

Civil Liability for Failure to Train to Standard

John Sample

Most Educational Technologists and Human Resource Development practitioners have a working understanding of some aspects of personnel law. EEOC and copyright law are two familiar examples (Carlson, 1987). Industrial tragedies at Three Mile Island and Chernobyl nuclear power plants, and the Union Carbide chemical plant in Bhopal, India, suggest another area of legal concern for educational and training practitioners, especially designers and deliverers of training (Ward, 1988). Failure to train to standard in law enforcement and correctional agencies has resulted in civil suits and judgments, at least one of which resulted in a petition for bankruptcy for a municipality (Scuro and Souza, 1983; Stafford, 1986).

The proliferation of civil actions in both state and federal courts against corporations, educational institutions, and public sector agencies presents an ongoing problem for CEOs and governmental agency administrators, regardless of size of their organization. As the number of lawsuits—and the jury awards for damages as well—the theory and thrust of such litigation takes on an aggressive, yet coldly dispassionate aspect. In addition, attorneys for victims have become highly sophisticated in the preparation and pursuit of such legal actions, and alarmingly, more and more knowledgeable of the interworkings and weaknesses of contemporary organizations.

The purpose of this article is to briefly review the legal concept of "failure to train to standard" from the context of law enforcement. Suggestions for preventing and limiting civil liability in the general training and instructional arena are included at the end of the article.

John Sample is currently as Associate for Research, Center for Needs Assessment and Planning, Florida State University. Reviews and comments on this article by Drs. Roger Kaufman, Walter Dick, and Robert Branson of Florida State University, and Jeffrey Higginbotham, Special Agent and attorney with the FBI National Academy, are greatly appreciated.

For purposes of this article, training to standard is defined as the responsibility of an organization to adequately develop requisite knowledge, skills, and/or attitudes for job tasks that are potentially hazardous to employees and the public. The term standard implies the level of measurable job performance expected of employees who carry out their job tasks in a safe and efficient manner.

The following work areas in law enforcement and corrections have been identified as potentially high liability job tasks: firearms and other forms of deadly force, vehicle operation, and methods of arrest and restraint and civil rights. Analogous high liability tasks in business and industry might include handling and disposing of toxic waste, operating and maintaining nuclear powered generating plants, stringing and repairing electrical wires on utility poles, manufacturing toxic and corrosive chemicals, and the safe operation of machinery, such as forklifts. In the public sector, the delivery of certain services, such as foster care, child abuse investigations, residential treatment for the mentally and emotionally disturbed, and emergency room practices in public hospitals, may be susceptible to this form of civil liability.

Legal Theory

A popular tactic in civil litigation is for a victim to seek the recovery of monetary damages under a negligence theory of civil liability. This approach argues that the conduct involved in the civil suit is not necessarily malicious in nature, but that the injury and damages sustained are a direct result of a breach of a duty of due care to the injured victim. The conduct need not be intentional in nature for liability to accrue if it can be demonstrated that there was a duty to be "non-negligent" and that this duty was not adequately met.

There are at least two theories of liability significant to this topic. Vicarious liability is based on a public policy that the employer who benefits by the acts of employees must be held accountable for wrongs committed by the employees.

This indirect form of liability does not apply to police, at least as far as civil rights suits under 43 United States Code (USC) Sec. 1983 are concerned. The police chief is not considered to be the employer of a subordinate officer. Generally, the chief of police does not personally select his officers, but acts only as a supervising officer for other public servants hired as managers of the department. The same would be true of CEOs in corporations and educational institutions. For these, and other reasons, there is no vicarious liability at all under 42 USC, Sec. 1983 (Steinglass, 1988).

Under a theory of direct liability, the victim's attorney must show that the administrator, such as a chief of police, breached a duty—in this instance, the duty to train—the errant officer which was the proximate cause of the resulting injury to the victim.

Lawsuits based on 42 USC, Sec. 1983 must establish more than simple negligence (*Daniels v. Williams*). The U.S. Supreme Court held in February 1989 that the victim must demonstrate deliberate indifference to the constitutional rights of persons with whom the police come into contact (*City of Canton v. Harris*). This means that the victim must prove that the deficiency in training actually caused the police officers' indifference that led to the injury.

This does not mean, however, that the supervisor must have had direct personal involvement. Liability may lie where the supervisor possessed a duty, but failed to perform a duty (such as adequately training or supervising employees), and that failure to perform the duty caused the deprivation of protected rights (the injury). The case law is also replete with examples of supervisors being held liable for not knowing—but *should* have known—of employee behaviors that violated the rights of other employees or members of the public.

Barrineau (1987, p. 38) states that "the potential for a successful defense of a legitimate Section 1983 lawsuit is virtually non-existent . . . Preventing the lawsuits from being filed in the first place may be the only viable defense."

Responsibility for Training

There are two compelling reasons for requiring and providing training for law enforcement and correctional personnel, and that rationale applies to private sector organizations and educational institutions that have an affirmative duty to train. Increasing the probability of consistent and correct performance on the job is the first reason. The second reason involves avoiding or limiting an organization's civil liability for failure to train to standard. If the first reason for training were attended to by administrators, the second reason would probably not exist, or would be minimal. Unfortunately, it is the fear underlying the second reason that gets the attention of administrators in law enforcement, and presumably in the private sector as well.

The courts consistently hold police departments liable and accountable for monetary damages for failure to meet their affirmative duty to properly train officers in a non-negligent manner. Because of this trend towards the imposition of civil liability, the importance and absolute necessity of

proper training cannot be over-emphasized; nor can the requirement to constantly evaluate programs be ignored.

In the *Canton* case cited above, the Supreme Court's requirement of deliberate indifference is an important requirement for the victim to overcome. According to that decision, only where the failure to train reflects a deliberate or conscious choice by the municipality can the failure be properly thought of as actionable. It is not sufficient to allege that a training program represents a policy for which a governmental agency is responsible, rather the focus must be on whether the program is adequate to the tasks the particular employees must perform, and if it is not, on whether such inadequate training can justifiably be said to represent policy of the governmental entity.

State statutes and standards serve merely as minimum requirements for officer training for purposes of certification. These statutory requirements do not address sufficiency of job relatedness of such training, nor do they specify the nature and extent of the training required for individual officers at various points in their careers (Scuro and Souza, 1983).

Who Gets Sued

In the law enforcement and corrections arena, the injured party may file a law suit against both the individual officer as well as the officer's department. Where both the officer and the department are sued, an interesting conflict of interest between the two will be exploited to the maximum during a trial by the victim's attorney. In many cases, the department will seek to defend by arguing that the officer's conduct was beyond acceptable departmental guidelines, while the officer will argue that his or her conduct was in conformity with existing policy, procedures, or training provided by the department.

Case Examples

The following case examples illustrate the potency of failure to train to standard in the law enforcement arena.

In the first case example, a suspect in a kidnapping led officers on a high speed chase. Several officers were involved and three officers fired their weapons. Although there were less severe alternatives available, the officers were successful in their use of deadly force. The executor of the suspect's estate sued under 42 United States Code, Section 1983, alleging that the municipality was negligent in the training of its officers, who deprived the suspect of his civil rights. Inadequate training was raised as a primary legal theory for establishing negligence on the part of the municipi-

pal police department. The municipality was found negligent and liable for damages (*Kibbe v. Springfield*).

The second case illustrates the findings of a suit brought after the plaintiff, whom the court said was apparently a drug addict, was arrested in a park after injecting heroin. The deputy ordered him out of his car, at which point the plaintiff pulled a gun out from under the car seat and pointed it at the deputy. With the assistance of another deputy and a civilian, the gun was seized. The jury believed that the deputies beat the plaintiff upon entering the police station, and again that night when a deputy opened the cell door, allowing someone inside to execute another beating. The jury believed evidence that officials at the station that night knew about the beating, perhaps before it happened and surely afterwards. The sheriff claimed he knew nothing of the incident until years later, just before the trial.

The county and sheriff were jointly liable for \$125,000 for deputies twice beating the prisoner. The sheriff was liable because he failed to train his deputies in appropriate arrest and restraint methods, and to discipline his officers, and because the incidents were never investigated. Even if he did not know of the matter, he *should* have known, ruled the court (*Marchese v. Lucas*).

In the last case, the victim fell down several times and was incoherent following her arrest by city police officers, and the officers did not summon medical assistance for her. After her release, she was diagnosed as suffering from several emotional ailments requiring hospitalization and subsequent outpatient treatment. It was policy of the department that shift commanders had sole discretion to determine whether someone arrested required medical care, and evidence was presented that they had not received any special training in the area of mental emotional illness. (*City of Canton v. Harris*).

Examples of Monetary Judgments

The following examples of civil judgments against law enforcement agencies are provided to illustrate the "deep pocket" mentality of plaintiff attorneys.

An Arizona County Superior Court jury awarded a verdict of \$3.6 million dollars against a city and its police department. The incident involved one police officer shooting another police officer during a barricaded suspect exercise. The jury verdict has been upheld at least twice, and has forced that municipality to file a petition for bankruptcy (*Scuro and Souza, 1988*).

In another case, a Michigan Federal District Court awarded damages of \$5.75 million dollars

to an individual shot by two police officers. State courts in California and Pennsylvania awarded damages of \$266,500 and \$1.7 million dollars respectively in incidents of officers involved in shootings where the subject was shot and survived.

Recommendations for Preventing and Limiting Liability for Failure to Train to Standard

The following practical suggestions apply to training and development situations where the potential for high liability exists. The operation and maintenance of dangerous equipment to employees and the public, and the handling and storage of toxic chemicals and wastes are good examples of high-liability tasks for which appropriate training and adequate supervision may be reasonably expected. Also, community colleges and vocational training centers around the country provide basic and advanced law enforcement and corrections training for their communities.

Step 1. Complete a job-task analysis and identify routine, critical, and high-liability tasks for which training is appropriate (Carlisle, 1986).

Step 2. Write job-related performance measures that include quantitative and qualitative criteria for critical tasks, especially those that are high liability tasks (Ward, 1988).

Step 3. Modify selection criteria for positions with high-liability tasks (selection is cheaper than training!). Previously trained and experienced applicants are better selection choices (Casio, 1982).

Step 4. Use a standard instructional systems design (ISD) model to design, develop, implement, and evaluate training (Butler, 1972; Dick & Carey, 1985). CERTIFY individual competence on each high-liability task. In this context, certification means that the trainee has demonstrated mastery of a high-liability task according to a measurable performance standard. Certification is documented by the educational unit responsible for training (e.g., regional police academy, corporate training unit, public school vocational education program).

Step 5. Require that supervisors QUALIFY their employees shortly after training, and at regular intervals (i.e., avoid liability for FAILURE TO SUPERVISE TO STANDARD). Qualification is different from certification. Whereas certification is the responsibility of an educational or training component of an organization, qualification is a responsibility of first-line supervisors. To be qualified means that an employee has been observed in a work setting by a supervisor, and that employee behavior and action were consistent

with high-liability job tasks as measured by a performance standard.

Step 6. Maintain adequate records of the employees' training experiences (attendance, learning objectives, pre-post tests, observation of the task performed to standard in a simulation or on-the-job), and documentation of on-the-job behaviors (critical incidents, etc.) by supervisors. Provide and document disciplinary actions when required. Some courts will rule that an absence of records equates to a finding of no training, even if the training occurred (Barrineau, 1987). "Quality, court-proof records are no accident." (Ward, 1988, p. 95)

Step 7. Communicate in writing any concerns that you have about high-liability training to your supervisor, and if necessary, to your corporate or governmental legal staff. Failure to do so may put you at risk legally if a problem occurs at a later time.

Step 8. Purchase individual liability insurance through professional associations, such as the American Society for Training and Development (ASTD), National Society for Performance and Instruction (NSPI), or the American Association for Adult and Continuing Education (AAACE). This type of insurance is relatively inexpensive, and provides reasonable security in the event of a failure to train to standard allegation against you personally.

Epilogue

This article has focused on failure to train to standard cases that emanate from Title 42 Section 1983 of the United States Code. For the most part, only governmental agencies will be subjected to this form of litigation, although corporations acting under the color of state law may be susceptible (*Anderson v. Randall Park Mall* and *Ozlu v. Lock Haven Hospital*). It remains to be seen if plaintiffs' attorneys will generate litigation in state civil courts using failure to train to standard as a theory of negligence. A preliminary search reveals no such cases.

Training and educational technology alone will not reduce the number of civil actions filed against organizations and their membership. However, a conscientious effort to design and implement competent, job-related, and results-oriented training will greatly assist in minimizing the probability or potential for the imposition of civil liability and the award of monetary damages. □

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