

# Destroying Evidence

May Bring Spoliation Penalties

Proving a case in court requires evidence to back up certain allegations. Sometimes, the 'evidence' is simply credible testimony without any tangible support; however, for many concerns actual material, such as pictures or documents or objects, are necessary. Of course, some evidence may be favourable and some evidence may be unfavourable, depending on the viewpoint of the respective litigants.

## Intentional Destruction

It should almost be unnecessary to suggest that the destruction or disposal of unfavourable evidence is wrongful and in certain circumstances may even be criminal. The intentional destruction of evidence in civil litigation cases can, and often is, punished by a punitive damages penalty or a costs sanction.

*Armstrong v. Moore*, [2018 ONSC 7056](#):

[61] Spoliation of evidence may or may not be tortious in its own right. In my view, it is an independent actionable wrong sufficient to justify punitive damages. Punitive damages were pleaded. These actions by Howard to obliterate markers of adverse possession and conceal evidence along with activities designed to spite the Armstrongs and further exacerbate the conflict are worthy of sanction. I am awarding punitive damages against Howard Moore in the amount of \$5,000.00.

## Accidental Destruction

In other circumstances where evidence is spoiled an adverse inference, meaning a presumption that the spoiled evidence would be unfavourable to the litigant who damaged or destroyed the evidence, may be taken by the court; however, this appears as only so when the party that was uninvolved in spoiling the evidence took reasonable steps to preserve the evidence itself.

[123] Plaintiff's counsel pointed out that the adjuster for the defendant's insurer lost photographs which were taken of the sidewalk in question. He asks that I make an adverse inference against the defence arising from the loss of the photos based on the theory of spoliation. I decline to do so. Photographs could just as easily have been taken by the plaintiff. She made notes within two weeks of the incident. She must therefore have contemplated taking some sort of action. It appears as though she had contact with counsel early on. I see no reason why her interest could not have been protected by having photographs taken herself. There is nothing in the conduct of the defendant that suggests that the loss of the photographs was intentional. Given the effluxion of time, it is not surprising that the photographs became misplaced. I decline to exercise my discretion in favour of the argument advanced to draw the adverse inference requested.

Accordingly, per *Manning*, it appears that without sufficient effort at self-preservation of evidence penalties or sanctions or even an 'adverse inference' against the spoliating litigant will fail. This outcome seems surprising as without some form of potential discipline a party may be without discouragement to refrain from destroying evidence. The lack of a deterrent may thereby encourage a party to diligently protect less than favourable evidence.

Furthermore, and despite the importance to a legal case, it appears that where evidence is accidentally destroyed, even neglectfully, penalties or sanctions will be avoided:

[9] Spoliation in law, however, does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavorable to the party destroying it. This presumption may be rebutted by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which a party either proves his case or repels the case against them.

[10] When the destruction is not intentional, it is not possible to draw the inference that the evidence would tell against the person who destroyed it. The unintentional destruction of evidence is not spoliation. It is not appropriate to presume the missing evidence would tell against the person destroying it where the destruction is unintentional, see *McDougall v. Black & Decker*, [2008 ABCA 353 \(CanLII\)](#).