

LESA Seminar: September 22, 2012, Calgary Impaired Driving - The Changing Landscape

IMPAIRMENT BY DRUG: "Dude, Where's My Car?"

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1. INTRODUCTION

It is rare to have cases involving drug impairment, opposed to an alcohol or alcohol and drug combination impairment. Calgary has three to four cases a month, according to Jonathan Hak, Q.C., and Team Leader of the Criminal Driving Unit of the Calgary Provincial Crown Prosecutor's Office. Yet recent studies, using random roadside testing in British Columbia, show more drivers with positive drug and alcohol testing.

The Canadian Centre on Substance Abuse has these comments on the study:

"The finding that drug use is now more common than alcohol use among drivers highlights the need for a societal response to the use of drugs by drivers comparable to that directed at drinking and driving over the past three decades."

Even with new legislation in July, 2008, giving police new drug impairment detection tools, drug impairment cases are rare. We will look at those charges, from Section 254 of the Criminal Code of Canada, in this paper.

2. SECTION 254(2) SCREENING PROVISIONS

Section 254(2) states there are reasonable grounds for a peace officer to suspect a person has drugs or alcohol in their body and it is within three hours of a motor vehicle operation, the peace officer may need compliance with paragraph (a) with a drug or paragraphs (a) and (b) with alcohol.

Paragraph (b) is most familiar to criminal practitioners as the approved screening testing provision for roadside screening devices.

Paragraph (a) refers to regulated, physical coordination tests which aid peace officers in deciding the need for a breath or blood sample.

Section 245(2) of the Criminal Code reads as follows:

(2) Testing for Presence of Alcohol or a Drug — If a peace officer has grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:

(a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and

(b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

(a) Standard Field Sobriety Tests

Standard Field Sobriety Tests (SFST) are regulated physical coordination tests. The test's purpose is helping the officer with deciding if there are grounds for examination by a Drug Recognition Expert (DRE).

Section 254(2.1) of the Criminal Code, allows video recording the physical coordination test or Standard Field Sobriety Tests, by the peace officer. Performance of the physical coordination tests, like the breath tests with an approved screening device, must be provided immediately.

In the 1970's, the National Highway Traffic Safety Administration of the United States, developed the Standard Field Sobriety tests. Canadian Parliament adopted these tests with the C-2 Criminal Code amendments in 2008 which is guided by regulations.

Evaluation of Impaired Operation (Drugs and Alcohol) Regulations, SOR/2008-196:

2. Paragraph 254(2) (a) of the Criminal Code specifies physical coordination tests to be conducted for the following standard field sobriety tests:

(a) HGN or horizontal gaze nystagmus test,

(b) WAT or walk-and-turn test, and

(c) OLS or one-leg-stand test.

(i) Horizontal Gaze Nystagmus Test (HGN)

Jerking of the eye is the basis of the horizontal gaze nystagmus test (HGN): watching the eye of the suspect as they follow a slow, horizontally moving object like a small flashlight or pen with their eyes. There are three signs of impairment:

- Eye not following a moving object smoothly
- Distinct jerking when eye reaches maximum deviation
- Angle of jerking starts within 45 degrees of centre

(ii) Walk-and-Turn Test (WAT)

Based on the principle of "divided attention", the suspect listens to and follows instructions while walking.

(iii) One-Leg Stand Test (OLS)

Like the walk-and-turn test, one-leg-stand test is the principle of “divided attention.” The suspect stands with one foot, about six inches off the ground, counting out loud by the thousands. The subject is timed for thirty seconds as the peace officer looks for the following four signs of impairment:

- Swaying while balancing
- Unable to balance without using arms
- Keeping balance by hopping
- Putting the foot down

(b) *Standard Field Sobriety Tests and Section 10(b) Right to Counsel*

Standard Field Sobriety Test evidence is only a tool for confirming or rejecting suspicion a driver is impaired. Tests are prohibited as direct incrimination evidence, since these tests are required at roadside, before seeking counsel. *R.v Orbanski*, [2005] S.C.J. No. 37 at para. 58

(c) *Reasonable Grounds*

When the Standard Field Sobriety Test gives grounds for driver’s ability of motor vehicle operation being drug impaired, the officer can demand an evaluation of the driver by a drug recognition examination evaluating officer at the police station; Criminal Code Section 254(3.1):

(3.1) *Evaluation* — If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under paragraph 253(1)(a) as a result of the consumption of a drug or of a combination of alcohol and a drug, the peace officer may, by demand made as soon as practicable, require the person to submit, as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether the person's ability to operate a motor vehicle, a vessel, an aircraft or railway equipment is impaired by a drug or by a combination of alcohol and a drug, and to accompany the peace officer for that purpose.

3. DRUG RECOGNITION EXAMINATION

With grounds to believe a person is impaired by drugs or drug and alcohol combination while operating or in care and control of a vehicle, a peace officer may hold suspect and seek an evaluation by a drug recognition examination officer.

(a) *Drug Recognition Expert*

The evaluating officer must be a certified Drug Recognition Expert, and accredited by the International Association of Chiefs of Police (IACP). Certification includes: standardized Field Sobriety Test training, DRE Preliminary training, DRE School and school examination, minimum evaluations done, observe minimum number of drug categories, toxicological

corroboration, keep log of evaluations, resume or curriculum vitae, final examination certification, endorsement from two instructors, and International Association of Chiefs of Police certification. Continuing education by the DRE, on a continual basis, is required for keeping certification.

Counsel may seek new and added disclosure, including: training records, toxicology corroboration test results, and officers log and resume reviews. The Evaluation of Impaired Operation (Drugs and Alcohol) Regulations, SOR/2008-196, Section 1.

(b). Drug Recognition Evaluation

The Drug Recognition Evaluation (DRE is prescribed by regulation - Evaluation of Impaired Operation (Drugs and Alcohol) Regulations, SOR/2008-196:

- (a) A preliminary examination, which consists of measuring the pulse and determining the pupils are the same size and the eyes track an object equally;
- (b) Eye examinations, which consist of
 - (i) The horizontal gaze nystagmus test,
 - (ii) The vertical gaze nystagmus test, and
 - (iii) The lack-of-convergence test;
- (c) divided-attention tests, which consist of
 - (i) The Romberg balance test,
 - (ii) The walk-and-turn test referred to in paragraph 2(b),
 - (iii) The one-leg stand test referred to in paragraph 2(c), and
 - (iv) The finger-to-nose test, which includes the test subject tilting the head back and touching the tip of their index finger to the tip of their nose satisfactorily while keeping their eyes closed;
- (d) An examination, which consists of measuring the blood pressure, temperature and pulse;
- (e) An examination of pupil sizes under light levels of ambient light, near total darkness and direct light and an examination of the nasal and oral cavities;
- (f) An examination, which consists of checking the muscle tone and pulse; and
- (g) A visual examination of the arms, neck and, if exposed, the legs for evidence of injection sites.

(c). Reasonable Grounds

If Drug Recognition Examination results give grounds to believe drugs, or a drug and alcohol combination, impair a person's ability to operate a motor vehicle; a sample of oral fluid, such as saliva, urine, or blood, may be demanded by the officer.

Blood samples are only taken if a qualified medical practitioner certifies taking the samples would not endanger a person's health or put their life at risk. Criminal Code Section 254(4).

4. DRUG RECOGNITION EVIDENCE AS EVIDENCE OF IMPAIRMENT AT TRIAL

(a) Opinion Evidence

Whether a Mohan inquiry is needed when a DRE officer is called to give opinion evidence about a defendant's drug impairment, has conflicting views. R.v. Mohan, [1994] 2 S.C.R. 9 (S.C.C.)

Sopinka, J. writing for the Court observed (at para. 17) that the admission of expert evidence depends on the application of the following criteria:

- (a) Relevance
- (b) Necessity in assisting the trier of fact
- (c) The absence of any exclusionary rule
- (d) A properly qualified expert.

(i) R.v. Wood, the Leading DRE Evidence Case in Alberta

The leading case in Alberta is R.v. Wood, [2007] A.J. No. 895 (Q.B.). In this case, the drug recognition examination was inadmissible for not being reliable enough. The Wood court did an outline of Mohan and J. (J.-L.). R.c. J. (J.-L.), [2000] 2 S.C.R. 600 (S.C.C.).

Starting at paragraph 35, page 8 of Wood, supra:

"The J. (J.-L.) Test 35

As did Mohan, J. (J.-L.) concerned the admissibility of expert opinion evidence about a specific class of offence and a specific class of offender. The defense in that case sought to introduce expert opinion evidence to show the accused lacked the personality characteristics held by the types of offenders committing the offence charged.

36 Evidence found inadmissible by the Supreme Court of Canada, based on Mohan factors. The court addressed the criteria (paras. 30 to 60) in the sequence as follows:

- (a) Inquiry subject matter
- (b) Novel scientific theory or technique
- (c) Ultimate issue approach
- (d) Any exclusionary rule absence

- (e) Properly qualified expert
- (f) Proposed testimony relevance
- (g) Necessity in assisting the trier of fact.

37 The Mohan court directed that based on novel science, expert opinion evidence faced special scrutiny in J. (J.-L.). Undertaking such scrutiny, defined a practical method.

Synthesizing the Mohan and the J. (J-L) tests, Madam Justice Topolniski set out a summary for expert opinion evidence abased on novel science. At para. 49 of Wood:

For expert opinion evidence, based on novel science, use the following criteria to analyze evidence: "In summary, when a party seeks the admission of expert opinion evidence based on novel science, the evidence should be analyzed according to the following criteria:

Criterion I. Relevance to an issue

- A. Does the evidence meet the threshold of logical relevance?
- B. Does the evidence meet the threshold of reliability?
 - 1. Is the opinion based on novel science?
 - 2. Does the opinion evidence pertain to the ultimate issue?
 - 3. Does the novel science attain threshold reliability?
 - (a) Has the theory/technique been tested?
 - (b) Has the theory/technique been subject to peer review/published?
 - (c) Is there a known or potential error rate?
 - (d) Is the theory/technique generally accepted?
- C. Do the costs of admitting the evidence outweigh the benefits?

Criterion II. Necessity to assist trier of fact.

- A. Is the subject matter of the expert opinion beyond that of the trier of fact?

Criterion III. Absence of any exclusionary rule.

Criterion IV. Properly qualified expert."

The Wood court reviewed the synthesized test, discovering the DRE study of evidence focuses on the DRE's testing ability to identify a drug presence rather than drug impairment.

"To paraphrase the words of Sopinka, J. in Mohan, the DRE was misleading in the sense that its effect on the trier of fact was out of proportion with its reliability". At para. 85, R.v. Wood, supra.

(ii) *DRE Evidence in Other Jurisdictions*

Other court jurisdictions also looked at how to use DRE evidence and what requirements are needed for the Crown to lead the evidence:

R.v. Wakewich case, [2010] O.J. No. 1128 at para. 15 (C.J.), the trial court held:

1. The evaluating officer must establish his or her qualifications as set out in Regulation 2008-196 of the Criminal Code.
2. The evaluating officer may testify as to the evaluation conducted pursuant to s. 254(3.1) of the Criminal Code, particularly describing the evaluation tests and procedures as set out in Regulation 2008-196.
3. The evaluating officer may testify that a demand was made pursuant to s. 254(3.4) of the Criminal Code, and the grounds for that demand.
4. Any opinion by the evaluating officer as to impairment by drug, other than for the purpose of making a demand pursuant to s. 254(3.4) of the Criminal Code, will not carry the weight of expert opinion, unless the criteria in R.v. Mohan have been met."

In R.v. Gardasknik, [2011] O.J. No. 2235 (C.J.), the court held that evidence from DRE proving impairment needs a Mohan hearing.

In R.v. Jurcevic, [2010] O.J. No. 5231 (C.J.) DRE evidence was admitted for impairment but not as "expert evidence".

5. SOME PROBLEMS FACED BY THE CROWN WITH DRUG IMPAIRMENT CASES

(a) *Police Office Qualification*

In Calgary, according to Jonathan Hak, Q.C., police officers must qualify to perform Standard Field Sobriety Tests, however they are seldom used since most police are not qualified. Nearly half a dozen officers are drug recognition examination trained in Calgary. Currently there are several cases involving DRE, but none are at trial stage.

(b) *Availability of Qualified DRE's*

Many times, officers are not aware a drug recognition examination expert officer is required, so none are involved in the investigation. Even when the officer fails to recognize a need for a DRE, there are few trained experts, making obtaining those services difficult when one is needed.

(c) *Crown Review of Impairment by Drug Cases*

Mr. Hak gave the Crown further advice to carefully review each case, looking for adequate drug recognition examinations. This attempt is for a drug recognition examination being held as expert evidence in an impairment of ability to operate a motor vehicle by drugs in such cases.

(d) Limitations of Analysis of Bodily Substances

Taking bodily substances brings other difficulties with subsequent analysis of the substances. Analysis only determines detection of a certain substance in the sample.

Another problem with taking bodily substance and analysis of the substance is limited results. Analysis only detects a certain substance in the sample, and drug traces found in the body at the time the sample is taken. Analysis won't show the drug amount in the system or when it was taken. Giving proof is difficult for the Crown because of no statutory presumption, long-standing scientific protocol, or accepted standards as in blood alcohol concentration cases. Without statutory presumptions, the Crown must give evidence relating to its expert evidence and the analysis to the time of driving.

Without the accused admitting to taking a certain drug, and sometimes, admitting the drug impaired ability to drive, it makes proving drug impairment difficult for the Crown. The Crown usually requires expert evidence of the defendant's inability to operate a motor vehicle when guilt is admitted.

6. CONCLUSION

Drug impairment cases, in comparison with alcohol or alcohol and drug combinations, are rare. As more police officers qualify to perform Standard Field Sobriety Tests and train as Drug Recognition Examination Experts, we will see an increase in these types of cases.

When drug impairment cases are more common, courts will recognize these officers differently than they do now. Better testing procedures and more accurate test results may help overcome obstacles the Crown currently faces when gaining convictions for these cases. The possibility of presumptions with blood alcohol concentration may help the Crown as legislative effort expands in this area.

The Crown Prosecutor of the Criminal Driving unit intends to advance their argument for DRE evidence being held by the courts, as expert opinion evidence, by discovering other test cases. If successful, drug impairment cases will be more prevalent in the Alberta province.