

Taking blood specimens from incapacitated drivers

Guidance for doctors from the British Medical Association and the Faculty of Forensic and Legal Medicine

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Summary

The Police Reform Act 2002 and The Criminal Justice (Northern Ireland) Order 2005 permit the taking of blood from incapacitated drivers for future consensual testing, therefore putting them in the same position with respect to testing for drug and alcohol levels as drivers with capacity. This guidance explains the legal framework and provides ethical advice for doctors asked to take samples under this legislation.

Background

In 2002, the Government introduced new legislative powers to close what many saw as a loophole in the law. The Police Reform Act introduced new arrangements in England, Wales and Scotland for obtaining blood specimens from people who are unable to give consent after they have been involved in road traffic accidents.¹ In 2005, the Criminal Justice (Northern Ireland) Order was passed, which extends these arrangements to Northern Ireland. The BMA and Faculty of Forensic and Legal Medicine (FFLM) support the arrangements in principle. At the BMA's annual representative meeting in 2001, the following resolution was passed:

'That this Meeting believes that police surgeons should be legally empowered to take blood samples for testing for alcohol and drug levels without consent from a driver without capacity after a road traffic accident and that testing should occur later only with the consent of the driver.'

There was a belief that some drivers had escaped appropriate prosecution for drink-driving offences, such as causing death by careless driving while under the influence of drugs or alcohol, which can carry a heavy penalty, owing to a lack of supporting evidence. Instead, they could only be prosecuted for lesser offences. Similarly, there was a belief that some drivers may have been wrongly suspected of drink-driving when an accurate test would have established their innocence. Concerns about the injustice of such situations led to calls for the law to be changed. The legislation aimed to put those who cannot give consent in the same position as those who can, while protecting doctors from actions for assault if they take a specimen without consent.

The law

- A blood specimen may be taken for future testing for alcohol or other drugs from a person who has been involved in an accident and is unable to give consent where a police constable believes the person to be incapable of giving valid consent due to medical reasons.²
- A forensic physician must be asked to take the sample unless this is not reasonably practicable, in which case another doctor may be asked. A request may not be made of a doctor who has any responsibility for the clinical care of the patient. A specimen can only be taken by the doctor to whom the request is made; the task cannot be delegated.
- It is a requirement of the legislation that, before the specimen is taken, the doctor in charge of the patient's care has been notified of the intention to take blood and has not objected on the grounds that such action would be prejudicial to the patient's care.
- The specimen may not be tested until the person regains competence and gives valid consent for it to be tested.
- A person who fails to give permission for the testing of a specimen, without reasonable excuse, is guilty of an offence.

- The police have no powers to take and test blood specimens that were taken as part of the patient's care in hospital.

Assessing capacity

Legally, it is the responsibility of the police constable to establish whether the person has or lacks capacity. Nevertheless, before taking a sample doctors should satisfy themselves that the individual lacks the capacity to consent and therefore falls within the remit of the legislation.

The relevant legal test of capacity is that the driver is:

'...conscious of what he or she is doing and has heard and fully understood the request for his consent.'³

Doctors will want to consider whether the person:

- understands what the request involves, and why the specimen is being sought
- understands any risks associated with the specimen being taken
- understands what will be the consequences of refusing to give consent
- can retain the information for long enough to make an effective decision
- can weigh the information in the balance; and
- can make a free choice.

If the driver is a patient in hospital, the doctor assessing capacity may want to ask the treating doctor whether there is anything about the patient's condition that he or she should know in order to assess capacity. The treating doctor should not reveal confidential clinical details about the patient unless doing so is essential for a judgement about capacity to be reached.

Decisions about a person's capacity may have particular implications where the person refuses to agree to a specimen being taken, since refusal without 'reasonable excuse' will lead to a charge of 'failure to provide a specimen'. Lack of mental capacity might be a 'reasonable excuse' and it is therefore important that doctors document their decisions about mental capacity carefully.

Competent patients

If the person is deemed to be competent then this guidance does not apply. The procedures for taking blood from people who give consent were largely unchanged by the 2002 legislation. As part of a drink-driving⁴ investigation, a police constable has the power to require a driver to provide a specimen of breath, blood or urine for analysis. It is an offence for a person, without reasonable excuse, to refuse to provide a specimen. A specimen may not be taken without the consent of a driver who is competent to give it.

Incapacitated patients

Where a patient is deemed to lack capacity to give consent, a specimen may lawfully be taken. Although doctors are legally permitted to take blood, they cannot be required to do so.

Ethically, it is important to maintain a clear separation between the clinical care a patient is receiving and any forensic procedures. Wherever possible, the specimen should therefore be taken by a forensic physician.

Legal and ethical responsibilities

The police constable

Where a drink or drug-related driving offence is being investigated, a police constable may ask a doctor to take a blood specimen where it appears to the constable that:

- the person has been involved in an accident related to the investigation; and
- the person is, or may be, incapable of giving valid consent to the taking of a specimen of blood; and
- the person's incapacity is attributable to medical reasons.

It is the responsibility of the police constable to assess these issues. Provided that he or she is satisfied that the conditions are met, the specimen may lawfully be taken, although there are additional ethical and professional considerations for doctors (see below).

The forensic physician

Legally, the decision about whether a person has capacity to give consent to the forensic specimen being taken rests with the police constable. A doctor could not be charged with assault if he or she, in good faith, took a specimen without consent if the requesting police constable was satisfied that the relevant legal conditions were met. Ethically and professionally, however, it is essential that the doctor taking a specimen is satisfied that the person either:

- (a) is competent and has given valid consent; or
- (b) lacks the capacity to give consent but taking a specimen is nevertheless lawful.

Under the legislation, the police cannot require a doctor to take a specimen, it is merely lawful for a doctor to agree to do so. The BMA and FFLM believe that forensic physicians should refuse to take a specimen if:

- there are medical reasons why a specimen should not be taken or to do so would be detrimental to the patient's care and treatment
- the patient refuses or resists, since it is not ethically acceptable for doctors to use force or restraint. Whether such patients would be treated as 'competent' and be convicted for refusing to provide a specimen is a matter for a court to decide at a later date. It is therefore important that doctors document their decisions and their assessment of capacity carefully
- the person is expected to recover capacity within a short period of time, for example if he or she is temporarily paralysed for the purpose of a clinical investigation. The doctor taking the specimen should seek to ascertain from the treating doctor whether this is likely to be the case.

A driver cannot be penalised if the doctor does not consider it appropriate to take a specimen.

Under the legislation, a blood specimen may be taken from an incapacitated patient in a hospital or, exceptionally, in a police station, although this is unlikely to be the case. If a situation arose where a specimen was taken in a police station, and the purpose of taking the sample was to test for drugs, the doctor must be satisfied that the condition of the person required to provide the specimen might be drug-related. This is not a requirement when the sample is taken in hospital.

The treating doctor

Where the driver is a patient in hospital, as will usually be the case, the doctor in immediate charge of the patient's clinical care, who may be a junior doctor or consultant, must be informed if a specimen is required. It is not the role of the treating doctor to determine whether the patient has capacity to give consent or to consider whether taking the specimen is lawful. His or her role is restricted to objecting where taking a specimen would be prejudicial to the proper care and treatment of the patient, for example if doing so would introduce unacceptable delay to treatment or peripheral access is difficult. Junior doctors may want to seek advice from a more senior colleague. It should not be necessary to reveal detailed clinical information about the patient to the doctor taking the specimen.

Taking and testing a blood specimen

The specimen must be taken using a kit provided by the police constable. Doctors should not attempt to use these kits without appropriate training.

Doctors should be aware that there are potential problems with the reliability of samples taken from an existing line, such as contamination and higher alcohol levels in arterial blood versus venous blood during the absorption phase of alcohol. While there is currently no legal precedent clarifying whether such samples would be deemed unreliable in court, doctors should be mindful of the potential risk involved.

Once a specimen has been taken it should be divided into two, and both parts given to the police. They cannot, however, be tested for their alcohol or other drug content until the person from whom they were taken:

- has been informed that the specimen was taken; and
- has been informed by the police constable that he or she is required to give permission for a laboratory test of the specimen; and
- has given permission.

It is an offence for a competent person to refuse to allow his or her specimen to be tested, unless there is a reasonable excuse. This puts the driver in the same position as a driver who is competent at the time the specimen is taken. If the person is still in hospital, the doctor who is now in immediate charge of the patient's care must be informed in advance that permission for testing is to be sought. The treating doctor should object if any part of this procedure would be prejudicial to the patient's proper care and treatment.

For further information about these guidelines, BMA members may contact:

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References

1. The Act also grants similar powers to constables in relation to people unable to consent to such tests when involved in an accident or dangerous incident and they are a driver, guard, conductor or signaller or in any other capacity in which they can control or affect the movement of a vehicle, or in a maintenance capacity or as a supervisor of, or look-out for, persons working in a maintenance capacity if such transport is used wholly or partly for the carriage of members of the public.
2. 'Medical reasons' is the terminology used in both pieces of legislation. No definition is given.
3. *Friel v Dickson* [1992] RTR 366.
4. The phrase is used to refer to offences under the Road Traffic Act 1988. Section 4(1): 'A person who, when driving or attempting to drive a motor vehicle on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence' and Section 5(1): 'If a person—(a) drives or attempts to drive a motor vehicle on a road or other public place, or (b) is in charge of a motor vehicle on a road or other public place, after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence'. The same offences are extended to Northern Ireland under the Road Traffic (Northern Ireland) Order 1995.

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