

ADMIRALTY LAW

BY PAUL S. EDELMAN AND JAMES E. MERCANTE

Of Hurricanes, Acts of God and Admiralty Jurisdiction

Hurricane season is here. No one disputes that a hurricane is an act of Mother Nature, or at law, an "act of God." The disputes arise when it is asserted as a defense.

Courts have frequent occasion to consider the "act of God" defense in deciding cases, particularly in admiralty. A shipowner will invoke this defense, sometimes referred to as "peril of the sea," against cargo lost or damaged at sea, sinking, charter disputes, third-party property damage and personal injury claims.¹ Same for marina owners, terminals, warehouses and shipyards. Similar phrases, such as "inevitable accident" and "force majeure," are sometimes used as the functional equivalent of "act of God." This is not always accurate, however. For example, unlike an act of God, a force majeure can constitute governmental intervention resulting from the necessities of war.²

The term "act of God" has been defined as:

Any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected could have been prevented.

Or,

[A] disturbance...of such unanticipated force and severity as would fairly preclude charging a [defendant] with responsibility for damage occasioned by [defendant's] failure to guard against it in the protection of property committed to its custody.³

Burden of Proof

A severe weather condition of hurricane force is considered in law to be an act of God.⁴ A hurricane also qualifies as "heavy weather." This term, whether or not conditions reach hurricane force, is the common parlance of maritime attorneys defending weather-related cases. Mariners use a numerical system, known as The Beaufort Scale, to express wind force. The scale ranges from zero for calm conditions to force 12 (and above) as severe. The Beaufort Scale describes force 12 winds above 75 miles per hour as a hurricane or typhoon. Today, shipping companies typically employ weather routing data or companies to forecast the speed and track of weather systems in an effort to avoid a dangerous shipping lane. However, hurricane paths are rarely predicted with precision.⁵

The burden of proving the affirmative defense of peril of the sea or act of God is on the party asserting it and carries with it the added burden of establishing lack of fault or unforeseeability for that party to be exonerated.⁶ An accident is said to be "inevitable" not merely when caused by an act of God but also when all neces-



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sary precautions have been taken, and the accident has occurred notwithstanding.⁷ Thus, under the law, an act of God insulates a defendant from liability only if there is no contributing human negligence.⁸

As an example, in a case involving Hurricane Audrey, a barge owner was found liable for damage to a dock after its barge broke free from its mooring during the hurricane. Precautions taken by the tug captain prior to the storm were judged in comparison to what a "prudent shipmaster" would have done under similar circumstances.⁹ The court found that although Hurricane Audrey was an act of God, the damage was directly caused by the failure of the captain to take reasonable precautions in the face of known conditions. The court emphasized that it is within the professional responsibilities of the captain to know the proper precautions to be taken in such a situation.

In an early 1900s case from the U.S. District Court for the Southern District of New York, a tug captain fainted and collapsed at the helm. Without a "guiding hand," the tug veered and collided with a vessel alongside a pier. The tug owner asserted "inevitable accident" (unrelated to weather) as a defense and the court recognized that this may benefit the captain but not the vessel owner because a lookout is legally required on all navigating vessels. Finding the vessel owner negligent, the court stated that if a competent lookout "had been properly stationed on this vessel, he would have noticed the absence of proper steering and corrected the same or had the engineer stop the engine and reverse if necessary."¹⁰

The added burden of proof may be unnecessary when the force of nature is of "catastrophic" proportions sufficient to overcome all reasonable preparations, such as appears to be the case with recent hurricanes Katrina and Rita in the Gulf region.¹¹

Jurisdiction

With all the ships, barges, pleasure boats, yachts and rigs that have recently landed ashore, hit houses or bridges, due to Hurricanes Katrina and Rita, the Admiralty Extension Act will likely feature prominently as a basis for federal jurisdiction in marine casualty lawsuits.¹² This act extends admiralty jurisdiction to "all cases of damage or injury...caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

Jurisdiction was at issue in a tragic hurricane-related sinking in which an entire crew of 31 perished. Hurricane Mitch in 1998 was a category 5 hurricane. The S/V Fantome was a 282-foot schooner which was part of the Windjammer Fleet, a fleet of sailing cruise ships in the Caribbean. The fleet was beneficially owned and operated by an American family based in Miami, although the vessels never entered U.S. waters. Honduras was the home port of the Fantome, registered to a Panamanian corporation and sailing under the flag of equatorial Guinea, a landlocked country. When Hurricane Mitch formed in the Caribbean, forecasts were for it to reach land in Central America. The vessel owners in Miami decided to let passengers and nonessential crew off the

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vessel in Belize and then to have the vessel try to outrun the hurricane to reach a safe haven in its home port in Honduras. This led the schooner directly into the path of the hurricane and the ship was lost with all hands, mostly young men from various Caribbean islands.

Landmark Case

The decision in *FANTOME S.A. v. Frederick*, has become a landmark admiralty case on the issues of forum non conveniens and choice of law.¹³ In the district court, the judge dismissed the complaint in favor of a Panamanian forum. On appeal, the U.S. Court of Appeals for the Eleventh Circuit was persuaded that the U.S. base of operations and ownership dictated that the case was appropriate in Florida where the shipowner elected to invoke admi-

ralty jurisdiction in an effort to limit its liability to the post-casualty value of the vessel, and where the shipowner's decisions emanated from, including the fateful one. After determining that the base of operations was Miami, the court discussed prior important decisions involving when U.S. law and the Jones Act will apply.¹⁴

Accordingly, in admiralty law, an act of God can be a viable defense; an act of man is not. And, acts of a shipowner can oftentimes result in jurisdiction.

1. See e.g., Carriage of Goods by Sea Act, 46 App. USCA §1304(2)(c) [providing that "[n]either the carrier nor the ship shall be liable for loss or damage arising or resulting from ... [p]erils, damages, and accidents of the sea or other navigable waters"]; *Gibbs v. Hawaiian Eugenia Corp.*, 966 F2d 101, 103-04, 1993 AMC 43 (2d Cir. 1992).

2. 1 AM. JUR. 2D Act of God §4 (1962).

3. 1A CJS, Act of God, at 757 (1985); *Compania de Vapores INSCO S.A. v. Missouri Pac. R.R.*, 232 F2d 657, 660, 1956 AMC 764, 768 (5th Cir. 1956).

4. 1 AM. JUR. 2D Act of God §5 (1962). "Hurricanes are precisely the sort of natural disaster for which the Act of God exception to liability is afforded." See 2 BENEDECT ON ADMIRALTY, §152 (7th ed. 1990).

5. William J. Kotsch, WEATHER FOR THE MARINER 143, 151 (2d ed. 1977).

6. *Thyssen, Inc. v. S/S Eurouquity*, 21 F3d 533 (2d Cir. 1994); *Hardisty v. Larchmont Yacht Club*, 1983 AMC 1059, 1064 (SDNY 1982) (citing *Compania de Navegacion Porto Ronco, S.A. v. S.S. Am. Oriole*, 474 FSupp 22, 1977 AMC 467 (E.D. La. 1976); *United States v. The Barge CBC 603*, 233 F. Supp. 85, 87-88 (E.D. La. 1964).

7. Grant Gilmore & Charles Black, Jr., THE LAW OF ADMIRALTY 486-87 (2d ed. 1975).

8. *Skandia Ins. Co. Ltd. v. Star Shipping AS*, 178 FSupp2d 1228, 1240 (S.D. Ala. 2001).

9. See *Boudoin v. J. Ray McDermott & Co.*, 281 F2d 81 (5th Cir. La. 1960).

10. *The Wilkesbarre*, 151 F. 501 (SDNY 1907).

11. *Dammers & Van der Heide Shipping & Trading Inc. v. Steamship Joseph Lykes*, 300 FSupp 358, 1969 AMC 1233 (E.D. La. 1969), aff'd, 425 F2d 991, 1970 AMC 2034 (5th Cir. 1970).

12. Admiralty Extension Act, 46 USC App. §7401; R. Force & M. Norris, 1 THE LAW OF SEAMEN §1:15 (55th ed. 2003).

13. 2003 WL 23009844 (11th Cir. 2003).

14. *Hellenic Lines Ltd. v. Rhoditis*, 398 US 306 (1970). Also cited were *Szumlicz v. Norwegian American Airlines Inc.*, 698 F2d 1192, 1196 (11th Cir. 1983); *Mancada v. Lemuria Shipping Corp.*, 491 F2d 470, 473 (2d Cir. 1974).