

The Duty to Prepare

By Christa Meyer Hinckley



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Regrettably, to date in the first decade of the 21st century, unimaginable catastrophes, both man-made and natural, are becoming almost commonplace. The first six (6) years of this century have seen the terrorist attacks of 9/11; bombings in Bali, Madrid, London, Israel, Iraq, and Egypt; the South Asian tsunami; the seemingly endless stream of hurricanes coming ashore, including Katrina, Wilma and Rita; and the devastating earthquake in Pakistan. On a much smaller scale, but equally traumatic to those it affects, are the almost daily reports of disasters caused by industrial accidents and workplace violence. We have also now heard the dire predictions of the next “big one” to hit San Francisco published in connection with the memorials marking the centennial anniversary of the earthquake of 1906, and we continue to receive threats of more terrorist actions by Al Qaeda and other organizations.

In addition, most Americans witnessed first hand, via their televisions and computers, the devastation that can be caused not only by a catastrophic event itself, but also by the lack of an adequate, competent emergency response by governmental agencies of all levels, local, state and federal. Emergency response has long been viewed as the responsibility of government, and failure to have an emergency response plan or to follow an existing plan has led to liability for government agencies.¹ However, what is increasingly emerging is that private business entities may also have a legal duty, in addition to a moral and ethical one, to have in place assessments of their exposure to these risks and a plan to respond. In fact, it can be argued that a minimum preparedness and response standard (albeit a voluntary one) for private enterprises already exists at the Federal level.

From where is this duty emerging? Just as the right to privacy was found to exist in a “penumbra” of different constitutional rights by Justice Douglas, it is arguable that this duty is emerging from a “penumbra” of different sources. The concept that employers and business owners have the obligation to provide a safe operating environment is not new in the United States. It has long been embodied in such things as:

- The Federal Occupational Safety and Health Act (OSHA)
- Department of Labor standards
- Building and fire codes
- Workers Compensation statutes
- Standard tort liability concepts

The obligation to provide your employees, tenants and business invitees with a safe working environment has its roots in tort law. Simplistically, in society every person

¹ *See e.g.* Commerce and Indus. Ins. Co. v. Grinnell Corp. 280 F.3d 566 (5th Cir 2002) and Coates v. United States, 612 F. Supp. 592 (C.D.Ill. 1985).

has the obligation or duty to act in a reasonable manner at all times and to employ a reasonable standard of care to prevent damage or injury to others whose injury is, again, reasonably foreseeable (and proximately caused) by the failure to exercise such a standard of care. Failure to adhere to this standard exposes the negligent party to liability for damages. *See e.g. Restatement (Second) of Torts* §282. As it is increasingly apparent that the occurrence of a catastrophic event is within the scope of the “reasonably foreseeable risks” that an employer or landlord will have to face, then it is not such a large leap to conclude that having a plan in place to respond to such an event (and to minimize or mitigate its effects) is equally reasonable to expect. Failure to have such a plan could, therefore, lead to damages independent of the event that caused the catastrophe in the first place. In fact, in his excellent article, *Emergency Action Plans: a Legal and Practical Blueprint “Failing to Plan is Planning to Fail,”* Chapman University law professor Dennis Binder observed:

Negligence analysis often revolves around the exercise of reasonable care that will either prevent or minimize the risk of an accident or the injuries suffered therefrom. Emergency action plans are just a reasonable, logical extension of existing negligence analysis. Plans to respond to a disaster are just as integral in negligence analysis as exercising reasonable care to prevent an accident. Emergency action plans are just as critical in minimizing losses as design, construction, maintenance, operations and inspection.²

The necessity of emergency response planning has also long been recognized in various industries such as airlines, coal mines, hydroelectric plants, refineries and others.³ But, as a result of the 9/11 attacks, the Federal Government, Congress in particular, has come to realize that private sector preparedness is a fundamental component of crisis response and planning.

The Emerging Federal Standard

Thomas Kean, Chairman of the 9/11 Commission, observed that “One of the lessons learned from 9/11 is that private sector preparedness remains critical to our national security.” The 9/11 Commission found, during its examination of the emergency response to the attacks, that “[w]itness after witness told us that despite 9/11, the private sector remains largely unprepared for a terrorist attack. We were also advised that the lack of a widely embraced private-sector preparedness standard was a principal contributing factor to this lack of preparedness.”⁴ The Commission responded by asking

² *See* Dennis Binder, *Emergency Action Plans: A Legal and Practical Blueprint “Failing to Plan is Planning to Fail,”* 63. U. Pitt. Law Rev. 791, 813 (2002).

³ *See e.g.* Aviation Disaster Family Assistance Act of 1996, Public Law 104-264, Title VII (1996). For a review of some of the statutory and regulatory requirements for the establishment of emergency action plans *see* *Emergency Action Plans: A Legal and Practical Blueprint “Failing to Plan is Planning to Fail,” supra.*

⁴ The 9/11 Report, Chapter 12, Section 12.4 *Protect Against and Prepare for Terrorist Attacks—Private Sector Preparedness.* (2004)

the American National Standards Institute (ANSI) to develop a consensus on a “National Standard for Preparedness” for the private sector. In 2004, the American National Standards Institute (ANSI) recommended to the 9/11 Commission that its Standard on Disaster/Emergency Management and Business Continuity Programs (NFPA 1600) be adopted as a voluntary national preparedness standard. The Commission endorsed this recommendation and cited NFPA 1600 as establishing a common set of criteria and terminology for preparedness, disaster management, emergency management and business continuity programs.⁵ Importantly, the Commission concluded its recommendation with the following words:

We believe that compliance with the standard should define the standard of care owed by a company to its employees and the public for legal purposes. Private-sector preparedness is not a luxury; it is a cost of doing business in the post-9/11 world. It is ignored at a tremendous potential cost in lives, money and national security.⁶

Consistent with the 9/11 Common Report, Congress, in Section 7305 of the *Intelligence Reform & Terrorism Prevention Act of 2004*, made the following findings and recommendation:

First: The private sector organizations own 85% of the Nation’s critical infrastructure and employ the vast majority of the Nation’s workers;

Second: Preparedness in the private sector and public sector for rescue, restart and recovery of operations should include:

- A plan for evacuation
- Adequate communication capabilities
- A plan for continuity of operations

Third: The American National Standards Institute recommends a voluntary national preparedness standard for the private sector based on the existing American National Standard on Disaster/Emergency Management and Business Continuity Programs (NFPA 1600) with appropriate modification. The standard establishes a common set of criteria and terminology for preparedness, disaster management and business continuity programs.

⁵ *Id.*

⁶ *Id.*

Fourth: The mandate of the Department of Homeland Security extends to working with the private sector as well as government institutions.

Recommendation: It is the sense of Congress that the Secretary of Homeland Security should promote, where appropriate, the adoption of voluntary national preparedness standards such as the private sector preparedness standard developed by the American National Standards Institute and based on the National Fire Protection Association 1600 Standard on Disaster/Emergency Management and Business Continuity Programs.⁷

The NFPA 1600 is an approximately forty page document which sets forth the criteria to assess current programs or to develop, implement and maintain a program to mitigate, prepare for, respond to and recover from disasters and emergencies. While it is too long to address here in detail, some of its more salient sections provide as follows:

- The entity (whether it be public or private) shall identify:
 - Hazards (which include both natural and human caused events)
 - the likelihood of their occurrence
 - the vulnerability of the people, property, the environment and the entity itself to those hazards⁸

- The entity shall also:
 - develop and implement a strategy to eliminate hazards or
 - mitigate the effects of hazards that cannot be eliminated; and
 - develop, coordinate and implement operational procedures to support the emergency management program which shall address the safety, health and welfare of people, the protection of property and the environment⁹

- The emergency management program developed shall include, but shall not be limited to:
 - a strategic plan
 - an emergency operations/response plan
 - a mitigation plan
 - a recovery plan
 - a continuity plan¹⁰

⁷ Intelligence Reform and Terrorism Prevention Act of 2004, 108 P.L. 458, §7305

⁸ Standard on Disaster Management and Business Continuity Programs (NFPA1600) (2004) Sections 5.3.1 and 5.3.2

⁹ *Id.*, at Sections 5.4.1 and 5.10.2

¹⁰ *Id.*, at Section 5.7.1

- The entity shall also:
 - assess training needs and shall develop and implement a training/educational curriculum to support the program¹¹
 - shall evaluate its program plans, procedures and capabilities through periodic reviews, testing post-incident reports, lessons learned, performance evaluations and exercises¹²
- The entity shall develop financial and administrative procedures to support the program before, during and after an emergency or disaster¹³

In addition, in December 2004, the Department of Homeland Security issued, in response to Homeland Security Presidential Directive (HSPD)-5, the almost three inch thick National Response Plan which sets forth the “Master Plan” by which the United States Government was to respond to domestic disasters, both man made and natural. The National Response Plan did address, although somewhat briefly, the private sector’s obligations with respect to disaster management planning:

- *Responsibilities:* Private sector organizations support the National Response Plan . . . by sharing information with the Government, identifying risks, performing vulnerability assessments, **developing emergency response plans** and business continuity plans. . . [emphasis added]¹⁴
- *Response Resources:* [P]rivate- sector organizations are encouraged to develop and maintain capabilities to respond and to manage a complete spectrum of incidents and emergencies. . . .¹⁵

The Government has continued its emphasis on the need for the private sector to “be prepared” with such web sites as the Department of Homeland Security’s *www.Ready.gov* and the Small Business Association’s web site found at *www/sba.gov/bewareandprepare/business.html*.

There are other reasons why private companies should have disaster mitigation plans in place. First, there is empirical evidence that the way a company responds to a disaster (in particular a mass fatality disaster) is a much stronger determinant of recovery than are the direct financial consequences of a loss. *See* “*Protecting Value in the Face of Mass Fatality Events*” (2005) by Rory F. Knight and Deborah J. Pretty (Oxford Metrica) and their previous work “*The Impact of Catastrophes on Shareholder Value*” (1996) (Templeton College, University of Oxford commissioned by Sedgwick). In addition,

¹¹ *Id.*, at Section 5.12.1

¹² *Id.*, at Sections 5.13.1 and 5.13.2

¹³ *Id.*, at Section 5.15.1

¹⁴ National Response Plan, Base Plan, Section III. Roles and Responsibilities, p. 13

¹⁵ National Response Plan Support Annexes, Private-Sector Coordination, p. 2

even before Hurricane Katrina, it was established that property and casualty insurance (including business interruption insurance) would not cover all of the losses a business suffers in the event of a catastrophic loss, and recovery of insurance proceeds could be a lengthy, time consuming process.¹⁶ Studies of this nature, combined with the financial risk analysis now required by Sarbanes-Oxley, should make chief financial officers at companies throughout the US require immediate review and assessment of how their companies plan to respond to a catastrophe, and the financial resources in place to make certain that such plans can be carried out. Loss of shareholder value as a result of a failure to plan could also lead to Director and Officer Liability exposure. Finally, other liability causes of action could be asserted as the result of poor planning. The failure to warn and the negligent infliction of emotional distress come to mind.

Although to date there appears to be no judicial codification of the “duty to prepare,” it will be interesting to see if, in the legal maelstrom that is occurring in the aftermath of Hurricane Katrina, this duty is legally recognized or at least expanded upon. In any event, I must concur with the conclusion of the 9/11 Commission, private sector preparedness is not a luxury any longer, it is a cost of doing business.

¹⁶ See e.g. Andrew Miles *Business Continuity: Best Practices* (2nd Edition) Section 2.19, page 30 (2004)

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- Directed resolution of airline hull and passenger subrogation claims, including multi-million dollar hull recoveries
- Coordinated the on-site response for four fatal accidents involving American Airlines and American Eagle aircraft, including American's 1995 crash outside Cali, Colombia and its 1999 crash in Little Rock, Arkansas
- Managed and settled multi-district litigation arising from four fatal aircraft accidents
- Key member of the senior management team responding to American Airlines Flights 77 and 11 on September 11, 2001
- Primary industry contact point with FAA regarding the drafting of emergency terrorism insurance policy issued pursuant to the Air Transportation Safety and System Stabilization Act of 2001
- Served as Managing Director of American Airlines' Family Assistance Program
- Negotiated aircraft/engine purchases in excess of \$10 billion dollars
- Served as key member of the legal mergers and acquisitions team for multi-million dollar acquisitions of several airlines, FBO's and airline asset acquisitions
- Responsible for the legal and insurance coordination of American Airlines' participation in Operation Desert Shield/Desert Storm (1990-1991) pursuant to Civil Reserve Air Fleet program (CRAF)
- Negotiated aircraft dispositions, equipment leveraged leases, software licensing agreements, international marketing and codeshare agreements, and computer technology acquisitions

* Past results afford no guarantee of future results. Every case must be judged on its own merits.
The choice of a lawyer is an important decision and should not be based solely upon advertisements.

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Representative Clients

- CAVOK International, Inc.
- Curt Lewis & Associates, LLC
- Infinite Security, a division of Infinite Computer Technologies, Inc.
- Kenyon International Emergency Services
- Securitas Security Services USA, Inc.
- Thompson Management, LLC

Admissions

- Texas, 1980
- Colorado, 1979
- * Not currently admitted to the State of Missouri

Background

- Joined firm as Partner, 2006
- Law Offices of Christa M. Hinckley, PLLC, Founder, 2004-2006
- GE Employer's Reinsurance Corporation, Global Runoff Claims Leader, 2002-2004
- American Airlines, Inc., Managing Director, Insurance and Risk Management, 1994-2001
- American Airlines, Inc., Attorney and Senior Attorney, 1986-1994
- Private Practice, Colorado and Texas, 1979-1985

Education

- J.D., University of Denver, 1979
Order of St. Ives
- B.A., Trinity University, *magna cum laude*, 1976
Phi Beta Kappa

Professional Affiliations

- American Bar Association
- Aviation Insurance Association
- Colorado Bar Association
- Dallas Bar Association
- International Aviation Women's Association
- National Transportation Safety Board Bar Association
- Risk Insurance Management Society, Inc.
- Texas Bar Association

Publications and Presentations

- "The Duty to Prepare," Aviation and Space Law Committee Newsletter, Fall 2006
- Panel Moderator, "Do We Insure This? Issues in Aviation Insurance," American Bar Association's Section of Litigation, Aviation Litigation Committee, CLE Seminar, June 2006

- Speaker, "War Risk and Weapons of Mass Destruction: Bridging the Divide Between Exposure and Coverage," International Air Transport Association's Airline Insurance & Risk Management Conference, Bangkok, 2006
- Speaker, "Mind the Gap: Gaps in Insurance Coverage between the FAA and Commercial War Risk Insurance Programs," ABA's Tort and Insurance Practice Section of the Aviation and Space Law Committee, Washington DC., 2005
- Speaker, "NTSB Family Assistance: History and Support Requirements," International Society of Air Safety Investigators' annual meeting, Fort Worth, TX, 2005
- Panel Speaker, "Accident Investigation Part I: The Airlines' Perspective in the Immediate Aftermath of an Accident," 9th Annual Aviation Litigation Seminar, sponsored by the Aviation Litigation Committee of the ABA Section of Litigation, NY, NY, 2003
- Speaker, "Aviation Liability Insurance Pre and Post September 11th," Federation of Defense & Corporate Counsel's 2002 Risk Analysis Symposium, Atlanta, GA, 2002
- Speaker, "Service to Victims," International Airline Transportation Association's ("IATA") Airline Insurance Rendezvous, London, England, 2002
- Speaker, "Reviewing the Effectiveness of the Model Codeshare Agreement," 17th Annual Insurance Day/DYP Airline Insurance Conference, London, England, 2001
- Speaker, "Aftermath of an Airline Disaster - Family Assistance," Beaumont Garnault 5th International Aviation Conference, London, England, 2000
- Speaker, "The Warsaw and New Montreal Conventions: Managing the Change," International Air Transport Association (IATA) Legal Symposium, San Diego, CA, 2000
- Keynote Speaker, 15th International Airline Insurance Conference, Queen Elizabeth II Conference Center, London, England, 1999

Civic and Charitable Activities

- Air Transport Association Risk and Insurance Panel, Vice Chair, 1998-2000, Chair, 1999-2000
- International Air Transport Association, Risk and Insurance Managers' Panel, 1998-2001
- Lone Star Council of Camp Fire Boys and Girls, Board Member, 1998-2002