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Risk Insights: Senior Living & LTC

Episode 22: Insights from the Front Lines Part 2

Welcome to the Risk Insights: Senior Living & LTC podcast, hosted by Tara Clayton with Marsh's Senior Living & Long-term Care Industry Practice. Each month, Tara, a former litigator and in-house attorney, speaks with industry experts about a variety of challenges and emerging risks facing the industry.

Tara Clayton

Welcome back to Risk Insights: Senior Living and Long-Term Care. I'm Tara Clayton, and this is Part 2 of my conversation with John Hall and Drew Graham from Hall Booth Smith.

In Part 1, we talked about the real-world complexity of caring for older adults, the emotional dynamics that can shape claims, and how quickly the caregiving story can get distorted once an adverse event is viewed through a legal lens. We also touched on why the narrative matters so much, especially when jurors may only see the outcome, not the day-to-day context behind it.

In this second half, we're going to get even more practical. We'll dig deeper into how regulatory findings can influence civil litigation, what "proactive" really looks like when it comes to surveys and compliance, and how providers can better align their regulatory, risk, and claims functions so they're not operating in silos. We'll also revisit the idea of anchoring and what the defense can do to counter outsized demands.

Let's jump back in.

Drew, you and John both kind of talked about the regulatory impact that can play out in the courtroom. Drew You mentioned preventative measures kind of with the regulatory process to try to mitigate the misuse of some regulatory findings in the courtroom on the plaintiff's side. What are some practical guidance that you have around regulatory impact on civil litigation?

Drew Graham

Yeah, sure. So in senior living, we're talking about state regulatory, typically licensure agencies. And I think the first point there is it's absolutely needed that these agencies exist. Their missions are absolutely, you know, meritorious and needed in society. The issue becomes, and, you know, this may be a little bit of a soapbox is making sure that they are vigilant and understand as a matter of state health policy, how these regulations are being used after they've done their good work in making sure there's been licensure, regulatory compliance. And by that I mean I don't believe that the vast majority of surveyors working out in our states and counties and towns today really expect that their finding of noncompliance that was cured or remedied in a very short time will ultimately form the basis of a lawsuit where a plaintiff lawyer demands 20 million dollars.

I just don't believe that they're attuned to that particular issue. So as an advocacy position, as ways that our industry can begin to integrate and change policy, I think that's a message that we need to talk about at the state level, because in virtually every state, it would just be a matter of regulatory rulemaking to limit the way their regulations are used in civil litigation. So I think on that side, that could be huge. That's been an issue for years, but again, it's getting more and more urgent now. And again, it's something that our state trade affiliates and others could dialogue with their state agencies about.

On the provider side, one of the things that I think providers, again, and particularly in senior living do is they silo their regulatory department from their risk management department, from their litigation department, and many things in the regulations that states pass. Some states have robust regulations, others are more simple. They are, at the end of the day, good milestones for risk management for understanding things, good practices and ways to encourage a culture of compliance with certain things, particularly, you know, around fall prevention and training and other things. So I think as we move forward, understanding how those fit into the broader operations of their buildings and not siloing the regulatory folks in their operation from the risk folks and then from those individuals who are leading either their insurance partners or claims departments or if they have in house folks. The folks in house.

So making that more integrated.

John Hall Jr.

Drew is so right in that we need to get more perception of the risk of these crazy lawsuits that are coming out now and the level at which people on the plaintiff side will go to prove them. And that does require an earlier awareness as you're doing your regulatory practice on that side, you're doing your business planning on that side. I'm not saying be controlled by or being afraid of or anything to let it change your business sense and your service to your clients. But what it should do is make you anticipate the risk and be able to structure what you're doing in a way that makes sense for a jury four years from now.

Tara Clayton

Great points, and I love that the concept of we don't work in a siloed world when it comes to litigation. And that kind of links into the next question I wanted to talk to you about. We've talked a little bit already about communication that ties into communicating internally with each other.

But I think, John, you kind of mentioned at the beginning, I know the book talks about, kind of highlights to me what I think we see often in these claims. And it's that real psychological response that we see from families. And you mentioned guilt, John, that I think a lot of times of moving someone out, you know, out of the home they've been in for a long time, not being able to provide the care that loved one needs and what the guilt that comes from that. And I think when families face a loss, even when there's no one's fault but they face a loss, they look for explanations, they're looking for answers. And sometimes that search that they go on can result in blame.

That stood out to me because, you know, I know both of you guys know we're doing a lot of work around communication resolution programs in senior living and the importance of building that communication with families even before move in. But for sure, throughout the residency and at the end, my question to you all is, how have you on the litigation side, in the courtroom, how have you seen where this miscommunication between staff and families, how that can escalate into legal claims?

John Hall Jr.

You know, I think that what you can get, and it's unfortunate, but people do have the guilt that they put their loved ones in there. And it's not. It may be that they could provide care, but because of life and choices and others, they don't provide care, which enhances the guilt a little bit more. But what also happens is the lack of participation in somebody else giving care to your loved one. So many of them don't ever go up until maybe, you know, a fortunate person in one of the facilities may get a visitor on Sunday afternoon for 30 minutes that comes in and says, hey, mom, dad, how you doing? All good. Hope everything's well. I'm thinking about you. And then maybe a phone call in between, but most don't even get that much.

And so I think it's hard when those come on the front end of it. And I know you, Tara, you and your group do a great job of pushing this idea out there. When there's an event, when there's something to happen, an injured loved

one or even a death or those things, people need to be sat down and talk to, you know, the providers and others said, hey, yeah, were there, and she got up and fell and, you know, were right there and we deal with her every day and do something to give a personalization to it, understanding that whatever you say, somebody's going to use against you later, but I think you can coach up to appropriately do that versus a claims person calling them and saying, hey, you know, here's where the circumstances are.

At trial, it's really just a constant beat of the drum of personalizing not only the person, but personalizing the treaters and the providers, those that are, we call them, healthcare heroes in there doing that on end. So you got to really work on that trial to overcome this problem that, you know, to personalize them. And then the harder one, this is the one that, you know, you've got to be more careful with. You would never, ever criticize a loved one. But you do want to put the facts out there in a very gentle but straightforward and easy to understand way. And what we find is the jurors end up giving that accountability for those issues. And so I think you have to factor that in and how to do it.

That's the art of what we do, is doing it in a way that's enough to get the point across, but not enough to irritate anybody and claim that we're blaming someone else. And so all of that put together helps a narrative to get it across, that we're caring for them and, you know, the loved ones, no problem with that, they're busy, and then fall back to defend everybody. And that is, unfortunately, it's inevitable. And that's part of what we talk about in the book.

Drew Graham

I would just amplify the to some extent on the idea that unlike other, again, other parts of health care, health systems and physicians, we unfortunately know that grief is going to be on the horizon. Loss is difficult for everybody. We are in most of our cases at a point where folks are beginning to see the last chapter of their lives, if not closer to the end of life. And we have to know from the beginning, maybe at move into our senior living facilities, who is good in our organization about having discussions that anticipate what we know is a very predictable reaction to a loss from Dr. Kubler Ross is that anger is the first reaction.

And so we know that's coming in any way that we can help our caregivers and providers, as John mentioned very diplomatically and very appropriately begin to help them understand how this happens. And that because there is a loss, the first anger is reasonable, but blame is not. The other thing I think around this is sort of the contra to Dr. Kubler Ross, which is if you go back to the Reptile book and you look at some of the details that we didn't talk about at conferences when went to them. Clotaire Rapai, who was one of the influences on that book, talked about mobility, loss of mobility, equal sign, death.

And so I think if we understand that the coded language that we're talking about, whether it's at trial or somebody at an admission meeting moving somebody into an assisted living facility, there's certain language that we know, there's certain reactions that are human reactions that we can anticipate and beginning to figure out ways from beginning to end up and through closing argument, move into closing argument. Unfortunately, in some instances that we can get better at talking about this. We're not fully evolved in that respect yet. And this is really a message to both the providers and the defense bar involved in this. And I'm hopeful that we'll continue to learn ways to talk about it, you know, in ways that resonate and it's meaningful to the people that we have to serve and talk to.

Tara Clayton

Yeah, but knowing kind of that the narrative that's coming against us and that the courtroom and kind of just human reactions. You know, I always have talked about how I feel like sometimes these cases are easy cases for the plaintiff bar because they already have someone who's passed away and they're dealing with this negative outcome. And it's a much easier story to paint in front of the jury than our side, which is really having to build piece by piece that narrative, John, that you and Drew have been talking about. And it's because the jurors, they're seeing the outcome without that day-to-day context of what's happening from a caregiving standpoint.

What do you think tend to be the biggest misunderstandings that jurors have or really the public at large? Right, because that's where our jury is coming from, is from the public at large about harm in resident decline that happens in a senior care community.

Drew Graham

I do think the language issue and understanding issue might even go more deeply than just the constituents that you mentioned. I think as a group, I think the communities and their staff are probably the most qualified to talk about this particular issue. I think our defense bar and our claims organizations are probably the least. And when it comes down to how do we talk about these things effectively, I'll let John talk about jurors. I think it again goes back to training and education and evolution, constant improvement of how we address these. John, I know can talk about sympathy is nothing new for those lawyers like John that try cases involving catastrophically injured children, you know, a variety of other terrible things.

We have ways to talk about things within our justice system. My question would just be have we evolved as far as we need to evolve and developed experts as trial counsel and others that are as good at talking about end of life as they are talking about other catastrophic situations that evoke sympathy?

John Hall Jr.

Yeah, I think let's talk about a specific aspect of these cases is where people inevitably develop wound sores because that's a very difficult issue when folks have them and somebody's managing or assisting in managing those because of the visualization of it and the reality. And this is where dealing with the medical side of it and talking about the skin as the largest organ in the body and the management of that organ, despite the best care, it's going to degrade and fall down. We all want the, you know, the cute cheek of an 18-year-old. But the truth is your skin is not the same when you're 70 or 75 or 80. And the tenderness of it and training a jury in all aspects of it to that and training the plaintiff's lawyers to it.

Many times the plaintiff's lawyers are you used to these cases. And I have to say the defense side has contributed to the thrill that the plaintiff's lawyers have about these case because we do a lot of national review of cases and you'll see a report that says, you know, there's a six inch sore and it was there for three weeks and nobody did anything, they didn't improve it. And it's just horrible to look at. And therefore the case goes, well, the truth, that's inevitable, that's a fact of life. And it's hard for people to understand you can't fix these things. Sometimes, sometimes they just move along and that's part of the pathway. And so educating the plaintiff's attorney as well as the jury and others on this and then desensitizing them to that appearance.

And we start out right early on with a jury pool to the extent the judge will let us. We get the worst, absolute horrible film that they've ever had or photo that they've ever had and we put it up for them. And we ask the folks, listen, this doesn't have to be the right case for you. There's all kind of cases you can sit on, contract case or traffic case or this kind of case. And we tell them that some people when they come here can't be fair and impartial because they have such a heart that the sympathy goes out. And any of you out there, we're asking the jury pool, any of you out there have that kind of sensitive heart.

And what we'll get is a lot of hand raises and then you take out those jurors for calls that ultimately would influence the case not based on the facts and the law and the medicine, but instead would base the calls based on a motion. So to the extent we can be aggressive with that, it amazes me. Some people try these cases and they say, well, I don't want to put up bad pictures and why would I put them up early? Well, because the plaintiff lawyer is going to put them up late and I want to put them up early and I want to get rid of those folks I can get rid of. And then there's still going to be one or two. Believe it or not, in our system, there are jurors lying and waiting for you.

They have a mechanism, they're designed to come in there and they want to redistribute wealth and they want to push out justice. And so they want to answer those questions. And so what we do is those people that are last, we then get them to affirm, they'll be our policemen and in the jury room and says, you know, this can't be decided by sympathy. If you're in the jury room and somebody says, hey, that's horrible, that wound's horrible, and we need to

do it. Just because these people need compensation, we encourage people to step up in the jury room and to object to that and notify the court of that.

And we let plaintiff's lawyers know that we're going to do that because they're going to be betting on sympathy and on people wanting to get out of there and not standing up to people who refuse to acknowledge their control by their sympathies. That's one of the factors that would go in. I thought I'd just kind of lay that one out there that can help deal with these issues.

Drew Graham

I think that gets very specifically at what we need to do as a senior living defense bar is use those strategies that we've learned from other cases, be, you know, increasingly open to cross discipline discussions about ways of dealing with things like this. A lot of resources out there, we need to use them all.

Tara Clayton

Completely agree. Speaking of, I don't think tactic is the right word, but it's the only one that's coming to my mind. So that's the one we're going to use tactics with the jury. John, you mentioned very early on this concept of anchoring. And that's another thing that I really wanted to talk with you guys about, because I think there's room for opportunity, room for improvement, and areas of opportunity when it comes to anchoring on the defense side, I guess, first, before we get into it, can you tell me what is anchoring?

John Hall Jr.

Sure. Anchoring is. And it's in anything in life. If you walk down the street and you see a sign that says sell 50% off, and you know, it's a store, it's got coats and you need a coat. So you step in, you're already anchored to think that when you get in there, whatever the original price was is the real price, and now you can get it for 50% off. And so this is a deal. Plaintiff's lawyers have taken that concept and they've applied it to lawsuits. They now come in and they anchor with ridiculous sums, $10 million, $20 million, we're going to ask for $100 million. I had one plaintiff's lawyer in a mediation in a case recently tell the mediator he was going to ask the jury for $750 million in a one person civil action tort injury.

And what they do, and unfortunately from the claims side, we get managed by what the plaintiffs do. I tell people that one of the worst questions I ever had. Because we're going to work up the case, we're going to tell you what the value is, we're going to look at it, and the plaintiff's lawyer is going to come into the jury room and anchor, or into the mediation room and anchor at $50 million. And then when we offer a reasonable sum, 100,000 or 200,000, they're going to go down 100,000. And somebody in the room looks to me and says, what do they know that we don't know? And my answer to them is, they know you're going to ask that question. Instead, stick with your value, ignore where they go, and be prepared to go try the case over your value.

And to do that in voir dire, plaintiff's lawyers now routinely ask up a jury. Fifteen years ago, if you walked into almost any jury in the country and you said, would any. The plaintiff's lawyer said, would any of y'all, you know, be open to. Or the plaintiff would say, we're going to ask for $10 million. Would that upset anybody? Half the jury pool would gasp. Now, the plaintiff's lawyers routinely come in and say, would anybody be upset if the facts and law support it, that we ask for $100 million? They just shake their head, yeah, okay, that's what it supports. And defense lawyers don't want to address damages in that voir dire context. Bad mistake. What you've then got to turn around and say, folks, let's say it's worth, you know, depending on your bad case, let's say it's worth $500,000.

You know, let's talk about, folks, first of all, any of you have relatives not working, you deal with that. Now, any of you a math teacher out there, we take $500,000. And I won't go through all the setup for it, but basically any of them, you take $500,000 and you put it into a very conservative prudent investor account that's earning 10% a year. That's 50% a year, right? Right. The math teacher tells me, yes. Now, if you just take that 50,000 every year, what happens 10 years from now? Well, you've gotten 50,000 for every year. And that 50,000 or that 500,000 is still in the account. And to help teach the jury the value of money, to start suggesting when we have a reason to make an example of what a reasonable offer was, and then even an opening, depending on how the case.

You know, you've always got a place. A case is like a ball game. You got to see which way the ball is going to make the decision. But regardless, at some point, either in openings, obviously in voir dire, in openings, or some aspects of the case, we start putting a reasonable number out to the jury and talk to them about the real value of money. For instance, if we think the reasonable value of the case is $500,000, we'll tell them, and let's say, first of all, dad wasn't working, had no income, nobody was getting dependents from dad. Dad was doing these sorts of things. And what dad would want is for you to be able to if he could end up being able to give you that, then it would be great for your grandkids.

And if you don't touch it, by the way, you put $500,000 in a bank and you don't touch it, and you wait till your kids go to college, that could be almost a million and a half dollars. And then the jury's starting to think about the real value of money. So a long concept kind of squashed down, but that's one way we deal with anchoring.

Tara Clayton

I feel like the concern was if we threw numbers out there, we talked about it implies some type of liability. And I don't know, from your perspective, is that how wrong is that concept that you've got automatic liability assessed against you? If you start talking numbers.

Drew Graham

Years ago, I think that was maybe more true, maybe 10 to 15 years. Now, with the current juries that we see and the way the world is, if you don't give them a number, they're going to use the plaintiff's number. And I think we have to be more vigilant in both coming up with a number, getting stakeholder alignment around the number, and then also being able to explain why that's the number that's important, as John mentioned, and that's complicated in these cases by the sergeant, just by the absence of economic damages. And I don't know that we've talked about that enough in this sector about how do we talk about non economic damages in ways that are productive and beneficial to the ultimate outcome of the case. Certainly we could talk about that for hours too, but it's an important topic.

John Hall Jr.

Yeah, that's part of the narrative in storytelling that interest money that raised that money is things dad could do for his kids, his grandkids and others. And it would make him feel good, it would help on that economic side. But the point too is that in fact, by putting up a reasonable number, you actually increase your chances of getting a defense verdict in a case that you have strong defensibility issues on. And the reason is trials are all about credibility. The credibility of the plaintiff, the credibility of their attorney, the credibility of the defense witnesses and the credibility of their attorney. And if a plaintiff gets up there and asks for $10 million and then you teach the jury that that's an unreasonable offer or response and that, you know, realistically, if there were liability, it would be, you know, $500,000.

What then happens is the jury and the plaintiff and their experts who set up those big numbers on damages lose credibility. And when they lose credibility on damages, they also lose credibility on standard of care and on causation. And so, and the jury, we tell the jury early on, the judge is going to tell you we have to talk about damages even if we think you absolutely shouldn't receive them. And in this case, we don't think there ought to be any damages. But we're told by the judge we have to do it in case there's a difference in terms of verdict. But just take a look at the numbers they show and it'll show to you the exaggeration that comes about in damages. And if there's that kind of exaggeration about the money, don't you think there's that kind of exaggeration about the facts?

And that's why we believe we can argue those issues very effectively. That a jury won't hold it against you, that you put up a number in fact more likely to decide for you if you met the standard of care.

Tara Clayton

I think that's incredibly well said of how really it goes against the credibility of the plaintiff's attorney. I mean, how many times do we see juries make decisions based on, well, I didn't trust what that person said about x. So I kind

of, you know, didn't trust him about anything else. And I think portraying it as, look, they're over exaggerating here. How do you know they're not over exaggerating everywhere else? So I think that's incredibly well said, John.

Okay, guys. Well, I've got a closing question for both of you. And Drew, you kind of already answered it a little bit, although I don't know that it's your answer. You talked about regulatory changes that would be helpful to address kind of regulatory impact coming into litigation. But here's my question.

If you could change one thing about how our legal or regulatory systems respond to accusations in senior care based on what you've seen and know, what would it be?

Drew Graham

Yeah, I think I did mention it before, and it's a great question. I think the regulatory agencies across the country have the opportunity to limit either completely or in part the use of their regulatory findings and civil litigation and let the civil justice system work through very well founded and very thoughtful ways of resolving disputes through expert testimony and other things in cases like this, and create a distinction between licensure findings, regulatory findings, and ultimately what we're factifying that asking a jury to do. I think it's created a tremendous complication that's made it difficult for our judges and our juries and frankly also for our regulators to do their jobs without confusion or manipulation by the plaintiff bar.

John Hall Jr.

No, I agree. Exactly. This is ripe for legislative limitation. Nobody intended the regulatory system to be a plaintiff's tool in a lawsuit. And in fact, most judges won't let use it as a defense tool on those issues. So we need some fairness to come out of that, and the only way is for a legislative change.

Tara Clayton

Well, I know I could honestly talk to you guys probably for a week about just this topic. It's like I said, it's a very meaty topic, but you guys are seeing a lot of stuff and I think creatively coming up with new ways to change the narrative of how we're defending senior care claims, which is desperately needed. So to me, this was very insightful and thank you both. I know you're both incredibly busy, so I really appreciate both of you taking time out of your day to join me and talking about this topic.

Drew Graham

Thanks, Tara. Thanks for all you're doing for the industry as well. You're a leader in leading trade organizations and other things, so we're in awe of what you're doing and appreciate the chance to talk.

John Hall Jr.

Yeah, it's going to take a team to fight back against the greed that the plaintiffs world has succumbed to and appreciate all that you and your folks do for that and everybody, in the group. So it's one of those things. We're just going to keep swinging away and sooner or later we're going to prevail.

Tara Clayton

Absolutely. I love that. To our listeners. I hope this was as insightful for you as it was for me. And hopefully pulled some new nuggets of information from the conversation. If you have any questions about the book that John and Drew co-authored or anything about the topic that we talked about today, you can find John and Drew at their website, hallboothsmith.com. Be sure you subscribe so you don't miss any future episodes. You can find us on your favorite podcast platforms, including Apple and Spotify. And as always, I would love to hear from you. If you have any topics you'd like to have addressed on the podcast, please email us your ideas at the email address provided in the Show Notes. Thank you all so much for tuning in and I hope you'll join us for our next Risk Insight.