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## NEGLIGENCE - APPLICATION OF RES IPSA LOQUITUR DOCTRINE

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NEGLIGENCE — APPLICATION OF RES IPSA LOQUITUR DOCTRINE — Plaintiff was passing under defendant's elevated railway structure when a small particle of steel<sup>1</sup> coming therefrom dropped into his eye. In his suit for damages plaintiff relied on the application of the doctrine of res ipsa loquitur to make out a prima facie case for him. *Held*, the rule of res ipsa loquitur cannot apply to help plaintiff on such facts. *Riles v. Murray*, (N. Y. Cty. Ct. 1939) 12 N. Y. S. (2d) 648.

It seems that in rejecting the applicability of the res ipsa loquitur doctrine in the principal case the court acted wisely and in accordance with settled judicial notions as to the scope of the rule.<sup>2</sup> It is generally held that a proper case for the application of this doctrine is made out where plaintiff was patently free from fault himself, the thing causing the injury was in the control of defendant, and the occurrence was one that normally does not happen in the absence of negligence.<sup>3</sup> Some courts add a fourth requirement—that defendant be in a better position than plaintiff to offer evidence as to what actually occurred.<sup>4</sup> While plaintiff in the instant case was admittedly free from any fault in the transaction, it appears that the remaining prerequisites for the application of the res ipsa loquitur doctrine were not present here. Defendant cannot reasonably be held to have had control of the steel particles, which may have settled on his elevated structure from numerous sources,<sup>5</sup> and this type of accident is one that commonly happens in the complete absence of any negligence.<sup>6</sup> It follows that defendant could hardly have any superior knowledge as to the events leading

<sup>1</sup> The court's statement of facts discloses that something hit plaintiff's shoulder causing him to look up and see steel particles or filings descending from defendant's structure. The size of the particle which got into plaintiff's eye was less than one-eighth of an inch.

<sup>2</sup> See 3 UNIV. CHI. L. REV. 126 (1935).

<sup>3</sup> HARPER, TORTS, § 77 at p. 183 (1933); 21 MINN. L. REV. 858 (1937), noting the case of *Pandjiris v. Oliver Cadillac Co.*, 339 Mo. 711, 98 S. W. (2d) 969 (1936). The leading English case applied the doctrine of res ipsa loquitur where a barrel fell from the upper story of defendant's warehouse on a pedestrian below. *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863). And see *Wichita Falls Traction Co. v. Elliott*, 125 Tex. 248, 81 S. W. (2d) 659 (1935).

<sup>4</sup> *Keller v. Pacific Telephone & Telegraph Co.*, 2 Cal. App. (2d) 513, 38 P. (2d) 182 (1935); 23 CAL. L. REV. 169 (1934). But as indicated in HARPER, TORTS, § 77 (1933), it seems that this requirement is merely an elaboration of the one that defendant be in control of the thing causing the injury.

<sup>5</sup> As the court in the principal case points out, steel particles may have been deposited on defendant's structure as the result of industrial operations elsewhere, with the wind being the only villain, having brought the particles to the elevated railway and eventually having blown them into the plaintiff's path. It seems that defendant must have a very real control over the thing causing the injury, not merely a conjectural one, for res ipsa loquitur properly to apply. Thus where plaintiff was sitting in defendant's subway train and a pane of glass broke, injuring her eye, res ipsa loquitur was applied. *Bressler v. New York Rapid Transit Corp.*, 277 N. Y. 200, 13 N. E. (2d) 772 (1938).

<sup>6</sup> It takes little stretch of the imagination to see this as an unavoidable accident. It is to remark the obvious to state that few people have escaped the annoyance of bits of things flying into their eyes, and that few people on the facts of the instant case would

up to the injury over that of plaintiff. Since the minimum effect of the *res ipsa loquitur* doctrine when applied is to permit the jury to draw an inference of defendant's negligence,<sup>7</sup> it is submitted that to apply it on these facts would be arbitrarily to thrust a burden on defendant unwarranted by an extant judicial policy.

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blame anyone or anything but the elements for their plight. It seems clearly that this is not the type of accident that does not ordinarily happen in the absence of negligence.

<sup>7</sup> HARPER, TORTS, § 77 (1933); 3 UNIV. CHI. L. REV. 126 (1935).