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Policy matters

Maternity Care and Liability: Least Promising Policy Strategies for Improvement

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A B S T R A C T

Background: The present liability system is not serving well childbearing women and newborns, maternity care clinicians, or those who pay for maternity care. Examination of evidence about the impact of this system on maternity care led us to identify seven aims for a high-functioning liability system in this clinical context. Herein, we identify policy strategies that are unlikely to meet the proposed criteria and contribute to needed improvements. A companion paper considers more promising strategies.
Methods: We considered whether 25 strategies that have been used or proposed for improvement have met or could meet the seven aims. 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: Fifteen strategies seem to have little potential to improve liability matters in maternity care. Despite support for capping non-economic damages, a series of studies has found a modest impact at best on maternity care. Maternity-specific studies also do not lend support to tort reforms collectively and several other specific tort reforms. Some tort alternative and liability insurance reform strategies have narrow aims and are not policy priorities.
Conclusions: Caps on non-economic damages and other tort reforms have narrow aims and have been marginally effective at best in the context of maternity care. Several other possible reforms similarly are not promising. Continued focus on these strategies is unlikely to result in the high-performing liability system that maternity care stakeholders need.

Introduction and Background

A new report, *Maternity Care and Liability: Pressing Problems, Substantive Solutions* (Sakala, Yang, & Corry, 2013b), and an overview of report highlights in this issue clarify that the current liability system does not serve well childbearing women, maternity care providers, or those who pay for the cost of maternity care, which includes liability-related expenses. Policy interventions are needed to better achieve a high-functioning liability system. Effective strategies must address a broad set of persistent challenges and

- Promote safe, high-quality maternity care consistent with best evidence, and minimize avoidable harm;
- Minimize maternity professionals' liability-associated fear and disaffection;
- Avoid incentives for defensive maternity practice;
- Foster access to high-value liability insurance policies for all maternity caregivers without restrictions or surcharges for care supported by best evidence;
- Respond appropriately when women and newborns sustain injury, and provide rapid, fair, efficient compensation;
- Assist families with responsibility for costly ongoing care of infants and women with long-term disabilities in a timely manner and with limited legal expense; and
- Minimize legal and administrative costs (Sakala et al., 2013b).

Four major classes of reforms might be used to improve liability matters: Tort, tort alternative, liability insurance, and health care system reforms. Each encompasses diverse possible strategies.

Tort Reform

The legal framework and rules governing harm resulting from medical malpractice have traditionally been matters for state

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courts. For five decades, tort reform statutes have supplemented this tradition in nearly all states (Studdert, Mello, & Brennan, 2004). Primary aims of the measures have been to stabilize the size of liability insurance premiums and the frequency and cost of claims, and to deter behavior that is believed to accompany malpractice pressure (Mello & Zeiler, 2008). Conventional tort reforms generally address the size of awards, modify liability rules, or limit access to courts (Studdert, Mello, & Brennan, 2004).

The evidence base for evaluating the effects of most traditional tort reforms across medicine generally is large and mature. Apart from caps on non-economic damages, better quality studies across clinical areas have found relatively little evidence that tort reforms have the desired impact on liability-related concerns (Mello & Kachalia, 2010). Numerous tort reforms have also been evaluated in the maternity context. This paper discusses eight specific tort reforms and the effect of multiple tort reforms.

Tort Alternative Reform

Although the national debate about problems with the liability system has largely focused on merits of conventional tort reform, some scholars and policymakers consider "tort alternative" reforms directed at making the liability system more efficient and responsive to injured patients. These strategies use alternative mechanisms to resolve disputes, dispense with negligence as the basis for compensation, and relocate legal responsibility for injury at the institutional level (Studdert, Mello, & Brennan, 2004). None of these reforms has been widely adopted by states.

Liability Insurance Market Reform and Regulation

Reform of liability insurance has attracted less attention than tort and tort alternative reforms (Sage, 2004). Liability crises that trouble health professionals are first and foremost insurance crises with spikes in liability insurance cost and/or reductions in the availability of coverage. It is important to dampen the volatile cycle of premiums that rise and fall regardless of risk and to ensure that insurance fosters high-quality care (Baker, 2005; Sage, 2004). This cycle is amenable to policy intervention, including better information, altered incentives, and appropriate behavior constraints (Sage, 2005). Liability insurance reforms focus on direct insurance industry regulations, government acting as insurers, and government-sponsored pooling arrangements. We found no controlled studies that have investigated the effectiveness of liability insurance reform in general or in the maternity field.

Health Care Reforms

Finally, there is growing awareness that reform of the delivery and organization of health care can impact liability outcomes and a valuable track record in maternity care.

Methods

We used a best available evidence approach to help clarify the potential for specific strategies to meet the seven proposed aims of 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 due to the diverse topics. The search results, health care news sources, journal table of contents notification services, and referees also pointed to relevant studies. In the absence of better quality empirical sources, we consulted theoretical analyses and commentaries and made judgments, indicated as such, about plausibility of addressing priority aims.

We deemed strategies that have been shown to have little or no impact or may plausibly be expected to have limited impact, in consideration of the breadth of liability system aims, to be of low policy priority for further implementation and evaluation.

Results

We evaluated 25 different strategies that might lead to a higher functioning liability system in maternity care, across the four major categories. Nine tort reform, one alternative tort reform, and five liability insurance reform strategies did not meet our criteria for policy priorities and are covered here. Strategies that did meet our criteria, including all of the health care reform strategies, are covered in the companion article in this issue (Sakala, Yang, & Corry, 2013a). Table 1 summarizes the current understanding of the degree to which more limited strategies do or could help to achieve the seven aims described.

Tort Reform

Tort Reforms Collectively

Two multivariable studies measured the additive effect of multiple tort reforms on the supply of obstetrician-gynecologists, out of concern that liability pressure adversely reduces supply:

- Yang, Studdert, Subramanian, and Mello (2008) evaluated the association between a series of tort reforms and two measures of obstetrician-gynecologist supply (number of obstetrician-gynecologists per 10,000 births and number of obstetrician-gynecologists per 100,000 women of childbearing age) across all states and Washington, DC, from 1991 to 2003. They examined 10 reforms: Attorney fee limits, collateral source rule, damages caps (four types), periodic payment, expert witness rule, joint and several liability modification, and pretrial screening. They found no relationship between the collective effect of tort reforms and obstetrician-gynecologist supply.
- Kessler, Sage, and Becker (2005) examined the impact of tort reforms on the growth of physicians at the state level from 1985 to 2001. They found that obstetrician-gynecologist supply increased by 2% in states that had adopted reforms that might directly reduce malpractice awards relative to states with no reforms. Indirect reforms were associated with a 0.5% decrease in supply. The supply was increased by 2% in states with both direct and indirect reforms. Comparable increases were much higher when this specialty's results were combined with those of four other specialties: