

COVID-19 and Exercise Rooms: Mitigating Legal Risks & Saving Lives in the Process

By Ashley Winberg



By now the majority of condominiums have reopened their indoor common element amenities, including their exercise rooms. Although these indoor amenities have been open for a considerable amount of time, many residents have yet to use their condominium's exercise room and instead have chosen to exercise outdoors. However, as the weather gets colder this fall, residents will be bringing their workouts indoors and an increasing number of residents will be using their condominium's exercise room.

Exercise rooms in condominiums, unlike other indoor amenities, can easily facilitate the spread of COVID-19 because when people workout they tend to breathe harder, more rapidly and more deeply, which causes them to expel a greater number of respiratory droplets that tend to spread further than if they were just breathing normally, and this is particularly problematic since exercise rooms in condominiums are generally small enclosed spaces with little ventilation and consistent air recirculation. Thus, the very nature of working out itself combined with the design of exercise rooms in condominiums, produces the perfect environment for respiratory droplets to easily spread, which is the primary mechanism for the transmission of COVID-19.

Condominiums under the *Condominium Act, 1998*, S.O. 1998, c. 19 (the “Act”) are deemed to be the occupiers of their common elements for liability purposes, and as the occupiers of their common elements have a duty of care under the *Occupiers' Liability Act, 1990*, R.S.O. 1990 c. O.2 (the “OLA”) to ensure the reasonable safety of persons while on their common elements. Thus, a condominium owes a duty of care to exercise room users to ensure their reasonable safety while they use the condominium's exercise room, especially during the COVID-19 pandemic. However, if an exercise room user were to contract COVID-19 as a direct result of using the condominium's exercise room, that does not necessarily mean that the condominium would be held liable under the OLA. Rather, as discussed in greater detail in this article, a court will look at the steps taken by the condominium:

1. to restrict, modify or exclude its duty of care under the OLA;
2. notify exercise room users of the foreseeable risks associated with using the exercise room during the COVID-19 pandemic; and
3. to ensure the reasonable safety of exercise room users.

Exclusion of Liability

Although a condominium owes a duty of care to exercise room users to ensure their reasonable safety while they use the exercise room, under the OLA the condominium can restrict, modify or exclude this duty of care vis-a-vis a waiver of liability.

By executing a properly drafted and implemented waiver, the individual executing the same relinquishes their right to a future legal claim. Generally, waivers are executed by individuals prior to engaging in a dangerous activity on one's property or prior to participating in some sort of athletic sport, and these waivers tend to focus on excluding liability for physical injuries, rather than the contraction of illness or disease transmission. However, with the onset of COVID-19, many organizations have drafted and implemented COVID-19 waivers, which exclude liability for exposure to and contraction of COVID-19.



Accordingly, one tool that a condominium can use as part of its larger risk mitigation strategy is to create and implement a “COVID-19 Exercise Room Waiver” prepared by a condominium solicitor, which excludes liability for exposure to and contraction of COVID-19. However, a condominium that has such a waiver prepared must do more than simply hand each exercise room user a copy of the waiver and request that the same be executed in order for a court to enforce the exclusion of liability contained therein, as under the OLA the condominium must take reasonable steps to bring each exercise room users' attention to the terms of the waiver that exclude liability. In this regard, the terms of a waiver that exclude liability for exposure to and contraction of COVID-19 should at a minimum be highlighted or in bold text, and the individual

executing the same should be given a sufficient amount of time to review the waiver and understand its terms. Hence, a “COVID-19 Exercise Room Waiver” created and implemented by a condominium should be provided to an exercise room user when they reserve the exercise room and an executed copy of the waiver should be provided to the condominium in advance of the exercise room user entering the exercise room for the first time after the same is reopened.

As waivers of liability for the contraction of illness and disease transmission have not yet been tested by the courts, it is impossible to predict with certainty how a court will interpret and enforce a waiver that excludes liability for exposure to and contraction of COVID-19. Given this uncertainty condominiums, including those that create and implement such a waiver, should take further steps to notify exercise room users of the risks associated with using the exercise room during the COVID-19 pandemic as well as additional precautionary measures to ensure the reasonable safety of exercise room users.

Notification and Assumption of Risks

A condominium can draw exercise room users’ attention to the condominium’s exclusion of liability and notify them of the risks associated with using the condominium’s exercise room during the COVID-19 pandemic by posting a clearly visible and easy-to-read sign in the exercise room that delineates the foregoing.

Any conditions that may increase the risks associated with using the condominium’s exercise room during the COVID-19 pandemic should also be posted in the exercise room. Conditions that may increase the risks associated with using a condominium’s exercise room during the COVID-19 pandemic include: if the exercise room is not professionally cleaned and disinfected after each individual use; if entry into and/or use of the exercise room is not monitored by the condominium; and/or if an agent of the condominium does not pre-screen all exercise room users for COVID-19 exposure and contraction prior to the same being permitted to enter the exercise room.

If a condominium creates and implements a “COVID-19 Exercise Room Waiver” the risks associated with using the condominium’s exercise room during the COVID-19 pandemic as well as any conditions that may increase said risks should also be delineated in the waiver and voluntarily assumed by each exercise room user who executes said waiver. The foregoing is recommended as under the OLA a condominium’s duty of care will not apply to risks willingly assumed by exercise room users. However, this exclusion of liability is narrow as a court will hold a condominium liable if it finds that the condominium acted with reckless disregard for the safety of exercise room users. Accordingly, additional precautionary measures should still be taken by a condominium to ensure the reasonable safety of exercise room users.

Creation and Implementation of COVID-19 Exercise Room Rules

To date, many condominiums have created “COVID-19 Exercise Room Rules”, which generally require that exercise room users, at a minimum:

1. comply with the restriction on the number of exercise room users at a single given time;
2. only use the exercise room on the dates and at the times reserved in advance;
3. be screened for COVID-19 exposure and contraction prior to entering the exercise room;
4. use hand sanitizer immediately before entering and immediately after exiting the exercise room and frequently while working out in the exercise room;
5. maintain a physical distance of 6 feet between one another at all times; and
6. disinfect all equipment and surfaces immediately before and immediately after coming into contact with the same.

While the creation of rules similar to the foregoing is a step in the right direction towards mitigating a condominium’s risk exposure, in order for the rules to achieve their intended objective they must be:

1. reasonable, such that exercise room users must be able to comply with the rules and the condominium must be able to enforce the rules;
2. effectively communicated to all staff and residents ideally in advance of the exercise room being reopened (i.e. written in English; available in other languages that are commonly used within the community, especially if the first language of the majority of residents is not English; clear, short and succinct; and posted throughout the exercise room);
3. monitored and enforced by the condominium; and

- regularly assessed for their effectiveness, compliance and adherence to the most up-to-date requirements, guidelines and recommendations issued by the provincial government, local municipality and local public health unit.

Redesigning Exercise Rooms

In addition to creating and implementing rules similar to those discussed above, since exercise rooms in condominiums, unlike other indoor amenities, can easily facilitate the spread of COVID-19, it is important that condominiums also take steps to redesign their exercise rooms to ensure that: sufficient hygiene and disinfecting products are readily available throughout the exercise room; exercise room users are able to maintain a physical distance of 6 feet between one another at all times; and to limit the spread of respiratory droplets. The foregoing could be achieved by a condominium:



- installing an automatic hand sanitizer dispenser at the entrance of the exercise room, a COVID-19 screening poster and any other notices that must be posted at the entrance pursuant to provincial, municipal or public health requirements;
- installing automatic hand sanitizer dispensers at various locations throughout the exercise room and placing individual disinfecting wipe dispensers at each individual piece of equipment and/or at each designated area within the exercise room;
- ensuring there are a sufficient number of garbage bins throughout the exercise room for used disinfecting wipes to be discarded;
- placing a bin in the exercise room for used free-weight and floor equipment that needs to be disinfected, if the condominium has cleaning staff clean and disinfect the exercise room after each individual use;
- redesigning the layout of the equipment in the exercise room;
- placing visible tape on the ground to delineate traffic arrows and separation markers;
- installing plexiglass dividers between the larger pieces of equipment, such as each cardio machine, each cable machine, and the free weight/bench area; and/or
- creating individual workout stations that are divided by plexiglass each with their own individual equipment.

COVID-19 is a potentially deadly virus that can easily and quickly spread among a condominium community if proper precautions are not taken. Exercise rooms in condominiums, unlike other indoor amenities, are particularly concerning in light of COVID-19, as the design of the same combined with the very nature of working out itself produces the perfect environment for respiratory droplets to easily spread, which is the primary mechanism for the transmission of COVID-19. Due to the foregoing, there is a real and significant risk that a resident could contract COVID-19 as a direct result of using their condominium's exercise room during the COVID-19 pandemic and that their condominium could be held liable as a result, especially if the condominium did not take steps to ensure the resident's reasonable safety, failed to notify the resident of the risks associated with using the exercise room during the COVID-19 and failed to exclude its duty of care under the OLA. Thus, prior to the influx of exercise room users this fall, it is imperative that condominiums take steps to exclude their duty of care under the OLA; notify exercise room users of the risks associated with using the exercise room during the COVID-19 pandemic; and ensure the reasonable safety of exercise room users by creating and implementing reasonable and enforceable rules, and redesigning the exercise room to promote compliance with the same. By taking the foregoing action a condominium will not only be able to effectively limit its exposure to potential liability but could also save lives in the process.

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