

quist's opinion in *Schall v. Martin*, 467 U.S. 253 (1984):

The juvenile's countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well (citation omitted). But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody [*Schall*, p 253].

Still, the arguments made by the dissent seemed weak in comparison. It is difficult to view age as a subjective or "individualized" characteristic when countless suspects will be the same age as one another, and their age is easily discernible. The assertion that this decision will "open the doors" to the addition of many more such individualized characteristics suffers the same flaws as any slippery-slope argument.

Jailer's Special Duty of Care in Inmate's Suicide Negligence-Based Claims

Himani Ghoge, MD
Fellow in Forensic Psychiatry
Center for Forensic Psychiatry

Melvin Guyer, PhD, JD
Professor of Psychology
Department of Psychiatry
University of Michigan
Ann Arbor, MI

Defendant-Jailer's Special Duty of Care Owed to Inmate Bars Jailer's Use of the Defense of Intervening Proximate Cause or Implied Assumption of Risk in Plaintiff's Claim That Jailer's Negligence Led to the Inmate's Suicide

In *Gregoire v. City of Oak Harbor*, 244 P.3d 924 (Wash. 2010), the Supreme Court of Washington reversed the court of appeals' decision that had affirmed the trial court's verdict that the defendant, although negligent, was not liable for damages related to the inmate-plaintiff's suicide. The supreme court held that the trial judge should not have instructed the jury on assumption of risk, because the jail owes a special, not to be waived duty of care to inmates when they are in the jail's custody. The trial verdict was reversed, and the case was remanded for a new trial.

The issue before the state supreme court was whether the jury instructions were erroneous and whether they led to the jury's being misled concerning the law and thereby being prejudiced against the plaintiff.

Facts of the Case

In December 1995, Edward Gregoire was arrested by State Trooper Harry Nelson on outstanding misdemeanor warrants. Mr. Gregoire was violent during his arrest and transport to jail. On arrival, he momentarily tried to escape, was caught, and was restrained. He reportedly screamed, "Why don't you shoot me?" Eventually he was put in leg restraints and hit to stop him from kicking. He calmed down and was placed in a regular jail cell by himself. His mental and physical condition was not screened by jail officials. He was seen crying within minutes after he was placed in a regular jail cell. Approximately 10 minutes later, he was found hanging from a bed sheet. As soon as the jail officers noticed, they cut him loose and called for help. CPR was performed by paramedics, but he was pronounced dead shortly after getting to the hospital.

In 1998, Ms. Tanya Gregoire, as guardian *ad litem* for Mr. Edward Gregoire's minor child, Brianna Gregoire, brought a suit in the U.S. District Court for the Western District of Washington. She filed claims based on 42 U.S. § 1983, as well as state claims of negligence and wrongful death. The court dismissed all federal claims and did not accept jurisdiction on the remaining state claims.

In 2002, Ms. Gregoire filed suit in the Island County Superior Court for wrongful death, negligence, constitutional violations, and civil rights claims. That court dismissed her state constitutional claims as well as the negligence claims, but agreed to hear the wrongful-death claim. At trial in 2006, the court allowed the city of Oak Harbor (the defendant) to assert the affirmative defenses of assumption of risk and contributory negligence. Over Ms. Gregoire's objection, the jury was instructed on these defenses. The jury found that the city was negligent but was not liable for damages, because its negligence was not the proximate cause of Mr. Gregoire's death. Instead, it found that Mr. Gregoire's own actions were the intervening proximate cause of his death, thus absolving the city of any liability.

Ms. Gregoire appealed to the state court of appeals, arguing that the special relationship between

jailer and inmate creates an affirmative duty of care owed by the city that cannot be delegated to the inmate; thus, the assumption-of-risk defense did not apply. The court of appeals agreed that there was a special relationship, but, noting that Ms. Gregoire had not cited any authority for her claim, affirmed the lower court's jury findings (*Gregoire v. City of Oak Harbor*, No. 58544-4-I (Wash. Ct. App. 2007)).

Ms. Gregoire then petitioned the Supreme Court of Washington for review to determine if the jury instructions were inappropriate and resulted in prejudicial error. The supreme court reversed the court of appeals decision and remanded the case for a new trial.

Ruling and Reasoning

In this case of first impression, the Washington Supreme Court held that jailers have a special relationship with their inmates. The court reasoned that because inmates are deprived of their liberty, it becomes the duty of the jailer to care for their health, safety, and welfare. The court further held that the duty owed is a special affirmative duty to the inmate, one that is nondelegable. This, the court held, bars any assumption-of-risk defense (*Gregoire*, p 927). It noted that there are state and federal requirements that jailers protect inmates' health, welfare, and safety. It noted, too, that state administrative regulations require Washington jails to perform suicide screenings and to use suicide-prevention programs.

The court discussed the doctrine of the assumption of risk and explained its subtypes: express, implied primary, implied unreasonable, and implied reasonable. It noted that assumption of risk that is express or implied primary relieves the defendant of all liability. If allowed and proven in this instance, it would mean that Mr. Gregoire had consented to relieve the jail of its duty to him.

At trial, Oak Harbor was allowed to argue implied primary assumption of risk, and the trial jury was instructed concerning Oak Harbor's claims that Mr. Gregoire was contributorily negligent and had assumed the risk of death when he hanged himself, thus making his own conduct the proximate cause of his death. The supreme court held that these instructions were legally erroneous because they allowed the defendant city to abrogate its nondelegable duty.

The supreme court regarded the question of whether the scope of a jailer's duty of care to an

inmate extends to liability for self-harm inflicted by the inmate as a matter of first impression. In deciding this question in the affirmative, the court turned to several sources. It noted that some other state supreme courts had decided that the special duty of care owed by a caretaker to a detainee could not be delegated to the detainee, citing, for example, *Sauders v. County of Steuben*, 693 N.E.2d 16 (Ind. 1998). The court also cited as analogous precedent two Washington cases: *Christensen v. Royal School Dist. No. 160*, 124 P.3d 283 (Wash. 2005), and *Hunt v. King County*, 481 P.2d 593 (Wash. Ct. App. 1971).

In *Sauders* the Indiana Supreme Court barred the defenses of assumption of risk and contributory negligence in a jail suicide case. In *Hunt*, the appeals court upheld the negligence claim against a hospital for its failure to protect a patient from injuries sustained in an attempted suicide. The *Hunt* court held that there is a duty to safeguard a detained patient from the reasonably foreseeable occurrence of self-harm, whether the self-harm is volitional or negligent. In *Christensen*, a school district's defense of contributory negligence was barred as inappropriate against a 13-year-old student's claim of sexual abuse by her teacher. The *Gregoire* court held that the jury's finding that the city's negligence was not the proximate cause of the inmate's death was likely the result of jury instructions on contributory negligence and assumption of risk. Since these instructions were erroneous, given the jailer's continuing duty to protect, they led to prejudice against the plaintiff.

The dissent, while acknowledging the special relationship between jailer and inmate, argued that there is no absolute duty to protect inmates from self-harm. It stressed that the purpose of incarceration is not to treat or prevent self-inflicted harm and that inmates have a duty of self-care (*Gregoire*, p, 933). Noting each person's duty of self care, the dissent construed suicide as a voluntary, willful choice determined by a moderate intellect that knows the power and the physical effect of the suicidal act. The dissent cited *Webstad v. Stortini*, 924 P.2d 940, 945 (Wash. Ct. App. 1996), which held that the mere existence of the special relationship does not guarantee the safety of the plaintiff. Arguing this, the *Gregoire* dissent cited *Yurkovich v. Rose*, 847 P.2d 925 (Wash. Ct. App. 1993), where a 13-year-old girl was killed while crossing a highway, shortly after exiting a school bus. Although the bus driver had a special relationship and owed a duty and although his negligence created

the risk of harm, the court approved the jury instructions allowing for consideration of the student's contributory negligence.

Discussion

Gregoire is a case of first impression in Washington. The supreme court decided whether an inmate should be held responsible at least partially for his self-injurious behavior and whether that leads to the jailer's being relieved of his duty to the inmate. Although Washington courts have long recognized the special relationship between jailer and inmate, this was the first case in the state to deal with the responsibility of the inmate as against that of the jailer when the inmate commits suicide. The majority reached its holding by citing previous cases such as *Hunt* and *Christensen* where, owing to the special relationship, the defense of contributory negligence was not allowed. Also, the majority cited cases from other states, including Oregon and Minnesota, where the courts ruled that contributory negligence could not be used as a defense in jail-related attempted or completed suicides. As in the holdings of other courts, the *Gregoire* opinion points out the logical oddity of a defense that acknowledges that jailers have a duty of care to protect inmates, but then argues that that duty should be abrogated when jailers fail to protect inmates from their own deliberate or negligent acts. The opinion cites the 2007 update of the World Health Organization paper, "Preventing Suicides in Jails and Prisons" (http://whqlibdoc.who.int/publications/2007/9789241595506_eng.pdf), which states that suicide is often the single most common cause of death in correctional settings. The opinion states that jail suicides are frequent and thus are eminently foreseeable. This foreseeability makes for the case that liability for an inmate's suicide rests with the jailer.

Perhaps implicit in the reasoning in this case was the question of whether a mentally ill individual should be legally responsible for his self-injurious actions. The facts of the case point to Mr. *Gregoire's* fragile state of mind at the time of his arrest and his demonstrated behavior, suggestive of an individual with a mental illness. The question is whether society should hold a person with a mental illness responsible for his actions, albeit partially, if that person most likely lacks the capacity to act deliberately and in a rational manner while undertaking his suicide.

The differing views of the majority and dissent in *Gregoire* directly relate to fundamentally differing views concerning the apportionment of risk between state actors and private citizens. The majority apportioned continuing and primary risk to the state when it assumes some responsibility for vulnerable individuals. Thus, in the majority view it was the immaturity of the 13-year-old plaintiff (*Christensen*), the mental disability of the psychiatric patient (*Hunt*), and the inmate's loss of liberty in *Gregoire* that immunized each of them against the duty of self-care, thus defeating the defense of assumption of risk. For the dissent, the view was that individual responsibility should be preserved and governmental liability should be tempered by each person's continuing duty of self-care.

Conflicting Expert Opinions Concerning Insanity

Josh Wool, MD
Resident in Psychiatry

Philip Saragoza, MD
Michigan Center for Forensic Psychiatry

Adjunct Clinical Assistant Professor
University of Michigan
Ann Arbor, MI

The Failure of Defense Counsel to Obtain a Third Expert Opinion Concerning an Insanity Defense Claim in Which Two Experts Disagree Does Not Constitute Inadequate Representation by Defense Counsel: Opposing Opinions Between Two Experts Is Not "a Stalemate" Requiring Appointment of a Third Expert.

In the case of *State v. McGhee*, 787 N.W.2d 700 (Neb. 2010), Eric McGhee appealed his convictions for first-degree murder and use of a weapon to commit a felony. He filed a petition for postconviction relief and based his appeal on ineffective assistance of counsel. Mr. McGhee's primary complaint was that his attorney did not acquire a third expert opinion regarding his competency to stand trial and his defense of legal insanity in the face of conflicting expert opinions. He contended that a third expert opinion was necessary to break the "stalemate" between the two opposing experts. The district court denied his appeal without an evidentiary hearing, and he then appealed to the Nebraska Supreme Court.