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Deliberate Indifference: Understanding the Legal Ramifications of Risk

By: Dave Hingsburger, Donna Lee and Chanelle Salonia

Rolling up the street in my power wheelchair I notice a young man with an intellectual disability coming down the street towards me. Following slightly behind him was a support staff who was talking on her cell phone. When he was about to pass me, he said something unintelligible and then reached out and slapped me, really hard, twice on my stomach. I reacted as any normal person would and, at my upset, the staff told me that, "he didn't mean anything by it." Later, as the interchange continued, she said that, "most people don't mind." This means, of course, that he's done it before and that it was of no great surprise to the staff that he'd done it again.

When I wrote about this experience in much more detail on my blog, the comments I received were mostly supportive. Many said that his disability didn't exempt him from following certain rules of conduct. However, there were a number of people who didn't know, had no idea, what could be done in situations like this with people who lash out and hurt others, yet don't have a real understanding of the impact of their behaviours.

In order to understand what needs to be done and, more importantly, what can be done, we need to look at a concept called 'Deliberate Indifference.' Before defining what it is and how it changes the way organizations approach situations where an individual's behaviour causes risk of harm to others, let's just state that the organization supporting the man who hit me and the staff who was accompanying him were guilty, in a legal sense, of deliberate indifference. Had I been a different person or had the situation been even slightly different, an effective lawsuit could have been launched against the host agency. But, we're getting ahead of ourselves.

The Cobra

If you look 'deliberate indifference' up, you will find a fairly bizarre example used to demonstrate its meaning. As this concept grew out of the prison system, the example comes from there as well. Here it is: If you were going to put a prisoner into a cell, and there may or may not be a cobra in that cell, and you put the person in the cell and a cobra strikes them, you are not guilty of deliberate indifference. If you put a prisoner into a cell, and you are pretty sure there is a cobra in the cell, but you don't know for certain, if the prisoner is struck by a cobra you still aren't guilty of deliberate indifference. However, if you put a

person into a cell knowing there is a cobra in the cell and the person gets bitten by the cobra, you are guilty of deliberate indifference. All this is saying is that if you know the risk is there and you do nothing about the risk, then you are guilty of deliberate indifference.

In human services we may balk at this example and the idea of comparing people to cobras, however, we need to look at what the legal concept is behind deliberate indifference. Let's take an example:

A woman with a disability is moving into an organization after having lived as a street person for a number of years. A recent assessment showed that she had an intellectual disability and, therefore, qualified for support. In interviewing her about what she wanted in the way of housing and support, she requested only one thing. After years of living on the street and experiencing rape and sexual assault on an ongoing basis, the only thing she wanted was to be safe. She wanted to be guaranteed that she wouldn't be hurt or abused any more. The organization had only one spot available, and in that spot were two men both of whom had a history of sexually offending against women with disabilities.

In this example the concept of the 'cobra in the cell' becomes quite clear. Furthermore, the responsibility of the housing agency comes dramatically into relief. In this case it's quite easy to see the potential damage that could be caused and the ramifications of the decisions to be made. Let's take a look at another example:

A man with an intellectual disability lives in a house with three other people. He has always demonstrated difficulty with aggression and yesterday he struck one of his housemates so hard that he left large bruises on the other's face, shoulder and torso. The parents of the individual who was hurt are outraged and have laid a complaint. A decision was made to move the man who has difficulty with aggression to another home so that there could be a fresh start.

Um, there is no such thing as a 'fresh start.' He is moving from one place to another, and he is bringing his long history of assault with him. The best predictor of future behaviour is past behaviour, and the support agency knows full well that they are now exposing others to risk of being struck and of being victimized.

What can be done?

Well, before we answer that question, and we will answer that question, let's take a look at some examples of how deliberate indifference has been defined and applied now that it is being used in legal cases outside the prison system and in community settings.

Deliberate Indifference in Community Settings

Definitions of deliberate indifference vary slightly depending on the particular context, but all involve these three elements: a responsibility to protect those in the organization's care, knowledge of the risk that serious harm could occur, and the failure to take sufficient action to prevent that harm or significantly reduce the risk. More than negligence, deliberate indifference is knowing about a danger and doing nothing to keep people safe from that danger.

Deliberate indifference has been used to show liability for harm not only in prison settings but also in child protection services, schools, and policing across North America. While it is a far more common concept in the United States, similar laws are in place in Canada under our human rights legislation which have led to the successful application of the concept of deliberate indifference in courts.

A teenage student was physically and verbally harassed by his schoolmates for years. He told teachers and his principal but, while the school did discipline a few of the perpetrators, the harassment continued and eventually escalated to physical assault. The British Columbia Human Rights Commission found the school to be deliberately indifferent to the safety of the victim and, therefore, in contravention of the Human Rights Code. This case shows us that the standard of deliberate indifference can be met when the actions taken to respond to a known risk are clearly ineffective yet no alternative methods or actions are implemented.

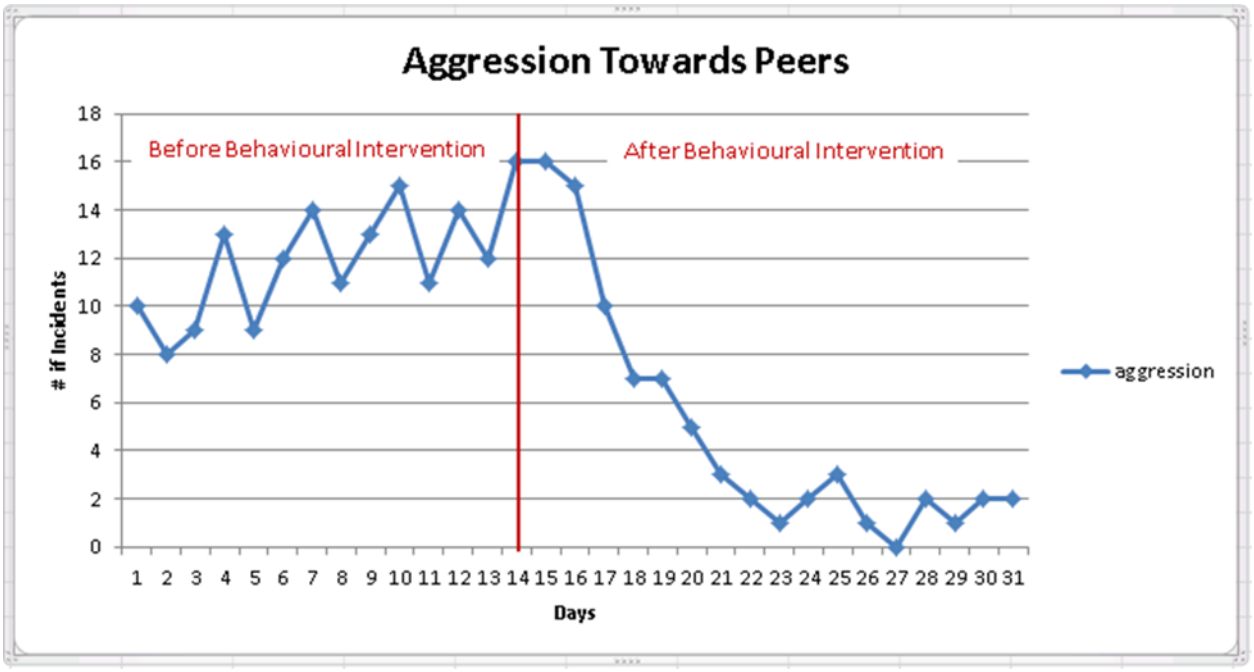
Another interesting and particularly relevant example of deliberate indifference can be found in the area of police training – or rather the lack of training. Over the past few decades, the U.S. courts have found numerous police departments to be deliberately indifferent to the safety of those officers who may have cause to restrain, protect or otherwise physically interact with the public, as a direct result of inadequate training. These cases were based on the fact that there were risks to officers and those they interacted with which were known by those in charge; there was training available to minimize those risks, and there was a choice made by those in authority not to provide that training.

A final example of deliberate indifference, before we get to how the concept applies within developmental services, can be found within Canadian nursing homes. Resident-to-resident violence in nursing homes has been the subject of recent journalists' investigations which made headlines in all the major print, radio, television and online news outlets across the country. Specific agencies were named, reputations were irrevocably damaged, and of course most importantly, people were being seriously harmed and even killed in the very places that were entrusted to provide care for these vulnerable individuals. Investigations into these incidents showed that nursing homes are often failing to identify residents prone to aggression, to assess them and develop strategies to effectively manage the risk of abusive residents, and protect vulnerable ones. In a few cases, nursing homes have been found liable for failing to take sufficient and reasonable steps to prevent resident-to-resident assault where that risk was clearly known to the home.

The concept of deliberate indifference has yet to be directly applied to the Developmental Services Sector in the courts; however, the idea that agencies within the sector are responsible to prevent harm to those in their care, and are liable when known risks result in harm is not new. A study in the 1990s looked at 72 cases of peer-to-peer sexual assault among adults with intellectual disabilities living in group homes or larger institutions – in 49% of these cases the agency providing support to the individuals involved was found to have neglected its responsibility to protect those in its care from harm.

Data Tells Two Stories

Let's take a look at the following graph. It shows the effectiveness of a behaviour programme on the aggressive behaviour of someone with a disability:



Many of us will have seen this kind of graph in meetings about individuals or at conference presentations. But while it is always seen as a graph of a behaviour program, we have to recognize that it is also a graph of the violence inflicted on people with disabilities in our care. It suggests that a low level of violence is tolerable and to be considered the result of a successful behaviour plan. To the people experiencing this violence, to the parents and family of the people experiencing violence, this is simply not good enough. Put simply, the behaviour plan is working, the risk management plan isn't.

What can be done?

What can we do to ensure safety and avoid accusations of deliberate indifference? In other words, how can we deliberately make a difference to the safety of those in our care? The answer is clear, we must:

- Be aware of the risks;
- Take steps to prevent harm resulting from these risks;
- If harm does occur, respond quickly ***and*** effectively to ensure it does not happen again.

Ensuring that we are aware of the risks requires that we consciously seek out information that would reveal such risks. Think about the process that occurs when we accept a new individual into service: there are meetings held, files reviewed, questions asked and answered. Risks are often revealed as part of this process and then planning occurs to ensure that those risks are effectively managed. But what about those situations where, despite the meetings and the questions and the file reviews, certain information is not forthcoming? In these cases we may not know about a serious risk until an incident or behaviour occurs alerting us to that risk. We cannot know what we have no way of knowing.

But once the behaviour has occurred, even just one time, we know. From that point on, we have a responsibility to manage the risk and to do so effectively.

There are many ways that we manage risk every day. We do so in our own lives – think about how you might prepare for an important meeting to reduce the risk of being asked a question you didn't anticipate or even the final bathroom visit you make before a long drive. We also manage risk in our workplaces – we ensure that John doesn't sit beside Alan at mealtimes because we know that they have had conflicts when in close proximity in the past or we provide a cell phone to staff who are going out with an individual who may require additional support on short notice. What is equally important though is that we become deliberate about these risk management strategies, that we build them into our policies, and that we document what we have put in place.

Risk management can look very different from situation to situation – it must be individualized based on what the particular risk involves, who is at risk, the environment, and a slew of other factors. Strategies can include supervision, staffing ratios, training and education (for staff and people with intellectual disabilities), adaptations to the environment, establishment of boundaries, changes to routines, etc.

There are a number of tools that can be used to manage risk and document the risk reduction strategies in place. These might include staff orientation procedures, training policies, and individual support plans. What we have developed at Vita is a Risk Reduction Plan which can be of particular use in ensuring that risks are identified, and that specific strategies are developed and documented to manage and reduce those risks.

The template for Vita's Risk Reduction Plan is one that we would like to share; of course it should be adapted to meet the needs of individuals and specific situations, but the template gives you and your staff a place to begin. The Risk Reduction Plan doesn't require a behaviour therapist to write or implement it – staff and supervisors, together with the individual supported, most often have the information and the ideas to create a strong plan. The fact that the plan is dynamic and evolving also ensures that strategies can be added or tweaked as needed. The template below is set up for use in a residential environment but, of course, can be adapted to any environment.

> *Name of Residence*-Risk Reduction Plan
>
> The following resources and strategies have been developed in order to maximize safety and minimize risk for all people that currently reside at the Name of residence and the staff who currently support these people. The goal of this plan is to identify and manage potential risks that are present from one or more household members.
>
> Behaviours or Issues Causing Risk: *List and define*
>
> **Disclaimer:** This plan should be updated as often as necessary to address the current safety needs of all involved. For example, the plan should be reviewed and updated if the behaviour causing risk occurs, if one of the people with high risk or dangerous behaviours moves to another residence, or if the behaviour profile of one or more of the people living in the home changes in nature with respect to their risk potential (e.g., a person starts engaging in additional risky behaviours or is no

longer engaging in risky behaviours).

Risk Reduction - Environmental: list strategies

Risk Reduction - Supervision: list strategies

Risk Reduction - Boundaries: list strategies

Risk Reduction - Staffing Approaches: list strategies

Add additional risk reduction categories and strategies as needed.

Back to the Beginning

At the beginning of this article, we used an example of a fellow who was aggressive towards his peers. He had seriously hurt another person he was living with, leaving a trail of bruises. The agency decided to move him because the parents of the victim were loud in their protests about what had happened to their son. The agency wanted a 'fresh start.' We stated that a move is not a 'fresh start,' it is just 'new victims.' Well, that's only true if nothing is done. Let's take a look at some risk reduction strategies that could be put into place, to ensure that the agency isn't deliberately indifferent to the danger this man presents, along with the hurt and pain of any future victims.

The following are some examples of risk reduction strategies for the above scenario;

Environmental:

- Safe environment: environmental changes have been made to this individual's surroundings in order to maximize safety and reduce the instances of physical aggression. These changes include, but are not limited to, relocating his bedroom to an area deemed safe, keeping in mind crowded areas, proximity to house mates, proximity to staff for support.
- Identify a calming location for the individual, as well as the identification of exit routes where redirection can occur free of obstruction. These can also be used to redirect housemates during times of escalation should this individual refuse to relocate or redirect.
- Ensure any sharp objects within the residence are locked up in a safe place to reduce the risk of harm.

Staffing:

- Review his list of 'signs of escalation and triggers.'
- Increase staffing in common areas to increase safety.
- When in any location in close proximity to peers, ensure staff presence to ensure safety.
- Ensure all staff are trained on the implementation of the organization's non-violent crisis interventions, i.e., safe management, CPI, etc.
- Continue to collaborate with consultants involved, e.g., occupational therapist.

Supervision:

- Eyes-on supervision when in common areas or in close proximity to house mates/peers is highly recommended.

- Ensure enough choice is provided to individual when supervised, and allow flexibility in his routine with appropriate safety supervisions in place.

Boundaries:

- Monitor for situations of close proximity to others, and provide consistent reminders of personal space.
- Consistently teach boundaries skills, ensure his awareness around concepts of personal space.

**Should behaviours become unmanageable and his safety or the safety of others is at immediate risk, contact 9-1-1.*

The above strategies are developed with an understanding that they will need to be modified on an ongoing basis and that the team will need to be quick to evaluate strategies which are not working and put in place revised approaches.

Summary

There is a responsibility by the service provider to ensure a safe environment for people with disabilities, a safe workplace for employees, and a safe neighbourhood for the community. In light of deliberate indifference lawsuits, and an ethical awareness of the need to respond appropriately to ensure the safety of all, social service providers should understand their decisions regarding risk, be aware and identify risks, and ensure due diligence in their actions to address the risk. If you remember, way back at the beginning of this article, an example was given of one man striking another man on the stomach while walking down the street. The reaction of many to this was 'well what could we do.' Hopefully it's clear that, once you know the risk, there are tools that you can use to determine ways to manage that risk.

Our experience at Vita has shown that our members and our staff appreciate the forthrightness with which the clinical team discusses risks and risk management strategies. It becomes clear that the agency through the development of these plans cares for both people with disabilities and for the staff who provide service to them.

Resources Available

If any readers would like a copy of the template we use for Behaviour Management Approaches, in which we embed a risk management section or the template used just to design a Risk Management Plan, please contact csalonia@vitacls.org and request either or both.

References

Boyle, T. (2013, November 24). Scarborough nursing home 'failed to protect residents.' The Toronto Star. Retrieved July on 29, 2014 from http://www.thestar.com/news/gta/2013/11/24/more_suspected_abuse_at_wexford_residence_nursing_home.html

Childress, J. (2011, November 21). "Deliberate indifference" to complaints can lead to liability. Texas School Administrators' Legal Digest, 27(10). Retrieved on July 29, 2014 from http://parkplacepubs.biz/wordpress/%E2%80%9Cdeliberate-indifference%E2%80%9D-to-complaints-can-lead-to-liability/

Furey, E. M. & Niesen, J. J. (1994). Sexual abuse of adults with mental retardation by other consumers. Sexuality and Disability, 12(4), 285-295.

Howard, J.P.R. (2002). School board liability for student-peer harassment and discrimination: “Deliberate indifference” and beyond? Education Canada, 42(1). Retrieved on July 29, 2014 from http://www.cea-ace.ca/education-canada/article/school-board-liability-student-peer-harassment-and-discrimination-deliberat

King, Martin J. (2005, October 1). "Deliberate indifference": Liability for failure to train. The FBI Law Enforcement Bulletin. Retrieved on July 29, 2014 from http://www.thefreelibrary.com/"Deliberate indifference": liability for failure to train.-a0139177099

Parkinson, J. (2011). The cost of inadequate training. Western Journal of Criminal Justice, 3(1). Retrieved on July 29, 2014 from http://www.wiu.edu/coehs/leja/cacj/research/past.php

Rinaldo, S. (2013, February 9). More than 10,000 Canadians abused annually by fellow nursing home residents. The Toronto Star. Retrieved on July 29, 2014 from http://www.thestar.com/news/gta/2013/02/09/more_than_10000_canadians_abused_annually_by_fellow_nursing_home_residents.html

Steinecke, Maciura, & LeBlanc. (2014). Sexual Abuse and Other Mandatory Reporting Requirements. [Power Point Slide Dr. R. Berman, lecture communication, 2014].

Swift, K.M. (2007). A child's right: What should the state be required to provide to teenagers aging out of foster care. William & Mary Bill of Rights Journal, 15(4), 1205-1235.

Vacca, R.S. (2014). The duty of care and deliberate indifference: Policy implications for special education. Commonwealth Educational Policy Institute Education Law Newsletter, 12(6).

Weiss, B.I. (2006). Title IX versus Canadian human rights legislation: How the United States should learn from Canada’s Human Rights Act in the context of sexual harassment in schools. UC Davis Journal of Juvenile Law & Policy, 11(1), 55-99.

About the Authors

Dave Hingsburger, MEd. is the Director of Clinical and Educational Services at Vita Community Living Services. He also works in private practice as a consultant, trainer and writer.

Donna Lee, M.A. is a Behaviour Therapist with over 20 years experience in the developmental services and mental health sectors. Until recently, she worked as part of the Clinical team at Vita Community Services and is now continuing her career at Dartmouth Adult Services Centre in Nova Scotia.

Chanelle Salonia, M.A. is a Behaviour Therapist with Vita Community Services, she also teaches in the Behaviour Science program at Humber College.

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