Usefulness of Austroads' fitness-to-drive guidelines: lessons from the *Gillett* case

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ABSTRACT

- *Regina v Gillett* deals with a man who did not disclose his epilepsy when seeking a drivers licence. Subsequently, he had a seizure while driving, causing an accident in which three people died. He was found guilty but appealed.
- During the trial to decide whether Gillett was guilty of dangerous driving occasioning death, the judge decided that the Austroads fitness-to-drive guidelines were extraneous to legal consideration of the acceptable risk to be attached to chronic medical conditions.
- Although the appeal was unsuccessful with respect to guilt and sentencing, it did reinstate the relevance of the Austroads guidelines when evaluating suitable risk with respect to potentially dangerous drivers.
- We suggest that even greater protection can be afforded to the community if a clearly enunciated warning, outlining a driver's responsibilities, were to appear on each drivers license.

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Ross Gillett, a man with epilepsy, failed to disclose this condition to the Roads and Traffic Authority, New South Wales, when seeking a drivers licence, and similarly misled his employer about his condition. On 2 May 2003, Gillett had a seizure while driving and caused a fatal car accident.

Therapeutic concentrations of carbamazepine in Gillett's blood after the accident suggested that he had been compliant with medical advice. Investigations after the accident showed previously undiagnosed sleep apnoea.

At Gillett's trial for contravening section 52A of the *Crimes Act (Dangerous Driving Occasioning Death) 1900* (NSW), two expert medical witnesses indicated that sleep apnoea could have converted nocturnal seizures to daytime seizures. The expert witnesses also said that, if asked before the diagnosis of sleep apnoea, they would have supported Gillett's application to drive, on the basis that his situation was significantly safer than the minimum standards for fitness to drive, as is provided for in the Austroads *Assessing fitness to drive* guidelines.[1] However, when assessing fitness to drive, the trial judge refused to admit the Austroads guidelines into evidence. He found Gillett guilty of dangerous driving occasioning death.

If the guidelines had been admitted and used, Gillett would have been deemed fit to drive. In this case, how could he have been convicted of dangerous driving simply for driving while "fit to drive"?

In making the decision to find Gillett guilty, the judge took into consideration a similar accident caused by Gillett in 1993. Relying on the evidence, and with the benefit of hindsight, the trial judge found that Gillett's 1993 accident was also due to a daytime seizure. This conclusion about the previous accident, combined with Gillett's failure to disclose his epilepsy to the relevant authorities, led the judge to believe that Gillett knew he was not in a fit state to drive when he did drive on 2 May 2003. Gillett's driving, knowing he was not fit to do so, constituted "an unacceptable level of risk to fellow road users".[2]

The trial judge's decision brings into sharp focus the issue of what, exactly, is an acceptable risk? How should the courts balance the interests of the community in being protected from harm against the right of an individual not to be arbitrarily deprived of a drivers licence?

Status of the Austroads guidelines

In this article, we argue that, although Gillett's subsequent appeal to the Court of Criminal Appeal failed, it is significant that the appeal court held that the trial judge had erred in his refusal to allow the Austroads guidelines to be tendered.

The Court of Criminal Appeal dealt with the function of the guidelines and their relevance in determining the issue of whether the accused's driving was objectively dangerous, in the following way:[3]

> 41 To my mind the document was relevant to the question of dangerousness and should have been admitted into evidence. His Honour was required to consider whether the driving of the appellant was dangerous having regard to the risk ordinarily associated with the driving of a motor vehicle … The standards, which are adopted for the certification, may be relevant to an identification of the level of risk, which the community is prepared to accept.
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> 42 If [the Guidelines] had been admitted, the publication would have been of little utility except to assist the Crown case … the publication expressly provides that for a person who has had a seizure causing an accident, the minimum period during which they should not drive is one year. However, it also states that "Consultant opinion [is] essential." In the present case such an opinion was not obtained. *It would be reasonable to infer that if a [consultant's] opinion had been sought, the appellant's sleeping pattern and level of tiredness would have been investigated* [our emphasis]. As the publication acknowledged, if deprived of sleep, a person suffering from epilepsy should not drive. This was the very condition from which the appellant was suffering and the publication, accordingly, confirms that driving in his condition posed an unacceptable level of risk to fellow road users.

Medicolegal implications

We question the Court of Criminal Appeal's assumption that "it would be reasonable to infer" that, if Gillett had observed the requirement for a consultant's opinion, his symptoms would have led to further investigation, which in turn would have revealed his true condition and, presumably, resulted in the cancellation of his drivers licence.

Until the time of the fatal accident, Gillett had been treated by an experienced neurologist (and an accredited sleep physician),

who found nothing to arouse suspicion of sleep apnoea. Indeed, the unchallenged evidence adduced at Gillett's trial was unequivocal: it was only after the 2003 accident that Gillett's sleep apnoea was diagnosed (by R G B) — and then only as a result of intensive investigation and repeated polysomnography — not because of suspicion of sleep apnoea, but in an attempt to explain what had caused Gillett to suffer a daytime seizure.

We, therefore, suggest that there was nothing in the evidence adduced at Gillett's trial to support the Court of Criminal Appeal's "reasonable inference".

However, the reason that the Court of Criminal Appeal's comments on the admissibility of the guidelines are significant is that, by implication, they reject the trial judge's finding that "the fact that the accused was driving while there was … [a] risk of seizure … subjected other people to a real … risk of injury and death".

In one sweeping statement, the trial judge would have disqualified *all* people with longstanding controlled epilepsy "with [a] risk of seizures" from driving, thereby pushing aside the guidelines that, on the history Gillett gave, would have supported his continued driving.

The significance of the Court of Criminal Appeal's finding on the relevance of the Austroads guidelines, therefore, lies in the fact that had the trial judge's rejection of the guidelines been upheld on appeal, they would henceforth be of no relevance, if only because all people with longstanding epilepsy, including those with a history of only nocturnal (sleep) seizures, would be disqualified from holding a drivers licence.

Issues for further attention

A number of issues remain unresolved. First, we ask: do the Austroads guidelines really identify the level of risk the community is prepared to accept? Inclusion in the guidelines of more information about the nature and extent of the scientific evidence on which they are based might increase the confidence of those who are expected to apply the guidelines and could be relevant to all medical conditions, not only epilepsy. Further, evidence-based comments could address issues of how safety in drivers with a medical condition is affected by the management of their condition, concomitant conditions (for example, sleep apnoea in people with epilepsy), as well as provide a scientific justification for the periods of driving exclusion imposed by the guidelines.

Second, the trial judge acknowledged the ethical dilemma for medical practitioners, conceding that the approach by doctors to disability and driving was "an attempt to balance the interests of those suffering medical conditions which may affect a person's ability to drive and the interests of other road users who may be injured or killed if that medical condition leads to a collision on the roads". Nevertheless, His Honour opined that:

> [Gillett's usual treating neurologist's] "concern" in 2001 that the accused had not informed the Road Traffic Authority about his seizure disorder seems, in the light of subsequent events, to have been entirely justified.[2]

With respect, we submit that His Honour attached undue significance to the treating neurologist's "concern". We submit that the practitioner in question, a highly regarded neurologist and accredited sleep physician, would undoubtedly have taken steps to ensure that the Roads and Traffic Authority was made aware of Gillett's condition had he suspected that his patient was suffering from sleep apnoea or daytime seizures. It was only after the accident that another neurologist diagnosed Gillett's sleep apnoea, which is now believed to be the cause of Gillett's traffic accident.

We endorse the judge's view that doctors attempt to balance a patient's ability to drive with the interests of other road users, but submit that the guidelines fail to provide sufficient guidance in applying that "balance of interests". The guidelines neither protect road users nor provide guidance that would keep doctors from future litigation.

In the section Ethics and Legal issues, the Austroads guidelines merely state that:

> A difficult ethical question arises if a health professional believes that there is an over-riding public interest in the disclosure of confidential information. The health professional must then decide if the public interest is sufficient to justify breaching patient confidentiality and jeopardising, perhaps irretrievably, the professional relationship held with the patient.[1]

We forcefully submit that the guidelines should be more forthright. In *W v Egdell*,[4] the English Court of Appeal laid down some conditions when public disclosure will outweigh the duty of confidentiality. Their Lordships held that it must be shown that:

- there is a real, immediate and serious risk to public safety;
- the risk will be substantially reduced by disclosure;
- the disclosure is no greater than is reasonably necessary to minimise the risk; and
- the public interest protected by the duty of confidentiality is outweighed by the public interest in minimising the risk.

We believe that Egdell's case will most likely be followed by Australian courts. Therefore, doctors would be well advised when confronted by patients who satisfy the Egdell conditions, to seek approval from their medical indemnity providers that the case is one that justifies them informing driver licensing authorities of their conclusion. Further, the conversation should be contemporaneously recorded in the patient's medical file.

Finally, it is worth pointing out that there are some patients with epilepsy who have no recollection of seizures that result in a loss of consciousness. These patients are, therefore, difficult to assess in respect of fitness to drive, even using the guidelines.

Conclusion

We submit that doctors should inform patients of their legal obligation to inform the driver licensing authority of their condition, as well as advising them that driving during the period legally prevented by their medical condition will render them not only criminally liable, but also in breach of their third party insurance. The latter breach enables the insurer to recover from such drivers any damages paid to third parties as a result of an accident attributable to the medical condition. This advice should be noted in the patient's medical record at the time of the consultation. Notice to that effect might also be considered for inclusion by the driver licensing authority on all future drivers licences, in the form of a prominent warning.

The Austroads guidelines warn that patients who are informed of their legal obligation may withhold information from their health care professional, with detrimental consequences for the management of their condition. However, this obstacle may be overcome if the warnings about criminal liability and insurance breaches are issued by the driver licensing authority, and appropri-

ate education programs are provided — possibly before a new driver's first licence is issued. Yet, despite the measures, some patients will go to any lengths, including "doctor shopping" and/or threatening their doctor, to avoid facing up to the consequences of disclosure.

Competing interests

None identified.

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2 *R v Gillett* (unreported judgment).
3 *Gillett v The Queen* [2006] NSWCCA 370.
4 *W v Egdell* [1990] 1 All ER 835.

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