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SENIOR LIVING LIABILITY:

What Standards Apply to Different Property Types?

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"Court ruling provides cautionary tale regarding duties of independent living operators"

— Headline from July 21, 2022 edition of *McKnights Senior Living*

Earlier this year, a decision by the Supreme Court of Michigan brought into focus the question of what standards for legal liability apply to senior living communities, and how different property types may be treated based on the scope of services offered, contract terms, licensure regulations and other factors.

Rowland v. Independence Village of Oxford

In *Rowland v. Independence Village of Oxford*, 974 N.W. 2d 228 (Mich. Supr. Ct. 2022), the Supreme Court of Michigan reversed trial court and Court of Appeal rulings that an independent living operator had no duty to protect an elderly resident from freezing to death after locking herself out of a back door to the building.

The trial court and Court of Appeal had determined that there was no duty to monitor the exit door and that it was not foreseeable that the resident would wander out of the building without her keys on a cold winter day. However, the Supreme Court disagreed, finding that:

"A reasonable person could anticipate that an elderly resident living in an unlicensed independent-living facility where the average age of the residents exceeds 80 years old could become locked out of a building after exiting an automatically locking door on a cold winter morning."

It noted that the operator "intentionally marketed and catered to elderly individuals who are in need of greater support than the general population," charged "a substantial premium" for tenancy, included two hot meals a day, biweekly housekeeping, and laundry services, and "provided daily check-in calls, a pull-cord alert mechanism in units, and an on-site third-party contractor who offers additional homecare and medical services for a fee," all of which "strongly suggest the landlord had some knowledge that certain residents would require additional assistance beyond that of an average tenant."

The Court noted that "[t]enants of any age may become locked out of their apartment building from time to time, regardless of age or mental capacity, and this possibility becomes more likely in a residential complex specifically catering to the elderly." The heightened foreseeability of the risk of harm at Independence Village, when compared with non-senior communities, was based on the "average age of the residents at the facility in question coupled with frequent below-freezing temperatures during winter months in Michigan."

The Court concluded that:

"The potential burden associated with taking reasonable measures to prevent residents from being locked out and unable to alert staff, such as installing a buzzer or cameras, appears minimal when compared to the potential harm that could befall residents."

Two dissenting Supreme Court judges pointed out that doors that lock from the outside cannot be considered to be a "dangerous condition" or a "defect," because they are designed to provide safety and security for the building and its residents. They further noted that the lease agreement provided that the operator had no responsibility for security services.

Nevertheless, the Court's majority vacated the lower courts' rulings and sent the case back to the trial court for further proceedings.

Differing Standards of Care for Different Property Types?

While the *Rowland* case involved an independent living property that offered hospitality services, under the court's analysis, any senior living community, such as senior apartments without services, could be found liable for failure to protect residents from death or injuries sustained after locking themselves out of the building. Indeed, there is a general common-law obligation on the part of the proprietor of any business to protect customers from "reasonably foreseeable" injuries that may occur on the premises. Because a "special relationship" exists between a business and its patrons, the business must "take reasonable action to protect or aid patrons who sustain an injury or suffer an illness while on the business's premises." See, for example, *Verdugo v. Target* Corp., 59 Cal.4th 312, 335 (Supreme Court of California 2014).

In determining whether a business is obligated to take precautionary steps to prevent harm to patrons, a court will consider whether the nature of the business and its customers poses a "heightened" or "high degree" of foreseeability of danger.[1]

[1] The *Verdugo* case involved a customer of a Target retail store who suffered a heart attack at the checkout counter, and considered whether the business had an obligation to administer an AED [automated external defibrillator] treatment to the customer, given that the store sold AEDs and had them in stock. While the California Supreme Court did not find liability, it carefully examined the responsibility of a business to protect its customers and stated that a heightened degree of responsibility to provide a precautionary security measure might exist in a business, such as a health club, where the risk of a heart attack is greater. [59 Cal.4th 312, at pp. 338-339, note 28].

Senior living communities, whether licensed or not, are susceptible to being seen as having a heightened level of responsibility, when compared to typical multifamily properties, to foresee and mitigate the risk of resident injury. As the *Rowland* decision demonstrates, the advanced age and presumed vulnerability of a senior population increases the risk of injury due to possible debilitating conditions that are more common among the elderly, such as ambulation and balance problems, and cognitive decline.

The liability of an unlicensed senior living property may also be affected by the kinds of services provided. Dining, recreational, transportation and housekeeping services, which are not typically provided by a landlord to a tenant, generally enhance the health and well-being of residents. While any services provided to residents must be performed in a competent and negligence-free manner, those services are not directly related to addressing the heightened risk of injury that may be a characteristic of the older resident population.

Sometimes, however, independent living operators anticipate some of the problems that their elderly customers may experience and provide services such as an emergency call system in each residential unit, or a once-daily check-in service to rule out the possibility that the resident is debilitated in the apartment and cannot call for help. Certainly, the presence of such risk-mitigating services, while potentially reducing injuries and overall liability, can also be seen as an acknowledgment of the heightened risk and foreseeability of certain kinds of potential injuries that can occur on the premises. Unless specifically disclaimed, undertaking such services might be used against the operator to imply a more generalized duty to monitor the health and well-being of residents and to anticipate and prevent circumstances that lead to injury. In fact, in finding the operators to be liable, the *Rowland* court specifically relied on the fact that a daily check-in call service, a pull-cord alert system and a third party home care service provider were available.

In addition to meeting the foreseeable harm standard applicable to all businesses, licensed senior living operators, such as those providing assisted living and memory care, must also follow applicable regulations. Regulatory responsibilities typically include assessing and monitoring the health condition and care needs of residents, preparing a plan of care and services, providing care and supervision where needed, and meeting regulatory standards for safety, sanitation, staffing, plant and equipment, resident rights, and other operating characteristics. While these regulatory standards are far more specific and comprehensive than the standards applied to unlicensed providers, they do not necessarily constitute all the obligations to which the operator can be held. For example, in any litigated dispute, expert

witnesses may be called upon to testify as to the standards of practice within the industry, whether or not such practices are contained in any law or regulation. These standards of practice, often unwritten, may determine the outcome of a case.

And regardless of licensure, courts will look to the written agreements between a senior living community and its customers to determine the type and scope of services offered and any limitations upon those services. To preclude an implication that, by catering to an older population the operator is assuming broad responsibility for their well-being, it is essential to specify in detail what services are provided and to identify any limitations on the scope of those services. Nevertheless, no matter how well a contract is drafted, a court may find that a common law duty of care supersedes contractual disclaimers, as the majority of the *Rowland* court did by disregarding the contract language to the effect that Independence Village had no obligation to provide security services.

Factors that Complicate Level of Care Classifications

While the customary classifications of senior living property types [e.g., active adult, independent living, assisted living, memory care, and continuing care] may broadly outline the differences in the service obligations and liabilities undertaken by their owners and operators, there are several additional factors that can determine the scope and extent of liability in any given case. For example, there may be wide variation from one community to another regarding the kinds of services offered. Even communities with the same licensure may offer different arrays of services in areas such as transfer assistance, or support for cognitive impairment. For unlicensed communities, the absence of regulatory mandates may lead to an even wider degree of differentiation in the scope of services among properties calling themselves "independent living."

Of course, contract language is important, but advertising also must be carefully crafted and edited to rule out any implication that the operator is guaranteeing optimal outcomes in the residents' health, safety or happiness.

With the widespread use of private duty caregivers and attendants, some residents in unlicensed settings may have acuity levels that are comparable to residents in a licensed assisted living facility. With residents aging in place and acquiring new care needs and disabilities over time, it can be a challenge to continue to safely house residents who might be appropriate for a higher level of care placement. And plaintiffs' attorneys have been known to

argue that the licensure requirements applied to licensed senior living communities should be applied to residents of unlicensed communities because of the similar needs of their residents. The lines of demarcation between traditional senior living property types can be blurred by the presence and use of private aides. Moreover, the involvement of third-party caregivers and family members in the planning and provision of care or services can also obscure the roles and responsibilities of those who may be expected to respond to a potentially dangerous situation.

While regulations may provide some standards against which the obligations of licensed senior living providers can be measured, the differences in service offerings among similarly licensed properties, the presence of private duty aides, the sometimes overlapping needs of residents in both licensed and unlicensed settings, and the presence of common law duties applicable to all, result in a nuanced and uncertain liability landscape. How regulations are interpreted and enforced by regulatory agencies may also be critical factors in determining legal liability — a finding by a state agency that a regulation has been violated can result in a presumption of legal liability in a civil suit for damages.

In continuing care retirement communities, the existence of multiple levels of care at a single location, and the existence of prepaid or discounted health benefits, and related underwriting considerations, add further complications that can affect liability in an individual case.

What Independent Living Operators Can Do To Mitigate Liability Risk

After reviewing the *Rowland* case, an independent living operator might be inclined not to offer any supplemental features or services designed to protect or safeguard older residents, for fear that they could create liability that might otherwise not exist. Such a view is shortsighted and misguided. It may be that some carefully-selected services will significantly reduce the risk of harm to residents and lessen liability exposure, without changing the character of the business into that of a care provider.

On the other hand, an independent living operator should not become overly involved with trying to manage residents' health and safety. In the matter of *Oakmont Senior Communities of Michigan and Huntington Management*, HUD determined that it was a violation of the Fair Housing Act for an independent living provider to delve too deeply into residents' health issues.

In the conciliation agreement, the community was required to cease: (1) health status reviews of residents returning from the hospital; (2) requiring residents to sign in and out of the premises; (3) routine safety checks (e.g., for failure to appear for a meal); (4) routine monitoring or restriction of resident diets; (5) mandatory liability insurance coverage for motorized mobility devices; (6) requiring residents to disclose medical information; (7) policies requiring residents to be capable of living independently, without needing "continuous nursing care," feeding assistance or other personal care assistance; (8) policies conditioning occupancy on compliance with "reasonable behavior requirements," not being a "flight risk to wander away from the building," maintaining bowel and bladder control, and other similar criteria.

The conciliation agreement with HUD does allow for the development of policies that: (a) provide for voluntary safety check and dietary programs; (b) require renter's insurance covering damage to the resident's unit and common areas, (c) inform residents that management is not responsible for providing care, (d) require that residents not disrupt other residents' quiet enjoyment of the premises, and (e) limit the number of residents who use certain areas to prevent overcrowding for safety reasons.

The most important precaution an independent living operator can take is to specify in detail what services are offered and which are not. For example, it should be specified that care and monitoring of the resident's health condition are not provided, that residents are responsible to provide for their own health needs or to obtain such services from a third party, and that failure to do so is ground for contract termination. If management determines that a supplemental service, such as a voluntary daily check-in, is desired by residents and promotes safety, a precise description of the limits of the service is necessary [e.g., a phone call at a specific time daily with a visit to the apartment if there is no answer].

Regarding situations similar to those addressed in the *Rowland* case, e.g., a door that automatically locks when a resident exits, bear in mind that the case was sent back to the trial court for further proceedings. The trial court could still determine that there are additional facts supporting a judgment for the defendant. In determining a defendant's liability, a trial court typically will consider whether there was a history of residents having problems being locked out of the building, whether the resident had the ability and means of returning to the building or contacting help, what kind of harm is likely to occur, and what remedies are feasible and effective. These may vary from one property to another and one resident to another.

Conclusion

Senior living communities, from active adult, to service-enriched independent living, assisted living, memory care and continuing care, will be held to differing liability standards based on the common law concept of foreseeable harm, their resident population and needs, varying service packages and limitations, the language in contracts and advertising, licensing regulations and enforcement activities, the actions or availability of private caregivers and family members, and the opinions of experts on customs and practices in the industry. When assessing the potential for liability in any senior living operation, it is wise to consider these and other factors that may persuade a judge, jury or arbitrator to hold the operator liable for injury or damage to a resident.

About the Author

Paul Gordon is a partner in the law firm of Hanson Bridgett LLP, with 190-attorneys across California. He is the author of ASHA's *Seniors Housing Guide to Fair Housing and ADA Compliance (6th Edition 2022)*. He is a member of the Executive Board and General Counsel to the American Seniors Housing Association and is former Chair of the Legal Committee of LeadingAge. Mr. Gordon's entire law practice is devoted to representation of seniors housing and long-term care operators, developers, investors and related organizations. For more information, see hansonbridgett.com.

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