



## Liability of Personal Trainers

**Do personal trainers and gyms have a duty of care to their clients? Read the following case study for more information:**

### **Case Study:**

In the recent decision of *Wilson v. Nilepac Pty Ltd trading as Vision Personal Training* (Vision), the New South Wales Supreme Court considered a duty of care owed by a personal trainer and gym. Wilson alleged that he was injured while exercising at a gym under the supervision of a personal trainer. Wilson was a 40 year old Barrister who signed up for a fitness program with a personal trainer at his local gym. The Court commented that *"his enthusiasm for vigorous exercise until that point had been limited. His decision was prompted by a combination of medical advice, the fact that his partner had commenced a similar program and a desire to get fit and lose weight."*

He signed up for a combined program of cardio and weight sessions with a personal trainer but four weeks into that program suffered a lower back injury (prolapsed disk). He alleged that the injury occurred in the gym and was the result of the negligence of the personal trainer assigned to him and Vision. He sought damages against the company for breach of contract and breach of duty of care and brought the claim against Vision in its own right as the employer vicariously liable for the trainer allocated to him. In the proceedings, Vision admitted that it owed Wilson a duty of care and conceded that there was an implied term of the contract consistent with that duty. The main area of contest in the proceedings was whether the company and personal trainer failed to exercise reasonable care and a substantial medical issue as to the cause of Wilson's injury.

Before he commenced training, Wilson was required to attend an initial assessment with a consultant employed by Vision. The assessment, over two hours, consisted of answering a series of questions and completing a number of forms. There was then a photograph taken and he performed a number of basic exercises such as sit ups and push ups. He was also prescribed a nutrition strategy (diet) and given a diary in which to record food consumption. At the time of the initial assessment he had been swimming one km twice a week and walking his dogs regularly and believed his level of fitness was average or below average. The training program formulated for him was based on four sessions with the personal trainer each week consisting of three cardio sessions and one weight session.

Wilson stated, however, that he changed the program because he wanted to do more of the weight sessions. The program was set for a period of 12 weeks.

Wilson claimed the injury to his back was caused by one or both of two "dangerous" exercises performed during a weights session on a particular date. The first exercise was known as a horizontal leg press. The second was described as an exercise which required Wilson "to twist from side to side whilst sitting up from a prostrate position and catching a heavy medicine ball".

There was some dispute as to whether or not weights were actually performed in the identified sessions. At the outset of the session, the personal trainer asked Wilson whether he consumed alcohol during the week and he conceded that he had drunk more than he should have on the previous night. According to Wilson the personal trainer commented, *"There is nothing better for a hangover than exercise. We'll have to smash you"*. Whilst Wilson did not accept that he was hungover, he conceded that the personal trainer's remark was made in a jovial way and not threatening. The Court in fact believed that what was undertaken was a "crunch" rather than a "sit up".

### **Expert Evidence**

Expert evidence was given for Wilson to support the allegation of negligence. The Court commented that the evidence of the expert (an accredited exercise physiologist holding a Bachelor of Science in Human Movement Studies and Exercise Science and a Master of Science in Exercise Rehabilitation) was flawed. Unfortunately, the expert made assumptions based on two interviews with Wilson that were incorrect or inaccurate. The Court commented *"it is well established that a prime duty of experts in giving opinion*

evidence is to "furnish the trier of fact with criteria enabling the evaluation of the validity of the expert conclusions" see *Makita (Australia) Pty Ltd v. Sprowles* [2001] NSWCA 305.

The "basal principle" is that what an expert gives is an opinion based on facts. In order to enable the trier of fact to assess the opinions expressed, the expert must explicitly identify any facts assumed as the basis for the opinion and fully expose his or her reasonings. The Court also dealt with the standard of care required.

### **Foreseeability of Injury**

The Court applied the statutory test in the provisions of Part 1A of the Civil Liability Act 2002, Section 5B which provides:

*"General Principles*

- (1) *A person is not negligent in failing to take precautions against a risk of harm unless:*
  - (a) *the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and*
  - (b) *the risk was not insignificant; and*
  - (c) *in the circumstances, a reasonable person in the person's position would have taken those precautions.*
  
- (2) *In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things);*
  - (a) *the probability that the harm would occur if care were not taken,*
  - (b) *the likely seriousness of the harm,*
  - (c) *the burden of taking precautions to avoid the risk of harm,*
  - (d) *the social utility of the activity that creates the risk of harm."*

The Court found that the risk of injury to Wilson was foreseeable and not insignificant. The Court accepted that the operation of personal training studios is an activity of high social utility and that *"gyms are meeting places, progenitors of community health, promote longevity and enjoyment of the twilight years keeping burgeoning health costs down, occupy idle persons, dissipate stress, give homemakers a break from drudgery, enhance the personal self esteem of members in their body image etc etc."*

On the other hand, the Court said, *"it would have been obvious to a reasonable personal trainer taking on a client with Mr Wilson's history that there was a prospect of injury if he was trained too hard and that a delicate balance had to be found"*

### **Breach of duty**

In assessing whether or not there had been a breach of duty the Court examined the establishment and implementation of Wilson's training plan. It was alleged that the trainer was not adequately qualified or sufficiently experienced; failed to train or adequately train or supervise; failed to have in place any adequate induction program for clients that explained the purposes and relevance of exercises; demonstrations by the trainer explaining proper technique; failed to explain or give common precautions in the effect of incorrect technique or provide supervision instruction at low resistance in order to develop correct technique.

The Court found that the personal trainer was adequately qualified and that he was properly supervised. The Court further found that there was no evidence of any shortcomings in the process of induction for new clients. In respect of the program itself delivered, the Court found there was no evidence to support a claim that the personal trainer failed to take precautions which a reasonable personal trainer would have taken. In relation to the two dangerous exercises, the Court found that there was no negligence or breach of duty or breach of contract on the part of the company or the personal trainer.

### **Causation and Result**

On the question of causation, the Court found that the injury was caused or materially contributed to by the medicine ball exercise, after relying upon expert evidence of a neurosurgeon.

Ultimately the Court dismissed the claim and gave a verdict and judgment for the Defendant.

### **Practical Tips**

The case illustrates that any personal training program carries with it a duty of care, both in contract and in tort which will be discharged upon a proper assessment, induction, training in correct technique and

supervision. Where the person being trained poses some risk, i.e. middle aged, unfit and overweight, some particular care is obviously required.

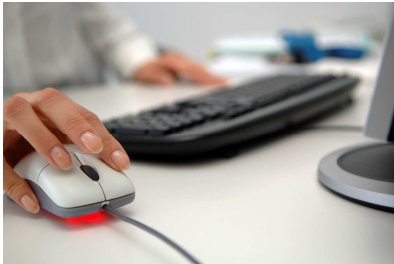
The case also illustrates that the giving of expert evidence is to be approached, having regard to appropriate guidelines and rules and particularly that facts should not be assumed but rather based upon proper investigation by the expert.

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**Michael Sing**, Managing Director of **msl**, has over 25 years of extensive experience in commercial and civil litigation, insurance matters, property and business transactions representing both plaintiff and defendant clients. Whether you are a sporting personality, sporting organisation/club, a manager, event organiser or an advisor to the sporting industry, the right legal advice can help you avoid a lot of emotional and financial stress. Michael can provide advice on contract law including sponsorship, advertising & e-commerce agreements as well as sporting tribunal representation and advice.

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