



MEMORANDUM

To: ANA-Vermont Members
Date: March 31, 2023
Re: Words Matter – Negligence and H. 171

The Vermont Legislature is considering legislation that could impact every nurse's career in the event that they come into contact with a medical error. The bill would result in innocent mistakes or errors that the nurse has committed or that they are aware of, being treated as reportable abuse and the bill will degrade the development of a Just Culture in health care.

With the national outrage over ReDonda Vaught's prosecution, nurses should be concerned over the potential, and more likely to occur, ramifications of the language changes in H. 171.

I. H.171 – An act relating to adult protective services

H.171 seeks to amend the current law for the mandatory reporting of abuse, neglect, and exploitation of vulnerable adults to expand mandatory reporting from the current law that deals with intentional or reckless abuse or neglect to now include negligent acts and omissions such as mistakes. This expansion would have dire and unnecessary consequences for the health care workforce. The nursing workforce as the majority of care delivery in the system has the most risk at stake.

The bill expands the definition of 'abuse' to include:

Any medical treatment that purposely, knowingly, recklessly, or **negligently** places the life, health, or welfare of a vulnerable adult in jeopardy or is likely to result in impairment of health to the vulnerable adult.¹

And expands the definition of 'neglect' to include:

Purposeful, knowing, reckless, or **negligent** failure or omission by a caregiver that has resulted in, or could be expected to result in physical or psychological harm...²

The addition of the word "negligent" could dramatically change the wellbeing of nurses, and other care providers. To understand the impact of the word negligent, it must be reviewed through a professional lens. As a nurse, what does it mean to be professionally negligent?

II. Negligence Defined

Negligence is defined as:

A failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. The behavior usually consists of **actions**, but can also consist of **omissions** when there is some duty to act.³

In Vermont professional negligence is defined through case law. To establish professional negligence or malpractice, it must be proven that the health care provider deviated from the standard of care and that this deviation resulted in

¹ House Journal, (March 21, 2023). 33 V.S.A. 69, 1. Available at [House Journal 3.21.23](#)

² Id.

³ [Negligence | Wex | US Law | LII / Legal Information Institute \(cornell.edu\)](#)

injuries that would have not otherwise occurred.⁴ The determination of this is reliant on **expert testimony** and what a reasonably prudent health care provider would do in a similar situation.⁵

III. The Impact

The addition of the word negligent and the compounding issue of who investigates and determines negligent acts is concerning for nurses. Reports of abuse and neglect of vulnerable adults are reported to and investigated by Adult Protective Services (APS). The investigators are not required to be clinically trained and are considered similar to a lay person's knowledge for medical conditions and patient care. It has been established that lay person's knowledge and experience to evaluate negligence is not sufficient which is why the courts determine it through expert testimony.⁶ APS staff does not have the context of the health care system in terms of staffing, scope of practice, prioritization, and the needs of other patients that impact nurses decisions in care delivery.

The addition of negligence and the inadequacy of APS' clinical knowledge to fully evaluate medical actions, errors and omissions is where nurses must draw concern. As nurses, we are mandatory reporters and are professionally bound to report instances or suspected instances of abuse and neglect – this includes reporting other health care professionals. If APS, without appropriate expert clinical knowledge, determines that a nurse was negligent, the nurse may be placed on the abuse registry, which would prevent them from working for most health care providers. If a nurse fails to report suspected abuse or neglect, the nurse could face criminal prosecution. An APS investigation may trigger an independent investigation by the Vermont Board of Nursing for which the board may determine any necessary discipline.

The extent of the issue is best demonstrated by examples of nurses' daily work:

Nursing Shift Change

After a 13 hour shift, a nurse hands off their patients to you, the oncoming nurse. They note that one of their patients was behaviorally demanding throughout the day and took the majority of time in the 6 patient assignment. The nurse did not have the support of a licensed nursing assistant because of vacancies and the Charge Nurse was in a full patient assignment due to a call out. The nurse states that they were unable to turn their frail elderly patient as much as they needed, and instead of every two hours they managed to turn her every 4 hours. As the oncoming nurse you enter the room to assess the frail elderly patient and on assessment note that her coccyx and heels have stage 2 wounds which you did not note the previous day. You follow hospital procedure for wound care, document the findings, put in a wound consult, complete an adverse event report for the organizations quality to review as part of establishing Just Culture, and then with the addition of negligence, you are required to report your peer to APS and if you don't, you could be subject to prosecution.

Nurse Visit at Home with a Patient and Caregiver

You are a nurse performing home care visits and see one of your elderly patients who is being cared for by his elderly spouse. Over the past few weeks you have gotten to know them well and helped them start to prioritize care and when the patient seems most agreeable. On your weekly visit, you enter the home and the husband is distraught. For two days he has been unable to get the patient to take their seizure medication and the patient suffered a seizure this morning and has been post-ictal with grogginess since the morning. You perform a neuro exam and note the patient has anasacoria that had not been there previously and is having trouble staying awake. You call 911 and the patient is taken to the hospital for management. You document the incident and provide handoff to the EMS team and make yourself available to the hospital staff for any questions of medical care. Then with the addition of negligence, you are required to report the spouse to APS and if you don't, you could be subject to prosecution.

⁴ *Jones v. Block*, 171 Vt. 569, 762 A.2d 846 (Vt. 2000)

Wilkins v. Lamoille Cty. Mental Health Ser., 179 Vt. 107, 2005 Vt. 121, 889 A.2d 245 (Vt. 2005)

⁵ *Id.*

⁶ *Wilkins v. Lamoille Cty. Mental Health Ser.*, 179 Vt. 107, 2005 Vt. 121, 889 A.2d 245 (Vt. 2005)

Nurse in the Community

As nurses we have professional duties that extend beyond where we clock in and clock out. As a nurse in your community, you are volunteering at a local residence home to plant spring gardens. You overhear two visitors of whom you know from the community, talking about their elderly mother that lives at the residence home and how her behavior has been erratic lately. They are discussing how to deal with her outbursts and one of the visitors you overhear is really agitated and seems aggressive. While they haven't directly stated physical abuse, the demeanor of the parent makes you suspect something may not be right. You report the concern to the facility supervisor, and then with the addition of negligence, you are required to report the visitor to APS and if you don't, you could be subject to prosecution.

These only serve as a few examples of the potential omissions and errors that are present in the health care system's every day work. As nurses in our work settings, we are highly regulated and strive for high reliability in patient safety. Decades of research and guidance from esteemed professional organizations recognize that creating a Just Culture is essential to improving patient care. This involves leveling the hierarchy, speaking up without fear of retaliation or recourse, and thoughtful examination by health care experts for the root cause of the error through a systems lens. For health care workers, the addition of negligence in H.171's definition of 'abuse' is the antithesis of Just Culture and will only add bureaucracy, fear, and distrust amongst a decimated and burned out workforce.

For more information about ANA-Vermont at <https://anavermont.nursingnetwork.com/>