Spasic Estate v. Imperial Tobacco Ltd.

Between
Ljubisa Spasic, as Estate Trustee of the Estate of Mirjana Spasic, plaintiff, and
Imperial Tobacco Limited, and Rothmans, Benson & Hedges Inc., defendants

[1998] O.J. No. 4906
Court File No. C17773/97

Ontario Court of Justice (General Division)
Cameron J.

Heard: October 14, 1998.
Judgment: November 25, 1998.
(15 pp.)

Counsel:

Deborah Glendinning and Stephen Lamont, for the defendant, Imperial Tobacco Limited.
Steven Sofer, for the defendant, Rothmans, Benson & Hedges Inc.
Robert S. Hart, Q.C. and Andreas G. Seibert, for the plaintiff.

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1 **CAMERON J.**:— The defendants move under Rule 21.01(1)(b) and (3)(a) to:

(a) strike out paragraphs 8 to 15 of the statement of claim claiming damages because the defendants, knowing the hazards of smoking cigarettes and having knowledge of potential lawsuits, intentionally and deceitfully avoided the creation of and destroyed, altered or concealed documentary and other evidence of such hazards with the intent to disrupt or defeat those potential lawsuits, and in the course of such conduct breached a continuing duty to the plaintiff, with the result the plaintiff has been deprived of the opportunity to properly and fully investigate and prove facts which support other causes of action set out in the claim ("Spoliation Claim"); and

(b) to delete paragraph 16 of the Statement of Claim pleading of the doctrine omnia praesumuntur contra spoliatorem ("all things are presumed against the despoiler or wrongdoer": Black's Law Dictionary, 6th ed. 1990)

2 The grounds for the motion are that it is plain and obvious that the spoliation Claim cannot succeed because:

(a) the Spoliation Claim discloses no reasonable cause of action;

(b) such a cause of action does not exist under Ontario law; or

(c) such a claim is an abuse of process; and

(d) respecting the pleading of a doctrine, the principle is a rule of evidence and not a legal doctrine.

The Action

3 In the action the plaintiff claims general, aggravated, exemplary and punitive damages for lung cancer caused to Mirjana Spasic by smoking cigarettes manufactured and distributed by the defendants since 1975. Mirjana Spasic died from lung cancer after she commenced the action. She alleged her addiction to cigarettes and her lung cancer were caused by:

(a) numerous negligent and intentional acts of the defendants;
(b) the Spoliation Claim;
(c) negligent misrepresentations and deceit as to the hazards of smoking;
(d) strict liability for use of an inherently dangerous product;
(e) misleading advertising;
(f) breach of express and implied warranties on the sale of cigarettes;
(g) failure to warn of the hazards;
(h) conspiracy to do one or more of the foregoing.

The issue on the Spoliation Claim

4 In order to survive a motion under Rule 21.01(1)(b) there must be a legally sufficient claim for which a court may grant relief. "If there is no such claim, litigation of it would be a waste of both the parties' and the court's time." Dawson v. Rexcraft (1998), Ont. C.A. Docket C22661, August 13, 1998. The test on such a motion is whether it is plain and obvious that the pleading of the cause of action has no reasonable chance of success. A cause of action should not be struck merely because it is novel. In deciding the issue the facts pleaded must be assumed to be true. See Hunt v. Cary, [1990] S.C.R. 959 at 979-80; Prete v. The Queen in Right of Ontario (1993), 16 O.R. (3d) 161.

5 There is in Canada a rebuttable rule of evidence omnia praesumuntur contra spoliatorium. In appropriate circumstances, where a party destroys a document the court may presume that the document was detrimental to that party's case: St. Louis v. Her Majesty The Queen (1895), 25 S.C.R. 649.

6 The tort of spoliation by a party to a lawsuit is recognized in some states of United States but not in others. It originated in California in the 1970's or early 1980's. It is based on the intentional, or sometimes negligent, destruction of important evidence which disrupts the plaintiff's case in forthcoming litigation. This raises a duty to preserve the evidence. Some courts say the duty arises only when the prospect of litigation is certain while others suggest the duty can arise when litigation is reasonably anticipated or probable. Some courts require the existence of a special duty to preserve the evidence created by statute or contract.

7 The tort is regarded as a clandestine form of obstruction of justice which can have a devastating effect on a potential plaintiff and its ability to obtain justice. The U.S. courts regard a prospective civil action in a product liability case as a valuable probable expectancy or a property interest which the court must protect from such interference, even though the plaintiff's damages cannot be stated with any certainty. The courts which recognize the tort consider that the traditional procedural and non-procedural remedies are inadequate to prevent the spoliation. See Smith v. Superior Court (1984), 151 Cal. App. (3d) 191; 198 Cal. Rptr. 829; Foster v. Lawrence Memorial Hospital 809 F. Supp. 831 (D. Kan. 1992); Hazen v. Municipality of Anchorage 718 P (2d) 456 (Alaska 1986) (Supreme Court); Smith v. Howard Johnson Company Inc., 615 N.E. (2d) 1037 (Ohio 1993); St. Mary's Hospital, Inc. v. Brinson, 685 So. (2d) 33 (Fla. App. 4 Dist. 1996); Viviano v. CBS Inc. 597 A (2d) 543 (N.J. Super A.D. 1991) at 549-50; Henry v. Deen, 310 S.E. (2d) 326 (N.C. 1984).

8 A number of states have rejected claims for spoliation. In Cedars-Sinai Medical Center v. Superior Court 74 Cal. Rptr. 2d 248 (Sup. Ct. May 11, 1998) and Trevino v. Ortega, 969 S.W. 2d 950 (Tex Sup. Ct. June 5, 1998) the highest courts in California and Texas disallowed claims based on spoliation by a party to the lawsuit.

Discussion
Pleading the Cause of Action
Authority

9 In Rintoul v. St. Joseph's Health Care Centre, Robb v. St. Joseph's Health Care Centre and Farrow v. Canadian Red Cross Society (herein collectively "Rintoul") the Divisional Court of Ontario, by a majority of 2 to 1 in a decision dated October 15, 1998, ruled that a separate cause of action for spoliation by a party to the lawsuit does not exist in Ontario. The decision relied heavily on Endean v. Canadian Red Cross Society, [1998] B.C.J. No. 724 (B.C.C.A.). I am bound by the majority decision in Rintoul as a matter of stare decisis.

10 I understand application has been made for leave to appeal Endean to the Supreme Court of Canada.

Logic and Principle

11 In view of the dissent in Rintoul and the contrary judgments in this court in Rintoul and in Coriale v. St. Joseph's General Hospital; Molloy J., September 17, 1998, I have considered the issue from the point of view of the principles underlying it.

12 I have reviewed "The Spoliation Tort: An Approach to Underlying Principles", Stephen Nolte 1995, St. Mary's Law Journal, Vol. 26: 351 which argues the need for a spoliation tort to provide an adequate deterrent to intentional or negligent injury to a property interest deserving of legal protection where the harm is foreseeable. I have also considered "Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action," Charles R. Nesson, 1991, Cardozo Law Review, Vol. 13: 793. These articles do not address the issue of the measure of damages where the underlying or principal cause of action is not established, except to argue for punitive damages.

13 A Spoliation Claim cannot give rise to a cause of action separate from the principal tort, breach of contract or other cause of action to which the destroyed or concealed evidence relates. The damages, and not just the measure of damages, for the alleged spoliation are the same as the damages for the principal cause of action. If the principal cause of action is not established there has been no loss, no matter what was the defendant's conduct in destroying or suppressing the document or thing.

14 An award of damages for a separate tort of spoliation would be unfair because it would be premature. The defendant would not have been found liable on the principal cause of action but would be found liable for conduct which caused no harm. If not liable on the principal cause of action, a defendant cannot be liable for any amount of damages for spoliation. See Endean at p. 471.

15 An award of damages for a separate tort of spoliation would also be speculative. In the absence of a finding of liability and the damages flowing from it on the principal cause of action, it would be impossible to measure the plaintiff's loss flowing from the spoliation. It would be contrary to the principles of justice to allow a court to pick a number out of the air having no relationship to the plaintiff's loss.

16 It is for the same reason that there can be no cause of action where the only remedy is punitive damages unrelated to any actual or compensatory damages alleged: Guaranty Trust Co. of Canada v. Public Trustee (1978), 20 O.R. (2d) 247 (H.C.) at 251; Mancini v. Falconi (1989), 76 C.B.R. (N.S.) 90 (Ont. S.C.) at 94-5.

17 A separate tort of spoliation by a party to the action is not necessary. Our law can prevent and compensate adequately for spoliation by procedural sanctions and remedies, including the following:

(a) rebuttable evidentiary presumption against the defendant: St. Louis (above), Lamb v. Kincaid (1907), 37 S.C.R. 516 (Duff J.), and Lindsay v. Davidson (1911), 1 W.W.R. 125 (Sask. C.A.);

(b) procedural sanction under Rule 30.08 for failure to produce a document, such as striking a pleading or such other order as is just, which might include shifting the burden of proof on precluding the calling of certain evidence;

(c) an order denying costs or awarding costs against the spoliator on a solicitor-client scale under s. 131 of the Courts of Justice Act and Rule 57.01;

(d) motion for contempt of court under Rule 60.11 where a court order is disobeyed: Werner v. Warner Auto-Marine Inc. (1996), 3 C.P.C. (4th) 110 (Ont. C.A.) where there was destructive testing contrary to a court order.

(e) motion for civil contempt of court under the common law.

Contempt

18 The common law permits a superior court to exercise its inherent jurisdiction over its proceedings by finding a contempt not in the face of the court. The conduct must be designed to impede access to the courts or the proper administration of justice. The court's jurisdiction must not be exercised on personal grounds but only to preserve the court's process and authority. The contempt proceedings should be invoked by the Attorney General or a party to the proceedings in accordance with the procedural rules of the court, such as a notice of a motion in the action.

19 A contempt which is neither in the face of the court nor in breach of an order could be either criminal

contempt or civil contempt. Both are directed towards the dignity and authority of the court. In either case it requires proof of mens rea and the other elements of contempt beyond a reasonable doubt and the person cited cannot be compelled to testify. See "Some Guidelines on the Use of Contempt Powers", Canadian Judicial Council, Ottawa, September, 1996.

20 Criminal contempt is directed to the harm suffered by society generally and the object of the penalty is to punish the contemnor. Civil contempt is directed to the protection of the interests of individuals and the sanction is directed to remedying or compensating the private character of the harm done. Civil contempt is coercive and compensatory rather than punitive: see Apotex Fermentation Inc. v. Noropharm Ltd. (1998), 162 D.L.R. (4th) 111 (Man. C.A.) at 189-192.

21 I see nothing to prevent a motion for contempt claiming private compensation where a party, with the intent of frustrating a claimant in an action of which he or she has notice, intentionally destroys evidence material to the claimant's case. Spoliation may constitute a common law civil contempt of court not in the face of the court. The basic procedure of a criminal hearing would apply which may limit this remedy as a practical preventative. Precedents of a contempt order for destruction of documents or other evidence in contemplation of litigation do not abound in Commonwealth or American law.

Criminal Sanctions

22 Prosecution for fraudulent concealment under s. 341 of the Criminal Code requires a criminal prosecution and proof of an ulterior fraudulent purpose.

Punitive Damages

23 The plaintiff suggests that spoliation may support a claim for punitive damages. In Vorvis v. I.C.B.C.I. (1989), 58 D.L.R. (4th) 193 (S.C.C.), a wrongful dismissal action, McIntyre J., writing for the majority of three judges, decided at p. 206-8 that an award of punitive damages is available for harsh, vindictive, reprehensible and malicious conduct deserving of punishment. Punitive damages are not compensatory in nature. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff and punitive damages can only be awarded in respect of that conduct. They cannot be awarded in respect of conduct which the court disapproves but occurs before or after the conduct constituting the actionable wrong which caused the injury complained of giving rise to compensatory damages.

24 Wilson J. speaking for the dissenting minority of two judges in Vorvis at p. 220-5 was of the opinion that a separate cause of action ought not to be required and that punitive damages could be based on misconduct occurring separately from the actionable wrong to deter the strong from deliberately and callously disregarding the rights of the weak. She said punitive damages may be awarded in either a tort action or in a breach of contract action.

25 In Ontex Resources v. MetaloreResources (1993), 13 O.R. (3d) 229 (C.A.) the court dealt with option agreements respecting mining property and non-disclosure of information. The court found a misuse of confidential information but no damages flowing from breach of a constructive trust. In considering a claim for punitive damages based on insider trading by the president of Metalore, Morden A.C.J.O. said, at p. 267, that it was essential that the conduct meriting the punitive damages be the conduct which caused injury to the plaintiff. The insider trading, while highly improper conduct, was by a third party and caused no actionable injury to the plaintiff. The claim for punitive damages was denied.

Finality of Judgments

26 A party can move in an action to set aside a judgment obtained on the grounds of fraud or facts arising or discovered after it was made: Rule 59.06(2)(a). See International Corona Resources Ltd. v. LAC Minerals Ltd. (1988), 66 O.R. (2d) 610 and 630 setting out the criteria for setting aside a judgment. To allow a separate cause of action for spoliation would avoid the finality of judgments and lead to an undesirable multiplicity of actions with possible inconsistent results. A plaintiff might bring a spoliation claim after losing an action based on a recognized cause of action. It would also effectively allow a judgment to be set aside on grounds other than those now permitted under Rule 59.06(2).

Scope of Discovery

27 The plaintiff does not need the cause of action to cross-examine the defendant on its affidavit of documents, and generally, respecting documentary evidence which the defendant once possessed but no longer possesses respecting the causes of action pleaded. The plaintiff is not entitled to discover on irrelevant matters or to allege facts so that it can engage in a wholly speculative fishing expedition into documents which are not relevant to the facts supporting the substantive causes of action or which do not exist and never have existed.

Pleading a Legal Principle

28 Clause 16 of the Statement of Claim pleads the doctrine of omnia praesumuntur contra spoliatorem. St. Louis states at p. 652-3 that this is a rule of evidence that where a party wrongfully destroys or conceals a relevant document or other evidence, the court will presume the evidence was unfavourable to the party. The party can rebut the presumption and application of the rule. In Lamb v. Kincaid, Duff J. stated the principle more succinctly:

29 "The mischief maker shall suffer for the mischief he has created."

30 I see no harm or embarrassment in the pleading although it is not required by Rule 25.06. It does notify the defendant and the court of the evidentiary issue prior to the trial. However, on the authority of Hellenius v. Lees, [1972] S.C.R. 165, a rule of evidence such as res ipsa loquitor states no principle of law. Accordingly, Rule 25.06(2) does not permit it to be pleaded. The same would be true of omnia praesumuntur contra spoliatorem. It is a rule of evidence similar to that respecting rebuttable adverse inferences which may be drawn on the non-production of evidence.

Order

31 I order that clauses 8 to 16 of the Statement of Claim be struck out as disclosing no cause of action which has any chance of success in Ontario.

32 This order is without prejudice to a concise pleading by the plaintiff of material facts which include spoliation as part of the circumstances constituting a wrong for which compensatory damages may be awarded, such as fraud, deceit or civil contempt. Such amended pleading may be delivered within 20 days after this order becomes final.

33 Costs may be spoken to.

CAMERON J.

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http://www.sommersandroth.com/cases-spasic-cameron-j.htm