

# DON'T BLAME IT ON GOD

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## I. INTRODUCTION

In 2019, Americans spent 1.1 trillion dollars on travel-related expenses.<sup>1</sup> Although cruise ships comprise less than one percent of the global maritime community,<sup>2</sup> thirty-two million people were expected to cruise in 2020.<sup>3</sup> Prior to the coronavirus pandemic, which halted much of the scheduled cruise travel towards the end of the year,<sup>4</sup> nearly three hundred cruise line ships sailed passengers to the Mediterranean, the coasts of Asia, and the incredibly popular Caribbean islands.<sup>5</sup> Of the expected passengers, the United States had at least twice as many as any other country.<sup>6</sup> With the large number of people and growing number of vessels, the cruising industry is worth over one hundred billion dollars.<sup>7</sup> Despite the growth of the cruising industry, operational incidents that cause a delay in

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1. U.S. TRAVEL ASS'N, U.S. TRAVEL ANSWER SHEET (Mar. 2019), [https://www.us-travel.org/system/files/media\\_root/document/Research\\_Fact-Sheet\\_US-Travel-Answer-Sheet.pdf](https://www.us-travel.org/system/files/media_root/document/Research_Fact-Sheet_US-Travel-Answer-Sheet.pdf).

2. CRUISE LINE INT'L ASS'N, 2020: STATE OF THE CRUISE INDUSTRY OUTLOOK 7, <https://cruising.org/-/media/research-updates/research/state-of-the-cruise-industry.pdf> (last visited Dec. 8, 2020) [hereinafter STATE OF THE CRUISE].

3. *Id.* at 12.

4. *See, e.g., Cruise Ship No Sail Order Extended Through September 2020*, CDC (July 16, 2020), <https://www.cdc.gov/media/releases/2020/s0716-cruise-ship-no-sail-order.html>.

5. STATE OF THE CRUISE, *supra* note 2, at 13.

6. *See id.* at 16.

7. CRUISE LINE INT'L ASS'N, 2019 CRUISE TRENDS & INDUSTRY OUTLOOK 16, <https://cruising.org/news-and-research/-/media/CLIA/Research/CLIA-2019-State-of-the-Industry.pdf> (last visited Dec. 8, 2020) [hereinafter CRUISE TRENDS]; STATE OF THE CRUISE, *supra* note 2, at 19.

sailing or an injury have been on a slight downward trend since 2009.<sup>8</sup> Incidents, however, do peak every few years.<sup>9</sup>

When passenger injuries occur due to the negligence of the cruise line, litigation is a viable option.<sup>10</sup> In response, the cruising industry has a variety of methods to protect the company from frivolous lawsuits. There are three common techniques cruise lines use to avoid liability. First, cruise lines create adhesion contracts through passenger ticket purchases. The terms of these contracts often provide broad protections to the cruise line company.<sup>11</sup> Second, cruise lines invoke the statute of limitations as an affirmative defense because injury claims have a reduced period of time for plaintiffs to file a claim.<sup>12</sup> Third, the use of maritime law restricts who can sue relative to other areas of law.<sup>13</sup> In addition to these common options to avoid liability, cruise lines may, and often do, rely on the “Act of God” affirmative defense in injury cases dealing with a natural phenomenon.<sup>14</sup> Through this defense, cruise lines reduce or eliminate liability by proving the injury was caused by a God-like act—an act out of the control of the cruise ship’s command.

This Comment will explore the cruise industry’s reliance on the Act of God defense to predict the outcome for a passenger injury case from December 2019. In Part II, this Comment will discuss a cruise line’s liability in passenger injury. After an overview of the topic, a recent passenger injury case will be discussed. In that case, passengers of a Royal Caribbean ship were injured, and some killed, in an onshore excursion.

Part III of this Comment will analyze the Act of God affirmative defense. First, this Comment defines the constraints of the affirmative defense, and gives examples of such. Then, it examines

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8. G.P. WILD (INT’L) LTD., REPORT ON OPERATIONAL INCIDENTS 2009 TO 2018 FOR CLIA GLOBAL 5, 7–9 (Mar. 2019), <https://cruising.org/news-and-research/research/2018/june/report-on-operational-incidents-2009-to-2018> (defining operational injury as a fire, technical breakdown, stranding or grounding, passenger missing overboard and not recovered, storm damage, collision, and sinking).

9. *See id.* at 8–9.

10. *See infra* Section III.B.

11. Spencer Aronfeld, *A Lawyer’s Perspective on Suing Cruise Lines*, HUFFPOST: THE BLOG (Dec. 10, 2016, 3:42 PM), [https://www.huffpost.com/entry/a-lawyers-perspective-on-b\\_8806934?utm\\_campaign=share\\_email&ncid=other\\_email\\_o63gt2jcad4](https://www.huffpost.com/entry/a-lawyers-perspective-on-b_8806934?utm_campaign=share_email&ncid=other_email_o63gt2jcad4).

12. *Id.*

13. *Id.*

14. *See infra* Section III.B.

the trends of the affirmative defense in the twenty-first century; these trends indicate that, overall, cruise lines have been successful with their use of this defense.<sup>15</sup>

Part IV will utilize the trends of the courts when analyzing the affirmative defense to determine the likely outcome for the December 2019 case. Finally, this Comment will analyze the positive and negative implications of the Act of God defense towards the cruise line industry and common carriers, in general.

## II. CURRENT ISSUE

### A. *Cruise Ship Passenger Injury*

A common carrier has the duty “to transport passengers safely and to exercise reasonable care,” known as the contract of carriage.<sup>16</sup> Failure to exercise reasonable care under the circumstances can lead to a carrier being liable for any injury to a passenger through a negligence action.<sup>17</sup> Black’s Law Dictionary includes cruise ships within the definition of a common carrier because cruise ships charge passengers to visit a variety of locations for a fee.<sup>18</sup> Thus, cruise ships—and their management, the cruise line—have an obligation to safely transport their passengers and use reasonable care. The scope of a cruise line’s liability extends to incidents on the ship,<sup>19</sup> while embarking or disembarking the ship,<sup>20</sup> and tendering passengers by smaller boats to ports.<sup>21</sup> Cruise lines can even be liable for incidents during onshore excursions lead by tour operators if an apparent agency relationship can be shown

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15. See *infra* Section III.B.

16. George L. Blum, *Liability of Cruise Ship Operator for Injury to or Death of Passengers*, 82 A.L.R.6th 175 § 2 (2013); see also *Frango v. Royal Caribbean Cruises, Ltd.*, 891 So. 2d 1208, 1210 (Fla. Dist. Ct. App. 2005).

17. See Blum, *supra* note 16.

18. See *Carrier*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee.”).

19. See, e.g., *Galentine v. Holland America Line-Westours, Inc.*, 333 F. Supp. 2d 991 (W.D. Wash. 2004) (noting the cruise line would be liable for any injury that occurred due to a faulty automatic sliding door on the ship’s observation deck).

20. See, e.g., *Kirk v. Holland Am. Line, Inc.*, 616 F. Supp. 2d 1101, 1103–04 (W.D. Wash. 2007) (stating the duty of a carrier extends to “render[ing] such services . . . reasonably necessary to get a passenger safely ashore” (citing *Chan v. Soc’y Expeditions, Inc.*, 123 F.3d 1287, 1290 (9th Cir. 1997)).

21. See, e.g., *Samuelov v. Carnival Cruise Lines, Inc.*, 870 So. 2d 853, 856 (Fla. Dist. Ct. App. 2003) (deciding the cruise line has a “non-delegable duty to provide . . . safe transportation, under adequate supervision, to and from the ship to shore”).

between the cruise line and the independent contractor leading the excursion.<sup>22</sup> This relationship can be illustrated to passengers by “manifestations made by the [cruise line]” that the cruise line owns or is “in charge of” the tour operations, making the operators agents.<sup>23</sup>

However, the scope of a cruise line’s liability is not infinite. An injured passenger must prove that the cruise line had constructive notice of the danger, that the danger was not apparent and obvious, and that the cruise line was the proximate cause of the injury.<sup>24</sup> These factors must be proven regardless of whether the injury occurred on or off the ship.<sup>25</sup> As a common carrier, cruise lines have a large scope of responsibility to maintain passengers’ safety.<sup>26</sup> As the number of cruise passengers increases by at least one million per year,<sup>27</sup> cruise lines have an increasing responsibility to limit injuries.

### B. Royal Caribbean’s Possible Litigation

The volcanic island of White Island in New Zealand increased seismic and volcanic activity throughout November 2019.<sup>28</sup> Thus, the eruption of the volcano on December 9, 2019, occurred during “a period when eruptive activity is more likely than normal.”<sup>29</sup> On that day, forty-seven people were on White Island, including passengers on a shore excursion from Royal Caribbean’s *Ovation of the Seas*.<sup>30</sup> The eruption led to the death of eighteen

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22. See, e.g., *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1316, 1324–25 (S.D. Fla. 2011) (concluding that a cruise line was not liable for injuries during a zip line tour because there was no agency relationship between the cruise line and the tour zip line company).

23. *Id.* at 1324 (quoting *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1371–72 (S.D. Fla. 2005)).

24. See, e.g., *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1236–38 (S.D. Fla. 2006) (finding that the cruise ship was not responsible for the passenger being bitten by a snake while inner tubing during a shore excursion).

25. See *Smolnikar*, 787 F. Supp. 2d at 1322–25.

26. See, e.g., 46 U.S.C. § 3507 (establishing a wide array of safety and security requirements for all passenger carrying ships).

27. CRUISE TRENDS, *supra* note 7, at 18.

28. Morgan Hines, ‘Excitement Turned into Horror’: New Cruise Details Emerge After New Zealand Volcano Eruption, USA TODAY (Dec. 21, 2019, 1:29 PM), <https://www.usatoday.com/story/travel/cruises/2019/12/20/new-zealand-volcano-eruption-royal-caribbean-cruise-details-emerge/2673683001>.

29. *Id.*

30. *Id.*

people, and over twenty-four people had severe burns.<sup>31</sup> After delaying sailing for investigations, the *Ovation of the Seas* continued its itinerary with additional support services for those impacted by the incident.<sup>32</sup>

After more than a year-long investigation, New Zealand has named thirteen parties in lawsuits following the eruption.<sup>33</sup> The tourism company that led the onshore excursion and Royal Caribbean, who advertised the excursion on the cruise line's website,<sup>34</sup> are expected to be targeted by lawsuits.<sup>35</sup> American courts are expected to receive liability suits from both injured passengers and the estates of the passengers who died.<sup>36</sup> The injured parties must prove three elements to be granted relief: (1) that Royal Caribbean was the proximate cause of the injury due to an apparent agency relationship between Royal Caribbean and the excursion company leading the volcano tour; (2) that the danger was not apparent and obvious; and (3) that Royal Caribbean knew or should have known of the increased risk on White Island.<sup>37</sup> The extensive description of the White Island tour on the website will likely show a connection between the excursion company and the cruise line.<sup>38</sup> Therefore, the difficult component for the injured parties to prove is Royal Caribbean's awareness of the risk by promoting and allowing the volcano excursion.<sup>39</sup> The evidence available creates a debate whether the volcanic eruption was foreseeable.<sup>40</sup>

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31. *Id.* Of the deaths caused by the eruption, two of the victims' bodies washed into the sea. Julia Hollingsworth, *New Zealand Police Say Two Bodies May Never Be Found After White Island Volcano Eruption*, CNN (Dec. 17, 2019, 11:51 PM), <https://www.cnn.com/2019/12/17/australia/new-zealand-volcano-bodies-intl-hnk/index.html>.

32. *Id.*

33. Nick Perry, *New Zealand Files 13 Safety Charges After Volcano Killed 22*, ABC NEWS (Nov. 30, 2020, 3:04 AM), <https://abcnews.go.com/Travel/wireStory/zealand-files-13-safety-charges-volcano-killed-22-74456684>.

34. Tom Hals, *Royal Caribbean Liability for Volcano Deaths May Turn on 'Act of God' Defense*, REUTERS (Dec. 12, 2019, 5:03 PM), <https://www.reuters.com/article/us-newzealand-volcano-lawsuits-analysis/royal-caribbean-liability-for-volcano-deaths-may-turn-on-act-of-god-defense-idUSKBN1YG2NX>.

35. *Id.*

36. *Id.*

37. *Id.*; Sara Ametrano, *New Zealand Volcano: Will Royal Caribbean be Found Liable for Passenger Deaths?*, TRISURA (Jan. 6, 2020), <https://www.trisura.com/royal-caribbean-white-island-eruption>.

38. See Hals, *supra* note 34.

39. *Id.*

40. See generally Julia Hollingsworth, *Should Tourists have been on New Zealand's Volcanic White Island?*, CNN TRAVEL (Dec. 11, 2019, 12:13 PM), <https://edition.cnn.com/2019/12>

As seen in previous litigation by Royal Caribbean and other cruise lines where the passenger injuries were due in part to natural causes, Royal Caribbean will likely use the Act of God affirmative defense.<sup>41</sup> The cruise line would deny liability because the volcano eruption was an unforeseeable force of nature.<sup>42</sup> The courts then must decide whether the cruise line irresponsibly allowed passengers to attend the excursion or if the injuries were beyond the cruise line's reasonable control.<sup>43</sup>

### III. THE ACT OF GOD AFFIRMATIVE DEFENSE

#### A. Background

An “unusual, extraordinary, sudden, and unexpected manifestation” of the forces of nature can cause the invocation of the Act of God affirmative defense.<sup>44</sup> This defense is unique because there is no human fault in the injuries—differing from the force majeure and inevitable accident defenses.<sup>45</sup> The weather or geophysical phenomenon described as an act of God would reduce or eliminate the liability of a party utilizing the defense.<sup>46</sup>

There is reluctance to reduce the Act of God defense to a precise definition.<sup>47</sup> A single definition may place too high of an expectation for acts of God to be “unprecedented,” inappropriately “restrict[ing] the application of the rule.”<sup>48</sup> However, a common carrier, like a ship or an airplane, must generally prove three factors to demonstrate that an event was an act of God.<sup>49</sup> First, the force of nature must be “abnormal or unusual in occurrence.”<sup>50</sup> Second, the force of nature must be “of a superhuman power that breaks the chain of causation in the realm of human activity,” meaning nature

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/10/asia/white-island-new-zealand-tourism-intl-hnk/index.html (noting an increase in the alert level of the volcanic monitoring system with tours operating safely at the same alert level as in the past).

41. Hals, *supra* note 34; *see infra* Section III.B.

42. Hals, *supra* note 34.

43. *In re Catalina Cruises, Inc.*, 930 F. Supp. 1384, 1391 (C.D. Cal. 1996).

44. 6 Am. Jur. 3d *Proof of Facts* § 319 (2019) [hereinafter *Proof*].

45. *Id.*

46. *Id.*; 13 C.J.S. *Carriers* § 400 (2019).

47. *Proof*, *supra* note 44; 13 C.J.S. *Carriers* § 400 (2019).

48. *Gulf v. Texas Star Flour Mills*, 143 S.W. 1179, 1182 (Tex. App. 1912).

49. *Proof*, *supra* note 44.

50. *Schrader v. State*, 213 N.W.2d 539, 542 (Iowa 1973); *Proof*, *supra* note 44, § 2.

was the sole proximate cause of injury.<sup>51</sup> Third, the severity of the occurrence must be so that “due diligence and proper skill were used to avoid the damage” but would have not prevented the harm.<sup>52</sup>

Various natural events have successfully been defined as an act of God.<sup>53</sup> Unusually violent wind and rainstorms satisfy the defense.<sup>54</sup> Similarly, hurricanes,<sup>55</sup> tornados,<sup>56</sup> snowstorms,<sup>57</sup> and floods of unexpected severity are considered acts of God.<sup>58</sup> Changes in weather that increase or decrease unprecedentedly can satisfy the defense if the changes could not be reasonably foreseen.<sup>59</sup> Other geophysical events, such as earthquakes<sup>60</sup> and rogue waves,<sup>61</sup> have also met the factors for the affirmative defense. The success of an Act of God defense is a matter of fact, leaving the decision to a jury or a judge in a bench trial.<sup>62</sup>

### B. History

Common carriers have used the Act of God defense to recuse liability since the nineteenth century.<sup>63</sup> In the past twenty years, cruise lines have continued to use the affirmative defense to shield against accusations of liability of injured passengers or damaged goods.<sup>64</sup>

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51. *Chicago & E. Ry. Co. v. Schaff Bros. Co.*, 117 N.E. 869, 870 (Ind. Ct. App. 1917); *Proof, supra* note 44, § 3.

52. *Skandia Ins. Co. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1241 (S.D. Ala. 2001); *Proof, supra* note 44, § 4.

53. *See generally supra* note 50–52; *see also infra* notes 54–57 and accompanying text.

54. *E.g., Harris v. Norfolk S. R. Co.*, 91 S.E. 710, 710 (N.C. 1917) (recognizing wind and rainstorms are acts of God if one is “so far outside the ordinary range of human experience”).

55. *See, e.g., Skandia*, 173 F. Supp. 2d at 1252.

56. *E.g., Gulf, C. & S.F. Ry. Co. v. Compton*, 38 S.W. 220, 221 (Tex. App. 1896).

57. *E.g., Ward v. Chicago, St. P., M. & O. Ry. Co.*, 137 N.W. 995, 997 (Neb. 1912).

58. *E.g., Whittier Mills Co. v. S. Ry. Co.*, 190 S.E. 433, 434 (Ga. Ct. App. 1937).

59. *E.g., Vernon v. Am. Ry. Express Co.*, 222 S.W. 913, 914 (Mo. Ct. App. 1920); *e.g., Rezek v. S. Pac. Co.*, 181 N.Y.S. 117, 119–20 (1920).

60. *E.g., S. R. Co. v. Cohen Weenen & Co.* 157 S.E. 563 (Va. 1931).

61. *E.g., Wyler v. Holland Am. Line-USA, Inc.*, 348 F. Supp. 2d 1206, 1211 (W.D. Wash. 2003).

62. *See generally Crowley v. Costa*, 924 F. Supp. 2d 402, 417 (D. Conn. 2013).

63. *See, e.g., McGraw v. B. & O. R. R. Co.*, 18 W. Va. 361 (1881).

64. *See, e.g., Wyler*, 348 F. Supp. 2d at 1211; *Skandia Ins. Co., Ltd. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1233–34 (S.D. Ala. 2001).

In the beginning of the twenty-first century, the affirmative defense was often granted in favor of common carriers.<sup>65</sup> At an Alabama dock, goods stored in containers were damaged when Hurricane George flooded the container yard.<sup>66</sup> When assessing the validity of the Act of God defense, the court distinguished the damage of Hurricane George from similar storms by describing the damage as “unexpected and unforeseeable devastation.”<sup>67</sup> The court acknowledged that predicting the strength of a hurricane and, thus, enacting due diligence was a difficult task.<sup>68</sup> The affirmative defense is expansive as to the effects of a natural phenomenon, not just the type; even expected storms can leave unexpected results.<sup>69</sup> Liability under the Act of God affirmative defense is determined to be “highly fact specific,” allowing the court to consider the rationale of the allegedly liable party.<sup>70</sup>

Allowing for a highly fact-specific approach has benefited cruise lines most commonly in cases of freak waves.<sup>71</sup> Since the beginning of the century, the most common and arguably predictable situation where ships enact the Act of God defense is for damages and injuries caused from the command’s operation of the vessel in a storm.<sup>72</sup> Injured parties provide evidence highlighting the foreseeability of storms and the risks associated with operating a ship through them.<sup>73</sup> Evidence of weather conditions on and around the date of the incident, historical weather conditions for the season, and the command’s standard of care leads to a clearer understanding of the foreseeability of the storm.<sup>74</sup> Even with the expectation that ships be aware and act diligently in storms—despite the infrequency with which the storm may occur—the Act of God defense is

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65. See generally *Skandia*, 173 F. Supp. 2d at 1228–29 (holding that the cargo shipping owner was not responsible for goods damaged in a hurricane).

66. *Id.* at 1233–34.

67. *Id.* at 1240.

68. *Id.*

69. *Id.* at 1246.

70. *Id.*

71. *E.g.*, *Wylar v. Holland Am.-USA, Inc.*, 348 F. Supp. 2d 1206, 1211 (W.D. Wash. 2003).

72. *Id.*; *Crowley v. Costa*, 924 F. Supp. 2d 402, 416 (D. Conn. 2013); *Stanley v. Starfleet Marine Transp., Inc.*, No. 16-13753, 2018 WL 3632354, at \*1, \*3 (E.D. La. July 31, 2018).

73. *Wylar*, 348 F. Supp. 2d at 1210; *e.g.*, *Crowley*, 924 F. Supp. 2d 402.

74. *E.g.*, *Crowley*, 924 F. Supp. 2d at 402; *Wylar*, 348 F. Supp. 2d at 1212.



largely successful for freak wave cases.<sup>75</sup> Ships and their command are acknowledged for being increasingly capable of identifying and navigating storms due to maritime technology.<sup>76</sup> However, the expectations for the safety of passengers and goods do not follow suit.

Despite the continuing success of the Act of God affirmative defense during trial, courts have greater hesitancy ruling in favor of the defense in a pre-trial motion.<sup>77</sup> In *Stanley v. Starfleet Marine Transportation, Inc.*, a motion for summary judgment was denied due to the factual analysis an Act of God defense requires.<sup>78</sup> This practice may benefit the injured parties because there is more time to prepare a case that rebuts evidence that favors the affirmative defense. Additionally, the trial setting may allow for more direct confrontation of the common carrier's evidence.

#### IV. IMPLICATIONS FOR FUTURE CASES

##### A. *Royal Caribbean's Litigation*

An American couple has filed the first complaint against Royal Caribbean for injuries that they sustained from the volcanic eruption.<sup>79</sup> While investigations are still ongoing,<sup>80</sup> burden-shifting will ensue once litigation begins; the injured parties would have to initially prove Royal Caribbean's negligence. Then, the burden shifts to Royal Caribbean to defend against the negligence claim. To do this, Royal Caribbean will likely use the Act of God defense, illustrating how the incident meets the parameters of the affirmative defense. If successful, the injured parties have the burden of challenging the applicability of the affirmative defense. Lastly, the

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75. *Slatten, LLC v. Royal Caribbean Cruises Ltd.*, No. 13-673, 2014 WL 5524270, \*4 (E.D. La. Oct. 31, 2014); *Wylter*, 348 F. Supp. 2d at 1210; *Crowley*, 924 F. Supp. 2d at 402.

76. *Wylter*, 348 F. Supp. 2d at 1210 (noting that there were reasonable options for the cruise line to mitigate injuries, including taking a Beaufort 10 reading, adjusting the timing of the turn, and being aware of when passengers were awake on the ship).

77. *Stanley*, No. 16-13753, 2018 WL 3632354 at \*2.

78. See generally *id.*

79. See Rebekah Riess, *Couple Sues Royal Caribbean After Sustaining Severe Burns in Deadly New Zealand Volcano Eruption*, CNN (June 26, 2020, 3:29 AM), <https://www.cnn.com/2020/06/26/us/couple-sues-cruise-line-after-volcano-eruption/index.html>.

80. See Charlotte Graham-McLay, *New Zealand Volcano Investigation Could Take a Year, says Arden*, THE GUARDIAN (Dec. 16, 2019, 1:16 PM), <https://www.theguardian.com/world/2019/dec/16/new-zealand-volcano-investigation-could-take-a-year-says-arden>.

factfinder determines whether Royal Caribbean has successfully proven an affirmative defense or if the injured parties have successfully proven a negligence claim.

The injured parties' prima facie negligence case must prove that Royal Caribbean owed a duty to its passengers, the cruise line breached the duty, and the breach was a proximate cause of the injury.<sup>81</sup> Additionally, the injured parties must prove damages.<sup>82</sup> This case is dependent on whether Royal Caribbean was the proximate cause for the injuries.<sup>83</sup> Determining the proximate cause is dependent on two factors: (1) the existence of an apparent agency relationship between Royal Caribbean and the tour excursion company, and (2) the foreseeability of the eruption of the volcano.<sup>84</sup>

### i. The Evidence

For an apparent agency relationship to exist, a cruise line must manifest a relationship with the onshore tour excursion company to its passengers.<sup>85</sup> Here, Royal Caribbean advertised the volcanic island, White Island, on its website.<sup>86</sup> Royal Caribbean advertised an opportunity to "get close to the drama" with "[g]as masks" to protect from "roaring steam vents, bubbling pits of mud, . . . and . . . steaming acid."<sup>87</sup> The specific tour company was not identified on the website.<sup>88</sup> However, if Royal Caribbean sold the tour online or on the boat, the tour would likely be viewed as an extension of the ship's offerings to passengers.<sup>89</sup> If so, the cruise line and the tour company would have an agency relationship.<sup>90</sup> Further evidence that the passengers believed that Royal Caribbean partnered with the tour group would strengthen the argument.<sup>91</sup>

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81. Justin Ziegler, *Passenger's Slip and Fall on Carnival Cruise Dismissed Where No Substance on Floor*, JZ HELPS (Sept. 1, 2015), <https://www.justinziegler.net/slip-fall-carnival-cruise-dismissed-no-substance-on-floor>.

82. *Id.*

83. Hals, *supra* note 34.

84. *Id.*; Ametrano, *supra* note 37.

85. *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1324–25 (S.D. Fla. 2011).

86. Hals, *supra* note 34.

87. *Id.*

88. *Id.*

89. *See Smolnikar*, 787 F. Supp. 2d at 1324.

90. *Id.*

91. *Id.* at 1324–25.

The more difficult factor for the injured party to prove is the foreseeability of the volcano eruption. For liability to be proven, Royal Caribbean must have had actual or constructive notice of the eruption; the injuries from the tour must be determined to not be apparent or obvious; and there must be no intervening factors that negate Royal Caribbean as a proximate cause.<sup>92</sup> For Royal Caribbean, the injured parties' evidence for foreseeability will be negated by the evidence used for the Act of God affirmative defense. While the injured parties attempt to prove that the injuries and deaths from the volcano eruption were due to the cruise line's negligence, Royal Caribbean will likely argue that the eruption was an "unusual, extraordinary, sudden, and unexpected manifestation" of nature.<sup>93</sup> Convincing evidence is available for both parties here,<sup>94</sup> causing the crux of the case to depend on the weight that the factfinder gives to the various pieces of evidence.

#### a. Supporting Foreseeability

From the description on Royal Caribbean's website, the cruise line likely knew the tour was dangerous.<sup>95</sup> White Island is described as "New Zealand's most active cone volcano" and the largest volcanic structure in the country.<sup>96</sup> The volcanic activity had been increasing in frequency.<sup>97</sup> Eruptions were reported in 2000, 2012, 2013, and 2016.<sup>98</sup> Twenty days prior to the 2019 eruption, the volcanic alert level increased, an earthquake occurred beneath the island, and gas levels increased.<sup>99</sup> GeoNet, a government-sponsored

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92. See, e.g., *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1236, 1237, 1238 (S.D. Fla. 2006) (requiring the plaintiff to establish if notice was given, provide sufficient evidence to prove causation, and show that the damage was not from an "apparent or obvious" danger).

93. *Proof*, *supra* note 44, § 1.

94. See *supra* Section IV.A.i; see *infra* Sections IV.A.i.a, b.

95. A cached version of Royal Caribbean's website described White Island as "one of the most active volcanoes in the world." It further encouraged passengers to "[g]et close to the drama: [g]as masks help you get near roaring steam vents, bubbling pits of mud, hot volcanic streams and the amazing lack of steaming acid." Hals, *supra* note 34.

96. GeoNet, *About White Island*, EARTHQUAKE COMM'N AND GNS SCI. (2019), <https://www.geonet.org.nz/about/volcano/whiteisland>.

97. See Keith S. Brais & Michelle Y. Gurian, *The White Island Volcano Eruption – What was Royal Caribbean thinking? A Maritime Attorney's Perspective.*, BRAILS L. FIRM: MAR. L. BLOG (Dec. 23, 2019), <https://www.maritimelawblog.net/the-white-island-volcano-eruption-what-was-royal-caribbean-thinking-a-maritime-attorneys-perspective>.

98. *Id.* GeoNet, *supra* note 96.

99. Brais & Gurian, *supra* note 97.

“modern geological hazard monitoring system in New Zealand,”<sup>100</sup> broadcasted four reports within the twenty-day period denoting the geological changes on White Island.<sup>101</sup> GeoNet provided warnings of the volatile conditions for more than two weeks prior to the eruption,<sup>102</sup> creating significant doubt that the eruption was unforeseeable to the cruise line.

Additionally, the extent of the danger is arguably not apparent or obvious to passengers because they trust cruise lines not to advertise risk-laden activities.<sup>103</sup> The family of one injured passenger believed “Royal Caribbean would not have let her visit the island if it were not safe,” trusting the cruise line to avoid dangerous conditions.<sup>104</sup> Furthermore, any failure by Royal Caribbean to reasonably assess the safety and knowledge of the tour company that the cruise website advertises is a breach of duty.<sup>105</sup> A reasonable common carrier would evaluate its agents to ensure there is no notice of dangers. Royal Caribbean could have warned passengers of the increasing volcanic activity or disallow passengers from participating in the tour under such conditions. Since Royal Caribbean made no efforts to limit activity on White Island, the danger was possibly not apparent or obvious to passengers.

#### b. Challenging Foreseeability

Royal Caribbean’s argument is supported by evidence that counters the foreseeability of the incident. The cruise line will initially challenge liability through the terms of passenger tickets, which state that the cruise line is not responsible for “death or loss of property caused by an act of God . . . or other events beyond the company’s control.”<sup>106</sup> Additionally, the cruise website advertised the obvious dangers associated with touring a volcanic island.<sup>107</sup> The advertisement informed passengers that there was safety

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100. GeoNet, *About GeoNet*, EARTHQUAKE COMM’N AND GNS SCI. (2019), <https://www.geonet.org.nz/about>.

101. See Brais & Gurian, *supra* note 97.

102. *Id.*

103. See Hals, *supra* note 34.

104. *Id.*

105. *Id.*

106. *Id.*

107. Tom Hals, *Royal Caribbean Faces Action over NZ Dead*, CENTRAL W. DAILY (Dec. 13, 2019, 10:08 PM), <https://www.centralwesterndaily.com.au/story/6541538/royal-caribbean-faces-action-over-nz-dead>.

equipment, like a gas mask, required for the tour.<sup>108</sup> Plus, participants of the tour signed a waiver and release of liability.<sup>109</sup> Although not determinative,<sup>110</sup> a waiver presumes that there is some risk in the tour. The requirement for the equipment and the signing of a waiver strengthens the argument that the danger was apparent and obvious.

Further supporting Royal Caribbean's defense, there is evidence that the volcano eruption was unexpected. The last time the volcano erupted was in 2016, three years prior to the incident, and it was described as "short lived."<sup>111</sup> Furthermore, the last fatal eruption was over 100 years ago.<sup>112</sup> In addition, White Island was charted at a two-out-of-five on GeoNet's Volcanic Alert Levels.<sup>113</sup> The volcano was categorized at the time for "moderate to heightened . . . unrest," not even to the level of an eruption.<sup>114</sup> Plus, volcanoes are known to be unpredictable; volcanoes have erupted and remained calm at various alert levels.<sup>115</sup> Monitoring systems of volcanic activity are not reliable enough to fully assess the risk of danger.<sup>116</sup> Therefore, even acting as a reasonable common carrier, Royal Caribbean may have had no notice of the true likelihood of an eruption. On December 9, 2019, Royal Caribbean and the tour company possibly had no signal that a volcanic eruption was going to occur that day.

## ii. The Predicted Outcome

Both parties have evidence with substantial weight to convince a factfinder. However, taking into consideration the available evidence at the time and the trends of the courts in the past twenty years, Royal Caribbean will likely be successful in defending the lawsuits.

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108. *Id.*

109. Brais & Gurian, *supra* note 97.

110. *Id.*

111. Ben Westcott et al., *New Zealand Volcano Eruption Leaves at Least Five Dead*, CNN WORLD (Dec. 9, 2019, 1:54 PM), <https://www.cnn.com/australia/live-news/new-zealand-volcano-live-intl-hnk/index.html>.

112. *See id.*

113. Hollingsworth, *supra* note 40.

114. GeoNet, *About Volcanic Alert Levels*, EARTHQUAKE COMM'N AND GNS SCI., <https://www.geonet.org.nz/about/volcano/val> (last visited Dec. 10, 2020). Although the number is low on the Volcanic Alert Levels, volcanoes like White Island are known to erupt at a level one out of five; Hollingsworth, *supra* note 40.

115. *See* Westcott et al., *supra* note 111.

116. Hollingsworth, *supra* note 40.

One of the first determinations a court will make is the predictability of the eruption. There was a peak of seismic and volcanic activity on and around the date of the incident, increasing the risk of injury. However, the historically low chances of injury on White Island reduce the foreseeability of future injuries. In addition, the volcanic activity prior to the eruption did not rise to a level that caused a concern to White Island's tourism.<sup>117</sup> Thus, Royal Caribbean could reasonably determine that there was no risk for its passengers. Most convincingly, volcanic monitoring systems are not yet advanced enough to accurately predict an eruption. Additionally, courts will compare Royal Caribbean's action with the standard of care in the industry.<sup>118</sup> Although evidence is limited in this aspect, no party has alleged that Royal Caribbean has acted outside of industry practices. Thus, the court will likely favor the cruise line on this issue.

Furthermore, the passengers must prove that the injuries from the volcano tour were not a result of obvious or apparent dangers. Touring an active volcano will always have innate dangers that a passenger should reasonably expect to recognize. The description of the tour noted that protective gear was required,<sup>119</sup> implying that this active volcano involved danger. In fact, an eruption is always a risk while on an active volcano. The severe burns the passengers sustained are an expected possible injury from touring an active volcano. However unfortunate the results, the ruling will likely favor Royal Caribbean, reasoning that the danger of the volcano was obvious and apparent.

Although courts will likely rule in Royal Caribbean's favor, the policy implications may be harmful. Passengers should be allowed to place trust in cruise lines and the excursions that the cruise advertises. If passengers are expected to heavily research every excursion, the ease of a cruise vacation is diminished. Royal Caribbean should have greater responsibilities in ensuring the safety of its guests. Imposing a higher standard on cruise lines will deter the company from making risky decisions for the sake of increasing profits. Balancing the rights of consumers and industry can become difficult and time-consuming. However, if the fact-intensive Act of

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117. Westcott et al., *supra* note 111.

118. See *Blansett v. Cont'l Airlines, Inc.*, 379 F.3d 177, 181 (5th Cir. 2004).

119. Hals, *supra* note 34.

God affirmative defense is utilized, courts should take time to guarantee its proper use.

*B. Effects on the Industry*

i. Cruise Industry

The Act of God affirmative defense is used by numerous cruise lines.<sup>120</sup> The success of the defense and the constant forces of nature will likely lead to the continuance of the defense's use. Courts have a responsibility to apply the defense appropriately to balance the rights of passengers and the cruise line.

The concerns for passengers all seem to stem from the imbalance of information between the two parties. Beginning with booking excursions, passengers are often not aware of the details—or identity—of the tour excursion agency.<sup>121</sup> The agency relationship is developed in a manner where passengers are limited in the amount of risk assessment that they can perform; cruise lines harbor such information and have the duty of care.<sup>122</sup> Additionally, the cruise lines use an adhesion contract in their tickets for the cruise, limiting the cruise line's liability in instances like acts of God.<sup>123</sup> Like most adhesion contracts, the passenger is in “a weaker position . . . with little choice about the terms” and, sometimes, has no knowledge of the details of the terms.<sup>124</sup> Lastly, updated information is more reasonably available to the cruise lines about the

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120. *E.g., In re Catalina Cruises, Inc.*, 930 F. Supp. 1384–86 (C.D. Cal. 1996) (determining liability of a ship in a “rogue wave, which is a peril of nature”); *see also* *Wyler v. Holland Am. Line-USA, Inc.*, 348 F. Supp. 2d 1206, 1211 (W.D. Wash. 2003). Hals, *supra* note 34 (describing a class action lawsuit where Norwegian Cruise Line successfully used an Act of God defense in 2005).

121. *Royal Caribbean May be Liable for Injuries and Deaths from Volcano Eruption*, HOLZBERG LEGAL (Dec. 9, 2019), <https://www.holzberglegal.com/royal-caribbean-may-be-liable-for-injuries-and-deaths-from-v.html>; *see Royal Caribbean liability*, *supra* note 34.

122. *Wolff v. Holland Am. Lines, Inc.*, No. 09-50RAJ, 2010 WL 234772, at \*3 (W.D. Wash. Jan. 13, 2010) (noting that the cruise line owed “a duty of care in selecting independent third parties to provide off-ship excursions”).

123. *E.g., id.* at \*2 (comparing case law where the terms of the contract with the cruise line contained a “limitation of liability”).

124. *Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“A standard-form contract prepared by one party, to be signed by another party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms”).

changes in the environment than the passengers on vacation.<sup>125</sup> Although the forecast information may not be perfect, cruise lines are in a better position to be notified than the passengers.<sup>126</sup> The imbalance increases when considering the experience and resources a cruise line's general counsel may have over certain plaintiffs' attorneys in arguing a case with an Act of God affirmative defense.<sup>127</sup> In recognizing these areas of information imbalance, courts should place a high threshold on the cruise line to prove an event was an unforeseeable act of God.

Even with a high threshold, cruise lines surprised with an act of God will still be able to utilize the affirmative defense. Ship commands must illustrate reasonable care under the circumstances to passengers, but reasonableness is not endless protection for passengers.<sup>128</sup> In the case of natural phenomena, forecasting technology can be inconsistent with predictability—causing the cruise line to take chances about the safety of a decision.<sup>129</sup> Additionally, courts should consider the norms of the tourism industry; if onshore tour excursion companies are still operating the tour, there is an assumption of safe conditions.<sup>130</sup> A history of safe operations under similar conditions increases the unexpected nature of an act of God.<sup>131</sup> Some events or the effects of an event simply cannot be predicted when using reasonable care.<sup>132</sup> The cruise industry needs the

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125. Hollingsworth, *supra* note 40; *see also In re Catalina Cruises, Inc.*, 930 F. Supp. 1384–86 (C.D. Cal. 1996) (weighing the information available in an Act of God defense to determine if the captain of the ship was reasonable for sailing in poor weather conditions).

126. *See* Hollingsworth, *supra* note 40.

127. Litigation is costly, sometimes public, and often favors the side with more financial resources. Additionally, general counsel may have encountered this issue previously and can effectively navigate the lawsuit. All of these factors can work against the passengers in this case. *See The Pros and Cons of Mediation, Arbitration, and Litigation for Resolving Business Disputes*, CONTRAXAWARE (Dec. 3, 2019), <https://www.contraxaware.com/blog/should-you-use-mediation-arbitration-or-litigation-in-a-contract-dispute>.

128. *See Catalina*, 930 F. Supp. at 1391 (“Factors to consider when determining what degree of care is required include, among others, 1) the experience of the crew, 2) the type of carrier involved, 3) the dangers to the passengers peculiar to that type of carrier involved, 4) the carrier’s degree of control over the passengers, and 5) the carrier’s ability to take precautions against such danger.”).

129. *See* Hollingsworth, *supra* note 40; *see also* Westcott et al., *supra* note 111.

130. *See* Hollingsworth, *supra* note 40.

131. *See id.*

132. *Skandia Ins. Co. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1239–41 (S.D. Ala. 2001) (noting that a hurricane is foreseeable, but the force of the storm caused unforeseeable damages).



protection of the Act of God affirmative defense to account for the unpredictability in the world.

Courts should recognize the imbalance between the parties and the extent of the cruise line's foreseeability when reviewing cases with the affirmative defense. The courts must ensure the Act of God defense is not abused by the cruise line industry, while allowing injured parties access to a just outcome.

## ii. Common Carrier Industry

A common carrier "transport[s] freight or passengers without refusal if the approved fare or charge is paid."<sup>133</sup> Although a fact-specific analysis, common carriers' status and accompanying duties have been applied to various industries: ambulance services, amusement parks, pipeline companies, regional transportation, and more.<sup>134</sup> Plus, weather and geophysical phenomena can affect all forms of transportation, resulting in damages to goods and injuries to passengers.<sup>135</sup> Thus, the Act of God defense is not unique to cruise lines. The aforementioned issues are concerns that should be considered among all common carriers.

Since the start of the twenty-first century, common carriers have generally used the Act of God defense in regard to transporting goods "free from negligence."<sup>136</sup> Differing from passengers, damaged goods are often protected under the Carmack Amendment of the Interstate Commerce Act, which provides a statutory right to recover from carriers who damage goods.<sup>137</sup> In the statute, an act of God is an exception, freeing the breaching party from negligence liability.<sup>138</sup> Like in the Carmack Amendment, the Act of God exception is a common term in statutes and contracts when determining liability,<sup>139</sup> as it should be. Reasonable actions will not limit harm in every situation. However, like for the cruise lines, there should be a high threshold for common carriers when determining if a natural force is unforeseeable. The Act of God affirmative

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133. See *supra* note 18.

134. 13 C.J.S. *Carriers* § 2, n.27 (2020).

135. See Hals, *supra* note 34.

136. *E.g.*, *Spray-Tek, Inc. v. Robbins Motor Transp., Inc.*, 426 F. Supp. 2d 875, 882–83 (W.D. Wisc. 2006) (noting, under the Carmack Amendment, the carrier can be "free from negligence and that damage to the shipment . . . due to . . . acts of God").

137. *Id.* at 882.

138. *Id.*

139. *E.g., id.*; see also Aronfeld, *supra* note 11.

defense should be applied, noting the steady improvement of weather monitoring systems and the expertise of the carrier's command.<sup>140</sup> The contract of carriage must be upheld to deter negligent or risky behavior by common carriers.<sup>141</sup>

As a trillion-dollar business, traveling—including leisure, business, and international—places more people onto common carriers.<sup>142</sup> One of the highest industry expectations must be passenger safety; common carriers have a duty to act reasonably according to the circumstances.<sup>143</sup> Courts must ensure that reliance on the Act of God defense does not compromise that goal.

## V. CONCLUSION

The Act of God affirmative defense protects common carriers from being liable for damage caused by unexpected natural forces. Common carriers are expected to undertake reasonable measures to limit or avoid the injuries to their passengers or damages to their goods. Over the past twenty years, many cruise lines have successfully utilized the Act of God defense. Courts have the responsibility to ensure that the affirmative defense does not improperly excuse cruise lines for failing to take reasonable precautions. The Act of God defense should be applied narrowly to deter cruise ships and other common carriers from engaging in risky travel, all in the desire to gain higher profits. A high standard for the affirmative defense will allow true acts of God to excuse cruise ships from liability, while reducing the overuse of the defense and holding common carriers responsible in cases of true negligence.

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140. See *In re Catalina Cruises, Inc.*, 930 F. Supp. 1384, 1386, 1391 (C.D. Cal. 1996); see also Hollingsworth, *supra* note 40.

141. See Blum, *supra* note 16.

142. U.S. TRAVEL ASS'N, *supra* note 1.

143. See Blum, *supra* note 16.