

# Conceptual



## **The Mandt System®**

Putting People First

### **Chapter 6** **Conceptual Skills**

Liability and Legal Issues

Recommended training time averages 1 – 1.5 hour(s)



## Table of Contents – Liability and Legal Issues

---

INTRODUCTION.....	162
DEFINING LIABILITY.....	163
PERSONAL LIABILITY AND THE LEGAL BASIS FOR LITIGATION .....	165
LIABILITY AND LEGAL ISSUES REGARDING RESTRAINTS .....	169
REDUCING EXPOSURE TO LAWSUITS.....	170
CONCLUSION .....	172
GLOSSARY OF TERMS.....	173
SELF STUDY QUESTIONS.....	174

# Introduction

---

During the past fifteen years, litigation related to work in human services organizations has increased greatly. This has come about due in part to changes in federal civil rights law, provincial reporting statutes, and improved advocacy systems for people in care. Cases of abuse are more frequently reported, investigated, and publicized than in the past. We think it is important for caregivers to have some understanding of their legal responsibility for providing care.

There has also been continued attention paid to injuries and deaths that have occurred as a result of restraint. We are aware of several cases where direct support professionals working with children and adults have been charged with felonies as a result of the deaths of individuals served while the staffs were restraining them. It is critical that administrative staff, managers and supervisors, and direct support professionals have an awareness of the liability and legal issues surrounding the prevention and use of restraint.

As a result of litigation more care is required in our work with violent and aggressive persons. This means our interactions with people who are violent must include certain safeguards for the protection of staff and the other person. The reason for this caution is founded on a legal doctrine called liability. Civil liability issues in human services work are a complex area of the law that requires expert legal advice. Protecting an agency from lawsuits is a matter that is best addressed with assistance from licensed attorneys in your particular legal jurisdiction. **David Mandt & Associates are not legal experts and therefore our discussions here should not be considered legal advice. Liability risk management is a process reserved for licensed attorneys. The information we are providing is the result of our own personal experience with litigation, legal counsel, expert witnessing, legal education, and research over the past twenty-five years.**

## Learning Objectives

It is important to know where we are going in this section of the training. Please read the following objectives carefully. They will give you a good picture of what you will learn during this part of the training. It is the intent of The Mandt System® that upon completing this chapter the students will have:

1. Defined liability.
2. Defined standards of care.
3. Identified three types of liability: personal, supervisory or vicarious, and organizational.
4. Explained the meaning of reasonable person standard.
5. Described the basic steps in reducing exposure to lawsuits.
6. Comprehended the four questions a court will ask in determining liability.
7. Understood the importance of not committing breach of duty.

# Defining Liability

---

We are all familiar with the notion that a person is responsible for his actions. Liability is the legal principle that holds people accountable for their actions. In a sense liability is not necessarily bad or good; it is simply a rule that governs the relationships and interactions between people in our society.

Think of liability as another way of describing responsibility. If you did it, you are responsible for it! Thus, liability is really inescapable if we choose to live and interact with one another; it is always present. Difficulties arise in the legal sense when our interactions cause harm to another person.

When this happens a question of accountability for the harm to another person comes into question. These questions are the basis of the lawsuits mentioned earlier. In a lawsuit one person is asking the court to determine if the harm he suffered was a result of an inappropriate action by another person. The legal term for this kind of inappropriate action is negligence.

Before we discuss the different forms of liability, it is important to learn how our conduct is evaluated by the court when we are sued. In other words, what is it we are liable for as caregiver(s)? In a general sense we are liable for our conduct as caregiver(s). You cannot be sued for what you think - only for your conduct (what you did or, in some cases, what you failed to do). The measures the court uses to determine if your conduct was acceptable are called standards of care. Let us turn now to a brief discussion of these standards.

## Standards of Care

We often hear the term “standard of care” used in human services work. What does it really mean? It is a concept that has significant legal importance to our work as caregiver(s). A standard of care ultimately refers to the quality of the work we do as caregiver(s). These standards are the measure of our work.

One of the first places courts will look to in order to establish standards are laws and regulations. Laws are passed by legislative bodies and signed by a member of the executive branch in federal, state or provincial jurisdictions. Laws provide the overarching framework, and regulations tell people how to implement the law. Regulations are much more specific than laws. For example, the United States Children’s Health Act of 2000, (also known as Public Law 106-310), Parts H and I, are each only several pages long. A set of regulations governing adolescent psychiatric centers (42 CFR 441.150 Psychiatric Centers Serving People under age 21) is over 80 pages long, as it goes into specific detail on how to do a medical assessment, when restraints may be authorized, etc.

Standards are developed in each profession independently. For example standards for social work may be different from standards for mental health workers, teachers, probation officers, and direct support professionals for people affected by developmental disabilities. It is very important for caregivers to know the standards for their profession to assure proper care and treatment.

Standards are developed for each profession through a process of research and discussion from all levels of the profession. In most cases standards are published in written form after many years of work by professional associations. The purpose of these standards is twofold:

1. To provide a guide for proper care giving in the profession
2. To provide uniformity in care giving across the profession

Standards of care may also be established from other sources outside professional associations (American Nursing Association, American Psychological Association, etc), which provide standards for:

- Average conduct for the profession (what most people do)
- Agency custom and practice
- Written Policy and Procedures
- Statute and administrative laws
- Reasonable conduct of similarly situated professional

It's important to remember that standards of care are not intended to be the best possible care - it is intended that these standards reflect care that is representative of the profession - what most professionals would or do provide. We have now learned about the idea of liability and the measures the court uses to determine if our conduct was reasonable or not. Let us now turn to the different kinds of liability that are attached to us as caregivers.

NOTES:

# Personal Liability and the Legal Basis for Litigation

---

Any time a suit is filed in a court of law certain criteria must be present for the suit to move forward in the legal process. It is the responsibility of the court (judge) to examine the evidence presented by the person alleging the injury or damage and to determine the sufficiency of the suit. The court will examine the facts, seeking to answer some basic questions before the case can move on to trial or resolution. The following questions must be answered affirmatively:

- A. Was there a legal duty to provide protection, care, or treatment for the person? Was the person our responsibility in a legal sense, by law?
- B. Was there a breach of the legal duty between the two people? Did we fail in our legal responsibility to care for a person?
- C. Was there, in fact, an injury to the person? Was he harmed and, if so, how?
- D. Was the breach in duty the proximate cause of the injury? By this, we mean was the failure to meet our duty the direct cause of the injury?

Once these questions are answered affirmatively, the case can move forward in the legal process. Remember the process is designed to determine a fair and just resolution to a dispute. For the Plaintiff (injured person) to succeed in winning a suit, it must be shown that you were negligent in your conduct. That is, you failed to meet the standard of care required for your job. We may be found negligent for our actions and the other person would then have a right to be compensated for the harm we caused. We could be held personally liable for the harm caused to the other person.

There are a number of ways we can actually protect ourselves from being negligent in our interactions with other persons. As a Mandt System student you will be teaching people to respond to potentially dangerous situations. The risk of harm to staff and the other person increases if we fail to be proactive in our care giving. Remember that as the potential for harm increases so does the potential for negligence in our interactions.

Here is an example of how these four questions work in a real life example. An organization serving adults affected by developmental disabilities reviewed the case file of an individual referred for services. Assessments were conducted, and it was noted that the individual had a tendency to eat his food too fast, causing him to choke. The organization said they would write a program to teach him to eat more slowly, cut his food, etc., and would provide a 1:1 staff person during meal times.

About six weeks later, the 1:1 staff person called off, and the plan had not been written. The individual ate too fast, choked on his food, and died. The four questions we just reviewed would operate as follows:

- A. Was the organization legally responsible for providing for the person's care and safety? Yes, they admitted him to service and he was in their home when this incident occurred.
- B. Was there a breach of duty? Yes, there were two. First, the plan was not written. Most residential and educational programs have from 14 – 30 days to complete a plan after an assessment is done. Hospitals have 24 hours to complete a nursing care plan. The plan was not written in the time frame specified by law and regulation, causing a breach of duty.

Second, the organization had committed to a 1:1 staff person during mealtime, and the person called off. This is not the person's responsibility; it is the responsibility of the supervisory and managerial staff of the organization.

C. Was there an injury? Yes.

D. Was the breach of duty the proximate cause of the injury? Yes.

As a result, the organization has liability and in fact was sued and the settlement was quite large.

**Another example, using the same case, highlights an important point:**

Using the same scenario outlined in the first paragraph above, six weeks later the individual is eating too fast, the 1:1 called off, the plan was not written, but let us say that he did not choke and did not die. A week later, this sixty-seven year old man dies of a heart attack.

A. Was the organization legally responsible for providing for the person's care and safety? Yes, they admitted him to service and he was in their home when this incident occurred.

B. Was there a breach of duty? Yes, there were two. First, the plan was not written. Most residential and educational programs have from 14-30 days to complete a plan after an assessment is done. Hospitals have 24 hours to complete a nursing care plan. The plan was not written in the time frame specified by law and regulation, causing a breach of duty.

Second, the organization had committed to a 1:1 staff person during mealtime, and the person called off. This is not the person's responsibility; it is the responsibility of the supervisory and managerial staff of the organization.

C. Was there an injury? Yes

D. Was the breach of duty the proximate cause of the injury? No. The death due to a heart attack was not directly attributable to the breach of duty. However, the attorney could argue that this poor man spent a week of anxious nervousness thinking about what happened and how he could have choked and died because of the breach of duty and as a result of a week of anxiety, he died of a heart attack. If there is a breach of duty and an injury, someone may try to "connect the dots" between the two.

The best defense, in our opinion, against potential litigation is to not commit breach of duty and to document what you did according to the plan or what you did not do according to the plan.

### **Supervisory or Vicarious Liability**

Another form of liability also exists where supervisors can be held responsible for the actions of their employees. This special form of liability is called vicarious liability. Under this legal doctrine a person's supervisor is held responsible for his actions even if the supervisor was not present at the time of the interaction. Therefore, entire organizations may be held accountable as liability travels along the entire chain of command in the organization.

There are specific areas of concern for supervisory personnel concerning liability for their employees' actions. Special areas of responsibility include the following:

1. Failure to properly screen candidates prior to employment.
2. Failure to properly train employees prior to independent duty assignment.

### 3. Failure to properly supervise employees by:

- Failure to evaluate subordinates according to standards of the profession.
- Failure to properly discipline subordinates according to standards for the profession.
- Failure to properly assign subordinates according to standards for the profession.
- Failure to properly terminate the employment of subordinates according to standards for the profession.

Supervisory liability can attach all along the chain of command in an organization ultimately making the organization itself liable. Lack of knowledge does not provide immunity from suit. If you are a supervisor it is assumed that you “should have known” about the risk to the person’s safety.

### **Organizational Liability**

Like individual staff persons, and supervisors, organizations have certain responsibilities or duties for which the court will hold them accountable. Organizations are responsible to provide written policy and procedures to employees for all program implementation. Policies and procedures assure adequate direction is available for agency employees. Managers are responsible for implementing written policy and procedures by adequately training staff.

There is also a duty to supervise employees in a reasonable fashion to assure that the standards of care are being met by the employees. Other related duties covered under this area are the hiring of qualified persons, appropriate duty assignment, employee discipline, and termination practices (previously mentioned under supervisory liability). In rare cases groups of people bring suits in court alleging injury. These cases are known as class action lawsuits because a “class” or group of persons has been harmed by the same party.

Another special circumstance sometimes occurs when the Government brings suit in federal court on behalf of persons in care for violations of their civil rights. These cases are most often seen in large provincially operated correctional institutions, psychiatric facilities, and facilities supporting individuals affected by disabilities. Federal lawsuits may also be filed by individual persons. These cases can be very complex and take years to resolve because they often involve many different standards of care. In some cases the courts have ordered the federal oversight of provincial institutions to assure people are cared for properly.

NOTES:

## Reasonable Person Standard

Not all negative outcomes are considered by the court to be negligent in nature. Many times the court considers mitigating facts and circumstances in making a decision. For example there may be good reasons for your conduct that would render your actions reasonable to the court. The process of determining if a person is justified in his conduct has come to be known as the "reasonable person standard." Generally this means negative outcomes may be excused if your conduct makes sense given the facts and circumstances of the case. Courts will consider if:

- Conduct meets or exceeds standards of care for the profession.
- Conduct followed established policy and procedures (written or unwritten).
- Conduct was consistent with current training and supervision.
- Conduct represents what a similarly situated professional would do under the circumstances.

Reasonable person standards are an area where expert witnesses are often used to help the court understand which professional standards are applicable to the case.

An example of the Reasonable Person standard: Bob Bowen conducted an investigation in a case where an individual served pushed a staff person to the floor, straddled their chest, and was about to hit him. The staff person deflected the individual's fist using an open palm redirection technique, and the individual rolled off the staff person into a table, where the individual hit his face on a table leg. He bled from his lip. An abuse allegation was filed, and Bob found that there was not abuse in this case, and that the staff person used a reasonable amount of force in a manner consistent with the training provided. His decision was appealed to an administrative law judge, who upheld his decision. Had the staff person hit the individual with the same level or injury to the individual, that would have been abuse according to state law, agency policy, and the training provided.

NOTES:

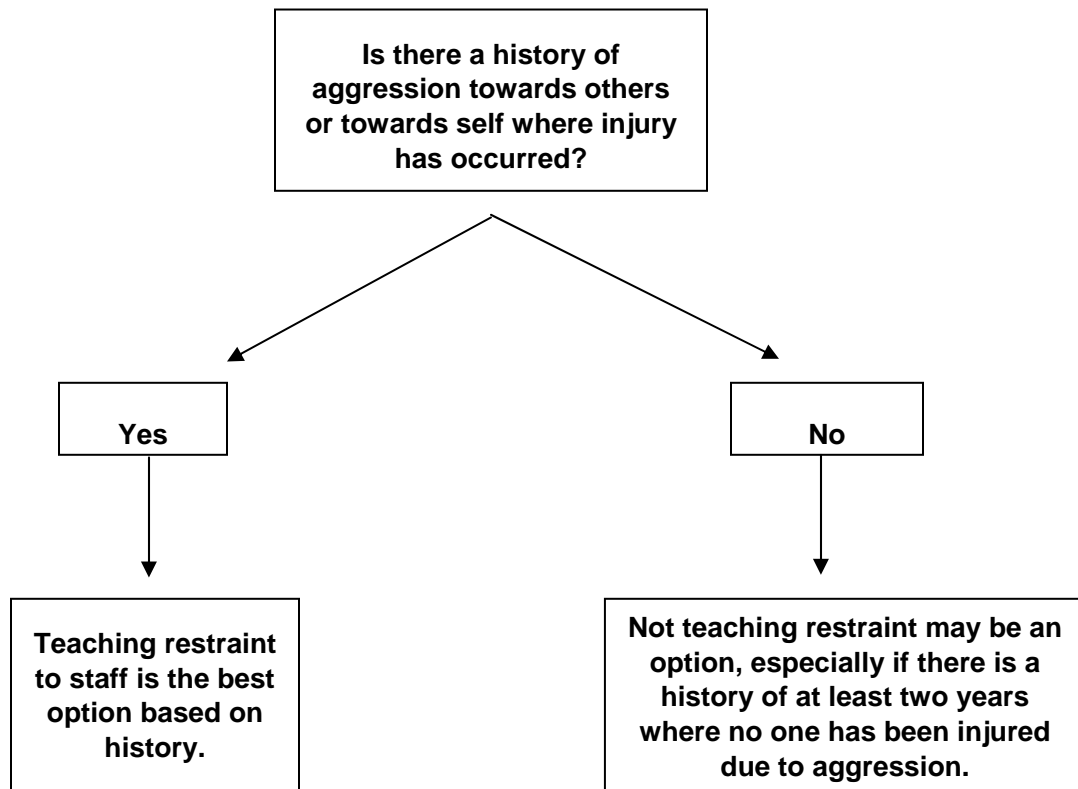
# Liability and Legal Issues Regarding Restraints

---

This topic will be discussed at length in Chapter 10 of the Technical section, which teaches the use of standing, seated, or kneeling restraints with adults and children. The focus of all major United States federal laws is on the “prevention and use of restraint” (P.L. 106-310, Parts H and I).

In The Mandt System, the Relational and Conceptual chapters focus on the prevention of restraint. Chapter 7 (Assisting and Supporting) in the Technical Section provides the foundation for physical intervention skills, and Chapter 8 (Releases) teaches how to attempt to gain release from a physical hold and perhaps deescalate a situation, so restraint is not needed. Only one chapter, constituting approximately 10% of training time and content, is devoted to the use of restraint, while the other 90% of our program focuses on prevention.

One question that is frequently asked relates to not training staff in the use of restraint. Look to your state and provincial regulations first! If they say all staff must be trained in the prevention and use of restraint, that is the answer.. As former and current administrators, we believe that the following questions should be asked in determining whether or not to train staff in the use of restraint, given that most of our training focuses on prevention.



Note: the guideline for having at least two years of history where no one has been injured due to aggression comes from Best Practice Guidelines in Ohio. Organizations will need to determine their own practices based on history. One organization in Ohio used 4 years as their guide and discontinued teaching restraint to their staff. If they admit a new person to service with a history of aggression, they will reinstitute training staff in the use of restraint.

# Reducing Exposure to Lawsuits

---

## Proactive Steps for Reducing Exposure to Lawsuits

Lawsuits can be very unpleasant experiences for the persons involved in the suit. As caregivers we can greatly increase our ability to defend or explain our conduct to the court if we take proactive steps in key areas of our work. We have listed below areas that have proven to be helpful in preventing litigation. Ultimately we will prevent mistakes if we take steps to prepare by having the necessary skill to meet the needs of the people in our care.

- **Know the Standard of Care** - It is not acceptable to the court to plead ignorance of the standard of care for your profession. After all, you should know the standards for your own work. Remember standards of care have many sources. Professional standards like those published by JACHO, ACA, AMA, ABA (yes, attorneys also have standards) and other professional associations are only one source available to the court for consideration.
- **Know the Law** - This means you should know your responsibilities as they are described in the law. Be sure to seek legal counsel for interpretation of laws and regulations as they pertain to your work. Most agencies and facilities have legal counsel assigned for this purpose.
- **Policy and Procedures** - Written policy and procedures are necessary to document that the standard for care is being provided to persons under the agency's care. Policy and procedures provide a uniform guideline for all staff. They assure consistency and fairness in the delivery of services to persons under our care.
- **Training** - All caregivers must be trained in all aspects of their jobs. Minimum training standards are not enough to meet the requirement that employees receive training in all aspects of the job. A good training program includes the following process:
  1. Employee training curriculums are determined by a job task analysis or similar process.
  2. Only qualified persons certified in the subject matter being presented deliver training.
  3. Training workshops are conducted according to established curriculum and documented in agency records.
  4. Training represents standards of care for the topic being trained. Training curriculums are reviewed annually and revised as needed.
  5. Documentation of completion and mastery of course material exists for all employees completing training. Those who do not demonstrate a mastery of the course material must receive additional training to overcome deficits. Adequate supervision must exist to monitor and evaluate the trainee's progress on the job.

These training standards are to be thought of as a standard of care for students. David Mandt and Associates practices these standards in the preparation and delivery of The Mandt System® training programs.

- **Supervision** - As stated in the Training section above, it is necessary to provide supervision to assure that employees perform as they were trained. It is also necessary for supervision to include corrective action in the event that an employee fails to meet the standard of care. Failure in this area of responsibility may result in negligent supervisory practice.
- **Documentation** - Written documentation is our best lawsuit prevention. In the legal world “If it is not documented it did not happen.” Documentation is used to prove that you followed reasonable standards of care in the exercise of your duties. It is required for all the prevention steps listed in this section. Examples of written documentation related to training include the following: policy and procedures, training manuals, course evaluations, course exams, performance evaluations, training logs, and incident reports. It is important to remember that there are two levels of documentation: primary documentation and secondary documentation.

1. **Primary documentation:** These documents prove the existence of a standard or process. Examples are written policy and procedures, training manuals, individual plans such as Individual Education Plans (IEP’s), Behavior Support Plans (BSP’s), Individual Habilitation Plans (IHP’s), Individual Treatment Plans (ITP’s), etc, as well as administrative regulations, professional licenses, etc.

2. **Secondary documentation:** These documents prove that the activity or process was actually performed as authorized by the primary documentation. Examples of these documents are observation logs, incident reports, inventories, inspection reports, training evaluation forms, training tests/exams, performance reports, employee evaluations, and agency memorandums.

An important concept to remember is this: **Primary Documentation** provides the framework for the **duties** which are to be carried out. **Secondary Documentation** will show whether or not there was a breach of duty. Again, “*if it isn’t written down, it didn’t happen,*” which underscores the importance of documentation to demonstrate that breach of duty was not committed.

NOTES:

## Conclusion

---

Congratulations! You have completed the third chapter in the Conceptual section of The Mandt System®, Liability and Legal Issues. We trust that this training will serve you and those with whom you interact in a way that will enhance the quality of your interactions on a daily basis. We also want to remind you that the information provided does not constitute legal advice, as the staff of David Mandt and Associates are not licensed attorneys. If you have specific questions regarding liability and legal issues at your workplace, please talk with an administrator and/or seek the advice of a licensed attorney.

Before proceeding to the next chapter, review the learning objectives found at the beginning of this chapter. Do you feel that you have accomplished each of the objectives listed there? If not, mark the objective(s) that you feel uncertain about and review the section of the lesson that corresponds to that objective. When finished, review the terms listed in the glossary. Since the chapters build upon one another, it is essential that you feel you have mastered the concepts presented in this chapter before proceeding to the next.

## Glossary of Terms

---

**Standard of Care:** A standard of care ultimately refers to the quality of the work we do as caregivers.

**Personal Liability:** We could be held personally liable for the harm caused to the other person.

**Supervisory Liability:** Under this legal doctrine a person's supervisor is held responsible for his actions, even if the supervisor was not present at the time of the interaction. Therefore, entire organizations may be held accountable as liability travels along the entire chain of command in the organization.

**Organizational Liability:** Organizations have certain responsibilities or duties for which the court will hold them accountable.

**Reasonable Person Standard:** The process of determining if a person is justified in his conduct has come to be known as the "reasonable person standard."

## Self Study Questions

---

These self-study questions are provided to give you an opportunity to gauge your understanding of this chapter. Some or all of these questions will be used on the final exam.

- Circle the correct answer(s) that apply:** Any time a suit is filed in a court of law, which of the following questions must be answered **affirmatively** (yes) before the case can move on to trial or resolution. (p165, S7)
  - Was the person our responsibility in a legal sense?
  - Was there a breach of duty?
  - Was there an injury to the individual?
  - Was the breach of duty the cause of the injury?
  - Were there any witnesses to the event?
- Circle the correct answer(s) that apply:** The two types of documentation are: (p171, S18)
  - factual and fictional
  - personal and professional
  - primary and secondary
  - organizational and supervisory
- Match the following:** (pp165-167, S7,12, 13)

___ personal liability	a. Legal doctrine where supervisors can be held responsible for the actions of their employees.
___ supervisory liability	b. Exemption through the "Good Samaritan Act."
___ organizational liability	c. Responsibility to provide direction for programs and make policies and procedures
	d. Responsibility for our own conduct (actions) as professionals.
- Fill in the Blanks** (one word each): \_\_\_\_\_ is the legal principle that holds people accountable for their actions. (p 163, S3)
- Fill in the Blanks** (one word each): According to The Mandt System®, the best way to reduce exposure to lawsuits is to not commit \_\_\_\_\_ of \_\_\_\_\_. (p166; S11)
- Fill in the Blanks** (one word each): Sometimes our actions may be excused by the court if our actions were found to be \_\_\_\_\_ under the circumstances taking into consideration training, policies and procedures, laws and regulations, and what a similarly situated professional would have done under the same circumstances. (p168, S14)
- Fill in the Blanks** (one word each): Standard of \_\_\_\_\_ ultimately refers to the quality of work we do as caregivers. (p 163, S4-5)