

Mercyhurst College Civic Institute



MEDICAL MALPRACTICE REPORT

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Erie County Medical Malpractice Workgroup

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Executive Summary

Medical malpractice has become a controversial topic not only for lawyers and doctors but for the general public. Calls are being made to cap non-economic damages in medical malpractice lawsuits, changes have been proposed in the administration of Pennsylvania's MCARE fund, insurance companies claim they must increase medical malpractice insurance rates because they are liable for large payouts, and reports cite that doctors are not practicing or leaving the state because they cannot afford to pay medical malpractice insurance. Sorting out these competing and divergent claims is a difficult task.

To study this issue, a group of Erie County physicians and lawyers, convened by Judge John A. Bozza, has been meeting since June 2003 to discuss and study available data and to present an objective view of what was learned.

We all agreed that access to quality medical care is a matter of critical importance. We agreed that it was in everyone's best interest to find effective ways to lower physician medical malpractice premiums, while assuring recourse for persons injured as a result of negligence and preserving the integrity of the legal system. Our effort has resulted in the following conclusions and recommendations.

Conclusions:

1. Although it is difficult to determine with certainty the amount of the premium increases over the past several years, it is apparent that there have been significant increases in the total amount physicians in general have had to pay since 1997. It also appears that the percentage of increase varied widely on the basis of location and specialty.
2. In general the amount paid out by the MCARE fund and private insurance carriers has increased since 1996 although there is a lack of data that precludes a more sophisticated analysis.
3. The lowest reported increase by medical malpractice insurers between 1997 and 2002 was 94.1%. The need for this large an increase cannot be fully explained by data showing that MCARE payouts rose 18.5% and the National Practitioner Data Bank (NPBD) records showing payments rose 28.3% during roughly the same time period (1996 and 2002).
4. The overwhelming majority of cases are settled, withdrawn, or dismissed prior to going to trial. Of the extremely small proportion that does go to trial, the large majority is resolved favorably to the defendant(s).
5. In some circumstances involving settlements, confidentiality agreements may make it difficult to obtain information about the nature and amount of settlements.

6. It is absolutely certain that accurate information about jury verdicts has not been available in Pennsylvania and that anecdotal information such as that provided by Jury Verdict Research is inherently unreliable.
7. No information exists from any reliable source concerning amounts awarded by juries for non-economic damages. This reality raises serious questions about the validity of claims regarding the character of jury verdicts.
8. There is no information available that directly indicates how much is actually paid out as a result of jury awards. Large reported verdicts may have little to do with how much, ultimately, is actually paid to resolve the case.
9. Doctors with multiple claims have a disproportionate impact on payouts by insurance carriers, but the data is insufficient to determine its effect on malpractice insurance rates.
10. Several insurance companies that formerly wrote medical malpractice insurance in Pennsylvania no longer sell such coverage. Others are unwilling to write new business, and others have gone out of business. The result is a lack of availability of coverage and a lack of competition among insurers.
11. It appears that the profitability of medical malpractice insurance carriers is prone to significant fluctuation. Because all insurers rely upon investment income to contribute to their profitability, depressed investment markets contribute to decreased profitability for medical malpractice insurers.
12. There is little regulation of the medical malpractice insurance industry in Pennsylvania as compared to other areas of casualty insurance (i.e., homeowners, car insurance, etc.), which have underwriting and rate structures that are highly regulated.
13. While insurance companies must reserve funds for the payment of future claims, the MCARE Fund functions essentially on a “pay-as-you-go” basis. As a result, the Fund has no funds reserved for the payment of future claims, and must raise such funds annually to cover the claims settled in the prior year. The unfounded liabilities of the current MCARE Fund are a major problem that will need to be resolved as a part of any plan to reform the system.
14. The Medical Professional Catastrophic Loss Fund (now called MCARE Fund) has proven to be unsatisfactory in the long run, and the General Assembly has directed that it be phased out if certain contingencies are met.
15. In general there is an extraordinary lack of credible information necessary to make an informed public policy decision.

16. The debate about changes necessary to improve the current system of providing medical malpractice insurance has largely been shaped by inaccurate and inadequate information that has led to unnecessary acrimony and suggested solutions that may have little to do with making actual improvements.

Recommendations:

1. Implementation of a mandatory system of data collection overseen by a broadly representative body based on the Pennsylvania Sentencing Commission model.
2. The creation of an independent, university-based center to collect and analyze data and publish a publicly available annual report.
3. Development of a mandatory and standardized reporting system to include:
 - a. Medical malpractice premiums by geography, specialization and claims experience;
 - b. MCARE surcharges by geography, specialization and claims experience;
 - c. Verdict results by type claim, characteristics of the plaintiff and damages awarded;
 - d. Settlement amounts by type of claim, characteristics of the plaintiff and type of damages sought; and
 - e. Payments actually made in cases that are settled for an amount less than the jury award.
4. Adoption of an insurance regulatory scheme that requires the reporting by medical malpractice insurers of underwriting profit and losses and investment profit and losses on an annual basis for the medical malpractice line of insurance. This plan should also subject the medical malpractice insurers to more significant regulation relating to underwriting practices and rates.
5. The legislature or other appropriate body should investigate the role played by the following possible contributing factors leading to the lack of medical malpractice insurance competition:
 - a. Investment performance;
 - b. Underwriting decisions;
 - c. Operations of the MCARE fund;
 - d. Impact of the MCARE fund on defense costs;
 - e. Impact of the MCARE fund on the ability to settle cases;
 - f. Insurance company losses in the medical malpractice line of business;
 - g. Differences in jury awards in medical malpractice cases when compared to jury awards for other types of insurance.
6. Development of a non-MCARE based system should be pursued.

7. Initiate a local effort to accomplish these recommendations, where applicable, for Erie County and perhaps Northwestern Pennsylvania.
8. Hold a community forum to discuss the issues raised.
9. Study the effect of the changes implemented in 2003.

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Medical Malpractice System in Pennsylvania

Introduction

The cost of medical malpractice insurance to physicians is a controversial topic that has led to much acrimonious public debate. The blame for recent increases in insurance rates has been ascribed to a variety of factors including high jury verdicts, lack of physician accountability, deficiencies in the operation of Pennsylvania's public malpractice claim fund and inadequate regulation of insurance companies that offer medical malpractice insurance.

Changes have also been proposed in the administration of Pennsylvania's MCARE Fund. Insurance companies claim they must increase medical malpractice insurance rates because they are liable for large payouts. There have been reports that doctors, particularly in certain specialties, have quit practicing or are leaving the state because they cannot afford to pay for medical malpractice insurance. Legislation is being considered to amend Pennsylvania's state constitution to permit the General Assembly to cap non-economic damages in medical malpractice lawsuits.

Concerned that the public discussion had become unnecessarily antagonistic and centered on misinformation, Judge John A. Bozza convened a group of Erie County physicians and lawyers to discuss the issue, study the available data and determine whether suggested changes in public policy are supported by accurate information. This report contains a summary of what has been learned as well as suggestions for increasing the likelihood that proposed solutions would meet expectations.

How does the current system operate?

All doctors practicing medicine in Pennsylvania are required by law to buy medical malpractice insurance to cover them if a patient is injured because of negligence. In Pennsylvania, unlike most states, there is a special fund operated by the state that pays part of the larger medical malpractice claims. This is now called the MCARE fund.

What is the role of the MCARE fund?

The MCARE fund shares the risk or liability of making medical malpractice payments to people with the insurance companies who provide medical malpractice insurance to doctors and hospitals. Under Pennsylvania law, doctors are required to have a total of \$1 million in medical malpractice coverage. Doctors must purchase private sector insurance that would pay up to \$500,000 per claim. The next layer of coverage, also in the amount of \$500,000, is provided by the state-run MCARE Fund. All doctors and hospitals in Pennsylvania pay an annual surcharge to the MCARE Fund, and these funds are used to pay claims. For claims with a value higher than \$500,000, the private

insurance company pays the first \$500,000 while the MCARE fund pays up to an additional amount of \$500,000. The total amount of required coverage is \$1 million. From 1976 until 2001, doctors were required to carry \$1.2 million in coverage.

The respective amounts, paid by private insurance and the MCARE fund, have changed over the years. Until 1997, the law required that doctors only had to have \$200,000 of private insurance coverage and MCARE was required to pay a maximum of an additional \$1 million for total of available coverage up to \$1.2 million per claim. Beginning in 1997 the amount of private insurance doctors needed to purchase was raised to \$300,000 and eventually to the current figure of \$500,000. The liability of the MCARE Fund, on the other hand, has been reduced from \$1 million to the current level of \$500,000.

The money for the MCARE fund comes from physicians and hospitals. Each year, the MCARE fund charges all practicing physicians and hospitals, whether they have had a medical malpractice case against them or not, a fee referred to as a “surcharge”, to fund the payment of medical malpractice claims in excess of a doctor’s primary coverage. The amount of the surcharge is determined by the fund and is calculated on the basis of the cost of premiums charged by private insurance providers.

The MCARE fund does not function like an insurance company. It charges doctors and hospitals what it thinks it will need to pay claims during the year. The next year, it charges what it thinks will be paid out that year. This is often referred to as the “pay as you go” approach. Doctors and hospitals aren’t charged enough to have money left over for subsequent years. Unlike an insurance company, the fund does not have money set aside to pay future claims.

What is the role of private insurance companies?

At present doctors buy their first \$500,000 of coverage from private insurance companies. These companies are responsible for paying malpractice claims up to a limit of \$500,000. While not required to do so, physicians and hospitals may purchase more insurance coverage.

The insurance companies get their money from charging premiums. Much in the same way that the amount of car insurance you pay depends on what car you drive, your driving record and where you live, medical malpractice insurance rates depend on a number of factors including the nature of the doctor’s specialty, prior claim history and where in the state he or she practices medicine.

Insurance companies that sell medical malpractice insurance also must pay for the cost of defending the doctor or hospital, including lawyer’s fees, if there is an accusation of negligence. According to the MCARE law, the insurance company has to pay these costs even if the MCARE fund has to pay a portion of the claim. Because of this, insurance companies must charge physicians and hospitals enough to cover any payments they have to make for the cost of defending them. Private insurance

companies are also required to collect the “surcharge” amounts imposed by the MCARE fund and distribute it to the fund.

Have medical malpractice insurance premiums and surcharges been increasing in recent years?

There are many factors that have an impact on a particular physician’s malpractice premium. Doctors, who practice in “high-risk specialties” such as obstetricians, neurosurgeons, etc., are more likely to have medical malpractice claims made (or asserted?) against them when compared to doctors in specialties such as internal medicine and psychiatry. As a result, the premiums and surcharges for physicians in higher-risk specialties are considerably higher. In addition, geographic factors appear to influence the insurance rates charged to Pennsylvania doctors. Because there is a higher incidence of medical malpractice claims in Philadelphia and claims payments appear to be significantly larger than in other parts of the state, insurance premiums for Philadelphia physicians are significantly higher.

Unfortunately, when we attempted to obtain precise information on how much doctors were paying for their medical malpractice insurance, we found that it was not readily available from an independent and authoritative source. Although the state insurance commissioner decides which insurers are permitted to offer medical malpractice insurance in the state, the commissioner doesn’t collect information from insurance carriers on what they actually charge doctors for the coverage they sell. Limited information is available from professional medical organizations, but specific information detailing the amount of premiums charged to physicians in Pennsylvania is not made available.

According to the US Department of Human Services, medical malpractice insurance premiums for physicians practicing in Pennsylvania increased approximately 40% between 2001 and 2002.

Although information on medical malpractice insurance is reportedly available through the Medical Liability Monitor, we have been unable to obtain such information from local insurance companies, the PA Medical Society, the MCARE Fund, the PA Insurance Commissioner’s Office, the American Medical Association, the Pennsylvania Medical Society Liability Insurance Company (PMSLIC) or any other source.

Data available from the Pennsylvania Medical Society indicates surcharges levied by the MCARE fund decreased significantly from 2001 to 2002 and increased somewhat in 2003. In 2003 surcharges for practitioners in Philadelphia and Delaware counties for family practice physicians increased by 11% over 2001 level, while surcharges for obstetrics increased by 4.7%. Surcharges for neurosurgeons actually decreased 16%. The surcharge history in other counties is similar. See Table 1.

Table 1 CAT FUND/MCARE FUND SURCHARGES: 2001-2003

Example Specialty	Philadelphia & Delaware Counties	<u>Erie</u>, Crawford, Warren, Venango, Forrest and most other PA Counties	
2001			
Family Practice	\$7,762	\$3,795	
Obstetrics	\$39,445	\$19,288	
Neurosurgery	\$54,386	\$26,595	
2002			
Family Practice	\$7,436	\$3,636	
Obstetrics	\$35,731	\$17,472	
Neurosurgery	\$41,131	\$20,113	
2003		Crawford, Warren, Venango, Forrest and most other PA Counties	<u>Erie</u> & most other Urban 3rd Class Counties*
Family Practice	\$8,643	\$4,321	\$5,185
Obstetrics	\$41,302	\$20,651	\$24,781
Neurosurgery	\$45,587	\$22,794	\$27,352

*New territory effective 2003
(Pennsylvania Medical Society, 2001 & 2003)

Other data collected by the Pennsylvania Medical Society suggests that private sector insurance premiums increased significantly over the period 1997-2003. Table 2 includes premium information about those carriers who continued to provide coverage in 2003. (Note that there has been a drastic reduction in the number of private insurers offering coverage during this time and an increase in risk retention groups providing coverage that are not included in the data presented.)

Table 2

Company	Percentage Increase between 1997 and 2002	Percentage Increase between 1997 and 2003
PMSLIC	153%	289.6%
Med-Pro	99.7%	223.5%
JUA	94.1%	167.3%

(Pennsylvania Medical Society, 2001 & 2003)

The surcharges paid by doctors to the MCARE Fund vary by year, and are based upon a percentage of the cost of the doctor's primary coverage obtained from a private insurance company. Since 1997, surcharges have been based on the Joint Underwriters Association charges by specialty. The MCARE surcharges are shown in Table 3.

Table 3

Year	CAT/MCARE Surcharge	Change in Surcharge Payment*
1997	75%	
1998	64%	-0.2%
1999	59%	1.4%
2000	61%	3.4%
2001	61%	25.7%

* Actual increase can vary by specialty due to JUA relativity changes.
(Pennsylvania Medical Society, 2001)

Although information is not available specifically for Erie County or another county in Northwest Pennsylvania, comparing Philadelphia County to Lancaster County (the high and low of those counties for which information is available) show wide differences between counties as well as wide differences between specialties and insurance companies as shown in Table 4.

Table 4

County & Specialty	Medical Malpractice Primary Premiums				Total Professional Liability Costs (includes MCARE surcharge)		
	Average	Range High	Range Low	JUA	Average	Range High	Range Low
2001							
Philadelphia County							
Family Practice	\$10,416	\$12,538	\$8,163	\$12,724	\$18,178	\$20,400	\$15,942
Obstetrics	\$46,698	\$55,138	\$38,919	\$64,664	\$86,143	\$94,583	\$78,364
Neurosurgery	\$67,544	\$120,960	\$47,853	\$89,158	\$121,931	\$175,346	\$102,239
Lancaster County							
Family Practice	\$4,798	\$6,178	\$3,926	\$6,222	\$8,594	\$9,973	\$7,721
Obstetrics	\$21,584	\$27,569	\$16,480	\$31,620	\$40,873	\$46,857	\$35,766
Neurosurgery	\$31,474	\$60,480	\$22,969	\$43,598	\$58,069	\$87,075	\$49,564
2003							
Philadelphia County							
Family Practice	\$15,087				\$23,730		
Obstetrics	\$86,603				\$127,905		
Neurosurgery	\$107,230				\$152,817		
Lancaster County							
Family Practice	\$7,980				\$12,301		
Obstetrics	\$45,127				\$65,778		
Neurosurgery	\$55,510				\$76,304		

(Pennsylvania Medical Society, 2001 & 2003)

Although it is difficult to determine with certainty the amount of the premium increases over the past several years, it is apparent that there have been significant increases in the total amount physicians in general have had to pay since 1997. It also appears that the percentage of increase varied widely on the basis of location and specialty.

Have medical malpractice claims and payouts been increasing?

According to the MCARE fund's annual report, the average payment has risen less than 10% since 1996. However the number of people who received payments rose 8% over the same period. On the other hand, information from the National Practitioner Data Base (NPDB), an entity to which insurance companies must report malpractice payments, shows a 7% decline in the number of people who got payments and a 37% increase in the average payment. In terms of total amounts paid, it would appear there

has been an increase of 18.5% in MCARE payments between 1996 and 2002 and an increase of 28.3% during the same period reported to the NPDB. During this time, it should be noted that the mandatory primary coverage doctors must purchase also rose from \$200,000 to \$500,000, while the MCARE Fund liability diminished from \$1 million to \$500,000 and the total coverage (primary plus CAT or MCARE Fund) dropped from \$1.2 million to \$1 million. See Tables 5 & 6.

Table 5

MCARE Payments for Individual Doctors			
Year	Payments for Individual Doctors	Total Fund Payments for Individual Doctors	Average Payment
1996	461	\$204,541,088	\$443,690
1997	486	\$204,603,286	\$420,994
1998	487	\$204,901,310	\$420,742
1999	567	\$231,940,685	\$409,066
2000	550	\$256,436,538	\$466,248
2001	528	\$237,838,807	\$450,452
2002	498	\$242,548,227	\$487,045

(MCARE 2002 Annual Report)

Table 6

NPDB Payments for Pennsylvania Doctors			
Year	Payments for Individual Doctors	Total Fund Payments for Individual Doctors	Average Payment
1996	1,348	\$291,918,950	\$216,557
1997	1,297	\$300,946,550	\$232,033
1998	1,103	\$263,676,300	\$239,054
1999	1,366	\$316,352,550	\$231,590
2000	1,339	\$337,331,800	\$251,928
2001	1,493	\$401,849,300	\$269,156
2002	1,259	\$374,594,300	\$297,533

(National Practitioner Data Bank, downloaded August 23, 2003)

The difficulty with using the information from the MCARE fund and the NPDB to understand the number and amount of medical malpractice claims payments made in any given year is that neither of these reports was intended to be used for this purpose. Unfortunately, there is at present no independent entity charged with the responsibility of systemically collecting this information in a form that would lend itself to an accurate analysis of insurance payouts. Insurance companies do not provide data to the insurance commissioner or any other non-industry entity on the number and amounts of medical malpractice payments they make. Therefore it is not possible to present an accurate picture of the history of total payouts by the insurance industry.

What is the National Practitioner Data Bank (NPDB)?

Insurance companies are required by federal regulation to report medical malpractice payments to the National Practitioner Data Bank. When we look at the information from NPDB on the payments made on behalf of Pennsylvania doctors, we find that the 97% of payments are made as the result of settlements rather than judgments (usually the result of a verdict). Moreover, the data indicates that no payments were made to plaintiffs over one million dollars. See Table 7.

Table 7

Cause of Payments Made For Pennsylvania Physician Malpractice Cases During Life of the National Practitioner Data Bank (September 1, 1990 through August 23, 2003)			
Categories of Payment Size	Judgment	Settlement	Total
Under \$200,001	361	10,978	11,339
\$200,001-\$500,000	74	2,414	2,488
\$500,001-\$1,000,000	57	1,703	1,760
Over \$1,000,000	0	1	1
TOTALS	492	15,096	15,588

Has there been an increase in the amount awarded by juries in medical malpractice cases, particularly for non-economic damages??

Many in the medical community and in the insurance industry have maintained that the increase in medical malpractice premiums is the result of significantly increased jury awards and in particular awards for non-economic damages. There is no available data to support or refute this conclusion.

The prominent characteristic seen in Table 8 is that the overwhelming majority of medical malpractice cases are settled before they go to trial. Information from the National Practitioner Data Bank shows that, although the number of settlements and total amount paid out in settlement awards are much higher than those of judgments, beginning in 2001, there has been a significant increase in the number and average amount of judgments.

Table 8

NPDB Pennsylvania Doctors Payments by Type of Disposition						
Year	Number of Judgments	Total Judgment Awards	Average Judgment Award	Number of Settlements	Total Settlement Awards	Average Settlement Award
1996	26	\$4,972,500	\$191,250	1,322	\$286,946,450	\$217,055
1997	40	\$6,052,250	\$151,306	1,257	\$294,894,300	\$234,602
1998	26	\$5,211,500	\$200,442	1,077	\$258,464,800	\$239,986
1999	30	\$5,378,750	\$179,292	1,336	\$310,973,800	\$232,765

2000	37	\$8,650,750	\$233,804	1,302	\$328,681,050	\$252,443
2001	75	\$28,421,250	\$378,950	1,418	\$373,428,050	\$263,348
2002	65	\$24,357,000	\$374,723	1,194	\$350,237,300	\$293,331

Foremost for those cases that do go to trial, it must be noted that comprehensive historical verdict data has not been available in Pennsylvania. County courts have not been required to keep track of it and most don't. Only limited data has been provided for selective years for Philadelphia and a number of other jurisdictions. In addition it appears that no county has systematically collected information about amounts awarded for non-economic damages. During this past year the Administrative Office of Pennsylvania Courts (AOPC), at the direction of the Pennsylvania Supreme Court, began the process of surveying Common Pleas Courts with regard to medical malpractice verdicts.

For purposes of this inquiry, selective and primarily larger county jurisdictions were requested to provide data on medical malpractice jury awards. Information provided in response to this request has been considered. This information is summarized in Tables 9 & 10.

Table 9

County	Year	Cases/Verdicts	Defense Verdicts	Plaintiff Verdicts
Bucks*	2001	30	19	3
	2002	9	7	0
Crawford	2000-2003	5	5	0
Delaware	2001	21	16	5
	2002	14	14	0
Erie	1998-2003	34	26	8
Lackawanna	1998-2003	38	32	6
Total		151	119	22

*Note discrepancy in reconciling numbers.

Table 10

	Medical Malpractice Awards January 2000 through August 2003			
	Philadelphia County		Allegheny County	
	Jury Verdicts	Non-Jury Verdicts	Jury Verdicts	Non-Jury Verdicts
Amount Awarded				
Defense Verdict (\$0)	241	3	119	2
Less than \$500,000	54	1	14	3
\$500,000 to \$1 million	29	0	8	0
\$1 million to \$5 million	58	2	5	1
\$5 million to \$10 million	16	0	1	0
Over \$10 million	9	0	0	0
Total	407	6	147	6

This data yields the following results:

- Of the cases which went to trial, juries found in favor of doctors almost 70% of the time.
- In Allegheny County less than 20% of plaintiffs were awarded any money at all, and almost 80% of those who were awarded damages received less than \$1 million.
- In the combined counties of Bucks, Erie, Crawford, Delaware and Lackawanna plaintiffs were successful in only 14.5% of the cases that went to trial.
- In Philadelphia, doctors prevailed in 60% of the cases tried before a jury, and 50% of the verdicts for plaintiffs were less than \$1 million).

- There is no information available from any county surveyed indicating amounts awarded for non-economic loss.

There is absolutely no question that accurate information about jury verdicts in Pennsylvania has not been kept and is not available at present. The anecdotal information such as that provided by Jury Verdict Research and other reporting entities and organizations is inherently unreliable. Moreover no information exists from any reliable source concerning amounts awarded by juries for non-economic damages. This reality raises serious questions about the validity of claims regarding the impact of jury verdicts. To the extent that insurance company and MCARE settlement decisions have been based on assumptions about the character of Pennsylvania jury verdicts, those decisions may well have been based on unreliable information.

What happens following a jury award?

A jury award has significance in two respects: 1) It allows a plaintiff to enter a judgment and collect the amount awarded, and 2) it provides information to assist others in evaluating the settlement value of other medical malpractice claims. From a purely economic perspective, a jury verdict is meaningful only to the degree it is collectable. One of the features of Pennsylvania's approach to medical malpractice coverage is the requirement that physicians are required to carry only \$1 million in coverage (formerly \$1.2 million). However given this fact, even where more than \$1 million is awarded against an individual doctor, the claim is often settled for only the available coverage. This is a particularly important item of information to document because it is the actual amount that is paid on a claim that has the most economic significance to all parties concerned and is of vital consideration in both underwriting decisions and settlement evaluation.

If a plaintiff wants to recover more than the \$1 million in insurance coverage available in Pennsylvania, it would be necessary to obtain it by levying on the physicians' separately owned property (property owned jointly with a spouse is usually not subject to attachment). It is important to recognize that institutional defendants such as hospitals are likely to have substantially more insurance coverage and assets more easily reachable.

There is no information available that directly indicates how much is actually paid out as a result of jury awards. Reported verdicts may have little to do with how much is actually paid out.

Is the increase in medical malpractice premiums the result of the claims experience of relatively small group of bad physicians?

Some people have claimed that a "few bad apples" among physicians who have many malpractice claims are to blame for the increase in medical malpractice increases. It is suggested that if the medical profession did a better job of "policing itself", serious

injuries and therefore large verdicts and settlements would be avoided. The available data is inadequate to support this conclusion.

According to data obtained from the then-Director of the former CAT Fund, John H. Reed (personal communication, March 28, 2001), from the inception of the CAT fund through the year 2000, almost 90% of the money spent by the Fund to settle claims was paid on behalf of doctors with three or fewer claims, and nearly 60% was spent on behalf of doctors with only one claim. This information can be seen in Table 11.

Table 11

Number of Paid Claims	1	2	3	4	5	6
Physician Count	4,033	692	231	75	35	18
% of \$ Paid	58.51%	19.84%	9.68%	4.70%	2.65%	1.82%
\$ Paid	\$1,540,886,483	\$522,589,201	\$254,879,190	\$123,696,095	\$69,695,117	\$47,907,074
Number of Paid Claims	7	8	9	10-16	17_	Total 6,933
Physician Count	11	6	2	3	1	5,107
% of \$ Paid	1.24%	0.65%	0.42%	0.27%	0.22%	100%
\$ Paid	\$32,654,634	\$17,220,778	\$11,132,000	7,065,000	\$5,737,500	\$2,633,463,072

Information obtained from the National Practitioner's Data Bank reflects similar findings. Eighty two percent of Pennsylvania physicians for whom payments were made had five or fewer payments and 73% of those payments were for less than \$200,000. Perhaps of significance in the context of the current discussion is the fact that for the entire group of physicians who had multiple claims payments, only one payment in excess of a million dollars is reported. See Table 12.

However it must be pointed out that it is possible that more than one payment was made on a single case from different sources. Moreover, as noted above, the NPDB data was not collected with the type of analysis required by this inquiry in mind.

Table 12

Number of Pennsylvania Physicians Having Multiple Malpractice Cases Reported Against Them				
Categories of Payment Size	Number of Medical Malpractice Payments Made			Totals
	1 to 5	6 to 10	11 or more	
Under \$200,001	9,446	1,326	567	11,339
\$200,001-\$500,000	2,020	337	131	2,488
\$500,001-\$1,000,000	1,413	236	111	1,760
Over \$1,000,000	1	0	0	1
TOTALS	12,880	1,899	809	15,588

It can only be concluded that doctors with multiple claims certainly have an impact on payouts by insurance carriers, but the data is insufficient to determine its significance in affecting malpractice premiums.

Does the law treat medical malpractice claims any differently from other civil actions?

Medical malpractice actions are treated differently than other civil actions in several ways, including the procedures that must be followed to institute a suit, and in the amount and kinds of damages that may ultimately be awarded.

The MCARE Act imposes limitations on claims for punitive damages. Punitive damages may only be awarded in more limited circumstances. The manner in which a punitive damage claim is determined is more restrictive and there is a limit on the amount of punitive or non-economic damages that can be awarded. Additionally, the MCARE upper liability limit, which had been \$1.2 million (including private medical malpractice coverage), was lowered to \$1 million in 2002.

Changes implemented in 2003 include a restriction on the venue or the jurisdiction in which the claim can be filed. Now, medical malpractice claims can only be brought in the county in which the alleged malpractice occurred. Future damage claims are now required to be paid in periodic payments, rather than in a lump sum at the time the verdict is satisfied.

In addition, lawyers representing plaintiffs in medical malpractice actions are now required to certify for each licensed professional against whom a claim is asserted that the lawyer has obtained a written statement from an appropriate licensed professional that there is a reasonable probability that the care skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint fell outside acceptable professional standards (e.g. was negligent) and that such conduct was a cause in bringing about the harm. Pennsylvania Rule of Court Procedure 1042.3, effective January 27, 2003. This rule applies to all civil actions in which professional

liability claims are asserted, including claims against doctors, lawyers, architects, accountants, etc. The failure to do so can result in the dismissal of the suit.

Have medical malpractice insurance carriers and the MCARE fund been losing money?

Since the MCARE fund is a pay as you go system, it really can't lose money. As stated before, the money for MCARE comes from surcharges to doctors and these surcharges depend on where the doctor practices and in what specialty they work.

The inherent problem with the MCARE system is that, unlike an insurance company, it is not required to reserve funds for the payment of future claims. The extent of the Fund's unfunded liability will make it difficult to transition to a system funded entirely by private insurance.

With regard to private insurance companies, there is remarkably little information readily available about their financial performance in the medical malpractice line of insurance. It is hard to determine if some or all of them have lost money in past years over medical malpractice insurance. There is no available data to support or refute that either the MCARE fund or medical malpractice insurance companies are either making or losing money. However, as previously noted, there is no question that payouts have increased somewhat and that premiums have increased dramatically over the last several years.

PHICO, PIE and PIC, three of the largest medical malpractice insurance companies covering large numbers of physicians in Pennsylvania, became insolvent and were liquidated by the Insurance Commissioner. St. Paul, which insured many physicians in Pennsylvania, stopped selling medical malpractice insurance altogether while continuing to sell other lines of insurance. Princeton, which continues to write policies in other states, will no longer write policies for physicians practicing in Pennsylvania.

Because of this dramatic reduction in the number of medical malpractice insurers in Pennsylvania, there is now a lack of availability of coverage and a lack of competition in the medical malpractice market. Those still offering coverage have little reason to reduce rates since other companies are not competing for the clients. Because of this, market forces, which would normally help to keep prices to the lower levels and promote companies to reduce rates to those that would make a reasonable profit yet spur physicians to look for the lowest price amongst companies, does not exist. Physicians are instead faced with few choices and high premiums from any of the few companies who will offer them coverage. Hospitals, including those in Erie County, have increasingly become self-insured, often with large deductibles as many of them feel they cannot afford the high premiums they were quoted. Likewise, smaller organizations such as private practices and partnerships are developing or joining risk-retention groups to cover their medical malpractice insurance needs.

One of the most common methods of evaluating insurance company profitability is the combined ratio. The combined ratio is the amount of money spent in making medical malpractice payments, defense costs and administration by the insurance company. Because they make money on their investments, they usually spend more than they take in premiums. If the amount of money they spent on costs equaled the amount of money received in premiums, the combined ratio would be 100. An amount more than 100 indicates they are spending more than they receive in premiums. Because insurance companies also receive income from their investments in bonds and stocks, a desired combined ratio is about 106 (S. Sersha, Joint Underwriters Association, personal communication, August 21, 2003).

Typically, when the ratio is below 100 or only slightly above it, insurance companies can lower their prices on insurance. When it is higher than desired, they have to raise prices to cover the extra money they are spending.

As suggested by the information depicted in Table 13, it would appear that medical malpractice insurance company performance is prone to significant fluctuation. However, in recent years it appears that these carriers have been required to earn substantial returns on investments to maintain profitability. This was not true as recently as 1997.

Table 13

National Medical Malpractice Premiums and Combined Ratios				
Year	Net Premiums Written* (000)	Annual Change	Combined Ratio	Annual Point Change
1992	\$4,133,567	1.6%	127.9	24.2
1993	\$4,370,812	5.7%	108.1	-19.8
1994	\$4,780,537	9.4%	97.6	-10.5
1995	\$4,800,552	0.4%	99.7	2.1
1996	\$4,875,486	1.6%	106.0	6.3
1997	\$4,892,496	0.3%	107.9	1.9
1998	\$5,145,066	5.2%	115.7	7.8
1999	\$5,104,093	-0.8%	129.5	13.8
2000	\$5,586,584	9.5%	133.5	4.0
2001	\$6,072,468	8.7%	153.3	19.8

Are medical malpractice insurance carriers regulated in Pennsylvania?

There is very little regulation of medical malpractice carriers in Pennsylvania, and absolutely no regulation with regard to the premiums that may be charged. Insurance companies do not have to have their premiums approved and the Insurance Commissioner does not even collect premium data. Insurance companies are able to enter and withdraw from the medical malpractice market in Pennsylvania virtually at will. There is also no requirement that insurance companies report information about payouts either as a result of settlements or judgments.

What have we concluded?

1. Although it is difficult to determine with certainty the amount of the premium increases over the past several years, it is apparent that there have been significant increases in the total amount physicians in general have had to pay since 1997. It also appears that the percentage of increase varied widely on the basis of location and specialty.
2. In general the amount paid out by the MCARE fund and private insurance carriers has increased since 1996 although there is a lack of data that precludes a more sophisticated analysis.
3. The lowest reported increase by medical malpractice insurers between 1997 and 2002 was 94.1%. The need for this large an increase cannot be fully explained by data showing that MCARE payouts rose 18.5% and the National Practitioner Data Bank (NPBD) records showing payments rose 28.3% during roughly the same time period (1996 and 2002).
4. The overwhelming majority of cases are settled, withdrawn, or dismissed prior to going to trial. Of the extremely small proportion that does go to trial, the large majority is resolved favorably to the defendant(s).
5. In some circumstances involving settlements, confidentiality agreements may make it difficult to obtain information about the nature and amount of settlements.
6. It is absolutely certain that accurate information about jury verdicts has not been available in Pennsylvania and that anecdotal information such as that provided by Jury Verdict Research is inherently unreliable.
7. No information exists from any reliable source concerning amounts awarded by juries for non-economic damages. This reality raises serious questions about the validity of claims regarding the character of jury verdicts.
8. There is no information available that directly indicates how much is actually paid out as a result of jury awards. Large reported verdicts may have little to do with how much, ultimately, is actually paid to resolve the case.
9. Doctors with multiple claims have a disproportionate impact on payouts by insurance carriers, but the data is insufficient to determine its effect on malpractice insurance rates.
10. Several insurance companies that formerly wrote medical malpractice insurance in Pennsylvania no longer sell such coverage. Others are unwilling to write new business, and others have gone out of business. The result is a lack of availability of coverage and a lack of competition among insurers.

11. It appears that the profitability of medical malpractice insurance carriers is prone to significant fluctuation. Because all insurers rely upon investment income to contribute to their profitability, depressed investment markets contribute to decreased profitability for medical malpractice insurers.
12. There is little regulation of the medical malpractice insurance industry in Pennsylvania as compared to other areas of casualty insurance (i.e., homeowners, car insurance, etc.), which have underwriting and rate structures that are highly regulated.
13. While insurance companies must reserve funds for the payment of future claims, the MCARE Fund functions essentially on a “pay-as-you-go” basis. As a result, the Fund has no funds reserved for the payment of future claims, and must raise such funds annually to cover the claims settled in the prior year. The unfounded liabilities of the current MCARE Fund are a major problem that will need to be resolved as a part of any plan to reform the system.
14. The Medical Professional Catastrophic Loss Fund (now called MCARE Fund) has proven to be unsatisfactory in the long run, and the General Assembly has directed that it be phased out if certain contingencies are met.
15. In general there is an extraordinary lack of credible information necessary to make an informed public policy decision.
16. The debate about changes necessary to improve the current system of providing medical malpractice insurance has largely been shaped by inaccurate and inadequate information that has led to unnecessary acrimony and suggested solutions that may have little to do with making actual improvements.

What are our recommendations?

1. Implementation of a mandatory system of data collection overseen by a broadly representative body based on the Pennsylvania Sentencing Commission model.
2. The creation of an independent, university-based center to collect and analyze data and publish a publicly available annual report.
3. Development of a mandatory and standardized reporting system to include:
 - a. Medical malpractice premiums by geography, specialization and claims experience;
 - b. MCARE surcharges by geography, specialization and claims experience;
 - c. Verdict results by type claim, characteristics of the plaintiff and damages awarded;

- d. Settlement amounts by type of claim, characteristics of the plaintiff and type of damages sought; and
 - e. Payments actually made in cases that are settled for an amount less than the jury award.
- 4. Adoption of an insurance regulatory scheme that requires the reporting by medical malpractice insurers of underwriting profit and losses and investment profit and losses on an annual basis for the medical malpractice line of insurance. This plan should also subject the medical malpractice insurers to more significant regulation relating to underwriting practices and rates.
- 5. The legislature or other appropriate body should investigate the role played by the following possible contributing factors leading to the lack of medical malpractice insurance competition:
 - a. Investment performance;
 - b. Underwriting decisions;
 - c. Operations of the MCARE fund;
 - d. Impact of the MCARE fund on defense costs;
 - e. Impact of the MCARE fund on the ability to settle cases;
 - f. Insurance company losses in the medical malpractice line of business;
 - g. Differences in jury awards in medical malpractice cases when compared to jury awards for other types of insurance.
- 6. Development of a non-MCARE based system should be pursued.
- 7. Initiate a local effort to accomplish these recommendations, where applicable, for Erie County and perhaps Northwestern Pennsylvania.
- 8. Hold a community forum to discuss the issues raised.
- 9. Study the effect of the changes implemented in 2003.

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