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FUTURE CARE COSTS FOR CANNABIS IN PERSONAL INJURY CLAIMS

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Introduction

This article will examine how courts have responded to claims for cannabis, as an element of future care costs, in personal injury cases. These claims have occurred against a background of significant change with regards to the acceptance of cannabis, both medically and recreationally.

Background

As a result of the *Cannabis Act*,[4] cannabis was legalized on October 17, 2018. Prior to that, cannabis was regulated under the *Controlled Drugs and Substances Act*.[5] There was, however, a legal exemption for the medical use of cannabis. Despite the recent legalization of cannabis, a framework for access to cannabis for medical purposes still exists, but under new regulations passed under the authority of the *Cannabis Act*.

The use of cannabis for medical purposes, while gaining acceptance, remains controversial. This controversy is evident in the case law reviewed.

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3. This article is intended to provide information of a general nature only and not legal advice. This article was originally published on Cox & Palmer's website (coxandpalmerlaw.com) on May 22, 2019. The information presented here is current to the date of the original publication and may be subject to change following that publication date.

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4. *Cannabis Act*, S.C. 2018, c. 16.
5. *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

Awards for Cannabis as a Future Care Cost

Generally speaking, there must be a medical justification for the item claimed as a future care cost in personal injury cases, and any award must be reasonable and fair to both parties. Given the controversy over the efficacy and safety of cannabis for therapeutic purposes, a key question in these cases, is whether cannabis meets the requirement of medical justification.

We review, in chronological order, a number of cases in an effort to identify how the courts have responded to these claims, and the principles that govern their decisions.

Poirier v. Robichaud[6]

Poirier sued following a surgical procedure that left her with chronic pain and limitations affecting her lifestyle and career. Following the incident, Poirier was prescribed numerous medications, but at the time of trial, she was only taking a muscle relaxant and cannabis. According to Poirier, she found cannabis to be an efficient pain reliever which, contrary to the muscle relaxant, did not make her drowsy, allowing her to function better. She did not have permission to possess the drug, which she purchased on the black market at a cost of $40/week. Poirier's family physician did not advise against the use of cannabis but did testify that, in the past, excessive use of the drug had resulted in adverse effects, including hospitalization at a psychiatric facility and problems with digestion. In the circumstances, the court was not satisfied that an award for cannabis was reasonable.

Joinson v. Heran[7]

An award for marijuana was allowed in this case, which involved a negligence claim against a surgeon. As part of his claim, Joinson sought $822,000 for a lifetime supply of medical marijuana apparently based on a supply of 15 grams/day. At trial, Joinson testified that he smoked about 10 grams/day of marijuana, took one capsule of Canacaps (marijuana in an oral suspension), and consumed marijuana in baked goods. Joinson had obtained an exemption from Health Canada for medical

6. *Poirier v. Robichaud*, 2007 NBQB 50.

7. *Joinson v. Heran*, 2011 BCSC 727.

marijuana but, according to the court, it had been obtained based on incorrect information. Furthermore, Joinson had obtained some of his supply from unauthorized dispensaries.

In determining whether to allow the claim, the court described the test as follows:

> … the foundational principle for an award of a cost of future care is that the expense must be both medically justifiable and reasonable on an objective basis. It is not enough to show merely that it is beneficial; the medical evidence must show it is reasonably necessary: …[8]

In this case, there was "no bright line distinguishing mere benefit and reasonable necessity".[9] Nevertheless, the court was convinced that Joinson met the test. According to Joinson, smoking dry cannabis reduced his pain levels, allowing him to reduce his use of morphine, a drug that negatively affected his functioning. Although other physicians disagreed, marijuana was an option that was endorsed by Joinson's treating physicians. The court acknowledged that the issue was controversial, even stating that the College of Physicians and Surgeons of British Columbia did not support the use of marijuana for medical purposes. Nevertheless, the court concluded as follows: "the medical evidence supports a finding that compensation for some medical use of marijuana is reasonably necessary in this case".[10]

As for the award itself, the court noted that it "must be assessed based on recommended guidelines and on costs charged by legally authorized dispensaries".[11] While Joinson had received an exemption for 20 grams/day, the court noted the caution by Health Canada with regards to dosages of more than 5 grams/day. In the end, the court made an award based on 5 grams/day of smoked marijuana, 1 Canacaps/day, and 1 gram/day for baked goods. The court awarded $30,000, based on a 50% reduction to account for amounts that Joinson would have consumed even in the absence of the injury, and to account for possible improvement over time.

8. *Joinson*, para. 420.
9. *Joinson*, para. 421.
10. *Joinson*, para. 422.
11. *Joinson*, para. 420.

Datoc v. Raj[12]

Datoc alleged that he suffered from persistent and debilitating pain caused by a motor vehicle accident. The court questioned Datoc's credibility and concluded that his injuries were far less severe than asserted. Datoc sought $20,000 for the cost of medical marijuana, based on $200/month. Datoc, who had obtained a prescription from a naturopath, testified that the marijuana helped him sleep, and stopped his panic attacks and chest pains. But he introduced no medical report to support his contention with respect to the effect of the drug. The court was unconvinced by Datoc's evidence as to the dramatic and persisting effect of the drug. Despite Datoc's denial, there was evidence to suggest a pre-accident interest in recreational marijuana. The court concluded as follows: «Given my concerns about the reliability of the plaintiff's evidence, and in the absence of expert evidence, I am not persuaded that medical marijuana is required by the plaintiff to treat his injuries».[13] The claim for medical marijuana was denied.

Amini v. Mondragaon[14]

Amini suffered soft tissue injuries as a result of a motor vehicle accident. The accident also "negatively affected her mood, personality and caused her to be depressed".[15]

With respect to awards for future care costs, the court held as follows:

> … an award for cost of future care must be based on medical evidence as to what is reasonably necessary to preserve and promote the plaintiff's mental and physical health. In assessing cost of future care, the court should consider whether the plaintiff would likely use the items or services in the future.[16]

A physiatrist recommended a prescription for 10 grams/day of marijuana as an ointment for six months. This physician estimated the cost of the marijuana to be about $9,000. The court allowed the claim

12. *Datoc v. Raj*, 2013 BCSC 308.

13. *Datoc*, para. 112.

14. *Amini v. Mondragaon*, 2014 BCSC 1590.

15. *Amini*, para. 109.

16. *Amini*, para. 131.

but accepted the defence argument that the cost could be reduced if Amini, a nurse, prepared the ointment herself. As a result, the court awarded $6,500.

Fabretti v. Gill[17]

A modest award for the cost of Cesamet/Nabilone, the synthetic cannabinoid, was awarded in this case. Fabretti was involved in an automobile accident when he was 12 years old. He developed neck, back and head pain that became chronic. He also suffered a minor traumatic brain injury. Following the accident, Fabretti began using marijuana and later also used cocaine and ecstasy. He developed a drug addiction which was found to have been caused by the accident. As part of the damages for future care costs, the court awarded the costs of drug rehabilitation and $2,100 for Cesamet for one year.

Torchia v. Siegrist[18]

The cost of medical marijuana was denied in this case. Torchia experienced pain in his low back as a result of an automobile accident. Prior to the accident, Torchia had used marijuana recreationally. After the accident, he used marijuana to relieve his back pain, smoking two joints per day. He requested and obtained a prescription for 1 gram/day of medical marijuana from his family doctor, who "confessed that he was not an expert as it relates to the treatment of pain with marihuana".[19] The court expressed the following concern: "There was no evidence before me or any reference to any conclusive studies that suggest treating pain with marihuana".[20]

In denying the claim for medical marijuana, the court distinguished *Joinson v. Heran*:

> That case is of no importance in the case of Mr. Torchia, as the test still is what is reasonably necessary on the medical evidence so as to promote the medical well-being of the plaintiff. Just because another case finds marihuana useful for one patient does not automatically infer that it is medically

17. *Fabretti v. Gill*, 2014 BCSC 899.
18. *Torchia v. Siegrist*, 2015 BCSC 57.
19. *Torchia*, para. 180.
20. *Torchia*, para. 181.

necessary for another plaintiff. In *Joinson*, medical marihuana was approved by Mr. Joinson's psychiatrist to use so that Mr. Joinson's use of morphine could be reduced.[21]

McCullum v. White[22]

McCullum's suit was for damages as a result of two motor vehicle accidents. He had a troubled background, having been taken from his mother at a young age and placed in several foster homes. He had a history of drug use both before and after the accidents that included cocaine, heroin, and crystal meth. At the time of trial, McCallum was on methadone and medical marijuana. While the physicians that testified did not recommend the use of medical marijuana, one of them was content to provide a prescription based on McCallum's assertion that marijuana alleviated his pain. The court held as follows:

> There is then no medical evidence that recommends that Mr. McCullum use medical marijuana on an ongoing basis and, accordingly, I consider that this aspect of the plaintiff's claim lacks an adequate foundation.[23]

Manoharan v. Kaur[24]

Manoharan developed major depression and chronic physical pain following a motor vehicle accident. A pain management specialist recommended a trial of Nabilone, the synthetic cannabinoid, or of medical marijuana. The court responded as follows:

> The evidence on the appropriateness of cannabinoids for the plaintiff along with the other medications that she expects to take in the future is lacking. I decline to award a sum of money to permit the plaintiff to experiment with cannabinoids; … .[25]

21. *Torchia*, para. 183.
22. *McCullum v. White*, 2016 BCSC 569.
23. *McCullum*, para. 124.
24. *Manoharan v. Kaur*, 2016 BCSC 692.
25. *Manoharan*, para. 56.

Gordon v. Ahn[26]

As a result of a motor vehicle accident, Gordon suffered soft tissue injuries to her neck, back and shoulders. She developed a disc herniation following the accident. Gordon had a significant history of drug use. A specialist, retained by her lawyer, recommended medical marijuana in a cream form. The medical history, taken by the specialist, was found to be flawed and his opinion was given little weight. Beyond that, Gordon had not found the cream to be very effective. Finally, given Gordon's history of drug use, the court expressed the view that medical marijuana was not in her best interest.

Hollyer v. Gaston[27]

A modest award for the cost of medical marijuana was granted in this case. Hollyer developed chronic neck, shoulder and back pain, as well as depression and anxiety, all as a result of a motor vehicle accident. The court, citing *Penner v. Silk*[28] and *Travis v. Kwon*,[29] noted that common sense should inform awards for costs of future care.

Hollyer sought $162,489 for the future cost of medical marijuana. According to the court, there was no medical recommendation that Hollyer use marijuana for life. While marijuana oil for sleep had been recommended, Hollyer had experienced some side effects after only a couple of months of use. The court awarded a total of $5,000 for medical marijuana and for various pain medications.

Wright v. Mistry[30]

Wright suffered vertigo, dizziness, soft tissue injuries, and an exacerbation of pre-existing depression, all as a result of a motor vehicle accident. With regards to whether the costs of medical marijuana were compensable, the court cited *Joinson* and *Amini* and wrote as follows: "It is clear that, in the right case, medical marihuana is compensable in a personal injury claim".[31] According to the court, however, this was

26. *Gordon v. Ahn*, 2016 BCSC 795, reversed on other grounds 2017 BCCA 221.
27. *Hollyer v. Gaston*, 2016 BCSC 1401.
28. *Penner v. Silk*, 2011 BCCA 135.
29. *Travis v. Kwon*, 2009 BCSC 63.
30. *Wright v. Mistry*, 2017 BCSC 239.
31. *Wright*, para. 84.

not the right case. Wright planned to use marijuana to alleviate stress and headaches, but it had not been established that these symptoms had been caused by the accident.

Chavez-Salinas v. Tower[32]

As a result of a motor vehicle accident, Chavez-Salinas suffered from minor lower back, neck and upper back symptoms. The accident also reactivated a pre-existing psychological condition which manifested as a chronic pain syndrome, and a pre-existing depressive disorder which was in partial remission at the time of trial.

In considering the test for awards for future care costs, the court made a number of comments. First, the court distinguished between treatments which "serve the sole function of making the plaintiff's life more bearable or enjoyable" and those that are "reasonably necessary to preserve the plaintiff's health".[33] Only the latter are compensable. Compensation is not payable for treatments that "simply improve the plaintiff's enjoyment of life".[34]

Second, the court noted the need to consider the likelihood that the claimed treatment will actually be used:

> If a particular item or service has not been used in the past, it may be inappropriate to award such an item or service as part of a cost of future care award.
>
> However, if the plaintiff can show that previously rejected services will not be rejected in the future, then recovery for such services may be appropriate: … .[35]

Third, the court noted the need to account for both negative and positive contingencies which may, in some cases, offset each other:

> … the award will be reduced based on a prospect of improvement in the plaintiff's condition or increased on the basis that additional care will likely be required, and each case, of course, must be determined on its own unique facts … .[36]

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32. *Chavez-Salinas v. Tower*, 2017 BCSC 2068.
33. *Chavez-Salinas*, para. 495.
34. *Chavez-Salinas*, para. 496.
35. *Chavez-Salinas*, paras. 497-498.
36. *Chavez-Salinas*, para. 500.

Fourth, the court considered the nature of the evidence required to establish the claim:

> The evidentiary requirement to prove a future care requirement does not require a physician to testify to the medical necessity of each and every item of care that is claimed. There must however be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: … .[37]

Chavez-Salinas sought between $6,120 and $22,032 for medical cannabis. Based on the recommendation of a physiatrist, the court was satisfied that the use of a cannabis cream was likely to assist her rehabilitation. In the absence of evidence as to how long she might require the cream, the court awarded $3,000.

Parlby v. Starr[38]

A significant award for Nabilone, the synthetic cannabinoid, was allowed in this case. The 25 year old plaintiff suffered significant injuries, including a spinal cord injury, while a passenger on an ATV that was involved in a collision with an RCMP vehicle. Parlby was left with «multifactorial and complex»[39] pain that was «insufficiently managed»[40]. According to Parlby, the side effects of narcotic medication were intolerable, but marijuana was helpful with his pain and sleep issues. He sought significant damages for the future cost of medication, including the cost of Nabilone at a dosage of 12 mg/day. Parlby had been smoking marijuana, which he found helpful in reducing anxiety and sleep problems. Nabilone was considered to be safer but possibly less effective.

According to the court, the medical evidence established «a medical justification» for the cost of Nabilone, and it awarded $70,000 for the cost of this item.

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37. *Chavez-Salinas*, para. 501.
38. *Parlby v. Starr*, 2017 BCSC 2353.
39. *Parlby*, para. 428.
40. *Parlby*, para. 429.

Murphy v. Hofer[41]

As a result of an automobile accident, Murphy suffered a left shoulder injury, requiring corrective surgery. More significantly, he suffered psychological injuries which had a profound negative effect on his life. Murphy sought $100,000 for the cost of cannabis to treat his symptoms. At the time of trial, Murphy was using 2-5 grams/day of cannabis oil, "which he testified does not contain tetrahydrocannabinol (THC), the hallucinogenic component of cannabis but does contain cannabidiol (CBD), which does not have hallucinogenic effects."[42]

According to the court, the claim for cannabis was problematic. Possession of cannabis was still illegal and, at the time of trial, Murphy had not obtained the necessary exemption for medical cannabis. In addition, no evidence was presented in support of CBD for therapeutic purposes:

> … a cost of care claim must be supported by evidence that it is reasonably necessary to promote the mental or physical health of the plaintiff. While there is anecdotal evidence that CBD does have beneficial properties, I heard no evidence that that claim has been established through recognized clinical trials.[43]

In rejecting the claim, the court cited *Torchia v. Siegrist* with approval. It also noted that Murphy had not complied with the regulations for medical cannabis, and had not submitted "evidence of any medical professional that the beneficial effects of CBD oil [were] unavailable from other analgesic or sedative medications which would cost far less."[44]

Chiasson c. Theriault[45]

An award for the costs of marijuana was granted in this decision. Chiasson suffered soft tissues injuries and developed chronic pain as a result of a motor vehicle accident. At the time of trial, she was using

41. *Murphy v. Hofer*, 2018 BCSC 869.
42. *Murphy*, para. 211.
43. *Murphy*, para. 213.
44. *Murphy*, para. 218.
45. *Chiasson c. Theriault*, 2018 NBQB 177.

marijuana to treat her symptoms. She had obtained a prescription from a physician and the required approvals from Health Canada. At trial, she sought 2 grams/day for life at a total cost of $140,000.

Although Chiasson testified as to the beneficial effects of cannabis on her symptoms, the medical evidence was somewhat equivocal. The first physician who had prescribed cannabis did not testify. Another physician wrote that "the use of cannabinoids for the management of chronic pain could be considered, but he himself did not prescribe cannabis". As for Chiasson's family doctor, who completed the documents for authorization from Health Canada, he testified that "he would do anything to make her happy if he believed there might be a chance it would help her". However, he did not testify that medical cannabis would be necessary "for the next 30 years".[46] Finally, the defendant's expert "questioned the use of cannabis for medical purposes because of the lack of serious studies on the safety and effectiveness of this product".[47]

Nevertheless, the court determined that the use of medical cannabis was justified to assist Chiasson to deal with her chronic pain. However, the court was also satisfied that even in the absence of the accident, Chiasson would have consumed some marijuana. Rather than the $140,000 claimed based on 2 grams/day of marijuana, the court awarded $30,000.

Kirby v. Loubert[48]

This was a complicated case involving a plaintiff, who as a result of an earlier accident in 1991, was a paraplegic and an incomplete quadriplegic. The subsequent accident, in 2009, caused soft tissue injuries to Kirby's neck, right shoulder and upper back. It also exacerbated many of his pre-existing problems. Kirby began using marijuana after the first accident, with the amount increasing steadily over time. He was consuming 15 grams/day at the time of the second accident. By the time of trial, Kirby was using 40 grams/day. He sought future damages based on 5 grams/day at a yearly cost of $18,250, for a total present

46. *Chiasson*, para. 169.

47. *Chiasson*, para. 170.

48. *Kirby v. Loubert*, 2018 BCSC 498.

value of $427,038. There was conflicting expert evidence, including the suggestion by one physician that Kirby met the criteria for a substance use disorder. In the end, the court held as follows:

> On all of the medical evidence, I am prepared to accept that Mr. Kirby's use of medical marijuana to treat chronic pain is medically justified in a general sense, given his spinal cord injuries and the resulting reduction in opioid use. But, I find, the evidence does not support the proposition that Mr. Kirby's use of amounts in excess of 20 g per day is either reasonable or medically justified in relation to the injuries he sustained in this accident, particularly since the resolution of his serious pressure wound sore. The medical evidence does not go that far. Indeed, the experts were unanimous in concluding that his present level of consumption is excessive.
>
> In these circumstances, I find that Mr. Kirby has not established a claim for the future cost of additional medical marijuana.[49]

Ryan v. Curlew[50]

The plaintiff alleged that an automobile accident caused chronic pain, depression, anxiety and post-traumatic stress disorder. According to the court, Ryan's claim was largely subjective with no objective evidence to even confirm a soft tissue injury. The court had reservations about Ryan's trustworthiness and her claim was described as "disingenuous and unconvincing".[51] She "minimized the positive aspects of her life since the accident and exaggerated the negative aspects, possibly to enhance her claim".[52]

Ryan sought future care costs of $332,094, which included $1,032/year for medical marijuana. The court refused to apply an actuarial approach, finding that many of the components of the claim, including medical marijuana, were not justified on the evidence. Ryan's use of

49. *Kirby*, paras. 174-175.

50. *Ryan v. Curlew*, 2018 NLSC 72.

51. *Ryan*, para. 125.

52. *Ryan*, para. 133.

marijuana was very recent and her usage and response to the drug was "clearly in the developmental phase".[53] In the end, the court awarded a lump sum of $100,000 for all future care costs, less a small reduction due to a failure to mitigate.

Carrillo v. Deschutter[54]

Carrillo sustained soft tissue injuries as a result of an automobile accident. He experienced chronic neck and low back pain, intermittent headaches, and a frozen shoulder. For about six months, Carrillo self-medicated with cocaine, and later pleaded guilty to possession of cocaine for the purpose of trafficking.

A physiatrist, who had been retained to provide a medical opinion, recommended that Carrillo be placed on a medical cannabis program, supervised by a medical practitioner. The physiatrist recommended cannabis in three forms: a topical cream, a tincture of oil, and an oral capsule. In opposing the claim, the defendant noted the following: Carrillo suffered from psychological illnesses such that cannabis was contraindicated; Carrillo had used cocaine; Carrillo's own treating physicians did not recommend cannabis; the evidence regarding the efficacy of cannabis was "not robust", and none of the evidence supporting its use had been presented in court; and Carrillo's pain was controlled by conventional medications.

The court held that "in some cases, medical cannabis is compensable in a personal injury case."[55] As for Carrillo, the court accepted that his use of cannabis prior to trial, had been effective, resulting in "some pain relief" with no evidence of side effects. While conventional medications also provided relief, they did not control his pain. The medical cannabis program recommended was "medically justified" but evidence as to costs and recommended length of the program was lacking. While Carrillo sought $91,032 for the future costs of medicinal cannabis, the court awarded $12,000.

53. *Ryan*, para. 205.

54. *Carrillo v. Deschutter*, 2018 BCSC 2134.

55. *Carrillo*, para. 158.

Relevant Principles

As can be seen from our review, each case is fact specific. Whether a court makes an award for the cost of cannabis will depend on the circumstances of the particular claim.

Nevertheless, a number of principles arise from the various cases. In particular, the following factors are likely to increase the likelihood of an award for the future costs of cannabis:

- The plaintiff's own evidence that cannabis has been effective in relieving symptoms;
- Expert evidence supporting the efficacy of cannabis for pain relief;
- The recommendation, by one or more physicians, of cannabis as a means of controlling the plaintiff's specific symptoms;
- An authorization for medical cannabis from Health Canada;
- Amounts claimed based on dosages that are consistent with recommended guidelines;
- Evidence that conventional treatment options are ineffective, less effective or that they cause side effects; and
- The absence of a history of recreational drug use, or of drug dependency problems.

Concluding Comments

Based on the cases reviewed, it appears that there is growing support for medical cannabis as a treatment option when making awards for future care costs in personal injury cases. Despite the controversy regarding the efficacy and safety of cannabis for therapeutic purposes, awards for the future costs of cannabis have been granted in many cases, although the amounts have generally been modest. The legalization of cannabis may add further support for these claims.