FEATURE

Spoliation: Rule of Evidence or Independent Actionable Wrong?

by Shane H. Katz

Introduction

What is "spoliation"? Literally, the word derives from the Roman rule of conduct "*omnia praesumuntur contra spoliatorem*", which means all things presumed against a wrongdoer. Practically, according to the Supreme Court of Canada, "spoliation" is a rule of evidence whereby the court is entitled to presume that evidence destroyed, or concealed, by a party would have been unfavourable to that party's case.[1] This presumption may be rebutted by the party who destroyed, or concealed, the evidence through other evidence.[2] If the presumption is not rebutted, there is no automatic dismissal of the case if the wrongdoer is a plaintiff, nor is judgment automatically granted if the wrongdoer is a defendant.[3] The presumption simply enables the court to infer facts that may have been proven by the destroyed or concealed evidence against the wrongdoer.

It is well established in every province in Canada that "spoliation" is a rule of evidence. However, can "spoliation" also be a tort? As a tort, "spoliation" gives rise to a cause of action that enables parties to litigation to obtain relief from the court should the evidentiary presumption not be rebutted by the wrongdoer, coupled with the inability of the innocent party to prove its case despite the presumption.[4] Unfortunately at the time of writing this paper, no court in Canada had yet awarded relief arising from the tort of spoliation, while the British Columbia Court of Appeal has stated that the tort of spoliation does not exist.[5] The Courts of Appeal of Ontario and Alberta have ruled that the tort of spoliation, if properly pleaded, is a proper cause of action that can only be determined on a full evidentiary record, preferably at trial.[6]

Therefore, the answer as to whether "spoliation" is a tort may depend on where one practices in Canada.

Spoliation as a Rule of Evidence

The Rule

Justice is served when courts make orders that are morally right and fair, and based on the facts. The facts relied on by courts are derived from evidence (information used to establish facts) provided by the parties in an action. If a party to litigation wishes to establish a fact, the party requires evidence. If the evidence required to establish the fact is within the possession, control or power of the adverse party, and the evidence has not been produced, how is one to prove his or her case? How can justice be served?

The answer is the evidentiary rule of "spoliation". One hundred and one years ago, in *St. Louis* v. *Canada*, the Supreme Court of Canada confirmed that should a party to litigation have evidence which would establish a fact necessary to the litigation, that evidence should be produced, or a rebuttable presumption that the evidence would be unfavourable to that party's case will arise. One can assume that the presumption is used by the court to allow the drawing of inferences that help establish facts that could otherwise have been established had the evidence been produced.[7] The presumption will not be arise if other evidence exists that can be used to either establish a fact or refute an allegation, and the presumption can be rebutted if the party can establish facts that prove the concealed or destroyed evidence would not have been unfavourable.[8] For example, in *St. Louis* the defendant relied on "spoliation", as a rule of evidence, because the plaintiff had destroyed documents that the defendant claimed would have established the allegation that the plaintiff was fraudulent with respect to the amount the plaintiff claimed the defendant owed him for services rendered. The court refused to make the presumption that the destroyed documents would have been unfavourable to the plaintiff because there was reliable and cogent testimony from witnesses that refuted the allegation that the plaintiff was fraudulent, making production of the documents unnecessary. The court went further and concluded that even

had the presumption arisen, the plaintiff had rebutted the presumption that the documents would have been unfavourable through the reliable and cogent testimony of witnesses.[9]

Parties who conceal or destroy evidence may argue that the presumption should not be made by the court if there was no intent to deceive, and the destruction of the evidence was accidental or occurred as a result of ignorance of any impending litigation. However, nowhere in *St. Louis* does the court require that the trier of fact determine why the evidence was destroyed, or concealed, prior to making a presumption. Nor does the court require that an intention to deceive be proven in order for the rule to apply. In fact, in *St. Louis*, it appears the court acknowledged that the plaintiff destroyed the documents in the ordinary course of business, and that there was no intention to deceive.[10] I would suggest that why evidence was destroyed, or concealed, is irrelevant to the application of the evidentiary rule of "spoliation", and should not be considered by the court when deciding to apply the rule. Once the party relying on the rule has established facts proving that the adverse party has destroyed, or concealed evidence, necessary to establish facts required to prove the cause of action, and there is no other evidence to establish or refute the allegations, the court should presume the destroyed or concealed evidence would be unfavourable, subject to rebuttal by the party against whom the evidence would otherwise have been proferred.

St. Louis continues to be relied upon in contemporary case law as the leading case on "spoliation" as a rule of evidence, despite the age of the decisions. Unfortunately, *St. Louis* is the most recent decision from the Supreme Court of Canada clarifying "spoliation" as a rule of evidence.

Pleadings

It is not necessary to plead principles or rules of evidence.[11] As a result, it is always open for the court to consider a spoliation evidentiary claim at trial, regardless of whether notice was provided to the adverse party prior to trial. As well, facts substantiating a spoliation evidentiary claim will likely arise after the close of pleadings; at discovery or through the conduct of the adverse party during litigation.

Statutory Remedies

To avoid the uncertainty of an evidentiary ruling at trial on spoliation, there are statutory procedures and remedies that one can use to access evidence prior to trial.

If you are unable to obtain an undertaking from an adverse party to preserve evidence, Rules 32.01 and 45.01 of the *Ontario Rules of Civil Procedure* can be relied upon in pursuing an order to access property prior to trial.

Rule 32.01 enables a party to move before the Court for an order to inspect real or personal property where it is necessary for the proper determination in a proceeding. Rule 45.01 enables a party to move before the Court to obtain an order to preserve property in question in a proceeding or relevant to an issue in a proceeding.

These procedures should be utilized in any case where an expert is required to investigate the condition of an item or premises within the possession, control or power of an adverse party, assuming that access has been, or will be, denied or preservation refused, by the adverse party.

If an adverse party fails to produce evidence based on a claim of privilege, Rule 30.09 requires the adverse party to produce the evidence or make it available for inspection 90 days prior to trial or the adverse party cannot use the evidence at trial.

Rule 31.07 (2) prevents an adverse party from using any evidence at trial that the adverse party refused to produce or make available for inspection.

Spoliation as a Tort

Does the Tort of Spoliation Exist?

"Spoliation" is the term used to define the rule of evidence whereby the court presumes that evidence destroyed or concealed by a party would have been unfavourable to that party. Therefore, the tort of spoliation, if it exists, as defined by Borins, J. in *Spasic*, is a cause of action enabling a party to claim damages against an adverse party as a result of harm suffered because the adverse party has destroyed or concealed evidence.[12] The problem with Justice Borins' definition, with due respect, is that it is not based upon any Canadian legal

precedent, because there are no Canadian legal precedents establishing or defining the tort of spoliation. No Canadian court has awarded any relief for the tort of spoliation.

Only in the last ten years have the courts in Canada begun considering whether the tort of spoliation exists. In *Endean* v. *Canadian Red Cross Society*, Justice Braidwood of the British Columbia Court of Appeal concluded that "spoliation" is an evidentiary rule which raises a presumption, and is not an independent tort. Justice Braidwood was of the view that a rebuttable presumption could not give rise to a separate and completed tort, as the fact that evidence has been destroyed, and the resulting presumption, are only parts of the evidence in a case and may not result in a claim succeeding.[13] Therefore, allowing spoliation to be a tort would be premature in many cases, as the court may not find the defendant liable for the other pleaded causes of action, despite the defendant's inability to rebut the presumption. Braidwood, J. claimed that spoliation as a tort deprives the defendant of the right to rebut the presumption, i.e. to prove that the destroyed or concealed evidence would not be unfavourable.[14] Moreover, the harm caused to the plaintiff by spoliation, in the justice's view, is only relevant to proving the fault for the other pleaded causes of action.[15]

Braidwood, J. apparently believed that the spoliation evidentiary presumption was sufficient to remedy any harm caused to the plaintiff's ability to prove its case. The theory goes as follows: Were the defendant able to rebut the presumption, there would be no actual harm suffered by the plaintiff as the destroyed or concealed evidence would not have assisted the plaintiff. Therefore there is no need for a separate tort to be asserted to obtain relief.

An appeal in *Endean* to the Supreme Court of Canada was not ultimately pursued,[16] and the decision has not been reconsidered by the British Columbia Court of Appeal. As a result, the "tort" of spoliation continues not to exist in British Columbia.

However, in Ontario and Alberta, the tort of spoliation may exist, even though no court has yet to award any relief for the tort.

Borins, J., in *Spasic*, concluded that a court is entitled to consider a claim based on the tort of spoliation.[17] He viewed a claim based on the tort of spoliation as an additional, or alternative, claim to be considered only if it is established that the destruction or concealment of evidence by the defendant results in the inability of the plaintiff to establish the other torts pleaded in the statement of claim.[18] Justice Borins concluded that if it is proven that the destruction or concealment of evidence by the defendant resulted in harm to the plaintiff by making it impossible to prove the claim, then it would be up to the trial judge to determine whether the plaintiff should have a remedy.[19] He observed: "...I do not see why the existence of procedural sanctions or the "spoliation inference".... should in themselves preclude the recognition of an independent tort."[20] If a plaintiff relies on the spoliation presumption, and the court will hear and consider evidence of spoliation, there is no reason why the court should be precluded from considering all possible remedies including the tort of spoliation.[21]

The Alberta Court of Appeal, in *Kacperski,* permitted the plaintiff to amend the statement of claim and plead the tort of spoliation. Cote, J.A. stated: "It is conceded that there is an emerging and arguable new free-standing tort of spoliation." However, he provided no reasons or comment on the validity, or feasibility, of the tort.

Leave to appeal *Spasic* was dismissed by the Supreme Court of Canada, and *Kacperski* was not appealed. Therefore these cases are the leading cases on the tort of spoliation in their respective provinces. As a result, a claim for damages based on the tort of spoliation can proceed to trial if properly pleaded. However, whether the tort of spoliation actually exists and what relief is to be awarded if it does, still need to be determined at trial.

Pleading the Tort of Spoliation

In *Coriale (Litigation Guardian of)* v. *Sisters of St. Joseph of Sault Ste. Marie,* Molloy, J. permitted the

plaintiff to amend the statement of claim to add a claim based on the tort of spoliation.[22] Justice Molloy concluded that in order to plead the tort of spoliation the plaintiff must set out sufficient particulars to plead all constituent elements of the tort and to disclose to the defendant what the defendant's responsibility is said to be.[23] Justice Molloy cautioned that the requirement for particulars should not be so onerous as to defeat the plaintiff's claim at the preliminary stage, and that the tort of spoliation would be sufficiently pleaded in the Statement of Claim, to the extent of the plaintiff's knowledge or belief, if the following is particularized:

- whether the evidence was destroyed, altered or mutilated
- when the evidence was destroyed, altered or mutilated
- who destroyed, altered or mutilated the evidence
- any special duties owed by the defendant with respect to the preservation of evidence
- the remedies claimed as a result of the spoliation, with respect to the tort and the evidentiary rule.[24]

Damages

The word "tort" is defined in the Oxford dictionary as wrongful conduct or an infringement of a right (other than under contract) leading to legal liability. I would suggest that the real issue with respect to whether the tort of spoliation exists, or should exist, is whether there are any damages to be awarded as a result of the wrongdoer's legal liability.

In *Spasic*, Borins, J. stated that the type of remedies to be awarded should be determined by the trier of fact.[25] However, if there are no damages, or there is no relief, that can be awarded for the tort of spoliation, why allow such a claim to proceed to trial?

If the damages are to be compensatory, what is being compensated? In *Spasic*, the harm caused by the destruction or concealment of evidence is the impossibility for the plaintiff to prove its case.[26] However, if the spoliation rule of evidence creates a rebuttable presumption against the wrongdoer, how could a plaintiff not prove its case if the defendant is unable to rebut the presumption and the presumption is correctly applied? The purpose of the presumption is to enable inferences to be drawn in favour of the plaintiff's case despite the absence of evidence.

If the defendant rebuts the presumption by proving the destroyed or concealed evidence would not have been unfavourable, why should the defendant have to compensate the plaintiff for anything? If the presumption is rebutted there is no actual harm to the plaintiff as the evidence would not have assisted the plaintiff in proving its case. If, despite the spoliation inference, the court is still

going to determine the defendant's liability with respect to the other causes of action pleaded, one could argue that there is no reason to assert an independent tort of spoliation as the plaintiff will either succeed or fail despite the inferences drawn from the spoliation presumption.

If the court correctly applies the spoliation rule of evidence and draws the proper inferences arising from the presumption against the defendant, justice will be served with respect to the other causes of action pleaded and there is no reason to plead the tort of spoliation. If the defendant is unable to rebut the spoliation presumption, but is still found not to be liable on the main cause of action, what should the award for the tort of spoliation be? Not the damages that would have been awarded for the other causes of action, as in that situation the defendant is essentially being sanctioned for conduct for which the court absolved the defendant of liability. As well, this would likely constitute an abuse of process which could bring the administration of justice into disrepute.

It appears that the only way a claim based on the tort of spoliation could be viable, is when the conduct of the defendant in the destruction, or concealment, of evidence is sufficient to warrant punitive damages. Presumably, the conduct would have to be of such a nature as to meet the criteria for punitive damages established by the Supreme Court of Canada in *Whiten* v. *Pilot Insurance*[27].

American Jurisprudence

Several Courts in the United States have found that the tort of spoliation exists, and have awarded relief. However, different jurisdictions have established different criteria for the tort.

Although an analysis of American law is beyond the scope of this article, counsel proceeding with a claim based on spoliation should carefully canvass the American law on the subject, which could provide useful guidance to Canadian courts.

Conclusion

"Spoliation" as a rule of evidence has been applied for over a century by courts in Canada, and will continue to be applied where justice and circumstances warrant. It is important for counsel to ensure that all relevant evidence is accounted for, and that the court draws proper inferences when evidence has been destroyed or concealed.

It will be up to courageous counsel to bring the claim of spoliation to trial, so that the bar can learn whether this anomalous "tort" actually exists and, if it does, the relief that can be obtained. The right set of facts and a full evidentiary record are the main ingredients. All that is then needed is the master chef to prepare an argument that will lead to a decision clarifying the tort of spoliation and the available remedies.

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Notes

[1] *St. Louis* v. *Canada* (1896), 25 S.C.R. 649 (S.C.C.) [hereinafter referred to as "*St. Louis*"] at Q.L. pg. 3.
[2] Supra at Q.L. pg. 22.
[3] Supra at Q.L. pg. 10.
[4] *Spasic Estate* v. *Imperial Tobacco Ltd.*, [2000] O.J. No. 2690 (Ont. C.A.) [hereinafter referred to as "Spasic"] par. 21.
[5] *Endean* v. *Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C. C.A.) [hereinafter referred to as "*Endean*"]
[6] *Spasic* supra and *Kacperski* v. *Orozco*, [2005] A.J. No. 575 (Alta. C.A.)
[7] I used the words "should have" because it is necessary to provide evidence establishing that it is more probable than not that a party had evidence to establish a fact and has failed to produce that evidence, prior to relying on "spoliation" as a rule of evidence.
[8] *St. Louis* at Q.L. pg. 22.
[9] Ibid.
[10] Supra at Q.L. pg. 4.
[11] *Spasic* at par. 25.
[12] Supra, *Spasic*, fn 4, at par. 21.
[13] (1998), 157 D.L.R. (4th) 465, at par. 23.
[14] Supra at par. 24.
[15] Supra at par. 30.
[16] *Endean* v. *Canadian Red Cross Society*, [1998] S.C.C.A No. 260
[17] *Spasic* at par. 22.
[18] Supra at par. 21.
[19] Supra at par. 22.
[20] Ibid.
[21] Ibid.
[22] [1998] O.J. No. 3735 (Ont. Crt. Gen. Div.)
[23] Supra at Q.L. pg. 10.
[24] Ibid.
[25] *Spasic* at par. 22.
[26] Supra at par. 21.
[27] [2002] 1 S.C.R. 595