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## MEDICAL MARIJUANA DAMAGES: WILL THEY RUN HIGH?

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### INTRODUCTION

After bouncing between the House of Commons and the Senate over several rounds of debate, Bill C-45, the *Cannabis Act*, has been passed by both Houses of Parliament, effectively legalizing the use of marijuana in Canada. The *Cannabis Act* received Royal Assent on June 21, 2018 and is projected to come into effect in October 2018.

A host of considerations arise for insurers as a result of the enactment of the *Cannabis Act*. Herein, we examine the expense of medical marijuana as damages in personal injury litigation.

### THE CASE LAW

The court set out the relevant principles regarding claims for medical marijuana in *Joinson v. Heran*, 2011 BCSC 727. In that case, the plaintiff Mr. Joinson claimed \$822,000 for the future cost of medical marijuana.

The court confirmed that 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 sufficient to show that it is beneficial; the medical evidence must show it is **reasonably necessary**.

In assessing Mr. Joinson's claim, the court noted that the medical literature regarding marijuana is controversial and this subject remains generally controversial among experts and authorities. The court expressed concern regarding the conflicting medical opinions, scientific controversy and safety concerns surrounding the use of marijuana to treat medical conditions, and emphasized that the court must require compliance with rules and regulations established for the legal purchase of marijuana.

The court found that the medical evidence supported a finding that compensation for some medical use of marijuana was reasonably necessary for Mr. Joinson, but was not prepared to make an award based on the quantity that he used or on the amounts that he had been paying to purchase from a dispensary.

The court awarded the sum of \$30,000 for the future cost of medical marijuana to Mr. Joinson, based on a maximum of 5 grams per day, and priced as if purchased from a Health Canada legally-authorized source,



or, alternatively, at the cost of the medically-equivalent amount of a synthetic substitute.

More recently, the BC Supreme Court denied the cost of medical marijuana as a special damage and as a cost of future care.

In *Murphy v. Hofer*, 2018 BCSC 869, the plaintiff's damages claim regarding injuries that he had suffered in a motor vehicle accident included \$100,000 for the future cost of medical marijuana.

Significantly, Mr. Murphy did not have a prescription from a doctor and therefore did not have any legal right to possess marijuana. As noted by the court, although the Federal Government had announced that marijuana will be legalized later this year, that event had not yet come to pass at the time of the court's decision.

Mr. Murphy was also unable to lead evidence of any medical professional that the beneficial effects of medical marijuana are unavailable from other less expensive medications, nor could he establish that medical marijuana was reasonably necessary to promote his health.

In the result, the court denied Mr. Murphy's claim for the future cost of medical marijuana.

In *Kirby v. Loubert*, 2018 BCSC 498, the plaintiff's damages claim as a result of injuries that he had suffered in a motor vehicle accident in 2009 also included a claim for medical marijuana. A prior accident had rendered him a paraplegic and an incomplete quadriplegic. As a result of the 2009 accident, Mr. Kirby maintained that he had to double his consumption of medical marijuana from 20 g per day before the accident to 40 g per day at the time of trial.

The court found that Mr. Kirby's use of medical marijuana to treat chronic pain was medically justified in a general sense, but found that his use of amounts in excess of 20 g per day was neither reasonable nor medically justified in relation to the injuries he sustained in the 2009 accident. Accordingly, the court denied his special damages and cost of future care claims in relation to medical marijuana.

## **PRACTICAL CONSIDERATIONS FOR INSURERS**

These three cases highlight some of the issues that will become increasingly common as a result of the *Cannabis Act*. Accordingly, insurers will need to consider how the legalization of marijuana will impact their products, policies and risk assessments.

In personal injury litigation, insurers will need to consider the cost of medical marijuana in assessing damages. In *Murphy*, the court was unimpressed with the evidence presented by the plaintiff regarding the



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medical properties of marijuana. Presumably, as the use of marijuana becomes more commonplace, its medical properties will be better understood and more accepted in mainstream science. As a result, a body of scientific evidence could become available on which the court can rely to find that a claimed marijuana expense constitutes a medically-necessary one and award damages accordingly.

There is uncertainty surrounding the new legal landscape regarding marijuana, and litigation will undoubtedly result regarding coverage and exclusion issues. However, provided that insurers assess their risks and policies accordingly, the legalization of marijuana also presents an economic opportunity for insurers to benefit with products that capitalize on the new market created by the enactment of the *Cannabis Act*.

Should you have any questions about this article or the cases presented, please contact me at [ostoklosa@rbs.ca](mailto:ostoklosa@rbs.ca), or on my direct line at 604.661.9245.



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