



# Dangerous arts

## Are martial arts considered a dangerous recreational activity by law?

People have engaged in risky pastimes since long before the law of negligence was formulated. However, the risky nature of a martial art activity in which an adult participant has chosen to engage may be of significant factual importance in establishing cases of negligence.

In 2002, the High Court in the case *Woods v Multi-Sport Holdings Pty Ltd*, upheld a WA District Court judge's finding that the respondent (the sports centre and organiser of the activity) didn't breach its duty of care to the appellant (a man whose eye was seriously injured while playing indoor cricket). The High Court judged that the respondent's failure to provide a helmet to the injured party, or to provide a sign warning players of the dangers of indoor cricket and the risk of serious eye injury, was not negligent.

This decision reinforces a particular view of sport as "physically risky, domineering and competitive. It continues the recent trend in the High Court in negligence cases away from the values of paternalism, loss distribution and communal responsibility, and towards autonomy, self-responsibility and risk choice". (1)

In the context of martial arts, there are risks in training, sparring and competition that may be regarded as acceptable by participants, so it's commonly regarded that there's a voluntary assumption of risk. It's important to understand, however, the concept of inherent risks in the context of obvious risks, when deciding whether there has been a failure to warn a participant of the risks associated with a particular martial arts activity.

In the law of negligence, the concept of 'foreseeability' has been taken to embrace risks that are quite unlikely to occur, such that a 'risk' is not one that is far-fetched or unrealistic. Generally speaking, it is a case of balancing the magnitude of the risk with the cost or inconvenience of preventing it.

Justice Mason pointed out in *Wyong Shire Council v Shirt (1980)*, that ultimately the question of fact is what a reasonable person, in the position of the defendant, would do by way of response to the risk.

In some cases, a court is not confronted with a risk that is quite unlikely to occur; it is dealing with an activity that carries the possibility of injury, including serious injury, in a number of different forms. In the context of martial arts, the adult martial artist is not a child and he is not being compelled to

engage in the practice of martial arts — it is his own choice to train, spar or compete. That such activities are risky is plain to anyone who understands what they involve. To determine whether the defendant has been negligent, the court or tribunal must determine whether the defendant's response to the risk was reasonable, in light of the foreseeability and magnitude of the risk, and the cost/inconvenience of preventing it.

Where it is claimed that reasonableness requires one person to provide protection or warning to another, the relationship between the parties and the context in which they entered into that relationship, may be significant. The relationship between an employer and an employee, or between a martial arts instructor and a student, may



have practical consequences as to what it is reasonable to expect by way of protection or warning. This may be different from the expectations that flow from the relationship between the proprietor of a sporting facility or dojo and a martial artist who uses the facility or dojo for training purposes, or a group of martial artists voluntarily using a gym for recreational purposes. It is ultimately a question of factual judgement, to be made in the light of all the circumstances of a particular case.

As for those who engage in martial arts competition, rules that govern the safety of competitors are paramount. Organisers of such competitions must consider making or changing the rules by giving weight to many considerations, some conflicting (like spectator enjoyment versus

competitor safety). It is, however, critical that considerations relating to the safety of participants in the competition be given due weight, as it is in this context that the question of a legal duty of care arises.

In *Agar v Hyde (2000)* — a case involving an injured rugby player — the High Court said that accepting risk, sometimes to a high degree, is part of many sports; the element of danger may add to the enjoyment of the activity. A great deal of public and private effort, and funding, is devoted to promoting and providing for individual or team sports. This reflects a view, not merely of the importance of individual autonomy, but also of the public benefit of sport. Sporting activities that sometimes result in physical injury are not only permitted, they're encouraged. Sport commonly involves competition, which in turn may involve body contact or efforts on the part of individual competitors that test the limits of their capabilities, both of which carry an inherent danger of physical injury. Rules are thus the essence of sporting competition — individuals or teams wishing to compete must agree, personally or through membership of an association, upon these rules.

Since the High Court case, NSW, WA, Tas. and Qld. have enacted legislation specifically dealing with dangerous recreational activity cases. A defendant cannot be held accountable for harm suffered by the plaintiff through the materialisation of an obvious risk of a dangerous recreational activity. Vic. and SA have not gone so far as the other states, but retain the concept of obvious and inherent risks. The ACT and NT legislation do not even cover obvious and inherent risks, (meaning the laws do less to protect those overseeing activities like martial arts).

Although the current trend is to exclude a duty of care owed to those who engage in dangerous recreational activities, martial arts organisations still ought to make sure that there are adequate warnings of risks and provide safety equipment where appropriate.

(1) Article by Kylie Burns: *It's just not cricket: The High Court, sport and legislative facts.*

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