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Policy matters

Maternity Care and Liability: Pressing Problems, Substantive Solutions

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A B S T R A C T

Background: This paper summarizes a new report presenting the best available research about the impact of the liability environment on maternity care, and policy options for improving this environment. Improved understanding of these matters can help to transcend polarized discourse and guide policy intervention.
Methods: We used a best available evidence approach and drew on more recent empirical legal studies and health services research about maternity care and liability when available, and considered other studies when unavailable.
Findings: The best available research does not support a series of widely held beliefs about maternity care and liability, including the economic impact of liability insurance premiums on maternity care clinicians, the existence of extensive defensive maternity care practice, and the impact of limiting the size of awards for non-economic damages in a malpractice lawsuit. In the practice of an average maternity caregiver, negligent injury of mothers and newborns seems to occur more frequently than any claim and far more frequently than a payout or trial. Many important gaps in knowledge relating to maternity care and liability remain. Some improvement strategies are likely to be more effective than others.
Conclusions: Empirical research does not support many widely held beliefs about maternity care and liability. The liability system does not currently serve well childbearing women and newborns, maternity care clinicians, or those who pay for maternity care. A number of promising strategies might lead to a higher functioning liability system, whereas others are unlikely to contribute to needed improvements.

Introduction and Background

This paper provides highlights from a new report assessing both the impact of the professional liability environment on maternity care in the United States and strategies for improving this environment (Sakala, Yang, & Corry, 2013c). Traditional aims of the liability system are to deter harm and compensate those who sustain negligent injury. A major segment of the health care system, maternity care impacts the entire population at the beginning of life and 85% of women who give birth once or, more typically, multiple times (Martinez, Daniels, & Chandra, 2012). Combined care of childbearing women and newborns is the most costly hospital condition for all payers, private payers, and Medicaid (Agency for Healthcare Research and Quality, 2012), and these payments include the costs of liability. Major liability concerns include the tragedy of a perinatal death or newborn with lifelong impairment, and of harm in a relatively young and healthy childbearing woman.

Professional liability issues are persistent sources of concern among policy makers and discontent among maternity care providers. These providers' elevated level of liability reflects the longer, often 12-year period for filing a claim after an event that may have harmed a newborn versus the typical 2-year "statute of limitations" period for other patients (Shea, Scanlan, Nilsson, Wilson, & Mehlman, 2008), the high cost of compensation for lifelong care needs or loss of life at the beginning of life, and the fact that obstetrician-gynecologists are at elevated risk as practitioners within a surgical specialty. It is crucial to ensure that the liability system fosters access to and the quality of all vital maternity services, including those of general obstetrician-gynecologists, maternal-fetal medicine subspecialists, family physicians, midwives, and care in hospitals and freestanding birth centers.

A broad investigation of maternity care liability issues has not been carried out since the Institute of Medicine issued a report in 1989 (1989a, 1989b), when limited sound quantitative data with few maternity-specific investigations were available to inform

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liability matters (Zuckerman, Koller, & Bovbjerg, 1986) and the health care system differed in many respects from present conditions.

Methods

We used a best available evidence approach to examine both the impact of the liability system on maternity care and the effectiveness of strategies to foster a high-functioning liability system. Finding no systematic reviews or experimental studies, we preferred studies that took into account potential competing predictor variables and confounding factors within empirical legal studies and health services research traditions. We preferred studies specifically about maternity care and liability, and considered more general studies when maternity-specific research was unavailable. We preferred results from the current or previous liability cycle but, when unavailable, consulted earlier studies. We preferred national or multistate studies to state-level studies. We excluded studies from other countries. We searched PubMed and LexisNexis, with widely varying search terms owing to the diverse topics. The search results themselves, health care news sources, journal table of contents notification services, and referees also pointed to relevant studies.

The new report provides an update of maternity care and liability in the context of the evolving health care, legal, and liability insurance systems (Mello & Zeiler, 2008; Struve 2004). Medical malpractice policy making frequently has not been guided by best evidence; such focus can help the various stakeholders to move beyond polarized discourse, competing beliefs, and gridlocked decision making to better understand the issues and identify and move toward substantive solutions (Mello & Zeiler, 2008).

Results

Impact of the Liability Environment on Maternity Care

Background: Underwriting for maternity providers professional liability insurance

As the traditional medical liability insurance business has contracted, and physician, hospital, and health system affiliates have increasingly offered liability insurance policies, obstetrician-gynecologists seem to have ready and relatively stable access to liability insurance coverage (Berenson, Kuo, & May, 2003; Mello, 2006b). However, liability insurance cycles, characterized by ebbing and flowing of premium levels, have been volatile and are impacted by litigation costs, broader economic conditions, and insurer industry business decisions (Mello, 2006b; Studdert, Mello, & Brennan, 2004). Obstetrician-gynecologists and other health professionals in specialties that are at higher risk for experiencing liability claims can perceive high and fluctuating premiums and rate increases during hard segments of the cycles as capricious and distressing. Although the extent of interference with clinical decision making is unknown, some policies impose surcharges for or do not cover evidence-based care, such as vaginal birth after cesarean section, obstetrician collaborative practice with midwives, and family physician provision of maternity care (Benedetti et al., 2006; Hale, 2006).

Liability insurance for maternity caregivers

The cost of professional liability insurance premiums to obstetrician-gynecologists varies widely across geographic areas and time (Medical Liability Monitor, 2011). Although obstetrician-gynecologist liability insurance premium levels tend to be higher than those of most other specialists, their premiums amount to a relatively small portion of overall practice expenses. National data from the American Medical Association, for example, revealed that malpractice premiums of self-employed obstetrician-gynecologists were 13% of total practice expenses in 2000. Further, other practice expenses have grown sharply over time, in contrast with premium expenses: Adjusted for inflation, from 1986 to 2000 average obstetrician-gynecologist premiums declined by 15% as practice expenses rose by 32% (Rodwin, Chang, & Clausen, 2006). Although national data were not available after 2000, analysis of Massachusetts data yielded similar results thereafter (Rodwin, Chang, Ozaeta, & Omar, 2008). Within the high level of compensation for physicians generally, the average income of obstetrician-gynecologists exceeds that of most other specialties and seems to have outpaced inflation up to the onset of the global economic downturn (Robeznieks, 2011).

Discussions of liability premium levels frequently do not consider adjustment for inflation, premium declines in soft phases of liability cycles, premium discounts, or use of unreliable data sources (Mello, 2006b; Rodwin et al., 2008). Surveys of maternity care professionals frequently identify the affordability of liability premiums as a salient concern, yet fail to examine the size and growth of other practice expenses, impact of tightened reimbursement, and other potential sources of economic pressure. These discussions also do not recognize that the Resource-Based Relative Value Scale, which sets a national standard for physician payment, includes a component for liability insurance that is adjusted in consideration of specialty and geographic area for every fee schedule service code (Grimaldi, 1991). The best current evidence suggests that liability insurance premiums do not threaten the economic viability of obstetrician-gynecologists.

With trends of health professionals consolidating into larger clinical groups and being employed within health systems, and strong incentives for younger physicians to embrace this model (Kocher & Sahni, 2011; O'Malley, Bond, & Berenson, 2011), clinicians increasingly receive liability insurance premium coverage as a benefit of employment. However, the extent to which maternity care professionals no longer have individual responsibility for paying liability premiums is unknown. Research is needed to understand the implications of this trend for liability matters, including traditional provider concern about liability insurance premium levels, improved potential for implementing effective risk reduction programs, and the extent to which previous studies apply to this evolving environment.

Finally, as practice expenses have grown and reimbursement has tightened, physicians generally (Ginsburg & Grossman, 2005), and obstetrician-gynecologists specifically (Mehlman, 1994; Pauly, 2006), seem to have successfully increased revenue through a procedure-intensive practice style with, for example, high rates of labor induction and cesarean section, with concerns about implications for quality, outcomes, and cost (Gregory, Jackson, Korst, & Fridman, 2012; James & Savitz, 2011). The growth of ancillary outpatient services may also be a factor in income trends (Ginsburg & Grossman, 2005).

Claims and lawsuits relating to maternity care

Obstetrics and gynecology is an outlier among medical specialties with respect to rates of ever being sued, of being sued two or more times, and of claims per 100 physicians (Kane, 2010). It is also an outlier among specialties with respect to the large number of closed (resolved) legal claims, the high rate of payouts (either settlements before a trial award or trial awards)