Waranch & Brown's 2019

"Top 5 of the Year"

Medical Defense Strategies

Tactics and Thoughts

W&B 20 YRS

WARANCH + BROWN

Representing Health Professionals

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INTRODUCTION

In an environment of rapidly changing legal trends, how can health care providers, hospitals and insurance companies – especially those facing medical malpractice, general liability or professional administrative defense issues in Maryland – learn about strategic alternatives?

That is what this collection of "Think Pieces" from 2019 is all about. The Theme: timely information that helps you win. With topics ranging from Maryland's increase in the non-economic damages cap in medical malpractice cases to a strategic effort by Plaintiffs to impose liability against the hospital, a.k.a. the "deep pocket," you will learn new ideas for reducing damages, avoiding traps, conserving resources and staying ahead of the opponent.

Even if you do not specifically relate to a topic, we hope you will gain from the discussion. In fact, after years of helping professionals adopt strategies and tactics that protect their institutions and practices, we believe one can never be too innovative in challenging plaintiffs' claims.

Happy Holidays!

Think Piece #1

Are You at Risk Now That Maryland's Non-Economic Damage Cap Exceeds $1M?

Important news for anyone whose practice is privately insured: Recent increases in the non-economic damages cap in medical malpractice cases could put you at risk of not having enough insurance.

As we all know, the non-economic damages in Maryland medical malpractice cases are "capped" by tort reform laws. According to the statute, the limit on non-economic damages increases by $15,000 at the beginning of each year. This year, 2019, the cap for non-economic damages for medical injury increased to $815,000, and the cap for wrongful death in medical malpractice claims became **$1,018,750** (for two or more beneficiaries). **This marks the first time since the law was enacted in 1986 that the claimant can recover more than $1 Million in non-economic damages.** This is of concern, particularly for private insureds who often have only $1M in medical malpractice insurance coverage.

While the Maryland legislature is considering changes to the cap, a prudent physician or insurer may wish to revisit and raise the limits available for medical malpractice insurance

coverage. In our view, barring some legislative relief, these rates will only continue to increase.

Bottom Line: This "cap" increase can result in personal exposure to health care providers, especially private insureds who often have only $1M in coverage facing wrongful death claims. To limit their exposure, we suggest raising limits available for medical malpractice coverage.

If you have any questions about this or any other issue concerning the non-economic "cap," please feel free to contact us.

Think Piece #2

Birth Injury Cases—the BIG Dollar Exposure!

Partners Neal Brown and Nicole Deford discuss an increasing threat to hospitals, physicians and insureds: high-dollar exposure in birth injury cases.

Click HERE to view the video »

It comes down to experience, preparation and approach. Neal and Nicole show that, to be effective, your legal team must:

- Know the medicine
- Have a stable of qualified experts who can assess both Mom and Baby
- Be aggressive and efficient

- Be creative and proactive
- Know how to challenge the exaggerated life care plans and liability experts
- Advocate for regular strategy sessions (think Skype!) with your client to discuss strategy and keep current with case activity

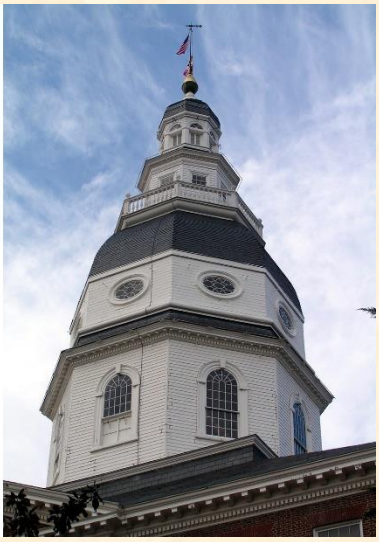
Bottom Line: It is our job to try to win your case. Whether that means win at trial or win at settlement, we want you to come out on top.

We're here to help. If this approach sounds like it can help ease the pain of your birth injury case, give us a call at (410) 821-3500 or contact us online.

Think Piece #3

Maryland's New 25% Rule

The good news for health care providers involved in personal injury matters is that plaintiffs have failed to repeal an important rule that protects you.



Maryland's former "20% Rule" precluded health care providers from attesting to violations of the standard of care in medical malpractice cases where they spent more than 20% of their professional time testifying in personal injury matters. In turn, Defendants used this rule to challenge over-utilized "experts" who spent a considerable amount of time doing medical-legal work.

Unhappy with the 20% Rule, the Plaintiffs' Bar recently fought to repeal it last year in the Maryland Legislature. They failed. To avoid a repeat fight, the Plaintiffs' and Defense Bar worked together to develop a compromise bill. As a result, the 20% Rule (now the 25% Rule) remains in effect, but with some important modifications:

- 20% goes to **25%**;

- An expert is judged as to "professional activities" (associated with, or arising out, of medical care) within 12 months prior to the date the claim was initially filed;
- If an expert meets the Rule at the time of filing, he or she will not be subject to collateral attack if the expert's practice changes during the pendency of the action; and
- If an individual is found to have violated this Rule, and the matter is dismissed after the statute of limitations has run, plaintiffs have one opportunity to refile within 120 days.

This Rule has always been vague and difficult to use in practice. Nevertheless, we have successfully used it in the past to explore an expert's financial information and challenge an expert's ability to testify. This new revision makes a 25% challenge more difficult though it preserves the opportunity.

If you have any questions about changes to the Rule or what this means for your insured, please contact us. Our firm was integrally involved in negotiating this bill.

Think Piece #4

Chain of Command Allegations: Suits Against Nurses on the Rise

A disturbing trend is emerging. Plaintiffs are raising allegations regarding a nurse's failure to trigger the "chain of command," in what appears to be a strategic effort to impose liability against the hospital, a.k.a. the "deep pocket."

Consider a recent unreported Kentucky case.[1] The jury found the hospital nurses negligent for failing to activate the "chain of command" when the OB/GYN requested a vacuum for an extraction delivery. Plaintiffs alleged the nurses "should have known" that a vacuum delivery was contraindicated based on the patient's presentation and should have used the chain of command to stop the vacuum delivery.

We see this trend in Maryland, too. Nurses have a duty to question a physician's decision, or turn to nursing superiors, where that decision is clearly improper and/or poses a significant risk of harm to a patient. The question is more complex, however, when the decision is based on physician discretion and not clearly improper. Often, it is only through

litigation hindsight that the physician's decision seems questionable, and only then an allegation of the corresponding duty of the nurse to intervene arises.

Bottom line: Failure to exercise the chain of command or question improper physician decisions is clearly a viable cause of action. Alternatively, a nurse who uses the chain of command appropriately protects the nurse, the patient, and the hospital. Therefore, raising awareness about following and implementing the chain of command may prove beneficial for all.

If you have any questions about this or any other nursing litigation issues, please feel free to contact us. We are glad to help.

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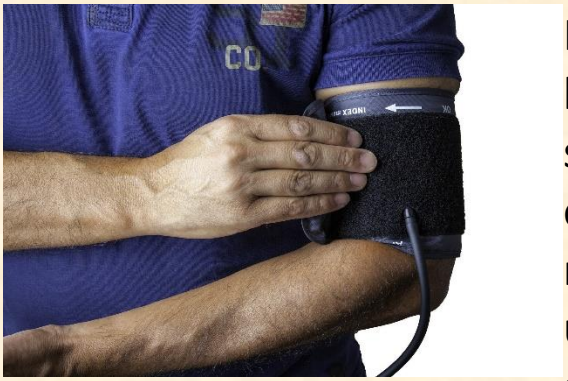
[1] *Knipp v. Ashland Hospital Corp*., No. 2017-CA-000254 MR (Ky. Ct. App. Feb. 1, 2019).

Think Piece #5

Alarming Trend: Urgent Care Malpractice Claims Rise Sharply



In recent years, hospital systems have been starting urgent care systems to reduce demand in their emergency rooms, among other reasons. But as the number of urgent care centers ("UCC") grows, so does their liability exposure. In our experience, and research confirms, medical malpractice claims involving urgent care – *i.e*., failure to diagnose stroke, heart attack and GI perforation - have increased dramatically in the last five years. To understand what these trends mean for your physician or organization, let's look a little deeper:

The fact patterns in UCC cases are uniquely similar: patient presents on Day 1 with symptomatology that mimics other less severe diagnoses. The next day, the patient appears at the emergency room in full-blown crisis. Plaintiffs can always find experts who say the diagnosis should have been made sooner.

Health care providers at these UCCs are not immune from suit. Although the care is provided in an urgent care facility (as opposed to a hospital), the M.D.s, P.A.s and nursing staff are still held to the same standard of care - what a reasonable practitioner would do under the same or similar

circumstances. They do not escape liability, nor are they held to a "softer" standard by virtue of practicing in an urgent care setting. In fact, these providers are often criticized simply because they are the first point of contact and may influence downstream events.

We have defended these UCC cases vigorously and will continue to do so. If you have any questions about exposure in an urgent care setting or are thinking of staffing one, we will take time to listen to your concerns, and discuss the risks and benefits involved in those decisions. Please contact us.

ABOUT THE AUTHORS

Waranch & Brown "thought leaders" publish electronic "Think Piece" newsletters on current legal issues.

Celebrating 20 Years serving Maryland!

Waranch & Brown, LLC is

a regional litigation practice based in Baltimore County, Maryland.

Our clients include solo practitioners, hospital systems, and national insurance carriers.

The firm provides trial attorneys with over 100 years of collective litigation experience.

To speak with a representative of Waranch & Brown, please visit https://waranch-brown.com, or call us at (410) 821-3500.

Click for a virtual tour of our new offices!