

6. Impact of Caps on Non-Economic Damages and Other Tort Reforms in Maternity Care

Fact Sheet for Stakeholders from *Maternity Care and Liability Report* *

Problem: To modify the way state court systems function when handling claims of medical malpractice, tort reforms have generally aimed to limit access of potential plaintiffs to courts, reduce the size of awards to plaintiffs, or otherwise alter liability rules. Caps on non-economic damages — i.e., a fixed ceiling on awards for “pain and suffering” and other injuries that are difficult to monetize — have raised concerns about fairness to women and newborns; about one state in five has found them to be unconstitutional. As this and other tort reforms have been the most advocated and widely implemented of liability reforms, it is important to understand their empirical record and plausible effects in achieving liability system aims.

Report findings: The report considered eight tort reforms and the collective impact of combined tort reforms in maternity care, and held these up to a framework (see fact sheet 1) of seven broad aims of a high-functioning liability system for maternity care. Tort reforms prioritize clinician interests relative to the multi-stakeholder framework that includes interests of women and newborns and of those who pay for their care. In nearly all cases, well conducted national studies have evaluated the impact of these reforms in the context of maternity care. Nine national maternity-specific studies have evaluated the impact of the most-advocated tort reform, caps on non-economic damages. In contrast to evidence in health care generally and in some other clinical areas, the effect in maternity care of both collective tort reforms and of caps on non-economic damages is modest at best for physician supply (combined and caps) and for premium levels, award levels, availability of hospital maternity services, use of interventions, and health outcomes (non-economic caps). Similar to evidence in health care generally, the maternity-specific studies of other tort reforms (attorney fee limits, collateral source rule, expert witness rule, joint and several liability rule, periodic payment of awards, and pretrial screening) provided no compelling support for their use. Despite strong interest in limiting payouts as a strategy for keeping malpractice premiums in check, the relationship between the two appears to be weak at best.

Takeaways: The effect of caps on non-economic damages has been well studied within maternity care, with studies finding modest and narrow impact at best. A smaller number of studies have examined effects of several other traditional tort reforms within maternity care, with generally disappointing results.

It is important to consider other strategies that might be more effective in improving the functioning of the liability system for all of the key stakeholder groups. Fortunately, several possible approaches appear to offer win-win-win opportunities for clinicians, women and newborns, and purchasers (see fact sheet 8). The strategy of implementing rigorous quality improvement programs has an impressive maternity care track record in this regard (see fact sheet 9).

* **Learn more:** Sakala C, Yang YT, Corry MP. *Maternity Care and Liability: Pressing Problems, Substantive Solutions*. New York: Childbirth Connection, January 2013. Available at <http://transform.childbirthconnection.org/reports/liability/>. See also open access “Maternity Care and Liability” articles in *Women’s Health Issues* 2013;23(1) at <http://www.whijournal.com/issues>.

