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Aftershocks

By: John T. Wolohan - May 2008

A court's decision may signal a change in fitness centers' duty of care with regard to AEDs.

Any health club that does not have an AED, even in states in which doing so is not a statutory obligation, runs the risk of being seen as acting with indifference to the welfare and safety of its patrons and either negligent or grossly negligent for any deaths that may result from a cardiac event. That was the message handed down earlier this year by the Cook County Circuit Court in *Fowler v. Bally Total Fitness* [Case No. 07 L 12258], a case that suggests a change in the way courts are viewing such incidents.

The court ruled that Bally's refusal to maintain an AED demonstrated intentional indifference to the welfare of its patrons and rose to the level of **gross negligence**.

As reported in this space ["Med Alert," April 2007, p. 30], at least seven states, including California, Illinois, New York and Massachusetts, have legislatively mandated that health clubs and fitness centers meeting a specified membership threshold not only maintain an automated external defibrillator, but also train employees on how to use such a device in the case of an emergency. The two main rationales legislatures have offered for requiring health clubs and fitness centers to have an AED are:

1. The sooner a heart attack victim gets medical care, the better his or her chances of survival; and,
2. The cost of purchasing an AED and training employees on its proper use is relatively low, especially when you consider that a potential result of inaction is the death of a patron.

Also spurring legislatures toward such mandates is the gradual acceptance of AEDs as devices, similar to fire extinguishers, that are meant to be operated by laypeople. AEDs are no longer considered sophisticated medical devices requiring specific training — and, in fact, all 50 states have now enacted Good Samaritan laws protecting AED users and providers.

While exercising at a Bally Total Fitness health club in Gaithersburg, Md., in late 2005, 46-year-old Gary Fowler collapsed from sudden cardiac arrest. This particular club did not have an AED on site, so while the staff at Bally called for emergency assistance, several patrons performed CPR in an attempt to resuscitate Fowler. Despite everyone's best efforts, Fowler died.

As a result, Fowler's estate filed a wrongful-death action, arguing that even though Bally may not have been statutorily obligated to have an AED on site, it still had a legal duty under negligence law to maintain an AED at the facility.

In moving for summary judgment, however, Bally argued that it was under no common-law duty to maintain or deploy an AED at its Gaithersburg facility. In support of this position, Bally cited three decisions from other jurisdictions — *Salte v. YMCA*, *Atcovitz v. Gulph Mills Tennis Club Inc.*, and *Rutnik v. Colonie Center Court Club Inc.* — where the courts held that health clubs have no duty to maintain AEDs on their premises for the benefit of

their patrons.

In considering Bally's motion for summary judgment, the court ruled that the issue was not whether Bally had a duty to maintain an AED on its premises or a duty to train its employees to deploy such a device, but whether, due to the special relationship between the premises owner and club member, Bally owed a duty to protect Fowler against unreasonable risks of physical harm. Clearly, the court ruled, the club owed him such a duty. What was not clear, however, was whether Bally breached its duty by not maintaining or deploying an AED on its Gaithersburg premises. The court, therefore, ruled that the case must go to trial.

In its ruling, the court did provide some clues as to the standard it would apply in determining whether Bally breached its duty by failing to maintain an AED. For example, the court noted that much has happened in terms of the statutory law regarding AEDs nationwide, and that in the time between the cases cited by Bally (which were decided in 1998, 2002 and 2004) and Fowler's death, the use of AEDs had become much more common — almost, the court held, bordering on standard practice in certain customer service-heavy industries. Citing *Ksypka v. Malden YMCA* [22 Mass. L. Rep. 122; 2007 Mass. Super. LEXIS 43], the court also ruled that it "sees no reason why the standard of care, even for emergency services, should not be regarded as an ever-evolving concept, measured in some way by the acceptance of the need for and efficacy of new emergency treatment procedures and equipment."

Next, the court considered whether it was foreseeable that someone using the facility might suffer a sudden cardiac arrest. Under negligence law, if the risk were not foreseeable, Bally would have had no duty to protect Fowler from such an injury. In considering whether Fowler's injury was foreseeable, the court ruled that cardiac events are reasonably foreseeable when people engage in strenuous physical activity. In support of this conclusion, the court cited a study conducted by Bally which found that an average of 35 Bally members die of cardiac events each year.

Additionally, the court looked at the cost such a burden would have on Bally and other health clubs, in comparison to the potential lives saved. Bally's cost to acquire AEDs for all its facilities nationwide and to train its employees on their use would be approximately \$2 million. By comparison, the court found that Bally spends more than \$60 million a year on advertising. As such, the court held that the consequences of imposing a duty on Bally to have AEDs at all its facilities and to train its employees on their use are relatively insignificant.

Bally, however, argued that even if the court did find that the Gaithersburg club owed Fowler a legal duty to maintain an AED, it was insulated from any negligence claims by the waiver Fowler signed as part of his membership agreement. While acknowledging that the club's waiver was valid and enforceable, the court also identified three exceptions where the public interest will render an exculpatory clause unenforceable:

1. When the party protected by the clause intentionally causes harm or engages in acts of reckless, wanton or gross negligence.
2. When the bargaining power of one party is so grossly unequal so as to put that party at the mercy of the other's negligence.
3. When the transaction involves the public interest.

After considering the three exceptions, the court ruled that Bally's refusal to maintain an AED at its Gaithersburg facility demonstrated intentional indifference to the welfare of its patrons and rose to the level of gross negligence. In support of this conclusion, the court, citing *Taylor v. Harford County Department of Social Services* [384 Md. 213, 228 (2004)], held that gross negligence is "the omission of that care which even inattentive and thoughtless men never fail to take of their own property[;] it is a violation of good faith ... it implies malice and evil intention."

Based on this definition, the court held that even though Bally had no statutory obligation, its failure to have such life-saving equipment at its facilities smacks of indifference by Bally to the welfare of its patrons — especially, the court held, given Bally's own internal study that showed an average of 35 Bally members die of cardiac events each year. Bally's conscious disregard of this known risk was, the court ruled, the very definition of gross negligence.

While the court's decision to remand the case for trial may have little value as precedent in future cases, this case is important for the change of opinion it could be signaling in the courts. Not so long ago, the courts and society viewed AEDs as sophisticated devices far beyond the type of first aid contemplated by fitness center personnel. As this case demonstrates, that view may no longer be the norm.

When you consider that more than 350,000 Americans suffer sudden cardiac arrest each year, and that the availability of defibrillators could prevent more than 100,000 deaths, it is clear that defibrillators should be part of all health clubs' emergency treatment procedures and equipment. To emphasize this point, the court noted that in Montgomery County, Md., during the past two years, AEDs were used on four separate occasions by other health clubs, saving the lives of all four of the individuals.

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