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COMMENTS

SPOILIATION: CIVIL LIABILITY FOR DESTRUCTION OF EVIDENCE

Intentional destruction of evidence has become a serious legal problem. Recently, the A.H. Robins Company was accused of intentionally destroying incriminating documents relevant to Dalkon Shield litigation.¹ Even documents the court ordered to be preserved were allegedly destroyed by an attorney representing the company.² The A.H. Robins Company is not the only corporation accused of intentionally destroying evidence. An attorney representing the Eastman-Kodak Company in an antitrust suit admitted that he destroyed documents relating to the litigation.³

Destruction of evidence benefits the wrongdoer and injures the victim—a party seeking legal relief. Under the present state of the law, an individual may decide it is more advantageous to destroy crucial evidence and face the legal penalty, if any, than to have the damaging evidence introduced at trial, especially when the law provides inadequate remedies to deter this type of conduct.

As society evolves, individuals necessarily sustain new injuries that require courts to fashion appropriate remedies.⁴ Tort law is responding to

1. McAllister, *Dalkon Story Sure to Rewrite Robins' History*, Richmond Times Dispatch, June 23, 1984, at A8, col. 4. The A.H. Robins Company's ["Robins"] former in-house counsel testified that Robins' top executives ordered employees to destroy documents which would reveal the corporate executives' knowledge of medical problems associated with the use of the Dalkon Shield intrauterine birth control device. Robins had been charged with negligence in designing, testing, and manufacturing the device. *Id.*; see also Morris, *Has Ruling on 1977 Robins Memo Opened Concealment Question Door?*, Richmond Times Dispatch, June 23, 1985, at A9, col. 4 (women across the nation contend they have suffered sterility or other serious injury as a result of having worn the Dalkon Shield).

2. A lawyer representing Robins kept boxes of Dalkon Shield documents at his home. The documents contained several medical studies performed on the contraceptive device. One Minnesota judge ordered the records to be preserved, and another judge ordered the records to be produced. Nevertheless, when the time came to produce the documents, the lawyer claimed his wife had thrown them away when she did her spring cleaning. Walsh, *A.H. Robins is Due in Court to Explain How Dalkon Shield Papers Disappeared*, Wall St. J., Aug. 20, 1984, at 8, col. 1.

3. In fact, however, the attorney later revealed to the trial judge that he had lied about destroying the documents in order to withhold them from discovery. See *Judge's Letter Spurs Probe by Prosecutor of Kodak's Lawyer*, Wall St. J., Apr. 11, 1978, at 1, col. 4.

4. As Professor Carl Wright has stated:

Arising out of the various and ever increasing clashes of the activities of persons liv-

the increasing need to protect individuals' rights and interests.⁵ This comment will explore a newly adopted tort which imposes civil liability for the intentional destruction of evidence. First, it will examine the present state of the law.⁶ It will then explore a recent California decision⁷ recognizing an action in tort for *intentional* spoliation of evidence and a Florida case⁸ recognizing the tort of *negligent* spoliation of evidence, leading to speculation that it might recognize a cause of action for *intentional* spoliation. Finally, it will analyze the viability of this new tort and implications of adopting it,⁹ as well as certain alternative remedies to this potential cause of action.¹⁰

I. THE PRESENT STATE OF THE LAW

California is the only state which recognizes tort liability for the intentional spoliation of evidence,¹¹ while Florida has implied that it might adopt the new tort in a proper case.¹² In all other states, intentional destruction of evidence may lead to criminal liability under the state's penal code, obstruction of justice statute, or contempt of court provisions.¹³

ing in a common society, carrying on business in competition with fellow members of that society, . . . in short, doing all the things that constitute modern living—there must of necessity be losses, or injuries of many kinds sustained as the result of the activities of others. The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.

Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944).

5. "[T]he law of torts must constantly be in a state of flux, since it must be ever ready to recognize and consider new losses arising in novel ways." *Id.* New torts are constantly being recognized. Recent additions to tort law include causes of actions for wrongful death, wrongful life, and invasion of privacy. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (4th ed. 1971).

Spoliation is a legal term meaning destruction of evidence; it constitutes an obstruction of justice. BLACK'S LAW DICTIONARY 1257 (5th ed. 1979).

6. See *infra* notes 11-24 and accompanying text.

7. *Smith v. Superior Court*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984); see *infra* text accompanying notes 25-43.

8. *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984); see *infra* text accompanying notes 44-55.

9. See *infra* notes 56-108 and accompanying text.

10. See *infra* notes 109-12 and accompanying text.

11. *Smith v. Superior Court*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984).

12. See *Bondu v. Gurvich*, 473 So. 2d 1307, 1312 (Fla. Dist. Ct. App. 1984).

13. Virginia, for example, does not have a statutory provision specifically dealing with the destruction of evidence. However, Virginia's obstruction of justice statute provides that a person shall be deemed guilty of a class 1 misdemeanor if he knowingly attempts to obstruct or impede the administration of justice in any court. This provision would cover the intentional destruction of evidence. VA. CODE ANN. § 18.2-460 (Cum. Supp. 1985); see also KAN. STAT. ANN. § 21-3816 (1981) (class A misdemeanor); MASS. ANN. LAWS ch. 268, § 13B (Michie/Law. Co-op. 1980) (punishable by fine, imprisonment or both); R.I. GEN. LAWS § 11-32-3 (1981).

Statutes prohibiting the destruction of evidence vary widely in their scope and in the elements of proof required.

States which have statutes similar to the Model Penal Code¹⁴ prohibit destruction of documents or real evidence with the intent to impair their availability in a prospective proceeding.¹⁵ Other jurisdictions have statutes which prohibit destruction of evidence relevant to a *criminal* proceeding.¹⁶ Still other statutes focus on the spoliator's state of mind alone, making it illegal to destroy evidence when the actor believes a proceeding is about to be instituted.¹⁷

The existing provisions dealing with spoliation are inadequate for several reasons. First, under the majority of statutes spoliation is only a misdemeanor.¹⁸ As a California court recognized in adopting the new tort for spoliation, the punishment for a misdemeanor is a minimal deterrent where a party to a civil action stands to gain substantial monetary benefit by destroying crucial evidence.¹⁹

Secondly, spoliators may slip through loopholes in the applicable code or statute and thereby escape any penalty. For example, under some statutes an individual may escape criminal liability where evidence is destroyed before a legal proceeding is instituted, even though the spoliator reasonably believed a legal proceeding or investigation was likely to arise.²⁰

Because of these statutory loopholes, many lawyers believe they can legally and ethically advise their clients to destroy evidence.²¹ The Model

14. MODEL PENAL CODE § 241.7 (1962) provides it shall be a misdemeanor to alter, destroy or conceal documents or other real evidence if, "believing that an official proceeding or investigation is pending or about to be instituted," a person acts "with purpose to impair its verity or availability in such proceeding or investigation" (emphasis added).

15. See, e.g., CAL. PENAL CODE § 135 (West 1970) (misdemeanor). Some state statutes have provisions similar to the Model Penal Code but make evidentiary destruction a felony. See, e.g., MINN. STAT. ANN. § 609.63(1)(7) (West Cum. Supp. 1985) (destruction of evidence is considered forgery and carries a penalty of up to three years in jail, a \$5,000.00 fine or both); MO. ANN. STAT. § 575.100.1(1) (Vernon 1979) (class D felony if actor impairs a felony proceeding, otherwise class A misdemeanor); N.Y. PENAL LAW § 215.40(2) (McKinney 1975) (class E felony).

16. See, e.g., FLA. STAT. ANN. § 918.13(1)(a) (West 1985) (third degree felony); IOWA CODE ANN. § 719.3(1) (West Supp. 1979) (aggravated misdemeanor).

17. See, e.g., DEL. CODE ANN. tit. 11, § 1269(2) (Repl. Vol. 1979) (class E felony); 18 PA. CONS. STAT. ANN. § 4910(1) (Purdon 1983) (second degree misdemeanor). Other statutes require the spoliator to *know* a proceeding is about to be instituted. See, e.g., OHIO REV. CODE ANN. § 2921.12(a)(1) (Baldwin 1979) (third degree felony); TEX. PENAL CODE ANN. § 37.09(a)(1) (Vernon 1974) (class A misdemeanor).

18. See *supra* notes 13-15 & 17.

19. *Smith*, 151 Cal. App. 3d at 501, 198 Cal. Rptr. at 835.

20. See *supra* note 16 and accompanying text.

21. Rubin, *A Casuerie on Lawyer's Ethics in Negotiations*, 35 LA. L. REV. 577, 587 (1975) (stating that juxtaposition of the permissible and the criminal leads inevitably to the con-

Code of Professional Responsibility provides little guidance. The Code only directs an attorney as to when it is illegal to conceal or knowingly fail to disclose evidence,²² thereby raising a possible inference that destruction of evidence may be permissible in some situations. While the Code prohibits a lawyer from counseling or assisting his client in illegal conduct,²³ this prohibition will not be implicated if the destruction fits within a statutory loophole and is not illegal. Indeed, if it is permissible to destroy evidence, a lawyer may feel duty bound to advise destruction in fulfillment of his obligation to represent his client zealously.²⁴ Finally, and more importantly, statutory relief leaves the victim uncompensated for the damages suffered as the result of another's wrongdoing.

II. BIRTH OF A NEW TORT

The California Court of Appeal became the first court to recognize a tort for intentional spoliation in *Smith v. Superior Court*.²⁵ Phyllis Smith was permanently blinded when a wheel flew off of an oncoming van and crashed through the windshield of her car.²⁶ After the accident, Abbott Ford ("Ford"), the dealership which had customized the van, towed the vehicle to its shop for repairs. Shortly thereafter, Smith's attorney contacted Ford, which agreed to retain certain van parts for further inspection and testing. However, when Smith's attorneys later requested the parts for inspection, Ford stated that the parts had been lost, destroyed, or transferred and were therefore unavailable.²⁷ Ford's conduct prompted Smith to allege a cause of action for "Tortious Interference with Prospective Civil Action By Spoliation of Evidence."²⁸ The complaint specifically alleged that Ford had promised to retain such van parts, that Ford knew such evidence would be essential proof in Smith's lawsuit, and that Ford "knew or should have known that the Smiths would be induced to rely upon its promise by forbearing from seeking a temporary restraining or-

clusion that all that is not criminal is acceptable).

22. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1983) (A lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal.") with *id.* DR 7-101(a)(1) (A lawyer shall not intentionally fail to seek lawful objectives through available means.).

23. *Id.* DR 7-102(A)(7).

24. *Id.* EC 7-1 (A lawyer has a duty to both his client and the legal system to represent his client zealously within the bounds of the law.).

25. 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984).

26. *Id.* at 494, 198 Cal. Rptr. at 831.

27. *Id.* Under California's liberal rules allowing pleadings to allege alternative causes of action, the plaintiff's brief asserted that the defendant either lost, destroyed, or transferred the van parts.

28. *Id.*; see also Note, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961 (1985); S. Lascher, *Spoliation of Evidence: A Troublesome But Vital Tort* (Summer 1984) (unpublished manuscript) (Miss Lascher is a student at Hastings Law School, San Francisco, Cal.).

der to compel it to maintain the evidence securely."²⁹ Smith further alleged that Ford had intentionally lost, destroyed or disposed of this essential evidence and that plaintiff's damage was the "significant prejudice" to Smith's opportunity to obtain compensation for her injuries.³⁰

In recognizing a cause of action for intentional spoliation for the first time,³¹ the California Court of Appeal relied on the reasoning of Professor Prosser.

New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not itself operate as a bar to a remedy.³²

Applying Prosser's reasoning, the court decided that the plaintiff had a protectable interest in bringing a products liability action against Ford and that the defendant's intentional destruction of potential evidence in that action had "significantly prejudiced" that interest.³³ Therefore, in order to protect plaintiff's interest in bringing a viable suit, the court held that creation of civil liability for the intentional spoliation of evidence was justified.³⁴

The court found support for creation of the new tort in a California Supreme Court decision which had impliedly recognized a cause of action for negligent destruction of evidence. In *Williams v. State*,³⁵ a woman sued highway patrolmen, alleging that they had negligently failed to find and preserve evidence during an automobile accident investigation,

29. *Smith*, 151 Cal. App. 3d at 495, 198 Cal. Rptr. at 832.

30. *Id.*

31. In the initial stage of this case, the trial court sustained Abbott Ford's demurrer based on the ground that an intentional tort for spoliation of evidence did not exist. Smith then filed a writ of mandate directing the trial court to recognize the cause of action. *Id.* at 494, 198 Cal. Rptr. at 831. The court of appeal limited the tort's application to cases that had not yet gone to trial. This was necessary to avoid collateral estoppel issues. *Id.* at 498, 198 Cal. Rptr. at 834.

32. *Id.* at 494-96, 198 Cal. Rptr. at 832 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 3-4 (4th ed. 1971)).

33. *Id.* at 502, 198 Cal. Rptr. at 837.

34. *Id.* Ironically, once the *Smith* case became final, Abbott Ford was able to locate the missing evidence. Smith's attorney agreed to drop the tort and injury charges and settle the case in principal for approximately \$3 million. Telephone interview with Robert E. Hinerfeld, counsel of record for Plaintiff (July 2, 1985); see also Goodrich, *Gone Today, Here Tomorrow*, 4 CAL. LAW. 15 (June 1984).

35. 34 Cal. 3d 18, 664 P.2d 137, 192 Cal. Rptr. 233 (1983).

thereby damaging plaintiff's ability to pursue her case. The court held that plaintiff had not stated a cause of action because she had not proven that the policemen had a duty to find evidence to aid in future litigation.³⁶ However, the court allowed plaintiff to file an amended complaint alleging that the policemen had such a duty, based upon voluntary conduct or statements upon which plaintiff had detrimentally relied.³⁷ The court in *Smith* reasoned that *Williams* represented the California Supreme Court's willingness to recognize a cause of action for negligent destruction of evidence.³⁸ Thus, the court had already moved one step towards creation of an intentional tort of spoliation by recognizing that such destruction might unreasonably interfere with the interests of others—a common element of *all* torts.³⁹

The court countered defendant's argument that a cause of action for intentional spoliation was precluded by a California statute making the willful destruction or concealment of material "about to be produced in evidence" a misdemeanor.⁴⁰ The court observed that the same offense may provoke both a criminal prosecution and a civil tort action where the interests invaded and the objects to be accomplished are different, as the court believed they were in this case.⁴¹ In addition, Ford's alleged destruction was not clearly covered by the penal statute because destruction occurred prior to the filing of any civil action.⁴² Even if it were covered, the court held that a misdemeanor penalty would not provide a sufficient deterrent to protect the plaintiff's interest in preserving potential evidence.⁴³

The impact of the California Court of Appeal's decision is clearly demonstrated in *Bondu v. Gurvich*.⁴⁴ In this case, the Florida Court of Appeal for the Third District seized the opportunity to recognize a cause of action for negligent destruction of evidence just five months after the *Smith* case was decided.⁴⁵

In *Bondu*, the plaintiff, Mrs. Bondu, brought a medical malpractice action against Cedars of Lebanon Hospital for the death of her husband. When requested to produce medical records, the hospital stated that the records could not be located.⁴⁶ Although discovery proceedings revealed

36. *Id.* at 27, 664 P.2d at 143, 192 Cal. Rptr. at 239.

37. *Id.*

38. *Smith*, 151 Cal. App. 3d at 497, 198 Cal. Rptr. at 833.

39. *Id.* at 496, 198 Cal. Rptr. at 832.

40. *Id.* at 497, 198 Cal. Rptr. at 833.

41. *Id.* at 498-99, 198 Cal. Rptr. at 834-35.

42. *Id.* at 499, 198 Cal. Rptr. at 835.

43. *Id.*

44. 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

45. *Id.* at 1313.

46. *Id.* at 1310.

that medical records had been made, none could be found.⁴⁷

Mrs. Bondu's complaint asserted that the hospital had purposefully and intentionally lost and/or destroyed medical records, thereby frustrating her ability to pursue certain proof necessary to establish her case. The trial court dismissed this count with prejudice on the ground that it failed to state a cause of action.⁴⁸ Because of the lack of medical records to support Mrs. Bondu's case, summary judgment was entered for the defendants on the remaining counts.⁴⁹

Bondu filed a subsequent suit alleging the hospital had negligently lost medical records, causing her to lose her medical malpractice suit.⁵⁰ Following California's example, the Florida court held:

If, as in *Williams and Smith*, action for failure to preserve evidence or destruction of evidence lies against a party who has no connection to the lost prospective litigation, then, *a fortiori*, an action should lie against a defendant which, as here, stands to benefit by the fact that the prospect of successful litigation against it has disappeared along with the crucial evidence.⁵¹

The court distinguished the instant case from the earlier one which it had dismissed. In the original suit, the court had failed to recognize a cause of action for failure to produce records which might be necessary to prove plaintiff's malpractice claims because "the uncertainty as to the fact of damages preclude[d] recovery."⁵² In contrast, Mrs. Bondu's second claim was cognizable because it arose once damages had become certain, i.e., once Mrs. Bondu had lost her malpractice suit.⁵³ Under these circumstances, the court was willing to recognize a cause of action for negligent destruction of evidence. Such claim was adequately alleged by Mrs. Bondu's assertions that: (1) the hospital had a statutory duty to keep such records; (2) it had breached this duty by failing to produce such records; and (3) plaintiff was damaged by this breach because it prevented her from proving her lawsuit.⁵⁴

While the court was not presented with a claim of intentional destruction, it seems logical to assume that the court would recognize a tort of intentional spoliation if presented with appropriate facts. In a footnote,

47. *Id.*

48. *Id.*

49. *Id.* Without her husband's medical records, Mrs. Bondu was unable to demonstrate that her husband received negligent medical care.

50. *Id.* The trial court had granted summary judgment in favor of the defendants on the medical malpractice claim because without medical records, no expert testimony could establish malpractice.

51. *Id.* at 1312.

52. *Id.* at 1311.

53. *Id.*

54. *Id.* at 1313.

the court noted that the hospital did not need to prove lack of intent "[s]ince Mrs. Bondu's complaint does not allege that the records were intentionally removed or destroyed."⁵⁵ An obvious inverse corollary to this statement would be that allegations of intentional spoliation would impose a burden on the defendant to prove lack of intentional destruction.

III. VIABILITY OF A TORT FOR INTENTIONAL SPOLIATION

Adopting a tort for intentional spoliation would rectify many of the shortcomings under current law. First, tort liability would create an additional deterrent against spoliation beyond the statutory penalty. Instead of being subject to a simple misdemeanor penalty,⁵⁶ a spoliator might have to contend with a substantial monetary judgment against him. Thus, adoption of the tort would eliminate any benefit of destruction gained under a legal system that provides only criminal penalties. Secondly, imposing tort liability for intentional spoliation would close statutory loopholes.⁵⁷ An individual would no longer be able to escape liability by destroying evidence before a legal proceeding was instituted or by claiming he did not know a legal proceeding would be instituted.⁵⁸ Additionally, recognition of the tort would alleviate any ethical confusion lawyers might have about advising clients to destroy evidence.⁵⁹ Once tort liability for spoliation was established, lawyers would know unequivocally that they could no longer counsel their clients to destroy evidence relevant to a prospective lawsuit. Finally, tort liability would compensate the victim, punish the wrongdoer for his socially unreasonable conduct, and deter others from engaging in spoliation.

Existence of a criminal penalty for spoliation does not preclude adoption of a civil remedy. Many times the same act will constitute a crime against the state and a tort against the individual.⁶⁰ As the California court recognized, criminal law and civil actions serve two completely different interests:

55. *Id.* at 1313 n.5.

56. *See supra* notes 13-15 & 17.

57. *See supra* note 20 and accompanying text.

58. Since the courts have not clarified the elements of the tort, the degree to which statutory loopholes are closed will depend on how the courts construe the element of intent. Logically, liability should be imposed any time an individual destroys evidence with the intention of making it unavailable at a legal proceeding. *See infra* notes 74-89 and accompanying text.

59. *See supra* notes 21-24 and accompanying text.

60. *See, e.g., Williams v. Dickenson*, 28 Fla. 90, 9 So. 847 (1891) (civil suit for damages may proceed concurrently with the criminal prosecution); *Gorman v. McArdle*, ___ Misc. ___, 22 N.Y.S. 479 (N.Y. Sup. Ct. 1893) (A person convicted of a criminal offense when he violated a state statute was also held liable in tort for damages caused by his violation.).

A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, by punishing the offender or eliminating him from society, either permanently or for a limited time, by reforming him or teaching him not to repeat the offense, and by deterring others from imitating him So far as the criminal law is concerned, [the victim] will leave the courtroom empty-handed.⁶¹

It is tort law then that is primarily directed toward compensating individuals, "rather than the public, for losses which they have suffered within the scope of their legally recognized interests."⁶² It is concerned not only with an individual's conduct but also with acts "which are unreasonable, or socially harmful, from the point of view of the community as a whole."⁶³

Spoliation is an act that constitutes both a crime against the state and a tort against the individual. The court in *Smith* recognized tort liability for intentional spoliation based on Prosser's probable expectancies theory, which states that "a large part of what is most valuable in modern life depends upon 'probable expectancies,' [and] as social and industrial life become more complex the courts must do more to discover, define and protect them from undue interference."⁶⁴ The *Smith* court reasoned that the right to bring a lawsuit is a probable expectancy which deserves legal protection.⁶⁵ When a party's intentional conduct significantly prejudices another's opportunity to win a suit, compensation for that injury is appropriate.⁶⁶ With the exception of California and perhaps Florida, all other jurisdictions look only to their criminal law in these instances, leaving the individual unprotected and uncompensated. Having both criminal and civil tort causes of action for spoliation provides an equitable remedy for both society and the individual since the interests invaded are different.⁶⁷

61. *Smith*, 151 Cal. App. 3d at 498, 198 Cal. Rptr. at 834 (quoting W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 2, at 7 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON]).

62. PROSSER & KEETON, *supra* note 61, § 1, at 5-6.

63. *Id.* at 7.

64. *Smith*, 151 Cal. App. 3d at 502, 198 Cal. Rptr. at 836 (quoting PROSSER & KEETON, *supra* note 61, § 130, at 950).

65. *Id.* at 502, 198 Cal. Rptr. at 837.

66. A misdemeanor penalty alone is a minimal deterrent where a party stands to gain a great deal monetarily if the crucial evidence is destroyed. Recognizing a tort for intentional spoliation alleviates any advantage to be gained in destroying crucial evidence.

67. *See* PROSSER & KEETON, *supra* note 61, § 1, at 8.

IV. ELEMENTS AND IMPLICATIONS OF THE NEW TORT

A. *Elements Necessary for a Cause of Action for Intentional Spoliation of Evidence*

The courts in *Smith v. Superior Court*⁶⁸ and *Bondu v. Gurvich*,⁶⁹ although discussing a cause of action for intentional spoliation of evidence, failed to firmly establish the elements of the tort. The nature of the tort itself, however, provides some guidance.

Intentional spoliation falls into the category of interference torts⁷⁰ which protect an individual's interest in "probable expectancies."⁷¹ Intentional interference with a prospective economic advantage, a tort closely analogous to intentional spoliation, is helpful in providing a model. Both torts allow recovery where a person has intentionally interfered with another individual's legally protected probable expectancy.

The elements of intentional interference with a prospective economic advantage are: (1) existence of a potential economic relationship; (2) the defendant's knowledge of the potential relationship; (3) interference; (4) intent⁷²—if the act of interference is unlawful in itself, intent is presumed; in other cases, actual intent is required; (5) a causal relationship between the act of interference and the injury; and (6) damage.⁷³

68. 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984).

69. 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

70. Other interference torts include interference with a contractual relationship, interference with prospective employment, and interference with prospective customers or employees. PROSSER & KEETON, *supra* note 61, § 130, at 1006.

71. A "probable expectancy" is an individual's reasonable belief that he will derive a benefit from an event that he reasonably expects will occur. See *supra* note 64 and accompanying text.

72. When courts analyze the intent element, they first determine the defendant's motive and the method he used to accomplish his purpose. However, most decisions have turned entirely upon the defendant's purpose. If the reason underlying the interference is a malevolent one or a desire to harm the plaintiff, the element of intent is usually satisfied. PROSSER & KEETON, *supra* note 61, § 130, at 1009.

73. Troy, *Tortious Interference with Existing or Potential Economic Relationship and Virginia Statutory Conspiracy*, THOSE OTHER TORTS: PERSONAL ACTIONS FOR BODILY HARM pt. III, at 1-2 (1982); see also *Buckalow v. Johnson*, 14 Cal. 3d 815, 537 P.2d 865, 122 Cal. Rptr. 745 (1975) (plaintiff was allowed to recover damages where he proved the defendant intentionally interfered with a prospective business advantage causing the plaintiff not to receive the expected benefits of the relationship); PROSSER & KEETON, *supra* note 61, § 130, at 1005.

Virginia courts, of course, recognize torts that have been codified by the legislature, but are also free to recognize common law torts. Most recently the Virginia Supreme Court recognized a common law cause of action for intentional interference with a prospective business advantage in *Allen Realty Corp. v. Holbert*, 227 Va. 441, 318 S.E.2d 592 (1984). "The cause of action arises from an intentional, improper interference with another's contractual relations, and this interference must (1) induce or otherwise cause a third party not to enter into a prospective contract with the plaintiff, or (2) prevent the plaintiff from entering into

A parallel can easily be drawn for elements constituting the tort of intentional spoliation: (1) existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) destruction of evidence; (4) intent—if the act of interference is unlawful in itself, intent is presumed; in other cases, actual intent is required; (5) a causal relationship between the act of destruction and the inability to prove the lawsuit; and (6) damage.

1. Duty

It is not clear if and when a duty exists to preserve evidence or whether such a duty would be a necessary element to prove intentional spoliation. However, in both *Smith* and *Bondu*, a potential duty existed. In *Smith*, Ford agreed with Smith's counsel to preserve certain auto parts;⁷⁴ in *Bondu*, the hospital had a statutory duty to make and maintain medical records.⁷⁵ However, since intentional torts punish one's wrongful intentional conduct⁷⁶ and negligence actions punish one's failure to perform a duty owed to another,⁷⁷ it is possible that existence of a duty to preserve evidence would not be required to prove intentional spoliation.

In *Spano v. McAvoy*,⁷⁸ a New York federal district court took a step towards clarifying the role of duty in a potential cause of action for intentional spoliation. In that case the court specifically examined whether the existence of a duty to preserve evidence gave rise to a constitutionally protected interest in that evidence on the part of the plaintiff.

Mark Spano was killed when his car crashed into a tree while he was being pursued in a high speed chase by Deputy Sheriff McAvoy. A tape recording of the radio transmissions between the defendant, McAvoy, and the sheriff's department during the incident were later erased under the department's thirty-five day recycling plan.⁷⁹

Plaintiff in this suit, the decedent's father, brought a section 1983⁸⁰ federal civil rights action against the sheriff's department alleging that the tape recordings of the radio transmissions were deliberately destroyed in order to deprive plaintiff of evidence in a state wrongful death action.⁸¹ Plaintiff's complaint alleged that this destruction of evidence "deprived

a contract." *Id.* at 449, 318 S.E.2d at 597 (citing Annot., 6 A.L.R.4th 195, 201 (1981)).

74. 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984).

75. 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

76. PROSSER & KEETON, *supra* note 61, § 8. The allegation of intent is a necessary element for an intentional tort cause of action.

77. *Id.* § 30. A cause of action for negligence requires the defendant to have owed a duty to the plaintiff. The plaintiff must allege that the defendant breached his duty.

78. 589 F. Supp. 423 (N.D.N.Y. 1984).

79. *Id.* at 425.

80. 42 U.S.C. § 1983 (1982).

81. *Spano*, 589 F. Supp. at 424-25.

him of some right, privilege, or immunity secured by the constitution or the laws of the United States."⁸²

The court dismissed the plaintiff's complaint for failure to state a cause of action, holding that the plaintiff had failed to establish a cognizable property or liberty⁸³ interest in the tapes protected by the fourteenth amendment.⁸⁴ However, the court conceded that arguably it would have recognized a property interest if the plaintiff had requested that the tapes be preserved prior to their routine erasure.⁸⁵ The court held that a request to preserve the tapes "could have constituted an understanding stemming from an independent source sufficient to yield a legitimate claim of entitlement protected by due process."⁸⁶ The court noted that *Smith v. Superior Court*⁸⁷ was distinguishable from the case at bar because the wrongdoer in *Smith* had previously agreed to preserve certain evidence.⁸⁸ Thus, had the police officer agreed to preserve the tape, Spano might have had a property interest in it, entitling him to bring suit under section 1983 when the tape was destroyed.

From the *Spano* decision, one can conclude that the existence of a duty potentially vests an individual with a property right in the preservation of evidence. More importantly, it appears that a breach of duty provides the fact-finder with an indication that evidence was destroyed with the intent of preventing its introduction in a legal proceeding.⁸⁹ Where an individual has failed to preserve and maintain evidence, the fact-finder may infer that the evidence was intentionally destroyed.

82. *Id.* It is important to note that Spano did not bring a tort action for intentional spoliation, but alleged that his fourth, sixth, eighth, and fourteenth amendment rights were violated where the sheriff's department intentionally erased tapes that allegedly would have revealed Officer McAvoy's wrongful conduct leading up to his son's death. *Id.*

83. *Id.* at 426, 428. The plaintiff could not identify any state law, rule or regulation that would confer a claim of entitlement to the preservation of the tapes. The court held that N.Y. PENAL LAW §§ 215.35, .40 (McKinney 1975), which prohibited tampering with physical evidence about to be used in a legal proceeding, did not vest the individual with a constitutionally protected property interest in the evidence. 589 F. Supp. at 426. In addition, the court found no cognizable liberty interest protecting plaintiff's ability to litigate his suit successfully. *Id.* at 428.

84. *Id.* at 428. Additionally, the court held that the fact that destruction of evidence has been held to give rise to tort liability does not mean that the interest at stake is constitutionally protected.

85. *Id.* at 426.

86. *Id.*

87. 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984).

88. *Spano*, 589 F. Supp. at 427 n.2.

89. *Id.* at 426. Since the sheriff's department regularly recycled tapes every thirty-five days and had no duty to preserve the tapes, a court would have been hard pressed to find that the sheriff's department intentionally erased the tapes with the motivation of preventing their introduction at trial.

2. Damages

As the *Smith* court noted, damages are the most troubling aspect of the tort of spoliation.⁹⁰ The nature of the tort itself prevents the plaintiff from proving damages with a great degree of certainty.⁹¹ One attorney has asked, “[D]oes the plaintiff ask himself, ‘what would the case be worth if I did have this evidence?’”⁹² Fortunately, as the California court recognized, the United States Supreme Court has provided some guidance in this area.⁹³ In *Bigelow v. RKO Radio Pictures*,⁹⁴ the Supreme Court stated that when the defendant’s tortious conduct precludes precise calculation of the amount of damages, the jury “could conclude as a matter of just and reasonable inference”⁹⁵ the amount of damages to be awarded.

In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.⁹⁶

Indeed, this is precisely the situation confronted by the plaintiff in an intentional spoliation action. The defendant’s intentional acts have prevented the plaintiff from proving his damages with certainty. In resolving this dilemma, the *Smith* court stated that:

[w]here the *tort itself* is of such a nature as to preclude the ascertainment

90. *Smith*, 151 Cal. App. 3d at 500, 198 Cal. Rptr. at 835. *Smith*’s product liability case had not yet gone to trial. Therefore, the fact-finder had not established liability or damages against the defendant. *Id.* at 502, 198 Cal. Rptr. at 837.

91. It is possible that a court first require the fact-finder to decide whether the plaintiff would have won the suit if he had had the evidence. Second, after deciding he would have won the suit, the fact-finder would determine how much the suit was worth. However, this is a speculative inquiry at best.

92. See Goodrich, *supra* note 34, at 15.

93. *Smith*, 151 Cal. App. 3d at 500, 198 Cal. Rptr. at 835.

94. 327 U.S. 251 (1946) (The petitioner brought suit under the Sherman and Clayton Acts, alleging that the respondents had entered into an unlawful conspiracy preventing petitioners from obtaining motion pictures for their theaters until after the preferred customers’ theaters had shown the movies first.)

95. *Id.* at 264.

96. *Id.* at 264-65.

of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.⁹⁷

Relaxation of the damages standard provides an equitable solution to the problem of determining damages. Courts have stated that the wrongdoer should bear the risk of his wrongdoing. Consequently, the plaintiff's inability to provide more accurate data in estimating damages because the wrongdoer's misconduct has made data unavailable is no ground upon which to object.⁹⁸ As the *Smith* court noted, relaxing the damages standard for intentional spoliation would not be unique.⁹⁹ There are many interests which the law seeks to protect even though damages cannot be proved with certainty. The court stated:

In wrongful death and personal injury cases, amounts of future earnings are uncertain, but are still recoverable. Likewise, in cases of patent or trademark infringement, damages may be difficult to estimate but nevertheless damage awards are sustained. Further, in tort actions such as libel, slander, and invasion of privacy, substantial damages are awarded without any proof of economic harm or even emotional distress.

Deterrence is an important policy consideration for allowing the maintenance of suits when damages cannot be shown with certainty.¹⁰⁰

It may be more sound for a court to base a damages award for intentional spoliation on its deterrence value rather than on the precise economic value of a lawsuit. A large number of torts are principally concerned with invasions of intangible interests rather than invasions of physical interests. "In this class of cases, damages are said to be 'presumed,' or the wrong is said to be damage in and of itself."¹⁰¹ In awarding

97. *Smith*, 151 Cal. App. 3d at 500, 198 Cal. Rptr. at 835 (citing *Story Parchment Co. v. Paterson P. Paper Co.*, 282 U.S. 555, 563 (1931)).

98. *See, e.g.*, *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 573 (4th Cir. 1976) (defendants in an antitrust suit could not complain that the plaintiff's estimated damages were speculative where the defendant's wrong had been proven and the nature of the tort itself precluded precise ascertainment of damages); *International Wood Processors v. Power Dry, Inc.*, 593 F. Supp. 710, 723-25 (D.S.C. 1984) (in an antitrust suit, the jury awarded damages even though the plaintiff company did not have a previous sales record from which the amount of injury could be measured).

99. *Smith*, 151 Cal. App. 3d at 501, 198 Cal. Rptr. at 836.

100. *Id.*

101. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 7.3, at 528 (1973) (citing *Wayne v. Venable*, 260 F. 64, 66 (8th Cir. 1919)) (one's right to vote "is so valuable that damages are presumed from the wrongful deprivation of it"); *see also Sutherland v. Kroger Co.*, 144 W. Va. 673, 110 S.E.2d 716 (1959) ("damage flows from the

damages, the primary or usual concern is not an economic one at all, but the vindication of an individual's intangible right.¹⁰²

In offering an explanation for courts awarding substantial damages in dignitary tort cases, Professor Dobbs stated:

Perhaps the real explanation for this is that some of these suits serve public law purposes, since they often operate to enforce limits upon the official or unofficial power of persons in authority and *to preserve rights of the public generally to be free from oppressive conduct*. It may well be that substantial damages are permitted in these cases partly in recognition that such public purposes are being served rather than in any belief that a person falsely arrested has suffered humiliation worth \$100,000.¹⁰³

Punitive damages are awarded in dignitary tort cases based on the nature, motive, and extent of the defendant's conduct and may be considered in determining the total damages award.¹⁰⁴

Determining an intentional spoliation damages award in a manner similar to a dignitary tort damages award would alleviate many problems with adopting the new tort. The fact-finder would only have to determine that the defendant destroyed evidence with the intent of preventing its introduction at trial and that the absence of this evidence prejudiced the plaintiff's opportunity to bring or win a lawsuit. The fact-finder would not have to determine whether the plaintiff would have won the lawsuit or precisely how much the lawsuit was worth.

B. *Limitations on a Cause of Action for Intentional Spoliation*

A tort for intentional spoliation should be applicable only to the destruction of *relevant* evidence. That is, the unavailability of the evidence in question must prejudice the plaintiff's right to bring or win a lawsuit.¹⁰⁵ If the evidence is irrelevant, its absence will not affect the plain-

wrongful act, itself injurious to another's right, although no perceptible loss or harm accrues therefrom") (quoting 86 C.J.S. *Torts* § 22 (1954)).

102. D. DOBBS, *supra* note 101, § 7.1, at 509. The list of protected dignitary interests includes false imprisonment, malicious prosecution, intentional infliction of emotional distress, libel and slander, and invasion of privacy. For example, in libel cases there is often no economic harm or even social reaction, but the plaintiff will nevertheless be permitted to recover damages for injury to his reputation. Damages in a libel suit represent a reasonable guess that actual damages have been sustained, even though the amount is not capable of proof. Libel and slander cases sustain money recovery even in the absence of demonstrated pecuniary loss. *Whalen v. Weaver*, 464 S.W.2d 176 (Tex. Civ. App. 1971).

103. D. DOBBS, *supra* note 101, at 531 (emphasis added).

104. *Delta Finance Co. v. Ganakes*, 93 Ga. App. 297, 91 S.E.2d 383 (1956) (threatening a child resulted in that child's emotional distress).

105. To illustrate how the tort works, if a defendant in a products liability suit acted on his attorney's advice and destroyed evidence which prejudiced the plaintiff's opportunity to win his suit, that defendant would not be liable for intentional spoliation since he was merely acting on his attorney's advice, therefore, he would lack the necessary intent to in-

tiff's case, and therefore no harm has been suffered.

Tort liability for spoliation should be limited to the physical destruction of evidence. Once evidence is destroyed, it can never be recovered. Concealed evidence, on the other hand, may later resurface, and a new trial can be ordered.¹⁰⁶ In this instance, the evidence still exists, and the plaintiff has the opportunity to have his case retried once the concealed evidence is recovered or perjured testimony discovered.¹⁰⁷

This tort would not necessarily affect individuals who destroyed records in the ordinary course of business under destruction/retention plans such as in the *Spano* case.¹⁰⁸ However, it would impose a duty upon individuals to refrain from destroying documents dealing with areas of present or prospective litigation if they believed the evidence was relevant. For example, a corporation would be liable in tort if it allowed documents containing critical information concerning use of a product to be destroyed after product liability litigation had already been instituted. The unavailability of such evidence would severely hamper the plaintiffs' ability to show that the corporation's executives knew use of their product was harmful. While the corporation still could maintain that the documents were destroyed in its regular document destruction program, the evident importance of such information might lead the fact-finder to infer an intent to destroy in order to affect a potential lawsuit. Thus, although an assertion that documents were destroyed in the ordinary course of business should be considered by the court, it should not constitute a complete defense to the tort.

V. ALTERNATIVE REMEDIES

Recognition of a tort for intentional spoliation provides the best protection for both the individual and society. However, alternative remedies are available where courts refuse to recognize a tort for intentional spoliation.

In federal court, Rule 37 of the Federal Rules of Civil Procedure permits a court to hold a spoliator in contempt of court and to impose a fine

terfere with the plaintiff's suit and would merely be acting on his attorney's advice. However, the attorney advising the client to destroy evidence would be liable in tort since the attorney instructed the evidence to be destroyed with the intent of making the evidence unavailable at trial.

106. For example, a witness who is intimidated and thereby refuses to testify at trial may later be induced to testify. The same concept applies to perjured testimony.

107. See, e.g., *Taylor v. Maritime Overseas Corp.*, 224 Va. 562, 299 S.E.2d 340 (1983) (The trial court judge has the discretion to order a new trial where evidence is discovered after the trial which could not have been discovered before trial by the exercise of due diligence.).

108. See *supra* notes 78-89 and accompanying text.

where the individual fails to comply with discovery requests.¹⁰⁹ Although contempt provisions do not compensate the injured party, Rule 37 does permit a court to impose a default judgment whereby the plaintiff wins his suit.¹¹⁰ However, Rule 37 sanctions are plagued with the same inadequacies that exist in state obstruction of justice statutes.¹¹¹ Before a court can invoke Rule 37 sanctions, the spoliator must first fail to respond to both the discovery request and a court order compelling discovery. If the individual destroys the evidence prior to discovery proceedings, he can escape Rule 37 sanctions entirely.¹¹²

Another way courts can combat intentional spoliation is to allow the jury to draw an inference that the evidence destroyed was favorable to the plaintiff's case. This remedy is inadequate, however, because a permissible inference does not compel the jury to find that the defendant destroyed the evidence because of its damaging nature. It would be more helpful if the court would instruct the jury that the act of intentional spoliation creates a presumption that the evidence was destroyed because it was favorable to the plaintiff's case.

None of these remedies financially compensate the victim for the loss of his prospective litigation. Also, these remedies still leave room for potential spoliators to gamble on the chance that they will slip through statutory loopholes or that a jury will not infer that the evidence destroyed was favorable to the plaintiff's suit. Finally, none of these remedies provide a deterrent effect equivalent to a potentially large monetary judgment against the spoliator.

VI. CONCLUSION

It is remarkable that by 1986 only two courts in the nation protect an individual against the harmful effects of intentional spoliation. In today's society where we have causes of action for wrongful death, wrongful birth, and invasion of privacy, it seems absurd that the law does not protect an individual's right to bring a lawsuit based upon intentional spoliation of evidence.

The legal problems of determining damages where the value of the evidence and the prejudicial effect of its unavailability are uncertain and of

109. See FED. R. CIV. P. 37(b)(2)(D) (If a party fails to obey an order or permit discovery, the court may hold that party in contempt of court.).

110. See *id.* 37(b)(2)(C). Virginia has sanctions comparable to Rule 37. VA. R. CT. 4:12(4)(b)(1)-(b)(2) (Repl. Vol. 1985).

111. See *supra* notes 13-17 and accompanying text.

112. For example, Rule 37 sanctions could not be imposed in the *Smith* case because Abbott Ford destroyed the van parts prior to a discovery request. An individual cannot be in contempt of court for failure to produce documents requested where the evidence was unavailable prior to the request.

determining the proper elements of proof are problems courts have dealt with before. The benefits gained by the individual and society in recognizing the tort far outweigh the accompanying burdens. Our judicial system is founded on the theory that where there is a wrong there is a remedy, and destruction of evidence fundamentally undermines the fair administration of justice. Certainly this is a wrong from which people and society deserve to be protected.

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