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Act Of God: A Reconsideration

ACT OF GOD: A RECONSIDERATION

The phrase, "act of God" or *vis major,* has been the subject of considerable litigation because a defendant who otherwise would be liable for the safety of another's person or property may be absolved of such liability when there fortuitously occurs an act of God.[1] The defendant's main difficulties are in establishing that: (1) the particular occurrence was an act of God in the legal sense; and, (2) the damage or injury incurred was proximately caused by the act of God and not by the negligence of the defendant.

In the recent District of Columbia case of *Garner v. Ritzenberg,*[2] a torrent of rain water entered the window of plaintiff's basement apartment destroying all his personal property. The rain was of such intensity that parked cars were moved about in the street. The plaintiff alleged that the defendant-landlord was negligent in leveling the ground outside his apartment and that such negligence caused the damage. On the other hand, the defendant contended the rain was so intense that an unforeseeable "flash flood" occurred. This, the defendant urged, constituted an act of God which was the proximate cause of the plaintiff's damage. The trial court found, as a matter of law, that the defendant was absolved of liability because the damage was caused by an act of God. On appeal, the District of Columbia Municipal Court of Appeals reversed the trial court by taking judicial notice of the fact that a rain of heavy intensity is not an act of God, even though this particular rain did cause automobiles to move and was referred to by residents as a "flash flood."[3] The appellate court thought that the only question was whether or not the defendant had been negligent.[4]

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[1]The best example of this is the common carrier who has traditionally been regarded as an insurer of the persons and the goods that he has undertaken to carry. The common carrier has been absolved of this extraordinary duty only by an act of God or enemy of the King. Beale, The Carrier's Liabilty: Its History, 11 Harv. L. Rev. 158, 167 (1897).

[2]167 A.2d 353 (D.C. Munic. Ct. App. 1961).

[3]The United States Weather Bureau substantiates the court's holding, in that no extraordinary rainfall was recorded in Washington on the day when the damage occurred. However, the weather bureau has only two recording stations in the city and it is possible that this rain was localized and escaped recordation. Letter from Chief, U.S. Weather Bureau, William E. Hiatt to J. L. Howe, III, Mar. 10, 1961.

[4]"The real issue was whether defendants were negligent in the construction or maintenance of premises likely to be inundated during heavy but foreseeable rainfalls." 167 A.2d at 355.

What is an act of God? Although the question is asked repeatedly, answers given in the cases are in conflict. In its broadest sense an act of God can be defined as every occurrence that takes place on earth. For legal purposes this definition must be restricted.[5] A comprehensive legal definition would be inaccurate without embodying the following elements: (1) unforeseeability by reasonable human intelligence;[6] and, (2) the absence of human agency causing the alleged damage.[7] Generally, the controlling test of unforeseeability is that the occurrence be unprecedented in the particular area.[8] Some courts construe the word "unprecedented" quite literally; if the occurrence has happened any time prior to this particular occurrence, then it is foreseeable and will not absolve the defendant of liability.[9] This construction is qualified only by the "memory of man" which in its literal construction means recorded history. Other courts, however, have

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[5]Central of Ga. Ry. v. Hall, 124 Ga. 322, 52 S.E. 679, 683 (1905).

[6]"An 'act of God' as known in the law is an irresistible superhuman cause such as no ordinary or reasonable human foresight, prudence, diligence, and care could have anticipated and prevented." Garrett v. Beers, 97 Kan. 255, 155 Pac. 2, 3 (1916). This requirement runs through all the reported cases on the subject. For a discussion on the subject see 15 Can. B. Rev. 724 (1937).

[7]"The expression act of God excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to have been the act of God, but must be regarded as the act of man." Polack v. Pioche, 35 Cal. 416, 423 (1868).

In a case in which many persons were injured after a gust of wind blew down the grandstand in which they were sitting, the court held that the injuries could not be attributed to an act of God because of the "intervening human agency which contributed to cause the damage herein...." Cachick v. United States, 161 F. Supp. 15, 19 (S.D. Ill. 1958).

Another case supporting this statement has a novel fact situation. The defendant, who was seeking to absolve himself of liability for damage done to plaintiff's adjoining field from the leakage of water from an irrigation ditch, claimed that the holes through which the water leaked had been dug by gophers and that this was an act of God. The court in dismissing this defense stated that in order to hold any occurrence an act of God all human agency must be excluded and since gophers have a penchant for digging holes, defendant should have guarded against them. Johnson v. Burley Irrigation Dist., 78 Idaho 392, 304 P.2d 912, 916 (1956).

[8]In describing a flood as an act of God the Ohio Supreme Court described it as being "so unprecedented in its extent and character... that it is an epoch in the history of the state." Foss-Schneider Brewing Co. v. Ulland, 97 Ohio St. 210, 119 N.E. 454, 456 (1918).

In a Wyoming case the fact that a canal had not overflowed in 35 years was adequate to show that the overflow which occurred was an act of God. Jacoby v. Town of City of Gillette, 62 Wyo. 487, 174 P.2d 505, 512, 514 (1946).

[9]In a Kansas case the court held that liability for the loss of plaintiff's cattle should fall on the defendant-carrier, even though the loss was caused by an unusually severe blizzard. The blizzard was held not to be an act of God in the legal sense because it was precedented by equally severe blizzards in previous years. McKinley v. Hines, 113 Kan. 550, 215 Pac. 301, 303 (1923).

been slightly more liberal in their construction of the word "unprecedented."[10]

Since acts of God almost invariably arise from the forces of nature,[11] it is necessary to look at nature's different manifestations in order to ascertain how courts have distinguished the natural force that is an act of God from the one which is not. Floods that are unprecedented in the locality in which they occur are usually held to be acts of God,[12] but paradoxically the intense rains which are the cause of floods are generally not so considered.[13] It has been held that a flash flood, or "freshet," is an act of God if the flooding is such that human foresight could not reasonably have anticipated it.[14] This determination has ordinarily been held to be a question of fact for the jury.[15] Therefore, the general rule in regard to flash floods is that the flood must be so extraordinary that the reasonably prudent man could not have anticipated it.[16] Since any act of God, under the prevalent view, is ultimately a question of fact for the jury to determine from the particular circumstances, it appears that the prin-

[10]In Alabama the court held that precedent need only be looked to in the determination of the question of reasonable anticipation. Louisville & N. R.R. v. Finlay, 237 Ala. 116, 185 So. 904, 906 (1939) (dictum).

[11]Alaska Coast Co. v. Alaska Barge Co., 79 Wash. 216, 140 Pac. 334, 336-37 (1914) (the court intimates that collisions with submerged rocks or reefs could have been due to an act of God); Early v. Hampton, 15 Ga. App. 95, 82 S.E. 669, 671 (1914) (in dictum the court cites 1 Words and Phrases 124 (1940) for the proposition that sickness or death may be considered as an act of God).

[12]An excellent example of a disastrous flood resulting from heavy rains and the breaking of a dam was the well known Johnstown flood of 1889 which the Illinois Supreme Court held was an act of God. Wald v. Pittsburgh, C., C. & St. L. R.R., 162 Ill. 545, 44 N.E. 888 (1896).

[13]The cases cited in the Garner case, note 2 supra n.1 at 354, bear this out; Sturges v. Charles L. Harney, Inc., 165 Cal. App. 2d 306, 331 P.2d 1072 (Dist. Ct. App. 1958); Christman v. State, 189 Misc. 383, 70 N.Y.S.2d 12 (Ct. Cl. 1947); Gibson v. State, 187 Misc. 931, 64 N.Y.S.2d 632 (Ct. Cl. 1946). But see Bratton v. Rudnick, 283 Mass. 556, 186 N.E. 669 (1933); Golden v. Amory, 329 Mass. 484 109 N.E.2d 131 (1952).

[14]Law v. Gulf States Steel Co., 229 Ala. 305, 156 So. 835, 839 (1934).

[15]Jacoby v. Town of City of Gillette, 62 Wyo. 487, 174 P.2d 505, 510 (1946); Snyder v. Farmers Irrigation Dist., 157 Neb. 771, 61 N.W.2d 557, 562 (1953).

[16]This is shown by the following language of a recent Nebraska case: "[A]n act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effect. It is enough that the flooding should be such as human foresight could not be reasonably expected to anticipate and ... is ordinarily a question of fact." Cover v. Platte Valley Pub. Power & Irrigation Dist., 162 Neb. 146, 75 N.W.2d 661, 669 (1956).

[W]hether it [act of God] comes within this description is a question of fact." Pollock, Torts 393 (14th ed. 1939).

cipal case did not adhere to the majority rule. However, a minority of jurisdictions have gone further by holding that, in order to be an act of God in the legal sense, the flash flood must not merely be unusual, but so completely unprecedented that its disastrous results could neither be anticipated nor prevented. This view implies that the question is to be determined as a matter of law.[17]

Courts have had little trouble finding that violent storms, such as hurricanes and tornadoes, along with their accompanying destructive forces of high winds, rains and floods are acts of God.[18] Snowstorms of great violence have been held to be acts of God.[19] Whether freezes are acts of God depend on the locality and season of the year in which they occur,[20] *i.e.*, their foreseeability is affected to a greater extent than other natural occurrences by these factors. Catastrophic earthquakes and volcanic eruptions should be defined as acts of God since they measure up to the accepted definitions of act of God in every respect.[21]

Not only must there in fact be an act of God in the legal sense, but also the negligent defendant has the burden of proving that the alleged damage was proximately caused by the act of God.[22] If an unforeseeable intervening cause occasions an unforeseeable result, the defendant's negligence cannot be said to have been the proximate

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[17]Where witnesses were unable to state that a rainfall or freshet was the greatest they had seen in a particular locality, the court held that the freshet was not an act of God. Eikland v. Casey, 266 Fed. 821 (9th Cir. 1920).

[18]Florida Power Corp. v. City of Tallahassee, 154 Fla, 638, 18 So. 2d 671 (1944) (hurricane); Harris v. Norfolk So. R.R., 173 N.C. 110, 91 S.E. 710 (1917) (wind and rainstorm); Chandler v. Aetna Ins. Co., 188 So. 506 (La. Ct. App. 1939) (tornado).

[19]Snowstorms obstructing the passage of trains have been held to be acts of God. Black v. Chicago, B. & Q. R.R., 30 Neb. 197, 46 N.W. 428 (1890); Cormack v. New York, N.H. & H. R.R., 196 N.Y. 442, 90 N.E. 56 (1909); Heyen v. Cleveland, C.C. & St. L. Ry, 184 Ill. App. 322 (1913).

[20]In holding that a carrier was liable for injury to cattle it was transporting, the Texas court said, "Cold weather in the month of December in this latitude is not that act of God which would excuse a carrier...." Texas & P. Ry. v. Coggin & Dunaway, 44 Tex. Civ. App. 423, 99 S.W. 1052, 1053 (Civ. Ct. App. 1906).

In Sargent Barge Line v. The Wyomissing, 127 F.2d 623 (2d Cir. 1942) the federal court stated that the presence of ice in the East River of New York during the month of January should be expected, and damage resulting from such ice cannot be attributed to an act of God in the legal sense.

[21]There are few cases which are concerned with earthquakes as acts of God. This lack of precedent would seem to indicate the obviousness of the fact that an earthquake is an act of God. Slater v. South Carolina Ry., 29 S.C. 96, 6 S.E. 936, 937 (1888).

[22]"Surely a defense based on 'an act of God' is one to be established by the defendant." McKinley v. Hines, 113 Kan. 550, 215 Pac. 301, 303 (1923).

cause of the result.[23] This line of reasoning seems persuasive, especially for the defendant, since it allows him to take advantage of the age old defense of act of God even though he has been negligent. On the other hand, when the defendant's negligence concurs or combines with an act of God to cause some kind of injury or damage, courts are faced with a somewhat more complex problem. In these cases the court might look to the degree as well as the kind of defendant's negligent conduct in order to determine whether he is liable for the resulting damage.[24]

A problem that has caused some conflict is where an act by human hands is done which would likely cause minor injury or damage, and this is directly followed by one of the natural occurrences that have been held to be an act of God which results in extensive damage or injury. The court may: (1) absolve the defendant;[25] (2) hold the defendant liable for only the damage caused by *his* act or failure to act;[26] or, (3) hold the defendant liable for the entire amount of damages.[27] The most equitable choice appears to be to hold the defendant

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[23]This can be illustrated in the case where through negligence a carrier delays the plaintiff's goods and they are destroyed or damaged by an unforeseeable act of God. Courts have sometimes absolved the carrier of liability in such cases. Railroad Co. v. Reeves, 77 U.S. 176, 189 (1869). But see Alabama Great So. R.R. v. Quarles & Couturie, 145 Ala. 436, 40 So. 120, 121 (1906).

[24]Generally courts have merely looked to see whether the defendant's conduct may be the proximate or material cause of the resultant harm when his negligence concurs with an act of God. American Coal Co. v. De Wese, 30 F.2d 349 (4th Cir. 1929); The Salton Sea Cases, 172 Fed. 792, 818 (9th Cir. 1909); Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925). However in some cases defendant's degree of negligence was compared with the type of natural occurrence in order to reach such a result. City of Piqua v. Morris, 98 Ohio St. 42, 49, 129 N.E. 300, 302 (1918); Perkins v. Vermont Hydro-Electric Corp., 106 Vt. 367, 177 Atl. 631 (1934).

[25]"[I]f the vis major is so unusual and overwhelming as to do the damage by its own power, without reference to and independently of any negligence by defendant there is no liability." City of Piqua v. Morris, 98 Ohio St. 42, 120 N.E. 300, 302 (1918).

[26]Defendant was held liable for just his proportion of the damage suffered by the plaintiff when defendant opened the floodgates of his dam and added to the flood waters which destroyed plaintiff's land by erosion. The jury held defendant liable for 1/5 of the damage. Inland Power & Lght Co. v. Grieger, 91 F.2d 811 (9th Cir. 1937).

[27]This result has been reached when the courts have applied the rule of law which makes joint tortfeasors jointly and severally liable for the entire damage. "Where separate and independent wrongful acts or default combine to form a single damage, those who have committed them are independently liable. . . ." Pollock, Torts 160 (14th ed. 1939). See cases cited note 26 supra.

liable for the damage which occurred as a result of his negligence and absolve him of liability for the remainder.[28]

Some courts have distinguished between act of God and inevitable or unavoidable accident,[29] while many others have treated the two phrases synonymously.[30] Manifestly, there is a basic difference between the two phrases in that every act of God is an inevitable accident,[31] but the converse is not true, *i.e.*, an inevitable accident might be attributable to an act of man[32] and not God. Also, the two phrases have been distinguished merely by stating that an inevitable accident denotes an act of man, while an act of God denotes some natural occurrence.[33] The latter seems to be an oversimplification of the issue.

"Act of God" is often a difficult defense to establish. There is uniformity in the decisions which require both the exclusion of human agency and unforeseeability to establish an act of God. However, there is a split of authority as to whether any negligence on the part of the person sought to be charged will be considered as a remote or concurring cause of the loss. Although every occurrence is mediately or immediately an act of God, the phrase is not to be accepted, in a legal sense, as a special dispensation of providence. This unhappy fact was made clear to the defendant in the *Garner* case by the holding of the court which illustrates clearly some of the difficulties to be encountered when act of God is utilized as a defense to civil liability. Suffice it to say that as long as there are natural phenomena there will be litigation wherein the occurrence or nonoccurrence of an act of God will be in issue.

JAMES LEWIS HOWE, III

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[28]The problem here is reaching a realistic apportionment which can be quite difficult under certain circumstances. For a discussion of this problem see 33 Ill. L. Rev. 113 (1938).

[29]Arkansas has distinguished between an inevitable accident and an act of God by holding that the former is broader in its application. Reed v. White, 204 Ark. 213, 161 S.W.2d 751, 752 (1942). See also Central of Ga. Ry. v. Hall, 124 Ga. 322, 52 S.E. 679, 683-84 (1905).

[30]No distinction was made between inevitable accident and act of God in Noel Bros. v. Texas & P. Ry., 16 La. App. 622, 133 So. 830, 832 (1931); Early v. Hampton, 15 Ga. App. 95, 82 S.E. 669 (1914).

[31]Alaska Coast Co. v. Alaska Barge Co., 79 Wash. 216, 140 Pac. 334, 335 (1914).

[32]Ibid.

[33]Ibid.