State: Calif.

Supreme Court Says In-Home Caregiver Limited to Comp Recovery for Injuries from Patient

August 5, 2014

A divided California Supreme Court on Monday ruled that the workers' compensation system provides the appropriate means of recovery for in-home health care workers who are injured by Alzheimer's patients.

The majority opinion in *Gregory v. Cott* expressly recognizes that because agitation and physical aggression are common late-stage symptoms of the disease, injuries to caregivers are not unusual. "We encourage the Legislature to focus its attention on the problems associated with Alzheimer's caregiving," the majority said. As the number of Californians afflicted with this disease can only be expected to grow in coming years, the majority suggested that the idea of "enhanced insurance benefits for caregivers exposed to the risk of injury" was "worthy of legislative investigation." Nonetheless, the majority reasoned that the risk of injury by a patient is part of the job that professional caregivers such as plaintiff Carolyn Gregory voluntarily take on. Accordingly, the majority said her employer was liable to her under the state's workers' compensation scheme, but the family that had retained her services through her employer could not be held liable in tort. Bernard Cott contracted with Gregory's employer in 2005 to get in-home care for his 85-year-old wife, Lorraine.

Gregory had training in how to care for Alzheimer's patients, and had done so in other assignments for her employer. After her employer sent her to care for Lorraine, Bernard warned her that Lorraine was combative and would bite, kick, scratch and flail.

Gregory's job duties included supervising, bathing, dressing and transporting Lorraine, as well as some light housekeeping at the home.

In September 2008, as Gregory was washing dishes in the kitchen sink, Lorraine approached her from behind and began to reach into the sink. Gregory dropped the knife she was washing and moved to restrain Lorraine. As she did so, the knife struck her wrist.

The knife severed vital nerves and tendons, causing Gregory to lose the use of her left thumb and two fingers.

Gregory's employer paid her workers' compensation benefits for her injuries, but she also sought to sue Lorraine and Bernard in tort, asserting claims for negligence and premises liability.

Lorraine and Bernard moved to dismiss her claim, arguing that it was barred by the assumption-of risk doctrine.

As applied in a workplace context, this doctrine bars a worker from suing a defendant for an injury that arose from the very condition or hazard that the defendant had hired the worker to remedy or confront.

The "firefighter's rule," which precludes firefighters and police officers from suing members of the public for the conduct that makes their employment necessary, is a variant of the assumption-of-risk doctrine. The "veterinarian's rule," which bars those who work with animals from suing if they are bitten by dogs during treatment, is another application of the assumption-of-risk doctrine.

Los Angeles Superior Court Judge Gerald Rosenberg granted summary judgment in favor of Lorraine and Bernard, finding the doctrine applicable to Gregory's work with Alzheimer's patients. A divided 2nd District Court of Appeal panel upheld Rosenberg's ruling last January.

Supreme Court Chief Justice Tani Cantil-Sakauye and Justices Carol Corrigan, Marvin Baxter and Ming Chin on Monday affirmed the 2nd DCA.

Corrigan, writing for the Supreme Court majority, said that Gregory's situation was akin to the scenario that the court confronted in a 1996 case called Herrle v. Estate of Marshall.
In the Herrle case, the California Supreme Court joined the Supreme Courts of Florida and Wisconsin in holding that institutionalized mental patients are not liable for injuries inflicted on their caretakers.

"As the Herrle court recognized, primary assumption of risk in its occupational aspect is readily applicable to the relationship between hired," Corrigan wrote Monday. Thus, as violent behavior is a known symptom of Alzheimer's, Corrigan reasoned that "the risk of violent injury is inherent in the occupation of caring for Alzheimer's patients."

Corrgian rejected the idea that caregivers in private homes face higher risks and should therefore be treated differently than caregivers in institutionalized settings.

However, she cautioned that she was not saying that anyone who helps take care of Alzheimer's patients assumes the risk of injury either.

"The rule we adopt is limited to professional home health care workers who are trained and employed by an agency," Corrigan said. She explained that Bernard had "contracted with an agency that promised to provide him an aide trained to manage his wife's condition," and by doing so, Bernard "paid to be relieved of a duty to protect the aide from the very risks she was retained to encounter."

Justice Goodwin Liu wrote separately, saying he was reluctant to push cases such as Gregory's into the tort system because that would pit "low-wage workers and ordinary families who are poorly positioned to mitigate risks or absorb the costs of injuries" against each other.

He said he thought the employers of in-home health care workers were in the best position to take on the risk of injury to workers. "As repeat players who hold themselves out as qualified and competent

care providers, the agencies are far better positioned than their workers or their clients to assess risks, to devise reasonable safety measures, to provide proper training to caregivers, and to determine whether in-home care is appropriate for a patient in the first instance and on an ongoing basis as a disease progresses," Liu opined.

Dissenting 2nd DCA Justice Laurence D. Rubin, sitting on the Supreme Court by appointment took issue with both Corrgan and Liu's assumption that the workers‘ compensation system would mitigate the consequences of subjecting Alzheimer‘s caregivers to primary assumption of risk.

Rubin said he could envision multiple situations in which a caregiver will not be covered by workers' compensation and warned that having the assumption-of-risk doctrine bar any recovery for injuries suffered by such workers would leave them without any remedy.

For example, had Gregory been an independent contractor she would not have been entitled to workers' compensation benefits, Rubin noted. The same would hold true if the employer didn't carry comp insurance, or if the worker had been hired directly by the patient's family, he said.

"For these reasons, I do not believe that the potential for workers' compensation benefits provides doctrinal support for the majority's extension of primary assumption of risk to a new class of workers," Rubin concluded.

Supreme Court Justice Kathryn Werdegar joined Rubin's dissent.

Los Angeles appellate attorney Steven Renick of Manning & Kass, Ellrod, Ramirez, Trester said he has been tracking the Gregory case because he was hoping the court was going to "clarify where's the line" between a risk that's inherent to an activity and one that's not.

This issue is "an ongoing fight in the civil arena," he said, adding that he thought the Gregory case may bring the fight into the comp arena too. "Things could get really interesting if we start having conflicting rulings in these areas," Renick added.

As the law stands right now, he said, an "inherent risk" of an activity is "what you can convince a court it is." Two years ago, Renick convinced the California Supreme Court that the risk of injury from a collision in a bumper car at an amusement park was an inherent risk of such a ride.

That case, *Nalwa v. Cedar Fair*, he said, brought the idea of "inherent risk" out of just being a concept that applied to sporting activities and expanded it to other recreational activities.
Since the California Supreme Court "has been expanding the scope of the primary assumption doctrine ever since it created it back in the 1990s," Renick said he was not surprised to see the court find it applicable in Gregory's case, but he was surprised to see the court apply it in such a narrow fashion.

Renick said he had been expecting the Gregory case to establish that the inherent risk doctrine could apply to any activity, but the court instead limited its ruling to saying that it applies only to workers whose employment with an in-home health care provider agency places them in contact with Alzheimer's patients.

The court has been "very fact-specific" in all of its rulings on primary assumption, he observed. "They have really been going activity by activity, and not setting up any sort of broad rules."

If Monday's decision is treated as creating a "bright-line" as to what dangers are inherent in caring for Alzheimer's patients, Renick suggested that "can be helpful" to employers and insurance carriers. While employers and carriers may not be happy about having injuries from such risks be compensable, Renick said, "at least we'd know."

He added that he didn't think the Gregory decision was expanding the potential liability for employers and carriers all that much by saying her injuries were covered by the comp system, so much as it was eliminating the ability of employers and carriers to get contribution from a thirdparty. "If there's no duty to protect (the worker)," Renick said, "it's clear we're on our own."

He said independent contractors are likely to be the most affected by the court's decision. As far as he could tell from the facts in the decision, Renick said, it seemed to him as through Gregory would have been without recourse if she hadn't been covered by the comp system and couldn't sue Lorraine and Bernard.

Renick posited that she could have tried asserting a claim against the agency that sent her to care for Lorraine, but any claim she might be able to raise seemed to him to be "a little thin." Then again, "if there are no other options," Renick said he expected workers would at least try to make some sort of argument.

He also said he wondered if workers' compensation judges who are asked to make findings as to whether an in-home health care worker was an employee or independent contractor would be more likely to find workers were independent contractors so that the workers can get some redress for an on-the-job injury.

In light of the limited avenues of recovery for a worker in Gregory's position, Renick said he "wouldn't at all be surprised" to see the Legislature respond to the Supreme Court's request that it take action on how to improve the safety, training and protection of workers in home caregiving arrangements.

He observed that all of the justices expressed concern with this issue, and all agreed that "something needs to be done," because the risk of harm to such workers "is a very real risk that's out there."