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COURT OF APPEAL FOR ONTARIO
BORINS, MACPHERSON AND SHARPE JJ.A.

BETWEEN:

LJUBISA SPASIC, AS ESTATE TRUSTEE OF THE ESTATE OF MIRJANA SPASIC Plaintiff (Appellant)	) Robert S. Hart, Q.C. and) Andreas G. Seibert, for the appellant
and	
IMPERIAL TOBACCO LIMITED, and ROTHMANS, BENSON & HEDGES INC. Defendants (Respondents)	) Deborah A. Glendinning and) Stephen Lamont, for the respondent) Imperial Tobacco Limited) Steven Sofer, for the respondent) Rothmans, Benson & Hedges

) Heard: May 31, 2000

On appeal from the order of Cameron J. dated November 25, 1998

BORINS J.A.:

[1] This is an appeal from the decision of Cameron J., reported in (1998), 42 O.R. (3d) 391, striking out paragraphs 8 to 15 of the appellant's statement of claim, with leave to amend, as well as paragraph 16, consequent to the respondents' motions under rule 21.01(1)(b) of the Rules of Civil Procedure. For the reasons that follow, I would allow the appeal and set aside the order of the motions judge, with the exception of that part of the order striking out paragraph 16.

Background

[2] This is a "tobacco liability" case. The late Mirjana Spasic died of lung cancer in 1998 after smoking cigarettes for a lengthy period. Before her death, she commenced this claim against the respondent tobacco manufacturers. The claim is continued by her estate.

[3] In her statement of claim, it is alleged that the defendants negligently and deceitfully manufactured defective and dangerous devices – tobacco products – and participated in a conspiracy to deceive the public about their defects and dangers. In an additional, or an alternative claim, she pleaded in paragraphs 8 to 15 that the defendants intentionally destroyed evidence relating to the inherent dangers of cigarettes, relying on the tort of intentional spoliation of evidence. In addition, in paragraph 16 she pleaded and relied on "the doctrine of omnia praesumuntur contra spoliatorem" – all things are presumed against a wrongdoer.

[4] Paragraphs 8 to 15 are very detailed and comprise eight pages of the twenty-seven page statement of claim. There is no need to reproduce these paragraphs. A brief summary of their contents will suffice. It is pleaded that since the 1950s, the defendants knew that cigarettes were hazardous and "inherently defective" and that they "engaged in various schemes to conceal, destroy and alter evidence that established their knowledge". The schemes alleged included contrived document retention and destruction policies and plans. It is further pleaded that "as a result of the defendants' participation in such schemes, the plaintiff

has been deprived of the opportunity to properly and fully investigate and prove the facts upon which her causes of action are based".
[5] The respondents were successful in their motions to strike out paragraphs 8 to 16 on the ground that they did not disclose a reasonable cause of action. However, with respect to paragraphs 8 to 15, Cameron J. granted leave to the plaintiff to amend the statement of claim "by pleading material facts which included those relating to spoliation, as part of the circumstances constituting a wrong for which compensatory damages may be awarded". The respondents cross-appeal from the order granting the plaintiff leave to amend.
Reasons of the motions judge

[6] In his reasons for judgment at p. 393, Cameron J. noted that the respondents attacked the spoliation claim on the ground that it was plain and obvious that it could not succeed because it failed to disclose a reasonable cause of action as no such cause of action existed under Ontario law
[7] At p. 394, Cameron J. set out the legal test which, in his view, applied to the respondents' motions:
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 Storage Inc., Ont. C.A., Docket No. C22661, August 13, 1998 [reported 164 D.L.R. (4th) 257, 20 R.P.R. (3d) 207]. 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. Carey Canada Inc., [1990] 2 S.C.R. 959 at pp. 979-80, 74 D.L.R. (4th) 321; Prete v. Ontario (1993), 16 O.R. (3d) 161, 110 D.L.R. (4th) 94 (C.A.).
[8] The motions judge then referred to the decision of the Divisional Court in Rintoul v. St. Joseph's Health Centre (1998), 42 O.R. (3d) 379 in which a majority of the court, relying on Endean v. Canadian Red Cross Society (1998), 157 D.L.R. (4th) 465 (B.C.C.A.), ruled that a separate cause of action for spoliation by a party to the lawsuit did not exist in Ontario. He concluded at p. 396 that as he was "bound by the majority decision in Rintoul as a matter of stare decisis", paragraphs 8 to 15 of the statement of claim were to be struck out on the ground that they did not disclose a reasonable cause of action. We were informed by counsel that although the Supreme Court of Canada granted leave to appeal in Endean, the appeal had been abandoned.

[9] Strictly speaking, it was unnecessary for the motions judge to say more because he was bound to follow the decision of the Divisional Court in Rintoul. However, he continued and expressed his views why a separate tort of spoliation by a party to the action, as contrasted with a tort of spoliation by a third party, is unnecessary. In doing so, he referred to the extensive American case law that is divided on whether the protection of the integrity of the adversary system requires a separate tort to prevent, or deter, the act of intentionally destroying or otherwise suppressing evidence in civil litigation rendering it difficult, or impossible, for a party to prove its case.

[10] It appears that Cameron J., in concluding that a separate spoliation tort was unnecessary, was influenced by the position taken by those American courts which have reached a similar conclusion on the basis that the harm to a litigant caused by spoliation can be dealt with in other ways, such as various discovery sanctions, the "spoliation inference" captured by the Latin maxim omnia praesumuntur contra spoliatorem cited in Armory v. Delamirie (1722), 1 Str. 504, 93 E.R. 664 (K.B.), statutory punishments for obstruction of justice and referral to bar associations for professional sanctions. The spoliation inference represents a factual inference or a legal presumption that because a litigant destroyed a particular piece of evidence, that evidence would have been damaging to the litigant.

[11] It was on the ground that the spoliation inference discussed by the Supreme Court of Canada in St. Louis v. The Queen (1895), 25 S.C.R. 649 provided an adequate remedy for spoliation that the court in Endean concluded that a separate tort of spoliation was not required. O'Driscoll J., writing on behalf of a majority of the Divisional Court in Rintoul, applied Endean, observing at p. 384 "that the foreseeable trend is to view 'spoliation' as an evidentiary rule that raises a presumption and not as a stand- alone, independent tort".

[12] Writing in dissent in Rintoul, Corbett J. observed at p. 390, correctly in my view, that St. Louis did not deal with the question of whether the tort of spoliation existed, or should exist, in Canada. The issue in St. Louis was whether the spoliation inference had been applied correctly by the lower courts. Referring to the principles stated in Hunt v. Carey Canada Inc. that a claim should not be struck out on the ground that it discloses no cause of action unless it is plain and obvious that it cannot succeed or merely because it is novel, Corbett J. stated at pp. 388-389:

The tort of spoliation is essentially novel in Canada. Canadian authorities have traditionally viewed the destruction of evidence as a matter of evidence giving rise to procedural remedies, including rule 30.08(2) of our rules, where warranted. This view that procedural remedies are sufficient should not preclude consideration of a substantive remedy for the wilful destruction of evidence.

In concluding that the claim should not be struck out as failing to disclose a reasonable cause of action, she held at pp. 390- 391:

Given the seriousness of the claim involved and the policy objective of preserving records, particularly where the public body in question has a legal duty to preserve that record and to make it available to the public upon request, a tort of spoliation in some form may be appropriate.

I am therefore of the view, and in agreement with [the motions judge] Feldman J., when she stated in her decision of March 18, 1998, at p. 6:

A motion such as this is not the place to set out a detailed treatise on the tort of spoliation for many reasons, chief among them being that as with virtually all legal analysis, a factual nexus is needed to properly assess the consequences of the various conclusions.

Analysis

[13] I agree with those portions of the reasons of Corbett J. in Rintoul which I have quoted. As I will explain, for the reasons of Wilson J. in Hunt, I am of the view that paragraphs 8 to 15 of the statement of claim should not have been struck out and that the appellant's claim pleaded in those paragraphs should be allowed to proceed to trial.

[14] At the outset of my analysis it is helpful to repeat what this court said in Dawson v. Rexcraft Storage Inc. (1998), 164 D.L.R. (4th) 257 at 264 in identifying the two categories of motions that are commonly brought under rule 21.01(1)(b):

Because the purpose of a rule 21.01(1)(b) motion is to test whether the plaintiff's allegations (assuming they can be proved) state a claim for which a court may grant relief, the only question posed by the motion is whether the statement of claim states a legally sufficient claim, i.e., whether it is substantively adequate. Consequently, the motions judge, as mandated by rule 21.01(2)(b), does not consider any evidence in deciding the motion. The motions judge addresses a purely legal question: whether, assuming the plaintiff can prove the allegations pleaded in the statement of claim, he or she will have established a cause of action entitling him or her to some form of relief from the defendant. Because dismissal of an action for failure to state a reasonable cause of action is a drastic measure, the court is required to give a generous reading to the statement of claim, construe it in the light most favourable to the plaintiff, and be satisfied that it is plain and obvious that the plaintiff cannot succeed: See Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321.

In some cases, a statement of claim will be vulnerable to dismissal under rule 21.01(1)(b) because the plaintiff has sought relief for acts that are not proscribed under the law. The typical textbook example is a statement of claim that alleges that the defendant made a face at the plaintiff, or that the defendant drove a car of an offensive colour. In other cases, however, the statement of claim may be defective because it has failed to allege the necessary elements of a claim that, if properly pleaded, would constitute a reasonable cause of action.

In this appeal, it is the first category of a rule 21.01(1)(b) motion that is under consideration.

[15] In my view, this court should apply the reasoning of Wilson J. in Hunt and permit the plaintiff's claim, based on the alleged spoliation of evidence by the respondents, to proceed to trial. The claim advanced in Hunt was very similar to the one advanced in this case. The plaintiff alleged that the defendant asbestos producers were negligent and, as well, that they conspired to withhold information concerning the effects of

asbestos fibres on workers such as himself. He alleged that “after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres …. that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of that conspiracy he contracted mesothelioma” (p. 963). At the time the plaintiff’s claim was launched, the tort of conspiracy to withhold information was unknown in law. On this basis the defendants succeeded in striking out this portion of the plaintiff’s claim. [16] Wilson J. delivered the reasons for the Supreme Court of Canada in Hunt in which she held that the plaintiff’s claim should proceed to trial. In the course of her reasons she reviewed the jurisprudence of this province on the test to be applied when it is sought to strike out a statement of claim for failing to state a reasonable cause of action, and stated at p. 977:
Thus, the Ontario Court of Appeal has firmly embraced the “plain and obvious” test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

[17] In his concurring reasons in the British Columbia Court of Appeal, Esson J.A. had specifically declined to embark upon a detailed consideration of the law of conspiracy, noting as Wilson J. stated at p. 967:
It has not generally been part of our tradition and, given the complexity and novelty of some of the issues raised in this case, it would I think be particularly undesirable to render a such decisions [sic], as it were, in a vacuum.
At p. 986, Wilson J. approved of this approach:
I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

[18] As I have noted, this is not a case in which it is argued that a portion of the statement of claim should be struck out because it pleads a recognized claim which contains a radical defect. Rather, the position taken by the respondents is that the statement of claim sets forth a claim which has been recognized in some jurisdictions, but which has not been recognized in Ontario, nor should it be recognized. I would note, however, that prior to Rintoul the tort of spoliation was permitted to proceed to trial by Molloy J. in Coriale (Litigation Guardian of) v. Sisters of St. Joseph’s of Sault Ste. Marie (1998), 41 O.R. (3d) 347 (Gen. Div.), from which, we were told, leave to appeal to the Divisional Court was refused. As she was of the opinion that it was not plain and obvious that spoliation could not form the basis of an independent tort, Molloy J. found that it was far preferable to develop legal precedent within the factual context of a trial and not on an interlocutory motion.

[19] Wilson J.’s response to a similar argument in Hunt is found at pp. 989-991:
If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this Court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff’s chances of success. As the law that spawned the “plain and obvious” test makes clear, it is enough that the plaintiff has some chance of success.
The issues that will arise at the trial of the plaintiff’s action in conspiracy will unquestionably be difficult. The plaintiff may have to make complex submissions about whether the evidence establishes that the defendants conspired either with a view to causing him harm or in circumstances where they should have known that their actions would cause him harm. He may well have to make novel arguments concerning whether it is enough that the defendants knew or ought to have known that a class of which the plaintiff was a member would suffer harm. The trial judge might conclude, as some of the defendants have submitted, that the plaintiff should have sued the defendants as joint tortfeasors rather than alleging the tort of conspiracy. But this Court’s statements in Inuit Tapirisat of Canada and Operation Dismantle Inc., as well as decisions such as Dyson and Drummond-Jackson, make clear that none of these considerations may be taken into account on an application brought under Rule 19(24) of the British Columbia Rules of Court.
…..

The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society. [Emphasis added.]

[20] The respondents also submitted that a cause of action in spoliation is not available where the plaintiff has available another cause of action. Wilson J. rejected a similar argument in Hunt for two reasons. Her second reason, in my view, is applicable to this appeal. At pp. 991-992 she stated:

This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge. [Emphasis added.]

[21] As I stated earlier, I view the plaintiff's claim based on the tort of spoliation as an additional, or alternative, claim to be considered only if it is established that the destruction or suppression of evidence by the respondents results in the inability of the plaintiff to establish the other nominate torts pleaded in the statement of claim. This, as well, is a good reason why trial efficiency commends that the pleading of the tort of spoliation remain intact so that all of the issues may be considered by the same trial judge.

[22] Therefore, I would apply the reasoning of Wilson J. in Hunt and permit the plaintiff's claim based on the tort of spoliation to proceed to trial. As in Hunt, there is no need to embark on a detailed consideration of the strengths and weaknesses of the law, including the Canadian law, on the tort of spoliation. If it is established that the conduct of the respondents resulted in harm to the plaintiff by making it impossible for her to prove her claim, then it will be for the trial judge, in the context of a complete record, to determine whether the plaintiff should have a remedy. This is how the progress of the common law is marked in cases of first impression, where the court has created a new cause of action where none had been recognized before. I need refer only to Donoghue v. Stevenson [1932] A.C. 562 (H.L.) as but one example. Expanding on what Wilson J. stated, when it is clear that a person's interests are entitled to legal protection against the conduct of another, the fact that the claim is novel will not in itself operate as a bar to a remedy. As well, I do not see why the existence of procedural sanctions or the "spoliation inference" which may, or may not, ameliorate the effects of spoliation should in themselves preclude the recognition of an independent tort. As the appellant relies on the spoliation inference, the trial judge will hear and consider evidence of spoliation in any event. I can see no reason why the trial judge should be precluded from considering all possible remedies, including a separate tort, on the basis of the record that will be developed.

[23] In my view, this case represents a paradigm of when a claim should be permitted to proceed to trial. As Finlayson J.A. stated on behalf of this court in R.D. Belanger & Associates Ltd. v. Stadium Corporation of Ontario Ltd. (1991), 5 O.R. (3d) 778 at 782: "Matters of law which have not been settled fully in our jurisprudence should not be disposed of at this [interlocutory] stage of the proceedings." See, also, Temilini v. Ontario Provincial Police (Commissioner) (1990), 73 O.R. (2d) 664 (C.A.); Hanson v. Bank of Nova Scotia (1994), 19 O.R. (3d) 142 (C.A.).

[24] For the assistance of the trial judge, consideration should be given to whether Rintoul precludes the trial judge from determining whether the appellant's claim based on the tort of spoliation should be recognized, should this issue be raised. In my view, the trial judge should not be bound by the result in Rintoul. While we are not required to overrule Rintoul, I believe that there is good reason to doubt the correctness of the result reached by the majority. As I have indicated, I believe that the reasoning of the majority in purporting to apply St. Louis, which was also applied in Endean, is flawed. Cameron J. and

counsel for the respondents referred to the substantial body of case law in the United States which has accepted and rejected the tort of spoliation. The very few Canadian cases which have considered the question are far from definitive. Accordingly, the trial judge is free to consider the appellant's claim based on the tort of spoliation as if it were a claim at first instance.

[25] The appellant, as indicated earlier, has also appealed from the decision of the motions judge striking out paragraph 16 of the statement of claim in which "the doctrine of omnia praesumuntur contra spoliatorem" was pleaded and relied on. It was submitted that paragraph 16 is not objectionable as it is the pleading of a point of law, which is permitted by rule 25.06(2). I do not agree. The "doctrine", as is apparent from St. Louis, is a rule of evidence and states no principle of law. The maxim res ipsa loquitur is also a rule of evidence and states no principle of law: Hellenius v. Lees (1971), 20 D.L.R. (3d) 369 at 373 (S.C.C.). In Hansen v. Weinmaster, [1951] O.W.N. 868 at 869 (C.A.) it was held that there was no rule of pleading that requires the pleading of res ipsa loquitur as it is a rule of evidence. It follows that as omnia praesumuntur contra spoliatorem is a rule of evidence, there was no need to plead it, and the motions judge did not err in striking out paragraph 16.

[26] I would, therefore, allow the appeal and set aside the order of Cameron J. with the exception of paragraph 16 of the statement of claim, which is to be struck out as it offends rule 25.06(2). In the circumstances, there is no need to consider the cross- appeal, and it is dismissed without costs. The appellant is to have costs of the motion and the appeal.

Released: S.B. JUL 21 2000

Signed: "S. Borins J.A." "I agree. J.C. MacPherson J.A." "I agree Robert J. Sharpe J.A."