

## MEDICINE AND THE LAW

# Confidentiality and fitness to drive: Professional, ethical, and legal duties in the case of the diabetic bus driver

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Patients who pose a risk of serious accidents present a difficult ethical problem for medical practitioners. The duty to maintain confidentiality is an ancient and weighty obligation and has many beneficial consequences for patients and society generally. Similarly, the duty of care towards a patient militates against disclosing details that could remove his or her source of income and imperil physical and mental wellbeing. However, in cases where maintaining confidentiality can result in severe harm to the patient and the public, the benefits of confidential practice may be outweighed. While many publications on this topic provide clinical criteria for determining the unfitness of a diabetic patient to drive, the focus in this article is on ethical, professional, and legal responsibilities after a practitioner has decided that a driver poses a significant danger.

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Suppose a medical practitioner receives a routine visit from a patient who is responsible for numerous lives, e.g. a vocational bus driver, and establishes that the driver is diabetic and experiences bouts of hypoglycaemia. Should the practitioner report the bus driver to a relevant authority or the driver's employer, thereby disclosing confidential information?

As an initial consideration, it is important to distinguish this situation from scheduled fitness-to-drive examinations organised by employers. In the context of fitness-to-drive tests, it should be the clear understanding of both health practitioner and driver that the former tests for fitness and reports on this to the employer. This understanding and the contractual obligations of the practitioner mean that the duty to report unfitness in this context is relatively uncontroversial. Therefore, the medical fitness-to-drive certificate stipulates that incorrect reporting by the examiner in this context can lead to a fine, or one year of imprisonment, or both.<sup>[1]</sup>

The situation at hand, in which the bus driver's practitioner diagnoses the patient's condition outside a fitness-to-drive examination, is more problematic and forms the subject matter of this article. In such cases, the practitioner faces serious ethical conflicts relating to her duty of confidentiality, her duty to consider the best interests of the patient, and her duty to the public at large. This article reviews the ethical and legal conflicts and professional duties that arise in this type of situation and points to the relevant guidance for practitioners.

While many publications on this topic provide *clinical criteria* for determining diabetic patients' unfitness to drive,<sup>[2-4]</sup> the focus here is on ethical, professional, and legal responsibilities after a practitioner has decided that a driver poses a significant danger. Therefore, other than highlighting a few ethically relevant medical factors, this article does not pass comment on when it is clinically correct to reach the determination of fitness to drive. Legal and ethical requirements with regard to *non-commercial* drivers also fall outside the current scope, except in providing context to the cases at hand. A further limitation of scope is that the article deals particularly with uncontrolled diabetes. While other conditions, such as epilepsy, pose similar problems, some of the discussion below applies only to diabetes. Nonetheless, many of the points made here are relevant to

other conditions. Similarly, outside the ambit of this article, there is the broader question of whether reporting of risky drivers ought to be legally mandatory under South African (SA) law, as in some other nations and states.<sup>[5,6]</sup>

## Risks posed by diabetic drivers

At the outset it is important to be clear about the nature and extent of the risks posed. Numerous disorders are regarded as potentially posing a risk to drivers and other road users.<sup>[1]</sup> For the most part, these disorders, e.g. epilepsy and narcolepsy, affect consciousness and concentration. Drivers with diabetes mellitus, similarly, are regarded as higher-risk drivers, owing mainly to the possibility of hypoglycaemic incidents while driving,<sup>[7]</sup> but also to other potential complications such as stroke, cataracts, or retinopathy.<sup>[8]</sup> Hypoglycaemia is of particular concern for drivers, as it can result in clumsiness, confusion, seizures, loss of consciousness, and death.

Results of research on diabetic drivers, although mixed, suggest that diabetics have an increased likelihood of accidents.<sup>[9]</sup> However, the increase is less substantial than one might think, and is of comparable significance to young age, male sex, and previous accident history, none of which is a disqualifying condition.<sup>[3]</sup> Therefore, in most cases it is inappropriate to prevent driving. Diabetic drivers, e.g. Ryan Reed and Charlie Kimball, have had success in competitive driving events such as the National Association for Stock Car Auto Racing (NASCAR) and IndyCar.<sup>[10]</sup>

Although cases such as these provide encouraging examples, there are instances of diabetic driving that pose greater danger. Risks are different for different categories of diabetic patients and different categories of vehicles driven.<sup>[2]</sup> A clinical judgement on the danger posed by a particular diabetic patient is based on a number of factors, including but not limited to the degree to which the diabetes is controlled and the driver's ability to presage a hypoglycaemic event.<sup>[2]</sup> Before coming to a decision about the risks posed by a patient's condition, it is necessary to carefully consider and consult with the patient about whether the condition can be safely managed.

In addition to taking into account medical facts about the patient's condition, a practitioner's judgement with regard to the risk posed

by a patient must consider the type of driver and the type of vehicle. Commercial drivers who control large vehicles, such as minibuses, passenger buses, trucks, or aeroplanes, are regarded as special cases for two reasons. First, they are in control of a vehicle for longer, increasing the *likelihood* of a hypoglycaemic incident while driving or flying. Second, the vehicles they command are more lethal to passengers and the public, increasing the *magnitude* of harm likely to be caused.<sup>[3]</sup>

Medical facts about the patient's condition, and considerations of the risk posed, impact on a decision regarding the danger the patient presents. This article focuses on the following question: once a practitioner has determined that a driver does indeed pose a serious danger, what are her ethical, professional, and legal duties, and what concrete steps should she take?

### Ethical duties

Is it ethical for a practitioner to report a patient to her employer? There are conflicting ethical duties in such cases. Firstly, there is the duty of confidentiality,<sup>[11]</sup> which is expressed in the Hippocratic Oath: 'Whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge.'<sup>[12]</sup>

Practitioners are sworn not to divulge information regarding their patients. This duty is underpinned by a number of ethical principles. In keeping with the ethical principle of non-maleficence (do not harm),<sup>[13]</sup> confidential relationships give patients confidence to report dangerous or embarrassing ailments that could harm themselves and others. A person who suspects she or he has diabetes is less likely to seek medical help if they believe they may consequently lose their job; this reluctance could contribute to the likelihood of harm.

Moreover, keeping information confidential is a way of respecting patient autonomy.<sup>[13]</sup> If patients do not wish information about themselves to be revealed, doctor-patient confidentiality provides some assurance that this will be respected. If confidentiality is violated and the patient is reported, respect for the doctor-patient relationship may be degraded.

A further ethical consideration against disclosing unfitness to drive is the notion that practitioners should always act in the best interests of their patient, which is encapsulated by the ethical duty of beneficence (do good).<sup>[13]</sup> Reporting a patient to their employer may deprive them and their family of their source of employment and income. In addition to depriving the family of material goods, lack of employment is thought to contribute to a decline in patient health, e.g. depression.<sup>[14]</sup>

However, if the patient is unfit to drive, she risks injury and death when she is behind a wheel. A practitioner's duties twin those of beneficence and non-maleficence, i.e. pulling in two directions. Moreover, beneficence and non-maleficence also apply to people other than the practitioner's patients. While the primary duty of care is to their patient, practitioners have a broader duty to society to try to prevent serious accidents and deaths.

A further, less-discussed ethical consideration is the practitioner's own good. Again, this pulls in two directions. On the one hand, as discussed below, reporting the incident may reduce the likelihood of civil action. On the other hand, the practitioner's reputation may suffer if others learn that confidentiality was broken. These ethical considerations mean that a decision about whether or not to report a patient is ethically fraught.

### Professional responsibilities

The Health Professions Council of SA (HPCSA) provides detailed guidelines on when it is acceptable to breach doctor-patient confidentiality. According to rule 13 of the HPCSA:

'A practitioner may divulge information regarding a patient only

if this is done, in terms of a Statutory provision; at the instruction of a court; in the public interest; with the express consent of the patient; with the written consent of a parent or guardian of a minor under the age of 12 years; in the case of a deceased patient with the written consent of the next of kin or the executor of the deceased's estate.'<sup>[15]</sup>

As discussed in the section on legal responsibilities below, there is no statutory provision that requires practitioners to disclose a patient's risky condition. Therefore, the relevant factor is whether the disclosure is in the public interest. 'Public interest' refers to the good of the community, and the interests of individuals and groups. Clearly, the public interest clause is activated by the most risky categories of diabetic driver, as they may cause extensive harm.

A threat to the public interest does not, however, automatically justify disclosure. In such cases, the HPCSA guidelines hold that the practitioner 'must weigh the possible harm (both to the patient, and the overall trust between practitioners and patients) against the benefits that are likely to arise from the release of information.' (Section 8.2.4.2) Assuming that a qualified practitioner is satisfied that the commercial driver's condition presents a risk to public safety, and given the increased magnitude and likelihood of harm that may be caused, it seems uncontroversial that professional guidelines imply a responsibility to report the patient's condition.

### Legal responsibilities

The National Road Traffic Act 93 of 1996 disqualifies a person from holding a driver's licence if he or she suffers from 'uncontrolled diabetes mellitus'. Once diagnosed, the legal responsibility to report this disqualifying condition and turn in his or her licence rests on the driver, and he or she has a legal duty to do so within 21 days.

According to the Occupational Health and Safety Act 85 of 1993, Sections 8.2.d and 9.1, an employer also has a duty to reduce risks 'as far as reasonably practicable'. Therefore, if a commercial driver causes harm, an employer may also bear some responsibility if it is clear that they did not take reasonable measures to prevent potential harm, such as medical surveillance.

The National Health Act, Section 14.2, provides that disclosure of confidential information is permitted when 'non-disclosure of the information represents a serious threat to public health'. While a precise definition of 'serious' threat is not provided, it is reasonable that the threat posed by poorly controlled diabetic bus drivers is sufficiently serious that revealing of confidential information can be legally justified.

However, while disclosure is permitted, existing statutes contain no specific discussion of a practitioner's *responsibility* to report an unfit driver. In some parts of the world, practitioners are legally required to report potentially dangerous conditions such as diabetes and epilepsy and may be the subject of legal action if they do not.<sup>[16]</sup> This is not the case in SA.

Nonetheless, there appears to be at least a possibility of legal liability in the event that a diagnosed patient causes injury or death as a result of his or her condition. While a SA precedent is unavailable, a Californian case, *Tarasoff v Regents of UCLA*, has similar features. This case involved a mental health patient who threatened to kill his ex-girlfriend. The mental health practitioner did not warn the patient's ex-girlfriend and the patient stabbed her to death 2 months later. The court ruled that the practitioner was liable, as he failed to report a threat to public interest.<sup>[17]</sup>

There are differences between the cases of unfit drivers and mental health patients, which may be regarded as salient. First, in *Tarasoff v Regents of UCLA*, there was a clearly specified victim, while the bus

driver's potential victims are unlikely to be known by the practitioner in advance. Second, as the patient appeared to lack autonomous self-control owing to mental illness, this may place greater responsibility on the practitioner. Nevertheless, the possibility that a similar result may be reached, counsels in favour of reporting when the practitioner reasonably foresees a possibility of serious harm.

### What to do?

Given that ethical, professional, and legal principles argue in favour of reporting a driver who poses a risk to public safety, how should a practitioner proceed once the complex balancing of harms and benefits has been done and the practitioner has decided that the patient is unfit to drive? The HPCSA provides some clear guidance on procedures for disclosures of confidential patient information.

First, the practitioner should try to gain consent for the disclosure, providing relevant information, reasons for disclosure, and the likely consequences of disclosure. If the patient does not consent, the practitioner should attempt to persuade the patient to consent to the disclosure. When a practitioner is satisfied that she or he has tried everything to obtain the consent of the unfit driver, but has nonetheless failed, it is considered justified to disclose the information to an employer.<sup>[15]</sup>

It should be recalled that it is the patient's legal duty to return their licence to the relevant authorities within 21 days. Depending on the severity of the patient's condition, it will often be justified to advise drivers who refuse to report themselves that they have some time to reconsider. However, given the threats to health and safety, the practitioner should follow up before the 21 days have expired to ascertain whether the patient has returned the licence. If not, they should again try to re-obtain consent. If there is still no consent, the practitioner should nonetheless report the condition to the employer and the traffic authorities.

### Conclusion

Diabetic patients who pose a risk of serious accidents present a difficult ethical problem for practitioners. The duty to maintain confidentiality is an ancient and weighty obligation and has many beneficial consequences for patients and society generally. Similarly, the duty of care towards a patient militates against disclosing details that could remove his or her source of income and imperil physical and mental wellbeing. However, in cases in which maintaining confidentiality can result in severe harm to the patient and the public, the benefits of confidential practice may be outweighed. Similarly, the duty of care to a particular patient should also obligate

the practitioner to make decisions that will reduce the risk of injury or death while driving. In such circumstances, practitioners should point to counselling and assist patients in reporting their condition to the correct authorities. If the patient refuses to do so, the practitioner has a duty to do so herself.

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