

Bar set high for awarding costs against counsel

By [AdvocateDaily.com Staff](#)



Seeking costs directly from opposing counsel is an uphill battle, says Toronto civil litigator [Sarah O'Connor](#).

O'Connor, principal of [O'Connor Richardson Professional Corporation](#), says such orders are "very rare," and a recent [ruling](#) by B.C.'s appeal court, overturning the costs award made against a lawyer for his actions while advancing a personal injury action on behalf of a client, is a reminder of the high bar applicants must clear to get one.

"It's a higher burden than just party-and-party costs. There has to be some reprehensible conduct on the part of the lawyer," O'Connor tells [AdvocateDaily.com](#).

"Negligence is not sufficient," she adds, explaining that a lawyer is unlikely to put themselves at risk unless they engage in dishonesty, deliberate misleading of the judge, malice, or other conduct that undermines the authority of the court.

"These are all factors that might warrant costs against counsel," O'Connor says. "It goes more on a case-by-case basis because of their discretionary nature."

The lawyer in the B.C. case ran into trouble while trying to identify the driver in a hit-and-run accident that injured his client outside a pub in mid-2012.

After a police investigation failed to find the culprit, the plaintiff's lawyer took matters into his own hands, hiring a string of private investigators whose searches were also unsuccessful.

According to the decision, the lawyer finally got a break in 2014 when his client's brother gave him the name of a man he thought was driving the vehicle. However, another private investigator suggested the real driver was another man with a similar name, prompting the lawyer to return to the police for their help.

Eventually, counsel for the pub informed the plaintiff's lawyer that his investigator had identified the driver, but said he was unable to reveal how the information had been obtained. Still, a judge ruled this was enough to support the plaintiff's application to have the man added as a defendant to the personal injury action.

When the plaintiff's lawyer learned that the pub's information was wrong, he discontinued the action against the man mistakenly named as the driver, promising to pay his costs out of his client's final settlement. However, the man was not satisfied and applied to have his costs personally paid by the plaintiff's lawyer.

A chambers judge agreed, finding the lawyer's failure to disclose inconsistencies in the investigations was "indefensible and an abuse of process meriting sanction in the form of an order of special costs payable by him personally."

However, the three-judge appeal court panel unanimously reversed the decision, finding the chambers judge failed to exercise the extreme caution required when considering lawyers' personal liability for costs, "given their duties to guard confidentiality of instructions and to bring forward with courage even unpopular causes."

"This Court has long held that such orders should be made only in 'very special circumstances,' and not on the basis of mistake, error in judgment or even negligence," the judges wrote.

In addition, the appeal court found the lawyer's conduct after obtaining permission to add the driver to the action demonstrated "an effort to be prudent." Holding off on filing his amended claim, before immediately discontinuing when he discovered his information was mistaken, was far from the kind of "reprehensible" conduct required to justify an order for special costs, they concluded.

O'Connor says she can understand why the lawyer at the heart of the case pursued his appeal so vigorously, explaining that an award of costs personally against counsel can do much more damage to their reputation than to their wallet.

"If during research on opposing counsel, you discovered that they had a costs award against them, it would be concerning," O'Connor says. "You might be wary of granting indulgences and want to hold them a little tighter to timelines."