Can a medication error be a crime?

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Every pharmacist makes mistakes, and all too often they are medication errors. Sometimes the system does not catch a medication error and it reaches a patient. Sometimes, thankfully not often, an error injures a patient.

In such an instance, we can be held liable in a civil suit for money damages as compensation for the injury. We carry malpractice insurance because we know that no matter how good we are, we will never eliminate the possibility of a negligent act that may result in human error and injury to a patient.

What if, however, our medication error resulted in a criminal charge? In May, an Ohio pharmacist pleaded “No contest” (essentially equivalent to a guilty plea without admission of guilt) to a charge of involuntary manslaughter. He faces up to five years in prison and a fine of up to $10,000.

We commonly think that a person charged with a crime is a “bad person.” The pharmacist in the Ohio case was not a bad person, but a mistake occurred under his supervision that resulted in the death of a two-year-old girl.

There seems little question that negligence was involved. According to newspaper accounts and Board of Pharmacy minutes, a hospital pharmacy technician mistakenly mixed chemotherapy solution with 23.4 percent instead of 0.9 percent sodium chloride. The parents’ civil suit charging negligence against the hospital was settled out of court.

Negligence charges are common in civil cases involving professional malpractice. In civil cases, negligence means deviation from professional standards of practice or failure to exercise due care. In criminal cases, negligence means something more. An earlier Ohio court explained:

A person is [criminal] negligent when, because of a substantial slip from the standard of care [the person] fails to take steps to evade a risk that his conduct may cause a certain result. ... It defines a higher degree of negligence than ordinary negligence. For one to be [criminal] negligent ... he must be guilty of a substantial departure from due care, whereas ordinary negligence merely requires a failure to exercise due care.

It does not happen often that a pharmacist is charged with a crime for a medication error. Whether the pharmacist in this case would have been found guilty had the case continued through a trial, we cannot know.

How can a pharmacist “take steps to evade a risk that his conduct may cause a certain result?” Every time we fill a prescription or drug order, there is a chance that we might make a mistake. When we dispense or compound dangerous drugs, i.e., ones that are designated Rx only, any selection of wrong drug or wrong strength could be a “substantial slip” if the only thing we judge by is the result. The only way to actually “evade a risk” of making a mistake that will result in a predictable (certain) outcome is to refuse to fill the prescription or drug order.

Mike Cohen, president of the Institute for Safe Medical Practices, said about this case, “Focusing on the individual is unlikely to have a positive effect in the long run. I have not read anywhere that he purposely tried to hurt the patient.” I agree: nothing I have read about this case indicates that the pharmacist’s conduct rose to the level of a criminal violation. A criminal conviction here serves no purpose. It may also have a dangerous, unintended consequence and may result in injury to a future patient.

The Institute of Medicine (IOM) report “To Err Is Human” found that medical errors are among the leading causes of death in the United States; it estimated that each year 40,000 to 98,000 patients die in hospitals from preventable adverse events — medical errors. The IOM, as part of its report, cited studies estimating that there are 7,000 deaths each year just from medication errors. How many of the professionals involved in these cases should be put in jail?

Prosecutors and grand juries, the ones who make such decisions, are as much subject to pressure to “do something” as the rest of us. They need to think hard about this type of case in the future and resist easy, “feel good” decisions. I was taught in law school that a person should be able to conform his or her actions to avoid being charged with a crime. In this case, to conform your actions, you’d have to avoid being a fallible human being — or refuse to fill the drug order.

There is a reason we teach that when a medication error occurs, we fix the system and do not punish the person. This is the basis of risk management and avoidance of medication errors. Systems are in place because people make mistakes. If people never made mistakes, we wouldn’t need systems. If systems never failed, none of our mistakes would ever reach a patient.

Routine punishing the person who made the mistake may make it less likely that we will learn of every mistake. If we do not learn of an error, we will not have a chance to fix the system. The result will be that some day, some patient will be injured when we could have modified the system to prevent the error from reaching the patient. In the present case, it is the prosecutors who need to fix their system.

This article is not intended as legal advice; it is intended to promote thought about ways to reduce medication errors. For legal advice, consult your own attorney.

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