

Emergency departments: Are they considered a safe haven from prosecution for impaired drivers involved in fatal or personal injury crashes?

Impairment-related crashes are the leading criminal cause of death in Canada, accounting for approximately 1239 deaths, 73 120 injuries, and as much as \$12.6 billion in financial and social costs annually.¹ Sanctions resulting from conviction are effective in preventing impaired driving.²⁻⁶ However, the injured impaired drivers treated in our emergency departments are infrequently convicted of impaired driving. Three Canadian studies have been published. The first found that only 11% of injured alcohol-impaired drivers identified in the British Columbia trauma registry between 1992 and 2000 were convicted of impaired driving.⁷ The second study found that the conviction rate for injured alcohol-impaired drivers admitted to Calgary Health Region trauma service between 1999 and 2003 was only 16%.⁸ The third study reported a conviction rate of only 6.7% for all alcohol-impaired drivers injured in a crash who presented to a tertiary care emergency department in British Columbia from 1999 to 2003.⁹ Follow-up over a 4 1/2 year period indicated that 30.7% of the injured impaired drivers were engaged in subsequent impaired driving, notwithstanding that they injured or killed someone in more than 84% of initial crashes.⁹ These studies suggest that our emergency departments may have become safe havens for the worst drinking drivers, those drivers who are involved in fatal or personal injury crashes.

Three separate Criminal Code, R.S.C. 1985, c. C-46, provisions allow the police to demand or seize blood samples from suspected impaired drivers. First, under section 254(3)(b),

the police may demand blood samples from a person if they have reasonable grounds to believe (a) that he or she committed an impaired driving offence within the preceding three hours; and (b) that, by reason of the person's physical condition, he or she is incapable of providing a breath sample or it is impracticable to obtain one. Second, under section 256, the police may apply to a justice for a warrant authorizing them to seek blood samples from a driver if they have reasonable grounds to believe that (a) the driver committed an impaired driving offence within the previous 4 hours; (b) the driver was involved in a crash resulting in death or bodily harm; and (c) a medical practitioner is of the opinion that the driver is unable to consent to the drawing of blood samples, and that the taking of the samples would not endanger the driver. Third, under section 487 of the Criminal Code, the police may apply to a justice for a general search warrant authorizing them to search for and seize any relevant evidence, including blood samples that have already been taken from a suspected impaired driver for treatment purposes. Before issuing such a warrant, the justice must be satisfied, based on information sworn under oath, that there were reasonable grounds to believe that such blood sample evidence would be found on the premises.

To satisfy these Criminal Code provisions the police must establish that they had "reasonable grounds to believe that the driver committed an impaired driving offence." However, in many cases the police will need information about the suspect's physical condition that can only be ob-

tained from the suspect's physician. For example in *R. v. Clark*, the accused was involved in a head-on collision that killed another driver. Gerein commented that the sweet odor on the accused's breath may potentially have been due to alcohol. However, the

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police officer did not provide reasonable grounds to obtain a blood sample, because the odor may have been due to another source such as diabetes.¹⁰ The police officer could only have determined if the patient had diabetes by interviewing Mr Clark's physician.

However, health professionals who release patient information without consent or statutory authority would be in breach of their common law, professional, and statutory confidentiality obligations. The Canadian Medical Association Code of Ethics permits "disclosure of patients' personal health information to third parties only with their consent, or as provided for by law, such as when the maintenance of confidentiality would result in a significant risk of substantial harm to others or, in the case of incompetent patients, to the patients

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themselves.”¹¹ The Canadian Medical Protective Association advises: “While physicians may have a desire to collaborate with police to foster public safety and injury prevention, physicians are bound by a duty of confidentiality to their patients. As such, physicians should not provide any patient information to the police unless the patient has consented to this disclosure or where it is required by law.”¹² While section 257(2) of the Criminal Code protects medical practitioners from criminal and civil liability for *taking* a blood sample pursuant to a valid demand or search warrant, it does not protect them from liability for breaching confidentiality in assisting police to make a valid demand or obtain a search warrant.

If the police wrongfully obtained confidential patient information, a blood sample demand made or a warrant obtained based on this information would be invalid. Any subsequent seizure of the blood sample would be found to violate section 8 of the Charter and, depending on the specific facts, may well be excluded at trial.¹³

For example, in *R. v. Dersch*, the accused expressly refused a police demand for blood samples and told the doctor not to draw blood in any circumstances. However, once the suspect was unconscious, the doctor took blood samples for medical purposes. At an officer’s request, the doctor disclosed the accused’s BAC to the police, who subsequently obtained a warrant and seized the samples. The Supreme Court of Canada held that the samples should not have been taken without the accused’s consent, and that the doctor breached his confidentiality obligation in disclosing the accused’s BAC to the police, as the police had not used appropriate means to obtain this information. The Court held that the police conduct in obtaining the suspect’s BAC information was analogous to a search and seizure. Consequently, the blood sam-

ple results were excluded, and the charges against the accused for impaired driving causing death and impaired driving causing bodily harm were dismissed.¹⁴

Complicating the issue further, the present statutes require the collection of evidentiary samples within 3 hours of the impaired driving offence. Often the police cannot establish grounds for demanding these evidentiary blood samples within this time. In other comparable democracies, blood samples are taken when the patient enters the emergency department and are held in a secure location within the hospital until the police have independently established grounds for their seizure.¹³

Moreover, the Criminal Code effectively limits the taking of blood samples in hospitals, where drawing blood is routine and taking evidentiary breath samples is simply not feasible due to limited space and patient care priorities. Before being allowed to demand a blood sample, the police must demonstrate that the patient is unable to provide a breath sample due to their physical condition or that it is impracticable to do so. The courts have generally held that police should not make decisions about the driver’s inability to provide a breath sample unless they have consulted a medical professional.¹³ For instance, in *R. v. Brooke*, the accused was wearing a neck brace and strapped down at the time of arrest. The officer demanded a blood sample, but the court excluded the blood sample evidence because the officer had not specifically asked the attending physician about the accused’s physical condition and whether he was able to provide a breath sample.¹⁵ Thus, in most cases, police cannot obtain evidentiary breath samples for logistical reasons, and a physician cannot give them the information they require to demand blood samples without violating his or her confidentiality obligations.

Thus, the legal “catch-22.” The

police need a considerable amount of information to comply with the legal requirements for a blood sample demand from a patient who is hospitalized. It is very difficult for the police to independently gather this information, given that the patient may be lying on a stretcher or otherwise unable to perform a standard field sobriety test. Moreover, the courts have indicated that tests on approved screening devices may only be conducted at roadside. Therefore, in the vast majority of cases, the police will only have authority to demand an evidentiary blood sample if they obtain the necessary information from the patient’s physician. However, the physician cannot provide this information to police without violating his or her confidentiality obligations. Such a breach of confidentiality will likely result in the evidence being excluded and the accused being acquitted.

The Canadian Medical Association is also concerned about this issue. In 2008, the CMA passed the following resolution at General Council: “The Canadian Medical Association urges the federal Department of Justice to conduct a review of the applicable sections of the Criminal Code related to blood testing of intoxicated drivers who are treated in hospital following a motor vehicle crash.” The authors of this paper are of the opinion that the following four amendments would improve the effectiveness of these Criminal Code provisions.

- 1) The Criminal Code should be amended to authorize police to demand blood samples from any hospitalized occupant of a motor vehicle that has been involved in a fatal or personal injury crash. The evidentiary collection process could be modeled after the systems that have been in place in England, New Zealand, and Australia for many years.¹³
- 2) To facilitate the timely collection of evidentiary blood samples, they should be taken from all occupants

of motor vehicles involved in fatal or personal injury crashes upon their entry into the hospital. These samples should be stored in a secure location and only released if the police can independently establish grounds for their seizure.

- 3) The Criminal Code and all laws governing patient confidentiality should specify what information physicians must provide to the police during an impaired driving investigation. The police cannot effectively investigate impaired driving cases unless they have been told that the patient has been admitted to hospital, the patient's location, if the patient can be interviewed, and if drawing blood would endanger the patient.
- 4) The Criminal Code should be amended to remove the "preference" for breath samples when suspected impaired drivers are taken to hospital.

—Roy Pursell, MD

Associate Professor, Department of Emergency Medicine, UBC

—Luvdeep Mahli,

Faculty of Medicine, UBC

—Robert Solomon, LLB

Professor, Faculty of Law,

University of Western Ontario

—Erika Chamberlain, LLB

Assistant Professor,

Faculty of Law, UWO

References

References are available at www.bcmj.org.

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For more information

For further information regarding asbestosis, contact Sami Youakim, MD, at 1 250 881-3490.

—Sami Youakim, MD, MSc,
FRCP, WorkSafeBC

Occupational Disease Services

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of a suitable candidate, consider nominating him or her for the honor of receiving the first Dr Don Rix Award for Physician Leadership. The deadline for nominations is 30 March annually, and should be sent to the CEO of the BCMA at 115–1665 West Broadway, Vancouver BC V6J 5A4 or CEO@bcma.bc.ca.

Signs of Stroke materials available for physicians

The Heart and Stroke Foundation of BC & Yukon has launched a 2-year campaign to educate BC residents about the five warning signs of stroke and the time-sensitive nature of tissue plasminogen activator treatments.

The campaign will use a TV commercial, radio, and print advertising, and public relations. Posters, wallet cards, and other materials have been printed for physicians to display in their offices. If you are interested in ordering a few posters and other materials for your office, please e-mail info@hsf.bc.ca with "Signs of Stroke" in the subject line.

—Susan Pinton

Heart and Stroke Foundation of
BC & Yukon

Body Worlds and the Brain exhibition

Telus World of Science is displaying the Gunther von Hagens' Body Worlds and the Brain exhibition until early January. The exhibit is renowned for the human bodies, specially preserved through a method called plastination, that are displayed in life-like postures. Different specimens allow visitors to appreciate the functional anatomy of the various body systems, including fetal development.

Since debuting in 1995, over 30 million people in 50 cities have seen Body Worlds. Dr von Hagens invented plastination in 1977 in an effort to



improve the education of medical students. He created the Body Worlds exhibitions to bring anatomy to the public. Understandably, an exhibit that presents human material in such a frank and vivid manner will attract both positive and negative interest, but such a valuable educational opportunity clearly deserves the support of the medical community. In addition to a special focus on the anatomy and function of the brain, the exhibit will allow people to see the consequences of a number of modifiable behaviors such as smoking, obesity, and poor eating habits. These are conditions that are not only important considerations for individuals, but are also major public health concerns. Visitor numbers are expected to be very high. Educational materials for school groups and adults are being prepared and extensive community consultations are underway.

Physicians interested in more information can find it at www.scienceworld.ca/bodyworlds and www.bodyworlds.com. Timed tickets are now available from Science World, either by phone at 604 443 7500 or online at www.scienceworld.ca/bodyworlds.

—Lloyd Oppel, MD
Vancouver