RISK MANAGEMENT AND TRENDS IN THE FITNESS INDUSTRY: WHAT AUSTRALIANS CAN LEARN FROM THE U.S. EXPERIENCE

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Is Your Business At Risk?
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FOUR MAJOR TOPICS

#1 -- Basic Overview of Negligence
#2 -- Causes of Injuries and Injury Data
#3 -- Areas that Create Legal Liability Exposures and Negligence Cases in the U.S.
#4 -- Building a Comprehensive Risk Management (RM) Plan
TOPIC #1: BASIC OVERVIEW OF NEGLIGENCE
WHAT IS NEGLIGENCE?

Definition

Negligence is “failing to do something” that a reasonable, prudent professional would have done or “doing something” that a reasonable, prudent professional would not have done, given the same or similar circumstances (2).

Negligence is “careless” conduct by either

OMISSION or COMMISSION

Failure to Perform

Improper Performance
Fault Basis of Tort Liability (2)

Tort Liability: Three Levels of Fault

- Intentional
  Harm due to intentional conduct

- Negligence
  Harm due to careless (or negligent) conduct

- Strict Liability
  Harm due to "no fault" conduct (no intent or negligence)

- Gross Negligence
  (Reckless Conduct)

- Ordinary Negligence
FOUR ELEMENTS OF NEGLIGENCE: PLAINTIFF HAS THE BURDEN OF PROOF (2)

Duty

What duty (standard of care) did the defendant owe to the plaintiff?

Breach of Duty

Did the defendant breach his/her duty?

Causation

Did the breach of duty "cause" the harm?

Damages

What damages will the defendant owe to the plaintiff if the breach of duty caused the harm?

Damages – plaintiff seeks monetary (compensatory) damages:
Economic (e.g., medical expenses, lost wages)
Non-economic (e.g., pain and suffering)
COURTS DETERMINE “DUTY” OR THE STANDARD OF CARE

Various “Standards” May be Used by the Courts to Determine the Duty the Defendant(s) Owed to the Plaintiff

• **Premise Liability Standard** – Duty toward “invitees” that requires the defendant to inspect the facility/equipment for any dangers/risks and to take action, e.g., remove or repair the danger/risk or warn of the danger/risk

• **Reasonable Person Standard** -- Duty is determined by weighing two factors: (a) the burden of the defendant to take precautions to help prevent the risks, and (b) the magnitude (probability and severity) of the risks

• **Professional Standard** – Duty is determined by “professional” practices given the situation, e.g., safety standards/guidelines published by government agencies and professional (or independent) organizations and/or expert testimony
POTENTIAL LEGAL IMPACT OF PUBLISHED SAFETY STANDARDS OF PRACTICE

Published Safety Standards of Practice →

Introduced in Court via Expert Testimony →

Provide Evidence in Determining Duty →

Defendant’s Conduct Inconsistent with Standards of Practice → (Breach of Duty)

Defendant’s Conduct Consistent with Standards of Practice → (No Breach of Duty)

Referring to Codes of Practice, Fitness Australia states:

“Fitness professionals can expect that their compliance with these standards and other industry guidelines set by Fitness Australia will be examined if any breach of duty is alleged.”

According to Van der Smissen (8), the professional standard is measured against the standard of care of a qualified professional for that situation. “For that situation” is determined by the following:

- **Nature of the activity** – the professional must be aware of the skills and abilities the participant needs to participate “safely” in the activity.
- **Type of participants** – the professional must be aware of individual factors of the participant, e.g., health conditions that impose increased risks and how to minimize those risks.
- **Environmental conditions** – the professional must be aware of any conditions, e.g., heat, humidity, slippery floor surfaces, and how to minimize those risks.
“GENERAL” LEGAL DUTY OF FITNESS PROFESSIONALS

To provide “reasonably safe” programs and facilities for their participants.

Reasonably safe involves taking precautions (developing and implementing risk management strategies) to help prevent “foreseeable” health and injury risks:

- **Health Risks** -- Medical conditions and/or risk factors that can lead to problems such as cardiac arrest, stroke, or an insulin reaction

- **Injury Risks** -- Conditions or situations that can lead to problems such as back injury, fractured bone, or cut/abrasion that causes bleeding (2)
TOPIC #2: CAUSES OF INJURIES AND INJURY DATA
CAUSES OF INJURIES – FROM A LEGAL PERSPECTIVE

Inherent Risks -- no one’s fault; they just happen (inseparable from the activity)

Ordinary Negligence -- the fault of the facility/personnel (e.g., failure to meet the standard of care due to “careless” conduct – omission or commission) and/or the fault of the participant (e.g., misuse of exercise equipment)

Gross Negligence – also referred to as willful/wanton conduct or reckless conduct (defendant has prior knowledge of risk and does not take steps to correct it; risk is clearly foreseeable)

Product Defects/Product Liability -- the fault of the manufacturer due to some type of defect in the product, e.g., design, manufacturing, or warning defect
## Types of Injuries Incurred by Plaintiffs in Negligence Lawsuits

<table>
<thead>
<tr>
<th>Type of Injury</th>
<th>Negligence Lawsuit</th>
</tr>
</thead>
<tbody>
<tr>
<td>2) Fractured ankle requiring surgical insertion of pins</td>
<td>Santana v. Women’s Workout and Weight Loss Centers, Inc.</td>
</tr>
<tr>
<td>3) Acute renal failure due to rhabdomyolysis</td>
<td>Guthrie v. Crouser</td>
</tr>
<tr>
<td>4) Serious neck injury requiring five-level fusion of cervical spine</td>
<td>Sanford v. Vision Quest Sport and Fitness</td>
</tr>
<tr>
<td>5) Severe head injury resulting in death</td>
<td>Xu v. Gay</td>
</tr>
<tr>
<td>6) Fractured ankle and crushed foot</td>
<td>Thomas v. Sport City, Inc.</td>
</tr>
<tr>
<td>7) Serious and permanent injuries to mouth and lips</td>
<td>Alack v. Vic Tanny International of Missouri, Inc.</td>
</tr>
<tr>
<td>8) Heart attack resulting in death</td>
<td>Hicks v. Bally Total Fitness Corp</td>
</tr>
</tbody>
</table>
### INJURY DATA:
**U.S. CONSUMER PRODUCT SAFETY COMMISSION**
**NATIONAL ELECTRONIC INJURY SURVEILLANCE SYSTEM (NEISS)**

<table>
<thead>
<tr>
<th>Type of Injury</th>
<th>Year</th>
<th>Total Number of Injuries*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exercise (includes activities without equipment, e.g., aerobics, jogging)</td>
<td>2009</td>
<td>210,360</td>
</tr>
<tr>
<td></td>
<td>2008</td>
<td>173,555</td>
</tr>
<tr>
<td></td>
<td>2007</td>
<td>149,080</td>
</tr>
<tr>
<td></td>
<td></td>
<td>41%↑</td>
</tr>
<tr>
<td>Weightlifting equipment</td>
<td>2009</td>
<td>86,307</td>
</tr>
<tr>
<td></td>
<td>2008</td>
<td>79,027</td>
</tr>
<tr>
<td></td>
<td>2007</td>
<td>72,369</td>
</tr>
<tr>
<td></td>
<td></td>
<td>19%↑</td>
</tr>
<tr>
<td>Exercise equipment (excludes weightlifting and gymnastics equipment)</td>
<td>2009</td>
<td>55,578</td>
</tr>
<tr>
<td></td>
<td>2008</td>
<td>50,869</td>
</tr>
<tr>
<td></td>
<td>2007</td>
<td>45,351</td>
</tr>
<tr>
<td></td>
<td></td>
<td>23%↑</td>
</tr>
</tbody>
</table>

*Reflect data obtained from U.S. hospital emergency depts. through NEISS. Retrieved October 8, 2010 from [www.cpsc.gov/LIBRARY/neiss.html](http://www.cpsc.gov/LIBRARY/neiss.html)*
INJURY DATA:
U.S. CONSUMER PRODUCT SAFETY COMMISSION
NATIONAL ELECTRONIC INJURY SURVEILLANCE SYSTEM (NEISS)

Study published in *The American Journal of Sports Medicine* in 2010 (5)

- Estimated 970,801 weight training-related injuries from 1990-2007
- Most common areas: Upper trunk (25.3%) and lower trunk (19.7%)
- Most common injury: Sprains/strains (46.1%)
- Most common mechanism: Dropping weights on the person (65.5%)
- Most occurred with free weights (90.4%)

http://www.youtube.com/watch?v=jWsIqKO6mAk
HEALTH CLUB LIABILITY CLAIMS – 12 YEAR STUDY (1995-2007)
ASSOCIATION INSURANCE GROUP (2)

<table>
<thead>
<tr>
<th>Type of Claim</th>
<th>Number of Claims</th>
<th>Average Claim Value*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member Malfunction</td>
<td>388</td>
<td>$8,902</td>
</tr>
<tr>
<td>Equipment Malfunction</td>
<td>339</td>
<td>$17,063</td>
</tr>
<tr>
<td>Slip and fall -- wet areas</td>
<td>252</td>
<td>$12,478</td>
</tr>
<tr>
<td>Treadmills</td>
<td>233</td>
<td>$8,933</td>
</tr>
<tr>
<td>Aerobic classes</td>
<td>121</td>
<td>$8,149</td>
</tr>
<tr>
<td>Spinning Bike</td>
<td>60</td>
<td>$12,682</td>
</tr>
</tbody>
</table>

* Claim value includes defense costs, expenses, and reserves
TOPIC #3: AREAS THAT CREATE LEGAL LIABILITY EXPOSURES AND NEGLIGENCE CASES IN THE U.S.

Legal Liability Exposures: Situations that create the probability of an injury to occur (e.g., improper instruction and/or supervision) or increase the severity of an injury when it occurs (e.g., failure to carry out proper emergency procedures)
LEGAL LIABILITY EXPOSURES - 7 AREAS

1. Employment Issues
2. Pre-Activity Health Screening
3. Health/Fitness Assessment & Prescription
4. Instruction & Supervision
5. Exercise Equipment
6. Facility Issues
7. Emergency Action Plan
EXAMPLES OF U.S. NEGLIGENCE LAWSUITS

First: Understanding Common Legal Defenses

A) Assumption of Risk (A/R) – an effective defense if the plaintiff knew, understood, and appreciated the “inherent risks” and voluntarily assumed them (injury was due to inherent risks, not negligence)

B) Waiver (a contract signed by a participant that contains exculpatory language absolving the defendants of their own negligence) – an effective defense if the waiver is enforceable, i.e., written/administered properly and not against public policy

Second: Understanding Summary Judgment -- a legal procedure in which the party that files the motion for summary judgment argues there are no real disputes as to the facts and that applicable case law requires they be awarded judgment

For example, if a plaintiff signed a waiver, the defendant can file a motion for summary judgment requesting the case be dismissed (does not go to trial).
Seigneur v. National Fitness Institute (NFI)
While performing a lift on an upper torso machine (set at 90 pounds by an NFI instructor conducting an initial fitness evaluation), the plaintiff (Seigneur) felt a tearing sensation in her right shoulder
- She reported this to the instructor who did not seek medical attention, but instead, had her proceed to the next machine.

Plaintiff’s Negligence Claims:
- **Negligent hiring** -- NFI hired an instructor who lacked sufficient training, experience, certification, and/or other qualifications even though it promoted itself as employing “degree, certified fitness…specialists”
- **Negligent instruction** -- NFI instructor was negligent in having her lift 90 pounds on the upper torso machine given her health/fitness history and directing her to continue, despite her complaint of injury.

Defendant’s Defense: Waiver

Court’s Ruling: Against the plaintiff -- The exculpatory language in the waiver was valid and protected the defendants from their own negligence.
Additional cases:

*Jessica H.* -- negligent hiring, supervision, and retention issues

- Plaintiff claimed her Personal Fitness Trainer (PFT) sexually assaulted and raped her.
- Plaintiff asserts that the club negligently supervised the PFT and negligently hired and retained him, but she did not report claims until after he was fired.
- She is unable to prove negligence because the club had no notice of foreseeability of such incidents.

RM Strategies?

*York Insurance Company* -- liability insurance policy issue

- Plaintiff claimed that her injury was due to negligent instruction.
- Insurance policy did not cover negligent conduct of employees due to an exclusion clause in the policy stating it did not apply to “bodily injury...arising out of...advice or instruction relating to physical fitness.”

RM Strategies?
Rostai v. Neste Enterprises (dba Gold’s Gym)
During his first personal fitness training session, Rostai (46 years old, overweight and inactive) allegedly suffered a heart attack toward the end of his 60-minute session.

Plaintiff’s Negligence Claims:
The defendants:
• Failed to assess his health (no screening) and physical condition (no fitness assessment), in particular, screen for his cardiac risk factors
• Aggressively challenged him to perform beyond his level of physical ability and fitness
• Denied his several requests for a break during the session

Defendant’s Defense:  Assumption of Risk

Court’s Ruling: Against the plaintiff -- Although the court acknowledged the trainer was negligent, there was no intentional or reckless conduct, and therefore the plaintiff assumed the risks.

NOTE: The assumption of risk defense is usually effective for injuries due to inherent risks but not negligence.
Additional Case: *Covenant Health System*

At a community heart screening event sponsored by a hospital, the plaintiff falls 2 minutes into a 3-minute step test (wrist is shattered) and claims that Covenant failed to have anyone available to:

1. observe/supervise her during the test
2. stop the test when she became fatigued
3. be close enough to prevent (or break) her fall

**NOTE:** The main issue in this case was whether or not the plaintiffs should have filed their claim as a “health care liability claim” versus an “ordinary liability claim” and the court ruled that Covenant’s failures breached the standard of care applicable to health care providers as established by *ACSM’s Guidelines for Exercise Testing and Prescription.*

RM Strategies?
Examples -- U.S. Negligence Lawsuits
#3 – Health/Fitness Prescription

**Capati v. Crunch Fitness International, et al.**
The personal trainer of the decedent, Marie Anne Capati (age 37), recommended that she take a variety of over-the-counter nutritional and dietary supplements including some that contained ephedra. The client was also taking prescribed medications for hypertension. While exercising at the Club, she became ill, lost consciousness and later died at the hospital of a brain hemorrhage (stroke).

**The Decedent’s Family Filed a Wrongful Death Lawsuit:**
- Seeking $320 million in damages claiming the trainer
  (1) did not advise Capati of the negative health consequences of certain supplements while on antihypertensive medications
  (2) did not possess qualifications for personal training

**Case was “settled” for over $4 million**
- The trainer and club* were liable for $1.75 million
- Vitamin Shoppe Industries, Inc. (and other defendants) were liable for over $2 million

*Great case to demonstrate *respondeat superior* -- a legal principle in which employers can be held liable for the negligent acts of their employees (a form of strict liability under tort).
Additional case – Makris
• While using the leg press during her first personal training session, the plaintiff (Makris) informed her trainer that she felt a sharp pain in her neck that radiated down her arm – the trainer told her the pain was due to upper body weakness.
• Makris experiences the same pain during subsequent training sessions when using the leg press and believes the trainer who told her that the pain would subside as she became stronger. (Pain was actually due to 3 herniated cervical disks)

RM Strategies? Scope of Practice Issues in Capati and Makris
• Practice within your own level of credentials -- education, experience, etc. e.g., do not design an exercise program for someone with medical conditions if you do not understand the implications the conditions may have with exercise; Obtain limitations and contraindications from participant’s physician (physician clearance)
• Do not practice medicine (or some other licensed profession such as dietetics) – do not diagnose and/or treat
• Respond properly – distinguish pain associated with an injury/medical condition and the pain/discomfort that is normal with exercise
• Provide “general” information regarding nutrition and supplements vs. “individualized” advice
Thomas v. Sport City, Inc.
Thomas was injured while using a hack squat machine at the defendant’s facility – Sport City. He thought he had properly engaged the hook to secure the weights; however he did not and the rack of weights (180 lbs) fell fracturing his ankle and crushing his foot.

**Plaintiff's Negligence Claims:**
- Sport City failed to warn, supervise, and instruct him on the proper use of the machine
- Capp’s Welding (manufacturer of the machine) was liable for a design defect
- Trial court assigned comparative fault (30% to the plaintiff and 35% each to Sport City and Capp’s Welding) and the defendants appeal

**Appellate Court’s Ruling:** Against the plaintiff -- Thomas was an experienced user of the machine (if Sport City breached its duty, that was not the “cause” of the injury) and he was unable to prove there was a design defect, but the court stated:

> “members of health clubs are owed a duty of reasonable care to protect them from injury on the premises” and “this duty includes a general responsibility to ensure that their members know how to use gym equipment” and that facilities have a duty to instruct their participants on the proper use of exercise equipment, warn them of any dangers/risks, and supervise them properly.

Great case to demonstrate the element of causation
Examples -- U.S. Negligence Lawsuits
#4 – Instruction and Supervision – Personal Trainers

**Corrigan v. Musclemakers, Inc.**
- Personal fitness trainer (PFT) placed his client on a treadmill (TM) at the end of first training session and set it at 3.5 mph. He provided her little or no instruction on its use and then left her unattended.
  - She began to drift back on the treadmill, tried to walk faster but was thrown off the treadmill fracturing her ankle
  - Plaintiff was 49 years old and was a “novice” – she had never patronized a fitness facility or gym of this type and had never been on a treadmill.

**Plaintiff's Negligence Claims:**
- PFT failed to instruct her on how to properly use the TM
- PFT failed to properly supervise her while on the TM
Defendant’s Defense: Assumption of Risk (exercising on the TM was an “athletic” or sport activity)

Court’s Ruling: For the plaintiff

• “Primary assumption of the risk may be applied in cases where there is an elevated risk of danger, typically in sporting and recreational events” – but the fitness activity that the plaintiff was engaged in was not a sporting event.
• The plaintiff was a novice and thus did not fully understand and appreciate the risks; the defendant did not carry out its duty to exercise care toward the plaintiff (i.e., negligent instruction and supervision).
• The defendant did not follow the operator’s manual for the machine that states individuals should understand its operation before using it.

http://www.youtube.com/watch?v=S4XFvEgeU&feature=related
Proffitt v Global Fitness Holdings, LLC et al.
The personal fitness trainer, in the first session with Proffitt, had him perform numerous bouts of strenuous exercises (several sets of squats to the point of repeated muscle fatigue) and directed him to continue the exercises even after sign/symptoms of exhaustion and requests by Proffitt to stop. Proffitt experienced extreme pain/fatigue after the workout and noticed his urine was dark brown -- he was diagnosed with Rhabdomyolisus and hospitalized for 8 days.

Plaintiff's Negligence Claims -- the Personal Trainer Failed To:
• Assess Proffitt's health/fitness status
• Provide a safe exercise program designed for him
• Respond to his complaints of fatigue during the workout

Case is Pending – recently filed

Exertional Rhabdo:
Damage to skeletal muscle through high intensity or unaccustomed exercise – caused by a breakdown of muscle fibers that leads to the release of myoglobin into the bloodstream. Myoglobin is then filtered out of the body by the kidneys which can lead to kidney damage/renal failure.
Stelluti v. Casapenn Enterprises, LLC

In her first spinning class, when Stelluti rose to a standing position, the handlebars dislodged from the bike and she fell forward while her feet remained strapped to the bike resulting in back and neck injuries.

Plaintiff’s Negligence Claims

- The instructor did not properly instruct her on safe use – did not inform her to check that the “pop pin” was fully engaged to make sure the handlebars were secure
- Expert witness for the plaintiff stated that “users should be aware of…functions and proper operation of the cycle…”

Defendant’s Defense: Waiver

Court’s Ruling: Against the plaintiff
(exculpatory language in the waiver was valid)
Waiver (signed by Stelluti) included the following:

“This waiver…includes…all injuries which may occur as a result of (a) your use of all…equipment and your participation in any activity, class, program, personal training or instruction, (b)…malfunctioning of any equipment, (c) our instruction, training, supervision, or dietary recommendations, and (d) your slipping and/or falling while in the club, or on the club premises…

“You acknowledge that you have carefully read this ‘waiver and release’ and fully understand that it is a release of liability…and you agree to voluntarily give up or waive any right that you may otherwise have to bring legal action against the club for personal injury or property damage”
Stelluti claimed the waiver was against public policy.*

Sometimes plaintiffs will argue that the waiver was contrary to or against public policy and thus unenforceable.

Courts often rely on the 6-factor test from a landmark case -- *Tunkl v. Regents of the University of California*, 60 Cal.2d. 92 (Cal., 1963) -- to determine if a waiver was against public policy.

In *Stelluti*, the court analyzed one of these 6 factors: Does the waiver create unequal bargaining power?

The Court stated that the waiver was an adhesion contract (yes – had to sign or could not use the club) but it did not create unequal bargaining power – plaintiff could have gone somewhere else.

*Public policy means that the act is not in the best interest of the public as a whole. (1)*
Dissenting opinions – two justices stated that the majority (5 of 7 justices) ruling is not in the public interest:

- Waivers allow clubs to operate negligently with no consequences
- These contracts of adhesion will become an industry-wide practice (patrons will have no bargaining powers)
- Without an incentive to provide safe programs/facilities – the cost to the public will be an increase in the number of avoidable accidents in health clubs
- Ruling of this Court is not in step with the enlightened approaches taken by courts of other jurisdictions that have barred these types of exculpatory clauses
Additional case: *Santana*

- During a steps aerobics class, the plaintiff (Santana) fell while performing simultaneous exercises (stepping and arm exercises with a Dynaband) as directed by the instructor. While performing the simultaneous exercises, the participants were instructed to look straight ahead at their reflection in a mirror versus looking at their feet.

- **Plaintiffs Negligence Claims:**
  - The instructor failed to provide a safe exercise class by creating an inherently dangerous situation.
  - The expert witness stated that the instructor “increased the risks over and above those inherent in the activity” when participants performed the simultaneous exercises.

- **Defendant’s Defense:** Assumption of Risk and the Waiver

- **Court’s Ruling:** *For the plaintiff*
The *Santana* Court distinguished sports and exercise when deciding that the assumption of risk defense did not protect the defendants stating:

- Exercise programs such as the step aerobics class in this case are designed to enhance health and fitness and therefore should not be designed to create extreme risks of injury
- Sports, by their nature, inherently create extreme risks of injuries due to:
  - Physical contact between participants
  - Competition aimed at scoring points, racing against time, or accomplishing feats of speed and strength

**Regarding the Waiver:**
- The plaintiff claimed she was not informed of the waiver – it was hidden on the back side of the membership agreement in small font (8 pt) and she was not offered time to read it.
#4 – Instruction and Supervision
RM Strategies?

**Thomas** – all participants need to be instructed on how to safely use the exercise equipment and facility; provide a **Facility/Equipment Orientation**

**Corrigan, Santana & Stelluti** – personal trainers and group exercise leaders need to know how to instruct and supervise properly; provide proper instruction on safe use of equipment (Needed: training, supervision, performance appraisals)

**Proffitt** – personal trainers need to incorporate principles of progression and overload, watch for signs/symptoms of overexertion and fatigue and take appropriate action; grant a client’s request for a break or to stop

*Facility/Equipment Orientation*

- Refer to the instructional place cards and warning labels on each piece of equipment
- Refer to the Facility’s safety policies – posted on the wall and inform them that everyone is expected to follow them
- Provide written information on safe and effective exercise (membership benefit that also promotes message “we care about your safety”)
- Refer to the Facility Safety Sign – posted on the wall
Facility Safety Sign

BE ALERT!

THE FITNESS EQUIPMENT IN THIS FACILITY PRESENTS HAZARDS WHICH, IF NOT AVOIDED, COULD CAUSE SERIOUS INJURY OR DEATH.

PRIOR TO USING THE EQUIPMENT, READ THE WARNING LABELS AND INSTRUCTION PLACECARDS AFFIXED TO EACH MACHINE.

IF YOU ARE UNSURE ON HOW TO USE A MACHINE, SEEK THE ASSISTANCE OF OUR FLOOR PERSONNEL. WE WILL BE HAPPY TO INSTRUCT YOU ON HOW TO USE THE EQUIPMENT PROPERLY.

IMMEDIATELY REPORT ANY PIECE OF EQUIPMENT THAT IS NOT FUNCTIONING PROPERLY TO OUR FLOOR PERSONNEL SO THAT IT MAY BE EVALUATED AND SERVICED PROMPTLY.

DO NOT ATTEMPT TO USE OR FIX ANY PIECE OF EQUIPMENT THAT IS NOT FUNCTIONING PROPERLY.

ASTM F1749

ASTM Designation

White letters on Safety Green background

Black, sans serif letters on white background

ASTM F1749-96 Standard Specification for Fitness Equipment and Fitness Facility Safety Signage and Labels
Examples -- U.S. Negligence Lawsuits
#5 – Exercise Equipment

**Guerra v. Howard Beach Fitness Center, Inc.**
While using a treadmill, the participant (Guerra) was thrown off the treadmill when the tread (mat) shifted or slipped on its roller causing a severe injury to her knee.

**Plaintiff’s Negligence Claims:** Defendant failed to:
- Maintain the treadmill in a reasonably safe and proper condition, *e.g.*, the defendant failed to provide evidence that the treadmill had been inspected
- Take suitable and proper precautions for the safety of persons using the exercise equipment.

**Defendant’s Defense:** Assumption of Risk and Waiver

**Court’s Ruling:** For the plaintiff -- A/R was ineffective because the malfunctioning tread was not an appreciated or foreseeable “inherent” risk and the waiver violated a N.Y. state statute that prohibits waivers.

RM Strategies?
Additional Cases:

**McDonald** – *maintenance of exercise balls, failure to adhere to recall*
- Plaintiff falls forcefully to the ground while using exercise ball
- Plaintiff claims the facility failed to:
  - Remove recalled exercise balls (in 2009, the U.S. Consumer Product Safety Commission recalled over 3 million balls)
  - Correctly inflate the balls
  - Monitor the balls for proper inflation

**Barnhard** -- *case against Cybex (design and marketing defects)*
- Physical therapy assistant, while working with a patient, stood on the weight-stack side of a leg extension machine and pulled on it to stretch her arms/shoulders
- It tipped over breaking her neck – rendering her a quadriplegic
- Damages awarded by the jury were $65.9 million and comparative fault was assigned (a) Cybex 75%, (b) PT Clinic (20%) and (c) Plaintiff (5%)
- It was predicted that this case would put Cybex out of business (had $4 or $5 million, per incident, in liability insurance) but ended with a settlement between Cybex and the plaintiff of $19.5 million

RM Strategies?

The court ruled that stretching was foreseeable (common misuse) and Cybex could have made it safer in its design and warn of machine’s tipping hazard.
Roer v. 150 West End Owner’s Corp.
While using a treadmill (TM), Roer falls off of it when an exercise ball gets sucked under the belt of the TM. This causes the rear of the TM to be lifted a couple of inches which propels the machine forward several feet where it hits the wall and causes Roer to fall and is injured (facility had video surveillance of the incident)

Plaintiff’s Negligence Claim:
The defendants failed to take reasonable measures to ensure that the exercise ball would be secured

Defendant’s Defenses: Waiver -- The defendants also claimed that
- even if a rack or other storage existed, the ball may not have been secured by the last person who used it
- the presence of the ball was not the cause of the injury, it was the movement of the ball toward the TM
- the accident was entirely unforeseeable

Court’s Ruling: For the plaintiff -- the waiver did not contain exculpatory language, and if it had, it would not be enforceable in N.Y. due to a state statute prohibiting waivers.

RM Strategies?
Additional Cases:

**Goynias** – slippery and wet floor surfaces in shower/locker areas
- Plaintiff fell in shower/locker area and injured his neck and back
- Plaintiff claimed the facility negligently (1) created the condition, and (2) failed to correct the condition after actual (prior) notice of the condition
- Court ruled in favor of the defendants – plaintiff was unable to provide any evidence of negligence (e.g., non-skid mats in the area and no prior knowledge of a dangerous condition)

**Xu** – fall off treadmill, distance (clearance) behind treadmill
- The decedent was thrown off the back of a treadmill (TM) hitting the wall or window ledge causing a severe head injury resulting in death
- Xu, representing the decedent, filed a wrongful death lawsuit claiming the facility failed to have ample clearance behind the TM (only 2.5 feet)
- Expert witness testified stating that should have been 5 feet according to industry standards – the appellate court agreed stating: “defendant’s ignorance of and failure to implement these [industry] standards...establishes a case of ordinary negligence...” (and the exculpatory language in the waiver was not explicit)

RM Strategies?
It is not known which industry standards the expert witness was referring to in *Xu* but some examples are:

(1) ASTM Standard – Standard Specification for Motorized Treadmills*

Minimum dimensions are:

1 m (39 inches) behind the machine (> 3 ft)
0.5 m (19.7 inches) on each side

(2) Equipment manufacturer specifications -- Cybex 750T Treadmill Owner’s Manual states 0.5 m at each side and 2.0 m -- 79 inches at the back (> 6 ft)

DiGiulio v. Gran, Inc.

While using a treadmill, DiGiulio suddenly fell off the treadmill and collapsed to the floor. An employee begins CPR and the assistant manager calls 911.

The assistant manager, though trained in the use of an AED, failed to use it. It was stored in a glass cabinet about 20 yards away from the incident.

He believed the cabinet had a lock and he did not have a key. He does not attempt to open the cabinet/break the glass – but attempts to find the key, but does not. Unbeknownst to him the cabinet was never locked.

Paramedics restore DiGuilio’s pulse but he dies 6 weeks later in the hospital.

Negligence Claims: Defendants failed to:

- properly train its employees about the use of the AED
- properly respond to DiGiulio’s cardiac arrest
- notify employees on how to access the AED.

They also violated a New York statute that requires health clubs to have an AED and an employee trained and certified on its use.

Defendant’s Defense: Assumption of Risk
Court Ruling: For the defendants
Citing rulings from various cases, the court stated that the defendants “correctly… fulfilled their duty under the common law by simply calling 911… the club’s employees went beyond that obligation and performed CPR…” and …Mr. DiGiulio… regularly exercised on the treadmill. He should thus be held to have assumed the inherent risk of suffering cardiac arrest from that activity”

Regarding General Business Law §627-a that requires clubs with 500 or more members to have at least one defibrillator and an employee trained and certified in its proper use, the court stated that it did not construe this law “as imposing liability on a health club which, in compliance with the statute, maintains an accessible defibrillator on the premises, but whose employee exercises poor judgment in attempting to access it or use it… there is nothing in the statute… to make a health club liable for an employee’s negligence in using, or attempting to use, an available defibrillator.”

NOTE: A different N.Y. appellate court after this case ruled the statute requires the actual use of AEDs in health clubs. (Migliino case)
Additional Cases:

**Zihlman and Zihlman – AED not used by YMCA staff**
- While using the exercise facility, the decedent (Thomas) suffered a sudden cardiac arrest. YMCA had an AED and trained AED/CPR personnel but no one began CPR or used the AED.
- EMS was contacted, but despite attempts to resuscitate her, she died.
- Daughters of Thomas claim the defendants failed to:
  - utilize the AED and as a consequence their mother died
  - exercise reasonable care for the safety, protection, and first aid in the event of a medical emergency
  - have accessible AEDs and properly trained staff on their use.

*Case is pending*

**Hicks – no employee began CPR or used an AED**
- The decedent (Mr. Hicks) suffered a sudden cardiac arrest while exercising at Bally’s fitness facility. No employee began CPR or used an AED, but EMS (911) was called.
- Paramedics arrived about 8 minutes after the call and applied the first electric shock about 12 minutes after the call. Mr. Hicks was transported to a local hospital where he died several days later.
Mrs. Hicks filed wrongful death lawsuit claiming:

- **Breach of Express Warranty** -- Bally had pledged to its members it would respond in a timely manner to any foreseeable emergency and abide by the guidelines of the American College of Sports Medicine
- **Negligence** -- Bally breached its duty by failing to (a) respond to Hick’s cardiac arrest, and (b) have an AED
- **Gross Negligence** -- Bally knew for 8-9 years prior that cardiac arrest killed 3 or more of its members per month
- **Case is pending**

RM Strategies? EAP and AEDs
In his latest “Legal Aspects Column,” Dr. Anthony Abbott, described 8 cases in which he served as an expert witness – all dealing with cardiac arrest litigations.
Risk Management: “the process of making and implementing decisions that will minimize the adverse effects of accidental and business losses on an organization” (4)

Types of “accidental” and “business” losses:
- Property losses (e.g., fire/theft)
- Net income losses (e.g., increase in expenses & decrease in revenue due to an accident)
- Liability losses (e.g., negligence claims/lawsuits)
- Personnel losses (e.g., premature death of an employee)

Risk Management -- a proactive administrative process that will help minimize liability losses (legal liability exposures) for fitness professionals and the organizations they represent

Focus: Legal Risk Management
BUILDING A COMPREHENSIVE RISK MANAGEMENT PLAN: 4 STEPS

1. Assessment of legal liability exposures
2. Development of risk management strategies
3. Implementation of the risk management plan
4. Evaluation of the risk management plan
1. Establish a Risk Management Advisory Committee made up of experts to assist with all four steps in the RM process such as:
   - Legal
   - Insurance
   - Medical
Getting Started – Important Factors to Consider

2. Establish a risk management planning team of staff members led by someone who:

-- is a respected leader
-- has superb strategic planning skills
-- is passionate about participant safety
-- has excellent problem-solving, communication, and people skills
### Getting Started – Important Factors to Consider

The Time Management Matrix (3)

<table>
<thead>
<tr>
<th>Important</th>
<th>Not Important</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urgent</td>
<td>Not Urgent</td>
</tr>
<tr>
<td>Crises</td>
<td>Preparation</td>
</tr>
<tr>
<td>Pressing problems</td>
<td>Prevention</td>
</tr>
<tr>
<td>Deadline-driven projects, meetings, preparations</td>
<td>Values clarification</td>
</tr>
<tr>
<td></td>
<td>Planning</td>
</tr>
<tr>
<td></td>
<td>Relationship building</td>
</tr>
<tr>
<td></td>
<td>True re-creation</td>
</tr>
<tr>
<td></td>
<td>Empowerment</td>
</tr>
<tr>
<td>Interruptions, some phone calls</td>
<td>Trivia, busywork</td>
</tr>
<tr>
<td>Some mail, some reports</td>
<td>Junk mail</td>
</tr>
<tr>
<td>Some meetings</td>
<td>Some phone calls</td>
</tr>
<tr>
<td>Many proximate, pressing matters</td>
<td>Time wasters</td>
</tr>
<tr>
<td>Many popular activities</td>
<td>“Escape” activities</td>
</tr>
</tbody>
</table>

3. Realize this is a “proactive” process that takes time – a Quadrant II activity to help minimize time spent in Quadrant I.
BUILDING A COMPREHENSIVE RISK MANAGEMENT PLAN

Getting Started – Important Factors to Consider

Example Goals:
• Fewer injuries
• Fewer negligence claims/lawsuits
• Enhanced quality & participant satisfaction
• Increased productivity of staff (less time in Quadrant 1)
• Improved ROI – increased profit and decreased costs

4. Develop “goals” for the risk management plan
1. For each of the 7 areas, assess your “level” of development of related risk management strategies, such as the following for Exercise Equipment (2)

<table>
<thead>
<tr>
<th>PUT INTO PRACTICE CHECKLIST 9-1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rate your phase of development for each of the following risk management strategies related to exercise equipment:</td>
</tr>
<tr>
<td>Developed</td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td>1. Using care in the selection of exercise equipment.</td>
</tr>
<tr>
<td>2. Assembling, installing, inspecting, and testing exercise equipment properly prior to use.</td>
</tr>
<tr>
<td>3. Posting exercise equipment signage.</td>
</tr>
<tr>
<td>4. Providing appropriate instruction and supervision for exercise equipment use.</td>
</tr>
<tr>
<td>5. Inspecting and maintaining exercise equipment and removing from use if in need of repair.</td>
</tr>
<tr>
<td>6. Keeping exercise equipment clean and disinfected.</td>
</tr>
<tr>
<td>7. Complying with exercise equipment recall/repair/warranty notices.</td>
</tr>
<tr>
<td>8. Maintaining exercise equipment records.</td>
</tr>
</tbody>
</table>
STEP 1 – ASSESSMENT OF LEGAL LIABILITY EXPOSURES -- CONT.

2. Know and assess your adherence to State and Territory Codes and Codes/Guidelines published by Fitness Australia

State and Territory Fitness Industry
Codes of Practice
Australian Capital Territory
New South Wales
Queensland
South Australia
Tasmania
Victoria
Western Australia

Fitness Australia
Exercise Professional Code of Ethics
Fitness Australia Code of Ethics
Exercise Guidelines
Australian Dietary Guidelines
Sports Medicine Australia Exercising in the Heat Guidelines
Safety Guidelines: Boxing, Kickboxing and Mixed Martial Arts for Fitness
Work Health and Safety Guide
Safety Guidelines for Strength Training
Addendum to Safety Guidelines for Kettlebell Training
Cardiovascular Exercise Prescription for Healthy Adults
Strength Training for Healthy Adults
Eating Disorder Guidelines
Kids in Gyms Guidelines

Afirm
Australian fitness industry risk management project
3. Additional assessments may include:
   • Review past injury/incident reports
   • Facility inspection – unique liability exposures
   • Evaluate demographics of populations served (e.g., high risk, older adults, children)
1. Data obtained from Step 1 should be used to develop risk management strategies – your policies and procedures:

**Policy** -- “a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions” (7)

**Example:** It is the policy of our fitness facility to have a written EAP that reflects the standard of care.

**Procedure** -- “a particular way of accomplishing something or of acting” or “a series of steps followed in a regular definite order” (7)

**Example:** Procedures would relate to the written action steps that describe what staff members need to do when an injury occurs.
2. Types of risk management strategies to consider: (4)

**Exposure Avoidance Strategies** -- Eliminates risk of injury, *e.g.*, decision to not have treadmills in your facility

**Loss Prevention Strategies** -- Reduces risk of injury, *e.g.*, conducting pre-activity health screening, proper instruction, proper equipment maintenance *(These Strategies Enhance Fitness Safety)*

**Loss Reduction Strategies** -- Lowers the severity of risk when an injury occurs, *e.g.*, carrying out the emergency procedures properly

**Strategies to Transfer Risks** -- Contracts that transfer the risk to some other party than the defendant, *e.g.*, a waiver transfers risk/liability to the participant and liability insurance transfers risk to the insurer who pays for damages if liable
3. Preparing your written risk management strategies:

- Concise sequence that makes sense
- Easily understood by staff members
- Not too much detail
  - Too much to remember
  - Does not allow for flexibility, given unique situations
  - Need balance between being “complete and thorough” and not too much written detail that may add confusion or misunderstanding

**NOTE:** Strategic planning is essential in the development of your risk management strategies, e.g., need to prioritize (where do you begin?), assigning staff members with specific tasks and timeframes for completing drafts of written procedures, reviewing/approving drafts, finalizing written procedures.
STEP 3 – IMPLEMENTATION OF THE RISK MANAGEMENT PLAN

1. Organize your risk management strategies into a Risk Management Policy and Procedure Manual (RMPPM) (2)

Make available electronically on your company’s intranet or web portal
2. Conduct staff training – one of the most important RM strategies

- **Formal training** – follow the 4 steps below
  - Initially upon hire
  - On-going, in-service trainings
- **Informal training**
  - Employee asks his/her supervisor questions
  - Supervisor notices an employee not carrying out a RM procedure correctly – corrects/retrains right away

### Stages for On-the-Job Training (6)

1. **Prepare the Learners**
   - Put them at ease
   - Find out what they know
   - Get them interested
2. **Present the Information**
   - Tell, show, question
   - Present one point at a time
   - Make sure they know
3. **Trainees Practice**
   - Trainees perform task
   - Ask questions
   - Observe and correct
   - Evaluate mastery
4. **Do Follow-Up**
   - Put them on their own
   - Check frequently
   - Reduce follow-up as performance improves
STAFF TRAINING – THE BENEFITS OUTWEIGH THE COSTS (2)

**Costs**
- Trainer’s time/pay to prepare and present trainings
- Trainee’s time/pay to attend trainings
- Educational materials for training
- Facility/equipment expenses
- Documentation/record keeping of training programs

**Benefits**
- Reduction in the frequency and severity of medical emergencies
- Reduction in legal liability claims and lawsuits
- Enhanced operational efficiency (e.g., staff members make fewer errors and require less supervision)
- Enhanced quality of programs and services (e.g., staff members know how to deliver safe and effective exercise and fitness programs)
- Increased revenue (e.g., increased staff productivity and participant satisfaction) and decreased expenses (e.g., lower liability insurance premiums)
STEP 4 – EVALUATION OF THE RISK MANAGEMENT PLAN

Two Basic Types of Evaluation

Formative Evaluation
Conducted on an on-going basis

Summative Evaluation
Conducted annually
STEP 4 – EVALUATION OF THE RISK MANAGEMENT PLAN – CONT.

1. Formative Evaluation

Observation by Supervisor – Corrective Action Needed Anytime
- Improper logging of exercise equipment inspections
- Improper instruction or supervision of client

Observation by Supervisor – Corrective Action Needed after a Performance Appraisal?
- Performed annually for all employees
- After probationary period for new employees

After a Medical Emergency
- Was it preventable?
- Does a risk/danger exist that needs to be corrected?
- Did staff members carry out the EAP correctly?
2. Summative Evaluation

Formal Review of the RM Plan
- Are revisions needed to reflect changes in laws/codes or guidelines published by professional organizations?

Were goals/objectives met (decrease in liability exposures)?
- Fewer injuries?
- Fewer negligence claims/lawsuits?

Were goals/objectives met (other positive outcomes)?
- Enhanced quality & participant satisfaction?
- Productivity of staff (less time in Quadrant 1)?
- Improved ROI – increased profit and decreased costs?
Risk Management Pyramid

See Poster for Descriptions of Each Line of Defense (2)
1. Safety is **the #1 Responsibility of All Fitness Professionals**

   The most important factor related to safety and applicable to all of the 7 areas of potential liability exposures is:

   The conduct (behavior) of your staff – are they **qualified** and **competent**?

2. Create a “Risk Management Culture” or “Safety Culture” at Your Fitness Facility

3. Risk Management Advances our Profession and Its Reputation with other Professions and our Participants

4. Remember – Not Only the Victim is Harmed
5. Support the AFIRM Project
   • Inform your colleagues
   • AFIRM will become known as the international model for all countries to follow
   • It will lead to “consistent” safety practices
   • It will meet the AGREE II Criteria - [www.agreetrust.org](http://www.agreetrust.org)

   -- Originating in the field of medicine, the AGREE II is now the new international tool for the assessment of practice guidelines.

   -- The purpose of the AGREE II, is to provide a framework to:
      (a) assess the quality of guidelines
      (b) provide a methodological strategy for the development of guidelines
      (c) inform what information and how information ought to be reported in guidelines
REFERENCES


References for the U.S. negligence lawsuits are provided on the handout that accompanied this PowerPoint presentation.
THANK YOU!