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Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence

Phyllis Smith was injured when the wheel of an oncoming Ford van separated from the vehicle and crashed through the windshield of her car.1 Abbott Ford, the dealer that customized the van, towed the van to its shop for repairs and promised Smith that it would preserve the van's wheels and brakes pending Smith's further investigation into the cause of the accident for purposes of a possible personal injury action. Abbott Ford thereafter claimed to have destroyed, lost, or transferred the parts, rendering any inspection impossible. Smith brought suit against Abbott Ford, alleging that it had tortiously interfered with her prospective civil action by intentionally spoliating evidence, and she claimed as damages the significant prejudice of her opportunity to obtain compensation for her injuries.2 The trial court rejected the new tort and sustained Abbott Ford's demurrer.3 The California Court of Appeals for the Second District reversed the trial court's dismissal of plaintiff's action, holding that Smith could proceed with a tort action against Abbott Ford for interference with a prospective civil suit by intentional spoliation of evidence.4 Smith v. Superior Court, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984).

2. Id. at 495, 198 Cal. Rptr. at 831.
3. Id. at 495, 198 Cal. Rptr. at 832. Plaintiff thereafter filed a petition for a writ of mandate to direct the trial court to allow the cause of action.
4. Id. at 503, 198 Cal. Rptr. at 837. The appellate court restricted the use of the new tort to cases in which the underlying litigation had not yet gone to trial, thereby avoiding problems of collateral estoppel.

After the appellate court decision, the California Supreme Court denied a rehearing, leaving the new tort intact. Faced with the task of defending the suit, Abbott Ford announced that the missing van parts had reappeared. Within weeks, Smith and Abbott Ford settled in principle; Smith dropped the new tort action and the original personal injury suit in exchange for Abbott Ford's payment of a large sum of money. See Goodrich, Gone today, here tomorrow, 4 CAL. LAW., June, 1984, at 15.

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The Smith court's recognition of a new tort of intentional spoliation of evidence raises several important issues. Recognizing a new tort action requires the court to identify an impermissible interference with a legally protectable interest and then to apply the traditional tort elements to the allegedly tortious conduct. A court asked to recognize the new tort of intentional spoliation of evidence must first determine whether the right to bring a personal injury lawsuit is a legally protectable interest. If the court determines that the interest is deserving of legal protection, it must next decide whether interference with that interest by intentional spoliation of evidence is tortious conduct. In doing so, the court must determine how to apply the traditional tort elements of intent, causation, and damages. In addition, because most states, like California, have a criminal statute that proscribes the intentional destruction of evidence, the court must consider whether the existence of criminal sanctions precludes the plaintiff's tort action. Finally, in determining whether to recognize a separate tort action, the court must measure the adequacy of existing means of dealing with spoliation of evidence within the framework of the underlying litigation itself.

Although no court prior to Smith had recognized spoliation of evidence as a separate tort, new torts often are created through the judicial process. In considering recognition of a new tort, a threshold consideration is whether the alleged conduct tortiously interferes with a legally protectable interest,

5. An intentional tort action requires an allegation of intent, W. Prosser, Handbook of the Law of Torts § 7 (4th ed. 1971); causation, id. §§ 41, 42; and harm, id. § 30. A tort action for negligence requires, in place of intent, defendant's breach of a duty owed to the plaintiff. Id. § 30.

6. Section 135 of the California Penal Code provides:
Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.
Cal. Penal Code § 135 (West 1970); see also infra note 23 and accompanying text.

7. See infra notes 39-44 and accompanying text.

8. See 4 Witkin, Summary of California Law, Torts § 10, at 2310 (8th ed. 1974); see also Knepper, Review of Recent Tort Trends, 33 Def. 1, 15 (1984) (describing judicial recognition of the tort of bad faith used to punish insurers for bad faith refusal to pay benefits to insureds). New torts are also recognized through the legislative process. See Knepper, supra, at 12 (reporting the Supreme Court's ruling that Congress, in 42 U.S.C. § 1983, created a species of tort liability in favor of persons deprived of federally secured rights); see also infra note 26 (state wrongful death statutes).
however novel the interest or the resulting injury may be. In allowing tort actions for invasion of privacy\(^9\) and wrongful birth,\(^11\) for example, courts have recognized interests that previously had not received legal protection. Once injury and damages are shown, the court asked to find the interest protected must carefully evaluate the proposed tort in light of additional policy considerations, including

the foreseeability of harm to the plaintiff, the degree of certainty that plaintiff suffered injury, the closeness of the connection between the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach . . . .\(^12\)

9. See W. PROSSER, supra note 5, § 1, at 3-4 ("When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.").

10. For the original argument supporting a tort action for invasion of privacy, see Brandeis & Warren, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890) (arguing for the protection of private individuals from the growing abuses of the press). Professor William L. Prosser defines the tort of invasion of privacy as an amalgam of four separate torts: "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." Prosser, Privacy, 48 CAL. L. REV. 383, 389 (1960); see, e.g., Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (plaintiff entitled to recover for emotional injury suffered as a result of defendant's exhibition of a movie that enacted the true story of plaintiff's past experiences as a prostitute and accused murderer); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927) (defendant garage manager invaded plaintiff's right to privacy by putting up a notice in his window announcing to the world that plaintiff owed him money). The Supreme Court also has expanded the right to privacy to protect more personal individual interests. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (a woman's right to terminate her pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting the details of marital intimacy such as the use of contraceptives).

11. Wrongful birth actions have been brought by parents against medical professionals whose negligence proximately caused the birth of an unwanted child. Courts have held that the parents' interest in making an informed procreative choice is invaded by the negligence of such medical professionals. The deprivation of the parents' opportunity to choose not to conceive the child is therefore a legally compensable injury. See, e.g., Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (parents of rubella syndrome child entitled to recover in tort from doctors who failed to diagnose pregnant woman's rubella and to inform her of the potential danger to the fetus); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (wrongful birth action permitted against a physician whose negligent performance of a sterilization failed to prevent an unwanted birth).

12. Rowland v. Christen, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 170 Cal. Rptr. 97, 100 (1968); see also W. PROSSER, supra note 5, § 1, at 6 ("[T]he law
If the benefits of recognizing the new tort outweigh its accompanying burdens, the court should create the new cause of action.

Interference torts were first recognized in the mid-nineteenth century beginning with the tort of interference with contractual relations. In the original interference tort action, the obligee of a contract sued a third party for inducing the obligor to breach the contract. The court held that the obligee's interest in the fulfillment of the contract was a legally protected interest, and the defendant's interference was therefore tortious. Modern American interference tort doctrine later expanded the scope of protected interests to include various commercial and economic relationships, even in cases in which no legally enforceable contractual obligation existed. Such torts include unjustifiable interference with a prospective advantage and unjustifiable interference with business relations.

must measure [the defendant's acts, and the harm he has done, by an objective disinterested and social standard].

14. Id. at 231, 118 Eng. Rep. at 755. In early tort actions for interference with contractual relations, the defendant's motive or purpose was often the decisive factor in the determination of liability. See, e.g., Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1911) (malicious motive to drive competing company out of business provides a basis of tort liability for interference with business relations); cf. Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61, 97 (1982) (suggesting that interference tort liability be imposed only when the interfering act is wrongful in itself rather than basing liability on subjective motivation or malice). The malice requirement has been replaced in intentional interference with contract cases by the requirement that the defendant, with knowledge of the other party's interests, intended to act in such a way that will have the effect of interfering with plaintiff's contract. The malice requirement, however, still lingers in negligent interference with contractual actions. See W. PROSSER, supra note 5, § 130, at 952, 956.
15. See Zimmerman v. Bank of Am., 191 Cal. App. 2d 55, 57, 12 Cal. Rptr. 319, 321 (1961) ("The actionable wrong lies in the inducement to break the contract or sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable."); RESTATEMENT (SECOND) OF TORTS § 766B (1979); W. PROSSER, supra note 5, § 130, at 949-62; see also Broida & Handler, Tortious Interference with Contract and Prospective Advantage in Illinois, 32 De Paul L. Rev. 325, 327-28 (1983) (protected relationships include contracts and expectations of financial advantage); Note, Interference with Contractual and Business Relations in Alabama, 34 Ala. L. Rev. 559, 628 (1983) (Alabama courts' recognition of tort actions for intentional interference with contracts and business relations).
16. The elements of the tort of interference with a prospective advantage are 1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefits to the plaintiff; 2) the defendant's knowledge of the existence of the relationship; 3) the defendant's intentional conduct designed to disrupt the relationship; 4) actual disruption of
Interference torts recognize the value of "probable expectancies," even though the expectancy is merely prospective. In cases of intentional interference with a prospective advantage, for example, a plaintiff is required to prove only that the defendant injured the plaintiff by intentionally disrupting a relationship containing the "probability" of future economic benefit.

After identifying a new interest deserving of legal protection, the court next must determine whether the defendant's conduct invading that interest is tortious. For intentional torts, the plaintiff must prove the traditional elements of intent, causation, and harm. Intent means that the defendant desired to bring about the injury or acted with knowledge that the harm was substantially certain to follow from the conduct. The causation element is two-fold: plaintiff must show first that the harm would not have occurred "but for" the defendant's conduct and, second, that the conduct proximately caused plaintiff's injury. The element of harm requires the plaintiff to show a legally cognizable injury and to prove the amount of damages with reasonable certainty.

Most courts thus far have attempted to address the problem of the intentional spoliation of evidence through criminal obstruction of justice laws rather than through recognition of

17. The elements of the tort of interference with business relations are 1) the defendant's intentional conduct designed to interfere with plaintiff's business relations; 2) the defendant's improper, wrongful, or unlawful conduct; 3) actual interference by defendant's affirmative or threatened act; and 4) damages proximately caused by the defendant's interference. See Purcell Co. v. Spriggs Enter., Inc., 431 So. 2d 515, 522 (Ala. 1983) (per curiam); see also Note, supra note 15, at 600-61 (tort of interference with business relations is also known as interference with advantageous economic relations).


19. See supra note 5.
20. See W. Prosser, supra note 5, § 8.
21. See id. §§ 41-42.
22. Id. § 30, at 143-44.
a separate tort action. Although criminal statutes commonly do not preclude civil liability for the same criminal conduct, a number of courts have relied on the existence of these criminal penalties in refusing to recognize tort actions for the intentional spoliation of evidence. Violations of a criminal statute often provide the basis for intentional tort actions. Intentional homicide, for example, may result in a civil suit for wrongful death. Similarly, assault and battery carry both criminal penalties and civil remedies. False imprisonment is another illustration of conduct that is both criminal and tortious. Moreover, criminal statutes frequently provide the basis for tort actions in negligence by defining the duty of care owed by the actor. A violation of the statute breaches the duty owed,

24. See infra notes 26-32. In the past, however, criminal statutes often barred civil actions for the same conduct. See Note, Civil Remedies for Perjury: A Proposal for a Tort Action, 19 Ariz. L. Rev. 349, 365 (1977) ("A civil action for damages [arising out of perjury] must be disallowed, for 'the defendant might twice be punished . . . by the statute, and by this action, which is not reasonable.' (quoting Damport v. Sympon, 78 Eng. Rep. 769 (K.B. 1596)).

25. See infra notes 37-38 and accompanying text.


28. See Restatement (Second) of Torts §§ 13, 29 (1964).


30. See Restatement (Second) of Torts § 35 (1964).

31. See W. Prosser, supra note 5, § 36, at 191; Restatement (Second) of Torts §§ 285, 286 (1964); see, e.g., Rimco Realty & Inv. Corp. v. LaVigne, 114 Ind. App. 211, 50 N.E.2d 953 (1943) (lessor's violation of criminal statute governing permissible types of garbage chutes provided a basis for tenant's negligence action against lessor for property damage resulting from chute fire); Hyde v. Maison Hortense, Inc., 132 Misc. 399, 229 N.Y.S. 666 (1928), aff'd mem., 225 A.D. 799, 232 N.Y.S. 776, aff'd mem., 252 N.Y. 534, 170 N.E. 133 (1929) (les-
constituting negligence for which the violator may be held liable to persons injured thereby.\textsuperscript{32}

Although criminal statutes often provide the basis for civil actions founded on the same conduct, the California Court of Appeals in \textit{Agnew v. Parks}\textsuperscript{33} refused to allow a tort action for obstruction of justice, citing a number of criminal statutes governing the allegedly tortious conduct.\textsuperscript{34} In \textit{Agnew}, the plaintiff,
after winning her medical malpractice case, alleged that the local medical association had prevented doctors from testifying about her injuries at trial, thereby interfering with the orderly prosecution of her civil action. The court held that no civil right could be predicated upon a mere violation of a criminal statute and rejected a tort action for damages arising from the withholding or concealing of documentary evidence.35

Notwithstanding the appellate court's holding in Agnew, the California Supreme Court in Williams v. State36 implicitly recognized a tort action for negligent spoliation of evidence. In Williams, an injured motorist alleged that a negligent investigation by highway patrol officers virtually destroyed her opportunity to obtain compensation for her injuries.37 The court held that the plaintiff failed to state a cause of action, but only because she failed to allege that the officers owed her a duty to preserve the evidence.38 Thus, the court implied that it would have recognized negligent spoliation of evidence as a new, independent tort if plaintiff had alleged and could have established that defendant had breached its duty by failing to investigate the accident properly.

Rather than permitting recovery in tort for intentional spoliation of evidence, other courts have dealt with spoliation within the underlying litigation. Some courts have punished spoliators for failure to comply with an order compelling or permitting discovery.39 Under this approach, the court may cite the spoliator for contempt of court,40 order the payment of expenses, including attorneys fees,41 or enter a default judgment

35. Agnew, 172 Cal. App. 2d at 765, 343 P.2d at 124. In reaching this conclusion, the court also emphasized the policy of putting an end to litigation. Id.

36. 34 Cal. 3d 18, 664 P.2d 137, 192 Cal. Rptr. 233 (1983). The Supreme Court in Williams made no attempt to distinguish the Agnew court's denial of an independent intentional tort action for withholding evidence.

37. Id. at 21-22, 664 P.2d at 138, 192 Cal. Rptr. at 234.

38. Id. at 27, 664 P.2d at 143, 192 Cal. Rptr. at 239. The court did, however, grant plaintiff leave to amend her complaint to allege that the officers owed her a duty to investigate and preserve the evidence. Id. at 28, 664 P.2d at 143, 192 Cal. Rptr. at 239.

39. See Fed. R. Civ. P. 37(b); see, e.g., Professional Seminar Consultants v. Sino Am. Tech., 727 F.2d 1470 (9th Cir. 1984) (Rule 37 sanctions imposed after plaintiff asserted that documents produced by defendant pursuant to a discovery order were falsified).


41. See Fed. R. Civ. P. 37(b)(2); see, e.g., Molina v. El Paso Ind. School Dist., 583 F.2d 213 (5th Cir. 1978) (plaintiff organization charged with deposition costs for failure to comply with court's discovery orders).
against the spoliator.\textsuperscript{42} Other courts have permitted litigants to introduce evidence of their opponents' spoliation on the theory that it implies an admission of liability,\textsuperscript{43} permitting the inference that the evidence was unfavorable to the possessor.\textsuperscript{44} Prior to \textit{Smith}, however, no court had recognized a separate civil cause of action for the intentional spoliation of evidence.

Following the traditional method of tort recognition, the California Court of Appeals in \textit{Smith v. Superior Court} found that Smith's right to bring a personal injury lawsuit was a legally protectable interest and that her interest was invaded by Abbott Ford's intentional spoliation of the evidence.\textsuperscript{45} The court acknowledged that it was recognizing a "new and nameless tort,"\textsuperscript{46} but concluded that the intentional spoliation of evidence met the criteria set out by Professor Prosser and the case law for the recognition of new torts.\textsuperscript{47} Specifically, the court held that the intentional spoliation of evidence caused an "unreasonable interference with the interests of others,"\textsuperscript{48} that is, with Smith's interest in having an \textit{opportunity} to win her suit.\textsuperscript{49} Emphasizing the importance of "probable expectancies," the court concluded that Smith's prospective personal injury suit was significant enough to warrant protection from interfer-

\textsuperscript{42} See Fed. R. Civ. P. 37(b)(2)(C); see, e.g., Professional Seminar Consultants v. Sino Am. Tech., 757 F.2d 1470 (9th Cir. 1984) (default judgment entered against defendant for producing falsified documents following an order permitting discovery). The decision as to which sanction to apply is within the discretion of the trial court. See General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1211 (8th Cir. 1973), cert denied, 414 U.S. 1162 (1974).

\textsuperscript{43} See, e.g., State v. Turner, 633 S.W.2d 421, 424 (Mo. Ct. App. 1982) (spoliation of evidence evinces a consciousness of guilt and thus is admissible as nonhearsay); State v. Quigley, 591 S.W. 2d 740, 742 (Mo. Ct. App. 1979) (same).

\textsuperscript{44} This approach is known as the doctrine of \textit{omnia praesumuntur contra spoliatorem} (all is presumed against the destroyer of evidence). See 2 J. Wigmore, \textit{Wigmore on Evidence} § 291 (J. Chadbourn rev. 1979). \textit{See generally Comment, Omnia Praesumuntur Contra Spoliatorem, 1 ADEL. L. REV. 344 (1962)} ("The general principle is that where a person intentionally puts it out of his power to produce something which he could produce, the object or article being of a nature relevant to the claim or defence, the principle . . . will cause an unfavourable inference to be drawn against that person."). For cases applying this doctrine, see Bird Provision Co. v. Owens Sausage, Inc., 379 F. Supp. 744, 751 (N.D. Tex. 1974), aff'd, 568 F.2d 369 (5th Cir. 1978); A.C. Becken Co. v. Gemex Corp., 199 F. Supp. 544, 553 (N.D. Ill. 1961), aff'd, 314 F.2d 839 (7th Cir.), \textit{cert. denied}, 375 U.S. 816 (1963).

\textsuperscript{45} \textit{Smith}, 151 Cal. App. 3d at 502, 198 Cal. Rptr. at 837.

\textsuperscript{46} \textit{Id.} at 495, 198 Cal. Rptr. at 832 (quoting W. PROSSER, supra note 5, § 1, at 3).

\textsuperscript{47} \textit{Id.} at 496, 198 Cal. Rptr. at 832.

\textsuperscript{48} \textit{Id.} (quoting W. PROSSER, supra note 5, § 1, at 6).

\textsuperscript{49} \textit{Id.} at 502, 198 Cal. Rptr. at 837.
Because Abbott Ford’s actions wronged Smith, the court, reciting the familiar maxim that “for every wrong, there is a remedy,” allowed Smith to proceed with a tort action for intentional spoliation of evidence.

After recognizing the new tort, the court examined the allegations of Smith’s complaint and determined that although the allegations did not meet the traditional levels of specificity, they were sufficient to state a cause of action. With respect to the intent element, Smith’s complaint alleged that Abbott Ford “willfully, wrongfully, and intentionally, and with conscious disregard of the probable serious harm to Plaintiffs, and with malice and reckless indifference for the injurious consequences of their acts, conceded, lost, destroyed or otherwise disposed of the physical evidence which they had promised to maintain for Plaintiffs.” Although the court did not specifically address the intent element, Smith’s allegations clearly satisfy the traditional definition of intentional conduct.

Proof of causation in actions for intentional spoliation of evidence would seem particularly difficult. The Smith court, however, relaxed the traditional standard of certainty, requiring only that Smith allege that a “reasonable probability” existed that she would have obtained compensatory damages “but for” Abbott Ford’s spoliation of the van parts. The court noted that the “reasonable probability” standard had been used in several other contexts in which the defendant’s conduct harmed the plaintiff’s probable expectancies.

The “most troubling aspect,” the court found, in recognizing a new tort for intentional spoliation of evidence is the problem of proving the certainty of damages. The court concluded, however, that the interference with Smith’s prospective civil suit, or more specifically, the significant prejudice of Smith’s opportunity to obtain compensation for her injuries, was a legally compensable harm. To deny relief simply because damages could not be proven with the traditional requisite degree of certainty, therefore, would be tantamount to

50. Id.
51. Id. at 496, 198 Cal. Rptr. at 832 (quoting CAL. CIV. CODE § 3523 (West 1970)).
52. Id. at 495, 198 Cal. Rptr. at 832.
53. See supra text accompanying note 20.
55. Id.; c.f. supra note 18 and accompanying text.
56. Id. at 500, 198 Cal. Rptr. at 835.
57. Id. at 502, 198 Cal. Rptr. at 837.
finding that the interest invaded was not deserving of legal protection. Thus, the court did not demand that Smith allege the damage amount with certainty, but required only that Smith produce enough evidence to show the extent of her damages "as a matter of just and reasonable inference." The Smith court also determined that the existence of an applicable criminal sanction did not bar the plaintiff's separate tort action. The court identified several types of other conduct that give rise to both criminal and civil liability and noted that the criminal law and the tort law serve different, although occasionally overlapping, social purposes. The public interest in the administration of justice invaded by intentional spoliation, which is protected by the criminal statute, differed in substance from Smith's private interest in obtaining compensation through a personal injury action. Recognition of a separate tort action, therefore, was necessary to provide the plaintiff with a complete remedy. The court also recognized that the imposition of civil liability promotes the public interest in the administration of justice by providing an additional deterrent to the destruction of evidence.

The recognition of a prospective personal injury action as a legally protected "probable expectancy" is consistent with general tort principles. As Professor Prosser noted, the law of torts "is directed toward the compensation of individuals . . . for the losses which they have suffered in respect of all their legally recognized interests." Smith sustained permanent

58. Although Smith did not allege the amount of her damages with certainty, the court reasoned that barring a cause of action for this reason alone would be a perversion of justice. \textit{Id.} at 500, 198 Cal. Rptr. at 835.
59. \textit{Id.} at 500, 198 Cal. Rptr. at 835 (quoting Story Parchment Co. v. Pater- son Parchment Paper Co., 282 U.S. 555, 563 (1931)).
60. \textit{Id.} at 500, 198 Cal. Rptr. at 835. The Smith court distinguished Agnew v. Parks, 172 Cal. App. 2d 756, 343 P.2d 118 (1959), discussed supra notes 33-35 and accompanying text, on the grounds that the obstruction of justice suit involved in \textit{Agnew} was brought after the underlying litigation had been decided, so that a collateral estoppel issue existed in \textit{Agnew} that did not exist in \textit{Smith}. \textit{Smith}, 151 Cal. App. 3d at 498, 198 Cal. Rptr. at 834.
62. \textit{Id.} at 499, 198 Cal. Rptr. at 835.
63. The court noted that California's criminal obstruction of justice statute, \textit{see supra} note 6, had a minimal deterrent effect because the destruction of evidence was only a misdemeanor. \textit{Smith}, 151 Cal. App. 3d at 499, 198 Cal. Rptr. at 835. Moreover, the court noted that the statute had apparently not been used to punish the spoliation of evidence relevant to a prospective civil suit in its 112-year history. \textit{Id.} at 500, 198 Cal. Rptr. at 835.
64. W. PROSSER, \textit{supra} note 5, § 1, at 6.
physical injuries as a result of the automobile accident. A personal injury lawsuit was a legally recognized procedure by which Smith might be compensated for those injuries. When Abbott Ford destroyed the evidence Smith needed to pursue this action, it significantly prejudiced her opportunity to obtain compensation. Although Smith could have attempted to pursue her personal injury suit without the evidence, her efforts undoubtedly would have been hampered by Abbott Ford's interference. A tort cause of action for intentional spoliation of evidence thus provided the only reliable means of compensating her injury. Had the court failed to recognize Smith's prospective lawsuit as a protected "probable expectancy," the compensatory goal of tort law would have been frustrated.

The Smith court appropriately noted the value of "probable expectancies." According to Prosser, "since a large part of what is most valuable in modern life depends upon 'probable expectancies' as social and industrial life becomes more complex, the courts must do more to discover, define and protect them from undue interference." With the increasing use of lawsuits to settle differences, a prospective civil action is a common "probable expectancy" deserving of legal protection.

The benefits of recognizing a tort cause of action for the intentional spoliation of evidence outweigh any burdens that may result to potential defendants. The new tort promotes both public interests, by enhancing the administration of justice and deterring the destruction of evidence, and private interests, by providing an injured plaintiff with a realistic opportunity to re-

65. See supra note 1.

66. Rule 37 sanctions would not have been available to compensate Smith because Abbott Ford had not violated any discovery order. See Fed. R. Civ. P. 37(a), (b); infra text accompanying notes 102-103.

67. W. Prosser, supra note 5, § 130, at 951 (quoting Jersey City Printing Co. v. Cassidy, 63 N.J. Eq. 759, 765, 53 A. 230, 233 (1902)).

68. One commentator has even suggested that persons have a property right in the pursuit of an expected performance that should be free from interference by third parties. See Note, An Analysis of the Formation of Property Rights Underlying Tortsious Interference with Contracts and Other Economic Relations, 50 U. Chi. L. Rev. 1116, 1118 (1983). Persons acquire a property right by giving notice to other parties of an intent to exclude them from reaping the advantages of the expected performance and by gaining some degree of control over the pursuit. Id. at 1136. Accordingly, Smith could claim a property right in the pursuit of her personal injury lawsuit because she notified Abbott Ford of her intent to pursue a civil suit. Moreover, Smith gained control over the pursuit of compensation when Abbott Ford agreed to retain evidence for Smith to use in the prospective civil action. Smith's interest in the lawsuit therefore is akin to a property right that deserves protection from interference.
ceive compensation for injuries. Any burden imposed on potential defendants would be minimal and may be largely avoided. If, for example, the duty to preserve evidence proves excessively costly to the custodian, the court may order the evidence transferred to the other party and charge that party with the duty of keeping the evidence at its own cost. The obligation imposed thus may be seen as merely a duty to not spoliate rather than an affirmative duty to preserve evidence.

Applying the traditional tort elements of intent, causation, and damages to the new tort may create difficulties in defining the requisite standards of proof. With respect to the element of intent, if the plaintiff need prove only that the defendant intentionally spoliated evidence, and not that the defendant intentionally interfered with plaintiff’s suit, then the defendant could be held liable for the destruction of potentially relevant evidence in the course of routine document destruction. In Smith, because plaintiff specifically requested Abbott Ford to preserve the evidence pending investigation, Abbott Ford’s destruction of the van parts clearly evidenced its intent to interfere with Smith’s prospective suit. The court therefore was not required to address the intent element further. In the absence of such compelling circumstances, however, traditional tort principles suggest that courts should require plaintiffs seeking recovery for intentional spoliation of evidence to prove that the defendant intended to produce the harm or knew with substantial certainty that the harm, the interference with another’s prospective civil suit, would follow.

69. See supra notes 60-63 and accompanying text.

70. Following the Smith court’s rationale, this analysis thus far has assumed that the plaintiff in the underlying action would be the party injured by the defendant’s intentional spoliation of evidence. The policy of deterring such conduct would be equally served by permitting the defendant to bring a separate action for intentional spoliation of evidence against the plaintiff who injures a defendant by interfering with its defense in the underlying suit. The need to recognize a new tort for the benefit of defendants deprived of a full defense by the plaintiff’s tortious conduct is less compelling, however, since the recognition of a separate tort action is not necessary to serve the objective of fully compensating the injured party. Moreover, in such a case, courts may be more willing to invoke Rule 37 sanctions against the plaintiff-spoliator than they would be against the defendant-spoliator, since in the latter situation the defendant might be deprived of an opportunity to defend the suit. See infra notes 105-106 and accompanying text.

71. Because the new tort has been defined as the intentional spoliation of evidence, and the Smith court did not define the intent element specifically, see supra notes 52-53 and accompanying text, it is conceivable that future litigants and courts will approach the intent element in this way.

72. See supra text accompanying note 20.
not specifically requested the defendant to preserve the evidence, the court could have required the plaintiff to prove that defendant actually intended to interfere with Smith's prospective civil action by spoliating the evidence, or that defendant acted with knowledge that its conduct would result in such an interference.

As with all interference torts, courts must relax the standards of proof of causation in suits seeking recovery for interference with a prospective civil action. Under the traditional causation standard, Smith would have been required to prove that she would have obtained compensation for her injuries "but for" Abbott Ford's interference. This standard would have been difficult to satisfy because conceivably any number of variables could have occurred during the litigation to impede Smith's chances of securing compensation. Because Abbott Ford possessed the van parts, it had special knowledge concerning the cause of the accident, without which Smith would have been hard pressed to prove that she would have recovered had the parts not been spoliated. Therefore, the Smith court held that the plaintiff was required to prove only that a "reasonable probability" existed that she would have obtained compensation "but for" Abbott Ford's conduct. This relaxed standard properly reflects the realization that because the future benefit is only a "probable expectancy," the plaintiff need only prove the "probability" of receiving the benefit.

The Smith causation standard, although relaxed, nonethe-

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73. See supra notes 16-18 and accompanying text.
74. See supra note 21 and accompanying text.
75. For example, Smith's attempt to obtain compensation could have been hindered by the death of witnesses, a change in law, or the inadequate performance of her attorneys.
76. See supra note 4.
77. Smith, 151 Cal. App. 3d at 503, 198 Cal. Rptr. at 837. Obtaining compensation includes not only recovering damages by a jury verdict or court order in a successful civil suit, but also receiving compensation through settlement. Thus, plaintiffs should not be required to prove that they would have won their underlying lawsuits in order to establish a causative link between the spoliation and the injury; interference with the plaintiff's ability to settle the case also may cause injury. This relaxed causation standard has been applied frequently in cases alleging interference with a prospective advantage. In Goldman v. Feinberg, 130 Conn. 671, 37 A.2d 355 (1944), for example, a real estate broker alleged that his client, a purchaser of property, lied to the vendor concerning the identity of the broker, thus precluding the plaintiff broker from receiving his commission. The court held that the plaintiff was required to demonstrate that but for the tortious interference of the purchaser there was a "reasonable probability" that the broker would have entered into a contract or made a profit. Id. at 675, 37 A.2d at 356.
less requires a plaintiff essentially to prove the merits of the underlying claim. Such a standard is not without precedence in tort law; it is also used, for example, in legal malpractice actions.\textsuperscript{78} In fact, the causation standard in legal malpractice cases is often more stringent: the plaintiff must prove that "but for" the attorney's negligence, plaintiff would have been successful in the case.\textsuperscript{79} Despite the difficulty in proving causation, legal malpractice claims are being brought, and won, with increasing frequency.\textsuperscript{80}

Recognizing a tort action for interference with a prospective civil suit also requires relaxing the damages standard. Under the traditional damages standard, a plaintiff must prove the amount of damages with reasonable certainty.\textsuperscript{81} This standard presents a problem for a plaintiff alleging intentional interference with a prospective civil action because such a standard would require that the plaintiff attempt to quantify exactly the value of the case had the evidence not been destroyed.\textsuperscript{82} A plaintiff could, for example, use expert testimony to show the settlement value of the lawsuit or the amount of damages recoverable on the underlying claim, but such testimony of course would be a mere estimate. The \textit{Smith} court thus appropriately lessened the plaintiff's burden by requiring only that she prove the extent of her damages as a matter of

\textsuperscript{78} See, e.g., Williams v. Bashman, 457 F. Supp. 322, 326 (E.D. Pa. 1978) (causation standard in legal malpractice actions "requires in effect that a plaintiff prove the merits of the underlying case").

\textsuperscript{79} See Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir. 1980), \textit{cert. denied}, 449 U.S. 888 (1980); see also Parker v. Daelen Corp., 59 A.D.2d 375, 377, 399 N.Y.S.2d 222, 224 (1977) (plaintiff must prove that "but for" the negligence of the attorney, plaintiff's claim would or could have been collected). For a slight relaxation of the "but for" causation standard in legal malpractice actions, see Daugherty v. Runner, 581 S.W.2d 12, 20 (Ky. Ct. App. 1978) (breach of attorney's duty need only be "a" substantial factor in plaintiff's failure to recover, not necessarily "the" substantial factor); Murphy v. Edwards & Warren, P.A., 36 N.C. App. 653, 658, 245 S.E.2d 212, 217, \textit{cert. denied}, 248 S.E.2d 728 (N.C. 1978) (conduct of the attorney need not be the sole cause of the client's loss).

\textsuperscript{80} See generally \textit{Carroll, Legal Malpractice}, 15 ARK. LAW. 46, 47 (1981) (reporting that legal malpractice claims were filed against an estimated 10% of all practicing attorneys in 1979 and that the average amount of claims paid had more than doubled from 1971 to 1975).

\textsuperscript{81} See W. PROSSER, \textit{supra} note 5, \S 30, at 143-44.

\textsuperscript{82} Raoul D. Kennedy of the Oakland law firm of Crosby, Heafey, Roach & May characterizes \textit{Smith v. Superior Court} as "the ultimate in speculation." Goodrich, \textit{supra} note 4, at 15. The most problematic aspect of the case, according to Kennedy, is the question of damages: "Does the plaintiff ask himself, 'What would the case be worth if I did have this evidence?' You could be asking the jury to quantify the unquantifiable." \textit{Id.} at 15.
"just and reasonable inference." In doing so, the Smith court adopted the rationale commonly advanced in legal malpractice actions, which requires that damages be measured by the amount that could have been recovered in the underlying action. Because the underlying claim in both malpractice and spoliation of evidence actions has not been resolved at trial, the exact amount of damages cannot be proved conclusively. It would be unjust to deny recovery to a plaintiff for failing to prove an exact assessment of the damages when the very reason the plaintiff cannot make such an assessment is the basis for the cause of action. To do so would allow the spoliator to profit from wrongdoing.

A relaxed damages standard has been employed in a number of situations in which the amount of damages cannot be proved with a high degree of certainty. In antitrust cases, for example, the exact amount of damages suffered by a new business as a result of an antitrust violation is often incapable of precise proof because of the unavailability of an economic history. Courts have reduced the standard of certainty in such cases to allow recovery for damages such as lost profits or injury to the plaintiff's business that were once considered too speculative. Similarly, in wrongful death and personal injury cases, compensation for lost future earnings, although speculative and inherently difficult to prove, is regularly awarded. In such cases, courts instruct the jury to calculate net earnings

83. Smith, 151 Cal. App. 3d at 500, 198 Cal. Rptr. at 835.
85. See, e.g., Frito Lay, Inc. v. So Good Potato Chip Co., 427 F. Supp. 677, 678 (D. Mo. 1977) (defendant whose wrongful conduct has rendered difficult the ascertainment of precise damages suffered by plaintiff is "not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible"); see also supra note 58.
86. See Rulon, Proof of Damages for Terminated or Precluded Plaintiffs, 49 ANTITRUST L.J. 153, 154 (1981) (explaining that antitrust plaintiffs may prove damages by expert testimony of the going concern value of the business or by lost profits, even though such items of damage may be speculative).
87. See Note, Tort Damages: The Adjustment of Awards for Lost Future Earning Capacity to Compensate for Inflation and Increased Productivity: Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980), 7 U. DAYTON L. REV. 139, 144 (1981) (reporting Pennsylvania decision allowing testimony showing the impact of inflation and increased productivity on decedent's future earning power in order to more accurately estimate damages); see also Johnson & Flanigan, Economic Valuation for Wrongful Death, 6 CAMPBELL L. REV. 47, 49 (1984) (examining North Carolina's wrongful death statute permitting a broad range of evidence, including expert testimony by economists, on the issue of damages in order to combat the difficulty of proof inherent in
over the plaintiff's life expectancy by estimating lost gross earnings and deducting from the figure the plaintiff's estimated personal maintenance costs. Such formulas may occasionally produce inaccurate results, but the importance of granting the plaintiff some recovery overrides this concern. The Smith court acknowledged this fact for plaintiffs seeking recovery for intentional spoliation of evidence when it allowed Smith to prove the extent of her damages as a matter of just and reasonable inference.

The Smith court properly rejected Abbott Ford's argument that California's criminal statute prohibiting the spoliation of evidence precluded a civil action. Tortfeasors should not escape civil liability merely because their tortious acts violate a criminal statute. Not only is the possibility of prosecution unlikely, but sole reliance on criminal sanctions to deal with the defendant's illegal conduct would fail to compensate the injured plaintiff. Intentional destruction of evidence invades both public and private interests, both of which are deserving of judicial protection. A criminal statute does protect the public in-

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89. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 124 (1969) (courts apply lenient damages standards because failure to do so would be an inducement to make wrongdoing so effective and complete as to render measure of damages uncertain and preclude any recovery). See generally DOBBS, REMEDIES, DAMAGES-EQUITY-RESTITUTION § 3.1, at 135 (1973) (plaintiffs are expected to prove damages with accuracy but "precision not attainable in the nature of the claim and circumstances is not ordinarily required"). Such a policy justification also supports the awarding of damages in other actions such as those for trademark infringement, libel, slander, invasion of privacy, and intentional infliction of emotional distress, all of which require inherently difficult damage calculations.
90. Smith, 151 Cal. App. 3d at 500, 198 Cal. Rptr. at 835. The Smith court's treatment of Agnew v. Parks, 172 Cal. App. 2d 756, 343 P.2d 118 (1959), see supra notes 33-35 and accompanying text, overlooked an important consideration. A civil action against witnesses for perjury, at issue in Agnew, is problematic not only because the new cause of action would have involved essentially a relitigation of matters already adjudicated, but also because witnesses are immune from civil action. See Note, supra note 24, at 35. This concern is not present in a civil action against a party for intentional spoliation of evidence, however, because the parties to the action do not have immunity from civil liability.
91. See supra note 24 and accompanying text.
92. California's criminal obstruction of justice statute, for example, has not been used to punish the destruction of evidence to be used in a civil suit in its 112-year history. See supra notes 6 & 63.
93. See supra text accompanying notes 60-62.
terest in avoiding obstruction of justice. Intentional spoliation of evidence, however, also significantly prejudices a plaintiff's opportunity to obtain compensation to which he or she may be legally entitled. Convincing a judge or jury of the defendant's liability may be extremely difficult for the plaintiff without the aid of the spoliated evidence. Plaintiff's ability to settle the case would also be impaired because without the wrongfully destroyed evidence, the plaintiff has little leverage to induce a settlement. Thus, because the criminal statute redresses only the public injury of obstruction of justice, the fundamental compensatory objectives of tort law demand that the injured party be permitted a cause of action in tort against the spoliator.

Although the Smith court properly concluded that a criminal statute for spoliation of evidence did not preclude Smith's separate tort action, it neglected to adequately employ the criminal statute in defining the new tort.\textsuperscript{94} Obstruction of justice statutes generally impose a duty to not conceal, destroy, or otherwise dispose of evidence on one who knows or has reason to know that the evidence may be needed for an investigation or for contemplated or pending litigation.\textsuperscript{95} These statutes thus may form the basis for the new tort by defining the duty of care owed by the spoliator. The duty, owing to any reasonably foreseeable plaintiff, arises when a reasonable person in the circumstances of the actor would know that the evidence is or will be sought in the investigation or litigation.\textsuperscript{96} In Smith, because Abbott Ford expressly promised Smith that it would preserve the evidence, the court relied exclusively on the defendant's promise in finding that plaintiff stated a cause of action in tort.\textsuperscript{97} In cases in which the defendant's duty cannot be premised on an express promise to preserve evidence, the court should define the alleged spoliator's duty by applying the stan-

\textsuperscript{94} A criminal statute often is used to define the duty of care owed by the actor in tort actions founded in negligence. See supra notes 31-32 and accompanying text. Violation of a criminal statute also provides the basis for intentional tort actions. See supra notes 26-30 and accompanying text.

\textsuperscript{95} See supra notes 6 & 23.

\textsuperscript{96} Although the various criminal statutes prohibiting the destruction of evidence do not adopt the standard of care of a reasonable person, such a standard is commonly used in tort law. See generally W. PROSSER, supra note 5, § 1, at 6.

\textsuperscript{97} An unduly narrow reading of the Smith holding would severely limit the use of the new tort. See Goodrich, supra note 4, at 15 ("If Smith is read narrowly, a plaintiff would have to show he had an agreement with the defendant or third party to preserve the evidence.").
standard of care set out in the state's criminal statute. If such a
duty is recognized, an intentional or negligent breach of that
duty would give rise to tort liability.

The Smith court did not discuss alternative, noncriminal
means of dealing with the spoliation problem within the under-
lying litigation itself. If other sanctions could effectively de-
ter spoliation and adequately compensate the plaintiff,
recognition of a separate tort action for spoliation of evidence
perhaps would be unnecessary. None of the sanctions devel-
oped so far, however, adequately protect both the public inter-
est in deterrence and the private interest in compensation.
Under Rule 37 of the Federal Rules of Civil Procedure, for ex-
ample, a court may impose sanctions for failure to comply with
discovery requests. Thus, a defendant may be held in contempt
and fined for spoliation of requested information or evidence.

As in the case of criminal statutes, however, contempt citations
fail to compensate the injured plaintiff. Rule 37 also permits
the imposition of a default judgment on a defendant who
spoliates evidence. Although this measure does compensate
the plaintiff, because the plaintiff actually wins the underlying
suit, the sanction can be imposed only after the defendant fails
to properly respond to both a discovery request and a court or-
der compelling discovery. A defendant who destroys evi-
dence prior to a discovery request is unable to comply with any
subsequent request and therefore could not be punished for
failing to comply. In Smith, for example, Abbott Ford de-
stroyed the van parts before the plaintiff had requested them in

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98. This Comment does not attempt to further analyze the appropriate-
ness of recognizing a tort action for interference with a prospective civil suit
by negligent spoliation of evidence. See supra text accompanying notes 36-38.
Negligence actions for other interference torts typically are not allowed unless
the interfering act is itself a tort. See W. Prosser, supra note 5, § 130; supra
note 14. Because the destruction of evidence is not a separate tort, unless of
course the evidence is the property of another person, recognition of a tort ac-
tion for negligent spoliation of evidence may be problematic.

99. For a discussion of available noncriminal means of dealing with spolia-
tion of evidence, see supra notes 39-44 and accompanying text.


101. See Fed. R. Civ. P. 37(b)(2)(C); see also supra note 42.

102. See Dorey v. Dorey, 609 F.2d 1128, 1135 (5th Cir. 1980) (Rule 37 sanc-
tions ordinarily are imposed only after violation of a court order; the only ex-
ceptions are sanctions for failure to admit, to attend the party's own
deposition, to serve answers to interrogatories, or to respond to a request for
inspection).

103. See Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958) (inability
to comply is an absolute defense to Rule 37 sanctions).
the formal discovery process. Because Abbott Ford had not violated a discovery rule, this sanction could not be invoked. Furthermore, even when a party does violate a discovery rule, the decision whether to impose a sanction lies in the discretion of the trial judge. The trial judge's discretion to enter a default judgment against the defendant, the only Rule 37 sanction that compensates the plaintiff, is much narrower than is the court's discretion in imposing other sanctions. Consequently, even when Rule 37 sanctions are available, the court may be reluctant to impose this most severe penalty, even though it is the only sanction that would adequately protect both the public and private interests invaded by the spoliation of evidence.

Another noncriminal means of dealing with spoliation within the underlying litigation itself is to permit counsel to introduce evidence to the jury concerning the spoliation and to allow the jury to infer from that evidence an admission of the defendant's liability. This method, however, does not effectively deter spoliation. The fact finder is not required to infer the spoliator's liability; rather, the judge or jury merely is permitted to do so. Consequently, a defendant faced with the possibility of potentially large liability in the underlying action may choose to spoliate the damaging evidence and risk explaining its conduct to the court or jury. A court that chooses to employ this means of addressing the spoliation problem should require at least that the spoliation be given the effect of a legal presumption of liability. Such a presumption is justified in this situation because the defendant has special knowledge concerning both the evidence and the destruction of the evidence, and the plaintiff is left with no means of obtaining this information. Furthermore, the use of a legal presumption of


105. See, e.g., Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 518 (1977) (trial court's entry of default judgment against defendant auto manufacturer for failure to produce evidence of safety tests in products liability action was clearly erroneous).


107. See supra note 44.

108. A presumption shifts the burden of producing evidence and often operates to shift the burden of persuasion as well. See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 345 (2nd ed. 1977). Reasons for creating presumptions include a judicial estimate of the probability of the thing presumed, fairness in light of defendant's superior access to the evidence, difficulty in proving the matter in any other way, and social policy. Id. § 343.
liability would have a stronger deterrent effect on potential spoliators than would merely allowing the jury to infer liability.

Recognizing a separate tort action for spoliation of evidence, however, would have an even stronger deterrent effect on potential spoliators. The Smith case is illustrative. Abbott Ford, when confronted with a tort action for the intentional destruction of evidence, produced the allegedly destroyed, lost, or transferred evidence and soon settled the case. Although the sudden reappearance of the evidence may have been coincidental, it is not unreasonable to postulate that Abbott Ford would not have "destroyed, lost, or transferred" the evidence in the first place had its liability in tort for nonproduction of the evidence been clear from the outset. Thus, as a means of deterring spoliation and compensating the injured party, allowing a separate tort action for intentional spoliation of evidence is preferrable to either imposing Rule 37 sanctions or introducing evidence of spoliation to the fact finder.

Because litigants often suspect their opponents of attempting to hide their liability by destroying, or at least withholding, relevant evidence, recognition of the tort of intentional spoliation of evidence may increase litigation. A problem of limitation arises because a plaintiff could sue for the spoliation of any type of evidence, including documents. Regardless of the type of evidence involved, the new tort should be used only when spoliation significantly prejudices the plaintiff's opportunity to obtain compensation. Although a precise test is difficult to formulate, the new cause of action should be permitted only in those cases in which the property destroyed constitutes po-

109. See supra note 4.
110. This suspicion may not be unfounded. United States District Court Judge Miles Lord recently commented during a speech to members of the Hennepin County Bar Association in Minneapolis, Minnesota: "I believe that many companies do not turn over documents as they are required to do in lawsuits. . . . I have handled only two cases in 20 years on the federal bench in which I believe the bulk of papers were properly produced." Many Firms Fail to Turn Over Data, Lord Says, Mpls. Star & Trib., Nov. 20, 1984, at 14B, col. 2.
111. The Smith decision may be relevant in situations like the Dalkon Shield products liability cases currently being litigated across the nation. The manufacturer of the Dalkon Shield, A.H. Robbins Co., and its attorneys, have been accused of destroying documents evidencing their early knowledge of the product's defects, thus interfering with the civil suits of injured users of the device. See A.H. Robbins is Due in Court to Explain How Dalkon Shield Papers Disappeared, Wall St. J., Aug. 20, 1984, at 8, col. 1. If such documents were destroyed after they were requested, however, Rule 37 sanctions would be applicable, and a separate tort action may be unnecessary.
tential evidence without which proof of an essential tort element is rendered unreasonably difficult. Such unreasonable difficulty may arise when there is no secondary evidence that can be used to prove a particular element of the underlying cause of action. In a products liability case, for example, destruction of the defective product leaves the injured plaintiff with no direct evidence to prove the product's defectiveness. Although the plaintiff may resort to the doctrine of res ipsa loquitur, plaintiff would be left with only circumstantial evidence of the defendant's liability. Unreasonable difficulty of proof is also present when the secondary evidence on which the plaintiff must rely is of such dubious value, as determined by the trial judge, that the plaintiff has no realistic possibility of proving a particular element of the underlying action. The trial court should assess the effect of the spoliation on the basis of "the ability of the injured party to establish [his or her] case," the same standard used in imposing a default judgment for failure to comply with discovery. If a plaintiff could prove the case even without the evidence, plaintiff cannot allege a legally cognizable harm, and the court should order the plaintiff to pursue the underlying litigation without the spoliated evidence.

Even with this suggested limitation, however, the new tort of interference with a prospective civil suit by intentional spoliation of evidence will provide an effective means of compensating persons who are significantly prejudiced by the spoliator's

112. The doctrine of res ipsa loquitur permits a plaintiff to satisfy the burden of producing evidence of defendant's negligence by proving that the plaintiff has been injured by a casualty of a sort that normally would not have occurred in the absence of the defendant's negligence. See C. McCORMICK, supra note 108, § 342, at 804. Most courts agree that res ipsa loquitur permits merely an inference of negligence. See, e.g., Gardner v. Coca Cola Bottling Co., 267 Minn. 505, 127 N.W.2d 55 (1964) (res ipsa does not place the burden of persuasion on defendant; it warrants, but does not compel, an inference); see also W. PROSSER, supra note 5, § 40, at 231 (res ipsa is a "simple matter of circumstantial evidence").


114. Id.

115. The plaintiff may still seek redress while pursuing the underlying litigation. For example, plaintiff may be permitted to introduce into evidence the fact that defendant spoliated the evidence, in which case the jury may infer that its contents were unfavorable to the defendant. See supra notes 43-44 and accompanying text. If plaintiff had served a formal discovery request prior to the spoliation, the plaintiff may also move for sanctions under FED. R. CIV. P. 37 or the state's equivalent. See supra notes 39-42 and accompanying text.
interference and will warn would-be spoliators that such conduct will no longer be tolerated. By recognizing the new tort, courts will signal that society will not allow litigants to shield themselves from liability by spoliating relevant evidence, safe in the knowledge that recrimination is limited to the remote chance of a misdemeanor prosecution or a slightly tougher battle in court should their opponent attempt to prove spoliation while pursuing the underlying litigation. Plaintiffs who experience such impermissible interference with their prospective civil suits need and deserve this new tort action.

Pati Jo Pofahl

116. See supra note 63.
117. See supra notes 43-44 and accompanying text.