New York Law Journal

**ALM Properties, Inc.**
Page printed from: *New York Law Journal*

Back to Article

# Act of God Defense and Sandy: Fact-Intensive Analysis Required

Alan L. Fuchsberg and Edward J. Hynes

New York Law Journal

12-07-2012

The destruction caused by Hurricane Sandy in the tri-state area is nothing short of tragic and monumental. Lives were lost, injuries were sustained, homes were flooded or destroyed, businesses shuttered, and communities endured lengthy losses of power. It is a heart-wrenching episode.

On the legal front, the extensive property damage and personal injuries will undoubtedly spur many to seek legal advice as to whether they can bring civil actions. These lawsuits will hinge on whether the losses were sustained exclusively due to an "Act of God," a defense, which if proven, precludes civil recoveries. As case law notes, the expression Act of God "denotes natural accidents, such as lightning, earthquake and tempest; and not accidents arising from the fault or negligence of man."[1] Mere bad weather will not suffice. The conditions must be "severe, unusual and wholly unforeseeable."[2]

To prevail on the Act of God defense under New York law, defending parties need to establish that there was a climatic phenomenon so forceful that it caused an injury[3] and also that there was no contributing negligence on their part. If the injury could have been prevented by human care, skill and foresight, the Act of God defense does not apply.[4]

Cases that consider an Act of God defense turn on intensive factual inquiries. In *Tel Oil Co. v. City of Schenectady*, a classic example, the Appellate Division, Third Department, scrutinized the opinion of the City of Schenectady's expert that an enormous rainfall combined with melting snow created an unprecedented water accumulation that caused a landslide and failure of a retaining wall, versus the plaintiff expert's opinion that a qualified engineer visiting the site should have recognized the instability of the hillside slope during an inspection.[5]

Since by all accounts Hurricane Sandy was an unprecedented storm, the issue then becomes whether injuries sustained were solely caused by the storm itself, i.e., an "Act of God," or whether human misfeasance or nonfeasance played a role. This article reviews cases that could be applicable to this inquiry.

**Falling Trees and Branches**

During the height of the storm, people were killed or injured from falling trees or branches brought down by heavy winds gusting to 80 miles per hour. These winds were sufficiently severe, unusual and unforeseeable that defendants involved in lawsuits will raise the Act of God defense. In *Simet v. Coleman Co.*, the Fourth Department held that a falling tree limb was an Act of God when it broke during an intense storm, and the owner had no notice that the tree was defective.[6] In one news story, a Queens' man died when a tree fell into his bedroom. It is reported that the man's

family had been complaining to the city for 25 years about this tree, which raises the question of whether there was notice of the defect (NY1, Rosemary Shultz, Oct. 30, 2012, "Queens Man's Storm Death Leaves Family Devastated," http://www.ny1.com/content/top_stories/171589/queens-man-s-storm-death-leaves-family-devastated.)

**Falling Materials**

Over 100 years ago, a man was struck by a skylight that blew off of the top of a building on Fifth Avenue. The First Department held that:

It is the duty of those constructing buildings in close proximity to the public street to exercise reasonable care to construct them with such safety and security that they will withstand any storm or wind that reasonably prudent men, familiar with weather conditions in the locality, would anticipate might occur.[7]

The court ruled that it is a jury question whether the storm was of such unusual violence as to exonerate the defendant from the normal requirement that, in constructing a building, it must foresee and guard against such incidental dangers.[8]

During Hurricane Sandy, the façade of one building fell onto a Manhattan street. In lawsuits that may follow, the owner may attempt to argue an Act of God defense. A reviewing court should take into account that surrounding building facades did not suffer the same fate. Maybe that is indicative of human error in upkeep or construction.

Hurricane Sandy famously broke a building crane boom, leaving it hanging precariously off a skyscraper on 57th Street in Manhattan. Lawsuits have been initiated claiming the crane operators were negligent in securing the boom before the storm, requiring a detailed investigation into what the crane operators knew or should have known about the crane and its safe storage before a storm.

A recent First Department decision found that gusts of wind on the roof of a 43-story building should not be characterized as an Act of God, and therefore not relieve the building owners of liability. In that case, a gust of wind caused a scaffold's basket to separate from its loading platform, causing a workman to fall. In *Verdugo v. Seven Thirty One Ltd. P'ship*, the First Department held that it was not an Act of God when the plaintiff was struck by falling plywood as he was walking. It was uncontested that the plywood blew away from a construction area and that there were 30-mph winds causing it to become airborne, yet it was not an "unusual, extraordinary and unprecedented event."[9]

In comparison, in one suit, where a 17-year-old boy in Onondaga County was injured by a piece of flying plate glass from a retail store window that broke during "Hurricane Hazel" in 1954, the Fourth Department held plaintiff was unable to establish sufficient notice to show that defendant knew of any defect and thus concluded the occurrence to be an Act of God. The storm was "one of the most violent windstorms in the area," said the court. Many windows were broken in the locality and the negligence claim was dismissed.[10]

The outcome of these cases is not easily predictable, no more than the destruction of a storm itself. In *Lofstad v. S&R Fisheries*, a shed blew off of a roof and injured several people below. The Second Department held, despite the fact that there were 70-mile-per-hour winds, that there was a question of fact whether the sole cause of the accident was an Act of God, or whether human behavior, such as the placement or securing of the shed, played a role.[11] As another example, see *Fulgum v. Town of Cortlandt*, where the Second Department held that genuine issues of material fact existed whether the collapse of a bridge during a hurricane was due to the town's negligent failure to inspect, repair, and maintain the bridge.[12]

**Flooding**

Other cases to consider involve damages resulting from flooding. In the Second Department decision of *Holmes v. Village of Piermont*,[13] plaintiffs' homes were flooded during Tropical Storm Floyd in 1999. The court held that plaintiffs stated a claim that the village negligently closed pumps on the sewer trunk during the storm, thereby causing sewage to flow onto their properties. The case was allowed to proceed because the municipality could not establish lack of negligence in its inspection and maintenance of the sewer line and storm drainage system.[14]

In *Prashant Enterprises v. State*, the Third Department held it was not an Act of God when 1.54 inches of rainfall caused a creek to overflow and flood claimant's property. Compare that result to *Abarca v. Shoes*, where the consequence of a shopping mall being flooded during a storm that caused 2.67 inches of rain to fall in four hours, was ruled an Act of God.[15] The analyses are fact-intensive.

On Nov. 20, 2012, a prospective class action was filed in New York County Supreme Court on behalf of the residents of two apartment buildings in Lower Manhattan against the building owners, *Cashwell v. 2 Gold LLC*, Index No. 158155/2012. The complaint alleges that the defendants failed to construct proper water barriers in front of a parking garage due to its slope and close proximity to the buildings' mechanical rooms. The inquiry here is whether the building

owner had notice of a defect that was the proximate cause of the flooding of the mechanical room, i.e., is it a natural direct consequence of human negligence, or was the unprecedented storm the overwhelming cause?

**Power Outages**

Millions of customers lost power during the peak of Sandy. Hundreds of thousands were without power for days, and thousands were without power for weeks. To be able to bring suit against the utilities that provide power, the person or business bringing the claim must have a service contract with the utility. This requirement was made clear in *Strauss v. Belle Realty*,[16] a Court of Appeals case involving a man injured when he fell down stairs during the 1977 blackout. Because the plaintiff did not have a contract with Con Edison for the electricity in the common area of the building in which he fell, he could not directly bring suit. The court held that:

[I]t is the responsibility of courts, in fixing the orbit of duty, to limit the legal consequences of wrongs to controllable degree and protect against crushing exposure to liability. In fixing the bounds of that duty, not only logic and science, but policy plays an important role. The courts' definition of an orbit of duty based on public policy may at times result in the exclusion of some who might otherwise have recovered for losses or injuries if traditional tort principles had been applied.[17]

Challenging questions regarding this "orbit of duty" will surely arise as a result of Hurricane Sandy. For those with service contracts, they should be able to bring claims if they can establish willful misconduct or gross negligence on the utilities' behalf in preparation or management of its services during or after the storm.[18] For example, gross negligence was found by a jury in *Food Pageant v. Consol. Edison*, which involved a grocery store chain seeking damages for food spoilage and loss of business as a result of the 1977 blackout. The Court of Appeals upheld the jury's determination that Con Edison had acted grossly negligent on the night of the blackout, as to both staffing decisions and ensuring that their employees acted appropriately.[19]

A class action lawsuit has already been filed against Long Island Power Authority (LIPA) claiming it failed to replace an "outdated, obsolete" management system for dealing with large-scale power outages. Flaws in the system were documented the year before, following Hurricane Irene, in a report issued by the New York State Public Service Commission, which regulates utilities. Governor Andrew Cuomo and Nassau County Executive Edward Mangano publicly described LIPA as unprepared for the storm, of operating an archaic system, and of poorly responding to customer needs for information. It these allegations prove to be true then claims that LIPA was grossly negligent may be successful.

**Hospitals and Nursing Homes**

Several nursing homes and hospitals had to be evacuated during Hurricane Sandy, not without injury. The New York Times reported that Promenade Rehabilitation and Health Care Center in Rockaway, Queens, failed to evacuate its residents before the storm despite the fact that it was in the flood zone, just yards from the Atlantic Ocean. When the storm hit, the facility generator flooded and failed. Also, food ran out quickly because none was stored. In violation of state regulations, when patients were transported the next day to shelters, hospitals or other facilities, they were sent without their medical records and unaccompanied by staff.

In the days and hours as Sandy was approaching, it has been reported that New York City officials, as well as Mayor Michael Bloomberg, specifically advised coastal nursing homes and hospitals that they did not recommend evacuation, although the general public instruction to some of these very same areas, such as Rockaway, was to evacuate. The decision was based on economic as well as health grounds. Some health care administrators were surprised and had been planning to evacuate until then.[20] Generally, a municipality is not liable for the negligent performance of a governmental function unless there existed "a special duty to the injured person, in contrast to a general duty owed to the public."[21] However, as a result of the city's "positive direction and control," in the face of a dangerous situation, the government may have undertaken a special duty.[22] The immediacy of the emergency may be another factor.[23] It is a case of first impression.

Flooding also affected Bellevue Hospital and NYU Langone Medical Center, both in a flood zone. Approximately 1,000 patients had to be evacuated. There are similar stories of patients sent without records, as well as claims of inadequate staff to assist in safely moving the patients. Al Aviles, president of the New York City Health and Hospitals Corporation, pointedly remarked that "[n]othing has happened like this in Bellevue's 275-year history."[24]

In conclusion, no one can ignore the incomparable size and strength of Hurricane Sandy. It was not easy for nonscientists to anticipate a storm where winds wreak such havoc as to cause record flooding tidal surges and endless fallen trees. Yet there are certain bad stories where questions are raised if injuries could have been avoided. Whether these potential civil actions reach a jury will depend in the first instance on a judge's analysis of the particular circumstances to see whether there could be found to exist an intervening human conduct causally responsible for an injury, notwithstanding the God-like power of the storm.

***Alan L. Fuchsberg*** *is a partner at the Jacob Fuchsberg Law Firm.* ***Edward J. Hynes*** *is a senior associate at the firm.*

**Endnotes:**

1. See *McArthur & Hurlbert v. Sears*, 21 Wend 190, 197 (N.Y. Sup. Ct. 1839). (Not recognized as a defense to carriers navigating the dangerous waters of Lake Erie).

2. Tel Oil v. City of Schenectady, 303 A.D.2d 868, 873, 757 N.Y.S.2d 121, 126 (3d Dept. 2003); see also *Woodruff v. Oleite*, 199 A.D. 772, 773, 192 N.Y.S. 189, 190 (1st Dept. 1922).

3. Verdugo v. Seven Thirty One P'ship, 70 A.D.3d 600, 602, 896 N.Y.S.2d 27 (1st Dept. 2010) (30-mile-an-hour winds not an "extraordinary, unusual or unprecedented event") ; and Prashant Enterprises v. State, 206 A.D.2d 729, 730, 614 N.Y.S.2d 653, 654 (3d Dept. 1994) (culvert collapse due to heavy but not unprecedented rainfall, not an Act of God).

4. *Barnet v. New York Cent. & H.R.R.*, 222 N.Y. 195, 197, 118 N.E. 625 (N.Y. Court of Appeals 1918); *Tel Oil v. City of Schenectady*, 303 A.D.2d 868, 873, 757 N.Y.S.2d 121, 126 (3d Dept. 2003); *Prashant Enterprises*, supra at 730, at 654; *Greeley v. State*, 94 A.D. 605, 608, 88 N.Y.S. 468, 470 (3d Dept. 1904) (Act of God does not relieve one from liability when one's own act of negligence concurs in causing injury), *Michaels v. New York Cent. R.*, 30 N.Y. 564 (Court of Appeals 1864) (unseaworthiness of vessel brings it within peril).

5. *Tel Oil,* supra, at 870-71, at 124; *Prashant Enterprises. v. State*, supra.

6. Simet v. Coleman Co., 42 A.D.3d 925, 839 N.Y.S.2d 667 (4th Dept. 2007); see also Ivancic v. Olmstead, 66 N.Y.2d 349 (N.Y. 1985) ("[N]no duty to consistently and constantly check all trees for non-visible decay, ...rather, the manifestation of said decay must be readily observable in order to require a landowner to take reasonable steps to prevent harm").

7. *Uggla v. Brokaw*, 117 A.D. 586, 595, 102 N.Y.S. 857, 864 (1st Dept. 1907).

8. Id.

9. Williams v. 520 Madison P'ship, 38 A.D.3d 464, 466, 834 N.Y.S.2d 32, 35 (1st Dept. 2007); *Verdugo v. Seven Thirty One P'ship*, 70 A.D.3d 600, 601, 896 N.Y.S.2d 27, 29 (1st Dept. 2010).

10. King v. Queen Anne Food Products., 5 A.D.2d 596, 598, 173 N.Y.S.2d 975 (4th Dept. 1958).

11. Lofstad v. S&R Fisheries, 45 A.D.3d 739, 846 N.Y.S.2d 283 (2d Dept. 2007); see also *Uggla v. Brokaw*, supra at 587-588, 864; Nessinger v. Ontario County Agr. Soc., 3 A.D.2d 971, 162 N.Y.S.2d 266 (4th Dept. 1957) aff'd sub nom. Nessinger v. Ontario County Agr. Soc., 4 N.Y.2d 814, 149 N.E.2d 895 (1958) (holding that where tent at county fair was blown down by a suddenly arising and freakish wind, patron's injuries were not due to negligence.)

12. Fulgum v. Town of Cortlandt, 2 A.D.3d 775, 770 N.Y.S.2d 416 (2d Dept. 2003).

13. Holmes v. Village of Piermont, 54 AD 3d 809, 863 N.Y.S.2d 774 (2d Dept. 2008).

14. Id; see also Zeltmann v. Town of Islip, 265 A.D.2d 407, 696 N.Y.S.2d 231 (2d Dept. 1999) (Jury question whether the town's "negligent maintenance or repair of the drainage system...or an act of God," caused damage to plaintiff's property); *Seifert v. City of Brooklyn*, 101 NY 136, 144-145 (1886).

15. *Prashant*, supra, Abarca v. Shoes, 81 A.D.3d 675, 676, 916 N.Y.S.2d 183, 184 (2d Dept. 2011).

16. Strauss v. Belle Realty, 65 N.Y.2d 399, 403, 482 N.E.2d 34, 36 (Court of Appeals 1985). Followed by Milliken & Co. v. Con Edison, 84 N.Y.2d 469, 475-76, 644 N.E.2d 268, 269-70 (Court of Appeals, 1994).

17. Id.

18. Food Pageant v. Con Edison, 54 N.Y.2d 167, 172, 429 N.E.2d 738, 740 (Court of Appeals, 1981); *Weld v. Postal Tel. Cable*, 199 N.Y. 88, 98, 92 N.E. 415, 418 (Court of Appeals, 1910).

19. 54 N.Y.2d 167, 174, 429 N.E.2d 738, 741 (Court of Appeals, 1981).

20. Jennifer Preston, Sheri Fink and Michael Powell, Dec. 2, 2012, "Behind a Call That Kept Nursing Home Patients in Storm's Path," New York Times, available at http://www.nytimes.com/2012/12/03/nyregion/call-that-kept-nursing-home-patients-in-sandys-path.html?pagewanted=1&_r=0&emc=eta1.

21. *McLean v. City of New York*, 12 N.Y.3d 194, 199, 905 N.E.2d 1167, 1171 (Court of Appeals 2009).

22. Pelaez v. Seide, 2 N.Y.3d 186, 810 N.E.2d 393 (Court of Appeals 2004).

23. *Rivera v. New York City Transit Auth.*, 77 N.Y.2d 322, 327, 569 N.E.2d 432, 434 (Court of Appeals 1991).

24. http://www.nytimes.com/2012/11/01/nyregion/bellevue-hospital-evacuates-patients-after-backup-power-fails.html.