

Insurance Insights

Are all activities performed in a gym recreational? The court says no.

Powell v JFIT Holdings Pty Ltd t/as New Dimensions Health and Fitness Centre

[2020] NSWDC 264

Background

On 4 February 2016, a gym member twisted her back while clearing weights strewn about the floor of the gym to make space for her exercise regime.

She sustained a serious spinal injury which has resulted in ongoing disabilities, and subsequently brought proceedings against the gym owner for damages.

At trial, the defendant sought to rely on the defence of a waiver under section 5N of the *Civil Liability Act (NSW) 2002*, which provides a waiver of contractual duties of care for recreational activities, defined to include (*...any sport (whether or not the sport is an organised activity); any pursuit of activity engaged in for enjoyment, relaxation or leisure; and any pursuit or activity engaged in at a place (such as a beach, park or other public open place) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure*).

The defendant sought to shield itself from responsibility for the plaintiff's injury. In support of this defence, the defendant relied on the terms of an acknowledgment of responsibility attached to the Terms and Conditions of the plaintiff's gym membership agreement.

Ultimately, however, the defendant was found to have negligently caused the plaintiff's injury, as the plaintiff's clearing of the weights did not constitute a 'recreational activity'.

Decision

In considering whether or not the defendant would have the benefit of the s5N defence, it was determined that 'recreational activity' must be given a beneficial and purposive construction.

To achieve this, the court looked to the purpose of the specific activity in which the plaintiff was engaged at the time of the injury. The "three disjunctive limbs" of the definition of recreational activity were then used to characterise the activity, the purpose, and the state of the location.

On the facts, the plaintiff was characterised to have been clearing weights to enable recreational activity to take place in the weights area, which was blocked from effective use.

The court then described that the service which was being provided to the plaintiff as provision of access to the premises, equipment and a space within the premises to use for her exercise regime. It was held that the preliminary activity of clearing away obstacles to the plaintiff's exercise regime was not something that the plaintiff undertook as a consumer of recreational services.

It was also held not to be incidental to her intended recreational activity, as it was the function of gym staff to ensure that the weights area was maintained in a tidy state suitable for use.

The court therefore held that s5N of the *CL Act* had no application to the facts of the case in sheltering the defendant from liability for the plaintiff's injury.

The court went on to examine the relevant duty of care, finding that the defendant owed the plaintiff a duty to clear the weights area in order to address the potential for harm from hazard and consequential injury. It was held that the defendant had breached the duty, and that there was no contributory negligence on the part of the plaintiff.

After assessment of the relevant heads of damage, an order was made against the defendant in the amount of \$551,097.62 plus costs.

Implications

This case is important for gym other recreational activity venue owners. It highlights that the section 5N waiver only applies to recreational services, but that not all services provided in these settings will be categorised as recreational.

Owners of these venues should ensure that their premises are maintained in a condition suitable for the relevant recreational activity, in order to minimise the circumstances in which patrons may perform tasks not covered by the waiver.

This article was written by Principal Robert Minc and Summer Clerk Keira Unmack. Please contact Robert Minc if you have any questions or would like more information.



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