

Medical Marijuana Costs Deemed Recoverable Special Damage In Personal Injury Claim

June 21st, 2011

In what I believe is the first award of its kind, damages of \$30,000 were recently allowed in a BC personal injury claim for the purchase medical marijuana to help manage the consequences of chronic pain.

In reasons for judgement released earlier this month ([Joinson v. Heran](#)) the Plaintiff sued the Defendant surgeon for medical malpractice. The Plaintiff's claim was in part successful and damages of just over \$310,000 were awarded including a \$30,000 cost of future care assessment for medical marijuana. Mr. Justice Brown provided the following reasons setting out his legal analysis in allowing this claimed damage:

[420] As a judge of the law, I cannot make orders that directly or indirectly endorse unsanctioned accessing of medical marijuana. At the same time, my role is now to assess medical needs and necessities. It is the responsibility of Dr. Surgenor and Dr. Bright, as Mr. Joinson's treating physicians, to address professionally these medical questions and to ensure Mr. Joinson's medical use of marihuana complies with the rules and regulations. Ultimately, however compensation claims for medical use of marihuana, either as a special damage claim or as a future cost of care claim, must be assessed based on recommended guidelines and on costs charged by legally authorized dispensaries. All said, 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: Andrews v. Grand and Toy Alberta Ltd., [1978] S.C.J. No. 6, at para. 120; Aberdeen v. Langley (Township), Zanatta, Cassels, 2007 BCSC 993, at para. 198; Strachan v. Reynolds et al., 2004 BCSC 915, at para. 632.

[421] There is no bright line distinguishing mere benefit and reasonable necessity in this case. But with basic reasoning and application of the above stated legal principles it can be drawn, if roughly. Pain control and its contribution to Mr. Joinson's ability to function to his maximum potential are core considerations here. Without use of medical marihuana or a synthetic substitute, Mr. Joinson would have to increase his use of morphine, which is detrimental, particularly to his functioning: he does not function as well, physically or mentally, without use of medical marihuana. His treating physicians endorsed this treatment option, supporting him in his use of medical marihuana. Other physicians may disagree, but his family physician and psychiatrist see him on a regular basis and, in this particular instance, are in the best place to consider what is medically necessary.

[422] The issue remains controversial and is one which more research and clinical experience must ultimately decide, or at least reveal clearer parameters for the safe and effective use of medical marihuana or its synthetic derivatives. Meanwhile, I find the medical evidence supports a finding that compensation for some medical use of marijuana is reasonably necessary in this case. However, I cannot find for compensation based on the quantity used by Mr. Joinson in his claim for exemption or on amounts he has been paying to purchase products from the TAGGS dispensary. The award will be 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 such as Cesamet.

[423] Ultimately of course, any award must make allowance for the fact Dr. Heran's errant surgery is not responsible for providing Mr. Joinson with a lifetime supply of medical marijuana, certainly not for the portion Mr. Joinson would have used for recreational purposes, irrespective of any of his surgeries. Moreover, I need to account for the medically beneficial effects of his participation in a chronic pain program, notably anticipated benefits that should help reduce his need to use pain medications....

[431] Therefore, I award \$30,000 for costs of medical marihuana.