NEW JERSEY COURT OF ERRORS
AND APPEALS

ESTELLE LAW,
Plaintiff-Appellee,
vs.
FRANK MORRIS,
Defendant-Appellant,

ACTION AT LAW
GROUNDS OF APPEAL

The following are the grounds of appeal under the appeal in the foregoing causes:

1. The Court refused to direct a judgment of non-suit at the close of the plaintiff's case.

2. The Court refused to direct a verdict at the close of the whole case.

3. There is no evidence in the cause sufficient to sustain a verdict and judgment for the plaintiff-appellee.

4. Because on the whole case there was no proof of negligence on the part of the defendant-appellant.

JAMES MERCER DAVIS,
Attorney of Defendant-Appellant.

Dated: October 13, 1925.

CAMDEN COUNTY CIRCUIT COURT

ESTELLE LAW,
Plaintiff,
vs.
FRANK MORRIS,
Defendant.

ACTION AT LAW
NOTICE OF APPEAL

To Carr & Carroll, Esqs.,
Attorneys of Estelle Law.

PLEASE TAKE NOTICE that the defendant, Frank Morris, appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

JAMES MERCER DAVIS,
Attorney of Defendant.

Dated: October 13, 1925.

STATE OF NEW JERSEY,
COUNTY OF CAMDEN.

I, William D. Brown, Clerk of the County of Camden, do hereby certify that the foregoing is a true copy of notice of appeal in the case of Estelle Law vs. Frank Morris, Action at Law, filed October 14, 1925, in the Clerk's Office of the County of Camden.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Camden, this twenty-second day of October, A. D. 1925.

(SEAL) WM. D. BROWN, Clerk.

CAMDEN COUNTY CIRCUIT COURT

ESTELLE LAW, *Plaintiff,* vs. FRANK MORRIS, *Defendant.*	}	ACTION AT LAW JUDGMENT ON VERDICT

Witness, Ralph W. E. Donges, Judge.

Carr and Carroll, Attorneys.

William D. Brown, Clerk.

Judgment entered on the eighth day of October, A. D. nineteen hundred and twenty-five.

Damages	$1,000.00
Costs	74.41
	$1,074.41

Plaintiff, who resides in the Borough of Audubon, County of Camden and State of New Jersesy, says:

1. On or about May 25, 1923, defendant was the owner and proprietor of a certain store in the Borough of Audubon, Camden County, New Jersesy, and was engaged in the sale of merchandise, and as such owner and proprietor defendant extended an invitation to the general public and intending purchasers to enter in and upon the premises used by the plaintiff as aforesaid for the sale of merchandise, and it became and was the duty of the defendant to exercise reasonable care to render the said store premises reasonably safe for the use of intending customers of the defendant, and such members of the general public as visited or entered said store in response to said invitation.

2. That on or about May 25, 1923, plaintiff entered the said store of the defendant for the purpose of making some purchases, and while standing at a counter in said store a portion of the ceiling suddenly fell upon plaintiff's head, and plaintiff was struck by falling plaster, and was partially stunned and fell to the floor.

3. Said accident was caused solely by reason of the carelessness and negligence of the defendant, his servants and agents, then and there in control of said store, in that said defendant neglected to take such reasonable precautions as were necessary to protect plaintiff as an intending purchaser at said store.

4. As a result of said accident, plaintiff was severely injured about the head, body and limbs, suffering serious cuts, contusions, lacerations of the head, face, arms, body and legs, and was permanently lamed, crippled, scarred, injured and weakened.

5. By reason of said injuries plaintiff has suffered and will suffer great pain, and has been attended by physicians and surgeons, and will be compelled to undergo treatments and operations, and has lost and will lose earnings which she otherwise would have had except for her disability due thereto, and has spent and will be required to spend money in an attempt to be cured, and has been permanently weakened, injured, scarred and crippled.

Plaintiff demands $25,000 damages.

The defendant, answering, says:

1. He admits the allegations of paragraph one and avers that he performed each and every duty he owed to the plaintiff or any other person.

2. He admits that the plaintiff was in his store on May 25, 1923, but denies that any plaster fell upon her and stunned her, causing her to fall to the floor.

3. He denies the allegations of paragraph three.
4. He denies the allegations of paragraph four.
5. He denies the allegations of paragraph five.

FIRST DEFENSE

The defendant will show that he used every precaution that was possible to insure the safety of the plaintiff in and about the premises.

SECOND DEFENSE

If indeed plastering fell from the ceiling of defendant's premises upon the said plaintiff, it was caused by agencies beyond the control of the defendant.

THIRD DEFENSE

The defendant will urge at the trial of this cause that the complaint filed herein, failed to set out the cause of action against the defendant.

The plaintiff denies all of the allegations of the defendant's answer, except those which admit the allegations of the complaint.

Therefore the Sheriff is commanded that he cause to come before the Judge of our Circuit Court at Camden, in the County of Camden, on the eighth day of October, A. D. 1925, twelve, etc., by whom, etc., who neither, etc., to recognize, etc., because as well, etc., the same day is given to the parties, etc., and the jurors of the jury whereof mention is made also come who to speak the truth of the matter within contained being chosen tried and sworn upon their oath say that they find for the

plaintiff damages at the sum of One thousand dollars and the court doth order judgment final in favor of the plaintiff and against the defendant for the sum of One thousand dollars, besides costs of suit to be taxed.

Therefore be it considered that the said plaintiff do recover against the said defendant her damages by the jurors aforesaid in form aforesaid assessed and also the sum of Seventy-four dollars and forty-one cents for her costs and charges by the said Court before the Judge now here adjudged of increase to the said plaintiff and with her assent, which said damages, costs and charges in the whole amount to the sum of One thousand seventy-four dollars and forty-one cents.

And the said defendant in mercy, etc.

Judgment entered and signed this eighth day of October, A. D. 1925.

RALPH W. E. DONGES,
Circuit Court Judge.

STATE OF NEW JERSSEY,
COUNTY OF CAMDEN.

I William D. Brown, Clerk of the County of Camden, do hereby certify, that the foregoing is a true copy of the proceedings and judgment, with all things touching and concerning the same in the case of Estelle Law vs. Frank Morris, Action at Law, filed October 8, 1925, and recorded in the Clerk's Office of the County of Camden, in Book K of Circuit Court Judgments, page 512.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Camden, this twenty-second day of October, A. D. 1925.

(SEAL) WM. D. BROWN, Clerk

CAMDEN COUNTY CIRCUIT COURT

ESTELLE LAW,
Plaintiff,
vs.
FRANK MORRIS,
Defendant.
} ACTION AT LAW

(Mr. Carroll opens the case for the plaintiff to the jury.)

(Mr. Davis opens the case for the defendant to the jury.)

THE CASE FOR THE PLAINTIFF

ESTELLE LAW, sworn.

MR. CARROLL: May it please your Honor, I might say for the information of the Court and jury that the ownership and control of the store by the defendant at the time this occurrence took place is admitted by the defendant's answer.

BY MR. CARROLL:

Q. Mrs. Law, you are the plaintiff in this suit? A. I am.

Q. Where do you live? A. Audubon.

Q. Whereabout in Audubon? A. 352 Audubon Avenue.

Q. How long have you lived there? A. Four years in August.

THE COURT: Keep your voice up, madam, so the last juror will hear you.

Q. Are you married? A. I am a widow.

Q. How long has your husband been dead? A. He died two years last December, the 2nd of December.

Q. You were a widow then in 1923? A. Yes.

Q. Now, in May, 1923, were you in any business? A. I was doing dressmaking at home.

Q. In and about Audubon? A. Yes, and outside, outside of Audubon.

Q. How long had you been doing dressmaking prior to May, 1923? A. Why, I started a couple of months after my husband died.

Q. Well, about how long was that in period of time? A. Well, say the latter part of January, the beginning of February.

Q. Then between January and May? A. Yes.

Q. You were earning your own living in that way? A. Yes.

Q. Now, do you know Mr. Morris, the defendant here? A. I do.

Q. He had a store in Audubon? A. Yes.

Q. What sort of store was it, what business? A. Drygoods.

Q. You used to go in there to buy stuff for your dressmaking business? A. I did.

Q. Do you recall going in there on the 25th of May, 1923? A. I do.

MR. DAVIS: The 23rd, wasn't it?

MR. CARROLL: The 25th, I think.

MR. DAVIS: Yes.

Q. For what purpose did you go in the store on that day? A. To buy some yard material.

Q. What hour of the day was it you went in there? A. Between ten and ten-thirty in the morning.

Q. Was Mr. Morris there? A. Yes.

Q. Did he wait on you? A. Yes.

Q. And what part of the store were you in? A. The rear of the store, the back part.

Q. In front of the counter? A. Yes.

Q. Now, while you were standing there, was Mr. Morris talking to you? A. I had made a decision to buy some trimming.

Q. He was with you? A. Yes, we were going to walk over to the other counter.

Q. And what happened? A. The plaster fell down on the top of my head; I was stunned; I went to the floor; I remember somebody picking me up, and I remember sitting on a chair.

Q. Were you rendered unconscious? A. I was stunned; I did not know where I was for a little while.

Q. When you came to, you were on a chair? A. I was on a chair.

Q. In the store there? A. In the store.

Q. Now, did you see the piece of plaster that hit you? A. No, I did not see the piece of plaster that hit me.

Q. You don't know how big a piece it was? A. No, I do not.

Q. At that time did you notice the ceiling? A. I looked up, but I couldn't tell you how large the place was.

Q. You didn't notice that? A. I did not know what was wrong with me, to realize where I was.

Q. And what part of you was hurt? A. The top of the head.

Q. Were you bleeding? A. Yes.

Q. Now, what then happened—was any one else in the store at that time? A. I saw two ladies standing there, also Mrs. Morris and another lady, a colored lady.

Q. You don't know the names of those other ladies, do you? A. No, I do not.

Q. What then happened? A. Why, someone got a doctor, Dr. Theiss, and from there I was taken to his office, put on the table, and he said he thought—

MR. DAVIS: No, one minute; I object to conversation, if the Court please.

THE COURT: Yes, the objection is sustained.

Q. You were taken to the office of Dr. Theiss in Audubon? A. Yes.

Q. Was he your physician—had he been your physician? A. Not for myself; I had him for my husband.

Q. Well, did you ask to be taken to the office of Dr. Theiss, or did someone take you there? A. Someone took me there.

Q. You don't know who did? A. No, I don't know who.

Q. And when you got in the office of Dr. Theiss, was he there? A. He was the store, and he took me—

Q. No, I mean when you got to the office of Dr. Theiss, was Dr. Theiss there? A. Yes, he took me to the office.

Q. Oh, he came to the store? A. Yes.

Q. And took you to his office? A. Yes, he took me to his office.

Q. And there he made some examination of you? A. Yes.

Q. What did he say was the matter, what he thought was the matter?

MR. DAVIS: I object.

THE COURT: How is it competent?

MR. CARROLL: He is a physician, if the Court please.

THE COURT: And you want this witness to state what the physician said to her?

MR. CARROLL: Yes, sir.

THE COURT: The objection is sustained.

Q. What treatment did Dr. Theiss give you at the time? A. He simply wrapped my head and took me to the hospital.

Q. To what hospital were you taken? A. Cooper.

Q. What happened when you were there? A. An X-ray was taken, and from there I was sent to a room under observation.

Q. And how long were you in the hospital? A. I guess about three hours.

Q. Then where were you taken? A. Taken in a taxicab home.

Q. So you got home in the afternoon of May 25, 1923? A. Yes.

Q. Now, right after this, right after you got home, what was your condition generally? A. Well, I was very nervous and my head was paining me dreadfully.

Q. Was your head bandaged? A. Yes, it was all bandaged.

Q. Had it bled much? A. Yes.

Q. And what was the condition of your hair—did it have any dirt in it or plaster, anything of that sort? A. Yes, a lot of dirt; a lot of hair was cut away.

Q. What was the condition of your clothing?

MR. DAVIS: Well, there is no item in here for clothing or for loss of hair.

THE COURT: I have not seen the transcript.

MR. CARROLL: It is a Circuit Court issue.

THE COURT: Do you make any claim for damages?

MR. CARROLL: No, it is not for that purpose, your Honor, we are not claiming any damaged clothes.

Q. What was the condition of your clothing, Mrs. Law?

MR. DAVIS: I object to that as incompetent, irrelevant and immaterial.

THE COURT: I think it may be shown generally what her condition was and the condition of her clothing.

Q. With respect to plaster or dirt or dust on it? A. Yes, it was covered.

MR. DAVIS: It is admitted, if the Court please, that plaster struck this lady; it seems to me that is all that it could be competent for.

THE COURT: I do not know whether it would have any relation to her injuries or not. I understand it is admitted that she was struck by falling plaster in the premises of the defendant.

MR. CARROLL: It may be material to show, your Honor, that beside that piece of plaster something may have come down and hit her on the head.

THE COURT: She may answer it.

Q. Just state the condition of your clothes with respect to dust and plaster being on it. A. Well, I was very dusty, and blood all over my clothing, and small pieces of plaster in my pocket which I discarded.

Q. After that were you under the care of any doctor? A. Dr. Theiss.

Q. How long were you under his care? A. Well, I had to go, I guess, about five weeks to have my head treated; it was healed from the inside.

Q. How many times did you go a week? A. Well, I went four times for a couple of weeks, then I ceased; I did not go so many after that.

Q. And each time he treated your head? A. Yes.

Q. Was your head bandaged during all this time? A. Well, just across the top; at first it was all around the head.

Q. Where your hair had been cut off? A. Yes.

Q. Now, do you know where Dr. Theiss is now? A. He is dead.

Q. And after you were treated by Dr. Theiss, were you treated by any other physician? A. Yes, I went to another physician.

Q. Who was that? A. Dr. Knight.

Q. That is Dr. George B. Knight? A. Yes.

Q. Now, prior to this accident, what had been the general condition of your health? A. I was in good health.

Q. Were you in any way nervous? A. No.

Q. Did you have any pain or trouble with your head or other parts of your body? A. No.

Q. And how about your eyes? A. They were all right.

Q. Did you have to wear glasses before the accident? A. No.

Q. And when you were dressmaking before the accident, did you have steady work? I mean, were you working every day? A. Yes, doing some sewing each day.

Q. How many hours of the did you work? A. Oh, the majority of the day I would work.

Q. I beg pardon? A. The majority of the day.

Q. Generally how many hours a day would you work? A. Well, I guess about eight.

Q. Then in addition to that, did you attend to your domestic duties? A. Yes.

Q. Cooking meals and cleaning up the house? A. My daughter done a great deal of the work.

Q. She helped? A. She helped.

Q. How old was she at the time? A. Fourteen.

Q. Did you and your daughter live together? A. Yes.

Q. Did anyone else live with you? A. My father.

Q. How old was he? A. Seventy-five.

Q. He did not do any of the work around the house, did he? A. No.

Q. Now,after the accident happened, did you undertake to go on with your dressmaking? A. I did.

Q. Was there any period of time following the accident when you could not do your work, do your dressmaking? A. Yes.

Q. About how long? A. It was a great effort for me to sew.

Q. No, but I mean —

MR. DAVIS: I move it be stricken out.

THE COURT: Strike it out.

Q. I mean, was there a period of time following the accident when you did not work at all? A. Oh, yes, I did not sew immediately after the accident.

Q. How long was that? A. Well, I guess that was about three weeks.

Q. About three weeks; then after that you undertook to take up the dressmaking again? A. Only finish what I had started, for two reasons.

Q. Why was that? A. Because the customer wanted the dress and I needed the money.

Q. Well, did you after three weeks had gone by, did you undertake to resume dressmaking? A. No, I did not.

Q. Why not? A. The materiral that I had not cut into, I sent back to the customer.

Q. Why did you not resume your dressmaking? A. Because I was too nervous; I could not sit and sew.

Q. And at this time, did you have pain? A. I have pain all the time; the pain has never left my head.

Q. You have had it continuously ever since? A. Ever since.

Q. You say you were nervous; has the nervous condition continued? A. Dreadfully nervous.

Q. And you have had these pains in the head, I understand? A. Ever since.

Q. Now, have you had any other trouble following this accident, physical trouble? A. No.

Q. How about your eyes—have you had any trouble with your eyes? A. Oh, yes, I got glasses, thought probably it might relieve the pain in my head, which it didn't.

Q. So you found out that you could not continue dressmaking? A. Yes.

MR. DAVIS: I object to that; she has not said so at all. The question is leading.

THE COURT: I suppose that is suggestive. It has been answered.

MR. CARROLL: Well, it may be rather a resume of what she has already said.

MR. DAVIS: I ask that it be stricken out; I objected as soon as I could, your Honor.

THE COURT: I think so; I think it is a conclusion and suggestive. It may be stricken out.

Q. Where are you employed now? A. Victor Talking Machine Company.

Q. In Camden? A. Yes.

Q. What work do you do there? A. Put records in the envelopes.

Q. You put records in the envelopes—how long have you had that job? A. Two years last October.

Q. Two years last October—that would be October, 1923? A. Yes.

Q. When you were dressmaking, how much did you average a week? A. Twenty dollars.

Q. And what has your salary been at the Victor Talking Machine Company? A. Sixteen.

Q. Sixteen dollars a week? A. Yes.

Q. Now, why did you go to the Victor Talking Machine Company instead of keeping on with your dressmaking? A. Because I was too nervous, I couldn't stand dressmaking.

Q. You found this job at the Victor easier? A. Yes.

Q. Now, this accident or blow on the head, has it had any effect on your energy, on your pep?

MR. DAVIS: I object; one minute.

THE COURT: I suppose it is suggestive.

MR. DAVIS: She is not qualified to say, your Honor.

THE COURT: Oh, I think she may testify to what her present condition is.

MR. DAVIS: No, that is not the question, what effect does it have on her energy and pep.

THE COURT: I suppose she may tell what, if any, change she has observed in her physical condition and ability.

Q. Now, before you had this accident, to what extent had you been under the care of any physician? A. I wasn't under any care.

Q. You had not been under a doctor's care before? A. No.

Q. Now, this piece of plaster that came down, was it just one piece, or did it come down in a solid piece or just a general crumbling?

MR. DAVIS: I object to it. I have no objection to her describing what she knows and what she saw.

THE COURT: She may describe it.

Q. Will you describe the piece of plaster that hit you? A. I never saw the plaster that hit me; I couldn't tell you that. Now, there was a lot of dirt on the floor and on myself and in my head; just the size I couldn't say.

CROSS EXAMINATION

BY MR. DAVIS:

Q. Mrs. Law, how old are you? A. Forty-five.

Q. You are forty-five now? A. Yes.

Q. And when you were dressmaking, what time did you go to work in the morning? A. Well, I didn't just

work at certain hours, start at a certain time; I would start in as soon as I possibly could, possibly eight o'clock.

Q. What time did you finish? A. Well, I sewed in the evening also, so I didn't just work straight hours through.

Q. So that you had no time, fixed time in the afternoon or evening when you would quit work? A. No, I sewed any time at all, sometimes late at night.

Q. Yes; now, did you have a doctor examine your eyes? A. I went to an optician.

Q. He just fitted the glasses to your eyes, didn't he? A. Yes.

Q. You had no oculist to examine your eyes, did you— A. I got the glasses—

Q. No, pardon me; say yes or no. A. No.

Q. You had been in the store before, of course? A. Yes.

Q. You were accustomed to shop there, weren't you? A. Yes.

Q. Of course, you had never seen anything that looked dangerous with regard to the ceiling, had you? A. I never looked up before.

Q. No, and of course, you had not seen anything because you had not looked; that is a fact? A. Yes.

Q. You had no warning that this was coming down, did you? A. No.

Q. How far was Mr. Morris away from you at the time this fell? A. I guess a couple of feet.

Q. Just a counter seperated him and you, wasn't there? A. I guess that was all.

Q. And when you woke up or shortly after you were hurt, Dr. Tice was there, wasn't he? A. I don't know Dr. Tice.

Q. Well, what do you call him—Theiss? A. Oh, Theiss, yes.

Q. You call him Theiss, do you? You may be right, I don't know. He was there, wasn't he? A. He was called in by someone.

Q. And he gave you first aid? A. He took me to the hospital.

Q. He took you to his office there and gave you first aid, didn't he? A. Yes.

Q. And then he attended you from that time on, until you recovered, that is, until your wound was healed, didn't he? A. Yes.

Q. And you never received any bill for that service, did you? A. No.

Q. Now, when did you go to Dr. Knight? A. I guess about a year or so ago.

Q. That is, after this suit was brought? A. After the suit?

Q. Yes. A. Yes, I guess it was.

Q. Was Dr. Theiss living then? A. He was living, but I couldn't get any attention because he was sick.

Q. How many times did you go to Dr. Knight? A. Well, I didn't go steady to him; I went off and on.

Q. No, I am asking you how many times? A. Well, I guess about a half dozen times.

Q. Now, do you suffer from diabetes? A. No, sir.

Q. Haven't you suflered from diabetes? A. No, sir.

Q. Not at all? A. No.

Q. Didn't you tell Mr. Morris that you suffered from diabetes? A. No.

Q. Mrs. Morris? A. No, I never talked to Mrs. Morris.

Q. Well, you never have suffered, you say, from that? A. No.

Q. What have you suffered from—you have never had any medical attention at all? A. Oh, yes, I have had diseases, that is, like scarlet fever.

Q. Now, this accident occurred on the 25th of May, 1923; how long before that was it that you had had a doctor? A. Well, I couldn't really tell you; I don't remember, it has been so long.

Q. And the only other doctor you have had was Dr. Knight? A. Yes.

Q. On that same evening that you were hurt, didn't Mrs. Morris come to see you? A. Yes.

Q. And where were you when she came? A. In the living room.

Q. Doing what? A. Nothing.

Q. Well, what position were you, sitting, lying or what? A. Sitting in a chair.

Q. And on the following day, did the young boy that works for Mr. Morris come to see you, his son—did Mr. Morris' son come to see you? A. Yes.

Q. What time did he see you? A. I don't know the time he was there.

Q. Where were you? A. In the kitchen.

Q. You had a talk with him then, didn't you? A. Yes.

Q. At that time was your father about the place? Pardon me, at that time that Mr. Morris' son came to your house, was your father there? A. I don't remember.

Q. Was your daughter there? A. Yes.

Q. And on the afternoon that this accident occurred, was your father there when Mrs. Morris came? A. I don't remember, I don't think so.

Q. Where was your daughter, was she there? A. I don't remember her being there.

Q. Well, was she employed at that time? A. No, she was going to school.

Q. She went to school? A. Went to school.

Q. What time of day was it that Mrs. Morris came to see you? A. I don't know the exact time; in the afternoon.

Q. What? A. In the afternoon; I don't know the exact time.

Q. Now, what time did you leave the hospital? A. Well, I guess about three o'clock.

Q. How soon after you got hurt was it that Mrs. Morris came? A. Well, possibly an hour.

Q. Now, who sent you or took you to the hospital? A. Dr. Theiss.

Q. And how did you get home? A. In a taxi-cab.

Q. Who furnished the taxicab? A. Dr. Ross got it for me.

Q. Who paid for it, do you know? A. I paid for it first.

Q. Did anybody else pay you for it afterward? A. Mrs. Morris gave me the money.

Q. That afternoon when Mrs. Morris came—I want to refresh your recollection—didn't you at that time tell her that you were suffering from diabetes? A. No.

Q. You are sure of that? A. I never suffered from diabetes.

Q. I didn't ask you that; did you tell Mrs. Morris at that time that you suffered from diabetes? A. No.

ESTELLE LAW, Jr., Sworn.

By Mr. Carroll:

Q. Miss Law, where do you live? A. 352 Audubon Avenue, Audubon.

Q. Audubon? A. Yes.

Q. And you are the daughter of Mrs. Law, who has just testified? A. Yes.

Q. How old are you? A. Sixteen.

Q. You live with your mother at Audubon? A. Yes.

Q. Do you work now or go to school? A. I have been working.

Q. Now, do you recall in May, 1923, your mother being hurt? A. I do.

Q. Now, when did you first see her after the accident? A. When she came home in the taxi.

Q. Came home from the hospital? A. Yes.

Q. You were home? A. I was home.

A Juror: Will the young lady kindly speak louder? We can't hear her.

Q. Will you speak up a little louder, please, so that the jury can hear you? A. You were home then in the house when she came home from the hospital? A. Yes.

Q. And did you observe her hair and her clothing? A. What was that?

Q. I say, did you see her hair? A. Yes.

Q. And her clothing? A. Yes.

Q. And what condition were they in? A. Her hair

was full of plaster, and her coat and dress had blood on it. Her coat was very dusty with plaster.

Q. Was her head wrapped up in bandages? A. Yes.

Q. Now, after this accident, how long was she laid up and unable to attend to her duties of dressmaking or household duties? A. I really don't remember.

Q. How is that? A. I really don't remember just exact.

Q. Well, about how long was it to your best recollection? All right, if you can't tell us; now, before this accident in May, 1923, what had been the condition of your mother's health generally? A. Why, she was very lively and very healthy, never complained of any nervousness or any pains in her head.

Q. Was she under the doctor's care at all before May, 1923? A. No, she was not.

Q. Now, you have lived with her ever since the accident? A. Yes.

Q. In the same house? A. Yes.

Q. Now, since this accident have you noticed any change in her condition? A. Very much so.

Q. What have you noticed? A. Why, she is very nervous, and any noise annoys her, and she suffers with pain in her head; I can tell by the expression on her face.

Q. Has that been ever since she was hurt? A. Yes, ever since she was hurt.

Q. Have yon noticed anything else the matter with her other than pains in the head and the— A. No, the nervousness.

Q. Has she any scar or mark in the head at this time? A. Yes, she has.

Q. What is that? A. Why, it is a scar about an inch long right where the stitches were.

Q. Is there any ridge or mark or indentation there? A. Yes, it is indented.

CROSS EXAMINATION

By Mr. Davis:

Q. Now, you remember when your father died? A. Yes.

Q. When did he die? A. December 2nd.

Q. December 2nd, 1922? A. Yes, I think it is 1922.

Q. Is that right? A. That is right.

Q. And this accident happened in May, 1923? A. Yes.

Q. You say during that time your mother was lively? A. Yes, she was.

PLAINTIFF RESTS

Mr. Davis: I move for a non-suit, your Honor; there is no evidence of any negligence in this case.

(At this point a recess was taken until Thursday morning, October 8, 1925, at 10 o'clock A. M.)

Camden, New Jersey, October 8, 1925

Trial of the cause resumed at 10 o'clock A. M., pursuant to adjournment, in the presence of counsel for the respective parties.

THE COURT (After argument): It seems to me that this case falls within the rule that where one has control over property he owes to invitees the duty of reasonable care, and where a piece of his property falls under circumstances that would not normally and usually occur, that proof of the happening of the event is sufficient to call upon the defendant for an explanation and is a circumstance from which negligence may be inferred. I think it does not necessarily follow that it is proof of negligence, but negligence may be inferred, and unexplained the jury could conclude that it was due to negligence; therefore the motion will be denied.

(Exception noted for the plaintiff.)

THE CASE FOR THE DEFENDANT

SARAH MORRIS, Sworn.

BY MR. DAVIS:

Q. Mrs. Morris, you are the wife of the defendant in this case? A. Yes.

Q. Were you in the store at the time of the accident to Mrs. Law? A. No, I was in the dining room.

Q. Did you hear about it? A. Yes, I heard it fall.

Q. Oh, you heard the fall of the plaster, did you? A. Yes.

Q. What did you do then? A. I come out and picked her up.

Q. Where did you go? A. Right out to the store.

Q. You went out in the store? A. Yes.

Q. Now, where did you find Mrs. Law? A. She was on the floor.

Q. Yes; did you see what had happened? A. No, I didn't see what had happened.

Q. Well, did you see any plaster or anything of that sort? A. Yes, I saw a piece of plaster.

THE COURT: You were asked if you saw what had happened, not when.

THE WITNESS: Why, a piece of plaster had fell and cut her head.

Q. What did you do? A. I got a basin of water and started to wash it, and sent over to the drug store to get something to fix her up. So the druggist didn't come over and I sent for the nearest doctor that we could get. Dr. Theiss came in, and I told him to take her to the hospital and see that there was nothing serious, and when he saw it, right away he said—

Q. Well, you can't say that. Did he take her away? A. Yes, took her to the hospital.

Q. Afterward did you go see her? A. Yes, I went down to see her.

Q. When? A. In the afternoon.

Q. The same afternoon? A. Yes.

Q. What time? A. I guess about three or four o'clock.

Q. Where did you see her? A. Sitting in her living room.

Q. Did you have a conversation with her? A. Yes, I had a conversation with her.

Q. At that time did she tell you that she suffered from diabetes?

MR. CARROLL: I object to that as leading.

A. She certainly did.

MR. DAVIS: That is exactly the way to put it.

THE COURT: I imagine under the rules of evidence he has to put it that way; it is contradiction.

Q. Now, did you have any further talk with her about her nervous condition? A. Yes, sir.

Q. When did you have that conversation? A. That same afternoon.

Q. What did she say to you with respect to her nervout condition? A. She told me she was very nervous and that she had a terrible crying spell the night before.

Q. The night before what? A. The night before the accident, and she went out in the yard and she cried, she said, for a couple of hours; that is the way she used to get since her husband died. I don't remember whether she said she went to the movies or wanted to go to the movies the night before with her daughter.

Q. Now, did you see her after that? A. No, I didn't go down the next day, because she was going away; I sent my boy down.

Q. Did she say anything to you as to what she was doing at that time? A. Yes, she said she had a couple of dresses to finish, and she was going to finish them up the next day, so I told her not to finish them, but give them to someone else, and I would pay for them to finish up, not to bother with them, and she said it was perfectly all right for her to finish them, she could finish them.

Q. Was anything said to you about how much she made? A. She told me she didn't make very much at all; the women would come there and want a dress made for about a dollar and a half, but she couldn't afford it, they were very mean, coming in and wanting her to do it that reasonable.

Q. Mrs. Morris, how long, do you know, if you know, had your husband had this place? A. Before the accident happened?

Q. Yes. A. I really couldn't tell you just how long, you know.

Q. Had he had any repairs made? A. Why, everything was made when we went into the place.

Q. You mean new? A. Everything new, the plaster and all.

Q. And how long had you been in the place? A. A. Well, that I really don't remember, whether it was a year or two years or how long, I don't remember, or less than that, I really couldn't tell you.

Q. And do you know whether or not shortly before that time that anything had been done to the plastering? A. No, everything was perfectly all right.

CROSS EXAMINATION

By Mr. Carroll:

Q. You are the wife of Mr. Morris, the defendant? A. Yes, sir.

Q. You live with him down there? A. Yes.

Q. Help him around the store? A. Yes, sir.

Q. Now, of course, you don't know whether or not Mrs. Law had diabetes, do you? A. Well, she told me she had.

Q. Well, outside of what she told you, you don't know it of your own knowledge, do you? A. No, how could I know? When she told me, then I knew she had diabetes and was nervous, that is all I know.

Q. There wasn't anything about her appearance before the accident to indicate ill-health, was there? A. Well, she was nervous when her husband died, that is what she told me.

Q. Well, outside of being nervous when her husband died, was there anything about her appearance before the accident which indicated ill health? A. I never took that much notice.

Q. She came in the store frequently, didn't she? A. Yes.

Q. A regular customer there? A. Yes.

Q. And you saw her frequently? A. Yes.

Q. You never noticed anything about her that indicated that she was in any ill health? A. No, I never noticed, no.

Q. She never told you before that she had diabetes? A. I never got in conversation with her so she could tell me.

Q. She used to come in the store, as people do in little towns, and chat with you? A. No, she just said, "Good morning," you know, or "Good-bye."

Q. You never exchanged words with her? A. No.

Q. No neighborhood gossip or anything of that sort? A. No.

Q. She never at any time before the accident complained of her health in any way, did she? A. That I don't know, because I never spoke to her.

Q. What was it on this particular afternoon, so far as you know, that caused her to make the remark that she had diabetes? A. Well, I don't know why she told me that, but we got into a conversation, and she started to tell me, and she told me that I should not worry about her, that she was perfectly all right, and she said to me that she never met people that tried to do so much for her as what we did, and we shouldn't worry, that she would be perfectly all right, that she is going away in a couple of days.

Q. And in the course of that conversation— A. That she started to tell me, yes.

Q. It was in the course of that conversation that she simply volunteered the remark that she had diabetes? A. Yes, sure, and nervous trouble, and crying spells.

Q. There was nothing in what you said to draw out the remark? A. No.

Q. Simply volunteered? A. Yes.

Q. Now, did you go and inquire of Dr. Theiss whether she did have diabetes? A. No, I didn't take that interest in diabetes; I just wanted that she should get well with her head. I told her that she should go to the doctor's and get cured of her head, you know, with her head and be better, and send us the bill, that she

shouldn't have to worry about it, and she said that was perfectly all right, that we were very nice to her.

Q. Was the bill sent to you? A. The bill was sent to us.

Q. That is, the bill of Dr. Theiss? A. Yes.

Q. Was it paid by you or your husband? A. Yes, it was paid by my husband and myself.

Q. Was the hospital bill sent to you? A. I don't think there was a hospital bill. Well, the X-ray, I guess we paid Dr. Theiss for it; I just don't remember.

Q. Now, there isn't any doubt—you say you went in the store on the occasion of this occurrence—when you got in there after hearing the plaster fall, Mrs. Law was on the floor? A. Yes, and she told me not to worry; I seemed to be more worried than she was; she told me not to get so excited, that everything was all right, that she wanted to go home. I said, "No, you can't go home; I am going to make you go to the hospital first and see that there is nothing serious."

Q. You were a good deal more nervous about it than she was? A. I certainly was, because it happened there.

Q. Are you of a nervous disposition, too? A. Well, sometimes I am.

Q. Notwithstanding the fact that she was the one that was hurt, you were more nervous than she was? A. I was nervous, because it happened, that is all.

Q. You helped her up from the floor and got her on a chair? A. Yes.

Q. There is no doubt her head was cut? A. Yes, her head was cut; it was a decided cut.

Q. Bleeding, bleeding badly? A. It wasn't bleeding so badly, no.

Q. Have you had any conversations with Mrs. Law

since the accident other than this one afternoon you speak of? A. No, just that one afternoon.

Q. You never came in contact with her again? A. No, I never came in contact with her again.

FRANK MORRIS, Sworn.

By Mr. Davis:

Q. Now, Mr. Morris, you live where? A. 107 Merchant Street.

Q. Audubon? A. Audubon.

Q. You have a place of business there? A. Yes.

Q. What kind of store do you have? A. Dry goods and general store and notions.

Q. And in this general store—is it in the same building with your house? A. Yes, sir.

Q. And the store in the front part of the house? A. Yes, sir.

Q. You know Mrs. Law? A. I do, very well.

Q. On the 25th of May, 1923, she came in your store? A. She did.

Q. How long had you had this store and building? A. Why, we got in there the Thursday after Thanksgiving of nineteen—previous to the accident.

Q. That is, 1922, then? A. 1922, yes.

Q. So just a week before Thanksgiving? A. A week after Thanksgiving.

Q. A week after Thanksgiving of 1922, you went in the place? A. Yes.

Q. Was it new or old? A. It was an old building, remodeled entirely through.

Q. And had the work of remodeling been done by you? A. Through a sub-contractor.

Q. I say, you had had it done? A. Yes, I had engaged a contractor to do the work.

Q. You owned the building, I suppose? A. I did, yes.

Q. And you had contractor make repairs? A. Absolutely.

Q. Now, what repairs were made, if any, to this store? A. Why, there was a new floor put in.

Q. A new what? A. A new floor for this building there, new shelving, and the entire walls gone over, walls and ceiling.

Q. Now, who did that work—who actually did the work? A. The contractor was Mr. Congle; the plasterer was Mr. Rutter, Charles C. Rutter.

Q. Mr. Rutter actually did the work, did he? A. Yes.

Q. Were you present from time to time while the work was going on in this room? A. Not at all times.

Q. No, I said from time to time? A. Oh, yes.

Q. Now, after this building was done, did you inspect it? A. From time to time I did.

Q. Was anything the matter with the plastering?

MR. CARROLL: I object to counsel leading the witness that way.

MR. DAVIS: I don't think that is leading.

THE COURT: I suppose this question is not.

A. No, there was nothing at all, just the same as that ceiling is now.

Q. Now, had you at any time before the accident seen anything in the plastering or anything around the plastering or anything around the place that indicated that any part of it was unsafe? A. Absolutely not.

Q. Now, you said that you were waiting on Mrs. Law, I think? A. Yes.

Q. And where were you at the time that this piece of plastering fell? A. That particular morning, that Friday morning?

Q. No, I am not speaking of— A. At the time, first I waited on her on the dry goods counter; she came for three yards of material, and she asked me for something in red to trim this material with. I walked over with her to the notion counter, which is on the opposite side of the drygoods, and I was standing right alongside of her, and I bent over to pick up this red material, the binding, to put on this material, and just at that time the vibration of the 11.20 express train came through; all I could hear was something like a crack over, and a clump, a small piece of plaster, twelve or fourteen inches in diameter, came down. As it came down it broke off, the end of the clump, see, a part of it struck me and a small piece hit Mrs. Law on the head. She kind of swooned when it hit her, and as she done that I grabbed hold of her. She said, "I am bleeding." I said, "Yes." Well in the meantime my wife came up, and she took care of her while I went for the doctor. I called Dr. Theiss and he came up there and done somthing in a medical term, which I don't understand, placed his hands this way on her eyes, and he said, "Frank, she is all right, just a little cut on the head."

Q. In the presence of the plaintiff? A. Yes. I said, "What are you going to do now?" He said, "I am

going to take her home and dress the wound and send her home. Now, he did take her home; I followed and I said to him, "Now, Doctor—

MR. CARROLL: I object.

Q. In the presence of this lady? A. In the presence of this lady.

Q. All right. A. I said, "Doctor, I want you to do the best you can." He says, "Frank, what do you want me to do?" I said, "I want you to take her to the hospital and have an X-ray taken; she is a friend of mine and I don't want you to consider no expense whatever." He said, "It is not necessary." I said, "You do as I tell you." He said, "All right, I will dress her wound and take her up to the Cooper Hospital." While she was resting, he called up Dr. Roberts at the Cooper Hospital to get the X-ray ready.

Q. Was that in your presence and in the presence of the defendant? A. Right there in the room there, and he got her up there, took her up there and after the X-ray was taken, he called me up, and said, "Frank,"—

Q. Never mind, you can't tell about that. What did you do in response to what he said? A. What do you mean?

Q. You said he called you up? A. Yes.

Q. Then what did you do? A. He says —

Q. No, I didn't ask you that. A. What did I do? Now, I will have to explain what he said to me.

Q. No, you don't have to explain at all; just do as I ask you to, tell us what you did. It is not proper that you should tell anything that occurred not in the presence of this lady. A. Now, he called me up from the hospital.

Q. All right, what did you do? A. I told him to send me—

THE COURT: No; it is a perfectly plain question, not what was said but what was done. What did you do, if anything?

A. Well, I didn't do anything; Dr. Theiss called me from the hospital.

Q. All right; when did you next see Dr. Theiss? A. That same afternoon.

Q. When did you next see this lady? A. Why, I didn't see her; I made an attempt to see her in about a week or ten days, I was going by there one Sunday morning.

Q. Well, did you see her? A. No, I didn't see her.

Q. When did you next see her? A. Not until a few weeks later, when I attempted to see her as she was in the bank, and when I got in there, she turned her head and wouldn't speak to me.

Q. Now, did Dr. Theiss send you a bill? A. He did.

Q. For his services in this case? A. Yes.

Q. You paid that? A. Absolutely.

Q. Paid all that he asked you? A. Yes, I asked him how much it was including the X-ray and all, and he said—

Q. Never mind; he sent you a bill, did he? A. Yes.

Q. And you paid it? A. Absolutely.

Q. Now, did you get any bill for the services at the hospital? A. No, that was all included.

Q. All in the bill? A. All in the bill.

Q. That is, I refer to the X-ray? A. Yes.

Q. Now, when this accident happened, you spoke about a train? A. Yes.

Q. What happened about the train? A. It seemed just at that moment when the train, that express from Camden to Atlantic City, went through, the vibration, it seemed to me that is the only thing I could figure on—

Q. No, I didn't ask you to do any figuring at all; I just asked you to tell me, did the train pass at that time? A. At that time, yes, the 11.20 express.

Q. At the same instant? A. At the same instant, yes.

Q. Now, how far is your place from the railroad? A. About a hundred feet.

Q. Now, did any other plaster fall? A. Just that one piece.

Q. Afterward did any plaster fall? A. No.

Q. Did you have any knowledge or any reason to suspect any plaster would fall? A. Absolutely, no more than I am sitting right here now under this here ceiling, thinking this would fall.

CROSS EXAMINATION

By Mr. Carroll:

Q. Mr. Morris, this building that you occupied as a store and dwelling, was that originally a dwelling house? A. Yes.

Q. And then you had it remodeled so as to turn it into a store and dwelling? A. No, it was a store before.

Q. Oh, it was a store and dwelling before? A. Yes, it was a store before.

Q. And you simply had it touched up and renovated? A. Yes.

Q. And at that time, you had the walls and ceiling plastered? A. Yes, all gone through, because they had the old-fashoned pebble, see, it was all taken off, pebble—I don't know what you would call it; it was some kind of ceiling made out of pebbles; understand, they used it as a grocery store, so it was all taken off and entirely new material put on over that there.

Q. You are not a plasterer yourself, are you? A. No, absolutely not.

Q. And you don't know anything about plastering? A. No.

Q. I mean, from a practical, expert standpoint? A. No, I do not.

Q. Now, you say your store was about a hundred feet from the railroad? A. About a hundred feet.

Q. That is in Audubon? A. In Audubon, yes.

Q. Whereabout is your store? A. It is on the right hand side going toward Mt. Ephraim.

Q. Does it face the railroad? A. No, it faces—well, the railroad goes this way, and the store is this way. (Indicating.)

Q. Now, this 11.20 train to Atlantic City went by every day, didn't it? A. Yes.

Q. A good many other trains go by? A. Yes.

Q. Now, you say that this piece of plaster that fell was about twelve inches square? A. About twelve or fourteen.

Q. About twelve inches? A. About twelve or fourteen, yes, not square, but—

Q. In an irregular piece? A. Yes.

Q. You say that no more plaster fell? A. No.

Q. You are positive of that? A. Absolutely.

Q. Weren't there other places where the plaster fell in a short time after that? A. No, sir.

Q. You had the ceiling repaired? A. I did.

Q. Was this little spot the only plaster that was repaired? A. That was repaired, yes.

Q. You are quite positive of that? A. Yes; well, I had a new ceiling put over there.

Q. This little place where the plaster fell from is the only place that you had repaired? A. Yes.

Q. Who made that repair? A. Mr. Nailor; he put a new ceiling on, a Compoboard.

Q. You mean he put a whole new ceiling on? A. Yes.

Q. And took all the plaster down? A. No, didn't take all, just put a new ceiling over it, remodeled the place.

Q. Left the old plaster on? A. Yes.

Q. And put a new ceiling over it? A. Yes.

Q. Some of this sheet-rock or something of that sort? A. Yes, sheet-rock board.

Q. Now, this railroad train that went by, did the vibration from these trains shake things off your shelves? A. Well, it does in the window.

Q. It shakes things in the window? A. Yes, you can't put a stand up there.

CHARLES RUTTER, Sworn.

By Mr. Davis:

Q. Where do you live? A. 268 Logan Avenue, Audubon.

Q. How old are you? A. Fifty-six years old.

Q. What is your trade? A. Plasterer.

Q. How long have you been a plasterer? A. Thirty-eight years.

Q. Do you conduct a business for yourself? A. I do.

Q. How long have you been in business for yourself? A. Seven years.

Q. And you say for forty years— A. Thirty-eight.

Q. Thirty-eight years you have been a plasterer? A. Yes.

Q. And devoted your time to that entirely, have you? A. Yes.

Q. Now, did you have a contract for doing any work in this building which Mr. Morris owns and occupies? A. I and my partner did at that time; I was in partnership with a gentleman at that time.

Q. Did you do any work there? A. I worked there entirely myself.

Q. Now, when was that? A. That was in October and November of 1921.

Q. 1921 or 1922? A. 1921.

Q. Well, this accident, I think, occurred in 1923; now, Mr. Morris says he went into the building in 1922, Thanksgiving; was it a year before he went in the build-

ing or the same year he went in the building? A. Your Honor, I copied this off my time sheet; I retain them all as I go along. I started the job on October 4th and finished it December 12th.

Q. Of what year? A. December 16.

Q. Of what year? A. 1921.

Q. So then it was a year before this accident or more that you put this plaster on or did this work? A. Yes, sir.

Q. Now, what did you do in this store? A. Do you want me to explain the condition the store was in when I took the work?

Q. Yes. A. Well, it had been a storeroom and occupied by Evaul Brothers, a grocery store, and the walls were entirely full of holes here and there, you might say, all over. the ceilings and side walls, so I go all over it and sound it, and wherever it needed I took off the loose and replastered it.

Q. What did you do by way of sounding it? A. Took a hatchet and sounded it to see whether it was firm or not; then I would touch these holes up, and after I got these holes all touched up, I took and gave it a white coat all over the room, sides and ceilings.

Q. Just explain—I suppose everybody on the jury knows—what was there to hold this plaster, what sort of lath? A. Pine lath.

Q. Now, these laths are nailed upon the frame, I suppose? A. Upon the joists and studs.

Q. And are they nailed flush, or are there cracks between them? A. Why, there are cracks between them to form a key.

Q. What is the purpose of having these cracks between the laths? A. To form a key, to retain the plaster to them.

Q. What do you mean by a key? A. You dash it through, and it clinches over and forms a key.

Q. When you push the plaster against the lath, it pushes through these holes, doesn't it? A. That is the idea.

Q. And it drops over—is that part that drops over what you call the key? A. That is it.

Q. When you plastered this place and repaired it, were the laths in good shape? A. Good shape, yes.

Q. And properly applied, as far as you could observe? A. Yes.

Q. And the plaster that you put on, what class or quality of plaster was it? A. Why, there had been—do you want to know what was on there?

Q. No, I didn't ask what was on there; I asked you what you put on? A. I put hard wall ivory plaster. gypsum plaster.

Q. And what is the quality of that plaster, is it good? A. A-No. 1.

Q. Is there any better in your opinion? A. No, sir.

Q. Now, the plaster that you left on there, as I understand, you did not take it all off? A. No, I didn't take it all off.

Q. And the plaster that you left on there, was that in your judgment and opinion after an examination in good shape? A. It certainly was.

Q. And was it of good quality? A. Yes, sir.

Q. And after you put this plaster on, I understand, the first coat, that you then went over and put a white coat all over it, is that right? A. Yes.

Q. Now, what quality of material did you put on that? A. My white coat?

Q. Yes. A. White Rock.

Q. And what is the quality of that? A. No. 1.

Q. Is there anything better in your opinion? A. No, sir.

Q. Now, was it applied in both places, that is, the first coat and the white coat, in a good and workmanlike manner? A. Yes.

Q. Do you know how to do it any better than you did that one? A. No, sir.

Q. Do you think anybody else knows how to do it any better than you did? A. I don't see how they could.

Q. Now, when you got through with it, how did it appear to you, what condition? A. First class condition.

Q. And you left there, as I understand it, on December 16th, or rather, you finished your work at that time? A. Yes.

Q. Did you go back any time after that and inspect it? A. I went back to do the patching after the carpenters.

Q. After what? A. After the carpenters had finished.

Q. I see, you had done this plastering then before the carpenters had finished their work? A. Surely.

Q. Now, when you went back, what time was that, if you know? A. Oh, I should judge a week or ten days.

Q. What condition did it appear in then? A. The same as I had left it previously.

Q. Good, bad or indifferent? A. Good.

Q. What did you do? A. Nothing more than touch up where the carpenters had made little knocks into it through doing their work.

Q. You say when you left it then in your opinion it was good? A. It was first class.

Q. Did you go back afterward to see where this piece had fallen out? A. No, sir.

Q. Now, when you left it, were there indications of any breaks or loose plaster or anything of that sort? A. No, sir.

Q. Now, it is testified that this piece of plaster fell over the notion counter—do you know where the notion counter was? A. No, sir.

Q. Was there any part of the ceiling or on the walls when you left it in your opinion in an unsafe condition? A. No, sir.

Q. Was there anything that would indicate on close observation and inspection that there was anything wrong? A. No, sir.

CROSS EXAMINATION

By Mr. Carroll:

Q. Now, Mr. Rutter, you did your work, your plastering job in this building, in November and December, 1921? A. Yes, sir.

Q. And after you did that job, you did not go back to the store again, did you? A. I went back to it to repair the work after the carpenters.

Q. Well, about when was that, sometime in December, 1921? A. The latter part of December.

Q. 1921? A. Yes.

Q. So that between December, 1921, and May, 1923, you made no inspection, had no occasion to make any inspection or examination of the ceiling, had you? A. No, sir.

Q. You don't know what process, if any, of deterioration or otherwise went on in the ceiling or in the walls between December, 1921, and May, 1923, do you? A. No, sir.

Q. You don't know what condition the ceiling was in in May, 1923? A. No, sir.

Q. You don't know whether it showed cracks or bulges or not, do you? A. No, sir.

Q. Now, ought plaster to break away from a ceiling if the key holds? A. Ought it?

Q. Yes. A. Now, that largely depends on where a building is situated and what it is used for. I should judge on wooden lath especially it is liable to work loose. Your lath, in applying fresh plaster, swells, and then it shrinks.

Q. You say the lath swells and then it shrinks? A. It surely does.

Q. Doesn't that have an effect on the plaster? A. No.

Q. In a building as old as this, would the lath shrink and swell? A. How is that?

Q. In a building as old as this, would laths shrink and swell? A. If you apply fresh plaster to it, it will, yes, just the same as a new building.

Q. And that shrinkage and swelling, would anything indicate that in the outward appearance of the plaster? A. No, I shouldn't think so.

Q. That does not show in the plaster? A. No.

By Mr. Davis:

Q. From the quality of materials that you used and the workmanship that you put on it, was there anything

that would make you apprehensive or think that within a year or a year and a half any part of this plaster would fall? A. Nothing at all whatever.

Q. Ought it to get harder and firmer? A. The plaster that I applied should get harder as it aged.

Q. And does it get firmer as it gets harder? A. Yes, sir.

JONAS MORRIS, Sworn.

By Mr. Davis:

Q. How old are you, Jonas? A. Fourteen.

Q. You are a son of Mrs. Morris, who was just on the stand, aren't you? A. Yes.

Q. A while ago, the defendant? A. Yes.

Q. Do you know Mrs. Law? A. Yes, I know her, yes, sir.

Q. And you remember the accident, don't you, that plastering fell on her? A. I wasn't there at the time.

Q. No, but you remember that such an accident happened? A. Yes.

Q. Where were you at that time? A. In school.

Q. And after school, what did you do? A. I came home and my mother told me about it.

Q. All right; did you see where the plaster had fallen? A. Yes, sir.

Q. Had you seen that plaster before that time, that is, been in the room? A. Yes, sir.

Q. Were there any cracks or anything to indicate that the plastering was in bad shape or poor shape? A. No, sir.

Q. Now, on the next day did you see Mrs. Law? A. I don't just remember if it was the next day or that afternoon, but mother gave me a bag—well, a basket full of fruits to take over to Mrs. Law.

Q. And did you go? A. Yes.

Q. Was that in the afternoon? A. Yes, sir.

Q. It was in the afternoon? A. Yes.

Q. After you came from school? A. Not right after I came home from school.

Q. Well, I didn't say right after; was it after school hours? A. After school hours, yes.

Q. Now are you sure it was in the afternoon or was it the next day? A. I just don't remember.

Q. All right; do you remember going to her house? A. Yes.

Q. And taking this basket? A. Yes.

Q. Did you see her? A. Yes.

Q. Where was she? A. She was waiting on the table, and an elderly man—she was waiting on an elderly man; they were eating and she was waiting on the table, and then the daughter showed me the radio.

Q. Did you see Mrs. Law waiting on the table? A. Yes.

Q. And did you sit down after you went in the house? A. No, sir.

Q. How long did you stay there? A. Ten minutes.

Q. Did she have a bandage on her head then? A. Yes.

Q. And during all that time was Mrs. Law waiting on the table? A. No, when I first came in she was waiting on the table, then while I was there she sat down to eat.

NO CROSS EXAMINATION

SARAH MORRIS, recalled.

By Mr. Davis:

Q. Mrs. Morris, when did you send, if at all, your son over to Mrs. Law's house? A. The next morning.

Q. What day of the week was that? A. It was Saturday.

Q. So it was Saturday morning? A. Yes.

Q. This accident occurred on Friday? A. On Friday.

NO CROSS EXAMINATION

DEFENDANT RESTS

PLAINTIFF'S REBUTTAL

JOSEPH F. BUCK, Sworn.

By Mr. Carroll:

Q. Mr. Buck, where do you live? A. Audubon.

Q. How long have you lived there? A. Fourteen years.

Q. What business are you in now? A. Contracting and building.

Q. How long have you been in that business? A. Going on two years.

Q. Have you built and constructed houses in and about Audubon? A. Yes, sir.

Q. Do you know Mr. Morris, the defendant here? A. Yes, sir.

Q. Do you know where his store is? A. Yes, sir.

Q. You know Mrs. Law, the plaintiff? A. Yes.

Q. You are no relation of Mrs. Law in any way, are you? A. None whatever.

Q. Now, do you recall having gone in to Mr. Morris' store a day or two after this accident? A. I was in there quite often. yes, I should say I was in there at that time.

Q. And do you remember having gone in there shortly after the accident? A. Yes.

Q. How long after the accident was it that you were in there? A. Oh, I am in and out of there right along; Mr. Morris and I are very friendly. I was in there, in and out several times.

Q. Now, you heard about the accident happening to Mrs. Law? A. Yes.

Q. I mean, you heard it, it was local gossip? A. Yes.

Q. And when you went in there, the first time you went in there after this accident, did you observe the ceiling? A. Yes, sir.

MR. DAVIS: I object to that as incompetent, immaterial and irrelevant.

THE COURT: Well, this answer may stand.

MR. DAVIS: I move to strike it, may it please your Honor.

THE COURT: The motion is denied.

(Exception noted for the defendant.)

Q. What was the condition of the ceiling?

MR. DAVIS: I object.

THE COURT: On what ground?

MR. DAVIS: On the ground that it is not rebuttal. This was within his power to produce in his main case.

THE COURT: How is it competent as rebuttal, Mr. Carroll?

MR. CARROLL: Because the witness testified that the only piece of plaster that fell was this little piece that hit

Mrs. Law on the head. I want to show that there were other places where plaster fell.

MR. DAVIS: Well, even that is irrelevant, incompetent and immaterial.

THE COURT: I think I shall permit that.

(Exception noted for defendant.)

MR. DAVIS: I further object on the ground, if the Court please, that it is not only irrelevant, incompetent and immaterial, but on the further ground that when he relies on the doctrine of res ipsa loquitur, he cannot then prove negligence.

THE COURT: I suppose this is contradiction of the defendant's testimony.

MR. DAVIS: Then it is contradiction on an immaterial matter.

THE COURT: I cannot say that it is immaterial; I think I shall permit it.

(Exception noted for defendant.)

Q. Did you observe the ceiling the first time that you were in there after this accident? A. Yes, I observed it.

Q. What was the condition of the ceiling? A. A. Why, the laths were visible where the plaster had fell.

Q. In what part of the store? A. Very near directly over the back counter in one place.

Q. Were there any other places? A. Later on, I don't know how much later, there was a place—

MR. DAVIS: Then I object to it.

Q. How big was this place where the plaster had fallen from? A. Well, I wouldn't want to confine myself to feet and inches; there was quite a place there that had fell.

Q. Would you say greater or smaller than about twelve inches?

MR. DAVIS: I object to that as leading and suggestive.

THE COURT: I do not suppose it is suggestive; the question is whether it was greater or smaller.

MR. DAVIS: Then there is no time fixed, if the Court please.

THE COURT: No, there is no time fixed.

Q. On this occasion when you were in there first after having heard of this accident?

MR. DAVIS: That don't help us; that don't fix the time.

BY THE COURT:

Q. How shortly after this occurrence was it? A. I should say it was a couple of days, your Honor, a day or two afterward.

THE COURT: He may answer. How large a piece was it—was it larger or smaller?

A. I should say it was about the size of a man's body; that is the way it appeared to me.

BY MR. CARROLL:

Q. And it had not been repaired at that time?

MR. DAVIS: I object to that as leading and suggestive.

THE COURT: The objection is sustained.

Q. Was there anything that had been done to the ceiling on this occasion? A. No, sir, not at that time.

Q. Now, do you have an office at Audubon? A. Yes, sir.

Q. And where is that office with relation to Mr. Morris' store? A. Directly opposite.

Q. The opposite side of the street? A. Yes, sir.

Q. Do you know the trains of the Reading Railroad go by there? A. Yes, sir.

Q. Now, to what extent do you experience in your building vibration from the passing of a railroad train?

MR. DAVIS: I object to that as irrelevant, incompetent and immaterial.

THE COURT: The objection is sustained.

Q. Do you recall this store having been remodeled for Mr. Morris? A. Yes, sir.

Q. How long did it stand vacant before Mr. Morris moved into it? A. I don't know; it seemed to me in our conversation he was anxious to get in—

MR. DAVIS: I object.

THE COURT: No, just answer the question—how long did it stand idle after the repairs were made? A. From the time the alterations were made?

Q. Yes. A. I don't think any time; I don't think it stood idle at all.

Q. Well, now, you are, you say, a practical builder and contractor? A. Yes, sir.

Q. What is the method used for making plaster ad here to the lath?

MR. DAVIS: I object to that as incompetent, immaterial irrelevant and not rebuttal.

THE COURT: I suppose the question in this case is whether or not the defendant exercised reasonable care to discover any defects, if there were any. I do not suppose what is the usual method is material, is it?

MR. CARROLL: Well, what I wanted to show by this witness, may it please your Honor, as a practical builder, is that this plaster could not have broken away without giving some preliminary signs in the shape of a crack or bulge.

THE COURT: (After argument) I doubt its competency; it is simply an opinion. I don't think this matter calls for expert opinion. The objection will be sustained.

(Exception noted for the plaintiff.)

NO CROSS EXAMINATION

MR. CARROLL: Now, unless Mr. Davis objects, I am going to call Dr. Knight; I should have called him on my main case but he was not here yesterday afternoon; he was here in the morning but could not be here in the afternoon.

MR. DAVIS: Well, I do object to it, if the Court please, for this reason, that if there had been any doctor that had testified yesterday I would have had an opportunity to prepare my case for that matter. No doctor testified, and consequently I left it exactly on the situation that the plaintiff presented at the close of his case.

THE COURT: I suppose in that situation the objection is valid.

MR. CARROLL: He was here yesterday morning but could not get here yesterday afternoon.

THE COURT: That is a matter in which the Court cannot help you.

ESTELLE LAW, Recalled.

By Mr. Carroll:

Q. Mrs. Law, do you recall the testimony of Mrs. Morris that you told her on the day following or on the day of the accident that you had diabetes?

Mr. Davis: If the Court please, that is no question; the statement of counsel is no question; it is not in such form that it can be objected to.

The Court: He asks her if she recalls the testimony; that is clearly a question.

Q. Do you recall Mrs. Morris testifying—

Mr. Davis: One minute; I move it be stricken out.

Q. Do you recall Mrs. Morris testifying on the stand this morning? A. Yes.

Q. Did you tell her on that occasion you had diabetes?

Mr. Davis: I object; she testified to that.

The Court: I think she denied that yesterday; she was asked whether she did not tell her, and she said she did not, and a witness was called by the defendant in contradiction of that statement.

Q. Have you ever had diabetes?

MR. DAVIS: I object; she was asked and testified that way yesterday.

THE COURT: I am not sure whether she did; I think her answer was that never having had it she made no such statement.

Q. Now, do you remember a little boy coming around with a basket of fruit? A. Yes.

Q. And he has testified that you were waiting on someone at the table, an elderly man—who was that? A. My father.

Q. He lives with you? A. Yes.

Q. How old is he? A. Seventy-five years old.

NO CROSS EXAMINATION

BOTH SIDES REST

MR. DAVIS: I move, if the Court please, the usual motion for a direction.

THE COURT: The motion is denied.

(Exception noted for the defendant.)

MR. DAVIS: Only that I may explain it to your Honor —I do it on the ground that there is nothing now for the jury to pass upon; having explained the situation, the presumption disappears, and there is only one side to the question.

THE COURT: I think it is a question for the jury to determine, and not a matter for the Court. The motion will be denied.

(Exception noted for the defendant.)

CHARGE OF THE COURT

DONGES, J.

Ladies and Gentlemen: The mere fact that thus occurrence took place does not necessarily mean that the defendant was guilty of negligence or that he is liable in damages for the accident. It does not follow at all as a matter of law that because this lady was hurt in the defendant's place of business that she is entitled to recover damages. To entitle her to recover, it must appear by the greater weight of evidence, taking the whole case together, everything that has been testified, that the plaintiff was injured through the failure of the defendant to use reasonable care to keep his premises reasonably safe for persons who came there to transact business with him. When he invited the plaintiff and other persons to enter his store and transact business, to become customers, there was a constructive invitation to come there for the purpose of doing business, and that imposed upon the defendant the duty to exercise reasonable care to keep his premises reasonably safe for the use of such customers.

What is reasonable care depends upon the circumstances. What ought he to have done that he did not do to keep his property reasonably safe for the plaintiff's

use? What did he fail to do that a person in the exercise of reasonable care under the circumstances should have done? What did he do that reasonable care required should not be done? Now, that is the test. This defendant did not become an insurer of the safety of the plaintiff; in other words, when she entered his store, the defendant was not by law put in the position of saying to her, "You will not be injured; I will insure you against injury." The law did not impose that duty upon him; the law imposed the duty upon him to exercise that degree of care which a reasonably prudent person in the circumstances would use to keep his property reasonably safe for the use of his customers. Now, did he do that? If he did, then he did all that the law required. If he did not, it is for you to say on the whole case what he failed to do that he ought to have done, what he did that he ought not to have done in the exercise of reasonable care for the plaintiff's safety.

Taking the whole case together, there must appear more evidence, a greater probability of his failure to perform that duty than there is to support it. That is the duty which the law imposes upon him, so that the mere occurrence, as I said before, is not conclusive of negligence at all; it is simply something that is to be considered, and then you consider the testimony of the defendant, and when you take it altogether, you say from the whole case, Does it appear by the greater weight of evidence that it was throug a failure of the defendant to exercise reasonable care that this thing occurred? And your verdict will be according as you determine that question.

Now, if the plaintiff is entitled to recover, she is entitled to recover such sum as will compensate her for

the pain and suffering which she has heretofore endured and any that she may, from the testimony, reasonably suffer in the future, for any diminution of earning power, any actual loss of wages, any decrease in her earning capacity. There is no testimony of any expenditures, I think, so that there can be no allowance for any medical services or the like, as I think there is no such testimony.

The primary question then is on the whole case, Does it appear by the greater weight of evidence that this defendant failed to exercise reasonable care to do that in the situation that existed, in the use of his property, that a person of ordinary prudence, a reasonably careful person, would do under the circumstances? As I have said, if you find on the whole case that the burden has not been borne by the plaintiff, then your verdict will be for the defendant. If your verdict is for the plaintiff, it is, as I have said, for such elements of damage as I have stated to you. You may retire.

THE COURT: Do you claim permanent injury—I have not seen the complaint?

MR. DAVIS: There is no evidence of it.

THE COURT: Yes, she said she has headaches.

MR. DAVIS: That is not evidence of permanency, your Honor.

THE COURT: Well, it may not be; I do not know.

DEFENDANT'S EXCEPTIONS

Defendant by his counsel prays a bill of exceptions to the charge of the Court in each of the following particulars:

1. To that portion of the Court's charge in which the Court charged the jury that they might consider in the question of damages the pain and suffering testified to.

(Exception noted.)

2. To that part of the charge in which the Court charged the jury with respect to the diminution of earning power. I make these exceptions on the ground that there is no testimony in this case to show that they are in any way connected with the accident.

(Exception noted.)

INDEX

	Page
Grounds of Appeal	1
Notice of Appeal	2
Judgment on Verdict	3
Charge of the Court	59
Defendant's Exceptions	62

TESTIMONY

Estelle Law, Direct	7
Estelle Law, Cross	18
Estelle Law, Recalled	57
Estelle Law, Jr., Direct	23
Estelle Law, Jr., Cross	25
Sarah Morris, Direct	26
Sarah Morris, Cross	30
Sarah Moris, Recalled	49
Frank Morris, Direct	33
Frank Morris, Cross	38
Charles Rutter, Direct	41
Charles Rutter, Cross	45
Jonas Morris, Direct	47
Joseph F. Buck, Direct	50

NEW JERSEY COURT OF ERRORS AND APPEALS.

ESTELLE LAW,
Plaintiff-Appellee,
v.
FRANK MORRIS,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL.

BRIEF OF PLAINTIFF-APPELLEE.

The defendant-appellant, **Frank Morris, is** appealing from a judgment rendered in the Camden County Circuit Court for the sum of $1000 in favor of Estelle Law. He has assigned four reasons for reversal: (1) The Court refused to direct a judgment of non-suit at the close of the plaintiff's case; (2) the Court refused to direct a verdict at the close of the whole case; (3) there is no evidence in the cause sufficient to sustain a verdict and judgment for the plaintiff-appellee; and (4) because, on

the whole case, there was no proof of negligence on the part of the defendant-appellant.

In applying the points noted above to the facts of the present case, the Court is confronted with but a single question: *Do the facts present a case for the application of the doctrine of res ipsa loquitur?*

FACTS.

The plaintiff, Estelle Law, was a customer, during the forenoon of May 25, 1923, engaged in making a purchase in defendant's store. Defendant, Frank Morris, was standing beside her, bending over the counter, picking up certain dress materials. Without warning, a piece of plaster fell from the ceiling, striking the plaintiff on the head and stunning her.

The occurrence may best be described by a reference to the testimony of the principal parties, the only ones present at the time of the accident. Mrs. Law testified, in reply to the question, "And what happened?" (S. C. 9-20): "The plaster fell down on top of my head; I was stunned; I went to the floor; I remembered somebody picking me up, and I remembered sitting on a chair." Frank Morris' version of the accident is somewhat similar. He says (S. C. 35-19, etc.): "All I could hear was something like a crack over, and a clump, a small piece of plaster, twelve or fourteen inches in diameter, came down. As it came down it broke off, the end of the clump, see, a part of it struck me and a small piece hit Mrs. Law on the head. She kind of swooned when it hit her and as she done that I grabbed hold of her. She said, 'I am bleeding.' I said, 'Yes.'"

ARGUMENT.

It is for just such a situation as is here presented that the doctrine of *res ipsa loquitur* exists. The means of proving the defendant's negligence lies within defendant's control, but beyond the plaintiff's reach. The phrase is but a picturesque way of describing a balance of probability on a question of fact on which little evidence either way has been presented.

The maxim, "*res ipsa loquitur,*" is defined by the Court of Errors and Appeals in *Mumma v. Easton & Amboy R. R. Co.,* 73 N. J. L. 653, 658, as follows:

> "This principle is that when through any instrumentality or agency under the management or control of a defendant or his servants there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care."

A resumé of cases dealing with this doctrine discloses its applicability to the present situation. In *Sheridan v. Foley,* 58 N. J. L. 230, the plaintiff was struck by a brick while passing a building under construction. The trial Court non-suited the plaintiff on the ground that there was nothing in the law or facts that would justify the Court in allowing the case to go to the jury. On a rule to show cause it was held that the plaintiff had made out a *prima facie* case. At *page* 232, the Court says:

> "While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim *res ipsa loquitur* is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care."

See also *Polony v. James Brady's Sons' Co.*, 126 Atl. 675.

The question in the present case is whether or not the fall of a portion of the ceiling, unexplained, discloses a situation from which an inference of negligence may be drawn. That ceilings do not fall in the ordinary course of events is a matter of common knowledge. A somewhat analogous case is the case of *Higgins v. Goerke-Krich Co.*, 91 N. J. L. 464. There the plaintiff was examining an ice box in defendant's store. While so doing, the lid of the box dropped upon her hand. The Court held that a jury question was presented and that such an occurrence, unexplained, raises a legal presumption of negligence on the part of the defendant.

The case now before the Court may be clearly distinguished from *Schnatterer v. Bamberger & Co.*, 81 N. J. L. 558; 70 Atl. 324. In that case, plaintiff tripped on a brass nosing which she alleged was loose. The Court held that the plaintiff had not made out a *prima facie* case, on the ground that the defendant had had no notice prior to the accident of any defect and that the condition had not existed for such a length of time as to charge the defen-

dant with notice. *This is not a case in which an extraordinary event has happened.* At *page* 560, the Court says:

> "Doubtlessly, the shoes upon the feet of countless numbers of persons were subjecting the brass nosing to wear and tear, and, of necessity, at *some* time during such wear, a weakening of its fastenings to the step would occur before they became loosened. In the present instance, for aught that appears to the contrary, it may readily have happened that the act of the plaintiff in placing her weight upon the metal nosing was the first force to produce this loosened condition."

Clearly, a distinction presents itself between an accident arising through the usual wear and tear which takes place on a step and the sudden, unexplained fall of a ceiling. The former is an everyday occurrence, the latter is most unusual.

The case of *Vecsy v. Central R. R. Co.*, 88 N. J. L. 177 (cited and discussed in appellant's brief) is not in point, nor does it aid in the disposition of the present case. The reason why it was there held that the doctrine of *res ipsa loquitur* did not apply to the facts there presented is tersely stated by the Court at *page* 180, where it says:

> "As there is no evidence in the case at bar to show that the wire was *under the management or control of defendant, or its servants, or that the defendant was charged with the exercise of care for the protection of the plaintiff at the time and place, with reference to the circumstance under which she was injured,* it cannot be said that the accident would not have taken place if the defendant had exercised due care." (Italics are ours.)

In the case now before the Court, the plaintiff was an invitee and the defendant was bound to have used reasonable care in maintaining his store in a safe condition.

In *Hughes v. Atlantic City, etc., R. R. Co.,* 85 N. J. L. 212, the Court was presented with the question whether an injury occasioned by fragments of glass from the explosion of an electric light bulb in the ceiling of a car, without proof as to the cause thereof, presented a case for the jury. Nowhere in the case is it held that the occurrence was not within the scope of *res ipsa loquitur.* On the contrary, the case was sent back to the jury for a re-trial because of an error in the charge, thus making it clear that the Court of Errors and Appeals did consider the occurrence within the doctrine of *res ipsa loquitur* and sufficient to send the case to the jury. What was held to be an unwarranted extension of the doctrine was not the occurrence, but the Court's charge as to the shifting of the burden of proof.

The doctrine of *res ipsa loquitur* is discussed in the case of *Excelsior Electric Co. v. Sweet,* 57 N. J. L. 224, in which case an electric street lamp fell and struck a horse upon a public highway. The horse was frightened and ran away, throwing the plaintiff from his wagon and causing his injury. At *page* 229, the Court said:

> "It would seem within the principle upon which the cases cited were decided that the fall of a lamp of the weight of the lamp in question suspended over a public street, without any explanatory evidence, would raise a presumption of negligence *res ipsa loquitur* sufficient to put the defendant on the defense."

The doctrine of *res ipsa loquitur* has received recent consideration from the Courts, and the doc-

trine given a liberal construction. In *Breen v. New York Cent. & H. R. Co.,* 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450, the rule is thus stated: "There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part." In *Griffen v. Manice,* 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, the cases are examined, and the rule stated is approved. The opinion, in part, reads: "The maxim is also, in part, based on the consideration that, where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present." These views have been recently reiterated in the case of *Fink v. Slade,* 72 N. Y. Supp. 821, 60 App. Div. 105, and also find support in analogous cases in this and other states. In *White v. Boston & A. R. Co.,* 144 Mass. 404, 11 N. E. 552, it is held that there is a presumption of negligence where a passenger is injured by the falling of a lamp shade. In *Och v. Missouri, K. & T. Ry. Co.,* 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442, a presumption of negligence was held to arise where the injury was caused by the falling of a ventilator window. In *Horn v. New Jersey Steamboat Co.,* 23 App. Div. 302, 48 N. Y. Supp. 348, it was held that the falling of an upper berth from an unexplained cause was *prima facie* evidence of negligence on the part of the steamboat company. See also *Gerlach v. Edel-*

meyer, 47 N. Y. Super. Ct. (15 Jones & S.) 292, affirmed 88 N. Y. 645; *Wolf v. American Tract Society,* 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241; *Stewart v. Ferguson,* 52 App. Div. 317, 320, 65 N. Y. Supp. 149. The falling of a fire extinguisher fastened to the side of a car, resulting in the injury to plaintiff, was held to establish a *prima facie* case of negligence against defendant, in the absence of evidence explaining the occurrence. *Allen v. United Traction Co.,* 73 N. Y. Supp. 737, 67 App. Div. 363.

Thus, where the plaintiff's testimony proves the occurrence and discloses circumstances from which the defendant's negligence is a reasonable inference, a case is presented which calls for a defense. It then became incumbent upon the defendant, Frank Morris, to explain or show such facts as would negative any negligence upon his part.

The only testimony pertinent in this respect is that as to the condition of the building. Mr. Morris testified, on direct examination, that a piece of plaster, twelve to fourteen inches in diameter, came down (S. C. 35-21). In the plaintiff's rebuttal, Mr. Buck testified that a day or two after the occurrence (S. C. 53-31) he observed the ceiling and that the place from which the plaster had fallen was about the size of a man's body (S. C. 54-4). Mr. Morris testified that it was an old building remodeled (S. C. 33-34). Mr. Rutter testified that he had done the work of replastering in 1921 (S. C. 42-2 to 8); it had not been entirely replastered (S. C. 42-14 to 20), although Mr. Rutter testified that the ceiling was in good condition when he finished his work (S. C. 44-28 to 30). This, however, was a year and a half prior to the time of the accident, and he states that he made no later examination

(S. C. 45-32 to 35). There is no evidence in the case of a more recent examination, although there are several abstract statements to the effect that it was in good condition. These seem to be based on nothing more than a casual observation, if that (Jonas Morris, S. C. 47-31 to 35).

It is to be noted that during the period in which the defendant occupied the store, which was but one hundred feet from a railroad (S. C. 38-13 and 14), it was subject to daily intermittent vibrations caused by a good many trains passing (S. C. 39-26), sufficient to shake things off shelves in the window (S. C. 40-23 to 27).

In this view of the case, it is analagous to *Mammon v. Odd Fellows, etc.,* 97 N. J. L. 215, where the Court of Errors and Appeals held a direction for defendant to be erroneous. There, while the plaintiff was rightfully in a building controlled by the defendant, a gas machine used to furnish light exploded, injuring him. The evidence disclosed that for some months prior to the occurrence this condition was such as to warn defendant of its possible danger. The Court held it to be a case for the application of *res ipsa loquitur* and that, on the whole case, the question of defendant's negligence was for the jury.

In the present case, the defendant of his own volition introduced the evidence of vibration due to an Atlantic City express train passing (S. C. 35-18) and, on cross-examination, that such train and many others passed daily (S. C. 39-25 to 27) and that the vibration caused thereby was sufficient to shake things off the shelves and prevented placing a stand in the window (S. C. 40-23, etc.). That the vibration was not confined to the window, but was prevalent throughout the store, was shown by

the fact that he noticed it in the back of the store. This testimony does not serve to exonerate the defendant from negligence, but presents an additional circumstance from which a jury might infer negligence upon the part of the defendant in neglecting to act in view of existing conditions.

At the close of the whole case it was for the jury to determine whether, under all the circumstances, an inference of negligence should be drawn, and if drawn, whether it was satisfactorily met by defendant's evidence. The Supreme Court so held in *McKittrick v. Public Service Railway Co.*, Vol. 3, N. J. A. R. No. 14, p. 711; 128 Atl. 226, the syllabus of which reads as follows:

> "Plaintiff was a passenger on the defendant's trolley car, and testified that when she started to get off the car, put her foot on the step and took hold of the handle, an electric shock went through her, throwing her back towards the car. A motion for a non-suit and for a direction of a verdict for the defendant was refused by the trial Court, and plaintiff had a verdcit. On appeal, defendant contended that there was no electric shock suffered by the plaintiff, and, if there was, it could not be held for negligence, because the car was both constructed and maintained with all the care reasonably required in view of possible danger from electricity. *Held,* that the alternative was between acceptance of plaintiff's claim that she was injured by an electric shock, from which an inference of negligence could be drawn, and acceptance of defendant's contention, and whether an inference of negligence should be drawn, and, if drawn, whether it was satisfactorily met by defendant's evidence, was for the jury to decide."

The above case arose on almost precisely the same grounds as appear in the present case, with the exception that the facts here are much stronger in that the precise instrumentality causing the damage is identified and shown and admitted to have been in the possession of and under the control of the defendant.

A case was thus presented to the Court in which the plaintiff proved an accident which would not ordinarily have occurred without negligence, and that the instrumentality causing such occurrence was under the control of the defendant. This called for the application of the doctrine of *res ipsa loquitur* and it became a question for the jury whether an inference of negligence should be drawn, and if so, whether or not the defendant had made a satisfactory explanation.

We respectfully submit, therefore, that the Court committed no error, and that the judgment for the plaintiff should be affirmed.

Respectfully submitted,
CARR & CARROLL,
WALTER R. CARROLL,
Counsel for Plaintiff-Appellee.

New Jersey
Court of Errors and Appeals

ESTELLE LAW, Plaintiff-Appellee, vs. FRANK MORRIS, Defendant-Appellant.	Action at Law. On Appeal. Brief of Defendant-Appellant.

FACTS.

This is an appeal from a judgment rendered in the Camden County Circuit Court for the sum of One Thousand Dollars, in favor of Estelle Law and against one Frank Morris.

The facts were that the defendant, Frank Morris, was the owner and proprietor of a dry goods store at Au-

dubon, Camden County, New Jersey. The plaintiff, Estelle Law, on May 25th, 1923, was a customer at the defendant's store, and while engaged in making a purchase, a piece of plaster fell from the ceiling, striking her on the head. The testimony showed that the plaintiff below was standing in front of the counter, while the defendant below was directly opposite to her, but in back of the counter.

The defendant-appellant assigns four reasons for reversal:

1. The Court refused to direct a judgment of non-suit at the close of the plaintiff's case.

2. The Court refused to direct a verdict at the close of the whole case.

3. There is no evidence in the cause sufficient to sustain a verdict and judgment for the plaintiff-appellee.

4. Because on the whole case there was no proof of negligence on the part of the defendant-appellant.

These grounds will be argued in the order stated.

ARGUMENT

I

1. THE COURT REFUSED TO DIRECT A JUDGMENT OF NON-SUIT AT THE CLOSE OF THE PLAINTIFF'S CASE.

The theory of the plaintiff's suit was negligence of the defendant. In the first paragraph of the complaint, s. c. 3-30 and following, the plaintiff alleged, "It became and was the duty of the defendant to exercise reasonable

care to render the said store premises reasonably safe for the use of intending customers," and in the third paragraph of said complaint, s. c. 4-8 and following, the allegation was that, "Said accident was caused solely by reason of the carelessness and negligence of the defendant, his servants and agents * * * * in that said defendant neglected to take such reasonable precautions as were necessary to protect plaintiff as an intending purchaser at said store."

Clearly the complaint was drawn in accordance with the accepted law of this State, to the effect that a store keeper is not an insurer, but is only bound to use reasonable care for the protection of his patrons.

At the outset it may be said that there are two classes of cases embraced in the general falling object class of cases. The one, in those cases where the objects are either within the knowledge of the proprietor or are so open and notorious that as a matter of law, he will be presumed to have knowledge, such as falling elevator safety gates, falling doors, windows, or in the case of a building being renovated, objects falling from the scaffold or places where workmen are employed. The present case does not fall within this class. The other class of cases are those in which some special knowledge must be brought to the attention of the proprietor before a recovery may be had where a piece of plaster without any preliminary warning falls, shelving which is fastened to the wall, a lighting fixture. The case in discussion clearly falls within this latter class.

The general doctrine of the duty of a store keeper towards a customer is laid down in Schnatterer vs. Bamberger, 70 Atl. Page 324. In passing it is gratifying to

know that this case has been repeatedly cited with approval all over the United States. The facts were that a customer at Bamberger's store in Newark, in treading on one of the steps caught her heel in a brass nosing which was loose, tripped and fell down stairs. The Court held that there being no testimony that this condition had been brought to the notice of the storekeeper before the accident, or that it had existed for such a length of time as to charge the storekeeper with notice thereof, there, was no liability on the part of the proprietor.

All of the facts touching the actual happening of the accident are embodied in five lines contained in the statement of facts. The plaintiff, after calling herself and her sixteen year old daughter, rested the case.

The daughter gave no testimony as to the accident itself; the premises of the defendant either before or after the accident, but confined herself solely to the physical injuries which she claimed her mother had suffered. All the testimony which the plaintiff gave as to the accident is summed up in her answer, s. c. 9-20 and following, "The plaster fell down on the top of my head. I was stunned. I went to the floor. I remember somebody picking me up and I remember sitting on a chair." After testifying that she did not see the piece of plaster which hit her in answer to her counsel she said, s. c. 9-32, "I looked up, but I couldn't tell you how large the place was."

No testimony was offered by the plaintiff as to the condition of the premises; whether the ceiling was defective, whether there were other places in the ceiling showing where plaster had fallen, or whether there were cracks.

There was no testimony to show that the defendant storekeeper had any notice whatsoever, either actual or constructive, that his premises were unsafe.

Clearly the defendant is not an insurer, a fact which the plaintiff stated in her complaint. Therefore, the only duty which he owed was reasonable care. The query is. in what particular had he failed to use that reasonable care? The doctrine of res ipsa loquitor is not sufficient. The mere happening does not necessarily predicate negligence. If the duty owed by the defendant is reasonable care, the accident could have happened as it did in this case, after exercise of reasonable care in the most precise and exact manner. In order to predicate negligence arising from the falling of this plaster there would have to be evidence of a failure on the part of the defendant to do something which he ought to have done, or the performance of some act in a negligent manner. If it is contended the defendant is liable for injuries resulting from falling plaster when he had no kowledge or reasonable apprehension of any existing defect, then he becomes an insurer. Reasonable care only requires protection against defects which are open and notorious or within the knowledge of the storekeeper. I find no authority which sustains the Court's ruling, s. c. 26-8 and following on the motion for non-suit, where the facts were as proven in this case. As an academical statement of law I concede it to be correct, but it was error when applied to the set of facts existing in the case under discussion.

There was no knowledge of any known defect shown on the part of the defendant, nor was there any testimony to show that the condition was such that as a matter of law he would have been presumed to have had knowledge

that the plaster was in a dangerous condition, and was likely to fall.

It is, therefore, respectfully submitted that at the close of the plaintiff's case there was no fact question of negligence to be determined by the jury, and that there was at that time no facts as to negligence before the Court upon which the liability of the defendant could be rested, and the refusal of the trial court to grant the motion for a non-suit was reversible error.

II

2. THE COURT REFUSED TO DIRECT A VERDICT AT THE CLOSE OF THE WHOLE CASE.

At the conclusion of the whole case the plaintiff had not changed the state of her proof as to lack of care on the part of the defendant. The defendant testified that he had no notice or knowledge of any existing defects in the plaster, or any knowledge or any reason to suspect that any plaster would fall.

The plaintiff in rebuttal called one, Joseph F. Buck whose testimony was limited entirely to an inspection of the property made by him two or three days after the accident, and did not aid the plaintiff in showing that the defendant had knowledge of any defect or that any defect existed so openly and notoriously that he would be presumed to have knowledge.

There was a contradiction between this witness and the defendant as to the size of the plaster. The plaintiff was no better off at the close of the whole case, than when she rested. She had proved nothing further, and

there was uncontradicted testimony that the defendant was innocent of any negligence whatsoever; that he had observed reasonable care for the protection of his patrons. What question could the jury then pass upon? If the verdict is based upon the theory that the mere falling of the plaster raises a presumption of negligence on the part of the storekeeper, then he becomes an insurer, and the well reasoned opinion in Schnatterer vs. Bamberger supra, is nullified and overthrown.

Reasonable care can only be directed to those things with which the person is familiar or has knowledge. The facts show that the falling of the plaster in this case was like a bolt from a clear sky. There was no warning to apprise the defendant that his patrons were in danger in coming to his premises. If he invites them with knowledge of the defect, actual or ~~employed~~, then he is responsible.

The following cases deal with the doctrine of reasonable care as defined by the Courts of this State toward invitees:

Schnatterer vs. Bamberger, 70 Atl. 324.
Buda vs. Dzuretzka, 93 Atl. 83.
Collins vs. Central R. R., 101 Atl. 287
Rose vs. Fuller Land Co., 106 Atl. 400.
Krebs vs. Rubsan, 104 Atl. 83.
Garland vs. Furst Store, 107 Atl. 38.
Rom vs. Huber, 108 Atl. 361 (109 Atl. 504).

The case of Vecsy vs. Central Railroad, 95 Atl 977, defines the doctrine of res ipsa loquitor as "The maxim 'res ipsa loquitor' is that when through any instrumentality or agency under the management or control of a defendant or his servant there is an occurrence, injurious

to the plaintiff, which, in the ordinary course of things would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords prima facie evidence that there was want of due care."

In this case the plaintiff attempted to signal the train of the defendant by pulling down a handle which raised a semaphore suppported on a post located in front of a station. A man assisted her by tying a wire, which was attached to a cross bar of the post, around the handle to relieve the plaintiff from the necessity of holding it down. The wire was in two pieces looped together and parted when plaintiff let go the handle, which flew up, striking her in the face and causing her injury. There was no evidence to show that the defendant had installed the wire or that its defective condition had been brought home to it, or that that condition had existed for such length of time as to charge it with notice. Held, that no case of negligence on the part of the defendant was established and that, therefore, a verdict for defendant was rightly directed. The Court defined res ipsa loquitor, and held that it did not apply. This case is stressed most strongly for the purpose of calling the Court's attention to the fact that knowledge of its defective condition had not been brought home to the defendant or that that condition had existed for such length of time as to charge it, the defendant, with notice. This case is directly in point, and adjudicates the very thing for which we now contend.

The doctrine of res ipsa loquitor as defined by the Court in this case, precludes its application to the present case. Where "There is an occurrence, injurious to

the plaintiff, which in the ordinary course of things would not take place if the person in control were exercising due care," it can be seen that the mere happening of an occurrence is not sufficient, it must happen because the person in control did not exercise due care, or putting it in another manner, the exercise of due care would have prevented the occurrence.

There was no testimony in this case that there was any lack of care on the part of the defendant. The uncontroverted evidence is that there was nothing to call to his attention in any way whatsoever a dangerous condition or any defect in the plaster in his store. The very situation of the parties plaintiff and defendant at the time of the happening corroborates that there was no defect then noticeable in the ceiling. The parties plaintiff and defendant were standing opposite to each other with only the counter between them, and Mr. Morris, the defendant, was only a couple of feet away from the plaintiff, s. c. 19-28.

Where the facts are uncontrovertel and no negligence appears on the part of the defendant, it is the duty of the Court to direct a verdict.

King v. Ziers, 73 N. J. L. 134.

State, Consolidated Traction Co. pros. vs. Reeves, 58 N. J. L. 573.

Day v. Donohue, 62 N. J. L. 380.

Voorman v. North Jersey St. R. Co, 70 N. J. L. 818.

Dickinson vs. Erie R. R. Co., 85 Law, 586.

Gricco vs. Edison, Inc., 90 Law, 680.

It is, therefore, respectfully submitted that error was committed in refusing to direct a verdict at the close of the whole case.

III

3. THERE IS NO EVIDENCE IN THE CAUSE SUFFICIENT TO SUSTAIN A VERDICT A JUDGMENT FOR THE PLAINTIFF-APPELLEE.

The Court in refusing the motion for a non-suit, s. c. 26-8 and following plainly did so upon the theory that it was a case of res ipsa loquitor, but this doctrine is limited by a fundamental rule. The occurrence does not finally adjudicate the negligence of the defendant, but simply requires him to make an explanation, and a denial of negligence on his part or of the facts from which negligence can be inferred shifts the burden again to the plaintiff and by a fair preponderance of the testimony, some negligent act, either of commission or omission must be shown.

Ruling Case Law, Vol. 20, Page 195.

Newark vs. Co. vs. Ruddy, 41 Atl., Rep. 712.

At the close of the plaintiff's case the only testimony was that a piece of plaster had fallen upon the plaintiff, who was an invitee of the defendant. The defendant then proved that he had no knowledge of any existing defect in the ceiling, and that a year or so prior to the occurrence he had had the premises inspected by a competent mason and plasterer, all loose plaster removed and a white coat placed over the entire store room; that the material used was of the best quality, and that when he finished the work, it was in first class condition, s. c. 44-14, and that a week or ten days afterwards he went back to the work and it was then in good condition, s. c. 44-29, and on page 45 of the State of the Case, Line 12, he was asked, "Was there anything that would indicate

at close observation and inspection that there was anything wrong?" to which he replied "No, sir."

Jonas Morris, a son of the defendant, testified that he had seen the place where the plaster had fallen, and that he had seen the plaster before that time, and that there were no cracks or anything to indicate that the plastering was in bad shape or poor shape, s. c. 47-13. So that the defendant's explanation under the res ipsa doctrine was sufficient to again place the burden upon the plaintiff.

None of this testimony was contradicted. It is, therefore, conclusive that the defendant had exercised all reasonable care that could be expected of him. It is elementary that if there was nothing about the appearance of the plaster that would give him notice of a defect, he could not be liable for any act, either of commission or omission.

It is, therefore, respectfully submitted that the plaintiff having failed to present any other testimony of negligence on the part of the defendant, there was no evidence to sustain the verdict, and there should be a reversal.

IV

4. BECAUSE ON THE WHOLE CASE THERE WAS NO PROOF OF NEGLIGENCE ON THE PART OF THE DEFENDANT-APPELLANT.

From the argument in points 1, 2 and 3, it will be seen that under the law of the State of New Jersey, the mere happening of the occurrence is not proof of negligence on the part of the defendant, but is merely at best evidential. Of course, the burden is upon the plaintiff

until by the state of the case it is shifted to the defendant, and this is one of the class of cases where the defendant can shift the burden back to the plaintiff.

We contend, that there never was a time in this case, when negligence was shown on the part of the defendant, and when the defense showed that there was nothing in connection with the plaster in this particular room which attracted the attention of the defendant, or which called for care on his part, it was then the duty of the plaintiff to show some additional grounds of negligence.

It was testified and it is submitted that the only manner in which the jury could find a verdict would be upon the mere happening of the occurrence. There was no other testimony before the Court. There were no controverted facts as to the actual occurrence, or as to the condition of the plaster before the accident. There was nothing for the jury to determine as to the manner in which it happened, or what reasonable care the defendant had failed to observe.

If the jury had been required to make a finding upon one question, the whole case would have been exploded. The jury had no more than is contained in the record. Their verdict was arrived at upon the testimony as shown in the printed State of the Case, so that the Court on this appeal is in a position to consider the question, which it is contended, would dispose of the whole case. Namely, in what particular did the defendant fail to use reasonable care? This occurrence was not caused by the falling of objects which had been insecurely placed by him; it was not caused by plaster weakened by water leaking upon it from the roof; it was not knocked from the wall

by any heavy shock caused by the defendant or his agents, nor was there anything about the plaster which gave him any notice of any defect or falling condition. The work had all been gone over a comparatively short time before by a competent mechanic. It was in first class condition at that time, and from that time on until the occurrence, there was nothing about it which gave the defendant any warning, so that he had no knowledge either actual or implied that the plaster was likely to fall.

It is, therefore, respectfully submitted that the verdict could only have been arrived at by reason of the jury assuming that the mere occurrence without any further explanation made the defendant liable. Such is not the law of this State, and we, therefore, respectfully contend that the verdict should be set aside and declared for nothing holden.

Respectfully,
JAMES MERCER DAVIS,
Attorney for Defendant.