1999

Balancing the Scales after Evidence Is Spoiled: Does Pennsylvania's Approach Sufficiently Protect the Injured Party

Cecilia Hallinan

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Evidence Commons, and the Torts Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol44/iss5/6

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
Comments

BALANCING THE SCALES AFTER EVIDENCE IS SPOILED: DOES PENNSYLVANIA'S APPROACH SUFFICIENTLY PROTECT THE INJURED PARTY?

I. INTRODUCTION

Picture for a moment that you are corporate counsel for a large company. Your company is being sued for the malfunction of a coffee carafe that allegedly shattered in the plaintiff's hand and caused her to sustain serious injuries. The plaintiff does not allege a design defect common to all carafes of this type, but rather a malfunction of her individual product. During discovery, you request production of the broken carafe, so that you may confirm that your company indeed manufactured the product and adjudge the validity of the plaintiff's claim. Opposing counsel answers your request by stating that plaintiff "lost" the product at issue.

Spoliation of evidence is the tampering with, interference with, loss of or destruction of evidence or potential evidence that is to be used in contemplated or pending litigation. Evidence spoliation is problematic for both plaintiffs and defendants. In all civil litigation, but particularly in the products liability and medical malpractice arenas, the disappearance of crucial evidence strikes a devastating blow to the party attempting to prove or defend a case. The American civil litigation system relies on the

1. See Roselli v. General Elec. Co., 599 A.2d 685, 686 (Pa. Super. Ct. 1991) (providing background on products liability lawsuit used as basis for hypothetical, including plaintiff's claims and damages). The plaintiff asserted that as she attempted to pour coffee the carafe shattered in her hand, thus spraying boiling coffee onto her leg and abdomen and causing severe burns. See id.
2. See id. (noting that appellant did not allege defect occurred in all General Electric coffee makers of same type).
3. See id. at 686-87 (stating that examination of product is necessary to determine validity of claim as well as identity of manufacturer for indemnity purposes).
4. See id. at 686 (stating that plaintiff and her former attorney were responsible for loss of evidence).
6. For examples of situations in which evidence spoliation caused plaintiffs' detriment, see infra notes 54, 58-59 and accompanying text.
7. See generally David H. Canter, The Missing or Altered Product: Nightmare or Dream?, 27-WTR BRIEF 12, 15 (1998) ("Product liability actions often progress through the intricate and costly process of civil litigation without a seemingly indispensable ingredient: the product itself."); see also Anthony C. Cassamassima, Spoliation of Evidence and Medical Malpractice, 14 FACE L. REV. 233, 236-38 (1994) (examining evidence spoliation in medical malpractice context); Edward A. Han-
individual litigant’s opportunity to investigate and to uncover evidence subsequent to filing suit.8 The intentional destruction of relevant evi-

---

8. See, e.g., Petrick v. Monarch Printing Corp., 501 N.E.2d 1312, 1319 (Ill. App. Ct. 1986) (“This state’s system of civil litigation is founded in large part on a litigant’s ability, under the authority of the Supreme Court Rules, to investigate and uncover evidence after filing suit.”).

Several important policies undergird a court’s duty to sanction evidence destruction. See JAMIE GORELICK ET AL., DESTRUCTION OF EVIDENCE 14-18 (1989 & Supp. 1997) (discussing three policies that justify strict regulation of evidence destruction). First, a court is the gate-keeper of evidence and must be concerned with accuracy and truth-seeking in fact-finding. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-97 (1993) (recognizing gatekeeping role of trial judge). The accuracy of the judicial process is diminished when one or more parties purge the record of relevant material that is favorable to the other side. See GORELICK ET AL., supra, at 15 (stating that evidence destroyer stands assumption of adversary system on its head because fact-finder cannot review all relevant information); see also David A. Bell et al., An Update on Spoliation of Evidence in Illinois, 85 ILL. B.J. 530, 530 (1997) (noting that spoliation represents “a form of cheating which blatantly compromises the ideal of the trial as a search for truth”) (citing Charles R. Nesson, Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action, 13 CARDozo L. REV. 793, 793 (1995)); James F. Thompson, Comment, Spoliation of Evidence: A Troubling New Tort, 37 U. KAN. L. REV. 563, 564 (1989) (commenting that destruction of evidence effectively eliminates party’s ability to prevail on valid claim or defense and thereby impedes administration of justice).

Second, a court may perform its historic function of providing equal access to justice only if relevant evidence survives until the time of trial or settlement. See GORELICK ET AL., supra, at 14-16 (reviewing Supreme Court cases that uphold individual’s “fundamental” right to equal litigation opportunity). The United States Supreme Court stated in Hickman v. Taylor that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” 329 U.S. 495, 507 (1947); see GORELICK ET AL., supra, at 16 (discussing Hickman). More recently, the Court has stated:

We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain he has access to the raw materials integral to the building of an effective defense.
ence violates the spirit of liberal discovery.9

The problems associated with evidence destruction have been addressed in common law courts as early as 1617.10 Today, most states agree that it is the court’s duty to realign the scales of justice once one or more parties become critically impaired by the loss of evidence.11 States diverge, however, in their approaches to the fairest and most effective method to remedy this situation.12

GORELICK ET AL., supra, at 16 (quoting Ake v. Oklahoma, 470 U.S. 68, 77 (1985)).

Third, by controlling evidence destruction, a court maintains the judicial system’s integrity by ensuring that a case can be decided on its merits. See id. at 16-18; see also Jonathan K. Van Patten & Robert E. Willard, The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation, 35 HASTINGS L.J. 891, 917 (1984) (“If a defendant may use the judicial process to delay, diminish, or even defeat a valid claim, then the court in effect has become a partner in the abuse. . . .”).


10. See Rex v. Arundel, 80 Eng. Rep. 258, 258 (K.B. 1617) (dealing with spoliation of property deed). King James I claimed title to property occupied by Countess Arundel. See id. Countess Arundel refused to produce the property’s title deed. See id. The court, suspecting spoliation, gave the land to the King until the Countess produced the deed. See id.

Additionally, in another landmark case, the plaintiff took a piece of jewelry to the jeweler to have it appraised. See Armory v. Delamirie, 93 Eng. Rep. 664, 664 (K.B. 1722) (applying spoliation inference for first time). The plaintiff brought a trover action against the jeweler after the jeweler refused to return the precious stone. See id. Although the court had no documentation of the stone’s actual value, the court instructed the jury to presume that the stone was of the highest quality in determining the damage award. See id. This case is known for establishing the legal principle omnium praesumptur contra spoliatorum—that all things are presumed against a wrongdoer. See id. This rule is frequently cited by American courts to describe the unfavorable inference or presumption that arises from evidence spoliation. See, e.g., Wong v. Swier, 267 F.2d 749, 759 (9th Cir. 1959) (stating that where evidence tampering occurs, presumption arises against responsible litigant that can be overcome by satisfactory explanation); Broomfield v. Texas Gen. Indem. Co., 201 F.2d 746, 748 (5th Cir. 1953) (quoting rule and stating that, during decedent’s workman’s compensation proceeding, evidence that insurance adjuster altered accident report by superimposing “no” answer over “yes” to question whether on-job heart strain was sole cause of death amounted to evidence suppression of such magnitude to be construed as recognition of insurer’s liability).

For a further discussion of the historical English and American debate on the spoliation issue, see GORELICK ET AL., supra note 8, at 5-7.


12. See id. ("[T]he critical question for the courts has not been whether some kind of adverse consequence should flow from the fact of destruction of evidence, but rather how best to integrate the teaching of Armory into a coherent scheme of 20th century evidentiary principles . . . .") (emphasis added); see also Steffen Nolte, The Spoliation Tort: An Approach to Underlying Principles, 26 ST. MARY’S L.J. 351, 404-24 (1995) (presenting contrasting state approaches to spoliation problem).
This Comment examines Pennsylvania's current approach to evidence spoliation and suggests ways that Pennsylvania could strengthen its existing sanctions. To lay the groundwork for this examination, Part II surveys the various remedies used nationwide to handle the spoliation problem.\textsuperscript{15} Part III addresses Pennsylvania's historical treatment of the spoliation problem.\textsuperscript{14} Part IV analyzes recent cases that have clarified Pennsylvania's spoliation law.\textsuperscript{15} Finally, Part V asserts that although Pennsylvania should not recognize a new tort action for spoliation, its courts must ambitiously enforce existing sanctions to ensure fairness and to deter future parties from spoliation.\textsuperscript{16}

II. Nationwide Remedies for the Spoliation of Evidence

Courts use a variety of legal doctrines to rectify evidence destruction.\textsuperscript{17} The primary remedies used to combat spoliation are first, pre-trial discovery sanctions; second, the spoliation inference; and third, the recognition of an independent tort action for the intentional and/or negligent spoliation of evidence.\textsuperscript{18}

One commentator has noted that these doctrines serve different institutional purposes: (1) a punitive function—to punish the spoliator and to

Evidence spoliation appears to be a growing problem. According to one study, 50\% of litigators found spoliation to be either a frequent or regular problem. See Bell et al., supra note 8, at 530 (citing Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 598-99 (1985)) (noting one-half of litigators believe that unfair and inadequate disclosure of material information prior to trial was "regular or frequent"). In the field of antitrust law, 69\% of surveyed lawyers had encountered unethical practices, the most common abuses being witness tampering and destroying evidence. See id. Some commentators indicate that the increasing frequency of spoliation cases in the courts proves the inadequacy of traditional remedies. See id. at 530 (noting inadequacy of traditional remedies); Nolte, supra, at 355 ("In effect, traditional procedural and non-procedural remedies are flawed by their limited scope, their inadequate preventative effect, and their failure to provide the victim with just compensation.").

13. For a further discussion of the various remedies used nationally to combat spoliation, see infra notes 17-64 and accompanying text. Part II includes a discussion of the contentious trend among some states to recognize an independent tort action for the intentional and/or negligent spoliation of evidence. For a further discussion of the independent tort action, see infra notes 49-64 and accompanying text.

14. For a further discussion of Pennsylvania's past treatment of the spoliation problem, see infra notes 65-103 and accompanying text.

15. For a further discussion of the most recent Pennsylvania decisions regarding spoliation, see infra notes 104-35 and accompanying text.

16. For further discussion of the advantages and deficiencies of Pennsylvania's treatment and for suggestions on how Pennsylvania can strengthen its approach, see infra notes 136-88 and accompanying text.

17. See Gorelick et al., supra note 8, at 12-13 (listing various legal doctrines used in spoliation context); Nolte, supra note 12, at 353 (listing procedural, non-procedural and tort remedies used to combat spoliation).

18. See Gorelick et al., supra note 8, at 12-13 (noting primary remedies for spoliation in civil proceedings); Losavio, supra note 7, at 862-69 (same); Nolte, supra note 8, at 353 (same).
deter the incidence of future destructive acts; (2) a neutral function—to preserve the accuracy of the factfinding process and (3) a compensatory function—to restore the injured party to the position the party enjoyed before the destructive act. Each type of sanction accomplishes each of the above-mentioned functions with varying degrees of success.

A. Pre-Trial Discovery Sanctions

A court may choose to impose discovery sanctions on the spoliating party before the trial. For the purpose of this discussion, discovery sanctions are “monetary and nonmonetary penalties imposed by trial judges on a party or its counsel . . . for destruction of discoverable material the party or its counsel knew or should have known was relevant to pending, imminent, or reasonably foreseeable litigation.”

A court can utilize both statutory and inherent authority to impose discovery sanctions. Federal and state courts find the explicit power to punish spoliation in the sanction provision of each jurisdiction’s civil procedure code. For example, Federal Rule of Civil Procedure 37(b) grants courts the power to sanction a party or deponent who fails to comply with a court-ordered discovery request. Each state and the District of Colum-


20. For further discussion on the court’s ability to impose sanctions, see infra notes 66-71 and accompanying text.

21. See Gorelick et al., supra note 8, at 65-66 (defining discovery sanctions).


23. See, e.g., Losavio, supra note 7, at 863-64 (noting explicit sanctioning power for spoliation under federal and state rules of civil procedure); Cambre, supra note 22, at 609 (remarking on existence of federal and state sanctioning provisions).

24. See Fed. R. Civ. P. 37(b) (2) (1999). The sanction provision of the Federal Rule reads as follows:

If a party or an officer, director, or managing agent of a party or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

[A] An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
bia has enacted a corresponding sanction provision in its civil procedure code.25 Permissible sanctions under Rule 37(b) include the exclusion of critical testimony, treating matters relevant to the spoliated evidence as established and holding the spoliator in contempt of court.26

A court's power to sanction under Federal Rule 37(b) is critically impaired, however, by the mandate that there be a pre-existing court order in place.27 Federal courts, consequently, lack the authority to sanction prelitigation destruction of evidence because at that early stage the spoliator is not yet under the jurisdiction of any court.28 The vast majority of state civil procedure codes contain a parallel pre-existing court order requirement.29 Only Pennsylvania, California, New York and Texas allow their courts to sanction discovery abuse regardless of the issuance of a court order.30

[B] An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence;
[C] An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
[D] In lieu of any of the foregoing orders or in addition thereto, an order, treating as contempt of court the failure to obey any orders except an order to submit to a physical or mental examination . . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Id.

25. See Gorelick et al., supra note 8, at 74-75 nn.24-28 (providing cites to corresponding state sanction provisions).
26. See Fed. R. Civ. P. 37(b) (2); see also Thompson, supra note 8, at 572 (discussing range of possible court-imposed sanctions).
27. See Gorelick et al., supra note 8, at 68 (commenting that Rule 37's pre-existing court order requirement effectively limits relief to two polar categories of cases: those in which spoliation victim is prudent enough to move for preservation order at beginning of litigation and those in which spoliator is reckless enough to destroy documents in face of judicial edict); see also Losavio, supra note 7, at 868 (noting that court order prerequisite critically limits force of Rule 37); see, e.g., Uniguard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 367-68 (9th Cir. 1992) (foreclosing application of Rule 37 sanctions where party's alleged discovery-related misconduct occurred prior to issuance of court order).
28. See Wilhoit, supra note 9, at 649 (discussing limitations and inadequacy of court-imposed sanctions as spoliation remedy).
29. See Gorelick et al., supra note 8, at 74-75 nn.24-27 (cataloguing 46 state procedural codes that contain parallel court order prerequisite); see id. at 76-77 (offering two suggestions for litigants in jurisdictions bound by pre-existing court order requirement: first, move for document preservation order at early stage of litigation and second, argue that sanctions should be imposed on basis of prior oral or "constructive" order).
30. See id. at 75 n.28 (containing text of four states' civil procedure sanction provisions). For example, California's discovery sanction provision reads, "Abuses
Because most jurisdictions are hampered by the court order requirement, courts find an alternative source of sanctioning authority in the concept of the court's "inherent powers."

The notion that a court possesses certain inherent supervisory powers to conduct its business has existed for centuries in the common law. The United States Supreme Court has stated that the basis for the inherent power doctrine comes from "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." The Court has cautioned, however, that this power be exercised with restraint and discretion. Finally, at least one court has invoked the Due Process Clause to claim the authority to sanction evidence destruction in the absence of a court order.

31. See, e.g., Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) ("A federal trial court has the inherent power to make appropriate evidentiary rulings in response to the destruction of relevant evidence"); Uniguard Sec. Ins. Co v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992) (finding that court properly exercised its inherent power to sanction where court was otherwise barred from sanctioning by Rule 37(b)'s pre-existing court order requirement); see also Turner v. Hudson Trans. Lines, 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (holding that courts possess power to sanction destruction of evidence through use of both Rule 37 and inherent powers).

32. See Gorelick et al., supra note 8, at 78 (noting historical development of inherent powers doctrine). The concept of inherent powers can be traced to the 16th century, where William Blackstone commented that the power to discipline for "rude and contumelious behavior must necessarily be as ancient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory." Id. (citing 4 W. BLACKSTONE, COMMENTARIES 282 (1765) (referencing inherent powers of court)); see also Philip A. Hostak, Note, International Union, Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt, 81 CORNELL L. REV. 181, 186 (1995) (noting that by 14th century, common law courts' inherent power to punish for contempt was "firmly established").

33. Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962) (invoking Court's inherent power to affirm dismissal of case sua sponte for want of prosecution). The Court noted that the power to invoke this sanction is "of ancient origin" and "is necessary to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the [courts]." Id. at 629-30; see Roadway Express v. Piper, 447 U.S. 752, 764 (1980) ("The inherent powers of federal courts are those which 'are necessary to the exercise of all others.'") (quoting United States v. Hudson & Goodwin, 7 Cranch (11 U.S.) 32, 34 (1812)).

34. See Roadway Express, 447 U.S. at 764 ("Because inherent powers are shielded form democratic controls, they must be exercised with restraint and caution.").

35. See Thompson, supra note 8, at 574 n.84. In the 1979 case Barker v. Bledsoe, the Western District of Oklahoma stated:

The requirement of due process is not an ephemeral concept, confined to the criminal area, but extends to all litigants. When an expert employed by a party or his attorney conducts an examination reasonably foreseeable destructive without notice to opposing counsel and such examination results in either negligent or intentional destruction of evi-
Once courts derive a legitimate source of sanctioning power, they can impose a spectrum of sanctions on the spoliator including monetary penalties, contempt sanctions, issue-related sanctions (such as ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims) and evidence sanctions prohibiting the offending party from introducing certain matters into evidence. In extreme cases, a court may issue terminating sanctions that include striking part or all of the pleadings, dismissing part or all of an action against a plaintiff spoliator or granting a default judgment against a defendant spoliator. The spoliating party can also be ordered to pay the injured party’s discovery and attorney’s fees.

B. Spoliation Inference

The oldest and most popular technique used by courts to remedy spoliation is the employment of jury instructions. A spoliation instruction will typically state that if relevant evidence within a party’s control is not produced by the party at trial, the jury may presume that the evidence would have negatively affected that party’s case had it been produced. The judge instructs the jury to draw an unfavorable inference against a litigant who has destroyed relevant documents in a dispute because the ...

36. See Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 517-18 (Cal. 1998) (listing available sanction options under state civil procedure code); Losavio, supra note 7, at 864-66 (listing range of possible sanctions); Thompson, supra note 8, at 572 (same).
37. See Cedars-Sinai, 954 P.2d at 517-18 (using and defining phrase “terminating sanctions”). For a discussion of Pennsylvania cases in which terminating sanctions have been issued, see infra notes 74-83; 120-27 and accompanying text.
38. See Fed. R. Civ. P. 37(b) (2) (1999) (permitting injured party to seek attorney’s fees and costs from spoliating party).
39. See Beers v. Bayliner Marine Corp., 675 A.2d 829, 831-32 (Conn. 1996) (considering civil evidence spoliation issue for first time and deciding to follow majority of jurisdictions in adoption of adverse inference rule); see also Armory v. Delamarie, 95 Eng. Rep. 664, 664 (K.B. 1722) (employing jury instructions to overcome spoliation problem in 16th century); Canter, supra note 7, at 15 (noting that in 1998, spoliation inference remains majority rule for dealing with loss of allegedly defective product). Although the adverse inference can be considered as one component of the large umbrella of discovery sanctions a judge can choose to impose, for the purposes of this Comment it will be treated as a separate remedy.

Keep in mind that through the adverse jury instruction, many courts use the terms “presumption” and “inference” interchangeably. See Frossard & Gainsberg supra, at 690.
spoliator is assumed to have been motivated by the concern that the material would have been unfavorable to that party's position.41

In order for a court to impose a spoliation inference, the following elements must be established: (1) an act of destruction of evidence; (2) the evidence destroyed was relevant to the dispute; (3) the act of spoliation was intentional and/or negligent; (4) legal proceedings were pending or reasonably foreseeable at the time when destruction occurred; and (5) the act of destruction was taken by the parties or their agents.42 Most jurisdictions will also require a showing that the destruction was in bad faith and for the purpose of suppressing evidence.43

The inference clearly serves a punitive function.44 Early American courts followed the common law reasoning that spoliators must be punished so that they cannot profit from their wrongdoing.45 The spoliation

41. See W. Russell Welch & Andrew Marquardt, Spoliation of Evidence, 5-WTR BRIEF 9 (1994) (discussing spoliation inference and other punishments that can be imposed on wrongdoer in pending lawsuit); see also Cambre, supra note 22, at 604-05 ("[T]he common sense observation that a party who proceeds to destroy a document that may be relevant to litigation is more likely to have been threatened by the document than is the party in the same position who does not destroy the document.").

42. See Gorelick et al., supra note 8, at 38 (listing elements of spoliation inference).

43. See Canter, supra note 7, at 13-14 (noting that although most courts are reluctant to sanction without bad faith or willful destruction finding, some courts allow spoliation inference for negligent loss or destruction of evidence); Thompson, supra note 8, at 575 ("Most courts and commentators have suggested that a spoliation inference is not available if the destruction results from mere negligence."). Compare S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R. Co., 695 F.2d 253, 258 (7th Cir. 1983) (holding that court must believe spoliating party acted in bad faith before unfavorable inference can arise), with Nation-Wide Check Corp. v. Forest Hills Distrib., 692 F.2d 214, 217 (1st Cir. 1982) (showing of bad faith not required to establish inference against party who destroyed documents relevant to case).

44. See Nation-Wide, 692 F.2d at 218 (discussing historical rationale behind spoliation inference). In discussing the policy rationale of the Armory decision, Judge Breyer commented that "the inference was designed to serve a prophylactic and punitive purpose and not simply to reflect relevance." Id.

The inference's primarily punitive nature is demonstrated by the fact that the majority of courts refuse to employ the inference absent a showing of willfulness or bad faith. See Gorelick et al., supra note 8, at 41 ("If the function of the inference is punishment, then it seems essential to impose a requirement of fault or bad faith... if the function of the doctrine is instead to compensate for losses suffered by innocent adversaries, liability should be imposed for negligent spoliation.").

45. See, e.g., Pomeroy v. Benton, 77 Mo. 64, 86 (1882) (holding spoliators must not profit from their wrongs). The Missouri Supreme Court reasoned that:

It is because of the very fact that the evidence of the plaintiff... ha[s] been destroyed, that the law, in hatred of the spoiler, baffles the destroyer and thwarts his inquisitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidently employed to perpetrate the wrong.

Id. But see Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 317 (1850) (holding that inference may impede factfinding process because innocent men, fearing presumption, may resort to deception to avoid it).
inference continues to be the primary technique used to combat spoliation.\textsuperscript{46} With the exception of Utah, virtually every state court system in the United States uses either a spoliation inference or a very close analogy, such as a suppression inference.\textsuperscript{47}

C. \textit{Independent Tort Action for the Spoliation of Evidence}

A minority of states have determined that traditional remedies are inadequate because although they serve a punitive function, they do not fully compensate the spoliation victim.\textsuperscript{48} Furthermore, traditional remedies fail to address the situation where a third party uninvolved in the litigation destroys the evidence.\textsuperscript{49} Consequently, these states have recognized a new tort cause of action that allows the injured party to bring an action against the spoliator for damages caused by evidence destruction.\textsuperscript{50}

The founding purpose of the tort is to provide equitable victim compensation when the destruction of key evidence causes a party to lose a valuable property right, a lawsuit.\textsuperscript{51} A lawsuit is a probable expectancy—a property interest with which one may not interfere.\textsuperscript{52}

\begin{itemize}
\item[46.] See, e.g., Rivlin, supra note 19, at 1008 (noting predominant use of adverse inference and citing cases).
\item[47.] See Beers v. Bayliner Marine Corp., 675 A.2d 829, 836 (1996) (citing cases and adopting majority rule that allows trier of fact to draw spoliation inference); Gorelick et al., supra note 8, at 58-64 (providing complete jurisdictional guide to spoliation inference and noting Utah’s absence).
\item[48.] See Nolte, supra note 12, at 355 (“In effect, traditional procedural and nonprocedural remedies are flawed by their limited scope, their inadequate preventative effect, and their failure to provide the victim with just compensation.”); Rivlin, supra note 19, at 1005 (noting that court’s remedial power is severely limited when spoliation is discovered after entry of final judgment); Stipancich, supra note 5, at 1139 (discussing traditional remedies’ inadequacy in compensating aggrieved party and deterring spoliator).
\item[49.] See Frossard & Gainsberg, supra note 40, at 686 (noting failure of traditional remedies to address third party spoliation).
\item[51.] See Gorelick et al., supra note 8, at 140 (noting that tort’s explicit purpose is compensation). One commentator opines that the critical innovation and insight of this tort is the concept “that destruction of evidence itself gives rise to liability rather than enhancing, through inferences and constructive admissions, the likelihood of recovery on some other basis.” Id. (emphasis added).
\item[52.] See, e.g., 6 Summ. Pa. Jur. 2d, \textit{Property} § 3:10 (1992) (stating that choices in action, defined as "a personal right recoverable by a lawsuit," are personal property).
\end{itemize}
The landmark case recognizing a tort action for the intentional spoliation of evidence was the 1984 California case Smith v. Superior Court. The Smith court reasoned that new and nameless torts are being recognized constantly, and that the “common threat woven into all torts is the idea of unreasonable interference with the interests of others.” The court analogized the emerging tort to the recognized tort of intentional interference with prospective business advantage on the basis that the opportunity to win a lawsuit is the same type of “valuable probable expectancy” as the opportunity to obtain a contract. The court acknowledged that the most troubling aspect of allowing an intentional spoliation cause of action was the speculative nature of determining damages, but the court concluded that the societal interest in promoting deterrence outweighed the damages concern.

The tort of intentional spoliation has subsequently been recognized in Alaska, Florida, Kansas, Ohio, Indiana and New Mexico. New Jersey

53. 198 Cal. Rptr. 829 (Ct. App. 1984). The Smith plaintiff was injured in a motor vehicle accident when an oncoming van’s left wheel and tire crashed into her windshield. See id. at 831. The van was immediately towed post-accident to the dealer who customized the wheels. See id. Although plaintiff’s counsel made an agreement with the dealer to store the automotive parts pending an investigation, the parts were subsequently destroyed, lost or transferred. See id. Plaintiff’s experts were thus unable to inspect and test the part to pinpoint the cause of the failure of the wheel assembly on the van. See id.

54. Id. at 832 (quoting W. Prosser, TORTS § 1, at 6 (4th ed. 1971)).

55. See id. at 837 (“While intentional spoliation of evidence has not been recognized as a tort heretofore, we conclude that a prospective civil action in a product liability case is a valuable ‘probable expectancy’ that the court must protect from the kind of interference alleged herein.”) (quoting W. Prosser, TORTS §130 at 950).

56. See id. at 835-36 (giving examples of many interests protected by law in which damages cannot be stated with certainty). The California Supreme Court found guidance from the decision of the United States Supreme Court in Story Parchment Co. v. Paterson P. Paper Co., 282 U.S. 555 (1931). See Smith, 198 Cal. Rptr. at 835. In Story Parchment, an antitrust case, the Court stated:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the 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.

Story Parchment, 282 U.S. at 563.

57. See generally Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986). The Hazen plaintiff sued the municipality and police officers after she was arrested for allegedly running a prostitution operation. See id. at 458. At the dismissal hearing, the plaintiff’s attorneys requested that the arrest tape be preserved in contemplation of a civil suit. See id. at 459. After the prosecutor agreed to preserve the tape, a male voice was heard saying, “Wait ‘til you hear what is on the tape now.” Id. Upon listening to tape during discovery, plaintiff’s attorneys found it to be generally inaudible. See id.

The Alaska Supreme Court held that plaintiff had a common law tort cause of action for intentional interference with a prospective civil action by spoliation of
recognizes an analogous tort action that it terms the fraudulent concealment of evidence.\(^5\)

Although each jurisdiction employs a slightly different formulation, the general elements of the intentional spoliation tort include: (1) the existence of a potential civil action; (2) defendant’s knowledge of the potential action; (3) destruction of evidence; (4) intent; (5) causal inability to prove the lawsuit or proximate cause; and (6) damages.\(^6\) In most states that recognize the tort, the claim is brought jointly with the underlying action.\(^7\) Some jurisdictions, however, require completion of the underlying litigation before a litigant can bring a spoliation action.\(^8\)

Additionally, several states recognize a cause of action for the negligent spoliation of evidence.\(^9\) The required elements are the same as evidence. See id. at 463. Citing to Smith, the Hazen court characterized the prospective false arrest and malicious prosecution actions as “valuable probable expectations.” Id. at 464. “If the arrest tape was intentionally altered, this was an unreasonable interference with these expectancies that can be remedied in tort.” Id.; see Foster v. Lawrence Mem’l Hosp., 809 F. Supp. 831, 838 (D. Kan. 1992) (recognizing cause of action for intentional and negligent spoliation of evidence); Bondu v. Gurwich, 473 So. 2d 1307, 1312-13 (Fla. 1984) (recognizing negligent spoliation tort); Levinson v. Citizens Nat’l Bank, 644 N.E.2d 1264, 1268-69 (Ind. Ct. App. 1994) (noting state recognizes intentional spoliation tort in limited circumstances); Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189 (N.M. 1995) (defining tort of intentional spoliation of evidence as “intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person’s recovery in civil action”); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (listing elements of cause of action for interference with or destruction of evidence).

58. See Viviano v. CBS, Inc., 597 A.2d 543, 549-50 (N.J. Super. Ct. App. Div. 1991) (recognizing cause of action for willful concealment of evidence). The Viviano plaintiff sustained injuries when her hand was crushed on the job by a machine. See id. at 545. Plaintiff won a fraudulent concealment tort action after she showed that her employer purposefully concealed an otherwise discoverable memorandum that detailed prior problems with the machine. See id. at 551-52. The court stated that to prevail on a fraudulent concealment of evidence action, a plaintiff must prove: “(1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of the defendant that litigation exists or is probable; (3) willful, or possibly, negligent concealment of evidence by the defendant designed to disrupt the plaintiff’s case; (4) disruption of the plaintiff’s case; and (5) damages proximately caused by the defendant’s acts.” Id. at 550.

59. See 86 C.J.S. Torts § 85 (1997) (listing necessary elements of tort); see also Gorelick et al., supra note 8, at 153-54 (same).

60. See, e.g., Smith, 198 Cal. Rptr. at 837 (noting that spoliation claim should be heard simultaneously with primary claim); Miller v. Allstate Ins. Co., 573 So. 2d 24, 28-29 (Fla. Dist. Ct. App. 1985) (requiring that claims be brought simultaneously).

61. See, e.g., Fox v. Cohen, 406 N.E.2d 178, 183 (Ill. App. Ct. 1980) (holding that spoliation action is premature until plaintiff actually suffers loss of claim); Federated Mut. Ins. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 439 (Minn. 1990) (holding that underlying case must be pursued to its full disposition before raising evidence spoliation claim). “The injury must be actual; the threat of future harm not yet realized is not enough.” Fox, 406 N.E.2d. at 183.

III. PENNSYLVANIA LAW ON THE SPOILATION OF EVIDENCE

At least since the early nineteenth century, Pennsylvania courts have used the adverse inference as the primary technique to remedy spoliation when a party to the litigation destroyed relevant evidence.\(^{64}\) The adverse inference was applied both where tangible evidence (documents, receipts, etc.) was withheld and also where a party to litigation attempted to induce witnesses to testify falsely or to withhold key information.\(^{65}\)

In the 1898 case, McHugh v. McHugh,\(^{66}\) the Pennsylvania Supreme Court conclusively established that a party cannot benefit from its own withholding or spoliation of evidence.\(^{67}\) The court subsequently clarified that the failure to produce key evidence raises a factual inference and not an implication or presumption of law.\(^{68}\) For many years thereafter, reference is made to spoliation in connection with the withholding of evidence.\(^{69}\) In particular, this concept has been preserved in the Pennsylvania courts through the cases of Wishart v. Downey,\(^{70}\) Mount v. Hoppe,\(^{71}\) and Wishart v. Downey.\(^{72}\)

63. See 86 C.J.S. Torts § 85 (defining negligent spoliation).
64. See 2 WIGMORE ON EVIDENCE § 291 at 224 n.2 (James H. Chadbourne ed. 1979) (listing 19th century Pennsylvania cases permitting adverse inference jury instruction). For example, in Wishart v. Downey, 15 Serg. & Rawle 77 (Pa. 1826), the court employed the adverse inference when defendant failed to produce a receipt for money allegedly owed to him. See id. at 79 ("[I]f notice to produce the receipt is given, and they are not produced, and no reason given why they are not, it would be matter which ought to affect the defendant's case . . . according to circumstances."); see also Frick v. Barbour, 64 Pa. 120, 121 (1870) (holding, in action for assumpsit, that nonproduction of receipts held open to inference).
65. See, e.g., McHugh v. McHugh, 40 A. 410, 411 (Pa. 1898) (attempted subornation of witnesses gives rise to negative presumption).
66. 40 A. 410 (Pa. 1898).
67. See id. at 411 (holding spoliation or withholding of evidence creates unfavorable inference). The plaintiff produced evidence that the defendant attempted to induce witnesses to appear and testify falsely. See id. The court established the long-used formulation that "[t]he spoliation of papers and the destruction or withholding of evidence which a party ought to produce gives rise to a presumption unfavorable to him, as his conduct may properly be attributed to his supposed knowledge that the truth would operate against him." Id. The court further stated:

This principle has been applied in a great variety of cases, and it is now so well established that it is unnecessary to do more than state it . . . A like presumption arises where, in connection with the trial, testimony has been fabricated or witnesses suborned, or a jury corruptly influenced, or where an attempt has been made to do any of these things.

Id. As noted above, even at this time, the problem of spoliation was well known to the court. See Wills v. Hardcastle, 19 Pa. Super. 525, 526-27 (Super. Ct. 1902) (holding that aggrieved party was entitled to presumption in its favor if jury found spoliation).
68. See, e.g., Piroz v. Ianncone, 17 A.2d 707, 711 (Pa. 1962) (finding reversible error where trial judge instructed jury that defendant's failure to testify raised "an implication in the eyes of the law" that testimony would not be in his favor);
ring the spoliation issue to the jury with accompanying instructions was the primary method used to combat spoliation.\textsuperscript{69}

Bayout v. Bayout, 96 A.2d 876, 879 (Pa. 1953) (stating that failure to produce evidence permits only factual inference and is not presumption of law).

69. See Haas v. Kasnot, 92 A.2d 171, 173 (Pa. 1952) (stating general rule that “where evidence which would properly be part of a case is within the control of the party in whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him”); see also Davidson v. Davidson, 156 A.2d 549, 551 (Pa. Super. Ct. 1959) (stating rule and commenting that inference is permissive, not conclusive).

Pennsylvania’s Standard Civil Jury Instructions suggest the following instructions:

PART I. GENERAL INTRODUCTION

In presenting his case, (plaintiff)(defendant) did not (produce) (call ). The general rule is that where evidence which would properly be part of a case is within the control of, or available to, the party whose interest it would naturally be to produce it and he fails to do so without satisfactory explanation, you may draw the inference that, if produced, it would be unfavorable to him.

PART II. FAILURE TO PRODUCE AN OBJECT OR DOCUMENT

Applying that general rule to this case and to (plaintiff’s)(defendant’s) failure to produce ( ), you may draw the inference that it would have been unfavorable to him if you find all of the following: that ( ) exists and is within his control, that it would naturally have been in his interest to produce it and there has been no satisfactory explanation of the failure to produce.

PART III. FAILURE TO CALL A WITNESS

In this case, (plaintiff)(defendant) did not call ( ) as a witness. The general rule as it applies in the case of failure to call a witness is as follows:

where a potential witness is available and is shown to have special information relevant to the case, so that his testimony would not merely be cumulative, and where his relationship to one of the parties is such that the witness would ordinarily be expected to favor him, then if the party does not produce his testimony, and there is no satisfactory explanation for his failure to do so, you may draw the inference that such testimony would have been unfavorable.

Therefore, if you find that the person who was not called as a witness was available to (plaintiff) (defendant), has special information which was relevant, and that his testimony would not merely be cumulative, and that his relationship to (plaintiff) (defendant) is such that the witness would ordinarily be expected to favor (plaintiff) (defendant), then if there is no satisfactory explanation for (plaintiff’s) (defendant’s) failure to call him, you may draw the inference that the testimony of the witness would have been unfavorable.

PART IV. FAILURE OF A PARTY TO TESTIFY

This general rule applies as well where the witness who did not testify was the party himself. Defendant’s failure to testify will not constitute affirmative evidence of (negligence) ( ); plaintiff still has the burden of that issue. Nevertheless, from defendant’s failure to testify without satisfactory explanation, you may draw the inference that his testimony would have been unfavorable to himself.
Traditionally, Pennsylvania followed the majority trend in its refusal to draw the spoliation inference absent clear evidence of intentional or fraudulent suppression or withholding of evidence.\textsuperscript{70} Thus, no unfavorable inference or penalty would arise if the spoliator lost the evidence through negligence or mistake.\textsuperscript{71}

Recently, however, Pennsylvania courts have begun to allow more drastic remedies, including termination sanctions, for intentional and/or negligent evidence spoliation.\textsuperscript{72} In the past decade, the courts struggled to clarify two key issues: first, the proper effect on the case when a key piece of evidence has been lost or destroyed; and second, whether Pennsylvania should recognize an independent tort action for evidence spoliation.\textsuperscript{73}

\textbf{A. Effect on Case When Key Evidence Is Lost or Destroyed}

In the 1991 case, \textit{Roselli v. General Electric Co.},\textsuperscript{74} the Pennsylvania Superior Court began a new trend by granting a defendant manufacturer's summary judgment motion in a products liability action because the plaintiff inadvertently disposed of the allegedly defective product before the defendant had the opportunity to examine it.\textsuperscript{75} The court reasoned that if it permitted a defective product claim to continue where the purchaser


\textsuperscript{71} See, e.g., Gums v. International Harvester, Inc., 718 F.2d 88, 96 (3d Cir. 1983) ("[N]o unfavorable inference arises when the circumstances indicate that the [evidence] has been lost or accidentally destroyed. . ."); Universe Tankships, Inc. v. United States, 388 F. Supp. 276, 286 (E.D. Pa. 1974) ("Mere negligence resulting in destruction of evidence is not enough to require the drawing of an [adverse] inference. . .").

\textsuperscript{72} For a further discussion on Pennsylvania's recent decisions regarding appropriate remedies for spoliation, see infra notes 103-34 and accompanying text.

\textsuperscript{73} For a further discussion on Pennsylvania's recent resolution of these two issues, see infra notes 103-34 and accompanying text.


\textsuperscript{75} See id. at 687-88 (holding that summary judgment appropriate in product liability case where purchaser has thrown product away before inspection). The facts surrounding the \textit{Roselli} case provided the basis for the introductory hypothetical used by the author. See id. at 686. The \textit{Roselli} plaintiff brought a products liability action against the manufacturer for injuries sustained when a glass coffee carafe allegedly shattered in her hand. See id. The plaintiff claimed that there was a malfunction in the particular carafe that caused it to shatter. See id. Plaintiff produced the coffee maker for defendant's inspection, but failed to produce the glass fragments from the carafe itself, which were lost by the plaintiff and her former attorney. See id.

The trial court granted the defendant's summary judgment motion on the basis that by losing the defective product, the plaintiff had deprived the defendant of "the most direct means of countering their allegations of a defect via expert testing and analysis." \textit{Id.} at 687.
had disposed of the product post-accident, the court would be encouraging false claims and making the legitimate defense of valid claims extremely difficult. Future plaintiffs would be put in the untenable position of deciding whether the availability of the item would help or hurt their case.

When producing the allegedly defective product for the defense attorney’s inspection would weaken the case, the court opined that some plaintiffs (or plaintiff’s attorneys) “would be unable to resist the temptation to have the product disappear.” Thus, as a matter of public policy, requiring the plaintiff to preserve an allegedly defective product will prevent fraudulent claims and remove plaintiffs from the tempting position of deciding whether the availability of the defective product will help or hurt their case.

Applying the Roselli principle, subsequently known as “the spoliation rule” or “the spoliation doctrine,” Pennsylvania state and federal courts routinely granted termination sanctions when the plaintiff was in any way responsible for failing to preserve the defective product. For example, in DeWeese v. Anchor Hocking, the Superior Court applied the Roselli principle so strictly as to affirm summary judgment where the plaintiff’s co-workers unknowingly disposed of evidence while the plaintiff was in the hospital being treated for post-accident injuries. Although the plaintiff

76. See id. at 687 (explaining policy basis of holding).
77. See id. (“It would put a plaintiff (or plaintiff's attorney) in the position of deciding whether the availability of the item would help or hurt his or her case.”).
78. Id. at 688.
79. See id. at 687 (stating public policy justification for granting defendant’s summary judgment motion). But see id. at 689 (Del Sole, J., dissenting) (finding factual disputes which warranted that case be presented to jury). Judge Del Sole stated:

The decision to affirm the award of Summary Judgment is based upon the fact that the key piece of evidence in this case was inadvertently destroyed. This is not, nor should it be the law in this Commonwealth. Many times products are destroyed before suit is filed, yet this is not sufficient reason to bar plaintiffs from pursuing their rights. Plaintiffs continue to have the burden of proof in such matters, which burden acts as protection to defendants.

Id. at 689 (Del Sole, J. dissenting).
82. See id. at 424 (stating that plaintiff’s “failure to preserve the shattered pitcher has precluded him from raising a genuine issue of material fact regarding the identity of its manufacturer and seller”). In DeWeese, the plaintiff sustained injuries when a glass pitcher he had filled with boiling water exploded. See id. at
himself did not lose the evidence, the court affirmed summary judgment because without the physical evidence, "there is simply no evidence tending to establish that the [evidence] involved in this case was manufactured by [the defendant] or sold by the [co-defendant]."  

Almost as quickly as the Superior Court made the drastic *DeWeese* decision, the court began limiting the application of termination sanctions. The first movement away from *Roselli* occurred when the Superior Court declined to grant defendant's motion for summary judgment based on the spoliation theory in design defect cases. The court reasoned that where the plaintiff alleges a design defect common to all products, the defendant has the opportunity to examine that product's design and any other product in the same product line to prepare for litigation. Thus, an examination of the particular product is unnecessary to determine the validity of plaintiff's claim. The court also refused to apply the spoliation rule when the defendant's bailee was in control of the allegedly defective product at the time it was lost.

422. While plaintiff was being transported to the hospital, fellow employees cleaned the area of the accident—discarding the remnants of the shattered pitcher. See *id.* Plaintiff testified in his deposition that the restaurant used various types of pitchers and he could not recall which manufacturer made the allegedly defective pitcher. See *id.* at 423-24.  

83. *Id.* at 423. The *DeWeese* court further stated that it is "contrary to public policy" to allow a cause of action to continue without the allegedly defective product. *Id.*


85. See, e.g., O'Donnell, 696 A.2d at 849 (denying summary judgment based on plaintiff's failure to preserve allegedly defective pants, because plaintiff alleged general design defect common to all of defendant's pants); Quaile, 1993 WL 53563, at *3 (refusing summary judgment request when defendant was not prejudiced by loss of lamp that allegedly caused injury because defendant was able to examine other lamps of same design).  

86. See O'Donnell, 696 A.2d at 848-49 (holding that "in cases where the plaintiff is able to establish a defect even if the specific product is lost or destroyed, the case must be allowed to proceed").  

87. See *id.* at 849 (stating that unlike *Roselli* manufacturing defect situation, design defect claim can be investigated without examination of particular defective product).  

88. See Long v. Yingling, 700 A.2d 508, 513 (Pa. Super. Ct. 1997) (holding spoliation rule inapplicable where defendant owned and controlled allegedly defective car in which plaintiff was injured). Because plaintiff was never in a position to dispose of the car or decide whether its availability would help or hurt her case, the court held that the public policy rationale of *Roselli* was inapplicable. See *id.* ("It would make no sense to require [plaintiff] to preserve and produce the master cylinder for [defendant's] inspection when [defendant] owned and controlled the master cylinder at all times.").
In *Dansak v. Cameron Coca-Cola Bottling Co., Inc.*, the court continued to back away from the holding in *DeWeese*. The Superior Court reversed the trial court's grant of summary judgment for the defendant on the grounds that the plaintiff bore no fault for the disposal of the allegedly defective product. Even though the plaintiff was proceeding on an individual malfunction theory, the court nonetheless concluded that the failure to produce the evidence was not fatal to the plaintiff's claim. The court further stated that it was inappropriate for the trial court to determine as a matter of law that the plaintiff could not prove her case on the basis that the defective product had not been preserved.

### B. Tort of Spoliation of Evidence

*Pirocchi v. Liberty Mutual Insurance Co.*, litigated in the Eastern District of Pennsylvania, was one of the first noted cases that discussed possible tort liability for evidence destruction. In *Pirocchi*, the district court held that an individual who voluntarily assumes control of evidence has an

---

90. See id.
91. See id. at 495 (stating that failure to produce evidence is not fatal to plaintiff's case). In *Dansak*, a convenience store employee sued a soda distributor after she cut herself on a broken soda bottle attached to a container she was unpacking. See id. at 491. While plaintiff was at the hospital, the convenience store manager, not a party to the case, threw away the bottle and the packing material. See id. Therefore, neither party to the litigation was responsible for the bottle's disappearance, nor did they have the opportunity to inspect the bottle before it was destroyed. See id. The trial court, citing *Roselli* and *DeWeese*, granted the defendant's motion for summary judgment on the spoliation issue. See id. at 492-93.
92. See id. at 494 (stating spoliation rule does not apply because plaintiff "was not at fault and can identify the product supplier"). The court distinguished *DeWeese* by noting that although the *DeWeese* plaintiff could not clearly identify the product's manufacturer, the *Dansak* plaintiff could identify the six pack as coming from defendant Coca-Cola. See id. at 493. The court realized that the *DeWeese* plaintiff was also not at fault, "[h]owever, *DeWeese* failed to carry a majority on the spoliation issue; thus, any discussion of spoliation in *DeWeese* is not binding on the court." Id. The court further characterized *DeWeese* as "not [being] a spoliation case." Id. "*DeWeese* turned on the fact that plaintiff failed to produce any verified evidence whatsoever that defendants' products were the cause of plaintiff's injury—an essential element of a prima facie products liability case." Id. at 493-94.
93. See id. at 495. ("We conclude that no controlling Pennsylvania authority mandates summary judgment whenever the plaintiff fails to preserve the defective product. In fact, a recent panel of our court has rejected this 'broad conclusion' as 'untenable.'") (quoting *O'Donnell v. Big Yank, Inc.*, 696 A.2d 846, 848 (Pa. Super. Ct. 1997)).
95. See id.; see also *Gorelick et al., supra* note 8, at 141 (recognizing *Pirocchi* as "first case imposing tort liability for destruction of evidence"). *Smith v. Superior Court* did not mention any of the tort cases that preceded it, and as a result, subsequent decisions assume that the *Smith* court invented the spoliation tort. See id. "In reality, the assumption that the spoliation tort is a radical judicial innovation is erroneous." Id.
Implicit duty to take reasonable care to preserve the evidence for future litigation. 96

Pennsylvania state court discussion of the independent spoliation tort has been sparse. 97 Prior to 1998, the Pennsylvania Superior Court had addressed the emerging spoliation tort twice, and both times it declined to decide whether the spoliation tort was a viable cause of action. 98 In the 1997 case of Kelly v. St. Mary Hospital, 99 the court, in dicta, seemed receptive to the concept of a spoliation tort. 100 Although Kelly was dismissed on procedural grounds, the court suggested the possibility of recognizing a tort under proper circumstances. 101 Additionally, a few Pennsylvania

96. See Pirocchi, 365 F. Supp. at 281 (holding that affirmative conduct will create duty to act reasonably under circumstances). In Pirocchi, an insurance adjustor, an employee of the defendant insurance company, assumed custody of the chair that caused the plaintiff’s injuries. See id. at 279. The defendant later lost the chair. See id. The plaintiff sued, arguing that the company negligently failed to preserve evidence that the plaintiff might need in a future products liability suit against the chair manufacturer. See id.


98. See id. at 67 n.2 (detailing history of Pennsylvania Superior Court’s consideration of spoliation tort).

The first time the spoliation tort was discussed was in the 1993 case, Olsen v. Gruta, 631 A.2d 191 (Pa. Super. Ct. 1993). In Olsen, two construction workers brought suit against the lessor of a crane after the crane cable snapped while they were suspended in the air. See id. at 191. One of the multiple defendants joined in the action filed a complaint alleging spoliation of evidence relevant to the suit. See id. at 193-94. The alleged spoiler filed a preliminary objection that the complaint did not set forth a recognizable Pennsylvania cause of action. See id. The Superior Court affirmed the trial court’s decision to dismiss the spoliation claim on procedural joinder grounds without deciding whether spoliation of evidence was a viable cause of action. See id. at 195. The court noted:

o]ur research reveals that no Pennsylvania court has recognized a cause of action for spoliation of evidence . . . . [A]ppellants assert that Pennsylvania courts have addressed spoliation of evidence under related theories . . . . Without deciding whether spoliation of evidence is a viable cause of action in Pennsylvania, we find a claim of this nature fails to satisfy the joinder conditions of Pa. R. Civ. P. 2252.

Id. at 195.


100. See id. at 357-58. The Kelly plaintiff sustained injuries after being struck on the wrist multiple times by a defective hospital bed guardrail. See id. at 356. After the plaintiff initiated an action against the hospital and the bed manufacturer, the hospital disposed of the bed. See id. Plaintiff filed a complaint against the hospital for the negligent and/or intentional spoliation of evidence, arguing that given the notice afforded by her previously filed suit, the hospital was charged with the legal duty to preserve the bed. See id. at 356. Plaintiff argued that existing remedies, such as negative inferences, burden-shifting, discovery sanctions or criminal prosecution, would be ineffective to restore her loss. See id. at 357.

101. See id. ("Appellant’s failure to suggest how to assess damages is fatal to the assertion of a separate cause of action as the absence of this element leaves the claim, even assuming it could otherwise be identified as valid, without substance.") (emphasis added). The court then cited to the principle, "[w]hen a plaintiff fails to establish damages in a tort action the defendant is entitled to a verdict, although
Courts of Common Pleas accepted spoliation of evidence as a separate cause of action.\textsuperscript{102}

IV. RECENT CASES

Within the past year, Pennsylvania courts have made significant developments in the evidence spoliation area. Consequently, there is now more guidance with regard to the spoliation problem in civil litigation.\textsuperscript{103} The Pennsylvania Supreme Court recently endorsed the use of a balancing test to determine the proper remedy when key evidence is destroyed.\textsuperscript{104} Although the Pennsylvania Supreme Court has not yet addressed the spoliation tort, a recent superior court decision indicates that neither intentional nor negligent spoliation will be recognized as viable torts in the near future.\textsuperscript{105}

A. Effect on Case When Key Evidence Is Lost or Destroyed

In Schroeder v. Commonwealth,\textsuperscript{106} the Supreme Court of Pennsylvania clarified that a products liability defendant will no longer be granted summary judgment simply because the plaintiff cannot produce the allegedly defective product.\textsuperscript{107} The Schroeder plaintiff brought a design defect, products liability action against a truck manufacturer and a negligence action against the state transportation department.\textsuperscript{108} Although the plaintiff had

guilty of negligence." Id. (quoting Sisk v. Duffy, 192 A.2d 251, 253 (1963)). In conclusion, the court stated that if spoliation were a valid cause of action in Pennsylvania, the plaintiff's critical omission of damages prevented her from advancing it. See id. at 358.


103. See David E. Prewitt, Developments in Spoliation of Evidence, The LEGAL INTELLIGENCER, Oct. 28, 1998, at 9-10 (discussing recent decisions that have further refined and extended application of spoliation challenge in product liability and general negligence cases).

104. For further discussion of the balancing test, see infra notes 121-27 and accompanying text.

105. For a further discussion on Pennsylvania's rejection of the spoliation tort, see infra notes 128-34 and accompanying text.

106. 710 A.2d 23 (Pa. 1998).

107. See id. at 25 (noting that summary judgment is to be used only when there is no genuine issue of material fact).

108. See id. at 24. Navistar designed and manufactured the cab and chassis of a truck and sold them to Sheets Truck Center in August of 1986. See id. Plaintiff,
arranged with a third party to preserve the evidence, it was nonetheless destroyed before the defendants had the opportunity to inspect it.109 At trial and on appeal, the court affirmed summary judgment in favor of the defendants.110

The Pennsylvania Supreme Court disavowed reliance on the Superior Court's Roselli and DeWeese decisions.111 Instead, the court adopted a new balancing test for determining the appropriate evidence spoliation sanction, which was approved by the United States Court of Appeals for the Third Circuit in Schmid v. Milwaukee Electric Tool Corp.112 The Schmid court stated that the relevant criteria for deciding the proper penalty for spoliation are: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction available that will avoid substantial unfairness to the opposing party and . . . deter such conduct by others in the future."113 The Pennsylvania Supreme Court stressed that termina-

Kelly Schroeder, and her husband, Gary, bought a truck containing parts from Sheets in 1988. See id. On May 5, 1991, Gary Schroeder was driving his truck on a state road when he lost control. See id. The truck crossed the on-coming lane, struck an embankment and flipped over. See id. At that time, the Department of Transportation (PennDOT) was doing construction work and had cut away the berm of the road. See id. A police officer discovered the car with the roof on the driver's side partially crushed and Schroeder trapped inside. See id. The officer tried to free Schroeder, but a fire ignited the engine area and consumed the cab. See id. Schroeder died at the scene. See id. Kelly Schroeder brought suit for design defect against both the manufacturer and seller of the truck, and a negligence claim against PennDOT. See id. at 25.

109. See id. at 24-25. Prior to filing the claims, the plaintiff's attorney asked the salvage company to store the component parts so that they could be examined for litigation. See id. The salvage company agreed to do so for a fee. See id. at 25. Despite the fee arrangement, the salvage company sold the component parts, preventing PennDOT from having the opportunity to examine them. See id.

110. See id. at 25-26. The trial and appellate court relied heavily on the Superior Court's decisions in Roselli and DeWeese, and on the public policy ground that destruction of the product renders the defendant unable to prepare an adequate defense. See id.

111. See id. at 26 (stating that Roselli was inapplicable because current plaintiff was alleging design defect common to all trucks). As for DeWeese, the court pointed out it did not produce a majority opinion and stated, "[a]t most, DeWeese stands for the principle that summary judgment is warranted when a plaintiff cannot identify a product manufacturer." Id.

112. 13 F.3d 76 (3d. Cir. 1994). This was not the first time the Schmid test was used by Pennsylvania courts in the spoliation context. In fact, several panels of the state superior court have applied the Schmid test and found summary judgment inappropriate. See, e.g., Smiley v. Holiday Rambler Corp., 707 A.2d 520, 527 (Pa. Super. Ct. 1998) (adopting Schmid test and finding summary judgment inappropriate); Sebelin v. Yamaha Corp., 705 A.2d 904, 909 (Pa. Super. Ct. 1998) (noting that when spoliation is issue in products liability cases, court must look to each case's facts and circumstances to determine if summary judgment is appropriate).

113. Schmid, 15 F.3d at 79; see Schroeder, 710 A.2d at 27 (discussing and adopting Schmid test).

The Schmid court offered three alternative sanctions for spoliation: (1) a jury instruction on the spoliation inference, (2) the exclusion of countervailing evi-
tion sanctions should be granted only as a last resort where no other remedy or combination of remedies can adequately redress the prejudice resulting from evidence spoliation.\footnote{114}

Applying the \textit{Schmid} test, the Pennsylvania Supreme Court found the defendants were not entitled to summary judgment.\footnote{115} In endorsing the test, the court asserted that a spoliation sanction based on fault, prejudice and other available sanctions will discourage intentional destruction.\footnote{116} The \textit{Schroeder} court further stated that in cases where summary judgment is not granted, the defendant remains protected by the plaintiff's substantial burden of having to establish that a defective product caused his or her injury.\footnote{117}

In the wake of \textit{Schroeder}, the Pennsylvania legal community questioned whether a defendant could still establish entitlement to summary judgment based on the spoliation theory.\footnote{118} Because \textit{Schroeder} did not overrule \textit{Roselli} or \textit{DeWeese}, a defendant, theoretically, can still be granted
dence, or (3) the outright dismissal of the claim or claims for which the defendant's position has been prejudiced. \textit{See Schmid}, 13 F.3d at 78. The option of excluding evidence is troubling because in many cases an exclusion will have the same effect as outright dismissal of the claim. \textit{See}, e.g., Unigard Sec. Ins. Co. \textit{v. Lakewood Eng'g \& Mfg. Corp.}, 982 F.2d 363, 369 (9th Cir. 1992) (excluding evidence had effect of eliminating claim).

\footnote{114} \textit{See Schroeder}, 710 A.2d at 28 (discussing why lesser sanction applies to case).

\footnote{115} \textit{See id.} (explaining reversal of summary judgment). The court stated that although it was an error for plaintiff to sign over the truck's title prior to filing suit, the transfer was not negligent or in bad faith. \textit{See id.} at 27 (discussing issue of Schroeder's fault and motion for summary judgment). In addition, the defendant's prejudice was not great because the claim was based on a design defect comparable to all trucks of its kind. \textit{See id.} Thus, the defendant could still comparably inspect and test other trucks for the design defect. \textit{See id.} To further support this conclusion, the court noted that the district courts that have applied \textit{Schmid} have found summary judgment inappropriate even in the individual malfunction context, where defendant does not have the option to inspect or test similar models. \textit{See id.} at 27 n.6.; \textit{see}, e.g., Howell \textit{v. Maytag}, 168 F.R.D. 502, 508 (M.D. Pa. 1996) (denying summary judgment in case where particular product was allegedly defective); Gordner \textit{v. Dynetics Corp.}, 862 F. Supp. 1303, 1307 (M.D. Pa. 1994) (same).

Finally, the court looked to the availability of lesser sanctions and decided that a jury instruction on the spoliation inference would be an appropriate remedy for the defendants. \textit{See Schroeder}, 710 A.2d at 28 ("[Defendants] may present evidence of spoliation at trial and the court may instruct the jury that it may infer that the truck's parts would have been unfavorable to Schroeder.").

\footnote{116} \textit{See id.} at 27 (stating that \textit{Schmid} sanctions will sufficiently deter intentional spoliation).

\footnote{117} \textit{See id.} (stating plaintiff's burden of proof provides defendant protection from prejudice). Note that this is the same reasoning used by Judge Del Sole in his \textit{Roselli} dissent.

\footnote{118} \textit{See Jonathan F. Ball, Has Schroeder Spoiled a Defendant's Entitlement to Summary Judgment Based Upon the Spoliation of Evidence? PA. LAW WEEKLY, Apr. 13, 1998, at 12-13} (discussing "whether summary judgment may still be granted based upon spoliation").
summary judgment based upon spoliation under the Schmid test.\footnote{See id. at 13 (assuming summary judgment is still available in limited circumstances).} Indeed, at least one court since Schroeder has utilized the more stringent Schmid principles and has granted the defendant summary judgment based on spoliation.\footnote{See Bowman v. American Medical Systems,\footnote{No. CIV.A.96-7871, 1998 WL 721079, at *6 (E.D. Pa. Oct. 9, 1998) (granting summary judgment to defendant manufacturer in products liability action based on spoliation).} the United States District Court for the Eastern District of Pennsylvania granted a defendant manufacturer summary judgment when a plaintiff sued on an individual product malfunction theory and the defective product was discarded by the plaintiff’s doctor.\footnote{See id. at *1. Plaintiff suffered from male penile impotence and underwent penile prosthetic surgery. See id. Plaintiff alleged that the prosthesis subsequently ceased to function normally, and he underwent surgery to have it removed and replaced. See id. Plaintiff asserted that he asked his doctor to preserve the prosthesis after removal so that it could be examined to determine the cause of the breakage. See id. The doctor nevertheless disposed of the prosthesis before any examination could be performed, and the doctor died prior to litigation. See id.} Applying the Schmid test, the court first found that the plaintiff bore responsibility and fault for the loss of the prosthesis because the acts of his agent led to the disposal of the evidence.\footnote{See id. at *4. Citing to Roselli, the court stated: A plaintiff who brings an action alleging an injury as a result of a defective product has a duty to preserve the product for defense inspection . . . [e]ven though no evidence suggests that the Plaintiff acted in bad faith, the evidence was actually discarded by his doctor . . . this “in no way relieves [his] responsibility.” Id. (quoting Roselli v. General Elec. Co., 599 A.2d 685 (Pa. Super. Ct. 1991)).} In determining the degree of prejudice to the defendant, the court emphasized the fact that the plaintiff brought forth a manufacturing defect claim.\footnote{See id. at *5 (stating that prejudice to defendant from spoliation is greater in particular product defect action). Quoting Schmid, the court stated, “[I]n a case in which plaintiff does not allege a defect in all of the defendant’s products, a defendant in a products liability case is entitled to summary judgment when the loss or destruction of evidence deprives the defense of the most direct means of countering plaintiff’s allegations.” Id. (quoting Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 80 (3d Cir. 1994)).} The defendant’s degree of prejudice was high because the defendant was unable to inspect the prosthesis, and there was no alternative evidence, such as measurements, videos, photographs or component parts, that could assist in opposing the claim.\footnote{See id. at *5 (noting high degree of prejudice suffered by defendant).}

Balancing the plaintiff’s responsibility and the high degree of prejudice suffered by the defendant, the court held that summary judgment was the only sanction that could adequately remedy the defendant.\footnote{See id. (explaining why dismissal of plaintiff’s action is appropriate). A lesser sanction such as a jury instruction was inappropriate because the plaintiff brought his claim under a malfunction theory, no physical evidence existed and...}
Although the court characterized dismissal as "a drastic measure" and a "last resort," no other sanction was appropriate "given the culpability of the Plaintiff for the spoliation of the evidence and the impossible task Defendant would face defending against this action as a result of it."127

B. Tort of Spoliation of Evidence

Any prospect that the Pennsylvania Superior Court would recognize the spoliation tort was extinguished after the court's 1998 decision in Elias v. Lancaster General Hospital.128 In Elias, the Superior Court explicitly announced that Pennsylvania does not recognize a cause of action for a third party's negligent spoliation of evidence.129

The Superior Court stated, "we are of the opinion that traditional remedies more than adequately protect the 'non-spoiling' party when the 'spoil- ing' party is a party to the underlying action."130 In Elias, "traditional remedies" could not provide relief because the hospital was a non-party to the underlying litigation rather than a litigant.131 Nonetheless, the court found it unnecessary to create a new and separate cause of action when the plaintiff could sue the hospital under traditional negligence theories.132

Although the Pennsylvania Superior Court did not ultimately decide whether an independent tort is necessary when an adverse party to litigation spoils evidence, it appears that the court was satisfied that traditional remedies adequately protect an injured party.133 So, although no state appellate court has spoken directly to this issue, it is safe to say that after

his doctor was deceased. See id. Given these circumstances, the defendant was completely precluded from proving secondary causes of failure of prosthesis or presenting any evidence relating to causation. See id.

127. Id. at *6.


129. See id. at 69 (holding hospitals do not owe patients duty of care for foreign objects removed from their bodies). The plaintiff sued a hospital for third party negligent spoliation of evidence because the hospital disposed of lead pacemaker wires that the hospital had extracted when they became embedded in the plaintiff's heart. See id. at 66-67. Almost two years after undergoing surgery to remove the lead wires, the plaintiff requested that the hospital produce the extracted wires so that he could use them in a potential lawsuit against the manufacturer of the pacemaker. See id. The hospital had discarded the wires and was unable to comply. See id.

130. See id. at 67. (noting remedies and sanctions available for one party's spoliation of evidence). The court further noted that alternative remedies such as adverse inferences, burden shifting and other sanctions adequately protect a litigant from an adversary's actions. See id.

131. See id. at 67-68 (stating that traditional remedies "would be unavailing" because spoliator is not party to underlying action).

132. See id. (finding traditional negligence remedies adequately protect victim of spoliation).

133. For a further discussion of the Pennsylvania Superior Court's satisfaction with traditional remedies, see supra note 130 and accompanying text.
Elias, Pennsylvania courts do not recognize an intentional spoilation tort.\textsuperscript{134}

V. SUGGESTIONS FOR IMPROVEMENT IN PENNSYLVANIA'S APPROACH

Pennsylvania's Superior Court has appropriately refused to recognize an independent tort action for evidence spoilation. Although the states that recognize this tort claim that traditional methods cannot fully compensate an injured party, the addition of a spoilation tort would bring along its own set of problems.\textsuperscript{135} Indeed, the increased social costs and burdens that a new cause of action imposes would exceed the possible benefits realized by the tort.\textsuperscript{136}

First, using tort law to correct litigation misconduct raises policy concerns that are not implicated when determining whether to create tort remedies for harms that arise in other contexts.\textsuperscript{137} The most effective means of addressing problems arising from litigation involve measures designed to achieve a swift and fair resolution of the initial lawsuit rather than measures expanding the opportunities for derivative litigation after the underlying action has been concluded.\textsuperscript{138}

When and if Pennsylvania's highest court decides explicitly to reject the viability of an independent spoilation tort, the court can be instructed by Pennsylvania's jurisprudence in the area of perjury.\textsuperscript{139} Pennsylvania courts have consistently refused to allow a civil damages action against a witness who commits perjury on the stand.\textsuperscript{140} Several principles are articulated in support of this ban, including: (1) public policy favors rules of law that support finality of adjudication and discourage the bringing of redundant suits, and (2) the adversarial system provides sufficient sanc-

\textsuperscript{134} See Burke v. Steen, No. CIV.A97-CV-6870, 1998 WL 351750, at *2 (E.D. Pa. June 30, 1998) (predicting that "Pennsylvania Supreme Court would not recognize separate cause of action for spoilation, at least where the person who destroyed the evidence is a party").

\textsuperscript{135} For a further discussion of the problems that may arise with the recognition of a new spoilation tort, see infra notes 135-58 and accompanying text.

\textsuperscript{136} For a further discussion of the problems that may arise with the recognition of a new spoilation tort, see infra notes 137-58 and accompanying text.


\textsuperscript{138} See Sheldon Appel Co. v. Albert & Oliker, 765 P.2d 498, 509-11 (Cal. 1989) (refusing to expand tort of malicious prosecution); Gorelick et al., supra note 8, at 140 (noting that spoilation cases are typically derivative of other litigation).

\textsuperscript{139} For a further discussion of Pennsylvania's treatment of perjury, see infra notes 139-41 and accompanying text.

\textsuperscript{140} See, e.g., Binder v. Triangle Publications, Inc., 275 A.2d 58, 56 (Pa. 1971) (statements made "by a party, a witness, counsel, or a judge cannot be the basis of a defamation action whether they occur in the pleadings or in open court"); Ginsberg v. Halpern, 118 A.2d 201, 202 (Pa. 1955) (holding that plaintiff may not sue defendant in tort even if defendant had volunteered to be witness and gave false testimony against plaintiff).
tions by which an aggrieved party may challenge the perjured testimony of a party.141 These same principles advocate that the best way to remedy spoliation misconduct is by imposing sanctions within the underlying lawsuit.142

A second troubling aspect of allowing a spoliation tort action is the problem of proving which damages are the proximate result of the defendant's act of spoliation.143 Because the spoliator has destroyed evidence, it seems likely that "in a substantial number of cases, the harm would be irreducibly uncertain."144 It would be very hard to determine exactly what the evidence would have shown and how much it would have weighed in the injured party's favor.145 In jurisdictions that allow the spo-


142. For a further discussion of the adequacy of Pennsylvania's current remedies, see infra notes 159-85 and accompanying text.

143. See, e.g., Nolte, supra note 12, at 400 (noting impossibility of ascertaining extent to which spoliation harmed underlying action); Stipancich, supra note 5, at 1150-51 (recognizing that damages are not only speculative, but can be extremely disproportionate to culpability of negligent party); see also Smith v. Superior Court, 198 Cal. Rptr. 829, 835 (Ct. App. 1984) (commenting on difficulty of ascertaining tort damages when underlying case has not gone to trial and injured party may be able to prove case through other means and recover damages). Despite this difficulty, however, the Smith court noted that there are many interests that the law protects where damages cannot be proven with certainty. See id. at 836 (reasoning that inability to prove damages with precision should not be factor which prevents action for spoliation). In wrongful death and personal injury cases, for example, future earnings are uncertain, yet still recoverable. See id. Deterrence is the important policy consideration for allowing the maintenance of suits when damages cannot be shown with certainty. See id. To deny the injured party the right to recover actual damages because they are hard to ascertain would enable parties to profit by their own wrongs, and would encourage violence and depredation. See id.

144. Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 518 (Cal. 1998) (discussing problem of speculative damages); see also Smith, 198 Cal. Rptr. at 837 (noting that jury is asked to "quantify the unquantifiable" in products liability action against tire manufacturer). In Cedars-Sinai, the court quoted an Illinois appellate court decision with respect to this problem that stated:

[1]It is impossible to know what the destroyed evidence would have shown . . . . It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's success on the merits of the underlying lawsuit . . . . [Given that the plaintiff has lost the lawsuit without the spoliated evidence], [i]t does not follow [that we should adopt a remedy that itself encourages a spiral of lawsuits].

Id. at 516-18 (quoting Petrik v. Monarch Printing Co., 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1986)).

145. See Cedars-Sinai, 954 P.2d at 519. The court stated:

[T]he uncertainty of the fact of harm . . . would create the risk of erroneous determinations of spoliation liability . . . . An erroneous determination of spoliation liability would enable the spoliation victim to recover damages, or avoid liability, for the underlying cause of action when the spoliation victim would not have done so had the evidence been in existence.
illation tort to be tried jointly with the claim for the underlying action, there is a significant potential for jury confusion and inconsistency.\textsuperscript{146}

As discussed previously, some jurisdictions require resolution of the underlying claim before a litigant may proceed with a cause of action for spoliation.\textsuperscript{147} Although this approach relieves the court of the problem of speculative damages, it creates a new problem of delayed litigation.\textsuperscript{148} One commentator has stated that as a result of excessive caseload dockets in civil court systems today, a party in a jurisdiction requiring resolution of the underlying claim may have to wait well over a decade before filing a claim for spoliation.\textsuperscript{149}

Finally, forcing court systems and defendants to litigate spoliation actions gives rise to increased social costs.\textsuperscript{150} For instance, recognizing a new tort would likely lead to an increase in excessive litigation.\textsuperscript{151} Although increased litigation may be a boon to attorneys, this litigation entails further judicial resources and a corresponding increase in taxes.

\textit{Id.}

\textsuperscript{146} For a partial list of some jurisdictions that allow the spoliation tort to be tried jointly with the underlying claim, see \textit{supra} note 60. The Cedars-Sinai court described the type of confusion that could result:

The jury . . . logically would first consider the underlying claims; for if it awards the spoliation victim relief on the underlying claims, then the spoliation has caused no harm to spoliation victim's position in the underlying litigation. If the jury rejects the spoliation victim's position on the underlying claims, it has either rejected application of the evidentiary inference to the case . . . or has determined that, even applying the inference in favor of the spoliation victim, the other evidence in the case compels a different result. The jury would then consider . . . the spoliation claim; in doing so, however, it would necessarily be reconsidering its adjudication that either no intentional spoliation occurred or that the spoliated evidence would not have led to a different result. At the least, this would be confusing to the jury; at most, it would lead to inconsistent results.

\textit{Cedars-Sinai}, 954 P.2d at 516.

\textsuperscript{147} See, e.g., Fox v. Cohen, 406 N.E.2d 178, 183 (Ill. App. Ct. 1980) (holding that spoliation action is premature until plaintiff actually suffers loss of claim); Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 438 (Minn. 1990) (noting that underlying case must be pursued to its full disposition before raising evidence spoliation claim).

\textsuperscript{148} See Stipancich, \textit{supra} note 5, at 1147 (discussing possibility of prolonged and excessive litigation arising in jurisdictions that require litigant to resolve underlying action before filing spoliation action).

\textsuperscript{149} See \textit{id.} One commentator noted:

Because of the excessive caseload dockets carried today, this could theoretically require the aggrieved party to wait for the initial trial, wait for the corresponding first level of appeals to the intermediary appellate court, and further wait for possible appeals to the state's supreme court. In total this could mean that the party must wait well over a decade before filing a spoliation action.

\textit{Id.}

\textsuperscript{150} See \textit{id.} at 1150 (discussing drawbacks of recognizing new tort).

costs. For example, in many complex cases, potential evidence not available at the time of trial must be acquired. In addition, there are often indirect social costs associated with the risk of erroneous liability.

For all of these reasons, the California Supreme Court recently announced, in Cedars-Sinai Medical Center v. Superior Court, that California no longer acknowledges a tort remedy for intentional evidence spoliation by a party to the litigation. The court held that when the injured party knows or should have known of the spoliation before a decision on the merits of the action, the injured party may not bring a tort suit for spoliation. Instead, the party must use the non-tort remedies of the adverse inference, discovery sanctions and criminal penalties to punish and correct spoliation misconduct.

Although the court did not expressly overrule Smith v. Superior Court it is likely that the high court's refusal to recognize a spoliation tort in these circumstances will drastically change the tendency of other jurisdictions to recognize an action for spoliation in the future.

---

152. See Stipancich, supra note 5, at 1150 (stating that "the majority of the American public views [increased litigation] as a drain on fiscal resources").

153. See Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 519 (Cal. 1998). The court stated:

The risk of erroneous spoliation liability could also impose indirect costs by causing persons or entities to take extraordinary measures to preserve for an indefinite period documents and things of no apparent value solely to avoid the possibility of spoliation liability if years later those items turn out to have some potential relevance to future litigation.

Id.

154. 954 P.2d 511 (Cal. 1998).

155. See id. (rejecting spoliation tort). Plaintiff through his guardian ad litem, brought a medical malpractice action against the hospital for injuries allegedly due to oxygen deprivation suffered during birth. See id. at 512. Defendant was unable to locate certain hospital records during discovery, including fetal monitor strips recording plaintiff's heartbeat during labor. See id. Plaintiff's attorney filed an amended complaint seeking punitive damages for the intentional destruction of records. See id.

Although the lower courts did not question the issue of the tort's general viability, the court decided to raise it because "it is a significant issue of widespread importance, and it is in the public interest to decide the issue at this time." Id. at 516.

156. See id. at 521. The court noted that it would not decide at this time the issue of whether a tort action for spoliation should be recognized in cases of "third party" spoliation or in cases of first party spoliation in which the injured party neither knows nor should have known of the spoliation until after a decision on the merits of the underlying action. See id. at 521 n.4.

157. See id. at 518. The court stated that "[t]hese non-tort remedies for spoliation are both extensive and apparently effective for, although real, the problem of spoliation does not appear to be widespread .... [t]he infrequency of spoliation suggests that existing remedies are generally effective at deterring spoliation." Id. at 518.

158. See id. at 521 n.4 ("We disapprove of ... Smith v. Superior Court to the extent [it is] inconsistent with our decision here."). California was the first state to recognize the spoliation tort with its Superior Court's Smith decision, and the six
A. Suggestions in the Wake of Schroeder

Although an independent spoliation tort may not be the answer, nevertheless, Pennsylvania’s current remedies do not carry enough bite to ensure fairness to the injured party and to deter future parties from thoughts of spoliation. Pennsylvania courts must increase their current sanctions and aggressively enforce existing sanctions to make punishment more meaningful.159

1. Adverse Inference

Pennsylvania courts currently employ the adverse inference method, which means that the party that cannot produce relevant evidence has the burden of establishing facts contrary to the inference.160 This is a factual inference and not a legal presumption.161 This inference can be conceptualized as a “vanishing inference” because the spoliator can overcome the inference with relative ease.162 If the spoliator can provide a reasonable explanation for the spoliation, or establish facts contrary to those inferred by the tampering, the presumption vanishes and the jury is never instructed about a presumption.163

Critics of the “vanishing” inference approach fear that a mere factual inference does not provide sufficient concern in the spoliator’s mind to deter the wrongful action.164 Consequently, this inference provides little

remaining jurisdictions that recognize an independent tort for spoliation based their recognition on the California court’s Smith reasoning.

159. For further discussion on how Pennsylvania might accomplish this, see infra notes 160-85 and accompanying text.


161. See Pioz v. Iannocone, 178 A.2d 707, 711 (Pa. 1962) (noting that trial judge committed reversible error when informing jury that defendant’s failure to testify raised “an implication in the eyes of the law” that testimony would not be in his favor); Bayout v. Bayout, 96 A.2d 876, 879 (Pa. 1953) (stating that “failure to produce an informed and competent witness permits only a factual inference and is not a presumption of law”).

162. See Cambre, supra note 22, at 605-06 (using term “vanishing inference” and describing effect of such inference).

163. See C.J.S. Evidence § 163 (1970) (noting that “[p]resumptions arising from the spoliation of evidence are not conclusive and may be rebutted”); see also Wong v. Swier, 267 F.2d 749, 759 (9th Cir. 1959) (declining to inform jury of tampering with evidence); Moore v. General Motors Co., 558 S.W.2d 720, 733 (Mo. App. 1977) (noting spoliation inference carries burden of production only); Longinotti, supra note 19, at 231 (discussing effect of vanishing presumption).

164. See Rivlin, supra note 19, at 1013-14 (using Oliver Wendell Holmes’ “bad man” theory to describe how slight risk of getting caught compounded by leniency of traditional penalties if spoliation is discovered does not outweigh enormous benefits of withholding potentially damaging evidence); see also Canter, supra note 7, at 15 (“[T]he spoliation inference may encourage a plaintiff with a weak case to simply lose or destroy the product, take the spoliation inference, and take his or her chances with the jury . . . plaintiffs [can] retain experts who are able to forcefully argue their position without fear that defendant will have physical evidence to disprove theories.”); Nolte, supra note 12, at 353 (stating that because of practical
protection for the injured party. In cases of pure negligence, or in cases where the evidence is relevant but of marginal value to the injured party, the "vanishing" inference is probably appropriate. In cases where spoliation is suspicious or the lost evidence is crucial to make out the case, however, a stronger type of inference is needed. Where a party intentionally destroys evidence, Pennsylvania courts should use a rebuttable presumption inference, which is more burdensome on the spoliator than the current "vanishing" inference.

By creating a rebuttable presumption, the trial court establishes the missing elements of the plaintiff's case that could only have been proven by the availability of the missing evidence. The burden of persuasion shifts to the spoliator to disprove the existence of the presumed fact.

difficulty in uncovering clandestine spoliation act, strong incentive exists for spoliator to choose spoliation over procedural and substantive consequences of disclosing sensitive or potentially incriminating information).

165. See, e.g., Walker v. Herke, 147 P.2d 255, 260-61 (Wash. 1944) (holding that adverse inference presumption is not enough to withstand summary judgment). Thus, it is possible for a defendant to destroy key evidence and avoid trial altogether. See Longinotti, supra note 19, at 231 (noting that in some cases, plaintiff's evidence without benefit of presumption may not be enough to support jury verdict and thus, directed verdict for defendant may follow); Rivlin, supra note 19, at 1015 ("When only the traditional remedies are available, there is no incentive for a harmed party to pursue a claim of spoliation since it is the harmed party who incurs the entire cost of proving that spoliation occurred without any reimbursement for her efforts."); Thompson, supra note 8, at 576 (stating that because courts have found that presumption alone is not enough to withstand summary judgment motion, it might be possible for spoliating defendant to destroy evidence and avoid trial entirely).

166. See Cambre, supra note 22, at 639 (advocating use of vanishing inference in Louisiana in limited circumstances).

167. See Welsh v. United States, 844 F.2d 1239, 1248 (6th Cir. 1988) (approving imposition of rebuttable presumption in certain circumstances). The court stated:

When, as here, a plaintiff is unable to prove an essential element of her case due to the ... loss or destruction of evidence by an opposing party, and the proof would otherwise be sufficient to survive a directed verdict, it is proper for the trial court to create a rebuttable presumption that establishes the missing elements of the plaintiff's case that could only have been proved by the availability of the missing evidence. The burden thus shifts to the defendant-spoliator to rebut the presumption and disprove the inferred element of plaintiff's prima facie case.

Id.

168. See Cambre, supra note 22, at 606 (explaining rebuttable presumption inference, which shifts burden of persuasion to spoliator who must disprove existence of presumed fact rather than simply offer explanation for it); Longinotti, supra note 19, at 231-32 (same).

169. See Welsh, 844 F.2d at 1248 (discussing implications of rebuttable presumption).

170. See Longinotti, supra note 19, at 231 (discussing rebuttable presumption's operation and effect). According to one commentator:

The [rebuttable] presumption does not disappear automatically when the party opposing the presumption presents contrary proof, as does the vanishing presumption. The presumption is rebutted only when the trier
Several jurisdictions have employed this approach with great success. The court typically makes a threshold finding that spoliation has deprived the plaintiff of the ability to prove a prima facie case and that the evidence is missing due to the fault or negligence of the adverse party. Shifting the burden results in proving the plaintiff’s prima facie case.

Unfortunately, neither type of adverse inference will provide relief where the spoliator is a third party to the litigation. It is nearly impossible to craft an equitable jury instruction that will compensate the injured party for the loss of evidence without also punishing the adverse party not responsible for the act of spoliation.

2. Discovery Sanctions

Because discovery sanctions are imposed before a bench trial, they are more conclusive and predictable in effect than the spoliation inference. A jury may not know how to react to a spoliation claim. A jury unfamiliar with litigation may punish evidence destruction more severely. Con- of fact (the jury) is convinced that the party opposing the presumption has produced evidence sufficient to overcome the presumed fact by the appropriate degree of persuasion or production that is required by the substantive law of that jurisdiction.

Id. at 251-32.

171. See, e.g., Welsh, 844 F.2d at 1245-49 (creating rebuttable presumption sufficient to survive directed verdict from negligent loss or destruction of evidence by adverse party); Nation-Wide Check Corp., Inc. v. Forest Hills Distrib., Inc., 692 F.2d 214, 217-19 (1st Cir. 1982) (holding that document destruction that amounted to “knowing disregard” of plaintiff’s claim, though not necessarily constituting “bad faith”, gave rise to adverse inference that sustained plaintiff’s burden of proof); Sweet v. Sisters of Providence, 895 P.2d 484, 492 (Alaska 1995) (imposing rebuttable presumption on hospital to prove actions were not negligent after hospital lost key medical records); Public Health Trust v. Valcin, 507 So. 2d 596, 599 (Fla. 1987) (recognizing rebuttable presumption of negligent performance of surgery when “essential medical records are unavailable due to the adverse parties’ negligence”); De Laughter v. Lawrence County Hosp., 601 So. 2d 818, 821-22 (Miss. 1992) (imposing presumption that missing records would contain evidence unfavorable to hospital).

172. See Sweet, 895 P.2d at 497 (discussing necessary threshold before rebuttable presumption can be imposed).

173. See Welsh, 844 F.2d at 1249 (“[T]his approach merely selects which of two parties—the innocent or the negligent—will bear the onus of proving a fact whose existence or nonexistence was placed in greater doubt by the negligent party.”).

174. See Frossard & Gainsberg, supra note 40, at 695 (discussing problems of third party spoliation).

175. See id. at 694-95 (discussing problems in giving jury instructions); see also Wilhoit, supra note 9, at 674 (advocating that only circumstance where courts should recognize independent spoliation tort is where third party to litigation intentionally interferes with evidence).

176. See Gorelick et al., supra note 8, at 69 (asserting that discovery sanctions provide greater predictability than does inference).

177. See Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 129 (S.D. Fla. 1987) (holding judicial sanctions guaranteed more predictability than leaving it to jury). The court stated that allowing the jury to draw an inference “would leave too much to fortuity, since we can only speculate as to the significance which
versely, it is conceivable that a jury may be more apt to believe a good explanation and may award insufficient damages to the injured party.

Pennsylvania is one of the few states whose civil procedure code sanction provision does not parallel that of Federal Rule 37.178 As discussed above, a court's sanctioning authority in the Federal Rules of Civil Procedure and in most state codes is limited by the pre-existing court order requirement.179 Pennsylvania courts enjoy more sanctioning freedom because they are not bogged down by this requirement. Pennsylvania's corresponding rule of civil procedure permits the court to impose sanctions if (1) a party, "in response to a request for production or inspection . . . fails to respond that inspection will be permitted . . . or fails to permit inspection as requested; [or (2)] a party or person otherwise fails to make discovery or to obey an order of court respecting discovery."180 Moreover, willful conduct is no longer a condition precedent to the power to impose a sanction.181

Another benefit of discovery sanctions is that they are flexible and adaptable to the case. Courts have a variety of measures they can impose: monetary sanctions, contempt sanctions, issue-related sanctions, dismissals of complaints and entry of default judgments.182

Prior to Schroeder, most Pennsylvania courts followed the Roselli rule that the appropriate sanction for plaintiffs who lose key evidence was an almost automatic dismissal of the case on defendant's summary judgment motion.183 This meant that a defendant was not forced into the untenable position of having to defend a claim without key evidence. Mechanical application of the Roselli rule, however, had an unjustly disproportionate effect on the plaintiff because it completely barred a plaintiff from damages even if the plaintiff bore a minimal degree of responsibility for the spoliation.184 In the wake of Schroeder, courts must be careful not to swing to the other extreme and make it impossible for the defendant to achieve

---

178. For a further discussion of Pennsylvania's civil procedure code sanction provision, see infra note 180 and accompanying text.

179. For a further discussion of the limitations put onto those courts which have a pre-existing court order requirement, see supra notes 27-35 and accompanying text.


181. See id. (discussing judge's ability to impose sanctions for negligent failure to respond to court's requests).

182. For a further review of the benefits of discovery sanctions, see supra notes 36-38 and accompanying text.

183. For a further discussion of Pennsylvania's prior treatment, see supra notes 64-71 and accompanying text.

184. See, e.g., DeWeese v. Anchor Hocking Consumer & Ind. Prods. Group, 628 A.2d 421, 424 (Pa. Super. Ct. 1993) (dismissing plaintiff's product liability action where allegedly defective product was disposed of by plaintiff's employees while plaintiff was being treated for injuries).
summary judgment when circumstances would warrant such a result. Courts applying the Schmid spoliation test must not be afraid to grant a defendant summary judgment when no other device can sufficiently remedy the injured party.\textsuperscript{185}

\section*{VI. Conclusion}

The loss of crucial evidence is devastating for a party trying to prove a case or trying to defend against one. Pennsylvania courts have recently resolved certain key issues regarding spoliation.\textsuperscript{186} Pennsylvania's rejection of an independent spoliation tort is an appropriate decision because the addition of a new tort action will create more problems than it would help to solve.\textsuperscript{187} On the other hand, Pennsylvania courts must not be afraid to toughen its existing remedies to compensate the injured party effectively in the absence of such a spoliation action. Tougher standards will create a meaningful disincentive for the spoliator and likewise compensate the injured party.

In circumstances where the spoliation is intentional or appears reckless, Pennsylvania courts should employ a rebuttable presumption that would shift the burden of proof onto the spoliator.\textsuperscript{188} This would ensure that the plaintiff has the opportunity to make out a prima facie case even in the absence of key evidence and will not be subjected to a directed verdict. Pennsylvania courts should look to other jurisdictions that have already successfully employed the rebuttable spoliation presumption for guidance as to the proper circumstances under which to use it.\textsuperscript{189}

When applying the Schmid balancing test delineated in Schroeder, Pennsylvania courts should not be afraid to issue terminating sanctions and to grant summary judgment to a defendant manufacturer when the plaintiff's evidence spoliation has rendered it impossible to defend a case adequately, and when no lesser remedy can sufficiently balance the scales for the defendant.\textsuperscript{190}

\begin{flushright}
\textit{Cecilia Hallinan}
\end{flushright}


\textsuperscript{186} For discussion of these Pennsylvania cases, see supra notes 74-134 and accompanying text.

\textsuperscript{187} For discussion of Pennsylvania's rejection of this tort, see supra notes 128-34 and accompanying text.

\textsuperscript{188} For discussion of this tact, see supra notes 39-47 and accompanying text.

\textsuperscript{189} For discussion of these courts, see supra notes 39-47 and accompanying text.

\textsuperscript{190} For a discussion of Schmid and Schroeder, see supra notes 106-27 and accompanying text.