



# MEDICAL LIABILITY IN PENNSYLVANIA: AN UNCERTAIN STATE

CHARLES A. CASTLE, M.D., F.A.C.O.G.

Senior Vice President

Lancaster General Women & Babies Hospital

## ABSTRACT

*The Medical Care Availability and Reduction of Error (Mcare) Act and the Healthcare Provider Retention Act have brought much needed relief to the deteriorating medical liability climate in Pennsylvania. As the future of both laws remains unclear, physicians need to know how their practices may be affected.*

## TEXT

The medical liability situation in Pennsylvania is tenuous. The American Medical Association named Pennsylvania one of twenty-one “crisis” states, states that have a deteriorating medical liability environment that affects patients’ access to health care. In the past, many efforts have been made to address this crisis and provide a solution that would benefit both physicians’ ability to practice medicine and patients’ access to healthcare services. Most recently, in 2002, the Medical Care Availability and Reduction of Error (Mcare) Act, also known as Act 13, was enacted to address the crisis. All physicians practicing full-time in Pennsylvania know about the Mcare Fund, if for nothing else than the annual fee they must pay to practice medicine in the state. Knowing the significance of the Fund and its impact on the future of medicine in Pennsylvania, particularly as the law is currently under scrutiny by the State Legislature, is equally vital to being an active and informed health care provider.

## WHAT IS MCARE?

The Mcare Act, enacted in March 2002, created the Mcare Fund, a state-run liability insurance provider. The law requires all practicing physicians to have at least \$1 million of medical liability insurance, \$500,000 of which must be obtained from a private insurance carrier, the Joint Underwriting Association, or risk retention groups, and the other \$500,000 must be obtained from the State’s Mcare Fund. The State created the Mcare Fund to ensure compensation for persons injured due to medical negligence, control medical malpractice insurance costs and ensure that insurance companies would continue providing coverage to health care providers,

and help make insurance coverage affordable for health care providers in Pennsylvania.

Physicians, nurse midwives, podiatrists, nursing homes, and hospitals must pay an annual surcharge, a percentage of the base premium physicians pay for their private insurance coverage. The surcharge is needed to pay operating expenses and losses or damages awarded to patients in excess of \$500,000. The surcharge amount that each physician needs to pay is based on the provider’s level of risk in the specialty and the region where the physician practices. For example, a neurosurgeon practicing in Philadelphia has to pay more than \$37,000, but a physician in a rural part of Pennsylvania who does not perform surgery has to pay less than \$1000.

In 2003, the legislature passed another law, Act 44, which established the Health Care Provider Retention Program, also known as the Mcare Abatement Program. This program, created by Governor Rendell and funded by a 25 cent per cigarette pack tax, pays for 100% of the physicians’ surcharges for high-risk specialties—obstetrics/gynecology, general surgery, orthopedic surgery, neurosurgery, and emergency medicine—and 50% of the surcharges for all other specialties. To receive the surcharge discount, physicians had to agree to actively practice in Pennsylvania for the following year. The abatement was initially approved for physicians and nurse-midwives only, and in subsequent years, included podiatrists and nursing homes.

The Abatement Program was created to provide some relief while the medical liability reforms were taking effect. One such reform was the mandate that cases be tried in the county in which they took place. For example, a liability suit that originated in Lancaster County could not be tried in Philadelphia, where damages awarded are often more than in other areas of the state. Another significant reform was the decision to have every case reviewed by a medical expert to ensure that cases had a reasonable allegation and to discourage frivolous lawsuits. The Abatement Program was intended only for years 2003 and 2004, but has continued until December 2007; the State Legislature

has had to review the program and extend the abatement every year for another one-year period. According to the State's Office of Mcare, the program has provided almost \$1 billion in surcharge relief to providers.

#### MCARE HISTORY

The predecessor of the Mcare Fund was the Medical Professional Liability Catastrophe Loss Fund, or the "CAT Fund." This fund was created in 1975 in response to a lack of adequate medical malpractice insurance coverage in the 1970s. The Fund was created to encourage private insurance carriers to offer medical malpractice coverage at reasonable rates and provide timely and fair compensation to injured persons. By the late 1990s, several problems became apparent with the CAT Fund. Increasing surcharges, inadequate resources, and lack of claims examiners, among other issues, necessitated that the Fund be either eliminated or revised.

In 2002, at the time Act 13 was enacted, Pennsylvania had been facing a potential shortage of physicians. The high cost of liability insurance, which had increased for some providers as much as 400%, was causing many physicians to retire early, limit or stop performing high-risk procedures to stem costs, or leave the state altogether to practice. Medical liability awards were at an all-time high at \$379 million in 2003, placing Pennsylvania as the state with the second-highest total amount and the highest amount per capita per physician.

The hostile environment for health care providers led the Pennsylvania Medical Society and many county medical societies to call for change—and Act 13 brought some necessary improvements.

Although the Mcare Fund is far from perfect, the benefits of the Mcare Fund and Abatement Program have been made apparent over the years. First, it helped to stabilize the number of physicians in Pennsylvania. However, it did not eliminate physician flight. The percentage of graduating residents who trained in Pennsylvania who choose to stay in Pennsylvania to practice has decreased by more than half in the last 15 years. This phenomenon has led to an aging physician population in the state—less than 10 percent of the practicing physicians in the state are aged 35 or younger and roughly 50 percent are over the age of 50. Many regions in Pennsylvania, including Lancaster County in particular, have a shortage of physicians. According to a recent Medical Staff Planning Report by LGH, Lancaster County has a deficit of

approximately 70 physicians. This number is expected to more than double in the next four years and not only encompasses high-risk specialties such as surgery, orthopedics, and obstetrics/gynecology, but also primary care physicians and specialties such as cardiology, neurology, and infectious disease.

By reducing physicians' premium costs, the Mcare Abatement Program helps hospitals, such as LGH, in its efforts to recruit physicians and to compete with other medical centers in recruiting and retaining physicians. In fact, many physicians have frequently stated that the Mcare Abatement was a primary reason for their choosing to work at LGH. This aspect is critical to diversifying Pennsylvania's aging physician population.

An added benefit of the abatement is that, according to Governor Rendell's Office, the amount of paid claims from the Mcare Fund has decreased dramatically since the law was passed—from \$379 million in 2003 to \$232 million in 2005. However, the average amount of money per physician payout remains at twice that of the national average.

#### A NEW CRISIS

The future of the Mcare Abatement Program may be in jeopardy. The State has identified a \$414 million surplus of money in the Mcare Fund. Traditionally, the surplus of funds is designated to pay for the Mcare outstanding liability claims—called the unfunded liability—that are still being settled in the legal system. There is more than \$2 billion in unfunded liability.

Governor Rendell would like to use part of the surplus to fund his proposed program, Cover All Pennsylvanians (CAP), to provide health care coverage to uninsured and underinsured individuals, approximately 800,000 people. The remaining surplus would be used to fund the Mcare Abatement Program for another 10 years. If money from the surplus is redirected elsewhere, the responsibility for paying the unfunded liability will likely fall to physicians, who will have to pay higher surcharges to cover the deficit. In this case, Pennsylvania may return to the state of crisis before the Mcare Fund was created.

As of this writing, the State Legislature has not enacted a law to continue Mcare Abatement for 2008. The Senate Republicans and the House Democrats cannot agree whether the Mcare Abatement and CAP program should be linked together. The Senate opposes linking the CAP program to the Mcare Fund. Rather, the Senate proposes using

the surplus funds to continue to fund the Mcare Abatement program and patient safety and IT initiatives. That means that physicians will soon be receiving bills for their Mcare surcharges without any abatement. The Governor has asked that collection of surcharges be deferred for those physicians whose surcharges are due between January and March 2008 until March 31, 2008 with hopes that the act would be passed in the first quarter of the legislative session. In addition, the Governor has threatened that he will veto any bill for the Mcare Abatement Program that does not include a provision for CAP.

Although most everyone would agree that providing healthcare insurance for uninsured individuals is an important initiative, recruiting and retaining qualified physicians in Pennsylvania is equally important to providing quality healthcare services. According to a recent

statement, the Pennsylvania Medical Society believes that “finding a way to provide coverage for Pennsylvania’s uninsured and under-insured population is a critical need to fix our ailing health system. It is equally critical that physician retention and recruitment in Pennsylvania be assured.” The medical society believes the issue of providing healthcare to uninsured individuals and improving the medical liability situation are two separate issues. The Society has proposed a plan that would provide funding for CAP as well as continue the abatement program while paying the unfunded liability.

Whatever the future may hold, physicians need to be aware of how this legislation will affect their practice and should voice their concerns to their local legislators to create a positive environment for the future of medicine in Pennsylvania.

Charles A. Castle, M.D., F.A.C.O.G.  
 Senior Vice President  
 Lancaster General  
 Women & Babies Hospital  
 phone - 717-544-0067  
 fax - 717-544-3302  
 cacastle@lancastergeneral.org



*Wild Goatsbeard Seedpod  
 Phyllis E. Wimer, R.N.  
 CT Surgery Database Coordinator  
 Lancaster General Hospital*