

## Clients With Addictions

# Advocacy for addicts in personal injury litigation | Sandra Kovacs

By **Sandra Kovacs**



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(July 4, 2017, 8:48 AM EDT) -- Addiction, whether to drugs or alcohol, is a prevalent problem in our society: statistics say roughly one out of every five Canadians will meet the criteria for substance addiction during his or her lifetime.

With these statistics it is not surprising that personal injury lawyers frequently encounter clients with substance abuse disorders. It is critical to a lawyer's ability to effectively advocate for these clients to not only understand the nature of addiction, but how it interacts with the client's injuries and, ultimately, how it might affect the client's ability to recover.

An essential first step is to recognize and overcome the misconception that substance abuse is a choice or a moral failing. Addiction is a disease. It is defined as a mental health disorder in the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5). The body of scientific research and evidence about addiction is ever-growing and it demonstrates a clear neurobiological basis for the disorder with genetic, environmental and epidemiologic factors all playing a role.

Another important step for a personal injury lawyer, when faced with a client who is an addict, is to consider how the pre-existing condition might impact the client's experience of the injury or, conversely, how the injury might impact the client's pre-existing addiction.

Addiction can affect a plaintiff's perception of pain. Addiction also frequently co-occurs with a mental health disorder, and there may be an increased risk for an addict to develop PTSD, depression, or anxiety following injury.

Establishing causation between the injury, the losses that flow therefrom, and the addiction is a significant challenge, an issue highlighted by the trial judge in *Fabretti v. Gill* 2014 BCSC 899 "... the most difficult issue raised by the circumstances of this case is ascertaining the extent to which the plaintiff's drug addiction was caused by the accident. ... It is axiomatic that chronic pain, efforts at self-medication for reasons such as physical pain or emotional stress and drug addiction are likely to either cause or exacerbate problems in psychological adjustment and learning, and thereby alter an individual's life trajectory."

The recent decision of *McCullum v. White* 2016 BCSC 569 makes clear the threshold of evidence that is required to prove a plaintiff's claim for past and future loss of capacity in the context of a pre-existing addiction. McCullum had serious and long-standing difficulties with illegal drug use before two motor vehicle accidents, and the court concluded that the plaintiff failed to prove his drug addiction was aggravated by the accidents, despite an observable escalation of use, because the necessary medical expert evidence was not before the court to establish causation between the accident injuries and that escalation.

In *Smith v. Wind* 2017 BCSC 342 and *Picco v. John Doe* 2015 BCSC 1904, there was sufficient expert evidence for the court to conclude that each plaintiff's addiction was caused or contributed to by chronic pain and trauma arising from motor vehicle accident injuries, but having established causation, each trial judge took into account the negative contingency that the plaintiff would have developed or relapsed into addiction in any event of the accident and reduced the overall award.

A further concern is how to persuade the court of your client's credibility despite the disease. Addiction is associated with deceptive and manipulative behaviour; addicts tend to avoid or distort the truth (to themselves and to others).

While it was in the context of a constructive trust action and not a personal injury claim, in one trial I confess I was wholly unprepared for the judge to focus on the issue of my client's history of alcoholism as a determining factor in assessing credibility. Despite the fact my client, the defendant, had been sober since 1985, the trial judge determined he was not credible with respect to key historical events because of his concurrent alcoholism, and the case turned on that assessment (*Haigh v. Kent* 2012 BCSC 1361).

Credibility was also a concern in *McCullum v. White* and *Zawadski v. Calimoso* 2011 BCSC 45, where each plaintiff's evidence was considered unreliable, but the trial judges in those cases had the benefit of collateral evidence to support their findings with respect to the plaintiffs' addictions and injuries.

When one in five Canadians is statistically prone to addiction, lawyers — and personal injury lawyers in particular — must take the time to educate themselves on the disease and how the case law considers the disease in order to be an effective advocate for their clients. With time, that education of lawyers — and, in turn, the courts — will hopefully lead to fairer outcomes that do not penalize plaintiffs unnecessarily, particularly those plaintiffs who have achieved long-term recovery and are at a low risk of relapse. Such plaintiffs, to my mind, should be commended for their achievements.

*Sandra Kovacs is a plaintiff's personal injury lawyer with KazLaw and a committed volunteer to the local legal community in Vancouver, most recently serving as president of the Lawyers' Inn Society. She would like to thank colleagues Marc Kazimirski and Janelle Mackoff, with reference to their comprehensive paper on this topic prepared for CLEBC on April 21, 2017.*

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