

# Criminal liability: What are the risks for medical professionals?

Medical professionals were held criminally liable in 2 widely publicized cases. This analysis enhances understanding of the legal implications for practice.

Steven R. Smith, MS, JD, and Joseph S. Sanfilippo, MD, MBA

### IN THIS ARTICLE

Essential elements of a crime

[this page](#)

Wrong drug administered

[page 43](#)

Overprescription of controlled substances

[page 45](#)

Medical professionals are well aware that civil liability (malpractice) may incur when a patient is harmed because of carelessness (negligence). Recent criminal charges against physicians and a nurse, however, have called medical professionals' attention to the fact that they also may face criminal charges for inappropriate practice.

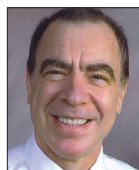
We cite 2 cases in which criminal liability resulted from bad medical practice. In both instances, there was considerable concern among medical professionals that criminal charges for making a mistake would make it difficult to practice without fear of criminal charges. One concern is that criminal charges

could drive good people out of the profession or make them too cautious.<sup>1</sup>

We look more closely at those 2 cases in which criminal liability was imposed. These cases are outliers. Relatively few criminal cases against medical professionals are based on the quality of care. (There are, however, more criminal charges related to fraudulent billing and other insurance fraud, kickbacks, Medicare and Medicaid abuse, and the like.<sup>2</sup>) At the same time, the criminal law does not stop at the front door of a clinic or hospital.<sup>3</sup> When medical professionals engage in seriously inappropriate health care conduct that directly harms someone, criminal liability may result.<sup>4</sup>



Mr. Smith is Professor Emeritus and Dean Emeritus at California Western School of Law, San Diego, California.



Dr. Sanfilippo is Professor, Department of Obstetrics, Gynecology, and Reproductive Sciences, University of Pittsburgh, and Academic Division Director, Reproductive Endocrinology and Infertility, Magee Womens Hospital, Pittsburgh, Pennsylvania. He also serves on the OBG MANAGEMENT Board of Editors.

The authors report no financial relationships relevant to this article.

doi: 10.12788/obgm.0239

## Anatomy of a crime

Crimes generally require a specific mental state (*mens rea*) and an act (*actus reus*). The law specifies the mental state required for conviction. It can range from premeditation—once commonly called “malice aforethought”—to negligence. The *mens rea* requirement is an essential element of the crime—as we will see in the discussion of the prescription drug cases. A few offenses do not require even negligence, but overwhelmingly, crimes require something more than simple negligence.<sup>5</sup>

The act requirement is generally obvious, such as firing a gun, driving while intoxicated, or recklessly giving inappropriate medication to a patient. It may include “attempts,” crimes

where an act was not completed. For example, attempted murder or conspiracy to commit do not require a completed offense, only intent plus overt acts toward carrying out the crime. Similarly, the wrongful act usually has to produce some harm, but again there are exceptions (attempts). To obtain a conviction, the prosecution must prove all of the elements of the crime, including the required *mens rea*, beyond a reasonable doubt.<sup>6</sup>

With this general background, we turn to the first case, in which the charge was a form of homicide. Please note that the following case description was derived from news descriptions of the case, because juries do not publish opinions concerning their conclusions and court documents are unavailable. The public reports therefore may contain factual gaps and errors.

#### **CASE 1 Patient dies after nurse administers wrong drug**

RaDonda Vaught, a 38-year-old experienced registered nurse employed at Vanderbilt University Medical Center (VUMC) in the intensive care unit (ICU), was providing care for a 76-year-old patient who was admitted to VUMC's ICU in December 2017 in association with a brain injury. The brain injury involved a fall with resultant subdural hematoma. In preparation for a positron emission tomography (PET) scan to assess the patient's injury, the physician team prescribed the sedative Versed (midazolam) because of the patient's claustrophobia. During the course of treatment, Ms. Vaught inadvertently administered the wrong drug, a fatal dose of the muscle relaxant vecuronium, to the patient, which resulted in the patient being unable to breathe. Apparently, Ms. Vaught had been unable to find the midazolam and disengaged a safeguard, proceeding into override mode, and thus vecuronium was dispensed. By the time the error was noticed, the patient was already in cardiac arrest with resultant brain damage (partial brain death). The patient died soon thereafter.

#### **How this medication error occurred**

The medication error occurred when Ms. Vaught overrode a computer in the

medical system when she could not find the "Versed" entry and typed in "VE," which was the abbreviation for vecuronium. The prosecutors in the case stated that she failed to distinguish that vecuronium is dispensed as a powder and Versed as a liquid formula. The vecuronium has a red cap, which warns that it is a paralyzing agent. Ms. Vaught ignored these red flags, according to the prosecutors. Furthermore, the lawsuit filing documented her discussion that she was "distracted with something" at the time and admitted to overriding the medication warning.

#### **The charges in this case**

The charges revolved around "criminally negligent homicide and gross neglect of an impaired adult," the most notable charge being criminally negligent homicide. Potential consequences were up to an 8 years' prison sentence.<sup>7</sup>

Furthermore, the Tennessee Board of Nursing revoked Ms. Vaught's license in July 2021.<sup>8</sup> The Board also reportedly fined her \$3,000.<sup>9</sup>

The criminal proceedings were filed in Davidson County Criminal Court, with Judge Jennifer Smith presiding. Ms. Vaught repeatedly manifested remorse for the event. The patient's family, including her son Michael and her daughters-in-law, provided tearful testimonies at the hearing. Ms. Vaught repeatedly cried during the testimonies. The nurse did not provide an apology, according to one daughter-in-law. The news media reported that the family did not want jail time for Ms. Vaught.<sup>7</sup> Nurses across the country were "jolted," as expressed by the news media.<sup>10</sup>

#### **Why the controversy?**

The entire issue of medical errors continues to be discussed among both the medical and the legal professions. To have a nursing personnel held to the level of criminal liability is unusual.

It was clear that Ms. Vaught took responsibility for her actions, and neither the prosecutors nor defendant attorneys sensed any evidence of malice on her part. On the other hand, there was enough evidence and

#### **FAST TRACK**

*To obtain a conviction, the prosecution must prove all of the elements of the crime, including the required mens rea, beyond a reasonable doubt*

concern for District Attorney Glenn Funk to proceed with prosecution-related action. Ms. Vaught was facing years in prison if convicted.

### WHAT'S THE VERDICT?

In March 2022, the jury convicted Ms. Vaught of criminally negligent homicide—but not of reckless homicide, a more serious offense.

Judge Smith granted a judicial diversion, that is, the conviction would be expunged from the record if Ms. Vaught completed a 3-year probation. Judge Smith noted the “credible remorse expressed by Nurse Vaught” and went on to state, “this is a terrible, terrible, mistake and there have been consequences to the defendant.” In the courtroom, Ms. Vaught apologized to the patient’s family and conveyed that she will “forever be haunted by her role in the (patient’s) passing.”

Overall, this served as an opportunity for health care workers to address oftentimes poor working conditions, which have been exacerbated by the COVID-19 pandemic.

The Davidson County District Attorney’s office conveyed that this was one case of a careless nurse and not a reflection of the nursing profession. The prosecutors were in accord with a probation verdict. The family felt that their mother, the patient, would not want to see the nurse serve a jail sentence: “Mom was a very forgiving person.”

The patient’s cause of death was listed as “intracerebral hemorrhage and cardiac arrest.” One year later, a new death certificate was issued and noted vecuronium intoxication as the cause of death.

### The health care institution’s involvement

Approximately 1 year after an apparent anonymous tip was made to health care officials, an unscheduled state and federal investigation, with the threat of possible sanctions, occurred at the VUMC. This was predicated on the criminal indictment related to Ms. Vaught. In the end, her nursing license was revoked, as noted earlier. The family earlier reached an out-of-court

settlement with the hospital and there were a number of problems identified at the university medical center.<sup>11</sup>

### Legal principles in the case

Most criminal cases are state cases. Crimes are defined in state statutes, and the trial takes place in state courts. Thus, crimes are defined a little differently from state to state. Ms. Vaught, for example, was tried in Tennessee under the laws of that state.

Homicide involves the killing of a human being. It may not be a crime. For example, there is “justifiable homicide,” such as self-defense. At the other extreme is first-degree murder, an intentional and planned killing. In this case, Ms. Vaught was charged with criminally negligent homicide, which is usually the least serious of criminal homicides but is still a felony. (Some states have misdemeanor manslaughter, which was not an issue in this case.) In some states, criminally negligent homicide is sometimes referred to as involuntary manslaughter. The *mens rea* for involuntary manslaughter is generally recklessness or “criminal negligence.” This crime goes by various names depending on the state, but involuntary manslaughter and criminally negligent homicide are common names.

**Ordinary negligence versus criminal negligence.** Criminal negligence is usually considered a more serious mistake than ordinary negligence. This is where there is a difference between civil malpractice negligence and criminal negligence. Criminal negligence is somewhat more careless than ordinary negligence. To use a driving example, if Dr. A was driving home from the hospital, missed seeing a red light, and killed Joe Pedestrian, it could be ordinary negligence. If, however, Dr. B was texting or drinking while driving, causing Dr. B to be distracted and miss seeing the red light, killing a pedestrian, it could be criminal negligence and result in the conviction for the homicide. Of course, in either case there could be civil liability for causing the death.

Applying these legal principles to the

### FAST TRACK

*There is a difference between civil malpractice negligence and criminal negligence; criminal negligence is somewhat more careless than ordinary negligence*

reported facts in Ms. Vaught's case, it appears there was more than simple negligence. That is, the nurse was more than careless. Using "VE" for the wrong drug might have been negligent. In addition, however, she disengaged a safeguard meant to prevent wrongful use of the drug, failed to notice that the drug was a powder instead of a liquid, and ignored the red cap warning that the drug was a paralyzing agent. It becomes apparent why the jury could have found aggravated or criminal negligence.

It is worth emphasizing that in this case, the criminal charges were unusual. For years, studies have suggested that many deaths result from medical errors. The Institute of Medicine famously said that the number of deaths from medical errors was equivalent to that of a 747 airplane crashing every day.<sup>12,13</sup> These events result in a relatively small number of malpractice actions but an infinitesimally small number of homicide charges. Among other things, prosecutors are reluctant to pursue such cases regarding acts carried out as part of clinical duties unless there is strong evidence, and grand juries may be reluctant to indict medical professionals.<sup>14</sup>

Nonetheless, medical professionals ultimately can be criminally responsible for deaths resulting from intentional, or criminally negligent, careless practice. Such liability should not dissuade nurses or others from medical practice any more than the much more common homicide charges that can occur from driving an automobile carelessly that results in someone's death. A fundamental purpose of the criminal law is to disincentivize unnecessarily harmful (deadly) conduct, whether it is distracted driving or distracted nursing.

## The drug-prescribing crimes

The US Supreme Court considered a much different kind of criminal medical practice in 2 (consolidated) cases in its 2021–2022 Term. Physicians in 2 states were each tried and convicted of federal charges of illegally dispensing or distributing (prescribing) controlled substances.<sup>15</sup> A federal statute makes it a felony for a physician, or others, "except

as authorized" to "knowingly or intentionally distribute, or dispense a controlled substance."<sup>16</sup> Federal regulations clarify the statute. The regulation provides that a prescription is authorized only if a doctor issues it "for a legitimate medical purpose . . . acting in the usual course of professional practice."<sup>17</sup>

### CASE 2 Physicians charged with overprescribing controlled substances

In these 2 drug-prescribing cases, the physicians had grossly overprescribed the opioids. One reportedly wrote prescriptions in 2 states in exchange for payments in cash or, infrequently, firearms, approximating the cost of the prescriptions to street drugs. The other had a clinic that, over about 4 years, issued 300,000 prescriptions for controlled substances and was a significant source for some kinds of fentanyl.<sup>18</sup>

## WHAT'S THE VERDICT?

In each trial, the juries found the defendant guilty of improper distribution of controlled substances. Although the charges were not homicides, the sentencing judges were much more severe than the court had been in the nursing case discussed above. One physician received a prison term of 20 years, the other, a 25-year term. These undoubtedly reflect both the outrageous conduct and the likely great harm the defendants did.

### The Supreme Court heard the cases

The Supreme Court reversed these physicians' convictions. The Court held that the lower courts had not correctly described for the juries the *mens rea* required for a conviction under these charges. The Supreme Court held that to be convicted of these offenses, the government had to prove "beyond a reasonable doubt that the defendant [physician] knew that he or she was acting in an unauthorized manner."<sup>19</sup> Both can be retried and probably will be unless they reach a plea agreement with the federal government. Nonetheless, the Court established a very high standard. Carelessness is not enough, but rather "knowingly" acting in an unauthorized way is required. Although these

## FAST TRACK

*Medical professionals ultimately can be criminally responsible for deaths resulting from intentional, or criminally negligent, careless practice*

### **FAST TRACK**

*The probability of criminal charges against medical personnel for their medical treatment is very low compared with, for example, fraudulent billing or tax avoidance*

physicians were prosecuted under *federal* law, other physicians have been prosecuted under *state* laws limiting the distribution of controlled substances.<sup>20</sup>

Some physicians have expressed concern that the Supreme Court, in these cases, made the practice of medicine more dangerous for physicians (the threat of criminal sanctions) and patients (making it more difficult to obtain pain control, for example).<sup>21,22</sup> That view may be overly pessimistic for 2 reasons. First, the Court actually made it *more* difficult to convict physicians of writing excessive prescriptions. It did so by setting a higher *mens rea* standard than lower courts were using, that is, the physician had to “knowingly” act in an unauthorized way. Because “knowingly” can be implied by the circumstances, taking guns or cash would be evidence that the physician knowingly misprescribed.

More fundamentally, the actions of these physicians appear to be well outside even a generous legitimate level of controlled substance prescription. These convictions should not be misunderstood as a way of federal courts to crack down on pain medications. However, the original convictions are a warning to the small handful who grossly overprescribe controlled substances.

### **Lessons about criminal law and the practice of medicine**

Medical professionals’ strong reaction to criminal charges is understandable. Criminal charges can result in jail time (the physicians involved in the controlled substance case were sentenced to 20 years or more) and hefty fines; bring social and professional disapprobation; may lead to license discipline; and are terribly disruptive even for those found not guilty. To make matters worse, malpractice insurance ordinarily does not cover criminal

charges, so any fines and the cost of defense are likely out of pocket for those charged—and that can be very expensive. Therefore, the strong reaction to the cases we have described is understandable.

At the same time, the probability of criminal charges against medical personnel for their *medical treatment* is very low compared with, for example, fraudulent billing, their driving habits, or tax avoidance. Criminal charges are much more likely to arise from insurance fraud, Medicare or Medicaid dishonesty, kickbacks, false statements, and similar corruption crimes rather than inadequate practice. In the cases we examined here, there is an enhanced or aggravated negligence in one case and grossly inappropriate prescribing in the others (which the Supreme Court held must be “knowingly” wrong).

Finally, there is an irony. Medical professionals worried about practice-related criminal charges should be thankful for the malpractice system. Civil malpractice is, as a practical matter, an alternative for patients who believe they were mistreated or harmed by physicians or other providers. They have the option of finding a private attorney to file a civil complaint. In the absence of that system, they would be much more likely to take their grievance and complaint to the prosecutor to seek answers and retribution. Criminal law and civil liability are each a way of allowing someone harmed by another to seek redress. Both are intended to deter harmful conduct and provide some individual and social retribution for such behavior. The civil system, of course, also provides the potential for compensation to those injured. An injured patient without the possibility of a civil suit sometimes would turn to the criminal system for satisfaction. This way, the malpractice system is a better alternative to criminal charges. ●

#### **References**

1. Kelman B. As a nurse faces prison for a deadly error, her colleagues worry: could I be next? NPR. March 22, 2022. Accessed November 7, 2022. <https://www.npr.org/sections/health-shots/2022/03/22/1087903348/as-a-nurse-faces-prison-for-a-deadly-error-her-colleagues-worry-could-i-be-next>
2. US Department of Justice. National health care fraud enforcement action results in charges involving over \$1.4 billion in alleged losses. September 17, 2021. Accessed November 7, 2022. <https://www.justice.gov/opa/pr/national-health-care-fraud-enforcement-action-results-charges-involving-over-14-billion>



3. Steinman G. Stuff of nightmares: criminal prosecution for malpractice. *OBG Manag.* 2008;20(8):35-45.
4. Maher V, Cwiek M. Criminal liability for nursing and medical harm. *Hosp Top.* 2022 July 13;1-8.
5. Singer RG. The resurgence of mens rea: III—the rise and fall of strict criminal liability. *Boston Coll Law Rev.* 1989;30:337-408. Accessed November 7, 2022. <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2431&context=bclr>
6. Sarch AF. Knowledge, recklessness and the connection requirement between actus reus and mens rea. *Penn State Law Rev.* 2015;120:1-51. Accessed November 7, 2022. <https://ideas.dickinsonlaw.psu.edu/cgi/viewcontent.cgi?article=4120&context=dlra>
7. Timms M, Gluck F, Wegner R, et al. RaDonda Vaught sentenced to three years probation on a diverted sentence, could see record wiped. *Tennessean.* May 13, 2022. Accessed November 7, 2022. <http://www.tennessean.com/story/news/crime/2022/05/13/radonda-vaught-sentenced-vanderbilt-nurse/9717529002/>
8. Tennessee Board of Nursing. Disciplinary hearing: RaDonda Vaught, RN #205702, minutes. July 22-23, 2021. Accessed November 7, 2022. <https://www.tn.gov/content/dam/tn/health/healthprofboards/nursing/meeting-minutes/Nursing%20Meeting%20Minutes%20July%2022-23,%202021.pdf>
9. Institute for Safe Medication Practices. TN Board of Nursing's unjust decision to revoke nurse's license: travesty on top of tragedy! August 12, 2021. Accessed November 7, 2022. <https://www.ismp.org/resources/tn-board-nursings-unjust-decision-revoke-nurses-license-travesty-top-tragedy>
10. Medina E. Ex-nurse convicted in fatal medication error gets probation. *New York Times.* May 15, 2022. Accessed November 7, 2022. <https://www.nytimes.com/2022/05/15/us/tennessee-nurse-sentencing.html>
11. Kelman B. In nurse's trial, investigator says hospital bears 'heavy' responsibility for patient death. *KHN.* March 24, 2022. Accessed November 15, 2022. <https://khn.org/news/article/radonda-vaught-fatal-drug-error-vanderbilt-hospital-responsibility/>
12. Institute of Medicine (US) Committee on Quality of Health Care in America; Kohn LT, Corrigan JM, Donaldson MS, ed. *To Err Is Human: Building a Safer Health System.* National Academies Press; 2000.
13. Bates DW, Singh H. Two decades since *To Err Is Human*: an assessment of progress and emerging priorities in patient safety. *Health Affairs.* 2018;37:1736-1743.
14. Eisenberg RL, Berlin L. When does malpractice become manslaughter? *Am J Roentgenol.* 2002;179:331-335.
15. *Xiulu Ruan v United States*, 20-1410, decided June 27, 2022. [https://www.supremecourt.gov/opinions/21pdf/20-1410\\_1an2.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1410_1an2.pdf)
16. 84 Stat. 1260, 21 U. S. C. §841(a).
17. 21 CFR §1306.04(a) (2021).
18. Liptak A. Supreme Court sides with doctors accused of running pill mills. *The New York Times.* June 27, 2022.
19. *Xiulu Ruan v United States*, at 2 (slip opinion).
20. Pedemonte S. *State v. Christensen*: criminalizing medical malpractice. *Montana Law Rev.* 2022;83(1):183-193. Accessed November 7, 2022. <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=2497&context=mlr>
21. Szalavitz M. A recent Supreme Court ruling will help people in pain. *Scientific American.* September 19, 2022. Accessed November 15, 2022. <https://www.scientificamerican.com/article/a-recent-supreme-court-ruling-will-help-people-in-pain/>
22. Lopez I. Opioid pill peddling case threatens future of pain treatment. *Bloomberg Law.* March 29, 2022. Accessed November 15, 2022. <https://news.bloomberglaw.com/health-law-and-business/opioid-pill-peddling-case-threatens-future-of-pain-treatment>