In *Hinsdale v. Orange County Publications, Inc.*,[116] the New York court found it libelous per se to say of an already married person that he or she is engaged to be married to another. A similar case adopting somewhat the same principle is the Washington action, *Pitts v. Spokane Chronicle Co.*,[117] wherein the court held that "words published in a daily newspaper concerning such matters as betrothals, marriages, births, divorces and custody of children, if false, may be shown to be libelous by proof of extrinsic circumstances, and may thus become actionable without proof of malice or special damages."[118] From the foregoing, it can be surmised that perhaps an increasing number of courts are finding the common law rule of libel to be the more equitable.

V. Conclusion

The Iowa supreme court has, for the most part, followed the principle throughout its decisions that if language is defamatory and subsequently is published, then it is libelous per se. It could forcefully be argued that the libel per quod-libel per se distinction was not introduced into Iowa case law prior to *Ragland v. Household Finance Corp.*[119] As has been pointed out, there is considerable case language that appears to deny a recovery in view of the failure to plead special damage in a libel per quod action. However, it could be argued that such a denial of recovery is based first, on the court's finding that the language is not defamatory, and second, on the failure to plead special damage in an action based on injurious falsehood. In making this all-important determination as to what language is in fact defamatory, the Iowa court has placed great emphasis on whether or not the imputations affect the plaintiff in his trade or business. It is the position of this author that that particular consideration, if given continued priority, will cause the Iowa decisions to lean closer and closer to the rule of libel per quod. The necessity of pleading special damage, as has been discussed, is difficult when trying to vindicate one's reputation that has been harmed in his business or profession, but may be an insurmountable requirement when the plaintiff has not been so affected. For this reason, it is suggested that the English common law rule of libel offers the more equitable remedy, and that the Iowa supreme court should take the opportunity to reiterate its adherence to that rule.

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116. 17 N.Y.2d 284, 270 N.Y.S.2d 592, 217 N.E.2d 650 (1966).
117. 388 P.2d 976 (Wash. 1964).
118. Pitts v. Spokane Chronicle Co., 388 P.2d 976, 981 (Wash. 1964).
119. 254 Iowa 976, 119 N.W.2d 788 (1963).

"ACT OF GOD" AS A DEFENSE IN NEGLIGENCE CASES

I. INTRODUCTION

The term "act of God" has given rise to considerable litigation over the years because of the potential it holds for relieving a defendant from liability for damage sustained by another's person or property. This rule of exemption from liability for loss is based upon the belief that one should not be held responsible for that which he could not have reasonably anticipated and guarded against.[1] Accordingly, if a defendant to a negligence action can prove the plaintiff's loss was due solely to the occurrence of an act of God, he will not be held liable for the damage resulting therefrom.[2] In relying upon such a defense, the defendant will encounter his greatest difficulty in trying to establish 1) that the particular occurrence falls within the legal definition of "act of God," and 2) that the act of God, and not the defendant's negligence, was the sole proximate cause of the damage or injury incurred.[3] This Note will devote itself to an analysis of these two problem areas as they relate to an act of God as a defense in negligence cases.

II. DEFINING "ACT OF GOD"

A. *The Legal Definition*

Since the expression "act of God" was first employed in 1581, courts have continued to apply a somewhat consistent, though narrowing, definition. The earliest use of the term "act of God" can be found in *Shelly's Case*,[4] where Sir Edward Coke used the expression in reference to the death of a man. In later cases, Coke frequently employed the term when speaking of sudden tempests and the like.[5] Lord Mansfield first introduced the idea that an act of God is "such as could not happen by the intervention of man, as storms, lightning, and tempests."[6] This narrow application of the expression to manifestations of nature forms the basis for the modern usage of the term.

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1. Louisville & N. Ry. v. Finlay, 237 Ala. 116, 185 So. 904 (1939); Oakes v. Peter Pan Bakers, Inc., 258 Iowa 447, 138 N.W.2d 93 (1965).
2. An act of God is an affirmative defense upon which the defendant has the burden of proof. Naxera v. Wathan, 159 N.W.2d 513, 517 (Iowa 1968).
3. Both issues present questions of fact to be determined by the jury. *See* Snyder v. Farmers Irrigation Dist., 157 Neb. 771, 61 N.W.2d 557 (1953).
The Iowa State Bar Association Committee on Uniform Court Instructions recently passed a new instruction on the act of God defense in negligence cases. It instructs the jury that the defendant must prove that the occurrence in question was an act of God and that the occurrence was the sole proximate cause of the loss. IOWA UNIFORM JURY INSTRUCTIONS No. 1.22 (Civil 1975).
4. 76 Eng. Rep. 206 (1581).
5. Central of Ga. Ry. v. Hall, 124 Ga. 322, 327, 52 S.E. 679, 683 (1905).
6. Forward v. Pittard, 99 Eng. Rep. 953, 959 (1785).

Modern courts appear to be in agreement upon the elements necessary for an occurrence to come within the legal definition of "act of God." A frequently employed definition which embodies these elements is that an act of God is an extraordinary manifestation of nature which could not reasonably be anticipated or foreseen.[7] The first requirement, then, is the exclusion of any human element,[8] which limits the applicability of the term to forces of nature such as lightning, storms, earthquakes and floods.[9] However, not every storm or flood will be considered an act of God in the legal sense. It is also necessary that the occurrence be extraordinary.[10] This second requirement is often expressed as an event which human prudence could not anticipate or prevent.[11]

The majority of problems which arise in the context of defining "act of God" center around this second element. Although courts agree that the event must be extraordinary, it is another matter to establish that the occurrence in question is of such a nature. Many cases deal with this issue, often with contrary results. The key to these cases appears to lie in a determination of whether the event should have been anticipated or foreseen. If the event could have been anticipated, it is not an act of God. In considering each situation, the character of the area, the surrounding circumstances, and the history of previous similar occurrences are taken into account.[12] Thus, it has been held that a December freeze in Florida is an act of God,[13] but freezing temperatures in March in Missouri are not, coming in that season of the year, when such weather may be expected.[14]

Some courts have required that the event in question be unprecedented,[15] although the current trend appears to be away from this requirement.[16] An example will aptly illustrate this to be the better position. Should an earthquake destroy a building, it would be destroyed by an act of God. Should the building be rebuilt and again destroyed by an earthquake, the second earthquake would be as much an act of God as the first, although it would not be unprecedented. It is enough that the event could not have been anticipated or expected

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7. Freifield v. Hennessy, 353 F.2d 97, 99 (3d Cir. 1965); Central Aviation Co. v. Perkinson, 269 Ala. 197, 201, 112 So. 2d 326, 330 (1959); Alamo Airways, Inc. v. Benum, 78 Nev. 384, 386, 374 P.2d 684, 686 (1962).

8. Southern Pac. Co. v. Loden, 19 Ariz. App. 460, 508 P.2d 347 (1973); Sky Aviation Corp. v. Colt, 475 P.2d 301 (Wyo. 1970).

9. A few courts include death and sudden illness within the definition of "act of God." *E.g.*, Watts v. Smith, 226 A.2d 160, 162 (D.C. Ct. App. 1967).

10. Southern Pac. Co. v. Loden, 19 Ariz. App. 460, 465, 508 P.2d 347, 352 (1973); Adkins v. City of Hinton, 149 W. Va. 613, 617, 142 S.E.2d 889, 893 (1965).

11. *See* Friefield v. Hennessy, 353 F.2d 97, 99 (3d Cir. 1965); Riddle v. Baltimore & O.R.R., 137 W. Va. 733, 740, 73 S.E.2d 793, 800 (1952); Young v. Marlas, 243 Iowa 367, 372, 51 N.W.2d 443, 448 (1952). *But see* Cover v. Platte Valley Pub. Power & Irrigation Dist., 162 Neb. 146, 154, 75 N.W.2d 661, 669 (1956) (event need not be unpreventable).

12. Marriott Corp. v. Norfolk & W. Ry., 319 F. Supp. 646 (E.D. Mo. 1970); Hearst Magazines v. Cuneo E. Press, Inc., 293 F. Supp. 824 (E.D. Pa. 1968).

13. Givens v. Vaughn-Griffin Packing Co., 146 Fla. 575, 1 So. 2d 714 (1941).

14. Missouri Pac. R.R. v. Terrell, 410 S.W.2d 356 (Mo. Ct. App. 1966).

15. *E.g.*, McKinley v. Hines, 113 Kan. 550, 215 P. 301 (1923); Kennedy v. Union Elec. Co., 358 Mo. 504, 216 S.W.2d 756 (1948).

16. Oakes v. Peter Pan Bakers, Inc., 258 Iowa 447, 138 N.W.2d 93 (1965).

under normal conditions. "The question of precedent, therefore, relates to the matter of reasonable anticipation and opportunity to avert the consequences, and it is in that sense that the term 'unprecedented' is used with regard to the nature of the catastrophe."[17] Applying this rule, the Iowa supreme court recently held that an unusually heavy snowstorm was an act of God even though such blizzards had occurred before.[18]

B. *Particular Occurrences*

Since acts of God invariably arise as specific acts of nature, it is helpful to look at various occurrences to understand the practical application of the definition just discussed. Hurricanes, earthquakes and volcanic eruptions fit easily within any definition of "act of God," since such occurrences are always extraordinary.[19] Similarly, courts have little trouble finding that lightning is an act of God,[20] as well as fires caused by lightning.[21] However, floods, winds, storms and snow give rise to more questions. Whether such natural occurrences are acts of God in the legal sense depends to some degree on the history of previous similar occurrences in the area.[22] Only when they are unusual or extreme, in the sense that they could not have been anticipated, are they held to constitute an act of God.[23] Thus, where floods were usual in the area, the flooding of a stream was held not to be an act of God even though the water rose to an unusual height.[24] On the other hand, a wind and rainstorm of such unusual duration and intensity as to be beyond the ordinary range of human experience was held to constitute an act of God.[25]

C. *Other Terms Distinguished*

Although the terms "act of God" and "inevitable accident" are sometimes treated synonymously,[26] in a strict legal sense they are distinguishable in their meanings. An act of God is due solely to natural causes without any intervention by man,[27] whereas an inevitable accident has its origin in the acts of men

17. *Id.* at 452, 138 N.W.2d at 98.
18. *Id.*
19. *See, e.g.*, Florida Power Corp. v. Tallahassee, 154 Fla. 638, 18 So. 2d 671 (1944) (hurricane); Slater v. South Carolina Ry., 29 S.C. 96, 6 S.E. 936 (1888) (earthquake).
20. *See, e.g.*, Sauer v. Rural Co-op. Power Ass'n, 225 Minn. 356, 31 N.W.2d 15 (1948); Bennett v. Southern Ry. 245 N.C. 261, 96 S.E.2d 31 (1957).
21. *See, e.g.*, Britton Lumber Co. v. Central of Ga. Ry., 221 Ala. 134, 127 So. 824 (1930); Mays v. Missouri & N. Atl. Ry., 168 Ark. 908, 271 S.W. 977 (1925).
22. *See, e.g.*, Little Rock Packing Co. v. Chicago, B. & Q.R.R., 116 F. Supp. 213 (W.D. Mo. 1953); Young v. Marlas, 243 Iowa 367, 51 N.W.2d 443 (1952); Sky Aviation Corp. v. Colt, 475 P.2d 301 (Wyo. 1970).
23. Mattos v. Mattos, 162 Cal. App. 2d 41, 328 P.2d 269 (1958) (wind); Chesapeake & O. Ry. v. Biliter, 413 S.W.2d 894 (Ky. 1967) (rainstorm); Baum v. Scotts Bluff County, 172 Neb. 225, 109 N.W.2d 295 (1961) (flood).
24. Eikland v. Casey, 266 F. 821 (9th Cir. 1920).
25. Harris v. Norfolk S. Ry., 173 N.C. 110, 91 S.E. 710 (1917).
26. *See, e.g.*, Noel Bros. v. Texas & Pac. Ry., 16 La. App. 622, 133 So. 830 (1931); Eleason v. Western Cas. & Sur. Co., 254 Wis. 134, 35 N.W.2d 301 (1948).
27. Watts v. Smith, 226 A.2d 160 (D.C. Ct. App. 1967); Central Ga. Elec. Membership Corp. v. Heath, 60 Ga. App. 649, 4 S.E.2d 700 (1939).

or the forces of nature.[28] "Inevitable accident" is broader and more comprehensive than "act of God," and covers *any* accident which human foresight or precaution could not prevent.[29] Thus, while every act of God is an inevitable accident, not every inevitable accident is an act of God. For example, damage caused by an unprecedented flood is due to an act of God and is also an inevitable accident. However, it has been held that the collision of two vessels in the dark is an inevitable accident but not an act of God.[30] Although the distinction makes little difference in most cases, it may be of consequence where a carrier has not expressly disclaimed liability for losses due to an inevitable accident. At common law, carriers were not liable for losses due to acts of God, while they remained responsible for losses due to an inevitable accident.[31]

The expression "perils of the sea" has also been used interchangeably with "act of God" by some courts.[32] However, "perils of the sea" is a broader term and encompasses accidents which are peculiar to navigation and the sea.[33] Thus, early courts held that destruction of a ship by rats was a peril of the sea,[34] although this certainly does not come within the definition of "act of God." "Perils of the sea" also includes loss caused by hidden obstructions to navigation[35] and collisions without fault of either party.[36]

III. Effect on Liability

A. *Proximate Cause*

Once the defendant has established that the occurrence comes within the legal definition of "act of God," he must then prove that the act of God was the proximate or legal cause of the plaintiff's injury or damage. It is not enough that the act of God has had some effect more or less remote in producing the injury, since almost any loss might then be said to result from an act of God.[37] However, it is not necessary that the act of God be the immediate cause of the harm so long as it is the predominate cause which sets in motion the immediate or incidental cause.[38] Thus, in an action against a railroad company for the loss of goods, the court held that a furious wind which blew the railroad car from the tracks served as the proximate cause of the loss of goods therein con-

28. Alaska Coast Co. v. Alaska Barge Co., 79 Wash. 216, 140 P. 334 (1914); *see* Yarborough v. Berner, 467 S.W.2d 188 (Tex. 1971).
29. Zayre of Ga., Inc. v. Haynes, 134 Ga. App. 15, 213 S.E.2d 163 (1975); King v. Richards-Cunningham Co., 46 Wyo. 355, 28 P.2d 492 (1934).
30. Plaisted v. Boston & K. Steam Navigation Co., 27 Me. 132, 46 Am. Dec. 587 (1847).
31. Freehill, *Mutually Excepted Perils*, 49 Tul. L. Rev. 899, 903 (1975); Note, "*Act of God*," 4 S. Car. L.Q. 421, 423 (1952).
32. *See, e.g.*, Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235 (1816).
33. Reisman v. New Hampshire Fire Ins. Co., 312 F.2d 17 (5th Cir. 1963); Cook v. Southeastern Lime & Cement Co., 146 F. 101 (D.C.S.C. 1906).
34. *See, e.g.*, Plaisted v. Boston & K. Steam Navigation Co., 27 Me. 132, 46 Am. Dec. 587 (1847).
35. Frederick Starr Contracting Co. v. Aetna Ins. Co., 285 F.2d 106 (2d Cir. 1960).
36. Peters v. Warren Ins. Co., 39 U.S. (14 Pet.) 99 (1840).
37. Lang v. Pennsylvania R.R., 154 Pa. St. 342, 26 A. 370 (1893).
38. Blythe v. Denver & R.G. Ry., 15 Colo. 333, 25 P. 702 (1891).

tained,[39] even though they were in fact destroyed by a fire which spread from a coal stove and lamp as a result of the overturning of the car. The fire was said to be merely an incidental cause of the loss and, therefore, the act of God *i.e.*, the wind, relieved the carrier of liability for the loss.[40]

B. *Concurrent Cause*

A major difficulty with the "act of God" defense arises where the defendant has been negligent in some way which the plaintiff claims contributed to or caused the harm. Although the authorities agree that one is not liable for damages caused by an act of God where he is free from negligence,[41] liability may be imposed where the defendant's negligence concurs with an act of God.

The general rule is that when an act of God concurs with the negligence of the defendant to produce the injury, the defendant will not be liable if the act of God would have independently produced the damage without the defendant's negligence.[42] Conversely, the defendant will be liable if the injury would not have occurred in the absence of such negligence.[43] This principle is well illustrated by the case of *Carlson v. A & P Corrugated Box Corp.*,[44] in which the defendant's negligence consisted of the improper upkeep of a dam for which it was responsible. The dam burst, causing extensive flooding. Although the defendant claimed that the flood was caused by a torrential rainfall which occurred that day, the court held that the high water was due to the bursting of the dam and, therefore, that the defendant was liable.

The most common situation arises where the damage results from the concurrent action of the act of God and the defendant's negligence. In such cases, the defendant has been held liable despite the concurring cause.[45] The courts require that in order to hold the defendant liable, the defendant's negligence must be a proximate cause of the injury in addition to the act of God. For example, where the defendant pilot negligently failed to ascertain the weather conditions at the local airport and landed the plane in extremely high winds, he was liable for the resulting damage to the plane when it was overturned by the winds.[46] Both the defendant's negligence and the wind were proximate causes of the damage.

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39. *Id.*
40. *Id.* at 334, 25 P. at 703.
41. *See* Hearst Magazines v. Cuneo E. Press, Inc., 293 F. Supp. 824 (E.D. Pa. 1968); Redman Indus., Inc. v. Morgan Drive Away, Inc., 179 Neb. 406, 138 N.W.2d 708 (1965).
42. Kennedy v. Union Elec. Co., 358 Mo. 504, 216 S.W.2d 756 (1948); Greenburg v. Steubenville, 47 Ohio L. Abs. 229, 72 N.E.2d 125 (Ct. App. 1945).
43. Bushnell v. Telluride Power Co., 145 F.2d 950 (10th Cir. 1944); Brown v. West Riverside Coal Co., 143 Iowa 662, 120 N.W. 732 (1909); Fairbrother v. Wiley's, Inc., 183 Kan. 579, 331 P.2d 330 (1958).
44. 364 Pa. 216, 72 A.2d 290 (1950).
45. *See* Wagaman v. Ryan, 258 Iowa 1352, 142 N.W.2d 413 (1966); Kimble v. Mackintosh Hemphill Co., 359 Pa. 461, 59 A.2d 68 (1948); Adkins v. Hinton, 149 W. Va. 613, 142 S.E.2d 889 (1965).
46. Sky Aviation Corp. v. Colt, 475 P.2d 301 (Wyo. 1970).

This latter set of cases dealing with concurrent causes may be further broken down into those wherein the result of the defendant's negligence is foreseeable and those where it is not foreseeable. Where the result of the defendant's negligence is foreseeable and in fact occurs, it is no defense that an act of God combines with the negligent act to cause the injury.[47] In other words, the actual manner in which the damage occurs is irrelevant so long as the defendant's negligence is a substantial factor in causing the harm. The leading case in this area is *Johnson v. Kosmos Portland Cement Co.*,[48] in which the defendant negligently allowed gases to accumulate in a barge, creating the possibility of a dangerous explosion. A bolt of lightning struck the barge and the gases exploded, killing the plaintiffs' decedents. The court held that the defendant was not relieved of liability for his negligence despite the intervening cause, *i.e.*, the lightning, since an explosion was within the foreseeable risk created by the accumulation of gases.[49]

The other side of this problem arises where the defendant has been negligent and an intervening act of God concurs to cause an unforeseeable result. The courts are in disagreement as to whether the defendant is liable, and many courts have relieved the defendant of any responsibility for such losses on the theory that the defendant's negligence was not the proximate or legal cause of the injury.[50] This is merely an application of the widely followed tort principle that one is liable only for the foreseeable consequences of his acts.[51] In *Gerber v. McCall*,[52] the defendant operated a gas station in which he stored flammable fuels and materials. The area in which the station was located was ordered evacuated because of the imminence of a flood which did, in fact, occur. The defendant had failed to cut the electrical current when he evacuated the premises and, as a result, an explosion occurred when the flammable fuels floated to the surface of the water and came in contact with the electrical wires. The fire was carried next door to the plaintiff's warehouse, which was completely destroyed by the fire. In an action to recover for the damage to the warehouse, the plaintiff claimed that the defendant station owner was negligent because he left the electricity on. The station owner defended on the ground that the damage was due solely to an act of God, *i.e.*, the flood. The court held that the series of events which occurred was unforeseeable and, therefore, that the defendant's omission was not the proximate cause of the damage.[53]

The difficulty in distinguishing between those results which are foreseeable and those which are not often arises in the context of carrier cases where the

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47. Naxera v. Wathan, 159 N.W.2d 513 (Iowa 1968).
48. 64 F.2d 193 (6th Cir. 1933).
49. Johnson v. Kosmos Portland Cement Co., 64 F.2d 193, 196 (6th Cir. 1933).
50. *See* Gerber v. McCall, 175 Kan. 433, 264 P.2d 490 (1953); Missouri Pac. Ry. v. Columbia, 65 Kan. 390, 69 P. 338 (1902); Strobeck v. Bren, 93 Minn. 428, 101 N.W. 795 (1904).
51. W. PROSSER, THE LAW OF TORTS § 43, at 250 (4th ed. 1971).
52. 175 Kan. 433, 264 P.2d 490 (1953).
53. Gerber v. McCall, 175 Kan. 433, 437, 264 P.2d 490, 494 (1953).

carrier has negligently delayed shipment or relocation of the goods and, in the meantime, the goods are destroyed by an act of God.[54] The question then arises as to whether the delay was the proximate cause of the injury, or merely a remote cause for which the carrier cannot be held liable. It seems to be established that, where the force of nature is known to be coming at the time of the delay or is otherwise within the bounds of reasonable apprehension, the carrier is liable for the loss of goods subjected to an act of God as a consequence of the negligent delay.[55] Thus, where the carrier has warning of an imminent flood, a negligent delay which subjects the goods to destruction by the flood results in the defendant's liability.[56]

A split of authority exists as to the carrier's liability where the destructive occurrence is unexpected and not to be reasonably anticipated.[57] In some jurisdictions the carrier is held liable,[58] while in others—among them the federal courts—the carrier is absolved by the intervening act of God.[59] The former view and the underlying reasons therefor were most clearly stated in *Green-Wheeler Shoe Co. v. Chicago, Rock Island & Pacific Railway:*[60]

> Now, while it is true that defendant could not have anticipated this particular flood and could not have foreseen that its negligent delay in transportation would subject the goods to the danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper.[61]

Thus, in *Green-Wheeler*, the defendant was held liable for the loss of the goods in the flood. This view gives more weight to hindsight as a judge of proximate cause than is usual in negligence cases. As noted above, one is ordinarily not held responsible for the unforeseeable consequences of his actions. If by definition an act of God is an occurrence which is not anticipated, it seems difficult to hold the carrier liable for damages resulting from such a catastrophe which he had no reason to foresee and no opportunity to guard against. Perhaps the answer to this strict interpretation of causation lies in the higher duty which courts have traditionally imposed upon the common carrier.[62]

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54. *See* Note, *Common Carrier's Delay Plus Act of God*, 8 NOTRE DAME LAW. 394 (1933).

55. Ithaca Roller Mills v. Ann Arbor R.R., 217 Mich. 348, 186 N.W. 516 (1922); Wabash Ry. v. Sharpe, 76 Neb. 424, 107 N.W. 758 (1906).

56. New Orleans & N.E. R.R. v. National Rice Milling Co., 234 U.S. 80 (1914).

57. *See generally* Annot., 46 A.L.R. 302 (1927).

58. *See, e.g.*, Green-Wheeler Shoe Co. v. Chicago, R.I. & Pac. Ry., 130 Iowa 123, 106 N.W. 498 (1906); Michaels v. New York Cent. Ry., 30 N.Y. 564, 86 Am. Dec. 415 (1864).

59. *See, e.g.*, Firpine Prods. Co. v. Atchison, T. & S.F. Ry., 124 F. Supp. 906 (W.D. Mo. 1954); Little Rock Packing Co. v. Chicago, B. & Q. R.R., 116 F. Supp. 213 (W.D. Mo. 1953); Rodgers v. Missouri Pac. Ry., 75 Kan. 222, 88 P. 885 (1907).

60. 130 Iowa 123, 106 N.W. 498 (1906).

61. Green-Wheeler Shoe Co. v. Chicago, R.I. & Pac. Ry., 130 Iowa 123, 129, 106 N.W. 498, 500 (1906).

62. *See* Southern Pac. Co. v. Loden, 19 Ariz. App. 460, 508 P.2d 347 (1973).

Some jurisdictions follow the rule that carriers are not liable for damages where the goods entrusted to them are destroyed by an act of God although there was a previous delay in transportation but for which the goods would not have been exposed to the destructive force of nature.[63] In a leading case which presented this situation, the court held that the carrier was not liable where a canal boat was delayed through the defendant's negligence and consequently destroyed by a flood which otherwise would have been avoided.[64] In reaching this decision, the court stated:

> Now there is nothing in the policy of the law relating to common carriers that calls for any different rule, as to consequential damages, to be applied to them. They are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary; and this liability included all those consequences which may have arisen from the neglect to make provision for those dangers which ordinary skill and foresight are bound to anticipate.[65]

The jurisdictions which have adopted this rule base their decision on the determination that the delay is a remote—not proximate—cause of any damage.[66]

C. *Apportionment of Damages*

Where the defendant's negligence has combined with an act of God to cause the damage complained of, the defendant is usually held liable for the full amount.[67] Courts have been very reluctant to apportion the damages and allow the defendant to pay only for that proportion which is attributable to his negligence.

IV. SUMMARY

The defendant who relies on the act of God defense has a two-fold task. He must first produce sufficient evidence of the occurrence so as to convince the jury that the event in question was indeed extraordinary and, therefore, within the legal definition of "act of God." This burden of proof may be met by evidence of the circumstances surrounding the event and of previous similar manifestations of nature in the area. The underlying reason for such evidence is to show the jury that the occurrence was not to be anticipated and, therefore, could not have been guarded against. If the defendant fails in this task he runs the fatal risk that the jury will conclude just the opposite: that the event was not unusual or extraordinary and, therefore, not an act of God in the legal sense. Even worse, the jury may conclude that the foreseeability of the particular

63. *E.g.*, Little Rock Packing Co. v. Chicago, B. & Q. R.R., 116 F. Supp. 213 (W.D. Mo. 1953); Rodgers v. Missouri Pac. Ry., 75 Kan. 222, 88 P. 885 (1907).
64. Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695 (1852).
65. *Id.* at 175, 57 Am. Dec. at 698-99.
66. *E.g.*, Little Rock Packing Co. v. Chicago, B. & Q. R.R., 161 F. Supp. 213 (W.D. Mo. 1953); Rodgers v. Missouri Pac. Ry., 75 Kan. 222, 88 P. 885 (1907).
67. Carlson v. A & P Corrugated Box Corp., 364 Pa. 216, 72 A.2d 290 (1950). *Contra*, Kennedy v. Union Elec. Co., 358 Mo. 504, 216 S.W.2d 756 (1948).

occurrence is a basis for a conclusion that the defendant was negligent for failing to take adequate precautions to avert the casualty or at least minimize the risk of severe damage. The defendant may then be held liable on the basis of this negligent omission.[68]

The second burden of proof which the defendant must meet is that the act of God was the sole proximate cause of the injury. This burden becomes increasingly difficult to meet as the forces of nature combine with the defendant's negligence to produce foreseeable, or even unforeseeable, results. Where the defendant's negligence was a contributing cause to the casualty, he is usually liable to the full extent of any damage sustained, although the result may be different where the resulting injury was unforeseeable.

In addition to the difficulties the defendant faces in proving his defense, he is often faced with confusing precedent which draws no distinction between foreseeability as affecting classification of the event as an act of God and foreseeability as a factor in determining proximate cause. Although the assertion of the act of God defense works best when approached as a two-tiered process,[69] many courts have included a determination of sole proximate cause as an element of their definition of "act of God."[70] For example, an occurrence may be held to be an act of God only if the harm suffered was in no way contributed to by human agency. Thus, a determination of the defendant's liability is incorporated in the definition of "act of God." The result of such a process is that some catastrophic events are held not to be acts of God because the defendant's negligence was a substantial factor in causing the harm. Paradoxically, the same event may be an act of God for the defendant who is free from negligence. The better approach is to make a determination of whether the occurrence qualifies as an act of God and then deal with the problem of proximate cause. Although the results reached may be the same under either approach, adherence to a two-step process will result in a more comprehensible and uniform body of law dealing with "acts of God."

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68. Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N.W. 551 (1941).
69. *See, e.g.*, Dickman v. Truck Trans., Inc., 224 N.W.2d 459 (Iowa 1974).
70. *See, e.g.*, Manila School Dist. v. Sanders, 226 Ark. 270, 289 S.W.2d 529 (1956).