

Personal Injury

The legal challenges of chronic pain | Bernard Gluckstein and Jan Marin

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(October 3, 2017, 9:53 AM EDT) -- North America is in the midst of a crisis caused by opioids, highly addictive painkillers that are being blamed for thousands of deaths. The Ontario government has pledged millions of dollars to handle the situation, but it is failing to recognize the root of the problem: chronic pain.

Chronic pain affects millions of Canadians, according to a report by the Canadian Pain Coalition, "The Painful Truth: The State of Pain Management in Canada." It has traditionally been treated by opioids, since there has been a lack of suitable and affordable alternatives, and opioids possess powerful pain-treatment capabilities.

But due to mounting scrutiny over the use of opioid prescriptions as a treatment method, the Ontario Ministry of Health and Long-Term Care issued a notice in July 2016, announcing reduced funding for those purchasing these prescriptions. With the opioid crisis and subsequent awareness growing, it is essential to examine the actual cause of the problem and not simply its effects. The real culprit is chronic pain and the way it's viewed by our legal system.

The U.S. Centers for Disease Control and Prevention, in its "Guideline for Prescribing Opioids for Chronic Pain," defines it as pain that lasts three months or more past the time of normal tissue healing. The cause of the pain is often unknown and the effects are invisible to observers. Chronic pain sufferers are affected both physically and mentally. However, because the pain is invisible, it is often a challenge for them to convince medical professionals that their pain is real, and that they are in need of the same treatment and support as people with visible injuries.

For example, someone who sustains fractures in a motor-vehicle accident may need to take time off work and will likely require care and rehabilitation. Since they have broken bones, they will likely need an X-ray and receive a cast and a specific treatment plan from their doctor. Those treatment recommendations and related expenses will likely be accepted by their insurance company as a legitimate claim. After a few weeks, once the bones have healed and they have returned to their normal life, the pain may continue, even though tests show the initial injuries have completely healed.

This pain can be the result of visible injuries, such as a broken bone, but can also be caused by invisible injuries, such as common sprains or strains. When the pain — whether from visible or invisible injuries — continues past the standard time that tissue heals, it is designated as chronic pain. For many chronic pain sufferers, their lives and ability to function are affected, but treatment and insurance payouts are no longer available. Because the pain is invisible and often cannot be explained by doctors, the patient's assertion is the only information available.

Historically, chronic pain has had a negative perception within the legal system. As recently as 2003, the Nova Scotia government had a regulation in place that explicitly excluded long-term disability benefits to those suffering from chronic pain — the same benefits available to those with visible injuries. Two Nova Scotia workers argued that the regulation was discriminatory, and their case was heard by the Supreme Court of Canada in the landmark decision of *Nova Scotia (Workers' Compensation Board) v. Martin* 2003 SCC 54. The top court concluded that the law violated s. 15 of the *Canadian Charter of Rights and Freedoms* and discriminated against those suffering from chronic

pain.

In his summary Justice Charles Gonthier (as he then was) stated: "... since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians."

Despite the Supreme Court ruling that chronic pain is a legitimate disability and should be treated as any other injury, the same problem persists today: convincing courts, insurance companies, employers and health-care providers of the legitimacy of chronic pain and its adverse effects.

In *Mandel v. Fakhim* 2016 ONSC 6538, a recent decision by Ontario's Superior Court of Justice, the court acknowledged the difficulty that those suffering from chronic pain face in persuading juries their pain is real. In this particular case, the plaintiff suffered from chronic pain stemming from a motor-vehicle accident in 2009. His injuries prevented him from working, and he needed daily medication and was enduring invasive treatment.

In his lawsuit, he claimed \$1.2 million in compensation for his injuries, but the jury awarded him a mere \$3,000, all of which would be applied to the \$30,000 deductible, essentially leaving him with nothing. In his decision, Justice Frederick Myers said that "the usual experts for both sides gave the usual testimony. And the jury gave the usual verdict."

The statement by Justice Myers demonstrates the problems facing those suffering from chronic pain: Insurance companies often opt for jury trials in cases of chronic pain, as it is difficult to convince a jury that a plaintiff suffers from invisible injuries, the court said. Insurance companies can typically find an expert witness willing to testify that the plaintiff has completely recovered from any injuries sustained from the original accident, as stated in *Bruff-Murphy v. Gunawardena* 2016 ONSC 7. With a lack of objective evidence, the case is often decided based on credibility, and since jurors cannot see the plaintiff's pain, they have a hard time accepting the plaintiff's assertions.

Although the Supreme Court spoke out about the challenges of chronic pain in *Martin*, the same difficulties persist today. Not only do sufferers face barriers and increased scrutiny by the government and treatment providers, they face similar obstacles in our legal system.

Personal injury lawyers must anticipate these legal challenges and be proactive from the beginning. Proper experts must be contacted (i.e., reliable expert witnesses who are able to explain the impact of the invisible injuries on the victim to the trier of fact (judge or jury). Medical professionals who have treated the plaintiff are in an especially good position to speak to the effects of the injuries on the plaintiff.

Lawyers should prepare their client for the examination for discovery. The plaintiff must be consistent and forthright throughout the litigation process to demonstrate credibility in front of the trier of fact. That will assist in securing a fair award for damages. Usually the best corroborative evidence is from lay witnesses who knew the plaintiff before the accident and can testify as to the differences they now observe.

While plaintiff-side personal injury lawyers have strategies and methods to work within the legal system, the issues affecting chronic pain sufferers need to be addressed much earlier. It is essential to devote resources to address and treat the cause of this crisis. This begins with health-care providers but also includes educating the public. If these individuals have the tools, treatment and support from the get-go, instances of opioid usage and addiction could be reduced.

For many addicts, their journey began with chronic pain, and they took opioids to manage their agony since they had no other recourse. Chronic pain is real and can be debilitating. We need to ensure these individuals are not failed by society, medical service providers or the legal system.

Bernard Gluckstein is the founding partner of Gluckstein Personal Injury Lawyers in Toronto and has 54 years of experience in personal injury litigation. Within the firm, he is personally involved in most of the serious cases and takes an advisory position on most other cases. Jan Marin, a lawyer at the firm, focuses her practice on motor-vehicle collisions, occupier's liability, product liability and medical malpractice.

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