

HRD Liability Update

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May Governmental Agencies Be Liable For Failure To Train Their Employees To Standard?

By John Sample, Ph.D. SPHR

Up until recently, the day-to-day business of designing, developing and implementing training has been fairly well removed from the legal system in this country. The review by Carlson (1987) of employee training and the law in a recent issue of *Performance and Instruction* suggests, quite accurately, that liability is always a potential problem for educators in both the private and public sectors. Recent industrial tragedies, exemplified by Three Mile Island and Chernoble nuclear plants, and the Union Carbide chemical plant in Bhopal, India, give new rise for concern of possible civil liability for failure to train to standard in the private sector (Ward, 1988).

What about those of us who ply our craft mostly in the public sector? Do we have cause for continuing concern? Public school educators have long been concerned with malpractice, and the case law seems reasonably clear in that area (Newell, 1978).

A growth area of civil liability in the public sector has to do with failure to train to standard. Training to standard refers to the responsibility that a public sector organization has to adequately develop requisite knowledge, skills, and or attitudes for job tasks that are potentially hazardous to employees and the public. Standard refers to the level of measurable job performance expected of employees who carry out their job tasks in a safe and efficient manner. (Sample, 1989)

Law enforcement and corrections are currently the most vulnerable occupational areas (Barrineau, 1987), however, hospitals, social services, and utilities governed by the public sector are ripe for potential liability (Steinglass, 1988).

Examples of high liability tasks in law enforcement include the use of firearms, vehicle operation, arrest and restraint techniques, and civil rights. Analogous high liability tasks in other governmental sectors could include the handling and disposal of toxic waste, proper care of children in foster care, residential treatment for the mentally and emotionally disturbed, emergency room practices in public hospitals, the stringing of electrical wires by a

public utility, and the safe operation of machinery, such as fork-lifts in a municipal warehouse.

In more pristine times, the primary reason for requiring and providing effective training in the public sector was to increase the probability of correct and consistent results on the job. Training directors in the public sector are now becoming concerned for a second reason. The second reason for training involves the avoidance or limitation of the organization's civil liability for failure to train to standard! If the first reason were attended to more effectively by the various agencies in the public sector, 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 most of our public sector organizations. (Sample, 1989) A recent pronouncement by the U. S. Supreme Court will no doubt add to that fear.

City Of Canton V. Harris

On February 28, 1989, the United States Supreme Court ruled unanimously in *City of Canton v. Harris* that a city may be held liable for failure to train it's employees properly. The legal theory for the decision is one of a negligence claim brought as a civil rights action, more specifically Sec. 1983 of the U.S. Code.

Geraldine Harris was arrested in 1978 on a speeding violation which occurred while driving her daughter to school. Upon arriving at the station, she was found sitting on the floor of the patrol wagon, and when asked if she required medical attention, she responded with an incoherent remark. She was brought inside for processing, and during this time, she slumped to the floor on two occasions. Finally, the police officers in charge left her lying on the floor to prevent her from falling again. No medical attention was ever summoned for her. She was released within an hour from custody, and was taken by a family procured ambulance to a hospital. She was diagnosed as suffering from several emotional ailments, and was hospitalized for one week. She required subsequent outpatient treatment for an additional year.

Legal Question

Were the civil rights of Mrs. Harris, under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical attention while in police custody, violated?

Relevant Department Policy/Regulation

A municipal regulation in the Canton Police Department required that police officers assigned to act as "jailers" at the police station

"shall, when a prisoner is found to be unconscious or semi-unconscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to City Jail."

Trial Court Evidence

Testimony was given during the lower court jury trial that shift commanders in the Canton Police Department were not provided with any special training (beyond first-aid training) to make a determination as to when to summon medical care for an injured person in custody.

Comments Of The Supreme Court

The Supreme Court held that the inadequacy of police training may serve as the basis for Sec. 1983 liability only where the failure to train in a relevant respect amounts to **deliberate indifference** to the constitutional rights of persons with whom the police come into contact. Such a standard is consistent with *Monell v. New York Department of Social Services*, which held that a city is not liable under Sec. 1983 unless a municipal "policy" or "custom" is the moving force behind the constitutional violation. Only where a failure to train reflects a "deliberate" or "conscious" choice by the municipality can the failure be properly thought of as an actionable city "policy."

According to the Supreme Court, it is not enough to merely allege that a training program represents a policy for which the city is responsible. Focus must be on whether the training 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 "city policy." Furthermore, the identified deficiency in the training program must be closely related to the ultimate injury, that is the injured party still must prove that the deficiency in training actually caused the indifference, in this case, to the medical needs of Mrs. Harris.

Implications For Instructional Designers And Trainers:

This pronouncement by the U.S. Supreme Court represents good news and bad news for public sector agencies and their training programs.

First, the good news.

According to Lee Ruck, legal council to the National Association of Counties, the standard of deliberate indifference means that "If the lower courts and juries will follow this decision, liability should only be found in egregious cases - cases where counties (and municipalities) have deliberately chosen a method of instruction or training which would be likely to cause injury or constitutional violation." (*Training Aids Digest*, April, 1989, p. 8)

According to *Canton v. Harris*, the Supreme Court did not want to have the dockets clogged with cases that would require judges and juries to second-guess municipal training programs. It would appear that the flood gates of liability will not be opened, unless the Supreme Court adopts a lesser standard of liability in the future.

Now, the bad news!

The courts requirement that **training be adequate to the task** indicates an appreciation for educational technology, instructional design and evaluation of adult learning experiences. Unfortunately, public sector agencies at the state, county, and municipal level, for the most part, are still developing training programs using the "lets get a speaker for a topic" syndrome.

Such a mentality goes something like this.

1. Someone in authority decides that members of an agency are deficient in a particular area of their performance.
2. The mandate goes to the training unit to "do something about it now!" No thought is given to the possibility that training is not the solution of choice.
3. A mad scramble for space, speakers and handouts within a tight time-line occurs, or contracts for the design and delivery specifications for training are hastily developed, distributed, and services procured.
4. A course is promoted and presented. The instructors talk and the participants listen, ad nauseam.
5. An end of course evaluation measures the participants "happiness index" with the course. No attempt is made to assess performance on the job after the training occurs.

City of Canton v. Harris clearly indicates that a new day has arrived for competence in the training units in public sector agencies at the state, county, and municipal level.

Training **adequately to the task** means that someone (or an operating unit within an agency) is accountable for...

1. The development of comprehensive operational policies and rocedures for high liability tasks(Ward,1988). Remember that the courts will consider oral (informal) and formal policies. Also, it's one thing not to have viable policies to guide a governmental training unit, but it's more of a problem when adequate policies exist, and the organization fails to follow their own dictates.
2. A legally defensible job-task analysis that identifies routine, critical, and high liability tasks (Carlisle, 1986).
3. Measurable performance standards that are developed for high liability tasks (Ward,1988).
4. A determination of prioritized tasks for which training is appropriate (Mager, 1988).
5. The modification of selection criteria for positions that require high liability tasks. Cascio (1982) reminds us that selection is cheaper than training!
6. The development of learning objectives, test items to objectives, instructional analysis of entry level skills and abilities, analysis of hierarchy of skills to be mastered, and media and materials development (Dick and Carey, 1985)
7. The development ofjob-related simulations and other tests of performance appropriate for the classroom and worksite (Priestley, 1982)
8. The training unit should certify individual competence on each high liability task using pre-established job performance measures. Additional training required when task mastery is not evident. Document the certification process. (Sample, 1989)
9. Require line supervisors responsible for employees who perform high liability tasks to qualify their employees shortly after training, and at regular intervals. To be qualified means that the employee has been observed in a work setting by a supervisor, and that employee behavior on high liability tasks is correct as measured by pre-established performance standards. (Sample, 1989)

10. Most courts will rule that the absence of documentation equates to a finding of no training, even if the employee was trained! (Barrineau,1987) Document the training process (e.g., attendance, learning objectives, pre-post test scores, observation of the task practiced to standard, etc.) and supervisory process (e.g., critical incidents, disciplinary action, on-the-job remediation, referral for additional training, esp.). Such documentation will also prevent additional areas of litigation, including negligent retention and failure to supervise to standard.
11. Communicate in writing any concerns that you have about high liability tasks to your supervisor, and if necessary, to your agency attorney. Do not expect your administrators or attorneys to understand or appreciate this potential area of liability. Part of your responsibility is to educate your agency personnel. Failure to do so may put you at risk legally if a suit is brought at a later date.
12. Purchase individual liability insurance through ISPI or other professional associations. This type of insurance is relatively cheap and provides reasonable security in the event of a failure to train to standard suit.

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NOTE: This is an earlier version of an article published in the June, 1989 issue of *Educational Technology* entitled "Civil liability for failure to train to standard" pp. 34 - 38).

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