



How far is too far?

If, when provoked by another person, a martial artist uses excessive force which results in death, what are the consequences?

Nowadays, many people learn martial arts and self-defence techniques to protect themselves from the threat of bodily injury, without developing the budo spirit within themselves. This makes many so-called martial artists candidates for committing acts of violence. Although real confrontations may be rare for the majority of martial artists, human nature is such that most people cannot help but respond aggressively when provoked. But what amounts to provocation?

This is a difficult area of the law and assessments by judges as to what may constitute legal provocation vary widely. Essentially, a murder charge can be reduced to manslaughter by way of provocation. The maximum penalty for manslaughter is 20 years imprisonment.

In *Masciantonio v. R (1995) 183 C.L.R. 58*, the High Court laid down the applicable principles of what amounted to provocation and said: "Homicide which would otherwise be murder is reduced to manslaughter if the accused causes death while acting under provocation. The provocation must be capable of causing an ordinary person to lose self-control. The provocation must cause the accused to lose self-control, and the accused must act before he has the opportunity to regain his composure."

This means that the accused must form an intention to kill or inflict grievous bodily harm (putting recklessness to one side) before any question of provocation arises. Provocation only operates to reduce what would otherwise be a charge of murder to manslaughter. The provocation must be such as could cause an ordinary person to form an intention to inflict grievous bodily harm or even death.

The test involving the hypothetical 'ordinary person' is an objective test which lays down the minimum standard of self-control required by the law. Since it is an objective test, the characteristics of the ordinary person are merely those of a person with ordinary powers of self-control. They are not the characteristics of the accused, although when it is appropriate to do so because of the accused's immaturity, the ordinary person may be taken to be of the

same age as the accused.

However, the seriousness of the behaviour that constitutes the provocation must be assessed by taking into account the relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely offensive to another

Someone pushing your buttons is not necessarily an excuse to react with violence.



because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the level of provocation in this way, it's then necessary to ask whether that degree of provocation could cause an ordinary person to lose self-control and act in the same manner as the accused.

So, what should happen when a person uses words to taunt another, or engages in provocative offensive behaviour such as spitting, raising their middle finger, etc.?

Withdrawing and retreating is not a bad start. In many instances, the martial artist has

a choice and it takes more courage to follow that choice. In most cases, the provocation is only slight. The circumstances of the provocation will become relevant in the jury's deliberation if provocation is left to them to decide. The other aspect to consider is the degree of violence demonstrated. If a person is holding a weapon at another, this could be seen as highly provocative and even life-threatening.

The skilled martial artist may still be able to walk away from a confrontation or, if given no other choice, do enough to avoid injury or diminish the danger. But then the question becomes, what is reasonable force? Is it reasonable to use dim-mak techniques, or a round-house kick, or bite the ears?

When a person is faced with such confrontations, there is no time to think about what is or isn't reasonable. How realistic is it for a person to deflect or redirect a frenzied attack? Do all martial artist train to execute a one-punch knockout? Is it better to slap someone with your palm than to punch their face? Should a person kick to the groin? Should a weapon be used to counter another?

While some types of behaviour may cause a person to feel hurt, disappointed or angry, there is nothing abnormal about this. What is abnormal is the reaction to the conduct. When a person loses self-control and perpetuates fatal violence with an intention to kill or to cause serious bodily injury, they cross the boundary of what an average person would do. As for martial artists, I believe the community requires them to exercise a higher degree of restraint and self-control. One judge observed that: "This community has a powerful commitment to the sanctity and inviolability of the life of everyone who dwells within it."

So, how far is too far? As a martial artist, I think to strike (provoked or unprovoked) when not defending oneself against physical harm, is going too far.

William Lye is a Master of Laws and has been a practising Barrister at Law for 16 years. He can be contacted at william@lye.com.au. 