**Chapter 4: Negligence and Common Defenses to Negligence**

**Given this chapter and the remaining chapters describe many negligence cases, it is essential that fitness managers and exercise professionals understand the information covering negligence and common defenses in Chapter 4.**

Review the learning objectives listed on page 115 in the text. After reading this chapter, complete the following study questions. **Instructions:** **Click on the shaded box provided - then type in your answer.**

**Study Questions**

1. Negligence can be defined as      .
2. According to van der Smissen, duty is formed from three primary origins. List each of these and give an example of each.

 (1)

 (2)

 (3)

1. The “standard of care – reasonable person” requires one to act as a reasonable person or a person of ordinary/reasonable prudence.

 (1)What is the responsibility (duty) of the reasonable person and how do courts determine this?

 (2) Describe how the court utilized the reasonable person standard of care in *Turner* *v. Rush Medical College*.

 (3) In *Turner*, why did the dissenting judge disagree with the court’s ruling?

1. The “standard of care – reasonable person” requires all of us to act as a person of ordinary prudence. However, if a person holds himself/herself out as having special knowledge or skills superior to that of an ordinary person (as do fitness managers and exercise professionals), that person can be held to a standard of care of a      , also referred to in this textbook as the      .
2. According to van der Smissen, “If one accepts responsibility for giving leadership to an activity or providing a service, one’s performance is measured against the standard of care of a qualified professional *for that situation*”. Describe the three “situational factors” that courts will consider when determining the standard of care of a professional.

 (1)

 (2)

 (3)

1. State statutes specify requirements of expert witnesses in medical malpractice (negligence of a licensed health care provider) cases. Expert witnesses often testify in negligence lawsuits against fitness facilities and exercise professionals as demonstrated in many of the cases described in this textbook. What is the major function or purpose of expert witnesses?

1. According to the *Restatement of Law Third, Torts*, duties can arise out of various special relationships. Describe the following special relationships that are formed between a person on land (e.g., fitness participant) and a land owner/occupier (e.g., fitness facility manage/owner) and the duty owed to each.

 Trespasser:

 Licensee:

 Invitee:

1. Regarding the standard of care for children, children cannot always be responsible for their negligent conduct because they do not fully understand and appreciate all (or some) of the risks associated with physical activity (as demonstrated in the *Smith v. AMLI Realty Co*.). Given this, what steps (or precautions) should fitness facility managers and exercise professionals take if they serve children?

1. As a fitness manager or exercise professional, describe specific tasks that you would take to meet the duties owed to your fitness participants (invitees).

1. List the two classifications of “published” standards of practice and give examples of each.

 (1)

 (2)

1. (1) Describe the difference between “standards of care” and “standards of practice.”

 (2) Describe when a court may consider standards of practice as standards of care. In your answer, describe the rulings of South Carolina’s Intermediate Court of Appeals and Supreme Court in *Elledge v. Richland/Lexington School District Five.*

1. What did expert witnesses Harvey Voris and Doug Baumgarten say about published standards of practice?

1. If it can be demonstrated that the defendant’s conduct was inconsistent with published

 standards of practice, it can lead to a      , whereas if the defendant’s conduct was

 consistent with published standards of practice, it can lead to      .

1. Why should fitness managers and exercise professionals comply with published standards of practice that are the most authoritative or safety oriented in their approach as well as those that are most applicable to their type of facility and programs?

1. **True or False:** Place a T or F in the space provided**.**

      A) Juries determine duty in negligence cases.

      B) Courts examine only two factors when establishing the standard of care –

 customary practice and locality.

      C) State statutes specify requirements for expert medical testimony in medical malpractice cases.

      D) In *Smith v. AMLI Realty Co*., the court found that the defendant’s burden to take

 precautions was very minor compared to the magnitude of the risks.

      E) It is likely that courts will apply the reasonable person standard of care in unsupervised

 fitness facilities (e.g., apartment complexes, hotels) and the professional standard of

 care in fitness facilities that are professionally staffed.

      F) Children under the age of 5 year (or 7 years in some jurisdictions) can be found liable for negligence.

      G) Organizations that published standards of practice (e.g., standards, guidelines,

 position papers) all use the same definitions for terms such as standards and

 guidelines.

      H) If a client is harmed by following the advice of his/her personal fitness trainer, the trainer can be held liable for the harm.

      I) The federal government has not published a definition of health care provider.

      J) Regarding future directions for published standards of practice, it is recommended that those involved in their development utilize the AGREE II standards and develop standards and/or guidelines based on legal research, e.g., common negligence claims made by plaintiffs in legal cases.

1. Defendants facing negligence claims/lawsuits can use the “assumption of risk” defense to

 defend (refute) such claims/lawsuits. Define assumption of risk.

1. Describe the differences between “express assumption of risk” and “primary assumption of

 risk.”

1. Primary assumption of risk can be an effective defense in negligence cases if the evidence

 shows what three elements?

 (1)

 (2)

 (3)

How did the court in *Corrigan v. MuscleMakers Inc*. refer to these three elements?

1. Define “risks inherent in the activity” or “inherent risks.”

1. Why was the primary assumption of risk defense ineffective in protecting the defendants in

 spotlight cases *Corrigan* and *Santana v. Women’s’ Workout and Weight Loss Centers, Inc*.?

*Corrigan*

*Santana*

1. Explain why the primary assumption of risk defense is often an effective defense to refute

 negligence claims/lawsuits for defendants involved in sports and recreational activities but is

 not for defendants involved in fitness programs.

1. How effective the assumption of risk defense will be depends on the court’s examination

 of the (a) activity (e.g., sport vs. fitness as in *Santana*), (b) experience level of the plaintiff

 (e.g., the plaintiff in *Corrigan* was a novice), (c) conduct of the defendant (e.g., the

 instructor in *Santana* increased the risks over and above those inherent in the activity),

 and (d) rulings from prior courts in the same jurisdiction. Of the five strategies that can help

 strengthen the assumption of risk defense, described on pp. 140-141, which ones

 specifically address the elements described in question #18 above to help ensure these

 elements are satisfied.

1. When analyzing waiver (release of liability) contracts, courts will determine if the waiver violated public policy.
2. Define public policy and describe how courts often determine if the waiver signed by the plaintiff violated public policy.

1. In the spotlight case, *Evans v. Fitness & Sports Clubs, LLC*, why did the court rule that the waiver signed by the plaintiff was not against public policy?

1. In the spotlight case, *Stelluti v. Casapenn Enterprises, LLC,* the plaintiff argued that the waiver contract she signed was against public policy based on unequal bargaining power. Why did the court disagree with her argument?

1. As described in Chapter 1, dissenting opinions are relevant because they may provide the basis of arguments for overruling a majority opinion in the future. As true with all laws, waiver law can change based on new statutes or rulings of appellate courts. After reading the short summary of the dissenting opinion in *Stelluti* (Exhibit 4-5, pp. 150-151), do you believe that New Jersey may change its waiver law in the future? Why or why not? In your answer, describe your arguments for agreeing or disagreeing with the *Stelluti* majority opinion?

1. What were the causes of injuries to the plaintiffs in *Evans* and *Stelluti*?

1. **True or False:** Place a T or F in the space provided.

      A) Waivers (releases of liability) do not need to be reviewed by a knowledgeable lawyer prior to having participants sign them.

      B) Waivers help ensure participant safety.

      C) Waivers can be effective in barring *ordinary* negligence claims/lawsuits

 against fitness facilities, but not *gross* negligence claims/lawsuits.

      D) All 50 states recognize and enforce waivers in fitness facilities/health clubs.

      E) Parents/legal guardians can always sign a waiver on behalf of their minor children.

      F) State laws vary as to whether or not a separate execution of a waiver document by

 a spouse is necessary to help bar a possible loss of consortium action.

      G) The *Santana* court stated that the exculpatory language in a waiver should be

 distinguishable (e.g., conspicuous using large and bold font) from other sections within the document to be enforceable.

      H) Participants should be given ample time to read the waiver.

1. **Matching:** Indicate the correct response in the space provided from the list of terms below.

      A legal doctrine in which the plaintiff does not have to prove negligence as he/she would

 in an ordinary case, but does have to show that the conduct that caused the harm was in

 violation of a state statute that was intended to prevent that type of harm.

     Activities in which an exercise professional engages when carrying out his/her practice that are within his/her own limitations (e.g., education, training, experience, and certification).

      A legal case in which the facility and a volunteer spotter, who voluntarily assumed a duty

 to spot another while performing a bench press, were held liable for $15,000 and $5,000

 in damages, respectively.

      A legal doctrine that describes the duties of land owners/occupiers who maintain a condition on their land that attracts children.

      The injury suffered by the plaintiff in *Turner v. Rush Medical College.*

      Legal case in which the assumption of risk defense was effective in protecting the

 defendant because the plaintiff was an “experienced” racquetball player and, therefore,

 fully understood and appreciated the inherent risks, including the risk of cardiac arrest.

      Landmark legal case in which the California Supreme Court provided a 6-factor test to be

 used to help determine if a waiver violated public policy.

      Section within a waiver that absolves the defendants from their own ordinary negligence.

1. Attractive Nuisance E. Scope of Practice
2. *Rutnik v. Colonie Center Court Club, Inc*. F. Negligence per se
3. *Tunkl v. Regents of the Univ. of California* G. *Parks v. Gilligan*
4. Severe Exertional Rhabdomyolysis H. Exculpatory Clause

28. **Case Study:**

Upon joining World’s Best Gym (WBG) located in Virginia, Mr. Smith requested an orientation on how to use the gym’s exercise equipment. Mr. Smith was 30 years old and had not participated in any physical activity since he was a junior in high school and had never participated in any weight training exercises. He was asked by a staff member to sign a membership contract and a separate document entitled *Waiver and Release of Liability*. However, he was not given time to read the waiver/release and no one explained to him what he was signing. He was told that, instead of an orientation, he should sign up for personal fitness training sessions which he did. The personal fitness trainer (PFT), an employee of WBG, did not conduct pre-activity health/medical screening procedures nor did he conduct any assessments to determine Mr. Smith’s fitness levels.

During his first training session, the PFT had Mr. Smith first complete multiple sets of squat exercises to the point of complete muscle failure with little or no rest in between sets. As the session continued, Mr. Smith informed his PFT that he was in a great deal of pain. He even requested several breaks during the workout. However, the PFT told Mr. Smith that he did not need a break and that, because he was young, he could handle the high-intensity workout saying to him “no pain, no gain.” After the workout, Mr. Smith went home, exhausted, experiencing extreme fatigue. That night and the next day, Mr. Smith was in severe pain and on the second day he was hospitalized (for eight days) with a diagnosis of severe exertional rhabdomyolysis. The medical specialists who treated Mr. Smith had never seen such a severe case of rhabdo in someone like Mr. Smith who had no other underlying medical conditions. Mr. Smith filed a complaint alleging several ordinary and gross negligence claims against the defendants (PFT and WBG). The defendants moved for summary judgment claiming that Mr. Smith assumed the risks and that the waiver absolved (protected) them from both ordinary and gross negligence.

1. Explain why the assumption of risk defense will likely not be an effective defense in this case.
2. What is the main reason why the waiver will likely not be an effective defense in this case regarding the ordinary negligence claims?
3. What conduct of the PFT would likely be considered gross negligence and why?