

Criminal

Drug overdose act weakened by limited immunity from prosecution

By **Melanie Webb**



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(October 12, 2017, 8:59 AM EDT) -- In May of this year, the *Good Samaritan Drug Overdose Act* was passed — a piece of legislation that amends the *Controlled Drugs and Substances Act (CDSA)* so as to exempt persons seeking emergency medical or police assistance for themselves or another person following drug overdose from simple possession charges, or charges resulting from the violation of certain conditions such as bail, probation, etc. that relate to a possession offence. This can be found under the new section 4.1 of the CDSA.

The intent behind this legislation is certainly laudable. However, it is limited to only simple possession-related offences, and does not allow for any “immunity” for other common and often more serious offences such as drug trafficking, weapons offences, etc., or outstanding warrants. Nor does it protect against common breaches of bail conditions, such as a breach of curfew or house arrest, or a non-communication condition, for example.

Aside from the fact that those types of breaches are incredibly difficult to defend, as any criminal lawyer knows, the going tariff for breaches is generally a jail sentence upon conviction. And given the significant difference in consequences between simple possession and “possession for the purpose of trafficking,” one could be forgiven for harbouring some doubts as to whether this new protection will be sufficient to encourage more people to report and seek medical attention for overdoses and remain at the scene until emergency responders to arrive.

Prior to the enactment of this legislation, many police officers no doubt exercised their discretion on occasion and chose not to lay charges against a “good Samaritan” who reported the incident. A recent media report confirms that in Peterborough, Ont., the police force has not laid charges in these types of matters for “a number of years.”

At the time of the consideration of this legislation, it was apparently the practice of one police department in the country not to attend an overdose unless requested by emergency services or unless there was a safety issue. But then of course, there are many other cases across the country that have resulted in charges and possible convictions as a result of police attending the call and investigating the circumstances.

The point is that a witness to the overdose who happens to be a fellow drug user, or someone who may face any other number of charges for whatever reason, may well have good reason to fear criminal consequences upon reporting an overdose victim. This only contributes to the tragic and needless loss of life from the opioid epidemic, as exemplified by a walk through our hospital emergency rooms.

It is evident that the concern that the proposed “immunity” did not go far enough was raised by those who made submissions to the standing committee on health in consideration of the private member’s bill, and indeed, it is clear from Hansard that this was acknowledged by the member of Parliament who first introduced it, although not clear that the limited “debate” on this specifically contemplated the extension to other types of breach of recognizance, probation and parole. However, broadening the scope to encompass other offences such as trafficking or impaired driving was

considered “too complex and controversial,” and it was feared that this would lessen the chances of its passage.

Awareness of the new law is clearly not yet widespread, although there have been more frequent reports in the media referencing it. There has also been at least one report of police in Regina “incorrectly” charging a person with drug possession charges as recently as September, apparently because the officers were unaware of the existence of the new law.

This type of mistake can certainly be avoided through proper police training. However, gaining the trust of people who have had prior contacts with the criminal justice system, let alone people suffering from addiction and other vulnerable persons, is another matter. Limiting immunity from prosecution in these cases to only simple possession-related offences is unlikely to do that. A layperson, not to mention someone who may already be under the influence of an intoxicant, has little time to analyze the situation and decide whether or not they’ll be “in the clear” or whether they will be at risk of further prosecution.

The legislation is better than nothing, perhaps, but only time will tell whether or not it will really have the desired effect of encouraging reporting of overdoses — and ultimately saving lives.

Melanie Webb practises primarily criminal law at the trial and appellate levels. She also represents clients on regulatory and disciplinary matters.

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