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The Dawning of Disaster Law

by Clifford J. Villa

disaster law. You may never have heard of it. You might reasonably wonder whether such a thing really exists. But consider: have you ever helped a client recover from a fire or flood? An earthquake or landslide or tornado or hurricane? If you have seen such things in your practice or personal life, or can imagine their consequences, wouldn’t it be something if you, as a lawyer, could help a client recover to a stronger place after a disaster? Or perhaps help a client to respond more effectively during a disaster? Or even better, prevent a disaster from happening in the first place?

Could you prevent a disaster from happening? We tend to think of disasters as natural phenomena, a so-called “Act of God” — one that just happens, leaving behind tragedy and loss. But to take one recent, tragic example in the state of Washington: the Oso landslide on March 22, 2014. Did the landslide have to happen, or might it have been precipitated by improper timber harvesting at the top of the slope? And if the landslide was inevitable — gravity wins, after all — was it inevitable that 43 people would die? Could this tragedy have been prevented by application or enforcement of zoning codes, perhaps?

In the growing law and literature of disaster law, which largely emerged in response to Hurricane Katrina in 2005, disasters are defined not by reference to any natural phenomena but in reference to effects and the efforts needed to recover. Thus, a landslide of the same magnitude of Oso that occurs within the vast interior of Alaska, affecting no one, is not disaster. If a tree falls in the forest ... that’s what trees sometimes do.

The legal literature, law, and national policy of disasters have also moved away from concern for “natural disasters.” What is “natural,” after all? Was the Oso landslide “natural” or was it the result of timber harvesting, residential development, or other human endeavor? For that matter, was Hurricane Katrina a “natural” disaster? Hurricanes occur in nature, but was there something about man-made climate change that helped fuel Katrina’s fury? Was there something...
about siting an American city upon the restless Mississippi River delta, or the weak levees to protect the city, or the decimation of protective wetlands that led more directly to the tragedy in New Orleans after the hurricane winds had passed? Questions like these have led some policymakers and commentators to conclude that “there is no such thing as a natural disaster.”

What really matters, what unites disasters of all stripes, including earth­quakes in Japan, tornadoes in Oklaho­ma, oil spills in the Gulf of Mexico, and the terrorist attacks on 9/11, is how you respond during the disaster, how you recover from it afterwards, and how you prepare — or better, prevent — the next disaster from happening. This is what disaster theorists, including Professor Dan Farber at Berkeley Law, term the “disaster cycle.” In simplest terms: readiness, response, and recovery.

Conventional wisdom usually conceives of a lawyer’s role in the disaster cycle as limited to the recovery phase. And probably for good reason: this is where investigations are conducted, insurance claims submitted, and lawsuits filed. In the recovery phase, people want to know, “Who is to blame for this?” and, “Who can I sue?” Such lawsuits may then proceed and continue for years and even decades, as in the litigation following the 1989 oil spill from the Exxon Valdez, for example. Lawyers prosecuting such cases may face significant questions of causation and damages. On the other side, lawyers defending such cases may find little reliance upon common law constructs such as “Act of God,” which in modern expression requires not only a “natural phenomena,” but effects “which could not have been prevented or avoided by the exercise of due care or foresight.” See, for example, Section 101(1) of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Outside of the recovery phase, lawyers may also find significant roles in the response phase of disasters. The response phase may be conceived as beginning in the immediate or imminent occurrence of the disastrous event. When the earthquake hits, the tornado strikes, the hurricane makes landfall, private entities, local responders, and agencies on all levels of government may need immediate legal advice in order to understand the nature and limits of their response authorities. For example, which agency or agencies would have jurisdiction for an oil spill on the Columbia River? Could the U.S. Coast Guard follow an oil spill in the Salish Sea into Canadian waters? What is the proper role of military forces, including the National Guard and U.S. Army, to maintain civil order? Does a relief shelter have to make accommodations for household pets or religious practices? Does the Fourth Amendment still apply to private residences after a community has been evacuated? Can grocery stores donate food without risk of liability if someone gets sick? Can volunteers assist search-and-rescue operations without proper training? The potential list of
legal questions during the response phase may continue endlessly. For this reason, response organizations are increasingly seeking the assistance of legal counsel during response efforts, helping client agencies and entities make good, defensible decisions and minimizing damages, liabilities, and even loss of life.

Before any disaster strikes, the best that anyone might do would be to help prevent it from happening. Short of prevention, the readiness phase of the disaster cycle seeks to prepare organizations and individuals in order to respond most effectively and recover quickly. Much about readiness is simply common sense, from locating the nearest exits in a movie theater to making a home disaster kit. Readiness may also be about good business practices, such as maintaining off-site copies of client information if your law offices are flooded. In some cases, readiness may also be a matter of law, as certain industrial facilities are required to maintain Risk Management Plans under Clean Air Act Section 112(r). Smart lawyers may help their clients to understand all elements of readiness applicable or available in their sectors.

Beyond the disaster cycle, another element that helps define disaster law is a unique body of law and policy. In terms of code, the principal federal statute in disaster law is known as the Stafford Act. The Stafford Act establishes the familiar process you may hear on TV of state governors requesting a federal disaster declaration in the wake of a flood, fire, or other calamity. Upon the request of a state governor — or more recently, a tribal executive — the Stafford Act authorizes the president to declare a “major disaster” and “emergency,” which, in turn, trigger different legal implications.

In general, an “emergency” may be declared immediately after, or even in anticipation of, a catastrophic event. Federal emergencies may be declared, for example, in anticipation of a hurricane making landfall or to ensure security for a presidential inauguration. The declaration of a federal emergency authorizes immediate, but limited, federal funding in order to “save lives and to protect property and public health” (Stafford Act Section 102). By contrast, the declaration of a “major disaster” triggers much broader federal authorities, including resources to help individuals, companies, and local governments rebuild their lives, businesses, and communities. Good lawyers may need to understand the implications of disaster declarations, as well as the resources and limitations of each. For example, following the unprecedented oil spill from the Deepwater Horizon into the Gulf of Mexico in 2010, many states requested federal disaster declarations. Those requests were denied, however, because federal assistance was not needed where the responsible party, BP, was already liable under a different federal statute, the Oil Pollution Act, and was funding the response efforts directly as required by the federal law.

In addition to applicable federal statutes, there is a unique body of federal policy applicable to disasters, including the National Response Framework, the National Disaster Recovery Framework, and the National Preparedness System. Each of these national frameworks is readily available to the public via FEMA.gov. While the National Disaster Recovery Framework is triggered by a disaster declaration, the frameworks for response and preparedness are “always in effect,” to promote a continual readiness to respond to sudden events.

One of the elements required by the National Response Framework is use of the Incident Command System. As described by FEMA, the Incident Command System (ICS) is a “management system designed to enable effective, efficient incident management by integrating a combination of facilities, equipment, personnel, procedures, and communications operating within a common organizational structure.” In essence, ICS helps private entities and agencies on all levels of government to come together quickly and efficiently in order to meet common objectives, such as search and rescue, evacuation, temporary housing, debris removal, and decontamination. By federal order, the use of ICS is required.

BEFORE ANY DISASTER STRIKES, THE BEST THAT ANYONE MIGHT DO WOULD BE TO HELP PREVENT IT FROM HAPPENING.
for all government entities receiving federal funding, which essentially includes all states, tribes, public schools, and universities. Lawyers may directly serve within an ICS structure as a “legal officer,” providing advice to the incident commander or other components of the organization. (For a more thorough discussion of ICS and the emerging role of legal officers, see my article, “Law and Lawyers in the Incident Command System,” available in the digital commons at http://digitalcommons.law.seattleu.edu/sulr/vol36/iss4/2.)

The use of ICS is specifically required by many local codes and state statutes, including RCW 38.52. This also serves as an important reminder that the federal statutes and policies described in this article may find important analogues or supplements in the applicable law and policies of states, tribes, and municipalities. Lawyers engaging in any aspect of disaster law, as in any other practice area, will be well advised to conduct their own careful research and analysis. As yet, few law schools offer dedicated courses in disaster law. However, the website of the ABA Committee on Disaster Response and Preparedness offers a rich collection of materials in this subject area specifically for lawyers, including publications such as A Lawyer’s Guide to Disaster Planning.

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is currently an assistant professor at the University of New Mexico School of Law. Before returning in 2015 to his hometown of Albuquerque, he served for almost 20 years in the Seattle office of the U.S. Environmental Protection Agency, where he provided legal counsel to the EPA emergency response program. He also served on the adjunct faculty at Seattle University School of Law, where he developed and taught the first class on disaster law offered at Seattle U. You can reach him at villa@law.unm.edu.