

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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- The forensic physician
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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. It is the responsibility of the police constable, not the health care professional, to assess capacity. Although doctors are legally permitted to take blood, they cannot be required to do so, and should not proceed if there are medical reasons why a specimen should not be taken. 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.¹ The police have no powers to take and test blood specimens that were taken as part of the patient's care in hospital.

Basic principles

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 has assessed the person's capacity and found the person to be incapable of giving valid consent due to medical reasons;² and
- the forensic physician taking the specimen is satisfied, at the time the sample is requested, that the person is not able to give valid consent (for whatever reason); and
- the person does not object to or resist the specimen being taken and has not refused consent to the sample being taken before losing competence; and
- in the view of the doctor in immediate charge of the patient's care, taking the specimen would not be prejudicial to the proper care and treatment of the patient.

The specimen is not tested until the person regains competence and gives valid consent for it to be tested. If doctors follow the advice in this summary they will fulfil both legal and ethical requirements.

1 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.³ In 2005, the Criminal Justice (Northern Ireland) Order (the 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 meeting in 2001, it passed the following resolution:

"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 is a belief that some drivers may, in the past, have escaped appropriate prosecution for drink driving offences, such as causing death by careless driving whilst 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 is 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 aims 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.

2 Defining capacity to give consent

Whenever doctors are taking blood specimens from drivers for forensic purposes, they must make a judgement about that person's capacity to give consent. 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".⁴

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.

3 Competent patients

In the past, blood specimens could only be taken from people who were able to give consent. Procedures for taking blood from people who give consent are largely unchanged by the new legislation. As part of a drink driving⁵ 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. It is taken by a doctor, who has a responsibility to assess whether the individual has the capacity to give consent (see section 2). In police stations, healthcare

professionals (defined as a nurse or registered member of any other profession designated by an order made by the Secretary of State) are also permitted to take specimens, and, in this context, the following guidelines apply equally to nurses and to doctors, although nurses will also have to take into account professional guidance from their own governing bodies.⁶ Where the specimen is taken in a police station (not in hospital) and is taken in order to test for drugs, the doctor must be satisfied that the condition of the person required to provide the specimen is drug-related. This is not a requirement when the specimen is taken in hospital.

A doctor cannot be required to take a specimen from a patient, and should not do so if there are medical reasons why a specimen should not be taken. A driver cannot be penalised if the doctor does not consider it appropriate to take a specimen.

Where a request for a blood specimen is made in hospital, the doctor in immediate charge of the patient's care must be told that a specimen is required. That doctor is entitled to object if requiring a specimen to be given would be prejudicial to the proper care and treatment of the patient.

It was reported in 2000 that a small number of police forces do not use forensic physicians to take blood specimens at hospitals, but that blood specimens are taken by the hospital doctors.⁷ We believe that it is important to maintain a clear separation between the clinical care a patient is receiving and any forensic procedures with which patients are asked to co-operate. It is therefore our view that, wherever possible, the specimen should be taken by a forensic physician. If, exceptionally, it is not possible for a forensic physician to attend, another doctor may take a specimen on behalf of the police provided that he or she is not involved in the patient's clinical care.

4 Incapacitated patients

4.1 The police constable

Since 1 October 2002 in England, Wales and Scotland, and 19 July 2005 in Northern Ireland, the police have had additional powers to ask for a blood specimen to be taken from a driver who lacks the capacity to give consent in certain circumstances. Where a drink or drug-related driving offence is being investigated, and a police constable requires a blood specimen, that specimen may be required 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 section 4.4).

There is advice to the police service about the Act in the police service guidance *Taking blood specimens from unconscious drivers at hospital*. Although the guidance is not explicit that the provisions are intended to apply only to unconscious drivers, not to those who lack capacity for

other reasons, this is implied in the document's title. The BMA and FFLM are concerned that this matter has not been made explicit. The organisations are also concerned that there has been no advice or training for the police about how to assess capacity and the reasons for any incapacity. Ultimately, however, these issues are matters for the police and not doctors.

4.2 The forensic physician

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 specimen should be taken by a forensic physician. If there are exceptional reasons why this is not possible, another doctor may take the specimen provided that he or she is not involved in the clinical care of the patient and is sufficiently familiar with the content of this guidance. It is essential to maintain a clear separation between clinical and forensic interventions. The task may not be delegated to another health care professional.

The police cannot require a doctor to take a specimen, it is merely lawful for a doctor to agree to do so. A forensic physician should refuse to take a specimen unless the conditions in section 4.4 of this guidance are met. A driver cannot be penalised if the doctor does not consider it appropriate to take a specimen.

4.3 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. The treating doctor should object if he or she considers that taking the specimen would be detrimental to the patient's clinical care, 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.

4.4 Taking the specimen

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 (see section 4.1). Ethically and professionally, however, it is important that the doctor taking a specimen is satisfied that the person either (a) is competent and gives valid consent or (b) lacks the capacity to give consent but taking a specimen is nevertheless lawful. It is therefore essential that forensic physicians, and other doctors who may become involved,

are familiar with this guidance. Assessing capacity is discussed in section 2 of this guidance.

Legally, the doctor taking the specimen may do so irrespective of whether the person agrees. Ethically, however, the BMA and FFLM believe that doctors should not take these specimens if the patient refuses or resists. It is not ethically acceptable 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 important that doctors document their decisions and their assessment of capacity carefully.

It is also unlikely to be appropriate to take a specimen without consent if 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.

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. Whilst 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.

4.5 Once a specimen has been taken

The specimen is divided into two, and both parts are 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 required. The treating doctor should object if any part of this procedure would be prejudicial to the patient's proper care and treatment.

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


Decisions about whether the patient is competent are made by the police constable. The treating doctor's role is to object if the processes would be detrimental to the patient's care, not to assess whether the patient is competent to agree to forensic testing.

5 Further reading

Taking blood specimens from those involved in road traffic accidents to test for levels of alcohol or drugs - Department of Health, 2002

Taking blood specimens from unconscious drivers at hospital - Department for Transport, 2002

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

askBMA on 0870 60 60 828 or 
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Department of Medical Ethics, BMA House
Tavistock Square, London WC1H 9JP
Tel: 020 7383 6286
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Email: ethics@bma.org.uk

Non-members may contact:

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BMA House, Tavistock Square, London WC1H 9JP
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References

- 1 Variously referred to as: forensic medical examiner, forensic medical officer and police surgeon.
- 2 "Medical reasons" is the terminology used in both pieces of legislation. No definition is given.
- 3 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 signalman or in any other capacity in which he 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.
- 4 *Friel v Dickson* [1992] RTR 366.
- 5 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.
- 6 The Secretary of State also has the power to make regulations extending this to other health professionals in the future.
- 7 Ramskill A. *"Blood, sweat & beers" The law and procedure relating to hospital breath tests*. London: Home Office, 2000: pp v.