

**Bariatric Surgery: A Comprehensive  
Bariatric Program Can Act To Reduce  
Liability Risks and to Promote Patient  
Safety**

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# **Bariatric Surgery: A Comprehensive Bariatric Program Can Act To Reduce Liability Risks and to Promote Patient Safety<sup>1</sup>**

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**Abstract. This Paper provides background on the development of bariatric surgery, its risks and benefits (which until recently have been debated), insurance and economic implications, and both an evaluation of professional liability risk as well as strategies to reduce the same. While the nation is currently experiencing an obesity epidemic, and where the morbidly obese individual's only option to improving health is generally accepted to be bariatric surgery, professional liability insurers have made coverage in some states or regions unaffordable, causing experienced surgeons to retire early and prohibiting many from entering or continuing in the field. The number of surgeries has increased dramatically. There have been complications and professional liability claims, but our premise is that these claims have been misunderstood, in some cases exaggerated, and clearly there has been inadequate execution of true loss control measures done in a serious and mandatory fashion, which could both improve outcomes and reduce the risk to both frequency and severity of professional liability claims.**

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## Table of Contents

	<b>Page</b>
<b>I. Introduction .....</b>	<b>4</b>
<b>II. Obesity &amp; Morbid Obesity - Some Background.....</b>	<b>6</b>
How are they defined?.....	6
What are the health risks of Obesity and Morbid Obesity?.....	6
What are the economic implications?.....	11
<b>III. Treatment Options for Morbid Obesity .....</b>	<b>14</b>
Non-surgical .....	14
Surgical Treatment for the Morbidly Obese.....	15
Adjustable silicone gastric banding (ASGB) .....	16
Vertical banded gastroplasty (VBG).....	17
Biliopancreatic diversion and duodenal switch (BPD, BPD-DS) .....	17
Roux-en-Y gastric bypass (RGB) .....	18
Benefits of surgery .....	19
Benefits of gastric bypass surgery .....	19
Positive Economic Affect of Gastric Bypass Surgery By Decreasing Healthcare Costs .....	23
<b>IV. Professional Liability Insurance Industry Response.....</b>	<b>25</b>
<b>V. Risks.....</b>	<b>28</b>
Risk of Surgical Complications.....	28
Risks to a lawsuit.....	32
Physician liability. ....	33
Hospital liability. ....	35
Statute of limitations.....	36
Litigation.....	37
Claims data. ....	40
Why is bariatrics different?.....	42
You can reduce the risk.....	43
Why verdicts/settlements are less. ....	45
<b>VI. Taking Bariatric Surgery Risk Management to a New Level...Methods for Reducing Risk .....</b>	<b>49</b>
A Comprehensive Bariatric Surgery Program with Risk Management .....	49
Competency of Physician and Training/Credentialing and Privileges.....	55
Facility/Equipment.....	57
Post-operative management .....	59
Risk Assessment Tool to Monitor Risk. ....	61
Taking the Traditional Risk Management Strategies to a New Level.....	62
Patient Involvement and Satisfaction.....	62
Communication.....	63
Culture .....	65
Documentation.....	67
Expectations Management .....	68
Event management.....	69
Professional Liability Insurance Loss Control Programs as an Avenue to Change .....	69
<b>VII. Conclusion.....</b>	<b>71</b>

## I. Introduction

Currently, the nation is experiencing an obesity “crisis” with the number of overweight and obese individuals increasing by 12% and 70%, respectively, over the past decade.<sup>2</sup> The number of obese individuals in the nation currently is estimated to be 61 million Americans.<sup>3</sup> The number of morbidly obese<sup>4</sup> is estimated to be 8 million, which accounts for approximately 5% of the population.<sup>5</sup> The numbers are even higher when morbid obesity is defined as a BMI of 35 kg/m<sup>2</sup>. Obesity is linked to a number of chronic diseases including cardiac related conditions and diabetes. The costs of treating obese patients inures to both employers and the health care industry generally. Employers experience expenses in healthcare insurance and face lost productivity of the obese employee. One study indicates that obesity healthcare costs total \$78.5 billion of the nation’s \$1.5 trillion health care bill, equaling 9.1% of the total national healthcare costs.<sup>6</sup>

Nationwide, in 2003, the number of bariatric surgeries performed was up 64% (to 103,000) from the previous year, according to the American Society for Bariatric Surgery. Since 2000, the volume has increased 50%; since 1993, the volume has increased by 500%.<sup>7</sup> From 1999 to 2003, the number of gastric bypass surgeries, for example in Pennsylvania, increased ten-fold.<sup>8</sup> 2004 numbers are expected to reveal a total higher than 140,000 surgeries.<sup>9</sup> The number of surgeons performing this surgery has doubled.

The media has brought nationwide attention to the complications and risks associated with bariatric surgery, reporting on patients’ stories of bariatric surgery outcomes (often reporting the negative ones), complications, and deaths. For example, the death of a 37-year-old patient at Brigham & Women’s Hospital in Boston on November 5, 2003 (cause of death undetermined at time of the article);<sup>10</sup> development of intestinal obstruction post-procedure by a 27-year-old patient.<sup>11</sup> Headlines such as: “Some Pay the Price in Pain; Others Pay with Their Lives”<sup>12</sup> grab the nation’s attention. While the stories of deaths and complications from bariatric surgeries can be alarming, this has contributed to the professional liability insurers quoting high premiums for bariatric surgeons (as well as hospitals), or even refusal to insure bariatric surgeons, and a trend of health insurers to refuse to provide health insurance benefits for bariatric surgery patients. In 2004, some bariatric surgeons were notified that, regardless of their loss experience, their insurance premiums for professional liability insurance would be doubling, tripling, or quadrupling.<sup>13</sup> Hospitals also face higher insurance premiums for bariatric surgery programs,

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<sup>2</sup> Mokdad A., et al. “The Continuing Epidemics of Obesity and diabetes in the United States.” *JAMA*. 2001; 286 (10); 1995-1200.

<sup>3</sup> Kolata G. “Health and Money Issues Arise Over Who Pays for Weight Loss.” *New York Times*. Sept. 30, 2004 (accessible at <http://www.nytimes.com/2004/09/30/business/30obese.html?ex=1097543759&ei=1&en=c321d46c8dfb8430>).

<sup>4</sup> Morbid obesity is correlated with a Body Mass Index (BMI) of 40 kg/m<sup>2</sup> or being 100 pounds overweight. See “Rationale for the Surgical Treatment of Morbid Obesity.” Last updated 11/29/2001 (accessible at <http://www.asbs.org/html/rationale/rationale.html>).

<sup>5</sup> Barrow C. “Roux-en-Y gastric bypass for morbid obesity - Home Study Program.” *AORN J*. 2002, Oct.

<sup>6</sup> Wolf AM, Colditz GA. “Current Estimates of the Economic Cost of Obesity in the United States.” *Obesity Research*. 1998; 6(2): 97-106; Wolfe A. “What is the Economic Case for Treating Obesity?” *Obesity Research*. 1998; 6 (Suppl.) 2S-7S.

<sup>7</sup> Kazel R. “Insurers Trim Bariatric Surgery Coverage.” *Amednews*. 2004, Apr. 5 (citing American Society for Bariatric Surgery).

<sup>8</sup> PHC4 Research Briefs. “Obesity-Related Surgery in Pennsylvania.” 2004, Aug. Issue 2.

<sup>9</sup> Elliott VS. “Bariatric Surgery Patients Need Care for a Lifetime.” *Am. Med. News*. 2004, June 28.

<sup>10</sup> Brown J. “As Obesity Spreads, Employers and Insurers Question Gastric Bypass Surgery Coverage.” *Managed Care Week*. 2004, Jan. 12.

<sup>11</sup> Salazar M. “Man Sues Gastric Bypass Doctors.” (accessible at [www.abqjournal.com](http://www.abqjournal.com)).

<sup>12</sup> Sommerfeld J. “Some Pay the Price in Pain; Others Pay with Their Lives.” *The Seattle Times*. 2003, Dec. 16.

<sup>13</sup> Alt SJ. “Liability Insurance Premiums on Bariatric Surgery Soar.” *Health Care Strategic Management*. 2004, Jan.

even if the hospitals have not been involved in a bariatric surgery claim.<sup>14</sup> Perhaps before the true data has been released, the professional liability insurers have acted prematurely in denying coverage, increasing premiums, and other non-productive reactions, denying many patients a much needed and beneficial procedure. There are many success stories making the news as well, which is also fueled by the notoriety of many celebrities whom have had the surgery (for example, weatherman Al Roker<sup>15</sup> and singer Carnie Wilson).

The need for bariatric surgical procedures is expected to continue to climb. The trends for bariatric surgery were studied in Wisconsin.<sup>16</sup> The Report indicates that the number of gastric bypass surgeries performed in Wisconsin more than doubled, from 182 surgeries in 2001 to 426 surgeries in 2002. In 2001, the number of obese Wisconsin adults doubled from 11% in 1990 to 22% in 2001. The authors of the study surveyed surgeons who reported that, from the year 2001 to the year 2002, the majority of them increased the number of bariatric surgeries they performed. Eight-three percent of these surgeons also predicted that in 2003 they would continue to increase the number of bariatric surgeries performed, and fifty-three percent predicted that the number of bariatric surgeries they performed would actually double. The demand for the surgery is significant, not only in Wisconsin, but also nationally.

It is essential that the healthcare community understands the liability risks associated with bariatric surgery and that it implement techniques, policies, and procedures to reduce both professional liability risk and patient safety risk in both the hospital and physician practice settings, involving patients in their own care. By doing so, not only will patient outcomes improve, but also it will reduce liability risk and could then also add to the stability of any evolving captive insurance vehicle insuring professional liability risk. Accordingly, the purpose of this Article is to assess the risks of both bariatric surgery complications which can lead to claims and the risk of professional liability claims. While, as with any surgery, there will be complications, by combining strategies to reduce clinical complications through clinical “best practices” and traditional and innovative risk reduction strategies, the healthcare industry can impact, positively, complication rates and professional liability claims. This Article further explores those risks and provides a brief background on bariatric surgery (its development, risks, and benefits) so that the topic can be reviewed in context. Importantly, methods for reducing risk by examining traditional strategies more seriously and embracing some innovative techniques are explored as well. The conclusion is clear. The risk associated with professional liability claims resulting from bariatric procedures lends itself to risk reduction strategies, and can be better controlled.

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<sup>14</sup> Alt SJ. “Liability Insurance Premiums on Bariatric Surgery Soar.” Health Care Strategic Management. 2004, Jan.

<sup>15</sup> See Johnson P. “The Skinny on Roker’s Weight Loss: Gastric Bypass.” USAToday. 2002, Nov. 3.

<sup>16</sup> See Erickson JL, Remington PL, Peppard PE. “Trends in Bariatric Surgery for Morbid Obesity in Wisconsin.” Wisconsin Public Health and Health Policy Institute Working Paper. 2003; 3(2).