AELE Monthly Law Journal

ISSN 1935-0007
Cite as: 2007 (8) AELE Mo. L. J. 201

Employment Law Section - August, 2007

Legal Aspects of Training Injuries
Part One

In Part One:

* Status of the claimant
* Assumption of risk
* Pretraining injury screening
  -- The Martinelli Protocols
* Protective gear
* Effect of the "firefighters' rule"
* No legal duty to provide employees with a safe working environment
* References

In Part Two:

* Duty to provide a safe workplace
* State created danger
* Workers' compensation: exclusive remedy - product liability claims as an exception
* TASER® injury litigation
* Refusal to participate in shock exercises
* References

This short article is an overview of the topic, and is not intended to be a comprehensive review of training injury litigation. Some cases that have been litigated in federal court were lost for the lack of a cognizable federal right, although they clearly showed negligence. Section 1983 litigation requires at least a deliberate indifference to a person's rights, and absent special circumstances, ordinary negligence will not support a federal civil rights claim.

State court litigation also is fraught with impediments. To illustrate, an Illinois appellate court invalidated the release of liability signed by a firefighter applicant that was injured while performing an agility test, but then dismissed the civil action, finding that the municipality was immune from liability. White v. Village of Homewood, 628 N.E.2d 616 and 673 N.E.2d 1092 (Ill.App. 1996).

Status of the Claimant

Applicants have been injured while performing pre-entry agility tests. Pre service trainees and cadets, who are actually compensated students, have been injured or disabled before they are commissioned as peace officers or firefighters. Non-employee participants and observers also have suffered injuries.

Whether a claimant is an employee or not usually is determinative of whether a workers' compensation claim will be approved. A secondary issue is, what entity is the employer -- the agency that intends to employ the claimant, the facility or academy where the injury occurred, or another entity?

- This article does not address status issues (which are typically fact dependent) and focuses on the principles of liability.

Assumption of Risk

A California probation officer filed a negligence and intentional tort action against a training company and the instructor, for personal injuries she sustained while participating in a certified training course.

The trial court rejected the suit, based on the doctrines of primary assumption of risk and the firefighter's rule.

On appeal, the appellate panel noted that the officer's duties included physically restraining juveniles. By participating in the course, she assumed the risk that she would be injured. There was no proof that the instructor intentionally hurt her.

The appellate panel said that under the doctrine of assumption of risk and the firefighter's rule, "no duty is owed to a peace officer who is engaged in training to meet an emergency situation."

They added: "It is of no moment that plaintiff was not injured while actually restraining a violent juvenile offender, but while training to restrain a violent juvenile offender." To hold otherwise would make assumption of risk hinge upon the formality of the activity, not the activity itself.

Further, the fact that the plaintiff did not sign a written waiver, disclaimer, or consent form did not raise a triable issue of fact concerning whether the defendants increased the risk of harm. Nor did the evidence that other persons suffered injuries in the defendants' other training courses have any legal consequence.

Hamilton v. Martinelli & Assoc., #E031683, 110 Cal.App.4th 1012, 2 Cal.Rptr.3d 168, 2003 Cal. App. Lexis 1114 (4th App. Dist. 2003).

The Martinelli decision was followed by an appeal in another California case. An injured officer sued a training facility, claiming that the facility negligently failed to inform him of the risk of injury in participating in the training and failed to properly supervise the training maneuvers.

The student understood the training had to replicate real-life situations. The appellate panel wrote:

> "The maneuvers cannot successfully be learned for passing the POST examination and for eventual use by peace officers without incurring the risk of injury from practicing them. Eliminating the risk of injury inherent in the maneuvers would require eliminating the maneuvers from the class. Such a result is exactly what the doctrine of primary assumption of risk is designed to prevent. For these reasons, the nature of the activity indicates the presumption of risk doctrine applies here."

The plaintiff was an adult who voluntarily participated in the training class. No one required him to enroll and he chose to participate in the takedown activity. The appellate panel, relying on the Martinelli precedent, rejected the claim. Saville v. Sierra College, #C047923, 133 Cal.App.4th 857, 2005 Cal. App. Lexis 1843 (3rd App. Dist. 2005).

A Palo Alto reserve police officer who was not a SWAT team member, but was assigned to serve as a role player, was shot to death by a Mountain View police officer who was a Regional Team member.

Although the plaintiffs received workers' compensation death benefits from Palo Alto, their heirs filed a wrongful death action against Mountain View and the shooter. A jury returned a verdict of $3.25 million.

On appeal, a major issue was which entity was the decedent's employer. The appellate court found that while he was carrying out his role-playing duties, the deceased was sometimes supervised by Palo Alto officers and at other times by a

Mountain View officer. His role-playing included the use of a "toy gun" which had been provided to him by Palo Alto. He was paid $7.40 per hour for his services by the Regional Team.

Mountain View claimed that the Workers' Comp. Act prevented a recovery against the city. The appellate court said although "it was undisputed that Palo Alto was the deceased's general employer ... this fact did not preclude a finding that Mountain View or the Regional Team was [his] special employer."

The estate was entitled to recover for wrongful death from the shooter. But the estate was not entitled to recover against the shooter's agency, Mountain View, under respondeat superior.

Brassinga v. City of Mountain View, #H015775, 66 Cal.App.4th 195, 77 Cal.Rptr.2d 660 (6th Dist. 1998).

Two cases involved applicants. A federal court in New Mexico dismissed all claims against an employer after an applicant suffered a fatal heart attack during the pre-employment agility test. Tafoya v. Bobroff, 865 F.Supp. 742 (D.N.M. 1994).

A Texas appellate court rejected liability for an applicant for a deputy sheriff who was injured while performing a fitness course. Chapman v. Gonzales, 824 S.W.2d 685 (Tex.App. 1992).

Pretraining Injury Screening

It is a recommended practice to inquire whether a participant had had a recent surgical procedure or has known risk factors, such as high blood pressure or a history of cardiac problems.

The facility should have a video presentation depicting the kind of physical activity that participants are likely to experience, accompanied by a list of potential injuries. The video can be in DVD format or downloadable from a website.

- Ron Martinelli, Ph.D. has produced a "Training Safety Protocol" and a "Normal Injury Assessment Protocol" for use of force or a dynamic role-playing training scenario.

  These can be accessed at http://www.aele.org/martinelli-protocol.html

Protective Gear

In most, if not all states, public employers are not exempt from state laws requiring employers to furnish necessary safety equipment, at no cost to employees. {n. 1} Where workers' compensation laws provide an exclusive remedy, the failure to provide such equipment ordinarily would not create personal liability for instructors.

The failure to provide necessary safety equipment is at most, negligence. The federal civil rights act does not provide a remedy for ordinary negligence. For example, in Colorado, an officer was injured while participating in a Simunition ® training exercise. These are intended to replicate combat scenarios that a police officer might encounter, using plastic ammunition. A projectile flew up beneath the officer's plastic shield on a riot helmet and hit him in his right eye, causing partial blindness.

The manufacturer markets protective equipment, including "a face mask which provides 360-degree head coverage and fits closely around the neck and chin without gaps." The officer sued the city and chief for civil rights violations.

Reduced propellant training blank

Three different firearms instructors, on three separate occasions, told the chief that the manufacturer required its own facemasks to be worn during exercises with Simunition ® rounds. However, the chief did not authorize purchasing any of the protective equipment from Simunition's manufacturer. Instead, he authorized using riot helmets during the firearms training.

The District Court dismissed the suit on qualified immunity. A three-judge appellate court affirmed. The panel noted the Supreme Court has held that substantive due process is not a guarantor of workplace safety, citing Collins v. City of Harker Heights, 503 U.S. 115 (1992):

> "Neither the text nor the history of the Due Process Clause supports [a] claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause."

The panel noted an important legal principle: deference to local decision-makers. They wrote:

> "Plaintiff is asking us to play Monday-morning quarterback about a decision (providing riot helmets rather than more protective face gear) that seems, at most, negligent. ...
>
> "Decisions concerning the allocation of resources to individual programs and to particular aspects of these programs involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges ..."

To overcome the qualified immunity defense, the plaintiff needed to find a case "which makes it 'apparent' that 'in the light of pre-existing law' a reasonable official, in [the chief 's position] would have known that having police officers wear riot helmets rather than Simunition face masks would violate their substantive due process right of bodily integrity." The plaintiff failed in that regard. Moore v. Guthrie, #04-1435, 438 F.3d 1036, 2006 U.S. App. Lexis 4171 (10th Cir. 2006).

An injured officer or firefighter who brings a negligence action in state court also may find impediments, such as a state law requiring proof of "wanton" or willful conduct. Nevertheless, a number of state court actions have been successful.

A New York court declined to dismiss a suit brought by an injured NYPD officer She sought damages for injuries sustained while participating in police training exercise at her precinct house. While acting out the role of a perpetrator, she was flipped face down onto the floor by another officer.

She claimed that her injuries were caused by the city's failure to comply with Labor Law §27-a, which requires employers to provide and have available the appropriate and necessary safety equipment for a training exercise, including mats and protective gear.

The city was exempt from workers' compensation liability. The trial court ruled that her claim sufficiently stated a cause of action "by failing to provide her with the appropriate and necessary safety equipment, including floor padding or mats, necessary to protect her from the recognized hazards inherent in the training exercise in which she was requested to participate."

Singleton v. City of New York, #9640/06, 2006 NY Slip Op 26412, 13 Misc.3d 117, 827 N.Y.S.2d 535, 2006 N.Y. Misc. Lexis 2928 (2006)

- The Louisiana Supreme Court affirmed an over-million dollar award to a corrections officer who was injured during a baton training exercise. Cole v.

State, #01-C-2123, 825 So.2d 1134, 2002 La. Lexis 2454 (2002).

- A Louisiana appellate court affirms an award to a sheriff's deputy that was injured during an on-duty training accident. In addition to medical expenses, he received $150,000 for pain and suffering. Albert v. Farm Bur. Insur. Co., #05-0352, 916 So.2d 1238, 2005 La. App. Lexis 2329 (2005).

Firefighter's Rule

The so-called police officer and firefighter's rule precludes them from recovering damages for injuries arising out of risks peculiar to their employment. The rule is said to have originated over one hundred years ago in Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892).

In its narrowest interpretation, it prevents a firefighter from recovering from a landowner or occupier who has been negligent in starting a fire. The rule has been extended, in many states, to other public safety workers who voluntarily assume the risks inherent to a dangerous occupation.

Police officers and firefighters are usually better compensated than other city workers. They often have their own retirement programs that are more generous than general municipal retirement plans.

With police officers the courts have had a more difficult time imposing the rule. A law review noted:

> "As compared to the more predictable public needs for firefighters, police calls are frequently more complex and evolving -- often making it difficult to determine whether an officer's injury relates to the original basis for the call. In fact, by the time an officer arrives at a scene, the original basis for the call may have developed into a completely unanticipated dilemma. Moreover, the actual reason for the call may be misinterpreted by a dispatcher or mistransmitted to police units in the field -- again making it difficult to determine whether a subsequent injury to an officer was the result of a reasonably predictable situation and/or the original basis for the call." 1992 Wis. L. Rev. 2031 at 2045 (1992).

In 2004, the Wisconsin Supreme Court allowed a suit by a police officer that was bitten by a dog. The "Firemen's Rule" did not apply to this kind of injury. A majority of the justices held that the policy considerations underlying the rule did not support extending it to police officers injured on the job. Police officers, like firefighters, serve the public in time of need, but there are many differences between them, the majority noted.

• Firefighters know they are exposed to danger when they are called to fight a fire, whereas police officers on patrol are not directed to a single hazard, and respond to many circumstances.

• Firefighters receive specialized training to fight fires, whereas police officers receive no specialized training to capture stray dogs, and doing so is not a central focus of their day's activities.

A dissenting justice said that to allow recovery for the acts of negligence that cause the need for a police officer's services places too great a burden on members of the public who are entitled to police protection. Cole v. Hubanks, #02-1416, 2004 WI 74, 681 N.W.2d 147, 2004 Wisc. Lexis 437 (2004).

Notes:

1. A few examples include:
Properly fitting protective clothing: Wedow v. City of Kansas City, #04-1443, 442 F.3d 661; 97 FEP Cases (BNA) 121, 2006 U.S. App. Lexis 7297 (8th Cir. 2006);
Rain gear: Sacramento Co. Deputy Sheriff's Assn. v. Co. of Sacramento, 220 Cal.App. 3d 280; 269 Cal.Rptr. 6, 1990 Cal. App. Lexis 443 (3rd Dist. 1990);
Firearms: Oakland Police Officers Assn. v. City of Oakland, 30 Cal.App.3d 96, 1973 Cal.App. Lexis 1140, 106 Cal.Rptr. 134 (App. 1973).

References: *(chronological)*

Prevention and Management of Training Injuries, by Fabrice Czarnecki, M.D., M.A., M.P.H of the Gables Group, Inc., 113 slides presented at the International Law Enforcement Educators and Trainers Association annual conference, Wheeling, IL (April 2007.).

Are You Liable for Trainees' Injuries Caused by Your Alleged Negligence?, 9 (1) Michael P. Stone - Training Bulletin (Jan. 2006). *Contains the Martinelli Training Safety Protocol.*

Comment: Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years, by David Strauss, 1992 Wis. L. Rev. 2031 (1992).

Simunition ® is a trademarked product line of General Dynamics Ordnance and Tactical Systems-Canada Inc., http://www.gd-ots.com/

AELE Monthly Law Journal
ISSN 1935-0007
Wayne W. Schmidt
Employment Law Editor
841 W. Touhy Ave.
Park Ridge IL 60068-3351 USA
E-mail: wws@aele.org

AELE Home Page --- **Publications Menu** --- **Seminar Information**