Adam J. Sedia

# IS THE ACT OF GOD DEFENSE STILL VIABLE IN INDIANA?

## I. Introduction

"[W]ith God all things are possible." Matthew 19:26. What happens, then, when a defendant asserts an Act of God defense? Has he named the Almighty Himself as a nonparty? How can a plaintiff prove that God is *not* responsible as a nonparty?

Humorous though the inquiry may seem, it nevertheless presents a problem for plaintiffs. Injecting the language of the supernatural into the trial process seems to provide an unfair advantage to the defense. On the surface, it appears to permit defense counsel to argue that the jurors can disbelieve the testimonial and scientific evidence if they find intervention on behalf of an omnipresent, omnipotent force. In any venue, more than one person of faith is likely to sit on a jury, and the language of divinity in the jury instructions can create confusion to the plaintiff's disadvantage. Thus, it is important to counter the defense before it rests in the jury's hands.

In reality, the affirmative defense is not what it seems. First, it has very limited applicability, and can easily be removed from the jury's consideration via a plaintiff's summary judgment motion. More importantly, Indiana has gone for nearly forty years without an appellate decision on the defense, and other developments in the law may have rendered it obsolete in Indiana. This article addresses both observations with the aim of providing plaintiffs' attorneys with the ammunition they need to fight off a defendant's invocation of the Almighty for its case.

## II. The Nature of the Act of God Defense

Indiana courts define an Act of God as follows:

> An act of God is the manifestation of a ***superhuman*** power which breaks the chain of causation in the realm of human activity. It upsets the best-laid plans of men and spoils all their calculations. Because its coming is beyond the scope of man's prevision and its power beyond his strength to resist, he is not liable for the consequences thereof.

Chi. & Erie R.R. Co. v. Schaff Bros. Co., 117 N.E. 869, 870, 74 Ind. App. 227, 230 (1917) (emphasis added). This is because "[t]he law holds men responsible for the effects of their acts and omissions within the sphere of human control only." Id. By way of example, "the phrase 'act of God' . . . denotes 'natural accidents, such as lightning, earthquakes, and tempests,'" and also "embraces all other unavoidable or inevitable accidents." Walpole v. Bridges, 5 Blackf. 222, 223 (Ind. 1839).

However, "'before the 'act of God' can be made available as a defense there must

be an entire exclusion of human agency from the cause that produced the injury, and that an occurrence that is produced partially by the intervention of human agency is not an 'act of God' within the meaning of the law.'" Cent. Ind. R.R. Co. v. Mikesell, 221 N.E.2d 192, 201, 139 Ind. App. 478, 494 (1966) (quoting Evansville, Mt. Carmel & N. Ry. Co. v. Scott, 114 N. E. 649, 658, 67 Ind. App. 121, 148 (1917)). Note the language: "***entire exclusion*** of human agency." That is sweeping language, and imposes a high burden for the defense to apply.

William H. Stern & Son, Inc. v. Rebeck illustrates the difficulty posed to defendants in prevailing on an Act of God defense. There, the plaintiff was walking along a street when a barricade serving as a temporary false front to a building that the defendant was remodeling collapsed on him, injuring him. 277 N.E.2d 15, 17, 150 Ind. App. 444, 444-45 (1971). The defendant tendered an Act of God instruction, which the trial court refused. Id., 277 N.E.2d at 18-19. The Court of Appeals affirmed, noting first that instructions failed to apprise the jury of a "possible finding that the accident was caused by defendant's negligence operating in concurrence with an act of God, in which case the defendant would be answerable for all resulting damages." Id. at 19. Even so, testimony indicated that "the windows in the rear of the building which the barricade fronted were out and had not been bricked in by the defendant company at the time of the accident," which "would create a tunnel effect which would increase the velocity of the wind from the time it entered the building until it reached the barricade in the front." Id. Thus, based on the evidence, human agency could not be entirely excluded from the cause of the injury, rendering the Act of God defense unavailable to the defendant. Id.

Accordingly, ***any*** evidence of human agency would be enough to have an Act of God defense barred on summary judgment. But that raises the question: if a plaintiff argues that a genuine issue of fact exists as to the human agent's negligence, would he not at the same time be admitting that an issue of fact exists as to the Act of God defense? Most of the case law predates the Rule 56 standard, but the answer appears to be "no."

The case providing that answer is Childs v. Rayburn, 346 N.E.2d 655, 169 Ind. App. 147 (1976). It involved a suit by a decedent's father alleging that the decedent's employer was negligent in allowing the decedent to remain in an open field during a thunderstorm, during which lightning struck the decedent, killing him. Childs, 346 N.E.2d at 657. The Court of Appeals affirmed a verdict for the plaintiff. Id. at 658, 665. Specifically, it held that the trial court properly refused the defense's Act of God instruction because there was evidence that created a question as to whether the employer's concurrent negligence, along with the lightning, caused the decedent's death. Id. at 660.

Accordingly, any evidence that places the defendant's liability at issue automatically excludes the Act of God defense because *any* concurrent negligence precludes external causation by an Act of God. In most cases, that will mean that overcoming a defendant's motion for summary judgment will preclude the Act of God defense.

But to achieve that, the plaintiff must take an active role and file his own motion or cross-motion for summary judgment.

## III. History and Disappearance of the Defense

The bulk of the cases addressing the Act of God defense predate the New Deal. Only Mikesell (1966), Rebeck (1971), and Childs (1976) address the defense in any detail under a modern system of court rules.

Childs was the last case in Indiana to discuss the Act of God defense in a suit for negligence. It is the last word that the Indiana courts have left us on the subject. Significantly, Childs defines the Act of God defense in terms of concurring causation. Id., 346 N.E.2d at 659 ("This concept of concurring negligence or causation is applicable to those situations where one of the two proximate causes of injury is an Act of God and the other is personal negligence.") Thus, Childs represents the culmination of a trend in Indiana from couching Acts of God in terms of third-party causation to terms of absent causation.

After Childs, the Act of God all but disappears from case law outside the context of contractual provisions. In the only subsequent negligence case to mention it, the Court of Appeals affirmed a trial court's refusal of an Act of God instruction without commenting on the validity of the defense. Nat'l Steel Erection v. Hinkle, 541 N.E.2d 288, 297 (Ind. Ct. App. 1989). A later case mentions the affirmative defense in citing to a Seventh Circuit case, but provides nothing more than the oblique reference. Shafer & Freeman Lakes Envt'l Conserv'n Corp. v. Stichnoth, 877 N.E.2d 475, 486 (Ind. Ct. App. 2007).

To decide how an Indiana court would handle the defense today, and whether the defense even remains viable in Indiana, it is helpful to study how other jurisdictions have handled the defense since Indiana went silent four decades ago.

## IV. Act of God, Mere Accident, or Causation?

As early as 1970, the California courts called into question the necessity of the Act of God defense. "The defenses of unavoidable accident and act of God are similar in nature, and it would not be inaccurate to state that the defense of unavoidable accident embraces an act of God." Clarke v. Michals, 84 Cal. Rptr. 507, 512, 4 Cal. App. 3d 364, 371 (1st Dist. 1970).

Indiana, shortly before it went silent on the Act of God defense, abrogated the unavoidable accident defense in no uncertain terms. Our supreme court held:

> The expression "unavoidable accident" or "pure accident" is not an affirmative defense and has no particular connotation in modern pleading of negligence cases. Such terminology adds nothing to the issues properly before the court or jury and as the expressions are ambiguous and particularly confusing to lay jurors, their use in instructions is undesirable and unwise, and any statements in prior decisions of this state construed as authorizing instructions on "pure accident" or "unavoidable accident" are hereby disapproved.

Miller v. Alvey, 207 N.E.2d 633, 636-37, 246 Ind. 560, 566,(1965). According to the court, the defense was "an obsolete relic or remnant carrying over from a time when damages could be recovered in an action for trespass and strict liability imposed unless the defendant proved the injury was caused by an 'inevitable or unavoidable accident.'" Id., 207 N.E.2d at 636. Thus, if the California courts' proposition holds in Indiana that unavoidable accident embraces acts of God, then the Act of God defense is abrogated.

Other courts have handled the issue differently, however. They have allowed Acts of God as affirmative defenses and held that they constitute an intervening cause that can relieve a defendant from liability. Puckett v. Mt. Carmel Reg'l Med. Ctr., 228 P.3d 1048, 1062 (Kan.2010); Llewellyn v. City of Knoxville, 232 S.W.2d 568 (Tenn. Ct. App. 1950) ("The intervening cause might be either a negligent or nonnegligent act of somebody else, an act of a child, a lunatic, or an act of God."). Under this line of cases, the Act of God defense is really a defense of absent causation, which a defendant must raise either by denying a plaintiff's allegation of causation or by an affirmative defense pleading a specific intervening cause.

Indiana appears to have two available appraches. Under the California approach, it can equate the Act of God defense with the "unavoidable accident" defense, in which case it is abrogated. Or it can take the Tennessee/Kansas approach, in which it equates the defense with an intervening causation defense. Based on Indiana's last pronouncement in Childs that an act of God is a concurrent cause, it is more likely the prefer the latter approach.

Holding that the Act of God defense is covered under causation amounts to its abrogation as a separate affirmative defense. The two approaches, then, are really not that different, for they achieve the same result.

The practical result of such an approach would be that a defendant's anticipated denial of causation in his answer or the assertion of a nonparty defense covers the Act of God defense, and any separate assertion of the defense is superfluous. Furthermore, it would only serve to confuse jurors, because it attributes to chance or divine intervention issues that are already covered by defenses and denials.

The best course of action for plaintiffs to take is – again – an active one. As soon as the Act of God defense appears in an answer, the plaintiff should move to strike it, arguing that it is already covered by either the denial of the causation allegation or any asserted nonparty defense. Hence, it is "redundant" under Trial Rule 12(F).

## V. Conclusion

The Act of God defense has not outlived its usefulness – it was never useful at all. A defendant either breached a duty or did not; and any breach either caused the plaintiff's claimed injuries or it did not. Inserting the Act of God defense into these questions adds nothing that they do not already address on their own. It does, however, add one thing: unnecessary confusion. Jurors might think of an Act of God as a force outside anyone's control that excuses inaction by a defendant. An

Act of God does not eliminate a defendant's duty when ordinary care requires him to take action. It bears on causation, not duty. Couching causation in such religious terms plays on the juror's religious sentiment, perhaps to achieve a defense verdict that a natural analysis of causation would not yield.

Plaintiffs, therefore, should be wary of the pitfalls that an Act of God defense presents to them, and should seek its exclusion as early as possible. Both binding and persuasive case law favor that result.

**ADAM J. SEDIA** practices in his native Lake County, Indiana. He focuses primarily on federal and appellate work, but also handles various civil, criminal, probate, and business matters. He received degrees in chemistry and English from Indiana University and a law degree from DePaul University. He is licensed in the state and federal courts in Indiana and Illinois, as well as the Seventh Circuit. In addition to his practice, Adam has published a volume of poetry, The Spring's Autumn, and composes music. He also speaks Spanish, Italian, and French.

Leading Technologies, LLC

CONSULTANTS & FORENSIC EXPERTS

Over 200 Qualified Local Experts in more than 100 Disciplines

Accounting & Economics
Agricultural & Animals
Architecture & Construction
Biomechanical & Biomedical
Computers & Intellectual Property
Document Identification
Electrical & Controls
Elevators & Escalators
Environmental & Occupational
Fires & Explosions
Human Factors & Warnings
Industrial & Manufacturing
Medical, Dental & Nursing
Police, Criminal & Security
Premises & Product Liability
Real Estate & Insurance
Securities & Brokerage
Sports & Recreation
Vehicles & Crash Reconstruction
Vocational & Life Care Planning

Robert A. Yano, PE
bob@LTForensicExperts.com

614.581.6704
www.LTForensicExperts.com