DOLDEN WALLACE FOLICK LLP

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"Sure, I put the dumbbell there, but it's your fault I tripped on it". No Duty to Warn of Obvious Risks; *Hosseinkhani v. QK Fitness Inc.*, 2019 ONSC 70

By Ryan Osbourne, *DWF Toronto*,

E-mail: rosbourne@dolden.com

You want to be healthy so you sign up for a gym membership. You go every week and follow the trainer's instructions. You are told to run, so you run. You are told to do push-ups, you do them. You are told to use a dumbell, you do. Do you also have to be told that when you put the dumbell down there is a risk you might trip over it?

In *Hosseinkhani v. QK Fitness Inc.,* the Ontario Superior Court granted summary judgment to the defendant gym and found that there is no duty to warn of obvious risks - in this case, a dumbbell the plaintiff had herself placed on the floor.

The plaintiff alleged that she sustained injuries while participating in a group aerobics class involving the use of steps and dumbbells – a class she had attended biweekly for about 8 months.

During the class, the participants were instructed on how and where to place their dumbbells. The plaintiff did not follow the instructions. While coming off the step, the plaintiff tripped and

18th FLOOR – 609 GRANVILLE ST
VANCOUVER, BC. V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777
E-mail: info@dolden.com

302-590 KLO RD,
KELOWNA, BC. V1Y 7S2
Tel: 1.855.980.5580
Fax: 604.689.3777
E-mail: info@dolden.com

850 – 355 4th AVE SW
CALGARY, AB. T2P 0H9
Tel: 1.587.480.4000
Fax: 1.587.475.2083
E-mail: info@dolden.com

14th FLOOR –20 ADELAIDE ST E
TORONTO, ON. M5C 2T6
Tel: 1.416.360.8331
Fax: 1.416.360.0146
Toll Free:1.855.360.8331
E-mail: info@dolden.com

fell on one of her dumbbells, which she states had rolled from its original position. The plaintiff alleges that the gym was negligent by failing to warn the plaintiff of this risk.

The Court noted that the *Occupiers' Liability Act* ("OLA"), does not impose strict liability; that an occupier need not remove every possibility of danger; and that Courts must assess the *OLA* with common sense. Most importantly, there is no duty to warn an adult of an obvious risk.

In granting summary judgment, the Court found that the risk of a dumbbell rolling from its place is "obvious" and, therefore, the defendant did not have a duty to warn the plaintiff. The Court noted, "*accidents can occur without anyone being negligent*".

Interestingly, the exclusion of liability clause, which formed part of the gym membership agreement, was insufficient to warrant summary judgment. The Court found that the defendant failed to satisfy the onus of proving that it complied with s. 5(3) of the OLA, which required it to take "*reasonable steps*" to inform the plaintiff of the exclusion.

Take Away

There is no duty to warn an adult of an obvious risk. While this may appear simplistic, what is "obvious" is open to interpretation. However, when defending trip/slip and fall claims, one should always consider pleading that the risk was "obvious".

Additionally, the Court re-affirmed that to rely on an exclusion of liability clause contained in a gym membership agreement, an occupier must take reasonable steps to bring it to the attention of the other party. Otherwise, it is of no value to the occupier.

EDITOR

Chris Stribopoulos
Tel: 647 798 0605
Email: cstribopoulos@dolden.com

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