

HRD Liability Update

Courtesy of Sample & Associatesã



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Falling Off A Log - And Landing In Court

By John Sample, Ph.D. SPHR and Robert Hylton, MS

This article chronicles the events of an independent contract trainer who was sued by an alleged injured party who claimed that negligent training was responsible for her injury. The facts and outcome are a matter of court records. For reasons of discretion, the names of the contract trainer and the corporation involved in this suit are not named. We believe that all independent contract trainers and the corporations who hire them will benefit from reading this article.

The Events Leading to the Lawsuit

It was a clear, warm morning in August as the contract trainer greeted fourteen nervous corporate employees on the first morning of three days of adventure based training. They were different from the usual young, energetic, ready for action corporate managers who had previously mastered the corporation's experiential teamwork training program. These employees were from two technical work groups of union employees, and they had never received the benefits of this type of training in the past. Their knowledge of the teamwork training was from the company grapevine. It was referred to as the "Rambo Course". Their supervisor had successfully completed the teamwork program about one year prior to this morning and he was now mandating that his work groups attend the company sponsored adventure teamwork training class. An experienced contract trainer was conducting the program.

The company, a major telecommunications firm, had contracted with the trainer to deliver a series of experiential learning programs for senior and mid-level management personnel. Each program had between nine and fifteen participants. The trainer had previously conducted twelve of these teamwork programs.

The contract trainer had received instruction in the facilitation of the course materials by a business that specialized in adventure based educational programs. Additionally, he had been supervised, coached, and certified by the corporate trainers of the company to which he was contracted.

Each teamwork program began with the same preparation. The first morning of each program consisted of group lectures concerning safety and the agenda for the three day workshop. The instruction and exercises on the first day changed very little from program to program. After the first day, the trainer could make adjustment to the course parameters based upon group interactions and abilities observed by the trainer.

On the morning of the first day of this particular program, the trainer had explained the parameters of the program and the rules for participation. He explained that teamwork was directly linked to working together on the job and that each of these two work groups could improve their working relationship by successfully completing the program. The trainer explained to the participants the concepts of experiential training and the physical nature of the exercises, or initiatives, that he would be using. Many participants had heard about some of the more famous initiatives such as, "The Wall" or the "Tarzan and Jane Snake Pit", or "The Spider Web". Part of the first morning discussion was centered on debunking the myths that circulated about these adventure based initiatives.

The trainer explained carefully with posters, flip charts, and written materials the very crucial concepts of participant safety and the availability of a feature that was called "Challenge Out". The challenge out concept means that any participant could opt not to participate physically in any initiative without having to explain. A participant simply needed to indicate to the team that he or she desired to challenge out of the exercise. The participant would be fully involved with all phases of planning, implementation, discussion, celebration, spotting and safety, but could not be required to physically participate.

After about two hours of classroom briefing and instructions, the team was then taken outside to the course to begin the program. The first of several initiatives is called the "Swinging Log" exercise. The swinging log is a failure designed initiative because it can not be mastered by most groups immediately. Because this initiative has simple instructions, is timed and has no resources except the teammates, it immediately challenges the group to evaluate issues regarding planning, leadership, participation, and personal comfort levels of each participant. The purpose of this activity is to create a failure in the initiative and thus provide the opportunity for the introduction of a planning model that would be helpful back on the job. The remainder of the course would be spent using this work planning model and relating the initiatives to real work situations.

The swinging log is a twenty foot pole about twelve inches in diameter suspended by a cable at each end. The top of the suspended log is approximately nineteen inches from the ground. There is a tether cable at each end to minimize the swing of the log to approximately three feet from side to side. The group planning for the exercise requires the team to develop a strategy and activity sequence for all participating team members to stand on the log with all their body parts above the horizontal center line of the log for a count of ten. Team participant define what is meant by the count of ten and determine the level of success of the team. Safety spotters are arranged around the log whenever anyone is attempting to mount the log. Other safety and comfort checks are routinely observed during the exercise. The time frame is limited to twenty five minutes for planning and only three attempts at achieving the initiative can be made by the team.

Of the fourteen team members, three challenged out of this exercise. Eleven attempted the implementation with the three who opted out and the trainer acting as safety spotters. The team had tried twice and failed the desired goal. They were now regrouped for their third and final attempt. On this third attempt, one of the women fell over sideways trying to maintain her balance. Part of the safety instructions had been the requirement of stepping down from the log rather than jumping when a participant began to feel like they were losing their balance. But rather than step down and cause her team to fail, this woman tried to hang on to the person in front of her as she lost her balance. As she fell she pulled the other person with her. The second person was not injured, but as the first woman struck the ground, the large bone in her left leg was fractured in several places. The accident happened about three hours into the teamwork training class. She later sued the corporation and the independent contract trainer.

The plaintiff was a 59 year old employee of the defendant telecommunications corporation. She had more than 25 years of employment to her credit with the company. As a union employee, she received an hourly wage and was designated as a craft employee. Her attendance in the teamwork course was mandated by her supervisor. The company worker's compensation insurance paid all medical bills and she qualified for retirement based upon her years of service and age.

What Happened Next?

Approximately 10 months after the accident, the contract trainer answered the door bell at his home one evening at about 8:00 PM. He was standing face to face with a civil process server who asked him, "Is this the residence of, and what is your name sir?" The officer of the court then handed the contract trainer a summons. As he walked away, the civil process server told the defendant contract trainer that he had twenty days in which to respond to the court concerning the allegations of the complaint and that he should get a lawyer. The contract trainer was stunned to discover fourteen allegations of negligence against him and the telecommunication corporation to which he was contracted. He and his wife sat up late that night talking over the devastating news that had ominous personal, professional, and financial implications.

It is difficult to describe the amount of anxiety that a law suite causes. Fortunately, the trainer had taken several beneficial precautions when the accident occurred. First, on the same day of the accident, he had written a four page summary report of the events prior to and immediately after the accident. The events were described in detail, noting times and names of persons involved. He had even noted the locations of the safety spotters and others in relationship to the swing log. Secondly, the trainer filed a copy of his report in the personnel files with the corporation, as well as giving a copy to his supervisor at the corporation. Several days after the accident, the trainer did a walk through of the events leading up to the accident with the safety inspector from the corporation. In the subsequent months that followed, the meticulous notes and records of the current and previous teamwork programs proved to be most valuable for the defense of the trainer and the corporation. As a matter of fact, these notes were the key to the trainers own defense against negligent training, and he became the key material defense witness for the corporation as well.

In addition to the record of the accident that the trainer had written, he also kept all the team posters and flip charts that were used in the class for the morning of the first day of the team work program. As the corporation began to develop a defense to the multiple allegations of negligence, it was the trainer's notes and posters that provided the most detailed and vivid recollection of what had occurred. Other witnesses who were called to testify verified the recorded events as they had been described in the trainer's notes.

The Civil Court Trial

The case came to trial approximately one year and two months after the accident. During the trial which lasted for eight days, the woman who had broken her leg alleged that the swinging log had impacted her leg causing the fractures. It was not clear in the testimony if the other woman had stepped on her foot as she was dismounting the log, but this was never challenged by the attorneys.

As the trial progressed, an additional benefit was realized for the trainer because he had maintaining a complete training manual in exactly the condition that he had received it from his certification. Often professional trainers will discard or cannibalize training manuals once the material has been learned. His manual was complete along with other hand written notes and instructions that had been received from the master trainers who had certified him for the course material. . During the trial, the plaintiff s attorney required the trainer to testify. The contract trainer spent six and one half hours on the witness stand giving testimony in defense of himself and the corporation. The plaintiff's attorney grilled the defendant trainer on every aspect of his certification, training, and events of the accident. The responsibility of the attorney for the defendant trainer and corporation was to intervene appropriately during the trial by rebutting claims by the plaintiff's attorney. During testimony, the plaintiff's attorney went page by page through the teamwork certification manual with the trainer. The plaintiff s attorney, with great passion and verve, attempted to portray the trainer as a "Rambo Trainer" who bullied little old ladies into performing physically dangerous stunts. The certification manual and the trainer's knowledge of the contents were crucial to demonstrating the integrity of the training process. The trainer had to demonstrate to the jury that he knew the purpose of each exercise, the conditions under which each could be conducted safely, and how to modify each exercise to meet various conditions. Since he and the corporation were on trial for negligence, it was crucial that the trainer demonstrate a thorough comprehension of every aspect of the training manual.

Ironically, the skills that were ordinarily used in the classroom to train management personnel and participants were now being used to educate the jury concerning the facts of the case before the court. An additional two hours of cross examination were required by the defense attorney. Using the trainer's flip charts and easel posters, which were brought into the courtroom, the trainer recreated the first morning of the teamwork class. As a witness for himself and the corporation, the contract trainer explained to the jury the content and process of the teamwork program in a factual and unemotional manner. The jury and the court became a classroom, and the years of training and facilitation were now being used to educate the jury and the judge.

The Final Verdict

In a case such as this with multiple defendants, the jury must determine the percentage amount of negligence each defendant deserves-in this instance, the contract trainer and the corporation. When the verdict came in, the trainer was cleared of all negligence, and the corporation was found to be 100% negligent. A judgment of \$875,000 was awarded the plaintiff against the defendant corporation by the jury. On appeal by the defendant corporation, it was determined that this judgment was excessive, and a subsequent settlement was agreed upon by the parties in excess of \$300,000. Since settlements are not usually a matter of record, such amounts are usually hearsay, and that is the case in this instance.

Implications for Human Resource Development Professionals

Technical or managerial trainers who are involved in experiential training should be aware of certain liabilities regarding their efforts. Indeed, those liabilities may exist for the trainer if he or she is a contract provider of training services, as in this instance, or an employee trainer of a corporation or business. In either case, trainers are well advised to follow a systematic and clearly defensible approach in developing or providing training that has legal implications. The following guidelines may be useful in this regard:

For the Corporation or Business:

- A corporation using adventure based or experiential training must ensure that participants have legitimate alternatives to physical activities for accomplishing their required development.
- The corporation and the trainer should always keep training manuals and notes intact. It can be difficult to reconstruct these tools over an extended period of time. If a suit is ever filed against the corporation or contract trainer, the manual and any other pertinent documents will be one of the first items requested by the plaintiff's attorney.
- If contract trainers are used, reasonable efforts must be exerted to assess their competence and certification requirements. The corporation should send qualified personnel to participate in the adventure based program before committing to an agreement for services or hiring their trainers.
- The corporation should inquire into the insurance coverage of the business that certifies a trainer or the company supplying the adventure based training. In the case discussed in this article, the contract stipulated that the facilitator provide insurance for liability if required by the company. No representative of the company ever required the contract trainer to produce a certificate of coverage. This particular trainer was fortunate because the defendant corporation desperately required the testimony of their contact trainer, so they decided to represent him with corporate counsel.
- For the company using contract trainers, care should be used to determine if there has been previous litigation against the contract trainer and/or the business that certifies him or her. If possible, interview records should be kept on file for review should a contract trainer perform negligently.

For the Contract or Company Trainers:

- Contract trainers should have their contracts reviewed by a competent attorney. Discussions with the attorney should center around the need for liability insurance or a performance bond as a safety net. It may seem costly, but it is well worth the peace of mind, especially if the trainer is involved in adventure based or experiential training.
- Contract trainers should consider including language in the contract requiring the corporation to provide legal assistance under the corporate umbrella as long as the trainer operates within the scope of the contract and/or in keeping with the parameters of the training manual.
- For both contract and internal corporate trainers, keep copious notes of activities during the training program. Do not stray significantly from program manuals and materials that would invalidate your certification. When changes are authorized by the supervisor or company, records of the new procedures or exercises should be inserted into the trainer's manual. If a lawsuit occurs, these notes and records become your best defensive tool.
- Inspect equipment used in adventure based programs prior to use each time, make notes of equipment problems, and request in writing immediate attention to defective equipment.
- For all trainers of adventure based training, if possible, co-train with another certified trainer, and use each other to make informed decisions impacting safety and potential injury.

The Civil Trial Process - How The Judicial Process Works

This section of the article is designed to educate HRD professionals about the civil trial process, especially some of the vocabulary and stages of development in a civil suit..

Pre-Trial Stage

Pleadings are the statements of opposing parties (plaintiffs and defendants) filed with the clerk of the trial court stating the nature of a civil wrong. The plaintiff must start the process by filing a *complaint* (also called a petition or declaration in some courts). The complaint requests paragraph by paragraph the *nature of the claims and the relief requested* from the court. The defendant is notified of the complaint by *service of process* by an agent of the court (deputy sheriff, process server, or private business that serves legal documents). In many jurisdictions, a complaint and *summons* are used to notify the defendant. The summons demands that the defendant *answer* the allegations of the complaint within a specified period of time.

The defendant files an *answer* (sometimes referred to as a *motion*) denying most or all of the allegations in the complaint. The answer may state an affirmative defense or a counterclaim against the plaintiff. Other pre-trial motions include the following:

Motion to dismiss - filed by the attorney for the defendant stating that even if everything alleged in the complaint is true, the plaintiff is not entitled to a

remedy from the court. If the motion to dismiss is granted, the plaintiff is not allowed to go forward with the suit. If the motion is denied, then the defendant must answer to the complaint and the case goes forward for trial.

Motion for summary judgment - at any time during the pre-trial processes, or anytime prior to a verdict, either party to the lawsuit may request a *summary judgment*. A summary judgment is based upon information from affidavits, depositions, and interrogatories alleging that no material fact or issue exists for which a jury trial is necessary. If granted by the judge, the lawsuit ends; if material issues or facts remain, then the case continues forward.

The *pre-trial discovery* process is designed to provide meaningful information to opposing counsel so that the case may move as expeditiously as possible to resolution. During the discovery process, as much factual information is surfaced and agreed upon so that the judge and jury will hear only those facts and issues that are in dispute. Each side must disclose all relevant information, including the names of witnesses, experts, books, papers and items relevant to the litigation. When properly utilized, the discovery process reduces the possibility of surprise and unfair advantage.

Two tools used by attorneys in the discovery process are *depositions* and *interrogatories*. *Depositions* are statements made by litigants, witnesses, and experts under oath prior to trial. The typical deposition includes the person to be deposed (witness or expert), the attorneys for the plaintiff and defendant, and a court reporter. During the deposition, the witness or expert is examined under oath by one of the attorneys. *Interrogatories* are written responses to questions posed by the attorney for the plaintiff or defendant.

The Seventh Amendment to the US Constitution preserves the right of a trial by jury in civil matters, and many state constitutions provide for the right to trial by jury. Prior to trial, the plaintiff and defendant must decide whether the trial will be by judge or jury. A trial by jury can be waived (voluntary relinquishment of a known right) if the plaintiff and defendant agree and the judge permits.

The Civil Trial Stage

Most states require a *pretrial conference* for all civil trials. The attorneys representing the *plaintiff* and *defendant* meet with the trial judge for two primary purposes: (1) to shorten the trial by further refining or narrowing the facts and issues and (2) to encourage a settlement. During the *pretrial conference*, guidelines with respect to the admissibility of evidence and qualification of expert witnesses may be determined. At the end of the conferences (there may be more than one), if no settlement has been reached, the presiding judge sets a date for the trial. Once the lawsuit has proceeded through discovery and survived any pretrial motions, and if there has been no settlement, the case is set for trial. The most basic function of a trial is to settle disputes without violence. The parties in the trial have their day in court to publicly present their evidence and legal theories. The judge ensures that only proper legal arguments and evidence are presented. The primary role of the judge is to maintain order in the *adversarial* process and to provide authoritative decisions on issues of law. The primary function of the jury is to hear evidence and to decide factual disputes.

If the trial is heard by a jury, then the first step is to select the jury. This process is called the *voir dire*, and it allows attorneys for the plaintiff and defendant to challenge a prospective juror's selection if it is believed that he or she cannot evaluate the evidence impartially. Each attorney has an unlimited number of *challenges for cause* and a limited number of *preemptory challenges*. Preemptory challenges are not related to a specific cause of suspected impartiality and are based on some factor other than race.

After the jury has been selected, each attorney makes an *opening statement*, and usually the plaintiff's attorney goes first. An *opening statement* provides the jury with a general overview of the case and typically outlines the type of evidence to be produced. The attorney for the defendant has the option of making an *opening statement* following the plaintiff's statement, or of deferring it until the plaintiff has finished presenting evidence.

Another issue discussed during the opening statement is the *burden of proof*. In civil trials, the plaintiff owns the initial burden of proof. If the plaintiff fails to meet the burden of proof during the presentation of evidence, the judge dismisses the case based upon a *motion for a directed verdict* by the defendant. If the judge agrees with the defendant, the case is over, and the defendant does not have to present any evidence. If the judge agrees with the plaintiff, the case moves forward.

Since the burden of proof is initially on the plaintiff, *evidence* is introduced to support the allegations set forth in the complaint. *Testimony* of witnesses and experts under oath and physical evidence are used to induce belief or refute some contention by the other party. Once the plaintiff meets the initial burden of proof, the burden automatically shifts to the defendant to refute the evidence presented by the plaintiff. Now, the defendant has the burden of proof of going forward with evidence from witnesses, experts, and physical evidence.

Examination of witnesses and experts by the plaintiff's attorney is called *direct examination*; examination of the same witness by the defendant's attorney is called *cross-examination*. Cross examination is limited to what was discussed during the direct examination by the plaintiff, and the plaintiff's attorney may conduct *redirect examination* on points raised by the defendant's attorney. Testimony of all witnesses and experts is subject to penalty of perjury.

After the presentation of all evidence by the plaintiff and defendant, either party may move for a directed verdict at the close of the defendant's evidence. Such a motion is based upon the premise that the evidence is so clear that reasonable people would not differ as to the outcome of the case. If the judge directs the verdict, the case is taken away from the jury, and the judge enters a judgment for the party who made the motion.

After all of the evidence has been presented, and the failure of any motions for a directed verdict, the attorneys for the plaintiff and defendant are allowed to make *closing arguments* to the jury. During the closing arguments, each side reviews the strength of their evidence and the weaknesses of the opposing party. After the closing arguments, the judge instructs the jury on their responsibilities as finders of fact. The jury's duty is to determine the facts of the case, accept the law as stated by the judge, apply the law to the facts, and reach a decision for the plaintiff or defendant.

In a civil suit, the jury must determine if the plaintiff has met the burden of proof by the *preponderance of the evidence*. Essentially, the plaintiff's evidence must simply be more credible than the defendant's evidence. In contrast, in a criminal case, guilt of the defendant must be proven by facts *beyond a reasonable doubt*.

The jury deliberates in private, and when it reaches a verdict, it returns to the courtroom, and in the presence of the judge and the parties, announces the decision for the plaintiff or the defendant. A *general verdict* states which party prevailed and does not include any special findings of fact. A *special verdict* consists of answers to specific factual questions posed by the judge to the jury. In this instance, the jury does not attempt to reach a decision in favor of either party. Instead, the judge applies the law to the facts determined by the jury. The final step in the civil trial is the entering of a *judgment* and final motions. A judgment states the *relief* granted to the prevailing party. The relief may include costs and/or damages (legal relief) and/or equitable relief in which the defendant would be ordered to act or refrain from acting in a way consistent with the judgment.

Two motions are likely to be made at the end of the trial. A *motion for a new trial* may be made by either party. This motion argues that a serious legal error was made by the judge during the trial. The losing party may also make a *motion for judgment notwithstanding the verdict*. This motion is based on the belief by the losing party that he or she is entitled to a judgment under the law even though the jury rendered a contrary verdict.

Finally, either party may file an appeal. Reasons for an appeal may include errors in admitting or excluding testimony, rulings on motions, stating the law during jury instructions, or an excessive judgment. The party bringing the appeal is the *appellant*; the other party is the *appellee* or *respondent*. The *appellate court* reviews a transcript of the case as conducted by the trial court to determine whether any error of law was made. During the appeals process, the appellate court reviews the complete trial record and may listen to oral arguments by attorneys for both parties, who also submit written briefs to support their arguments. The appellate court's decision in writing will affirm (agree with), modify (alter), or reverse (set aside) the trial court's decision. If the case is reversed and remanded, then the case is sent back for a new trial or for a modification of some kind.

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