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Comment

Spoliation of Evidence and Medical Malpractice

I. Introduction

Spoliation of evidence has been defined as “the intentional destruction of evidence”¹ However, spoliation has developed into a more expansive concept, and may be accomplished by destruction, alteration, tampering or concealment of physical evidence, and tampering with witnesses.² It is a major vexation to the execution of justice since it hinders the pursuit of the truth.³ Spoliation has been looked upon unfavorably and has been the subject of a variety of remedies.⁴

The 1982 film “The Verdict” centered around a medical malpractice trial.⁵ A young woman aspirated gastric contents during the induction of general anesthesia, leaving her in a vegetative state.⁶ The most dramatic piece of evidence was the testimony of a former admitting nurse, who stated that the anesthesiologist had ordered her to alter the admission history to reflect that the patient’s last meal had been consumed nine hours, rather than one hour, before admission.⁷ This was done to disguise the negligent administration of anesthesia to a pa-

1. BLACK’S LAW DICTIONARY 1401 (6th ed. 1990). Destruction, in turn, has been defined as “rendering discoverable matter permanently unavailable to the court and the opposing party.” JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 1.1 (1989).

2. See *infra* notes 29-32 and accompanying text.

3. GORELICK, *supra* note 1, § 1.11.

4. See *infra* notes 34-37 and accompanying text.

5. THE VERDICT (Twentieth Century Fox 1982).

6. *Id.*

7. *Id.*

tient with a full stomach.⁸ Although the jury was instructed to disregard this testimony,⁹ the damage had been done. Not only did the jury return a verdict for the plaintiff, but it inquired of the dumbfounded judge whether damages were limited by plaintiff's prayer for relief.¹⁰

In the real life medical malpractice context, spoliation of evidence continues to be, or at least is alleged to be, an all too frequent occurrence.¹¹ It may be accomplished by altering the medical record,¹² adding to the record at some time after an initial entry,¹³ deleting or substituting,¹⁴ obliterating,¹⁵ substituting a fabricated record,¹⁶ and by destruction or loss of radiographs, laboratory reports, or physical evidence.¹⁷ It has been estimated that as many fifty percent of medical malpractice cases involve altered records,¹⁸ and that ten percent of all

8. *Id.*

9. The copy of the admissions form violated the cinematic version of the best evidence rule.

10. *Id.*; see E.R. Shipp, *Message of 'The Verdict' Debated in Courthouse*, N.Y. TIMES, Apr. 13, 1983, at B1.

11. Robert L. Prosser, *Alteration of Medical Records Submitted for Medical Review*, 267 JAMA 2630 (1992); e.g., generally Bruce Maston, *The Record of Malpractice Is Undeniable - and Frightening*, TIMES UNION (Albany), Sept. 14, 1992, at A6; Terry Neal, *Plantation Doctor to Pay \$1 Million Dollars in Boy's Death*, MIAMI HERALD, Mar. 31, 1992, at 3BR (request for punitive damages permitted based upon allegations of altering medical record and destruction of originals); Thomas Omestad, *4 Infants Die - Doctor and Aide Charged with Murder*, L.A. TIMES, Nov. 4, 1986, § Metro at 6 (disposal of body of stillborn in unknown manner and destruction of records); Robin Topping, *Victim's Lawyer: Probe NCMC*, N.Y. NEWSDAY, June 16, 1988, § News at 21 (overwritten order, morphine overdose).

12. Anonymous, *Altered Medication Orders in Medical Records*, 22 HOSP. PHARMACY 230 (1987). "Altered medical records are records on which changes have been made to the original record's entry after its completion, without following an established protocol for record correction." *Id.* at 230.

13. John Barchilon, *The Case of the Doctored Record*, TRIAL, Oct. 1978, at 27, 30.

14. Harold L. Hirsh, *Tampering with Medical Records*, 24 MED. TRIAL TECH. Q. 450, 454 (1978).

15. Sanford M. Gage, *Alteration, Falsification, and Fabrication of Records in Medical Malpractice Actions*, 27 MED. TRIAL TECH. Q. 476 (1981).

16. *Id.* at 478-79.

17. *Id.* at 480.

18. Robert C. Mathews, *Altering the Medical Record*, 10 AM. J. EMERG. MED. 162, 162 (1992).

malpractice cases involve fraudulently altered records.¹⁹ Such alteration may be prompted by the emotional turmoil triggered by a malpractice suit.²⁰ Records may also be routinely altered regardless of whether concern exists about a malpractice suit.²¹ The value of unaltered records in defending a malpractice action has been acknowledged.²² Despite warnings to health care personnel that such attempts are viewed as self-serving²³ and are susceptible to detection by document examiners, attempts to alter medical records continue.²⁴ The physician who alters medical records, after becoming aware of the possibility of malpractice litigation, may be subject to cancellation of professional liability insurance.²⁵ Even excellent medical care may prove indefensible in a malpractice suit if records have been altered.²⁶

19. Richard F. Gibbs, *The Present and Future Medicolegal Importance of Record Keeping in Anesthesia and Intensive Care: The Case for Automation*, 5 J. CLINICAL MONITORING 251, 253 (1989).

20. Mathews, *supra* note 18, at 162.

21. D. C. Galletly et al., *The Anaesthetic Record: A Confidential Survey on Data Omission or Modification*, 19 ANAESTHESIA AND INTENSIVE CARE 74 (1991). Occasional data omission or falsification occurred according to 55% of New Zealand anesthesiologists surveyed. *Id.*

22. *Mirkin v. Medical Mut. Liab. Ins. Soc'y*, 572 A.2d 1126 (Md. Ct. Sp. App. 1990). The court wrote:

[c]redible, accurate, contemporaneous medical records are the foundation of the proper defense of a medical malpractice claim. Even if contemporaneous records are not complete, credible testimony of a treating physician may be used to supplement the records and demonstrate compliance with the applicable standard of care. If a physician submits subsequently prepared medical records which are represented as contemporaneous, however, the credibility of the contemporaneous records as well as of the physician will be destroyed.

Id. at 1131.

23. Gibbs, *supra* note 19, at 252.

24. Karen A. Dean, *Altering the Patient Record*, FOCUS ON CRITICAL CARE, Apr., 1984, at 48. Document examination experts may search for overwriting, erasures, use of ink eradicator or other chemicals, intactness of paper coating, differences in ink color and composition, writing surface, slant, angle, and instrument. *Id.* at 49-50. Microscopic examination and ultraviolet light may be employed to detect alteration of documents. *Id.* at 50.

25. *Mirkin*, 572 A.2d at 1131-32 (holding that cancellation of physician's professional liability insurance for improper alteration of medical records was reasonably related to insurer's economic and business purposes).

26. Prosser, *supra* note 11, at 2631.

Less ominous is the negligent loss of medical records by a disorganized medical records department.²⁷

Spoliation, however, is not the sole province of the defendant. Less commonly, spoliation of evidence will be the act of the plaintiff patient, not the defendant health care provider.²⁸

This Comment will examine spoliation of evidence in the context of medical malpractice actions. Part II will discuss the background of spoliation of evidence and policy reasons for controlling spoliation. Section A will discuss the definition of spoliation. Section B will discuss the various remedies for spoliation: the spoliation inference, discovery sanctions, and the independent tort of spoliation. Section B will also discuss the applicability of obstruction of justice statutes and record retention statutes. Section C will discuss the law of bailments and its analogy to the duty to preserve evidence. Part III will review case law relating to spoliation of evidence in the medical malpractice arena, and is divided into sections containing groups of cases representing each of the spoliation remedies. Part IV will analyze the availability and effectiveness of the various remedies for spoliation and the analogy between the law governing preservation of evidence and the law of bailments. Part V, in conclusion, proposes that in the medical malpractice context, while no single remedy will always provide adequate relief, a bailments approach may provide the simplest, most uniform remedy to spoliation in the medical malpractice context.

27. Frederick L. Brancati, *Readers of the Lost Chart: An Archaeologic Approach to the Medical Record*, 267 JAMA 1860 (1992). The author whimsically describes the medical records department as:

the Temple of Doom . . . [g]uarded by file clerks, who in Greek mythology were described as having the body of a serpent and the head of John Sununu, the eye perceives the gory silhouettes of unsorted charts strewn haphazardly across long tables in dim light. To find the grail, the only option is to examine the grisly remains of each chart one-by-one while suffocating in the heavy odor of bureaucracy.

Id. at 1861.

28. *E.g.*, *Jerome v. Pardis*, 783 P.2d 919 (Mont. 1989) (noting that after defendant's discovery request plaintiff withheld a letter from a subsequent treating physician and her own written statement concerning her long history of back ailments).

II. Background

A. Definition of Spoliation

At its simplest, spoliation of evidence may be defined as the destruction of evidence.²⁹ Although there appears to be no universally accepted definition, "destruction" may be defined as "rendering evidence permanently unavailable to the court and the opposing party."³⁰ This may involve actual physical destruction (shredding), alteration (such as creation of a paper copy of records or erasure of electronically stored computer files), concealment or relocation of evidence to a permanently inaccessible location.³¹ It also encompasses attempts to prevent or alter the testimony of witnesses by intimidation or coercion.³² In the context of spoliation, "evidence" refers not only to proof admissible at trial, but also to other discoverable proof.³³

B. Remedies for Spoliation

Historically, the courts have fashioned a number of remedies for those injured by spoliation.³⁴ The spoliation inference is a time-honored remedy.³⁵ Discovery sanctions have also been employed.³⁶ More recently, several jurisdictions have approved, or at least considered, the independent tort of spoliation of evidence.³⁷

Generally, three policy reasons exist justifying the control of spoliation of evidence: promotion of truth-seeking, fairness, and preservation of the integrity of the judicial system.³⁸ There are three corresponding purposes for remedial measures in response to spoliation: restoration of accuracy, compensation of

29. BLACK'S LAW DICTIONARY 1401 (6th ed. 1990).

30. GORELICK, *supra* note 1, § 1.1.

31. *Id.*

32. *Id.* § 1.4.

33. FED. R. CIV. P. 26(b)(1). The rule provides for discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action," even though "the information sought need not be admissible at the trial" provided that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

34. GORELICK, *supra* note 1, § 1.2.

35. *Id.* § 1.3.

36. *Id.* § 1.5.

37. See *infra* notes 87-114 and accompanying text.

38. GORELICK, *supra* note 1, §§ 1.9-13.

the victim of spoliation, and punishment of the spoliator.³⁹ In turn, the aim of punishment may be retribution against the spoliator or deterrence of spoliative conduct.⁴⁰ The purpose of restoration of accuracy is closely tied to the policy of promoting truth-seeking;⁴¹ the compensation purpose parallels the fairness policy; and the punitive aspect may prevent further incursions upon judicial integrity.⁴² The effectiveness of the various remedial measures for spoliation in the medical malpractice context will be examined with these aims in mind.

1. *Spoliation Inference*

The existence of negative consequences to one who destroys evidence is summarized by the maxim, "*omnia praesumuntur contra spoliatorem*," that is, "[a]ll things are presumed against a despoiler or wrongdoer."⁴³ However, the terms "inference" and "presumption" have been used interchangeably and indiscriminately.⁴⁴ The spoliation inference permits, but does not require, the trier of fact to find that the evidence not produced was harmful to the spoliator.⁴⁵ A presumption of spoliation, on the other hand, compels the trier of fact to find that the missing evidence was harmful to the spoliator unless the presumption is rebutted by the spoliator, thus shifting the burden of production to the spoliator.⁴⁶ Generally, courts have invoked an inference rather than a true presumption.⁴⁷ According to Judge Learned Hand, such an inference arises because "[w]hen a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to

39. *Id.* §§ 1.9, 1.21.

40. *Id.* § 1.21.

41. *Id.*

42. *Id.*

43. BLACK'S LAW DICTIONARY 1086 (6th ed. 1990); see GORELICK, *supra* note 1, § 1.3 (citing *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722) (instructing the jury to make the strongest presumption against a jeweler who refused to produce a gemstone brought to him for appraisal by a chimney sweep)).

44. See generally GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE, § 3.2 (2d ed. 1987) (distinguishing between presumptions and inferences).

45. *Id.*

46. *Id.*

47. 29 AM. JUR. 2D *Evidence* § 177 (1967). "It is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that the evidence would have been unfavorable to the cause of the spoliator." *Id.*

conceal, and is conscious of guilt."⁴⁸ In other words, he who has spoliated evidence is presumed to have a weak case at the outset.

Whether intentional spoliation is always indicative of consciousness of guilt or of the weakness of one's case, however, has been questioned.⁴⁹ For example, an innocent party may wish to avoid the inconvenience or notoriety of litigation, or may feel that his honestly held belief in his own innocence may give him the "right" to destroy evidence.⁵⁰ However, even the spoliator who destroys evidence due to a firm belief in his own innocence deprives the opposing party and the finder of fact of the opportunity to weigh all available relevant evidence.⁵¹

Traditionally, in order to apply the inference of spoliation, five elements must be shown: (1) destruction; (2) the destroyed matter must be relevant to the dispute; (3) the destruction must be intentional; (4) the evidence must be destroyed at a time when legal proceedings are pending or reasonably foreseeable; and (5) the destruction must be carried out by a party or its agent.⁵² The inference against the spoliator serves three main functions: (1) accurate fact finding; (2) compensation of the party placed at a disadvantage by the act of spoliation; and (3) punishment of the spoliator.⁵³

The element of intent has been subject to varying interpretations.⁵⁴ The breadth of the inference against the spoliator has varied depending upon whether the destruction has been

48. *Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha*, 102 F.2d 450, 453 (2d Cir.), modified *per curiam*, 103 F.2d 430 (2d Cir. 1939).

49. GORELICK, *supra* note 1, § 2.3.

50. *Id.*

51. John M. Maguire & Robert C. Vincent, *Admissions Implied from Spoliation*, 45 YALE L.J. 226 (1935). The authors wrote:

[c]ourtroom truth is what a jury or the judge finds after full and fair presentation of evidence. The correct hostile inference from efforts to prevent a witness from giving testimony is that the offending party, by disclosing unwillingness to let the tribunal use human recollection and all other materials relevant to the shaping of courtroom truth, gives support to the conclusion that a proper finding would be against him.

Id. at 238.

52. GORELICK, *supra* note 1, § 2.5.

53. *Id.* § 1.21.

54. *Id.* § 2.8; see also 29 AM. JUR. 2d *Evidence* § 177 (1967). "Such a presumption or inference arises, however, only where the spoliation or destruction was intentional, and indicated fraud and a desire to suppress the truth, and it does not

"merely" intentional (a deliberate destruction of information without the intent of depriving the court of information), or "truly" intentional or purposeful (a deliberate destruction with the intent to deprive the court of information).⁵⁵ If merely intentional, the destruction would permit the finder of fact to infer that the destroyed evidence was unfavorable to the spoliator, while if truly intentional, a general inference of consciousness of guilt could be raised.⁵⁶ In either case, the spoliation inference will neither restore accuracy nor compensate the victim in the case of negligent spoliation.⁵⁷

Destruction of material that is normally destroyed in the course of business may not be actionable if litigation was not foreseeable.⁵⁸ Destruction of evidence before the commencement of a suit or before the reasonable expectation that a suit will commence will not generally give rise to the inference of spoliation.⁵⁹ Thus, destruction of evidence in the course of a routine records destruction program, before litigation is foreseeable, will not give rise to a spoliation inference, even if such evidence were later found to be relevant.⁶⁰ In the medical malpractice context, this requirement seldom presents a practical problem, since the statutorily required period for record retention usually exceeds the limitation period for bringing a malpractice action.⁶¹ However, when the discovery rule is applied to extend the statute of limitations many years beyond the actual onset of harm, records may become less accessible or may

arise where the destruction was a matter of routine with no fraudulent intent." *Id.* (footnote omitted).

55. *Miller v. Montgomery County*, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985).

56. *Id.*

57. GORELICK, *supra* note 1, § 2.8 (noting the intent requirement to raise the spoliation inference); *but see* *Welsh v. United States*, 844 F.2d 1239 (6th Cir. 1988); *Sullivan v. General Motors Corp.*, 772 F. Supp. 358 (N.D. Ohio, E.D. 1991) (spoliation of evidence charge would not be given where failure to take photographs was neither negligent nor in bad faith); *Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759 (D.C. 1990); *DeLaughter v. Lawrence County Hosp.*, 601 So. 2d 818 (Miss. 1992).

58. GORELICK, *supra* note 1, §§ 8.1-8.

59. *Id.*

60. *Id.*

61. *E.g.*, Virginia requires retention of medical records for ten years, VA. CODE ANN. § 42.1-79.1 (Michie 1990), but has a two year statute of limitations on medical malpractice. VA. CODE ANN. § 8.01-243 (Michie 1992).

even have been destroyed.⁶² Under such circumstances, the requirement that litigation be pending or foreseeable does not necessarily serve the accuracy, compensatory, or punitive purposes of the spoliation inference.⁶³

The spoliation inference will apply only where the spoliator is a party or its agent.⁶⁴ Application of the inference cannot effectively punish a non-party spoliator; other remedies, however, may be involved.⁶⁵

2. Discovery Sanctions

Sanctions for spoliation of evidence are based upon: (1) broad discovery sanctions predicated upon a court order;⁶⁶ (2) the court's inherent power absent a specific order;⁶⁷ (3) rules requiring a party to serve a written response for requests for inspection and discovery;⁶⁸ (4) the due process clauses of the United States Constitution;⁶⁹ (5) rules concerning a party's obligation to make reasonable inquiry before filing pleadings;⁷⁰ and (6) rules regarding a party's obligation to make reasonable inquiry before making discovery responses.⁷¹

Discovery sanctions may be monetary or nonmonetary.⁷² Monetary sanctions include compensating the injured party for discovery costs, the cost of reconstructing evidence, and attorney's fees.⁷³ Nonmonetary sanctions include precluding evi-

62. See *infra* notes 450-51 and accompanying text.

63. See *supra* notes 39-42 and accompanying text.

64. GORELICK, *supra* note 1, § 2.10.

65. See *infra* notes 107-09, 113-14, 153-60 and accompanying text.

66. FED. R. CIV. P. 37(b).

67. *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126-27 (S.D. Fla. 1987); *Barker v. Bledsoe*, 85 F.R.D. 545, 548-49 (W.D. Okla. 1979); see *infra* notes 296-99 and accompanying text.

68. FED. R. CIV. P. 37(d).

69. U.S. CONST. amends. V & XIV, § 1; *Barker*, 85 F.R.D. at 547-49 (stating that "the requirement of due process is not an ephemeral concept, confined to the criminal area, but extends to all litigants the standard of fundamental fairness in federal court").

70. FED. R. CIV. P. 11; *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 554 (N.D. Cal. 1987).

71. FED. R. CIV. P. 26(g); *National Ass'n of Radiation Survivors*, 115 F.R.D. at 554.

72. GORELICK, *supra* note 1, § 3.14.

73. *Id.* § 3.16.

dence,⁷⁴ deeming certain facts established,⁷⁵ dismissing the action,⁷⁶ entering a default judgment,⁷⁷ and holding the offending party in contempt.⁷⁸

The elements required to establish grounds for the application of discovery sanctions have been listed as: (1) destruction (2) of discoverable matter (3) which the spoliator knew or should have known (4) was relevant to pending, imminent, or reasonably foreseeable litigation.⁷⁹ These elements are similar to those required for the spoliation inference, but here the measure of culpability also may be negligence, not only intent.⁸⁰ Although it is not specifically required that the destruction be carried out by a party or its agent, discovery sanctions are not generally sought against non-party spoliators.⁸¹

The severity of sanctions that courts will fashion are generally conditioned upon two factors: (1) the degree of the spoliator's culpability, and (2) the degree of prejudice to the spoliation victim.⁸² Sanctions may be imposed even for inadvertent spoliation if the victim is severely prejudiced;⁸³ conversely, no or mild

74. FED. R. CIV. P. 37(b)(2)(B); *Nally v. Volkswagen of America Inc.*, 539 N.E.2d 1017 (Mass. 1989) (precluding evidence where plaintiff's accident reconstruction expert destroyed allegedly defective parts during testing, leaving defendant with no direct evidence to present to jury).

75. FED. R. CIV. P. 37(b)(2)(A).

76. FED. R. CIV. P. 37(b)(2)(C).

77. *Id.*

78. FED. R. CIV. P. 37(b)(2)(D).

79. GORELICK, *supra* note 1, § 3.1.

80. *Huber v. Henley*, 669 F. Supp. 1474 (S.D. Ind. 1987). In *Huber*, defendants inadvertently placed the axle and suspension of a truck trailer involved in a motor vehicle accident case in another vehicle in violation of a court order to preserve evidence. *Id.* at 1476. The court noted:

The discovery provisions of the federal rules require more, however, than the absence of intentional noncompliance; they impose an affirmative duty upon counsel and litigants to ensure compliance. The failure of compliance in this case was the direct result of negligence in the communication of instructions from counsel to the litigant's employees.

Id. at 1477.

81. *See, e.g., Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 415 (9th Cir. 1978).

82. GORELICK, *supra* note 1, § 3.14.

83. *DePuy, Inc. v. Eckes*, 427 So. 2d 306 (Fla. Dist. Ct. App. 1983).

sanctions may be imposed for intentional misconduct resulting in no prejudice to the opposing party.⁸⁴

As with the spoliation inference, discovery sanctions are available in all jurisdictions, but unlike the inference, the compensation purpose of remedying an act of spoliation is better served by the relaxed culpability requirements associated with discovery sanctions.⁸⁵ However, the punitive purpose of remedying spoliation may be less well served, since even intentional acts of spoliation may receive light sanctions if no actual prejudice to the opponent resulted.⁸⁶ As with the inference, third party spoliators are not covered.

3. *The Tort of Spoliation*⁸⁷

Several jurisdictions have recognized an independent tort of spoliation of evidence.⁸⁸ The case credited with establishing the modern tort of spoliation of evidence is *Smith v. Superior Court*.⁸⁹ In *Smith*, a tire flew off a van and crashed through the windshield of plaintiff's vehicle, causing plaintiff permanent bilateral blindness and impairment of sense of smell.⁹⁰ The dealer who had installed the customized wheels agreed to a request by plaintiff's counsel to preserve certain car parts, including the wheels, but later lost, destroyed, or otherwise disposed of them, making it impossible for plaintiff's expert to determine the cause of the failure of the wheel assembly.⁹¹ A cause of action for intentional spoliation of evidence was allowed on the ground that plaintiff relied, to his detriment, on defendant's promise by foregoing to seek a restraining order compelling

84. See *Thurman-Bryant Elec. Supply Co. v. UNISYS Corp., Inc.*, No. 03A01-CV00152, 1991 WL 222256 at *4 (Tenn. Ct. App. Nov. 4, 1991) (concluding that summary judgment was an inappropriate sanction for plaintiff's unintentional destruction of computer where no prejudice to defendant resulted).

85. See *infra* note 304 and accompanying text.

86. See *infra* note 470 and accompanying text.

87. See generally Nancy Melgaard, Note, *Spoliation of Evidence—An Independent Tort?*, 67 N.D. L. REV. 501 (1991).

88. *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska, 1986); *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Ct. App. 1984); *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984); see *infra* notes 336-56 and accompanying text.

89. 198 Cal. Rptr. 829 (Ct. App. 1984).

90. *Id.* at 831.

91. *Id.*

maintenance of evidence.⁹² The novelty of the tort was not a bar to recognition.⁹³ Further, the court found that a previous California decision may have recognized a negligence cause of action for spoliation of evidence.⁹⁴ The court distinguished *Smith* from a case in which damages were sought for conspiracy to obstruct the orderly prosecution of a civil action.⁹⁵ It was further noted that the concern of criminal prosecution is vindication of public interests, not compensation of the injured plaintiff.⁹⁶ The court further noted that criminal prosecution would not act as a sufficient deterrent since the penalty was only a misdemeanor, and since the statute had never been used to prosecute destruction of evidence in a civil case.⁹⁷ The uncertainty of the existence and amount of damages also was not viewed as an obstacle.⁹⁸ The tort of intentional spoliation of evidence was analogized to intentional interference with prospective business

92. *Id.* at 832.

93. *Id.* Quoting Prosser, the court stated that:

[n]ew and nameless torts are being recognized constantly The law of torts is anything but static, and the limits of its development are never set. *When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant*, the mere fact that the claim is novel will not of itself operate as a bar to a remedy.

Id. (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 1 at 3-4 (4th ed. 1971)) (emphasis in original).

94. *Id.* at 833 (citing *Williams v. State*, 664 P.2d 137 (Cal. 1983) (implying that a cause of action for failure to preserve evidence could be stated if a duty to preserve evidence was demonstrated)).

95. *Id.* at 833-34 (citing *Agnew v. Parks*, 343 P.2d 118 (Cal. Ct. App. 1959)). In *Agnew* the plaintiff, who had already been successful in the underlying malpractice action, brought a civil conspiracy action against a county medical society for allegedly conspiring to intimidate witnesses, to recommend a biased expert witness, and to conceal X-rays. *Agnew*, 343 P.2d at 121-29. The court held that the allegation of perjury could have been raised at the prior proceeding, and was thus merged with the previous action, and that there was no private cause of action for perjury. *Id.* at 124. In *Smith* there was no merger problem since the plaintiff had not yet gone to trial. *Id.* at 833-34.

96. *Smith*, 198 Cal. Rptr. at 834.

97. *Id.* at 835.

98. *Id.* at 835-36. The court stated that:

[w]here 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 . . . 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[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.

advantage.⁹⁹ Thus, by analogy, the prospective civil action giving rise to the tort of spoliation has been stated to be a valuable probable expectancy of the party, harm to which is directly actionable.¹⁰⁰

Other jurisdictions have considered whether spoliation should be recognized as an independent tort without ultimately ruling on the issue.¹⁰¹ Kansas appears to have rejected the tort, reasoning that it simply amounts to a tort remedy for perjury.¹⁰²

Id. at 835 (quoting *Story Parchment Co. v. Paterson P. Paper Co.*, 282 U.S. 555, 563 (1931) (antitrust action seeking damages for alleged conspiracy)).

The court noted that approximated damages for future earnings were routinely awarded for causes of action for wrongful death, personal injury, defamation, invasion of privacy, and patent and trademark infringement. *Id.* at 836.

99. *Id.* at 836.

100. *See, e.g.*, *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 464 (Alaska 1986).

101. *E.g.*, *La Raia v. Superior Court*, 722 P.2d 286 (Ariz. 1986) (holding that where destruction of physical evidence in an underlying negligence action caused physical harm, the spoliation provided the basis for a traditional negligence claim); *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312 (Ill. App. Ct. 1986) (holding that plaintiff's injury from spoliation was not speculative since he had lost the underlying suit, but the tort of spoliation would not lie since the spoliation was not the proximate cause of the injury); *Fox v. Cohen*, 406 N.E.2d 178 (Ill. App. Ct. 1980) (holding that an action for spoliation of evidence was premature, since no final judgment had been rendered in the underlying action, and damages would be speculative); *Miller v. Montgomery County*, 494 A.2d 761 (Md. Ct. Spec. App. 1985) (holding that relief under the spoliation tort would not be available when the victim of spoliation could be afforded full relief under the spoliation inference, but admitted the spoliation tort could provide relief against a non-party spoliator); *Pharr v. Cortese*, 147 Misc. 2d 1078, 559 N.Y.S.2d 780 (Sup. Ct. N.Y. County 1990) (holding that the alleged alteration of medical records would not allow plaintiff to amend complaint to include spoliation of evidence, not yet recognized in New York, since the alleged spoliation had not made her case more difficult to prosecute, and since the spoliation inference and criminal prosecution for altering medical records were available remedies); *Tomas v. Nationwide Mut. Ins. Co.*, 607 N.E. 2d 944 (Ohio Ct. App. 1992) (finding no evidence that plaintiff's products liability claim was unsuccessful because of the destroyed evidence, or that destroyed evidence would have allowed her to successfully pursue it); *Studier v. Taliak*, 599 N.E.2d 718 (Ohio Ct. App. 1991) (holding that the trial court's holding that Ohio did not recognize a cause of action for spoliation of evidence was moot, since plaintiff's pleading was defective for failing to state actual damages).

102. *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177 (Kan. 1987) (holding that where there is no duty to preserve evidence, no cause of action could be brought against a non-party spoliator; also, tort of spoliation of evidence would create an impermissible private remedy for perjury); *see also Agnew v. Parks*, 343 P.2d 118 (Cal. Ct. App. 1959) (holding that there was no private cause of action for perjury); *but see* ME. REV. STAT. ANN. tit. 14, § 870 (West 1964) (creating a private cause of action for perjury).

However, this reasoning was rejected in North Carolina.¹⁰³ Georgia has rejected the tort outright.¹⁰⁴ In *Spano v. McAvoy*¹⁰⁵ the Northern District of New York apparently rejected the tort, but the precedential effect of that decision is unclear.¹⁰⁶

The tort of spoliation of evidence may be either intentional or negligent. The elements of intentional spoliation are: (1) probability of litigation involving the plaintiff; (2) knowledge by defendant of litigation or probability of litigation; (3) intentional spoliation designed to adversely affect the plaintiff; (4) actual disruption of plaintiff's cause of action; and (5) damages resulting from spoliation.¹⁰⁷ These elements are analogous to those for intentional interference with prospective economic advantage.¹⁰⁸ The elements do not appear to bar a cause of action against a non-party spoliator.¹⁰⁹

The elements of negligent spoliation of evidence are: (1) the degree to which the transaction was meant to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff was actually harmed; (4) the degree of certainty that the plaintiff's injury was the result of the defendant's action; (5) the moral blame associated with defend-

103. *Henry v. Deen*, 310 S.E.2d 326, 334 (N.C. 1984) (distinguishing a claim for civil conspiracy leading to injury of a cause of action from claims seeking damages for the loss of a claim from parties alleged to have committed perjury or subornation of perjury).

104. *Gardner v. Blackston*, 365 S.E.2d 545, 546 (Ga. Ct. App. 1988). The court noted: "Neither does Georgia law recognize spoliation of evidence as a separate tort, nor is there any indication here that the evidence was despoiled or tampered with." *Id.*

105. 589 F. Supp. 423 (N.D.N.Y. 1984).

106. The court in *Spano* appears to have construed *Smith v. Superior Court* to have limited the spoliation tort to cases where a prior agreement between the parties to preserve evidence existed. However, *Smith* analogized the tort of spoliation of evidence to the tort of intentional interference with prospective business advantage, which does not require a prior agreement. *Smith*, 198 Cal. Rptr. at 836.

107. *County of Solano v. Delancy*, 264 Cal. Rptr. 721, 729 (Ct. App. 1989).

108. *Buckaloo v. Johnson*, 537 P.2d 865, 872 (Cal. 1975) (listing elements of the tort of intentional interference with prospective economic advantage as: (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) disruption of the relationship; and (5) damages proximately caused by the acts of the defendant).

109. See *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1179 (Kan. 1987) (holding that a non-party spoliator had no duty to preserve evidence absent a special relationship).

ant's action; and (6) the desire to prevent future harm.¹¹⁰ These elements center around whether a duty to preserve evidence exists on the part of the defendant in the absence of specific notice.¹¹¹ The critical element is the foreseeability of harm to the plaintiff; the presence of a duty is a question of law.¹¹² Unlike intentional spoliation, the elements of negligent spoliation appear to preclude a cause of action against the non-party spoliator.¹¹³ However, one court has analogized the negligent destruction of evidence by a non-party to the loss or destruction of goods by a bailee.¹¹⁴

4. *Obstruction of Justice Statutes*

Federal and many state jurisdictions have general obstruction of justice statutes or statutes which do not specifically mention destruction of evidence.¹¹⁵ Other states have statutes that specifically prohibit destruction of evidence¹¹⁶ and provide criminal penalties for destroying, altering, concealing, mutilating, removing or tampering with physical evidence if the spoliator knows or believes that an official proceeding has begun or is likely to be instituted, and if the destruction is done with the

110. *Velasco v. Commercial Bldg. Maintenance Co.*, 215 Cal. Rptr. 504, 506 (Ct. App. 1985).

111. *Solano*, 264 Cal. Rptr. at 729.

112. *Id.*

113. *See supra* notes 107-09 and accompanying text.

114. *Tomas v. Nationwide Mut. Ins. Co.*, 607 N.E.2d 944 (Ohio Ct. App. 1992) (holding that while destruction of automobile by plaintiff's insurer's agent may have given rise to a cause of action in contract or tort for bailee's failure to return bailor's goods, plaintiff was not seeking the market value of the bailed goods, but rather consequential damages for the loss of a prospective civil action).

115. *E.g.*, 18 U.S.C.A. § 1503 (West 1984 & Supp. 1993); MD. ANN. CODE OF 1957, art. 27, § 27 (1992 & Supp. 1993); MISS. CODE ANN. § 97-9-55 (1972 & Supp. 1993); R.I. GEN. LAWS § 11-32-3 (1981 & Supp. 1993); VT. STAT. ANN. tit. 13, § 3015 (Supp. 1993); W. VA. CODE § 61-5-27 (1992).

116. *E.g.*, ALA. CODE § 13A-10-129 (1982 & Supp. 1993); ARIZ. REV. STAT. ANN. § 13-2809 (1989); ARK. CODE ANN. § 5-53-111 (Michie 1993); COLO. REV. STAT. ANN. § 18-8-610 (1986 & Supp. 1992); CONN. GEN. STAT. ANN. § 53a-155 (West 1985); D.C. CODE ANN. § 22-723 (1981 & Supp. 1993); HAW. REV. STAT. § 710-1076 (1985); KY. REV. STAT. ANN. § 524.100 (Michie 1990 & Supp. 1992); ME. REV. STAT. ANN. tit. 17-A, § 455 (West 1983); MONT. CODE ANN. § 45-7-207 (1993); NEB. REV. STAT. § 28-922 (1989); N.H. REV. STAT. ANN. § 641:6 (1986); N.D. CENT. CODE § 12.1-09-03 (1985 & Supp. 1993); N.Y. PENAL LAW § 215.40 (McKinney 1988 & Supp. 1993); OHIO REV. CODE ANN. § 2921.12 (Anderson 1993); OR. REV. STAT. § 162.295 (1991); TEX. PENAL CODE ANN. § 37.09 (West 1989 & Supp. 1994); UTAH CODE ANN. § 76-8-510 (1990 & Supp. 1993); WASH. REV. CODE ANN. § 9A.72.150 (West 1988).

intent to impair the verity or availability of the evidence.¹¹⁷ In some jurisdictions, obstruction of justice statutes apply only to criminal proceedings,¹¹⁸ and thus would afford no remedy in a medical malpractice action. Federal¹¹⁹ and state¹²⁰ witness tampering statutes also exist. Obstruction statutes provide additional weapons against intentional spoliation of evidence, but are rarely invoked against spoliation in civil matters.¹²¹ Because of infrequent prosecution and the possibility of relatively minor penalties, obstruction of justice statutes are regarded as insufficient to deter such action by a party who stands to gain considerable financial benefit through the absence of critical evidence.¹²²

5. *Record Retention Statutes*

Medical records are maintained for numerous purposes. The primary purpose is to provide information regarding the patient's diagnosis, condition, response to treatment, and prognosis, not only for the use of the current health care providers, but also for future providers.¹²³ Secondary purposes include billing, utilization review, quality assurance review, risk man-

117. The offense is a felony in Arizona, Colorado, Connecticut, the District of Columbia, Kentucky, Maine, Montana, Nebraska, New Hampshire, New York, Ohio, Texas, and Utah. It is a misdemeanor in Alabama, Hawaii, Oregon, and Washington. In Arkansas and North Dakota the offense is a felony if spoliation occurs in the context of a felony proceeding and a misdemeanor for other proceedings. See *supra* note 116.

118. *E.g.*, FLA. STAT. ANN. § 918.13 (West 1985 & Supp. 1993); ILL. ANN. STAT. ch. 38, para. 31-4 (Smith-Hurd 1993); IOWA CODE ANN. § 719.3(1) (West 1993); LA. REV. STAT. ANN. § 14:130.1 (West 1986); N.J. STAT. ANN. § 2C:29-3 (West 1982 & Supp. 1993); N.M. STAT. ANN. § 30-22-5 (Michie 1984); 18 PA. CONS. STAT. § 5105 (1983 & Supp. 1993).

119. 18 U.S.C.A. § 1512 (West 1984 & Supp. 1993).

120. *E.g.*, ALA. CODE § 13A-10-124 (Michie 1982); ALASKA STAT. § 11.56.540 (1993); ARIZ. REV. STAT. ANN. § 13-2804 (1989); ARK. CODE ANN. § 5-53-109 (Michie 1993); CAL. PENAL CODE § 136.1 (West 1988 & Supp. 1994); COLO. REV. STAT. ANN. § 18-8-707 (West 1986); CONN. GEN. STAT. ANN. § 53a-151 (West 1985 & Supp. 1993); DEL. CODE ANN. tit. 11, § 1263 (Michie 1987 & Supp. 1992); N.Y. PENAL LAW § 215.10, -11, -12, -13 (McKinney 1988 & Supp. 1992).

121. James F. Thompson, *Spoliation of Evidence: A Troubling New Tort*, 37 U. KAN. L. REV. 567, 571 (1989).

122. *Id.*

123. See 42 C.F.R. § 482.24(c)(1) (1992).

agement, statistical review, and the evaluation, prosecution, and defense of medical malpractice claims.¹²⁴

The duty to maintain medical records for prescribed periods of time is defined by statute in federal¹²⁵ and a large number of state jurisdictions.¹²⁶ In addition, Illinois has a statute specifically requiring retention of X-rays for a prescribed period.¹²⁷ Contractual and common law duties to preserve other forms of medical evidence also exist.¹²⁸

New York prohibits the fraudulent alteration of business records, which include medical records.¹²⁹ California has enacted a criminal statute which prohibits the fraudulent alteration of medical records by any individual.¹³⁰ A number of states provide for professional disciplinary action when health care providers inappropriately alter medical records.¹³¹

Additionally, the health care profession has established standards for quality and retention of medical records. One

124. Briggs W. Andrews, *Medical Records Liability*, A.B.A.F. ON HEALTH L., Summer 1992, at 11; JOINT COMMISSION ON ACCREDITATION OF HEALTH ORGANIZATIONS, ACCREDITATION MANUALS FOR HOSPITALS 49 (1992).

125. 42 C.F.R. § 482.24(b)(1) (1991). This section includes among the Medicare Conditions of Participation: "[m]edical records must be retained in their original or legally reproduced form for a period of at least 5 years." *Id.*

126. *E.g.*, ALASKA STAT. § 18.20.085 (1993); HAW. REV. STAT. § 622-58 (1985 & Supp. 1992); IDAHO CODE §§ 39-1394, 41-3909 (Michie 1993); LA. REV. STAT. ANN. § 40:2144 (West 1992 & Supp. 1993); MINN. STAT. ANN. § 145.32 (West 1989); MISS. CODE ANN. §§ 41-9-69, -71, -73, -77, -79 (1993); NEV. REV. STAT. ANN. § 629.051 (1991); N.M. STAT. ANN. § 30-44-5 (1989); TENN. CODE ANN. § 68-11-302, -305, -308 (1992); TEX. HEALTH & SAFETY CODE ANN. §§ 262.030, 281.073 (West 1992); VA. CODE ANN. § 42.1-79.1 (Michie 1990); WASH. REV. CODE ANN. § 70.41.190 (West 1992).

127. ILL. ANN. STAT. ch. 111 1/2. para. 157-11 (Smith-Hurd 1992). Arguably this is superfluous, since X-rays can be considered a part of the medical record.

128. *Wolf v. Lakewood Hosp.*, 598 N.E.2d 160 (Ohio Ct. App. 1991).

129. N.Y. PENAL LAW § 175.00 (McKinney 1988 & Supp. 1994) (defining business records as, "any writing or article, including computer data or a computer program, kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity"); N.Y. PENAL LAW §§ 175.05-10 (McKinney 1988 & Supp. 1994) (providing for misdemeanor and felony penalties, respectively).

130. *E.g.*, CAL. PENAL CODE § 471.5 (West 1988). This section states that "[a]ny person who alters or modifies the medical record of any person, with fraudulent intent . . . is guilty of a misdemeanor." *Id.* However, CAL. BUS. PROF. CODE § 2262 (West 1990) merely provides for disciplinary action and a civil penalty when a physician fraudulently alters the medical record.

131. *E.g.*, CAL. PENAL CODE § 471.5 (West 1988); FLA. STAT. ANN. § 458.331(1)(m) (West 1991); NEV. REV. STAT. ANN. § 630.3062 (1991); UTAH CODE ANN. § 58-31-2(17)(h) (Supp. 1993).

source of the professional standard is the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) Accreditation Manual for Hospitals (AMH).¹³² The professional code of ethics also provides for the disclosure of medical records at the patient's request to the patient or the patient's designated party.¹³³

C. *The Law of Bailments*

A bailment may be defined as "the rightful possession of goods by one who is not the owner."¹³⁴ To establish a bailment, the purported bailee must be in possession of the goods in question, that is, must have physical control and the intent to exercise such control.¹³⁵ A bailment is distinct from mere custody, in which the owner transfers physical control without the intent to relinquish dominion.¹³⁶ Bailments may exist for the sole benefit of the bailor, for the sole benefit of the bailee, or for mutual benefit.¹³⁷ The degree of care required of the bailee to prevent loss or damage to the bailed goods will vary with the type of bailment, being greatest when only the bailee benefits, least when only the bailor benefits, and "ordinary" when there is mu-

132. The Accreditation Manual for Hospitals provides in part that "[t]he hospital maintains medical records that are documented accurately and in a timely manner, are readily accessible, and permit prompt retrieval of information, including statistical data." JOINT COMM'N ON ACCREDITATION OF HEALTH ORGS., ACCREDITATION MANUAL FOR HOSPITALS 49 (1992); "[t]he medical record contains sufficient information to, identify the patient, support the diagnosis, justify the treatment, and document the course and results accurately." *Id.*; "[m]edical records are confidential, secure, current, authenticated, legible, and complete." *Id.* at 52; "[t]he medical record department is provided with adequate direction, staffing, and facilities to perform all required functions." *Id.* at 53; and "[t]he length of time that medical records are to be retained is dependent on the need for their use in continuing patient care and for legal, research, and educational purposes and on law and regulation." *Id.*

A duty to preserve surgical specimens for pathology evaluations, included in earlier editions of the Joint Commission on Accreditation of Hospitals AMH (PA.3.1) was cited in *Welsh v. United States*, 844 F.2d 1239 (6th Cir. 1988) (quoting JOINT COMM'N ON ACCREDITATION OF HEALTH ORGS., ACCREDITATION MANUAL FOR HOSPITALS 130-31 (1980)).

133. AMERICAN MEDICAL ASSOC. COUNCIL ON ETHICS AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS, ANNOTATED CURRENT OPINIONS 58 (1992).

134. 9 SAMUEL WILLISTON, LAW OF CONTRACTS 875 (3d ed. 1967).

135. RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 10.2 (3d ed. 1975).

136. *Id.* § 10.4.

137. *Id.* §§ 11.1-4.

tual benefit.¹³⁸ The degree of care expected of the bailee may increase with the value of the goods,¹³⁹ and with the nature of the place in which the goods are kept.¹⁴⁰ The bailee also owes a duty to return the bailed goods to the bailor at the conclusion of the bailment; misdelivery to a third party will subject the bailee to liability regardless of the degree of care employed.¹⁴¹

The bailor generally will not be in as good a position as the bailee to prove the circumstances of the destruction or damage of bailed goods.¹⁴² Therefore, once the bailor has made a *prima facie* case by showing delivery to the bailee and a failure of return or return of the bailed goods in a damaged condition, a presumption is created in favor of the bailor which shifts the burden of production regarding negligence to the bailee.¹⁴³ This presumption may be destroyed if the bailee can meet his burden of going forward, shifting the burden of production back to the bailor.¹⁴⁴ Thus, in most jurisdictions, the burden of persuasion remains with the bailor.¹⁴⁵ However, some courts have held that if the bailment arises out of an express or implied contract, the burden of persuasion shifts to the bailee upon the bailor's making of a *prima facie* case.¹⁴⁶ Further, some courts have held that whether the bailment exists in contract or not, certain types of bailees will always have the burden of persuasion shifted upon them.¹⁴⁷ Certain bailees, such as common carriers, are virtual insurers of bailed goods,¹⁴⁸ subject to certain exceptions.¹⁴⁹ A significant characteristic of the common carrier is that it holds itself out as offering carriage for hire to all those

138. *Id.* § 11.1 (citing JOSEPH F. STORY, *BAILMENTS* 27 (9th ed. 1878)).

139. *See id.* § 11.2 (citing *Kittay v. Cordasco*, 103 N.J.L. 156 (1926) (bailee diamond dealer placed three loose diamonds in his pocket while attending public auction)).

140. *Id.*

141. *Id.* § 11.7.

142. *Id.* § 11.8.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* Warehousemen have been included in this category. *See Rustad v. Great N. Ry. Co.*, 142 N.W. 727 (Minn. 1913).

148. BROWN, *supra* note 135, §§ 12.5-6.

149. *Id.* The exceptions are: "(1) the act of God . . . , [] (2) the act of the public enemy. . . . (3) the act of the state, (4) the act of the shipper, and (5) damages due to the inherent nature of the goods themselves." *Id.*

who wish to employ it.¹⁵⁰ Policy reasons for imposing virtual insurer status include the prevention of collusion among carriers, and the encouragement of a high standard of care,¹⁵¹ as well as the unequal footing of the carrier and the customer.¹⁵²

Bailments have traditionally been treated as arising out of contract.¹⁵³ In *Miller v. Allstate Insurance Co.*,¹⁵⁴ the alleged spoliator entered into what was essentially a bailment contract with the plaintiff. The insured brought a contract action for spoliation of evidence against a third party spoliator, her automobile insurer, alleging breach of promise to return a wrecked automobile which she intended to use as evidence against the manufacturer in a products liability action.¹⁵⁵ While Florida recognized the tort of negligent spoliation of evidence,¹⁵⁶ a contract action for spoliation of evidence was not precluded.¹⁵⁷ Although the extent of damages to plaintiff by the spoliation was uncertain, the rule of certainty did not bar recovery, since several modifying factors existed.¹⁵⁸ Further, in the interests of

150. *Id.* § 12.5.

151. *Id.* § 12.6.

152. *Liverpool & Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889). The case noted that "[t]he carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice." *Id.* at 441.

153. BROWN, *supra* note 135, § 10.1 (citing JOSEPH F. STORY, BAILMENTS 5 (9th ed. 1878), defining a bailment as "a delivery of a thing in trust for some special object or purpose, and upon a contract express or implied, to conform to the object or purpose of the trust").

154. 573 So. 2d 24 (Fla. Dist. Ct. App. 1990).

155. *Id.* at 25.

156. *Id.* at 27; see *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

157. *Miller*, 573 So. 2d at 27 (holding that, "[w]here the parties have a contract, and the same act or transaction constitutes both a breach of the agreement, express or implied, and a tort, the tort may be waived and the injured party may sue on the contract").

158. *Id.* at 28-29. The court observed that:

There are various modifications to the rule of certainty. They enable the courts, while holding up a high standard of certainty as an ideal, to avoid applications of the rule to a harsh result. Among them are: (a) If the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference. (b) Where the defendant's wrong has caused the difficulty of proof of damage, he cannot complain of the resulting uncertainty. (c) Mere difficulty in ascertaining the amount of damages is not fatal. (d) Mathematical precision in fixing the exact amount is not required. (e) If the best evidence of the damage of which the situation admits is furnished, this is sufficient. (f) The plaintiff may recover the value of his contract, and this may be measured by the value of the expected profits. (g) Profits may some-

judicial economy and to prevent piecemeal litigation, the court saw no need to await a final outcome in the underlying products liability case before bringing the spoliation action.¹⁵⁹ If the jury found that the plaintiff failed to prove the underlying products liability action, the same jury could then decide whether the failure to prevail was due to the insurer's spoliation in breach of contract.¹⁶⁰

There is a duty of reasonable care to preserve evidence of which the defendant's employee¹⁶¹ or agent¹⁶² has voluntarily taken custody,¹⁶³ has contracted to preserve¹⁶⁴, or has a statutory duty to preserve.¹⁶⁵ However, it is not always certain that breach of a bailment will permit the remedy of the spoliation inference. In *Jagmin v. Simonds Abrasive Co.*,¹⁶⁶ the plaintiff was injured when a grinding wheel with which he was working broke, causing facial injuries.¹⁶⁷ After a verdict was rendered for the plaintiff on his strict liability cause of action, he moved for additur.¹⁶⁸ The plaintiff contended that the broken wheel, which had been sent by his employer to the defendant manufacturer for inspection, had not been returned, but that a replacement had been sent, thus weakening his case and reducing the amount of the award.¹⁶⁹ The Supreme Court of Wisconsin held that the duty owed by the bailee to the bailor is only that of ordinary care; the possibility that the lost item would become evidence in a future suit did not create a higher standard of care

times be proved as evidence of the damages, when they would not be directly recoverable.

Id. at 28 n.4 (citing C. McCORMICK, DAMAGES § 31, at 101-02 (1935)).

159. *Id.* at 28 n.7.

160. *Id.* at 31 n.13.

161. *Pirocchi v. Liberty Mutual Ins. Co.*, 365 F. Supp. 277 (E.D. Pa. 1973) (defendant's employee, a claim adjuster, had voluntarily taken custody of evidence for the purpose of an accident investigation).

162. *Tomas v. Nationwide Mut. Ins. Co.*, 607 N.E.2d 944 (Ohio Ct. App. 1992) (plaintiff's insurer and insurer's agent were bailees of plaintiff's automobile which agent disassembled).

163. *Pirocchi*, 365 F. Supp. at 281.

164. *Miller*, 573 So. 2d at 27.

165. *Rodgers v. St. Mary's Hosp.*, 556 N.E.2d 913, 916 (Ill. App. Ct. 1990), *aff'd*, 597 N.E.2d 616 (Ill. 1992); *see infra* notes 381-97 and accompanying text.

166. 211 N.W.2d 810 (Wis. 1973).

167. *Id.* at 812.

168. *Id.*

169. *Id.* at 819.

on the part of the bailor.¹⁷⁰ The court affirmed the trial court's decision not to invoke the spoliation inference, holding that it was reserved for intentional acts, not mere negligence, even though the outcome to the injured party might be the same.¹⁷¹

III. Spoliation in the Medical Malpractice Arena

This section will review the applications of the spoliation inference, discovery sanctions, the tort of spoliation, obstruction of justice statutes, and record retention statutes in the medical malpractice context. It should be remembered that while a charge of spoliation is most frequently brought against a defendant in a medical malpractice action, the charge is occasionally raised against a plaintiff.¹⁷²

A. Spoliation Inference

Despite the seemingly straightforward elements that must be fulfilled in order to apply the spoliation inference,¹⁷³ courts have treated the spoliation inference in the medical malpractice context in variable fashions. Regarding the first element, destruction, one state court took what currently would be seen as a lenient view of alteration of medical records.¹⁷⁴ In *Furlong v. Stokes*,¹⁷⁵ an entry in a patient's chart that he had suffered a "burn area"¹⁷⁶ due to proximity of the leg to a hot lamp during a femoral saphenous bypass¹⁷⁷ was later overwritten with the words "ulcer of the left knee, medial aspect".¹⁷⁸ The court held, *inter alia*, that this alteration was not equivalent to destruction of the record or to an alteration or erasure of the record intended to obliterate completely the underlying writing.¹⁷⁹ It

170. *Id.* at 821.

171. *Id.*

172. See *infra* notes 296-99, 305-13 and accompanying text.

173. See *supra* note 52 and accompanying text.

174. *Furlong v. Stokes*, 427 S.W.2d 513 (Mo. 1968).

175. *Id.*

176. *Id.* at 519.

177. *Id.* at 515-16. A femoral saphenous bypass is a procedure in which a portion of a large leg vein, the saphenous vein, is grafted onto a large leg artery, the femoral artery, replacing the occluded portion. *STEDMAN'S MED. DICTIONARY* 123, 224, 1703 (25th ed. 1990).

178. *Furlong*, 427 S.W.2d at 519.

179. *Id.*

was not considered a spoliation, and an inference would not be permitted which would make plaintiff's prima facie case for negligence.¹⁸⁰

Regarding the second element, relevancy, destruction of evidence as a matter of routine procedure unrelated to litigation will not give rise to the spoliation inference.¹⁸¹ For example, routinely discarding admission slips and carbons after transcribing the information to the permanent record will not give rise to the spoliation inference.¹⁸² Nor will mere *de minimis* alteration of evidence that does not interfere with its evidentiary value to the proffering party give rise to the inference.¹⁸³ However, in *Bettis v. Marshall*,¹⁸⁴ a draft of the post-mortem report, more clearly stating the cause of death than did the final report, had not been produced in response to plaintiff's discovery request.¹⁸⁵ Further, defendants' counsel had written a letter to the physicians' malpractice insurance carrier, expressing the hope that the draft report would not make its way into plaintiff's hands, since it was felt to be damaging to defendants.¹⁸⁶ The trial court denied the motion *in limine* of two of the physicians to exclude the attorney's letter.¹⁸⁷ The Alabama Supreme Court denied defendants' request for mandamus to exclude the letter,¹⁸⁸ rejecting the dissent's position that the letter was non-discoverable attorney work product, and that the draft post-mortem report was not part of the records concerning the de-

180. *Id.*

181. See *supra* notes 58-60 and accompanying text.

182. *Baykian v. White*, No. 05-90-00929-CV, 1991 WL 141769 (Tex. Ct. App. July 29, 1991) (holding that where actual time of admission of maternity patient with prolapsed cord was in issue, routine destruction of admission slip, unrelated to the litigation, did not manifest the bad faith necessary to raise the spoliation inference).

183. *Martin v. Reed*, 409 S.E.2d 874 (Ga. Ct. App. 1991) (holding that hospital's placing of "mark" on X-ray did not constitute spoliation), *cert. denied*, 428 S.E.2d 91 (Ga. 1991).

184. 549 So. 2d 23 (Ala. 1989) (per curiam). The deceased had been admitted to the hospital with what later proved to be a hypersensitivity reaction to Dilantin, but was given a large intravenous dose of the same drug, which caused her rapid death. *Id.* at 24 (Maddox, J., concurring in part and dissenting in part). Dilantin is phenytoin, an anti-seizure medication. PHYSICIANS' DESK REFERENCE 1708-10 (26th ed. 1992).

185. *Bettis*, 549 So. 2d at 24.

186. *Id.* at 23 n.1, 24.

187. *Id.* at 24-25.

188. *Id.* at 23-25.

ceased's medical treatment, but simply a document concerning her autopsy.¹⁸⁹

The third element, intent, has been a particularly significant hurdle for the victim of spoliation to overcome. Since the spoliation inference permits, but does not require, a conclusion regarding the harm to the spoliator of the missing evidence, the jury's determination of the spoliator's intent may be critical.¹⁹⁰ *Sims v. Callahan*¹⁹¹ was an action for intentional fraudulent misrepresentation and malpractice for the allegedly unnecessary recommendation of cataract surgery.¹⁹² In *Sims*, the Alabama Supreme Court held that the trial court did not err in admitting a copy of plaintiff's medical record kept by defendant when the original was lost, but not through defendant's negligence.¹⁹³ No indication was given as to how the originals were lost.¹⁹⁴

Similarly, in *Walker v. United States*,¹⁹⁵ where the issue of causation was confounded by the fact that the fetal monitoring strips could not be located, presumably having been lost by the microfilming firm employed by the hospital,¹⁹⁶ the court noted that no adverse inference would arise from the absence of the

189. *Id.* at 26-27. The dissent, however, did not explain how the hope expressed in the letter of preventing discovery of the draft constituted a mental impression or legal theory constituting attorney work product, nor why this explicit statement of attempted concealment should not give rise to an inference of negligence. *Id.*

190. In *DiLeo v. Nugent*, 592 A.2d 1126 (Md. Ct. Spec. App. 1991), a patient who sued her psychiatrist for post-traumatic stress syndrome allegedly caused by his use of psychedelic drugs and sexual intercourse in his therapy destroyed an 800-page journal. *Id.* at 1129-30. On appeal, the defendant contended that the spoliation instruction against plaintiff was improper. *Id.* at 1131. The Maryland court held that the jury was properly instructed that while unexplained destruction of evidence could lead to the inference that the destroyed evidence was unfavorable to the spoliator's position, the jury could (but was not required to) accept the party's explanation for destruction of the evidence. *Id.* at 1132. See *Miller v. Montgomery County*, 494 A.2d 761 (Md. Ct. Spec. App.), *cert. denied*, 498 A.2d 1185 (Md. 1985).

191. 112 So. 2d 776 (Ala. 1959).

192. *Id.* at 778.

193. *Id.* at 789.

194. *Id.* The cursory treatment given the issue may have been due in part to the novel fact situation, as well as to the fact that plaintiff had not objected at trial that such copy was not the "best evidence." *Id.*

195. 600 F. Supp. 195 (D.D.C. 1985).

196. *Id.* at 198 n.6.

strips.¹⁹⁷ There was no evidence that the hospital had deliberately destroyed them, or had exercised less than due diligence in attempting to recover them.¹⁹⁸ The court never reached the question of whether any consequences would accrue to the hospital for non-negligent loss of evidence, or whether the micro-filming company could be impleaded by the hospital as its bailee for damages awarded to plaintiff as a result of the lost strips.¹⁹⁹

The District of Columbia Court of Appeals, while not precluding the inference for non-intentional destruction of records, left the decision to the trial court's discretion. In *Battocchi v. Washington Hospital Center*,²⁰⁰ in which the plaintiff alleged that her infant son's skull fractures, intracranial bleeding, and subsequent neurologic damage were caused by defendant's negligent performance of a forceps delivery,²⁰¹ the original record containing a nurse's progress note describing the delivery was lost and the copies produced did not contain the nurse's notes.²⁰² A hospital representative explained that the chart, last checked out to the head of risk management, had possibly been lost in the physical move of the risk management department to another building.²⁰³ Judgment was entered for the hospital at the trial court level.²⁰⁴ Plaintiff's appeal contended that the trial court had erred in not submitting the issue of the missing evidence to the jury and in not giving a "missing evidence instruction."²⁰⁵

197. *Id.*

198. *Id.*

199. Compare *Tomas v. Nationwide Mut. Ins. Co.*, 607 N.E.2d 944 (Ohio Ct. App. 1992). The court held that a bailment existed when plaintiff's insurer delivered her motor vehicle to a salvage yard as its agent. *Id.* at 946. When the vehicle was redelivered with parts missing, plaintiff sought as consequential damages the injury to her products liability cause of action which alteration of the vehicle had caused. *Id.* The court declined to recognize the tort of spoliation, stating that no evidence existed that plaintiff had as yet unsuccessfully pursued a products liability claim, or that destroyed evidence would have allowed her to successfully pursue it. *Id.* at 948.

200. 581 A.2d 759 (D.C. 1990).

201. *Id.* at 761.

202. *Id.* at 762.

203. *Id.* at 762-63.

204. *Id.* at 761.

205. *Id.* at 764.

The court of appeals attempted to distinguish "true spoliation" (destruction of evidence in bad faith or with reckless disregard for the relevance of the evidence) from mere failure to preserve evidence (loss of evidence through negligence or accident).²⁰⁶ The court implied that if the loss of evidence were intentional or reckless, the spoliation inference was mandatory,²⁰⁷ but if spoliation were merely negligent, the choice whether or not to raise the inference lay within the trial court's discretion.²⁰⁸

The court noted that if spoliation did not rise to the level of recklessness, the inference of consciousness of a weak case is not supported.²⁰⁹ However, even for negligent non-production, the inference could be drawn that if the evidence were favorable to the non-producing party, it would have taken greater pains to preserve it.²¹⁰ Since it was not stated whether the trial court found the spoliation to be intentional or reckless as opposed to negligent, the record was remanded for a specific finding.²¹¹

Although *Battocchi* appeared to be hostile to the spoliation inference, the same court relied on *Battocchi* a year later in *Williams v. Washington Hospital Center*,²¹² holding that the trial court had abused its discretion in not raising the inference.²¹³ Plaintiff's expert was to examine an ocular foreign body at trial.²¹⁴ Only on the last day of trial, when plaintiff's expert was

206. *Id.* at 765-66.

207. *Id.* at 766-67.

208. *Id.* at 767.

209. *Id.* at 766 (citing CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 273, at 809 (3d. ed. 1984)).

210. *Id.* at 766.

211. *Id.* at 768.

212. 601 A.2d 28 (D.C. 1991). Plaintiff was struck in the eye while chipping cement, and experienced ocular pain and visual disturbance. *Id.* at 30. Although initial evaluation revealed no foreign body, five months later, the plaintiff suffered sudden loss of vision. *Id.* Reevaluation revealed a foreign body in the affected eye. *Id.* A small, sharp, metallic foreign body was removed. *Id.* Permanent visual impairment ensued. *Id.* The plaintiff alleged that the physician was negligent in failing to detect and remove the foreign body at the initial examination. *Id.* Defendant contended that the foreign body was not present at the time of initial examination, for if it had been, it would have left a visible track or "footprint" as it penetrated into the eye, and no track was seen. *Id.*

213. *Id.* at 34-35.

214. *Id.* at 33. Based upon the description of the object, he was prepared to testify that because the foreign body was sharp and narrow, it would not have left a track as the defendant had contended it would. *Id.*

due to testify, was it revealed that the foreign body had been lost.²¹⁵ Plaintiff moved for default judgment, which was denied.²¹⁶ Plaintiff then moved for an adverse inference.²¹⁷ The trial court held that the defendant had not demonstrated bad faith or gross negligence, nor had the loss of evidence prejudiced plaintiff, and denied the request for the inference.²¹⁸

On appeal, the D.C. Court of Appeals held that factors to be considered in exercising the court's discretion were the degree of fault, the importance of the evidence, and the availability of other evidence enabling the deprived party to make the same point.²¹⁹ Here, the court found that the trial court had abused its discretion in denying the inference.²²⁰ The trial court's findings regarding the lack of importance of the evidence and lack of prejudice to plaintiff were held to be clearly erroneous.²²¹

The fourth element needed to raise the spoliation inference is that litigation must be pending or at least foreseeable at the time of destruction. The court in *May v. Moore*²²² held that evidence of destruction of documents may be admitted even though the litigation was not pending at the time of destruction.²²³ The original hospital chart had been "lost," but a hospital administrator had made a copy before the original was lost.²²⁴ At deposition, Dr. May produced two copies of the chart, but the

215. *Id.* at 30. The foreign body had already been used in discovery, and counsel had agreed that it should be maintained in the plaintiff's medical record, in defendant's custody. *Id.* at 31. Apparently, the chairman of the ophthalmology department wished to remove the object in order to determine its radiopacity by subjecting it to X-ray examination. *Id.* at 32. Counsel for defendant indicated that this could be destructive testing, and instructed the chairman not to remove it. *Id.* Nevertheless, the chairman removed the object from the chart, whereupon it was lost. *Id.* Although defense counsel was aware that the object was lost at the outset of the trial, he did not inform plaintiff until the last day of trial. *Id.* at 31.

216. *Id.* at 31.

217. *Id.*

218. *Id.*

219. *Id.* at 32.

220. *Id.* at 35.

221. *Id.* at 34. Note that the metallic object had been entrusted to the hospital for safekeeping. *Id.* at 31. Although not specifically discussed in the opinion, *Williams* represents another case in which the court could have, but did not, treat spoliation of evidence in a manner analogous to a lost bailment. See *supra* notes 195-99 and accompanying text.

222. 424 So. 2d 596 (Ala. 1982).

223. *Id.* at 603.

224. *Id.*

administrator noted discrepancies between her copy and the copies produced by Dr. May.²²⁵ The trial court found that this circumstantial evidence of alteration and attempted destruction of the record was sufficient to raise the inference of negligence.²²⁶ Denial of the doctor's motion *in limine* to suppress this evidence was upheld on appeal.²²⁷

The fifth element requires that the destruction be carried out by a party or his agent. In *McHugh v. Audet*²²⁸ an officer of the local medical society, of which both plaintiff's and defendant's expert witnesses were members, had unsuccessfully attempted to persuade plaintiff's witness not to testify.²²⁹ The court held that since defendants had no knowledge of the officer's actions, the mere fact that defendant's witnesses were members of the same medical society did not make the officer an agent of defendant.²³⁰ Thus, the trial court had not abused its discretion in refusing to permit introduction of evidence regarding the tampering.²³¹

Whether the spoliation inference implies merely that the destroyed evidence would have been unfavorable to the spoliator, or creates an implication of weakness of his case as a whole, also varies. In *Carr v. St. Paul Fire & Marine Insurance Co.*²³² the court held that the jury had been properly instructed to consider evidence that part of decedent's medical record had been destroyed.²³³ Though it was never stated whether this destruction was intentional, negligent, or innocent, the court held that since plaintiff was hampered in proving what the examination had disclosed, it was appropriate to raise an inference that the record would have shown that decedent's vital signs were abnormal.²³⁴

225. *Id.*

226. *Id.* Testimony was also admitted that medical records of other patients of Dr. May were missing. *Id.*

227. *Id.*

228. 72 F. Supp. 394 (M.D. Pa. 1947).

229. *Id.* at 404.

230. *Id.*

231. *Id.* at 404-05. Moreover, since the attempt was unsuccessful, plaintiff's cause of action did not appear to have been prejudiced. *Id.* at 404.

232. 384 F. Supp. 821 (W.D. Ark. 1974).

233. *Id.* at 831.

234. *Id.* One court has extended the spoliation inference to encompass evidence of the standard of care. In *Libbee v. Permanente Clinic*, 518 P.2d 636, *reh'g*

Some courts have extended the spoliation inference to the weakness of the spoliator's case as a whole. In *Thor v. Boska*²³⁵ original clinical records could not be produced,²³⁶ but defendant claimed to have recopied them verbatim in a more legible form at the time that plaintiff informed him she was seeking the care of another physician.²³⁷ However, defendant's account of when treatment began conflicted with plaintiff's testimony.²³⁸ Because the defendant partially admitted negligence, the trial court ruled that admission of testimony regarding the non-availability of the original record would be unduly prejudicial.²³⁹ On appeal, it was noted that defendant had only admitted breach of duty but denied proximate cause and damages,²⁴⁰ and the trial court was held to have abused its discretion by suppressing evidence of defendant's loss of the original records.²⁴¹ Since defendant's admission of negligence was ephemeral, his inability to produce the original records created a strong inference of consciousness of guilt,²⁴² and affected the spoliating party's case as a whole; admission of a single issue did not neutralize the overall effect of the spoliation.²⁴³

An attempt to intimidate the opposing party's witnesses can give rise to a spoliation inference applied to the spoliator's case as a whole.²⁴⁴ In *Meyer v. McDonnell*²⁴⁵ the defendant threatened to have the testimony of plaintiff's standard of care witness transcribed and disseminated to the witness's local

denied, 520 P.2d 361 (Or. 1974), an action for the wrongful death of a stillborn child, a false entry was made that the fetal heartbeat had been monitored every half-hour, even though there was testimony that at one point monitoring had not occurred for an hour. *Id.* at 641. The court held that the jury could have reasonably inferred that the false entry was made out of realization that monitoring every half-hour was the customary practice, or because the physician had ordered her to do so. *Id.* Because of this inference, the standard of care by which the negligence of the nurse was to be measured was not a matter requiring expert testimony. *Id.* at 640-41.

235. 113 Cal. Rptr. 296 (Ct. App. 1974) (claiming negligent failure to diagnose and negligent treatment of plaintiff's breast cancer).

236. *Id.* at 298.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 299-300.

241. *Id.* at 301.

242. *Id.*

243. *Id.* at 302-03.

244. *Meyer v. McDonnell*, 392 A.2d 1129 (Md. Ct. Spec. App. 1978).

medical society, causing the witness to refuse to testify.²⁴⁶ The court of appeals found the judge's instruction that attempted intimidation of a witness would give rise to an inference that the testimony would be unfavorable, but should not be considered as substantive proof of negligence, too narrow.²⁴⁷ The court noted "the distinction between a mere failure to produce specific evidence and fraudulent conduct aimed at suppressing or spoliating evidence."²⁴⁸

Some courts have applied what has been termed the spoliation inference as a presumption. In *Welsh v. United States*²⁴⁹ the Sixth Circuit held that negligent destruction of evidence gave rise to a rebuttable presumption on the issues of negligence and proximate cause.²⁵⁰ A flap of skull bone, needed by the plaintiff's expert to demonstrate the time of onset of fatal *E. coli*²⁵¹ chronic osteomyelitis²⁵² and thus critical to the plaintiff's carrying her burden as to proximate cause, had been discarded.²⁵³ The specimen should have been sent for a pathology evaluation, as is the usual custom and as is generally required

245. *Id.* The plaintiff alleged that Dr. McDonnell had negligently performed surgery on his back, resulting in loss of bowel and bladder control and impotence. *Id.* at 1130.

246. *Id.*

247. *Id.* at 1134.

248. *Id.* at 1132. The court noted that:

It has always been understood that the inference, indeed, is one of the simplest in human experience that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.

Id. (citing JOHN WIGMORE, 2 WIGMORE ON EVIDENCE, § 278 at 120 (3d ed. 1940)); see also *May v. Moore*, 424 So. 2d 596 (Ala. 1982).

249. 844 F.2d 1239 (6th Cir. 1988).

250. *Id.* at 1245.

251. *E. (Escherichia) coli* is a gram negative bacterium normally present in the large intestine, but which is pathogenic when present in other parts of the body. STEDMAN'S MEDICAL DICTIONARY 536 (25th ed. 1990).

252. Chronic osteomyelitis is a chronic "inflammation of the bone marrow and adjacent bone." STEDMAN'S MEDICAL DICTIONARY 1109 (25th ed. 1990).

253. *Welsh*, 844 F.2d at 1239.

for specimens removed at surgery.²⁵⁴ The district court held that the defendant's agents negligently failed to diagnose and treat the decedent's infection.²⁵⁵ Defendant appealed the district court's judgment for plaintiff, arguing that the verdict was based on insufficient evidence of negligence and proximate cause, and on impermissible inferences by the district court.²⁵⁶

The court of appeals held that, while not negligence per se, this violation of a procedural requirement was determined to be grossly negligent, if not intentional.²⁵⁷ Because the plaintiff was unable to carry her burden of proof regarding proximate cause due to the loss of the bone flap, the Sixth Circuit held that the district court properly applied Kentucky law in creating a rebuttable presumption of liability on the part of defendant.²⁵⁸ This presumption did not merely shift the burden of production, but shifted the burden of persuasion as well.²⁵⁹ The court noted that two state appellate courts²⁶⁰ and a federal district court²⁶¹ had endorsed the idea of shifting the burden of persuasion by creation of a rebuttable presumption against a health care provider who negligently destroyed or lost records of medical care.²⁶²

254. *Id.* at 1243.

255. *Id.* at 1242.

256. *Id.* at 1239.

257. *Id.* at 1244. The court noted that the Veterans Administration Hospital was governed by the provisions of the Joint Commission on Accreditation of Hospitals (JCAH) (now Joint Commission on Accreditation of Health Organizations - JCAHO) regarding handling of surgical specimens. *Id.* at 1243-44. The JCAH 1980 Manual provided: "Specimens removed during a surgical procedure *shall ordinarily be sent to the pathologist for evaluation . . .* Every gross specimen sent to the laboratory shall be evaluated by a pathologist . . ." *Id.* (citing JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS, 130-31 (1980)). The bone flap did not come within any of the exemptions from sending a surgical specimen for pathology examination provided in the manual. *Welsh*, 844 F.2d at 1244.

258. *Id.* at 1245.

259. *Id.* at 1246-47.

260. *Id.* (citing *Public Health Trust v. Valcin*, 507 So. 2d 596, 599-601 (Fla. 1987)); *Thor v. Boska*, 113 Cal. Rptr. 296, 303 n. 8 (Ct. App. 1974) (*dicta*).

261. *Id.* at 1247 (citing *Barker v. Bledsoe*, 85 F.R.D. 545 (W.D. Okla. 1979) (negligent destruction of autopsy material warranting more than a rebuttable presumption)).

262. *Id.*

One of the most severe decisions concerning loss of medical records is *Valcin v. Public Health Trust*.²⁶³ Plaintiff's expert could not reach a definite conclusion regarding negligence since no operative report was found in the hospital record.²⁶⁴ The trial court entered summary judgment for the defendant.²⁶⁵ The district court of appeal held that the hospital had both a moral and a statutory duty to ensure that an operative report was made and to maintain medical records, in part to promote the public health.²⁶⁶ The court held that since plaintiff was prejudiced in her attempt to meet her burden of production and persuasion in demonstrating defendant's negligence, a presumption against defendant should be created.²⁶⁷ Defendant would have the burden of persuasion by a preponderance of evidence to show that the loss of records was not deliberate.²⁶⁸ If defendant met this burden, then a rebuttable presumption of negligence would arise.²⁶⁹ If, however, defendant failed to meet this burden, then an irrebuttable presumption would arise, and a judgment against defendant would be entered.²⁷⁰

This decision was partially modified on appeal to the Florida Supreme Court.²⁷¹ The court found that an irrebuttable presumption of negligence, establishing the liability of the party responsible for the loss of evidence, violated due process since it deprived the spoliator of the opportunity to rebut the presumption of negligence.²⁷² However, the court agreed that a rebuttable presumption against the spoliator which shifted the burden

263. 473 So. 2d 1297 (Fla. Dist. Ct. App. 1984), *modified*, 507 So. 2d 596 (Fla. 1987) (malpractice action alleging negligent performance of a bilateral tubal ligation resulting in a ruptured ectopic pregnancy).

264. *Id.* at 1304.

265. *Id.* at 1300.

266. *Id.* at 1305 n.7, 1306.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* The court declined to decide whether burden shifting would occur if the records were lost due to an act of God. *Id.* at 1306 n.9. In this case, a private right of action based upon a statute was not involved; instead, a statute was invoked to establish the duty upon which a spoliation presumption could be based. *Id.* at 1305-06. *Cf.* *Rodgers v. St. Mary's Hosp.*, 597 N.E.2d 616 (Ill. 1992) (holding that the Illinois X-Ray Retention Act provided the victim of spoliation with a private cause of action).

271. *Public Health Trust v. Valcin*, 507 So. 2d 596 (Fla. 1987).

272. *Id.* at 597.

of persuasion, not merely the burden of production, was appropriate.²⁷³

Another jurisdiction has not allowed a statutory duty to preserve records to create a true presumption of negligence in the underlying malpractice action, rebuttable or otherwise.²⁷⁴ In *DeLaughter* the plaintiff claimed error for, *inter alia*, the failure of the trial court to give any of plaintiff's three proposed jury instructions regarding the hospital's failure to maintain medical records²⁷⁵ as required by statute.²⁷⁶ The Mississippi Supreme Court rejected each of plaintiff's three proposed instructions.²⁷⁷ The first was rejected because it would have raised an irrebuttable presumption of negligence on the wrongful death cause of action against the defendant if the destruction of records was found to be intentional,²⁷⁸ which the court held to be impermissible.²⁷⁹ The second proposed instruction was rejected because it created an improper inference of negligent treatment from the failure to maintain records.²⁸⁰ The third proposed instruction was rejected because it shifted the burden on the negligence issue to the defendant.²⁸¹ The court held that a proper instruction would create a rebuttable presumption that the missing information was unfavorable to the spoliator, and would also shift the burden to the spoliator to show that it had not destroyed or misplaced the records.²⁸²

273. *Id.* at 599-601. The court did not address what distinction, if any, was to be made between merely negligent spoliation and intentional spoliation.

274. *DeLaughter v. Lawrence County Hosp.*, 601 So. 2d 818 (Miss. 1992).

275. *Id.* at 821. The hospital's director of nursing instructed the medical records custodian to lock up the records so that the family could not obtain them, but the custodian found that the records were already missing. *Id.* The hospital attempted to reconstruct the records from photocopies, but the reconstructed records lacked the admission history and physical, and nurse's notes for a critical period of the hospitalization. *Id.* Some of the nurse's missing notes were found in the possession of the hospital's attorney who had not produced them during discovery. *Id.*

276. *Id.* (citing MISS. CODE ANN. § 41-9-63 (1972) and MISS. CODE ANN. § 41-9-69 (Supp. 1990)).

277. *Id.* at 822-23.

278. *Id.* at 822.

279. *Id.*

280. *Id.* at 822-23.

281. *Id.* at 823.

282. *Id.* The court wished to limit the spoliation "inference" (here, a rebuttable presumption) to the unfavorable nature of the missing evidence, but did not wish to raise an inference regarding the weakness of the spoliator's case as a

B. *Discovery Sanctions*

Monetary sanctions may be imposed for failure to comply with a court order to produce evidence when it causes the plaintiff to incur additional expense.²⁸³ Under Federal Rule of Civil Procedure 37(b)(2), monetary sanctions are appropriate even when one acting as a party's agent is directly responsible for nondisclosure.²⁸⁴

Failure to disclose one's expert witnesses in a timely manner is a form of spoliation which has led to the preclusion sanction.²⁸⁵ In *Bradley*, a medical malpractice action under the Federal Tort Claims Act, the government answered plaintiffs' interrogatories which requested the identities of its expert witnesses by stating it had not yet identified such witnesses. The government failed to supplement this response until a few days before trial,²⁸⁶ citing budgetary constraints and bureaucratic policy reasons.²⁸⁷ The plaintiffs were able to depose the experts before trial, and the district court granted the government's motion to allow its experts to testify.²⁸⁸ Judgment was entered for the government.²⁸⁹

The court of appeals held that the trial court had abused its discretion in allowing the experts to testify,²⁹⁰ noting that such action violated its own pretrial order to timely identify experts,²⁹¹ disadvantaged the plaintiffs since the experts' testi-

whole. *Id.* Similarly, the court wished to limit burden shifting to the issue of whether the spoliator destroyed or misplaced the records, but not the burden regarding the underlying cause of action. *Id.*

283. *May v. Moore*, 424 So. 2d 596, 604-05 (Ala. 1982) (also raising the spoliation inference against defendant's case as a whole); see *supra* notes 222-27 and accompanying text.

284. *Id.* at 604-05 (applying Alabama's equivalent of Fed. R. Civ. P. 37(b)(2)).

285. *Bradley v. United States*, 866 F.2d 120 (5th Cir. 1989).

286. *Id.* at 123.

287. *Id.* at 126.

288. *Id.* at 123.

289. *Id.*

290. *Id.* at 127. The trial court's discretion was to be guided by : "(1) the importance of the witness's testimony; (2) the prejudice to the opposing party of allowing the witness to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to identify the witness." *Id.* at 125 (citing *Murphy v. Magnolia Elec. Power Ass'n*, 639 F.2d 232, 235 (5th Cir. Mar. 1981)).

291. *Id.* at 124.

mony went to the central issue of the case,²⁹² and that the plaintiffs were able to depose the experts only a few days before trial.²⁹³ The case was remanded for a new trial with leave for the government to present its experts, but the district court was instructed to impose appropriate sanctions²⁹⁴ to fulfill the court's truth-seeking and punitive functions.²⁹⁵

Destructive examination of evidence has also led to the preclusion sanction. In *Barker v. Bledsoe*²⁹⁶ the district court rejected the notion that a mere rebuttable presumption against the spoliator would suffice.²⁹⁷ The court implied that before a party embarks upon a destructive examination of evidence, there is a duty to provide notice to the other party so that it may have an opportunity to examine the evidence before destruction.²⁹⁸ The plaintiff was barred from introducing any evidence from the examination, including the testimony of plaintiff's expert.²⁹⁹

If an expert witness for only one party has had the opportunity to inspect physical evidence before its destruction, a hardship will accrue to the opposing party.³⁰⁰ Such a situation has been held to warrant disclosure by the expert of the facts surrounding the inspection, but not the expert's opinions.³⁰¹ Also, when the altered or destroyed article can be replaced, the spoliator may be permitted to recreate the article as an alternative to preclusion.³⁰² However, if there is insufficient evidence of

292. *Id.* at 125.

293. *Id.*

294. *Id.* at 127-28.

295. *Id.* at 128. Granting a continuance would have cured all prejudice against plaintiff, but would not have punished the government or deterred future failures to comply with discovery. *Id.* at 125-26.

296. 85 F.R.D. 545 (W.D. Okla. 1979) (where plaintiff's expert performed an autopsy upon plaintiff's deceased wife that was so destructive that defendant could not perform his own examination).

297. *Id.* at 547.

298. *Id.*

299. *Id.* at 549.

300. *Rosario v. General Motors Corp.*, 148 A.D.2d 108, 111, 543 N.Y.S.2d 974, 975 (1st Dep't 1989) (automobile examined by plaintiff's expert destroyed before defendant's expert could inspect it).

301. *Calo v. Ahearn*, 135 A.D.2d 457, 522 N.Y.S.2d 149 (1st Dep't 1987).

302. *Goens v. Vogelstein*, 146 A.D.2d 606, 536 N.Y.S.2d 525 (2d Dep't 1989) (holding that testimony of plaintiff's expert concerning X-rays he had reviewed, but which were lost before defendant's expert could examine them, was not pre-

willful spoliation, the court may refuse to issue discovery sanctions, even if meaningful reconstruction is not possible.³⁰³ This approach is at odds with the tendency to issue discovery sanctions for even negligent spoliation if it causes severe prejudice to the victim.³⁰⁴

Dismissal of a cause of action with prejudice, though an extreme measure, was utilized in *Pavlinko v. Yale*.³⁰⁵ Plaintiff had removed from the hospital the original medical records of his deceased wife the day after her death and retained them for over two years.³⁰⁶ At deposition, plaintiff repeatedly invoked the privilege against self-incrimination when questioned concerning the reliability and integrity of the record.³⁰⁷ On defendant's motion, the trial court dismissed the complaint.³⁰⁸ On appeal, the Connecticut Supreme Court held that dismissal was the appropriate sanction.³⁰⁹ Nonsuiting the plaintiff would merely allow him to bring the same action within a year³¹⁰ and awarding costs would not likely produce the desired information.³¹¹ An order establishing facts or precluding evidence was held to be inapplicable.³¹² An order to comply was held to be

cluded, on the condition that plaintiff undergo new X-rays and disclose the reports concerning the missing X-rays).

303. *Id.* While the initial X-rays were obtained in 1984, replacement X-rays were ordered in 1989. *Id.* at 606, 536 N.Y.S.2d at 526-27. Arguably, the replacement X-rays did not recreate the plaintiff's clinical condition at the time the original X-rays were obtained. See also *Parascandola v. Kaplan*, 108 A.D.2d 738 (2d Dep't 1985) (mem.) (discovery sanctions not imposed when defendant hospital did not deliberately destroy evidence but was misled by misinformation from one of its own nurses).

304. See *DePuy, Inc. v. Eckes*, 427 So. 2d 306 (Fla. Dist. Ct. App. 1983) (holding that discovery sanctions are appropriate regardless of the degree of culpability).

305. 470 A.2d 246 (Conn. 1984).

306. *Id.* at 248.

307. *Id.* at 248-50.

308. *Id.* at 250.

309. *Id.* The court listed factors to be considered in determining the appropriateness of a sanction, including: (1) whether deponent's failure to respond was due to inability or bad faith; (2) the degree of harm caused to the opposing party; and (3) the appropriateness of the sanction given the circumstances. *Id.*

310. *Id.* at 250-51.

311. *Id.* at 251.

312. *Id.* The court did not explain why raising an inference that plaintiff had altered the record was inapplicable. *Id.*

ineffective, since plaintiff did not indicate at hearing that he would comply if so ordered.³¹³

Although not guilty of destroying evidence directly or through an agent, lack of diligence can lead to discovery sanctions against a dilatory plaintiff. In *Carroll v. Kimmel*,³¹⁴ while plaintiff delayed fifty-eight months between filing a notice of complaint and the complaint itself,³¹⁵ the non-party hospital had appropriately disposed of X-rays as a matter of routine record destruction.³¹⁶ The court granted a judgment of *non prosecutur* for defendant, since plaintiff's lack of diligence in prosecuting its cause of action resulted in prejudice against defendant by virtue of the appropriate destruction of X-rays.³¹⁷ The plaintiff's lack of diligence was found to fulfill the destruction element for imposition of discovery sanctions because her inaction made the evidence unavailable.³¹⁸

Discovery sanctions against one party may act to preclude the spoliation inference against the other. In *Kilker v. Mulry*³¹⁹ plaintiff alleged that the hospital, a party-defendant, had altered records to omit references to prior vaginal bleeding so as to avoid liability for failure to earlier diagnose placenta previa.³²⁰ Judgment was returned for defendant.³²¹ On appeal, the Iowa Court of Appeals held, *inter alia*, that the trial court had not abused its discretion in barring testimony of plaintiff's document expert.³²² Although plaintiff had been in possession of the expert's report for seven months, he failed to disclose the identity of this witness at least thirty days before trial.³²³ Even

313. *Id.* The court noted that the privilege against self-incrimination is a shield against self-conviction in a criminal matter, not a sword to deny the opposing party discoverable information in a civil case. *Id.*

314. 524 A.2d 954 (Pa. Super. Ct. 1987).

315. *Id.* at 955-56.

316. *Id.* at 957.

317. *Id.* at 956.

318. *Id.* at 956-57. See *supra* note 79 and accompanying text.

319. 437 N.W.2d 1 (Iowa Ct. App. 1988).

320. *Id.* at 3. Placenta praevia is a condition in which the placenta is abnormally positioned so as to block the unborn child's path of exit through the birth canal. STEDMAN'S MED. DICTIONARY 1206 (25th ed. 1990).

321. *Id.* at 2.

322. *Id.* at 3-4.

323. *Id.* at 4 (citing IOWA R. CIV. P. § 125(c), which provides the court the discretion to exclude or limit the expert's testimony if the expert's identity is not disclosed in compliance with the rule).

though failure to disclose was not willful, the trial court barred the expert's testimony.³²⁴ Without the expert's testimony, plaintiff was unable to produce other evidence that would permit an instruction to the jury that the burden had shifted to the defendant to show that it had not altered the records.³²⁵ In effect, plaintiff's non-willful spoliation by failure to comply with discovery procedure precluded the possibility of raising the spoliation inference for defendant's alleged willful alteration of records.³²⁶

An order to produce, and discovery sanctions for failure to comply, will not issue if the desired information is protected by the physician-patient privilege.³²⁷ In *Dierickx*, defendant's motion to compel physical examination of plaintiff's two sisters and production of their records to show that her disorder was genetic, rather than due to birth injury, was denied.³²⁸ On appeal, the court upheld the denials, holding that the sisters' records were protected by the statutory physician-patient privilege³²⁹ which had not been waived by her sisters or by plaintiff on their behalf, and that the sisters' physical conditions had not been placed in issue.³³⁰ The strength of the privilege outweighed the defendant's assertion that plaintiff invoked the privilege solely to conceal evidence.³³¹

A party's innocent failure to disclose evidence which is not prejudicial to the opponent may not give rise to sanctions or other corrective action.³³² In *Bohus*, the plaintiff's failure to disclose a post-treatment consultation allowed her to toll the statute of limitations on a podiatric malpractice action.³³³ The

324. *Id.* at 6.

325. *Id.*

326. *Id.* at 6-7.

327. *Dierickx v. Cottage Hosp. Corp.*, 393 N.W.2d 564 (Mich. Ct. App. 1986).

328. *Id.* at 565.

329. *Id.* at 566 (citing MICH. COMP. LAWS § 600.2157 which provides that plaintiff may waive the privilege on her own behalf in a personal injury or malpractice action by calling a physician to testify).

330. *Id.*

331. *Id.* at 567 (noting that the position expressed in *State ex rel Lester E. Cox Medical Ctr. v. Keet*, 678 S.W.2d 813 (Mo. 1984) that the search for truth may require the disclosure of redacted medical records of non-party patients is a minority view).

332. *Bohus v. Beloff*, 950 F.2d 919 (3d Cir. 1991).

333. *Id.* at 923.

Third Circuit Court of Appeals held that granting a new trial for defendant was inappropriate, since the nondisclosure was apparently innocent, and since the nondisclosure not only was not prejudicial to defendant, but the undisclosed information actually would have made plaintiff's position regarding tolling the statute of limitations stronger.³³⁴ For a new trial to be granted under Federal Rule of Civil Procedure 60(b), the newly discovered evidence must be such that it would probably have changed the outcome of the trial.³³⁵

C. *Spoilation Tort*

The independent tort of intentional spoliation of evidence in a medical malpractice case may have been recognized in North Carolina under a different name in *Henry v. Deen*.³³⁶ Although never explicitly mentioning the tort of spoliation of evidence, the court recognized a claim for civil conspiracy to alter medical records which impeded the investigation of plaintiff's malpractice claim.³³⁷ The North Carolina Supreme Court held that a cause of action for civil conspiracy to alter medical records was not equivalent to an impermissible civil remedy for perjury.³³⁸ The court apparently found the critical aspect of the cause of action to be the injury resulting from the conspiracy, not the conspiracy itself.³³⁹ Although intentional spoliation as an independent tort was not mentioned by name, the civil conspiracy cause of action for deliberately destroying records fulfills the elements of the tort of intentional spoliation.³⁴⁰

334. *Id.* at 930-31.

335. *Id.* at 931 (citing *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983)).

336. 310 S.E.2d 326 (N.C. 1984).

337. *Id.* at 336. Plaintiff alleged that defendants conspired to and did create false and misleading entries in decedent's medical record, obliterated another entry on the chart, destroyed or concealed the actual medical record of the decedent, and held out the fraudulent record as the actual record. *Id.* at 331, 334.

338. *Id.* at 335 (citing *Gillikin v. Springle*, 118 S.E.2d 611 (N.C. 1961); *Gillikin v. Bell*, 118 S.E.2d 608 (N.C. 1961); *Brewer v. Carolina Coach*, 116 S.E.2d 725 (N.C. 1960)). In fact, plaintiff's complaint, which included the conspiracy allegation, "was apparently filed before any discovery in which sworn statements were made" and therefore, before defendants could be subject to criminal sanctions for perjury. *Id.*

339. *Id.*

340. See *supra* note 107 and accompanying text. The holding would not violate the policy favoring finality of judgments, since the case at bar had not yet been adjudicated upon the merits, and the liberal joinder of plaintiff's malpractice and

*Bondu v. Gurvich*³⁴¹ "adopted a new cause of action for negligent spoliation of hospital records."³⁴² Plaintiff alleged that the hospital was negligent per se in failing to provide certain medical records, and in the alternative had deliberately lost or destroyed certain records, frustrating her ability to pursue proof necessary to establish her case.³⁴³ After failing to carry her burden regarding negligence, plaintiff moved for leave to amend her complaint to add a count charging defendant with negligent loss of records and filed a separate cause of action charging the same negligent loss of records.³⁴⁴ The lower court held that dismissal with prejudice of the loss of record counts barred the new action by res judicata.³⁴⁵

While the court of appeals held it appropriate to deny leave to amend the complaint since the proposed amendment stated a new cause of action not pleaded in or accrued at the time of the original complaint,³⁴⁶ it ruled that the spoliation claim was a new cause of action and was not barred by res judicata.³⁴⁷ A cause of action for damage to plaintiff's suit was not ripe until she had lost her original suit, and therefore, that issue could not have been previously adjudicated.³⁴⁸ The court found a statutory basis for the hospital's duty to maintain records,³⁴⁹ and recognized the tort of spoliation.³⁵⁰

civil conspiracy causes of action would permit adjudication at the same trial, barring subsequent collateral attack. *Henry*, 310 S.E. 2d at 336. Ripeness was also not an issue, since the plaintiffs' complaint on the civil conspiracy issue alleged an injury independent from the loss of the underlying cause of action. *Id.*

341. 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984) (plaintiff's decedent husband's death allegedly caused during negligent induction of anesthesia).

342. David R. Goodnight & Douglas R. Davis, *Spoliation of Evidence: The Unnecessary Tort*, 25 J. HEALTH & HOSP. LAW 232, 232 (1992).

343. *Bondu*, 473 So. 2d at 1309-10.

344. *Id.* at 1310.

345. *Id.*

346. *Id.* at 1310-11 & n.2.

347. *Id.* at 1311.

348. *Id.* at 1311. Other jurisdictions have also held that a cause of action for spoliation of evidence is not ripe until the underlying cause of action has been lost. *E.g.*, *Fox v. Cohen*, 406 N.E.2d 178 (Ill. App. Ct. 1980) (holding that alleged breach of statutory duty to maintain medical records had caused no injury and therefore the cause of action was not ripe).

349. *Id.* at 1313 (citing FLA. STAT. § 395.202 (1979), repealed and replaced by FLA. STAT. ANN. § 395.3025 (West 1993)).

350. *Id.*

Similarly, after an unsuccessful state action for medical malpractice, the plaintiff in *Langager v. Lake Havasu Community Hospital*³⁵¹ brought an action in federal district court alleging medical malpractice based on gross negligence in the maintenance of her medical records.³⁵² Plaintiff's second count alleged spoliation of evidence, resulting in the loss of the state action.³⁵³ Summary judgment was granted for the defendant on both counts.³⁵⁴ On appeal, it was affirmed that the malpractice count was time barred.³⁵⁵ The court recognized that the alleged spoliation damages arose from actions independent of the underlying medical treatment, and that this cause of action was governed by the two-year limitation period for injuries to the person of another, rather than the three-year period for medical malpractice.³⁵⁶

Absent a duty to preserve evidence, the spoliation tort will fail. In an unusual turnabout in *Walsh v. Caidin*,³⁵⁷ defendants in a wrongful death action cross-complained against plaintiff and her attorney for, *inter alia*, spoliation of evidence.³⁵⁸ When it became apparent that decedent was terminally ill, and knowing that a suit was contemplated in which the nature of the fatal illness would be contested, defense counsel secured the assent of plaintiff's counsel to the performance of an autopsy in the event of death before the trial.³⁵⁹ However, decedent's spouse had sole authority over the disposition of her husband's remains and instead had the body cremated.³⁶⁰ The trial court sustained plaintiff's demurrer to the cross-complaint.³⁶¹ In affirming, the court of appeal found no need to extend its analysis beyond the lack of duty on the part of decedent's spouse to pre-

351. 799 F.2d 1354 (9th Cir. 1986).

352. *Id.* at 1355.

353. *Id.* at 1355-56.

354. *Id.* at 1355.

355. *Id.* at 1356.

356. *Id.* at 1356-57.

357. 283 Cal. Rptr. 326 (Ct. App. 1991).

358. *Id.* at 327.

359. *Id.* at 327 & n.1.

360. *Id.* at 327.

361. *Id.*

serve the body as "evidence" for defendant.³⁶² The court distinguished *Walsh* from the leading California case regarding the independent tort of spoliation of evidence, *Smith v. Superior Court*.³⁶³ However, if the defendant could prove that the plaintiff had been motivated by consciousness of weakness of her case, the defendant could request that an adverse inference be drawn from the act of cremation.³⁶⁴

The novelty of the independent tort of spoliation can act as a disadvantage. In *Threlkeld v. Haskins Law Firm*³⁶⁵ the United States District Court for the Eastern District of Louisiana found no authority under Louisiana law to support a claim for the independent tort of spoliation of evidence.³⁶⁶ Since plaintiff did not allege that the fetal monitor strips at issue were destroyed through bad faith of the hospital the court would not support even an adverse inference, citing the requirement of bad faith for this inference, rather than just mere negligence.³⁶⁷

A perceived lack of injury can also be fatal to the spoliation tort. New York has declined to recognize the independent tort of intentional spoliation of evidence, at least under the circumstances of *Pharr v. Cortese*.³⁶⁸ The court held that plaintiff had not suffered actual damages, since the alleged spoliation had not made prosecution of her case more expensive or difficult,³⁶⁹ and that the spoliation inference, criminal and disciplinary sanctions were available.³⁷⁰

362. *Id.* at 327-28 (noting that under CAL. HEALTH AND SAFETY CODE § 7100 (West 1970 & Supp. 1994), the surviving spouse had primary authority and right to control decedent's remains).

363. *Id.* at 328 (citing *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Ct. App. 1984)); see *supra* notes 89-99 and accompanying text.

364. *Id.* at 329. Compare with *Barker v. Bledsoe*, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979) (once autopsy was undertaken by plaintiff's expert, a duty existed to perform it in as non-destructive a manner as possible); see *supra* note 296 and accompanying text.

365. Civ. A. No. 88-2392, 1991 WL 211520 (E.D. La. Sept. 27, 1991).

366. *Id.* at *1.

367. *Id.* (citing *Vick v. Texas Employment Comm'n*, 514 F.2d 734 (5th Cir. 1975)).

368. 147 Misc. 2d 1078, 559 N.Y.S.2d 780 (Sup. Ct. N.Y. County 1990); see *supra* note 101 and accompanying text.

369. *Id.* at 781-82.

370. *Id.* at 782.

D. *Obstruction of Justice and Other Criminal Statutes;
Professional Sanctions*

While no cases were found applying obstruction of justice or other criminal statutes for spoliation of evidence in the medical malpractice context, severe professional sanctions may accrue for inappropriate alteration of medical records.³⁷¹ In *Jimenez* the court upheld the sanctions of a monetary fine, suspension of license, and probation,³⁷² in part because of the criminal nature of alteration of medical records.³⁷³ In *Commission on Medical Discipline v. McDonnell*,³⁷⁴ a physician attempted to intimidate two of plaintiff's expert witnesses at his malpractice trial.³⁷⁵ The Maryland Court of Special Appeals held him to be guilty of "immoral conduct of a physician in his practice as a physician."³⁷⁶ Such conduct was found to be "clearly morally wrong. It amounts to an endeavor to obstruct justice That is a crime involving moral turpitude,"³⁷⁷ and was considered to have been committed as part of the physician's practice of medicine.³⁷⁸

E. *Record Retention Statutes*

Many states have statutes which specifically delineate a duty to preserve medical records for a specified period of time, whether litigation is pending or not.³⁷⁹ These statutes ensure the availability of records to other health care providers and facilities, and ensure quality and continuity of care.³⁸⁰ In *Rodgers*

371. *Jimenez v. Department of Professional Regulation, Bd. of Medicine*, 556 So. 2d 1219 (Fla. Dist. Ct. App. 1990) (physician altered record after patient's death).

372. *Id.* at 1220-21.

373. *Id.* at 1220 (citing FLA. STAT. ANN. § 395.0165 (West 1985), renumbered as § 395.302 and amended in 1992).

374. 467 A.2d 1072 (Md. Ct. Spec. App. 1983), *rev'd*, 483 A.2d 76 (Md. 1984).

375. *Id.* at 1075-77.

376. *Id.* at 1077 (citing MD. ANN. CODE art. 43 § 130(h)(8) (1980), recodified as MD. CODE ANN., HEALTH OCC., § 14-504(3) (1981), renumbered as § 14-404(a)(3) (1991)).

377. *Id.* at 1078.

378. *Id.* at 1079.

379. *See supra* note 126.

380. *See Fox v. Cohen*, 406 N.E.2d 178, 182 (Ill. App. Ct. 1980) (citing the American Hospital Association's Committee on Medical Records and the American Medical Record Association's Planning and Bylaws Committee (Statement on Preservation of Medical Records in Health Institutions, 1975)).

v. St. Mary's Hospital,³⁸¹ spoliation of evidence by one defendant in the original malpractice claim, the hospital, gave rise to a separate cause of action against the hospital when the spoliation resulted in an unfavorable verdict against another defendant, the radiologists.³⁸² Without appealing the verdict against him in favor of the radiologists, plaintiff filed suit in Illinois District Court against the hospital, based upon the breach of the hospital's statutory duty to retain X-rays or diagnostic quality miniaturized versions for five years.³⁸³ Plaintiff claimed that the X-rays were critical evidence in the malpractice suit against a group of radiologists,³⁸⁴ the absence of which caused the loss of his case against the radiologists.³⁸⁵

The circuit court acknowledged the existence of the tort of spoliation of evidence.³⁸⁶ It also conceded that *res judicata* resulting from the summary judgment in favor of the hospital in the malpractice action did not bar the spoliation action, and held that the spoliation action is not controlled by the statute of limitations governing medical malpractice.³⁸⁷ Nonetheless, the court held that Rodgers's failure to appeal the judgment in favor of the radiologists barred his action for spoliation against the hospital.³⁸⁸ The Illinois Court of Appeals held that it need not decide whether Illinois recognized an independent tort for spoliation of evidence, since Rodgers had stated a statutory cause of action pursuant to the "X-Ray Retention Act".³⁸⁹ The court held that since the statute protects the property rights of those involved in litigation, violation of the statute constitutes *prima facie* evidence of negligence.³⁹⁰ The court found that Rodgers was an individual within the scope of protection of the statute, and thus that he had stated a proper cause of action.³⁹¹

Rodgers's failure to appeal the judgment in favor of the radiologists did not bar his spoliation claim, since the lost X-

381. 556 N.E.2d 913 (Ill. App. Ct. 1990), *aff'd*, 597 N.E.2d 616 (Ill. 1992).

382. *Id.*

383. *Id.* at 915 (citing ILL. REV. STAT. ch. 111 1/2, para. 157-11 (1987)).

384. *Id.* at 914-15.

385. *Id.* at 915.

386. *Id.*

387. *Id.* at 914-15.

388. *Id.*

389. *Id.* at 916 (citing ILL. REV. STAT. ch. 111 1/2, para. 157-11 (1987)).

390. *Id.*

391. *Id.*

rays could not be recreated, and thus there was little chance of success on appeal.³⁹² The court also held that the spoliation claim was not barred by *res judicata* because of the summary judgment in favor of the hospital in the original malpractice claim, since the evidence needed to show the hospital's violation of the X-Ray Retention Act differed from the evidence needed to show the hospital's negligence in the treatment of his wife.³⁹³

On further appeal,³⁹⁴ the Illinois Supreme Court held that Rodgers had a private cause of action under the X-Ray Retention Act.³⁹⁵ The court found that the X-Ray Retention Act is not merely an administrative regulation to be enforced exclusively by the Public Health Department; in fact, the Act provides no administrative remedies which would compensate those injured by violation of the Act.³⁹⁶ Also, the Illinois Supreme Court upheld the appellate court's ruling that summary judgment in favor of the hospital in the original malpractice action did not act as a *res judicata* bar to the spoliation action, whether a "same evidence" test or a transactional approach was used.³⁹⁷

One New York court, in *Pharr v. Cortese*,³⁹⁸ declined to recognize a private cause of action under a medical record retention statute.³⁹⁹ The court reasoned that the purpose of the statute prohibiting alteration of medical records related solely to the state's supervisory and disciplinary roles regarding the practice of medicine, and did not create a private cause of ac-

392. *Id.* at 918-19.

393. *Id.* at 919.

394. *Rodgers v. St. Mary's Hosp.*, 597 N.E.2d 616 (Ill. 1992).

395. *Id.* at 619. A private right of action exists under a statute when:

(1) plaintiff is a member of the class for whose benefit the Act was enacted; (2) it is consistent with the underlying purpose of the Act; (3) plaintiff's injury is one the Act was designed to prevent; and (4) it is necessary to provide an adequate remedy for violations of the Act.

Id. (citing *Corgan v. Muehling*, 574 N.E.2d 602 (Ill. 1991)).

396. *Id.* at 619-20. *Cf. Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984) (statutory duty to preserve records formed the basis of duty for independent tort of spoliation).

397. *Rodgers*, 597 N.E.2d at 621.

398. 147 Misc. 2d 1078, 559 N.Y.S.2d 780 (Sup. Ct. N.Y. County 1990).

399. *Id.* at 1081, 559 N.Y.S.2d at 782 (citing N.Y. EDUC. LAW §§ 6506, 6509 (McKinney 1985 & Supp. 1994)).

tion.⁴⁰⁰ The court found that other remedies, including criminal sanctions, were available under New York law.⁴⁰¹

Related to the statutes which require retention of medical records are those which require disclosure of medical records.⁴⁰² In *Davis v. Johns Hopkins Hospital*⁴⁰³ the plaintiff brought a malpractice action claiming that the defendant hospital had failed to conform to the statutory requirement to disclose medical records.⁴⁰⁴ The trial court granted judgment to defendant on this count.⁴⁰⁵ On appeal, the court interpreted "refuse" to mean "intentional, as opposed to negligent or contractual conduct,"⁴⁰⁶ but noted that "no more than a mere refusal to disclose within a reasonable time, upon proper request, whether done maliciously or not, results in liability for punitive damages in addition to actual damages."⁴⁰⁷ The court found that whether failure to disclose was intentional was a question for the jury.⁴⁰⁸

A physician-patient relationship must exist before refusal to supply records would be actionable under a record disclosure statute.⁴⁰⁹ In *Saari*, the defendant physician performed a physical examination of plaintiff on behalf of plaintiff's insurer.⁴¹⁰ Based upon the examination, the insurer informed plaintiff that it was discontinuing plaintiff's coverage.⁴¹¹ The plaintiff then sued for, *inter alia*, malpractice⁴¹² and "breach of doctor-patient relationship" for the physician's refusal to release medical records.⁴¹³ The court held that no physician-patient relation-

400. *Id.*

401. *Id.* (citing N.Y. PENAL LAW § 215.40 (McKinney 1988)).

402. *E.g.*, CAL. CIV. CODE § 56.10 (West 1992); FLA. STAT. ANN. § 455.241 (West Supp. 1994); MD. CODE ANN., HEALTH-GEN. §§ 4-307 to 309 (1994); MINN. STAT. ANN. § 144.335 (West 1989 & Supp. 1994).

403. 585 A.2d 841 (Md. Ct. Spec. App. 1991).

404. *Id.* at 842 (citing MD. CODE ANN., HEALTH-GEN. § 4-302(d)(2) (1990) (repealed and replaced by § 4-309 (1991))).

405. *Id.* at 843.

406. *Id.* at 850 (citing *Laubach v. Franklin Square Hosp.*, 556 A.2d 682, 690 (Md. Ct. Spec. App. 1989), *aff'd*, 569 A.2d 693 (Md. 1990)).

407. *Id.* at 851 (citing *Laubach v. Franklin Square Hosp.*, 569 A.2d 693, 697 (Md. 1990)).

408. *Id.* at 851.

409. *Saari v. Litman*, 486 N.W.2d 813 (Minn. Ct. App. 1992).

410. *Id.* at 814.

411. *Id.*

412. *Id.*

413. *Id.*; see MINN. STAT. ANN. § 144.335 (West 1989 & Supp. 1994).

ship existed, and therefore no malpractice action could lie, nor did a duty exist to furnish records.⁴¹⁴

A less promising judicial response to failure to supply medical records was found in *Roberts v. Golden*.⁴¹⁵ The court held that summary judgment for defendant was properly granted on plaintiff's complaint that defendant had withheld medical records since plaintiff had not requested the records until the underlying malpractice action was time barred.⁴¹⁶ More significantly, even if the alleged concealment had taken place while the malpractice action was timely, the complaint still would have been dismissed since it alleged only refusal to supply records to be used in evaluating a tort claim of which plaintiff was already aware,⁴¹⁷ not concealment of a cause of action.⁴¹⁸

E. Bailments

Only one case was found in which bailment was specifically mentioned in the context of spoliation of evidence and medical malpractice.⁴¹⁹ In *Wolf* plaintiff became aware of a metallic fragment lodged in his knee upon which arthroscopy had been performed at Lakewood Hospital twenty-seven months earlier.⁴²⁰ Plaintiff had the metal fragment removed at Metropolitan General Hospital.⁴²¹ Plaintiff's counsel attempted to retrieve the metal fragment from Metropolitan, but was informed that the pathology department had probably discarded the specimen.⁴²² Plaintiff sued Lakewood and her physician for negligence, and Metropolitan for "prima facie tort."⁴²³ Metro-

414. *Saari*, 486 N.W.2d at 815.

415. 345 N.W.2d 924 (Mich. Ct. App. 1984).

416. *Id.* at 926-27.

417. *Id.* at 927 & n.2 (citing *Tonegatto v. Budak*, 316 N.W.2d 262 (Mich. 1982)).

418. *Id.* at 926-27. *Cf.* *Kelleher v. Mills*, 245 N.W.2d 749 (Mich. Ct. App. 1976); *Cates v. Bald Estate*, 221 N.W.2d 474 (Mich. Ct. App. 1974).

419. *Wolf v. Lakewood Hosp.*, 598 N.E.2d 160 (Ohio Ct. App. 1991).

420. *Id.* at 161.

421. *Id.*

422. *Id.*

423. *Id.* "Prima facie tort" was defined as, "the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful." *Id.* at 163 (citing *Costell v. Toledo Hosp.*, 527 N.E.2d 858, 859 (Ohio 1988) (emphasis omitted)).

politan's motion for judgment on the pleadings was successful.⁴²⁴

On appeal, the Ohio Court of Appeals rejected the bailment theory, since Metropolitan had received no compensation for retaining the metal fragment, received no benefit as bailee, and was, at most, a gratuitous bailee.⁴²⁵ The court held that although the metal fragment was surgically removed at and retained by Metropolitan, this was not the equivalent of the delivery required for a bailment to exist.⁴²⁶

IV. Analysis

A. *The Availability and Effectiveness of the Various Spoliation Remedies*

All of the remedies discussed possess advantages and drawbacks in terms of fulfilling the rationales of the spoliation remedies: restoration of accuracy, compensation of the victim of spoliation, and punishment of the spoliator.⁴²⁷

1. *Spoliation Inference*

Although the spoliation inference is a time-honored remedy available in some form in all jurisdictions, it has several weaknesses as a remedy against acts of spoliation. One weakness is the uncertainty of its application.⁴²⁸ It may exist as a literal inference (the trier of fact may, but is not required to, draw the inference)⁴²⁹ or as a rebuttable presumption (the trier of fact must accept the presumption, subject to rebuttal by the party opposing the presumption).⁴³⁰ In either case, the inference may be narrow, meaning that the missing evidence would have been unfavorable to the spoliator,⁴³¹ or broad, where the act of spolia-

424. *Id.* at 161-62.

425. *Id.* at 164.

426. *Id.* The court stated that the plaintiff alleging breach of a bailment contract must establish "(1) the [existence of the] contract of bailment, (2) delivery of the bailed property to the bailee, and (3) failure of the bailee to redeliver the property at the termination of the bailment." *Id.* (citing *David v. Lose*, 218 N.E.2d 442, 444 (Ohio 1966)).

427. See *supra* notes 39-42 and accompanying text.

428. See *supra* note 44 and accompanying text.

429. See *supra* notes 212-21 and accompanying text.

430. See *supra* notes 249-62 and accompanying text.

431. See *supra* notes 232-34 and accompanying text.

tion is probative of the weakness of the spoliator's case as a whole.⁴³² The nature of the inference or presumption that the spoliator must rebut may vary widely. The inference or presumption may simply be that the missing evidence would have been unfavorable to the spoliator.⁴³³ It may also be the degree of fault with which the spoliation was committed,⁴³⁴ the appropriate standard of care,⁴³⁵ or the weakness of the case as a whole.⁴³⁶ When a presumption is raised, only the burden of production may be shifted, or the burden of persuasion may be shifted as well.⁴³⁷

The degree of fault needed to raise the inference or presumption is also highly variable. While traditionally the spoliation inference could be raised only for intentional behavior,⁴³⁸ various jurisdictions have both granted and denied inferences and presumptions of various degrees for intentional,⁴³⁹ reckless,⁴⁴⁰ and negligent spoliation,⁴⁴¹ as well as for loss of records in violation of a statutory duty to preserve medical records.⁴⁴² Further, the logical basis of the spoliation inference would seem not to support the inference for merely negligent conduct, since negligent conduct should not presuppose a guilty mind or knowledge of the weakness of one's case.⁴⁴³ However, if the inference is held inapplicable for negligent conduct, neither the purpose of restoring accuracy nor compensating the victim of

432. *Thor v. Boska*, 113 Cal. Rptr. 296 (Ct. App. 1974); *Meyer v. McDonnell*, 392 A.2d 1129 (Md. Ct. Spec. App. 1978); see *supra* notes 235-48 and accompanying text.

433. See *supra* notes 232-34 and accompanying text.

434. See *supra* notes 263-73 and accompanying text.

435. *Libbee v. Permanente Clinic*, 518 P.2d 636, *reh'g denied*, 520 P.2d 361 (Or. 1974); see *supra* note 234.

436. See *supra* notes 235-48 and accompanying text.

437. See *supra* notes 271-82 and accompanying text.

438. See *supra* notes 54-57 and accompanying text.

439. See *supra* notes 200-08 and accompanying text.

440. See *supra* notes 200-08 and accompanying text.

441. See *supra* notes 200-08 and accompanying text.

442. *E.g.*, *DeLaughter v. Lawrence County Hosp.*, 601 So. 2d 818 (Miss. 1992). The concurrence's view of the scope of the spoliation inference gives a more accurate view of the duty imposed upon a hospital to maintain medical records. While not imposing strict liability, the statutes do not require intentional conduct for a violation to be found. MISS. CODE ANN. § 41-9-63 (1972) and § 41-9-69 (Supp. 1990). See *supra* notes 274-82 and accompanying text.

443. See *supra* notes 209-210 and accompanying text.

spoliation will be fulfilled.⁴⁴⁴ Facts can be just as irretrievable, and the harm to the victim just as great, if records or other evidence are negligently rather than intentionally made unavailable.⁴⁴⁵ The negligent absence of records can be just as great an impediment to securing expert testimony as would be intentional destruction.⁴⁴⁶ Without expert testimony, few malpractice claims will survive.⁴⁴⁷ Further, instances of self-serving alterations of medical records may be found insufficient to raise the inference at all.⁴⁴⁸

The requirement that litigation be pending or foreseeable to give rise to the spoliation inference also poses difficulties.⁴⁴⁹ While it would be impractical, if not impossible, to retain the records of all patients, or every non-permanent record of any given patient, routine record destruction programs have the potential to foster inappropriate destruction of records. While most record retention statutes require records to be preserved for a period greatly in excess of the statute of limitations for a medical malpractice action,⁴⁵⁰ the adoption of the discovery rule by many states could potentially leave a malpractice action viable after the statutorily required record retention period has ended.⁴⁵¹ This is of special concern with regard to medications which do not manifest a deleterious effect for many years.⁴⁵² The destruction of pertinent records itself may make it impossible to demonstrate that litigation should have been foresee-

444. See *supra* notes 195-98 and accompanying text.

445. *E.g.*, *Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759 (D.C. 1990). While arguably merely negligent loss of records does not fully support the logic of the spoliation inference, an exercise of the court's discretion to refuse to instruct the jury regarding the missing evidence leaves the party unjustly deprived of evidence uncompensated. Also, the decision fails to take into account the duty of a hospital to preserve medical records. See *supra* notes 200-10 and accompanying text.

446. See *supra* notes 249-58 and accompanying text.

447. See *supra* notes 219-21 and accompanying text.

448. See *Furlong v. Stokes*, 427 S.W.2d 513 (Mo. 1968); see *supra* notes 175-80 and accompanying text.

449. See *supra* notes 61-63, 182 and accompanying text.

450. See *supra* note 61 and accompanying text.

451. See *supra* note 62 and accompanying text.

452. For example, adverse effects of diethylstilbestrol (DES), an agent used to prevent miscarriage, may not manifest themselves until the offspring of a woman exposed during pregnancy reaches adulthood herself. See Barbara Pober, *Fetal Diethylstilbestrol (DES) Effects*, in *BIRTH DEFECTS ENCYCLOPEDIA* 694-95 (Mary Louise Buyse ed., 1990).

able.⁴⁵³ This would hinder the ability to even demonstrate that failure to suspend a routine record destruction program was unreasonable.⁴⁵⁴

The spoliation inference cannot be raised against a non-party who is not an agent of a party.⁴⁵⁵ This would leave the victim of spoliation by a non-party hospital or staff member who can not be shown to be an agent of the party without a remedy. This requirement does not serve to restore accuracy.⁴⁵⁶ The deterrence purpose is also poorly served, since this requirement permits the possibility of undetected conspiracies to destroy harmful records.⁴⁵⁷

Finally, if only an inference is raised, the jury is free to reject it.⁴⁵⁸ The effect of the inference will likely be overshadowed if plaintiff has been unable to secure adequate expert testimony due to the absence of critical evidence.⁴⁵⁹

2. *Discovery Sanctions*

Discovery sanctions are universally available and can provide a great deal of flexibility in fashioning remedies for spoliation of evidence, both in terms of the variety of sanctions that may be applied and the variety of bases of authority for imposing such sanctions.⁴⁶⁰ For example, even when an order compelling discovery has not been issued, and even when a party has not refused to participate in discovery to an extent prohibited in Federal Rule of Civil Procedure 37(d),⁴⁶¹ incomplete disclosure may result in broad sanctions being applied when the rules regarding signing of discovery requests, responses, and objections are violated.⁴⁶² Courts have imposed discovery sanctions when

453. *See supra* notes 58-63 and accompanying text.

454. *See supra* notes 58-63 and accompanying text.

455. *See supra* note 64 and accompanying text.

456. *See supra* notes 39-42 and accompanying text.

457. *See supra* notes 39-42 and accompanying text.

458. *See supra* notes 45-47 and accompanying text.

459. *See supra* notes 219-21 and accompanying text.

460. *See supra* notes 66-78 and accompanying text.

461. FED. R. CIV. P. 37(d) provides for sanctions: "If a party . . . fails (1) to appear before the officer who is to take the deposition . . . or (2) to serve answers or objections to interrogatories . . . or (3) to serve a written response to a request for inspection" *Id.*

462. FED. R. CIV. P. 26(g)(2) provides:

the spoliation inference would have been clearly inadequate.⁴⁶³ Discovery sanctions give greater recognition to acts of spoliation as evils in themselves that should be remedied. Damages due to spoliation of evidence are caused not only by loss of the underlying cause of action, but also by increased expense incurred during discovery.⁴⁶⁴

Negligent acts of spoliation are more amenable to remediation by discovery sanctions than by the spoliation inference.⁴⁶⁵ Severe sanctions may be imposed for conduct highly prejudicial to the victim of spoliation even if the degree of fault is low.⁴⁶⁶ Occasionally, however, courts have failed to impose sanctions if the degree of fault is low, even if significant prejudice occurred, thus weakening the compensatory effect of sanctions.⁴⁶⁷ Conversely, when mild or no sanctions may accrue if little or no prejudice occurs, the deterrent effect is weakened.⁴⁶⁸

A weakness of the use of discovery sanctions as a remedy for spoliation of evidence is that the trial court has a vast degree of discretion in resolving matters concerning pretrial discov-

The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response or objection is: (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction

Id.; *Jerome v. Pardis*, 783 P.2d 919 (Mont. 1989) (holding that although plaintiff's incomplete disclosure of medical records after defendant's discovery request did not violate a court order and did not constitute a complete failure to cooperate, the court upheld the imposition of the sanction of dismissal with prejudice based upon violation of the certification requirements of Mont. R. Civ. P. 26(g)).

463. *Barker v. Bledsoe*, 85 F.R.D. 545 (W.D. Okla. 1979); see *supra* notes 296-99 and accompanying text.

464. See *supra* notes 73, 283 and accompanying text.

465. The spoliation inference addresses only willful acts of spoliation. See *supra* notes 54-57 and accompanying text.

466. See *supra* note 83 and accompanying text.

467. See *supra* note 303 and accompanying text.

468. See *supra* notes 332-34 and accompanying text.

ery.⁴⁶⁹ Even when a party's explanation for the unavailability of evidence appears barely credible, courts may be hesitant to disturb a trial court's findings regarding a pretrial discovery motion unless the findings are against the substantial weight of the evidence.⁴⁷⁰

The problem of foreseeability of litigation, as discussed in relation to the spoliation inference, also exists with discovery sanctions, again because the very destruction of evidence makes foreseeability of litigation problematic.⁴⁷¹ Discovery sanctions will not solve the problem of the unavailability of expert witnesses without crucial records.⁴⁷² Default judgments could provide a remedy, but these have rarely been employed for spoliation in the medical malpractice context.⁴⁷³ Further, discovery sanctions cannot be applied against non-agent third party spoliators.⁴⁷⁴

3. *Independent Tort of Spoliation*

The independent tort of spoliation of evidence clearly recognizes the independent harm caused by the destruction of evi-

469. *E.g.*, *Bradley v. United States*, 866 F.2d 120 (5th Cir. 1989). A more favorable outcome would have accrued to plaintiff had the court of appeals simply excluded the testimony of the experts. However, this was not believed to be possible, since the findings of fact of the district court not only referred to the experts' testimony, but also interpreted other testimony in light of it. The court of appeals could have instructed the district court to exclude the testimony of the government's experts at the new trial. While no reason is given explicitly for not taking this course, this decision may have been based on the absence of any real "destruction" of evidence which could not be recreated, and the reasoning that sanctions were punishment enough without depriving the Government of its only testimony which could effectively dispute plaintiff's evidence regarding proximate cause. *Id.* at 127. *See supra* notes 285-95 and accompanying text.

470. *E.g.*, *Brown v. Hamid*, No. WD 44461, 1992 WL 42300 (Mo. Ct. App. Mar. 10, 1992). The appellate court refused to upset trial court's refusal to grant plaintiff's motion for a default judgment based upon defendant physician's failure to supply medical records. *Id.* at *3. Defendant claimed to have sent records, without keeping a copy, to plaintiff's attorney, who claimed not to have received them. *Id.* at *2. Defendant testified at deposition that he never personally handled such requests, delegating this duty to his office staff. *Id.* Plaintiff proffered evidence that members of defendant's staff would testify that defendant always insisted on handling such matters personally. *Id.*

471. *See supra* note 79 and accompanying text.

472. *See supra* note 446 and accompanying text.

473. *See supra* notes 283-335 and accompanying text.

474. *See supra* note 81 and accompanying text.

dence.⁴⁷⁵ The tort may apply to both negligent and intentional conduct, although only the latter may solve the problem of providing a remedy against the third party spoliator.⁴⁷⁶

Some commentators have argued that independent torts for spoliation of evidence are unnecessary and undesirable.⁴⁷⁷ Several objections have been raised. One is that a spoliation claim can never be a truly independent one since it depends upon the underlying cause of action for its very existence.⁴⁷⁸ The specter is raised that claims for spoliation of evidence may themselves give rise to claims for spoliation of evidence (although admittedly, this has not yet been known to occur).⁴⁷⁹ This argument is unpersuasive. To hold that one cause of action should never give rise to another would be to abnegate the existence of a charge of perjury or obstruction of justice arising from an underlying criminal prosecution, or the existence of a cause of action for malicious prosecution or abuse of process.⁴⁸⁰ Further, the spoliation tort need not always be pursued as separate litigation, but may be pursued in the same litigation by amending the complaint.⁴⁸¹

Acts of spoliation of evidence arise out of different conduct than that giving rise to the underlying act of malpractice.⁴⁸² The malpractice cause of action arises from acts failing to meet the standard of care with regard to diagnosis or treatment which proximately cause injury to the patient's health, bodily or mental functioning, longevity, or capacity to earn.⁴⁸³ On the other hand, the spoliation cause of action arises from independent acts, directly or indirectly related to foreseeable or pending litigation for medical malpractice, intentionally or negligently, resulting in loss, destruction, alteration, or unavailability of evidence, in violation of the duty to preserve such evidence, which proximately cause injury to the plaintiff's cause of action.⁴⁸⁴

475. See *supra* notes 92, 339 and accompanying text.

476. See *supra* notes 107-14 and accompanying text.

477. Goodnight & Davis, *supra* note 342, at 232.

478. *Id.* at 235.

479. *Id.*

480. See *supra* notes 102-03 and accompanying text.

481. Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Smith v. Superior Court, 198 Cal. Rptr. 829 (Ct. App. 1984).

482. See *supra* notes 351-56 and accompanying text.

483. See *supra* notes 356, 393 and accompanying text.

484. See *supra* notes 107-14 and accompanying text.

The duties, standards of care, acts, and interests that are injured in the malpractice action and the spoliation action differ. Ironically, it was because acts of malpractice and spoliation arose out of different conduct that a plaintiff's attempt to amend her original complaint to allege failure to maintain medical records was denied.⁴⁸⁵

It is also argued that deciding whether and how the destroyed evidence would have contributed to the victim's case is speculative.⁴⁸⁶ However, this speculativeness also plagues the spoliation inference and discovery sanctions as well, where it is necessary to show that the destroyed evidence was relevant.⁴⁸⁷ In each instance, a determination of the damage to the underlying cause of action or relevance becomes problematic because the contents of the evidence remain unknown due to the very destruction of the evidence itself.⁴⁸⁸ Decrying the speculativeness of the tort accrues to the benefit of the allegedly guilty spoliator and to the detriment of the innocent victim.

Another concern raised is that of ripeness.⁴⁸⁹ Some courts that have recognized the independent tort have held that the underlying cause of action first must be lost before the tort of spoliation may lie,⁴⁹⁰ while others have not.⁴⁹¹ It has been ar-

485. *Brown v. Hamid*, No. WD 44461, 1992 WL 42300 (Mo. Ct. App. Mar. 10, 1992) (remanded on other grounds). The alleged mishandling of records was held not to relate back to the original date of filing since it did not involve medical treatment, and was thus barred by the statute of limitations. *Id.* at *3. Interestingly, the statute of limitations applied was that relating to health care. *Id.* Section 516.105 of Missouri's Annotated Statutes provides: "[a]ll actions against physicians . . . for damages for malpractice, negligence, error or mistake related to health care shall be brought within two years from the date of occurrence of the act complained of." MO. ANN STAT. § 516.105 (Vernon Supp. 1993). Since the court held that the mishandling of medical records did not involve medical treatment, arguably it also did not involve health care. *Brown*, 1992 WL 42300 at *3. In that case, a cause of action for spoliation, had it been recognized as an independent tort, could have been held to have accrued at the time injury occurred to the plaintiff's malpractice cause of action. *See also* *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984); *see supra* notes 341-50 and accompanying text.

486. *Goodnight & Davis*, *supra* note 342, at 235-36.

487. *See supra* notes 58-63, 79 and accompanying text.

488. *See County of Solano v. Delancy*, 264 Cal. Rptr. 721 (Ct. App. 1989) stating that "[T]here will be doubt about what the evidence would have shown." *Id.* at 730.

489. *Goodnight & Davis*, *supra* note 342, at 236.

490. *Bondu v. Gurvich*, 473 So. 2d 1307, 1311 (Fla. Dist. Ct. App. 1984); *Petric v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1321 (Ill. App. Ct. 1986); *Fox v.*

gued that the reasoning of those courts which require loss of the underlying cause of action as actual demonstrated harm is analogous to the case and controversy (ripeness) requirement of Article III of the federal constitution.⁴⁹² However, some courts have correctly noted that the increased inconvenience and expense of proving the underlying cause of action are compensable harms even without demonstrating loss of the underlying claim.⁴⁹³ Also, damage to the underlying suit by spoliation parallels the loss of the benefit of the bargain in the contract context, and loss of a chance of recovery in the medical malpractice context.

Uncertainty of damages is also stated as an objection to the spoliation tort.⁴⁹⁴ However, uncertainty of damages does not generally act as a bar to awarding damages, nor should it act as a bar to recognition of a tort.⁴⁹⁵ A degree of uncertainty exists in the award of damages for pain and suffering, future medical expenses, and lost future earnings in tort, and lost expectancy in contract. It is the spoliator who occasions the uncertainty; therefore, it would be unjust for the victim to suffer.

The traditional remedies of the spoliation inference and discovery sanctions may not always adequately compensate the victim or punish the spoliator. Since the spoliation inference merely permits, but does not require, the trier of fact to find that the destroyed evidence would be unfavorable to the spoliator,⁴⁹⁶ its remedial effect is uncertain, especially when the trier of fact is a jury. The weight afforded to the spoliation inference, even if accepted by the jury, is also unclear. Further, since the content of the evidence must remain unknown due to the very act of spoliation, whether the lost evidence would have allowed

Cohen, 406 N.E.2d 178 (Ill. App. Ct. 1980); *Federated Mut. Ins. v. Litchfield Precision Components*, 456 N.W.2d 434, 439 (Minn. 1990).

491. *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 459 (Alaska 1986); *Smith v. Superior Court*, 198 Cal. Rptr. 829, 835 (Ct. App. 1984).

492. *Goodnight & Davis*, *supra* note 342, at 236.

493. *See supra* notes 92-100 and accompanying text.

494. *E.g.*, *Pharr v. Cortese*, 147 Misc. 2d 1078, 559 N.Y.S.2d 780 (Sup. Ct. N.Y. County 1990). Had the court recognized that harm to plaintiff's malpractice cause of action represented an independent cause of action, it might have held that the question of damages represented a matter of fact to be decided by the jury. *See Goodnight and Davis*, *supra* note 342, at 236-37.

495. *See Solano*, 264 Cal. Rptr. at 730-31.

496. *See supra* note 45 and accompanying text.

the victim to meet the burden of persuasion on an essential element of medical practice will also remain unknown.⁴⁹⁷ When the spoliation tort is brought, the plaintiff must show injury to the underlying medical malpractice action, not that he would have necessarily prevailed.⁴⁹⁸

Even when the spoliation "inference" is actually a rebuttable presumption requiring the trier of fact to find that the lost evidence would have been unfavorable to the spoliator, it is problematic whether the inference outweighs the damage done to the expert witness's testimony by the inability to examine crucial records.⁴⁹⁹ When the cause of action is for the tort of spoliation rather than medical malpractice, the need for and importance of the expert medical witness is decreased or eliminated.⁵⁰⁰

Some difficulties in the application of the spoliation tort do exist. It is currently not widely available.⁵⁰¹ There is no uniformity in the recognition of negligent as opposed to intentional spoliation.⁵⁰² There is also little agreement as to whether the underlying cause of action must be lost before damages will be recognized to have occurred, or for the spoliation cause of action to have "ripened".⁵⁰³ Most likely, the plaintiff pleading a spoliation cause of action will need to carry the burden of production concerning all elements as opposed to the shifting of the burden to the defendant that occurs when the spoliation inference is

497. *See supra* notes 58-63 and accompanying text.

498. *See supra* notes 351-56 and accompanying text.

499. *See supra* notes 219-21 and accompanying text.

500. *See supra* notes 349-50, 356 and accompanying text.

501. *See supra* notes 101-06 and accompanying text.

502. *See supra* notes 107-14 and accompanying text.

503. *Fox v. Cohen*, 406 N.E.2d 178, 183 (Ill. App. Ct. 1980) (holding that if the underlying malpractice action is still pending the plaintiff has not yet sustained any damages); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990) (holding that the underlying claim must be resolved "to demonstrate actual harm and prevent speculative recovery in spoliation action"). *Cf. Pharr v. Cortese*, 147 Misc. 2d 1078, 1080-81, 559 N.Y.S.2d 780, 781-82 (Sup. Ct. N.Y. County 1990) (holding that the alleged alteration of medical records would not allow plaintiff to amend complaint to include spoliation of evidence, since the alleged spoliation had not made her case more difficult to prosecute). The court may have also considered the spoliation tort to be premature since the underlying cause of action was still pending, but did not comment upon whether an independent cause of action for spoliation would lie if the malpractice action had been defeated. *See supra* notes 368-70 and accompanying text.

employed.⁵⁰⁴ Also, the applicable statute of limitations, when recognized, may be shorter than that for the underlying malpractice claim.⁵⁰⁵ Whether this factor will be significant may depend upon whether the spoliation cause of action is held to accrue before litigation commences.

4. *Obstruction of Justice Statutes*

As a practical matter, no case has been found where obstruction of justice statutes have been applied to remedy spoliation of evidence in a medical malpractice claim. In some jurisdictions, these statutes do not apply to civil actions.⁵⁰⁶ Since these statutes are criminal in nature, they will be strictly construed, and will not provide a private right of action to the spoliation victim.⁵⁰⁷ Further, if the offense is a misdemeanor, the potential spoliator may not be deterred from destroying potentially devastating evidence.⁵⁰⁸ While professional sanctions may have a higher deterrent value, even this remedy does not compensate the victim or restore accuracy to judicial proceedings.

5. *Record Retention Statutes*

Most jurisdictions have medical record retention statutes.⁵⁰⁹ As a remedy for spoliation, these statutes recognize the independence of failure to preserve records from the underlying medical malpractice claim.⁵¹⁰ This approach decreases the spoliation victim's burden by allowing him to show simply that records were not retained, independent of degree of fault.⁵¹¹ Since violation of the statute is negligence per se, a cause of action based upon such a statute borders upon strict liability in tort.⁵¹² Further, the statutes provide a clear source of the duty to maintain records for jurisdictions which choose to use them

504. See *supra* notes 45-47, 107-14 and accompanying text.

505. See *supra* note 356 and accompanying text.

506. See *supra* note 118 and accompanying text.

507. See *supra* note 117 and accompanying text.

508. See *Smith*, 198 Cal. Rptr. at 835.

509. See *supra* notes 125-26 and accompanying text.

510. See *supra* notes 394-97 and accompanying text.

511. See *supra* notes 389-90 and accompanying text.

512. See *infra* notes 518-19 and accompanying text.

as the basis of a duty in the spoliation tort. The statute applies to health care facilities that are not parties to the suit.⁵¹³

The application of this remedy is illustrated in *Rodgers v. St. Mary's Hospital*.⁵¹⁴ It is noteworthy that in *Rodgers*, spoliation committed by one codefendant below, the hospital, in a malpractice action defeated the cause of action against another codefendant below, the radiologists.⁵¹⁵ Invoking the spoliation inference against the spoliator, the hospital, would not have aided the plaintiff since the factual basis for a claim against the hospital differed from that against the radiologists.⁵¹⁶ The hospital could not be deemed the agent of the radiologists concerning the lost X-rays, since such loss was not accomplished at the radiologists' request.⁵¹⁷ Thus, allowing a separate statutory cause of action provided relief that the inference could not.

Permitting a statutory cause of action for spoliation also resulted in a lighter evidentiary burden for the plaintiff; *Rodgers* needed to show only that the statute had been violated to establish a rebuttable presumption of negligence.⁵¹⁸ This would shift the burden of production to the defendant to show that the alleged violation of the statute was either reasonable or not a proximate cause of the injury.⁵¹⁹ Had the cause of action for spoliation proceeded as an independent tort, the plaintiff would have carried the burden of production of all elements of negligence.⁵²⁰ It is also uncertain whether the court would have recognized an independent cause of action for spoliation in the absence of an applicable statute.⁵²¹ Interestingly, the court did not decide the issue of strict liability for spoliation of evidence in violation of a statute.

513. See *supra* note 127 and accompanying text.

514. 556 N.E.2d 913 (Ill. App. Ct. 1990), *aff'd*, 597 N.E.2d 616 (Ill. 1992).

515. *Id.* at 916-17.

516. *Id.* at 919. Apparently, *Rodgers* had proceeded against the hospital on a respondeat superior theory. *Id.* The action against the radiologists claimed failure to diagnose his wife's medical condition. *Id.* at 915.

517. *Id.*

518. *Id.* at 916.

519. *Id.*

520. See *supra* note 504 and accompanying text.

521. *Rodgers*, 556 N.E.2d at 915-16. The Illinois Appellate Court had previously declined to decide this issue. *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312 (Ill. App. Ct. 1986); *Fox v. Cohen*, 406 N.E.2d 178 (Ill. App. Ct. 1980).

When the duty to disclose medical records is construed as addressing only intentional failure to disclose, negligent nondisclosure (honestly stating that records are unavailable in the mistaken belief that they are lost when in fact they have not been lost) will not be actionable.⁵²² This approach, whereby refusal to disclose medical records is actionable only when there is intent to conceal the existence of a cause of action, provides no remedy when the refusal hinders the successful prosecution of a known cause of action, and would not serve the truth-seeking or fairness policies which justify controlling spoliation. Possibly, such circumstances could be approached by use of record retention statutes if the reason for nondisclosure is loss or destruction of the records.

Although record retention statutes are widely available, their application to the spoliation of evidence has been rare. It is unclear whether jurisdictions other than Illinois will recognize a private right of action under record retention statutes. These statutes generally do not apply to third party spoliators other than the responsible health care facility.

B. *Analogy of Spoliation to the Law of Bailments*

Although medical records are maintained as the property of the health care provider, they contain much information of value to the patient, even aside from their potential utility in a legal action, that constitutes a property right in the patient. The health care provider is in rightful possession of this property right.⁵²³ It files and maintains such records, and exercises dominion over them.⁵²⁴ Contrary to the analysis provided in *Wolf v. Lakewood Hospital*,⁵²⁵ delivery is not an essential element of a bailment.⁵²⁶ The essential element of a bailment is

522. *Davis v. Johns Hopkins Hosp.*, 622 A.2d 128, 138-39 (Md. 1993); see *supra* notes 403-08 and accompanying text.

523. While the health care provider has been construed as the owner of the record itself, patients do have a right to the information contained in them. *AMA Code of Ethics*, *supra* note 133, at 58 (citing *South Carolina Att'y Gen. Op.* (Feb. 19, 1978) available on LEXIS, States Library, S.C. File).

524. See *supra* note 135 and accompanying text.

525. 598 N.E.2d 160 (Ohio Ct. App. 1991).

526. *BROWN*, *supra* note 135, §§ 10.2-.3. The situation in which the subject matter of a bailment, medical records, is already in the possession of the bailee, the health care provider, is analogous to the situation in which the subject matter of a

possession, physical control with the intent to exercise that control.⁵²⁷ The health care provider exercises such control and is the bailee of the property rights to the patient's records.

The maintenance of medical records, X-rays, surgical specimens, removed foreign bodies, and other medical evidence serves both the patient (bailor) and health care facility (bailee), and is analogous to a bailment for mutual benefit.⁵²⁸ The patient is benefitted, since an accurate record of diagnosis, treatment, and follow-up care is available to current and future health care providers, insurers, government agencies, schools, and others with a legitimate interest in the patient's medical status.⁵²⁹ The maintenance of records likewise benefits the health care provider in pursuing its business.

Ordinarily, a bailment for mutual benefit would impose no more than an ordinary duty of care upon the bailee.⁵³⁰ However, like the warehouseman and common carrier, the hospital or other health care provider holds itself out as one who can safeguard the patients' property interest in their medical records.⁵³¹ Further, the patient does not stand on equal footing with the health care facility in terms of access to medical records, especially in terms of securing evidence that records were negligently lost or altered.⁵³² The possibility of collusion between the health care facility and the practitioner who is subject to a malpractice suit is a real one.⁵³³ Public policy, in the form of record retention statutes, indicates the need for a higher than usual standard of care on the part of the health care provider as bailee of medical records. For these reasons, the bailee of medical records and specimens should be held to a greater than ordinary standard of care; like the common carrier, the health care provider should be held to be a virtual insurer of medical records.

gift is already in the possession of the donee. In the latter case, formal delivery is not required. *Id.* § 7.8.

527. *Id.* §§ 10.2-.3.

528. *See id.* § 11.2.

529. *See supra* notes 123-24 and accompanying text.

530. *See supra* note 138 and accompanying text.

531. *See supra* note 150 and accompanying text.

532. *See supra* note 152 and accompanying text.

533. *See supra* note 151 and accompanying text.

The bailment created between the patient and the health care provider is not a mere gratuitous bailment, contrary to the holding in *Wolf*.⁵³⁴ An implied contract exists between the patient and the health care facility to properly maintain records. Proper maintenance of records is part of what patients have a right to expect when they pay for health care, in part due to the general duty to provide appropriate health care and in part due to the statutory duty to maintain records. It is also part of what the health care facility expects to provide.⁵³⁵ Proper maintenance of health records is clearly within the contemplation of the parties.

If the bailee of medical records is held to the standard of the common carrier, he will be held to be a virtual insurer of the records, and subject to strict liability in tort.⁵³⁶ Once the victim of spoliation, the bailor, has made a *prima facie* case that a bailment existed and that the records were not delivered, a rebuttable presumption will arise against the bailee, shifting the burden of production to the bailee in some jurisdictions, and the burden of persuasion in others.⁵³⁷ Even if the bailee is held to only an ordinary standard of care, if the bailment arose from an express or implied contract the presumption of negligence arises against the bailee, shifting the burden of production to him in some jurisdictions, and the burden of persuasion in others.⁵³⁸

Applying a bailment approach to spoliation of evidence in medical malpractice cases would avoid a number of the problems posed by the application of other spoliation remedies. The spoliation inference suffers from many uncertainties. It is unclear whether the spoliation "inference" is a true inference or a presumption.⁵³⁹ Jurisdictions vary as to whether negligent or only intentional acts of spoliation should give rise to the inference.⁵⁴⁰ It is uncertain whether the inference will point to the

534. 598 N.E.2d 160, 164; *see supra* notes 419-25 and accompanying text.

535. A number of professional health care organizations have set standards for the maintenance of medical records. *See supra* notes 132-33 and accompanying text.

536. *See supra* notes 148-49 and accompanying text.

537. *See supra* notes 142-45 and accompanying text.

538. *See supra* note 146 and accompanying text.

539. *See supra* notes 44-47 and accompanying text.

540. *See supra* notes 438-42 and accompanying text.

weakness of the spoliator's case as a whole, or only to the unfavorability of the missing evidence to the spoliator.⁵⁴¹ Courts vary as to whether or not litigation must be pending before the inference may be invoked.⁵⁴² The inference is not available against a collusive, non-party spoliator.⁵⁴³ Finally, if the "inference" is truly an inference, the jury is free to reject it.⁵⁴⁴

Applying a bailment approach to the spoliation of evidence simplifies matters considerably; it will create a true presumption against the spoliating bailee, and will shift either the burden of production or persuasion depending upon the standard of care to which a bailee of medical records is held. A bailment approach applies equally well to party and non-party spoliators alike, so long as the non-party spoliator is a health care facility with a contractual or statutory duty to maintain medical records, or is an agent of the bailee.

The use of discovery sanctions as a remedy for spoliation also suffers from variable application, questionable foreseeability of litigation in the face of unavailability of crucial evidence, and inapplicability to third parties.⁵⁴⁵ These obstacles are avoided by a bailment approach.

Although, as discussed above, an independent tort of spoliation of evidence is preferable to either the spoliation inference or discovery sanctions alone, problems of availability of the tort, whether it applies to negligent as well as intentional spoliation, and ripeness are remaining concerns.⁵⁴⁶ A cause of action for breach of bailment is a time-honored cause of action of universal availability. The degree of fault to be applied would range from ordinary negligence (when the bailment is construed to be for mutual benefit) to no negligence at all (if the health care provider is considered the equivalent of a common carrier or found to have a statutory duty to preserve records).⁵⁴⁷ Ripeness would not be an issue, since a breach of bailment, founded either on an implied contract or a statutory basis, will exist regardless of whether the underlying cause of action is still pend-

541. See *supra* notes 431-32 and accompanying text.

542. See *supra* note 449 and accompanying text.

543. See *supra* note 455 and accompanying text.

544. See *supra* note 458 and accompanying text.

545. See *supra* notes 471-74 and accompanying text.

546. See *supra* notes 501-05 and accompanying text.

547. See *supra* notes 138, 148-49, 512 and accompanying text.

ing. The tort may have the advantage of providing a remedy against the non-party spoliator who does not have the duties of a bailee or who is not an agent of the bailee.

An action in bailment avoids the problem of strict construction of criminal obstruction of justice and witness tampering statutes, and is universally available in civil matters.⁵⁴⁸ The deterrent value of available damages will arguably be higher than criminal statutes that are punishable as a misdemeanor.

Record retention statutes are one of the bases of the bailee's duty to maintain medical records in a bailment approach to spoliation.⁵⁴⁹ Application of such statutes in the case of loss of medical records may have an advantage over the bailment approach since, at least as interpreted in *Rodgers v. St. Mary's Hospital*,⁵⁵⁰ violation of such a statute is prima facie evidence of negligence,⁵⁵¹ and may be governed by the principles of strict liability.⁵⁵² However, it is uncertain whether courts outside Illinois will apply such statutes in the spoliation context, and if other jurisdictions will find that such statutes permit a private cause of action.⁵⁵³

The bailment approach may do little to restore the accuracy diminished by the act of spoliation. However, if evidence is destroyed or otherwise rendered permanently unavailable, no spoliation remedy will restore the missing evidence. Even when the spoliation inference is properly applied, it does not restore the missing facts, but merely tips the balance back against the spoliator. If evidence is not permanently unavailable but is merely withheld, an order to compel production can be issued along with a bailment approach.

The bailment approach appears to be the most certain way to compensate the victim and punish the spoliator. Since the bailment relation is contractually based, consequential dam-

548. See *supra* notes 506-07 and accompanying text.

549. See *supra* notes 125-28 and accompanying text.

550. 556 N.E.2d 913 (Ill. App. Ct. 1990), *aff'd*, 597 N.E. 2d 616 (Ill. 1992); see *supra* notes 379-93 and accompanying text.

551. *Rodgers*, 556 N.E.2d at 916; see *supra* notes 518-19 and accompanying text.

552. See *Rodgers v. St. Mary's Hosp.*, 597 N.E.2d 616, 620 (Ill. 1992). However, the issue of whether strict liability should govern a violation of the statute was not reached since it had not been raised on appeal. *Id.*

553. See *supra* notes 398-408 and accompanying text.

ages, as long as they are foreseeable, can be awarded. The uncertainty of the amount of damages if the underlying cause of action is still pending presents no more difficulty than any other situation in which the amount of damages is not known with precision.⁵⁵⁴ In any event, breach of a bailment is an independent wrong.

V. Conclusion

The courts should strive to strictly discourage spoliation of evidence in the medical malpractice context, no matter what form it may take. The health care facility exercises a great degree of control over medical records and other forms of medical evidence, and stands in a vastly superior position to the patient and potential plaintiff regarding the disposition of such evidence. None of the spoliation remedies applied individually will uniformly provide an ideal solution to the problem of spoliation. However, a bailment approach appears to be the simplest and most uniform remedy for the spoliation of evidence in the medical malpractice context. It will best serve the purposes of spoliation remedies which compensate the victim and punish the spoliator. The bailment approach should be considered, and hopefully recognized, as a tool to be employed in conjunction with other available remedies whenever the courts are faced with the problem of spoliation of evidence in the medical malpractice context.

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554. *See supra* note 495 and accompanying text.

† The author dedicates this article to his wife, Teresa Lynn Casamassima, and daughters Nicole, Samantha, and Danielle Casamassima, who endured many lonely hours during its preparation, and to the memory of his parents, Louis and Frances Casamassima.