

## Plaintiff Who Collapses at Trial Responsible for Costs Thrown Away

Rebecca Moore  
April 2020

Will costs thrown away be awarded when the health of a party necessitated the adjournment of a trial?

This was one of the issues examined by Justice Fowler Byrne in [Syed v. Petrie](#), 2020 ONSC 2513 (CanLII).

### **Background**

This matter proceeded to trial during the January 2020 civil jury blitz.

Following a number of pre-trial and mid-trial motions, with mixed success for the parties, a mistrial was declared on January 23, 2020.

This decision deals with the costs awards for the various motions argued by the parties, including the defendant's request for costs thrown away.

### **Analysis**

Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 states that an award of costs, for either a proceeding or step in a proceeding, is at the discretion of the court.

Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 sets out a list of factors that may be taken into consideration by the court in reaching their decision. This includes the complexity of a proceeding, the amount claimed and the amount recovered, as well as the conduct of any party to lengthen or shorten unnecessarily the duration of the proceeding.

Ultimately, an award of costs is meant to reflect “a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.”<sup>1</sup>

---

<sup>1</sup> *Syed v. Petrie*, 2020 ONSC 2513 (CanLII), at Para 11; *Zesta Engineering Ltd. v. Cloutier*, 2002 CanLII 25577 (ON CA), [2002] O.J. No. 4495, at para. 4

A party may also seek “costs thrown away” when a trial is adjourned. This award will take into consideration that party’s costs spent in preparation for the trial that will ultimately need to be duplicated or redone as a result of the adjournment.<sup>2</sup>

The courts have held that an award of costs thrown away is meant to indemnify a party for their time that was wasted in preparation for trial, or wasted in trial work, as a result of the adjournment, rather than to penalize the party that sought or caused the adjournment.<sup>3</sup> On this basis, costs thrown away are usually granted on a substantial basis.<sup>4</sup>

In the case at issue, the defendant brought a motion for mistrial following the plaintiff’s collapse in front of the jury, due to self-harm. As Justice Fowler Byrne notes, it was this health crisis that led to the adjournment of the trial.

Citing *Caldwell v Caldwell* 2015 ONSC 7715 (CanLII), Justice Fowler Byrne reviews the three categories of cases for when costs thrown away are being sought:

(i) the first category deals with fault where, for example, one of the parties or their counsel neglect to call a witness or a last-minute amendment is required. The court will grant the adjournment on conditions, including the payment of costs thrown away;

(ii) the second category is where the trial is adjourned because of the court’s scheduling problems. No costs are awarded in this circumstance as no party bears responsibility for the adjournment; and

(iii) the third category deals with adjournments sought by one of the parties as a result of no fault on their part. Costs thrown away are still awarded against the party applying for the adjournment, notwithstanding lack of fault: *Goddard v. Day*, [2000 ABQB 799](#).<sup>5</sup>

In *Caldwell*, Justice Quinlan relies on *Goddard* to find “that the third category of adjournment is really one of responsibility for the adjournment as opposed to fault or lack of fault. By that I mean situations where someone is responsible for an adjournment, but cannot be faulted for that responsibility.”<sup>6</sup>

---

<sup>2</sup> *Syed*, at para. 14; *Caldwell v. Caldwell*, 2015 ONSC 7715, at para. 8

<sup>3</sup> *Syed*, at para. 14; *Caldwell v. Caldwell*, 2015 ONSC 7715

<sup>4</sup> *Syed*, at para. 14; *Pittiglio v Pittiglio* 2015 ONSC 3603, at para. 6.

<sup>5</sup> *Syed*, at para. 15; *Caldwell*, at para. 9

<sup>6</sup> *Goddard*, at para. 20; *Caldwell*, at para. 10

The second category was expanded by the court in *Graziano et al v Ciccone* 2017 ONSC 362 to include “unforeseen events such an illness of a party, lawyer or witness or an emergency such as a personal emergency, health issue or death in a family.”<sup>7</sup> This case expansion, however, was critiqued in *Furr v Duhamel* 2017 ONSC 4623.

In *Furr*, a request for an adjournment of the hearing of an application was granted further to the health issues of the applicant’s counsel. Therein, the Judge found that the respondents were entitled to an award for costs thrown away. In reaching this decision, Justice Beaudoin held that *Graziano* should not be followed as it confused the second and third *Caldwell* categories: “Costs thrown away are still awarded against the party applying for the adjournment, notwithstanding lack of fault and these are generally payable on a full recovery basis.”<sup>8</sup>

Following the decision of *Furr*, Justice Fowler Byrne found the defendant in this case to be entitled to costs thrown away, on a substantial indemnity basis:

After reviewing the case law, I have concluded that the approach adopted in *Furr* more accurately reflects the approach that should be taken by this court. Requests for an adjournment of a trial are either the fault of one party, the responsibility of one party, or neither the fault nor responsibility of either party. Only the last category excuses both parties from any cost consequences. The Plaintiff’s health crisis is unfortunate and is not the *fault* of any party. Nonetheless, it is the *responsibility* of the Plaintiff. Costs have been incurred and need to be addressed, no differently than if he was called away by a family emergency beyond his control.<sup>9</sup>

Therefore, substantial indemnity costs thrown away can be awarded against a party, even if the reason for a mistrial or adjournment is not the “fault” of the party.

### **Costs Awards**

After a review of the relevant principles, costs were awarded as follows:

1. Motion to move the trial back to Brampton: *No costs payable*
2. Motion to exclude surveillance evidence or adjournment: *Partial indemnity costs of \$7,500 payable to the plaintiff*
3. Motion with respect to the number and type of expert witnesses: *Partial indemnity costs of \$5,000 payable to the plaintiff*

---

<sup>7</sup> *Syed*, at para 17; *Graziano*, at para 11

<sup>8</sup> *Furr v Duhamel* 2017 ONSC 4623, at para. 13

<sup>9</sup> *Syed*, at para. 19

4. Motion for mistrial following opening submissions: *No costs payable*
5. Motion for mistrial following injury to the plaintiff: *Partial indemnity costs of \$7,000 payable to the defendant*
6. Costs thrown away: *The defendant sought substantial indemnity costs of \$120,950.10, or in the alternative, on a partial indemnity basis of \$86,990.94. After reviewing the Costs Outline, substantial indemnity costs of \$33,588.03 were awarded to reflect time that was wasted, and would be duplicated, when the trial is rescheduled.*

### **Take Away**

In circumstances where the health of a party requires the adjournment of a trial, they may still be held responsible for paying the other party's costs thrown away, irrespective of "fault."

These types situations are not always predictable, and more often than not are likely to catch a party off guard. That said, such surprises can be kept to a minimum by informing clients well in advance of the potential costs consequences that may be awarded when an adjournment is requested, even when the reason for the request is out of their control.