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WHITE PAPER ALERT

Assumption of Risk -
Employment & Long Term Care

CONFIDENTIAL COMMUNICATION NOT FOR DISSEMINATION

Gregory v. Cott (Cal. Ct. App. - Jan. 28, 2013)

*Primary assumption of the risk doesn't just bar claims for sports injuries.
It also bars claims or assault when you are a care giver for someone afflicted with dementia.*

As many of those receiving this are aware this issue has been an ongoing battle. We have repeatedly attacked this issue for Health Care Providers faced with suits by employees, and others, for the actions of patients with dementia. This is the second appellate court decision holding what we have felt was common sense for many years; when you care for someone diagnosed with dementia you may be injured by their actions.

Facts and Analysis

In Gregory the court held an elderly Alzheimer's patient and her husband were not liable for injuries a home health care worker sustained when the patient attacked her. In a 2-1 decision, the court held that the doctrine of primary assumption of risk barred the aide's claims for injuries sustained when the 85 year old tried to grab a knife the caregiver plaintiff was washing. The knife cut Gregory's wrist, severing nerves and tendons, and causing her to lose the use of her left thumb and two fingers.

Mrs. Cott's husband contracted with a home care agency to provide services by an in-home caregiver for his wife, who suffered from Alzheimer's disease for nine years and could not carry on a coherent conversation. Mr. Cott informed the caregiver that his wife was at times combative and engaged in biting, kicking, scratching, and flailing.

The court noted that while, as a general rule, people have a duty to use due care to avoid injury to others, an exception is the doctrine of primary assumption of risk, which bars recovery by a plaintiff to whom the defendant owes no duty of care because of the nature of the activity involved.

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While the main category of primary assumption of risk cases has traditionally been sports and recreational activities, the court explained, another application is found in the employment context and termed the firefighter's rule. The firefighter's rule is based on the public policy that someone injured in the line of duty should be compensated through the worker's compensation system rather than by individual tort recoveries. In the employment context, the doctrine has been applied by California courts to other professions, including lifeguards and veterinarians.

Herrle v. Estate of, Marshall (1996) 45 Cal.App.4th 1761, extended the notion of occupational assumption of risk to persons who care for Alzheimer's patients in an institutional setting. Finding the rationale of *Herrle* applied equally to the facts in this case, the trial court granted summary judgment in favor of the defendants, saying:

"It's unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront."

The appellate court agreed, holding there was no meaningful distinction between undertaking care for an Alzheimer's patient in a convalescent hospital or other care facility and undertaking to care for such a patient in a private residence.

Please contact us with any questions.

[A Copy Of The Opinion Is Available Here.](#)

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