TRAIN THE TRAINERS: MAINTAINING STANDARDS TO MINIMISE INJURIES AND AVOIDING LEGAL LIABILITY IN THE FITNESS INDUSTRY

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A recent comprehensive survey of fitness industry professionals shows that there is a lack of confidence amongst members of the fitness industry about the quality of training necessary to obtain fitness qualifications. This is concerning given that legal liability in negligence is determined by reference to the standards of a reasonably competent person possessing particular qualifications. Injuries incurred during fitness activities may lead to legal liability if the standard of reasonable care is not met. Fitness professionals who are not adequately trained are more likely to fail to meet standards of reasonable competence. Case law demonstrates the importance of fitness professionals being knowledgeable and well-trained in their field of expertise to avoid legal liability arising.

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Introduction

As part of a recent project on risk management in the fitness industry, surveys have revealed a widespread perception amongst fitness professionals that fitness qualifications are too easily obtained and that training is inadequate. If this perception reflects reality, then the risk of injuries in the fitness industry is increased, giving rise to both more adverse health outcomes, as well as potential legal liability. This article considers the implications of the project's results and illustrates how legal liability may arise from inadequately trained trainers.

Over 2 million people in Australia use fitness services,[8] reflecting a 101% increase in the last fifteen years.[9] According to the most recent Australian Bureau of Statistics Sport and Physical Recreation Overview,[10] amongst all adults aged 15+ years, 15.1% of males and 19.1% of all females participate in aerobics/fitness activities. This ranks aerobics/fitness activities as the second most common sport and physical recreation undertaken in Australia, exceeded only by walking.

Many Australians (including people who fall into higher risk groups with chronic health conditions) join gyms to maintain or improve their health and fitness and to lose weight rather than for aesthetic purposes.[11] The fitness industry has a critical role to play in supporting active and healthy lifestyles in Australia's efforts to combat diseases that result from increasing patterns of sedentary behaviours in contemporary society.[12] However, while regular physical activity can help prevent obesity and reduce the risk of inactivity-related diseases, overly vigorous exercise can trigger adverse health events, especially in habitually sedentary people.[13] Additionally, some exercise programs offered by fitness providers can also increase the risk of injury.[14] Injury incidence also occur for a range of other reasons, including poor facility design and layout, equipment malfunction, and inappropriate pre-exercise screening, exercise advice and supervision from staff.

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[8] Access Economics, *Let`s get physical: the economic contribution of fitness centres in Australia (2009)*.

[9] Australian Sports Commission, *Participation in exercise, recreation and sport*. Annual Report 2009, (Australian Government, Canberra, 2009).

[10] Australian Bureau of Statistics Sport and Physical Recreation Statistical Overview 2012; <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4156.0/>.

[11] C Finch, A Donaldson, L Otago and M Mahoney, 'Who chooses to use multi-purpose recreation facilities for their physical activity setting?' (2009) 27(2) *Sport Health* 6-8.

[12] Preventative Health Task Force, Australia: The Healthiest Country by 2020. Australian Government, June 2009; Preventative Health Task Force, *Taking Preventative Action – A response to Australia: The Healthiest Country by 2020 – The Report of the National Preventative Health Taskforce.* Australian Government (May 2010).

[13] D Corrado, C Basso, M Schiavon and G Thiene, 'Does sports activity enhance the risk of sudden cardiac death?' (2006) 7(4) *Journal of Cardiovascular Medicine* 228-233.

[14] J Spengler, DP Connaughton and AT Pittman, *Risk management in sport and recreation* (Human Kinetics USA, 2006).

The Australian Fitness Industry Risk Management (AFIRM) Project was funded by an Australian Research Council Linkage Project Grant in conjunction with Fitness Australia and Sports Medicine Australia. The overall project objectives are to generate new data about the fitness industry and the risk management practices that are adopted in that industry. The underlying premise for the project is the obvious benefit that improving safety management practices will reduce adverse health outcomes and injuries, creating direct savings in health care costs to governments.

As part of the AFIRM Project, persons employed in the fitness industry were surveyed on a range of questions concerning health and safety risks that exist in the industry, and risk management practices. The data was gathered using both small focus group research, as well as part of a national survey (the methodology of which are briefly discussed below). One of the significant outcomes of the data thereby obtained is a widespread perception that fitness industry professionals and employees, including personal trainers, who provide advice and assistance to clients using fitness services, are inadequately trained and can obtain qualifications too easily. The relevant survey results are discussed in more detail below, but one important consequence of such a conclusion, if the perception reflects reality, is that legal liability (particularly in the tort of negligence) may well arise if an injury should occur as a result of poorly considered advice or careless supervision by fitness trainers and staff.

This article describes data from the national survey relevant to the training of fitness professionals. The article then considers how the law determines the legal liability for injuries occurring in fitness facilities, focussing specifically on the law of negligence. The critical feature of the law of negligence that is of relevance here concerns the reasonable standards of care that are required. In short, fitness instructors, including even newly qualified ones, need to meet the standards of a competent, trained instructor with such qualifications as the instructor purports to have. Peer professional opinion as to what appropriate and reasonable conduct demands will be critical in determining whether a fitness professional has breached a duty of care and, consequently, will be held legally liable. The article will use examples to highlight the importance of the adequate education of fitness professionals and the need to evaluate and audit current educational practices and minimum qualifications if the widespread perception in the industry, that qualifications are too easily obtained and that educational standards may therefore be too low, indeed reflects reality.

Survey Methods, Aims and Results

In 1997, the National Sports Safety Framework (NSSF) strongly advocated that an injury risk management approach be adopted to reduce the risk of adverse health outcomes associated with sport and other physical activities, including

in health and fitness facilities.[15] Since this time, industry codes of practice have emerged and industry stakeholders have produced accreditation frameworks. But the complexity and diversity of legal liability exposures remains significant. Moreover, injuries continue to occur to people who use fitness facilities and services, suggesting that current preventive efforts are sub-optimal.

The NSSF specifically recommended that physical fitness facilities and sporting clubs adopt formal injury risk management audit processes.[16] Since then, a valid sports safety audit tool has been developed for Australian sports clubs,[17] and used to assess the range and extent of safety policies and practices in that setting.[18] To date, there have been only two sets of Australian studies which have assessed the safety risk management practices of health and fitness facilities and indicated some areas where improvement could be made.[19] Further, assessments by the fitness industry itself have demonstrated that current OH&S requirements provide little practical guidance for service providers, and that there was a need for comprehensive, relevant and accessible industry specific safety benchmarks and standards to promote injury prevention.[20] Interdisciplinary research, combining both legal research approaches and social science methodologies, has been identified as a significant research need in this field.[21]

It was with this background in mind that the idea for the AFIRM project developed, as a step in exploring how best to deliver safe fitness services.[22] Further, given the complex legal environment within which fitness professionals operate, there is also the need for better resources to equip fitness professionals with the tools they need to ensure they understand the effect that regulations

[15] C Finch and A McGrath, *SportSafe Australia: A national sports safety framework.* A report prepared for the Australian Sports Injury Prevention Taskforce (Australian Sports Commission, Canberra, 1997).
[16] Ibid.
[17] A Donaldson, T Hill, C Finch and R Forero, 'The development of a tool to audit the safety policies and practices of community sports clubs' (2003) 6(2) *Journal of Science and Medicine in Sport* 226–230.
[18] A Donaldson, R Forero, C Finch and T Hill, 'A comparison of the sports safety policies and practices of community sports clubs during training and competition in northern Sydney, Australia' (2004) 38 *British Journal of Sports Medicine*, 60-63.
[19] Finch et al, 'What do users of multi-purpose recreation facilities think about safety at those facilties?' (2009) 27(3) *Sport Health* 31-35; Betul Sekendiz, *An Investigation of Risk Management Practices in the Health and Fitness Facilities in Queensland: Minimising the Likelihood of Legal Liability*, PHD Dissertation, 2011, Bond University, discussed B Sekendiz and S Quick, 'Is the Australian Health and Fitness Industry Going to be the Biggest Loser?' 15th *Annual Congress of the European College of Sports Science (ECSS)*, 23-26 June, 2010, Antalya, Turkey. The former study showed that multipurpose recreational facilities lacked safety policies and practices for gymnasium and group exercise activities.
[20] RiskLogic and Fitness Australia (2010) Safety First, An Occupational Health and Safety – Guide for Fitness Businesses.
[21] C Tremper, S Thomas and A Waagenaar, 'Measuring law for evaluation research' (2010) 34(3) *Evaluation Review* 242-266.
[22] G Matheson, N Mohtadi, M Safran and W Meeuwisse, 'Sport injury prevention: time for an intervention?' (2010) 20 *Clinical Journal of Sports Medicine* 399-401.

have on their work. Such an understanding will help reduce the risk of adverse health outcomes and injury *and* the legal liability associated with those risks.

The AFIRM project started with focus group research conducted as a precursor to a national survey. Fifty-eight fitness professionals were sampled from seven urban and regional locations in four Australian States.[23] The research was conducted to identify risk management themes in the fitness industry from the perspective of fitness professionals. These findings were then used to inform the design of the largest ever national survey of fitness industry professionals in Australia. Focus group research, utilising the nominal group technique (NGT) was conducted initially to ensure that the questionnaire would have content and construct validity. In an NGT session,[24] participants provide responses to a particular issue or question, list them in their order of importance, pool their responses, and then conduct a secret ballot to list and rank the most important issues drawn from the pool.[25] In essence, the NGT technique produces a rank ordering of the various problems identified by individual group members that is anonymous and thus unaffected by the personality allegiances of those in the group.

Following on from the focus group research, and using a well-adopted method,[26] the information obtained in the NGT sessions was used to develop 45 specific items for a questionnaire that was disseminated throughout the fitness industry. A six-point Likert scale was used to avoid the problem of participants regarding the midpoint of the 5 and 7 point scales typically utilised as equating to a neutral position when, arithmetically, these scores are above the mean. All surveys were completed anonymously through the Survey Monkey program. Overall, a total of 1178 respondents completed the survey, but not everyone completed every question.

The questionnaire employed in the survey was factor analysed. Factor Analysis is a powerful mathematical technique that determines which questionnaire items relate to one another in the sense that mathematical relationships between questionnaire items reflect underlying factors. Simply put, Factor Analysis determines which questionnaire items 'go together'. That analysis, however,

[23] Seven sessions were held in total: Sydney (2), the Gold Coast, Ballarat, Rockhampton and Adelaide (2).

[24] Delbecq AL and VandeVen AH, "Group techniques for program planning: a guide to nominal group and Delphi processes', Scott Foresman and Co., Glenview, Illinois, 1975. See also Keyzer P, Johnston J, Pearson M, Rodrick S and Wallace A, "The courts and social media: what do judges and court workers think?" (2013) 25(6) *Judicial Officers' Bulletin* 47-53.

[25] Delbecq AL, VandeVen AH and Gustafson DH, "A Group Process Model for Problem Identification and Program Planning" (1971) 7 *Journal of Applied Behavioral Science* 466-91.

[26] IR Coyle, SD Sleeman N and Adams, 'Safety climate' (1995) 26(4) *Journal of Safety Research* 247-254. A more detailed discussion of the methodology is found at P Keyzer, IR Coyle, J Dietrich, JK Norton, B Sekendiz, V Jones, and CF Finch, 'Legal risk management and injury in the fitness industry: The outcomes of focus group research and a national survey of fitness professionals', (2014) 21 *Journal of Law & Medicine*, 826.

does not directly correlate with the sub-analysis of the questions discussed in this article.

Results for the relevant questions are set out in the table below. The results were transformed so that a score of 6 always equated to the most positive response and 1 to the least positive response.

Survey question (all 6-point Likert Scales)	**Mean score (standard deviation) (n=valid responses)**
Q 54 How easy is it to gain basic qualifications as a Personal Trainer?	2.33 (sd 1.114) (n=913) 1=extremely easy; 6=extremely hard
Q 48 How important is ongoing training/ professional development in the Fitness Industry?	5.5 (sd .937) (n=930) 1=extremely unimp.; 6=extremely imp.
Q 41 How would you rate the education you have received as a Personal Trainer?	4.82 (sd .971) (n=920) 1=extremely poor; 6=extremely good
Q 36 How would you rate the training you have received?	4.98 (sd .834) (n=952) 1=extremely poor; 6=extremely good
Q 35 How frequently do you observe Personal Trainers operating outside the limits of their competency?	2.91 (sd 1.387) (n=946) 1=extremely infrequently; 6=extremely frequently
Q18 How frequently is the competency of Personal Trainers assessed in your facility?	3.84 (sd 1.511) (n=977) 1=extremely infrequently; 6=extremely frequently

Interestingly, although more than 75% of valid responses considered that the respondent had personally received either extremely good or very good training, with a mean score of 4.98, and an almost equal level of satisfaction for the education received, with a mean score of 4.82,[27] the same respondents viewed the quality of the training received in general (and therefore presumably of others) with a considerable lack of confidence. A high number of respondents considered that 'basic qualifications' as a personal trainer were either 'extremely easy' or 'very easy' (approximately 28% for each); and a similar 28% chose somewhat easy. Overall only around 15% chose an answer to Q 54 on the side of the scale suggesting that such qualifications were 'somewhat', 'very' or 'extremely' hard to obtain. The mean score of 2.33 reflects the lack of confidence in the ease with which persons can qualify as fitness trainers.

The lack of satisfaction, perhaps with the training and competence of others, but more specifically, with management procedures to ensure such competence, is also reflected in the responses to the question 'How frequently is the competency of Personal Trainers assessed in your facility?' Over one third

[27] These two questions were very similarly worded in order to check for consistency of responses and to maximise the validity of the survey as a whole.

(38%) of respondents chose a result on the infrequent side of the scale, with 8% and 14% choosing extremely infrequently and very infrequently respectively. The overall mean score of 3.84 reflects the wide range of responses and is firmly in the 'somewhat frequently' range.

Answers to the question 'How frequently do you observe Personal Trainers operating outside the limits of their competency?' reflected a more positive attitude about professional conduct, with the mean of 2.91 reflecting an average that equated between 'somewhat infrequently' and 'very infrequently'. Nonetheless, there was a broad range of responses, reflected in the high standard deviation, and a worrying 15% of valid responses selected very frequently or extremely frequently.

In summary, although most respondents expressed a high level of confidence in their own training, they lacked confidence in the ease with which one could, in general, obtain qualifications, and therefore, presumably, a lack of confidence in others' qualifications. A significant number noted that they had observed others acting outside of their competence, and a significant minority (38%) considered that competence was infrequently assessed.[28] Unfortunately, the questionnaire did not ask by who or how such assessment should take place.

Legal Liability for Injury in the Fitness Industry: The Tort of Negligence

In Australia, fitness facilities are governed by a complex web of legislation (Commonwealth, State and Territory), common law, and State and Territory-based fitness industry codes (some of which are mandatory and have the status of statutory instruments, and some of which are not). Generally speaking, where fitness facilities fail to comply with reasonable and acceptable industry standards in the provision of services, this can give rise to legal liability in the tort of negligence to compensate clients for personal injuries that have been caused by the failure.[29] Legal liability may also arise as a result of injuries suffered by *employees* resulting from a failure to maintain equipment, or to ensure adequate safety training and the like.[30]

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[28] It is interesting to note that media reports related to the fitness industry anecdotally support these perceptions. An example is recent reports of industry members' awareness of 'cases around Australia … of inexperienced crossfit trainers having clients do exercises that put too much pressure on their muscles'; and of 'trainers … working outside their scope of practice, pushing people to a medically dangerous intensity.' See Gold Coast Bulletin, 23 January 2014, p 7, 'Exercise just about killed me'; 'Going too hard at gym can be fatal'.

[29] J Dietrich, *Liability for Negligence in the Fitness Industry*, a report of the AFIRM Project located on the website of the Centre for Law, Governance and Public Policy at Bond University.

[30] For example, in *Gale v New South Wales* [2005] NSWCA 143 a weight machine became stuck, and the employee Gale injured herself attempting to free the weights. She was successful in her claim for damages.

In order for an injured person, such as a client (the plaintiff) of a fitness service provider, to successfully claim in negligence against another person, such as the fitness service provider (the 'defendant'), for compensation for the harm or loss suffered, the plaintiff must prove the following elements:

(i) a duty of care owed by the defendant to the plaintiff;

(ii) breach of that duty of care, in that the conduct of the defendant was inconsistent with a reasonable person's response to a foreseeable risk; and

(iii) an injury caused by the defendant's carelessness.

Once the plaintiff has established these elements, then the defendant may be able to raise a number of defences that reduce or avoid liability.

The elements of the tort of negligence are derived from the common law.[31] However, the common law has now been significantly changed by State and Territory legislation, so that much of the law of negligence is now contained in legislation. This is a result of changes to the law that were driven by a perceived torts and insurance 'crisis' (in the late 1990s to early 2000s) and the governmental responses to it.[32] A committee, the Negligence Review Panel chaired by Justice Ipp, a justice of the NSW Court of Appeal, recommended numerous and significant changes to negligence law in its report to the government.[33] Many of these suggested changes (or similar ones) have become law in all jurisdictions, except the Northern Territory, in what we will generically label the Civil Liability Acts (CLAs).[34] One of the purposes of the changes was to limit liability in negligence, including by introducing new defences in some jurisdictions (including in some states, concerning recreational activities) and by limiting the award of damages. Damages are not discussed in this article. Although many of the CLAs are wide-ranging in their scope, they are not codes, that is, they are not exhaustive and do not set out all relevant legal rules that apply; they exist on a substratum of common law.[35]

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[31] Cf the framework set out by Deane J in *Jaensch v Coffey* (1984) 155 CLR 549, 585–6.

[32] These events have been documented elsewhere, see, eg, the Honourable J J Spigelman, 'Negligence and insurance premiums: Recent changes in Australian law' (2003) 11 *Torts Law Journal* 291; the Honourable Justice P Underwood, 'Is Ms Donoghue's snail in mortal peril?' (2004) 12 *Torts Law Journal* 39; and, with a particular focus on NSW, D Villa, *Annotated Civil Liability Act 2002 (NSW)* (Lawbook Co, 2nd ed, 2010) 'Introduction'.

[33] The '*Ipp Report': Review of the Law of Negligence Final Report*, 2 October 2002. The *Ipp Report* can be accessed at the following web address: <http://www.amatas.com.au/assets/ipp_report.pdf>.

[34] The relevant legislation in each jurisdiction is as follows: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); and *Civil Liability Act 2002* (WA). For convenience, these Acts will be referred to generically as the 'Civil Liability Acts'. The Northern Territory's *Personal Injuries (Liabilities and Damages) Act 2003* has not introduced many of the extensive changes to the common law contained in the other jurisdictions' Acts.

[35] Only the CLA (Tas) s 3A(5), CLA (Qld) s 7(5) and the CLA (Vic) (in various sections, eg, ss 14F, 47, 71, and 82) expressly make this point.

The first element, the *existence* of a duty of care, concerns the relationship between the plaintiff and defendant and whether such relationship is one that gives rise to a *legal responsibility* on the part of the defendant to consider the safety and interests of the plaintiff when engaging in particular conduct that causes harm.[36] Although this question can raise considerable difficulties of law in new categories of cases, the relationships between fitness instructors, fitness centre operators and the like, and their clients, fall within a number of established duty relationships which the law recognises as satisfying this element[37] and is therefore not controversial and can be taken as a given.[38]

The third element, that of causation, considers whether the negligent act of the defendant caused the loss or harm of which the plaintiff complains. In most factual circumstances, this will be fairly straightforward and will not pose any analytical problems. If a weight machine is carelessly maintained and the weights fall on a client because of a fault that proper maintenance would have remedied, then the negligent act of failing to maintain the machine can be said to have *caused* the harm. All the consequences that flow from, or are caused by, that harm must be compensated. Consequences that can be said to flow from such harm include loss of income from an inability to work for a period, medical expenses, therapy and rehabilitation costs, and pain and suffering.

Having said that, in some cases, the mechanism by which an injury was caused may be at issue in cases of physical injuries arising from an incident while exercising. The plaintiff bears the onus of proof of causation and therefore needs to tender sufficient evidence to allow a court to determine that the injury was caused by the particular negligent act of the defendant (s 5E CLA (NSW)). The principles of causation are set out in s 5D CLA (NSW) (and equivalent sections in other states). The 'factual causation' test in s 5D (1)(a) requires a consideration of the 'but for' test of causation.[39] This test poses a hypothetical question: what would have happened to the plaintiff 'but for' the defendant's negligence or, to put it another way, what would have happened if the defendant had not been negligent and had taken appropriate precautions. If a plaintiff were to argue that the lack of training and competence of a trainer in general was the cause of an injury, this test would be difficult to satisfy. For the most part, however, the concern of this article is that poor training may lead to specific negligent advice or conduct of a trainer; such specific carelessness can generally be fairly easily shown to have caused an injury.

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[36] See generally *Donoghue v Stevenson* [1932] AC 562; *Sullivan v Moody* (2001) 207 CLR 562.

[37] As was stated by Mildren J in *Renehan v Leeuwin Ocean Adventure Foundation Ltd*. (2006) 17 NTLR 83; [2006] NTSC 4 [84]: 'in the case of recreational activities, those who teach or instruct others owe a duty to take reasonable case for their student's safety'.

[38] This is demonstrated by cases such as *Belna Pty Ltd v Irwin* [2009] NSWCA 46 and *Wilson v Nilepac Pty Ltd t/as Vision Personal Training* [2011] NSWCA 63.

[39] *Strong v Woolworths Ltd* [2012] HCA 5.

Although defences, such as contributory negligence, may be relevant in some contexts, they are not the concern of this article.[40]

The most important and relevant element of the tort of negligence in the context of the competence and qualifications of trainers is that of breach of duty.

The Essence of Negligence: Breach of Duty or Carelessness

The provisions in the CLAs setting out the general principles for *establishing liability* in negligence do not appear to differ in any significant ways between jurisdictions, despite minor differences in wording and headings. Usually the most important question in establishing liability is whether a defendant has breached a duty of care or, in other words, has been careless. Section 5B of the CLA (NSW) sets out the relevant principles; importantly, the relevant sections in all other states and the ACT are essentially identical. Section 5B of the CLA (NSW) states:

> **5B General principles**
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> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
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> (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.

Section 5B sets out a number of conditions that need to be met before a defendant can be found to have been negligent. First, the risk must have been

[40] Some states have introduced defences that arise where injuries are caused as a result of dangerous recreational activities, but these are not generally applicable to ordinary fitness activities, which would not be considered 'dangerous'. See further, J Dietrich, 'Liability for Personal Injuries Arising from Recreational Services' (2003) 11 *Torts Law Journal* 244.

foreseeable to a reasonable person acting in the same capacity as the defendant, that is, a reasonable fitness operator (discussed below). So, for example, (1) failing to maintain fitness equipment, or (2) prescribing strenuous exercise to an unfit client or in the absence of normal enquiries as to a client's medical history, might foreseeably lead to injury or even death to someone.

Secondly, such risk must be 'not insignificant'. This includes a consideration of the probability of the injury occurring, but it is not generally a difficult test to meet. Even very improbable and unlikely events may be 'not insignificant' risks.[41] For example, in the medical context, even very small risks (such as 1 in 1000) of negative side-effects from a particular medical procedure, would be 'not insignificant'. Similarly, the risk that a treadmill's stop button fails to work may be very small, even if the machine is not maintained, but nonetheless, not insignificant.

The third requirement focuses on whether a reasonable person would have taken certain precautions or acted differently in light of the foreseeable risks that he or she confronted. So, to take our earlier examples, a reasonable fitness operator may have had the fitness equipment regularly checked or serviced, or would have prescribed only moderate exercise or sought more detailed information on the client's medical history before prescribing an exercise regime.

In order to determine whether a reasonable fitness operator would have acted differently, the balancing factors listed in subsection (2) need to be considered. Obviously, factors such as 'probability', 'seriousness of risk', 'burden of avoiding risk' and the 'social utility' of conduct, cannot be given a mathematical value. Nonetheless they need to be weighed up against each other.

Standard of Care: The Reasonable Person

Of critical importance in deciding the question of whether the defendant was negligent is the standard of care that can be expected of the 'reasonable' person *in the defendant's position*.

The concept of a reasonable standard of care sets an *objective* test, of how the *hypothetical* reasonable person would respond to the particular risk. It is not, however, an abstract question since the focus is on the particular events leading up to the incident. It takes into account the context and all the relevant circumstances of the activity that the defendant was engaged in. Therefore

[41] Under the previous common law, a risk had to be 'not far-fetched or fanciful' in order to be foreseeable: *Wyong Shire Council v Shirt* (1980) 146 CLR 40. This was a very undemanding test. The slightly more onerous 'not insignificant' test is not likely, however, to change how easily this requirement of foreseeability is satisfied: see, eg, *Shaw v Thomas* (2010) Aust Torts Reps 82-065 (NSW CA) Macfarlan JA (Beazley and Tobias JJA agreeing), [44], and H Luntz, D Hambly, K Burns, J Dietrich and N Foster, *Torts: Cases and Commentary* (LexisNexis, 7th ed, 2013) [3.1.7]-[3.1.9].

the knowledge, expertise and experience that the typical, 'reasonable' fitness operator would *ordinarily* have is relevant in determining whether the defendant should have acted differently. This sets the minimum, objective standard that the defendant must meet.

Obviously, what is considered to be a response of a reasonable person to a risk depends on factors such as the nature and type of the fitness activity. For example, relevant factors include whether the activity occurred in a large centre, in a small gymnasium, or during an individual instructor-led outdoor recreational class, whether any supervision, instruction or advice was given, what equipment was used, the type of clientele, etc.

Further, inexperience is not taken into account when assessing the standards of a person professing a particular qualification. This is a general rule that is applicable in a range of contexts, for example, health professionals[42] and learner drivers.[43] Even a newly qualified fitness instructor or personal trainer will be expected to adhere to the standard of the 'reasonably competent professional personal trainer', as was noted in *Wilson v Nilepac Pty Ltd t/as Vision Personal Training.*[44] In that case, a newly qualified fitness trainer required a 40 year-old client to undertake a medicine ball exercise. As a result of that exercise, the client suffered injury to his lumbar spine. It was held that the exercise, though designed to 'push the [client] reasonably hard',[45] was unsuitable for a client who did not have sufficient abdominal strength. A reasonable trainer would have satisfied himself of the client's strength before proceeding.[46] Indeed, the trainer in question had no knowledge as to whether particular clients could cope with the added challenge of the exercise but had 'thought that it would be okay to do'[47] because he had seen other trainers use the exercise. Despite his lack of experience, he was held to have breached his duty of care – he should have informed himself further before prescribing the exercise – and his employer was held vicariously liable.

In most contexts, evidence as to particular industry practices in relation to particular risks and risk-creating activities, may be an *indication* of what reasonableness requires, that is, what objectively, a defendant should have done (or not done). Such evidence alone does not determine the issue, however, and

[42] *Wilsher v Essex Area Health Authority* [1987] QB 730, but contrast *Smit v Brisbane South Regional Health Authority* [2002] QSC 312.
[43] *Imbree v McNeilly* (2008) 236 CLR 510.
[44] *Wilson v Nilepac Pty Ltd t/as Vision Personal Training* [2011] NSWCA 63, [123].
[45] Ibid [170].
[46] Ibid [125].
[47] Ibid [106].

the court merely considers the industry practices when determining what is reasonable.[48]

As the discussion above demonstrates, persons professing to act as, say, qualified fitness instructors, will need to conduct themselves as 'reasonably competent professional personal trainer'. The decisions that they make, the exercises that they prescribe, the equipment they recommend, the advice they give, and the information that they seek before providing such advice, are all assessed according to the reasonable competent practices of others with similar skill and training. Importantly, unless their training or experience allows them to comply with such minimum standard, there is a likelihood both of injuries occurring and of legal liability arising from such injuries. The next case demonstrates the importance of complying with recommended industry practices.

In *Walker v Canberra Institute of Technology,*[49] Geoffrey Walker had suffered a knee injury to his left knee whilst he was enrolled as a student undertaking a course in fitness training with a view to qualifying as a personal trainer. The defendant was the Canberra Institute of Technology ('CIT') which provided such courses. Ironically, unlike most personal injury claims arising from fitness accidents, this was a claim brought not by a client against a fitness facility, but by a student against a training provider, for the consequences arising from inadequate instruction and supervision. The case therefore highlights the importance of compliance with basic standards of professional conduct (which would be even higher for a professional teacher of fitness courses) and the potential for inadequately trained graduates of such courses further failing to adopt appropriate practices.

Walker was 56 years old at the time of injury, having decided that he wanted to pursue a career in fitness. He was very fit for his age, though he had a history of pervious injuries to his wrists and to an ankle.[50] The injury occurred when

[48] However, provisions of the CLAs in all jurisdictions except Western Australia and the Territories apply in relation to conduct of a 'professional'. Where a professional's conduct complies with 'peer professional opinion', this provides defendants with a relevant defence (*Dobler v Halverson* [2007] NSWCA 335): such a professional's actions are *determined* not to be negligent in some cases unless it is irrational or unreasonable. Compare CLA (NSW) s 5O; CLA (Qld) ss 20-21; CLA (SA) ss 40-41; CLA (Tas) s 22; CLA (Vic) ss 57-60. It is likely that the term 'professional' includes within it at least some recreational and fitness instructors, personal trainers, and the like, depending on their precise role, training, industry accreditations, and similar relevant factors. To the extent that the 'professional' sections of the CLAs may apply to some members of the fitness and recreation industry, then the determination of the relevant standard of care required by such persons in their professional conduct is governed by those sections. As s 5O of the CLA (NSW) states, for example, the standard that applies to a 'professional' is that of 'widely accepted' 'peer professional opinion' and that there is no breach of duty if such opinion has been followed. In order to qualify as professional opinion, it need not have been universally accepted, nor even be a majority view, since there may be more than one, differing professional opinions. In Queensland and Victoria, however, the opinion must be accepted by a *significant number* of professionals.

[49] *Walker v Canberra Institute of Technology* [2013] ACTSC 193.

[50] Ibid [57].

the students in the class were asked to design and conduct fitness classes for other students. The suggested programs had to be submitted to the instructor, and were to be carried out under his supervision once cleared. Walker was asked by another student to do jumping squats from a deep knee bend position: the exercise was to be repeated for 30 seconds. During the exercise, Walker suffered pain in his left knee, but continued the exercise until completed.[51] Importantly, the instructor had cleared the exercise as part of the program and indicated afterwards that he did not consider the exercise to be harmful.

Walker sued the CIT as being vicariously liable for the instructor's negligence. Critical in the determination of whether the instructor had been careless was evidence from two sources supporting the argument that the exercise was potentially damaging: (1) medical experts and fitness instructors, and (2) the text book provided by the instructor as course materials. The course text book specifically referred to deep knee bend squats under the heading of 'Potentially harmful practices', as 'not recommended', and as increasing the risk of injury. It stated that it was an exercise that at best, only elite athletes trained for such type of exercise undertook.[52] Similarly, the medical evidence suggested that the exercise was 'inviting disaster'.[53]

Importantly, the evidence of other fitness instructors, medical experts, and the course materials provided by the instructor, all stressed that deep knee bends were potentially harmful. The Court had no hesitation in concluding that the exercise exposed the plaintiff to 'unnecessary and unreasonable risk' of injury; the instructor had therefore been negligent, and the defendant was held liable, despite the view of the instructor himself that the exercise involved no real risk of injury.

Breach: Proof of Breach

A plaintiff who seeks to establish that the defendant's acts or omissions were negligent will need to consider what reasonable conduct was required in the specific circumstances. On the one hand, in proving breach, a plaintiff may seek to show that *the defendant's conduct departed from* accepted industry standards and practices in relation to such activities. On the other hand, the defendant may seek to *deny liability* by proving that *the conduct complied with* accepted industry practice.[54] At a general level, relevant practices and standards may be found in industry adopted codes of conduct; professional bodies' standards and the like, or they may also be found in legislation. The relevant standard would be that which applies *at the time of* the incident, unless further information or

[51] Ibid [30]-[36].
[52] Ibid [6], quoting from R Marches and A Hill, *The Essential Guide to Fitness: for the fitness instructor*, (Pearson Education Australia 2005) p 254.
[53] [2013] ACTSC 193[75].
[54] See R Balkin and J Davis, *Law of Torts* (LexisNexis, 4th ed, 2008) p 282.

research has already become available to a reasonable person that indicates that that standard is no longer acceptable as a sufficient response to the foreseeable risks.[55] For example, one widely accepted fitness industry standard is that pre-exercise screening is carried out using accepted or recommended tools.

Specifically in relation to the fitness industry, in all states and the ACT, standards are set out in the various Fitness Industry Codes of Conduct. Some of these Codes are mandatory and are thus regulations under the jurisdictions' relevant Fair Trading Acts; others are voluntary.

Where there are relevant laws or regulations that apply, whether a defendant has breached such laws or regulations is obviously relevant to determining a defendant's negligence; but it is not *decisive*. Importantly, any breach of a law or regulation is not determinative of the question of negligence. Having said that, in many cases, failure to comply with laws or regulations, and the standards that these set out, will provide a strong basis for a finding of negligence, as the next case illustrates.

In *Loose Fit Pty Ltd v Marshbaum*,[56] the plaintiff, Ellen Marshbaum, aged 60, was attending a fitness centre when she fell down a set of stairs leading from the fitness centre to the downstairs entrance. The stairs were uneven and of differing riser heights and varying depth. Importantly, the stairs had no handrail installed on the upper flight. Both the fitness centre leasing the premises and the owners of the building were held liable in negligence for the plaintiff's injuries (quantified at over $430,000) and were required to pay 50% of the damages each. Of particular relevance here is that one of the key reasons why the court found that the defendants were liable was that the stairs did not comply with requirements of the *Building Code of Australia* (BCA) adopted in NSW from 1992.[57] Extensive renovations to the premises had been carried out approximately one and half years prior to leasing the premises, and had raised the issue of handrails in relation to the lower flight of stairs. These had been installed by the owners prior to the commencement of the lease.[58] It was held that the failure to consider the necessity of, and thus to install, handrails on the upper flight was careless conduct on the part of the owner and lessee.

Implications of Legal Liability for the Fitness Industry

It is a fundamental tenet of human factors engineering that human error is pervasive in critical incidents. It is not so much a question of when we should

[55] See the discussion of the issue of the application of relevant industry standards, and whether compliance with those standards was sufficient for defendants to discharge their reasonable standard of care, in *Baker v Quantum Clothing Group* [2011] UKSC 17; 4 All ER 223.
[56] *Loose Fit Pty Ltd v Marshbaum* [2011] NSWCA 372.
[57] Ibid [24], [72]-[74].
[58] Ibid [27]-[29].

expect human error to be involved in such incidents but when we should **not** expect human error to be involved. Even in organisations with the highest standards of hazard analysis and safety management as identified in exemplary safety culture or safety climate of an organisation,[59] critical incidents causing fatalities can and do occur. Acts of nature excepting, **all** injury causing incidences involve human error at some stage. This can occur either in the design, construction, training, maintenance or the operating stage of any process or activity where humans are involved.

The overwhelming majority of injury causing events are the result of a failure on the part of one or more persons to take adequate care when engaging in conduct that posed a risk to the safety of others, though that failure need not have been an unreasonable one. Where a person suffers personal injury and such injury was, at least arguably, the result of the careless conduct of another, such a person can seek recompense for their losses under the tort of negligence.

Understanding of the ways in which human error contributes to critical incidents is assisted by evaluating the types of error involved. The simplest taxonomy of errors is the dichotomy between errors of omission and errors of commission: whether something was done or not done. However, greater understanding of why human error occurred can be achieved based in part on whether the inappropriate action was intended or not.[60] Intended errors include knowledge-based mistakes (failure of perception/understanding because of inadequate knowledge or assessment of the situation). Intended errors also include rule-based mistakes (selection of the wrong if-then rule such as when a driver from Australia drives on the wrong side of the road in the USA). Another variant of intended errors includes violations (intentionally doing the wrong thing). Unintended errors include slips (such as in hitting the wrong button on a treadmill) and lapses (as when someone did not intend not to perform an action, such as tightening a screw on an exercise machine).

The value of assessing the causes of particular incidences by categorising errors is that this can reveal specific solutions, given the types of errors committed. Thus this type of analysis is necessary for error-containment and the development of error–tolerant systems. Such systems recognise that humans are inevitably fallible and that the focus should be on system designs that enable the effects of errors to be contained.

As already noted in relation to the Factor analysis that highlights how questionnaire items relate to each other, it is obvious that efforts to resolve the problems identified by this survey should focus on management, monitoring of

[59] IR Coyle, SD Sleeman & N Adams, 'Safety Climate' (1995) 26 (4) *Journal of Safety Research*, 247-254.

[60] See, generally: CD Wickens, JD Lee, Y Liu & SE Gordon-Becker, *An Introduction to Human Factors Engineering*, Pearson Prentice Hall, New Jersey, 2004.

safety policy and training/education of fitness instructors. Much effort in safety management is often directed at improving the physical environment as a first step, rather than seeking to improve safety via administrative means. It may therefore seem at odds with commonly accepted wisdom to suggest that the focus should be perhaps more on administrative and long term education and training goals. However, this apparent conflict is just that: an *apparent* conflict with accepted wisdom. For a start, the physical environment of fitness facilities and 'the goods produced' are much more homogenous than what is found in most industries. This leads to the conclusion that the physical environment of fitness facilities cannot be improved without management involvement from the start.[61] The best safety policy in the world is useless unless it is properly implemented and this requires management involvement.[62] By way of amplification, free weights and treadmills are virtually identical between fitness facilities, albeit that the correct use of them is another matter. The education that fitness instructors receive is beyond the scope of individual managers of fitness facilities to influence. This requires an industry wide reappraisal of extant courses, particularly on-line courses, which were the subject of trenchant criticism by participants in the NGT sessions. It is recommended that the peak fitness industry bodies address this as a priority.

In particular, the focus for improving sufficient professional competency ought to be on the quality of initial qualifications, and then to ensure the adequacy and availability of ongoing training and professional development. Certainly, most members of the industry recognise the importance of ongoing training: 66% of respondents and 27% of respondents considered that ongoing training was either extremely important or very important, respectively.

There is an important caveat here. The results of this study deal with fitness industry respondents' perceptions of what is important from an occupational health and safety perspective in the fitness industry. To the extent that these perceptions are not founded in fact, then erroneous conclusions must follow. That being said, given the robustness of the Factor Analysis and the scope of the NGT sessions, this would require statistical improbability on a vast scale considering the breadth and depth of this study. There are, however, situations in which the perceptions of employees in various industries as to what constitute the most important occupational health and safety problems they confront in the performance of their work are demonstrably far from objective fact.

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[61] Finch C, "A new framework for research leading to sports injury prevention", (2006) 9(1) *Journal of Science and Medicine in Sport* 3-9; Finch C, "No longer lost in translation – the art and science of sports injury prevention implementation research", (2011) 45 *British Journal of Sports Medicine* 1253-1257.

[62] Geller E, *The psychology of safety: how to improve behaviours and attitudes on the job*, Boca Raton, Florida: CRC Press, 1998; McClure R, Stevenson M, McEvoy S, et al, *The scientific basis of injury prevention and control*, Melbourne: IP Communications, 2004.

An obvious way of dealing with this potential limitation of this study is to conduct physical audits of facilities by suitably trained assessors. Such audits are a means of identifying discrepancies between the perceptions of employees and the actual facts as determined by independent, expert, assessment, but are not likely to be helpful in relation to the issue here under consideration, namely the training and competency of staff. Details of the physical audits dealing with other aspects of health and safety will be published in future articles.

One current mechanism that is commonly used to attempt to minimise exposure to potential legal liability and the associated financial risks is through the use of contractual exclusion clauses. Following changes to Australian law in 2002, recreational service providers have been given the right to contract out of their duty of care to their customers by using exclusion clauses that can exclude or limit liability for negligence or for breaches of warranties that services are to be provided with reasonable care and skill.[63] Membership applications and pre-screening tools used by fitness businesses now typically include exclusion clauses. Common use of such clauses has raised concerns that recreational service providers may refuse to invest in injury prevention practices and risk the safety of their consumers.[64] Despite such legislative changes, however, contractual exclusion clauses are often ineffective in limiting or excluding legal liability for injuries caused to customers.[65] Contractual exclusion clauses may thus provide a false sense of security to health and fitness facilities that rely on them, and ultimately provide limited security against actions for negligence.

Conclusion

The AFIRM project has identified a widely held perception that the training of fitness professionals is inadequate.

If the perceptions of insufficient professional qualifications are correct, then as the fitness industry faces the ever-growing challenges of dealing with an increasingly diverse clientele, the likelihood increases of more injury causing incidences and, consequently, potential legal liability. It is time to consider seriously whether we need to do more to train the trainers.

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[63] *Competition and Consumer Act 2010* (Cth), s 139A.

[64] B McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27(3) *Sydney Law Review* 443-482. And see JM Eickhoff-Shemek, 'The Legal Aspects: Legal Liability Associated with Instruction' (2005) 9(5) *ACSM`s Health & Fitness Journal* 29-31, 31.

[65] For example, *Walker v Canberra Institute of Technology* [2013] ACTSC 193; *Kovacevic v Holland Park Holdings* Pty Ltd [2010] QDC 279 and *Belna Pty Ltd v Irwin* [2009] NSWCA 46; see also J Dietrich, 'Minors and the exclusion of liability for negligence' (2007) 15(1) *Torts Law Journal* 87-103.