Caselaw that supports learning science

Caveat

This webinar is US centric for case law. I do not have access to the case law of foreign countries. If you are in a foreign country, it would be a very useful and productive venture to do this research to build a body of evidence to support your training. This webinar is still useful as a reference for building your own body of evidence, and, at the least, you can use our experience as a cautionary tale, especially for those countries that may not have the case law yet.

Why liability matters

Law enforcement training boils down to one thing - accountability. We want police to be held accountable and the courts have determined that police are not only held accountable for how they perform their duties, but their instructors and agencies are also accountable to how police are trained to conduct those duties.

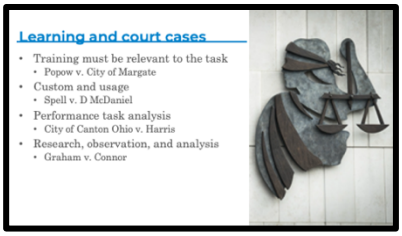
It means that individual police officers are not only accountable for performance, but the whole environment that influenced that performance, including instructors and agencies, can be held liable. All accountability comes down to training performance, but it starts before that - it starts with how the training was developed. Courts are taking notice of this more and are looking at the documentation and source of training, to include the performance of instructors and what they delivered.

All cases, as we know in law enforcement, hinge on the chain of evidence and reason. I speak at length in my courses about an instructional design process creating a "training chain of evidence" Making sure our training creates a chain of evidence that establishes reasons for everything in it becomes essential if we are going to adequately protect our training, agencies, personnel, instructors, and citizenry.

The cases listed here are not exhaustive. I am not a lawyer, so I do not have access to the databases that lawyers have to find the cases that I can add to this list. Seeking out case law that supports how we create training is essential and, more importantly, we can use them to

convince superiors that we need to change how training is created and documented, and hold other instructors accountable to what they create and deliver.

Court cases addressing liability in training



Training must be relevant to the task and repetition is necessary for retention

Popow v. City of Margate - 1979

Officer Biagi and another officer from the city of Margate Police Department were chasing a subject thought to be involved in an attempted kidnapping. It was night in a residential area, there was no weapon visible, and they weren't sure that the subject they were chasing was actually involved. At some point, Biagi decided to shoot the fleeing subject and fired in their direction.

Mr. Popow, hearing a commotion outside, went to his front door, exited his residence, and was hit by the round fired by Biagi, killing him. The estate of Popow sued Biagi and the Margate PD under 42 U.S.C. § 1983.

The court found Biagi and Margate PD liable. Using a recent decision that created a narrow path for a municipality to be held accountable for the actions of employees (*Monell v. Department of Social Services*, 1978) if it is found the municipality was directly responsible for the actions of their employees, either by policy or the lack of policy, for situations that should be evident.

The court identified that Biagi had received firearms training 10 years prior and the city provided firearms training every six months. The PD had also developed a policy for Use of Force two years prior. However, the training did not include shooting at moving subjects, use of a firearm at night, nor shooting in a residential area. The court felt that the training was "grossly inadequate" for a situation that the PD should have recognized, especially because their jurisdiction is almost entirely residential. The court also identified that the training did not include any video or simulations (scenario-based training). This led to gross negligence on the part of the officer and the agency.

Moral of the story: This is the case that set up “failure to train” tort actions. *Monell* opened the door to municipality liability, *Popow* applied *Monell* to “failure to train.” The court found that the police department's firearms training was insufficient for addressing the

conditions that a police officer would face and those conditions should have been foreseeable enough for the agency to have developed this training. It also made clear that regular training is necessary for police and that the training needs to reflect the general situations that police will be exposed to.

Popow and *Monell* also set the first test for whether there is direct or vicarious liability. A municipality and its bodies are not always susceptible to vicarious liability, but they can be sued for direct liability in cases of gross negligence. *Monell* created the two question test for whether a municipality has liability under 42 U.S.C. § 1983:

> *"an official policy or custom which results in constitutional violations*
>
> *or*
>
> *"conduct by officials in authority evincing implicit authorization or approval or acquiescence in the unconstitutional conduct."*

Custom and usage in training – training needs to be based on research and observation, not opinions:

Spell v. D McDaniel - 1985

This case represents liability for "non-specific policy," or policy that is established by custom or behavior. This case establishes that the idea *"What I am I going to teach isn't really how it is on the street.."* can create a standard of liability as if there was actual written policy. This means that "custom and usage" is just as important as stated policy and procedure. What's more, this means that the custom and usage in your classroom creates vicarious liability for you, as well. Unfortunately, it means you have to be careful about what you joke about, because if it is taken out of context or someone takes seriously something you were "just joking about," they can claim it was actually part of your training.

In *Spell v. D. McDaniel*, Spell was arrested for DUI. He was drunk and high on drugs at the time of his arrest. Spell claimed that while he was being processed and tested for intoxication, he had enraged McDaniel to the point where McDaniel severely assaulted him. He was beaten and kneed in the groin so hard, a testicle ruptured and had to be removed.

Spell sued both McDaniel and the City of Fayetteville. McDaniel denied the assault, but a jury found him liable for the assault, thus

making the city liable, also. Upon losing the case for liability for the assault, the city attempted to separate their liability by claiming McDaniel was not following policy and his actions were outside of policy.

The city lost their attempt to separate themselves from liability. The court concluded that:

> *Official policy is not the only basis for imposing liability—custom and usage may also serve.*
>
> *"Custom and usage" includes persistent and widespread practices by agents and employees that occur with enough duration and frequency which warrants actual or constructive knowledge by the leaders without correction so that they have become customary among employees.*
>
> *There are two basic theories for imposing organizational liability in the more typical situation where fault and causation cannot be laid to a municipal policy "itself unconstitutional." The first theory applies directly to this topic, the second does not. The first "locates fault in deficient programs of police training and supervision which are claimed to have resulted in constitutional violations by untrained or mis-trained police officers."*
>
> *"The way in which a municipal police force is trained, including the design and implementation of training programs and the follow-up supervision of trainees, is necessarily a matter of 'policy' within the meaning of [liability]. To the extent a particular training policy is fairly attributable to a municipality, it is 'official municipal policy.' To the extent such an official municipal policy has deficiencies resulting from municipal fault that then cause specific constitutional violations by deficiently trained police officers, the municipality is liable..."*

Moral of the story: this means that even if you have a policy of training people to not break rules or violate the rights of others, if you know people are doing so and you are not attempting to stop it or hold them accountable, you are making it an acceptable **custom and practice**, which implies unofficial policy.

This also has another repercussion that will start impact liability – lesson plans or instructor guides. Instructor guides that are nothing but

bullet points provide a gap of evidence for what was said in class. The more content in an instructor guide, the smaller the gap. If an instructor goes off topic or leads with the "This isn't how it is on the street" conversation, the liability is clearer and the instructor can be held accountable.

Instructor guides that provide only bullet points, if instructor ignores parts of the training, dismisses some parts of training as unimportant, or expresses disagreement with how something is trained, it could make the organization, and even that specific instructor, liable for the actions of the participants they trained or, more accurately, failed to train. A bullet list makes it harder to determine if the instructor was making claims based on custom and usage or if it was the instructor's own opinion that was being expressed.

The need for a performance task analysis:

City of Canton Ohio v. Harris - 1989

City of Canton v. Harris is considered the landmark case that established "deliberate indifference" to failure to train. Although *Popow* referred to deliberate indifference, *Harris* canonized deliberate indifference as sufficient for liability. While there had been other cases regarding failure to train, this case went all the way to the Supreme Court and established the precedent that a municipality is required to provide training on all things, regardless of if they are considered reasonable expectations of common knowledge.

Essentially, the *Harris* made a lot of claims about police misconduct, but ultimately, it came down to one factor – she had an emotional and physical issue that was not immediately addressed. It was accepted by SCOTUS that a municipality can be held liable for a lack of training if it is clear the lack of training demonstrated a deliberate indifference to their citizens needs or reasonable possible situations.

Harris had been arrested after a traffic stop and demonstrated some unusual affects while detained in the police jail. She had been asked several times if she was having a medical emergency, to which she declined each time. Based on her regular denials, she was ultimately left to lie on a floor where she had placed herself. When she was released from detention, she was taken to a hospital by her family where doctors diagnosed her as having some medical issues.

It was found that the supervisors had not been trained to identify issues that needed medical attention, which the court felt was a deliberate indifference on behalf of the city. The city was found liable, but the supervisors were not because of a failure to train.

Moral of the story: an organization should have a reasonable expectation of what an employee's performance will entail. SCOTUS has also set the precedence that people cannot be trained for every circumstance, but they should be trained generally to recognize how to adapt their training to circumstances that are predictable and likely. Training should be based on a reasonable expectation of the expected performance of the duties assigned and the possible variations of issues that may arise.

Training should be based on research, observation, and analysis:

Graham v. Connor - 1989

If you are law enforcement in the United States, you have heard of *Connor v. Graham*, but not usually in relationship with training. Graham establishes "objective reasonableness." This principle was established primarily as a Use of Force principle and in relationship to 4th Amendment violations, but it has become another metric in assessing liability when it comes to failure to train, as well.

Essentially, the combination of *Harris* and *Graham* have created our current environment where more is accessible for tort claims and the liability of training is continuing down the chain. The question becomes "is it objectively reasonable for an agency to have foreseen the need for training" and is leading to "is it objectively reasonable that an instructor should foresee the need for different elements of training."

This is what is happening now - training itself is being dissected by plaintiffs and questions are being asked about the foundation and structure for, and the validity of, the training we create and deliver.

Moral of the story: We need to move away from the position that training is based on the "background, training, and experience" of an instructor and, instead should be based on "research, observation, and analysis." The former should only inform the later, not be the extent of creating training.

Realistic examples, decision making, and assessment should be included in all training:

Clipper v. Takoma Park - 1989

In *Clipper v. Tacoma Park* Maryland, the police department was held liable for an instructor that had not provided examples in their training.

The case was related to a bank robbery that occurred in 1971. Three men entered a bank and robbed it. They were confronted by police as they left the bank, and a shootout ensued. One was shot, one was captured, and the third escaped.

The robber who escaped was described as an older male. This description fit the father-in-law of the robber who had been shot. Det. Starkey arrested the father-in-law, Clipper, and held him for six days. He was released when it was determined he was not the robber.

The point in contention was whether Det. Starkey had a duty to seek exculpatory evidence, which included two alibis (one being a police officer) who were with Clipper at the time of the robbery. The court determined that the agency (namely the lieutenant) should have been aware that there was no probable cause for arresting Clipper, since he could have been easily eliminated as a suspect by eyewitness identification and the alibis.

But Starkey was not held accountable, Takoma Park PD was through vicarious liability:

> *"Starkey stated that he had received no training materials giving typical examples of arrests properly based on probable cause and that he applied the practices and policies in Clipper's case that were "applied ... to every case that I worked on."*
>
> *- Clipper v. Takoma Park, Maryland, 876 F. 2d 17*

This quote, and the inability of Takoma Park to prove otherwise, was crucial in protecting Starkey from the $300,000 award to Clipper.

Moral of the story: provide examples for participants to analyze and apply the new knowledge and behavior, and then have a documented assessment that they demonstrated their ability to do so competently. Document what these examples are, with sources, and, at every

opportunity, provide scenarios where they have to use critical thinking skills.

Training must realistically reflect the task:

Zuchel v. Denver - 1993

A Denver police officer responded to a disturbance at a restaurant. When he and his partner arrived, they found the subject, Zuchel, arguing with four teenagers. Witnesses said that the officer approached Zuchel with his firearm out, was about 10-120 feet away. Zuchel turned around and slowly approached the officer. The officer shot him four times claiming that Zuchel lunged at him with a knife.

The coroner report and the witnesses said that Zuchel did not lunge at the officer and his right hand was in front of his chest when he was shot. His partner also claimed this and that she was surprised that Zuchel was shot because she was making a move to detain him.

The estate of Zuchel filed suit claiming the shooting was unjustified and a failure to train. Zuchel was denied qualified immunity because it was an unconstitutional shooting despite it not violating any city policy. The officer settled out of court. However, Denver PD was still being sued for failure to train.

The DA for Denver had sent a letter to the Denver PD recommending enhanced shoot-don't shoot training to include live fire and practical application because of a number of recent shooting Use of Force incidents. Denver PD did not act on it and continued the practice of their training shoot-don't shoot scenarios with lectures and movies.

The courts found Denver PD liable due to their not using practical application in their training, thus failure to train. The argument met criteria established by Canton v. Harris.

Moral of the story: training that requires situational decision making should be a part of training. This applies to more than Use of Force, but it is most evident in Use of Force issues. Just as *Clipper* is about providing examples as part of training, examples are not sufficient when it comes to decision making. Training should include scenario-based, practical, or simulation training that requires making decisions and skills application, while also presenting realistic use cases for what a reasonable law enforcement officer may encounter.

Document when, who, and what was trained:

Paul v. City of Altus - 1998

Paul was a passenger in a car that was pulled over by law enforcement. Paul is a quadriplegic and was ordered to exit the vehicle, even after telling police that he was unable to. He claims that a police officer pulled him through the window by his neck, threw him to the ground, and handcuffed him while the officer had his knee on his neck. Paul claims that he urinated himself and went unconscious, but then asked to be taken to a hospital. At the hospital, x-rays showed that his neck was fractured and his hip was strained.

For the court case, the agency provided written policy developed by CLEET (Oklahoma's law enforcement training regulatory body) that stated that officers should not put their knee on the necks of those being handcuffed "for obvious medical reasons." However, the officer's sergeant wrote in his report that the officer arrested the Paul using techniques "as he was trained."

The court found that since there was a discrepancy in what was trained versus policy, they could not hold the officer accountable, but the agency was still accountable.

Moral of the story: training must be documented at two levels: "what was trained" and "who was trained." I would add that "when they were trained" and "by whom were they training" is just as essential. There have been many cases where law enforcement agencies were found liable, but their personnel were not, because the courts determined the officer hadn't received recent training (or the courts couldn't establish when someone was trained) and when the courts couldn't identify who the instructor was.

Training must meet established standards – including the ones set in training:

Flores v. City of San Diego - 2022

San Diego Police Department received complaints of a motorcycle rider and passenger were driving erratically and dangerously in traffic. While a traffic light, and SDPD officer identified the rider and attempted to make a stop. The rider and passenger took off at a high-rate of speed in excess of 100mph. At one point, the initiating officer lost view and stopped pursuing, only to resume when he found the rider again.

The officer lost view of the motorcycle and stopped pursuing, but had not notified dispatch of the termination because he was reassigned a competing high-priority call. Another officer saw the vehicle and picked up the pursuit, believing it was still in process. he chased the vehicle, which again accelerated to upwards of 100mph. The motorcycle rider tried to lose the officer by turning into a parking lot, but lost control ejecting both the rider and passenger killing them both.

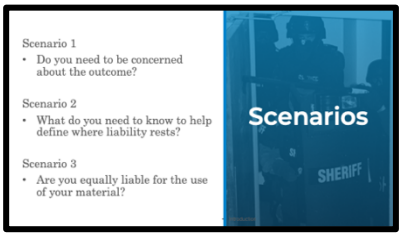
The family of the rider sued claiming that SPDP was deliberately indifferent by not providing vehicle pursuit training according to California pursuit training standards. The plaintiff claimed that California had established two laws that required a specific standard for training, established by California's POST, and the SPDP's 25 minute training video, without any assessment or practicals, did not meet that standard.

The SDPD claimed they were within standards because the law only set a standard for police recruits and POST did not have jurisdiction over how SPDP trains their personnel.

The court found for the plaintiff. They established that the first law established that POST set standards for training and POST's standards were clear to apply to all vehicle pursuit training. The standard required one hour of training with a list of topics, of which the court found that the SPDP 25 minute video did not satisfy on several points

Moral of the story: if a standard is dictated by a governing body, the training must meet that standard. While the court didn't specifically address the lack of an assessment, the way the court decided implies that an assessment should have been part of the training. POST was empowered to set a standard, the standard was set based on what they established as an adequate time to cover all of the requirements, all training created for that topic needs to meet all standards.

Activity:
These scenarios do not have answers. We are going to discuss them according to your agency's policy, procedure, and we will analyze whether you, as an instructor, would be held liable.



Scenario 1
You are in a class where you and a co-instructor are training a defensive tactics course. Part of the course is watching videos of police combating resisting individuals.

As you are watching the videos, your co-instructor is doing a play-by-play of the scenarios and making funny comments about the tactics. He says things like "Kick'em in the nuts!" and "I would have just gone Jimmy Snuka Superfly on him!"

Several months after the course, someone who had been in that class is facing a civil suit for using a tactic that is against policy. The agency is also a defendant and you have been subpoenaed. Turns out he did something similar to your co-instructor's commentary.

Do you need to be concerned about the outcome of this case?

Scenario 2
You have been training a particular course for several years now and you were very diligent in maintaining and updating it through those years. It is a topic you are passionate about.

You have had hundreds of participants over the years. One of your participants is going to court for a civil action for something related to your course. This participant took your course quite a while ago and the information has changed since they were in your course.

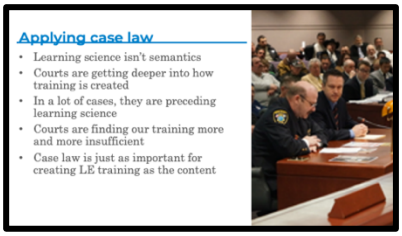
What do you need to know to help define where liability rests with this impending court case?

Scenario 3
You are providing training to large cities and to small jurisdictions. You find out that the training you are providing has very different applications depending on the size of the

agency. The small jurisdictions do not have specific policy on the material you are training, whereas the larger agencies have large sections of policy dedicated to this topic.

Are you equally liable for the use of your material depending on the jurisdiction's standards of policy?

Applying case law



Consider all of the training you have attended or created in this new light. How much of it has violated these precedents? I think you would agree - a lot. If you felt that there was a game of semantics going on with creating training, hopefully now you see that it isn't really semantics, they are standards that can help protect us in liability issues.

These are the cases I was able to find – so far. There are many others and more coming up through courts every year. As litigators start catching onto the fact there is a science and methodology of creating training, more questions and challenges will become the norm, especially when they find out that, in most cases, law enforcement instructors are not even following the case law that currently exists - that learning science has in the last 20 years completely supported.

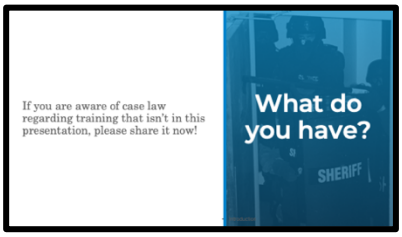
The courts are getting it right with the science that follows, yet our training is not staying up to date even with old case law, let alone the science. We have to do better because it is not only costing a lot of money for jurisdictions, but the cost is also coming in lives lost, loss of freedom, and loss of employment.

Notice also that the courts are identifying that what we call "training" is becoming insufficient. Training needs to get ahead of the curve for when plaintiff attorneys start applying Learning and Development science and practices to law enforcement training - we will be found wanting and exposed to liability.

It is exceedingly important that instructors are aware of case law and stay apprised of changes in case law, just as it is exceedingly important for instructors to be aware of and current on Learning and Development research and practices. Otherwise, we are setting ourselves up for failure.

What cases do you have?

If you know of cases that can provide more evidence for why we do the things we should, now is the time to share them. If you have cases that did not make this list, please share in chat so we can all learn.



Cases provided in presentation:

Contribution from Stephanie Pederson:

Failure to Train - Mentally Ill Persons:

Gaddis v. Redford Township and City of Dearborn Heights (2004)
Herrera v. Law Vegas Metropolitan PD (2004)
Cruz v. Laramie (2001)

Failure to Train - Off Duty Action:

Brown v. Gray (2000)

Negative Training:

Sager v. City of Woodland Park (1982)

Inappropriate Training:

Markham v. White (1999)

Contribution from Richard Maxwell

1. Fagan v. City of Vineland (1991) Citation: 22 F.3d 1283 (3d Cir. 1994) Summary: This case involved allegations of constitutional violations due to inadequate police training. The plaintiffs argued that the city failed to properly train its police officers, resulting in a violation of their civil rights. The court held that a municipality could be held liable under Section 1983 if the failure to train demonstrated deliberate indifference to the rights of individuals with whom the police come into contact.

2. Carter v. City of Vineland (1993) Citation: 989 F.2d 1171 (3d Cir. 1993) Summary: This case addressed municipal liability under Section 1983 for constitutional violations resulting from inadequate police training. The Third Circuit emphasized that to establish liability, plaintiffs must show that the training deficiencies were closely related to the constitutional injury and that the municipality was deliberately indifferent to the need for better training.

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