

# **Report on Spoliation of Evidence**

# British Columbia Law Institute

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The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its mission is to:

- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia, which ceased operations in 1997.

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## **Introductory Note**

The British Columbia Law Institute has the honour to present:

### **Report on Spoliation of Evidence**

When evidence is destroyed, mutilated, altered, or concealed both litigants and the civil justice system suffer. Spoliation of evidence can cause courts to render decisions on imperfect evidentiary records, frustrate litigants in the prosecution of their actions, and, in extreme cases, deny people the opportunity to obtain a legal remedy even though they have suffered harm.

The common law has long recognized the seriousness of spoliation of evidence and the problems it causes. In order to address these problems, the courts have developed evidentiary and procedural rules to restore accuracy to the trial process, to sanction litigants who damage, mutilate, alter, or conceal evidence, and to provide limited compensation to litigants who are harmed by spoliation of evidence.

This Report examines those evidentiary and procedural rules and discusses proposals for the further development of the law. The proposals for reform seek to refine the existing rules and to promote the development of a tort of spoliation of evidence, which would provide a substantive remedy in those cases that are currently beyond the reach of the existing rules.

Ann McLean  
Chair  
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# Report on Spoliation of Evidence

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## TABLE OF CONTENTS

<b>I. INTRODUCTION</b> .....	<b>1</b>
A. The Nature of the Problem .....	1
B. The Scope of this Report .....	2
<b>II. THE EVIDENTIARY PRESUMPTION: <i>OMNIA PRAESUMUNTUR CONTRA SPOLIATOREM</i></b> .....	<b>3</b>
A. Introduction .....	3
B. The Origins of the Evidentiary Presumption .....	3
C. Recent Cases Considering the Evidentiary Presumption .....	7
D. Summary .....	10
<b>III. PROCEDURAL SANCTIONS FOR SPOLIATION OF EVIDENCE</b> .....	<b>10</b>
A. Introduction .....	10
B. <i>Rules of Court</i> .....	10
1. Introduction .....	10
2. Rule 2 (5): Refusal or Failure to Make Discovery of Documents .....	11
3. Rule 46: Detention, Preservation, and Recovery of Property .....	13
4. Rule 57 (14): Costs Arising from Improper Act or Omission .....	15
5. Summary .....	17
C. The Inherent Jurisdiction of the Supreme Court .....	17
D. Summary .....	20
<b>IV. DEVELOPING EXISTING THEORIES OF LIABILITY TO PROVIDE REMEDIES FOR SPOLIATION OF EVIDENCE</b> .....	<b>20</b>
A. Introduction .....	20
B. Negligence .....	21
C. Fiduciary Duty .....	25
D. Contract and Promissory Estoppel .....	29
E. Summary .....	32
<b>V. PROPOSALS FOR REFORM</b> .....	<b>33</b>
A. Introduction .....	33
B. The Evidentiary Presumption .....	33
C. Procedural Sanctions .....	37
D. A Substantive Remedy: A New Tort of Intentional Spoliation of Evidence .....	38
1. The Need for a New Remedy .....	38
2. Policy Considerations .....	42

**TABLE OF CONTENTS—Continued**

3. Elements of the Tort .....	44
(1) The existence of pending or probable litigation involving the plaintiff .....	44
(2) Knowledge on the part of the defendant of the pending or probable litigation .....	44
(3) Intentional spoliation by the defendant designed to defeat or disrupt the plaintiff's case .....	45
(4) A causal relationship between the act of spoliation and the plaintiff's inability to prove its case .....	46
(5) Damages .....	47
E. Summary .....	49
<b>VI. CONCLUSION .....</b>	<b>49</b>

# Report on Spoliation of Evidence

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## I. INTRODUCTION

### A. The Nature of the Problem

“Spoliation” means “the action of spoiling” or “the action of plundering.”<sup>1</sup> For lawyers and judges, though, the term has a narrower technical meaning. Spoliation in the legal context refers to the “. . . destruction, mutilation, alteration, or concealment of evidence. . . .”<sup>2</sup>

Spoliation of evidence can occur in a number of ways. Documents can be shredded. Computer files can be erased. Physical items can be disassembled, destroyed, or otherwise disposed of. Modifications can be made to the evidence. Evidence can be altered or destroyed in order to create other types of evidence, such as an expert report. Evidence can also be sold or transferred to a third party, and thereby rendered unavailable for discovery or trial. Finally, evidence can be suppressed in any number of ways. In each of these instances, a litigant, a potential litigant, or the justice system at large can suffer uncertainties, costs, and prejudice due to the actions of a spoliator.

The law recognizes the harm that spoliation of evidence can cause. In British Columbia, those who suffer due to spoliation may be entitled to one or more of a variety of remedies. These remedies currently range from an evidentiary presumption to procedural sanctions. Substantive remedies may also be developing in the courts. The entitlement to a remedy—and the selection of an appropriate remedy—is highly dependent on the context surrounding the spoliation. As an American judge once observed, “. . . almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed.”<sup>3</sup> A court is often required to make a careful judgment call in order to find the correct remedy, if any, for spoliation.

This Report aims to shed some light on the existing sanctions for spoliation, the policy goals underlying those sanctions, and the ways in which the law may be reformed. Spoliation interferes with two major policy goals of the legal system: the establishment and maintenance of a fair trial process and the quest for the truth. Courts can check this interference by crafting rules that restore accuracy to the trial process, punish spoliators, and compensate those harmed by spoliation.<sup>4</sup> The British Columbia courts, though, appear to have taken an unduly restrictive view of their role in developing the law to combat spoliation.

### B. The Scope of this Report

This Report is concerned with spoliation of evidence in relation to civil trials. Spoliation may also occur in the context of a criminal proceeding. Nevertheless, there are significant differences in how

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1. *The Concise Oxford English Dictionary*, 10<sup>th</sup> ed., s.v. “spoliation.”
  2. *Black’s Law Dictionary*, 7<sup>th</sup> ed., s.v. “spoliation.”
  3. *Killian v. United States*, 368 U.S. 231 at 242 (1961), Whittaker J. (for the majority).
  4. See Lawrence Solum & Stephen Marzen, “Truth and Uncertainty: Legal Control of the Destruction of Evidence” (1987) 36 *Emory L.J.* 1085 at 1166–1168 (arguing that legal rules to control spoliation of evidence have three functions: accuracy, compensation, and punishment).
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## Report on Spoliation of Evidence

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the problem is addressed in civil and criminal proceedings, and in civil and criminal procedure generally. These differences justify a focus on spoliation of evidence in connection with civil proceedings, to the exclusion of criminal proceedings.<sup>5</sup>

The courts have initiated and developed most of the rules intended to control spoliation of evidence in civil proceedings. These rules begin with the drawing of an evidentiary presumption based on the fact of spoliation. They also include procedural sanctions that have been developed under the inherent jurisdiction of the court and (in some instances) prescribed in the *Rules of Court*.<sup>6</sup> Finally, and rather more controversially, they may include aspects of the substantive law, in particular the law of torts, fiduciary duties, contracts, and promissory estoppel.

It is the view of this Report that the existing rules largely provide an effective response to many of the problems posed by spoliation. Nevertheless, there is some scope for fine tuning and reform. This reform could be accomplished in a number of ways: by legislation, by amendments to the *Rules of Court*, or by judicial decisions. This Report, while not ruling out legislative change, will focus on the role of the courts. The courts have traditionally taken the lead in forming rules to control spoliation; there is no legislation in North America that directly addresses spoliation of evidence. In part, reform in this area of the law can be accomplished simply by the courts taking a less restrictive view of the powers that they already have. In addition, it may be useful to articulate new rules to deal with some of the effects of spoliation of evidence.

This Report will begin by reviewing the historical development and recent application of the evidentiary presumption. Then, it will examine procedural sanctions available under both the *Rules of Court* and the inherent jurisdiction of the court. Next, it will consider the ways in which the substantive law may arguably be extended to provide remedies in certain cases involving spoliation of evidence. Finally, it will conclude by discussing several proposals for reforming the evidentiary and procedural rules and the substantive law.

## II. THE EVIDENTIARY PRESUMPTION: *OMNIA PRAESUMUNTUR CONTRA SPOLIATOREM*

### A. Introduction

A longstanding evidentiary rule provides one remedy in cases of spoliation. This rule creates the following rebuttable presumption: if the spoiled evidence had been available at trial, it would have

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5. Spoliation occurring before or in the course of a civil proceeding could, in theory, result in a criminal penalty under either section 139 (2) (obstructing justice) or section 341 (fraudulent concealment) of the *Criminal Code*, R.S.C. 1985, c. C-46. In practice, criminal charges are almost never laid in relation to such misconduct in a civil proceeding: see Richard J. Sommers & Andreas G. Seibert, “Intentional Destruction of Evidence: Why Procedural Remedies Are Insufficient” (1999) 78 Can. Bar Rev. 38 at 48–49. Criminal penalties for spoliation may loom larger in other jurisdictions, though: see *Trevino v. Ortega*, 969 S.W.2d 950 at 953 (Tex. 1997), Enoch J. (for the court) [*Trevino*] (declining to create a separate tort remedy for intentional spoliation of evidence because “[t]rial judges have broad discretion to take measures ranging from a jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions”).

6. *Supreme Court Rules*, B.C. Reg. 221/90 [*Rules of Court*].



## Report on Spoliation of Evidence

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been harmful to the spoliator's case. The presumption can be deceptively simple to state. In order to understand it fully, it is necessary to look at its application in the cases. The cases can be divided between those decided in the nineteenth and early twentieth centuries and those decided within the last ten to fifteen years. This division marks a shift in the courts' understanding and application of the evidentiary presumption.

### B. The Origins of the Evidentiary Presumption

The origins of the evidentiary rule can be traced back to Roman law, which gives us the maxim *omnia praesumuntur contra spoliatores* ("all things are presumed against the wrongdoer").<sup>7</sup> The rule first appeared in English law in the early seventeenth century.<sup>8</sup> When it was proved that a litigant had suppressed or destroyed evidence, the opposing litigant could rely on a presumption, generated by the fact of that destruction or suppression, that the spoiled evidence was harmful to the spoliating litigant's case.<sup>9</sup>

The strength of this presumption has been variously described. Some courts said it was very strong: the presumption alone would allow the non-spoliating litigant to make out its case.<sup>10</sup> Other courts

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7. For a discussion of spoliation and the law of Rome *see* Craig Jones, "The Spoliation Doctrine and Expert Evidence in Civil Trials" (1998) 32 U.B.C. L. Rev. 293 at 294–295.
  8. *See R. v. Arundel*, (1617) Hob. 109 at 109, 80 E.R. 258 (K.B.) ("... the cause of the suit was made, that the deeds . . . were not extant, but very vehemently suspicious to have been suppressed and withheld by some under whom the defendants claimed, and therefore in the end the decree ran, that the King . . . should hold the land 'till the defendans [*sic*] should produce the deeds, and the Court thereupon take further consideration and order").
  9. *See Ward v. Apprice*, (1705) 6 Mod. 264 at 264, 87 E.R. 1011 (K.B.) (The headnote reads: "If one of several partners receive money on the joint account, and give his *note* for it, and enter his expenditures in the partnership-books, and then the other partners possess themselves of the books, and bring an action against him for the monies he received to their use, the Court will not *order* the plaintiffs to produce their books at the trial, but the defendant may give them *notice* so to do, and thereby raise a presumption against them if they refuse." [emphasis in original]); *Armory v. Delamirie*, (1722) 1 Str. 505 at 505, 93 E.R. 664 (K.B.), Pratt C.J. (in an action in trover by the finder of a jewel, upon defendant refusing to produce jewel "... the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did"); *James v. Biou*, (1826) 2 Sim. & St. 600 at 607, 57 E.R. 475 (Ch.), Sir John Leach V.C. (plaintiffs admitting possession of certain receipts and refusing to produce them; court ruling "... the suppression of them is evidence that the receipts afford instances unfavourable to the title of the Plaintiffs").
  10. *See Young v. Holmes*, (1718) 1 Str. 70 at 70, 93 E.R. 390 (K.B.), Parker C.J. ("It being proved, the defendant had the lease in her custody, and refusing to produce it; an attorney who had read it was allowed to give evidence of the contents. And the C.J. said, he would intend it made against the defendant, it being in her power if it was otherwise to show the contrary."); *Dalston v. Coatsworth*, (1721) 1 P. Wms. 731 at 731–732, 24 E.R. 589 (Ch.) (defendant suppressing a document and objecting to testimony establishing its contents as being favourable to plaintiff; court ruling "... since a term [of the document] might be limited in such a manner, I will intend it to have been limited in the present

## Report on Spoliation of Evidence

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struck a more cautious note.<sup>11</sup> The circumstances surrounding spoliation of evidence had a considerable bearing on the operation of the presumption. To illustrate this point, one judge drew a telling contrast between two types of cases:<sup>12</sup>

In a case before me this year, one partner, several years before the institution of the suit, and upwards of twenty years after the closing of the partnership business, and when the accounts had been settled between him and his partners by arbitration, and now afterwards opened or disputed, had destroyed the books which contained the accounts of that partnership, I treated lightly the circumstance of that destruction and did not suffer it to prejudice his case. But the case is very different when the transactions to which they relate are recent, where the accounts arising from them have not been finally adjusted, or the balance ascertained or paid, and still more when that destruction takes place by the person who has actually filed a bill to have the accounts taken of those very transactions to which these books relate. In such a case some very cogent reason must be given to satisfy the Court that the destruction was proper or justifiable, and, in the absence of any such satisfactory reason, which is the fact here, I am compelled to act on the principle laid down in the well-known case of *Armory v. Delamirie*, and presume, as against the person who destroyed the evidence, everything most unfavourable to him which is consistent with the rest of the facts, which are either admitted or proved.

The court's examination of the circumstances surrounding the destruction of these documents leads it to draw inferences about the litigants' actions. The first litigant, who destroyed his books and records when the litigation was not a reasonable prospect, appears to have acted in a routine and innocent manner. The second litigant, who destroyed his books and records after a lawsuit had been commenced, appears to have acted deliberately to thwart the opposing litigant's prosecution of the action. As this passage indicates, the presumption is rebuttable: the spoliating litigant is able to call evidence to rebut the presumption.<sup>13</sup>

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case, for every thing shall be presumed *in odium spoliatoris*").

11. *See Barker v. Ray*, (1826) 2 Russ. 63 at 72–73, 38 E.R. 259 (Ch.), Lord Eldon L.C. (“Now, this Court has a peculiar jurisdiction in cases of spoliation. . . . The jurisdiction of this Court has gone a long way; indeed, it has gone to such a length, that, if I did not think myself bound by authority and practice, I should have great difficulty in following them so far. To say that, if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be, in a great many instances, going a great length.”).
12. *Gray v. Haig*, (1854) 20 Beav. 219 at 226, 52 E.R. 587 (Rolls Court), Sir John Romilly M.R. *See also Cookes v. Hellier*, (1749) 1 Ves. Sen. 234 at 235, 27 E.R. 1003 (Ch.), Lord Hardwicke L.C. (“Although, if deeds or writings are destroyed by a party, who would take benefit thereof, a court of equity *in odium spoliatoris* will go further than a court of law. . . . But if it be a casual destruction, the evidence is the same here as at law.”).
13. *See also The Hunter*, (1815) 1 Dods. 480 at 486–487, 165 E.R. 1385 (Adm.) (although spoliation “. . . does not found an absolute presumption *juris et de jure*, it only stops short of that, for it certainly generates a most unfavourable presumption”).

## Report on Spoliation of Evidence

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The leading Canadian case, *St. Louis v. Canada*,<sup>14</sup> addressed this issue of rebutting the evidentiary presumption. *St. Louis* was an appeal of an action brought by way of petition of right to recover payment alleged to be due on a contract to supply labour and materials for the construction of a public work. The contract required the suppliant's bookkeeper to submit paylists to certain government officials for certification. Payments were made in accordance with the certified paylists. Toward the end of the project the Crown began to suspect that it was the victim of a fraud touching on the paylists and their certification. It refused to make the final payments required under the contract. The Crown also announced that it would strike a commission of inquiry to investigate the project. Shortly thereafter, the suppliant destroyed his accounting records. Later, after the commission of inquiry had run its course, the suppliant commenced an action to recover the final payments due under the contract. The trial court held that the certified paylists were "utterly valueless" without the supporting accounting documentation because the certifying officers had been careless in their duties.<sup>15</sup> It applied the evidentiary presumption *omnia praesumuntur contra spoliatores* and ruled in favour of the Crown.

In reversing the trial judge's decision, the Supreme Court of Canada had occasion to map out the limits of the evidentiary presumption. Taschereau J. and Girouard J. delivered lengthy judgments, both concurred in by all the other justices of the court, reviewing the facts of the case, the application of the presumption in past cases, and the significance of its being a rebuttable presumption. Both judgments stressed the value of the evidence of the various employees of the suppliant who had testified at trial as to the contents of the destroyed documents.<sup>16</sup> Taschereau J. indicated that these witnesses should have the benefit of "another presumption" to the effect that they had not perjured themselves.<sup>17</sup> This "other presumption" greatly assists the spoliator in establishing the absence of fraud, bad faith, or obstruction of justice. In many cases, the absence of these elements can go a long way in rebutting the evidentiary presumption. Girouard J. observed that the suppliant had destroyed

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14. (1896) 25 S.C.R. 649 [*St. Louis*].

15. *St. Louis v. Canada*, (1894) 4 Ex. C.R. 185 at 190, Burbidge J.

16. *St. Louis*, *supra* note 14 at 656, Taschereau J. ("The destruction of the books entitled the respondent to put the appellant on the strict proof of each and every item of his claim, but for each and every item duly proved the appellant is entitled to recover. And the evidence is all one way.") and at 676, Girouard J. ("All these facts were proved at the trial, and I cannot understand how any presumption can exist that the blotters or time books, sheets or memoranda were destroyed for the purpose of preventing the verification of the accounts rendered to the government, or that, if produced, they would show that the pay-rolls rendered to the government were not correct.").

17. *Ibid.* at 663 ("But in addition to that proof [rebutting the negative presumption generated by spoliation], and in aid of it, is there not another presumption that must not be lost sight of, the presumption that all these witnesses have deposed to the truth? Can a court of justice brand such a number of respectable citizens with the stigma of perjury because the appellant has chosen to destroy his books, or because the government has neglected to have the men's time accurately taken?"). Note the irony—the suppliant has destroyed the best evidence that the Crown could have used to displace this presumption of honesty.

## Report on Spoliation of Evidence

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his records “. . . long before the institution of the present action. . . .”<sup>18</sup> The fact that the suppliant destroyed his records shortly after the Crown constituted its commission of inquiry was brushed aside as not being relevant to these proceedings.<sup>19</sup> Finally, Girouard J. observed that (at that time) there was no statutory duty under Canadian law to preserve accounting records.<sup>20</sup> Since the records, then, were simply the suppliant’s property, he had a right to do with them whatever he pleased.<sup>21</sup>

This material is relevant to the decision in *St. Louis* because of the nature of the evidentiary remedy for spoliation: “[t]his presumption is not one of law, but of fact left to the determination of the trial judge or jury, according to the circumstances of each case.”<sup>22</sup> This statement is consistent with past authority and with common sense. However, *St. Louis* shows that allowing the spoliator to rebut the presumption can easily develop into denial of any remedy for the non-spoliator. The court may have reached the correct result in *St. Louis*, but, in its enthusiasm to show the myriad ways in which the suppliant rebutted the presumption, it placed a number of roadblocks in the way of a non-spoliator’s reliance on the presumption as a means to establishing its case. These obstacles include the focus on the suppliant’s property rights and the presumptive honesty of the suppliant’s witnesses, and the dismissal the connection between the destruction of accounting records and the commencement of the commission of inquiry.

These roadblocks would appear to make it difficult for a non-spoliating litigant to rely on the evidentiary presumption to make its case. However, despite the fact that *St. Louis* is a decision of the Supreme Court of Canada, it was not mentioned in subsequent Canadian cases dealing with spoliation. These subsequent cases continued to apply the simple, fact-based approach to spoliation of evidence: if the surrounding circumstances pointed to a deliberate attempt to sabotage the opposing litigant’s case, then the court would punish the wrongdoer by applying a presumption so strong that it effectively shifted the burden of proof to the spoliator.<sup>23</sup> *St. Louis* was not cited in a case dealing

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18. *Ibid.* at 670.

19. *Ibid.* at 664–665, Taschereau J. (“Mention is made by some of the witnesses of a certain commission in connection with these works. . . . However, this is immaterial, except that I notice that McLeod’s evidence in this case seems to be based to a great extent on knowledge he acquired as chairman of that commission, and as such is altogether illegal.”) and at 670–671, Girouard J. (“The Crown has assumed that he [*i.e.* the suppliant] has destroyed them [*i.e.* his records] for the purpose of avoiding the investigation to be made by the commission. . . . [W]ere it true it would appear that this destruction was made by the appellant merely to prevent the public from become acquainted with his affairs, and not in view of this suit. . . .”).

20. *Ibid.* at 667.

21. *Ibid.* at 683–684 (“The appellant is his own master; he has taken nothing from the respondent; and I cannot understand how the maxim *contra spoliatorem* can generally be applied to a party who withholds or destroys his own papers.”).

22. *Ibid.* at 670, Girouard J.

23. See *e.g. Lamb v. Kincaid*, (1907) 38 S.C.R. 515 at 540, Duff J. (Fitzpatrick C.J. and Girouard J.

## Report on Spoliation of Evidence

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with spoliation of evidence until it reappeared, somewhat out of context, in a recent British Columbia decision.<sup>24</sup>

### C. Recent Cases Considering the Evidentiary Presumption

The evidentiary presumption continues to exist in Canadian law. In clear cases of spoliation by a litigant, courts have applied the presumption without much consideration of past authorities such as *St. Louis* or consideration of the kinds of evidence that may rebut the presumption.<sup>25</sup>

The more interesting—and more numerous—recent cases involve refusals to apply the evidentiary remedy. These refusals tend to come in cases that do not fit the historical pattern of a litigant intentionally destroying what he or she clearly knows to be relevant evidence. A number of recent cases have involved the destruction of physical evidence by a litigant's expert or insurer.<sup>26</sup> In another

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concurring) (“The court is not called upon to speculate in such a case for the benefit of deliberate wrongdoers; 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.”); *R. v. Chlopeck Fish Co.*, (1912) 17 B.C.R. 50 at 55 (C.A.), Irving J.A. (In a prosecution for illegally fishing within Canadian waters the Crown may meet its burden of proof by showing that the ship's crew threw relevant evidence overboard: “[t]he inference I would draw from this act of abandonment—this suppression of evidence—was that the unrecovered gear was in Canadian waters. . . .”); *Lindsay v. Davidson*, [1911] 1 W.W.R. 125 at 129 (Sask. S.C. *en banc*), Newlands J. (“This broken cleat was taken home by the defendant and destroyed. This made it impossible for the plaintiff to show what caused the accident, and therefore shifted the onus of proof to the defendant.”); *Brandon Electric Light Co. v. Brandon (City of)*, (1912) 1 D.L.R. 793 at 799 (Man. K.B.), Mathers C.J. (“The [electric light] company had gone on for years deliberately appropriating the city's water without preserving any records of the quantity so taken. In such a case the maxim *omnia praesumuntur contra spoliatores* must be applied and every presumption be made against the company.”).

24. *Endean v. Canadian Red Cross Society*, (1998) 157 D.L.R. (4<sup>th</sup>) 465, 48 B.C.L.R. (3d) 90 at para. 9 (C.A.), Braidwood J.A. (for the court) [*Endean* cited to B.C.L.R.] (citing *St. Louis* as authority for the proposition that no independent tort of spoliation of evidence exists in Canadian law), *leave to appeal to S.C.C. granted*, (1998) 235 N.R. 400n (S.C.C.), *notice of discontinuance of appeal to S.C.C. filed*, (1998) 165 D.L.R. (4<sup>th</sup>) vii (S.C.C.).
25. *See Mark James Ltd. v. Collins*, (1987) 96 B.C.L.R. (2d) 87 at paras. 37–40, 57 C.P.R. (3d) 355 (S.C.), Rowan J. (assessing damages in a manner favourable to plaintiff because “. . . Defendants know, or have known, the extent of their benefit and are not telling”); *D. Fogell Associates Ltd. v. Esprit De Corp. (1980) Ltd.*, [1997] B.C.J. No. 1060 at para. 55 (S.C.) (QL), Edwards J. (“Esprit has in fact failed to provide sufficient records to allow the plaintiff to carry out an accurate accounting. Esprit's failure gives rise to the adverse presumption stated in *Armory v. Delamirie* (1792), 93 E.R. 664 whereby the court, when faced with a wrongdoer who refuses to reveal facts within the wrongdoer's knowledge, will presume against the wrongdoer the facts that are adverse.”).
26. *See e.g. Dyk v. Protec Automotive Repairs*, (1997) 151 D.L.R. (4<sup>th</sup>) 374, 41 B.C.L.R. (3d) 197 (S.C.), Burnyeat J. [*Dyk* cited to B.C.L.R.] (litigant's expert “irretrievably altering” the brake system in the course of preparing a report on a car involved in a motor vehicle accident); *Dawes v. Jajcaj*, (1999) 66

## Report on Spoliation of Evidence

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case, a non-litigant destroyed its own documents, which later turned out to be potentially relevant evidence in an action involving its corporate affiliate.<sup>27</sup> When a litigant has been the spoliator, often its conduct is better characterized as “negligent” rather than “guilty” or “intentional.”<sup>28</sup> Finally, victims of spoliation have increasingly been asking for these remedies to be granted to them in pre-trial motions, rather than relying (or attempting to rely) on the evidentiary remedy at trial.<sup>29</sup>

These situations pose difficult challenges for a court that attempts to apply the evidentiary presumption *omnia praesumuntur contra spoliatores*. Should a litigant be disadvantaged by the acts of a non-litigant? In what circumstances should an “accidental” destruction of evidence—which nevertheless harms the opposing litigant’s case and the ability of the court to find the relevant facts for judgment—draw sanctions? How should a court deal with cases where a litigant’s expert has damaged evidence? A court that strictly applies the rule will draw a presumption that the spoiled evidence would, if it were produced at trial, have been unfavourable to the spoliator’s case. However, the spoliator will be permitted to rebut the presumption. Does this opportunity allow the spoliator to introduce the expert report? As a result, a court deciding such a case would be placed in an awkward position, particularly if the evidence that has been spoiled would have had high probative value at trial. The court could deliver a technical judgment in favour of the non-spoliator. Such a judgment would rest largely on the evidentiary presumption and would effectively ignore the expert report. Or, the court could decide that the expert report rebuts the evidentiary presumption and render judgment in favour of the spoliator. This outcome may be unfair to the non-spoliator, who was denied an opportunity to obtain an expert report of its own. It also runs the risk of discouraging litigants, and their experts, from treating evidence with due care.

In most of the recent British Columbia cases, these questions have tended to be resolved by focussing on the consciousness of guilt or degree of fault of the spoliator. Faced with a non-litigant’s destruction of documents, the court concluded that it required “. . . evidence as to why and when the documents were destroyed” in order to determine whether the destruction had occurred “. . . through bad

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B.C.L.R. (3d) 31, 1999 BCCA 237, Finch J.A. (for the court) [*Dawes* cited to B.C.L.R.] (litigant’s insurer destroying car after it was examined by an expert on the insurer’s behalf but before other litigant’s expert had an opportunity to conduct similar tests), *leave to appeal to S.C.C. refused*, (2000) 255 N.R. 195n (S.C.C.).

27. *Universal Printed Circuit Co., Canada v. Omni Graphics Ltd.*, [1999] B.C.J. No. 157 (S.C.) (QL), Clancy J. [*Omni Graphics*].

28. *See e.g. Clark v. Royal Oak Holdings Ltd.*, 2003 BCSC 275 at para. 91, Taylor J. [*Clark*] (plaintiff in “slip and fall” action discarding the shoes she was wearing at the time of the accident before trial; court refusing to draw adverse presumption); *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, 2003 YKSC 18 at paras. 75–84, Veale J. (employees of defendant discarding metal base of sign that was removed from plaintiff’s building shortly before it caught fire; court finding that base could have been relevant evidence as to the cause of the fire, however no adverse presumption drawn, because employees’ action was merely negligent).

29. *See e.g. Douglas v. Inglis Ltd.*, [2000] O.T.C. 199, 45 C.P.C. (4<sup>th</sup>) 381 (S.C.J.), Flinn J. (application by various manufacturers in a products liability case for a declaration that evidence had been destroyed).

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## Report on Spoliation of Evidence

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faith and not simply through negligence.”<sup>30</sup> Variations on this “bad faith” prerequisite to drawing the evidentiary presumption have appeared in other cases. In one instance, a court concluded that the discarding of evidence by a litigant was not “sinister in purpose” and thereby found evidence to rebut the presumption.<sup>31</sup> In other cases, the court has required that the non-spoliating litigant provide evidence of the spoliator’s consciousness of guilt in addition to evidence of the fact of spoliation in order to obtain the evidentiary remedy. In *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, Justice Veale reviewed a number of recent British Columbia cases on this point and formulated the following test:<sup>32</sup>

. . . to draw a negative inference from spoliation the following is required:

- i. relevant evidence has been destroyed;
- ii. legal proceedings were pending;
- iii. the destruction was an intentional act indicative of fraud or intent to suppress the truth.

This test shows how far some recent cases have departed from the traditional view that the act of spoliation raised a presumption against the spoliator that the spoliator could rebut. Under Justice Veale’s test, the non-spoliator bears an additional burden of showing that the spoliator acted fraudulently or with an intention to suppress the truth. This additional burden limits the utility of the presumption.

### D. Summary

The evidentiary presumption *omnia praesumuntur contra spoliatorem* has a long history in English and Canadian law. In certain cases, it continues to be an effective solution to the problems posed by spoliation of evidence. However, recent cases show that the usefulness of the evidentiary presumption is being diminished by the courts’ inability to apply it in new circumstances and by the willingness of some courts to complicate the rule by imposing new and often onerous legal tests on litigants who seek to benefit from the presumption.

## III. PROCEDURAL SANCTIONS FOR SPOLIATION OF EVIDENCE

### A. Introduction

Some litigants have been frustrated in their attempts to have courts apply the evidentiary presumption

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30. *Omni Graphics*, *supra* note 27 at para. 32.

31. *Clark*, *supra* note 28 at para. 91.

32. *Supra* note 28 at para. 79. Veale J. considered the trial decisions in *Dawes*, *supra* note 26 and *Endean*, *supra* note 24, along with the Court of Appeal decision in *Endean* and the decision in *Dyk*, *supra* note 26, in formulating this test. The trial decisions of the two appellate cases are reported at: *Dawes v. Jajcaj*, (1995) 15 B.C.L.R. (3d) 240, 18 M.V.R. (3d) 66 (S.C.), Boyd J. [*Dawes* (S.C.) cited to B.C.L.R.]; *Endean v. Canadian Red Cross Society*, (1997) 148 D.L.R. (4<sup>th</sup>) 158, 36 B.C.L.R. (3d) 350 (S.C.), Smith J.

## Report on Spoliation of Evidence

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in new circumstances. Litigants have also been asking for the exclusion of evidence and for financial compensation. Although it may be difficult to apply an evidentiary presumption in these circumstances, the courts are not without powers to control spoliation in such cases. British Columbia's procedural rules governing civil trials are highly relevant here, even though they do not address spoliation by name. The two primary sources of civil procedure—the *Rules of Court*<sup>33</sup> and the inherent jurisdiction of the court—provide a number of sanctions that can be used to restore fairness to civil proceedings affected by spoliation, to compensate litigants impeded by spoliation, and to punish those seeking to take advantage of spoliation.

### B. *Rules of Court*

#### 1. INTRODUCTION

The object of the *Rules of Court* is “. . . to secure the just, speedy and inexpensive determination of every proceeding on its merits.”<sup>34</sup> Spoliation of evidence can frustrate this goal in several ways. It can force a court to make a decision in the absence of relevant evidence, increasing the risk of an incorrect or unjust result. It can divert proceedings into considerations of the circumstances surrounding the act of spoliation and the application of an appropriate remedy, adding time and expense. As a result, it is not surprising to find that there are rules that intersect with issues arising from spoliation of evidence. The most important examples of such rules are those dealing with discovery of documents, orders to preserve property, and costs. The Canadian courts have tended not to address their procedural rules in connection with spoliation of evidence; but the *Rules of Court* can, in appropriate cases, provide a useful set of tools to deal with spoliation.

#### 2. RULE 2 (5): REFUSAL OR FAILURE TO MAKE DISCOVERY OF DOCUMENTS

Rule 2 (5) describes the consequences of certain forms of noncompliance with the *Rules of Court*. Two forms of noncompliance listed in the rule may involve spoliation of evidence. They are: where a person “refuses or neglects to produce or permit to be inspected any document or other property”; and where a person “refuses or neglects . . . to make discovery of documents.”<sup>35</sup> The word “document” has an extended meaning under the *Rules of Court*; it includes media other than printed words on a page.<sup>36</sup>

Rule 2 (5) sets out two consequences for these forms of noncompliance. Which one of the two consequences applies depends on the “person” who is noncompliant. If the person is a plaintiff, then “. . . the court may dismiss the proceeding”; if the person is a defendant, then “. . . the court may

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33. *Supra* note 6.

34. *Ibid.*, rule 1 (5).

35. *Ibid.*, rule 2 (5) (c) and (d).

36. *Ibid.*, rule 1 (8) (“‘document’ has an extended meaning and includes a photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device”).

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## Report on Spoliation of Evidence

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order the proceeding to continue as if no appearance had been entered or no defence had been filed.”<sup>37</sup> In addition, a person who has breached rule 2 (5) is guilty of contempt and may be made subject to the court’s power to punish contempt.<sup>38</sup>

Determining sanctions for breaches of rule 2 (5) is a matter within the discretion of the court. The courts have traditionally been reluctant to dismiss a proceeding or to allow a proceeding to continue as if an appearance had not been entered or a statement of defence filed. These sanctions have been characterized as a last resort.<sup>39</sup> The court’s approach to breaches of rule 2 (5) involves a “two stage process”: on application, the court will direct that the person in breach has a “last opportunity” to make discovery of documents; if discovery is not made, then the opposing litigant may apply for a further order dismissing the proceeding or allowing it to proceed as if no appearance had been entered and no statement of defence filed.<sup>40</sup> Upon reaching the second stage, it is not necessary for the applicant to show that the person in breach “has acted dishonourably, egregiously, or to the detriment of other parties.”<sup>41</sup> The court need only determine whether or not the person in breach acted “with lawful excuse.” The onus is on the person in breach to show a lawful excuse for his or her actions.<sup>42</sup>

Both the words of rule 2 (5) and the jurisprudence considering it are potentially wide enough to embrace cases involving spoliation of evidence. Practically, though, there are some obstacles to overcome in order to rely on rule 2 (5) in cases of spoliation. Discovery of documents is only available against parties to the proceeding. A litigant must have a fair sense of the evidence to be produced. If documents (or other property) have been destroyed well in advance of the proceeding, then rule 2 (5) will not provide any assistance. Multiple court applications in the main action may be necessary to obtain an order under rule 2 (5). Practical considerations may also be behind the fact that Canadian courts tend not to address rule 2 (5) (and its equivalents in other provinces) in cases involving spoliation.

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37. *Ibid.*, rule 2 (5) (f) and (g). The categories of persons are actually broader than plaintiffs and defendants. They also include petitioners, respondents, third parties, and present corporate officers and partnership managers of litigants.
  38. *Ibid.*, rule 56 (4).
  39. See *Hauwelling v. Dowak Industries Ltd.*, [1980] B.C.J. No. 1276 at para. 10 (C.A.) (QL), Hinkson J.A. (for the court); *Langret Investments S.A. v. McDonnell*, (1996) 80 B.C.A.C. 4 at para. 28 (C.A.), Legg J.A. (for the court).
  40. See *Neeld v. Pezamerica Resources Corp.*, [1985] B.C.J. No. 2356 (C.A.) (QL), Taggart J.A.
  41. *Stovicek Estate v. Napier International Technologies Inc.*, [1996] B.C.J. No. 1460 at para. 38 (S.C.) (QL), Harvey J.
  42. *Ibid.* at para. 42. See also *Ultra Fuels Ltd. v. Kern*, (1992) 14 B.C.A.C. 306 at para. 24 (C.A.), Legg J.A. (for the court) (“Their production at that late date [the second day of trial] amounted to an acknowledgment by the appellants that they had neglected to make discovery of relevant documents until the last moment. In these circumstances it was incumbent upon the appellants to explain the reason for such neglect and show that there was a lawful excuse for such neglect.”)

## Report on Spoliation of Evidence

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The courts' position in the United States is quite different. The relevant American rule may be broader than rule 2 (5).<sup>43</sup> More importantly, the American courts have relied on this rule to provide litigants who come within its scope such remedies as exclusion of evidence obtained through spoliation, preclusion of arguing issues at trial, and costs.<sup>44</sup> Despite differences in wording, rule 2 (5) could be similarly developed by the British Columbia courts.<sup>45</sup>

### 3. RULE 46: DETENTION, PRESERVATION, AND RECOVERY OF PROPERTY

Rule 46 (1) authorizes the Supreme Court to make “. . . an order for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise. . . .”<sup>46</sup> Orders under rule 46 (1) may be obtained in two circumstances. First, when a litigant asserts a proprietary interest in an item of property it is “the subject matter of a proceeding” and an order may be made to preserve that item of property pending disposition of the proceeding. Second, the court may make an order under rule 46 (1) with respect to property “as to which a question may arise.” This category is broader than the first.<sup>47</sup> How broad it is remains a question that has not yet been definitively answered.

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43. See Fed. R. Civ. P. 37.

44. See e.g. *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 90 F.R.D. 613 (N.D. Ill. 1981), Robson & Will JJ. (ordering defendant to reimburse plaintiffs for costs and fees related to all depositions, court appearances, or motions dealing with a report that defendant destroyed and was therefore unable to produce for discovery); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68 at 72 (S.D.N.Y. 1991), Francis J. (“. . . Rule 37(b) of the Federal Rules of Civil Procedure provides that a party that fails to comply with a discovery order is subject to sanctions. Thus, when non-compliance results from spoliation of evidence, Rule 37(b) comes into play.”). See also Robert L. Tucker, “The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction” (1995) 27 U. Tol. L. Rev. 67 at 82–84 (citing further cases in which discovery sanctions have been applied to spoliation of evidence).

45. *Contra Sommers & Seibert*, *supra* note 5 at 46–47, 56 (arguing that Canadian discovery rules are too restrictive in comparison to those in the United States and, therefore, do not provide Canadian litigants with much of a basis for relief from spoliation).

46. *Supra* note 6.

47. See *Nicoll v. Oakes*, (1979) 17 B.C.L.R. 356 at 361, 14 C.P.C. 144 (S.C.), Fulton J. [*Nicoll* cited to B.C.L.R.].

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## Report on Spoliation of Evidence

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Only a few cases have considered rule 46 (1); the scope of the rule is therefore somewhat in doubt.<sup>48</sup> It may extend to the preservation of assets in advance of judgment.<sup>49</sup> Most of the cases that consider rule 46 (1) have focussed on this issue.<sup>50</sup> However, rule 46 (1) also appears to extend to the preservation of evidence.<sup>51</sup> One British Columbia Court of Appeal decision, in which spoliation was a factor, contained comments on the suitability of rule 46 (1) for addressing this problem.<sup>52</sup> In addition, there are a number of Ontario cases in which the court relied on the Ontario equivalent of rule 46<sup>53</sup> to make an order preserving evidence for trial.<sup>54</sup>

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48. *See Nicoll, ibid.* at 363 (In an action to prove a will in solemn form, court granting order preserving testator's property under rule 46 to principal beneficiary under an earlier will and observing that “. . . the rule, as it stands, provides a speedy and simple method of bringing before the court an application to preserve property. . . .”); *Dean v. Ford Credit Canada Ltd.*, (1982) 38 B.C.L.R. 145 at 149, 43 C.B.R. (N.S.) 14 (S.C.), McEachern C.J. (“. . . the scope of the rule as applied in *Nicoll v. Oakes* . . . is so broad that I think I should consider that authority limited to probate and analogous cases, and I should decline to extend its application, or the application of R. 46(1)(a) to all cases where a question might arise in other proceedings . . .”).
  49. *See* Michael F. Welsh, “Can Property Be Preserved? (A Comment on Rule 46)” (1997) 55 Advocate 65 (commenting on the extent to which rule 46 is “. . . potentially [a] powerful method of preventing dissipation or removal of property or money pending trial” in the nature of a *Mareva* injunction).
  50. *See e.g. Proprietary Industries Inc. v. eDispatch.com Wireless Data Inc.*, (2002) 24 C.P.C. (5<sup>th</sup>) 142, 2002 BCSC 1207, Barrow J. (application for order to segregate fund of \$5 000 000 refused because applicant not asserting proprietary interest in fund or a case “analogous” to *Nicoll v. Oakes*); *Culos Developments Corp. v. High Street Development Ltd.*, (1995) 26 C.L.R. (2d) 87 at para. 36 (B.C.S.C.), Cooper J. (“. . . I conclude that a preservation order may issue where, as here, a question may arise as to property that is the subject matter of a proceeding, and not only where there is a proprietary issue”).
  51. If rule 46 does not extend to the preservation of evidence, then a litigant may be able to apply for an injunction in these circumstances.
  52. *Dawes, supra* note 26 at para. 69 (obligation to preserve property for evidentiary purposes can only be founded on an order granted under rule 46 (1)).
  53. *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, rule 45.01 (1). Ontario's rule is worded somewhat differently than British Columbia's; it more clearly applies to property that may be material evidence in a proceeding. Rule 45.01 (1) authorizes the court to “make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding. . . .”
  54. *See Werner v. Warner Auto-Marine Inc.*, (1996) 3 C.P.C. (4<sup>th</sup>) 110 at para. 7, (*sub nom. Roe v. Warner Auto-Marine Inc.*), 93 O.A.C. 145 (C.A.), Finlayson J.A. (for the court) [*Werner* cited to C.P.C.] (order to preserve to marine fuel tanks from destructive testing by litigant's expert); *Cheung (Litigation guardian of) v. Toyota Canada Inc.*, (2003) 29 C.P.C. (5<sup>th</sup>) 267 at para. 5 (Ont. S.C.J.), Hoy J. [*Cheung*] (order to deliver specified component parts of a van to litigant's experts); *Marchand v. Public General Hospital Society of Chatham*, (1993) 20 C.P.C. (3d) 68 at para. 13 (Ont. Gen. Div.), Morin J. (in a medical malpractice action, plaintiff may obtain an order against defendant hospital requiring hospital to preserve certain tissue samples and to make them available for inspection, examination, and analysis).
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## Report on Spoliation of Evidence

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Orders made under rule 46 are interlocutory orders; to obtain such an order it is necessary to have commenced a proceeding. The order may be directed to a litigant or a litigant's agent (such as a lawyer or an expert). It may not be obtained against other persons. Orders under rule 46 must describe specific, identified items of property.<sup>55</sup> The litigant in possession of the property (either in fact or through an agent) must be notified of the application and given an opportunity to oppose it. The correct test to be applied to rule 46 applications is somewhat in doubt. The jurisprudence is heavily influenced by cases involving injunctions to restrain the dissipation of assets in advance of trial. This means that, in addition to showing that the property is likely to be material evidence at trial, the applicant must also show that the balance of convenience favours granting the order. Any one of these factors may prove to be a significant legal or practical hurdle for a litigant to overcome in circumstances where the order is sought on an urgent basis. Indeed, the Ontario cases show that the order is often obtained after-the-fact: evidence has been damaged or destroyed and the purpose of the order is to prevent further damage or destruction.<sup>56</sup>

Under rule 46 the court may direct that the property be retained in safekeeping on certain conditions imposed by the court or delivered to the applicant or a third party for safekeeping.<sup>57</sup> The consequences flowing from the breach of a preservation order are various, depending on the severity of the breach. These consequences include the exclusion of evidence obtained by way of destructive testing of the property<sup>58</sup> and awards of special costs.<sup>59</sup> Further, a breach of a rule 46 order may, in certain circumstances, engage the power of the court to punish contempt by imprisonment, fine, or other sanctions.<sup>60</sup>

#### 4. RULE 57 (14): COSTS ARISING FROM IMPROPER ACT OR OMISSION

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55. *See Ruston v. Muir*, [1985] 2 W.D.C.P. 589 (Ont. H.C.J.) (order will not be granted where property is not sufficiently identified).
56. *See Werner*, *supra* note 54 at paras. 5–7; *Cheung*, *supra* note 54 at paras. 4–5.
57. *See Minge v. J.W. Oak Furniture Imports Ltd.*, (1998) 38 B.L.R. (2d) 257 at para. 6 (B.C.S.C.), Master Joyce (referring to three options for safekeeping of the property under rule 46).
58. *See Werner*, *supra* note 54 at para. 24 (litigant allowing destructive expert testing of property subject to preservation order not permitted to rely on expert report at trial).
59. *See Werner*, *ibid.* at para. 26 (ordering litigant and its solicitors to pay costs of application on a solicitor and client basis); *Cheung*, *supra* note 54 at para. 31 (ordering litigant to pay costs of application on a substantial indemnity basis).
60. *See Rules of Court*, *supra* note 6, rule 56. *See also Werner*, *ibid.* at paras. 19–21 (finding that breach of preservation order amounts to contempt of court sustained on appeal; sanctions for contempt varied).
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## Report on Spoliation of Evidence

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Recent cases have said that the courts may use their power to award costs as a means to redress spoliation of evidence.<sup>61</sup> This power is discretionary; however, it must be exercised in accordance with legal principle.<sup>62</sup> The most important source of this legal principle is the *Rules of Court*.

Rule 57 deals with costs. It does not contain a subrule that addresses spoliation directly. Rule 57 (14), which is concerned with costs arising from an improper act or omission, comes the closest to being a provision directed at spoliation. Under rule 57 (14) the court or the registrar may award costs against or withhold costs from a litigant “[w]here anything is done or omitted improperly or unnecessarily, by or on behalf of a party. . . .”<sup>63</sup>

The leading cases decided under rule 57 (14) have dealt with commencing and sustaining multiple proceedings in circumstances where only one is appropriate,<sup>64</sup> bringing unnecessary interlocutory applications,<sup>65</sup> and failing to advise an opposing litigant of a significant change in circumstances.<sup>66</sup> One case has cited a litigant’s “. . . delay . . . in completing discoveries, producing documents, and providing particulars” and his opponent’s “. . . poor recollection and inadequate records” as bases for making an order under rule 57 (14).<sup>67</sup> The court did not find that the delay in producing documents and the inadequacy of record-keeping were due to spoliation. Nevertheless, spoliation could cause these results in other cases, and give a court scope to make an order under rule 57 (14).

The other subrule that is significant in this context is rule 57 (3), which describes the power to order special costs. The court will award special costs in the face of “scandalous,” “outrageous,” or

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61. See e.g. *Endean, supra* note 24 at para. 33 (“In an appropriate case, the trial judge may see fit to award special costs to approximate the actual expense to which the plaintiff may have been put due to the destruction of evidence.”).

62. See *Oasis Hotel Ltd. v. Zurich Insurance Co.*, (1981) 124 D.L.R. (3d) 455, 28 B.C.L.R. 230 at 237 (C.A.), Lambert J.A. (for the court) (“In British Columbia trial judges have a wide discretion with respect to costs. That discretion must be exercised judicially and in accordance with general legal principles pertaining to the law of costs.”).

63. *Supra* note 6, rule 57 (14).

64. *Underwood v. Ocean City Realty Ltd.*, (1987) 12 B.C.L.R. (2d) 199, (*sub nom. Underwood v. Brown*), [1987] B.C.J. No. 470 (C.A.) (QL), Craig J.A. (for the court) (successful plaintiff should not be deprived of costs solely on the basis that proceedings could have been commenced in the County Court).

65. *Webster v. Webster*, [1987] B.C.J. No. 23 (S.C.) (QL), Spencer J. (chambers judge, rather than trial judge, should determine if applications are unnecessary and make appropriate order as to costs).

66. *Morton v. Morton*, (1996) 83 B.C.A.C. 39 (C.A.), Proudfoot J.A. (for the court) (awarding special costs to wife in family law proceeding due to nondisclosure of husband’s death by husband’s committee).

67. *Spraggs & Co. Law Corp. v. Lopushinsky*, (2002) 30 C.P.C. (5<sup>th</sup>) 371 at paras. 41, 47, 2002 BCSC 1128, Sigurdson J.

## Report on Spoliation of Evidence

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“reprehensible” conduct “as a form of chastisement.”<sup>68</sup> The word “reprehensible” has been interpreted as having a wide meaning, one that embraces “milder forms of misconduct” that are “deserving of reproof or rebuke.”<sup>69</sup> Depending on the circumstances, spoliation of evidence could come within these categories and result in an award of special costs.<sup>70</sup>

Finally, in one instance a court has exercised its discretion to deprive a successful litigant of costs due to spoliation of evidence.<sup>71</sup>

### 5. SUMMARY

The *Rules of Court* provide litigants with the means to impose a duty to preserve evidence, to compel disclosure and discovery of documents, and to compensate litigants with costs. Their reach may even extend to non-litigants (such as lawyers), in certain circumstances. The *Rules of Court*, therefore, provide some of the assistance that persons harmed by spoliation have been seeking through the application of the evidentiary presumption and the development of substantive remedies. The small number of British Columbia cases dealing with procedural sanctions under the *Rules of Court* as a means to control spoliation should not limit their further development in this area.

### C. The Inherent Jurisdiction of the Supreme Court

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68. *Stiles v. British Columbia (Workers' Compensation Board)*, (1989) 38 B.C.L.R. (2d) 307 at 311, 39 C.P.C. (2d) 74 (C.A.), Lambert J.A. (Toy J.A. concurring). *See also Garcia v. Crestbrook Forest Industries Ltd.*, (1994) 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242 at para. 13 (C.A.), Lambert J.A. (for the court) (“... [T]here are three separate standards by which to measure objectionable conduct. If it is outrageous, if it is scandalous, or if it is reprehensible, then solicitor-client costs may be awarded.”).
  69. *Leung v. Leung*, (1993) 77 B.C.L.R. (2d) 314 at para. 5, 15 C.P.C. (3d) 42 (S.C.), Esson C.J. *See also Bank of Credit & Commerce International (Overseas) Ltd. (Liquidators of) v. Akbar*, (2001) 86 B.C.L.R. (3d) 312 at paras. 16, 23, 2002 BCCA 204, Finch J.A. (for the court) (a court deciding whether or not to award special costs should focus on the person’s culpability or intent; innocent conduct does not deserve rebuke and should not form the basis of an award of special costs).
  70. *See Rozen v. Rozen*, (2002) 173 B.C.A.C. 102 at para. 45, 2002 BCCA 537, Huddart J.A. (for the court) (a litigant “who deliberately misleads a court” by failing to disclose income as required “is guilty of conduct deserving of a rebuke of special costs”). *See also Werner*, *supra* note 54 at para. 26 (ordering litigants and their solicitors, who were responsible for the destruction of evidence that was subject to a preservation order, to pay opposing litigants’ costs on a solicitor and client basis); *Cheung*, *supra* note 54 at para. 31 (ordering litigant whose expert destroyed car that was subject to a preservation order to pay opposing litigants’ costs on a substantial indemnity basis); *Schatz v. Doust*, (2002) 227 Sask. R. 1 at paras. 72, 73, 2002 SKCA 129, Tallis J.A. (for the court) (successful litigant who failed to produce financial records before trial deprived of costs at trial and ordered to pay opposing litigant’s costs on appeal “taxed on 2½ times Column V” as “an additional penalty”).
  71. *See Farro v. Nutone Electrical Ltd.*, (1990) 72 O.R. (2d) 637, 68 D.L.R. (4th) 268 at 276 (C.A.), Lacourcière J.A. (for the court) (court denying successful litigant of costs at trial and on appeal in products liability action because litigant’s subrogees delivered component parts to a third party who destroyed them before opposing litigant had an opportunity to examine them).
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## Report on Spoliation of Evidence

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A number of recent cases have said that the court's inherent jurisdiction is the source of its authority to develop and apply procedural sanctions to control spoliation of evidence.<sup>72</sup> The concept of the inherent jurisdiction of the court—and its relation to the *Rules of Court*—can be vague and difficult to explain. Sir Jack I.H. Jacob, the author of the leading academic article on the subject, has said that “. . . the inherent jurisdiction of the court may be defined as being a reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”<sup>73</sup> He went on to de-scribe the relation of this inherent jurisdiction of the court to the *Rules of Court* as follows:<sup>74</sup>

The powers of the court under its inherent jurisdiction are complementary to its powers under Rules of Court; one set of powers supplements and reinforces the other. . . . The usefulness of the Rules of Court is that they regulate with some precision the circumstances in which the court can apply coercive measures for disobedience of or non-compliance with the requirements of the rules or orders of the court. . . . On the other hand, where the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins. This is shown in three important respects in which the powers arising out of the inherent jurisdiction differ from those conferred by Rules of Court. First, perhaps by their very nature, they are wider and more extensive powers, permeating all proceedings at all stages and filling any gaps left by the Rules and they can be exercised on a wider basis. . . . Secondly, they can be invoked in respect of persons who are not themselves actual litigants in pending proceedings. Thirdly, they can be used to punish the offender by fine or imprisonment.

The inherent jurisdiction of the court, then, provides judges with a rationale for defending the fairness and integrity of the litigation process and for punishing those who would interfere with that goal. It helps to fulfill two of the functions of judicial control of spoliation of evidence. It is not surprising

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72. *See Dawes* (S.C.), *supra* note 32 at para. 23 (“I find this is not an appropriate case in which to exercise my inherent jurisdiction and exclude from evidence those expert reports based upon an inspection of the vehicle involved.”), *aff’d*, *Dawes*, *supra* note 26; *Cheung*, *supra* note 54 at para. 23 (“As to whether any sanctions can be imposed for spoliation prior to trial in the absence of evidence of intentional destruction or alteration through bad faith, in reliance on the courts [*sic*] inherent jurisdiction, it seems to me that in appropriate circumstances the court should be able to impose sanctions.”).

73. “The Inherent Jurisdiction of the Court” (1970) 23 *Curr. Leg. Probs.* 23 at 51. This article has been cited in a number of leading Canadian cases. *See e.g. B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214 at 240, 53 D.L.R. (4<sup>th</sup>) 1, Dickson C.J. (power of the court to grant an injunction *ex parte* and of its own motion); *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at paras. 29–31, 130 D.L.R. (4<sup>th</sup>) 385, Lamer C.J. (discussing the inherent jurisdiction of the superior courts to punish a young offender for contempt); *Ladner Downs v. Thauberger*, (1983) 149 D.L.R. (3d) 21, 47 B.C.L.R. 121 at 130 (S.C.), Wallace J. (inherent jurisdiction of the court to review a solicitor’s bill of costs despite it not being taxable under governing legislation); *McNally v. Bass*, (2003) 223 Nfld. & P.E.I.R. 322 at paras. 12–15, 2003 NLCA 15, Cameron J.A. (appellate court setting aside trial judgment that was based on trial judge’s ignorance of agreement between counsel on presentation of issues for determination).

74. Jacob, *ibid.* at 50.

## Report on Spoliation of Evidence

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that judges have turned to the inherent jurisdiction of the court to justify some the actions they have taken to remedy problems created by spoliation of evidence.

Of the three ways in which the powers under the inherent jurisdiction differ from those conferred by the *Rules of Court* the most important in this context is the first. Courts have relied on the gap-filling function of their inherent jurisdiction to create a process to preserve evidence in situations of extraordinary urgency. This process is called the *Anton Piller* order. The order is named after the first appellate case to consider the remedy, *Anton Piller K.G. v. Manufacturing Processes Ltd.*<sup>75</sup> In *Anton Piller* Lord Denning described the order as filling a need that was not met by the English equivalent of rule 46 by allowing a plaintiff to apply to the court for the order *ex parte* and without notice to the defendant.<sup>76</sup>

The *Anton Piller* order is analogous to, but not identical with, a search warrant.<sup>77</sup> In the leading British Columbia case<sup>78</sup> the rationale for the order was described by reference to its origins in copyright infringement cases:<sup>79</sup>

English Chancery judges developed the Anton Piller order in 1974 to preserve the subject-matter of a cause of action. In its traditional form it is an order directing the defendants to permit representatives of the plaintiff to enter the defendants' premises for the purpose of inspecting and removing certain specified classes of documents and things. The plaintiffs are permitted to copy those capable of being copied and to ensure their safe custody pending resolution for the action. As Hoffman J. pointed out in *Loc International plc v. Beswick*, [1989] 1 W.L.R. 1268 (Ch. D.), this jurisdiction was invented "as the ultimate weapon against fraudulent copyright pirates."

From these earlier intellectual property cases use of the *Anton Piller* order has spread. In British Columbia, it has been granted in cases involving the sale of shares,<sup>80</sup> breach of contract,<sup>81</sup> and fraud.<sup>82</sup> The *Anton Piller* order can be of considerable assistance to anyone who can come within its

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75. [1976] 1 Ch. 55, [1976] 1 All E.R. 779 (C.A.) [*Anton Piller* cited to All E.R.].

76. *Ibid.* at 783 ("But it is a far stronger thing to make such an order *ex parte* without giving him [*i.e.* the defendant] notice. This is not covered by the rules of court and must be based on the inherent jurisdiction of the court.").

77. *Ibid.* at 782.

78. *Grenzservice Speditions GmbH v. Jans*, (1995) 129 D.L.R. (4<sup>th</sup>) 733, 15 B.C.L.R. (3d) 370 (S.C.), Huddart J. [*Jans* cited to B.C.L.R.].

79. *Ibid.* at para. 38.

80. *Woo v. Lo*, [1998] B.C.J. No. 2242 (S.C.), Martinson J.

81. *Morrison v. Forth*, (1998) 79 C.P.R. (3d) 308 (B.C.S.C.), Leggatt J.

82. *Jans*, *supra* note 78; *Girocredit Bank Aktiengesellschaft Der Sparkassen v. Bader*, (1998) 110 B.C.A.C.



## Report on Spoliation of Evidence

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strict requirements. The order can preserve evidence and defeat spoliation, in cases where a person knows the type of evidence in the possession of another and is able to demonstrate a grave danger of it being destroyed.

The other two ways in which the powers of a court under its inherent jurisdiction differ from those granted by the *Rules of Court* have proved to be less significant in this context. The *Rules of Court* do not limit sanctions for noncompliance with its rules of discovery to litigants. The court's power to punish contempt under rule 56 appears to be fully developed, and not in need of a supplement. Nevertheless, the inherent jurisdiction of the court may provide the source for a solution to a novel problem involving spoliation in these areas that could arise in the future.

### D. Summary

Existing procedural sanctions can help to fulfill a number of the functions necessary to control spoliation of evidence. The *Rules of Court* and the inherent jurisdiction of the court provide a means to restore fairness to the trial process by allowing for orders to strike out pleadings and exclude evidence (such as, in certain cases, expert reports obtained through destructive testing). Costs can provide some compensation for litigants who are harmed by spoliation. Egregious cases of spoliation are subject to punishment through the court's contempt power. Finally, rule 46 and *Anton Piller* orders give litigants the means to guard against a possible occurrence of spoliation.

## IV. DEVELOPING EXISTING THEORIES OF LIABILITY TO PROVIDE REMEDIES FOR SPOILIATION OF EVIDENCE

### A. Introduction

In addition to engaging evidentiary and procedural rules, spoliation of evidence may be subject to a rule of the substantive law. For example, in some cases a statute imposes a duty to preserve certain documents or records and sets out a penalty or other consequence for failure to uphold this duty.<sup>83</sup> No jurisdiction in Canada or the United States has enacted a statute to provide for a general duty to preserve documents, records, or items of property, because they could be relevant in a future civil proceeding. The development of a substantive duty to preserve evidence from spoliation has been left to the courts. The focus of the courts' attention has largely been on the formulation of an intentional tort of spoliation of evidence. Such a new tort will be discussed in a later section of this Report.<sup>84</sup>

This chapter will examine trends in other areas of the common law that could develop into substantive remedies for those harmed by spoliation of evidence. The law of negligence, fiduciary duty, contracts, and promissory estoppel may be relevant to spoliation in certain circumstances. Understanding their relevance is something of a speculative exercise since no court in Canada has said that they do provide remedies for spoliation. However, the courts have shown a propensity to develop and

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19 (C.A.), Goldie J.A. (for the court).

83. See e.g. *Income Tax Act*, R.S.C. 1985 (5<sup>th</sup> Supp.), c. 1, sections 230 (records and books), 238 (offences and punishment).

84. See part V.D., below, at 38ff.

## Report on Spoliation of Evidence

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expand negligence, fiduciary duty, and, to a lesser extent, promissory estoppel. Each theory of liability could prove to be an important future means to control spoliation of evidence and a source of substantive remedies and financial compensation for those who are harmed by it.

### B. Negligence

There has been some debate over whether a tort of “negligent spoliation” does exist or could be formulated to exist in Canadian law.<sup>85</sup> This debate has been carried into the courts. Recently, the Court of Appeal ruled that no one can sustain an action in negligence based on spoliation of evidence under the current law of British Columbia.<sup>86</sup> However, the court’s reasoning on this point was brief. The court pointed to the *Rules of Court* and to cases applying the evidentiary presumption for spoliation of evidence as controlling provisions and precedents.<sup>87</sup> The court also felt constrained by the state of the pleadings and evidence.<sup>88</sup>

There is authority—in the form of an interlocutory ruling on a motion to strike out pleadings—that holds that the role of the law of negligence in cases involving spoliation of evidence can only be determined at a trial that fully considers the application of the principles underlying negligence.<sup>89</sup> The Canadian courts have shown a willingness to expand the scope of the tort of negligence in a number of recent judgments.<sup>90</sup> In a sense, what has been called “negligent spoliation” is nothing more

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85. See Jones, *supra* note 7 at 308–312 (arguing that Canadian cases on negligence and spoliation are “fraught with faulty assumptions and inadequate analysis,” leaving the law in a state of uncertainty).

86. Dawes, *supra* note 26 at para. 68 (“It would be anomalous for our law to recognize a common law duty of care not to destroy property [that is potentially evidence in an action] by negligence, when this Court has declined to recognize a common law tort for intentional destruction of property.”)

87. *Ibid.* at paras. 61–70 (ruling that the common law duty of care should not be extended to spoliation of evidence because rule 46 (1) occupies the field and because an evidentiary presumption is the only means to redress spoliation).

88. *Ibid.* at para. 68. The plaintiff sought exclusion of an expert report as a remedy for spoliation, not damages.

89. *Wilkes v. Maung*, [1999] B.C.J. No. 467 (S.C.) (QL), Master McCallum (allowing plaintiff to amend pleadings to state a cause of action in negligence due to failure of hospital to retain tissue samples).

90. See e.g. *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186 at 1193, 51 D.L.R. (4<sup>th</sup>) 321, Wilson J. (for the court) (“Canadian courts have become increasingly willing to expand the number and kind of special relations to which a positive duty to act attaches.”); *Haskett v. Equifax Canada Inc.*, (2003) 63 O.R. (3d) 577, (*sub nom.* *Haskett v. Transunion of Canada Inc.*), 224 D.L.R. (4<sup>th</sup>) 419 (C.A.), Feldman J.A. (for the court) (credit reporting agencies owing duty of care to subject of credit report), *leave to appeal to S.C.C. refused*, [2003] S.C.C.A. No. 208 (QL); *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, (1989) 58 D.L.R. (4<sup>th</sup>) 389 at 400–430, (*sub nom.* *Jane Doe v. Police Board of Commissioners (Metropolitan Toronto)*), 48 C.C.L.T. 105 (H.C.J.), Henry J. (police owing duty of care to victim of serial rapist who they failed to warn of rapist’s distinctive pattern of selecting victims due to their stereotypical beliefs about women), *aff’d*, (1990) 74 O.R. (2d) 225, (*sub nom.* *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*), 72 D.L.R. (4<sup>th</sup>) 580

## Report on Spoliation of Evidence

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than an extension of the law of negligence to cover a novel situation. Canadian law on this point has been clear since the decision of the Supreme Court of Canada in *Kamloops (City of) v. Nielsen*.<sup>91</sup> In that case the court ruled that any expansion of the law of negligence must first focus on whether a duty of care can be imposed on the novel situation and adopted the test set out in *Anns v. Merton London Borough Council*<sup>92</sup> to govern this issue.<sup>93</sup> In its most recent statement of the test, the Supreme Court of Canada formulated it as follows:<sup>94</sup>

At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. . . . If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negate the imposition of a duty of care.

These questions have not even been posed in a case in Canada involving spoliation of evidence. However, there is nothing in the decided cases on spoliation that would prevent them from being raised in an appropriate case. Since these past judgments have largely been concerned with the application of an evidentiary presumption or the imposition of a procedural sanction, they should not be relied on to pre-empt a consideration of whether the law of negligence may provide a remedy to victims of spoliation.

The *Anns* test may yet prove to be an insurmountable hurdle for a victim of spoliation wishing to sustain an action in negligence. When will it become reasonably foreseeable that the destruction of a document (for example) will cause harm to a litigant's ability to prosecute a lawsuit? The answer to this question will require careful consideration of a specific set of facts presented to a court. However, some tentative observations may be made at this stage. Foreseeability will likely depend on how advanced the original cause of action is. There is a spectrum here. At one end would be cases

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(Div. Ct.), *leave to appeal to Ont. C.A. refused*, (1990) 1 O.R. (3d) 416n (C.A.).

91. [1984] 2 S.C.R. 2, 10 D.L.R. (4<sup>th</sup>) 641 [*Nielsen* cited to S.C.R.].
92. [1978] A.C. 728 at 751–752, (*sub nom. Anns v. London Borough of Merton*), [1977] 2 All E.R. 492 (U.K.H.L.), Lord Wilberforce.
93. *Nielsen*, *supra* note 91 at 10–11, Wilson J. (Ritchie and Dickson JJ. concurring). *See also Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 19, 146 D.L.R. (4<sup>th</sup>) 577, La Forest J. (for the court) (“It is now well established in Canadian law that the existence of a duty of care in tort is to be determined through an application of the two-part test first enunciated by Lord Wilberforce in *Anns v. Merton London Borough Council*. . . .”); *Ryan v. Victoria (City of)*, [1999] 1 S.C.R. 201 at para. 22, 168 D.L.R. (4<sup>th</sup>) 513, Major J. (for the court) (reaffirming applicability of *Anns* test).
94. *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at para. 30, 206 D.L.R. (4<sup>th</sup>) 193, 2001 SCC 79, McLachlin C.J. and Major J. (for the court) [emphasis in original].

## Report on Spoliation of Evidence

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where documents, records, or items of property are destroyed or altered at a time when no one is aware of an underlying cause of action. A duty of care should not exist in these circumstances. At the other end of the spectrum would be cases where a cause of action is suitably advanced to be in the contemplation of all the litigants. This would occur, for example, where proceedings have been commenced and served. There is an argument to be made that litigants (and perhaps others who are similarly aware of the proceedings) who commit spoliation of evidence in these circumstances should be able to foresee the likelihood of causing harm. In between the two ends of the spectrum would be a grey area, where a cause of action has “arisen” but proceedings have not been commenced and served.

Under the *Anns* test this foreseeability analysis is only the first stage in determining whether a duty of care exists. If foreseeability is established, then a *prima facie* duty of care arises. However, this *prima facie* duty of care may be defeated by policy considerations. American cases that have considered the extension of tort law remedies to cases involving spoliation of evidence have focussed heavily on policy arguments.<sup>95</sup> These cases have considered the harm caused by spoliation to the overriding general policies of the civil justice system, the common law policy against creating derivative tort remedies for misconduct in litigation, the adequacy of non-tort remedies for spoliation, the difficulty of proving damages with certainty in this context, and the indirect effects of a duty of care to preserve evidence on such things as storage costs and the finality of actions as being the key policy issues to consider.<sup>96</sup> Such policy factors play a highly significant role in determining whether it is appropriate to extend the duty of care to embrace certain cases of spoliation.

Questions about whether to extend the duty of care have, despite these hurdles, been answered in the affirmative by a number of American state courts.<sup>97</sup> These cases have not instituted a sweeping

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95. See e.g. *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4<sup>th</sup> 1, 954 P.2d 511 (1998), Kennard J. (for the court) [*Cedars-Sinai* cited to Cal.] (overruling earlier decisions and ruling that no tort remedy for intentional first party spoliation exists under California law). Although *Cedars-Sinai* did not involve negligence, the case is relevant here for its thorough discussion of the major policy considerations involved in an extension of tort law remedies.

96. See *Cedars-Sinai*, *ibid.* at 8–17. See also Robert D. Peltz, “The Necessity of Redefining Spoliation of Evidence Remedies in Florida” (2002) 29 Fla. St. U. L. Rev. 1289 at 1314–1316 (discussing the *Cedars-Sinai* court’s consideration of policy matters).

97. See e.g. *Bondu v. Gurvich*, 473 So.2d 1307 (Fla. App. 1984), Person J. (for the court) [*Bondu*] (litigant permitted to state a case in negligence against hospital for failure to preserve medical records, which failure rendered litigant unable to sustain medical malpractice action), *rev. denied*, (*sub nom. Cedars of Lebanon Hospital Care Center, Inc. v. Bondu*), 484 So.2d 7n (Fla. 1986); *La Raia v. Superior Court*, 722 P.2d 286 at 290 (Ariz. 1986), Feldman J. (for the court) (“Having caused or contributed to plaintiff’s poisoning, defendant was under a duty to act reasonably to mitigate the resulting harm. . . . In failing to provide [correct information to the plaintiff’s physician], and intentionally providing false information, it did not spoil the evidence, it caused a new or further injury to the plaintiff.” [footnote omitted]); *Smith v. Atkinson*, 771 So.2d 429 at 432 (Ala. 2000), Lyons J. (for the majority) [*Smith*] (“ . . . [W]e see no need to recognize a new cause of action for spoliation of evidence. We hereby recognize a claim against a third party for spoliation of evidence under the traditional doctrine of negligence. . . .”

## Report on Spoliation of Evidence

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general duty to preserve evidence; rather they have said that a duty of care only exists in clearly-defined circumstances.<sup>98</sup> An example of these circumstances may be seen in the case of *Boyd v. Travelers Insurance Co.*<sup>99</sup> In *Boyd* the underlying cause of action was a potential products liability claim by a person who was injured by an exploding portable heater. The heater was the injured plaintiff's property; however, the accident took place on the job. The employer's insurer took possession of the heater in the course of investigating the plaintiff's concurrent workers' compensation claim. When the plaintiff asked for the heater to be returned, the insurer informed him that it had been lost. The plaintiff commenced an action against the insurer.

The Illinois Supreme Court held that this case was one that could be decided under the law of negligence.<sup>100</sup> Although there is no general duty under Illinois law to preserve evidence, such a duty may arise by agreement, statute, or another special circumstance.<sup>101</sup> *Boyd* is an example of such a special circumstance. The court found that the insurer assumed a duty of care when it took possession of the plaintiff's property knowing that it would be relevant evidence in any future products liability litigation.<sup>102</sup> The duty was breached when the insurer lost the heater.

The court then considered causation and damages. Under these headings it made a number of rulings that greatly assisted the plaintiff's case. First, the court held that the plaintiff need only ". . . allege sufficient facts to support a claim that the loss or destruction of the evidence *caused the plaintiff to be unable to prove* an underlying lawsuit," rather than prove that he would have prevailed in the underlying action but for the spoliation of evidence.<sup>103</sup> In other words, the plaintiff need only show that he had a reasonable chance of prevailing in the underlying action, but for the lost evidence. Although the plaintiff must prove actual damages, the court did not require the plaintiff to litigate the

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[footnote omitted]).

98. See *Bondu, ibid.* at 1312–1313 (duty imposed by statute and regulations); *Smith, ibid.* at 432–434 (duty imposed by voluntary undertaking, agreement, or specific request).

99. 652 N.E.2d 267 (Ill. 1995), Bilandic C.J. (for the majority) [*Boyd*].

100. *Ibid.* at 270 ("Courts have long afforded redress for the destruction of evidence and, in our opinion, traditional remedies adequately address the problem presented in this case. An action for negligent spoliation can be stated under existing negligence law without creating a new tort.")

101. *Ibid.* at 270–271.

102. *Ibid.* at 271. The existence of the duty appears to be unaffected by the question of whether the plaintiff had commenced his products liability action when the insurer took possession of the heater. *Boyd* is analogous to other cases imposing liability on a person who voluntarily undertakes to perform an act and performs it negligently. For a British Columbia example of such a case see *Wiens v. Serene Lea Farms Ltd.*, (2001) 97 B.C.L.R. (3d) 282, 2001 BCCA 739, Low J.A. (for the court) (person voluntarily undertaking to hold ladder placed on slippery surface while another climbs it assumes a duty to continue holding ladder while other person is on it).

103. *Boyd, ibid.* [emphasis in original].

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## Report on Spoliation of Evidence

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underlying action to a losing conclusion. Instead, it directed the trial court to join the two actions and “. . . resolve all claims fairly and consistently.”<sup>104</sup> Other American courts have developed similarly relaxed standards of proving causation and damages in negligence cases involving spoliation of evidence.<sup>105</sup>

It is axiomatic that “[t]he categories of negligence are never closed.”<sup>106</sup> A general, all-embracing duty to preserve evidence would likely impose too high a cost on society for the benefits derived from it. Nevertheless, as the American cases show, a limited duty, tailored to address specific problems such as spoliation of evidence by certain non-litigants, could play a useful role in remedying and controlling spoliation.

### C. Fiduciary Duty

The Supreme Court of Canada has declared that “[t]he categories of fiduciary, like those of negligence, should not be considered closed.”<sup>107</sup> The Canadian courts have not yet addressed the applicability of the law of fiduciary duty to spoliation of evidence. As is the case with the law of negligence, the first issue to consider here is when the law will extend fiduciary duties to cover a new situation. In Canada, the courts have tended to impose fiduciary duties on relationships that possess three qualities:<sup>108</sup>

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.

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104. *Ibid.* at 272.

105. *See e.g. Smith, supra* note 97 at 434 (“Once a plaintiff has established that the third party had knowledge of the underlying action or potential action, that the third party assumed control over the evidence, and that the lost or destroyed evidence was ‘vital’ to his claim in the underlying action or potential action, a rebuttable presumption arises in favor of the plaintiff,” effectively shifting the burden of proof to the spoliating litigant to demonstrate that its actions did not cause the damages alleged by the plaintiff.)

106. *Donoghue v. Stevenson*, [1932] A.C. 562 at 619 (U.K.H.L.), Lord Macmillan.

107. *Guerin v. Canada*, [1984] 2 S.C.R. 335 at 384, 13 D.L.R. (4<sup>th</sup>) 321, Dickson J. (Beetz, Chouinard, and Lamer JJ. concurring).

108. *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136, 42 D.L.R. (4<sup>th</sup>) 81, Wilson J. (dissenting). *See also Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 598, 61 D.L.R. (4<sup>th</sup>) 14, Sopinka J. (dissenting in part) (“I agree with the enumeration of these features made by Wilson J. in dissent in *Frame v. Smith*. . . .”); *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 408, 117 D.L.R. (4<sup>th</sup>) 161, La Forest J. (L’Heureux-Dubé and Gonthier JJ. concurring) [*Hodgkinson* cited to S.C.R.] (“. . . Wilson J.’s mode of analysis has been followed as a ‘rough and ready guide’ in identifying new categories of fiduciary relationships. . . .”).

## Report on Spoliation of Evidence

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- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

The courts have been careful to describe these characteristics as “*indicia*” of a fiduciary relationship and not as the steps of a test that must be satisfied in each case where an extension of the fiduciary principle is at issue.<sup>109</sup> This distinction opens up the possibility that a relationship that does not have precisely these features of power and vulnerability could be labelled a fiduciary relationship. However, it is important to bear in mind the result of such a classification. Fiduciary duties are among the highest and strictest duties that the law can impose on a person. Paul D. Finn describes “the core of the fiduciary principle” as being “a responsibility to act in another’s interests.”<sup>110</sup> The relationship between opposing litigants, however, is adversarial. It would take a very rare combination of facts and circumstances for a court to label any aspect of this relationship as fiduciary.

Any application of the law of fiduciary duty to spoliation of evidence should be sought among already-established categories of fiduciary relationships. Some examples of these existing categories are: lawyer and client; director and corporation; agent and principal; doctor and patient; and, the prime example, trustee and beneficiary. Since these relationships are recognized as fiduciary relationships, the important inquiry here is into the nature and the scope of the duties imposed by virtue of that fiduciary relationship. Fiduciary duties can be easy to state in the abstract. Once a duty is identified, however, care must be taken in describing its contours, since they may vary depending on the category of relationship and the circumstances in which the duty is invoked.

The aspect of fiduciary duty that may play a role in cases involving spoliation of evidence is the duty of disclosure. The duty of disclosure developed within the trustee–beneficiary relationship. There are two theories that account for the rationale of this duty.<sup>111</sup> One theory explains the duty by reference to the equitable property interest that a beneficiary has in the trust documents. A second theory locates the source of the duty in the fact that the trustee is administering property in which others have an interest. Both theories lead to the same result: a beneficiary has a right to inspect and copy trust documents and a trustee has a corresponding duty to disclose those documents. The second theory, though, allows for the expansion of the duty of disclosure beyond the trustee–beneficiary relationship to other fiduciary relationships. This expansion is significant because the Canadian courts have been developing the idea that fiduciary duties may contain prescriptive aspects, in addition to their traditional proscriptive aspects. This controversial development is important here because it may allow for the interpretation of the duty of disclosure as requiring a fiduciary to take positive steps to preserve trust documents in order fully to discharge its duty of disclosure.

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109. *See Hodgkinson, ibid.* at 409 (“Wilson J.’s guidelines constitute *indicia* that help recognize a fiduciary relationship rather than ingredients that define it.”).

110. “The Fiduciary Principle” in Timothy G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1 at 11, 11, n. 64.

111. *See* Donovan W.M. Waters, *Law of Trusts in Canada*, 2<sup>nd</sup> ed. (Toronto: Carswell, 1984) at 871.

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## Report on Spoliation of Evidence

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Even if it is understood in this expanded sense, a duty of disclosure is not identical to a duty to preserve evidence. There has been little judicial consideration of what constitutes a trust document or a material fact and what precisely must be made available for disclosure. Approaching the question from first principles, Donovan Waters has argued that only a very limited class of documents fits within the category of “trust documents” and that “[i]f a trustee records nothing at any stage in the exercise of a discretionary power, and destroys correspondence, he cannot be compelled to reveal anything because his reasons are confidential. . . .”<sup>112</sup> However, it is equally apparent that the scope and the timing of such a destruction of documents may be important factors to consider. A complete and thoroughgoing destruction of trust documents or a destruction of documents timed shortly after a request from a beneficiary could be characterized as an interference with the duty of disclosure that rises to the level of a breach of fiduciary duty. Therefore, there is some overlap between the duty of disclosure and a duty to preserve documents.

An American case has considered the extent to which a fiduciary’s duty to disclose results in a duty to preserve evidence from spoliation in the course of a civil proceeding. *Prostok v. Browning*<sup>113</sup> involved a complex and highly contentious corporate restructuring in bankruptcy. At the centre of this litigation was an allegation made by a group of creditors that the bankrupt corporation had intentionally undervalued its assets. The bankrupt was acting as a debtor-in-possession throughout the bankruptcy; no trustee in bankruptcy had been appointed. It was common ground that, under American law, this fact resulted in the bankrupt, and its directors and senior officers, owing fiduciary duties to its creditors. Among the creditors’ claims was an attempt to impose liability on the bankrupt’s directors and officers due to their failure to disclose material information and their destruction or concealment of evidence. This claim was dismissed in summary judgment proceedings. The district court concluded that Texas law does not allow a claim for damages for spoliation of evidence.<sup>114</sup> On appeal, the Texas Court of Appeals restored the claim. The court distinguished an earlier Texas Supreme Court case that rejected the creation of a tort remedy for spoliation of evidence.<sup>115</sup> The case could be distinguished because the creditors relied on fiduciary duty. The court reasoned that this case is analogous to a trustee’s breach of fiduciary duty by failure to disclose material information.<sup>116</sup> Further, framing the case as one involving a breach of fiduciary duty gives the creditors a considerable advantage in proceeding with the claim: “. . . unlike a putative claim for spoliation or perjury, non-disclosure by a fiduciary gives rise to a claim for any benefit received by the fiduciary through his breach, even if the beneficiary of the fiduciary’s duties cannot

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112. *Ibid.* at 878.

113. 2003 Tex. App. LEXIS 2723, Moseley J. (for the court) [*Prostok*].

114. *See Trevino, supra* note 5.

115. *Prostok, supra* note 113 at \*94–\*107.

116. *Ibid.* at \*103.

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## Report on Spoliation of Evidence

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prove damages resulting from entering or declining to enter into a transaction because of the alleged breach.”<sup>117</sup>

*Prostok* shows how a pre-existing fiduciary relationship may, in certain circumstances, be relevant to spoliation of evidence in a civil proceeding. An Australian case illustrates a second way in which fiduciary duties could play a role here by giving litigants a remedy when non-litigants destroy, conceal, or suppress evidence. In *Breen v. Williams*<sup>118</sup> a patient claimed a right of reasonable access to the medical file compiled by her doctor, which would encompass a right to inspect and copy all the records in the file. The physician in this case treated the patient for complications resulting from breast augmentation surgery she had undergone in the care of another physician. Some years after her relationship with the physician in this case ended, the patient, still experiencing problems, wished to opt into an American class action against the manufacturer of the breast implants. Filing a copy of her medical record with the American court was a condition to opting into this class action. Rather than invoking the discovery procedures of the American or the Australian court, the patient commenced an action against the physician, arguing (among other theories) that the physician owed her a fiduciary duty to provide her with the access to her file that she was seeking. The patient pointed to the Supreme Court of Canada decision in *McInerney v. MacDonald*<sup>119</sup> as embodying precisely the duty that she was seeking to invoke in this litigation.

All of the judges on the *Breen* court rejected the application of a fiduciary duty in these circumstances. Each of the judgments also contained some criticism of the reasoning and unintended consequences of the *McInerney* decision. Significantly, one judgment addressed an issue that was not clearly resolved in *McInerney*. Gaudron and McHugh JJ. referred to concerns about the costs of preserving records and the potential liabilities of destroying them as one of their reasons for refusing to recognize a fiduciary duty in these circumstances. Gaudron and McHugh JJ. concluded that “[t]he idea that a doctor who shreds the records of treatment of living patients is necessarily in breach of fiduciary duties owed to those patients is untenable.”<sup>120</sup> This comment indicates that a fiduciary under Australian law will not be held liable in the situation that is one step removed from the facts of *Breen*—where the fiduciary’s destruction of documents results in the beneficiary losing a cause of action. Gaudron and McHugh JJ.’s comment also implicitly points to the possibility that a Canadian fiduciary who destroys documents in these circumstances may be held liable as a result.<sup>121</sup>

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117. *Ibid.* at \*101.

118. (1996) 186 C.L.R. 71 (H.C. Aust.) [*Breen*].

119. [1992] 2 S.C.R. 138, 93 D.L.R. (4<sup>th</sup>) 415, La Forest J. (for the court) [*McInerney* cited to S.C.R.].

120. *Breen*, *supra* note 118 at 112.

121. See also Donovan W.M. Waters, “Liability and Remedy: An Adjustable Relationship” (2001) 64 Sask. L. Rev. 429 at 464 (“*Breen v. Williams* has conveniently created emphases for us in this matter that we may hitherto have missed. With the extension of fiduciary liability in Canada from the proscriptive to the prescriptive it is not difficult to see a future opening up of new areas of civil liability, and a significant opportunity for actions to be heard in fiduciary law rather than in tort or contract law.”).

## Report on Spoliation of Evidence

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### D. Contract and Promissory Estoppel

A contract may give rise to a duty to preserve evidence. The courts will enforce validly- formed contracts, except in cases involving fraud, duress, unconscionability, or illegality. A contract to preserve evidence could easily be crafted to avoid those pitfalls. Contracts, however, have not played much of a role in providing remedies for spoliation of evidence for two reasons, one legal and one practical.

A Florida decision, *Miller v. Allstate Insurance Co.*,<sup>122</sup> provides an example both of a contract to preserve evidence and of the legal difficulties involved in relying on a contractual remedy for spoliation. In *Miller* the plaintiff and a passenger were injured in an automobile accident. While the plaintiff was recovering in hospital, her father, who was also a lawyer, contacted her insurer and advised an agent that the plaintiff wanted to retain possession of the car. The plaintiff's father was of the view that the plaintiff potentially had a products liability claim against the car's manufacturer. He wanted to have the car examined by an expert. The insurer, anticipating a claim by the passenger, wanted its own expert to examine the car for defects. The two reached an agreement that granted the insurer possession of the car in return for a promise to preserve it and to make it available for testing by the plaintiff's expert. Before the plaintiff's expert had an opportunity to test the car, though, the insurer sold it to a salvage yard, where it was disassembled. The plaintiff sued the insurer for breach of contract.

The court dealt shortly with the threshold questions in this case. The insurer conceded that the parties had formed a valid contract.<sup>123</sup> The court held that the contract did not fall into any of the categories of contracts that the law will decline to enforce.<sup>124</sup> The court then addressed the main legal issue in this case. If the contract to preserve evidence does not contain a liquidated damages clause, then how can the court determine the measure of damages for the breach with any certainty? The court began to answer this question by stating the principle in *Hadley v. Baxendale*.<sup>125</sup> Since the loss of the plaintiff's cause of action against the car's manufacturer reasonably would have been within the contemplation of parties to a contract to preserve evidence at the time such a contract was made, there was no issue here as to remoteness of damages. The difficulties that this case presented had to do with assessability of damages. On this point the court observed that American contract law has

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Arguably, doctors in British Columbia may no longer be subject to this fiduciary duty to disclose to a patient information contained in a medical record. La Forest J. qualified his conclusions in *McInerney* by making them subject to "regulatory legislation": see *McInerney*, *supra* note 119 at 159. Thus, the fiduciary duty may be superseded by the duty to permit access to personal information contained in part 7 of the *Personal Information Protection Act*, S.B.C. 2003, c. 63. However, *McInerney* continues to be relevant by analogy to the duties owed by other fiduciaries in similar circumstances.

122. 573 So.2d 24 (Fla. App. 1990), Ferguson J. (for the court) [*Miller*], *rev. denied*, 1991 Fla. LEXIS 776.

123. *Ibid.* at 26.

124. *Ibid.* at 27.

125. (1854) 9 Ex. 341 at 354, 156 E.R. 145, Alderson B. (for the court).

## Report on Spoliation of Evidence

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tended to apply a strict “all or nothing” version of the rule that damages must be established with certainty.<sup>126</sup> The court contrasted this American approach with an “. . . alternative theory of recovery . . . established under the English Common Law. . . .”<sup>127</sup> The English rule relaxes the certainty requirement and allows recovery for loss of opportunity.<sup>128</sup> As the Florida court put it: “[r]ecovery was based not on the value of the contract; instead the value of the plaintiff’s opportunity or chance of success at the time of the breach became the basis for the award.”<sup>129</sup> The English approach has been followed in Canada.<sup>130</sup> It could be employed in any future case dealing with a breach of a contract to preserve evidence.

The legal difficulty connected with using contracts as the source of a duty to preserve evidence could be overcome by employing this relaxed approach to certainty of damages. However, a practical difficulty would still exist. Contractual obligations are voluntary. In *Miller*, for example, the insurer’s contractual duty to preserve the car could have been avoided by its refusing to enter into the contract. The facts of the *Miller* case are common, with one exception. The existence of a valid contract makes *Miller* unusual. There are many cases with similar facts that involve a litigant, an insurer, or an expert giving a gratuitous promise to preserve evidence and subsequently breaching that promise. The American courts have shown a willingness to enforce such promises by relying on the doctrine of promissory estoppel.<sup>131</sup> However, the American conception of promissory estoppel is

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126. *Supra* note 122 at 27

127. *Ibid.* at 29.

128. *See Chaplin v. Hicks*, [1911] 2 K.B. 786, [1911–13] All E.R. 224 (C.A.) (contestant in beauty contest recovering damages from contest’s promoters, who failed to notify her of interview requirement, thereby depriving her of an opportunity to win the contest); *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563 at 574–576, [1958] 2 All E.R. 241 (C.A.), Lord Evershed M.R. [*Kitchen* cited to W.L.R.] (widow recovering damages from solicitors who negligently failed to file a claim before expiration of limitation period); *Allied Maples Group Ltd. v. Simmons & Simmons*, [1995] 1 W.L.R. 1602 at 1611–1614, [1995] 4 All E.R. 907 (C.A.), Stuart-Smith L.J. (client recovering damages from solicitor who negligently failed to obtain warranty against liability from vendor in asset purchase transaction).

129. *Supra* note 122 at 29.

130. *See e.g. Kohler v. Thorold Natural Gas Co.*, (1916) 52 S.C.R. 514 at 530, Duff J. (“. . . as against a wrongdoer, and especially where the wrong is of such a character that in itself it is calculated to make and does make the exact ascertainment of damages impossible or extremely difficult and embarrassing, all reasonable presumptions are to be made”), *leave to appeal to U.K.P.C. refused*, (1916) 52 S.C.R. vii (U.K.P.C.); *Webb & Knapp (Canada) Ltd. v. Edmonton (City of)*, [1970] S.C.R. 588 at 599–603, 11 D.L.R. (3d) 544, Hall J. (for the majority) (developer recovering damages from city in breach of agreement to submit plan to develop city centre, which city rejected and then used as the basis for its own plan of development); *Mills v. Edmonton (City of)*, (1987) 46 D.L.R. (4<sup>th</sup>) 26 at 36, [1988] 1 W.W.R. 454 (Alta. Q.B.), Berger J. (“In my opinion it is incumbent upon the court in the case at bar to award damages based on good sense and fairness even if the value of the loss cannot be established with certainty.”).

131. *See e.g. Coprich v. Superior Court*, 80 Cal.App.4<sup>th</sup> 1081 at 1091–1092, 95 Cal.Rptr.2d 884 (2000),

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## Report on Spoliation of Evidence

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broad than the Canadian.<sup>132</sup> A recent decision of the Supreme Court of Canada expressed the principles of promissory estoppel as follows:<sup>133</sup>

The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

This passage shows that Canadian law continues to hold to the classical conception of promissory estoppel. In order to rely on the doctrine, a litigant must establish that there is a pre-existing legal relationship. Further, the doctrine can only be used defensively, not to found a cause of action. American law has developed a conception of promissory estoppel that does not contain these requirements, which are fatal to any attempt to locate a remedy for spoliation of evidence within the doctrine of promissory estoppel. Several cases<sup>134</sup> indicate that Canadian law could be undergoing a development similar to Australian law,<sup>135</sup> which has recently formulated a version of promissory

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Croskey A.P.J. (for the court) (non-existence of tort remedy for spoliation of evidence does not preclude the existence of a remedy in contract or promissory estoppel), *rev. denied*, 2000 Cal. LEXIS 6032; *Owens v. American Refuse Systems, Inc.* 563 S.E.2d 782 at 785 (Ga. App. 2000), Barnes J. (for the court) (remedy based on promissory estoppel for spoliation of evidence available, but no justified reliance on defendant's promise shown in this case), *cert. denied*, 2000 Ga. LEXIS 827.

132. *See Restatement (Second) of Contracts* § 90 (1) (1981) (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.”)
133. *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57, 80 D.L.R. (4<sup>th</sup>) 652, Sopinka J. (for the court).
134. *See Robichaud v. Caisse Populaire de Pokemouche Ltée*, (1990) 105 N.B.R. 227, 69 D.L.R. (4<sup>th</sup>) 589 at 600 (C.A.), Rice J.A. (“If the principle of promissory estoppel could be invoked successfully as grounds of defence in an action by the Caisse Populaire against the appellant, then, considering the relations between them, to refuse its application on the pretext that it is not invoked as grounds of defence is, in my opinion, untenable and contrary to the principles of equity on which the doctrine is based.”); *Deer Valley Shopping Centre Ltd. v. Sniderman Radio Sales & Services Ltd.*, (1989) 96 A.R. 321 at 333, 69 Alta. L.R. (2d) 203, McBain J. (Q.B.) (“It has been suggested that estoppel can only be used as a shield, not as a sword. Thus, estoppel cannot be used to enforce promises made, but only as a defence where the promisor attempts to go back on his promise and enforce his rights as they stood before the representation. However, in my view, this is not the present state of the law.”). *See also Re Tudale Explorations Ltd. and Bruce*, (1978) 20 O.R. (2d) 593, 88 D.L.R. (3d) 584 at 588 (Div. Ct.), Grange J. (“The sword/shield maxim has been heavily criticized . . . and I must confess to difficulty in seeing the logic of the distinction. . .”).
135. *See Waltons Stores (Interstate) Ltd. v. Maher*, (1988) 164 C.L.R. 387, 76 A.L.R. 513 (H.C.) (promissory estoppel operating in pre-contractual relationship between prospective tenant that demolished part of its building in reliance on promise from prospective landlord that it would enter into a lease requiring it to put up a new building to the prospective tenant's specifications).

## Report on Spoliation of Evidence

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estoppel similar to the American version. These cases are a long way from establishing a definite trend. The law of promissory estoppel in Canada would have to develop considerably, then, before it could be the source of a remedy for spoliation of evidence.

### **E. Summary**

The courts may develop existing theories of liability to address some of the problems created by spoliation of evidence. The law of negligence, fiduciary duty, and contracts may provide remedies to those harmed by spoliation in situations when a remedy would not otherwise be available. For example, each of these theories of liability may give a victim of spoliation a cause of action against a person who is not a party to the original litigation. Further, these theories of liability take on added prominence in jurisdictions, such as British Columbia, that have refused to develop a tort of intentional spoliation of evidence.

## **V. PROPOSALS FOR REFORM**

### **A. Introduction**

Reform of the law relating to spoliation of evidence involves three tasks: clarifying the role of the spoliator's mental state in the application of the evidentiary presumption; adjusting existing procedural rules to cover what the cases identify as a persistent problem; and developing a new substantive remedy to address the most flagrant instances of spoliation of evidence.

### **B. The Evidentiary Presumption**

There are two concerns with the contemporary application of the evidentiary presumption that the courts should address. First, in some cases the evidentiary presumption has been considered in relation to an application for a pre-trial procedural sanction.<sup>136</sup> As a result, some of the conceptual clarity of the various judicial means to control spoliation of evidence may be distorted. As this Report has shown, there are a range of remedies for spoliation. Reasoning that might be appropriate for a procedural sanction or a substantive remedy might not be appropriate for the application of the evidentiary presumption.

The second concern is more significant. The courts have begun to impose additional burdens on the non-spoliating litigant that seeks to rely on the evidentiary presumption.<sup>137</sup> In particular, courts have been requiring the non-spoliator to prove either intent to destroy, mutilate, alter, or conceal evidence or one of fraud, bad faith, or intent to suppress the truth, before the court will apply the presumption.

This new requirement focusses the court's attention on the spoliator's state of mind. An inquiry into the spoliator's state of mind will be relevant in many cases involving spoliation. Analyzing the role that intent plays in such cases can be a useful way to organize the jurisprudence and to formulate a principled basis for applying the presumption in one case and not in another. Crystallizing this analysis of intent into a requirement that a non-spoliator must always prove an intention to destroy,

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136. *See supra* note 29.

137. *See supra* note 32.

## Report on Spoliation of Evidence

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mutilate, alter, or conceal evidence, or fraud, bad faith, or intent to suppress the truth, causes two problems. First, it places a burden on the non-spoliator that should properly rest on the spoliator. Second, intent to destroy, mutilate, alter, or conceal evidence may not be a relevant issue in all cases involving spoliation.

The non-spoliator should simply have to prove spoliation in order to raise the evidentiary presumption. The historical cases involving spoliation held to this position. Recent cases have not explained fully why it is being abandoned. These recent cases may simply have pushed the issue of the spoliator's state of mind to the fore in a way that did not occur historically. Unfortunately, the effect of the current analysis of intent is to place the burden of persuasion on the litigant who is less able to bear it. Due to the fact of spoliation, evidence about the spoliator's state of mind may be hard to come by. The spoliator will be in a better position than the non-spoliator to provide the court with such relevant evidence as exists on this point.<sup>138</sup>

Alternatively, the courts may be worried that simply requiring the non-spoliator to prove the act of spoliation in order to raise the presumption will open the floodgates to litigants who will attempt to argue spoliation in a routine and frivolous manner. If fashioning a requirement that non-spoliators prove intent reflects such a concern, then the new test is superfluous. The rule already contains adequate protections against such abuses. The non-spoliating litigant must prove spoliation of documents or other property which would have been relevant evidence at trial. Further, the non-spoliating litigant must also demonstrate with a degree of certainty what the contents of the destroyed, mutilated, altered, or concealed evidence would have been or it will fall into the logical error of begging the question.<sup>139</sup> Finally, the presumption only operates upon the actions of a litigant or that litigant's agent. A litigant will not be made to suffer by the spoliation of a non-litigant. If these safeguards are applied consistently and rigorously, then there should be no concern that spoliation will be argued in a routine and frivolous manner.

Beyond frivolous cases, there still may be concerns that the evidentiary presumption is being applied fairly. The key to ensuring fairness in the application of the presumption rests in the fact that the spoliator is able in all cases to call evidence to rebut the presumption. Since this inquiry is tied

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138. See Charles R. Nesson, "Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action" (1991) 13 *Cardozo L. Rev.* 793 at 802 ("In general, intentionality is extremely difficult to prove, particularly when inadvertence and misunderstanding are such easy alternative explanations: my attorney lost the documents; my employee was unaware of the litigation." [footnotes omitted]).

139. See 2 Wigmore, *Evidence* § 291 (Chadbourn rev. 1979) ("... [W]hen A desires to prove his title by a deed from X to Y, possessed by B and describing the land he claims, and upon B's failure to produce it, A shows that B has burned a deed from X to Y and argues that the deed be taken to read as he alleges, and B maintains that the burned deed, though from X to Y, concerned a piece of land totally different from the land in controversy, it is obvious that A has not yet made a case ripe for inference; he is arguing from the supposed fact that B has destroyed the deed that A wants, but it does not yet appear that the destroyed deed *was* the one which A wants. . . . Thus, when B denies the identity of the document spoliated or the identity of the document failed to be produced, no inference can be drawn until the jury find the fact against B's denial; and obviously this cannot be done until some evidence of this identity has been introduced by A." [emphasis in original]).

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## Report on Spoliation of Evidence

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intimately to the facts of any given case, it is difficult to articulate a test or set of logical steps that can be applied in every case involving the evidentiary presumption. Taken at a very high level of generality, though, the cases in which the presumption may be rebutted fall into two broad categories.

The first category of cases will be those where the spoliator is able to show that the destroyed or altered evidence was not harmful to its case. This strikes at the heart of the presumption, which is, at bottom, a tool to assist the court in restoring accuracy to the fact-finding process when that process has been compromised by spoliation. Although it includes a wide-ranging discussion of spoliation, *St. Louis* is, at its core, an example of such a case.<sup>140</sup>

The second category of cases will be much more prevalent than the first. In the second category the spoliator has destroyed, mutilated, altered, or concealed relevant evidence, which might have proved harmful to the spoliator's case, if it could be produced at trial. Nevertheless, the court can decline to apply the presumption if the spoliator proves that the destruction, alteration, or suppression of evidence was not done with a guilty mind. Guilt and innocence can be slippery categories. As a result, the courts have tended to use concepts such as fraud, bad faith, intent to suppress the truth, intention, and negligence in discussing the requisite mental state.

The courts have not provided a framework for using these categories in a principled way. Unfortunately, there has been a tendency to group fraud, bad faith, intent to suppress the truth, and intention together on one side of a bright line and to place negligence on the other. This tendency should be resisted. Requiring a spoliator simply to disprove fraud, bad faith, or intent to suppress the truth sets the bar too low. There may also be cases where negligent spoliation is enough to allow the court to apply the presumption.

An illustration of the subtleties of analyzing the spoliator's mental state may be found in the common practice of destroying documents pursuant to a retention and destruction schedule. A reasonably designed and implemented retention and destruction policy should not give rise to the application of the evidentiary presumption. Such a policy should not immunize the spoliator from the application of the presumption in all cases, though. If a court finds fraud, bad faith, or intent to suppress the truth in such a policy or in its implementation, then it should apply the presumption. Further, a destruction schedule can be implemented in a manner that shows an intention to destroy documents for the purpose of making them unavailable for evidence in a proceeding, as two American law professors explain:<sup>141</sup>

. . . the decision to allow the destruction to proceed—in practical terms, the failure to suspend execution of the document destruction protocol—can itself be an intentional act or omission.

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140. *See supra* note 14 at 652–653 (“The destruction 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. Now, here the presumption raised by the destruction of papers and books by *St. Louis*, not unsatisfactorily explained, could not be better rebutted than by proving, as he has done in the clearest manner, that they would, if forthcoming, conclusively establish his claim.”).

141. *Solum & Marzen, supra* note 4 at 1188.

## Report on Spoliation of Evidence

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The assumption to the contrary appears to rest on a confusion between the act/omission distinction and the intentional/negligent distinction. Omissions can be intentional, just as acts can be negligent. Intentional omissions of measures to save from destruction documents which are relevant to pending, imminent, or clearly foreseeable litigation entails a “specific” intent to destroy evidence.

As this passage implies, destruction of evidence pursuant to a retention and destruction policy may also be negligent, because the policy’s design is unreasonable or because the policy was not implemented with due care. Such cases of negligent destruction pose the greatest challenge for applying the presumption. Previous decisions have tended to be categorical: the recent cases imply that negligence falls outside the scope of the presumption; the historical cases frankly say that the negligent litigant should always bear the loss.<sup>142</sup> The historical position provides the more promising starting position. Demonstrating that the spoliation occurred negligently should not, in most cases, be enough to rebut the presumption. Although, it should also be recognized that some litigants may be able to rebut the presumption even in the face of their negligence.

Cases involving the application of the evidentiary presumption to spoliation due to negligence may form a growing category in the near future. The Canadian courts have yet to consider the application of spoliation principles to the deletion or loss of electronic records.<sup>143</sup> Is the failure to maintain copies of, for instance, electronic mail messages that may be relevant evidence in litigation that has been, or reasonably will be, commenced, negligence? Most large organizations will maintain backup copies of such information, though not necessarily for reasons related to concerns about sanctions for spoliation. Should this practice be the standard for all individuals and organizations? Should the courts grant exceptions to the application of the rule based on policy concerns about the cost of storage? A related issue is the cost of searching for records that are relevant to the litigation within the backup copies. The relevant information will not necessarily be segregated. The cost of searching backup tapes and discs of a large organization, and extracting the relevant information, can be substantial. Should the spoliator or the non-spoliator bear these costs? A sound initial position would be to apply the presumption in cases of negligent loss or deletion of electronic records and to require the non-spoliator to bear the costs of search and recovery, while recognizing that the facts of any given case may rebut this position. The jurisprudence will have to be developed case by case, at least for the near future.

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142. See e.g. *The Ophelia*, [1916] 2 A.C. 206 at 229–230 (U.K.P.C.), Sir Arthur Channell (“If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position that he is without the corroboration which might have been expected in his case.”).

143. Such cases are beginning to appear in the American courts, though: see e.g. *Zubulake v. USB Warburg LLC*, 2004 U.S. Dist. LEXIS 13584 (S.D.N.Y.), Scheindlin U.S.D.J. (applying spoliation of evidence principles to deletion of electronic records).



## Report on Spoliation of Evidence

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The Law Reform Commission of Canada has said that what the courts commonly call “presumptions of fact” should be called “inferences” because “[f]rom the basic facts that give rise to the doctrine, the trier of fact may or may not draw the necessary inference. . . .”<sup>144</sup> The effect of such inferences as *omnia praesumuntur contra spoliatores* varies from case to case.<sup>145</sup> For this reason, it can be very difficult to rationalize the cases applying the evidentiary presumption. The temptation to impose a sort of logical gatekeeper—such as a requirement on the non-spoliator to prove intentionality—should be resisted, though. The law is better developed by articulating the reasons why the inference is drawn in one case and rebutted in another.

### C. Procedural Sanctions

The *Rules of Court* do not require extensive reform in order to address issues arising from spoliation of evidence. The existing provisions provide the courts with an adequate set of sanctions to apply to cases of spoliation by litigants and, in certain circumstances, by those who are not parties to the proceeding. The main problem to overcome here appears to be simply that the *Rules of Court* are not being invoked in appropriate cases.

There is one recurring issue, however, that appears to have eluded British Columbia’s procedural rules. This issue involves evidence that is damaged, altered, or destroyed in order to create new evidence, usually in the form of an expert report. Expert testing of this nature can cause prejudice to an opposing litigant’s case if the evidence is no longer available for further testing. However, the courts have been reluctant to impose sanctions on the litigant who is responsible for the original tests because, as one court put it, the tests were undertaken not to “suppress the truth” but rather to “ascertain the truth.”<sup>146</sup>

A practical solution to this problem may be found in a suggestion in the *Dawes* case. In that case a car was destroyed by testing done by an expert on behalf of the Insurance Corporation of British Columbia. The court remarked that “the course of prudence” in such cases may be for the insurer to develop a policy to allow for testing and to preserve the interests of other persons.<sup>147</sup> The most effective version of such a policy would be to encourage the person undertaking a course of potentially destructive testing of evidence to notify other interested persons.

A notice procedure would best balance the needs of litigants. Destructive testing of evidence is often necessary. As the courts have observed, such testing is of a different order than other types of spoliation. The practice should not necessarily be prevented; rather, the prejudice to other persons

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144. *Burdens of Proof and Presumptions* (Law of Evidence Project Study Paper 8) (Ottawa: The Commission, 1973) at 64.

145. See John Sopinka, Sidney N. Lederman, & Alan W. Bryant, *The Law of Evidence in Canada*, 2<sup>nd</sup> ed. (Toronto: Butterworths, 1999) at § 4.5.

146. *Dyk*, *supra* note 26 at para. 11.

147. *Dawes*, *supra* note 26 at para. 70. The court was also careful to conclude that it was expressing no opinion on the desirability of such a policy.

## Report on Spoliation of Evidence

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should be limited. This result can be accomplished by giving notice and permitting experts of other interested persons to conduct their own tests of the evidence. The cases show that inadvertence and miscommunication, rather than malice, tend to be the cause of this prejudice. Further, expert testing tends to take place when the interested parties to a proceeding are apparent. This reduces the possibility that such a notice procedure would be onerous.

A notice procedure could be implemented by amendments to the *Rules of Court*; or, relying on its inherent jurisdiction, the court could simply decide to sanction litigants who engage in destructive testing. The logical sanction would be to preclude a litigant who engages in destructive testing without notice from being able to rely on the expert report produced by that testing in the proceeding. In appropriate circumstances, the inherent jurisdiction of the court could also be the source of sanctions for non-litigants. Finally, a court could draw favourable inferences from the giving of notice. Such favourable inferences could limit the ability of a litigant, who did not act during the notice period, to argue successfully that procedural sanctions or the evidentiary presumption should apply to this instance of spoliation of evidence.

### D. A Substantive Remedy: A New Tort of Intentional Spoliation of Evidence

#### 1. THE NEED FOR A NEW REMEDY

The evidentiary rule and various procedural sanctions can effectively restore accuracy to trials, punish spoliators, and provide for the compensation of those harmed by spoliation in most circumstances. A gap exists in their coverage, though. The presumption can only be applied at trial; procedural sanctions may be applied before a trial, but still require the maintenance of a proceeding. A litigant whose underlying cause of action has been wholly destroyed by a thoroughgoing spoliator will not receive assistance from the evidentiary presumption or any of the procedural sanctions contained in the *Rules of Court* or developed under the inherent jurisdiction of the court. A victim of such thoroughgoing spoliation may be left without a remedy and without compensation for his or her injuries. Ironically, procedural sanctions and the evidentiary presumption may act as a deterrent to less thorough spoliators, whose actions do not completely frustrate the ability of an opposing litigant to maintain a proceeding, while failing to deter those spoliators whose actions completely destroy a person's underlying cause of action.<sup>148</sup>

Some examples of such complete spoliation of evidence may be found in American case reports: an automobile dealer that “destroyed, lost, or transferred” customized wheels that injured a motorist and were at the centre of a products liability action against it;<sup>149</sup> a corpo

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148. See Steffen Nolte, “The Spoliation Tort: An Approach to Underlying Principles” (1995) 26 *St. Mary’s L.J.* 351 at 354 (Observing that the evidentiary rule and procedural sanctions “. . . fail to adequately confront willful spoliation. Because of the difficulty in uncovering a clandestine spoliation act, a strong incentive still exists to choose spoliation over the procedural and substantive consequences of disclosing sensitive or potentially incriminating information.”).

149. *Smith v. Superior Court*, 198 Cal.Rptr. 829 (App. 1984). The defendant dealer located the missing parts shortly after the California Court of Appeals allowed the injured motorist to proceed with an action for intentional spoliation of evidence, and quickly reached a settlement with the injured motorist. See

## Report on Spoliation of Evidence

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rate employer that suppressed a memorandum setting out the conclusions of its investigation into an accident involving its employee;<sup>150</sup> and a major shareholder and chief executive officer of a corporation involved in a dispute under international trade legislation who ordered the destruction of vital corporate documents.<sup>151</sup> Further examples may be found in cases where the victim of spoliation fails to obtain a remedy. An American law professor describes one such case:<sup>152</sup>

I was one of a team of lawyers who represented a group of plaintiffs against two major corporations in a toxic tort suit. The lawyers for one of the defendant corporations played straight in the discovery process, and, after suffering an adverse jury finding in a liability phase of the case, settled with the plaintiffs for \$8 million dollars. The other corporate defendant and its lawyers suppressed and destroyed evidence in a variety of ways during the discovery process without being detected and won a jury verdict. This defendant paid the plaintiffs nothing. When evidence of the spoliation began to surface after trial, the trial judge was unwilling to investigate it. When forced by the Court of Appeals to hold a serious inquiry, the trial judge found that the defendant had engaged in deliberate misconduct, but imposed no sanction. The judge found that the *plaintiffs* had violated Rule 11 [of the *Federal Rules of Civil Procedure* (signing of pleadings, motions, and other papers; representations to court; sanctions)] by pursuing the claim on which the defendant spoliated the evidence! The Court of Appeals affirmed, deferring to the discretion of the trial judge. The lesson was obvious. Not only were the cheaters allowed to win, but those who raised objection to the foul were punished.

Two Canadian lawyers have also written about types of cases that can be damaged by intentional spoliation of evidence:<sup>153</sup>

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. If key documents "disappear", the plaintiff may not be able to obtain critical expert reports.

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Pati Jo Pofahl, "*Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*" Case Comment (1985) 69 Minn. L. Rev. 961 at 961, *n.* 4.

150. *Viviano v. CBS, Inc.*, 597 A.2d 543 (N.J. Super. A.D. 1991).

151. *Helmac Products Corp. v. Roth (Plastics) Corp.*, 150 F.R.D. 563 (E.D. Mich. 1993).

152. Nesson, *supra* note 138 at 794 [emphasis in original; footnotes omitted].

153. Sommers & Seibert, *supra* note 5 at 39–40. [emphasis in original; footnotes omitted]

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## Report on Spoliation of Evidence

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Consequently, a spoliating tortfeasor could prevail at trial; indeed, could successfully move for summary judgment.

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.

The manufacturer may, based on its own internal research, have a more sophisticated understanding of certain product dangers than do most 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 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.

When the underlying cause of action has been destroyed due to spoliation of evidence, the plaintiff must look for a substantive duty to preserve evidence to find a remedy. The existing theories of liability that were discussed earlier in this Report<sup>154</sup> may be developed in ways that provide some victims of spoliation a remedy. However, the law of negligence, fiduciary duty, contracts, and promissory estoppel will, at best, only apply in limited instances of spoliation. Each theory, by its nature, does not directly address the type of deliberate, willful wrongdoing that is described in the examples set out above. A new departure is needed. This new departure is the judicial creation of a tort of intentional spoliation of evidence.

A number of American state courts have recognized a tort of intentional spoliation of evidence.<sup>155</sup> In Canada, the Ontario Court of Appeal has allowed an action based on intentional spoliation of evidence to go to trial.<sup>156</sup> Unfortunately, the development of such a tort in British Columbia has

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154. See chapter IV, above, at 20ff.

155. See e.g. Alaska: *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska 1986), Rabinowitz C.J. (for the court); Illinois: *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312 (Ill. App. 1986), Scariano J. (for the court) [*Petrik*]; New Mexico: *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995), Minzner J. (for the court) [*Coleman*]; Ohio: *Smith v. Howard Johnson Co., Inc.*, 615 N.E.2d 1037 (Ohio 1993), the court [*Howard Johnson*]. See also *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998), Gallager S.J. (for the court) [*Holmes*] (announcing cause of action for negligent or reckless spoliation of evidence).

156. *Spasic Estate v. Imperial Tobacco Ltd.*, (2000) 49 O.R. (3d) 699, 188 D.L.R. (4<sup>th</sup>) 577 (C.A.), leave to appeal to S.C.C. refused, (2001) 269 N.R. 394n (S.C.C.), Borins J.A. (for the court) [*Spasic Estate* cited to D.L.R.].

## Report on Spoliation of Evidence

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stalled, due to the Court of Appeal's decision in *Endean v. Canadian Red Cross Society*.<sup>157</sup> *Endean* was an application under rule 19 (24) (a) to strike out pleadings stating a cause of action for spoliation as not disclosing a reasonable claim. At first instance the application was dismissed. The Court of Appeal, though, allowed the appeal, deciding that “. . . an action for damages—being punitive or otherwise—is not an appropriate response to the destruction of documents.”<sup>158</sup> The court rested this conclusion on the authority of *St. Louis*, holding that this earlier decision precluded the development of a remedy for spoliation of evidence in tort.<sup>159</sup> As the Ontario Court of Appeal later pointed out this application of *St. Louis* is “flawed” because the *St. Louis* court was not deciding the issue of whether a victim of spoliation has a remedy in tort.<sup>160</sup> Beyond the invoking authority of *St. Louis*, the *Endean* court had little to say about the issue.<sup>161</sup>

Since the Courts of Appeal for Ontario and British Columbia have come to different conclusions on this issue, the Supreme Court of Canada could decide to resolve the matter authoritatively by granting leave to appeal in a future case involving spoliation. Even if no case makes it to the Supreme Court of Canada, the British Columbia Court of Appeal could reconsider its decision in *Endean* by constituting a five-justice panel to hear a subsequent case.<sup>162</sup> These two avenues of appeal leave open the possibility of the development of a tort of intentional spoliation of evidence.

### 2. POLICY CONSIDERATIONS

John G. Fleming has observed that “[n]ew and innominate torts have been constantly emerging in the long course of our history and the courts have shown no inclination at any stage to disclaim their creative functions, if considerations of policy pointed to the need for recognising a new cause of

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157. *Supra* note 24.

158. *Ibid.* at para. 20.

159. *Ibid.* at para. 23 (“. . . a rebuttable presumption cannot give rise to a separate and completed tort”), para. 32 (“. . . the law as explained in *St. Louis* . . . is a flexible remedy and can be fashioned to compensate the plaintiff for any loss it may have suffered *by reason* of the destruction of evidence” [emphasis in original]).

160. *Spasic Estate*, *supra* note 156 at para. 24. *See also* Sommers & Seibert, *supra* note 5 at 67–68 (“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 discoverable. Accordingly, no tort issue could have arisen on the facts.”).

161. *See* Sommers & Seibert, *ibid.* at 66 (“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. . . .”).

162. *See* British Columbia Court of Appeal, *Practice Directive 5—Five Justice Divisions* (issued: 7 March 2002).

## Report on Spoliation of Evidence

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action.”<sup>163</sup> The policy arguments in favour of a tort of intentional spoliation of evidence may be simply stated. Procedural sanctions and the evidentiary presumption require a person who has been harmed by spoliation to maintain the underlying cause of action in order to receive a remedy. If the underlying cause of action is destroyed due to spoliation, then that person will not be compensated for any injuries suffered. Our civil justice system recognizes the right to pursue a reasonable cause of action as an important and valuable right. It is a right that should not be interfered with or curbed, except in rare circumstances. Further, only an independent tort action can effectively deter extreme cases of spoliation. Since access to the other remedies depends on maintaining the underlying cause of action, the absence of an independent tort remedy creates a perverse incentive to take extreme acts of spoliation, because lesser acts will be subject to sanctions. Finally, an independent tort action helps to preserve the integrity of the civil litigation system as a whole. As one American court put it:<sup>164</sup>

It would be a large loophole indeed, if the other party could avoid the effect of the rules simply by ending the existence of the demonstrative or documentary evidence. . . . Intentional destruction of evidence manifests a shocking disregard for orderly judicial procedures and offends traditional notions of fair play.

An independent tort action would complement the evidentiary presumption and procedural sanctions. Together, these remedies would afford litigants and the courts with the means to make a complete and total response to all instances of spoliation of evidence deserving of blame.

The competing policy reasons against the creation of a new tort may also be stated briefly. Creating an additional remedy will encourage litigation. Much of this litigation could needlessly duplicate the underlying cause of action.<sup>165</sup> The finality of court judgments could be undermined as unsuccessful litigants attempt to use the tort remedy to re-litigate the original cause of action. A tort remedy would also impose burdensome costs on individuals, government bodies, and businesses. People would not know when documents or property could be destroyed without breaching their duties under the tort. This uncertainty could impose significant storage costs on businesses and public bodies, such as hospitals. It would also be very difficult for a court to quantify damages suffered by claimants.<sup>166</sup> This exercise would be speculative in most cases. Finally, there is a perception that victims of spoliation are adequately protected by the availability of procedural sanctions and the evidentiary rule. These policy considerations moved the California Supreme Court to conclude that spoliation of evidence “. . . is the rare case in which a tort remedy for an intentionally caused harm is

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163. *The Law of Torts*, 9<sup>th</sup> ed. (Sydney: LBC Information Services, 1998) at 7.

164. *Petrik*, *supra* note 155 at 1319.

165. *See e.g. Trevino*, *supra* note 5 at 952 (“We are especially averse to creating a tort that would only lead to duplicative litigation, encouraging inefficient relitigation of issues better handled within the context of the core cause of action.”).

166. *See e.g. Cedars-Sinai*, *supra* note 95 at 13–15.

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## Report on Spoliation of Evidence

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not appropriate.”<sup>167</sup> Overruling earlier decisions that had established a cause of action in California for spoliation of evidence, the court concluded that:<sup>168</sup>

Given that existing remedies will in most cases be effective at ensuring that the issues in the underlying litigation are fairly decided, whatever incremental additional benefits a tort remedy might create are outweighed by the policy considerations and costs described above. By opening up the decision on the merits of the underlying causes of action to speculative reconsideration regarding how the presence of the spoliated evidence might have changed the outcome, a tort remedy would not only create a significant risk of erroneous findings of spoliation liability but would impair the fundamental interest in the finality of adjudication and the stability of judgments.

The striking thing about these competing policy considerations is that they are not so directly opposed that the favouring of one set necessarily entails the rejection of the other. The purpose of a tort of intentional spoliation of evidence would be to allow for compensation of victims of egregious cases of spoliation and to deter those who would engage in such practices.<sup>169</sup> The tort remedy should be carefully tailored to achieve only this purpose.

### 3. ELEMENTS OF THE TORT

The scope of the tort of intentional spoliation of evidence can be controlled by selecting the elements that a plaintiff must prove in order to obtain the remedy. A number of American cases have extensively considered the options available for each element of the tort.<sup>170</sup> The most desirable formulation of the elements of the tort would require the plaintiff to allege and prove the following:

- (1) The existence of pending or probable litigation involving the plaintiff.
- (2) Knowledge on the part of the defendant of the pending or probable litigation.
- (3) Intentional spoliation by the defendant designed to defeat or disrupt the plaintiff’s case.
- (4) A causal relationship between the act of spoliation and the plaintiff’s inability to prove its case.
- (5) Damages.

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167. *Ibid.* at 17.

168. *Ibid.*

169. *See Solum & Marzen, supra* note 4 at 1103 (“ . . . [T]he principal function of the tort may be to compensate for destruction of evidence whose probativeness is not known rather than restoring the accuracy of the original proceeding. For example, if a plaintiff sues for violation of antitrust laws and the defendant destroys all purchase, sale, and inventory records, a court would find it difficult to let the case go to the jury or impose an issue-related sanction because it is not clear what, if anything, the documents would have proved. In this case, no inference or issue-related sanction can substitute for the destroyed evidence. At most, a court can compensate the victim of the destroyed evidence and deter such destruction in the future.”).

170. *See e.g. Howard Johnson, supra* note 155 at 1038; *Coleman, supra* note 155 at 189.

## Report on Spoliation of Evidence

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Each element contains a deliberate choice or series of choices that affect the scope of the tort.

(1) *The existence of pending or probable litigation involving the plaintiff*

Without a link to litigation there can be no spoliation of evidence. The destruction, mutilation, alteration, or disposal of one's own property is permissible, unless it is forbidden by some other legal rule.

This element should not be formulated narrowly to require the commencement of a proceeding and service of originating documents, though. Such a narrow formulation would greatly restrict the utility of the tort. A victim of spoliation should not be denied a remedy because the spoliator acted before commencement of the proceeding or service of the originating document.

(2) *Knowledge on the part of the defendant of the pending or probable litigation*

This knowledge element complements the first element. It is important that the defendant have knowledge of the pending or probable litigation or the tort would have too broad a scope. It would also be unfair to impose liability under the tort of intentional spoliation on those who acted without knowledge of the underlying litigation.

The defendant's knowledge could be established by proof of service of a writ or other process commencing a proceeding. Proof of knowledge of a probable lawsuit is much more difficult. A plaintiff would need to rely on circumstantial evidence to afford such proof. The standard required should be reasonableness. The court should determine whether a reasonable person, in the circumstances of the spoliator, would have known that litigation is pending or probable.

This element touches on a subsidiary question. Should the tort remedy be available against non-litigants? There is no compelling reason to restrict the tort to parties to the underlying proceeding. If a plaintiff is able to prove all the elements of the tort of intentional spoliation of evidence, then that plaintiff should be able to recover from someone who was not a party to the original proceeding.<sup>171</sup> The knowledge requirement will guard against impositions of tort liability on persons who were not aware of the underlying litigation.

(3) *Intentional spoliation by the defendant designed to defeat or disrupt the plaintiff's case*

In the law of torts, "intent" is used ". . . to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it."<sup>172</sup> The key idea contained in this definition of intent is the fact that it focusses on the consequences of an act, rather than any quality inherent in the act itself. In an action for intentional spoliation of evidence the plaintiff would have to prove that the defendant destroyed, mutilated, altered, or concealed documents

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171. See *Howard Johnson, ibid.*

172. *Restatement (Second) of Torts* § 8A (1965).

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## Report on Spoliation of Evidence

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or other items with the design of defeating or disrupting the plaintiff's prosecution of the underlying proceeding.

This intentional element is an important part of tailoring the scope of the tort. This remedy should only be available against those who deliberately attempt to destroy another's cause of action through spoliation of evidence. Requiring the plaintiff to prove that the defendant intended to disrupt or defeat the plaintiff's claim will reduce the possibility that a defendant will be held liable for an innocent act of spoliation.

Some commentators have suggested that a higher standard, such as fraud or bad faith, should be used.<sup>173</sup> This higher standard is not attractive. It places an additional, onerous burden on the plaintiff. Further, it should not be necessary to show fraud or bad faith in order to ensure that the tort of spoliation of evidence is not too broadly applicable. The standard of intentionality adequately protects against this possibility.

(4) *A causal relationship between the act of spoliation and the plaintiff's inability to prove its case*

The Supreme Court of Canada has stated that the following general principles apply to questions involving causation:<sup>174</sup>

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury.

The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant.

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury.

The "but for" test requires the plaintiff to prove that the plaintiff's injury would not have occurred "but for" the defendant's tortious act. The tort of intentional spoliation of evidence is an example of when proof of causation under the "but for" test is unworkable. The difficulty relates to the gist of the tort. The "but for" test would require demonstration that the plaintiff would have succeeded in the underlying action. However, if the plaintiff could prove this element, then an independent tort action for spoliation would not be required. As an American court put it: "The tort is designed to

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173. *See* Sommers & Seibert, *supra* note 5 at 63 ("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.")

174. *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–15, 140 D.L.R. (4<sup>th</sup>) 235, Major J. (for the court) [citations omitted].

## Report on Spoliation of Evidence

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help plaintiffs who are unable to prove the underlying case to the ordinary standard of proof, so requiring plaintiffs to do just that in pursuing a spoliation claim is illogical.”<sup>175</sup>

The American courts have recognized this problem and have relaxed the test of causation used for the tort of intentional spoliation of evidence, requiring the plaintiff only to show that the act of spoliation “significantly impaired” the proof of the underlying cause of action. However, the District of Columbia Court of Appeals has pointed out that balancing the interests of the plaintiff and the defendant under this relaxed standard of causation “. . . adds a unique characteristic to the tort”:<sup>176</sup>

Not only must the plaintiff show that an expectancy of recovery was harmed, but also that such an expectancy realistically existed. Specifically, proximate cause must include two showings. First, it must be shown that the defendant’s actions proximately caused some level of impairment in the plaintiff’s ability to prove an existing underlying civil claim. Second, in order to show that defendant’s actions proximately caused any damages, it must be shown that plaintiff’s underlying claim was, at some threshold level, meritorious.

This dual approach to causation requires the plaintiff to prove both that the defendant’s acts significantly impaired the ability to prove the underlying lawsuit and that the plaintiff had a significant possibility of success in the underlying lawsuit.

Some American courts have crystallized the causation element into a requirement that the plaintiff litigate the underlying action to a losing conclusion before commencing an action for intentional spoliation of evidence.<sup>177</sup> This requirement has some theoretical appeal. The tort should only be available to those plaintiffs who have lost a cause of action due to spoliation. However, practical considerations make such a rule undesirable. The better approach is to allow a claim based on intentional spoliation of evidence to be brought at the same time as, or instead of, the underlying action.<sup>178</sup> This rule may be displaced in those cases where fresh evidence of spoliation comes to light only after the conclusion of the underlying action. Such an approach conserves judicial resources by allowing one court to consider all the issues related to spoliation.

### (5) Damages

The American courts have repeatedly observed that “[t]he most difficult aspect of a spoliation of evidence tort is the calculation of damages.”<sup>179</sup> The difficulty results from the central feature of the tort. The evidence that the court could have relied on to make a precise calculation of damages is

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175. *Holmes, supra* note 155 at 851.

176. *Holmes, ibid.* at 851.

177. *See Petrik, supra* note 155 at 1321–1322.

178. *See Howard Johnson, supra* note 155 at 1038.

179. *Petrik, supra* note 155 at 1320. *See also Holmes, supra* note 155 at 852–854.

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## Report on Spoliation of Evidence

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unavailable due to spoliation. As a result, damages can only be calculated by “reasonable estimate.”<sup>180</sup>

The courts are asked to consider such reasonable estimates of damages in other cases. For example, successful litigants in negligence actions can receive damages for loss of future earnings. Quantifying this head of damages requires some speculation. Damages for lost profits, under either the law of tort or contract, similarly require the courts to make decisions based on the best available knowledge of what may occur in the future.<sup>181</sup> Resolving concerns about the measure of damages in an action for intentional spoliation of evidence is not beyond the competence of the courts.<sup>182</sup>

The American courts have also pointed out that the formulation of this element of the tort runs the risk of awarding the plaintiff with a windfall. Such a windfall could occur if the plaintiff is awarded damages based on allegations of what the measure of damages would have been in the underlying action. Since the evidence required to prove these allegations is often lacking, there is no way of knowing with certainty whether the plaintiff actually would have received the amount alleged. Some American courts have adopted a discounting rule to address this concern.<sup>183</sup> One court explained the discounting rule as follows:<sup>184</sup>

... damages arrived at through just and reasonable estimation based on relevant data should be multiplied by the probability that the plaintiff would have won the underlying suit had the spoliated evidence been available. For example, hypothetically, if a jury determined that the expected recovery in an underlying suit was \$200,000, and that there was an estimated sixty percent probability that a plaintiff would have recovered that amount if the underlying suit had not been impaired or precluded due to the spoliated evidence, then the award of damages would be \$120,000, or sixty percent of \$200,000.

This rule has some appeal. The purpose of the tort of intentional spoliation of evidence is to compensate the plaintiff, not to put the plaintiff in a better position than he or she would have been in

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180. *See Holmes, ibid.* at 853.

181. *See* John K. Stirpancich, “The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative” (1992) 53 *Ohio State L.J.* 1135 at 1148 (“The problem of excessively speculative damages is nothing new to the courts, which have generally dealt with the issue leniently from the plaintiff’s perspective.”).

182. *See* Fleming, *supra* note 163 at 255–256 (observing that, in every negligence action, “[a] speculative guess is always required at the time of the award concerning all future contingencies, ranging from the developing health picture of the victim (including his earlier death) to the possible remarriage of his widow in the case of fatal accidents” [footnotes omitted]).

183. *See Holmes, supra* note 155 at 853–854 (adopting the rule for the District of Columbia). *See also* Petrik, *supra* note 155 at 1320 (considering the rule as one of a number of options for final determination in a more appropriate case).

184. *Holmes, ibid.*

## Report on Spoliation of Evidence

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if the underlying litigation had gone ahead with no spoliation occurring. In addition, this method of discounting speculative damages has been employed by the courts in other, similar cases.<sup>185</sup> This rule recognizes that there will be a spectrum of cases, some requiring a deep discount, some requiring no discount. The court should be able to place each case in its appropriate place on that spectrum, rather than being forced to apply an all-or-nothing rule.

### E. Summary

These law reform proposals vary in scope. The jurisprudence on the evidentiary presumption calls for an abandonment of some recent impediments to the operation of the presumption. The procedural rules require only a small adjustment to deal with an emerging problem. The substantive law, however, needs reconsideration. A remedy in tort would break new ground. However, it is necessary if the purposes of rules controlling spoliation of evidence—restoring accuracy to civil trials affected by spoliation; punishing those who engage in spoliation and deterring those who would engage in spoliation; and compensating victims of spoliation—are to operate to their full potential and address the most egregious cases of spoliation.

## VI. CONCLUSION

The number of decided cases involving spoliation of evidence show that it is a serious problem. The array of rules developed by the courts to combat it indicate that it is also a problem that the courts have taken seriously. These rules, some of which date back to the early seventeenth century, are in constant need of development and refinement. The rise of new technologies, such as computers, will have a double effect in this area of the law, making it both easier to commit spoliation of evidence and easier to recover evidence that a person intended to destroy, alter, or suppress.<sup>186</sup> To face these challenges, the courts will need a firm grasp of the various rules designed to control spoliation of evidence and principles underlying those rules, in order to determine when intervention is necessary to restore accuracy to a proceeding comprised by spoliation, to punish those who engage in spoliation and to deter those who would engage in it, and to compensate a victim of spoliation. The courts in

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185. See e.g. *Clark v. Kereiff*, (1983) 43 B.C.L.R. 157 at 162 (C.A.), Carrothers J.A. (for the court) (awarding plaintiff in a personal injury action damages for loss of opportunity to play professional hockey; discounting damages to 1/10 of what average National Hockey League player would have earned to account for the fact that “. . . evidence is far from clear as to the extent of his success”); *Kitchen*, *supra* note 128 at 574–576 (awarding plaintiff 2/3 the amount of damages claimed in fatal accident claim lost due to negligent failure of solicitor to file claim within limitation period); *Hampton & Sons, Ltd. v. George*, [1939] 3 All E.R. 627 at 630 (K.B.), du Parcq L.J. (awarding real estate agents damages for loss of opportunity to earn commission of £104, discounted to £80 to reflect court’s “. . . estimate of what their chance of earning £104 was”).

186. See Anita Ramasastry, “The Proposed Federal E-Discovery Rules: While Trying to Add Clarity, the Rules Still Leave Uncertainty,” online: Findlaw’s Writ (15 September 2004) <<http://writ.news.findlaw.com/ramasastry/20040915.html>> (“On one hand, computer data can be destroyed or lost due to problems with hardware and software—or intentionally deleted. If there are no paper backups, the data may be lost forever. On the other hand, though, electronic data can have a longer lifespan, in a sense: Electronic documents often continue to exist (either as backups or originals) despite an author’s intention to destroy them.”).

## Report on Spoliation of Evidence

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British Columbia have occasionally remarked on the novelty, difficulty, and obscurity of the legal rules that exist to control spoliation of evidence.<sup>187</sup> It is hoped that this Report will assist the courts in their task of reforming the law to address the issues posed by spoliation of evidence.

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187. See e.g. *Kaiser v. Bufton's Flowers Ltd.*, [1995] B.C.J. No. 878 at para. 10 (S.C.) (QL), Saunders J.

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## Report on Spoliation of Evidence

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