

Gregory v. Cott, 2014 Cal. LEXIS 5460 (August 4, 2014).

In-home caregivers for Alzheimer's patients may not sue their clients for injuries caused by the risks they were retained to confront.

FACTS AND PROCEDURAL POSTURE

Plaintiff Carolyn Gregory was assigned to provide in-home health care services to 85-year-old Defendant Lorraine Cott, who was suffering from Alzheimer's disease. Gregory was trained to care for Alzheimer's patients and knew they could be violent. Additionally, Lorraine's husband and Co-Defendant, Bernard, told Gregory that Lorraine was combative and would bite, kick, scratch, and flail. Gregory's duties included supervising, bathing, dressing, transporting, and housekeeping. In September 2008, Gregory was washing dishes while Lorraine sat at the kitchen table and Bernard was not home. Gregory was washing a large knife when Lorraine approached Gregory from behind and reached toward the sink. Gregory attempted to restrain Lorraine and dropped the knife, which struck Gregory's wrist causing her to lose feeling in several fingers and recurring pain. Gregory received workers' compensation.

The Trial Court granted Defendants' motion for summary judgment and a divided Court of Appeal affirmed on the ground Plaintiff's claims were barred by the primary assumption of the risk doctrine.

DISCUSSION

The Cotts argued application of primary assumption of the risk, an exception to the general duty of care. The Court recognized the primary assumption of risk doctrine governs claims arising from inherent occupational hazards and held that the doctrine applies in situations in which it is appropriate to find that the defendant owes no duty of care. Whether a duty of care is owed is determined by public policy considerations viewed in light of the nature of the activity and the relationship of the parties to the activity. Examples of when it has been held to be appropriate to find the defendant owes no duty include the "firefighter's rule" [precluding firefighters and police officers from suing members of the public for the conduct that makes their employment necessary, and the veterinarian's rule [Veterinarians and their assistants assume the risk of being bitten during treatment]].

The Court found the case most closely on point to be *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1770-1772, which held that a certified nurse's aide being struck and injured by an Alzheimer's patient while moving the patient from a chair to a bed constituted primary assumption of the risk. The *Herrle* Court observed the nature of the activity was the protection of the patient from doing harm to herself or others and the particular risk of harm that caused the injury was the very risk plaintiff and her employer were hired to prevent.

Plaintiff argued assumption of the risk did not apply pursuant to *Civil Code § 41*, which makes incompetent people civilly liable for their wrongs. The Court rejected this argument on the grounds that *Civil Code § 41* is intended to place an incompetent person in the same posture as a competent person, not a legally worse position. Since the primary assumption of risk defense is available to competent individuals, it must also be made available to incompetent individuals.

Plaintiff argued *Herrle* should not be applied to in-home caregivers as the home environment lacks specialized equipment and trained health care professionals found in institutions. She also pointed out that she was not engaged in patient care at the time of her injury, but housekeeping. For these reasons, Plaintiff believed her claim should have been analyzed under secondary assumption of risk, which is predicated on the existence of a duty. The Court found Plaintiff's attempts to distinguish home health care workers from those in institutions to be unpersuasive since in both cases, if the patient injured the caregiver through combative behavior symptomatic of Alzheimer's disease, the "particular risk of harm that caused the injury" was among the risks the caregiver was hired to prevent. The Court pointed out Plaintiff was hired as an in-home caregiver as opposed to a housekeeper and also rejected Gregory's argument that in-home caregivers face higher risks and have fewer risk management tools than institutional caregivers as entirely speculative.

The unions representing home health care workers argued Plaintiff's low rate of pay made it inequitable to apply the primary assumption of risk doctrine, but the Court held this factor was not determinative.

Plaintiff also argued Defendant Bernard Cott should have been held liable for failing to install restraining devices and mirrors to facilitate observation and prevent Lorraine from catching others by surprise. The Court noted the limitation to the primary assumption of risk doctrine only applied if defendant *increased* the risk of injury. Plaintiff further argued Lorraine's intentional conduct was not within the scope of primary assumption of risk, but the Court found violent conduct by Alzheimer's patients is an inherent aspect of the caregiving function, and therefore within the scope of the assumed risk.

The Court, *sua sponte*, examined whether liability should have been imposed to encourage institutionalization of dangerously demented patients with violent tendencies, but decided the incentive to institutionalize was not removed and institutionalization was not an effective solution of injury to caregivers. The Supreme Court found there was actually a public policy to prevent the elderly from being institutionalized prematurely and inappropriately and that workers' compensation was the appropriate means of compensation for hired caregivers for injuries caused by Alzheimer's patients.

CONCLUSION

The Court upheld a ruling that primary assumption of risk barred Plaintiff in-home caregiver's recovery from injuries received by the violent behavior of the Alzheimer's patient she was retained to provide care for because the particular risk of harm that caused the injury was what she was hired to prevent, as well as a public policy interest in preventing the elderly from being institutionalized prematurely and inappropriately.