



No-Fault Fund Model Can Help Preserve Birthing Services

By RYAN O'DOHERTY

Since before American independence, Catholic hospitals have, in some form, been providing birthing services and health care to mothers and babies, especially the poor and underserved. Today, an alarming trend of multi-million-dollar jury awards has created an unsustainable litigation environment in Maryland, as it has in other states across the nation. This growing financial risk now poses a significant threat to these birthing institutions' historic mission of providing maternity care to women.

The issue represents a difficult challenge to the Catholic health care ministry. The unique nature of birth injuries, which can occur even under the best circumstances of medical care and without negligence, simply cries out for a better solution to address these very difficult cases.

Maryland's proposed Injured Baby Fund offers an innovative solution to the emerging problem of medical liability in the field of obstetrics and maternity care traditionally provided by Catholic hospitals.

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MARYLAND MICROCOSM

The State of Maryland is nicknamed "America in Miniature" because of the state's geographic, demographic and economic diversity. It also is home to Baltimore — the nation's first Catholic Archdiocese. The presence of Catholic health care is especially robust, but Maryland has become the center of an emerging threat to Catholic hospitals in a microcosm of a broader national trend in medical liability risk. Economic damages in tort cases that involve catastrophic birth injuries and allege malpractice are driving jury awards to new highs — averaging more than \$20 million per case.

At their simplest, tort cases are civil lawsuits that claim injury and seek monetary awards, called damages, in compensation. The size and nature of these lawsuits have become a direct financial threat to the continuation of obstetrical care by birthing hospitals.

The boards of trustees of Catholic and other mission-driven hospitals ultimately will be forced to consider whether or not providing obstetrics services is financially viable, or simply too much of a risk to endure.

Catholic birthing hospitals in states with statutory caps on punitive and non-economic damages, but no limits on economic damages, are likely to be the most vulnerable to this trend. In these states, the plaintiffs' bar, the lawyers who handle such tort cases, earn contingency-based fees keyed to a portion of a total award. In catastrophic birth injury cases, tort lawyers have found that by estimating how much it will cost to provide a lifetime of care for the injured child — the so-called "life care plan" — they can dramatically increase the value of the total jury award in a successful claim of birth injury. Millions of dollars in a jury award benefits the plaintiff's lawyer, as well as the plaintiff.

In Maryland, as in other states with no limits or caps on economic damages, increasingly steep judgments set legal precedents. Among the examples:

- In June 2012, a Maryland jury awarded a \$55 million judgment in a birth injury case against the Johns Hopkins Hospital in Baltimore. The award was among the largest in state history.

■ Also in June 2012, another Maryland jury awarded \$20.9 million in a birth injury case related to a physician delivering at Washington Adventist Hospital in Silver Spring, Md.

■ In July 2012, yet another jury awarded \$21 million to a couple whose son was born prematurely at MedStar Harbor Hospital in Baltimore.

■ In May 2013, a Maryland jury awarded \$16 million in a birth injury case against Prince George's Hospital Center in Cheverly, Md.

It is important to note that in these cases, the hospitals vigorously defended their actions, arguing that they did not deviate from the standard of care. Many legal observers attribute the determining factor to sympathetic juries, rather than actual medicine, in the outcome. And, while Maryland's statutory cap on non-economic damages reduced the dollar value of these jury awards, total damages awarded in several cases averaged above \$20 million due to significant economic damages related to estimated life care plans.

COSTLY PRECEDENTS

In addition, once jury awards have set a precedent for the value of a potential birth injury claim within a certain jurisdiction, plaintiff attorneys then can demand exponentially more during settlement negotiations with hospitals in all birth injury cases. Such precedent also causes medical liability insurers and hospital reinsurers to raise premiums. The cases can be so lucrative that some personal injury lawyers spend significant sums of money advertising their "birth injury" *bona fides* to potential clients by means of mobile billboards that circle hospitals, placards on public transit and in advertisements on radio and television.

Further, 36 states have special provisions for claims filed by minors, extending the ordinary statute of limitations far beyond the point of being able to predict future claims and their costs with any level of certainty. In

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these states, which include Maryland, it is possible and even commonplace to be sued for an injury that occurred more than a decade earlier.

Beyond the direct financial implications for Catholic hospitals and other obstetrical care providers, the unsustainable risk environment threatens access to care for vulnerable mothers and babies in urban and rural communities where the poor already struggle to obtain prenatal care.

One only need look to Philadelphia where, in just over a decade, more than a dozen birthing hospitals shuttered their obstetrics programs because of financial pressures, especially liability costs and risk. Since then, the city has failed to meet established United Nations maternal health goals, according to a 2011 report.¹ The report documents a massive disparity in maternal mortality between the city of Philadelphia and the rest of Pennsylvania. From 1997 to 2004, the rate in Philadelphia is 23.8 maternal deaths per 100,000 live births, compared to Pennsylvania's average of 9.01 maternal deaths per 100,000 live births. State legislators in Maryland fear that Baltimore could suffer the same fate if the worsening litigation environment is not reformed.²

To confront this challenge and to secure access to obstetrical care in the state, such leading Maryland health

systems as Johns Hopkins Medicine, the University of Maryland Medical System, Mercy Medical Center, the Maryland Hospital Association and several others are working together to advance the concept of a no-fault, injured baby fund in the state.

The Injured Baby Fund is envisioned as a compensation fund paid for by hospitals and doctors that is designed to remove from the tort system the most devastating and costly medical malpractice claims and place them in a lower cost, no-fault administrative compensation system. In exchange for guaranteeing lifetime benefits to the babies, the fund provides an exclusive remedy for claims that meet a legal definition of a birth-related neurological injury. "Exclusive remedy" means the claim is not compensable through the tort process.

NO-FAULT MODEL

The no-fault concept is similar to state-based worker's compensation processes and the National Vaccine Injury Compensation Program, which also provide exclusive remedy. The premise seems entirely appropriate for the specific class of neurological injuries, as studies suggest that many cases of cerebral palsy and related disorders previously thought to be the result of birth-related asphyxia are not the result of malpractice.³ In addition, the unique no-fault nature of the fund suggests that more babies who suffer birth injuries would receive compensation than under the current tort system, because under a no-fault system, the compensation is based on the injury alone, not on the outcome of a lawsuit.

Once accepted into the program, beneficiaries receive lifetime medical, hospital, rehabilitation, therapy, nursing, residential and custodial care — the same services covered by a tort case's life care plan. But rather than guessing what a baby's future medical needs might be, the fund pays expenses as they are incurred. The value of the average award is estimated actuarially



to be worth \$3.5 million in lifetime care benefits per beneficiary. Families also receive an immediate one-time payment, and the child is eligible for lost earnings beginning at age 18 for the rest of his or her life. Finally, the claims are adjudicated in this administrative process over an average period of six months, compared to an average of six years in most birth injury lawsuits.

Under the no-fault program, the family receives all benefits without ever having to go to court to prove negligence. To some, this arrangement may seem too generous, but actually it is far more efficient and costs far

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less than the typical, fault-based birth injury case that runs up large fees for attorneys on both sides, raises insurance premiums and takes years of protracted litigation before judgment.

The Maryland proposal is closely modeled after the best practices of no-fault birth injury fund programs that have been in place since the late 1980s in Florida and Virginia. These novel programs have been closely evaluated by numerous academic studies over the last quarter-century. For example, a 2008 study of the programs published in the *American Journal of Law & Medicine* summarizes the success of those programs by stating that academic evaluations and independent investigations have generally have found:

... The programs have largely achieved their principal objectives — namely, acting as a stabilizing influence on the obstetrics tort environment, improving

efficiency and speed of adjudication of claims, and responding to the needs of injured children and their families. Specifically, the reports found that, relative to the tort system, the programs have shortened the time from claim filing to compensation and lowered overhead costs and attorneys' fees. They have also had high rates of physician participation and have decreased the number of high-cost malpractice claims brought in tort. Finally, they have resulted in lower malpractice insurance premiums for obstetrician-gynecologists, even those who do not participate in the programs.⁴

The Maryland effort has taken the opportunity to learn from the Florida and Virginia programs' strengths and shortcomings. Indeed, two separate task forces led by Maryland's Department of Health and Mental Hygiene and the Maryland Hospital Association closely evaluated those programs and independently determined that the Maryland General Assembly should implement a fund for Maryland in order to safeguard access to obstetrical care in the state.

MARYLAND VOTER SUPPORT

A statewide poll of 799 voters — conducted by OpinionWorks of Annapolis — found that voters support creating a birth injury fund by a 3-to-1 margin, with 64 percent in favor and only 21 percent opposed. In the poll, voters strongly support the concept of families giving up their right to sue in exchange for being guaranteed an award from the fund if they have a child who suffers a permanent birth injury, with 66 percent believing such a trade-off is fair and only 24 percent saying it is unfair. However, the business of successfully suing a hospital for birth injury represents a multimillion-dollar enterprise, and the proposal faces stiff opposition from the state trial lawyers

association and their lobbyists in the Maryland state capital.

Catholic health care institutions that provide obstetrical care in states without statutory limits on economic damages should pay close attention to what happens to the Injured Baby Fund concept in Maryland. If successfully enacted and implemented, the fund could become a model of reform that will protect Catholic hospitals' health care ministry to mothers and babies.

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NOTES

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