

Liability – Gyms and Gym Equipment – Adv Louis Nel

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TYPES OF GYMS

I believe there are a variety of different types of gyms and whilst gyms at large may have generic risk issues, each of the categories I propose has its own vagaries and idiosyncrasies – read on & form your own opinion!

The most obvious and well know category are the gym chains such as Virgin Active and Planet Fitness and then there are others focused on ladies etc. Even these gyms with leading attorneys and insurance companies backing up their risk management have regular issues arising from users and they have to be on their toes. Notwithstanding the aforesaid I still find some of their contracts and terminology falling short of 100% CPA (The Consumer Protection Act, Act 68 of 2008) compliance. The applicable terms and conditions ('T&C') and indemnities are usually contained in the application form and prominent signage, but it is my experience that the T&C are rarely if ever discussed with clients as required by the CPA (Section 41, 49 & 68) and wording is sometimes not compliant either (inter alia with section 22: plain language and the exclusions: sections 51 & 68 read with regulation 45)

Gyms at hotels, whether it is your 500 bed or your smaller boutique hotel are becoming more and more a 'must have' and are regularly being upgraded. Some of them manage their own gyms, others outsource such management and others simply allow you unfettered and unsupervised access by swiping your accommodation access card. Supervision is a good idea even if it is by camera. Where third parties are engaged to manage the gym, their contract and an assessment of their track record is essential. The T&C are sometimes reflected in the check-in/registration form and/or the entrance to the gym, but in my experience that is rare, it is never discussed with the client and often the indemnity falls woefully short of CPA compliance.

It is not uncommon for business, office and residential complexes to have private gyms and most of my comments on hotel gyms are applicable here.

Timeshare and share block units/resorts fall into the same category. As with hotels they have the added 'danger' of minors wandering off with their parents' access card, entering the gyms and 'using' (More like 'playing on') the equipment and this scenario is an accident waiting to happen, especially when there is no form of supervision.

A new and more recent phenomenon is the placement of an array of gym equipment in public areas and parks. The one that immediately comes to mind is the one on the Sea Point promenade opposite the SABC. This is an absolutely terrific idea but by definition fraught with danger! Clearly it is open to use by everyone so e.g. putting the T&C in correspondence with rate payers will not suffice so adequate, prominent signage (T&C and indemnity) is crucial.

AREAS WITHIN GYM

It should be noted that in gyms it is not just the area dedicated to the equipment that constitutes risk areas as there are many other areas that should also be managed adequately from a risk and CPA perspective. Let's have a look at what I have in mind.

Of course the risk starts with something as mundane as parking. More often than not the parking is not dedicated or controlled by the gym but shared with other tenants but that does not mean the gym should not be aware, vigilant and deal with potential liability, especially where a regular gym user parks there regularly and specifically to use the gym. The T&C, indemnity, signage and contract with the landlord and company controlling access to and the parking area per se must be addressed.

The entrance to the gym as such could be an area of risk despite being perceived as a low or no risk area. Regardless of the latter it is imperative that any T&C and indemnity must be prominently sign-posted at the entrance (section 49 ...'the earlier of'). Extraneous factors that can raise the degree of risk in this area is exposure to the elements (Rain could make the floors slippery), being close to the change rooms (steam room and showers) or crowded public areas adjacent (which could result at peak times to the risk of e.g. pick pockets).

It is almost as if gyms do not regard equipment as such as dangerous! Hard to believe if you look at the proximity of some of the 'machines' to each other, the mass of the weights used by some customers and the foot traffic. I know the first and foremost argument that the gym and its lawyers will raise (and rightly so) will be volenti non fit injuria i.e. the voluntary acceptance of risk. Fair enough but it may not be enough to get the gym off the hook! A sign of the following nature may well be warranted:

- Use mass within your capability or ask for advice
- Always be aware of other users in close proximity
- Minors must be supervised at all times
- Gloves are recommended if you have a propensity to sweat

Squash courts – again in my view an area the risk of which is underestimated & a sign of the following nature may well be warranted:

- Protective eyewear is recommended
- Please be aware of and mop up sweat on the floor

Change rooms present various challenges from pilferage to slippery floors. The latter can be caused by leaking cisterns/urinals, showers, cleaning operations and steam rooms. The wearing of shorts/swimming costumes in steam rooms & saunas must be compulsory and signposted. Given the recent spate of judgments regarding so-called 'slip and fall' cases, there should be permanent signage outside steam rooms and showers and when cleaning up/mopping is in progress, the mobile signage must be displayed in close proximity to the wet/damp areas. Over and above 'slip and slide', it may be well worth your while to warn users of saunas and steam rooms of excessive temperatures, very hot steam escaping from the 'rocks' in the sauna when dampened and possible hot dripping/escaping steam in steam rooms/outlets to be avoided.

Pools are mostly unsupervised so the only way to communicate with users other than T&C is via signage re risks, usage and indemnities, over and above which the 'slip and fall' issues discussed above apply here as well. It should at all times be noted that guests/one-off visitors will not have signed your T&C and maybe not an indemnity either! Coaching and training of especially minors and the contracts with such parties will be addressed later. The signage should include 'use at own risk', a waiver and should also address the following:

- Depth of the pool – at either end
- No jumping or diving allowed
- Swimming caps and goggles must be worn
- Treat other users with courtesy and share lanes if required
- Asthma sufferers – BEWARE this is an HTH pool (If applicable)

Playrooms for minors – these are found at most gyms. Extreme caution needs to be exercised and inter alia and at least the following should be addressed:

- Parent/guardian/au pair must sign minor in & out – it must be the same person!
- The signing in must be linked to/include a suitably worded indemnity and disclaimer
- Parent/guardian/au pair ID must be presented & copied
- ALL allergies, requirements, physical impairment must be noted in writing
- This must take place NOT at the 'general' reception but at the actual playroom
- All minors in the playroom must be supervised at ALL times by a staff member who must be present at ALL times
- Such staff member must have first aid training
- Access/egress must be strictly monitored

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