

**LEGAL IMPLICATIONS FOR THE PREVENTION  
AND CONTROL OF ILLICIT TRAFFIC OF  
PHARMACEUTICAL PRODUCTS AND OTHER  
DRUGS VIA THE INTERNET IN GRENADA**

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(Paper Presented to the Fifth Annual General Meeting: Grenada Drug information Network (GRENDIN)/National Observatory on Drugs – 11<sup>th</sup> December, 2008 – by Darshan Ramdhani, Senior Crown Counsel in the Office of the Director of Public Prosecutions)

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## **A. INTRODUCTION**

The internet has been described as a modern day wonder. It is that and more so. Perhaps it ought to be properly described as the greatest change to the modern world. It might be true to say that no single technological advancement or man-made creation has so profoundly affected the lives of so many people throughout the world. But with all its advantages and ability to making life on earth better, the internet also has a dark side; cyberspace has a number of 'black holes' which has attracted the unsavoury amongst us. And the criminals have been quick off the mark in making use of the internet for their illicit activities.

Among the many categories of criminals making use of the internet is the traditional drug trafficker. Today's street corner drug dealer is being rapidly complemented by the cyber café drug dealer; drug monies are no longer delivered in brief cases in darkened corners of the globe, but fly through cyber space to end up in 'overseas' accounts in various tax havens – to sit there briefly before being electronically summoned again from half way across the world in a 'hop and skip' manoeuvre to end in the hands of the drug lord.

The net has also spawned a new breed to drug men. These are not the traditional dealers in illicit drugs but new age pharmaceutical entrepreneurs who will sell any pharmaceutical online. These dealers, quick to recognise the ability of the internet to hide their unsavoury activities, have successfully emulated authentic pharmacies who have turned to the internet to sell their product, and who are prepared to be regulated like traditional 'brick and mortar' outlets.

## **B. DRUGS IN CYBERSPACE – THE PROBLEM**

The net has clearly presented new issues for many including law enforcement throughout the world. There is no doubt that many countries are faced with an increasing number of persons who throng the market place of the net; people are turning more and more to the world wide web to shop for their needs. It is enticing and addictive to sit at home and search this new market place to cater for our needs and wants. As one Dr. Henney writing on growth of the internet in the US, has recognised:<sup>1</sup>

*“In the health sector, telemedicine allows people in remote areas to access the expertise of doctors in the nation’s finest academic health centers. The internet permits an increasing number of individuals to obtain a plethora of medical information that often helps them to understand health issues and treatment options....*

The recognition has been growing in first world countries that more and more consumers are turning to the net to source and buy their medications. One only has to surf the web to see many pharmaceutical web sites advertising all manner and types of drugs. In today’s busy world no doubt the properly regulated sale of pharmaceuticals online can have tremendous benefits to consumers.

Even so, for the not so careful but legitimate shopper (as distinct from someone who is seeking to buy ‘controlled substances’ for abuse) can easily find himself shopping for the wrong or even fake drugs from an online store. In fact online stores present greater opportunity for persons who self diagnose and prescribe for a perceived ailment. If there are no safeguards then it is easy to buy ‘controlled substances’ which may cause harm to the user.

The many dangers which are commonly associated with an unsafe website also include the likelihood that these sites will not enquire as to details of person’s medical history, illness or condition, and even if they are provided with this information they generally have no mechanism to ensure that truthful information is being provided.

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<sup>1</sup> “Cyberpharmacies and the role of the US Food and Drug Administration” Jane E. Henney M.D. originally published in the Journal of Medical Internet Research (2001)

Much of the laws seeking to control and prevent the abuse of drugs were passed at a time when the net was still science fiction. The question now: 'Have we been overtaken by the world wide web? Are our present laws and enforcement mechanisms capable of dealing with Drugs in Cyberspace?'

### **C. TRADITIONAL DRUGS LEGISLATION**

The general aim of governments in this area is to prevent the abuse of drugs and to protect the health of the consuming public, and in this regard legislators in the past have all sought to criminalise the use of illicit drugs – buyers and sellers alike are treated as criminals by the law. With the passage of time and the manufacture of more medicinal substances to treat an ever-growing list of human illnesses, the law has extended its umbrella to prevent abuses of more and more drugs (described as 'controlled substances'). Licensing requirements is an integral part of the mechanism to prevent abuse and to protect public health, and practitioners (doctors and pharmacists) have all been mandated to comply with a number of safeguards to ensure that not only 'controlled substances' get delivered to the prescribed person, but also properly approved drugs are prescribed.

The Drugs legislation found generally in almost every country usually have as primary objectives the protection of persons against the abuse of certain controlled substances and the protection of public health. It is well accepted that a drug designed for a particular purpose may be completely unsuitable for a particular person. Modern medical practices have recognised that it therefore important that a person must be professionally diagnosed and treatment carefully considered before certain types of 'controlled substances' are prescribed. In fact, these substances fall to be 'controlled' because of the high risk nature of their curative qualities. Side effects may have fatal consequences. Additionally the sale and use of unapproved or counterfeit drugs will often have disastrous and often fatal consequences.

These laws, in relation to controlled substances, have generally worked well with traditional 'brick and mortar' pharmacies, in ensuring that the consumer is protected and that known and approved drugs are prescribed and dispensed.

## **D. LEGISLATION IN GRENADA**

This traditional position is generally along these lines in Grenada. One of our primary pieces of legislation which seeks to prevent and control drug abuse is Chapter 3 of the Laws of Grenada – The Drug Abuse (Prevention and Control) Act, Cap 3. This legislation in addition to treating with the traditional illicit substances, cocaine and marijuana also treats with a long list of ‘controlled substances’. The Act criminalises the possession and supply of any of the substances listed and penalties can be as much as \$250,000 and 20 years imprisonment. Under this Act provision is made to ensure that proper permission is given with regards any controlled drug which enters Grenada in transit, and further that such drugs are monitored and not diverted unlawfully. Separate and specific provision is made to criminalise the importation and or exportation of any of the controlled substances.<sup>2</sup> Chapter 3 of course cater for the proper use of some of controlled substances and provision is made giving the Minister power to grant licences to medical practitioners and pharmacist to deal with these drugs. The licenses are very limited and subject to control and any professional acting contrary to the grant of such licences may be subject to penalties including restriction from dealing with the relevant controlled substances and even extend to imprisonment for as much as five years together with a fine of \$250,000.<sup>3</sup>

Apart from these ‘controlled substances’, legislation has been in place long before the internet to control and regulate the use and sale of what may be referred to as mainstream pharmaceuticals.

Other primary pieces of legislation are the Pharmacy Act Cap 241, the Food and Drugs Act Cap 110, The Penicillin and Sulphonamide control Act Cap 230, The Poison Sales Act, Cap 243 and The Licenses Act Cap 172. These various Acts set up a regime to ensure that the buying and selling of pharmaceuticals are regulated so that abuse is avoided and public health is protected.

Under the Pharmacy Act, no person is to engage in the practice of pharmacy (which is described as drugs, medicines, chemical substances

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<sup>2</sup> Section 44, Cap 3

<sup>3</sup> Section 27, Cap 3 together with the Fifth Schedule.

and poisons being stored, compounded, dispensed or sold or distributed by retail) unless he is registered as a pharmacist under the Act. Such a person must possess the prescribed qualifications. The Act further provides that 'no person shall, whether on his own behalf or on behalf of another carry on in any premises a business which includes' the business of a pharmacy unless such premises has been certified as fit and registered for such purposes.<sup>4</sup> (Incidentally a literal reading of these provisions would mean that even 'over the counter' drugs cannot be sold except at a pharmacy – so that a supermarket selling advil, panodol etc. would be in breach unless they are registered as a pharmacy and a pharmacist conducts the business of the pharmacy).<sup>5</sup>

Under the Licences Act, cap 172 an injunction is given that no poison shall be sold unless at a pharmacy at which a registered pharmacist is present. Unless it is shown that the business of a pharmacy is being bona fide conducted by a person registered as a pharmacist no licence shall be granted to that pharmacy.<sup>6</sup>

Under the Food and Drug Act Cap 110 there are additional safeguards provided for in relation to the sale of drugs. Part III of this Act makes it an offence to sell insanitary or adulterated drugs and generally prohibits misleading representations with respects to drugs – it is an offence to label, package, treat, process, sell or advertise a drug in a manner which is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

Section 12 of this Act is also an important provision aimed at maintaining standards which may be set for certain drugs. This section provides *inter alia* that 'where a standard has been prescribed for a drug, a person who labels, packages, sells or advertises any substance in such a manner that is likely to be mistaken for such a drug is guilty of an offence. Where no standard is prescribed reference is made to certain international

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<sup>4</sup> Sections 16 and 17, Cap 241

<sup>5</sup> See also Section 16 of the Pharmacy Act.

<sup>6</sup> Section 24, Cap 172

standards. Breach of these standards will result in the commission of an offence.<sup>7</sup>

## **E. DO THESE LAWS GOVERN THE SALE AND DISTRIBUTION OF PHARMACEUTICALS AND OTHER DRUGS ONLINE ?**

### Pharmaceutical Websites

First, with regards the sale of illicit drugs, it would have been obvious from the foregoing that wherever illicit drugs are sold, it would be unlawful. Whether you sell them on the street corner or online, the buying and selling and possession continues to be unlawful.

Second, with regards pharmaceuticals being sold by a locally based website, the position is as follows: The law states that the business of a pharmacy must be done at a place registered as a pharmacy. What it does not state is how sales and purchases may be done. It is open to any pharmacy, and to anyone for that matter to advertise the sale of drugs online. Of course, the drugs will have to be stored at a place (if they are stored in Grenada) which is registered as a pharmacy. As they stand, the laws appear to capture the errant pharmacist who sells his drugs online from someplace other than a proper registered pharmacy.

### The Overseas Based Website

A few different issues will arise with regard the overseas based website. First it is hardly likely that they will operate pharmacies which will be registered under our laws. Our laws will of course capture any person found in Grenada with illicit drugs regardless of where they procured them. And further, anyone in Grenada who is found in possession with any of the controlled substances without authorisation will also be caught by the laws. The question which then arises is whether someone operating an overseas based website (meaning the principal are also overseas) will be caught by any provisions of our laws?

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<sup>7</sup> Note the penalty for offences committed against the provisions of this Act includes a fine up to \$500 (\$1000 for subsequent conviction) and to imprisonment for three months (six months in the second instance) on a summary charge, and to \$5,000 and imprisonment for 3 years on indictment. – see section 34.

## CASE STUDY – Criminal Conduct Committed in Cyberspace<sup>8</sup> - The Ryan Haight Case in California

Recently a student (teenager) in California visited an online pharmacy portal originating overseas, which told customers that they could get prescription drugs 'without the embarrassment of talking to a doctor'. The site did not require mailing an original prescription or electronic transmission of the original by facsimile. The student ordered 90 capsules of an antidepressant. All he had to do was to complete an online questionnaire about his medical history and submit credit card details for payment. The order was routed to a firm in Florida, which was then routed to a subcontracting physician in Colorado. The doctor authorised the order and issued a prescription without speaking to the student. The prescription was forwarded to a pharmacy in Mississippi that was part of the arrangement. The medication was then sent to the student. Two months later the student was dead of an apparent suicide from carbon monoxide and alcohol poisoning. He had the antidepressant in his system at the time of his death. The doctor was then charged with the crime of practising medicine in California without a license, a felony that carried a potential term of life imprisonment. The doctor sought to have the charges dismissed arguing that the licensing requirements of California did not apply to him, because he was always in Colorado whilst acting as the teen's physician. Accordingly, he was never in the state whilst acting in his professional role and hence not subject to the jurisdiction of the medical board of California and the California courts. He lost in the local courts and appealed to a California Court of Appeal.

The Court of Appeal ruled that the California courts did indeed have jurisdiction over the acts of the California physician and the charges could proceed.

"The court reasoned that 'the traditional rules of jurisdiction, or authority, of a court to hear and decide a matter require that the issue or case arise within the territory served by the tribunal. An exception to that doctrine is known as extraterritorial jurisdiction. The relevant California statutes confer on the courts in that state jurisdiction, or power over

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<sup>8</sup> Case discussed by Dr. Fink a professor of Pharmacy law and policy at the university of Kentucky College of Pharmacy, Lexington – Article "Pharmacy Law : Legal Implications of Prescribing over the Internet."

criminal cases, when it is alleged that the crime was in fact committed in whole or in part in the state. The court here concluded that the crime was in fact committed in part in California, using a legal principle known as constructive presence.

‘Under the constructive presence approach to these matter, an individual may be subject to criminal penalties not only for acts done while physically present in the State, but also for an offence consummated within the boundaries of the state by his agent or by other means proceedings directly from him. Under the factual scenario presented in this case, the Mississippi pharmacy acted as the agent of the prescribing physician in dispensing the medication, and then someone at the pharmacy acting on its behalf had the medication shipped to the student in California.

‘The court ignored the fact that the agent – the pharmacy- was located outside the state, focusing instead on the detrimental impact flowing from its action that had occurred outside the state. Specifically, the court observed that ‘it makes no difference that the charged conduct took place in cyberspace, rather than real space’. In the view of the judges, the most important facet of the case was that the conduct of the physician had detrimental effects in California and was directed at a California resident.”

The Ryan Haight case has been one of the most controversial cases in the field of the sale of medicines. The clear problem which it highlighted was that a medical practitioner was diagnosing and prescribing for a patient that he had not seen. The second problem was that online pharmacies were doing business by facilitating such online diagnosis simply to be able to sell their drugs.

In Grenada someone sells adulterated or fake drugs from another country via the net, that person would have committed an offence punishable under the laws of Grenada.<sup>9</sup> But do our laws address the type of problem which arose in Ryan Haight’s case? (Incidentally the US has now passed into law the Ryan Haight Online Pharmacy Consumer Protection Act of 2008).

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<sup>9</sup> See DPP v Stonehouse [1977] 2 All ER 909 HL

According to the Chief Medical Officer in Grenada, it would be considered inappropriate and misconduct for a medical practitioner in Grenada to issue a prescription for a first time patient that the medical practitioner had not seen. She also notes that it would be improper and amounting to misconduct for a pharmacist to dispense 'prescription drugs' without seeing a written prescription or perhaps speaking personally to a doctor known to the pharmacist to confirm that the doctor had indeed issued such a prescription.

An examination of the legislation however does not make the position as clear as this. There are no provisions which state specifically that a pharmacist can only issue prescription drug on seeing a prescription. Though of course, it could be argued under the legislation that a pharmacist must act in a manner which is not inconsistent with professional ethics and standards.

One would therefore expect that the pharmacist dispense pharmaceuticals only after having seen the proper prescription. The question could therefore be: Will a pharmacist have acted properly if someone sends him a scanned prescription through his internet store and requests drugs? And what about those pharmacies which may decide to 'work' together doctors to issue prescriptions?

A feature of the online pharmacies has been to offer the consumer to facility of 'consulting' with an electronic physician. Following this online diagnosis a prescription is issued, which is then filled by the same online shop.

Arguably a doctor in Grenada may find himself in breach of professional standards. According the American Medical Association, a health care practitioner who offers a prescription for a patient that he has never seen before, based solely on an online questionnaire, generally does not meet the appropriate medical standard of care – in fact it has been described as being outside the bounds of professional conduct.

In the US prior to the Ryan Haight Act, the federal definition of a lawful prescription was:

*“A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”*

The statute never defined the phrase *“in the usual course of his professional practice”* and it has been the subject of differing views. Would this mean that a face to face encounter was necessary? In the absence of express statutory rules, from a civil law perspective one may arguably be able to impose civil penalties on a doctor who acted outside on some generally accepted practice. But from a criminal law perspective it would be debatable as to whether liability would hardly be imposed on the doctor who prescribed without personally seeing the patient.<sup>10</sup>

The New Ryan Haight Act passed in the US has attempted to solve the dilemma and has passed specific provisions dealing with the very important concern. This act among things, now requires an in-person meeting to ground a valid prescription.

The New Health Practitioner Bill 2008 which is still in its formative stages. At present it is approximately 75 pages long. The proposed section 113 does treat with the prescription of drugs but does not cover the issues above. This writer has since had discussions with the Draftsperson and those are continuing.

### Law and Policy

Unless our policy will be to prohibit all drug websites from doing business in Grenada, we must ensure that our laws are clear in their reach and scope. If we are encouraging dynamic market forces, then proper regulatory mechanisms must be implemented.

The policy makers may decide that a start to control unlawful behaviour via the internet is to legislate that all internet pharmacies be registered –

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<sup>10</sup> In the US, there have been many prosecution for illegal prescriptions by professionals. At this beginning of this month a doctor in New York was sentenced to three years probation for his part in an illegal online pharmacy. His role was the writing of prescriptions and he wrote thousand of them for weight loss drugs between November 2002 to December 2003. He was also required to wear an electronic bracelet and perform 100 hours of community service. The conviction was premised on the fact that he had ‘no legitimate doctor patient relationship’ with the customers. (Source: Times Herlad-Record, December 1<sup>st</sup> 2008)

if the traditional brick and mortar pharmacy launches a website then that too must be registered and subject to regulation.

As a start we may decide to take a cue from the Ryan Haight' Act in the US and make a clear statement that a medical practitioner may only issue a prescription after conducting an in-person examination.

In any event the law must clearly state that pharmacists must be require a valid prescription to be produced before any prescription drug is dispensed. In addition online pharmacies must be required to state on its website:

- (a)The Actual Physical Address of its Business;
- (b)The Source of the Drugs advertised;
- (c)The Name of the Pharmacist who conducts the business and state that that pharmacist is registered and licensed to practice in Grenada.

These changes will mean it would be easier to ensure that both brick and mortar pharmacies and online drug stores in Grenada are properly licensed and regulated, and will go a far way in ensuring that foreign based online drug stores understand clearly the regime with which they must comply if they expect to do lawful business in Grenada.

### Special Drug Internet Task Force

The concerns and suggestions raised so far do not resolve the issues. The unique quality of the internet, its broad reach, relative anonymity, the ease of removing old websites, creating new ones pose considerable challenges for law enforcement. And it is in this area that we in Grenada are especially vulnerable. One only has to open his email and find unsolicited mail from numerous sites which bombard him with advertisements of various drugs.<sup>11</sup> (Luckily, it is hoped that our Custom

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<sup>11</sup> One apparently legitimate site has recently launched a campaign named 'Safe Shopper' which is aimed at protecting good websites. They have issued guidelines for consumers on how to distinguish between good and bad online pharmacies. They ask the shopping public to (a) avoid online pharmacies that do not list their addresses, do not require consumers to visit their local physician's office to get a prescription, or do not carry a full line of prescriptions, (b) not buy medications from unlicensed websites that send unsolicited emails, (c) look for a pharmacy association seal of approval.

Controls will ensure that shipments are intercepted). There is at present no mechanism in place to actively monitor the net.

Suggestions have been made that special task forces or units be set up to monitor the internet regularly. (Actively browsing the net and employing various search engines and special drug crawlers). Such units should have an active relationship with the customs department, gatekeepers of imports and exports, and other important stakeholders. Such a Unit can be easily set up in Grenada from the general ranks of the police department, and there is no need to pass any special legislation to facilitate this. In the normal course of the investigation, the police have the power to conduct sting operations – and in this regard will be able to respond to online adverts and make purchases from these drug stores as part of their investigations.

### Special Powers of Investigations

By the very nature of these investigations, much of the evidence will be of the electronic kind. Under our present laws the police have powers to go after evidence either with or without warrants. In this regard the police will be able to secure information stored on any computer. What will pose some concerns will be issues relating to interception of communication to facilitate effective and proper law enforcement. In this area authority would be needed to ensure that there is the power to compel online operators to preserve evidence (web pages and other source information).

### Public Awareness

The utility in education and public awareness has to be assessed carefully. Whilst policy makers and law enforcement need to be ensure that this area is given attention, a campaign to foster public awareness may actually trigger criminal entrepreneurs to explore this new market in Grenada. An appropriate balance must be struck. But in the view of this writer, if regulations are going to be implemented to ensure that 'safe internet pharmacies' will be allowed to operate, then the inclination should be to encourage a public outreach programme. Public announcement must be made to ensure that information is disseminated on the safe ways to buy pharmaceuticals online. Perhaps a 'safety checklist' could be developed with a requirement that it is posted on

every approved website and also placed on other media in Grenada (television and radio).

### International Law Enforcement and Cooperation

This is perhaps one of the most difficult aspects of policing the internet. As given in our case study above it is easy to see that a doctor who is not registered to practise medicine here in Grenada may be prescribing for a Grenadian National in breach of our laws. In the normal course of things, the pharmacy unit of the Ministry of Health may grant approval for importation of these pharmaceuticals where the prescription is produced and the consumer is then (in the event of refills) told to ensure he gets a local doctor to certify and issue a new prescription. But if we are to ever have real problems in this area, it would come from overseas based websites. In this regard we would need the cooperation of foreign countries. Where the principals of a criminal website are located overseas we will need those governments to launch investigations and possibly institute criminal charges against those persons.

### **F. CONCLUSION**

Our old laws do have some bite. As the foregoing has hopefully shown, our laws as they exist will criminalise:

- (1)The seller and buyer of illicit drugs;
- (2)The rogue pharmacy in Grenada
- (3)The rogue pharmacy in cyberspace who sells drugs in Grenada;
- (4)The consumer in Grenada who imports prescribed drugs without proper authority.

But if abuse is to be prevented and public health is to be protected, we need to ensure that greater clarity is given to the world of pharmaceuticals. In today's high speed world it must be recognised that the internet present considerable advantages and benefits for the consuming public. Government's role ought to be to regulate the sale of drugs online and bring it in line with traditional and safe practices adapted to meet modern needs and methods. We in the regulatory and law enforcement fields are faced with new and modern challenges as we

step up to the crease. At the end of the day, a good balance must be struck between consumer access to information and drugs and the need to protect the public health. Such a balance must be continuously reassessed to meet and deal with changes to this new market place.

**End**

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