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## Health Clubs, Defibrillators and Saving Lives

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The Appellate Division, Second Department, has made it a lot safer to exercise at a health club. In fact, if you exercise in a health club in the Second Department<sup>1</sup> the health clubs, which are governed by General Business Law (GBL) §627-a, are now not only required to have an operable automated external defibrillator (AED) and a person trained in its use but also have an affirmative duty to actually use this life-saving device upon a club member in apparent cardiac distress. In [Miglino v. Bally Total Fitness of Greater New York](#),<sup>2</sup> the Second Department noted that "The risk of heart attacks following strenuous exercise is well recognized, and it has also been documented that the use of AED devices in such instances can be particularly effective if defibrillation is administered in the first few minutes after the cardiac episode commences... 'Sudden cardiac arrest is a major unresolved health problem. Each year, it strikes more than 350,000 Americans... More than 95% of these people die because life-saving defibrillators arrive on the scene too late, if at all'."

The *Miglino* court held that GBL 627-a "imposes an inherent duty to make use of the statutorily required AED" and, further, that such a duty was assumed at common law because defendant's employee "was trained in the use of the AED [and] his failure to use the device was tantamount to not acting carefully."

Prior to *Miglino*, there have been several cases addressing the duties of health clubs, in New York and elsewhere, to have AEDs available, along with trained employees, and to use the AED in a responsible manner when needed. These issues were recently explored in [DiGiulio v. Gran Inc.](#)<sup>3</sup> with the First Department rejecting the "argument that [GBL §627-a] implicitly obligated the club to use its AED" and finding that "While the statute explicitly requires health clubs to have AEDs and people trained to operate them on their premises, it is silent as to the clubs' duty, if any, to use the devices." Although the Court of Appeals affirmed, it did so leaving "open the question of whether GBL §627-a creates a duty upon a health club to use the AED which it is required to provide."<sup>4</sup>

### Pre-GBL §627-a Cases

Cases involving cardiac events prior to the 2005 enactment of GBL §627-a rejected the necessity of having or using AEDs to assist distressed sports participants. In [Colon v. Chelsea Piers Management Inc.](#),<sup>5</sup> a 21-year-old suffered cardiac arrest and died while playing basketball at Basketball City New York. The Second Department found that the plaintiffs failed to submit admissible evidence that defendants violated industry custom by failing to provide an AED at the premises and the defendants had "no statutory duty to provide an [AED] or personnel trained in [CPR]."

In [Rutnick v. Colonie Center Court Club](#),<sup>6</sup> a 47-year-old died after suffering cardiac arrest while playing racquetball in a tournament. In dismissing the complaint which, inter alia, claimed that defendants "failed to have proper procedures, personnel and equipment [i.e., defibrillator] ready to respond to medical emergencies," the Third Department found that decedent, an experienced amateur racquetball player, assumed "the risk of cardiac failure." And in [Chappill v. Bally Total Fitness Corp.](#),<sup>7</sup> the plaintiff "collapsed by the lat pull down machines...[suffering] tremendous brain damage." The Supreme Court, New York County, in this pre-GBL 627-a case found no gross negligence or assumption of the risk, applied the Good Samaritan statute (Public Health Law §3000-a), and found no duty to keep an AED on the premises.

### AEDs in Other States

In [Rotolo v. San Jose Sports and Entertainment](#),<sup>8</sup> a teenage hockey player died of sudden cardiac arrest at an ice hockey facility. The California appellate court noted that California's Health and Safety Code §1797.196 encourages "the availability of AEDs by providing immunity from liability for those who acquire the devices, when they are used in an attempt to save a life. Noting that "building owners and managers have no duty in the first instance to acquire and install an AED," it went on to state that those who do install AEDs in their buildings "will not be liable for damages resulting from the rendering of emergency care...so long as certain requirements are met."

In [Aquila v. Ultimate Fitness](#),<sup>9</sup> involving a sudden heart attack in the locker room, a Connecticut Superior Court found "a genuine issue of material fact as to whether the defendant breached the duty of care to a business invitee for its failure to own an AED and have staff trained in its use." In [Salte v. YMCA](#),<sup>10</sup> involving cardiac arrest while exercising on a treadmill, an Illinois appellate court concluded that "defendant had no duty to have [an AED] on its premises, without regard to a defibrillator's cost or complexity." In [Goldin v. Bally Total Fitness Corp.](#),<sup>11</sup> involving sudden cardiac attack while exercising, a Pennsylvania state court held that a health club owed no duty to maintain an AED on premises. In [L.A. Fitness International v. Mayer](#),<sup>12</sup> involving cardiac arrest while using a stepping machine, a Florida appellate court held that "There is no common law or statutory duty that a business have an AED on its premises. ...L.A. Fitness... fulfilled its duty of reasonable care in rendering aid to the deceased by summoning paramedics within a reasonable time."

#### Airplanes and Hotels

Travelers may experience sudden cardiac arrest while at a domestic or foreign hotel<sup>13</sup> or resort or while being transported on domestic and international aircraft. For example, in a suit in Washington state, [Beaudu v. Starwood Hotels and Resorts Worldwide Inc.](#),<sup>14</sup> a FedEx international airline pilot experienced a heart attack and died at the Sheraton Hong Kong Hotel & Towers. The complaint asserted that the hotel "negligently failed to establish and implement a policy of summoning emergency medical assistance consistent with the standard of care in the industry, delayed in summoning medical assistance and failed to summon an ambulance with automatic defibrillation capability."

In [Abramson v. The Ritz-Carlton Hotel Company, LLC](#),<sup>15</sup> a guest went into cardiac arrest at dinner and his wife performed CPR after which hotel loss prevention officers arrived with an oxygen tank and AED. The District of New Jersey noted that "Plaintiff contends that the oxygen tank was empty and the defibrillator only produced a 'faint like quiver' when applied..." Plaintiff seeks to predicate liability on the fact that the medical equipment that was gratuitously provided by the hotel was negligently maintained. The court found that defendants "did not have a duty to have oxygen or a defibrillator on the premises, or to make the equipment available... To the extent that Defendants endeavored to provide this equipment...this voluntary act is immunized by the Good Samaritan Act."

Typically, when an airline passenger has sudden cardiac arrest an effort is made, if possible, to divert the aircraft in search for medical treatment.<sup>16</sup> More recently, however, commercial aircraft, both domestic<sup>17</sup> and international,<sup>18</sup> usually maintain oxygen tanks and AEDs on board.

#### Conclusion

The *Miglino* decision is a step forward in making needed medical assistance available to victims of sudden cardiac arrest.

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#### Endnotes:

1. The court rejected the reasoning of the First Department case of *DiGiulio v. Gran Inc.*, 74 A.D.3d 450 (1st Dept. 2011), leave granted 16 N.Y.3d 450 (2011), [order affirmed](#) 17 N.Y.3d 765 (2011), reargument denied 17 N.Y.3d 881 (2011) which found no such duty under either GBL 627-a or the common law.
2. *Miglino v. Bally Total Fitness of Greater New York*, —A.D.3d—, 2011 WL— (2d Dept. 2011).
3. *DiGiulio v. Gran Inc.*, 74 A.D.3d 450 (1st Dept. 2011), leave granted 16 N.Y.3d 701 (2011), order affirmed 17 N.Y.3d 765 (2011), reargument denied 17 N.Y.3d 881 (2011).
4. *Miglino v. Bally Total Fitness of Greater New York*, —A.D.3d—, 2011 WL— (2d Dept. 2011).
5. *Colon v. Chelsea Piers Management Inc.*, 50 A.D.3d 616, 855 N.Y.S.2d 201 (2d Dept. 2008).
6. *Rutnik v. Colonie Center Court Club*, 249 A.D. 2d 873, 672 N.Y.S.2d 451 (3d Dept. 1998).
7. *Chappill v. Bally Total Fitness Corp.*, 2011 N.Y. Misc. LEXIS 555 (Sup. Ct. New York Co. 2011).

8. *Rotolo v. San Jose Sports and Entertainment*, 151 Cal. App. 4th 307 (Cal. App. 2007). See also: [Brown v. Atlas-Kona Kai Inc.](#), 2009 Cal. App. Unpub. LEXIS 2108 (Cal. App. 2009) ("We conclude that Kona Kai's duty as operator of the health club was simply to call for help").
9. *Aquila v. Ultimate Fitness*, 2011 Conn. Super. LEXIS 1474 (Conn. Super. 2011).
10. *Salte v. YMCA*, 814 N.E. 2d 610 (Ill. App. 2004).
11. *Goldin v. Bally Total Fitness Corp.*, 2011 Phila. Ct. Com. Pl. LEXIS 54 (Pa. Cm. Pl. 2011). See also: [Atcovitz v. Gulph Mills Tennis Club Inc.](#), 571 Pa. 580 (Pa. 2002) ("the existence of a civil immunity provision for Good Samaritans who use an AED in an emergency situation cannot impose a duty on a business establishment to acquire, maintain and use such a device on its premises").
12. *L.A. Fitness International v. Mayer*, 980 So. 2d 550 (Fla. App. 2008).
13. Nathan, Heartbreak Hotels, *The Informer/Traveler's Health*, Conde Nast Traveler January 2010, p. 47 ("Sudden cardiac arrest strikes more than 300,000 Americans annually. Only about five percent survive. 'We could save about 25,000 more people every year if AED's were more widely used'").
14. *Beaudu v. Starwood Hotels and Resorts Worldwide Inc.*, 2005 WL 1877344 (W.D. Wash. 2005) (complaint dismissed on the grounds of forum non conveniens).
15. *Abramson v. The Ritz-Carlton Hotel Company, LLC*, 2011 WL 2149454 (D.N.J. 2011).
16. See e.g., [Fulop v. Malev Hungarian Airlines](#), 175 F.Supp.2d 651 (S.D.N.Y. 2001)(passenger suffers heart attack and claims negligence in not diverting flight); [Krys v. Lufthansa German Airlines](#), 1997 WL 450150 (11th Cir. 1997) (airline liable for failing to land at nearest airport to assist heart attack victim).
17. The FAA requires defibrillators on domestic commercial aircraft which meet certain requirements: 14 CFR 121.803 (c)(4) provides: "For treatment of injuries, medical events, or minor accidents that might occur during flight time each airplane must have the following equipment that meets the specifications and requirements of appendix A of this part: ...In airplanes for which a flight attendant is required and with a maximum payload capacity of more than 7,500 pounds, an approved automated external defibrillator as of April 12, 2004.
- See e.g., [Tandon v. United Air Lines](#), 926 F.Supp. 366 (S.D.N.Y. 1996) (failure to provide adequate oxygen to heart attack victim during flight); [Kemmelman v. Delta Air Lines Inc.](#), 293 A.D.2d 576 (2002) (passenger suffers heart attack; empty oxygen bottle); [Somes v. United Airlines Inc.](#), 33 F.Supp.2d 78 (D. Mass. 1999) (claim that airline failed to equip its aircraft with defibrillator to assist passenger with cardiac arrest); [Tobin v. AMR Corp.](#), 637 F.Supp.2d 406 (N.D. Texas 2009) (cardiac arrest; airline not entitled to immunity under Illinois Automated External Defibrillator Act or Good Samaritan Act).
18. See e.g., [Aziz v. Air India Limited](#), 658 F.Supp.2d 1144 (C.D. Cal. 2009) (cardiac arrest during international flight; failure to have AED did not constitute an "event" under the Montreal Convention; complaint dismissed).

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