

## SPOLIATION OF EVIDENCE AN INTELLECTUAL QUAGMIRE

DAVID B. MUELLER

Since 1995 product liability plaintiffs have had a fall back weapon in their armamentarium. After *Boyd v. Travelers Insurance Co.*, 166 Ill.2d 188 (1995) it may be easier to recover for a "defective" product without the product than by using the product to establish a strict liability cause of action. That possibility is even welcomed by manufacturers and suppliers because the recovery is obtained from third parties. In *Boyd* the Supreme Court recognized a variant of negligence known as "spoliation of evidence". There plaintiff was injured when a propane heater he was using in the course of his employment exploded. The workers' compensation carrier for his employer, Travelers Insurance Company, took possession of the heater to investigate the claim. Subsequently, when Boyd decided to pursue a claim against the manufacturer the heater was missing. Therefore Boyd sued Travelers claiming that its intentional or negligent loss of the heater prevented him from proving a valuable strict liability claim.

Travelers defended on several theories. First, it claimed that the plaintiff's claim was premature as he had not tried his case against Coleman and lost. Consequently, the argument proceeded, there could be no damages as there was no injury. Second, the insurer contended that it had no duty to preserve the heater for the benefit of the plaintiff. On the other side Boyd argued that his only burden was to prove that the defendant was responsible for the product's disappearance. By proving those facts he contended that he need go no further, as damages should be presumed from the loss. In other words, the plaintiff claimed that the spoliation of evidence freed him from proving that he had an otherwise meritorious case.

The Supreme Court disagreed with both. It first held that Illinois recognizes a duty to preserve evidence where a party knows or reasonably should know that it is material to a potential claim. In that regard the opinion states:

"The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute (see *Rodgers v. St. Mary's Hospital* (1992), 149 Ill.2d 302) or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. (See *Nelson v. Union Wire Rope Corp.* (1964), 31 Ill.2d 69, 74.) In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." Boyd, 166 Ill.2d 195.

While there is some discussion of a "special relationship" between the plaintiff and the spoliating malefactor, the requirement is satisfied by the defendant's voluntary undertaking in taking possession of the evidence. Therefore, the court posited a traditional negligence analysis, including "duty, breach, causation and damages". In that analysis the duty is to exercise ordinary care to preserve evidence in an anticipation of a claim which potentially depends upon it. That duty is breached where the evidence is lost or destroyed by the defendant's acts or omissions.

Where the destruction is knowingly done to prevent a claim from being brought the court recognizes the additional tort of "intentional spoliation of evidence".

The traditional analysis becomes more problematic in the areas of causation and damages. Damages are the fruits which might have been obtained through the successful prosecution of a strict liability action. Causation is therefore the failure to obtain those damages because of the missing evidence. In these respects the opinion states:

"Initially, we note our disagreement with Travelers' assertion that for plaintiffs to allege actual injury from the loss of the heater, they must first pursue and lose the underlying claim. To plead causation, a plaintiff must allege that an injury proximately resulted from a breach of a duty. (*Moudy v. New York, Chicago & St. Louis R.R. Co.* (1944), 385 Ill. 446, 453-54.) Therefore, in a negligence action involving the loss or destruction of evidence, a plaintiff must allege sufficient facts to support a claim that the loss or destruction of the evidence *caused the plaintiff to be unable to prove* an underlying lawsuit." *Boyd*, 166 Ill.2d 196.

The preceding language infers that the plaintiff must prove impossibility. In other words, it seems to indicate that spoliation damages can be recovered only if the plaintiff proves that "but for" the absence of the product he would have prevailed against the manufactures and suppliers. However, in a rare footnote the court ameliorates the quantum of proof which must be adduced to support the claim. Instead of "all or nothing" a plaintiff can prevail by showing that he had a "reasonable probability of succeeding in the underlying suit." Thus the cause in fact standard is reduced to require proof that "but for" loss of the evidence the plaintiff *probably* would have recovered from the principal defendant. In the context of the traditional burden of proof instruction it would seem that the plaintiff must establish that it is "more *probably* true than not" that he *probably* would have won.

The ebb and flow of the burdens of going forward with the evidence on the issue of causation does not stop with the plaintiffs showing that he had a "reasonable probability of succeeding in the underlying suit." At that juncture it becomes incumbent upon the spoliating defendant to prove that the plaintiff's case was so bad that he would have lost even if the missing evidence had been available. This aspect of the decision appears in the court's rejection of the plaintiff's contention that loss or destruction of the evidence creates an irrebutable presumption that he would have prevailed.

Over a strenuous dissent the Boyd Court refused to assess damages solely upon a showing that the defendant's culpable conduct caused the evidence to be lost. Instead of recognizing a presumption to that effect, which would discharge the manufacturers and sellers, the majority reasoned that the plaintiff might be able to prove his case against them without the product. However, upon his failure to do so, it imposed the negative burden of proving he would have lost anyway upon the spoliation defendant. In this regard the opinion states:

"... An evidentiary presumption is improper here for two reasons. First, if plaintiffs can prove their underlying lawsuit against Coleman without the missing heater, then they have not been injured by Travelers' loss of it. This is entirely

possible in the present case because plaintiffs may be able to prove their products liability action against Coleman through circumstantial evidence. (See *Ralston v. Casanova* (1984), 129 Ill. App. 3d 1050, 1057-60.) Similarly, we can envision several factual situations where a party has negligently lost or destroyed evidence, but that evidence is not critical or even material to a plaintiff's underlying suit. A plaintiff in this circumstance should not be allowed to recover through the operation of an evidentiary presumption. Second, if Travelers can prove that plaintiffs would have lost their underlying claim against Coleman even with the missing heater, then Travelers had not caused plaintiffs' injury. A plaintiff should not be allowed to recover with an evidentiary presumption where it can be proven that the underlying suit is meritless." *Boyd* at 200.

The Court also rejected Travelers contention that a spoliation claim could not be brought until after the plaintiff had lost his products case. Although damages for the *loss* could not technically accrue until there was a *loss* because of the *loss*, the court responded that both claims could and should be tried in a single proceeding. In that manner a single jury would simultaneously decide the issues of whether the plaintiff had a good products liability claim without the missing evidence and, if not, whether the evidence would have made any difference. Interestingly, a verdict in favor of the suppliers in the first instance, but against the spoliating defendant in the second, presupposes that the product was defective and *ergo* that the primary defendants were liable. Thus it can be said that the fact of spoliation exonerates the guilty.

Reduced to its essence, the *Boyd* decision recognizes the confluence of two separate torts which may be tried against different defendants in the same action. The distinct nature of strict liability and spoliation causes of action is significant in as much as there is neither legally or nor logically a nexus which would permit contribution. Simply stated, the product defendants are not liable because of the conduct of the spoliation defendants. Nor do the latter have any recourse based upon the defective condition of the product which they destroyed. In that regard the court noted:

"Plaintiffs incorrectly argued in the trial court that a single jury should be permitted to apportion liability between Coleman and Travelers. Contribution does not apply in this case. Colemans' and Travelers' potential liabilities arise from two different injuries. (See 750 ILCS 100/2 (West 1992).) Coleman is liable if plaintiffs can prove that its heater was unreasonably dangerous or negligently manufactured. Travelers is liable only if plaintiffs can demonstrate that its loss of the heater caused them to be unable to prove their lawsuit against Coleman. Therefore, as a practical matter, in a concurrent trial the trier of fact would resolve the products liability action against Coleman before its consideration of the negligence action against Travelers." *Boyd*, footnote 198-199.

Superficially, *Boyd* seems to make sense. However, in the crucible of reality its application leaves more questions open than are answered. Ideally, the court contemplates that the plaintiff's claims against the principal defendant and spoliating defendant will be tried together. Joinder permits the jury to first decide the underlying claim and thereafter, if necessary, to resolve the action against the defendant who destroyed the evidence. In this three-way dispute

each of the parties is upon the horns of dilemma. The plaintiff must decide which case he wants to pursue. If he goes after the products defendant based upon circumstantial evidence he weakens his spoliation claim. On the other hand, by pursuing the spoliating defendant he denigrates his evidence against the manufacturer. If he is lukewarm as to both then it is likely he will recover from neither. Similarly, the principal defendant has to decide whether to defend the product, despite its absence, or join with the plaintiff in crying "foul" against the co-defendant who is responsible for its loss. Finally, the spoliating defendant is required to elect between supporting the plaintiff's circumstantial claims in the underlying case or arguing that the plaintiff's case was so bad that the missing evidence made no difference. Those are the quandaries which confront the parties in the "best case scenario" where the claims are joined in a single trial. The problems are compounded if the principal defendant settles and the claim proceeds against the spoliating defendant. Arguably, that claim may be pursued by the plaintiff for additional damages or by the manufacturer or supplier to recover the sums which it paid to settle. Each is fraught with theoretical uncertainties which challenge the viability of the tort. As the plaintiff's claims are both alternative and "all or nothing", it is doubtful that any recovery from the principal defendant would leave room for a further claim for spoliation. This intellectual quandary is further compounded by the issue of credits.

Problems of a different but equally compelling nature exist where the settling manufacturer pursues a claim to recover the sums which it paid. The fact of payment presupposes that the plaintiff would have been able to prove that the product was defective, despite its absence. There is no right to contribution. A party who is at fault or who settles a claim which alleges fault has no right to common law indemnity. *Dixon v. Chicago & North Western Transportation Co.*, 151 Ill.2d 108, 601 N.E.2d 704 (1992). Therefore, on what theoretical basis can a principal defendant seek to recover back sums which it paid for damages caused by a "unreasonably dangerous" product which is missing?

This conceptual conundrum did not prevent the Fifth District from sustaining spoliation causes of action on behalf of settling defendants in two cases. In fact, the right to relief was never questioned in either case. In *Stinnes Corp. v. Kerr-McGee Coal Corp.*, 309 Ill.App.3d 707, 722 N.E.2d 1167 (1990) and *Jones v. O'Brien Tire & Battery Service*, 322 Ill.App.3d 418 (2001) spoliation claims were brought by settling defendants against third party defendants which had discarded or lost the products or components upon which the settled claims were based. The *Stinnes* court recognized that contribution was unavailable as the basis for its third party claim because "potential liability under a personal injury action and the potential liability under a negligence spoliation claim arise from two *different* injuries." *Stinnes*, 309 Ill.App.3d 717. However, it did not consider that the absence of contribution left indemnity which would also be foreclosed. Instead, the court held that the negligent failure to preserve evidence was an independent tort which will support a cause of action where a settling defendant is able to prove that the loss of the product caused it to "be unable to defend" the underlying suit. There is no discussion regarding apportionment of damages and therefore it must be assumed that any recovery would be "all or nothing".

The opinion in *Jones v. O'Brien Tire & Battery Service*, 322 Ill.App.3d 418, 425 (2001) recognizes that *Stinnes* is "essentially identical". However, in *Jones* the court lowers the "bar"

which the settling party must prove from a showing of inability to defend to the lesser standard of impairment stating:

"In the present case, O'Brien alleges that it is the defendant in a wrongful death suit wherein the death is attributed to O'Brien's negligence in mounting a wheel to Macios' truck, that Macios discarded or destroyed the wheel assembly, and that as a result O'Brien's ability to defend itself has been *impaired*. Following *Boyd*, we find that O'Brien has sufficiently alleged actual damage resulting from MaCios' breach of his duty to preserve evidence." (Emphasis supplied). *Jones v. O'Brien Tire & Battery Service*, 322 Ill.App.3d 424.

### CONCLUSION

The preceding discussion reflects the uncertainties and inequities which are inherent in most spoliation of evidence claims. It is intended for "food for thought" as these problems are not only unresolved but are likely to remain so in the foreseeable future. The caveat is therefore to analyze every products liability claim which has potential spoliation implications with care in order to maximize use of the doctrine as either a sword or shield.