reversed, grounding its decision on the following assertions:

In Canada, the law is that the destruction of documents in the appropriate case carries a procedural as opposed to a substantive remedy. In the case of *St. Louis v. Her Majesty The Queen* ... this principle was set out by the Supreme Court of Canada. The Court established that "spoliation" or destruction of documents, is an evidentiary rule which raises a presumption — not an independent tort.⁹⁵ [Emphasis added]

XI. *The British Columbia Court of Appeal's decision in Endean*

The British Columbia Court of Appeal surprisingly failed to cite or consider a single American case from the Twentieth Century, despite the fact that United States Courts in numerous jurisdictions had considered this novel tort prior to the *Endean* appeal and no analogous Canadian tort decisions were yet available to the Court (the first *Rintoul/Robb Estate* decision, *supra*, was released on the same date as the *Endean* appeal hearing).

In light of the lack of in-depth consideration of the spoliation tort in Canada, more developed American jurisprudence may have been (and remains) instructive, especially in light of the fact that American tort law is rooted in the same fundamental philosophy and general principles as our law.⁹⁶

The British Columbia Court of Appeal based its decision largely upon the 1896 Supreme Court of Canada case, *St. Louis v. Her Majesty The Queen, supra*.

⁹⁴ *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (S.C.) at 357-358.

⁹⁵ *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C. C.A.) at 468, para. 9.

⁹⁶ See Robins J.A., in *Buchan v. Ortho Pharmaceutical (Canada) Ltd.*, (1986), 54 O.R. (2d) 92 (C.A.) at 102-103.

As was stressed by Madame Justice Corbett in her dissenting opinion in *Rintoul*,⁹⁷ *supra*, in *St. Louis*, the Supreme Court was not called upon to determine whether a cause of action for intentional spoliation could be pleaded. Rather, the Crown *defended* itself, relying upon the well-established evidential principle *omnia praesumuntur contra spoliatores*. The issue before the Court was whether this rebuttable evidential presumption was properly applied at trial. On the facts, while the destruction was 'intentional' (in the sense that it was not accidental),⁹⁸ there was absolutely no evidence of bad faith or even a suggestion of dishonesty. Thus, the Court simply held that the principle was too zealously applied.

One must also be very careful when relying upon 19th century case law in support of arguments concerning modern obligations and sanctions in relation to the non-production or destruction of relevant litigation documents.

At the time the *St. Louis* case was decided, the notion that parties to an action had an obligation to preserve and disclose documents with a "semblance of relevancy"⁹⁹ was not well developed.

The common law had, after all, only recognized pre-trial discovery in 1854.¹⁰⁰ Trial by ambush was not always frowned upon.¹⁰¹ Significantly, a party was not required to produce documents relating exclusively to that party's own case,¹⁰² nor did a party have to produce documents which tended to involve the party in a criminal charge or subject him to a penalty.¹⁰³ As discussed above, intentional spoliation may theoretically trigger concurrent criminal sanctions.

In *St. Louis*, the plaintiff was trying to establish damages through secondary source evidence. It could be argued that the primary source evidence related exclusively to his case, and, thus, at the time was not even

⁹⁷ At paragraph 15 Her Honour noted:

Thus, *St. Louis* did not deal with the question of whether the tort of spoliation existed or could exist in Canada. The case dealt with the question of the appropriate application of the spoliation presumption, an evidentiary rule. To hold that *St. Louis* forecloses any possibility of considering whether wilful destruction of documents gives rise to remedy in the tort is not warranted on the facts alleged herein.

⁹⁸ Loose note papers printed in pencil were destroyed, as was normal practice, after the information thereon was recopied onto permanent ledgers.

⁹⁹ See *Air Canada v. McDonnell Douglas Corp.* (1995), 22 O.R. (3d) 140 (Master) at 145, appeal dismissed (1995), 22 O.R. (3d) 382 (Gen. Div.) [supp. reasons reported at (1995), 23 O.R. (3d) 156 (Gen. Div.)].

¹⁰⁰ G.D. Cudmore, *Choate on Discovery*, 2d ed. (Toronto: Carswell, 1993) at 1-1.

¹⁰¹ *Ibid.* at 1-2.

¹⁰² G.S. Holmstead and T. Langton, *The Judicature Act of Ontario and The Consolidated Rules of Practice and Procedure of the Supreme Court of Judicature*, 2d ed. (Toronto: Carswell, 1898) at 640-641.

¹⁰³ *Ibid.* at 640.

discoverable. Accordingly, no tort issue could have arisen on the facts. Further, none of the Canadian cases relied upon by the British Columbia Court of Appeal — *St. Louis, Werner, Telenga, and Lindsay*,¹⁰⁴ *supra* — involved cases of confirmed bad-faith destruction of evidence by a defendant to suppress the truth.

As already noted, the British Columbia Court of Appeal asserted that Canadian law provides no “substantive” remedy in relation to spoliation of evidence, despite such remedies (in the sense suggested by the British Columbia Court¹⁰⁵) under provincial discovery rules, evidently not considered by the Court. In making this assertion, the Court relied upon cases involving non-bad faith destruction of evidence *in search of the truth*.

XII. Causation

Another reason cited by the British Columbia Court of Appeal in rejecting the tort of intentional spoliation was that this would “depriv[e] the defendant of its opportunity to rebut which would otherwise be a rebuttable inference.”¹⁰⁶

The elements as understood by the Court, however, did not include a causative factor, as is set in such American cases as *Coleman, supra* (i.e., the tort requires the plaintiff to prove a causal relationship between the act of spoliation and the inability to prove the underlying lawsuit). It is submitted that the defendant to a spoliation tort claim (as generally understood in the United States) is permitted to rebut the allegation (as with any tort allegation) that the destruction of evidence caused the plaintiff to lose its suit.

¹⁰⁴The trial judge in *Lindsay, supra*, applied the maxim *res ipsa loquitur*. It is not clear from the appellate decision whether the rebuttable spoliation presumption was advanced at trial. The Saskatchewan Court of Appeal *en banc* dismissed the defendant’s appeal. Two of the appellate judges concluded that a number of facts supported the finding that there had been negligence, and that the trial judge’s determination was strengthened by the fact that the defendant had removed (and presumably destroyed) an important piece of physical evidence. The other two appellate judges focussed on the fact that the defendant had removed and destroyed evidence *thus shifting the onus of proof* to the defendant. The appellate decision does not reveal whether there was a pleading, or finding at trial, of bad faith (as opposed to mere negligence) on the part of the defendant. In *St. Louis*, and *Telenga*, bad faith was not established by the party relying upon the spoliation principle. In *Werner* there was no attempt to suppress the truth; rather there was misguided pursuit of the truth.

¹⁰⁵That is, ‘substantive’ in the sense of striking a statement of defence, and awarding damages to the plaintiff-victim of spoliation. Whether striking a defence or dismissing an action for noncompliance with provincial rules of civil procedure is a substantive, as opposed to a procedural, remedy for purposes of determining whether an issue is *res judicata*, for example, is not considered herein.

Immediately following this assertion in respect of causation, the British Columbia Court of Appeal concluded at p. 472:

Accordingly, the suggested tort of spoliation punishes the defendant for intentionally destroying evidence and the measure of that punishment is based on damages that it may not have caused.

Notwithstanding the apparently erroneous causation assumptions upon which the Court based its damages analysis, the issue of damage assessment has been raised in American spoliation cases as a concern. The California Court of Appeal in *Smith, supra*, was the first to address the issue.¹⁰⁷ At 835, the court noted:

The most troubling aspect in allowing a cause of action for intentional spoliation of evidence is the requisite tort element of damages proximately resulting from defendant's alleged act. Here, the underlying products liability case has not yet gone to trial and it is possible that the Smiths could prove their case through other means and recover damages.

In this regard, the court quoted from the United States Supreme Court's decision, *Story Parchment Co. v. Paterson P. Paper Co.*:¹⁰⁸

[W]here the *tort itself* is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damage may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. [Emphasis added by the Court of Appeal]

Similarly, in Canada, Mr. Justice Duff stated almost a century ago in the *Lamb*¹⁰⁹ case:

[T]he defendants have, by their own wrongful acts, made it impossible to ascertain these expenses. The court is not called upon to speculate in such a case for the benefit of deliberate wrong-doers; they come within the wholesome rule, that if a man by his deliberately tortious act destroys the evidence necessary to ascertain the extent of the injury he has inflicted, he must suffer all the inconvenience which is the result of his own wrong. [Emphasis added]

The asserted concern that damages for a separate tort of spoliation would be "speculative"¹¹⁰ and may have no relationship to the plaintiff's loss is exaggerated. Compensatory, aggravated and punitive damages in respect of the spoliation tort would be equivalent to the amount recoverable in respect of the underlying cause(s) of action jeopardised by the intentional destruction or alteration of relevant, material evidence. Such damages are no more speculative than

¹⁰⁶ *Endean* (B.C. C.A.), *supra* note 17 at 471, para. 24.

¹⁰⁷ See also the more recent case, *Holmes v. Amerex Rent-a-Car*, 710 A.2d 846 (D.C. App. 1998) at 853, applying *Story Parchment Co. v. Paterson Parchment Paper Co.*, *supra*.

¹⁰⁸ (1931) 282 U.S. 555.

¹⁰⁹ *Supra* note 6 at 540-541.

¹¹⁰ As suggested by Mr. Justice Cameron in *Spasic*, *supra* note 34.

damages flowing from a plaintiff's success in respect of an underlying cause(s) of action where the defendant's statement of defence is struck, pursuant to established conventional remedies, and the factual allegations are, thus, assumed by the court to be true. Moreover, in a spoliation tort case involving personal injuries, for example, plaintiffs still have to establish, *inter alia*, the extent of their injuries, cost of future care, and loss of income earning capacity.

Conclusion

Tort law, as contrasted with the procedural and 'substantive' remedies and criminal law sanctions set out above, seeks to compensate victim-plaintiffs and deter specific tortfeasors.

Over the centuries the common law and law of equity have adapted themselves to the changing needs of society, and have developed means to remedy newly recognized problems and injustices. The intentional destruction of evidence by tortfeasors, particularly in complex litigation, can have a devastating effect on plaintiffs. Tortfeasors may avoid liability completely, may avoid full restitution to plaintiffs and members of a class of persons similarly situated, and may avoid warranted punitive damages, as well as equitable restrictions and obligations. A tort remedy designed to deal with these problems ought to be available to the Courts in appropriate circumstances.