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Liability protection for owners and operators of athletic facilities - by Matthew Welnicki

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For amateur athletes, our local rinks, tracks, fields, parks, gyms, and other facilities are necessities. These require construction, maintenance, and supervision. Facility owners and operators must protect their clients, themselves, and their investments.

The first step in preventing personal injuries and property damage (and, in turn, liability) is maintaining a safe facility. Owners and operators must adopt appropriate risk management policies, which should be reviewed and updated periodically. Clearly-worded and prominently-featured instructions and warnings are necessary; proper staffing is crucial; and it can be extremely helpful for owners and operators to bring in sport-specific experts to advise on improvements.

Not all injuries or property damage can be avoided by padding or proper supervision. So insurance and risk transfer agreements remain vital parts of any risk management program. Owners and operators must continuously review their agreements and policies to make sure they are current and offer protection for all of the types of activities in which the patrons engage. For example, a gym that adds a pool or even an inflatable water slide must make sure that they have appropriate protection for the unique types of losses they might encounter (personal injury – drowning; property damage – water loss). An indoor soccer facility that adds a weight room for training should review coverage as their relationship with certain patrons might have evolved. And all facilities that contract with amateur programs covered by state or national organizations must monitor the programs to make sure that organizational coverage is not waived. Participants who are not wearing required protection or programs that participate in unsanctioned events might be left uncovered. If there are prerequisites to obtaining indemnity or insurance coverage, owners and operators must ensure that all of these are satisfied.

Releases and waivers of liability also are extremely important. The Massachusetts courts have repeatedly enforced these contractual provisions in a variety of circumstances. See Sharon v. City of Newton, 437 Mass. 99 (2002); Cormier v. Central Mass. Chapter of Nat. Safety Council, 416 Mass. 285 (1993); Lee v. Allied Sports Assocs., Inc., 349 Mass. 544 (1965); Zarvas v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17 (1997); see also Minassian v. Ogden Suffolk Downs, 400 Mass. 490 (1987). Participants can even indemnify others for their own negligence. Post v. Belmont Country Club, Inc., 60 Mass. App. Ct. 645 (2004). Guardian-signed releases on behalf of minors have also been upheld. See Sharon, supra. However, waivers do not typically protect against gross negligence claims. In the context of “health clubs,” which is broadly defined by statute, they might be deemed prohibited as a matter of public policy. G.L. c. 93, §§ 78, 80. And patrons often attempt to challenge the language of a particular waiver or claim that they did not understand its terms. None of this should take away from the importance of liability waivers; at a minimum, they help put patrons on notice of potential risks.

Other protections might be available under the circumstances. Take, for instance, the owner who allows patrons to enter and use facilities for free. In some contexts, the recreational use statute might preclude liability. Whooley v. Com., 57 Mass. App. Ct. 909 (2003).

If a claim against an owner arises out of its own defective design and construction of the facility, that owner should explore whether the statute of repose might apply. Chapter 260, Section 2B, imposes the six-year repose period for any claims arising out of the negligent “design, planning, construction, or general administration of an improvement” to real property. This might apply to the design of a facility, including the selection and use of padding, protections, or other features. A plaintiff should not be permitted to circumvent Section 2B by claiming negligent maintenance of the improvement if the real complaint is about its design. See Sonin v. Mass. Tpk. Auth., 61 Mass. App. Ct. 287, 289 (2004) (discussing that the statute does not name any class of protected actors but instead focuses on the activities claimed to have been the cause of the loss).

And the open and obvious rule remains alive in Massachusetts. O’Sullivan v. Shaw, 431 Mass. 201, 207 (2000) (rule obviated duty to warn against diving into shallow end of a pool). This duty negating principle can help in some instances. Yet, it can be a tricky argument associated with a tacit acknowledgment about the inherent risks of the activities and the need for protection. After all, the tort-based assumption of risk defense was abolished by G.L. c. 231, § 85; but see Hopkins v. Medeiros, 48 Mass. App. Ct. 607 (2000) (unlike secondary assumption of risk, primary or contractual assumption of risk left undisturbed by Section 85).

It remains in everyone’s best interest to keep athletic facilities open and available at reasonable costs. Protecting the athletes is important; but so too is protecting the owners and operators. Good risk management and an awareness of special defenses can go a long way towards achieving this goal.

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