



# The Blood Rule

**Fear of liability and litigation plagues sports and martial arts clubs. In light of this and students' safety, should martial arts clubs allow students infected with HIV or Hepatitis to train?**

**T**he HIV and Hepatitis B and C viruses are only transmitted through blood, but unless a student reveals they have such a virus, it is very hard to monitor or detect. It is, however, inevitable that in any martial arts style that involves contact, there will be minor injuries involving blood, which may result in either direct transmission or contamination of equipment. This leaves martial arts clubs at risk of being sued for negligence should a member become infected with HIV or Hepatitis while participating in the activity. However, if martial arts clubs exclude such students from being members or participating in certain activities, they may find themselves the subject of a discrimination lawsuit. Either way, clubs are at risk of litigation.

Not accepting a student because they're infected with HIV or Hepatitis may lead to a claim of discrimination under the *Disability Discrimination Act 1992* (DDA) or the *Equal Opportunity Act 1995* (EOA). It's against the law to discriminate against someone because of their actual or assumed disability or impairment. Under both Acts, the presence of viruses such as HIV or Hepatitis is included in the definition of disability or impairment. The EOA deals with public clubs, whereas the DDA deals with both public and private discrimination.

**Blood is common in combat sports (Bruce MacFie shown for illustrative purposes only)**



VINCE VAURUM

Essentially, it's unlawful for a club to refuse a membership application or accept it subject to terms and conditions on the grounds of the person's disability. It's also unlawful to discriminate against someone because of their disability by excluding them from a sporting activity.

However, there is an exception for infectious diseases. It's not unlawful for a person to discriminate against another person if their disability is an infectious disease and the discrimination is reasonably necessary to protect public health. However, to show that the exclusion of an infected member is 'reasonably necessary to protect public health' the risk of transmission would have to be sufficiently high. In contrast, many martial arts clubs (hopefully) operate a 'zero blood-tolerance' rule, whereby members with open wounds are not permitted to participate. Such a rule might be considered a more reasonable precaution than excluding infected members.

In the court case *Hall v Victorian Amateur Football Association* [1999], the Tribunal was asked to determine whether the VAFA discriminated against Hall (an amateur footballer) by refusing his application for registration with the VAFA, on the grounds that the rejection was necessary in order to protect the health and safety of other football players. The Tribunal found that the risk of HIV transmission was so low that it was unreasonable to ban the player, thus the VAFA was found guilty of discrimination.

Although the two Acts and the Hall case would lead one to think that martial arts clubs shouldn't discriminate against those infected with HIV or Hepatitis, another branch of the law indicates a contrary position. By accepting infected students, martial arts clubs could be increasing the risk of other participants contracting the disease and could find themselves vulnerable to a suit for negligence in the event that an infected person proved that he/she contracted the disease as a result of contact with blood from a fellow student at the dojo.

It's clearly established that a club owes its members a duty of care. The question

is, what does that entail? Does it extend to excluding infectious participants? In determining the standard of care, there are three considerations: first, the probability of risk; second, the gravity of the risk; and third, the practicability of precaution. Each case depends on the facts, which might involve whether or not the martial arts club did all it could to minimise the risk of exposure. While the probability of transmission of HIV or Hepatitis might be very low, the gravity of contracting either disease is such that every martial arts club should ensure that non-discriminatory precautions are in place.

Some might think that mandatory testing is the way to minimise exposure to such risks. Although mandatory testing is not prohibited by either the DDA or EOA, it would be of little value to a martial arts club as it would be unlawful (under the DDA) to prevent membership of a person who has tested positive. It's thus arguable that excluding members who refuse to take the test also amounts to discrimination.

In my view, it's also the duty of a student who is infected with HIV or Hepatitis to ensure that others aren't unduly concerned about the possibility of contracting the disease. Obviously, it's difficult to strike a balance between one's privacy and public responsibility.

In the end, martial arts students need to be educated about risks posed to them when undertaking contact activity and use common sense in situations where a person has been exposed to blood. Martial arts clubs also need to take 'reasonably practicable' precautions by having some sort of program in place to deal with such situations. A 'zero blood-tolerance' rule is arguably taking a reasonable precaution and not discriminating against those with contagious disease.

*William Lye is a Master of Laws and has been a practising Barrister for 17 years. He can be contacted at [william@lye.com.au](mailto:william@lye.com.au)*

*(\* The author acknowledges the help of his legal assistant, Jessica Gurevich, in writing this column.)*