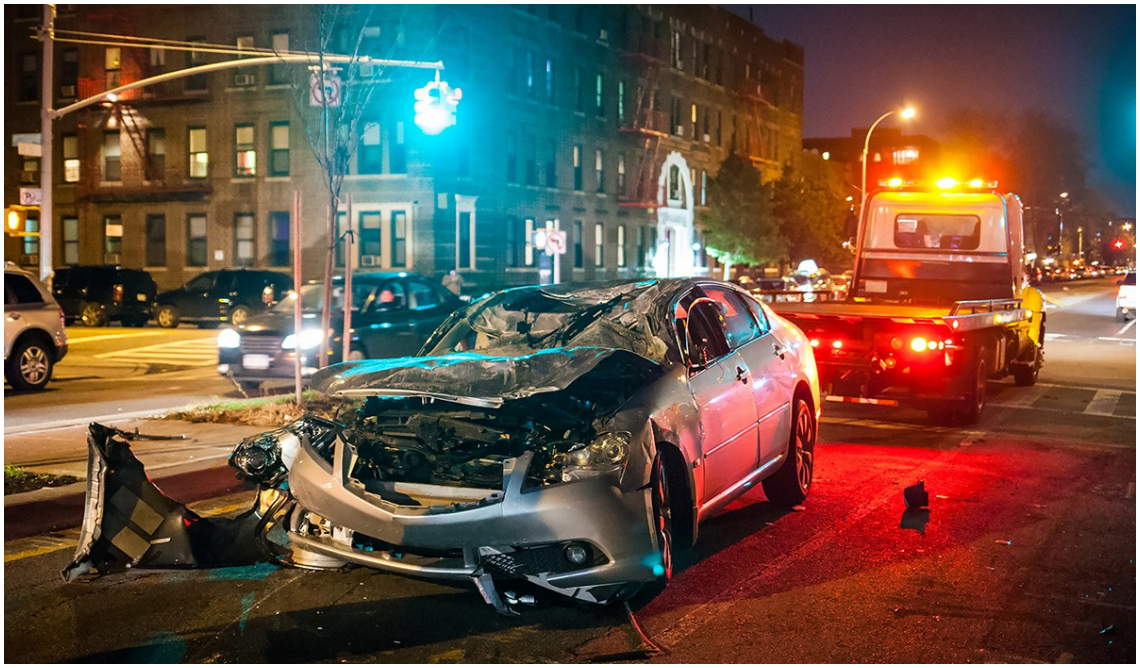
The Physician's Dilemma When Facing Unsafe Drivers



By Jeffrey A. Woods, JD

Last year, Prince Philip, the 97-year-old husband of Queen Elizabeth II of the United Kingdom, overturned the Land Rover he was driving after colliding with a minivan on a rural road outside of London. Prince Philip was unhurt and the two women in the other vehicle suffered only minor injuries. This incident along with several others which have made the headlines have reignited the debate over when is it time to “hit the brakes” on the aging driver. Specifically, what role do physicians and other healthcare professionals play in making that determination?

Most physicians would prefer that this decision did not involve them because the laws vary from state-to-state on a variety of issues:

- Is it mandatory or optional for doctors to report their concerns?
- Are physicians afforded immunity for making such a report?
- If, and how, elderly drivers are assessed differently than younger ones?
- How, and to whom, physicians are supposed to make the report?

- How to strike the right balance between confidentiality and safety?
- Do physicians risk legal liability if, on the one hand, they alert the state authorities or, on the other hand, keep silent and a subsequent accident occurs potentially creating third-party liability?
- As it places the physician at odds with their patient, what are the ethical considerations ?

The following is an article originally written in 2004 by our then Vice President of Claims, Jim Howell. The recommendations outlined in this article are as sound today as they were over 15 years ago. This is due in large part to a lack of legislative action to address the problem.

> One of the most sensitive and difficult dilemmas facing physicians today is what to do about patients with diminished capacity to safely operate a motor vehicle. Patients whose cognitive or motor impairment renders them unable to drive safely represent a potential threat to themselves, as well as to the public at large. Other than a patient's family, a physician may well be in the best position to observe signs and symptoms indicating impaired ability to drive, but ethical and legal considerations present the physician with a confusing set of choices and no black or white answer. As the number of older drivers increases in the future, practitioners can expect to face this dilemma more frequently.
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> Impaired drivers may be encountered in two situations. A physician may occasionally be called upon to perform a driver fitness or certification exam for a third party, such as an employer or the Department of Safety. The rendering of an opinion concerning the capacity to drive in this scenario does not raise confidentiality concerns, and a physician's only legal exposure would be in the realm of negligence for the reasonableness of the exam and opinion. This article focuses on a more difficult situation, when, in the ordinary course of a patient's treatment, a physician encounters signs or symptoms calling into question the patient's ability to drive safely.

Conditions such as alcohol or drug abuse, poor eyesight, seizure disorders, and cognitive impairment may be encountered in a patient who regularly drives. In this situation, a physician's first duty is to protect the patient, whose own safety may be jeopardized by continued driving. If the dangerous condition cannot be promptly treated and corrected, then the patient should be honestly confronted with the medical findings and the physician's advice to cease driving. If the patient will not accept such advice, then the physician is faced with the very difficult task of balancing the patient's desires and rights of confidentiality with the interests of the public. The fundamental dilemma is whether the physician should go "over the head" of the patient and notify the appropriate safety or licensing authorities of the patient's situation.

This no-win scenario confronts the physician with potential legal action regardless of the decision made. A patient who loses the ability to drive may seek legal redress for a perceived violation of physician-patient confidentiality. On the other hand, if the patient is not reported to licensing authorities and then has an accident, the physician may face a lawsuit by victims of the accident. A brief analysis of these two potential legal exposures leads to the conclusion that a decision in favor of the public's safety may be the safer course for the physician.

Physicians must be concerned, more than ever, about keeping their patients' medical information confidential. Aside from the profession's ethical obligations, many states, like Tennessee, recognize that confidentiality is implicit in the doctor-patient relationship, and a breach of confidence can form the basis of a lawsuit. The HIPAA law and regulations also mandate confidentiality at the federal level. However, a patient cannot expect medical information to be absolutely confidential in every circumstance. For example, the Tennessee Supreme Court has ruled that a right of confidentiality also recognizes that the patient's privacy rights may be overridden in situations where a physician has a duty to warn third parties against risks emanating from a patient's medical condition.[1] Even the onerous confidentiality regulations under HIPAA contain an exception for the purpose of averting a serious threat to health or safety.[2] Ethical considerations also allow for release of medical information about unsafe drivers to licensing authorities without a patient's permission. The AMA's Code of Medical Ethics recognizes the need for reporting unsafe drivers and contains valuable guidance about when and how reports should be made.[3]

Balanced against confidentiality considerations is the physician's duty to warn. The policy of most states, including Tennessee and contiguous states, is to encourage the reporting of unsafe drivers. Unfortunately, most

states do not grant legal immunity for good-faith reports. Nonetheless, coupled with a physician's common law duty to warn third parties about risks posed by a patient's medical condition, such state policies tend to indicate that a physician would be able to successfully defend a lawsuit by a patient whose driving impairment has been reported in good faith to appropriate authorities. As a practical matter, a physician will almost certainly be better off defending a lawsuit by a patient alleging breach of confidentiality, than in defending a lawsuit by victims of an accident caused by the patient's unsafe driving. (Either lawsuit would be covered and defended under the physician's professional liability policy with SVMIC.)

Based upon these considerations, SVMIC recommends the following approach to patients whom a physician believes to be unfit to drive: Before reporting, discuss medical findings and risks of driving with the patient and, if the patient permits, with immediate family members. If appropriate, recommend further evaluation or treatment, or even referral to a driver rehabilitation specialist. Encourage the patient to self-report to the state. Such efforts may render physician reporting unnecessary. If, in the physician's best judgment, there is clear evidence of a substantial driving impairment, and if advice to self-report or retire from driving is ignored, notify the appropriate licensing authority, after informing the patient of your obligation to do so. Write a letter to the patient confirming your findings and the basis of your opinion that the patient should not drive and confirming that a report has been made to the state licensing authority. A report to the state should contain only the minimal information necessary to document the medical conditions causing the patient's driving impairment, and the report should recommend that the state conduct its own examination and assessment to determine the patient's fitness to drive.

Ultimately, the decision as to whether to report or not to report a patient rests on the judgment of the physician. If you are confronted with this dilemma and would like some guidance, please contact an SVMIC Claims Attorney to discuss your specific situation.

Note that if the patient is willing to self-report, encourage him or her to contact the local county Department of Motor Vehicles to find out what steps should be taken. If a physician is making a report, many states have Department of Safety or Department of Motor Vehicles websites which provide a sample medical form for providers to complete. For Tennessee, this site is: https://www.tn.gov/safety/driver-services/driverimprovement.html

[1] Givens v. Mullikin, 75 S.W. 3d 383, 409 (Tenn. 2002)

[2] 45 CFR 164.512(j)

[3] AMA Code of Ethics Opinion E-8.2 "Impaired Drivers and Their Physicians" https://www.ama-assn.org/delivering-care/ethics/impaired-drivers-their-physicians