No safe haven for impaired drivers

There never has been and never will be a safe haven for impaired drivers in hospital emergency departments, says Victoria's chief constable, Jamie Graham.

Jamie Graham

The article "Emergency departments: Are they considered a safe haven from prosecution for impaired drivers involved in fatal or personal injury crashes?" (*BCMJ* 2010;52[9]:477-479) resonated with many of our frontline police officers, and the recommendations received immediate support from cops who actually investigate these kinds of cases. The article also rekindled the discussion and will prompt a number of police organizations (mine included) to ask the federal government to examine the current legislation. British Columbia has been studying the issue so the timing is good. Collecting blood samples from all occupants of motor vehicles involved in serious wrecks would be legally challenged, but doing so makes a world of common sense. We have recommended random breath testing for motor vehicle operators for some time, so the onus is on the federal government to look at changes. The other countries you mentioned do not have our Charter of Rights and Freedoms, so we know it is going to be a long road to take effect.

The authors of the article, Dr Roy Purssell, Ms Luvdeep Mahli, Mr Robert Solomon, and Ms Erika Chamberlain, really did their homework on the issue, but I want to add a few points to highlight how complicated and troublesome these investigations can be. The RCMP and some other agencies have developed a checklist for officers who arrive at the hospital so they don't miss any steps in the collection of evidence. The last checklist I saw was a 24-step convoluted, complicated process that only the most talented could follow. The sheet, the forms, and the authorizations are usually kept in the trunks of many police cars, but most of us now keep kits readily available at our local hospitals. This is important so those officers who often do not handle these kinds of cases can follow the color-coded process and take the appropriate action with the proper forms.

In rural areas the challenges are compounded. Staff Sergeant P. Mulvihill of the RCMP in Burnaby helped with some of these points, which illustrate why impaired driving investigations are not easy. A police officer has to establish who was driving the motor vehicle and the time of driving, and be able to *prove* that no alcohol was consumed after the collision. This might sound straightforward; it is not. Evidence is usually obtained through witnesses. Some remain at the scene; others leave notes with their names and phone numbers for future contact. Having established these three critical elements of the offence, preferably firsthand, the investigator then must establish defensible evidence that would show that the suspect's behavior was not caused by a head injury sustained in the collision. If there are facial injuries (often the case) the chance of obtaining a breath sample will be remote, but a positive approved screening device (ASD) reading will elevate an officer's grounds from reasonable suspicion to reasonable and probable grounds, giving the officer the authority to move to the next stage.

Once at the hospital, the difficulties really begin! If you have a combative suspect (head injury, intoxication, rowdy associates being examined in the next bed, demanding relatives, etc.) a doctor will sometimes assess the patient quickly. The investigator must establish three key elements from the doctor:

1) That taking the samples will not endanger the subject's life or health.

2) That, in the doctor's expert opinion, the subject is capable of understanding the demand (the actual wording from the Criminal Code is, "by reason of any physical or mental condition of the person that resulted from the consumption of alcohol or a drug, the accident or any other occurrence related to or resulting from the accident, the person is unable to consent to the taking of samples of his or her blood").

3) That the doctor is willing to participate in the process, because section 257 of the Criminal Code absolves him or her of mandatory participation.

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Medical doctors, like many professionals, are guided by ethical guidelines and principles. There lie more issues. If the subject is unconscious or head injured as confirmed by the doctor, the police move into a "telewarrant" scenario. As these cases are very time sensitive, the police investigator must have completed the telewarrant process and have the warrant "in hand" within 4 hours. This may seem obvious, but believe it or not there are people involved in this process who actually attempt to deliberately create delays beyond the 4 hours. The issue is compounded when the officer does not receive timely phone calls back during the telewarrant process, thereby stretching the mandatory time line beyond the 3-hour mark for collecting a breath or blood demand from the time of the original collision. This forces the police officer into a "blood warrant" scenario after the fact. The continuity of the blood samples and a chain of possession of the blood taken by the hospital staff then become crucial. All those involved are subject to subpoena for court at a later date. One must not forget that we are trying to show the level of impairment at the time of the actual incident, so any exhibits that may show levels of alcohol impairment are necessary.

There are often problems with time lines. When there are no apparent head injuries the police officer must still operate as if there were, to address future speculation by the court. Doctors see the officers waiting so they are aware of the investigator's purpose, and nursing staff are sometimes asked to evaluate patients. Doctors are smart; they know that the less they are involved, the less likelihood they will have to go to court. While not true in all cases, I have found that doctors and lawyers sometimes disagree and the former dislike going to court in any circumstances (just like lawyers probably hate going into emergency rooms!). Some doctors also realize these cases are very time sensitive so the longer the delay in looking after head injuries, or not giving the investigator a straight answer, the greater the possibility that the police officer is forced to proceed with a blood warrant after the fact.

Police officers are also sometimes stonewalled in a number of hospitals by physicians or hospital staff who do everything to prevent the officer from collecting evidence. There is no amount of skill or training of a police officer that will help when this happens. In most cases, physicians are more than willing to help, but unfortunately the other hurdles are difficult to overcome. I am also aware of the ethical "right vs right" dilemmas some doctors feel in not doing any procedure on a patient that does not further medical care. I think there are bigger issues at play here in terms of their overall personal responsibility to keep people safe.

Another difficulty is when a blood warrant is obtained and the suspect/patient regains consciousness in the middle of the blood taking. In this case the blood warrant becomes invalid. If the person goes back into an unconscious state, the process begins again. If the suspected impaired driver requires immediate surgery, and the police officer has not had any direct dealings with him or her and thereby established no indicators of impairment, the evidence can only be obtained if hospital staff are willing to attest to the level of impairment themselves. That means they will have to give direct evidence as to their observations and actions. When they are unwilling or unable to do this, these cases are forever lost.

Police officers must be vigilant and insist that hospital staff save and protect blood results. Blood must be collected in a very specific manner, and non-alcohol wipes must be used to clean the site of the blood extraction. I am told that generally in the Lower Mainland these blood samples are destroyed within 4 to 7 days, depending on the hospital. We have had cases where some hospitals have destroyed the samples even after being asked that they be saved for our own independent laboratory analysis. The blood warrant includes the blood and the hospital's own lab analysis, the results of which can be compared with the police forensic lab's results.

I previously mentioned the paperwork that the officers need to complete. It is staggering. There are many forms that are required by the police investigators when blood samples are drawn in the hospital by the doctor or a technician. The certificate of analysis must be served on the driver 7 days prior to trial. Experienced police officers will attempt to set a first court appearance 4 to 5 months from the date of the collision as accused drivers are mysteriously hard to find, resulting in the suspect's lawyer being served with the documents "substitutionally."

As you can see, these investigations are complex and uncommon. Most officers have never handled one, and most departments usually have several specific subject matter experts that do these kinds of cases or are available to provide advice and guidance. Officers must be diligent, knowledgeable, and focused, and they must doggedly pursue the suspects through the hospital emergency room process for there to be any success. A safe sanctuary in hospitals could be a reality if the current process continues and necessary changes are not made. BCMJ