Improving Quality of Care and Patient Safety Through "Safe Harbor" Tort Reform

Andrew Strunk

Department of Health Systems Administration
School of Nursing and Health Studies
Georgetown University

The passage of the Affordable Care Act (ACA) in March 2010 signified the largest reform effort this nation's healthcare system has ever experienced. While the long-term effects of these changes have yet to be realized, additional steps can be taken to improve the efficiency and equity of the U.S. healthcare system. Among these additional steps is comprehensive reform of the medical liability system.

In addition to the cost cutting-measures outlined in the ACA, system-wide tort reform offers another option for reducing the growth of national health expenditures. Current estimates gauge the total annual cost of the medical liability system to be $55.6 billion in 2008 dollars, representing 2.4 percent of total national health care spending in 2008 (Mello, Chandra, Gawande, & Studdert, 2010). Although it occupies a relatively small percentage of total spending, in absolute dollars, the cost of the medical malpractice system is far from trivial. Thus, meaningful cost savings can be achieved through the enactment of reform that seeks to reduce the use of defensive medicine and limit the occurrence of frivolous lawsuits.

Aside from contributing to cost-cutting efforts, truly effective tort reform should aim to effectuate the primary goal of the malpractice system: improving patient safety by deterring preventable medical errors. After all, in theory, the liability risk faced by physicians should act as an incentive to practice safer medicine, leading to improved quality of care (G. Dalton, Samaropoulos, & A. Dalton, 2008). In reality, however, the current system is performing its intended task poorly. This is evidenced by the large number of Americans who suffer preventable medical injuries each year (Kohn, Corrigan, & Donaldson, 2000). Additionally, the widespread use of defensive medicine by physicians to reduce their liability risk subjects patients to potentially harmful treatments and procedures.

The ACA and Tort Reform

Despite this potential to reduce costs and improve healthcare quality, the ACA fails to create reform that directly addresses the problems with the existing medical liability system. Instead of providing a lasting solution to the maladies of the current system, the law merely authorizes the federal government to award $50 million worth of demonstration grants over 5 years to the states for the "development, implementation, and evaluation of alternatives to current tort litigation" ("PPACA," 2010).

Proposal

One promising approach to medical malpractice reform is the creation of a federal "safe harbor," which would retain the existing adjudication process, but protect physicians from liability if they followed evidence-based medical practices. After the enactment of "safe harbor" legislation, care could not be found negligent if the physician complied with accepted clinical practice guidelines (Mello & Brennan, 2009).

The success of this type of reform in reducing costs and patient harm is demonstrated by the experience of anesthesiologists in the mid-1980s. During this period anesthesiologists faced very high malpractice insurance premiums, even in comparison to those of other high-risk specialties. These steep premiums were the result of the large malpractice awards granted to plaintiffs who prevailed in their lawsuits against

anesthesiologists. In response, the American Society of Anesthesiologists developed practice guidelines to reduce patient harm. The result was a dramatic decrease in both the number of deaths and the price of malpractice insurance premiums (Schoenbaum & Bovbjerg, 2004).

By insulating physicians from liability if they adhere to evidence-based practices, "safe harbor" reform provides them with a legal incentive to follow clinical practice guidelines, such as comparative-effectiveness research (CER). Comparative-effectiveness research seeks to determine the optimal methods of clinical care by evaluating the impact of various alternatives for treating a given medical condition for a specific group of patients (DeMaria, 2009). The "safe harbor" approach to tort reform is particularly appealing given Washington's current interest in CER. $1.1 billion was allocated for CER in the American Recovery and Reinvestment Act of 2009. Providing physicians with immunity if they complied with the findings of credible comparative-effectiveness research will promote the adoption of CER recommendations by providers (Mello & Brennan, 2009).

Increased adherence to proven best practices of clinical care will result in fewer medical injuries, and in turn, generate considerable cost savings in the medical liability system. A system that promotes the uptake of evidence-based practices will limit the use of defensive medicine as a means of reducing liability risk. Furthermore, fewer medical injuries equates to fewer malpractice claims, which will lower physician's insurance premiums. As a result, providers will no longer increase the volume or price of services performed in order to offset high malpractice premiums (Mello et al., 2010).

Overcoming Obstacles

The biggest obstacle facing the enactment of federal "safe harbor" legislation is the principle of federalism. Traditionally, medical malpractice laws have been a matter of state regulation. Attempting to institute a federal structure on the medical liability system complicates this issue (Mello & Brennan, 2009).

One suggested way of bypassing this hurdle is simply to make states' receipt of federal health funds contingent on their willingness to implement "safe harbor" reform on their tort systems. Alternatively, Congress could employ more drastic measures and "declare its intent to completely preempt state regulation of the field" (Mello & Brennan, 2009).

Conclusion

The creation of federal "safe harbors" as a means of improving the medical liability system is a valid next step in healthcare reform, one that builds upon the advances made by the ACA. Legislation that promotes the use of evidence-based practices among physicians helps to achieve the main goal of the malpractice system: improving patient safety and quality of care. In so doing, "safe harbor" reform can create a healthcare system that is more cost-effective as well as more equitable to patients.

References

Dalton G.D., Samaropoulos X.F., & Dalton A.C. (2008). Improvements in the safety of patient care can help end the medical malpractice crisis in the United States. *Health Policy*. *86*, 153-162.

DeMaria A.N. (2009). Comparative effectiveness research. *Journal of the American College of Cardiology*, *53*, 973-975.

Kohn L.T., Corrigan J.M., & Donaldson M.S. (Eds.). (2000). *To err is human: building a safer health system*. Washington, DC: National Academy Press.

Mello M.M., Chandra A., Gawande A.A., & Studdert D.M. (2010). National costs of the medical liability system. *Health Affairs*, *9*, 1569-1577.

Mello M.M. & Brennan T.A. (2009). The role of medical liability reform in federal health care reform. *The New England Journal of Medicine*, *361,*1-3.

Patient Protection and Affordable Care Act of 2010 §10607, 42 U.S.C. §280g-15 (2010).

Schoenbaum S.C. & Bovbjerg RR. (2004). Malpractice reform must include steps to prevent medical injury. *Annals of Internal Medicine, 140,* 51-53.