As the First State to Decriminalize Medical Errors, Kentucky Reinforces the Importance of Patient Safety in Healthcare

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After passing unanimously in the Kentucky General Assembly, House Bill 159 was signed into law by Governor Beshear on March 26, 2024. HB 159 provides criminal immunity to health care providers for inadvertent medical errors. Coincidentally, it was signed into law the week following National Patient Safety Week.

HB 159 became law two years after a Nashville jury convicted RaDonda Vaught, a nurse at Vanderbilt University Medical Center, of reckless homicide and abuse of an impaired adult for the death of a 75-year-old patient. Ms. Vaught inadvertently administered the paralytic vecuronium instead of the sedative Versed to her patient, which prosecutors later claimed resulted in the death of the patient. Ms. Vaught did not intend to kill her patient; rather she made a series of mistakes in retrieving and administering the medication leading to the fatal error. Even though Ms. Vaught reported the medication error, she still faced criminal charges, which was unusual given that medical errors are not uncommon in the health care setting and providers who make inadvertent errors typically do not face criminal charges.

Her guilty verdict shocked health care providers nationwide, many of whom were nurses who rallied behind her. Health care experts were concerned that the verdict would negatively impact patient safety by dissuading health care providers from self-reporting medical errors and would cause nurses to leave the profession in droves. At Ms. Vaught's sentencing, Judge Jennifer Smith noted that "[t]his was a terrible, terrible mistake" and sentenced Ms. Vaught to three years of probation instead of eight years in prison, the maximum sentence she was facing. Ms. Vaught also lost her nursing license permanently. The family of the patient settled its civil lawsuit with Vanderbilt shortly after the patient died.

The Purpose of HB 159

Pursuant to HB 159(2), "a health care provider providing health services shall be immune from criminal liability for any harm of damages alleged to arise from an act or omission relating to the provision of health services, except as provided in subsection (3) of this section." Health care provider is broadly defined and includes all health care providers from nurses and physicians to therapists and lab technicians who may come in contact with a patient. The General Assembly amended the bill to make it clear that criminal immunity only applies to those health care providers who are actual clinicians caring for patients, not hospital administrators such as CEOs. As set forth in HB 159(3), there is no criminal immunity for "gross negligence or wanton, willful, malicious, or intentional misconduct." As to what may constitute grossly negligent criminal conduct in the health care setting in Kentucky remains to be seen, but presumably it would require the necessary criminal intent to harm a patient. HB 159 does not limit civil liability for medical negligence, including gross negligence, which is now more often than not included as a claim in civil medical malpractice actions.

When HB 159 was introduced in the Kentucky House of Representatives, Rep. Patrick Flannery stated that its purpose was to protect frontline health care providers from being criminally charged for inadvertent medical errors and to help the Commonwealth attract health care workers, particularly nurses. Rep. Flannery noted that "[i]t is important for health care workers to self-report any error or mistake that they make so the system, processes, and procedures can be amended to help prevent human errors in the future. With potential criminal charges over their heads, self-reporting could be stifled." He also noted that the bill was supported by the Kentucky Nurses Association and the Kentucky Medical Association.

According to the "Kentucky Nurse Workforce Projections: 2022-2035" report prepared by Global Data for the Kentucky Hospital Association, "Kentucky faces significant challenges with attracting people into a nursing career and retaining its current nurse workforce. The COVID-19 pandemic exacerbated these

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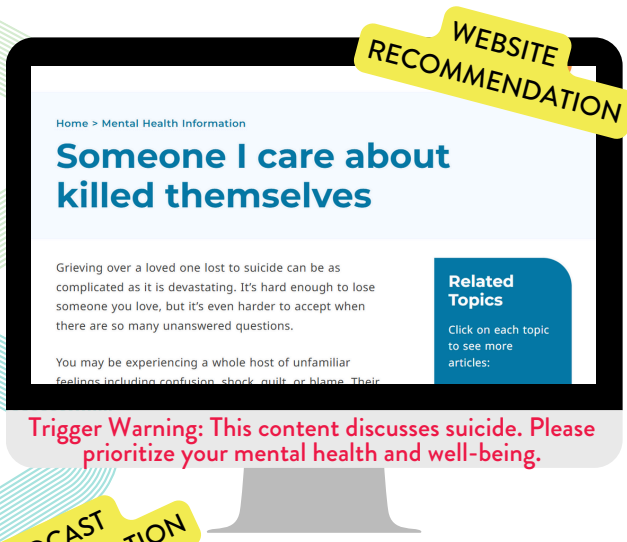

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- Diabetes Month
- International Survivors of Suicide Loss Day (11/23)

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challenges, with average patient acuity rising while nurses are being asked to care for more patients. A shortage of support personnel (particularly respiratory therapists, nurse aides, phlebotomists, and emergency medical technicians, but also other occupations) places additional pressures on nurses who find themselves performing the additional tasks often delegated to others." Global Data concluded that Kentucky's "current [nursing] shortfall is projected to persist" through 2035. *Id.*

Both the spike in nuclear verdicts in civil litigation following the COVID-19 pandemic and Kentucky's recent appearance on the American Tort Reform Association's "Judicial Hellhole Watch List" certainly hinder efforts to attract health care providers to the Commonwealth even further. With the threat of both civil and criminal liability looming, why would health care providers want to work in Kentucky? The General Assembly needed to take action to attract health care providers and protect the Commonwealth's citizens.

Medical Errors and Creating a Culture of Patient Safety

A Johns Hopkins' study in 2016 found that medical errors cause approximately 250,000 deaths yearly and are the third leading cause of death in the United States. Common medical errors noted by the World Health Organization (WHO) include medication errors, surgical errors, health care-associated infections, sepsis, diagnostic errors, falls, pressure ulcers, venous thromboembolism, unsafe transfusion and injection practices, and patient misidentification errors such as wrong-site surgery. According to the WHO, "[h]alf of the avoidable harm in health care is related to medications." *Id.* Medication errors like those made by RaDonda Vaught are the most common errors in the health care setting.

The WHO defines patient safety as "the absence of preventable harm to a patient and reduction of risk of unnecessary harm associated with health care to an acceptable minimum." *Id.* Patient safety "creates cultures, processes, procedures, behaviours, technologies and environments in health care that consistently and sustainably lower risks, reduce the occurrence of avoidable harm, make error less likely and reduce impact of harm when it does occur." *Id.* The WHO recognizes that "there are multiple and interrelated factors that can lead to patient harm" and "[m]ost of the mistakes that lead to harm do not occur as a result of the practices of one or a group of health and care workers but are rather due to system or process failures that lead these health and care workers to make mistakes." *Id.* That is exactly what Ms. Vaught's defense argued at her trial—her mistake was the result of systemic errors at the hospital. According to the WHO, it is critical to shift from a blame approach to a system-based thinking approach to "[u]understand the underlying causes of errors in medical care." *Id.* This approach attributes errors to "poorly designed system structures and processes" while taking human nature and fallibility into account as well as the quick-changing environments of health care. *Id.*

Last year, CMS announced in its "First, Do No Harm" blog post for National Patient Safety Week that patient safety "[b]est practices include ensuring a culture of safety, improving teamwork and communications, and carefully analyzing errors to identify root causes. These best practices can be standardized across health care to build a more resilient and durable system of safety that extends from the C-suite and the Boardroom to every health care worker for the benefit of patients everywhere." The WHO notes that "[a] safe health system is one that adopts all necessary measures to avoid and reduce harm through organized activities." These organized activities include: "ensuring a leadership commitment to safety and creation of a culture whereby safety is prioritized; ensuring a safe working environment and the safety of procedures and clinical processes; building competencies of health and care workers and improving teamwork and communication; engaging patients and families in policy development, research and shared decision-making; and establishing systems for patient safety incident reporting for learning and continuous improvement." *Id.*

To create a culture of patient safety, health care providers must be able to disclose errors free from blame or criminal charges. Blame and criminal charges create a culture of fear and punishment and do not promote patient safety. Such an approach discourages the principles behind patient safety initiatives, i.e., self-reporting, open communication, and actions to prevent future errors, and has the propensity to increase medical errors thereby decreasing patient safety. An unfortunate result of the fear approach is that it discourages not only self-reporting of medical errors but also discourages individuals from wanting to practice in the health care setting at all. A health care culture focused on fear and punishment will inevitably create a shortfall in staffing of all health care providers. No health care providers intend to hurt patients. Physicians take the Hippocratic Oath, and nurses take the Nightingale Pledge. Health care is, for the most part, delivered by humans who are fallible. Why would anyone want to provide health care services if they knew they could go to prison for an honest, inadvertent mistake? For these reasons, the Kentucky General Assembly was forward-thinking in its approach with HB 159. It recognized not only that the Commonwealth needs to be able to attract and retain health care providers, especially when facing a shortfall of qualified health care workers, but also that it needs to reinforce the importance of creating a culture of patient safety in health care settings to protect the citizens of the Commonwealth.

Leigh Schell is an Associate in Stoll Keenon Ogden's Louisville office. Her primary focus is on the defense of professional negligence claims made against physicians, healthcare personnel, hospitals and nursing homes. Leigh is chair of the LBA's Health Law Section. ■