



# Criminal Prosecution for Nursing Errors

Rebecca F. Cady, Esq., RNC, BSN, JD, CPHRM

## ABSTRACT

*Headlines describing nurses being prosecuted for crimes related to nursing errors raise numerous questions for nurses and their managers. Nurse managers need to be aware of situations in which nurses may be subject to criminal prosecution to assist staff in educating themselves and acting to minimize risk. After reading this article, the reader should be able to (a) identify the legal basis for criminal charges for nursing errors, (b) list 3 errors likely to result in criminal prosecution, and (c) discuss licensure implications of criminal charges for nursing errors.*

## Introduction to Criminal Law Concepts

### Criminal Law Terms

To best understand the issues related to criminal charges for nursing errors, it is important for nurses to become familiar with the terms that apply to issues of criminal law. Box 1 highlights important concepts nurses need to know about crimes. A crime is a type of behavior that has been defined by the state as deserving

of punishment, which usually includes imprisonment. Crimes and their punishments are defined by Congress and state legislatures.

There are several types of crimes for which nurses may be charged as a result of a nursing error. Criminal negligence is more-than-ordinary carelessness, in other words, recklessness. In general, carelessness can be a crime when a person recklessly disregards a substantial and unjustifiable risk. It is up to judges

and juries to evaluate a person's conduct according to community standards and to decide whether the carelessness is serious enough to demonstrate criminal conduct. Criminal neglect is an act, omission, or course of conduct that because of the failure to provide adequate medical care creates a significant danger to the physical or mental health of a patient.

Author Affiliations: Children's National Medical Center, Washington, DC.  
Corresponding author: Rebecca F. Cady, Esq., RNC, BSN, JD, CPHRM, Children's National Medical Center, 111 Michigan Avenue, Washington, DC 20010 (rfcrnj@aol.com).

Negligent homicide is the negligent killing of one human being by the act or omission of another. Criminal homicide occurs when a person purposely, knowingly, recklessly, or negligently causes the death of another. Murder and manslaughter are both examples of criminal homicide. A felony is a serious crime (contrasted with misdemeanors and infractions, less serious crimes), usually punishable by a prison term of more than 1 year or, in some cases, by death. For example, murder, extortion, and kidnapping are felonies; a minor fistfight is usually charged as a misdemeanor, and a speeding ticket is generally an infraction. A misdemeanor is a crime, less serious than a felony, punishable by no more than 1 year in jail. Petty theft (of articles worth less than a certain amount), first-time drunk driving, and leaving the scene of an accident are all common misdemeanors. Assault is a crime that occurs when one person tries to physically harm another in a way that makes the person under attack feel immediately threatened. Actual physical contact is not necessary; threatening gestures that would alarm any reasonable person can constitute an assault. A battery is a crime consisting of physical contact that is intended to harm someone. Unintentional harmful contact is not battery, no matter how careless the behavior or how severe the injury. A fistfight is a common battery; being hit by a wild pitch in a baseball game is not. Other crimes for which nurses could be charged include elder/dependent adult abuse, drug possession/use, and breach of privacy, that is, snooping in charts or revealing patient information.

In criminal cases, a grand jury typically decides whether there is enough evidence to justify an indictment (formal charges) and a trial. A grand jury indictment is the first step, after arrest, in any formal prosecution of a felony. A charge is a formal accusation of criminal activity. The prosecuting attorney decides on the charges, after reviewing police reports, witness statements, and any other evidence of wrongdoing. Formal charges are announced at an arrested person's arraignment. The *information* is the name of the document, sometimes called a criminal complaint or petition, in which a prosecutor charges a criminal defendant with a crime, either a felony or a misdemeanor. The information tells the defendant what crime he/she is charged with, against whom, and when the offense allegedly occurred, but the prosecutor is not obliged to go into great detail. If the defendant wants more specifics, he must ask for it by way of a discovery request. An arraignment is a court appearance in which the defendant is formally charged with a crime and asked to respond by pleading guilty, not guilty, or nolo contendere. Other matters often handled at the arraignment are arranging for the appointment of a lawyer to represent the defendant and the setting of bail.

Bail is the money paid to the court, usually at arraignment or shortly thereafter, to ensure that an arrested person who is released from jail will show up at all required court appearances. The amount of bail is

determined by the local bail schedule, which is based on the seriousness of the offense. The judge can increase the bail if the prosecutor convinces him that the defendant is likely to flee (for example, if he has failed to show up in court in the past), or he can decrease it if the defense attorney shows that the defendant is unlikely to run (for example, he has strong ties to the community by way of a steady job and a family). A bail bond is the money posted by a "bondsman" for a defendant who cannot afford his bail. The defendant pays a certain portion, usually 10%. If the defendant fails to appear for a court hearing, the judge can issue a warrant for his arrest and threaten to forfeit, or keep, the money if the defendant does not appear soon. Usually, the bondsman will look for the defendant and bring him back, forcefully if necessary, to avoid losing the bail money.

A plea bargain is a negotiation between the defense and prosecution (and sometimes the judge) that settles a criminal case. The defendant typically pleads guilty to a lesser crime (or fewer charges) than originally charged, in exchange for a guaranteed sentence that is shorter than what the defendant could face if convicted at trial. The prosecution gets the certainty of a conviction and a known sentence; the defendant avoids the risk of a higher sentence; and the judge gets to move on to other cases. Sentencing is the imposition of the sentence by the judge. A sentence is the punishment in a criminal case. A sentence can range from a fine and community service to life imprisonment or death. For most crimes, the sentence is chosen by the trial judge; the jury chooses the sentence only in a capital case, when it must choose between life in prison without parole and death.

## Criminal Law Process

When an incident with patient care occurs, the first step in the criminal process is an investigation. The authorities may become involved because of a mandatory reporting obligation on the part of the hospital when a patient is injured, or because of reports made by the patient or family. In most jurisdictions, either a judge in a preliminary hearing or a grand jury must indict the defendant before charges can be brought. On some occasions, after the indictment, a warrant is issued for the arrest of the defendant. Arrest is a situation in which the police detain a person in a manner that, to any reasonable person, makes it clear he/she is not free to leave. A person can be "under arrest," even though the police have not announced it; nor are handcuffs or physical restraint necessary. Questioning an arrested person about his/her involvement in or knowledge of a crime must be preceded by the Miranda warnings if the police intend to use the answers against the person in a criminal case. If the arrested person chooses to remain silent, the questioning must stop.

In many cases involving nurses, the nurse is allowed to surrender to authorities at the district attorney's

office or the police station instead of being arrested. This saves the defendant nurse from public embarrassment of the police showing up at his/her home or place of employment to make the arrest. After a defendant is arrested, a judge will conduct an arraignment, in which the defendant is informed of the charges against him and imposition of bail, which would allow the defendant to remain free pending trial. After the arraignment, the defendant's attorney will have the opportunity to conduct discovery to gather facts related to the incident. The prosecuting attorney will have to share with the defense attorney certain evidence gathered during the prosecution's investigation. Many times after discovery is conducted, the defendant will reach a plea bargain with the prosecutor. This means that the defendant will plead guilty to a limited charge in exchange for a lighter punishment than would result if the defendant were found guilty at trial of all the charges. Should a plea deal not be reached, the case will go to trial. Box 2 lists the steps in the trial process. It is important for the nurse to remember that the criminal law system provides certain protections for defendants. These include the higher burden of proof which applies in a criminal case. In a criminal case, the prosecutor must prove the defendant's guilt beyond a reasonable doubt. Reasonable doubt is sometimes explained as being convinced to a moral certainty. The jury must be convinced that the defendant committed each element of the crime before returning a guilty verdict. Another protection is the requirement that the jury must be unanimous in finding the defendant guilty in a criminal matter. Thus, if only 10 of 12 jurors find the defendant guilty, then the verdict must be entered as not guilty. Box 3 lists some important differences between the civil and criminal law systems.

#### FINDING AND PAYING FOR AN ATTORNEY

It is imperative for the nurse who believes he/she is facing possible criminal charges to hire a competent criminal defense attorney. There are several sources the nurse can use to help find an attorney: the state bar referral service, the county bar referral service, the public defender's office and the American Association of Nurse Attorneys can all provide referrals to criminal

### B O X 2 Steps in Trial Process

- Jury selection
- Opening statement
- Evidence
- Closing argument
- Deliberations
- Appeals

defense attorneys. Nurses should note that the law requires that if a defendant in a criminal case cannot afford to hire an attorney, one must be provided for the defendant by the state. These attorneys usually work for the public defender's office in the jurisdiction. Many legal aid societies also have attorneys who are willing to provide services for free to those who cannot afford to hire an attorney. With any attorney, it is important for the nurse to determine that the attorney has experience with criminal defense work and that the attorney can consult with other attorneys experienced in issues related to healthcare providers.

### Case Study: Denver Nurses

The nurses involved in this case were the following:

- Neonatal nurse practitioner (NNP) with 7 years' experience
- Level II nursery nurse with 6 years' experience
- Mother-baby nurse with 20 years' experience

The mother was a G4P3003, who was found to have positive RPR prenatally with positive fluorescent treponemal antibody (syphilis). The mother reported having contracted syphilis in 1981 and that it had been treated at that time. She had given birth to 3 healthy babies since 1981. The Colorado State Health department

### B O X 3 Differences Between Civil and Criminal Systems

Civil	Criminal
Judge or jury	Jury
Penalties limited	Fines and/or jail
Must get own attorney	State must provide you with an attorney if you can't afford one
May have action against other party for bringing suit if frivolous	No right to sue prosecutor or judge for wrongful prosecution

### B O X 1 Important Concepts Regarding Crimes

- All crimes must be defined by statute
- The behavior at issue must be proscribed by statute before a criminal case can be brought
- State laws define most crimes with which nurses can be charged
- Criminal intent is usually not required

attempted to verify the 1981 treatment but was unable to confirm it had been provided. Centers for Disease Control and Prevention guidelines recommended retreatment; the obstetrician elected to defer treatment, although RPR titers repeated at 18 and 29 weeks remained mildly positive. The obstetrician's rationale for this decision was not documented on the prenatal American College of Obstetricians and Gynecologists (ACOG) record. At 36 weeks, the ACOG record was sent to the hospital. At 38 weeks, a fourth RPR titer was negative; this result was not communicated to the hospital, nor was the updated ACOG record sent to the hospital. The mother had an uncomplicated vaginal birth at 40 weeks. The neonatologist read the ACOG record and consulted with the State Health Department about the lack of treatment of the mother for a positive RPR during pregnancy; the State told the neonatologist what the recommended treatment was for the infant. The neonatologist did not consult with the obstetrician. The neonatologist ordered antibiotic treatment for the infant with 150,000 U benzathine penicillin G intramuscularly administered (IM) as well as bone radiographs and a lumbar puncture. The neonatologist decided not to wait for the test results before administration of antibiotics. The neonatologist ordered the antibiotic treatment to be given immediately. The neonatologist testified at trial that because the family spoke Spanish, she feared they would be lost to follow-up if she delayed the treatment or if treatment was deferred to the family pediatrician. A translator was sought to discuss the lumbar puncture with the parents, who questioned the necessity of this test because their other children were healthy.<sup>1</sup>

The NNP and nursery nurse became involved because of a change in the infant's risk status as a result of the "positive" RPR. The mother-baby nurse was assigned to this couplet. The pharmacist filled the physician order with 10 times the ordered dose (1,500,000 vs 150,000 U). The drug arrived in prefilled syringes. The nurses observed that it was a very large volume (2.5 mL) of medication for an IM injection for an infant. Administering this volume by IM injection would have required 5 separate injections because infants can only get a maximum of 0.5 mL per injection. The nurses did not call the pharmacy to verify the volume sent. The nurses did not notice that the dose sent was 10 times the ordered dose. The NNP and nursery nurse decided to investigate whether a different route of administration (intravenous [IV]) could be used. The NNP knew that national standards for NNPs allow them to plan and change drug therapy. The NNP and nursery nurse consulted Neofax 95 regarding alternatives for administration of this medication.

Neofax described treatment for congenital syphilis with aqueous penicillin G slow IV push. The NNP believed that benzathine was a brand name for penicillin; it is actually the solution in which the penicillin is suspended, so it was not clear to the nurses that the drug ordered by the physician could not be given by

IV route. The NNP and nursery nurse then told the mother-baby nurse that they would give the drug by IV route; the mother-baby nurse was relieved that she would not have to give the infant multiple IM injections and delegated the administration of the medication to the NNP and nursery nurse. The NNP and nursery nurse gave the medication IV push; the baby arrested within 3 minutes, and extended efforts to resuscitate were unsuccessful.<sup>1</sup>

The hospital conducted an investigation. As a result of the hospital's investigation, the NNP was terminated; the nursery nurse was assigned nonnursing duties while on suspension from the Board of Nursing; the mother-baby nurse was cleared; and the pharmacist was allowed to resign.<sup>1</sup>

The death was reported by the hospital to the State Board of Nursing, as a sentinel event. The Board of Nursing suspended the NNP's license and nursery nurse's license. The mother-baby nurse's license was left intact. The pharmacist was reported to the State Board of Pharmacy, which investigated but did not discipline the pharmacist.<sup>1</sup>

This case was reported on in the media and became a front-page story; the public wanted an explanation. Legal authorities became interested. A criminal investigation was opened by the district attorney. Several months later, all 3 nurses were indicted on charges of negligent homicide. All defendants faced a possible 5-year jail term if convicted. The NNP and nursery nurse accepted a plea bargain; both pled guilty with a deferred sentence. Their records would be expunged of the conviction (this means the record will be wiped clear as if it never happened), provided they had no further criminal convictions for a period of 2 years; the plea removed the possibility of a prison sentence or fines. The mother-baby nurse went to trial and was acquitted by a jury on January 30, 1998, after a 45-minute deliberation.<sup>1</sup> Acquittal means a decision by a judge or jury that a defendant in a criminal case is not guilty of a crime. An acquittal is not a finding of innocence; it is simply a conclusion that the prosecution has not proved its case beyond a reasonable doubt.

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## Lessons Learned—What Could Have Been Done Differently?

### Systems Errors in Denver Case

The Institute for Safe Medication Practices found more than 50 deficiencies in the medication use system that contributed to this error. There were a string of steps that led to this error, including an unsuccessful effort to document previous treatment of syphilis; the obstetrician elected to defer treatment despite Centers for Disease Control and Prevention recommendations of retreatment when clear documentation was not available; the obstetrician did not document why the mother

was not retreated; the obstetrician did not communicate a clinical update after 36 weeks; the neonatologist did not communicate with the obstetrician regarding the treatment plan; decisions were made regarding the need for immediate treatment of the infant based on a language barrier; the parents concerns seem to have been overlooked; the pharmacist made a serious error in interpreting the order and sent 10 times the ordered dose; the nurses did not check with the pharmacist when a large volume of medication was sent to the nursery; writing on syringes was hard to read; the nurses did not follow the 5 rights (patient, time, medication, route, and dose) for medication administration; the hospital had no written protocols for NNPs; the NNP and nursery nurse lacked experience in administering this drug but did not check with the pharmacist or neonatologist; and information in Neofax was incomplete and did not clearly indicate the drug could only be given IM.<sup>1</sup>

### Case Study: Wisconsin Nurse

The nurse in this case was an obstetrics nurse with 15 years' experience. She volunteered to work two 8-hour shifts on July 4, 2006. She then slept at the hospital and began her next shift at 7 AM on July 5. The nurse had 2 patients assigned to her on the date of the error: one was a 19-week pregnant patient with rupture of membranes; the other was a patient in labor. The patient in labor was a 16-year-old girl who was postdates and had been admitted for induction of labor. The patient wanted "natural" childbirth, indicating that she would accept pain medication but that she did not want an epidural. The patient had a culture positive for group B streptococcus on June 1, 2006. An obstetrics resident wrote an order for penicillin G, 5 million U IV at 11 AM. At 11:15 AM, the obstetrician ruptured the patient's membranes. At 11:36 AM, the nurse went to the Pyxis machine and removed a number of medications that had been ordered for the patient. At the same time, she removed a bag containing bupivacaine and fentanyl for use as an epidural. No order had been written for an epidural; the nurse removed the epidural medication because she believed one would be ordered. At the same time the nurse removed the medications from the Pyxis, another nurse brought a bag containing the penicillin to be given to this patient IV. The facility had a Bridge Medical System for ensuring that the right patients got the right medications, but the nurse did not use it. The nurse started an IV around noon and mistakenly piggybacked the bag of epidural medication rather than the penicillin to the IV and infused it at faster than the standard rate. Within 5 minutes, the patient was seizing and gasping for air. She was declared dead several hours later as a result of cardiac arrest, convulsions, and central nervous system complications as a result of poisoning by IV administration of the epidural anesthetic.<sup>2</sup>

On November 2, 2006, the nurse was charged with neglect of a patient causing great bodily harm: it was claimed that she failed to provide adequate medical care, creating a significant danger to the patient's physical health under circumstances that caused great bodily harm to the patient. The criminal complaint alleged that the nurse did not follow the 5 rights of medication administration and did not use an available bedside bar-coding system.<sup>2</sup> This nurse faced up to 6 years in jail, a fine up to US \$25,000, or both.<sup>3</sup>

On December 16, 2007, the nurse was placed on 3 years' probation for 2 misdemeanors. As part of a plea agreement, the nurse pleaded no contest to 2 misdemeanors (dispensing of a drug by someone other than a pharmacist and possession of a drug by a person to whom it had not been prescribed). The charges were amended from the single felony (negligence causing great bodily harm). While on probation, the nurse was prohibited from practicing critical care nursing including obstetrics, emergency room, and recovery room nursing.<sup>3</sup>

The Board of Nursing suspended this nurse's license for 9 months and imposed 2 years of practice limitations of no more than 12 hours per 24 hours and 60 hours per 7 days. The Board also required continuing education of 54 hours in 1 year, required her to make 3 presentations to the nursing community, and imposed a US \$2,500 fee. The Board found that the nurse failed to place the identification wristband on the patient's wrist, failed to scan the barcodes and use the Bridge Medical System for administering medication, and failed to read the label on the minibag containing the epidural medication, which had a bright pink large label on it.<sup>3</sup>

The public response to this case was one of shock.<sup>4</sup> The Institute for Safe Medication Practices released a statement opposing criminal prosecution of healthcare professionals for unintentional errors. The Wisconsin Hospital Association released a statement opposing criminal charges. The Wisconsin Nurses Association opposed the Department of Justice decision to pursue criminal prosecution.<sup>5</sup> In a press release, the Wisconsin Hospital Association declared "The association believes that existing regulatory agencies can appropriately address and apply necessary sanctions and monitoring systems to promote quality of care and patient safety" and that action by the Department of Justice is not warranted for an unintentional medical error.<sup>6</sup> The American Nurses Association also released a statement opposing criminal charges and the bypassing of the usual administrative process.<sup>7</sup>

### Case Study: New York Nurses Indicted for Quitting Their Jobs

In March 2007, the Suffolk County Grand Jury indicted 11 persons for endangering the welfare of pediatric patients at a nursing home. The defendants were charged with misdemeanor endangering the welfare of children and physically disabled persons; 1 defendant

(an attorney representing the other defendants) was charged with instructing the others, all of whom were nurses at the facility, to resign without giving notice. The indictment claimed that the sudden, en masse resignation of this group of nurses endangered the lives of pediatric patients.<sup>8</sup>

The parent company of the nursing home recruited the defendant nurses from the Philippines and brought them to the United States. If the nurses did not honor the 3-year commitment in their contract, they would owe the company US \$25,000. The indictment claimed that the nurses and their attorney tried to get out of the contract without paying the penalty. The defendants were charged with agreeing to resign en masse without notice, knowing that doing so would make it hard for the facility to find skilled replacement nurses in a timely manner. The defendants face up to 6 years in prison. The nurses contended that they were recruited under false pretenses. The Nursing Board cleared the nurses of administrative charges. The facility filed a civil suit against the nurses and worked with the district attorney's office to file criminal charges. NY Education Law defines unprofessional conduct as abandoning employment at a facility without giving reasonable notice and under circumstances that seriously impair the delivery of professional care to patients.<sup>9</sup>

#### LICENSURE IMPLICATIONS OF CRIMINAL CHARGES AGAINST NURSES

It is important for nurses to be aware that conviction of a crime is a basis for nursing license discipline; pleading guilty may also be a basis for licensure discipline. The nurse needs to consult both criminal and administrative attorneys if involved in a criminal case to be sure that the actions taken by the criminal defense attorney do not adversely impact the nurse's chances for retaining his or her license. A plea may impact licensure, and the nurse may not be able to function as nurse while the plea agreement is in effect. Most Board of Nursing statutes indicate that the board can suspend, revoke, or limit the license if the holder has been convicted of a felony; conviction is usually defined to include the entry of a plea of guilty or nolo contendere, or the imposition of a deferred sentence. It is also important to note that the Board's failure to discipline a nurse is not a bar to criminal charges; the standards for licensure discipline differ from those governing criminal charges.

#### ERRORS LIKELY TO LEAD TO PROSECUTION

It is important for nurses to be aware of errors that are likely to lead to prosecution. These errors include medication errors involving especially vulnerable patients, errors resulting from inattention or fatigue, errors that can be deemed grossly negligent by a nursing expert, and errors that inflame public sentiment.<sup>4</sup>

#### PROTECTING YOURSELF THROUGH GOOD NURSING PRACTICE

For the nurse to protect against the possibility of facing criminal charges for a nursing error, the following steps should be considered.

- Make sure to review and use basic nursing principles especially when faced with a new or chaotic situation
- Use all available resources to ensure safe care, that is, communicate with other providers
- Know your limits and do not function outside those parameters
- Carefully document the medical record
- Know your facility's policies and procedures
- Insist that your facility conduct appropriate orientation, continuing education, and staffing
- Be proactive if a mistake is made
- Know and use the chain of command
- Share information with the patient and do not discount their concerns or questions
- Recognize and report system flaws
- Turn down extra shifts if you are tired or stressed
- Practice assertive communication—state concerns with persistence until there is a clear resolution

Because medication errors have been the basis for 2 of the case studies discussed above, it is also important for the nurse to follow steps for reducing medication errors.<sup>10</sup> These steps include the following:

- Follow the 5 rights every time
- Double check with another registered nurse the medication volume, dose, route, and the patient's name
- Contact the pharmacy when medication is not labeled correctly and withhold administration until the issue is clarified
- Reverify medication volume over 1.5 mL when unfamiliar with the medication
- Monitor serum drug levels as appropriate

#### BOX 4 Protecting Yourself

Realize that professional malpractice policy does not cover criminal charges and the resulting legal costs

Hospital may or may not choose to pay nurses' legal expenses

Plea bargain—you need to understand all the terms; if the plea calls for a deferred sentence, then any further criminal convictions in the specified period of time will result in automatic sentencing for the crime pled to

Be active in your community—district attorneys are elected officials

Make every effort to participate when called for jury duty

Be aware that investigator will be a cop, usually from the Medicaid Fraud Unit, and has no medical training

**B O X 5**  
**For the Nurse Manager/Executive**

Be aware of and foster organizational culture that fosters collective agency for safety (willingness to take a stand on an issue of concern) in which all providers have responsibility for changing the plan when needed and through improving communication and assertion skills among team members

Ensure all clinicians have individual and collective authority to question the plan of care and to “stop the line” to change the direction of a situation in the patient’s best interest

Act to reduce the factors that threaten patient safety: hierarchy, status, power, role conflict, sleep deprivation, and fatigue

Be aware of the impact of context factors:

Availability of resources

Segregation of professional activities

Hierarchical structure of unit<sup>12</sup>

- Use medication administration equipment only after orientation and demonstrated competence
- Medication area should have sufficient lighting and be quiet with limited distractions

If involved in an error, the nurse should take the following actions<sup>11</sup>:

- Take immediate action to make the patient safe; notify the physician and your supervisor and document your actions
- Be aware of and follow the facility’s policies for error reporting
- Avoid informal discussions of the event; discuss only in the presence of the hospital’s attorney or risk manager
- If applicable, notify union representative according to procedure
- Do not change documentation in the chart

- Follow the facility’s protocol regarding disclosure of the error to the patient/family
- Do not speak to the police or an investigator without an attorney present to represent your interests
- Be aware of your constitutional right to remain silent and to have counsel present during interrogation

Box 4 lists additional ways in which the nurse can protect against criminal charges. Box 5 lists action items for the nurse manager to consider in assisting staff to avoid criminal charges.

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