



Marijuana use and the civil jury trial

The rules you must know before evidence of marijuana use is put before the jury

BY ALAN VAN GELDER

In 2010, Randy Hernandez was struck and killed by a vehicle driven by a Los Angeles County Sheriff's Deputy as he stood on a freeway next to his disabled car. Randy had a legal prescription for marijuana. The night before his death he allegedly used some of his prescription marijuana. Trace amounts of marijuana were still in Randy's system at the time of a post-mortem blood test. In the ensuing wrongful death action, the plaintiffs would contend there was no connection between Randy's marijuana use and the events that caused his death.

At trial in 2012, the County desperately tried to get evidence of marijuana before the jury. The County had multiple experts, all of whom admitted they could not connect the marijuana to Randy's death. Still, the County claimed it was a matter of disputed fact that had to be resolved by the jury. Ultimately, after a hotly contested motion-in-limine hearing, the marijuana evidence was admitted. Although the plaintiffs were able to get a verdict against the County, the jury's verdict was compromised by the marijuana evidence, with the jury apportioning 14%

We have added this article to the bicycle and pedestrian issue because the issue of marijuana use and comparative negligence could play a role in an otherwise admitted-liability case of a vehicle striking a cyclist or pedestrian. – Editor

of the fault to Randy. The plaintiffs appealed.

In 2014 the Court of Appeal ordered a new trial in the published decision of *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599. The Court agreed with the Plaintiff that the jury's verdict had been prejudicially tainted by the introduction of evidence related to marijuana.

The lesson to take away from the *Hernandez* decision is that parties need to be careful when attempting to present evidence of marijuana use to the jury. Marijuana evidence is extremely complicated and controversial. If the marijuana issue is improperly admitted into evidence, a party risks having a verdict overturned. The *Hernandez v. County of Los Angeles* decision provides some helpful guidance about the use and misuse of marijuana

evidence at trial. This article will walk you through the *Hernandez* decision and provide some basic rules regarding marijuana evidence.

Rule #1: Marijuana is different than alcohol

Testing positive for marijuana is not the same as being under the influence. In the State of California if your test results show you have a blood alcohol level of .08 you are legally intoxicated, but marijuana is different. Marijuana is processed by the body differently than alcohol. Each person processes and reacts to marijuana differently depending on a variety of factors. Significantly, evidence of marijuana use lingers in the body long after the active effects of the marijuana have worn off.

Evidence of past marijuana use does not establish when the marijuana was actually used or whether the person was suffering from the effects of the marijuana at the time of the incident. Even when the marijuana is no longer actively affecting the user, it can still appear in the blood work. Consider the following discussion from the *Hernandez* case at 1606-08:

[Plaintiff's Medical toxicology expert] testified that "The level of the active



ingredient of marijuana found in Randy's heart during the autopsy was extremely low." It was barely within the ability of the test to measure. In addition, the amount of the inactive metabolite measured in the autopsy was higher than it would have been at the time of the accident, because concentrations that have built up in the tissues over time are released as the tissues break down postmortem.

[In the expert's] opinion, the level of active marijuana ingredient detected in Randy's blood was consistent with his having ingested marijuana between 10:00 p.m. and 12:30 a.m. the night before the accident. The main effects from marijuana occur in the first one to two hours. Most of the effects would have worn off within three to four hours.

[Plaintiff's expert] stated the opinions of the [County's expert] were flawed, because she relied on a model that does not account for postmortem redistribution. The fact that marijuana is detectable does not mean Randy was impaired or under the influence of marijuana. [Plaintiff's expert] admitted the study he relied on used less potent marijuana samples than marijuana on the current market and the concentration affects the results.

[The County's expert] testified that in her opinion, Randy was under the influence of marijuana at the time of his death. Marijuana is not stable and dissipates after death, but the autopsy performed a few days after Randy's death showed he still had the active ingredient in the blood in his heart. Based on the presence of the active ingredient, she concluded the amount must have been higher prior to the accident and Randy had used it recently enough to be impaired at the time of his death. She also testified that the level was well within the measurable amount for the test.

[The County's expert] concluded Randy used medical marijuana approximately five to six hours before his death. The model she relied upon suggested a

wide range of times in which Randy could have taken the marijuana based on the ratio of the active ingredient and the metabolite in Randy's blood, but she agreed with [Plaintiff's expert's] concern that the model was based on living participants. Therefore, [the County's expert] accepted the conclusion that Randy used medical marijuana the night before the accident, because it was within the range provided by the model and consistent with his mother's testimony.

[The County's expert] could not quantify the level of impairment that Randy was experiencing at the time of the accident. The level measured in his blood could not be related to an alcohol level. [The County's expert] did not do any accident reconstruction, so she could not form an opinion that the marijuana Randy used caused the accident. Although [the County's expert] could say where Randy was in the ranges and effects, [she] could not say that Randy would not have died if he was not impaired. She disagreed with [Plaintiff's expert] that Randy's level of the active ingredient was so low that it would not have an effect on his driving. She could not say that the marijuana Randy used the night before caused his death the next morning or that being under the influence caused his death.

As the above discussion illustrates, the science related to marijuana can get complicated especially when trying to use a blood test to work backwards in an effort to prove the effect the marijuana was having, if any, at the time of the incident. This discussion leads us to the next important rule.

Rule #2: You need an expert, or several

You need an expert and, depending on the case, you may need multiple experts. There are many traps and pitfalls that need to be navigated when dealing with marijuana. As set out above there are questions as to how testing is done,

questions related to the test results, the meaning of the test results, and how those test results can be applied to your case. The issue gets even more complicated when a party tries to use the blood work to reconstruct how marijuana was affecting a person at the time of the incident.

You are a lawyer, not a toxicologist. Only an expert trained in the field is going to be able to explain to you and the jury why the opposing expert is playing fast and loose with the facts and the science. As the Court in *Hernandez* wrote at supra 1614:

Where the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation.

(*Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563, 1569.)

The probable effect of intoxicants other than alcohol is a topic 'sufficiently beyond [the] common experience' of most jurors that expert testimony is required. [Citations.] (*Pedefferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359.)

Also, while it is important to have an expert who can handle the science of marijuana and testing for marijuana, sometimes the case will require more than one expert. It is not enough for the party to establish that there was marijuana in the system or that the party was potentially under the influence of marijuana. As set out in CACI Instruction 404, "A person is not necessarily negligent just because he or she used alcohol [or drugs]. However, people who drink alcohol [or take drugs] must act just as carefully as those who do not."

It is not enough to show marijuana use. In order to get the marijuana evidence in front of the jury, the particular facts of your case might require testimony about how the marijuana played a role in causing the incident. This may involve additional experts in accident reconstruction and/or human factors, or others. These experts might be necessary to help put the marijuana use in the



context of the behavior of the person at the time of the incident and link the marijuana to the incident. This leads us to our next and important rule of this article.

Rule #3: Substantial factor

Without expert testimony that marijuana was a substantial factor in causing the incident, marijuana evidence should be inadmissible. In *Hernandez*, the County's attempt to put evidence of Randy's alleged marijuana use before the jury was riddled with problems related to testing and analysis of the actual test results. In the end, the County was unable to connect Randy's alleged marijuana use to his death. None of the three County experts (pharmacologist/forensic toxicologist, accident reconstruction, and human factors) could provide an opinion that marijuana was a substantial factor in causing Randy's death.

Comparative fault is an affirmative defense which places the burden of proof on the County. As the *Hernandez* Court wrote at page 1614:

The comparative fault doctrine "is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine 'is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss.'" [Citation.] (*Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1233, quoting *Knight v. Jewett* (1992) 3 Cal.4th 296, 314.)

Generally, the defendant has the burden of establishing that a percentage of fault is properly attributed to the plaintiff, other defendants, or nonparties to the action. The County tried to compensate for this problem by arguing that although the marijuana claim was weak, and there was no expert testimony on causation, jurors

were sufficiently familiar with marijuana that they could decide the issue themselves. The Court cited parts of the Defense closing argument at page 1609:

The County's attorney added, "There was evidence of marijuana. You folks are going to do with it what you will. None of our experts could say it caused the problem. Did it contribute to it? I don't know. Think about this. The blood was drawn 50 hours after the incident. And 50 hours is a long time. That's more than two days. Two days [later] and then tested, and those levels are still in the blood. I think that counts for something. ...

There is competent evidence that he was under the influence. You folks are going to do with it what you will.

The Court of Appeal rejected the attempt by the Defendant holding:

In this case, the County failed to present evidence that Randy's marijuana use was a substantial factor in causing his injuries. [The County expert] could not quantify the level of impairment that Randy was experiencing at the time of the accident, did not form an opinion that the marijuana Randy used caused the accident, and could not say that the marijuana Randy used or being under the influence of marijuana caused his death. *If none of the County's experts could say Randy's marijuana use was a substantial factor in causing his death, the jury could not speculate there was a causal connection between Randy's use of marijuana and his death. Therefore, the evidence of marijuana use was irrelevant and should have been excluded.* (Cf. *Smith v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 763, 771-775 [employer that denied workers' compensation benefits based on employee's intoxication must prove intoxication was a proximate cause or a substantial factor in causing accident, as was shown by expert testimony that judgment and reaction time would be impaired seriously at a blood-alcohol level of 0.25 percent and could have contributed to the accident].) (*Hernandez*, at 1614.)

The County's closing argument made it apparent that Randy's marijuana use was not relevant. The County's attorney admitted there was no evidence Randy's marijuana use contributed to his death, but he invited the jury to speculate about the effects of marijuana anyway.

Because the experts could not identify any manner in which marijuana use contributed to the accident that injured Randy or his decision to exit the Land Rover, the evidence was not relevant to the issues and had no probative value. *Even if the presence of marijuana in Randy's blood had some minimal probative value, the danger of undue prejudice was substantial. The conflicting evidence about marijuana use confused the issues for the jury and encouraged them to speculate whether marijuana use was a factor in the accident in some way, when there was no evidence to support causation.* The County's attorney even used the marijuana evidence to suggest that Randy might not have had a legitimate medical need for marijuana or that marijuana was not a legitimate treatment option. This was impermissible character evidence that had nothing to do with negligent actions on the morning that Randy was killed, because Randy's character was not at issue.

(*Id.* at 1615.)

Rule #4: Improperly admitted evidence = reversal of verdict

Improperly admitted marijuana evidence can result in reversal of a verdict. While it is true that certain segments of society have become more accepting of marijuana (especially medical marijuana) over the years, marijuana is still a hotly contested issue. There are conflicts in the science, conflicts in the politics, and conflicts between generations and social classes on the issue. Combine those conflicts with a lack of understanding from many jurors as to the effects of marijuana and marijuana can potentially turn into a very prejudicial issue.



During the appeal, defendant argued that times have changed and that plaintiff was stirring up arguments about old fears and prejudices related to marijuana from the 1950's. The Court rejected the argument and found that the issues relating to marijuana are complicated and can very easily taint an entire trial and verdict.

It is not enough to point to a positive marijuana result in a blood test and leave

it to the jury. Without the right science, the right experts, and a solid connection between marijuana and the cause of the incident, marijuana should not be admitted into evidence. The *Hernandez* case demonstrates that the Court of Appeal will not hesitate to overturn a verdict if claims of marijuana are improperly tossed into the jury box.



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