

MARTIAL ARTS PARTICIPANTS DO NOT ASSUME INCREASED RISK OF INJURY

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Under the assumption of risk doctrine, there is generally no legal duty to eliminate or protect participants against inherent risks in a sport or activity. There is, however, a legal duty for coaches and instructors not to negligently increase risks above those inherent in a particular sport or activity. Unlike coaches or instructors, there is generally no liability to co-participant for ordinary careless conduct (i.e. negligence) committed during the sport. Rather, participant liability to co-participants is limited to injuries caused resulting from intentional or reckless misconduct totally outside the range of ordinary activity involved in the sport.

By electing to participate in an sport or activity, a participant manifests a willingness to submit to such bodily contacts as are permitted by the rules or usages of a contact sport. In other words, a voluntary participant generally assumes all risks incident to the contest or sport which are obvious, though not necessarily the risk of injuries inflicted intentionally or recklessly. The degree of risk to be anticipated varies from sport to sport. For example, in contact sports, actions reasonably expected to cause incidental physical damage (e.g., blocking, tackling, checking, punching) are generally deemed within the ordinary expectations of participants. Under the assumption of risk doctrine, a participant in contact sports assumes the risk of injury associated with such natural and ordinary risks of physical contact. On the other hand, the participant does not necessarily assume the risk of injury associated with negligent instruction or inadequate equipment. The cases described herein examine the assumption of risk doctrine as it has been applied by courts within the context of participation in karate and judo.

UNSKILLED OPPONENT INCREASES RISK

In the case of *Deangelis v. Izzo*, 596 N.Y.S.2d 560, 192 A.D.2d 823 (1993), plaintiff Robert Deangelis (Deangelis) was injured in an accident which occurred at the Academy of Okinawan Karate, a school owned by defendants John Izzo and Bert Randio (defendants hereafter referred to collectively as "Izzo"). The facts of the case were as follows:

As part of his eighth half-hour semiprivate karate lesson--the first seven consisted of push-ups, sit-ups and instruction in basic karate moves or stances--at the Academy, and while under the instruction of defendant Anthony Fontanelli, plaintiff engaged in a sparring exercise with another beginning student and received a blow to the head. It is alleged that because of the blow plaintiff was required to undergo two separate craniotomy procedures, resulting in permanent physical damage and emotional

difficulties.

In his complaint, Deangelis alleged that Izzo was “negligent in failing to provide him with adequate instruction prior to allowing him to spar with other beginning students.” In addition, Deangelis claimed Izzo was negligent “in failing to furnish proper protective equipment or supervision during the exercise.” In response, Izzo argued that Deangelis had assumed the risk of injury.

In the opinion of the trial court, further proceedings were necessary for to jury to determine “the scope of Deangelis’ knowledge of the risks posed by and inherent in karate sparring.” As a result, the trial court refused Izzo’s pretrial motion to effectively dismiss plaintiff’s negligence claims on the basis of assumption of risk. Izzo appealed.

Given the limited amount of Deangelis’ preparation, the appeals court also found that Deangelis had not necessarily assumed the risk of injury engaged in the sparring exercise with another beginning student. According to the appeals court, it was “unclear whether Deangelis knew the apparent or reasonably foreseeable risks associated with his participation in this particular activity”:

Karate is not a commonly observed sport such as football or baseball, where the dangers are apparent to anyone who has engaged in the activity; to the contrary, much of the appeal of karate stems from the fact that it consists of specialized training to enable the practitioner to punch or kick in an effective manner. The record indicates that prior to sparring, beginners at defendants’ school were trained in kicking and punching--presumably in the particularly effective methods of doing so that are at the heart of karate--but apparently not in the blocks or counters that are effective against such blows...

Furthermore, the record establishes not only that sparring may be a dangerous activity, but also that it is more dangerous to spar with a relatively unskilled partner than with an experienced opponent; this risk being somewhat counterintuitive, it calls into question the degree of care exercised by defendants to make the conditions plaintiff would be exposed to as safe as they appeared to be, as well as the extent to which plaintiff, who was a karate novice, was aware of the danger.

The appeals court, therefore, affirmed the action of the trial court denying Izzo’s motion for summary judgment based upon assumption of risk. As a result, a jury trial would be conducted to fully address Deangelis’ claims of negligent instruction and negligent failure to provide adequate protective equipment.

SERIOUS KNEE INJURY RISK KNOWN?

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In the case of *Clark v. Wiegand*, 617 N.E.2d 916 (Ind. 1993), plaintiff Carol Wiegand brought a negligence action against defendants Rick Clark, Indiana State University, and the Indiana State University Board of Trustees (collectively "ISU") for knee injuries sustained when a fellow student in her college judo class threw her to the mat. The facts of the case were as follows:

In 1987, Wiegand was a student at Indiana State University pursuing a degree in fitness management and had enrolled in a judo course. At the beginning of each class period, the instructor, Clark, explained and demonstrated various judo throws and techniques. The students were then instructed to practice with each other while Clark supervised. Although Clark would sometimes pair students at the beginning of class period, he told the class to switch partners and practice with other class members.

During one class in November, Wiegand had the wind knocked out of her after a classmate, Tim Jordan, threw her while practicing a technique. Wiegand testified that Jordan, a 260-pound member of the university football team, was "very aggressive" in practice. He had knocked the wind out of her during judo class more than once. Following the November incident, Wiegand spoke to Clark after class, mentioning that she "was afraid" of Jordan. Clark responded that she "would have to learn how to deal with it."

During class on December 2, 1987, Jordan, attempting to apply a newly-taught technique, threw Wiegand, resulting in a disabling injury to the central ligament of her left knee. Wiegand testified that by December, 1987, she was aware of the possibility that she could have the wind knocked out of her in judo class but that it had not occurred to her that she could have a serious injury.

A jury trial resulted in a \$50,000 verdict for Wiegand. ISU appealed. On appeal, ISU contended that the trial court erred in denying their motions for judgment on the evidence." According to ISU, "the undisputed facts produce[d] the single inference that the plaintiff incurred [i.e. assumed] the risk of her injury as a matter of law." Because Wiegand had "experienced judo class injuries prior to the incident at issue in this action," ISU claimed assumption of risk (referred to as "incurred risk" in Indiana) was conclusively established. In particular, ISU noted that Wiegand's "experiences of getting the wind knocked out of her constitute[d] conclusive proof that she understood and appreciated the risk of injury and thus incurred the risk of ISU's negligent supervision as a matter of law."

In response, Wiegand asserted that "these prior occasions consisted solely of 'a couple' of times when she had the wind knocked out of her. While conceding that "she understood and appreciated the risk of

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having the wind knocked out of her,” Wiegand contended that “she did not understand and appreciate the risk of suffering a serious knee injury.”

The appeals court agreed with ISU that assumption of risk barred Wiegand’s negligence claim. The appeals court, therefore, overturned the jury verdict for Wiegand and ordered judgment be entered for ISU. Wiegand appealed to the state supreme court.

The specific question on appeal was whether Wiegand had necessarily assumed (or incurred) the risk of injury under the circumstances of this case. In particular, the issue was whether Wiegand “had actual knowledge, appreciation, and voluntary acceptance of the specific risk involved.” As defined by the state supreme court, the doctrine of incurred risk [i.e. assumption of risk] consisted of the following components:

It involves a mental state of venturousness on the part of the actor, and demands a subjective analysis into the actor's actual knowledge and voluntary acceptance of the risk. By definition . . . the very essence of incurred risk is the conscious, deliberate and intentional embarkation upon the course of conduct with knowledge of the circumstances. It requires much more than the general awareness of a potential for mishap. Incurred risk contemplates acceptance of a specific risk of which the plaintiff has actual knowledge.

It is not enough that a plaintiff have merely a general awareness of a potential for mishap, but rather, the defense of incurred risk demands a subjective analysis focusing upon the plaintiff's actual knowledge and appreciation of the specific risk and voluntary acceptance of that risk... [A] general awareness of a potential for mishap is not enough to constitute incurred risk.

On appeal, ISU had argued that Wiegand’s assumption of the risk was “established from discussions between Clark and Wiegand at the beginning of the semester regarding risks associated with preexisting injuries” as well as the following characterization of the course syllabus:

The syllabus explained that judo was a physical contact sport, and although injuries had rarely occurred in his class, the syllabus cautioned that judo techniques could aggravate a pre-existing injury and requested that students with physical problems notify Clark [the instructor].

The state supreme court, however, found “conflicting evidence” as to whether such warnings or statements actually occurred. In reviewing this evidence, the state supreme court noted “[t]he syllabus

itself makes no mention of judo being a 'physical contact sport,' the frequency of injury, or the potential aggravation of pre-existing injuries." On the contrary, the state supreme court noted: "The sole reference to the physical nature of judo is found in this sentence: 'If you have any physical problems which may cause you difficulty in this class, notify the instructor'."

As a result, the state supreme court held that "the specific risk of harm from the classroom practice of a judo technique upon which instruction had been given does not include a comparable prospect of severe or specific injury." In so doing, the state supreme court rejected ISU's argument that the specific risk of harm assumed by Wiegand included "any injury, regardless of severity, from being thrown in judo class."

Having found sufficient evidence for a jury to find that Wiegand did not necessarily assume the risk of a severe knee injury, the state supreme court reinstated the judgment of the trial court in favor of Wiegand.

CONSENT TO CONFRONT CERTAIN DANGERS

In the case of *Kuehner v. Green*, 406 So. 2d 1160 (Fla.App. 1981), plaintiff Clifford Kuehner brought a negligence claim against his karate "sparring" partner, defendant Henry Green. Kuehner alleged that he was injured when he fell as a result of a "leg sweep" performed by Green during a practice session. Specifically, Green caught Kuehner's right foot in mid-air and swept Kuehner's left leg from under him, causing Kuehner to fall backwards.

Under the circumstances of this case, the jury found Green had assumed the risk of injury. In so doing, the jury apparently rejected conflicting testimony as to "whether 'leg sweeps' should be done on concrete floors, as occurred here, and whether Kuehner realized Green might 'sweep' him without catching him, in the practice session." Instead, the jury found Kuehner did "know of the existence of the danger complained of, realize and appreciate the possibility of injury as a result of such danger; and, having a reasonable opportunity to avoid it, voluntarily and deliberately exposed himself to the danger complained of." The trial court, therefore, entered judgment in favor of defendant Green on the basis of assumption of risk. Kuehner appealed.

On appeal, Kuehner argued that "the jury's finding that he was aware of the danger of 'leg sweeps' in karate practice and that he voluntarily assumed the risks of injury resulting therefrom" was "not supported by the evidence." In the opinion of the appeals court, there was sufficient evidence on the record to establish Green's defense of express assumption of risk. Moreover, the appeals court found the testimony did not indicate that "Green willfully or deliberately harmed Kuehner, or that the leg sweep was performed in violation of recognized or formal karate rules designed to protect the participants."

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(While sport participants generally assume the risk of a fellow participant's or opponent's negligence, participants do not assume the risk of injury associated with willful, deliberate, or reckless disregard of a safety rule resulting in injury.) The appeals court, therefore, affirmed the judgment of the trial court in favor of defendant Green. In so doing, however, the appeals court petitioned the state supreme court to clarify the assumption of risk defense in situations where the plaintiff is injured in a contact sport with another participant who injures him without deliberate attempt to injure.

In the case of *Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983), the Florida state supreme court responded, providing the following characterization of assumption of risk "where one voluntarily participates in a contact sport":

If contact sports are to continue to serve a legitimate recreational function in our society express assumption of risk must remain a viable defense to negligence actions spawned from these athletic endeavors... From the outset we find that a participant in a contact sport does not automatically assume all risks except those resulting from deliberate attempts to injure. Express assumption of risk, as it applies in the context of contact sports, rests upon the plaintiff's voluntary consent to take certain chances.

This principle may be better expressed in terms of waiver. When a participant volunteers to take certain chances he waives his right to be free from those bodily contacts inherent in the chances taken. Our judicial system must protect those who rely on such a waiver and engage in otherwise prohibited bodily contacts.

It is the jury's function to determine whether a participant voluntarily relinquished a right, or, "actually consented" to confront certain dangers. In so doing several threshold questions must be answered. First, the jury must decide whether the plaintiff subjectively appreciated the risk giving rise to the injury... [A]ctual knowledge is essential to voluntary assumption of risk...

In making this determination it is well within the province of the jury to consider all the evidence as to what the plaintiff really expected while participating in the particular contact sport. If it is found that the plaintiff recognized the risk and proceeded to participate in the face of such danger the defendant can properly raise the defense of express assumption of risk. Voluntary exposure is the bedrock upon which the doctrine of assumed risk rests... Even though the defendant breached his duty of care and was negligent, the plaintiff should be barred from recovery because he in some way consented to the wrong.

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As noted by the state supreme court, the jury in this particular case had determined that “Kuehner subjectively recognized the danger of ‘leg sweeps’ and voluntarily proceeded to spar in the face of such danger.” Furthermore, the state supreme court found “[a]mple evidence in the record supports this factual determination.” Accordingly, the state supreme court concluded that “the trial court was proper in finding applicable the doctrine of express assumption of risk.” The state supreme court, therefore, affirmed the judgment of the lower courts in favor of defendant Green.