ABSTRACT

The Gillett case, dealing with a man who denied his epilepsy and subsequently had a seizure related accident causing three fatalities, led to the AUSTROADS Guidelines being rendered extraneous to legal consideration of acceptable risk to be attached to chronic illness. While his appeal was unsuccessful, concerning guilt and sentencing, it did reinstate the relevance of the AUSTROADS Guidelines when evaluating suitable risk regarding potentially dangerous drivers. The paper to follow tracks the decisions emerging from the Gillett appeal and reviews their impact on the guidelines. The paper suggests ways in which even greater protection can be afforded to the community, with clearly enunciated warning, outlining a driver’s responsibilities, to appear on each driver’s license.

TITLE

THE UTILITY OF AUSTROADS FITNESS TO DRIVE GUIDELINES – LESSONS FROM GILLETT [i]

THE FACTUAL BACKGROUND

Ross Gillett, a man with epilepsy, lied to the Road Traffic Authority when seeking a driver's licence by not disclosing his epilepsy, and similarly misled his employer about his condition. On 2 May 2003, Gillett had a seizure while driving which caused a fatal car crash.

Therapeutic carbamazepine levels after the accident suggested compliance with medical advice. Investigations post-accident discovered previously undiagnosed sleep apnoea.

At Gillett’s trial for contravening section 52Aof the Crimes Act 1900 (dangerous driving causing death), both expert medical witnesses indicated that his sleep apnoea could have converted nocturnal seizures to daytime seizures.

They also said [that, if asked before the diagnosis of sleep apnoea?] they would have supported Gillett’s application to drive [on the basis of his only suffering from nocturnal seizures?]. This was on the basis that Gillett's situation was significantly safer than the minimum standards for fitness to drive, as is provided for in the Austroad Guidelines. However the trial judge, when assessing fitness to drive, refused to admit into evidence the AUSTROADS guidelines. He found Gillett guilty of dangerous driving occasioning death.

If, then relying on the AUSTROADS guidelines suggests Gillett was fit to drive, how could he be convicted of dangerous driving, simply for driving while “fit to drive”? 
In making the decision the judge took into consideration a previous, similar accident, caused by Gillett in 1993. Relying on the evidence and with the benefit of hindsight, the trial Judge found that Gillett’s previous accident was also due to a daytime seizure. With this knowledge in mind, combined with Gillett’s failure to disclose his epilepsy to the relevant authorities, it suggested to the Judge 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”

The trial judge’s decision brings into sharp focus what exactly is an acceptable risk. How should the courts weigh up balancing the interests of the community in being protected from harm from potentially dangerous drivers, against the right of an individual not to be arbitrarily deprived of his driver’s licence?

STATUS OF THE GUIDELINES

The purpose of this article is to 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 refusing the tender of the Guidelines.

The Court of Criminal Appeal dealt with the function of the Guidelines and their relevance in determining the question whether the accused’s driving was objectively dangerous, in the following way:

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.

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 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. 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. [Our emphasis]

MEDICO-LEGAL IMPLICATIONS OF THE DECISION OF THE COURT OF CRIMINAL APPEAL

We respectfully question the Court of Criminal Appeal’s assumption on the use that could be made of the Guidelines, that “it would be reasonable to infer” that had Gillett observed the “Consultant opinion essential” mandated in the Guidelines, his symptoms would have led to further investigation, thus revealing his true condition, and, presumably, resulting in the cancellation of his driver’s licence.

With the utmost respect, Gillett had been treated up until the time of the fatal accident by an experienced neurologist (who was also an accredited sleep physician) who found nothing to arouse his suspicion of sleep apnoea.

Indeed, the unchallenged evidence adduced at Gillett's trial was unequivocal, i.e. that it was only after the accident that Gillett’s sleep apnoea was finally diagnosed by one of us, and then only as a result of intensive investigation by recourse to repeated polysomnography, not because of suspicion of sleep apnoea, but in an attempt to explain what had occurred to cause Gillett to suffer a daytime seizure and thereby lose control of his car.

We therefore respectfully suggest that there was nothing in the evidence adduced at Gillett’s trial capable of supporting the Court of Criminal Appeal’s “reasonable inference”.

Having said that, we submit that the reason that the Court of Criminal Appeal’s comments on the admissibility of the guidelines are significant is that they impliedly reject the trial judge’s finding that “the fact that the accused was driving whilst there was … [a] risk of seizure…subjected other people to a real…risk of injury and death.”

Respectfully, in one sweeping statement, the trial judge would have disqualified ALL people with long standing 'controlled' epilepsy “with [a] risk of seizures” from driving, thereby sweeping 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 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 long standing epilepsy, including those with a long history of only nocturnal (sleep) seizures, would be disqualified from holding a driver licence.
ISSUES WHICH DESERVE FURTHER ATTENTION

A number of issues remain unresolved. Firstly, we ask whether the Guidelines really identify the level of risk the community is prepared to accept? It may increase the confidence of those, who are expected to apply the Guidelines, if more information regarding the nature and extent of scientific evidence, upon which the Guidelines are based, was offered within the text. This would be relevant to all medical conditions, not just epilepsy, and could address issues of safety and driving with other conditions, such as sleep apnoea. Comments could also address management, including any literature that reviewed same and its relationship to driving, to provide a scientific justification for the periods of driving exclusion imposed by the Guidelines.

Secondly, the trial judge acknowledged the ethical dilemma for medical practitioners facing patients with disabilities, 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….”. Having said that, His Honour returned to 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.”

With respect, we submit that His Honour attached undue significance to Dr Worthington’s “concern”. We submit that Dr Worthington, a highly regarded neurologist and accredited sleep physician, would undoubtedly have taken steps to ensure that the Road Traffic Authority was made aware of Gillett’s condition had he suspected that his patient was suffering from sleep apnoea and/or daytime seizures. It was only after the accident that one of us diagnosed Gillett’s sleep apnoea and believes it to be the cause of Gillett’s crash.

Respectfully endorsing the judge’s view that doctors, dealing with patients suffering from various disabilities, attempt to balance their patient’s ability to drive with the interests of other road users, we submit that the Guidelines fail to provide sufficient guidance in applying that “balance of interests”, neither protecting road users, nor providing guidance that would protect doctors from future litigation.

In the section Ethics and Legal issues, the 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.” [ref the guidelines]

We forcefully submit that the Guidelines should be more forthright in this matter.

In W v Egdell[ii], 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.

Doctors would therefore be well advised, that when confronted by patients who satisfy the Egdell conditions, to seek approval from their medical indemnity providers that the case is an appropriate one justifying informing the Driving Licensing Authorities of their conclusion, and contemporaneously record the conversation 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 which 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 Drivers 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 constitutes a breach of their third party insurance, enabling 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 records at the time of the consultation.

Notice, to that effect, might also be considered for inclusion by the Drivers Licensing Authority on all future driver licences in the form of a prominent warning.

Although the Guidelines warn that experience “in some places” has shown that informing patients of their legal obligation may result in patients
“withholding information from their health care professionals and, as a consequence, their condition is less effectively managed” reference the guidelines, it is hoped that if the above warning were to be enforced by the Drivers Licensing Authority, and accompanied by an appropriate education programme, possibly instigated even before the issuance of an initial driver's licence, it may overcome this obstacle, albeit some will go to any lengths, including doctor shopping and/or threatening their doctor to avoid facing up to the consequences of disclosure.

REFERENCES

[ii] W v Egdoll [1990] 1 All ER 835