Waranch & Brown's

2024 HOLIDAY TWO-PACK

W&B WAR STORIES

Medical Defense Strategies, Tactics, and Thoughts

WARANCH + BROWN

Representing Health Professionals

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INTRODUCTION

Marylanders were affected by new trends in 2024, including the emergence of third-party litigation funding, advertising-fueled juror bias, and sky-high verdicts caused by social inflation. For those in healthcare, the rate of change continues to accelerate.

How can healthcare providers and insurance companies – *especially* those facing malpractice, general liability, or professional administrative defense issues – keep up with the changing times and learn about strategic alternatives?

To help you think through your options, we present our Holiday eBook in two parts this year: Part I includes lessons drawn from recent trials. Part II contains medical defense strategies, tactics, and physician/practice tips.

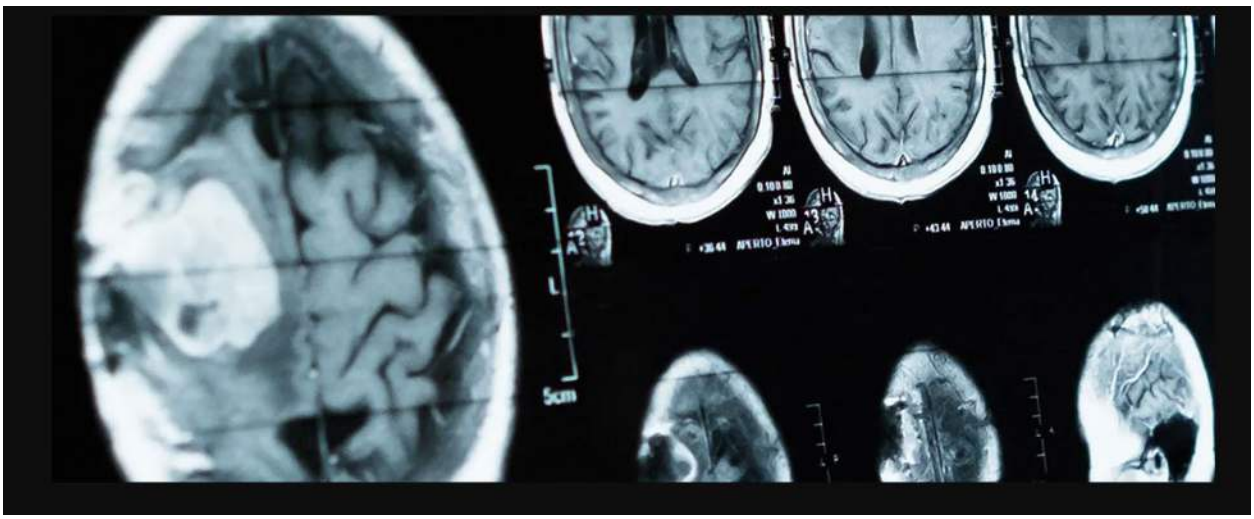
Both offer ideas for reducing damages, avoiding traps, conserving resources, and staying ahead of the opponent.
After years of helping professionals adopt strategies and tactics to protect their institutions and practices, we believe one can never be too innovative in challenging plaintiffs' claims.

Happy Holidays!

Part I – W&B War Stories

Think Piece #1

W&B War Story: Simplifying the Complex in a Brain Surgery Case



Watch the Video Think Piece on W&B TV »

Waranch & Brown Partners Christina N. Billiet and Neal M. Brown recently secured a defense verdict in favor of a hospital and a neurointerventional surgeon, marking the culmination of a strategic and meticulous legal battle.

In the accompanying video, Tina and Neal discuss the following:

- This medical negligence case centered around a ruptured brain aneurysm and how the surgeon reacted to it. This was the second time the case had been tried; the first resulted in a hung jury in 2022. The first trial served as a valuable dry run, allowing us to identify areas for strategic improvement and ensure that we entered the second trial with a “leg up” on plaintiffs.

- In advance of the second trial, we took a different approach to preparing our surgeon client for cross-examination. We brought in one of our partners, John Sly, to simulate an aggressive cross, which helped our client improve his tone and answers to difficult questions that may be thrown at him. He made an exemplary witness at trial the second time around, and this played a pivotal role in securing our victory.

- Another key factor contributing to our success was our commitment to simplifying the complex medicine for the jury. Recognizing the intricacy of brain surgery, we worked tirelessly to distill the information, enabling the jury to grasp the critical aspects of the case without being overwhelmed. This approach played a crucial role in presenting a compelling narrative that resonated with the jury, ultimately working in our favor.

Watch the Video Think Piece on W&B TV »

Think Piece #2

W&B War Story: Defense Verdict in a Sensitive Trial

Watch the Video Think Piece on W&B TV »

Waranch and Brown's Christina N. Billiet and Rachel E. Giroux recently secured a defense verdict in the Circuit Court for Baltimore City. This sensitive case involved a young mother, struggling with opioid addiction, who delivered a premature baby and later developed severe complications of infection, including amputations and lifelong dialysis.

In this video, Tina and Rachel share some of the strategies which led to their success in this complex trial:

- A key factor in this victory was the strategic use of contributory negligence. We presented the evidence in a way that was both respectful and compelling, and it resonated soundly with the jury. Post-verdict discussions confirmed that this approach significantly influenced their decision.

- We also faced and effectively countered attempts by Plaintiff's counsel to utilize Golden Rule and reptilian arguments — tactics designed to appeal to the jury's emotions. By addressing this proactively with the judge and staying alert throughout the trial, we ensured that the jury's verdict was based on facts rather than emotional appeals.

- Finally, this trial reinforced the importance of treater testimony. Despite having strong expert witnesses, it was the testimony from the treating physicians which left the most lasting impression on the jury. Preparing treaters to present as credible and to connect with jurors is often the most important factor in securing a defense verdict.

At Waranch & Brown, we pride ourselves on our ability to defend our clients with precision and tenacity, even in the most challenging legal environments.

Watch the Video Think Piece on W&B TV »

Think Piece #3

W&B War Story: Victory in a Wrongful Birth Trial

Watch the Video Think Piece on W&B TV »

In today's Video Think Piece, we share lessons learned from a recent wrongful birth twins case tried in the Circuit Court for Baltimore County, in which a local hospital and obstetrician were facing a claim of $26M.

Waranch & Brown's Managing Partner, Christina N. Billiet, and Partner Michelle L. Dian share some of the challenges they faced, along with the strategies that led to a hard-fought defense victory at trial.

In particular, the sympathy factor for two young boys – each born with a serious genetic disorder – could have overwhelmed the jury. Tina and Michelle worked hard to moderate the jury's emotions and presented impressive expert testimony, including

testimony by a genetics expert after whom the genetic disorder was named.

Obtaining a unanimous defense verdict in this case after just 30 minutes of jury deliberation gave our obstetrician client some well-deserved comfort in the quality of her care.

At Waranch & Brown, we specialize in defending and trying high exposure birth injury cases.

Watch the Video Think Piece on W&B TV »

Think Piece #4

W&B War Story: Defense Verdict in a Surgery Trial

Watch the Video Think Piece on W&B TV »

How Waranch & Brown's Rachel E. Giroux and Neal M. Brown secured a victory for a surgeon in a case alleging negligence in the performance of a bowel resection. In this video Think Piece, Neal and Rachel share strategies they used to cinch victory in this 10-day complex jury trial.

The plaintiff claimed the surgeon client improperly resected a portion of his ureter during bowel surgery, ultimately causing him to require multiple reparative operations. Rachel and Neal overcame the testimony of a likeable plaintiff (who had suffered an obvious complication) and his solid experts.

Creative demonstratives played a pivotal role in obtaining a defense verdict. By using a common garden hose to illustrate the

urinary system's pressure dynamics, and plastic tubing to represent the ureter's shape, the W&B team made complex medical concepts understandable to the jury.

Another decisive factor for the jury was the testimony of the defense expert pathologist. He was able to concisely explain that there was no ureteral tissue in the surgeon's pathology specimen; therefore, the surgeon had not resected the ureter. If not in the surgery specimen, then where was it? The jury found his testimony compelling.

At Waranch & Brown, we specialize in defending and trying high exposure cases creatively and aggressively.

Watch the Video Think Piece on W&B TV »

Part II – Medical Defense Strategies, Tactics, and Thoughts

Think Piece #5

Social Inflation and Why It Matters

Social inflation is defined as an increase in claim severity, above what could be anticipated under the usual scope of economic inflation and claim trends.

The impact of "social inflation" in the health care setting is wide-reaching. Medical malpractice juries, swayed by societal sentiments, commonly award hefty damages even in cases where the medicine is defensible. This heaps financial strain on healthcare institutions and professionals, as verdicts start to reflect emotional tugs rather than solid evidence of wrongdoing.

The fear of facing sky-high verdicts also impacts the practice of medicine and the cost of providing care. Consider a health care provider who feels pressured to order unnecessary tests based

upon a looming fear of litigation, driving up costs without necessarily improving patient care.

In our work defending health care providers, we go to great lengths to tackle the issue of social inflation from the start. Our primary task is to advocate for fair evaluations of medical care based on evidence, not emotions. By challenging the sway of social inflation, we aim to ensure that verdicts are reflective of the facts of each case and uphold the fundamental principles of justice.

At Waranch & Brown, our seasoned attorneys are prepared to tackle this head on.

Think Piece #6

Healthcare Havens: Immunity from the COVID Storm

COVID-19 was a once-in-a-century pandemic which caused millions of hospitalizations and deaths. Many health care providers risked their lives to provide services to people who were exposed to and infected with COVID.

Now that we are on the "other side" of the pandemic, lawsuits against health care providers regarding care impacted by COVID have increased. Fortunately, there are federal and state statutes which provide immunity for those health care providers if (1) they were providing care during the time when there was a public health emergency and (2) that care was provided in good faith.

We recently represented an attending physician who was sued by the family of an elderly patient who contracted and died from COVID in a nursing home. We filed a motion for summary judgment, citing the applicable immunity statutes. The court

granted our motion based upon the timing of the care and the lack of any evidence of bad faith.

If you are aware of any health care providers who have claims or lawsuits filed against them for care impacted by COVID, please know that state and federal immunity statutes may provide valuable defenses. If you would like more information about these immunity statutes, or other immunity statutes which protect health care providers, please contact us.

Think Piece #7

How Advertising Creates Juror Bias, and What to Do About It

"Three times more money!"

"Need a check?"

"Hurt at work? Would $504,500 help?"

Outrageous advertisements from plaintiffs' lawyers are everywhere. From television and billboards to social media and direct mail campaigns, there is no escaping the message from unscrupulous advertisers that "you can make a lot of money off of this" (whatever "this" may be).

The constant stream of advertisements does more than attract potential plaintiffs; these ads create high expectations for payouts, making it difficult for defense attorneys to fight for

fairness. Plaintiffs and jurors enter the courtroom with preconceived notions of the worth of claims. Large or “nuclear” verdicts are often based, in part, on what jurors perceive to be “normal” numbers — and their perception of normal is skewed by their exposure to legal advertisements. Defense attorneys should consider initiating *voir dire* with potential jurors regarding their exposure to legal advertisements and whether their perception of case value has been impacted.

As defense attorneys representing health care providers, it is incumbent upon us to advocate for a legal system based upon integrity and fairness. Through education, advocacy, and ethical practice, we can challenge the notion that justice is synonymous with exorbitant monetary compensation.

If you need assistance with a legal matter, Waranch & Brown and our experienced attorneys are here to help.

Think Piece #8

The New Frontier: Exploring Third-Party Litigation Funding

In recent years, the emergence of third-party litigation funding has created a notable paradigm shift in the litigation landscape. Third-party litigation funding involves external entities (hedge funds, etc.) financing legal actions, primarily on behalf of Plaintiffs, in exchange for a percentage of the recovery if the case is successful. In essence, these entities are betting on lawsuits.

Proponents argue that this practice is a driving force for change, breaking down financial barriers for individuals who may lack the means to pursue legal action independently. This levels the playing field, empowering individuals to seek legal recourse for grievances they might otherwise be unable to address or enabling smaller entities to take on larger opponents.

Critics express concerns about the lack of transparency and potential ethical implications, suggesting that it might encourage frivolous litigation, compromise the attorney-client relationship as financial interests become more entwined with legal strategy, or even be a predatory practice.

The long-term effects of third-party litigation funding on legal strategies, settlement negotiations, and the overall dynamics of litigation remain to be seen.

At Waranch & Brown, we are actively seeking information regarding third-party litigation funding in discovery, and ensuring we understand its potential implications in every case we defend. If you need assistance with your case or would like to discuss potential defense strategies, we are here to help.

Think Piece #9

Audible in the Courtroom

We've all been there — something happens in life which requires you to adapt quickly or face sudden failure. For trial lawyers, those "things" often happen on the eve of trial, making adaptation exponentially more challenging. At W&B, it is our goal to face those challenges deftly and with confidence.

Recently, we tried a high-value case where a co-defendant — seemingly the "target defendant" — settled three days before trial. Suddenly, we were left with a decision: should we continue with our defense strategy as planned or call an audible and incorporate the newly available "empty chair" defense?

Fortunately, we were prepared for this contingency and were able to shift quickly to take advantage of an empty chair defense

- where we used Plaintiffs' own experts against them, demonstrated that Plaintiffs were misplacing their blame, and established greater attenuation in the chain of causation.

Instead of viewing this change in circumstances as a "problem" for our defense, we embraced it and took advantage of it — resulting in a very favorable resolution midway through trial.

At Waranch & Brown, we believe that it is important to be ready to try any version of your case — not just the version we expect.

Think Piece #10

Combatting Jury Presumptions: Do Only "Winners" Go to Trial?

There is a common misconception among jurors that, if a case goes to trial, it must have merit. While jurors may not understand the specific procedural processes involved in bringing a medical malpractice case to trial, they are savvy enough to expect those procedures to minimize frivolous claims.

Defense attorneys must be prepared to combat this misconception at every opportunity — from *voir dire* to closing argument:

- *Voir dire* can be utilized to explore jurors' attitudes toward the legal system and any presumptions about the case's merit at trial, and exercise legal challenges to preclude individuals who hold incorrect presumptions.

- During opening statement, consider explaining directly to the jury that any case can be filed and the fact that a particular case is being tried does not mean that it has validity.

- Closing arguments should reinforce the idea that going to trial does not equate with merit.

Our team at Waranch & Brown is prepared to combat merit-based jury presumptions at trial.

ABOUT THE AUTHORS

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

Waranch & Brown, LLC, is a regional litigation practice based in Baltimore County, Maryland.

Our clients include health care providers, hospital systems, and national insurance carriers. The firm provides trial attorneys with over 250 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.