

## **The Legal Obligation for Corporate Preparedness**

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October 16, 2006

Subject to Ongoing Revision

### **Executive Summary:**

Corporations are vulnerable to significant legal liability if they do not undertake emergency preparedness efforts. This liability can result from several sources including common law negligence, specific legislation/regulations and contractual obligations.

Negligence law requires corporations to exercise reasonable care under the circumstances, including care to prevent an accident or other injury. The basic principles of negligence law readily apply to specific emergency preparedness efforts undertaken by organizations that focus on the prevention or mitigation of the impact of foreseeable hazards.

Since the essence of negligence is the failure to exercise reasonable care under the circumstances, much attention has been paid of late to practical cases in which the circumstances have arguably changed. For example, hurricane projections as well as business risk analyses indicate that the probability of an event occurring, the gravity of the resulting injury, and the burden of adequate precautions are all changing to potentially increase corporate liability.

As legislators and regulators attempt to respond to these same changing circumstances, corporations may increasingly be held liable for emergency preparedness based upon specific legislation and/or regulations that address their industry. The clear beginnings of this trend are visible in specific arenas including firms operating in financial services and other critical infrastructure industries.

Finally, corporations may also have liability based upon requirements that arise from specific contract obligations with other parties. Such “push down” obligations have increasingly appeared in supply chain relationships, where procuring corporations require suppliers to validate their emergency preparedness programs as a condition of doing business.

Thus in view of the common law, legislative/regulatory and contract liability surrounding emergency preparedness, corporations would be prudent to undertake preparedness efforts to mitigate or avoid exposure to these risks.

This paper informs those efforts by focusing on the common law precedents and contemporary circumstances relevant to corporate liability for emergency preparedness.

### **Key Points:**

- **The corporation faces a diversity of risks in its day-to-day operations:** Whether the source is natural or human, the number of ways an accident can occur, a facility fail, or system malfunction is probably infinite.
- **Emergency preparedness efforts by corporations can avoid or lessen the impact of these risks, including resulting injuries, should they occur.** Benjamin Franklin’s “ounce of prevention” or “pound of cure” axiom reflects the age-old understanding of the value of preparedness and prevention activity.
- **Corporations may be subject to significant legal liability if they do not undertake preparedness efforts in advance of a crisis.** This liability can result from several sources including common law negligence, specific legislation/regulations and contractual obligations. Potential sources of liability from legislation and regulation include Occupational Safety & Health Administration regulations, Security Exchange Regulations (for financial services firms) as well as a suggestion by some that Sarbenes-Oxley may be interpreted to include disclosure and business continuity planning responsibilities.
- **Under negligence law, corporations as with any other actors must exercise “reasonable care:”** The essence of negligence is the failure to exercise reasonable care under the circumstances. More technically defined, negligence is the failure to exercise the standard of care of a reasonable person under similar circumstances.<sup>1</sup> Thus, corporations or any parties must exercise reasonable care under the circumstances or be liable for any resulting impacts on others.
- **The standard for “reasonable care” can be multi-faceted with the “common law standard” considered as the default:** The standard of care may be established by case law, statutes,<sup>2</sup> regulations,<sup>3</sup> and contracts,<sup>4</sup> as well as by

<sup>1</sup> Charvoz v. Bonneville Irr. Dist., 235 P.2d 780, 783 (Utah 1951).

<sup>2</sup> Violations of a statute or ordinance may constitute negligence. Burran, Jr. v. Dambold, 422 F.2d 133 (10<sup>th</sup> Cir. 1970); Henry v. Britt, 220 So.2d 917 (Fla. Ct. App. 1969).

<sup>3</sup> Henry v. Britt, 220 So.2d 917, 920 (Fla. Dist. Ct. App. 1969). Of course, a plan which does not conform to statutory or regulatory requirements will fail. For example, the Iowa Beef Processing Co. had a “disaster readiness plan” in effect for its Council Bluffs, Iowa, plant. This plan provided for immediate evacuation in case of a major ammonia leak. The readiness plan was an alternative to an emergency action plan. 29 C.F.R. §1910.120 (q)(1) (2002). The employees were trained to evacuate immediately. However, when a major ammonia leak occurred on June 30, 1993, two employees, only one of which was wearing a self-contained breathing apparatus, attempted to rescue a downed employee of a sub-contractor. Because the

industry, professional<sup>5</sup> and building codes.<sup>6</sup> These measures will usually establish the minimum standard of care. The actor will be held to a higher standard, the common law duty of reasonable care, if they are inadequate.<sup>7</sup>

- **The common law standard of care can be wide ranging and is based on probability, gravity and burden:** The essence of reasonable care was set out by Judge Learned Hand in *United States v. Carroll Towing Co.*<sup>8</sup> as a calculus of three factors: the probability of an accident occurring, the gravity of the resulting injury, and the burden of adequate precautions.<sup>9</sup>

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plan provided for rescues as well as evacuations, it did not qualify for an exception from the requirement to prepare a more detailed emergency action plan. *See* *IBP, Inc. v. Iowa Employment Appeal Bd.*, 604 N.W.2d 307 (Iowa 1999).

<sup>4</sup> “The principle which seems to have emerged . . . is that there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract – which is to say, whenever such misperformance involves a foreseeable, unreasonable risk of harm to the interests of the plaintiff.” William L. Prosser & W. Page Keeton, *The Law of Torts* 602 (5<sup>th</sup> Ed. 1984)(*hereinafter referred to as Prosser & Keeton*).

<sup>5</sup> An example of a professional code is National Fire Protection Association, NFPA 1600 Standard on Disaster/Emergency Management and Business Continuity Programs (2000 Ed.) [http://www.nfpa.org/Codes/NFPA\\_Codes\\_and\\_Standards/listof\\_nfpa\\_documents/nfpa\\_1600.asp](http://www.nfpa.org/Codes/NFPA_Codes_and_Standards/listof_nfpa_documents/nfpa_1600.asp). NFPA 1600 contains provisions on Hazard Identification and Risk Assessment (3-3), Hazard Mitigation (3-4), Resource Management (3-5), Planning (3-6), Direction, Control, and Coordination (3-7), Communications and Warning (3-8), Operations and Procedures (3-9), Logistics and Facilities (3-10), Training (3-11), Exercises, Evaluations, and Corrective Actions (3-12), Crisis Communications, Public Education, and Information (3-13), and Finance and Administration (3-14). The standard requires not only a plan but also that businesses fund it (Id. at §3-14). NFPA 1600 was approved by the American National Standards Institute on February 11, 2000 as an ANSI Standard. *Id.* at 1600-1. The National Fire Protection Association prepares standards for fire fighting and protection. ANSI Standards are in a sense purely advisory, but they are often admissible as evidence of the reasonable standard of care. *See e.g.* *Hansen v. Abrasive Engineering & Manufacturing Co.*, 856 P.2d 625 (Ore. 1993) (holding that the advisory safety standards of the American National Standards Institute may be considered in deciding whether defendant has met the standard of care); *Arkansas Valley Elect. Coop. Corp. v. Davis*, 800 S.W.2d 420, 422 (Ark. 1990) (holding that defendant’s violation of the national electric safety code can be used as evidence of negligence); *Norman v. Ogallala Pub. School Dist.*, 609 N.W. 2d 338 (Neb. 2000); *Kent Village Associates Joint Venture v. Smith*, 657 A.2d 330 (Md. App. 1995). *See also*, *Miller v. Yazoo Mfg. Co.*, 26 F.3d 84 (8th Cir. 1994).

<sup>6</sup> *See e.g.* FLA. STAT. ANN. §553.84, *Burran v. Dambolo*, 422 F.2d 133, 135-136 (10<sup>th</sup> Cir. 1970) (holding that building codes create standard of care); *St. Joseph Hospital v. Corbetta Construction Co.*, 316 N.E.2d 51, 61-62 (Ill. Ct. App. 1974) (holding that violation of building code creates cause of action); *Virginia Elec. & Power Co. v. Savoy Const. Co.*, 294 S.E.2d 811, 817 (Va. 1982) (holding that violation of building code creates negligence per se).

<sup>7</sup> *See e.g.* *Alvarado v. J.C. Penney Co., Inc.*, 737 F.Supp. 371, 374 (D. Kan. 1990); *Gryc v. Dayton Hudson Corp.*, 197 N.W.2d 727 (Minn. 1980); *Dawson v. Chrysler Corp.*, 630 P.2d 950 (3<sup>rd</sup> Cir. 1980); *Helling v. Carey*, 519 P.2d 981 (Wash. 1974); *The T. J. Hooper*, 60 F.2d 737 (2<sup>nd</sup> Cir. 1921); *Clark’s Adm’r v. Kentucky Utility Co.*, 158 S.W.2d 134, 137 (Ky. 1941).

<sup>8</sup> 159 F.2d 169 (2<sup>nd</sup> Cir. 1947)

<sup>9</sup>*Id.* at 173. *See also* *Conway v. O’Brien*, 111 F.2d 611, 612: “The degree of care demanded of a person by an occasion is the resultant of three factors: The likelihood that his conduct will injure others, taken with

- **Increasing risk increases responsibility:** A corollary to this basic analysis is that as the risk increases, so too does the standard of care.<sup>10</sup>
  
- **The global business environment is changing to potentially heighten corporate liability under the common law standard:** Increasing globalization and its widening connectivity of business has effectively increased the operational footprint of the corporation. Many corporations have off-shored or outsourced their operations to areas remote from their primary locations making them essentially larger geographic “targets” for both natural hazards and man-made threats. Corporate supply chains can span the world. Advancing technologies bring with them new vulnerabilities. Enhanced global transportation can widen the impact and accelerate the spread of contagious diseases worldwide. Interconnected power grids coupled with ever increasing power demands set the stage for cascading power outages. Both the probability of emergencies and the gravity of their potential impact have arguably increased as a result of these and other factors. Yet, with the advancement of the disciplines of risk management, business continuity, crisis management, emergency management and other studies, the capability to address these risks has also increased. Arguably, at least in terms of fundamental preparedness capability, these evolving disciplines developments have provided new tools and somewhat lessened the “burden” of adequate precautions. Thus, increasing probability and gravity of crisis coupled with a decreased burden of precautions (at least on a fundamental basis) supports a climate for increased corporate liability.
  
- **Duty is a key element in establishing negligence:** In any negligence action, plaintiffs have the burden of proof to establish four basic elements: duty, breach, causation, and damages. Establishing the breach, causation and damages tend to

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the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.”

<sup>10</sup> *PROSSER & KEETON, supra* n. 4 at 171. “[I]f the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach . . . As the gravity of the possible harm increases, the apparent likelihood of its reoccurrence need be correspondingly less to generate a duty of precaution.” (Let us add that the railroad’s duty will often include posting warning signs and installing crossing gates.). This principle goes back to the germinal negligence case in the United States, *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850) (“[W]hat constitutes ordinary care will vary with the circumstances of the case.”). See also *Erickson v. Bennion* 503 P.2d 139, 140-141 (Utah 1972); *Willie v. Minnesota Power and Light Co.*, 250 N.W. 809 (Minn. 1933); *City Water Power Co. v. City of Fergus Falls*, 128 N.W. 817, 818 (Minn. 1910); *Herro v. Board of County Road Commission for County of Chippewa*, 118 N.W.2d 271 (1962); *Dover v. Georgia Power Co.*, 168 S.E. 117, 118 (Ga. Ct. App. 1933); *Mackay v. Breeze*, 269 P. 1026, 1027 (Utah 1928); *Erickson v. Bennin*, 503 P.2d 139, 140-141 (Utah 1972).

be by their nature very specific to the individual case. The concept of duty, however, can be more generally discussed as it relates to emergency preparedness.

- **Duty is based upon the reasonable foreseeability of the risk.**<sup>11</sup>, with the critical issue being how should a reasonable person act in light of the foreseeable risk. The reasonable foreseeability of these risks creates a duty<sup>12</sup> to employ reasonable care to reduce the risks of a disaster.
- **The event need not have ever happened before to be foreseeable.** The issue is not whether a similar event has occurred before, but the foreseeability of the risk that this particular mishap may occur. Standard negligence analysis requires the exercise of reasonable care to prevent an accident. Liability may exist if reasonable design,<sup>13</sup> construction,<sup>14</sup> operation,<sup>15</sup> inspection,<sup>16</sup> or maintenance procedures<sup>17</sup> should have anticipated and prevented or minimized the failure.
- **Duty is owed to all who may be foreseeably injured.** The duty of reasonable care extends to those foreseeably injured by the negligence, and not just those in privity of contract with the defendant.<sup>18</sup> Even inspectors, who are neither in a

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<sup>11</sup> Charvoz v. Bonneville Irr. Dist., 235 P.2d 780, 783 (Utah 1951)

<sup>12</sup> Indeed, an OSHA guideline recognizes EAP's "should address emergencies that the employer may reasonably expect in the workplace," including fire, toxic chemical releases, hurricanes, tornadoes, blizzards, and floods. 29 C.F.R. §1910.38, Appendix to Subpart E (2002).

<sup>13</sup> See e.g. Barr v. Game, Fish and Parks Commission, 497 P.2d 340 (Col. Ct. App. 1972).

<sup>14</sup> The concept of liability for construction defects long precedes the common law, going back to the hallowed Code of Hammurabi, which provided that in the case of "a house being so carelessly built as to cause death to the owner's son," the builder's son was to be put to death. Gibson B. Witherspoon, ARCHITECTS' AND ENGINEERS' TORT LIABILITY, 16 D.L.J. 409 (1967).

<sup>15</sup> See e.g. Gutierrez v. Rio Rancho Estates, Inc., 605 P.2d 1154 (N. Mex. 1980) and Bruton v. Carolina Power and Light Co., 6 S.E.2d 822 (N.C. 1940).

<sup>16</sup> See e.g. Ingram v. Howard-Needles-Tammen & Bergendoff, 672 P.2d 1083 (Kan. 1983).

<sup>17</sup> Curtis v. Dewey, 475 P.2d 808 (Idaho 1970); Hayashi v. Alameda County Flood Control and Water Conservation District, 343 P.2d 1048 (Cal. Ct. App. 1959); Bowling v. City of Oxford, 148 S.E.2d 624 (N.C. 1966); Carlson v. A&P Corrugated Box Corp., 72 A.2d 290 (Pa. 1950).

<sup>18</sup> See e.g. Navajo Circle, Inc., v. Development Concepts, 373 So. 2d 689 (Fla. Ct. App. 1979), where a condominium association and a unit owner were allowed to seek damages to the roof and the exterior walls from the architect for negligently supervising the construction and subsequent repairs of the roof, and also from the contractor for negligently constructing the roof. See also Kristek v. Catron, 644 P.2d 480 (Kan. App. 1982) (contractor liable to a third party); Seiler v. Levitz Furniture Co., 367 A.2d 999 (Del. 1976) (liability of architect/engineer to tenant); Heigh v. Wadsworth, 361 P.2d 849 (Okl. 1961) (contractor liable to purchaser's tenant); Waldor Pump & Equipment Co. v. Orr-Schelen-Meyerson & Co., 386 N.W.2d 375 (Minn. App. 1986); Montijo v. Swift, 33 Cal. Rptr. 133 (Cal. App. 1963); Lumber Products, Inc. v. Hiriart, 255 So.2d 783, 787 (La. Ct. App. 1971); S.K. Whitty & Co., Inc. v. Laurence L. Lambert & Assoc., 576 So.2d 599 (La. Ct. App. 1991); Evans v. Howard R. Green Co., 231 N.W.2d 907, 913 (Iowa 1975); Mudgett v. Marshall, 574 A.2d 867 (Me. 1990); Miller v. DeWitt, 208 N.E.2d 249, 284 (Ill. App. 1965)

relationship to the victims nor operating a facility, may be liable for negligence for failure to discover the problems.<sup>19</sup> Liability thus extends to any person who foreseeably is at risk through the failure to exercise reasonable care.

- **In sum, the duty to undertake emergency preparedness is consistent with the basic principles of negligence law and constitutes a significant exposure for the corporation.** Plans to respond to disasters are just as critical in minimizing the resulting damages as reasonable steps to prevent an accident. The law's interest in minimizing the costs of an accident is shown by a number of well-established liability scenarios, such as products liability and safety measures.

### Preface

During the summer and fall of 2003, a diversity of stakeholders (primarily large and small business representatives across a variety of industries and sectors) came together as The Working Group on Private Sector Preparedness to advance emergency preparedness in the private sector in general and in particular to support the mission of Federal 9-11 Commission to identify lessons learned from the tragedies of September 11<sup>th</sup>, 2001 and to move forward in light of that knowledge. Multiple roundtable discussions as well as individual research efforts were undertaken by the Working Group in cooperation with 9-11 Commission staff to identify key issues in private sector preparedness. These efforts and the Working Group were chaired by one of this paper's authors, Bill Raisch. Legal liability was a recurring theme in these roundtables. The Working Group ultimately produced recommendations to the Commission in a report entitled "Strategies for Private Sector Preparedness" in April 2004. The Working Group's report noted that:

"It has been suggested both employees and investors expect that corporations should be prepared. The manner in which an organization prepared for, responded to and recovered from an emergency will inevitably be an issue in the

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("The architects may be liable for negligence in failing to exercise the ordinary skill of their profession, which results in the erection of an unsafe structure whereby anyone lawfully on the premises is injured.") In terms of measuring the potential liability to third parties, the court in *Coburn v. Lenox Homes, Inc.*, 441 A.2d 620, 624 (Conn. 1982) stated:

A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from the act or failure to act.

<sup>19</sup> See *e.g.* *Ingram v. Howard-Needles-Tammen & Bergendorf Corporation*, 672 P.2d 1083 (Kan. 1983); *Phillips v. United States*, 801 F. Supp. 337, 348 (D. Idaho 1992), *aff'd* 15 F.3d 1088 (9<sup>th</sup> Cir.); *Johnson v. Burley Irrigation Dist.*, 304 P. 2d 912, 915 (Idaho 1956)(existence of gophers should have been discovered through an inspection).

aftermath of any crisis. Some in the legal community suggest future liability based upon “negligent failure to plan for emergencies.”<sup>20</sup>

The Working Group’s report included a recommendation on “Reducing the Potential for Legal Liability through Voluntary Conformity with the National Preparedness Standard / Demonstrating a Standard of Care.” This proposal informed the final recommendations of the 9-11 Commission addressing private sector preparedness which included an acknowledgement of a National Preparedness Standard and recommendation that it serve as the “standard of care owed by a company to its employees and the public for legal purposes.”

In October of 2004, the International Center for Enterprise Preparedness (InterCEP) at New York University was founded with an initial mission to substantiate the private sector preparedness recommendations of 9-11 Commission and lay a foundation for ongoing research and initiative in this area. To that end, the Center brought together stakeholders from the corporate legal community in a series of roundtables and informal discussions to define the legal rationale for preparedness. These discussions built upon and included many prior participants in the earlier forums in support of the 9/11 Commission and were again coordinated by the Chair of the Working Group, who also serves as the founding director of InterCEP. The discussions included leading corporate counsels, members of key professional associations, insurance representatives, and legal scholars. A legal advisory committee was established from the participants.

Among other issues, participants reached a general consensus that private sector organizations (e.g., businesses) have a legal obligation to their employees and the general public to implement preparedness measures that a reasonable person would deem appropriate under the principle of “reasonable standard of care.” This obligation was in addition to any contractual or regulatory obligation that the organization may already have.

Separately, the key elements of negligence theory as they relate to emergency preparedness have been well researched and presented by Prof. Denis Binder, S.J.D. in his two analyses: “Emergency Action Plans: A Legal & Practical Blueprint” and “The Role of Statutes, Regulations and Professional Standards in Emergency Responses.” These works are foundational to the following analysis which builds upon them and integrates substantial portions thereof into the text. Prof. Binder has co-authored this paper and has joined InterCEP’s advisory body.

## **The Law of Negligence and Corporate Liability for Preparedness**

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<sup>20</sup> Bruce T. Blythe and Terri Butler Stivarius. “Negligent Failure to Plan: The Next Liability Frontier?” *Occupational Hazards* 26 Jun 2003. 20 Aug 2006 <<http://www.occupationalhazards.com/articles/7316>>

**The corporation faces a diversity of risks in its day-to-day operations:** The number of ways an accident can occur, a facility fail, or system malfunction is probably infinite. Accidents happen. So too do disasters and tragedies.<sup>21</sup> In spite of the best precautions, structures fail and systems malfunction. Airplanes crash, trains derail, ships sink, and vehicles collide. Petrochemical facilities, refineries, and manufacturing plants explode.<sup>22</sup> Natural hazards include avalanches, blizzards, cold snaps, drought, earthquake, fire, floods, heat waves, hurricanes, landslides, lightning, tornadoes, volcanoes, tsunamis, wildfires, and wind. Electrical surges, perhaps caused by lightning, can blow through surge protectors and burn electrical equipment, including computers. Human acts can include basic negligence, pollution, computer hacking and viruses, deferred maintenance, disgruntled employees, sabotage,<sup>23</sup> terrorism,<sup>24</sup> vandalism, and bioterrorism in subways,<sup>25</sup> office buildings,<sup>26</sup> food supplies,<sup>27</sup> and public arenas. Environmental emergencies include air pollution, oil spills, toxic spills, and workplace accidents.

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<sup>21</sup> As Judge Oakes notes:

‘Worst case’ accidents have a way of occurring - from Texas City to the Hyatt Regency at Kansas City, from the Tacoma Bridge to the Greenwich, Connecticut, I-95 bridge, from the Beverly Hills in Southgate, Kentucky, to the Cocoanut Grove in Boston, Massachusetts, and from the Titanic to the DC-10 at Chicago to the I-95 toll booth crash and fire - and that alone would end the case for many.

City of New York v. United States Department of Transportation, 715 F.2d 732, 753 (2<sup>nd</sup> Cir. 1983) (Oakes, J., dissenting). Another court wrote:

It may be that such a disaster could occur only upon a concatenation of circumstances of not too great probability, and that the odds are against it. It is common experience, however, that catastrophes occur at unexpected times and in unforeseen places . . . . A court of equity will not gamble with human life, at whatever odds, and for loss of life there is no remedy that in an equitable sense is adequate.

Harris Stanley Coal and Land Co. v. Chesapeake & Ohio Ry. Co., 154 F.2d 450, 453 (6<sup>th</sup> Cir.), *cert. denied*, 329 U.S. 761 (1946).

<sup>22</sup> *In general, see* Caleb Solomon, *Volatile Situation: Rash of Fires at Oil and Chemical Plants Sparks Growing Alarm*, Wall Street Journal, November 7, 1989 at A1, col. 6, and *Toxins Abounding: Despite the Lessons of Bhopal, Chemical Accidents Are on the Rise*, Scientific American, July 1995 at 22.

<sup>23</sup> *See e.g.* Wheatland Irrigation Dist. v. McGuire, 537 P.2d 1128 (Wy. 1975) (holding that a landowner is not absolutely liable for damage resulting from extraordinary use of his land where the damage is caused by the malicious acts of a third party).

<sup>24</sup> *In general, see* KEVIN M. QUINLEY AND DONALD L. SCHMIDT, BUSINESS AT RISK: HOW TO ASSESS, MITIGATE, AND RESPOND TO TERRORIST THREATS (The National Underwriter Company 2002)

<sup>25</sup> *See e.g.* James Glanz & Randy Kennedy, *The Subways: Past Lessons Guide Transit for Attack*, N. Y. TIMES, Nov. 9, 2001, at B10, col. 1 (Nat. Ed.) (describing research related to potential chemical attacks on the New York subway).

<sup>26</sup> NEWSWEEK, Nov. 5, 2001, at 36.

<sup>27</sup> *See e.g.* World Health Organization, Food Safety Department, Food Safety Issues: Terrorist Threats to Food: Guidance for Establishing and Strengthening Prevention and Response Systems (2002).

**Emergency preparedness efforts by corporations can avoid or lessen the impact of these risks should they occur.** Benjamin Franklin’s “ounce of prevention” or “pound of cure” axiom reflects the age-old understanding of the value of preparedness and prevention activity. The modern disciplines of emergency management, business continuity, crisis management, disaster recovery, risk management and related have built upon this core wisdom and developed systematic strategies to increase the effectiveness of preparedness efforts. These tools are readily available to the corporation from a variety of sources.

**Corporations may be subject to significant legal liability if they do not undertake preparedness efforts in advance of a crisis.** This liability can result from several sources including common law negligence, specific legislation/regulations and contractual obligations. Potential sources of liability from legislation and regulation include Occupational Safety & Health Administration regulations, Security Exchange Regulations (for financial services firms) as well as a suggestion by some that Sarbenes-Oxley may be interpreted to include disclosure and business continuity planning responsibilities.

The U.S. Occupational Safety and Health Administration in the Code of Federal Regulations 29 Standard 1910.38 defines very basic requirements for emergency planning applicable to most medium to large U.S. businesses. While extremely fundamental, the requirements include (for most businesses) a written document addressing emergency reporting, evacuation, critical plan operations, employee accounting, rescue, medical duties, applicable employee duties under the plan, alarm / notification system and training.<sup>28</sup>

There is another statute that defines the form and contents of an Emergency Action Plan (EAP) as well. The U.S. Congress enacted the Emergency Planning and Community Right-To-Know-Law (EPCRA) as Title III of the Superfund Amendments and Reauthorization Act (SARA).<sup>29</sup> Section 301 of EPCRA establishes State Emergency Response Commissions (SERC’s) and Local Emergency Planning Commissions (LERC’s) The LERCs are required to prepare comprehensive EAP’s, which must include: the facilities where an extremely hazardous substance is present; the methods

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<sup>28</sup> OSHA requires the preparation of EAP’s in many situations. The minimal requirements of such EAP’s include “Emergency escape procedures and emergency escape route assignments .... Procedures to be followed by employees who remain to operate critical operations before they evacuate .... Procedures to account for all employees after emergency evacuation has been completed .... Rescue and medical duties for those employees who are to perform them .... The preferred means of reporting fires and other emergencies; and .... names or regular job titles of persons or departments who can be contacted for further information or explanation of duties under the plan.” 29 C.F.R. §1910.38(a)(2). California has adopted similar regulations. Barclays California Code of Regulations, Tit. 8, §3220.

<sup>29</sup> 42 U.S.C. §§11041-11050(c) (1995). Another statute requiring EAP’s is the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6924(a)(5) (1995)(contingency plans for all hazardous waste treatment, release and storage facilities).

and procedures for reporting a release of such a substance; the names of the community and facility coordinators; public notification procedures; methods for determining the occurrence of a release and the geographic area or population likely to be affected; the available emergency equipment and facilities within the community; training programs; and evacuation plans.<sup>30</sup>

Industry focused regulations include the rules developed in response to a Securities Exchange Commission (SEC) policy statement and subsequently approved by the SEC on April 7, 2004 requiring National Association of Securities Dealers (NASD) and New York Stock Exchange (NYSE) members “to develop business continuity plans that establish procedures relating to an emergency or significant business disruption.” Specifically, these rules require, at a minimum, that member organizations address: “1) books and records back-up and recovery; 2) identification of all mission critical systems and back-up for such systems; 3) financial and operational risk assessments; 4) alternate communications between customers and the firm; 5) alternate communications between the firm and its employees; 6) alternate physical location of employees; 7) critical business constituent, bank and counter-party impact; 8) regulatory reporting; 9) communications with regulators; and 10) how the member or member organization will assure customers prompt access to their funds and securities in the event the member or member organization determines it is unable to continue its business.”<sup>31</sup> These requirements address member organizations, but do not extend to address companies listed on the exchanges.

The U.S. Resource Conservation and Recovery Act (RCRA) regulations issued by the Environmental Protection Agency (EPA) require owners and operators to develop a contingency plan to address “fire, explosions, (other) releases of hazardous waste or hazardous waste constituents which could threaten human health or the environment.”<sup>32</sup> They also require the owners or operators to familiarize local emergency response authorities with the physical layout of the facility, and local hospitals with the properties of the pollutants.<sup>33</sup>

Even if an emergency action plan is not required by statute or regulation, failure to prepare such a plan could risk substantial liability under common law if a tragedy results which a plan could have averted.

**Litigation Can Drain Financial and Executive Resources:** Unlike generations past, America had become a much more litigious society. The aftermath of any major disaster,

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<sup>30</sup> *Id.* at §11003(c).

<sup>31</sup> Securities Exchange Commission File Nos. SR-NASD-2002-108 and SR NYSE-2002-35  
<http://www.sec.gov/rules/wro/34-48502.htm>

<sup>32</sup> 40 CFR §264.51(b) (2002).

<sup>33</sup> *Id.* at §264.37.

such as Hurricane Katrina, 9/11, or the Loma Prieta and Northridge earthquakes in California, will include extensive litigation, both over issues of liability and insurance coverage. The costs of litigation and diversion of executive resources away from management can be enormous.

Any risk analysis should include the extensive damages that can result from a finding of liability, reflecting the injuries to the victims, including loss of life, personal injury, emotional distress, property and economic damage, lost earnings and business interruption, and medical expenses. Damages are measured by the injuries to the victims and are not limited to any profits, earnings, or savings held by the wrongdoer. If the damages exceed the available resources, including insurance coverage, then bankruptcy will ensue.

**Under negligence law, corporations as with any other actors must exercise “reasonable care:”** The basic principles of negligence law readily apply to the analysis of emergency preparedness. The essence of negligence is the failure to exercise reasonable care under the circumstances. More technically defined, negligence is the failure to exercise the standard of care of a reasonable person under similar circumstances.<sup>34</sup> Thus, corporations or any parties must exercise reasonable care under the circumstances or be liable for any resulting impacts on others.

Negligence can lie either in the failure to act when a reasonable person should have acted (nonfeasance) or affirmatively acting in a wrongful manner (malfeasance).<sup>35</sup> 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.

Generally following any catastrophe, witnesses will come forward and documents emerge, which we can refer to as "I told you so memos." These memos and/or other notices or reports may have been buried deep in the corporate files, but the typical corporation in the aftermath of a crisis will be hard pressed in any trial to explain why it did not take appropriate action in light of the foreseeable risk.

<sup>34</sup> Charvoz v. Bonneville Irr. Dist., 235 P.2d 780, 783 (Utah 1951).

<sup>35</sup> Indeed, one of the germinal negligence cases, Blyth v. Birmingham Waterworks Co., 11 Ex. 781, 784, 156 Eng. Rep. 1047 (1856), defined negligence as “the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.” More recently, the New Jersey Supreme Court stated, “To act non-negligently is to take reasonable precautions to prevent the occurrence of reasonable harm to others.” Weinberg v. Dinger, 524 A.2d 336, 374 (N.J. 1987). Liability can arise in a wide variety of circumstances, such as the failure to warn with unavoidably unsafe products, RESTATEMENT (SECOND) OF TORTS § 402A, Comment **k (lower case)** (1965), or failing to anticipate a foreseeable intervening cause. *Prosser & Keeton*, supra n. 4 at 303.

**The standard for “reasonable care” can be multi-faceted with the “common law standard” considered as the default:** The standard of care may be established by case law, statutes,<sup>36</sup> regulations,<sup>37</sup> and contracts,<sup>38</sup> as well as by industry, professional<sup>39</sup> and building codes.<sup>40</sup> These measures will usually establish the minimum standard of care. The actor will be held to a higher standard, the common law duty of reasonable care, if they are inadequate.<sup>41</sup>

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<sup>36</sup> Violations of a statute or ordinance may constitute negligence. *Burran, Jr. v. Dambold*, 422 F.2d 133 (10<sup>th</sup> Cir. 1970); *Henry v. Britt*, 220 So.2d 917 (Fla. Ct. App. 1969).

<sup>37</sup> *Henry v. Britt*, 220 So.2d 917, 920 (Fla. Dist. Ct. App. 1969). Of course, a plan which does not conform to statutory or regulatory requirements will fail. For example, the Iowa Beef Processing Co. had a “disaster readiness plan” in effect for its Council Bluffs, Iowa, plant. This plan provided for immediate evacuation in case of a major ammonia leak. The readiness plan was an alternative to an emergency action plan. 29 C.F.R. §1910.120 (q)(1) (2002). The employees were trained to evacuate immediately. However, when a major ammonia leak occurred on June 30, 1993, two employees, only one of which was wearing a self-contained breathing apparatus, attempted to rescue a downed employee of a sub-contractor. Because the plan provided for rescues as well as evacuations, it did not qualify for an exception from the requirement to prepare a more detailed emergency action plan. *See IBP, Inc. v. Iowa Employment Appeal Bd.*, 604 N.W.2d 307 (Iowa 1999).

<sup>38</sup> “The principle which seems to have emerged . . . is that there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract – which is to say, whenever such misperformance involves a foreseeable, unreasonable risk of harm to the interests of the plaintiff.” *Prosser & Keeton, supra* note 4, at 602.

<sup>39</sup> An example of a professional code is National Fire Protection Association, NFPA 1600 Standard on Disaster/Emergency Management and Business Continuity Programs (2000 Ed.) [http://www.nfpa.org/Codes/NFPA\\_Codes\\_and\\_Standards/listof\\_nfpa\\_documents/nfpa\\_1600.asp](http://www.nfpa.org/Codes/NFPA_Codes_and_Standards/listof_nfpa_documents/nfpa_1600.asp). NFPA 1600 contains provisions on Hazard Identification and Risk Assessment (3-3), Hazard Mitigation (3-4), Resource Management (3-5), Planning (3-6), Direction, Control, and Coordination (3-7), Communications and Warning (3-8), Operations and Procedures (3-9), Logistics and Facilities (3-10), Training (3-11), Exercises, Evaluations, and Corrective Actions (3-12), Crisis Communications, Public Education, and Information (3-13), and Finance and Administration (3-14). The standard requires not only a plan but also that businesses fund it (*Id.* at §3-14). NFPA 1600 was approved by the American National Standards Institute on February 11, 2000 as an ANSI Standard. *Id.* at 1600-1. The National Fire Protection Association prepares standards for fire fighting and protection. ANSI Standards are in a sense purely advisory, but they are often admissible as evidence of the reasonable standard of care. *See e.g. Hansen v. Abrasive Engineering & Manufacturing Co.*, 856 P.2d 625 (Ore. 1993) (holding that the advisory safety standards of the American National Standards Institute may be considered in deciding whether defendant has met the standard of care); *Arkansas Valley Elect. Coop. Corp. v. Davis*, 800 S.W.2d 420, 422 (Ark. 1990) (holding that defendant’s violation of the national electric safety code can be used as evidence of negligence); *Norman v. Ogallala Pub. School Dist.*, 609 N.W. 2d 338 (Neb. 2000); *Kent Village Associates Joint Venture v. Smith*, 657 A.2d 330 (Md. App. 1995). *See also*, *Miller v. Yazoo Mfg. Co.*, 26 F.3d 84 (8th Cir. 1994).

<sup>40</sup> *See e.g. FLA. STAT. ANN. §553.84, Burran v. Dambold*, 422 F.2d 133, 135-136 (10<sup>th</sup> Cir. 1970) (holding that building codes create standard of care); *St. Joseph Hospital v. Corbetta Construction Co.*, 316 N.E.2d 51, 61-62 (Ill. Ct. App. 1974) (holding that violation of building code creates cause of action); *Virginia Elec. & Power Co. v. Savoy Const. Co.*, 294 S.E.2d 811, 817 (Va. 1982) (holding that violation of building code creates negligence *per se*).

<sup>41</sup> *See e.g. Alvarado v. J.C. Penney Co., Inc.*, 737 F.Supp. 371, 374 (D. Kan. 1990); *Gryc v. Dayton Hudson Corp.*, 197 N.W.2d 727 (Minn. 1980); *Dawson v. Chrysler Corp.*, 630 P.2d 950 (3<sup>rd</sup> Cir. 1980); *Helling v.*

**The common law standard of care can be wide ranging and is based on probability, gravity and burden:** The essence of reasonable care was set out by Judge Learned Hand in *United States v. Carroll Towing Co.*<sup>42</sup> as a calculus of three factors: the probability of an accident occurring, the gravity of the resulting injury, and the burden of adequate precautions.<sup>43</sup> A corollary to this basic analysis is that as the risk increases, so too does the standard of care. As stated by Prosser and Keeton:

[I]f the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach . . . As the gravity of the possible harm increases, the apparent likelihood of its reoccurrence need be correspondingly less to generate a duty of precaution.<sup>44</sup>

Relative to emergency preparedness and key activities including the preparation of an emergency action plan, Judge Hand's factors might be rephrased as follows:

- 1) How likely is an emergency to occur?
- 2) What are the potential consequences should it occur?
- 3) What safety precautions are available?

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Carey, 519 P.2d 981 (Wash. 1974); *The T. J. Hooper*, 60 F.2d 737 (2<sup>nd</sup> Cir. 1921); *Clark's Adm'r v. Kentucky Utility Co.*, 158 S.W.2d 134, 137 (Ky. 1941).

<sup>42</sup> 159 F.2d 169 (2<sup>nd</sup> Cir. 1947)

<sup>43</sup>*Id.* at 173. *See also* *Conway v. O'Brien*, 111 F.2d 611, 612: "The degree of care demanded of a person by an occasion is the resultant of three factors: The likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied."

<sup>44</sup> *PROSSER & KEETON*, *supra* n. 4 at 171. (Let us add that the railroad's duty will often include posting warning signs and installing crossing gates.). This principle goes back to the germinal negligence case in the United States, *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850) ("[W]hat constitutes ordinary care will vary with the circumstances of the case."). *See also* *Erickson v. Bennion* 503 P.2d 139, 140-141 (Utah 1972); *Willie v. Minnesota Power and Light Co.*, 250 N.W. 809 (Minn. 1933); *City Water Power Co. v. City of Fergus Falls*, 128 N.W. 817, 818 (Minn. 1910); *Herro v. Board of County Road Commission for County of Chippewa*, 118 N.W.2d 271 (1962); *Dover v. Georgia Power Co.*, 168 S.E. 117, 118 (Ga. Ct. App. 1933); *Mackay v. Breeze*, 269 P. 1026, 1027 (Utah 1928); *Erickson v. Bennin*, 503 P.2d 139, 140-141 (Utah 1972).

In terms of Judge Learned Hand’s basic factors for negligence analysis, the ease of developing and maintaining a basic preparedness program (including a fundamental emergency action plan) will often outweigh the risk of not doing so.<sup>45</sup>

**The** probability of various risks certainly vary and each can be dependent upon a diversity of contributory factors. Certainly, some hazards have greater probability than others. Often, a multitude of potential threats are dismissed as “improbable” if they are examined on an individual basis. Yet the collective likelihood that “something will happen” can be high. Nonetheless, to explore the applicability of Judge Hand’s analysis, let us address a low probability but high impact risk.

If we apply the first of Judge Hand’s three factors to the potential failure of a large structure, such as a dam, the risk of failure is low.<sup>46</sup> However, the potential magnitude, the second factor, may be quite large.<sup>47</sup>

For example, the potential damages and losses can include loss of life, personal injuries, emotional distress (including post traumatic stress syndrome), property damage, infrastructure losses, loss of utility services, business interruption and loss of industry, commercial and habitation, loss of use of facility and resulting losses to the beneficial users of the facility, including water supply, flood control, irrigation, navigation, recreational uses and hydroelectric power, as well as disaster relief,<sup>48</sup> cleanup and

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<sup>45</sup> In the case of a dam **or levee** failure, for example, the class of foreseeable victims could include the resident population, tourists, travelers, recreational users, workers, commercial enterprises, utilities, and government entities, sureties, and lenders. Foreseeable legal damages could include wrongful death, loss of consortium, personal injury, and emotional distress. *See e.g. Prince v. Pittston Co.*, 63 F.R.D. 29 (S.D.W.Va, 1974).

<sup>46</sup> As September 11 showed, though, while the risks may have been low, they were not non-existent. As one government dam safety document states: “The probability of failure may be small, but is not nonexistent. An emergency action plan may minimize the extent and effects of a failure.” U.S. DEPT. OF THE INTERIOR, NATIONAL PARK SERVICE, GUIDELINE NPS-40: RELEASE NO. 1, DAMS AND APPURTENANT WORKS MAINTENANCE, OPERATION AND SAFETY, ch. 6, p. 12 (Feb. 1983). Indeed, sometimes a backup to a primary response center may be needed. New York’s \$13 million emergency bunker was on the 23<sup>rd</sup> floor of 7 World Trade Center. The collapse of the Twin Towers and adjoining buildings forced New York City to scramble to put together a new emergency operations center. Al Baker & Kevin Flynn, *After a Bunker Proves Vulnerable, Officials Rethink Emergency Response*, N.Y. TIMES, Sept. 29, 2001, at A9, col. 1 (Nat. Ed.).

<sup>47</sup> Eleven lives were lost on June 9, 1976, 25,000 people were left homeless, and 300 square miles inundated when the Teton Dam failed on its initial filling. The reservoir contained 250,000 cubic acre feet of water at the time of failure. The peak discharge was 1,000,000 cfs. Congress appropriated \$400 million to compensate the victims. Pub. L. No. 94-100, 90 Stat. 1211. *See Aetna v. United States*, 628 F.2d 1201 (9<sup>th</sup> Cir. 1980) (sovereign immunity).

<sup>48</sup> For example, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) authorizes FEMA to administer individual (not business) relief efforts for five discrete areas in Presidential declared emergencies:

1. Temporary Housing Assistance;
2. Individual and Family Grants;
3. Crisis Counseling;
4. Unemployment Assistance; and

recovery costs, public health and sanitation problems,<sup>49</sup> water pollution and toxic contaminations, repair and reconstruction, unemployment, workers compensation, environmental damages, fish, wildlife and vegetation losses, cultural resources, revenue losses, fraudulent claims, and even political losses.<sup>50</sup>

Emergency preparedness in general and emergency action plans in particular easily fit into the third factor of the Hand analysis. First, even though emergency action plans may have received little judicial scrutiny so far,<sup>51</sup> they are far from a novel concept. The ease and cost of preparing an emergency action plan is facilitated by the fact that sample emergency action plans are available from several agencies.<sup>52</sup>

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#### 5. Legal Services.

Temporary housing assistance may include mortgage and rental assistance and limited home repairs, transient accommodations, and manufactured housing. Individual and family grants can include expenses for real and personal property, medical and dental expenses, funeral expenses, transportation needs, and other needs.

<sup>49</sup> In general, see Eric K. Noji, *Medical and Public Health Consequences of Natural and Biological Disasters*, *Natural Hazards Review* 143 (August 2001).

<sup>50</sup> John Laye recounts a series of political repercussions for poor responses to emergencies, including reelection defeats by the mayors of San Francisco (1989 Loma Prieta Earthquake) and Seattle (1999 World Trade Organization Riots). *John Laye, Avoiding Disaster: How to Keep Your Business Going When Catastrophe Strikes* 29 (2002).

<sup>51</sup> See *Bluestone Emergency Design, Inc. v. Federal Energy Regulatory Commission*, 74 F.3d 1288 (D.C. Cir. 1996); *IBP, Inc. v. Iowa Employment Appeal Board*, 604 N.W.2d 307 (Iowa 1999); *Engle v. West Penn Power Co.*, 598 A.2d 290 (Pa. Super. Ct. 1991). In a few cases, the emergency action plan is simply a tangential aspect of the case. See e.g. *Avery v. City of Indianapolis*, 2000 WL 1469361 (S.D. Ind. 2000). Of course, reasonable care should be exercised in a training exercise. See *Miskovich v. Independent School Dist.* 318, 226 F. Supp. 2d 990 (D. Minn. 2002).

Of peripheral interest is *DFDS Seacruises (Bahamas) Ltd. v. United States*, 676 F.Supp. 1193 (S. D. Fla. 1987), which held the Coast Guard was not liable for failing to establish a shipboard firefighting contingency plan. The suit was brought under the Federal Torts Claim Act, 28 U.S.C. §2680(a)(1994), and thus subject to the discretionary function exception, which precludes liability when the government agency is engaged in an act of discretion. The court stated: “However desirable such contingency planning may be, decisions as to whether, where and when to expend time and resources to develop such plans are entrusted to the Coast Guard’s judgment and are not reviewable . . . .” 676 F.Supp. at 1205.

<sup>52</sup> FEMA publishes a Model State Dam Safety Program, prepared by the Association of State Dam Safety Officials. See FEDERAL EMERGENCY MANAGEMENT AGENCY, MODEL STATE DAM SAFETY PROGRAM (FEMA 316/ March 1998). WASHINGTON STATE, *supra*, no. 2, at Appendix A-C, 16-40; FEMA, EMERGENCY ACTION PLANNING GUIDELINES FOR DAMS (FEMA 64/February 1985) at ch. 2; FEMA, MITIGATION DIRECTORATE, FEDERAL GUIDELINES FOR DAM SAFETY: EMERGENCY ACTION PLANNING FOR DAM OWNERS 11 (October 1998); NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, DAMS AND APPURTENANT WORKS MAINTENANCE, OPERATIONS AND SAFETY, Guideline NPS-40, Appendix E (1983). COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GUIDELINES FOR DEVELOPING AN EMERGENCY ACTION PLAN FOR CATEGORY 1 AND 2 DAMS (July 1997). FEMA also publishes an outline for preparing an emergency action plan. FEMA, EMERGENCY ACTION PLANNING GUIDELINES FOR DAMS 10-16 (FEMA 64, February 1985).

The 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. The court held the government had a duty to prepare an emergency action plan. 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.<sup>53</sup>

Emergency actions plans are well-established, long preceding September 11.<sup>54</sup> They have either been required or customary for such diverse activities, facilities, and industries as airlines,<sup>55</sup> coal mining,<sup>56</sup> dams and reservoirs,<sup>57</sup> environmental emergencies,<sup>58</sup> nuclear power plants and nuclear safety,<sup>59</sup> oil production and transportation, plants or facilities handling toxic substances,<sup>60</sup> refineries and petrochemical plants, workplace safety,<sup>61</sup> and even horse race tracks.<sup>62</sup> Fire Departments are perforce trained to respond to emergencies. So too are private and government

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<sup>53</sup> *Id.* at 596.

<sup>54</sup> Indeed, they go by a variety of terms, including business continuity plans, contingency plans, crisis management, crisis planning, crisis reaction, disaster planning, disaster recovery, emergency responses, and risk management.

<sup>55</sup> Airlines know that planes crash. They have accordingly adopted voluntary emergency response plans, including counseling for relatives of victims. For example, American Airlines executives have a thick binder detailing the airline's response in a disaster. Laurence Zuckerman, *Airline Management Style Honed by Catastrophe*, N.Y. TIMES, Nov. 15, 2001, at C1, col. 2 (Nat. Ed.).

<sup>56</sup> Coal miners routinely practice rescue operations.

<sup>57</sup> KY. REV. STAT. ANN. tit. XVII, Ch. 151, §293(a) (2001); ME. REV. STAT. ANN. 37-B §1127 (2001), MICH. COMP. LAWS ANN., Ch. 324, §31523(1) (2001); MONT. CODE ANN. §85-15-212 (1993); N.H. REV. STAT. ANN. §482:11-a (“The owner shall develop an emergency action plan for any dam, the failure of which may threaten life or property.”); §482.12 (2000); PA CONS. STAT. ANN. §693.13 (1997); S.C. CODE ANN. §49-11-150 (2000); UTAH CODE ANN. §73.5(a)-601 (2001); VA. CODE ANN. §10.1-611 (2001).

<sup>58</sup> OHIO REV. CODE ANN. §3704.032 (2001) (air pollution episodes); OKLA. STAT. tit. 27A, §§1-3-101B(13) (2000).

<sup>59</sup> *See e.g.* ARK. CODE ANN. §20-21-402(b)(3) (2001); CAL. HEALTH & SAFETY §114660(b)(3); CONN. GEN. STAT. §22(a)-135(a)(13) (2001); FLA. STAT. §252.60; ILL. COMP. STAT. ANN. §420(8)(a) (2001); LA. REV. STAT. TIT. 40 §1299.100(B); MINN. STAT. §12.13, N. H. REV. STAT. ANN. §107-B:1 (including annual reviews); PA. CONS. STAT. §7320(A)

<sup>60</sup> LA.REV. STAT. tit. 40 §1299.100 (2001); KY. REV. STAT. tit. XVII §§224.01-400(14) (2000).

<sup>61</sup> “An emergency response plan shall be developed and implemented to handle anticipated emergencies prior to the commencement of emergency response operations. The plan shall be in writing and available for inspection and copying by employees, their representatives and OSHA personnel.” 29 C.F.R. § 1910.38 (2001)(2002) (“Employee Emergency Plans and Fire Prevention Plans” for employers of ten or more employees). *See also* 28 CAL-OSHA REP. 3 (abnormally hazardous materials).

<sup>62</sup> *See e.g.* MINN.STAT. §240.23(f)(2000).

HAZMAT teams. Law Enforcement and SWAT teams practice training and hostage rescues. Schools have fire drills. Passenger and cruise ships engage in evacuation drills. Airports practice for crash landings. Hospitals practice triage operations. Hotels have evacuation plans. Hospitals and other critical facilities often have backup generators in case of power failures. Highway departments and utilities must respond to all sorts of inclement weather and outages. Utilities share crews to promote recovery efforts. Rescue training is not limited to the obvious entities, such as police, fire and the Coast Guard. The Cold War gave rise to a civil defense program, which metamorphosed into disaster relief agencies.

The legal standards for emergency action plans may be found in statutes, administrative regulations, internal agency guidelines, professional and industry standards or the general common law negligence standard of reasonable care under the circumstances.

**The global business environment is changing to potentially heighten corporate liability under the common law standard:** Increasing globalization and its widening connectivity of business has effectively increased the operational footprint of the corporation. Many corporations have off-shored or outsourced their operations to areas remote from their primary locations making them essentially larger geographic “targets” for both natural hazards and man-made threats. Corporate supply chains can span the world. Extended supply chains may lack resiliency and redundancy. Advancing technologies bring with them new vulnerabilities. Enhanced global transportation can widen the impact and accelerate the spread of contagious diseases worldwide. Interconnected power grids coupled with ever increasing power demands set the stage for cascading power outages. To use the Judge Learned Hand’s terms for the basic factors of negligence analysis, both the probability of emergencies and the gravity of their potential impact have arguably increased as a result of these and other factors. Yet, with the advancement of the disciplines of risk management, business continuity, crisis management, emergency management and other studies, the capability to address these risks has also increased. Arguably, at least in terms of fundamental preparedness capability, these evolving disciplines developments have provided new tools and somewhat lessened the “burden” of adequate precautions. Thus, increasing probability and gravity of crisis coupled with a decreased burden of precautions (at least on a fundamental basis) supports a climate for increased corporate liability.

**Duty is a key element in establishing negligence:** In any negligence action, plaintiffs have the burden of proof to establish four basic elements: duty, breach, causation, and damages. Establishing the breach, causation and damages tend to be by their nature very specific to the individual case. The concept of duty, however, can be more generally discussed as it relates to emergency preparedness.

**Duty is based upon the reasonable foreseeability of the risk.**<sup>63</sup> with the critical issue being how should a reasonable person act in light of the foreseeable risk. The reasonable foreseeability of these risks creates a duty<sup>64</sup> to employ reasonable care to reduce the risks of a disaster.

**The event need not have ever happened before to be foreseeable.** The issue is not whether a similar event has occurred before, but the foreseeability of the risk that this particular mishap may occur. Standard negligence analysis requires the exercise of reasonable care to prevent an accident. Liability may exist if reasonable design,<sup>65</sup> construction,<sup>66</sup> operation,<sup>67</sup> inspection,<sup>68</sup> or maintenance procedures<sup>69</sup> should have anticipated and prevented or minimized the failure.

**Duty is owed to all who may be foreseeably injured.** The duty of reasonable care extends to those foreseeably injured by the negligence, and not just those in privity of contract with the defendant.<sup>70</sup> Even inspectors, who are neither in a relationship to the

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<sup>63</sup> Charvoz v. Bonneville Irr. Dist., 235 P.2d 780, 783 (Utah 1951)

<sup>64</sup> Indeed, an OSHA guideline recognizes EAP's "should address emergencies that the employer may reasonably expect in the workplace," including fire, toxic chemical releases, hurricanes, tornadoes, blizzards, and floods. 29 C.F.R. §1910.38, Appendix to Subpart E (2002).

<sup>65</sup> See e.g. Barr v. Game, Fish and Parks Commission, 497 P.2d 340 (Col. Ct. App. 1972).

<sup>66</sup> The concept of liability for construction defects long precedes the common law, going back to the hallowed Code of Hammurabi, which provided that in the case of "a house being so carelessly built as to cause death to the owner's son," the builder's son was to be put to death. Gibson B. Witherspoon, ARCHITECTS' AND ENGINEERS' TORT LIABILITY, 16 D.L.J. 409 (1967).

<sup>67</sup> See e.g. Gutierrez v. Rio Rancho Estates, Inc., 605 P.2d 1154 (N. Mex. 1980) and Bruton v. Carolina Power and Light Co., 6 S.E.2d 822 (N.C. 1940).

<sup>68</sup> See e.g. Ingram v. Howard-Needles-Tammen & Bergendoff, 672 P.2d 1083 (Kan. 1983).

<sup>69</sup> Curtis v. Dewey, 475 P.2d 808 (Idaho 1970); Hayashi v. Alameda County Flood Control and Water Conservation District, 343 P.2d 1048 (Cal. Ct. App. 1959); Bowling v. City of Oxford, 148 S.E.2d 624 (N.C. 1966); Carlson v. A&P Corrugated Box Corp., 72 A.2d 290 (Pa. 1950).

<sup>70</sup> See e.g. Navajo Circle, Inc., v. Development Concepts, 373 So. 2d 689 (Fla. Ct. App. 1979), where a condominium association and a unit owner were allowed to seek damages to the roof and the exterior walls from the architect for negligently supervising the construction and subsequent repairs of the roof, and also from the contractor for negligently constructing the roof. See also Kristek v. Catron, 644 P.2d 480 (Kan. App. 1982) (contractor liable to a third party); Seiler v. Levitz Furniture Co., 367 A.2d 999 (Del. 1976) (liability of architect/engineer to tenant); Heigh v. Wadsworth, 361 P.2d 849 (Okla. 1961) (contractor liable to purchaser's tenant); Waldor Pump & Equipment Co. v. Orr-Schelen-Meyerson & Co., 386 N. W.2d 375 (Minn. App. 1986); Montijo v. Swift, 33 Cal. Rptr. 133 (Cal. App. 1963); Lumber Products, Inc. v. Hiriart, 255 So.2d 783, 787 (La. Ct. App. 1971); S.K. Whitty & Co., Inc. v. Laurence L. Lambert & Assoc., 576 So.2d 599 (La. Ct. App. 1991); Evans v. Howard R. Green Co., 231 N.W.2d 907, 913 (Iowa 1975); Mudgett v. Marshall, 574 A.2d 867 (Me. 1990); Miller v. DeWitt, 208 N.E.2d 249, 284 (Ill. App. 1965) ("The architects may be liable for negligence in failing to exercise the ordinary skill of their profession, which results in the erection of an unsafe structure whereby anyone lawfully on the premises is injured.") In terms of measuring the potential liability to third parties, the court in Coburn v. Lenox Homes, Inc., 441 A.2d 620, 624 (Conn. 1982) stated:

victims nor operating a facility, may be liable for negligence for failure to discover the problems.<sup>71</sup> Liability thus extends to any person who foreseeably is at risk through the failure to exercise reasonable care.

**In sum, the duty to undertake emergency preparedness is consistent with the basic principles of negligence law and constitutes a significant exposure for the corporation.** Plans to respond to disasters are just as critical in minimizing the resulting damages as reasonable steps to prevent an accident. The law's interest in minimizing the costs of an accident is shown by a number of well-established liability scenarios, such as products liability and safety measures.

#### **Action Items For Paper Development Going Forward Include:**

1. Adjust footnotes to reflect *Ibid.*, etc. notations
2. Add examples of settlements and damages paid (each example with relevant cite)
3. Potentially integrate hazard probability discussion and other elements for earlier InterCEP white papers

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A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from the act or failure to act.

<sup>71</sup> See *e.g.* *Ingram v. Howard-Needles-Tammen & Bergendorf Corporation*, 672 P.2d 1083 (Kan. 1983); *Phillips v. United States*, 801 F. Supp. 337, 348 (D. Idaho 1992), *aff'd* 15 F.3d 1088 (9<sup>th</sup> Cir.); *Johnson v. Burley Irrigation Dist.*, 304 P. 2d 912, 915 (Idaho 1956)(existence of gophers should have been discovered through an inspection).

## Appendix A: Comments from Advisory Group Members

This appendix includes verbatim comments on this white paper from members of InterCEP's Legal Incentives Advisory Group. These comments will be considered during the Roundtable discussion on October 17, and together with the roundtable proceedings, integrated into a subsequent draft of this white paper.

- The standard for negligence may vary depending upon the status of the injured party (employee, tenant, guest). Indeed, as you know, we have workers compensation which imposes absolute liability for workplace injuries.
- The duration of the duty can change. Some duties could be imposed upon defendants for past conduct (an architect) or for short term conduct (the driver of an auto).
- The plan is not immunity from liability, it is merely evidence that a company tried to act responsibly. Companies have adopted plans in other contexts (such as sexual harassment) and have become part of the defense to liability.
- Overall, the document could be trimmed down, as there is some repetition, especially in the footnotes
- It's also a fairly simple set of points that appear to be written for a non-lawyer audience
- You could do more with NFPA 1600 as well
- If you want to attract the attention of lawyers, you could focus on a question such as the value of preparedness, or you could also try to teach about or analyze a new ruling that nobody has yet heard about
- Unlike generations past, America had become a litigious society. The aftermath of any major disaster, such as Hurricane Katrina, 9/11, or the Loma Prieta and Northridge earthquakes in California, will include extensive litigation, both over issues of liability and insurance coverage. The transaction costs of litigation and diversion of executive resources away from management can be enormous.
- Any risk analysis should include the extensive damages that can result from a finding of liability, reflecting the injuries to the victims, including loss of life, personal injury, emotional distress, property and economic damage, lost earnings and business interruption, and medical expenses. Damages are measured by the injuries to the victims and are not limited to any profits, earnings, or savings realized by the tortfeasor. If the damages exceed the available resources, including insurance coverage, then bankruptcy will ensue.
- After every catastrophe, witnesses will come forward and documents emerge, which we can refer to as "I told you so memos." These memos may have been buried deep in the corporate files, but the corporation will be hard pressed in any trial to explain why it did not take appropriate action in light of the foreseeable risk.
- Sarbanes-Oxley, and its interpretation by the accounting firms, may also include disclosure and business continuity planning.
- My concern involves government and the plaintiff's bar
- This document provides a roadmap for future legislation
- The shareholders and other stakeholders will be hurt by such action
- Instead of the result of putting companies in a better position to understand business continuity, they find themselves liable in ways that might not otherwise be the case
- I'm nervous that the best intentions, meant to be helpful, will be put to bad use
- If you draft legislation and the stuff gets codified, or you put something together that's greater than best practices, you open a Pandora's box
- I say less law, and more ethics
- When dealing with government, if you can demonstrate that you have a plan, that you've been preparing, that's fine, but with the plaintiff's bar it's another case, a huge stream of potential litigation, and that's what we're creating here
- I can go along with all your arguments except the negligence part

- If you were the victim of a large theft, who's to say your security means were adequate?
- It'll be up to a court of law, and as soon as you codify it, then you get a template
- SOX exists because people abused it, but I don't see terror activity causing the same kind of statutory requirement
- You're a victim, and this will punish you for being a victim by requiring you to prepared for next time
- If you want to talk about best practices, with insurance and rating awards for preparedness, then I'm all for it
- For example, insurance companies can say to law firms, you need to have a docketing system – firms say that they do, but they lie, and if tort action happens then it's disputable
- The point is the law doesn't say it's necessary, but leaves it as a private issue
- I would like to focus on rewards, without the negative side of codification, negligence and liability
- Whose interests are you protecting? There's a responsibility on the part of the individuals, and we're taking away personal responsibility
- You're saying that if they don't adhere to COSO, they're liable, but why?
- Incentives are cool, and you probably will be able to demonstrate a better relationship between preparedness and trust in the organization, etc.
- But the alternative is, the next time I'm a victim, I have to be worried I didn't have my ducks in a row because my employees, and my shareholders can sue me
- There is currently not a list of what's reasonable that has been sanctioned by the ABA, so it's currently up to the individual case settlement
- The good thing about best practices is that there is a diversity of them, they are specific to circumstances, rather than centralized on a codified list
- Look at state and federal employment laws, where there's lots of conflict – who's right?
- With codification, as more events happen, we tend toward the perspective of those who did the codifying
- I would argue for the standard as a best practice, create the various offensive plays
- Instead you're creating a way for plaintiffs to just go after whomever has the deepest pockets
- If you're using things as best practices, there's no statutory requirement to do them
- The law is there, so what should we be doing? We should be looking at best practices, providing people with a road map without ipso facto liability
- Companies that are dealing with an enterprise threatening crisis caused by criminal terrorist acts should not have to deal simultaneously with the additional risk of enterprise threatening litigation, or scurrying around to obtain legislative relief in the face of it. Some sort of safe harbor is appropriate. Examples of legal considerations that may arise from the incident (and will likely need to be reviewed immediately) include:
  - a. Tort issues—and what governing law might apply
  - b. Company insurance policies—property and casualty, liability, D&O, business interruption, terrorism riders, foreign govt intervention (I've forgotten what these policies are specifically called)—consider particularly exclusions and how many insurable occurrences may trigger coverage
  - c. Company provided employee life and ADD policies, and whether waivers of exclusions will need to be sought
  - d. Financial and operating covenants in financing agreements, leases, guarantees, commercial paper terms and similar agreements
  - e. Labor contracts, especially "no furlough" clauses, and WARN
  - f. Pending business acquisition and disposition agreements (anything that might have some sort of MAC clause)
  - g. Force majeure clauses
  - h. Disclosure implications

- i. Legislative relief already available, or for which there might be precedent to pursue relief (e.g., federal reparations)
  - j. What are the limits on relief that bankruptcy could afford
- It would serve a company well to maintain a current inventory of these sorts of contractual clauses.
- Note that a public company will be expected to comment on such an incident within the first 24 hours of occurrence. What is said needs to anticipate the company's position in litigation in any significant risk area, so the fewer areas of risk the company needs to consider, the less complex that initial research task will be.
- Safe harbors should consider not just isolation from liability in the particular event, but also consider the litigation process, such as:
  - a. A safe harbor that is exposed to a discovery process may not be worth much—consider a safe harbor that can be established on a motion to dismiss, or at least after very narrow discovery.
  - b. Can alternate forums for relief be established in advance? E.g., government reparations in the event of injury caused by a terrorist act. Plaintiffs should be expected to utilize such a forum as an exclusive remedy.
  - c. What should happen to insurance proceeds that might otherwise provide coverage? Presumably, if a clear safe harbor system is developed, there would not be any proceeds available because there would not be anything to insure, and the coverage would have been priced accordingly. In the 9/11 cases, airline liability in the civil cases, if any is ultimately proven up, is limited to these proceeds
  - d. Opportunity to consolidate cases in a single or a few forums—even the Pennsylvania and Pentagon cases from 9/11 went to SDNY.
- Should the safe harbor apply in multihazard scenarios, or only for specific kinds of events? It is important that the law not be crafted so as to give rise to a claim that traditional principles of tort law (e.g., foreseeability) have not been affected by the promulgation of legislation, as applied to claims that fall outside the safe harbor.
- If possible, SEC disclosure rules should not be the vehicle by which a safe harbor is established—to avoid yet another cottage industry for accountants, lawyers and consultants.
- New York General Construction Law Section 24-a(3)(a) authorizes the governor, by proclamation, to designate and appoint one or more bank holidays or holiday periods to be observed throughout the state . . . if an emergency shall in his opinion, require such action. The section defines an emergency as any condition which may interfere with the conduct of normal banking operations in the "holiday area" or which poses an imminent or existing threat to the safety and security of persons or property or both.
- Defenses to contract claims, such as force majeure. More specifically, we discussed UCC Section 4-109, which would excuse delays related to forward collection and return of checks if (i) the delay is caused by the interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank, and (ii) the bank exercises such diligence as the circumstances require.
- The likelihood that written reports prepared by contingency planning experts would become discoverable ammunition during subsequent litigation, as evidenced by the 1993 World Trade Center case. We also discussed whether the legislative creation of some sort of self-critical or self-evaluative analysis privilege would provide comfort and remove the current disincentive for companies to plan appropriately for these events.