Risk Management & the Law: How Liable is your Organization?

Risk is inherent in human activity. It is a common hazard for businesses which have to compete in the volatility and vagaries of the marketplace. Businesses either succeed or ultimately fail in a competitive marketplace.

Recent years have witnessed new risks, often external, which may have a devastating impact upon a business, its employees, customers, suppliers, society, communities, and the government.

These external risks include forces of nature (sometimes referred to as “Acts of God”), terrorism, pandemics (SARS in Toronto and Asia), criminal activity, and supply chain interruptions. “Just in time,” single source suppliers leave little margin of error. Internal risks may include catastrophic plant explosions, chemical leaks, disgruntled employees, or information technology disruptions. Many times the external and internal risks could have been averted, minimized, or alleviated through the exercise of reasonable care.

The example of a dam failure illustrates the potential costs of failure. Damages may be substantial. While we readily think of the downstream devastation, including loss of life, personal injuries, property damage, and disaster relief, other costs and consequences may also be great.

These impacts include repairing or reconstructing the structure, revenue losses to the owner or operator occasioned by the failure of the structure, and losses to a wide ambit of the facility's beneficiaries, such as hydroelectricity, irrigation and water supply, flood control, and recreational benefits. Farms, homes, and businesses may be inundated. Insurers and real estate lenders, such as banks, may incur substantial losses.

Governmental bodies may suffer direct losses, as well as incur relief and recovery obligations. Environmental damage may be severe. Clean-up and recovery efforts may cover extensive periods of time. Utility services may be interrupted, other businesses adversely affected, and jobs lost. Public health and sanitation issues arise, and law enforcement efforts may be stretched, as with Katrina. As we know from 9/11 and Katrina, false and fraudulent claims may be filed.

Each enterprise faces different risks and losses, but a great commonality of consequences exists.

Common risks for a business are the loss of independence and possibly bankruptcy or even liquidation. For example, Union carbide was acquired by Dow Chemical after the Bhopal, India tragedy, and Nestles took over Perrier after the bottled water company failed for 18 months to filter out benzene in its water.

Even absence a takeover, management will often lose their jobs, and perhaps face criminal prosecutions. The entire asbestos industry, led by Johns Manville, entered bankruptcy because of its failure decades earlier to address the health risks of asbestos. A major disaster in the public sector, showcasing a lack of leadership, may result in electoral defeats in the next election.

Every enterprise should analyze its risks. Once it understands the risks, it should then study the ways to minimize these risks, respond to an incident, and resume operations. Risk management, emergency action planning, and business continuity all work together in this respect. Failure to exercise reasonable care will result in litigation, and probably liability, in today's litigious society.
NEGLIGENCE
The most common cause of action in tort law is negligence, which is broadly defined as the failure to exercise reasonable care under the circumstances. As more technically defined, negligence is the failure to exercise the standard of care of a reasonable person under similar circumstances. Plaintiffs have the burden of proof to establish four basic elements: duty, breach, causation, and damages.

Duty usually focuses on the reasonable foreseeability of the risk, with the critical issue being how should a reasonable person act in light of the foreseeable risk. Duty may also be established by a violation of an applicable statute. Negligence can exist either in the failure to act when a reasonable person should have acted (nonfeasance) or affirmatively acting in a wrongful manner (malfeasance). Thus, an act of omission, the failure to respond in the first instance, to a foreseeable risk is as culpable as affirmative misconduct, an act of commission. Indeed, much of negligence liability consists of a failure to exercise reasonable care to either prevent or minimize foreseeable risks.

The great jurist, Learned Hand, once wrote that negligence is the calculus of three factors: how likely is a failure to occur (the risk), what are the possible consequences should the failure occur (the gravity or magnitude), and what is the burden of alternatives or precautions. United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947).

Negligence is a flexible concept, which varies with the risk, technology, and potential consequences. The duty of care varies with the risk. As the risk increases, so too does the standard of care. For example, a higher duty of care is imposed on one who operates a large dam overlooking an urban population than a stock watering pond in the middle of nowhere. Downstream development changes the calculus of risk. In addition, changes in technology may allow us to improve safety.

DUTY: FORESEEABILITY OF THE RISK
Duty is normally based upon the reasonable foreseeability of the risk. Foreseeability is a broad standard, far reaching in its application. Almost everything is foreseeable with the benefit of hindsight. However, the ultimate question though is not foreseeability per se, but whether in light of that reasonable foreseeability, how should a reasonable person have acted, taking into account the potential risk, magnitude of harm, and the available alternatives.

The duty to exercise reasonable care extends to anyone and everyone foreseeable at risk – not just those who might be in privity of contract with the defendant. Foreseeable victims can therefore include employees, co-workers, customers, suppliers, tenants, visitors, or rescuers.

Case law on emergency action planning is just beginning to develop, but the decisions so far present a strong case for institutions to prepare emergency action and business continuity plans. In essence, these germinal cases are developing a tort of negligent failure to plan.

An example of how not to respond occurred at the Maharishi University of Management in Fairfield, Iowa. A student, Shuvender Sem, who had gone off his medications, attacked a fellow student during class, stabbing him in the face and neck with a ball point pen. Fellow students came to the aid of the victim, stopping the attack. Sem was placed in the custody of Joel Wysong, the Dean of Men, who took Sem to his apartment. Wysong then engaged in meditation, while Sem stole a paring knife and left the apartment. Wysong found Sem in the student dining hall, but let Sem mingle with the other students. Sem then pulled...

The legal consequences of failing to have an emergency action plan are shown by the failure of Lawn Lake Dam on July 15, 1982. The dam sat high up in the Rockies overlooking the resort community of Estes Park, Colorado. Between the dam and Estes Park was the smaller Cascade Dam. The dam was privately owned by the Farmers Irrigation and Ditch Company, but was located on public National Park Service land.

The dam failed before 6:30 a.m. The Park Service was soon notified. Within 20 minutes a Ranger was dispatched to warn downstream campers. He proceeded, in a somewhat desultory manner, to warn without a sense of urgency several, but not all, of the campers. The flood wave caused the lower dam to fail, causing extensive loss of life and property damage. The district court found several instances of negligence on the part of the government, and awarded $480,000 to the family of a deceased camper. The victim and his wife were not warned by the Ranger, but learnt second-hand that campers were being advised to evacuate. He went to his car to get his camera and take pictures while his wife woke the children and prepared to leave. He drowned in the surging floodwaters. The court in *Coates v. United States*, 612 F. Supp. 592, 593 (C.D. Ill. 1985) held the government had a duty to prepare an emergency action plan:

> Because these national parks are outdoors and, therefore, subject to extreme and sometimes unexpected weather changes, structural failures such as the one at issue here, other flash floods, and major fires which occur, changes may be sudden and dramatic (because of acts of God or foibles of man). Therefore, the Government, in creating this relationship with citizens, also creates a duty for itself to develop orderly procedures for dealing with emergencies.

The Court presciently stated:

> It is imperative to have a plan in place because in such situations there is little time for reflection. Priorities should be established before an emergency arises; otherwise personnel are unprepared to deal with them.

The court noted: "Elementary lapses, obvious with the clarity of hindsight, could have been avoided through the development of orderly procedures for warning and evacuating people in the park in the case a crisis arose." The court held a duty existed:

> The exercise of reasonable care mandated, at a minimum, the issuance of careful and complete warnings to all of the people who were camped in or otherwise using areas of the park which were downstream from Lawn Lake Dam.

Another case arose out of Hurricane Katrina. Murphy Oil had a 250,000 barrel above-ground storage tank at its Meraux Refinery in the Katrina flooded St. Bernard Parish outside New Orleans. About 25,110 barrels of crude oil escaped into the flood waters, and contaminated surrounding neighborhoods. A critical question for the district court in determining the appropriateness of the resulting class action suit was: "[W]hether Murphy Oil had hurricane safety plans, and whether
those plans were carried out during Hurricane Katrina ....” Turner v. Murphy Oil Co., 234 F.R.D. 597, 603 (E.D. La. 2006).

Murphy Oil settled the class action lawsuit shortly thereafter for $330 million in damages and $36 million in attorneys fees.

The failure to plan for emergencies is also shown by the ongoing litigation involving the 1993 World Trade Center bombing. On February 26, 1993 a truck bomb exploded in the underground public parking garage of the World Trade Center, killing six, and injuring scores. The Port Authority of New York and New Jersey had earlier created a terrorist planning and intelligence section, which submitted a report in 1984. Other reports, studies, and recommendations followed. The vulnerability of the parking garage was especially noted; several recommendations for improved security were made, but none were implemented. In the Matter of the World Trade Center Bombing, 776 N.2d 713 (S. Ct. 2004).

Plaintiffs asserted negligence against the Port Authority. Defendant’s defenses included the lack of foreseeability of the bombing as a matter of law.

Defendant’s claim that the risk was unforeseeable was viewed as a question of fact for the jury. The duty is to provide minimal security precautions against reasonably foreseeable criminal acts. The Port Authority had a legal duty to exercise reasonable care to maintain the premises in a reasonably safe condition.

However, foreseeability includes both “what the landlord actually knew and what it reasonably should have known” (Id. at 734), a variation of the known or reasonably should have known standard for negligence. In light of that foreseeability, the proper level of safety measures is a question of fact. The inquiry was focused on “the risks reasonably to be implied.” The Port Authority’s own acts analyzing the risk of a terrorist attack on the WTC demonstrates the perceived risk.

The decision was affirmed on appeal. Nash v. Port Authority of New York and New Jersey, 2008 WL 1869554 (App. Div. 2008). The Authority did not argue the blast was unforeseeable. Indeed, that was essentially forestalled by its own studies, but that acting as a governmental entity it had no legally enforceable duty to implement any of the recommendations for action. The court viewed the Authority as acting in the capacity of a private landlord, and thus had a duty “to meet its basic proprietary obligation to its commercial tenants and invitees reasonably to secure its premises, specifically its public parking garage, against foreseeable criminal intrusions.” Id at 4

This risk was shown by the Authority’s own studies and reports, including security recommendations by Scotland Yard. The relevant criteria is notice, not history, especially in the case of a distinctly higher order of magnitude than the risks typically at issue in premises security.

In this tragedy we had a highly foreseeable, indeed potentially monstrous, risk of a high profile target, coupled with potentially great losses. None of the proposed precautions were implemented, including ending public parking under the World Trade Center. Significantly, the Port Authority in 1985 rejected the earlier recommendations as entailing inconvenient and unacceptable revenue losses.

Even with modern advances in science, we are unable to prevent the occurrence of a major event, such as an earthquake, the exact path of a storm such as a hurricane or tornado, or even control the physical
course of natural forces, such as floods. However, we expect builders and developers to foresee the risks, and then take reasonable steps to mitigate their impact, including design, construction, operations, maintenance, and inspections. For example, a lightning bolt may be a force of nature, but failure to ground a utility line is a negligent act of humans.

DUTY: STATUTORY AND PROFESSIONAL STANDARDS

The starting point in assessing the legal duty to plan for a disaster is to check applicable statutes, ordinances, and regulations that apply to the business. Most industries are regulated - some more so than others. Congress or state legislatures may have enacted statutes that impose planning duties. County and municipal ordinances may also impose such a duty. For example, building codes are often enacted by local governmental agencies.

The violation of a statutory requirement is often treated as “negligence per se” by courts.

Regulatory agencies, pursuant to the authority delegated to them by legislatures, often impose planning duties on the regulated entities. For example, OSHA requires the preparation of an EAP by employers subject to its jurisdiction. 29 C.F.R. §1919.38.

The violation of an applicable regulation usually creates a presumption of negligence.

Professional standards may also impose EAP and business continuity requirements on members of the industry/profession. Many of these standards, such as NFPA standards and building codes, are often incorporated into statutes or ordinances, in which case the rules of negligence per se apply. Courts place great emphasis on NFPA standards.

Agencies and administrators, such as state fire marshals, may also expressly adopt or incorporate by reference professional codes and standards. Private parties often contractually agree to comply with professional standards in carrying out the terms and conditions of the contract.

Even in the absence of enactment or adoption, the violation of a professional standard may create the inference of negligence.

THE RISKS OF COMPLYING WITH MINIMAL GOVERNMENT OR PROFESSIONAL STANDARDS

As we saw earlier, professionals will be liable for failing to comply with statutory and regulatory requirements. However, compliance with such a standard does not preclude legal liability. Compliance with a statute, regulation, or a generally accepted industry or professional standard of care, establishes only the minimal standard of care. Courts may assess a higher standard of care, utilizing the “reasonable person” standard and foreseeability of risk as the criteria.

Judicial rejection of a governmental or professional is not routine, but it does occur often enough to transcend the unusual. Persons, who blindly rely upon a governmental or professional standard of care, pose great danger to others, and present a legal risk to themselves, when they know or reasonably should
know that reasonable prudence requires higher care. Thus, the industry custom may itself be held "negligent."

The most famous case in this respect is another Judge Learned Hand opinion, *The T. J. Hooper*, 60 F.2d 737 (2d Cir. 1932). The case involved a lawsuit by the owner of two barges lost in a storm. The tug company argued it was not liable in failing to equip the tug boats with radio receiving sets. The contention was premised on the general custom among coastwise carriers at the time not to equip tugs with radio receivers. Had the tug been so equipped, the captain would have received timely warning of the approaching storm and presumably would have, through the exercise of good prudence, stayed in port. The opinion noted "an adequate receiving set . . . can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows." *Id.* at 729.

In rejecting the defense of compliance with a generally accepted industry standard, Judge Hand wrote:

> Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. *Id.* at 730.

The Washington Supreme Court reached a similar result in *Helling v. Carey*, 519 P.2d 981 (1974). Plaintiff was periodically treated for eye problems by defendant ophthalmologist. However, she was not checked for glaucoma because no symptoms manifested themselves. The worldwide standard of the profession was not to routinely test patients under the age of 40 for glaucoma absent specific symptoms. The reason for this standard of care was that the incidence of glaucoma was exceedingly low for patients under the age of 40 (the rate is 1/25,000). As it turned out, plaintiff, who was 32, suffered from glaucoma, with a sustained loss of vision.

The Court held for plaintiff, in effect holding that the universal standard of care was deficient. The opinion was based on several factors: the simplicity and reliability of the test, the lack of judgment required of the professional in reading the test results, the safety of the test, and the relative inexpensiveness of it. The Court proceeded to cite Judge Hand's remarks in *The T. J. Hooper* that Courts must in the end determine what is required.

Thus, as stated elsewhere, "Evidence of custom in the trade may be admitted on the issue of the standard of care, but is not conclusive." *Coburn v. Lenox Homes, Inc.*, 441 A.2d 620, 626 (1982).
A representative example of compliance with a governmental standard being inadequate to preclude legal liability is Gryc v. Dayton Hudson Corp., 197 N.W.2d 727 (Minn. 1980). A 4-year old girl received severe burns upon her upper body. She was wearing pajamas made of untreated cotton. The material met the federal standards of product flammability.

Plaintiff established at trial that (1) the government standards were clearly inadequate at the time of the accident, (2) the apparel manufacturers were vigorously fighting any change in the government standards, (3) durable flame retardant chemicals, that would have significantly increased the safety of the product, were commercially available, and (4) the defendant was aware of these facts. Consequently, it was found that the defendant acted in a reckless, wanton, and/or malicious disregard of the rights of others in marketing the fabric. The verdict of $750,000 compensatory and $1,000,000 punitive damages was affirmed on appeal.

While many of the cases appear clear-cut on their face, they are not always so. The critical fact is that the courts retain the power to override professional or industry standards as inadequate. The reality is that judges and juries may find that the avoidable tragedies warrant compensation from the “wrongdoers.” Thus, compliance with minimal, or non-existent government regulations or professional standards, may not protect the owner/operator if reasonable prudence would justify a higher standard of care.

By way of example, many states do not require emergency action or business continuity plans. Failure to prepare such a plan though could risk substantial liability if a tragedy results, a tragedy which could have been averted. In this respect, the professional standard may impose a greater duty than some states require. The existence of a viable plan, which has been periodically tested and updated, can well reduce the risk. Indeed, failing to plan can be construed as planning to fail.

IMPLEMENTATION OF THE PLAN
The response effort may be the key to minimizing the risks. Critical factors include:

- Preparation of the plan;
- Periodically updating and testing the plan;
- Communications; and
- Flexibility.

An unplanned, uncoordinated response may succeed, but the odds are against it.

An enterprise may be caught totally unaware at the onset of an emergency. “The Fog of War” may set in. One of the hardest tasks in an emergency, as shown by Virginia Tech, is to identify the nature of the threat as it is rapidly unfolding. However, the response effort, guided by the plan, should be implemented as soon as possible, preferably within minutes.

In addition, the onset of a major emergency may often be met with disbelief, followed rapidly by background noise, chatter, chaos, confusion, fear, hysteria, panic, and rumors, and then perhaps by indecision and paralysis. A major problem, especially at the beginning of the emergency, is information assessment, to cut through the fog, assess the situation, prioritize the response efforts, and marshal, deploy and track critical resources. Response efforts may often involve difficult judgment calls in rapidly unfolding, confusing scenarios where time is of the essence. Planning will facilitate these efforts.
Employee awareness and training is critical to the success of any emergency action or business continuity plan. Employees should be prepared to act virtually instantaneously. If they are familiar with the plan and well trained, then their response effort may almost seem instinctive.

**UPDATING AND TESTING THE PLAN**

An outdated plan may be worse than useless; it might provide a false sense of security as well as result in a waste of time during an emergency and the exercise of avoidable futile actions. The plans should be revised and updated at least annually. A simple step is to periodically verify and update critical contact numbers. The tragedy at Virginia Tech provides us several lessons for improvement.

For example, Virginia Tech discovered a lack of emergency contact numbers, especially for students. Some were missing or unreliable. The parents’ information and home addresses were frequently unavailable. An imperative for all enterprises is to maintain current contact numbers.

**COMMUNICATIONS**

The tragic events at Virginia Tech again raised issues of on-going communications problems for responders, as was the case six years earlier on 9/11. They did not though play a causal role in the tragedy, but they reemerged nevertheless. Police, fire and rescue responders from the responding agencies used incompatible communications systems. Equipment did not always work, and some structures, significantly including Norris hall where most of the shootings occurred, had cell phone dead zones.

As is often the case in a major emergency, cell phone and land lines systems were congested, resulting in forced blockages; that is, an inability to get through. The University experienced a large volume/demand on its information technology resources. It had prepared a backup, emergency, bare-bones home page, which it quickly substituted for the regular homepage.

A different compatibility issue existed in the dispatch center. Separate headphones had to be used for the 9/11 emergency calls and the radio communications with responders. The recommendation is for a single headset to monitor both.

Other problems arose in the call center established by Virginia Tech in the immediate aftermath of the tragedy. Some of the operators lacked immediate access to the needed information. In addition, as is foreseeable with any diverse student body, many of the incoming calls were not in English, which caused a communication problem.

To further convey urgent messages in the future, Virginia Tech is considering installing internal message boards in classrooms and external message boards at the entrance to the campus.

**FLEXIBILITY**

While flexibility may seem the antithesis of planning, the reality is that hardly any incident will unfold as planned. “The Fog of War” equally applies to domestic emergencies. As General Dwight Eisenhower said before D-Day: “The plan is nothing; planning is everything.”

A different approach is to learn the lessons from prior incidents. The tragedies of 9/11, Katrina, Columbine and Virginia Tech have led, and will lead, to a reassessment of response efforts. The perils of strictly following a plan when it is no longer applicable are demonstrated by the tragic shootings at Columbine High School in Littleton, Colorado on April 20, 1999.
Two students, Eric Harris and Dylan Klebold, started shooting outside the school around 11:17am and then moved into the school. They committed suicide around 12:14pm, which became known to authorities by 12:30pm. The tragic toll was 12 students and one teacher killed and dozens wounded.

The first 911 calls came in at 11:21am. Law enforcement officers from throughout the area responded. A teacher, William Sanders, was wounded at 11:40am and collapsed in Science Room 3. Constant phone calls detailing the declining health status of Sanders were made to the 911 operators. Not until 4:00pm did the S.W.A.T team enter Science Room 3.

A command post, staging area, and perimeter were established early in the incident. Multiple orders were issued to not permit access to or egress from the facility; the effect was to preclude any escape or rescue efforts. The sheriff’s office characterized the situation as a “hostage” situation rather than as a “high risk” situation. S.W.A.T. teams conducted a slow, methodical, room-by-room sweep with Science Room 3 in the last area reached. At that point, they ordered everyone to leave the room, including those applying pressure to the teacher’s wounds. His wounds, “heretofore survivable … became fatal.” The case involved issues of constitutional violations, governmental immunity, and civil rights violations.

The actions were protected during the first 75 minutes of the attack. The interests of public and officer safety outweighed the rescue needs of the students and staff. Upon the awareness of the deaths of the assailant, a time to deliberate ensued. The awareness of the teacher’s condition and location coupled with the affirmative actions of blocking access and rescue became a deliberate indifference to the teacher’s plight. The acts were viewed as reckless and conscience shocking. Sanders v. Board of County Commissioners of Jefferson County, 192 F.Supp. 2d 1094 (D. Colo. 2001).

The law suit was subsequently settled for $1,500,000. Response procedures changed after this tragedy. Other settlements include $38 million in the Minnesota I-35 bridge collapse and $11 million to date in the Virginia Tech shootings.

In most cases the compensable damages recoverable by the victim are relatively clear. The general purpose of damages is to compensate the victim for the loss, that is, to place the victim, as closely as possible, to the position he was in prior to the injury; in other words, "to make the victim whole". In some situations the assessment can be fairly accurate, as with the diminution in value of real property, the costs of repair, and the value of any chattels, i.e., personal property, lost or destroyed.

Also relatively easy to compute would be certain forms of personal injuries, such as medical expenses and loss of earnings. Less easy to calculate, and thus much more speculative and subjective, are such intangibles as the pain and suffering incurred by the victims, as well as the value to be placed on any loss of life. Such damages may be large. For example, a 33 year old woman rendered a quadriplegic in the Hyatt Regency skywalk collapse, received a verdict of $15 million. See, Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99 (Mo. 1985).

Total damages in a dam failure can be high. By way of illustration, Congress appropriated $400 million to compensate the victims of the Teton Dam failure. The final costs of 9/11 and Katrina, already in the tens of billions, have yet to be finally calculated. Dow Chemical is still grappling with the costs and aftermath of Bhopal.
CONCLUSION
Negligence analysis revolves around the exercise of reasonable care that will either prevent or minimize the risks of an accident or resulting injuries. The development of emergency action plans, and now business continuity plans, are a reasonable extension of existing negligence analysis.

Plans to respond to a disaster are as critical in negligence analysis as exercising reasonable care to prevent the accident in the first instance. Emergency action and business continuity plans are as critical in minimizing losses as design, construction, maintenance, operations, and inspections.

The duty of reasonable care should extend to steps to minimize the impact of an emergency, whether from natural or human causes, external or internal origins, through the implementation of an emergency response and business continuity plan. Such plans should be an integral part of the operations of the facility. Indeed, they are often required by government, industry, and professional codes.

The plans should be simple, but flexible, and shared with the employees. Once adopted, the plan is a dynamic document and process, which should be periodically reviewed, tested, and updated.

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