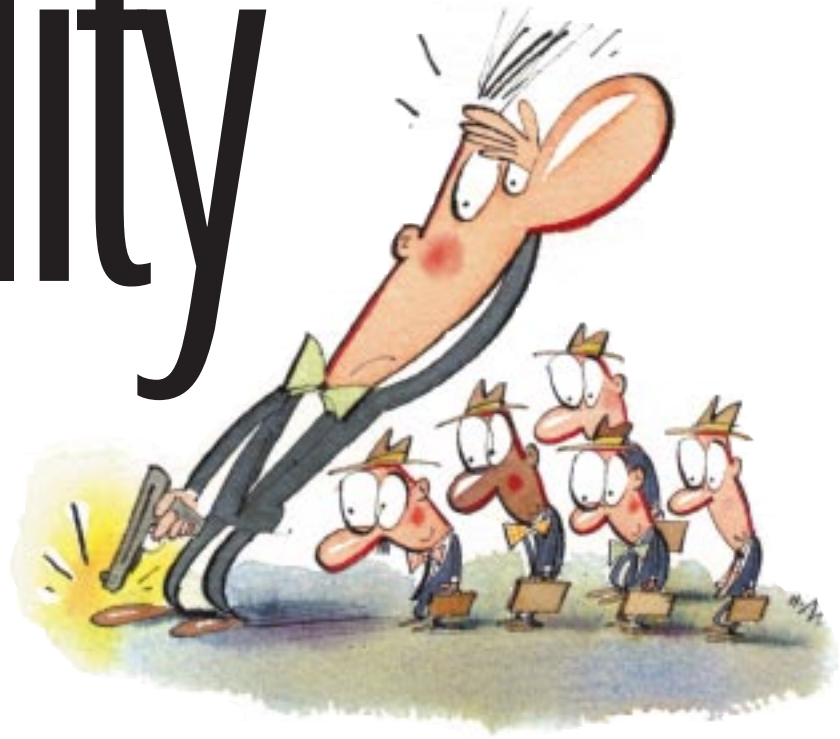


Liability

and the Technical Trainer



Case law has left a clear liability imprint on technical training. Here's what you should know to avoid shooting yourself in the foot.

The “Working Life” column of the May 1991 issue of *Training & Development* cited the following court settlement:

“A man who threatened to sue himself for workplace negligence received a cash settlement of \$122,500—tax-free. The part-owner of a California manufacturing business was working in a factory one day when a maverick bolt snagged his sweater and yanked him into churning machinery. As an employee, the injured man hired a lawyer to sue himself as owner. As the owner, he hired another lawyer to defend himself.

The two attorneys agreed that the “owner” had been negligent in allowing the bolt to stick out and that he should pay the “employee” compensation. As allowed by federal law, the “employee” got the money tax-free and the “owner” deducted the amount as a business expense.

Makes you want to shoot yourself in the foot, doesn't it?”

Such lighthearted legal curiosities always yield a chuckle, inevitably followed by a series of bad attorney jokes. The fact is, we live in a society that reveres our personal freedoms. As a result, no segment of our society is immune from the potential for litigation.

Technical trainers, along with their human resource development counterparts, are experiencing important changes in the practice of their vocation from a legal standpoint. In simpler times, the primary reason for providing effective training was to increase the probability of correct and consistent performance on the job. Managers of technical training programs are now shouldering a secondary reason—preventing or reducing a com-

pany's legal liability. Under this new responsibility, training becomes a defense to an allegation of failure to adequately train employees and their managers. Of course, if the primary reason were attended to by employers more consistently and effectively, the existence of the secondary reason would be significantly diminished.

Figure 1 outlines types of organizational and training lapses that could provoke training-related lawsuits. Figure 2 outlines organizations and individuals who may be held liable. Both tables represent only a partial listing of potential liability.

OSHA AND WORKPLACE SAFETY

During the 1960s, sufficient concern was raised about safety in the workplace that Congress in 1970 passed the Occupational Safety and Health Act (OSHA). One author asserts that the act has two specific functions: “to provide an incentive not to hurt people and to provide funds to compensate victims” (McWhirter, 1989). Under this act, an employer has a general duty “to furnish to each of his employees

In This Story

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employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees..." (OSHA, 1970).

Because the general duty requirement was so vague, Congress intended that the Secretary of Labor promulgate specific safety standards for each industry so that employers knew what was expected of them.

A 1977 U.S. Appeals Court decision argues that the general duty clause of OSHA "includes training of employees as to the dangers and supervision of the work site" (*General Dynamics v. OSHARC*, 1977).

According to one expert witness specializing in OSHA training, there are several areas of potential liability for technical trainers and their managers (Sage, 1990):

- ▼ The training results in personal harm or injury to a trainee.
- ▼ Harm or injury was caused by "failing to perform a training responsibility on which the trainee depends."
- ▼ Someone else under the control of the trainer causes harm or injury to a trainee.

One must keep in mind the importance of supervisors as first-line trainers in any organization. This point is important because supervisors can be held liable for failure to supervise and to train to standard. Sage states that the standard of care owed by trainers and supervisors to their adult learners is the duty of supervision: "If there is a failure to exercise reasonable care in performing this duty, either in the commission or omission of an instructional act or training activity, and that failure results in an injured trainee, the trainer or...[supervisor] is assumed liable."

EMPLOYER NEGLIGENCE—FAILURE TO TRAIN TO STANDARD

Negligence is generally defined as "unintentional conduct that falls below the standard of care that is necessary to protect others against exposure to an unreasonable risk of foreseeable injury (Blackburn and Sage, 1991). Negligence cases are initiated and resolved in civil courts, both at the state and federal levels.

From a training and development perspective, the elements of a negligence

Training Liability Triggers and Relevant Statutes

Figure 1

▼ EEOC/ADA Violations

- Privacy and freedom-of-religion infringement (nontraditional and New Age training)
- Discrimination in selection of trainees for advanced and specialized training
- Training that results in a discriminatory effect on a federally protected class of employees
- Testing that unfairly discriminates against employees who are non-English-speaking or culturally diverse
- Failure to provide assistance or to reasonably accommodate trainees with disabilities

▼ Federal and State Statutes

- State government: workplace health standards; safety violations; criminal negligence
- Federal government: OSHA and EPA violations; other industry regulations (Nuclear Regulatory Commission, etc.)

▼ Injuries to Trainees

- Training facility
- Unsafe simulation/laboratory equipment
- Unsafe workplace (OJT)

▼ OSHA Regulatory Requirements

- General duty to train to standard
- Warning of workplace hazards and toxins

▼ Loss of Benefits

- Anti-drug Abuse Act of 1988
- Workers Compensation
- Third Parties

▼ Personal Injuries

- Training facility
- Workplace
- Off-site location

▼ Property Damages

- Real or personal property in the vicinity

Excerpted from "Legal Liability and HRD: Implications for Trainers," John Sample. Alexandria, VA: INFO-LINE. American Society for Training and Development, 1993.

action are described by Henszey et al. (1991) as follows:

- ▼ *A Legal Duty or Standard of Care*—may be specified in a statute or part of the "common law" from judicial precedents
- ▼ *Breach of Duty*—the duty of a reasonable trainer in the industry
- ▼ *Proximate Cause*—the breach of the duty was the legal cause of damage or injury
- ▼ *Injuries/Damages*—injuries resulted directly from the training or lack of training.

For example, in *Stacy v. Truman Medical Center* (1992), the center had a legal duty to instruct its nurses in the correct performance of their work. Although the center had a policy on fire evacuation procedures, the nurse in this instance was not trained on the policy. The breach of duty was failing to remove the patient from a room on fire. A proximate causal link between the death of the patient (injury/damage) and the legal duty to adequately train the nurse about fire evacuation policy was argued successfully before the court. The medical center was held liable. It is prescribed by statute in most states that employers are protected from lawsuits by employees for negligence in the workplace by Workers Compensation laws (McWhirter, 1989).

As indicated by the preceding, negligence involves unintentional conduct. Are there legal remedies when an employer intentionally harms an employee? Under certain circumstances, employees may sue their employer for an intentional tort. From a training perspective, the employer could be sued for intentionally injuring employees by failing to train them (Blackburn and Sage, 1991).

An employer may be sued by an employee alleging several wrongful acts that caused an injury. For example, it is not unusual to allege failure to train and to supervise to standard. In *Granite Construction Co. v. Mendoza* (1991), the court determined that Granite knew about the peril, but its acts or omissions demonstrated that it did not care. The employer had policies and procedures and training programs on safety in general, including monthly safety meetings and "tailgate" instruction prior to work assignments. Contrary to policy and training, an employee was not issued a safety vest while working on a roadway, and was struck and killed by an automobile. Although training had occurred, the employer was still liable for the gross negligence of lack of supervision at the roadway work site.

Who May Be Liable

Figure 2

Trainers

- ▼ Negligent design of program, delivery of program, vendor selection, trainer selection, and/or facility supervision

Owner/Employer

- ▼ Negligent program design, supervision of training and facility, instructor selection, implementation of mandated training, and/or vendor selection

- ▼ Course content that is discriminatory

- ▼ Vicarious liability

- ▼ Invasion of privacy

Employer

- ▼ Negligent program design, selection of instructors/vendors, supervision of training activities

- ▼ Failure to implement training mandated by statute

- ▼ Discriminatory course content

- ▼ Discriminatory selection of trainees

- ▼ Vicarious liability—intentional acts of supervisors or trainers

- ▼ Invasion of privacy

Outside Contractors/Vendors

- ▼ Negligent program design, supervision of training facility

- ▼ Misrepresentation of a safety record, credentials, experience, or other requirements such as bond or insurance

- ▼ Contractual agreement—failure to meet specifications or breach of an indemnification agreement.

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There are instances in which an employer may be criminally responsible for failure to adequately train their employees. In these types of cases, higher levels of proof and state and federal constitutional guarantees for prosecuting and defending criminal cases apply. For exam-

ple, in *State v. Shoreline Support Corp.* (1989), a Wisconsin employer was found guilty of reckless homicide in the death of one of its bulldozer operators. The appeals court noted that a jury could have reasonably found that the lack of training and supervision of the employee were causally

related to his death and that the employer acted recklessly in its failure to train and supervise.

In the Shoreline case, uncontested testimony established that the work site was inherently dangerous and was no place for an inexperienced bulldozer operator to be working and unsupervised. The operator was required to maneuver an 8-by-20-foot bulldozer along a strip of land which measured between 16 and 75 feet in width. The operator scooped rubble in the bulldozer shovel, made a 180-degree turn, and dumped the rubble over the edge of a cliff. At the time of the fatal accident, the operator had approximately 49 hours of experience with the bulldozer. Since the accident was not witnessed, it was reasonable to assume that the operator was not being supervised. Testimony established that bulldozer operators are normally provided 1,500 hours of training and supervision before working under the conditions described.

KNOW YOUR RESPONSIBILITIES

The probability of a company or a technical trainer becoming involved in a lengthy litigation suit is slight; however, if the occasion were to arise, defending one's professional competence and integrity will surely be costly, embarrassing, and time consuming—even if found not liable!

Technical trainers and their managers must learn to consider the potential for liability in their quest for improving individual and group performance. Although several general reference texts exist for the lay person, the best resource for advice on potential and real legal problems is competent legal counsel. Most businesses and government agencies that have technical training responsibilities also have attorneys on staff or under contract. Do not hesitate to use their expertise whenever necessary.

Unfortunately, attorneys at your disposal may not be familiar with the legal concerns of the technical trainer. Ever educators, technical trainers may find themselves in a position to frame issues and problems of a legal nature for their attorneys. Costly legal fees and judgments will be reduced or prevented when members of both disciplines work together to understand legal threats to their companies'

assets, and to resolve them in a timely manner with due process.

There is one caveat to this overview. Employers will expect their technical trainers to perform to the best of their capabilities. Meeting an organization's vision and mission requires a certain amount of risk taking. Employees must not be frightened into underperforming their jobs because of the potential for litigation. Remember that the courts do not expect perfection, and reasonable and prudent behavior may result in mistakes of an intentional or unintentional nature. For this reason, the United States has a court system to right wrongs, and a risk management system to indemnify those who are covered with insurance. ■

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