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## **Actions/Inactions of Professionals During a Catastrophe Can Affect Liability**

### **Introduction**

Catastrophic disaster can occur any day and any time. These disasters include but are not limited to an earthquake, flooding, wildfires, and mudslides. Different professionals like design professionals, insurance agents, and those in the medical field are called on to act in their professional capacity before, during or after the catastrophe. While professional may have the best intentions, their actions/inactions can have a chilling effect on their respective liability. One must always be cognizant that the standard of care for a professional is not perfection but rather what a normal like-minded professional would have done in the same situation. The American Institute of Architects provides in its contract for the standard of care- “[t]he Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.”

### **Proper Planning for Catastrophes**

On the East Coast when it snows there is always the question of whether the State Agencies have done the proper planning. Are the streets pre-treated? Are school timely closed? Many catastrophes are discussed for day in advance and when this happens, the professionals at issue like a doctor or engineer may have more of a responsibility because notice if given well in advance.

Successes and failure in risk mitigation can be the difference between a routine disruption and a major catastrophe. The damage wrought by a natural event is linked to hum activity. Physical phenomena are a necessary component of risk, but they are only the starting point in addressing safety concerns. Calculating and planning for disaster risks must account for acts of nature, weaknesses of human nature and side effects of technology.

Emergency and disaster planning involve a coordinated, co-operative process of preparing to match urgent needs with available resources. The phases are research, writing, dissemination, testing, and updating. Hence, an emergency plan needs to be a living document that is periodically adapted to changing circumstances and that provides a guide to the protocols, procedures, and division of responsibilities in emergency response. Emergency planning is an exploratory process that provides generic procedures for managing unforeseen impacts and should use carefully constructed scenarios to anticipate the needs that will be generated by foreseeable hazards when they strike.

Plans are needed, not only for responding to the impacts of disaster, but also to maintain business continuity while managing the crisis, and to guide recovery and reconstruction effectively. Additional planning need to be done in case of a prolonged power outage which could make it easier access to cyber-attacks. Dealing with disaster is a social process that requires public support for planning initiatives and participation by a wide variety of responders, technical experts and citizens. It needs to be sustainable in

the light of challenges posed by non-renewable resource utilization, climate change, population growth, and imbalances of wealth. Although, at its most basic level, emergency planning is little more than codified common sense, the increasing complexity of modern disasters has required substantial professionalization of the field. This is especially true in light of the increasing role in emergency response of information and communications technology. Disaster planners and coordinators are resource managers, and in the future, they will need to cope with complex and sophisticated transfers of human and material resources. In a globalizing world that is subject to accelerating physical, social, and economic change, the challenge of managing emergencies well depends on effective planning and foresight, and the ability to connect disparate elements of the emergency response into coherent strategies.

### **Duties of Medical Professionals**

Medical professionals, whether they be doctors or nurses have consistently shown to be reliable responders, and their compassionate nature typically compels them to respond to those in need, even when it puts their own safety or well-being at risk. Society, as such, sanctions professions to be self-regulating on the understanding that such a response would occur. But do medical professionals have a contractual “duty” to answer a call to help in disaster situations? Do they have an ethical obligation to respond? For example, a nurse’s duty to care is an ethical component of the nurse-patient relationship that can be inferred from Provision 2 of the ANA Code of Ethics for Nurses with Interpretive Statements which states that “the nurse’s primary commitment is to the patient.” However, nurses not only have an ethical obligation to care for others but also to care for themselves. Provision 5 of the Code states that the nurse owes the same duty to self as to others. This conflict of obligation is especially prominent during times of disaster when nurses are put in the position to provide care to critically ill or wounded patients for extended periods of time. During these times of pandemics or natural catastrophes, nurses and other health care providers must decide how much high quality care they can provide to others. Registered nurses, especially those in nonemergency response functions, may find themselves in a difficult predicament. They are called upon to respond in times of mass casualty—such as a catastrophic weather event (hurricanes/floods) — or when the nature of their work puts them at risk for exposure—such as influenza or other infectious disease pandemics.

### **Duties of Insurance Brokers/Agents**

Insurance agents and brokers are responsible for their unfaithfulness to the customer and for their fault or neglect. As a professional, the insurance agent and broker is charged with knowledge of the different types of insurance policies available and the terms, conditions and parameters of those policies. If he or she does not understand the terms of the policy being sold, the insurance agent or broker is responsible for learning what is included and excluded under the policy.

Upon agreeing and undertaking to procure insurance for a customer, an insurance agent or broker has the obligation to use reasonable diligence in obtaining the insurance requested and must notify the customer promptly if unable to obtain the requested insurance. The customer can recover an uninsured loss from an insurance agent or broker who (1) agreed to procure insurance for the customer, (2) failed to use reasonable diligence in obtaining the insurance or failed to notify the customer promptly of the failure to obtain the insurance and (3) had the customer to assume that he or she was properly insured.

In undertaking to procure insurance for another, the insurance agent or broker must obtain the specific coverage desired by the customer. The customer is required to clearly inform the agent or broker of the desired coverage and must read the clear provisions of the insurance policy. However, if the face of the policy suggests that the desired coverage has been obtained, the customer has no duty to review the entirety of the policy to be sure that it in fact has the desired coverage. If the desired coverage is not or can not be obtained, the agent or broker must inform the customer of the difference between the desired coverage and the coverage actually obtained. The agent or broker is not required to discuss with the customer every possible situation which might arise and whether that situation would be covered under

the policy, but must inform the customer when the policy does not cover a particular risk about which the customer specifically inquired.

Although insurance agents and brokers both owe the same fiduciary duty to a customer, there may well be distinctions in how they satisfy those duties as a result of their different roles. For example, one court has held that where an insurance broker has experience in a particular field, proper diligence in attempting to obtain coverage for a customer requires the broker to “canvass the market” and be informed about different companies and variations in available terms. On the other hand, while an insurance agent would certainly be expected to know the coverages offered by the insurance company employing him or her, and the terms, conditions and exclusions of those coverages, it is doubtful whether the insurance agent would have a duty to “canvass the market” and direct a customer to a competitor.

The duties owed by the agent or broker to a customer may extend beyond the simple acquisition of requested insurance coverage. Louisiana courts consider agents and brokers to be more than “mere order takers.” Certainly, insurance agents or brokers must properly perform basic functions of acquiring insurance coverage, such as sending proper information about the customer to the prospective insurers and forwarding applications and premiums received from the customer to the insurer. However, the agent’s and broker’s fiduciary duties include advising the customer with regard to recommended coverage, and investigating and ascertaining the financial condition of prospective insurance companies. Again, these duties may not be applied or evaluated in exactly the same manner for agents and brokers. Nor are these duties exclusive—they may be broader depending on what services an agent or broker holds himself or herself out as performing. In other words, the circumstances surrounding the dealings between a particular customer and an insurance agent or broker will have some influence on the scope of the duty and obligation owed by the agent or broker to the customer.

Nor do the agent’s and broker’s duties and obligations to the customer end after an insurance policy has been obtained and delivered to the customer. Agents and brokers have an affirmative duty to notify the customer of any premature termination or cancellation of the policy. They must also promptly notify the customer of possible financial problems with the company issuing the policy, such as insolvency, the placement of the insurance company in rehabilitation or other questionable financial information subsequently received.

In *Ring v. Meeker Sharkey*, plaintiff owned three residential dwellings: her primary home in Trenton; a small beach bungalow in Seaside Park; and a three-story Victorian home in Ocean Grove. The Ocean Grove property suffered an electrical fire on May 25, 2009, and was the subject of the litigation. The amount of coverage available through the policy insuring the Ocean Grove property was \$150,000, and the amount of fire damage exceeded the policy limits. Plaintiff filed her complaint alleging defendant’s procurement of inadequate insurance coverage constituted professional negligence and caused her loss. The unrefuted deposition testimony of the insurance broker disclosed that questions posed to the insured that were designed to determine the adequacy of the insurance coverage were rebuffed by the insured, who expressed she “wanted those homes to remain covered under the amount that was on the policy at that time [,]” that is, under a prior policy, because they were second homes and unencumbered by mortgages. The agent described plaintiff as “extremely feisty” and as the most tenacious person I’ve ever spoken to ...” Additionally, the plaintiff provided inaccurate information to the agent concerning the square footage of the house, as well as the age of the house.

In affirming the grant of summary judgment to the agent, the Appellate Division decision found there was no evidence at odds with the agent’s testimony that plaintiff had sought coverage similar to her prior homeowners’ policy; that the plaintiff had advised the agent that the \$150,000 coverage was adequate because the home was unencumbered; or that the plaintiff had expressed a concern to avoid possible modifications in coverage of the concomitant increase in premiums. Moreover, the court concluded that “when plaintiff received the policy, which stated

the total coverage, she did not object. The amount of coverage is clearly and prominently stated and easily understood. Were plaintiff dissatisfied with the extent of coverage, an opportunity to raise such concerns presented itself with each annual renewal.” Id. at 19. Citing to Want, supra, 125 N.J. at 11-12, the court noted that there is no common law duty of a carrier or its agents to advise an insured concerning the possible need for higher policy limits upon renewal of a policy. Duffy, supra, at 19.

The court concluded that the facts of the case did not trigger a breach of the special relationship exception because agent acted as instructed by the insured. Id. At 22. Noting that an agent or broker’s liability is not unbounded, the court stated, in pertinent part:

Aside from a broker receiving specific requests and directives from an insured, we decline the invitation to impose a more stringent duty upon any insurance broker, by mandating an obligation to inspect or possibly appraise real property when originating a policy. We similarly decline to obligate brokers to inform clients their present coverage is inadequate or calculate the replacement value of the home in circumstances where the insured does not request or desire such coverage. We can only speculate as to the cost consequences of such a mandate and cannot know the impact on a broker’s or underwriter’s ability to do business under such circumstance. We continue to follow the Supreme Court’s directive in this regard; the Legislature is best equipped to obtain expert input from the Department of insurance and other interested parties allowing it to discern the most appropriate requirements for brokers and agents originating homeowner’s insurance policies to do so in accordance with the needs of citizen in this state.

[Id. At 26-27]

Even if the insurance agent or broker does breach a duty or obligation owed to a customer, the agent or broker is not liable for the customer’s uninsured loss unless the agent’s or broker’s breach was the cause in fact of the customer’s loss. Thus, if the loss was uninsurable in any event or if coverage would have been excluded for some reason other than the agent’s or broker’s breach of duty, such as the customer’s failure to pay premiums, the agent or broker should not be responsible for the customer’s uninsured loss.

Similarly, to the extent the agent or broker is responsible for the customer’s uninsured loss, the amount owed by the agent or broker should be the amount which would have been paid under the insurance policy that should have been obtained, taking into account the deductible and policy limit.

## **Duties of Engineers**

Canon 1 of ASCE's Code of Ethics is certainly applicable: "Engineers shall hold paramount the safety, health and welfare of the public...in the performance of their professional duties," and category (a) in the guidelines to practice for this canon adds the following: "Engineers shall recognize that the lives, safety, health and welfare of the general public are dependent upon engineering judgments, decisions and practices." The recognition described in this guideline implies more than a mere abstract awareness of the engineer's duty to the public; it requires the engineer to be untiringly vigilant in preserving the interests of the men, women, and children whose lives may be affected by the engineer's actions. In New Jersey even if an engineer does not have a contractual site safety duty, if one is aware of an unsafe condition the engineer has a duty to notify owner of the unsafe condition.

Yet the decades leading up to the Katrina disaster bore witness to a pattern of decisions in which compromises in the safety and reliability of the New Orleans levee system were made for reasons having to do with cost, scheduling, or political pressure. Instead of a single flaw serving as the direct cause of the failures, the hurricane protection system as a whole was significantly underdesigned for its purpose, which represented an overall lapse in vigilance on the part of the engineers and other decision makers in their obligation to protect the residents depending on the levees.

One example of these compromises in safety lay in the U.S. Army Corps of Engineers' calculation of soil strength for the 17th Street Canal levee and floodwall. The Corps engineers based their estimate of soil strength below the canal on boring samples spaced across a 1.5 mi distance, but the New Orleans area is characterized by high variability in soil strength. Although the engineers used a target factor of safety to account for this variation, they chose a value of 1.3, which is at the low end of generally accepted engineering values and below the Corps's own engineering guidelines. While not the key factor in the failure of the 17th Street Canal levee, the combination of a nonconservative interpretation of sample data and a low factor of safety led the engineers to overestimate the average soil strength by some 30 percent in their design

A second example involved the decision to design the levee system for a less severe hurricane. The Corps chose to model its system on what it defined as a standard project hurricane, which incorporated the most severe parameters that were "reasonably characteristic" of the region. On the basis of U.S. Weather Bureau projections of wind speeds of 101 to 111 mph as representative of the area, the engineers once again chose data at the low end of the spectrum and designed the system for Lake Pontchartrain and the vicinity for a surface wind speed of 100 mph. Moreover, when the National Weather Service (as the successor of the U.S. Weather Bureau) later raised its projected maximum wind speeds to 151 to 160 mph, the Corps failed to update its standard project hurricane assumptions or to alter its design to match the new data. Thus, the system modeled for lower wind speeds was incapable of handling Katrina's 125 mph winds and associated storm surge

Still another example of safety compromises involved the heights of the levee structures. The Corps designed the levee system relative to mean sea level, but many structures were built with reference to land-based datums that were incorrectly believed to be equal to local mean sea level. Moreover, despite knowing that the New Orleans region is subsiding at a rate of roughly 0.2 in. per year, the Corps declined to make an allowance for this subsidence in its design, a decision attributed to a congressional restriction on considering water above "authorized levels." In such areas as the Industrial Canal, the combination of improper elevation data and subsidence meant that the structures were a full 2 ft lower than called for in the design

These are a few simple examples of the complex problems affecting the readiness of the New Orleans levee systems for an extreme storm. In fact, the engineering and design issues as a whole are only part of the story behind Katrina's devastating impact. Additional problems brought to light in postdisaster assessments of the hurricane protection system include failures of coordination on the part of federal, state, and local agencies; the absence of a central authority with responsibility for the system; a poor funding mechanism and pressures from government to lower design standards to increase affordability; and the failure of city disaster planners to mitigate the risk with more effective evacuation procedures.

Disaster risk management would benefit from more sophisticated methods of understanding risk. For example, engineers have traditionally safeguarded their projects through the technique of overdesign, a practice of compensating for uncertainties in loading, materials, quality of construction and maintenance, etc. Overdesign is accomplished by adopting some multiple of loading as a margin of safety ranging from 1.4 to 5.0 and even greater. How these margins are set is of critical importance, especially when tradeoffs with cost, deadlines, or other factors may compromise the intended reduction of risk. We need a fuller understanding of risk, going beyond this engineering rule of thumb, if we are to deal with environmental disasters.

Other fields of law such as torts, insurance, and toxics regulation deal with risks, but disaster law provides a comprehensive look at how to handle risks rather than limiting itself to specific mechanisms such as compensation. Thus, it centers on the design of a portfolio of risk management tools, including prevention, emergency responses, compensation, and restoration. Disaster law also involves public risks, which inherently affect multiple individuals and interest, rather than personal risks that can be managed purely through individual responses.

Nevertheless, if the engineer's ethical duty is to hold paramount the safety, health, and welfare of the public, then the Katrina disaster demonstrates the costs of failing to be vigilant in honoring that duty. As the persons best qualified by education and experience to understand the ramifications of technical decisions, it is essential that engineers question decisions that compromise safety or reliability and that they clearly communicate risks and consequences when they believe a course of action poses too great a threat to the public. Moreover, as the individuals with the greatest understanding of the limitations of engineered systems, it is crucial that engineers be forthright in acknowledging these limitations and that they ensure that the affected parties understand the risks and are prepared for untoward events.

Victim compensation is a central focus of disaster law. Postdisaster compensation to disaster victims generally takes one of three forms: "private insurance, government programs, or the tort system." The legal system provides a mix of public and private sector methods for compensating victims of natural disasters. Each of the methods that have been used to provide compensation for catastrophic risks has its limitations.

The first method of compensation is private insurance. However, the unavailability of insurance for catastrophic risks (due to expense or underwriting risks), exclusion of catastrophic risks by contract, and difficulty of handling very large numbers of claims create significant hurdles. Insurance is not commonly considered as a way of dealing with risks in the area of environmental law, perhaps because the harm generally relates to health rather than property. But it may not always be feasible to eliminate environmental risks, and insurance could provide a useful backup.

The second method of compensation, litigation against responsible private parties, also has its limitations: the need for proof of negligence or some other basis for liability, limits on the financial assets and insurance coverage of potential defendants, and other judicial doctrines limiting recovery. Toxic torts remains a relatively secondary area of environmental law, with the main focus being on regulation or cleanup to reduce risks.

Third is the possibility of obtaining compensation from the government through various routes: tort claims against federal or state government for negligence (subject to immunity defenses), claims based on constitutional provisions requiring compensation for taking (or in some states, damaging) of property. In addition, the United States government provides flood insurance. We have no similar system of insurance for other hazards.

### **Limitation of Liability**

Most states have provisions that limit legal liability during emergencies. Ball from South Carolina outlined a number of laws that help limit medical malpractice liability during emergency situations in South Carolina, including the following:

Emergency Health Powers Act (44-5-570, (C)(1)): "Any health care provider appointed by [the South Carolina Department of Health & Environmental Control] ... must not be held liable for civil damages as a result of medical care ... unless the damages result from ... circumstances demonstrating a reckless disregard for the consequences."

Medical Malpractice Act (38-79-30): "Volunteer (non-compensated) health care provider ... not liable for any civil damage for any act or omission resulting from the rendering of the (medical) services unless ... act or omission was the result of ... gross negligence or willful misconduct."

Similar laws exist in most other states. But although these laws represent a good start, they come with one major drawback during crisis standards situations. Raymond Pepe of the Uniform Law Commission (ULC) noted that the laws "by and large immunize ordinary acts of negligence while not immunizing gross negligence or willful disregard of standards of care."

There can also be contractual limitation of liability that can be applied to catastrophic events as well.

## **XI. Conclusion**

Disaster law as a whole is unified by the concept of risk management. Each stage of the circle of disaster mitigation, emergency response, insurance/liability compensation, government assistance, rebuilding is part of this risk management portfolio. Mitigation efforts attempt to lessen the potential impact of disaster events before the fact, while disaster response attempts to do so afterwards. Insurance, tort, and government disaster assistance provide ways of spreading and shifting risks. Rebuilding is in some sense just the mitigation phase for the next disaster down the road.

These risk management techniques are interwoven. For instance, the prospect of generous disaster assistance creates moral hazard, which may necessitate government intervention to ensure adequate mitigation. In turn, adequate mitigation before the fact reduces the need for disaster assistance or insurance after the event. Disaster response can have a similar relationship with mitigation a quick and effective response reduces the need for precautionary measures. For instance, if complete evacuation of an area is anticipated, the need for flood control may be reduced. To complete the cycle, post-disaster assistance, insurance, and other forms of compensation help shape post-disaster rebuilding and the degree to which future disaster risks are mitigated. Thus, the tight linkage between various risk management strategies provides a conceptual framework for disaster law.