



God Moves in Extraordinary Ways

J A McInnis explains the 'act of God' defence as it is applied to floods and storms in Hong Kong

The concept of 'act of God' as a legal defence has been considered in several recent local cases including *Born Chief Co (t/a Beijing Restaurant) v Tsai George and Anor*, [1996] 2 HKC 282.

In that case the Defendants raised the defence to a negligence claim which arose because their leaving a rooftop sliding door open resulted in flood damage to the Plaintiff's premises during a rainstorm.

Floods or storms are often cited as classic examples of acts of God which are themselves typically defined as extraordinary and unforeseeable events or accidents that take place without human intervention. The elements of this definition had been considered in local judgments before *Born Chief*.

In *Star Ferry Co Ltd v Owners of the M V Argonaut*, [1980] HKLR 921, Barker J considered whether damage to the Star Ferry pier caused by the *M V Argonaut* during a very severe typhoon fell within the plea. Barker J held that:

In my judgment, an act of God is an accident, due to natural causes, directly and exclusively without human intervention which could not by any amount of ability have been foreseen, or if foreseen, could not by the exercise of all reasonable skill and care have been avoided. But many of the cases speak of the occurrence, the manifestation of nature, as having to be extraordinary. The difficulty is to know what is meant by "extraordinary". Literally it means "out of the ordinary" but that does not advance matters a great deal. Clearly, it does not mean unique. Nor can it mean something which

happens regularly. It must refer to something in between. The mere fact that it has happened before, and may happen again, in my opinion does not prevent it being an act of God. It must however not be an ordinary accidental circumstance. It must be something overwhelming. Whether a particular occurrence amounts to an act of God must be a matter of fact, depending upon the circumstances of the case.

It was argued in *M V Argonaut* that, in view of the fact that typhoons of varying intensities occur quite frequently in Hong Kong, a typhoon could not be said to be an extraordinary occurrence.

Barker J disagreed and reasoned that the birth, development, course and intensity of a typhoon were all unpredictable notwithstanding weather satellites and improved meteorological information. Even though the onset of a typhoon can be foreseen at least by a matter of hours, such factors did not, in his Lordship's judgment, remove the phenomenon from the category of an act of God.

With regard to the human intervention aspect of the tests, his lordship noted that the actions of the crew, eg human intervention in steering the vessel, did not preclude the plea.

In another local case, *Lee Yau Cheung v Seto King Tung and Ors*, No 1355 of 1983 a construction worker was injured when formwork collapsed on him during a storm.

In that case Nazareth J considered whether strong winds could constitute an act of God. His lordship referred to *Charlesworth and Percy on Negligence*, 7th edition; *Nugent v Smith* and, in particular, the views of

Barker J in *M V Argonaut* to draw out the significance of the irresistibility and unforeseeability of such events. On the facts, it was significant that the unconsolidated formwork was unstable, that general forecasts of the rain and winds had been given and that some countermeasures could ultimately have been taken. Hence he held that the defence failed.

Returning to *Born Chief*, the issues were summarised as follows by Liu J:

On behalf of the defendants, the flooding was submitted to be an act of God. In *Tennent v Earl of Glasgow* Lord Westbury defined an act of God in the context of flooding as an escape caused directly by natural causes without human intervention in "circumstances no human foresight can provide against and of which human prudence is not bound to recognise the possibility". . . . From the Royal Observatory statistics available to the judge. . . . It is reasonably clear that. . . the heavy rainfall on 15 October 1991 could not be accepted as a possibility that human prudence was not bound to recognise. There is no evidence that the rainfall was so exceptional as to constitute an act of God. The plea of act of God fails.

If a distinction can be drawn between the results in *M V Argonaut*, *Born Chief* and *Lee Yau Cheung*, it may be that greater weight was given by Barker J in *M V Argonaut* to the harmful magnitude of the storm.

If so, it is submitted that the other cases better accord with legal tests for acts of God which turn upon notions of foreseeability and reasonableness, than they do with theological tests which focus upon the magnitude of events.

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