

The Case of “Judge Nodd” and other Sleeping Judges—Media, Society, and Judicial Sleepiness

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## **ABSTRACT**

**Study Objectives:** Review cases of judicial sleepiness and subsequent outcomes, including media and community attitudes.

**Design:** Index case report and Internet search in English language at 2 recent time points.

**Participants:** Index case and 14 other cases of judicial sleepiness reported on the internet

**Measurements:** Qualitative review of media and Internet reports.

**Results:** The index and other cases highlighted the role of the media seeking a punitive approach to occupational sleepiness, similar to that observed within the transport sector. In the index case, the judge's driver's license was withdrawn, despite official acknowledgement of effective treatment of sleep apnea. In 10 cases, judicial sleepiness resulted in a retrial and, in up to 5 cases, resulted in dismissal or retirement of the judge. In most cases, the cause of sleepiness was not determinable.

**Conclusion:** Judicial sleepiness is not uncommon and is viewed negatively by the media, community, and judicial system. Active monitoring of the judiciary for sleepiness and sleep disorders is suggested.

**Keywords:** sleepiness, judges, judicial, sleep apnea, medico-legal

Occupational sleepiness has been linked to transport accidents and a range of disasters, including the Exxon Valdez oil spill and Challenger disaster.<sup>1</sup> The role of sleepiness in human errors contributing to such accidents increasingly attracts media attention with support for punitive measures in fall-asleep accidents.<sup>2,3</sup> The cause of driver sleepiness is multifactorial, including extended work hours resulting in sleep deprivation and sleep disorders, such as obstructive sleep apnea.<sup>4,8</sup> In order to prevent sleepiness-related driving accidents and in response to media pressure, government transport regulators are developing legal responses to these issues, including guidelines for fitness to drive or punitive action through the judicial system.<sup>2,3,5,9</sup> Most of the judicial and regulatory activity in this field has focused on commercial drivers or other participants in typical “blue-collar” industries.<sup>9</sup> For example, in Australia, detailed fitness-to-drive guidelines have been published by national road authorities, with similar processes in place for rail workers.<sup>9</sup> More recently, attention has been drawn to the impact of sleepiness in “white-collar” workplaces, such as hospitals, with responses to these health-related issues, including calls to limit work hours of physicians in training by the Accreditation Council for Graduate Medical Education in the United States, as well as with legal proceedings being instituted against doctors making errors related to sleepiness.<sup>10</sup>

Sleepiness-related errors occur predominantly during exposure to monotonous activity. One “white-collar” monotonous workplace in which sleepiness may have major consequences is the courtroom. In this report, we highlight 1 recent Australian case of judicial sleepiness that attracted protracted media attention and review recent media stories of other alleged instances of sleepiness “at the bench” to highlight current community views on this subject and discuss different approaches taken to resolve cases involving judicial sleepiness.

## **INDEX CASE REPORT**

In March 2005, the *Daily Telegraph*, a Sydney morning newspaper, broke the story of Judge Ian Dodd, aged 56, of the New South Wales District Court (a midlevel state court for criminal and civil matters), who had been reported to the State Judicial Commission for allegedly repeatedly falling asleep while listening to witness testimony and legal argument. The paper, in a sequence of investigative articles, reported a lengthy list of Judge Dodd’s sleep episodes that appeared to affect court proceedings.<sup>10-16</sup>

According to the newspaper, it was claimed that the judge fell asleep numerous times during a corporate fraud trial and in another separate shooting trial, both in 2002. Subsequently, in 2003, he was reported to have fallen asleep during a rape victim's evidence. Following this episode, Judge Dodd was found allegedly asleep during a drug-smuggling trial that, the newspaper stated, led to the jurors nicknaming him "Judge Nodd." In 2004, he was reported to be asleep intermittently during a 7-month trial of 7 men who were eventually convicted of shipping 383 kg of pure cocaine into Australia. The newspaper alleged that, during this 2004 trial, the defense lawyer would hand notes to court staff who were sitting near to Judge Dodd to wake him up. The sleepiness was also noted by jurors in the trial, who commented on Judge Dodd's loud snoring. The accused were subsequently sentenced for up to 24 years in prison

In late 2004, some months prior to any press reports about his sleepiness during trials, Judge Dodd obtained a medical consultation regarding his sleepiness, was diagnosed with obstructive sleep apnea, and was apparently treated effectively. There were no reported sleep episodes following commencement of treatment. This was confirmed in a statement by District Court Chief Judge Reg Blanch.<sup>11,12,17</sup>

Following the allegations in March 2005 by the Daily Telegraph, investigations were commenced by the State Judicial Commission. Both the State Attorney General and State Premier vocally raised their concerns about Judge Dodd's work performance. Following its initial story, the Daily Telegraph commenced a campaign to have Judge Dodd investigated, removed from his position by parliamentary vote, and have all the cases during the period he was reported to be sleepy reviewed or retried (up to 11 cases). In all, the Daily Telegraph ran 18 articles, 3 editorials, and 3 editorial cartoons in a 6-week period in its campaign to have Judge Dodd removed. Coverage in the other main Sydney morning newspaper was less and only editorialized once.

In response to the media coverage about Judge Dodd, the NSW Judicial Commission instituted stringent health checks for all judges and contracted this work to a statutory government agency, Healthquest, as well as increasing the Commission's powers to discipline judges. Also, in response to the media photographs of the judge driving, despite being aware of the Chief Judge's statement on

Judge Dodd's treatment for sleep apnea, the Roads and Traffic Authority removed Judge Dodd's driver's license pending "proof" of his ability to drive without falling asleep.<sup>16</sup>

On June 19, 2005, the Daily Telegraph reported that the Judicial Commission had referred 7 complaints against Judge Dodd to its conduct division for public hearing. The mother of 1 of the convicted persons (a Ms. Miguez) said she felt outraged at how her son's case was handled. "I am not blaming the judge for being sick, but how can he be allowed to hold a position of power and responsibility when he falls asleep on the job. It doesn't make any sense and is extremely unfair on the people whose lives can be dramatically affected by his decision."

On August 5, 2005, the Telegraph reported in an article, "Sweet dreams as judge retires," that Judge Dodd had retired on medical grounds on a \$152,000-a-year pension for life and avoided an inquiry into his conduct by the Judicial Commission. He was granted medical retirement, effective from late July, under the terms of the NSW Judicial Officers Act after failing a nonspecified health test or examination. The Attorney General's office stated "Judge Dodd will no longer be sitting on the bench. Healthquest recommended that, on the basis of their findings, the judge should be medically retired." The following day, in an article entitled "Rude awakening as judge cases closed," the newspaper highlighted several legal cases that would not be reopened following the judge's retirement. The spokesman for the Attorney General stated that complainants could apply to the department for compensation and be assessed. The Attorney General, Mr. Debus, stated "The government has said all along that justice is not served by judicial officers who are too ill to carry out their duties. That is why we have a new program of access to medical support and counseling for judicial officers." Judge Dodd, who was on extended leave after 8 years on the bench, had agreed to an independent health assessment in early July 2005. It found that he was permanently unfit to continue working as a judicial officer, and his retirement was effective from July 19. The retirement was not recommended on the basis of his sleep apnea.<sup>17</sup>

The State Opposition attorney-general spokesman, Andrew Tink, said the government owed the public an explanation as to how Judge Dodd was being retired on medical grounds.<sup>18</sup> Mr Tink said that, only months ago, the Judicial Commission had given an assurance that Judge Dodd had been successfully

treated for the disorder. "Given that Judge Dodd has now retired on medical grounds was he in fact successfully treated as publicly asserted on March 1 or not?" Mr. Tink asked. "And, of the cases which he heard during the three months after he was said to be successfully treated and before he stood down, how many cases did he hear and were there any complaints to the Judicial Commission about them?"

In Parliament, Mr. Tink asked why the Judicial Commission chose not investigate how it was that a judge was able to concentrate sufficiently to adjudicate from the bench but is not able to concentrate sufficiently to drive a motor vehicle, as evidenced by the withdrawal of his driver's license by the Roads and Traffic Authority. He questioned "How could a judge who is prohibited from driving because he cannot concentrate be allowed to remain on the bench and pass judgment on people, many of whom may appear before him on driving offences? It is an absolute nonsense that that is the case. The question that this House would be able to consider this afternoon but for the suspension motion moved by the Leader of the House is: How can a judge be unfit to drive, but fit to judge, where concentration is the issue? How could the Chief Judge of the District Court be satisfied that Judge Dodd has the capacity to concentrate when the Roads and Traffic Authority could not be so satisfied? The House should consider on what medical evidence the Chief Judge based his opinion. The House ought to be able to consider on what evidence the Roads and Traffic Authority based its opinion.....Six million people of this State can be judged against Roads and Traffic Authority standards on whether or not they can concentrate. Apparently, the 100 or so judges in this State, any or all of whom can pass judgment on the six million people of New South Wales for any number of offences, cannot have their judgment called into question. Did Judge Dodd reveal to the Roads and Traffic Authority things that were not revealed to the Judicial Commission? Was there a resolution of the Judicial Commission on its consideration of these matters?"

The retirement of Judge Dodd seemed to end the media frenzy. In May 2006, the Sydney Morning Herald reported the tabling of new laws for handling complaints against judicial officers. Heads of courts will be able to order health checks if they fear a judge or magistrate suffers from "incapacity," rather than having to wait for a complaint from the public.<sup>19</sup> The Judicial Commission would be given

the power to order medical or psychological examinations. If the judicial officer refuses, the matter can be treated as a complaint—and can trigger a full investigation of their "fitness for office." Complainants would be given updates on the progress of their complaints. The Attorney General was again quoted: "Justice is not served by a judge or magistrate in the grip of serious health problems, when those health problems are unaddressed or unresolved. It is far better to face up to problems, to seek treatment and leave where appropriate, than to risk a miscarriage of justice." All judges will be offered a health check at public expense, but this will not be mandatory.

## **METHODS AND RESULTS**

We undertook an Internet search using the "Google" search engine using the term "Judge asleep" in April 2005 and again in July 2006, looking for other examples similar to the Dodd case. The first 500 "hits" (excluding Judge Dodd) at each time point were examined. If a case was found, further Internet searches were conducted to find matching articles with more updated findings. We describe 14 cases below, all reported by the media. No attempt was made to look in languages other than English

### **1. International War Crimes Tribunal, The Hague<sup>20,21</sup>**

In 2001, at the International War Crimes Tribunal, The Hague, 3 men—Mucic, Delic, and Landzo—were convicted of numerous counts of grave breaches of the Geneva Conventions of 1949, appealed against their conviction. Their crime involved harm to Bosnian Serb detainees in the Celebici camp where they served as officials. All 3 challenged the fairness of the trial upon the basis that the presiding judge, Judge Karibi-Whyte, had been asleep during *substantial* parts of the trial (emphasis added). As a result, the 3 accused believed they did not undergo a fair trial. The Appeals Chamber found that appellants had failed to establish that Judge Karibi-Whyte was asleep during *substantial (emphasis added)* portions of the trial, although video evidence apparently showed the judge having regular sleep episodes usually up to 10 seconds long, sometimes up to 30 seconds with snoring. On 1 occasion, the judge was asleep for 30 minutes. The Appeals Chamber did comment that the judge's conduct was not regarded as appropriate for a judge but still rejected the ground of appeal. Karibi-Whyte's term as judge

on the tribunal was not renewed, and he returned to Nigeria after the verdict, although it is unclear whether this was related to his somnolence during the trial.

## **2. Ontario Superior Court, Canada<sup>22,23</sup>**

In 2003, an Ontario man, Mr. Andras Deak, who had been convicted of mischief and criminal harassment in 2001, was granted a new trial after an appeal court heard that the judge, Justice Ayres Couto, had fallen asleep during the cross examination of the accused. Deak's trial lawyer, Kim Schofield, had accused Justice Couto of dozing off during trial and decided to drop a 2136-page copy of the Criminal Code onto the judge's desk to get his attention. "His Honour was visibly stirred from his slumber," commented Schofield. The Appeals Court held that Couto's ability to witness the demeanor of a key witness may have been impaired.

## **3. Indiana Court of Appeals<sup>24</sup>**

In 2004, in the Indiana Court of Appeals, Ronald Lampitok appealed against his conviction for carjacking on multiple grounds. One of the grounds was that the presiding judge appeared to have fallen asleep during the defense counsel's closing argument, and this would have influenced the jury that his attorney's argument "were not worthy of attention." The Appeals Court found no direct evidence of the judge falling asleep, except for 1 exchange with the defense counsel during which the counsel asked the judge "Am I boring you today, Your Honor?" The judge replied "No, just resting my glaucoma eyes." They also failed to note any evidence that the jury was aware of the fall-asleep episode or that Lampitok had raised this issue during the trial. The Court raised the precedent of United States versus White 589 F.2d 1283 1289 (5<sup>th</sup> Circuit, 1979) in which a mistrial was not called despite the presiding judge having fallen asleep during the defense counsel's opening statement because there was no evidence of prejudice to the defendant's case.

## **4. Court of Appeal, London, United Kingdom<sup>25</sup>**

In 2004, Judge Michael Coombe was alleged to have missed vital evidence after falling asleep during a court hearing describing the failed robbery of diamonds from the London's Millennium Dome. Four men had conspired to rob at least £200 million worth of diamonds. They were part of a group using a mechanical digger to smash their way into the Dome, which housed the De Beers diamond exhibit in



November 2000. The 4 men were convicted in February 2002 and sentenced by Judge Coombe to up to 18 years in prison. The defense lawyer, Edmund Romilly, claimed that vital evidence may have been missed and that lesser sentences may have been handed out because the jury may have assumed from the judge's sleepiness that he was uninterested in the defense case. Romilly insisted: "Snoring adds another feature, in that it makes the conduct more blatant. Anyone can be forgiven for momentary lapses of concentration, but it is another matter if there is sleepfulness accompanied by noises associated with sleep, drawing attention to the person who is asleep and deflecting the jury's attention." Judge Coombe admitted having fallen asleep but denied snoring loudly. Local journalist Miss Tamsen Vian-Courtenay commented that Judge Coombe's "head fell so far forward as to be almost touching the table," with sounds that she thought were snoring and that the judge "seemed to wake up with a start." However the Court of Appeals rejected the men's appeals, though they did reduce their sentences. Lord Justice Rose of the Appeals Court said it was "highly regrettable" that Judge Coombe had fallen asleep, but it did not render the conviction unsafe. "Because the appearance as well as the actuality of justice being done is important, no judge ought in any circumstances to fall asleep during any stage of a criminal trial." However the men's lawyers had not demonstrated that Judge Coombe had failed to sum up significant evidence. Judge Coombe retired shortly after the case concluded.

##### **5. The New York Appellate Division, 1st Department<sup>26,27</sup>**

Justice James Leff of New York convicted David Degondea for the murder of a police officer in 1993. He was sentenced to 55 years to life in prison, and his conviction was affirmed on appeal. Some years later, Degondea appealed again on the grounds that Leff (by then deceased) had fallen asleep during jury selection and a biased juror was allowed to serve on the jury. In 2002, New York Supreme Court Judge Marcy L. Kahn reversed Degondea's conviction, finding that Judge Leff had been "inattentive," if not actually asleep, during jury selection. The prosecution then appealed Judge Kahn's ruling. The New York Appellate Division, 1<sup>st</sup> Department (5 judges presiding) decided that Degondea should not receive a new trial, even if Judge Leff had been asleep at times while the jury was selected.

They stated that Degondea and his attorney failed to object to the judge's alleged behavior at the time of the original trial and thus could not use it to attack the jury's verdict years later. They also questioned

whether Judge Leff had actually fallen asleep during jury selection or simply appeared "sluggish." Justice Friedman of the Appellate Division wrote, "There is no question that it is utterly unacceptable for a judge to sleep while presiding over a trial" but stated that there was no clear evidence that he had done so. Moreover the defendant "unjustifiably failed to use due diligence to cause the matter of the trial judge's somnolence or inattention" to appear on the record. "We conclude that judicial somnolence or inattention does not rise to the level of a "mode of proceedings" error and that such a claim may be waived by the defendant's failure at trial, with knowledge of the relevant facts, either to place such facts on the record or to preserve the claim by appropriate objection." Justice Friedman added: "More fundamentally, we do not believe that a claim of judicial inattention, based solely on the judge's appearance, demeanor and errors in his or her stated recollection of prior proceedings, can give rise to a claim of constructive judicial absence requiring vacatur of the judgment. Judges, like all human beings, are prone to occasional lapses of memory."

#### **6. Supreme Court of Arizona<sup>28</sup>**

A Justice of the Peace in Arizona, Mr. John Carpenter, was noted to have sleepiness during court proceedings in 1999. He had been elected in 1998 and took office in 1999. A Phoenix newspaper published an article detailing some of these sleep episodes, and, eventually, Mr. Carpenter admitted he had been suffering from narcolepsy, a condition he did not disclose when applying for the post of Justice of the Peace. He suggested in response that his courtroom should be staffed with a bailiff to assist him. Later in 2000, formal proceedings against Mr. Carpenter were filed in the Disciplinary Commission for the Supreme Court of Arizona on the basis of multiple complaints, and Mr. Carpenter was then removed from office. It was felt his diagnosis of narcolepsy was a "minimal mitigation" for his behavior, which also included inappropriate comments in court, including sexual and racist jokes.

#### **7. Florida Judicial Qualifications Commission<sup>29,30</sup>**

Pinellas County Florida Circuit Court Judge Brandt Downey was reported to be sleeping during a murder trial and had a formal complaint lodged against him by the Florida Judicial Qualifications Commission. The defendant's attorney petitioned for a new trial. The veracity of this report is still not proven, as it may have been misinterpretation by the media of the claim that Downey had ignored

jurors' complaints about a fellow juror being asleep during trial proceedings. Downey had agreed to step down following admissions related to other instances of misconduct.

#### **8. Supreme Court of Louisiana<sup>31</sup>**

In 2006, Shreveport, Louisiana, Judge LeLeshia Alford was suspended following allegations of falling asleep at the bench due to use of pain-relieving medications. The Supreme Court of Louisiana, acting on a recommendation by the state Judiciary Commission, ordered her off the bench while it considers additional disciplinary action that could include further suspension or removal.

#### **9. New York State Commission on Judicial Conduct<sup>32,33</sup>**

In November 2005, a child advocacy group for victims of sexual abuse filed a complaint with the New York State Commission on Judicial Conduct against Suffolk County (New York) Criminal Court Judge Gary Weber. They claimed that the judge slept through the testimony of a 15-year-old girl before acquitting her mother's boyfriend of raping her. The letter of complaint stated that the judge "fell asleep intermittently" during the girl's testimony. The girl said that she watched Weber fall asleep while she testified during the trial last November in Riverhead. "His head was on his hands, his elbow on the table, he was asleep," she said. Weber denied having fallen asleep.

#### **10. New Hampshire. Judicial Conduct Committee<sup>34-36</sup>**

In 2005, a subcommittee of the New Hampshire Judicial Conduct Committee was reported to be investigating at least 5 complaints alleging Rockingham County Superior Court Judge Patricia Coffey slept on the bench. The subcommittee had to be formed because Coffey is a member of the Judicial Conduct Committee. The original complaint came from the wife of Donald Spinner, whom Coffey had sentenced to a prison term of 23 to 46 years for sexually assaulting his stepdaughter. Coffey was alleged to have fallen asleep on multiple occasions during this trial, and at least 2 of the 13 jurors polled by the Public Defender's Office reported having seen the judge doze off during the trial. Spinner also alleged that his public defender knew that Coffey slept and had advised it was "neither a cause for alarm nor an uncommon occurrence." Spinner's motion contended that Coffey's "somnolence" violated his right to a fair trial, whereas his public defender's "conduct constituted ineffective assistance of counsel." After this complaint, other complaints with similar allegations were made against Coffey, including a letter

written to a local newspaper several years before Spinner's case and a local state representative who had seen the judge sleep on the bench on several occasions. Judge Coffey's explanation was that she had simply closed her eyes and that she was now keenly aware that any gesture or mannerism may be misinterpreted. She stated to the Judicial Conduct Committee. "You can be sure that I will not be closing my eyes except to blink."

In August 2006, Judge Coffey was found in violation of the judicial conduct code requiring judges to behave in a manner promoting judicial integrity. The report stated that Coffey's conduct "did not adversely affect the outcome of a case or result in the denial of the rights of any litigant appearing before her." They also stated "There is no credible evidence that (Coffey) was ever asleep, as that term is generally understood, during the course of a trial or any hearing," but "there are a number of credible witnesses" who described "instances of 'nodding off,' very brief periods of time when (Coffey's) eyes would close, her head fall forward or to the side, or she would appear to be 'fighting to stay awake.'" "There are instances, and the panel believes this is one of them, where there is an appearance of impropriety that, in order to maintain the integrity of the judicial system, must be addressed." Coffey agreed she would "not admit to any specific violation of the Code of Judicial Conduct," but accept the panel's conclusions, be examined by a "qualified medical specialist" within 30 days to allow that doctor to inform the panel "of any specific clinical diagnosis," and to comply with any recommended treatment. Coffey also agreed to be subject to random monitoring, as recommended by the Chief Justice of the Superior Court for 1 year, with the monitoring to be conducted on a random basis and without prior notification.

#### 11. **US SUPREME COURT**<sup>37,38</sup>

In March 2006, US Associate Supreme Court Justice Ruth Bader Ginsburg was reported by Associated Press to have fallen asleep for about 15 minutes during oral argument in the Court's review of a controversial Texas redistricting plan directed by Rep. Tom DeLay, R-Texas, in 2003. Ginsburg apparently had difficulty staying tuned to the details of the hearing: They reported that "the subject matter was extremely technical, and near the end of the argument Justice Ruth Bader Ginsburg dozed in her chair. Justices Souter and Samuel Alito, who flanked the 72-year-old, looked at her but did not

give her a nudge.” The Court’s sketch artist drew a humorous picture of the hearing, featuring Ginsburg with her forehead planted firmly on the bar in front of her seat.

There was a resultant flurry of reports mainly in conservative media outlets not favorable to Ginsburg. Fox News Channel reporter Megyn Kendall highlighted Ginsburg’s “Supreme” napping ability during a segment on “Special Report with Brit Hume.” “It is one of the biggest redistricting cases the high court has heard in years,” explained Kendall. “But the special two-hour argument proved less than compelling to Justice Ruth Bader Ginsburg, who at times appeared to be, well asleep.” Mark Baden, a Republican lawyer told The Associated Press that the case could determine the outcome of the upcoming midterm elections. “It’s conceivable,” said Baden “that this case could swing control of the House of Representatives in November.” Conservative columnist, Joseph Farah named the judge “Snoozeburg,” suggesting that she should resign from the court so “she can so she can take as many midday naps as she likes.”

## **12. United States Court of Appeals 10<sup>th</sup> Circuit<sup>39</sup>**

In 2002, Salvador Martinez appealed to the United States Court of Appeals 10<sup>th</sup> Circuit against his conviction for methamphetamine trafficking. One of his grounds of appeal was that the trial judge had fallen asleep during cross-examination of the lead witness for the prosecution by defense counsel. Both prosecution and defense counsel had noticed the episode of sleep and requested an “in camera” session with the judge and, after some discussion, agreed that there was nothing meriting a mistrial. Martinez was convicted, and the judge died suddenly after the trial but before sentencing. Martinez’ appeal was based on his view that the act of the judge falling asleep had “disparaged” the defendant’s cross-examination of the lead witness. The Appeals Court disallowed this appeal, stating “We are not persuaded.” In *U.S. versus Yanez-Baldenegro*, Nos. 93-10538, 93-10542, 1994 WL 441757, at \*\*3 (9th Cir. August 15, 1994), the Ninth Circuit held that the fact that the trial judge fell asleep during defense counsel’s closing argument did not dictate a reversal, stating that “[a] federal judge has broad discretion in supervising trials, and his or her behavior during trial justifies reversal only if it abuses that discretion.”

### **13. KANE COUNTY COURT, ILLINOIS<sup>40</sup>**

In March 2006, John Markiewicz, convicted of murder, appealed against the conduct of John Doyle, presiding judge of the Kane County Drug Rehabilitation Court, at his resentencing hearing. He alleged that Doyle had fallen asleep during a statement made by the defendant.

### **14. Court of Queens bench, Alberta<sup>41</sup>**

In 2004, an Alberta judge, John Moore, admitted having fallen asleep during a sentencing hearing for convicted drug dealer, Mr. Nicholas Chan. The defense lawyer claimed that, when he stopped speaking, he could hear Judge Moore snoring. Judge Moore has publicly apologized to the lawyers involved in the case and was referred to a sleep physician for further investigations. A new sentencing hearing was ordered under a new judge.

## **DISCUSSION**

The case of Judge Dodd and the additional 14 recent cases of judicial sleepiness found by an Internet search highlight the importance of “fitness-for-duty” issues and sleep disorders in the high-profile “white-collar” professions such as the judiciary. The frequently monotonous and passive aspects of judicial work would increase the propensity to fall asleep in judges exposed to sleep deprivation or have sleep disorders. Furthermore, such sleepiness occurring in a highly visible and frequently highly emotive setting has resulted in adverse media coverage and complaint. In 19 of the 15 cases, the episodes of sleep at the bench were used as grounds to seek retrial and, in up to 5 cases, resulted in retirement or dismissal of judges. In all but the index case and 1 of the 14 other cases, the exact cause of sleepiness was indeterminable or unknown. Clearly, judicial sleepiness threatens the integrity of the judicial system, and there would seem to be a need to develop preventative or monitoring strategies in judicial systems to prevent its occurrence.

Our report has highlighted the diverse outcomes of cases in which there has been an “exposure“ to judicial sleepiness. Typically, the judicial appeals mechanism has been used to seek redress, often driven by media attention. The general principle has been to assess whether there has been influence on the conduct of the case that is prejudicial to the defendant to the degree that the verdict may be unsafe.

Unfortunately, such an assessment may occur some months or even years later when the facts may be

hard to verify and the impact on the jury may be difficult to determine. There seems to be a need for more immediate determination of the impact of sleepiness on a particular case *during* a hearing rather than at some time distant. In several of the cases, including those involving Judge Dodd, sleepiness was not isolated microsleeps but persisted throughout the case or involved the judge in several cases.

Failure to bring this to the attention of the judge or judicial authorities may be secondary to a culture of deference to the position of the judge, a wish not be seen to be “rocking the boat,” or a misunderstanding as to the frequent medical basis of sleepiness.

One could contrast the media-driven approach to Judge Dodd with the deferential reference to the sleepiness of a more senior judge in NSW, Justice Roderick Meagher in 2005.<sup>42</sup> In a speech in honor of the judge’s retirement, the president of the NSW Bar Association (the organization representing lawyers who appear in higher courts), Ian Harrison, stated that Justice Meagher “brought colour to the Court of Appeal,” Mr Harrison added, “but not, if I may say so . . . much movement.” Harrison told the audience that the judge was known for his ability to nod off on the bench, and Judge Meagher had once warned him: “Mr Harrison, I’m going to sleep now, and I don’t want you to be here when I wake up.” The etiology of his sleepiness was sleep apnea.<sup>43</sup> No one seemed to question the effect of Justice Meagher’s sleepiness on his judicial competency, and the Justice himself had apparently always argued that a transcript of evidence was also available. This argument has limitations as in many of the cases reported above; complaints about judicial sleepiness referred to its impact on juries, particularly the lack of importance of evidence being heard or even the ability of the judge to monitor the conduct of the prosecution or defense lawyers. Another example of judicial sleepiness being ignored despite widespread knowledge was the case of Lord Widgery, Lord Chief Justice of England and Wales. In 1979, he started to develop dementia, but his fellow judges covered up for him and wrote his judgments. He was not dismissed and continued to repeatedly fall asleep on the bench for another 9 months before he retired.<sup>44,45</sup> Moreover, there may be a view that, where there may be multiple judges present (eg, Supreme Court, International Court), the sleepiness of an individual judge is less relevant. The opposite of this “cover-up” approach is the high-profile media-driven “frenzy” approach aimed at removing the judge from the judicial system, as typified by the case of Judge Dodd. It would seem that

a culture change is required to prevent ongoing judicial “failure” so that it is seen in the interest of both the judge’s health and the judicial system to have episodes of judicial sleepiness investigated. A process of identification of inappropriate sleepiness must be coupled with appropriate interventions and countermeasures. It may be a simple matter of the judge avoiding sleep deprivation or getting expedited treatment of sleep apnea. Rapid assessment and treatment would prevent situations in which multiple defendants seek compensation or continued media attention result in judges departing the bench. In the case of Judge Dodd, his resignation on medical grounds was indeed curious. His sleep apnea was by then effectively treated, and no further sleep episodes were reported once he commenced treatment. Presumably the reason for his resignation was related to the stress of the media and government campaign against him, and the NSW Attorney General explicitly stated that his retirement was unrelated to sleep apnea.<sup>17</sup> It is disconcerting that there was a failure by both the government and the media to recognize that he had a reversible medical condition causing his sleepiness. Moreover, Judge Dodd may not have been aware of the severity of his condition. Self-diagnosis of sleep apnea is often delayed or symptoms underestimated, and primary care practitioners may be poor at detecting this condition.<sup>46,47</sup> Unlike in many conditions, patients with sleep apnea are frequently unaware of their condition and referral relates to bed partner or family complaint of snoring or sleepiness. Therefore the apparent inherent need to blame or scapegoat in situations like judicial sleepiness may have little justification in medical terms. However, the media may not see such potential mitigating factors and instead pursue the “blame game” taking a punitive approach toward the judge. None of the stakeholders in the Judge Dodd debate (media, complainants, Attorney General, Opposition Attorney-General Spokesman) seemed willing to concede that Judge Dodd had a medical disorder that may not have been apparent to him. More importantly, these detractors also failed to recognize that the disorder was (with appropriate intervention and monitoring) reversible. The concept seemed to be once “unfit for duty,” always unfit for duty. This information on sleep-apnea treatment reversibility could have been provided to the Judicial Commission had their deliberations taken place. In the case of Judge Dodd, despite a diagnosed and treated sleep disorder, the judge resigned on health grounds on a large pension at significant cost to the community. One positive outcome of the Judge Dodd case was the



development of new regulations for judicial officers that are designed to make it easier to bring judicial health issues to the attention of judicial regulators and have introduced voluntary health screening. Another worrisome aspect of the Judge Dodd case was that his driver's license was withdrawn in circumstances unique in our experience. Under local conditions in New South Wales, Australia, a driver's license is typically withdrawn for risk of "fall asleep driving" if reported by a medical practitioner or if a fall-asleep defense is used in a case of negligent driving or more serious driving-related criminal charge. In this case, the judge's driver's license was withdrawn apparently solely in response to a media story regarding past sleepiness and observation of him driving to work. This revocation of his license occurred despite a public statement by the Chief Judge of the District Court that Judge Dodd had been diagnosed with sleep apnea and successfully treated.

The ramifications of this decision are major. It would appear that the NSW Roads and Traffic Authority could summarily withdraw the licenses of anyone exposed for falling asleep in public situations, eg, politicians in Parliament, clergy at the pulpit, teachers, or anyone with a public display of somnolence. The same rigor would apply to anyone diagnosed with sleep apnea, even if treated. From our reading of the media reports at the time, the decision to withdraw Judge Dodd's license was in response to media reports without any reference to his current state of health. It is unclear whether Judge Dodd has subsequently been permitted to drive again or under what circumstances or based on what assessment. The behavior by the traffic authorities in NSW have now created a dangerous precedent for the management and licensing of patients with sleep disorders in NSW. In the case of Judge Dodd, one could question whether the withdrawal of licensing was in effect part of a punitive process designed to encourage the judge to resign. It is important that sleep medicine professionals are aware of the possibility of driver-licensing regulations to be abused in this way.

In most of the other cases, our Internet search revealed a consistent unsympathetic attitude by the media to sleepiness while at the bench, irrespective of and with little interest in, any potential mitigating medical cause. In the case of Supreme Court Justice Ginsburg, recognized as one of the more liberal judges of the Court, the media attention came selectively from 1 side of politics. Even in Judge Dodd's case, media attention was predominantly from 1 of the 2 main Sydney newspapers, a newspaper with a

strong record of criticism of the current State Government. In effect, judicial sleepiness may get politicized in a way different from other fall-asleep “accidents.” The general media approach we observed perhaps a varying but increasing punitive societal and judicial response to sleepiness causing some real or potential public harm.<sup>2,5,10</sup>

In certain cases described—case 5 and 12—a more lenient view of judicial sleepiness was advocated with a concept that brief periods of sleep may be inevitable or acceptable in a judges behavior.

However, the view by Lord Justice Rose stated in Case 4—“Because the appearance as well as the actuality of justice being done is important, no judge ought in any circumstances to fall asleep during any stage of a criminal trial,”—would be widely held in the community, though there is no data on this.

In many ways, the evidence from these cases suggests that judges are now held to a high standard similar to those in the trucking industry or hospital medical staff.<sup>10</sup> While potential consequences of fall-asleep errors by truck drivers and hospital medical staff often involve death or serious injury, fall-asleep episodes by judges could possibly lead to serious consequences such as a wrong conviction or incorrect sentence. In effect, these consequences to an individual may result in loss of liberty or in the extreme case, in effect, loss of life. Therefore, it is not surprising to see such fall-asleep episodes by judges to be held as a serious breach of behavior, given that the integrity of the judiciary is seen as an important concept in society. As well, the visibility of judicial sleepiness is greater than sleepiness in the trucking or health care industry and is more likely to attract attention from media and public. For judges, the punitive consequences of judicial sleepiness involve ridicule and loss of employment, as evidenced by the described cases, in contrast with imprisonment, as is now occurring in the transport industry.

The similarity with the transport industry can be taken further because one strategy is to prevent judicial sleepiness by methods similar to those being introduced in the trucking industry—education, prevention, and regulation. Drivers have a level of accountability and liability to adhere to, but the implications of judges being asleep during the court cases are also far reaching, particularly on the assimilation of all the evidence and the accuracy of the final judgment. The cost of retrials and compensation and the influence of a sleeping judge on a jury are issues of major importance in such cases. We would also argue that the media should take a more responsible role. In the case of Judge

Dodd, there was no balanced reporting of the case—there was failure to recognize the potential of personal lack of awareness of his sleepiness and the effectiveness of his continuous positive airway pressure therapy to make him “safe” in his workplace. The political response was knee jerk following the media stories. It is important for the medical community to emphasize the reversibility of many forms of sleepiness. If individuals with sleepiness know that they can be treated and return to work, this will result in better cooperation with regulatory procedures. The confrontational approach taken by the media in the case of Judge Dodd highlighted issues related to lack of transparency but placed far too much fault on 1 individual and neglected consideration of the reversibility of many forms of sleepiness.

Other participants in the judicial system may also be vulnerable to sleepiness. Given the relatively greater passivity of jury work and the larger numbers of jurors relative to judges, it is not surprising that we also encountered frequent reports on the Internet of jurors sleeping during trials. Although judicial sleepiness is the focus of this report, similar medical and legal issues relate to jurors’ somnolence. In a major review of juror delinquency, 562 judges were surveyed about jury trials that they had presided over during the previous 3 years.<sup>48</sup> Of these 562 judges, 69% reported cases in which jurors had fallen asleep; overall, by judges' estimates, this had involved 2300 cases, approximately 5% to 10% of cases heard by all the surveyed judges in that 3-year period. Even legal counsel may fall asleep. In the famous 1984 case of Calvin Burdine, his conviction for murder and sentence of death was regarded by the US District Court as “unfair” due to the “consistent unconsciousness” displayed by the court-appointed attorney, Mr. Joe Cannon.<sup>49</sup> It was observed that Mr. Cannon had fallen asleep for long periods of time during the questioning of witnesses, as testified to by the trial court clerk. The US District Court held that “unconscious or sleeping counsel is equivalent to no counsel at all.”

Judicial sleepiness is not new. On March 12, 1860, Governor T. H. Hicks of Maryland signed a bill removing Judge Henry Stump, Judge of the Criminal Court of Baltimore, based on charges that he had been intoxicated and asleep on the bench. This is the first reported case we could find, but it is unknown how many subsequent cases of judicial sleepiness exist. Furthermore, our Internet search was limited to the English language, and others may well exist in non-English-speaking countries.

Interestingly, 2 pieces of art from the 18<sup>th</sup> and 19<sup>th</sup> century exist that depict sleeping judges—Thomas Coutoure’s “A Judge Asleep” in the National Gallery of Ireland and another by William Hogarth.

A more thorough or transparent process of screening for, identification of, and therapy for such sleep disorders may be in order. In addition to acknowledging the importance of judicial vigilance to the system of jurisprudence, such activity would also act as a nonpunitive intervention. By recognizing the treatable issues associated with hypersomnolence, this system could help “decriminalize” the existence of sleepiness. It would not, however, modify the responsibility of the individuals affected to persist in the management of their sleepiness. This would be similar to the recognition of other chronic and debilitating disorders that are amenable to therapy.

There are many worse cases of judicial misconduct than the cases of judicial sleepiness on which we have reported.<sup>50</sup> However, judicial sleepiness is clearly seen by the community as undermining their confidence in the judicial process. Regulatory processes and health screening to ensure the fitness for duty of the judiciary, legal counsel, and even juries may be required to ensure that confidence is maintained in the judicial system in the future.

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