

Murder Liability for Prescribing Opioids: A Way Forward?

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In February 2016, a California judge sentenced Dr Hsiu-Ying Tseng (“Dr Tseng”) to 30-years-to-life in prison after a jury found her guilty of second-degree murder for 3 patient drug overdose deaths.¹ This marked the first time in American history that a physician was held criminally liable for the *murder* of a patient by means of extreme recklessness in opioid prescribing. Although Dr Tseng’s unique conviction reflects her outlier prescribing practices, the recently spotlighted potential for criminal penalty may have a chilling effect on physicians treating patients for pain.

A general practitioner in southern California since 2007, Dr Tseng played a role in at least 12 patient overdose deaths, all by prescribing opioids in dangerous ways—namely, in high quantities or dosages, with polypharmacy potential, and with limited knowledge of patient symptoms or history.¹ Despite receiving repeated warnings from coroners and law enforcement officials that her patients fatally overdosed on their medication, Dr Tseng failed to alter her practices.¹ Although Dr Tseng’s explicit awareness and conscious disregard of the risks resulted in a high-profile murder conviction, the case is unlikely to increase the prospect of criminal charges for opioid prescribers who take steps to legitimately treat patients with pain. Moreover, although the small number of physicians who truly act as drug dealers or grossly deviate from recommended clinical practices warrant criminal prosecution, this approach may not be the answer to curb overall prescription opioid misuse—a larger epidemic that calls for prevention and treatment measures of broader scope.

CRIMINAL LIABILITY FOR PRESCRIBERS

The growing movement to hold physicians like Dr Tseng criminally responsible for patient overdose is a logical extension of the

prescription opioid epidemic’s iatrogenic roots. A heightened focus on adequate pain management in the 1990s and early 2000s liberalized opioid prescribing.² Aggressive marketing campaigns spearheaded by pharmaceutical manufacturers persuaded the medical community to believe that narcotics could be safely prescribed for chronic pain without widespread risk of addiction.³ Prescribers even faced threats of tort liability and medical licensing board sanction for inadequate opioid prescribing for chronic pain.² This climate change that legitimized opioid prescribing resulted in sharp increases in the supply and prescribing of opioids and laid the foundation for misuse.⁴

As overdoses involving prescription opioids rise, a small but increasing number of physicians face criminal charges for opioid prescribing under state homicide or controlled substance laws or the federal Controlled Substances Act (CSA).^{5,6} Physicians traditionally confront civil medical malpractice suits, restrictions on hospital privileges, and medical board discipline related to patient injuries attributed to their care, including negligent prescribing.⁶ But more recently, extreme cases like Dr Tseng’s raise the question: when do physician opioid prescribing behaviors become criminal?

For a prescriber to be criminally (as opposed to civilly) charged, he or she must exhibit a blameworthy, or culpable, state of mind.⁷ Murder charges under state homicide laws can follow when a physician engages in risky opioid prescribing that is likely to result in an adverse consequence, such as death, *purposefully* or with a *subjective understanding* of the risks (Table^{1,8}). Lesser involuntary manslaughter (sometimes termed “criminal negligence”) charges require *reckless* prescribing, where the prescribers should have been aware of the risks but evidence suggests they subjectively did not appreciate them (Table⁹). Under the CSA and many comparable state controlled substance laws, it is a crime to prescribe controlled

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TABLE. High-Profile Criminal Cases Against Opioid Prescribers for Patient Overdoses

Case	Description of criminal charges	Level of criminal intent	Potential penalties	Outcome of case
<i>State of Florida v Gerald Klein</i> , Florida Palm Beach County Circuit Court, Palm Beach County (2015) ⁸	Dr Klein was charged with <i>first-degree murder</i> for the 2009 overdose death of 24-y-old Joseph Bartolucci. Dr Klein was accused of causing Bartolucci's death by overprescribing opioid pain medications and his clinic was accused of providing thousands of hydromorphone and oxycodone pills into the community on a daily basis in disregard of the safety of the community	Homicide caused by unlawful distribution of controlled substances <i>knowingly</i> . No <i>premeditation</i> requirement, but the drug must be proven to be the proximate cause of the death of the user (Fla. Stat. §782.04(1)(a)3)	Death penalty or life imprisonment without the possibility of parole (Fla. Stat. §775.082(1))	The jury acquitted Dr Klein on the first-degree murder charge because the patient was found negligent for his own actions that may have contributed to his death, but Dr Klein was convicted on 1 minor drug charge
<i>State of California v Hsiu-Ying Tseng</i> , Superior Court of California, County of Los Angeles (2016) ¹	Dr Tseng was arrested in 2012 on second-degree murder charges for the overdose deaths of Joey Rovero, Vu Nguyen, and Steven Ogle as a result of prescriptions she wrote. Despite being notified over a dozen times that her patients had overdosed, Dr Tseng continued similar prescribing practices. According to evidence presented, these included providing prescriptions in 3 min and absent a physical examination to patients with evidence of addiction; and writing more than 27,000 prescriptions over a 3 y period starting in January 2007 (an average of 25 per day)	Unlawful killing of a human being with <i>malice aforethought</i> (ie, with an appreciation of the risk) (Cal. Pen. Code § 187-189)	Imprisonment for 15 y to life (Cal. Pen. Code § 190(a))	The jury found Dr Tseng guilty of second-degree murder. The judge sentenced Dr Tseng to 30 y to life in prison
<i>State of Iowa v Daniel J. Baldi</i> , Iowa District Court, Polk County (2014) ⁹	Pain specialist Dr Baldi was charged with 7 counts of <i>involuntary manslaughter</i> for the overdose deaths of his patients, including Paul Gray, the bassist of the band Slipknot. Dr Baldi was accused of unintentionally causing Gray's death by writing high-dose prescription opioids from December 2005 to May 2010	Unintentionally causing the death of a human being, including by the commission of an act in a manner likely to cause death or serious injury (Iowa. Code § 707.5)	Imprisonment for up to 2 y and fines of at least \$625 but not to exceed \$6250 (Iowa. Code § 903.1(2))	The jury acquitted Dr Baldi on all involuntary manslaughter charges, because there was no clear evidence showing the patients in question died from overdoses of drugs Dr Baldi prescribed

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TABLE. Continued

Case	Description of criminal charges	Level of criminal intent	Potential penalties	Outcome of case
<i>United States v William E. Hurwitz</i> , United States District Court for the Eastern District of Virginia (2007) ¹⁰	In a retrial, Dr Hurwitz was charged with over 50 counts of drug trafficking, including several counts of drug trafficking resulting in serious bodily injury and drug trafficking resulting in death in 2004. He was accused of distributing pain medicine in violation of the Controlled Substances Act	Knowingly and intentionally distributing drugs outside the bounds of medical practice (21 U.S.C. § 841(a))	Imprisonment for up to 20 y and fine of \$1 million (21 U.S.C. § 841(b))	In the retrial, the jury found Dr Hurwitz guilty of 33 counts of drug trafficking. The judge sentenced Dr Hurwitz to 4 y and 9 mo in prison

substances, such as opioids, for reasons other than a legitimate medical purpose and in the usual course of professional practice (Table¹⁰).^{5,6}

Although a medical malpractice suit might settle for \$500,000, leaving a stigma on a physician's record and inflicting monetary losses (traditionally covered by physician malpractice insurance), stiffer penalties are imposed on criminals. Those convicted of murder, like Dr Tseng, can face significant prison time or even the death penalty (Table). Involuntary manslaughter charges typically carry shorter prison times or substantial fines or both (Table). Furthermore, if a physician is convicted of murder or manslaughter, his or her license can be permanently revoked by the state medical board, making such charges an enticing option for prosecutors in egregious cases.⁶ Penalties for violations of the CSA or state controlled substance laws can also be harsh (Table) and are often accompanied by medical board temporary suspensions of physicians' licenses.⁶

Given varied prescribing contexts and legal standards across states, regrettably it may be unclear to an opioid prescriber what can render him or her criminally liable.⁶ Juries often have a hard time assessing a prescriber's culpable state of mind and therefore look to objective practices to infer what the prescriber was thinking.^{7,11} Objective evidence presented in Dr Tseng's case and others that resulted in criminal charges include explicit notice of patient overdoses but failure to change opioid prescribing practices; failure to conduct thorough patient examinations and take histories (including asking about drug use); prescribing in extremely high volumes (eg, thousands of opioid prescriptions per year) and dosages; and being linked to a pattern of patient overdose deaths (Table). Although such elements increase the perception of criminal wrongdoing, actual convictions can be highly unpredictable and circumstantial.

BEYOND THE CRIMINAL JUSTICE SYSTEM

Perceived possibilities for murder conviction carry important implications for how physicians approach opioid prescribing going forward. Because the medical community is often risk-averse, the threat of consequences like Dr Tseng's, coupled with an inability to fully

control the environment in which patients receive and self-administer prescription drugs, may render physicians more reluctant to prescribe opioids, even when benefits of their use may outweigh harms. The inadvertent aftermath may be undertreated patients with pain. In some cases, such as in rural America, finding alternative treatment may not be a possibility for patients.

However, physicians—particularly the majority who prescribe opioids in an earnest attempt to alleviate legitimate patient pain—may take comfort that the legal risks can be managed. Prescribers can take a number of steps to minimize perceived commission of a crime. In broad strokes, physicians should vigorously validate that opioid treatment is a clinically appropriate option for their patients (eg, physicians may use validated instruments to track patient outcomes¹²), assiduously ensure that the patients remain appropriate candidates post-prescribing¹³ (eg, opioid therapy should be continued only if clinically meaningful improvement in pain and function still outweigh risks), and readily revise the course of treatment if patients manifest any indications of misuse.⁶ Specific actions physicians can take to minimize their criminal liability exposure include taking thorough patient histories and performing clinical tests to assess symptoms and misuse potential; educating themselves on appropriate pain prescribing and patients as to opioid risks; checking their state prescription drug monitoring programs for misuse flags or polypharmacy concerns; following available guidelines, such as those recently issued on opioid prescribing for chronic pain by the Centers for Disease Control and Prevention⁴; referring patients to pain specialists when appropriate; and carefully documenting the above actions in a patient's medical file.

Although some see criminal convictions as a positive step that may deter future dangerous prescribing, more likely they hold limited potential to address the larger epidemic to which well-intentioned physicians and established prescribing norms contribute heavily. Rather than a small subset of physicians accounting for a disproportionately large percentage of opioid prescribing, the phenomenon is distributed across many prescribers.¹⁴ Although certain rogue providers, like Dr Tseng or

“pill mill” clinics that distribute large quantities of opioids, exhibit criminal culpability, blameworthiness for widespread opioid overprescribing in the broader medical community is less clearly attributed. For instance, many drug seekers—like the 2 college students who drove over 300 miles in pursuit of quick prescription fixes before returning home and overdosing in the murder case against Dr Tseng¹—are already addicted before resorting to drug-dealing physicians.

CONCLUSION

Dr Tseng's behavior and that of “pill mills” engaged in irresponsible, outlier opioid prescribing warrant criminal charges and medical board discipline to deter their individual behaviors and send a clear message to others tempted by the pecuniary gain. But, combating opioid misuse in America and avoiding undertreatment of pain will require going beyond the criminal justice system and instead focus on more judicious, informed opioid prescribing across all contexts. Clinical prevention measures—such as the prescriber steps recommended above that serve the dual benefit of reducing physician liability exposure, developing better tools to help prescribers identify at-risk patients, making the opioid overdose reversal drug naloxone more readily available, increasing addiction treatment availability, and better understanding individual propensities toward addiction—will go much further toward addressing prescription opioid misuse in America.

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Abbreviations and Acronyms: CSA = Controlled Substances Act

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