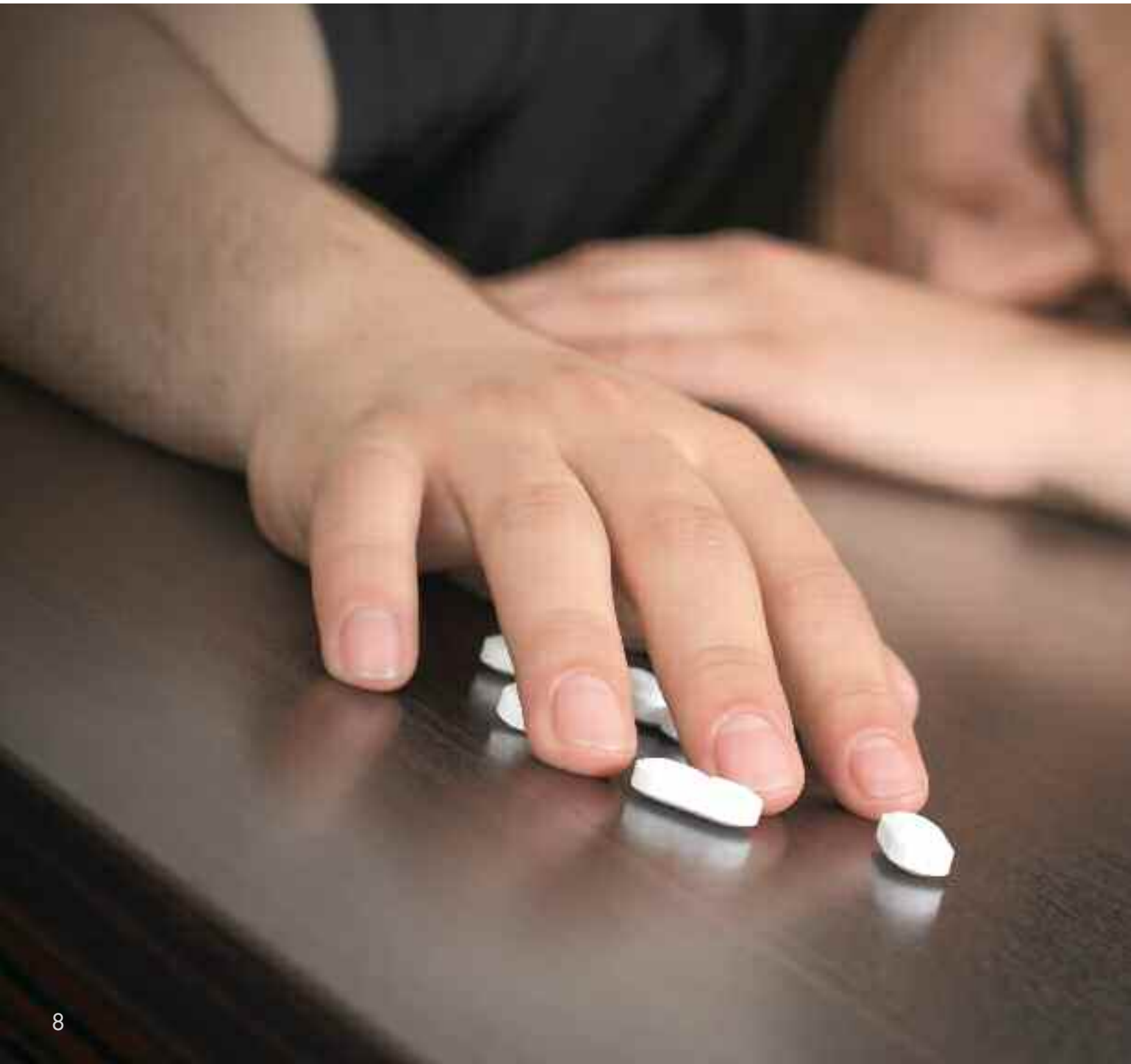
The Opioid Epidemic: The Potential Consequences on Claims Handling



Opioids are a class of pharmaceutical medication used primarily to treat pain. They include codeine, fentanyl, morphine, oxycodone, hydromorphone and medical heroin. The quantity of opioids sold to pharmacies and hospitals for prescriptions in Canada has increased by more than 3,000% since 1980 with Canada being the second-largest consumer of prescription opioids in the world (after the US). Nonmedical prescription opioid use is estimated to be the fourth most prevalent form of substance abuse after alcohol, tobacco, and cannabis.

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Risk managers need to be particularly sensitive of the impact that the opioid crisis could have as drug addiction and the associated losses could result in enhanced damages

While the benefits in reducing an individual's pain experience through the consumption of opioid medication is clear, the longer term side-effects are now known to be very significant and to include increased tolerance, physical dependence, substance use disorder, and worsening pain (opioid induced hyperalgesia). Additionally, opioid users who reduce or alter their consumption patterns often experience physical withdrawal symptoms that include insomnia and widespread / increased pain that make weaning oneself off the medication quite challenging. Given this and given that these drugs are highly susceptible to diversion, misuse and abuse which results in increased risk of addiction and overdose, special consideration is necessary when prescribing opioid medication.

Unfortunately, the addictive nature and the full risks associated with consuming opioid medication was not fully understood or appreciated until relatively recently. The misinformation in the medical community coupled with the zeal with which opioids were previously promoted and prescribed over the last number of years to treat pain, both by the pharmaceutical industry and well-intentioned medical professionals, has resulted in what is now being described by many public health officials as a full-on epidemic. It has become readily apparent that improper opioid usage, which often arises from improper opioid prescriptions and supervision, has resulted in addiction and, in many cases, death.

In 2017 alone, nearly 4,000 Canadians lost their lives to opioid-related overdoses. To make things worse, 2018 was on pace to account for even more, with 1,036 recorded opioid-related deaths between January and March of that year. An epidemic that began primarily in Western Canada has made its way to Ontario. In fact, British Columbia is the only Canadian province that saw more opioid related deaths (390) than Ontario (320) during the first three months of 2018.

With the ease in which people were able to obtain opioids to address pain and given their addictive nature, understanding the potential effect of this epidemic on claims for pain and suffering and an injured person's legal entitlement needs to be properly considered and understood. Risk managers need to be particularly sensitive of the impact that the opioid crisis could have as drug addiction and the associated losses could result in enhanced damages.

Is a tortfeasor liable for an addiction that develops following an injury?

It is well established that the court will apply the "but for" test when tasked with determining whether

there is a substantial connection between allegedly negligent conduct—vehicle accidents, slip/trips and falls, work place injuries – and the damages that flow from the injury event. The plaintiff must show on a balance of probabilities that the injury and damages would not have occurred *but for* the defendant's negligent act or conduct.

In instances where an injured person suffers further injuries after the initial injury event, the person responsible for causing the initial injury is often held liable for these subsequent injuries and impairments. This exposure traces itself back to the decision of *Mercer et al. v. Gray* where Justice McTague held:

> *It seems to me that if reasonable care is used to employ a competent physician or surgeon to treat personal injuries wrongfully inflicted, the results of the treatment, even though by an error of treatment the treatment is unsuccessful, will be a proper head of damages.*

Determining whether addiction is related to an injury event is very complicated. It requires a thorough understanding of the mechanism of injury, the subsequent medical treatment, the prescription of medication, and the actions taken by physicians in managing the prescription and use of opioid medication. The injured person does not have to prove to a scientific certainty that, but for the accident, they would have developed a drug addiction, only that it was more likely than not.

When tasked with determining whether a tortfeasor is responsible for an addiction to pain medication that arises following an injury event, the Court will be asked to answer "but for the accident, would the injured person have become addict-

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ed to pain-relief medication?" Given the logical connection between an injury event and the prescription of opioid medication, Canadian courts have routinely held that those who are liable for causing the injury are also responsible for the addiction to pain medications and all associated damages, so long as the injured person's addiction is temporally connected to the injury event.

Given the nature of addiction, addiction can even arise years later and be attributable to an earlier injury event. This was specifically found in the case of *Fabretti v. Gill* where a teenager suffered injuries in a motor vehicle accident in the summer before he started High School and was found to meet the criteria for drug and stimulant addiction 6 years after the accident. While the Court was cognizant of the statistics that by age 15, 60% of people living in Western Canada have tried marijuana, it nonetheless held that the person at fault for the motor vehicle accident was liable for the addiction and awarded enlarged non-pecuniary damages to account for his addiction.

What about the Physician who prescribed the Opioid Medication? What will it take to establish liability as against the Physician?

Establishing liability as against a physician (or other medical professional) responsible for the prescription of opioid medication is a particularly challenging task. It requires a careful look at the injured person's medical history and a thorough understanding of the subsequent medical treatment that resulted in the prescription of opioid medication in order to have any chance in finding that the physician was negligent. Furthermore, whether the physician properly monitored the injured person following the prescription of opioid medication will also need to be examined.

Determining whether the physician's actions were negligent and caused or exacerbated an injured person's injuries requires a thorough analysis of whether the physician's actions fell below the standard of care applicable to physicians. A physician's standard of care has been addressed on many occasions and was recently restated in the decision in *Jarvis v Gnidec* where it was held:

> *Physicians are not held to a standard of perfection judged from the position of hindsight. They are generally not responsible for errors and mistakes made in the exercise of their professional judgment, unless their conduct has fallen below the standard of care of their profession in respect of the particular task they have undertaken.*

Given this, it is necessary to know the standards set by the medical profession for the prescription of opioid medication prior to initiating an action where it is alleged that a physician's conduct failed to meet the applicable standard of care.

In 2017, the National Pain Centre produced the Canadian Guideline for Opioids for Chronic Non-Cancer Pain to address the risks associated with prescribing opioid medication. These guidelines recommend that

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physicians carefully consider whether a narcotic or controlled substance is the most appropriate choice for the patient and must consider whether alternative treatment or drug is more clinically appropriate. If the decision is then made to prescribe opioid medication, physicians must determine a safe and effective dose, recognize and respond to signs of abuse, and must continue to monitor patients for emerging risks or complications. Additionally, prescribing opioid medication must be discontinued where the medication no longer meets the physician's therapeutic goals, or the risks outweigh the benefits. Physicians must then ensure that the discontinuation is undertaken consistently and with consideration for the safety of the patient.

These guidelines have been endorsed by the College of Physicians and Surgeons of Ontario as a reference for physicians who prescribe opioid medication. Given this, it is reasonable to expect the courts to utilize the National Pain Centre's guidelines when analyzing whether the physician who prescribed the opioid medication was negligent.

In 2018, the Ontario College of Physicians and Surgeons Discipline Committee (the "Committee") addressed the issue of negligent prescription of opioid medication in the decision of *Ontario v. Garcia*. The Committee was faced with a doctor who was seeing, on average, between 10 to 13 patients per hour and prescribing opioid medication without proper supervision. The

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Committee ultimately determined that the doctor was reckless in terms of the amount of opioid medication prescribed and with failing to properly monitor his patients, resulting in his patients being at an increased risk of harm. The Committee noted that the opioid crisis has become a significant public health problem in our society and recognized that physicians who prescribe opioids inappropriately contribute to that crisis.

So who is liable if it is found that the Physician prescribed Opioids Negligently?

In cases where multiple parties are found to have acted negligently then the tortfeasors will be held jointly and severally liable and the court will apportion liability according to each party's degree of fault. Determining negligence and apportioning fault will almost certainly be complicated where there are allegations against a physician relating to the prescription of opioid medication. This was recently confirmed by the British Columbia Supreme Court where it was asked whether a trial where there were allegations of negligence as against a physician relating to the prescription of opioid medication was suitable to be determined by a jury. The court found that the jury would be required to consider expert opinions regarding the evolving standard of care in the controversial area of opioid treatment and did not believe that the determination of apportionment of fault between the tortfeasors was suitable for a trial by a jury due to the complexity of these issues.

However, there are also situations where a tortfeasor could be let off and, instead, the physician who prescribed the opioid medication will be held completely accountable for the development of the addiction. This is possible under the doctrine of *Novus Actus Interveniens* which states that the tortfeasor is *not* liable for the aggravated loss if an unforeseeable event occurs that breaks the chain of causation. Ontario courts have held that *Novus Actus Interveniens* may apply in cases where medical treatment is so negligent as to be actionable.

To establish that the negligent prescription of opioid medication amounts to an intervening act that breaks the chain of causation will be very difficult and will be fact-dependent. Despite this challenge, it could be beneficial to a party to attempt to establish the break in the chain of causation in instances where the initial injury event and associated damages are relatively minor while the damages arising from the subsequent addiction are significant.

Recommendations for Risk Managers

With the increasing scale of the opioid epidemic, it is reasonable to expect physicians to alter their treatment strategy to address a person's

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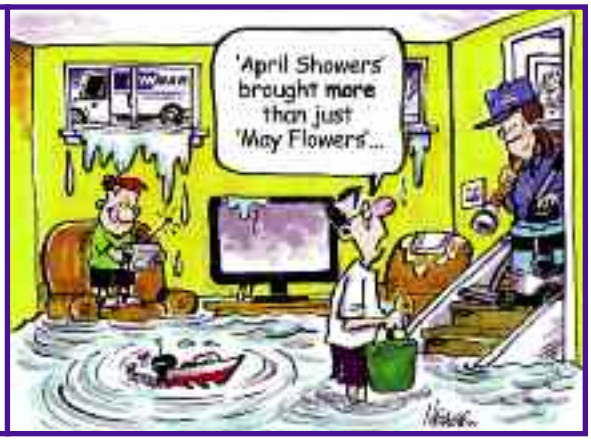
pain complaints. Given the recommendations from the National Pain Centre, physicians may prescribe cannabis or other alternative therapies before prescribing opioid medication. While the altered methods of treating pain will certainly have a knock-on effect and unexpected consequences, this outcome is likely to be found to be reasonable given the risks now known to be associated with the consumption of opioid medication.

It is also reasonable to expect opioid addiction to become more prevalent in claims. While it is expected that it will be the exceptional case where a physician is found to have acted negligently and caused or contributed to the injured person's damages, it must nonetheless be properly considered and investigated given the recently enhanced knowledge associated with the risks associated with the prescription of opioid medication.

Establishing medical negligence for the prescription of opioid medications will not be easy and an aggressive defence advanced by the Canadian Medical Protective Association on behalf of the physician is to be expected. Significant and thorough investigations will need to be undertaken to secure all evidence associated with the care provided subsequent to the injury event and all possible facts relating to the prescription and monitoring of opioid medication. It should be assumed that expert assistance will always be necessary to successfully argue that a physician has failed to meet the applicable standard of care. Determining whether the prescription of opioids constitutes negligence will no doubt be a costly exercise.

Given this, it is recommended that risk managers (and all involved in the claims handling experience) know



how to manage this altered risk and how best to control/minimize the potentially enhanced damages.

Michael Blinick is a litigator. He brings an energetic yet reasoned approach to his litigation practice. While a primary aspect of his practice involves the defence of personal injury claims, Michael has varied experience and is routinely retained to represent companies with varied risks or who seek to recover for losses caused by others. He has represented clients at the Court of Appeal, Superior Court of Justice, Ontario Provincial Court, in private arbitration and at various administrative tribunals.

Michael graduated from Queens University in 2008 and was called to the Bar in 2009. Before this Michael graduated from the Kinesiology Program at McMaster University and worked in a physiotherapy clinic where he routinely assisted individuals in their recovery from pain and orthopaedic injuries. Since then, he has been assisting risk managers, insurers and business owners and operators with managing their litigation risk in a cost-effective manner. He is particularly interested in emerging industries and assisting companies identifying risks and developing protocols to minimize the future risk of litigation.

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