

Trainers: Are you liable for trainees' injuries caused by your alleged negligence?

Another Appellate Court Says "No" - Follows the Decision in the Martinelli Case

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and
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On October 26, 2005, the California Court of Appeal filed its published opinion in the case of *Saville v. Sierra College, et al.*, ___ Cal. App. 4th ___, 3rd Civ. No. C047923, which followed an earlier case on the same subject, *Hamilton v. Martinelli & Associates* (2003) 110 Cal. App. 4th 1012, at 1020-26. Dr. Martinelli was sued for personal injuries by a peace officer in-service trainee who claimed that in teaching a defensive tactics program for San Bernardino County, Martinelli negligently exposed Hamilton to an unreasonable risk of injury. She claimed that his failure to use due care to avoid injury to trainees who were required to perform the defensive tactics maneuvers (designed to simulate real attacks and assaults), resulted in permanent disability to Hamilton's spine and neck.

Dr. Martinelli instructed his Texas insurance carrier to place the defense of this case with our law firm, which specializes in every variety of law enforcement litigation. So, I asked Dr. Martinelli to collaborate with me on this paper, to help trainers and agencies protect themselves from lawsuits brought by trainees who become injured (or claim to be) during dynamic interactive training.

The Martinelli Case

This was a case of first impression which featured Ms. Hamilton, a probation officer, as a trainee in a use of force and defensive tactics in-service school taught by Martinelli and Associates for the County. The training featured typical instruction and testing, which we all know, needs to be dynamic, hands-on and as "real" as possible. No matter how carefully the instructors and participants in these simulation exercises perform them, risk of unintended injury cannot be completely eliminated. Later in this article, Dr. Martinelli will describe his protocols to achieve maximum safety together with effective training, assimilation and testing in these critical officer safety skills. Suffice to say, we were prepared to prove to the jury beyond peradventure of doubt that his precautions, instructions and techniques in the *Hamilton v. Martinelli* case were entirely consistent with professional standards of care in the relevant professional training community. As it turned out, the case never made it to the jury because the trial court granted our motion for summary judgment as to *no liability as a matter of law*. But plaintiff appealed, and that is how the *Martinelli* case became a precedent (published) decision of general applicability throughout the United States.

Our defense in *Martinelli* rested upon two interrelated legal doctrines long recognized in statutes and case law throughout the country: (1) assumption of risk; and (2) the so-called Firefighter's Rule. The *Martinelli* court found both of the doctrines applied to Hamilton, to bar her claims of

negligence against Dr. Martinelli, thus affirming the trial court's grant of summary judgment in favor of Dr. Martinelli.

We pause here to consider the impact of *Martinelli* on professional police training if the decision had gone the other way. Law enforcement trainers recognized many years ago that training in defensive tactics and arrest and control techniques must be dynamic, involving hands-on interactive physical contact and exertion, in order to teach and test assimilation of these critical skills. And, because the skills are perishable, they must be refreshed periodically by in-service training such as the kind Dr. Martinelli was providing for the San Bernardino County Probation Department.

Today, many police organizations turn to outside private training providers for specialized use of force training. Where the training is actually provided by the agencies' own trainers, employees who claim injury are limited to the exclusive remedies of state workers' compensation statutes, and may not sue their own agencies and employees for tort damages, for example in a negligence action like Ms. Hamilton's. But where the training is provided by outside providers like Martinelli & Associates, tort actions against them are theoretically possible because they are not the trainees' employers. So, workers' compensation statutes do not bar such lawsuits. And, if the agency has paid worker's compensation or pension benefits to an injured trainee, the agency-employer could intervene in the trainee's lawsuit against the trainer to recover the costs of the benefits and medical care it paid to and for the injured trainee.

Three obvious results would inevitably flow from the *Martinelli* case if the Court of Appeal justices ruled that Hamilton's lawsuit could go forward: First, dynamic, reality-based interactive training would be scaled back or eliminated because the trainer would be too vulnerable to personal injury claims by trainees. Next, private, independent-contractor trainers would stop offering such training, for the same reasons. Lastly, insurers would withdraw policies affording coverage for trainers against negligence claims, or the premiums would be cost-prohibitive for most independent contractors. The overall result is that available training options in these critical skills would be substantially curtailed. In these circumstances, public policy should favor denying even deserving injured claimants a tort remedy, because the benefits of permitting and encouraging challenging, dynamic, interactive physical training by professional trainers outweighs substantially the limited harm to the occasional, seriously injured trainee. After all, since the training is usually sponsored by the employer, and trainees attend "on-duty," workers' compensation and medical pension benefits are available.

The above considerations are part of the legal fabric in the *Martinelli* and *Sierra College* cases discussed herein, that support these two independent Court of Appeal decisions barring the plaintiffs' tort claims, by application of assumption of risk and the Firefighter's Rule.

ASSUMPTION OF RISK AND THE FIREFIGHTER'S RULE

Assumption of the risk, of which the Firefighter's Rule is a variant, is based upon the principle that certain activities involve a level of anticipated risk of injury to participants. When persons voluntarily engage in inherently risky activities, such as downhill skiing, mountain climbing, bungee jumping and whitewater rafting, and are injured by the very risk they voluntarily confronted in order to enjoy the sport, they should not be able to sue the sport's providers for negligence. Reducing the risk of injury to almost none would deprive participants of the enjoyment of these sports. So, public policy counsels against permitting injured participants to sue. Police training is similar. If we curtail the dynamic training to a near no-risk proposition, trainees and their employers would be deprived of the benefits of dynamic, reality-based interactive training.

The Firefighter's Rule generally bars public safety members from suing persons whose

negligence is the reason for the member's presence at the scene and which is the proximate cause of the member's injury. Again, it is based upon the principle that police and fire members voluntarily assume risky employment for which they are specially compensated, and may not sue tortfeasors for injuries sustained in the normal course of performing duties occasioned by the wrongful conduct of others.

Assumption of the risk and the Firefighter's Rule are highly fact-oriented and complex in their application to particular cases. Both have numerous exceptions and subtleties that are far beyond the reach and purpose of this paper. But, for a more detailed discussion, see our Training Bulletin at Volume VI, Issue No. 7, entitled "Police Trainers Cannot Be Held Civilly Liable For Trainees' Injuries During Training," which discussed the *Martinelli* case at length.

The *Sierra College* Case

Plaintiff Robin Saville wanted to become a search and rescue helicopter pilot. To improve his chances of being hired,

... plaintiff enrolled in a class at defendant Sierra College entitled Administration of Justice 600, also referred to as PC 832 (referring to Pen. Code, § 832), Arrest, Communications, and Firearms. Sierra College is a community college operated by the Sierra Joint Community College District. (For convenience, we refer to the different Sierra College entities named in plaintiff's complaint as the College.)

The course was open to any student who could pass a firearms background check. The College's catalog for spring 2001 described the course as follows: "P.C. 832: ARREST, COMMUNICATION, AND FIREARMS [¶] . . . [¶] Meets requirements of California Penal Code Section 832 requiring individuals having Peace Officer powers to complete a training course prescribed by the Commission on Peace Officer Standards and Training (POST). Partially satisfies POST Level III Module training. Covers ethics, courts, community relations, laws of arrest, use of force, search and seizure, investigations, arrest and control methods, shooting principles, and range qualification."

...

The course consisted of three portions: lectures, methods of arrest and control, and a firearms portion. Plaintiff declared in his separate statement of undisputed facts participation in the activity to learn arrest and control methods was required: "The class was pass/fail. In order to pass the class, the students were required to attend and pass all three parts including arrest and control procedures."

Former Rocklin Chief of Police Nick Willick was the lead instructor of the course. He taught the lecture portion of the course, and other officers taught the control methods and firearms portions. Willick explained the arrest techniques portion of the course to the students. Although he did not use the words "role-playing," Willick informed the students they would learn the techniques in as realistic an experience as possible, and they would be "modeling" the actions an actual police officer would take when performing a takedown in the field. (Saville, slip op. at pages 2-3).

At one point during the class, Saville and another student engaged in a slow-speed takedown maneuver. Saville was "taken down" by his partner and hit his neck on the partner's knee. Saville suffered a herniated cervical disc and other injuries that necessitated surgery.

Saville sued the College, claiming that the college negligently failed to: (1) inform him at registration of the risk of injury in participating in takedown maneuvers; (2) evaluate or screen him, or advise him to do the same in light of the risks; and (3) supervise and properly train him and his classmates to perform the maneuvers correctly.

Relying on a long line of assumption of the risk cases, and then focusing on those cases that involved training injuries when the plaintiff was trying to learn a sport or physical maneuver, the Court of Appeal cited the *Martinelli* case with approval as an example of correct application of

the assumption of the risk doctrine (*See*: slip op. at pg. 17). Ultimately, the Third Appellate District panel ruled the same as our Fourth Appellate District justices did in *Martinelli*, and affirmed the grant of summary judgment in favor of Sierra College.

But trainers need to remember that assumption of the risk may not bar an injured trainees' tort claims if he/she can show that the trainer *actually increased* the risk of injury inherent in the training by grossly negligent or intentional misconduct. So it is very important to employ industry-recognized safety protocols and individual precautions such as those discussed below by Dr. Ron Martinelli.

THE MARTINELLI SAFETY PROTOCOL

What follows below is the Training Safety Protocol and Normal Injury Assessment Protocol utilized in Dr. Martinelli's Officer Safety Institute ("OSI") which offers dynamic, reality-based interactive training for law enforcement self-defense and arrest and control tactics.

The Training Safety Protocol

All Officer Safety Institute (OSI) instructors follow this Training Safety Protocol each time they instruct any Use of Force (UOF) or dynamic role-playing training scenario. Instructors should always err on the side of safety and *repeat* the student assessment protocols whenever there is any question as to whether the student might have any of the following:

1. A prior (latent) injury within the last few years.
2. A recent or previous surgery to any "protected area," especially to the head, neck, shoulders, joints, back, hips, arms, legs, knees or feet; or any internal organs.
3. A history of breathing difficulties, i.e., asthma.
4. A history of high blood pressure.
5. A history of any heart disease.
6. Is overweight (25 - 49 lbs. over normal body weight), or obese (50+ lbs. over normal body weight).
7. Is experiencing or complaining of soreness as a result of being out of shape

Normal Injury Assessment Protocol

1. Instructors explain the training objectives of each course of instruction and underscore that dynamic scenarios with physical competency testing while the student is "stress inoculated" are required to pass the class.
2. Instructors fully explain the Training Safety Protocol to the class and then to each student individually. Instructors inquire about the student's physical and medical history as indicated above. If a student advises an instructor that the student has any physical limitations as described above, the student will be identified by a conspicuous piece of colored tape placed on the clothing (which will also identify any "protected area(s)."
3. If a student is identified as having a significant protected area or preexisting medical problem, he/she will be identified by a large "X" in colored tape, placed over the chest. The "X" identifies the student as a "non-dynamic scenario" trainee, precluded from participating in high-stress or dynamic physical training. All test forms will indicate that this student participated in the training, but was not tested or certified under dynamic conditions.
4. Prior to and immediately following each dynamic testing scenario, instructors will ask each student how he/she is doing physically and whether any have sustained any injuries or have any new physical/medical problems.

5. During the class, instructors make continuous contacts with the students in class, especially those marked with colored tape to determine whether there are any difficulties. Instructors constantly monitor their students and are proactive in assessing any potential problems before injury occurs.
6. Throughout the class, students are repeatedly encouraged to seek out an instructor at the first sign of unusual soreness or potential injury. Examples of warning signs are: unusual muscle fatigue, muscle strain, sharp pain, throbbing pain, shortness of breath, prolonged and rapid pulse, headache, and pain in joints.
7. Instructors immediately assess any student who experiences any of the symptoms described above to determine whether the training should be continued, modified or stopped.
8. Instructors identify all injuries and medical problems sustained during the class on an injury report and ensure that injured students fill out a departmental worker's compensation injury form.
9. Instructors identify any unusual physical or medical problems in the section provided on the course test form to document the existence of that problem regardless of whether or not that student was injured during the class. Examples are injuries to protected area(s) or pre-existing problems identified by the student and marked with tape in the beginning of class. This helps protect the trainers from claims by students that they were injured in the class, when in fact the injuries were pre-existing.
10. At the conclusion of each class, the instructors personally assess each student to ensure that the student was not injured in class, and to document any injury or problems that the student did not identify to the instructor during class.
11. All injuries and medical problems are reported in writing to the department's training manager immediately following the injury. Minor injuries such as small cuts, muscle strains, or significant soreness can be reported at the end of class.

Stay safe!

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and

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Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 26 years, following 13 years as a police officer, supervisor and police attorney.

Dr. Ron Martinelli, directs *Martinelli & Associates: Justice Consultants, LLC* and its Officer Safety Institute. He is a Master Instructor in all levels of force, and has been a certified Police Practices Expert and Trial Specialist for 25 years in state and federal courts. Ron Martinelli can be reached at: Code3Law@aol.com or at (949) 376-1840

