The Role of Statutes, Regulations and Professional Standards in Emergency Responses

Denis Binder
THE ROLE OF STATUTES, REGULATIONS AND PROFESSIONAL STANDARDS IN EMERGENCY RESPONSES *

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Professor Denis Binder
Chapman University School of Law
One University Drive
Orange, California 92866
714-628-2505
dbinder@chapman.edu
INTRODUCTION

The number of ways an accident can occur, a facility fail, or system malfunction is probably infinite. Accidents, disasters and tragedies happen. Structures fail and systems malfunction despite the best precautions. Natural phenomena include avalanches, blizzards, cold snaps, disease, drought, earthquakes, fire, floods, freezing rains, heat waves, hurricanes, ice storms, influenza, landslides, lightning, pestilence, plague, tornadoes, tsunamis, volcanoes, wildfires, and wind. Human acts can include basic carelessness, computer crashes, errors in judgment, hacking, viruses, spyware and worms, criminal acts, deferred maintenance, disgruntled employees, industrial accidents, pollution, sabotage, terrorism, vandalism, and bioterrorism. Environmental emergencies include air pollution, oil spills, toxic spills, water pollution, and workplace accidents.

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1 These criminal acts can range from assassinations and kidnappings of critical personnel to acts of either peaceful or violent civil disobedience.

2 On December 7, 1984 methyl isocyanate, a toxic gas, escaped from a Bhopar, India plant, jointly owned by Union Carbide, killing over 2,000 and injuring over 200,000. In Re Union Carbide, 809 F. 2d 195 (2nd Cir. 1987).

The emergency may even include secondary impacts remote from an incident, or just threats which never materialize, but which require a response.

However, whether the cause of the emergency is of human, natural, or more recently technological, origin or a combination of them, the impacts and results may be the same. While the threats may be infinite, the foreseeable damage, the resulting emergency, is finite.

The preferred approach is to minimize risks in the first instance. However, since such a goal is unachievable, the next step is to plan in advance to mitigate the damages if the risk materializes.

Today’s victims, unlike decades past, will often sue all possible wrongdoers; that is, anyone who might be remotely at fault, or played a role, however slim, in bringing about the tragedy.

The legal standards for emergency action/business continuity plans may be found in statutes, regulations, professional codes and industry standards, or through default by

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4 These can include the loss of a critical resource or the fallout from an economic collapse. For example, the events of 9/11 had a devastating impact on the hospitality industry throughout the United States and much of the world.

5 For example, in today’s world credible threats must be followed up on even if, with the benefit of hindsight, the response appears to be an overreaction to a false alarm.

6 People are increasingly moving into geologically fragile areas, such as floodplains, hurricane zones, landslide areas, and seismic zones. In general, see Denis Binder, The Duty to Disclose Geologic Hazards in Real Estate Transactions, 1 Chapman L. Rev. 13, 45-50 (1998).


By way of contrast, only one plaintiff received damages in the Johnstown, Pennsylvania Flood of May 31, 1989. 2209 died as the result of the dam’s failure. The recovery was for luggage lost in the flood because of a railroad’s misshipment. Wald v. Pittsburgh, C.C. & St. L. R.R. Co., 44 N.E. 888 (Ill. 1896). On the other hand, “several juries held that the flood was an act of God” and held for defendants. Donald J. Jackson, When 20 Million Tons of Water Flooded Johnstown, Smithsonian, May 1989 at 50, 60.

8 For example, maritime safety regulations are found at 33 C.F.R. part 105.
the common law principle of negligence. The issue is what role do these sources of legal authority play in assessing liability to the victims of the incident?

**Negligence**

A summary of the basic principals of negligence law serves as the back ground for understanding the role of professional standards. The most common cause of action in tort law is negligence, which is broadly defined as the failure to exercise reasonable care under the circumstances. As more technically defined, negligence is the failure to exercise the standard of care of a reasonable person under similar circumstances.\(^9\)

Plaintiffs have the burden of proof to establish four basic elements: duty, breach, causation, and damages. Duty usually focuses on the reasonable foreseeability of the risk, with the critical issue being how should a reasonable person act in light of the foreseeable risk. 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). Thus, an act of omission (the failure to respond in the first instance) to a foreseeable risk is as culpable as affirmative misconduct; an act of commission. Indeed, much of negligence liability consists of a failure to exercise reasonable care to either prevent or minimize foreseeable risks.

The great jurist, Learned Hand, once wrote that negligence is the calculus of three factors: how likely is a failure to occur (the risk), what are the possible consequences should the failure occur (the gravity or magnitude), and what is the burden of alternatives or precautions.\(^{10}\)

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\(^{10}\) United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947); see also, Conway v. O'Brien, 111 F.2d 611, 612 (2nd Cir. 1940).
Negligence is a flexible concept, which varies with the risk, technology, and potential consequences. As the risk increases, so too does the standard of care. For example, a higher duty of care is imposed on one who operates a large dam overlooking an urban population than a stock watering pond in the middle of nowhere. In addition, changes in technology may allow us to improve safety.

**DUTY**

**Foreseeability of the Risk**

Duty is normally based upon the reasonable foreseeability of the risk. Foreseeability is a broad standard, far reaching in its application. However, almost everything is foreseeable with the benefit of hindsight. The ultimate question though is

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11 The principle was laid out in an early New York case, **Mayor of New York v. Bailey**, 2 denio 433, 440-41 (N.Y. 1845). As stated in the basic treatise on tort law, Prosser & Keeton on the Law of Torts 171 (5th Ed. 1984),

[If] 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 to correspondingly less to generate a duty of precaution. Albison v. Robbins & White, Inc., 116 A.2d 608, 612 (Me. 1959); Willie v. Minnesota Power & Light Co., 250 N.W. 809 (Minn. 1933); Erickson v. Bennion, 503 P.2d 139, 140-41 (Utah 1972)(The degree of care increases in proportion to the hazards to be anticipated."). See also, City Water Power Co. v. City of Fergus Falls, 113 Minn. 33, 37, 128 N.W. 817, 818 (1910)(The owner is bound to exercise in construction and maintenance of a dam the degree of care proportionate to the injuries likely to result to others if it proves insufficient); Herro v. Board of County Road Commissioners for County of Chippewa, 368 Mich. 263, 118 N.W.2d 271 (1962); Dover v. Georgia Power Co., 168 S.E. 117, 118 (Ga. Ct. App. 1933) (Due care is “in proportion to the extent of the injury which will be likely to result to third persons…”); Mackay v. Breeze, 269 P. 1026, 1027 (Utah 1928) (“The degree of care required to prevent the escape of water is commensurate with the damage or injury that will probably result if the water does escape”); Erickson v. Bennion, 503 P.2d 139, 140-41 (Utah 1972); Stallman v. Robinson, 745 S.W. 2d 735 (Mo. 1953) (Hospital owes a patient a duty of reasonable care proportionate to the patient’s needs).

not foreseeability per se, but whether in light of that reasonable foreseeability, how a reasonable person would have acted, taking into account the potential risk, magnitude of harm, and the available alternatives.

What we are dealing with in many of these cases is in effect a failure to plan in light of the foreseeable risk; in short, the negligent failure to plan. The duty to plan for emergencies is rooted in the common law, as well as being imposed by statutes, regulations and professional standards.

Negligence extends to anyone and everyone foreseeably at risk – not just those who might be in privity of contract with the defendant. Foreseeable victims can therefore include employees, co-workers, commercial enterprises, governmental

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13 Courts may sometimes look just to foreseeability rather than reasonable foreseeability as the standard. For example, the California Supreme Court went through a period of time in which the key to duty was foreseeability. See e.g. Bigbee v. Pacific Tel. & Tel. Co., 665 P.2d 947, 951-53 (Cal. 1983); Weirum v. RKO Gen., Inc., 119 Cal. Rptr. 191 (1975)(“foreseeability “is a primary consideration in establishing” duty.”)

14 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, 7 Kan. App. 2d 495, 644 P.2d 480 (1982) (contractor liable to a third party); Waldor Pump & Equipment Co. v. Ott-Schellen-Meyerson & Co., 386 N.W.2d 375 (Minn. App. 1986); Montijo v. Swift, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (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, 59 Ill. App. 2d 38, 112, 208 N.E.2d 249, 284 (Ill. 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., 186 Conn. 370, 375 441 A.2d 620, 624 (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.

15 Although workers compensation will normally be the only remedy an employee has against an employer, normal tort remedies will lie against culpable third parties.
entities, customers, contractors, sub-contractors, tenants, neighbors, visitors, recreational users, travelers, and even trespassers.

Even inspectors, who are neither in a relationship to the victims nor operating a facility, may be liable in negligence for failing to discover problems. For example, a private engineering firm, under contract with a government agency to inspect a bridge, owes a legal duty to all the travelers on the bridge – not just the governmental agency, which contracted with it to conduct inspection.

Liability can attach to the original designers, contractors, sub-contractors, owners, operators, leasees, inspectors, and perhaps regulators, involved in designing, constructing, operating, maintaining, repairing, planning, executing, or implementing a facility, structure, plan, undertaking or operation. Similarly, liability can extend to any

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18 Id.


24 Shell v. Town of Evarts, 178 S.W. 2d 32 (Ky. 1944).

party involved with repairs, alterations, additions, modifications, or any other changes to it.

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 the occurrence.

**The Duty of a Professional**

A professional, such as an architect, engineer or physician acting in a professional capacity, is held to the professional standard of care. At a minimum, the expert impliedly promises to exercise the standard of reasonable care required of members of the profession. As the Georgia Supreme Court stated:

26 Aetna Insurance Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472 (8th Cir. 1968), Coberly v. Superior Court, 42 Cal. Rptr. 64, 67 (Cal. Ct. App. 1965) ("[A] lawyer may not gain business as a specialist and defend mistakes as a layman.")

27 See Klein v. Catalano, 386 Mass. 701, 718, 437 N.E.2d 514, 525 (1982); Milton v. Womack, Inc. v. House of Representatives, 509 So.2d 62, 64 (La. Ct. App.); writs denied, 513 So.2d 1208, 1211 (La. 1987); Cowles v. City of Minneapolis, 151 N.W. 184 (Minn. 1915). In a subsequent case involving an architect, the Minnesota Supreme Court elaborated upon the general standard as follows:

The circumstances to be considered in determining the standard of care, skill, and diligence to be required. . . include the terms of the employment agreement, the nature of the problem which the supplier of the service represented himself as being competent to solve, and the effect reasonably to be anticipated from the proposed remedies upon the balance of the system.”

City of Eveleth v. Ruble, 302 Minn. 249, 254, 225 N.W.2d 521, 524-5 (1974). A similar standard was adopted in Pennsylvania:

An architect is bound to perform with reasonable care the duties for which he contracts. His client has the right to regard him as skilled in the science of the construction of buildings, and to expect that he will use reasonable and ordinary care and diligence in the application of his professional knowledge to accomplish the purpose for which he is retained. While he does not guarantee a perfect plan or a satisfactory result, he does by his contract imply that he enjoys ordinary skill and ability in his profession and that he will exercise these attributes without neglect and with a certain exactness of performance to effectuate work properly done… While an architect is not an absolute insurer of perfect plans, he is called upon to prepare plans and specifications which will give the structure so designed reasonable fitness for its intended purpose, and he impliedly warrants their sufficiency for that purpose.
The law imposes upon persons performing architectural, engineering, and other professional and skilled services the obligation to exercise a reasonable degree of care, skill, and ability, which generally is taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by their respective professions.\(^{28}\)

Thus, an engineer designing, building, or operating a facility, such as a dam, will be held to the same degree of care as other experts of the same background, training, education, and experience.

In addition, the higher the level of expertise, training, education or experience of the professional, the greater the legal standard of care that applies. For example, if an emergency life-saving operation must be performed on the side of the road, a general practitioner would not be held to the same standard as a skilled surgeon under these circumstances.\(^{29}\)

Experts and professionals must know the appropriate legal standards. For example, architects are responsible for knowing the building restrictions imposed by the appropriate jurisdiction, such as through a city’s building or zoning codes.\(^{30}\)

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\(^{29}\) In Aetna Insurance Co. v. Hellmuth, Obata & Kassabaum, Inc., 92 F.2d 472, 477 (8th Cir. 1968), the court stated:

> The standard of care applicable is that of ordinary reasonable care required of a professional skilled architect under the same or similar circumstances in carrying out his technical duties in relation to the services undertaken by his agreement. This includes the knowledge and experience ordinarily required of a member of that profession and includes the performance of skills necessary in coping with engineering and construction problems, which skills are ordinarily not possessed by laymen.

the requisite standard of care is the duty to stay current in the field. Experts need to recognize their limits; they should not engage in professional activities beyond their expertise. Therefore, the details and intricacies of Emergency Action Plans (EAP’s) are such that they should be prepared by those with a firm understanding of EAP’s.

The designer of a facility is charged with foreseeing the normal forces of nature and must act reasonably in light of these foreseeable risks. Indeed, the duty extends to foreseeable, but highly improbable risks, which may entail catastrophic damages. For example, even if the “Big One” never strikes Los Angeles or San Francisco, we expect the designers of the skyscrapers to factor seismic risks into their design criteria.

Although California receives the most publicity for seismic risks, the reality is that earthquakes occur in every state. Even if the general public is unaware of the risks, design professionals should be aware of them and act accordingly.

Response efforts may often involve judgment calls in rapidly unfolding scenarios with limited or inaccurate information when time is of the essence. If, for example, a...


32 A classic example is Barr v. Game, Fish & Parks Comm’n., 497 P.2d 340 (Colo. Ct. App. 1972). The probable maximum flood was 200,000 cfs, although the previously known high flow of water was 27,500 cfs. Design plans called for a spillway capacity of 33,000 cfs, but the spillway actually constructed was only 4500 cfs. The flood peak was 158,000 cfs with an estimated 75,000-100,000 cfs passing over the top of the dam. Negligence was found in designing an inadequate spillway. Similarly, the failure to take precautions against foreseeable lightning strikes is actionable negligence. See e.g. Central Ga. Elec. Membership Corp. v. Heath, 4 S.E.2d 700, 702 (Ga. Ct. App. 1934); Tex-Jersey Oil Corp. v. Beck, 292 S.W.2d 803, 807 (Tex. Civ. App. – Texarkana (1956), aff’d in part, rev. in part, 305 S.W.2d 162 (Tex. 1957).

33 The “Big One” is defined as an earthquake of the magnitude of 8.0 or above.

34 Thirty-nine states are considered at risk for moderate to major earthquakes. The major fault lines in addition to the famous San Andreas are the Cascadia in the Northwest, the Wasatch in Utah, and the New Madrid in the Mississippi Valley. Three of the largest earthquakes in recorded American history occurred during the winter of 1811-12 on the New Madrid fault. U.S. General Accounting Office, Federal Buildings: Many are Threatened by Earthquakes, But Limited Action Has Been Taken 15 (May 1992).
pandemic is the emergency at hand, employers, businesses, and other institutions such as hospitals and educational establishments, should have a protocol in place for dealing with employees, customers, suppliers, visitors, patients, and students, who manifest symptoms of the disease. The response may include reporting the incidents to the proper health authorities.

Statutes, Regulations and Professional Standards

Statutes

Foreseeability is not the exclusive measure of duty. Statutes, regulations, professional codes, and industry standards may also establish the minimal standard of care.

An increasing number of statutes mandate emergency action/business continuity plans, including the operation of dams and reservoirs, nuclear power, oil spills, other environmental emergencies, and the handling of toxic substances. Statutes that provide

35 Of course, this situation may also involve emergency proclamations by governors, mayors, or public health officials.

for emergency action planning include the Oil Pollution Act of 1990,\textsuperscript{37} the Emergency Planning and Community Right-to-Know-Law,\textsuperscript{38} and the Resource Conservation and Recovery Act.\textsuperscript{39}

The negligence analysis is slightly different though. Courts often state that duty is a question of policy determined by the courts. Statutes therefore have a critical importance in establishing duty since legislative bodies, unlike many judges, are elected by the body politic and hence are more closely attuned to shifts in public policy and mores.

However, many if not most statutes, while positing an express standard of care, such as the speed limit, are criminal in nature; they do not expressly provide civil remedies. A quick glance through the motor vehicle code probably will not find a provision granting a cause of action to a victim to sue a wrongdoer for damages. Statutes, of course, may provide for damages, such as the Comprehensive Environmental Response, Compensation and Liability Act with cleanup costs,\textsuperscript{40} but they are usually

\textsuperscript{37} 33 U.S.C. §1321 (2005), The Oil Pollution Act of 1990 created a national contingency plan to “provide for efficient coordinated, and efficient action to minimize damage”. \textit{Id.} at §1321(d)(2).


\textsuperscript{39} 42 U.S.C. §6924(a). The Resource Conservation and Recovery Act (RCRA) regulations issued by 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 then threaten human health or the environment”, 40 C.F.R. §264.51(b)(2002). 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. \textit{Id.} at §264.37.

\textsuperscript{40} 42 U.S.C. §9607(a)(4). Indeed, contrary to the statute’s broad title, victims’ compensation was expressly excluded from CERCLA.
silent on liability for victims. Yet, these statutes are expressive of public values and intended to promote public health, safety and welfare.

Therefore, courts exercise their discretion and usually apply criminal statutes in crafting civil liability. The standard rule is that an unexcused violation of statute is negligence per se\(^41\) if:

1. The victim is in the class intended to be protected by the statute;
2. The risk encountered was that intended to be protected against by the statute;
3. Breach of the statute causes;\(^42\)
4. Damages.\(^43\)

Some states impose a lesser standard for a violation of statute and only make it “prima facie evidence of negligence or simply evidence of negligence.”\(^44\) The status of ordinances is not as clear cut. As statutes, they should be governed by the general standard of negligence per se.\(^45\) However, some courts hold that ordinances, such as building codes, simply constitute evidence of negligence.\(^46\)

\(^{41}\) See e.g. O’Buin v. Bingham county, 122 P. 3d 308 (Idaho 2005); Burran v. Dambold, 422 F.2d 133, 135 (10th Cir. 1970), Erie Ry. Co. v. Stewart, 40 F.2d 855 (6th Cir. 1930).


Regulations

The role of regulations is not quite as strong as statutes in establishing a tort duty since regulations are promulgated by administrative agencies rather than legislatures. They are, though, entitled to great deference by courts. The reality therefore is that courts allow the introduction into evidence of regulations, such as those issued by OSHA for workplace safety,\(^\text{47}\) as strong proof of the standard of care.\(^\text{48}\)

Regulations are therefore admissible to establish a presumption of negligence.\(^\text{49}\)

An OSHA required emergency action plan\(^\text{50}\) mandates a written plan in the workplace be available to employees.\(^\text{51}\) 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.\(^\text{52}\) The minimal requirements of the EAP include:


\(^{47}\) California has adopted similar regulations. Barclays California Code of Regulations, Tit. 8 §3220.

\(^{48}\) See e.g. Scott v. Matlack, 39 P. 3d 1160 (Colo.2002).


\(^{50}\) OSHA’s EAP requirement does not apply to all employers, but only when “an OSHA standard in this part requires one”. 29 C.F.R. §1910.38(a).

\(^{51}\) The plan must be communicated in writing in workplaces of 11 or more employees. 29 C. F. R. §1910.38(b).

1. procedures for reporting a fire or other emergency;\textsuperscript{53}
2. procedures for emergency evacuations;\textsuperscript{54}
3. procedures to be followed by employees who remain behind to perform critical tasks;\textsuperscript{55}
4. procedures to account for the employees after the evacuation;\textsuperscript{56}
5. procedures to be followed by employees performing rescue or medical duties;\textsuperscript{57}
6. the contact number of employees who can provide information or explanation of duties under the plan; \textsuperscript{58}
7. employee alarm system;\textsuperscript{59}
8. training for a “safe and orderly evacuation;”\textsuperscript{60}
9. and review of an emergency action plan with all employees covered by the plan.\textsuperscript{61}
10. When the plan is developed or employee initially assigned to a job, an employee’s responsibilities under the plan has changed, or the plan is changed.\textsuperscript{62}

\textsuperscript{53} Id. at §1910.38 (c) (1).
\textsuperscript{54} Id. at §1910.38 (c) (2); it must include the type of evacuation and exit route assignments.
\textsuperscript{55} Id. at §1910.38 (c) (3).
\textsuperscript{56} Id. at §1910.38 (c) (4). One of the largest potential problems in the immediate aftermath of an emergency is accounting for employees. Assigned reporting locales, or communications numbers can facilitate the process, and thus allows other resources to be reallocated to other needs.
\textsuperscript{57} Id. at §1910.38 (c) (5).
\textsuperscript{58} Id. at §1910.38 (c) (6).
\textsuperscript{59} Id. at §1910.38 (d).
\textsuperscript{60} Id. at §1910.38 (e).
\textsuperscript{61} Id. at §1910.38 (f).
\textsuperscript{62} Id. at §1910.38 (f)
Employees must be kept informed when the plan is developed or an employee is initially assigned to a job, an employee’s responsibilities under the plan has changed, or the plan is changed.\textsuperscript{63}

\textbf{Professional Codes and Industry Standards}

Professional codes and industry standards are neither statutes nor regulations issued by governmental bodies. As such, they are neither legally binding nor subject to fines and penalties for violations. However, professional codes, such as National Fire Protection Association (NFPA) standards and building codes, are often incorporated into statutes or ordinances,\textsuperscript{64} in which case; the rules of negligence per se generally apply,\textsuperscript{65} or into agency regulations with a presumption of negligence. Agencies and administrators, such as the State Fire Marshall, issue rules and regulations, pursuant to state authorization. Their regulations may expressly adopt or incorporate by reference professional codes and standards.\textsuperscript{66} Professional standards can also be contractually

\textsuperscript{63} Id. at §1910.38 (f).

\textsuperscript{64} Electrical Inspectors, Inc. v. Village of East Hills, 320 F.3d 110 (2nd Cir. 2003); (National Electrical Code); Joseph C. Carmizaro-901 LTD. Partnership v State, Dept of Public Safety, Office of State Fire Marshall, 570 So. 2d 56 (La. Ct. App. 1990).


agreed to by the parties and hence become binding between the parties.67 Professional standards may even be incorporated into other professional standards.68

One critical distinction exists between the effect of statutes and professional codes. When a violation of statute constitutes negligence per se, juries are bound by it; they must follow it in assessing liability. However, since a professional code or industry standard is only evidence of negligence, juries may disregard these standards if they wish.

However professional standards can be highly persuasive in establishing the requisite standard of care and are generally admissible into evidence.69 They often constitute the generally accepted standards.70 Consequently, the failure to comply with professional standards may constitute a breach of the requisite duty of care.71

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.72


An example of a professional code is the NFPA 1600 Standard on Disaster/Emergency Management and Business Continuity Programs. NFPA 1600 was approved by the American National Standards Institute on February 11, 2000 as an ANSI Standard. NFPA 1600 contains provisions on Hazard Identification and Risk Assessment:

A. Hazard Mitigation

B. Resource Management

C. Planning

D. Direction, Control, and Coordination

E. Communications and Warning

F. Operations and Procedures

73 http://www.nfpa.org/Codes/NFPA_Codes_and_Standards/listof_nfpa_documents/nfpa_1600.asp.

74 Id. at 1600-1.

75 Hazard identification includes identifying the hazards, the likelihood of occurrence, vulnerability of people, property, the environment, and the entity itself. Id. at ch.5, §5.3.1. The requisite hazard included both natural hazards, such as geological, meteorological, or biological, and human-caused events, both accidental and intentional Id. at ch.5, §5.3.2.

76 An impact analysis should determine the potential impact of the hazards, including health and safety, continuity of operations, property, facilities, and infrastructure, delivery of services, the environment, economic and financial conditions, regulatory and contractual obligations, and reputation and confidence in the entity. Id. at ch.5, §5.3.3.

77 The hazard elimination or mitigation plan will be based upon the hazard identification study, impact analysis, program assessment, operators experience, and, significantly, cost-benefit analysis. Id. at ch. 5, §5.4.2.

78 Significantly, the resource management objectives shall identify the “resource capability shortfalls” and the steps necessary to overcome the shortfalls. Id. at ch.5, §5.5.3.

79 The plan shall assign specific responsibilities to organizations and individuals. Id. at ch.5 §5.7.2.2.

80 The plan shall include an incident management system. Id. at ch.5 §5.8.2.(1).

81 A critical element is to regularly test the communications systems and procedures. Id. at ch.5, §5.9.1.
NFPA 1600, as well as OSHA’s standards for Emergency Action Plan Requirements, identifies processes and procedures to be followed, but does not spell out the specific criteria for each provision. As a practical and legal matter, each plan should be *sui generis*, as each facility, operation, or site is unique. Therefore, we should be chary of excessive boilerplate, which came to characterize many NFPA/EIS statements.

The emergency response field is coalescing around NFPA 1600. It is rapidly becoming the standard in fact, if not yet in law.

The 9/11 Commission had strong praise for NFPA Standard 1600:

The result of these sessions was ANSI’s recommendation that the Commission endorse a voluntary National Preparedness Standard. Based on the existing American National Standard on Disaster/Emergency Management and Business Continuity Programs (NFPA 1600), the proposed National Preparedness Standard establishes a common set of criteria and terminology for preparedness, disaster management, emergency management, and business continuity programs. The

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82 *Id.* at ch.5, §5.10.

83 Primary and alternate faculties, “capable of supporting continuity, response and recovery,” shall be “established, equipped, periodically tested, and maintained”. *Id.* at ch.5, §5.11.2.

84 “The objective of the training shall be to create awareness and enhance the skills required to develop, implement, maintain, and execute the program.” *Id.* at ch.5, §5.12.2.

85 The program must not only include exercises and evacuations, but also procedures to ensure corrective actions are taken for any deficiencies identified. *Id.* at ch.5, §5.13.3.

86 A central contact facility for the media shall be established as well as a public awareness program. *Id.* at ch.5, §§5.14.2(1) and 5.14.3.

87 *Id.* at ch.5, §15.15.
experience of the private sector in the World Trade Center emergency demonstrated the need for these standards.

Recommendation: We endorse the American National Standards Institute’s recommended standard for private preparedness. We were encouraged by Secretary Tom Ridge’s praise of the standard and urge the Department of Homeland Security to promote its adoption. We also encourage the insurance and credit-rating industries to look closely at a company’s compliance with the ANSI standard is assessing its insurability and creditworthiness. 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.88

Congress in the Intelligence Reform and Terrorism Protection Act of 2004 urged the Department of Homeland Security to promote adoption of voluntary preparedness standards89

Common problems often call for common solutions.90 While we concentrate on professional standards within the United States, the reality is that in our increasingly global economy, an international consensus is developing with emergency responses. American and international practices are coalescing on “best practices.” For example, the Emergency management Act for the Province of Ontario adopted NFPA 1600.

None of these sources are automatically binding upon judges, but the general acceptance of NFPA 1600 is persuasive. In addition, NFPA standards are accorded great weight by the courts in establishing the appropriate standard of care. Indeed, NFPA

89 Senate Bill S. 2845, § 7305, signed into law on December 17, 2004.
90 Just as the laws of physics and thermodynamics are universal, so too are disasters.
standards are often referred to as “generally accepted” for specific purposes.\textsuperscript{91} When OSHA was established, it adopted several professional codes and standards as “national consensus standards.”\textsuperscript{92} NFPA Codes and standards are often adopted by federal agencies, state and local governments. Indeed, they often de facto define the duty of care.

**Professional Standards and the Admissibility of Evidence**

NFPA standards may also play a significant role in the admissibility of expert testimony. The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*\textsuperscript{93} held that expert testimony must meet two standards to be admissible into evidence. First, the expert must in fact be qualified as an expert to testify. Second, the proffered testimony must meet standards of admissibility, such as reliability.\textsuperscript{94} The reliability of expert testimony can be validated by following professional standards and scientific methodology.\textsuperscript{95} Thus an expert’s testimony might be inadmissible if, for example, it fails to comply with professional standards and procedure, such as methodology.\textsuperscript{96} Professional standards are admissible to establish the standard of care.\textsuperscript{97}

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\item \textsuperscript{91} See e.g. Engleson & Van Libre, Inc. v. Village of Sodus Point, 523 N.Y. S. 2d 269, 270-71 (N.Y. App. 1987) (NFPA Flammable and Combustibles Code (30-1981) is the generally accepted standard for installation of gasoline storage tanks).
\item \textsuperscript{92} See e.g. Fusibles Westinghouse De Puerto Rico, Inc. v. Occupational Safety and Health Review Com’n, 698 F.2d 21 (1\textsuperscript{st} Cir. 1981).
\item \textsuperscript{93} 509 U.S. 579 (1993).
\item \textsuperscript{95} See e.g. State v. Schultz, 58 P.3d 879, 884 (Utah App. 2002). For example NFPA 921 sets forth a 6 step process in arson investigations.
\item \textsuperscript{96} See e.g. Fireman’s Fund Ins. Co. v. Canon U.S.A., 394 F.3d 1054, 1057-58 (8\textsuperscript{th} Cir 2005) (Testimony inadmissible because of failure to comply with NFPA 921, which was viewed as a reliable method
\end{itemize}
The Risks of Complying with Minimal Government or Professional Standards

While liability may be imposed for failing to comply with statutory, regulatory, or professional requirements, mere compliance with these standards does not preclude legal liability. Generally accepted industry standards, professional codes, statutes, or government regulations only establish the minimal standard of care. They set the floor rather than ceiling on the duty to act. Courts may assess a higher standard of care, utilizing the “reasonable person” standard and foreseeability of risk as the criteria.

Legislatures may change the common law rule by enacting statutes, such as by creating a rebuttable presumption that compliance with government standards precludes liability.


98 For example, building codes provide the “bare minimum standards,” Glynos v. Jagoda, 819 P.2d 1202, 1205 (Kan. 1991) (Conformity with the building code is not an absolute defense to a claim based on ordinary negligence. Id at 1211); Washington, Jr. v. Albany Housing Authority, 746 N.Y.S.2d 99 (Sup. Ct. App. Div. 2002)(compliance with fire and building codes are not dispositive for claims based on common law negligence).

99 The A.L.I. Restatement of Torts (2d) §288C provides: “Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable [person] would take additional precautions.” The comment to §288c provides: “Where a statute, ordinance or regulation is found to define a standard of conduct … the standard defined is normally a minimum standard, applicable to the ordinary situations contemplated by the legislation. This legislative or administrative minimum does not prevent a finding that a reasonable [person] would have taken additional precautions where the situation is such as to call for them … Where there are no such special circumstances, the minimum standard prescribed by the legislation or regulation may be accepted by the triers of fact, or by the court as a matter of law, as sufficient for the occasion; but if for any reason a reasonable [person] would take additional precautions, the provision does not preclude a finding that the actor should do so.” See also, Jones v. Hittue Service, Inc., 549 P.2d 1383 (1971); Garst v. General Motors Corp., 484 P.2d 47, 61 (Kan. ).

100 See e.g. Hackbart v. Cincinnati Bengals, Inc., 601 F. 2d 516 (1 Cir. 1979).

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

The leading case in this respect is a famous 1932 opinion by Judge Learned Hand, The T.J. Hooper. The case involved a lawsuit by the owner of two barges lost in a storm. The tug company argued it was not liable in failing to equip the tug boats with radio receiving sets. Its contention was premised on the then general custom among coastwise carriers to not equip tugs with radio receivers. Had the tug been so equipped, the captain would have received timely warning of the approaching storm and presumably would have, through the exercise of reasonable care, stayed in port. The opinion noted “an adequate receiving set . . . can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows.”

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

Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests . . .

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103 60 F.2d (2nd Cir.), cert. denied 287 U.S. 662 (1932).

104 However, as the opinion notes, most captains in fact had radios by this time.

105 Id. at 739.
Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.\textsuperscript{106}

As Justice Holmes stated in Texas & Pac. Ry. Co. v. Behymer:\textsuperscript{107} “What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.”

The Washington Supreme Court reached a similar result in a 1974 medical case.\textsuperscript{108} The 32 year-old plaintiff was periodically treated for eye problems by defendant ophthalmologist. However, she was not checked for glaucoma because no symptoms manifested themselves. The worldwide standard of the profession was not to routinely test patients under the age of 40 for glaucoma absent specific symptoms. The reason for this standard of care was that the incidence of glaucoma was exceedingly rare for patients under the age of 40 (the rate is 1/25,000). Unfortunately, plaintiff suffered from glaucoma, with a sustained loss of vision. Had she been tested earlier, the glaucoma could have been detected in time to save her vision.

The court held for plaintiff, in effect holding that the universal standard of care was deficient. The opinion was based on several factors: the simplicity and reliability of the test, the lack of judgment required of the professional in reading the test results, the safety of the test and the relative inexpensiveness of it. The court cited Judge Hand's remarks in \textit{The T. J. Hooper} that courts must in the end determine what is required. Thus,

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\textsuperscript{106} \textit{Id.} at 740.
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\textsuperscript{107} 189 U.S. 468, 470 (1903).
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as stated elsewhere, "Evidence of custom in the trade may be admitted on the issue of the standard of care, but is not conclusive." Similarly, “compliance with federal standards, while plainly relevant, is not conclusive on the issue of liability and the jury is entitled to consider any other reasonable evidence on the issue.”

The *T.J. Hooper* and *Helling v Carey* cases are easy to understand. The professional errors are simple – not complicated or highly technical. Experts are not necessary to establish negligence in failing to utilize a radio or performing a simple diagnostic test. Common sense is all that is required to identify the error. Courts may not so easily second guess professional standards of a highly complex, technical nature. Qualified experts will often be necessary in these situations.

A good example of compliance with a governmental standard being inadequate to preclude legal liability is a 1980 Minnesota opinion. A 4-year old girl received severe burns upon her upper body. She was wearing pajamas made of untreated cotton. The material complied with the federal product flammability standards. Plaintiff established at trial that (1) the government standards were clearly inadequate at the time of the accident, (2) the apparel manufacturers were vigorously fighting any change in the government standards, (3) durable flame retardant chemicals, that would have significantly increased the safety of the product, were commercially available, and (4) the defendant was aware of these facts. Consequently, the jury found that the defendant acted in a reckless, wanton, and/or malicious disregard of the rights of others in

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109 *Coburn v. Lenox Homes, Inc.*, 441 A.2d 620, 626 (Conn. 1982).


marketing the fabric. The verdict of $750,000 compensatory and $1,000,000 punitive damages was therefore affirmed on appeal.

Similar results were reached in other cases where manufacturers knew of dangers that exceeded statutorily mandated warnings.\(^{112}\) They should have warned the product users of the dangers and precautions. Thus, the victim can attempt to demonstrate by a preponderance of the evidence that a regulatory or administrative standard does not provide the necessary level of safety.

The critical fact is that the courts retain the power to second-guess professional codes or industry standards as inadequate. The reality is that judges and juries may find that the avoidable tragedies warrant compensation from the "wrongdoers." Thus, compliance with minimal, or inadequate regulations or professional standards, may not protect the defendant if reasonable prudence would justify a higher standard of care.

Even close cases may go against the defendant. A good example is \textit{Dawson v. Chrysler Corp.}\(^{113}\). Plaintiff, a police officer, was rendered a quadriplegic when he lost control of his police car on a rain-slicked road and crashed into a telephone pole. The car struck the pole in a backward direction at a 45 degree angle on the left side of the vehicle. The point of impact was the left rear wheel well. The vehicle literally wrapped itself around the pole. The pole ripped through the body of the car and crushed plaintiff between the seat and the "header" area of the roof. Plaintiff claimed the vehicle was defective because it did not have a full, continuous steel frame extending through the door panels, and a cross member running through the floor board between the posts.


\(^{113}\) 630 F.2d 950 (3\textsuperscript{rd} Cir. 1980), \textit{cert. denied}, 450 U.S. 959 (1981).
located between the front and rear doors of the vehicle. Plaintiff alleged that with such a design the car would have bounced off the pole with little injury to plaintiff, who incidentally was not using his seat belt.

Plaintiff successfully recovered a verdict of $2,064,863.19 in spite of Chrysler's evidence that the vehicle met all federal requirements, and that plaintiff's design theory would create a greater risk of injury in most auto accidents. Chrysler’s design absorbed the impact of most crashes like an accordion, and decreased the rate of deceleration on the occupants of the vehicle. In addition, plaintiff's design would add between 200 and 300 pounds to the weight of the vehicle, and about $300 to the price of the vehicle. Yet plaintiff won. The reason is obvious. Defendant risked going to trial with a severely injured victim for whom the jury understandably feels sympathy.

Dawson v. Chrysler Corp. is significant in another respect. Chrysler designed the vehicle to reduce the dangers of the riskiest type of auto accident, a head-on collision. To have chosen plaintiff's design would have resulted in a greater risk of death or serious bodily injury to a larger number of persons, as well as increased gasoline consumption and a higher cost to purchasers, which factors would adversely affect society at large.

For the courts and the jury, the specific risks posed to plaintiff through defendant's design outweighed the increased costs to society necessitated by plaintiff's design proposal. The law, through the mechanism of litigation, tends to focus narrowly on the rights and liabilities of the parties before it. In such a situation the jury understandably has compassion for a severely injured victim. The judges on the appellate tribunals may also be sympathetic to the innocent victim. Thus, the question all too often
becomes what could defendant have done to reduce the risk presented to this victim, rather than what defendant could have done to reduce the risk to society in general.

Indeed, if an entity knows, or reasonably should know, that the standards may be inadequate to protect the public, and that safer alternatives are viable, but refuses to reasonably respond in light of the risks, then punitive damages may be awarded. Acting in disregard of these known risks can be viewed as “willful, wanton or reckless disregard of the rights of another,” one of the criteria upon which punitive damages are appropriate.

The burden of proof to show that a product, which otherwise satisfies federal standards, is unsafe may be high. For example, a federal judge held that testimony to show a gown was unreasonably dangerous “must produce substantial expert or lay evidence that a fabric which complies with the federal standards is nevertheless unreasonable dangerous for normal use.”114

An added twist is that if the members of the industry, such as through a trade association, promulgate inadequate standards, then these competitors may be collectively liable for those injured as the result of the inadequate standards.115

**Breach of Duty**

Upon establishing the requisite duty of care, plaintiff must then show that defendant breached that duty; i.e. failed to exercise reasonable care. The appropriate standard of care, the professional standard of care, may be established by expert testimony, textbooks, professional publications, and even occasionally by common sense.


For example, expert testimony probably is unnecessary to establish that an architect should have taken into account the weight of books in designing a high-rise library.

Another way to sometimes establish breach is through the legal doctrine of “res ipsa loquitur,” which loosely translates as “the thing speaks for itself.”116 We know that experts can often determine the cause of a major failure. Even in the absence of such knowledge, a presumption of negligence is created if an accident would not normally have occurred in the absence of negligence and the instrumentality was in the exclusive control of the defendant. A classic example of a res ipsa scenario would be a sunny day breach of a dam when no other explanation exists.117

To be realistic, in the case of a major disaster, such as the Hyatt Regency Skywalk collapse in Kansas City with scores of fatalities and injuries, an architect, engineer, owner or operator probably will not escape liability short of settling the case prior to trial.118 Detailed examinations of structural and systems failure will usually lead to human error as a cause.119 Once human error is identified as a cause of the accident, then the lawyers for the victims will translate the human error into negligence.


117 See e.g. City Water Power Co. v. City of Fergus Falls, 128 N.W. 817 818 (Minn. 1910); East Liverpool City Ice Co. v. Mattern, 101 Ohio St. 62, 127 N.E. 408 (1920).

118 Two skywalks in the lobby of the Hyatt Regency Kansas City collapsed on July 17, 1981, killing 114 persons and injuring over 215. In one case arising out of the collapse, a 33 year-old woman was rendered a quadriplegic. She received a verdict of $15 million. Firestone v. Crown Center Redevelopment Corp. 693 S.W.2d 99 (Mo. 1989).

119 In general, see H. Petroski, To Engineer is Human (1982). As a practical matter, my experience is that after a major tragedy, be it Katrina, 9/11, or the space shuttles Columbia and Challenger, at least one “I told you so” memo will emerge from the files. The failure to heed the memo’s warnings will be hard to defend in hindsight, whether it be at a public hearing, litigation, or media coverage. The writer of the memo will emerge as a seer.
Causation

Defendant’s breach of duty must be a cause of plaintiff’s injury. Therefore, even if a landlord failed to provide, as required by statute, an operational fire escape, no liability will attach if a deceased tenant could not have reached the fire escape; in other words, the failure to provide the fire escape was not the cause of the victim’s death.

A typical auto accident usually involves simple, uncontested issues of causation. For example, an intoxicated driver speeding through a red light severely injures another driver, who had the legal right of way. The speeder is undoubtedly the cause in fact of the victim’s injuries.

However, a critical issue in almost every complicated case will be causation. A terrorist attack, such as 9/11, or a natural disaster, such as Hurricane Katrina, may have had scores of separate causes that collectively led to the tragedy, including lack of preparation, inadequate warnings, inadequate regulation, security failures, poor inspection, and lack of, failure to follow, or inadequacy of an emergency action/business continuity plan. Multiple acts of commission and omission, as well as errors in judgment, are usually necessary for a tragedy, such as 9/11, to occur. Even lesser incidents may have multiple causes. Lawsuits may be filed on a variety of theories against hundreds of defendants, not all of whom may be subject to the court’s jurisdiction.

Defendants in any multi-causation case are apt to claim that they are not at fault because they are not the cause of the accident, which might have happened anyway. They will also be quick to blame any absent wrongdoer who is not in court.

However, the law is quite clear as to plaintiff’s burden of proof. Plaintiff does not have to establish that defendant’s act was the cause of plaintiff’s injuries, but only that by a preponderance of the evidence defendant’s breach was a cause of the accident.\textsuperscript{121}

The strength of negligence is such that even if a human act coalesces with a calamity of natural origins, such as a flood or hurricane, or with other negligent or even intentional wrongful acts of third parties, the defendant might still be liable. For example, if inadequate spillway design or maintenance results in a dam failure in a heavy, but foreseeable, precipitation, the dam owner will still be liable if proper design or maintenance would have prevented the injuries.\textsuperscript{122}

Analogous issues often arise in causation analysis when defendant claims no liability should attach for an intervening cause, especially an intervening criminal act. This argument will often fail though, either because the intervening act is foreseeable, or on the premise that if the result is foreseeable,\textsuperscript{123} then the defendant is liable regardless of how the intervening act came about.\textsuperscript{124} Thus, intervening criminal acts do not necessarily


\textsuperscript{122} For example, in Curtis v. Dewey, 475 P.2d 808 (Idaho 1970), defendants boarded up the dam’s spillway, neglected to maintain the toe of the dam properly, and then waited until back waters were almost overspilling the top of the dam, before opening the headgates. They had also ignored warnings the previous day that the dam’s condition was critical. See also, Hayashi v. Alameda County Flood Control & Water Conservation District, 343 P. 2d 1048 (Cal Ct. App. 1959).


\textsuperscript{124} See PROSSER & KEETON, supra n. 4 at 303-306; DAN B. DOBBS, THE LAW OF TORTS 476-481 (2000). For example, one who negligently installs a fire alarm may be liable for the subsequent fire damage, even if the fire was started by criminal acts, Pacific Employers Insurance Co. v. Austgen’s Electric, Inc., 661 N.E. 2d 1227 (Ind. Ct. App. 1996).
supersede the negligence of the defendant.\textsuperscript{125} Even terrorist acts can be foreseen and thereby averted or minimized in some situations.\textsuperscript{126}

Liability would not be imposed under these circumstances for failure to prevent the original act, such as a natural emergency, but for failure to minimize the foreseeable consequences of the emergency. Examples of such liability may include inadequate responses to 911 calls,\textsuperscript{127} inadequate design of an automobile to minimize the second collision even if the driver is intoxicated and not wearing a seat belt,\textsuperscript{128} and inadequate security by owners of buildings.\textsuperscript{129}

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\textsuperscript{126} In general, see Kevin Quinley & Donald Schmidt, Business at Risk: How to Assess, Mitigate, and Respond to Terrorist Threats (National Underwriter Co. 2002). Indeed, California’s Department of General Services is charged with developing business interruption plans for a variety of scenarios, including acts of terrorism. Cal. Gov’t. Code §8549.20(a)(2). New York State is planning to create the nation’s first statewide alert system to alert every practicing physician in the state of suspected biological or chemical attacks and other public health emergencies. E-mail and a web site will be utilized to get the warnings out in six minutes after notification of the emergency to the state. Lydia Polgreen, New York State: Plan to Alert Doctors in Case of Terror Attacks, N.Y. TIMES, Dec. 19, 2002 at A16, col. 3 (Nat. Ed.).


\textsuperscript{128} See e.g. D’Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001); Alami v. Volkswagen of Am., Inc., 766 N.E. 2d 574 (N.Y. 2002).

\textsuperscript{129} Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970); Seibert v. Vic Regnier Builders, Inc., 856 P.2d 1332 (Kan. 1993); L.A.C. v. Ward Parkway Shoppong Ctr. Co., 75 S.W.3d 247 (Mo. 2002). The real issue in security cases is often the requisite duty of care that must be established by the victim to recover against the owner or occupier. For example, California had adhered to the “prior similar circumstances” test, changed to the foreseeability standard in Isaacs v. Huntington Memorial Hospital, 695 P.2d 653 (Cal. 1985), but then readopted the earlier test in Ann M. v. Pacific Plaza Shopping Center, 863 P.2d 207 (Cal. 1993). See also, Mellon Mortgage Co. v. Holder, 5 S.W.3d 654 (Tex. 1999)(risk
Even issues of proximate/legal cause may arise. At some point, courts will limit liability short of infinite liability. Lines must be drawn. The first bombing of the World Trade Center provides an illustration of this principle.

Terrorists on May 26, 1993 set off a truck bomb in the underground garage of the World Trade Center, killing 6, injuring scores, and causing extensive property and economic damage. The Port Authority of New York and New Jersey, the owner of the WTC, had received reports recognizing the vulnerability of the underground parking garage and recommending security improvements. These steps were not implemented. The Port Authority’s defenses of sovereign immunity, no duty, and lack of foreseeability were rejected. 130

Liability did not extent though to the manufacturers of the ammonium nitrate and urea purchased by the terrorists to build the bomb. 131 A similar result was reached in litigation arising out of the Oklahoma City bombing. 132

**Other Consequences**

A modern trend is for criminal prosecutions of the responsible parties deemed “criminally negligent” in operational, structural or engineering failures. The usual charge will be involuntary manslaughter, but stronger counts may be filed. When incorporated into a statute or ordinance, the professional code can become the basis of a criminal

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131 Port Authority of New York and New Jersey v. Arcadian Corp., 189 F.3d 305 (3th Cir. 1999).
132 Gaines-Tabb v. ICI Explosives, USA, Inc., 160 F.3d 613(10th Cir. 1998).
prosecution.\textsuperscript{133} In addition, various government agencies might seek administrative and civil sanctions.

The responsible parties may also suffer professionally. For example, the two engineers who designed the skywalk at the Hyatt Regency- Kansas City lost their professional licenses after the skywalk collapsed on July 17, 1981.\textsuperscript{134}

**Conclusion**

Negligence analysis revolves around the exercise of reasonable care that will either prevent or minimize the risks of an accident and its consequences. The requisite standard of care may be established by statutes, regulations, professional codes or industry standards. These sources of conduct will usually establish only the minimal standard of care. Liability, including punitive damages, may be imposed when a defendant knows these standards are inadequate to protect the public but continues to comply only with the bare minimum required by them.

Whether mandated by a statute, administrative regulation, professional code, industry standard, or the common law standard of reasonable care under the circumstances, the duty exists today to prepare an emergency action/business continuity plan to minimize the impacts of an emergency, whether from natural or human sources. Plans to respond to a disaster are just as significant in negligence analysis as exercising reasonable care to prevent an accident, and should be an integral part of the operations of a facility.

\textsuperscript{133} People v. LBR Enterprises, 399 N.Y.S. 2d 578 (N.Y. App. 1977) (NFPA No. 1) (exit was padlocked and 355 people filled a venue with a capacity of 218).

\textsuperscript{134} See Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors, 744 S.W.2d 524 (Mo Ct. App. 1988).