INDEX

TESTIMONY.

NOTICE AND GROUNDS OF APPEAL.

Filed December 31, 1925.

New Jersey Supreme Court

BERGEN COUNTY.

ABRAM HOLMES, *Plaintiff,* *vs.* STEPHEN PELLIGRINO, *Defendant.*	*Action at Law.* *Notice and Grounds of Appeal.*

To Isadore V. Klenert, Esq., attorney of defendant.

SIR:

PLEASE TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause on the following ground:

The trial court non-suited the plaintiff when thereunto moved by the attorney for the defendant, whereas said motion should have been denied and the issues submitted to the jury for their decision.

Dated December 14, 1925.

Respectfully yours,
FEDER & RINZLER,
Attorneys of Plaintiff.

EDWARD A. MARKLEY,
Of Counsel.

Service acknowledged December 19, 1925.
I. V. KLENERT,
Attorney of Defendant.

COMPLAINT.

Filed April 14, 1925.

Plaintiff, residing in the City of Garfield, County of Bergen and State of New Jersey, says that:

1. On January 21, 1924, defendant was either the owner or lessee of a certain building situate on Garden street, Passaic, New Jersey, and was in possession thereof or entitled to possession of said building.

2. On said date, the plaintiff, as an employee of one Cornelius Sluissman, was lawfully upon and in the defendant's said building as an invitee of said defendant expressly and also by implication.

3. Under an arrangement made by and between the said defendant and Cornelius Sluissman the said Cornelius Sluissman, his agents, servants and employees including the said plaintiff, were doing certain work on the ceiling of said building and to that end and purpose the said defendant furnished the said Cornelius Sluissman, his said agents, servants and employees with the necessary working materials, supplies and implements including a scaffold to enable the said persons to perform said work.

4. In accordance with said arrangement and as an invitee of the said defendant, as aforesaid, the plaintiff was working on said scaffold furnished by the said defendant for said purpose and was laying plaster boards on the ceiling of said building.

5. Said scaffold was supported by two wooden horses and was at an altitude about fifteen feet from the floor.

6. While the plaintiff was engaged in the aforesaid work upon said scaffold in said building one of the wooden planks suddenly gave way and broke and plaintiff fell through the opening of said scaffold striking the floor.

7. Defendant, contrary to his duties in the said premises carelessly and negligently failed to use reasonable care to maintain said scaffold in a reasonably safe condition for the purpose aforesaid and carelessly and negligently allowed and permitted the said scaffold to be and remain in an unsafe and dangerous condition for a long time and said defendant either knew or by the exercise of reasonable care should have known that said scaffold was not in a reasonably safe condition to be used for the purpose aforesaid and as a direct and prominate result of the defendant's said carelessness and negligence said wooden plank gave way and broke, by reason of which said plaintiff fell, as aforesaid, and sustained the following injuries, to wit, a fracture of the left shoulder; his pelvis bone was broken, his hip was dislocated; his left arm was broken and his left leg was injured so that it is now, and will permanently be, shorter; all of which injuries are permanent and said plaintiff suffered other permanent injuries in and about the head, arms, legs and body and certain permanent internal and external injuries of a technical nature.

8. By reason of the injuries which the plaintiff sustained he was confined to the hospital, house and bed and was, and will for a long time in the future be confined to the house and

bed and was and will for a long time in the future be disabled and prevented from attending to his lawful business, tasks and duties, and from walking and moving about; and said plaintiff was and will for a long time in the future be obliged to procure medical and surgical aid, treatment and attention, X-rays, drugs and medicinals, nurse attendance, in an effort to cure and heal the injuries which he sustained.

9. Plaintiff has ever since the aforesaid date undergone and suffered great pain and torment of mind and body and will for a long time in the future undergo and suffer great pain and torment of mind and body.

10. Plaintiff was, and for a long time in the future will be, obliged to expend divers sums and incur various debts for medical and surgical aid, treatment and attention, drugs, medicinals, X-rays, hospital service and hospital room and nurse attendance, all in an effort to cure and heal the injuries which he sustained.

11. Plaintiff has been, and for a long time in the future will be, deprived of his income salary and earnings, to his great damage.

Wherefore plaintiff demands damages in the sum of fifty thousand ($50,000) dollars, together with costs of suit.

FEDER & RINZLER,
Attorneys of Plaintiff.

ANSWER.

Filed April 23, 1925.

Defendant, Stephen Pelligrino, answering the complaint, says that:

1. Defendant admits paragraph one of the complaint.

2. Defendant has no knowledge or information sufficient to form a belief as to paragraph two of the complaint.

3. Defendant denies paragraph three of the complaint.

4. Defendant denies paragraph four of the complaint.

5. Defendant denies paragraph five of the complaint.

6. Defendant has no knowledge or information sufficient to form a belief as to paragraph six of the complaint.

7. Defendant denies paragraph seven of the complaint.

8. Defendant has no knowledge or information sufficient to form a belief as to paragraph eight of the complaint.

9. Defendant has no knowledge or information sufficient to form a belief as to paragraph nine of the complaint.

10. Defendant has no knowledge or information sufficient to form a belief as to paragraph ten of the complaint.

11. Defendant has no knowledge or information sufficient to form a belief as to paragraph eleven of the complaint.

Answer.

First Separate Defense.

Defendant alleges that at the time the plaintiff sustained the supposed injuries complained of, he, the said plaintiff, was a servant and employed by one Cornelius Sluissman and engaged by the said Cornelius Sluissman in the work mentioned in said complaint in which the defendant had no control whatsoever, and by reason of the injuries received as mentioned in said complaint, the plaintiff received and was paid by the said Cornelius Sluissman under and by virtue of the Employers' Liability Act of the State of New Jersey, the sum of seventeen dollars and fifty cents ($17.50) weekly from the time of said accident continuously up to the presented time.

Second Separate Defense.

The alleged accident as set forth in the complaint was due to contributory negligence on the part of the plaintiff.

Third Separate Defense.

The alleged accident as set forth in the complaint was due to contributory negligence on the part of the plaintiff in failing to exercise reasonable care for his own safety.

Fourth Separate Defense.
(Legal Points.)

Take Notice that the defendant, Stephen Pellegrino, shall move at the time of the said trial or prior thereof to dismiss the complaint against him on the grounds that the same does not set forth a legal cause of action against the said defendant.

Answer.

FIFTH SEPARATE DEFENSE.

(Legal Points.)

Take Notice that the defendant, Stephen Pellegrino, shall move at the time of the said trial or prior thereto to dismiss the complaint against him on the grounds that the same does not set forth a legal cause of action against the said defendant in that the plaintiff was employed by one Cornelius Sluissman as his servant and employee and under the direction and control of the said Cornelius Sluissman, who was an independent contractor and therefore the said defendant was under no legal obligation to the said plaintiff for any injuries that he might have sustained as mentioned in his complaint.

ISADORE V. KLENERT,
Attorney of Defendant.

REPLY.

Filed May 13, 1925.

Plaintiff replying to the answer filed by the defendant in the above cause says that:

As to First Separate Defense.

Plaintiff denies each and every allegation therein contained.

As to Second Separate Defense.

Plaintiff denies each and every allegation therein contained.

As to Third Separate Defense.

Plaintiff denies each and every allegation therein contained.

As to Fourth Separate Defense.

Plaintiff denies each and every allegation therein contained.

As to Fifth Separate Defense.

Plaintiff denies each and every allegation therein contained.

FEDER & RINZLER,
Attorneys of Plaintiff.

POSTEA.

Entered October 15, 1925.

It is ordered that judgment of non-suit be and hereby is entered in favor of defendant and against the plaintiff with costs to be taxed *nisi.*

On motion of

ISADORE V. KLENERT,
Attorney.

JUDGMENT.

Entered October 15, 1925.

NEW JERSEY SUPREME COURT.

ABRAM HOLMES, *Plaintiff,*	*Action at Law.*
vs.	*On Postea.*
STEPHEN PELLIGRINO, *Defendant.*	*Judgment of Non-suit.*

Costs .....$

Isadore V. Klenert, attorney.

Judgment entered this fifteenth day of October, A. D. nineteen hundred and twenty-five in favor of defendant and against the plaintiff for the sum of.....costs.

WM. S. GUMMERE,
C. J.

Opening.

CIRCUIT COURT OF NEW JERSEY.

BERGEN COUNTY.

ABRAM HOLMES,
Plaintiff,

against

STEPHEN PELLEGRINO,
Defendant.

Hackensack, N. J., October 5, 1925.

Before Hon. William A. Smith, *J.*, and a jury.

Appearances:

Feder & Rinzler, Esqs., attorneys for the plaintiff, by Mr. Rinzler and Mr. DeTurck, of counsel.

Addison P. Rosenkrans, Esq., attorney for the defendant, Joseph H. Gaudielle, Esq., of counsel.

A jury was duly empanelled and sworn.

Mr. Rinzler opened the case to the jury on behalf of the plaintiff.

Mr. Rosenkrans opened the case to the jury on behalf of the defendant, and in the course of his address said:

Plaintiff built the scaffold for his own use, built the scaffold in his own way.

Mr. Rinzler: There is no such defense set up in the answer. I object to it.

The Court: I think a general denial would cover it.

Mr. Rinzler: I do not think so.

The Court: I will allow it.

Mr. Rinzler: May I have an exception?

ABRAM HOLMES, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. Rinzler.

Q Mr. Holmes, you are the plaintiff in this case? A Yes, sir.

Mr. Rinzler: By some typewriting error, the year of the accident was mentioned as 1924; it should be 1925.

The Court: Do you consent to the change to 1925?

Mr. Rosenkrans: Yes.

Q Mr. Holmes, you are the plaintiff in this case? A Yes, sir.

Q By whom were you last employed? A By Cornelius Schlossman.

Q And on whose property were you last employed, working for Mr. Cornelius Schlossman? A Mr. Stephen Pellegrino.

Q And where was Mr. Pellegrino's property located at that time? A In Garden street, Passaic.

Q Where does Mr. Schlossman live? A In Clifton.

Q And where do you live? A At Garfield.

Q How long have you lived in Garfield? A The last five years in May.

Q Where did you live before you moved to Garfield? A Hackensack.

Q How long had you lived in Hackensack? A All my life.

Q How old are you? A Forty-nine.

Q And with the exception of five years you lived in Garfield, you have lived in Hackensack the remainder of your life? A Yes, sir.

Q Now, you say, then, that you worked for Cornelius Schlossman last on the property of the defendant on Garden street, Passaic? A Yes, sir.

Q And how were you working on the defendant's Garden street property, as an employee of Mr. Cornelius Schlossman, what kind of work were you engaged to do, and what were you doing? A Putting plaster boards onto a ceiling.

Q On the ceiling of Pellegrino's property? A Yes, sir.

Q How high from the floor was that ceiling? A About eighteen feet.

Q Now, under the arrangement between Schlossman and Pellegrino, who was to furnish the scaffold?

Mr. Rosenkrans: That is objected to as calling for a conclusion.

The Court: I sustain the objection.

Q Who did furnish the scaffold to enable you and the other employees of Mr. Schlossman to do the work on the defendant's property? A Mr. Pellegrino.

Q Stephen Pellegrino? A Yes, sir.

Q On what date did you first start doing that kind of work on Pellegrino's property? A On January 16, 1925.

Q Were you there when the materials which were to be used for the building of the scaffold and also the plaster boards were brought to Pellegrino's property? A Yes, sir.

Q Do you know who brought those materials—I withdraw that. In the building of a scaffold, what is used? A Four horses—two planks, one plank on each side of the horses, into a socket, then we have cross members, going across where we can stand on to reach the ceiling.

Q These cross-member planks are laid across those longer planks? A Yes, sir.

Q Which are connected with the horses? A Yes, sir.

Q Now, on whose direction or orders were those horses, planks, and plaster boards brought to Pellegrino's property on January 16, 1925? A By Mr. Stephen Pellegrino.

Q And whom did he direct and order to bring those plaster boards, planks, and horses to his property? A His driver.

Q And did you see Pellegrino's driver bring those planks, horses, and plaster boards to Pellegrino's property? A Yes, sir.

Q And upon what did he bring those various things? A On Mr. Pellegrino's truck.

Q Was Stephen Pellegrino's name on that truck? A Yes, sir.

Q And what, if any, instructions did Mr. Pellegrino give when his driver returned to the Garden street property with those plaster boards, horses, and planks? A He ordered Mr. Peter Schlossman to get a scaffold, so Mr. Cornelius Schlossman could go ahead, and he didn't want to delay the job any longer.

Q Did he say then who was supposed to build that scaffold?

Mr. Rosenkrans: I object to that as leading.

The Court: I sustain the objection.

Q What, if anything, did he say with respect to who was obliged to build the scaffold? A When it was delivered Mr. Pellegrino simply said, "Get the scaffold up, so that your boss can go ahead on this job and get to work—get on this scaffold and get to work," for he didn't want to delay the job any longer, and didn't want the boss to come down and holler that there was not any scaffold for the men to work on.

Q Did he say who was supposed to build the scaffold? A He ordered Mr. Peter Schlossman.

Q Did he say, "I want this made, Peter—"

Mr. Rosenkrans: Objected to as leading.

Q Did he say who was supposed to build the scaffold?

Mr. Rosenkrans: I object to it for the same reason, as leading.

The Court: I sustain the objection. Ask him to give the conversation.

Q Give us, just in effect, if you can, what the conversation was about, as to building the scaffold. A To carry in the building after the plank was there, and I started to carry the plank in—I was ordered to carry the plank in.

The Court: By whom?

Q Who ordered you to carry the plank in? A Mr. Pellegrino.

Q From where, from the sidewalk? A From the sidewalk where they were left.

Q And ordered to put them where? A In the building.

Q And then, after Pellegrino ordered you to do that, did you bring those horses, planks, and plaster boards from the sidewalk and place them in Mr. Pellegrino's building? A Yes, sir.

Q Now, tell us what Pellegrino then said? A He went to Mr. Peter Schlossman and ordered him to get the scaffold up.

Mr. Rosenkrans: I object to that; that is a summary.

The Witness: And said to him—

Mr. Rosenkrans: I object to the answer.

The Court: Strike it out. Just say the words that were said by Mr. Pellegrino and yourself.

Q Yes, after those things were brought into the building from the sidewalk, tell us now what Mr. Stephen Pellegrino said? A He said to Mr. Peter Schlossman, "Get that scaffold up, and get it ready, so your brother's men can get to work on it. I don't want to delay this job any longer, or I don't want your brother coming here and say I am holding the men up on account of my scaffold is not here."

Q "On account of my scaffold is not here"? A Was not here and put up.

Q "On account of my scafford not being here and was not put up"? A Yes, sir.

Q Now, after Mr. Pellegrino addressed those remarks to Peter Schlossman, who, I understand, is Cornelius Schlossman's brother, did anybody examine the scaffold? A Yes, sir.

Q Who examined the scaffold? A Mr. Peter Schlossman.

Q And which horses and planks were used by Mr. Peter Schlossman in assembling or building

that scaffold? A The plank that I carried in, that was left by Mr. Pellegrino on the sidewalk.

Q Were those the same horses and planks that Mr. Pellegrino instructed his driver to bring to the premises? A Yes, sir.

Q And those are the same ones that you carried from the sidewalk in front of the building into the building, on Mr. Pellegrino's instructions? A Yes, sir.

Q And it was after that was done that Peter Schlossman— A —was ordered to put up the scaffold by Mr. Stephen Pellegrino.

Q And that, you say, was done on January 16, 1925? A Yes, sir.

Q Now, this scaffold was used by you in working on the defendant's work?

Mr. Rosenkrans: Now,—

Mr. Rinzler: I withdraw that.

Q Did you or not use that scaffold? A Yes, sir.

Q And did you use that scaffold or not while it was in Pellegrino's building? A Yes, sir.

Q And did you or not work on that scaffold in the defendant's building while employed by Cornelius Schlossman? A Yes, sir.

Q And while you were so employed on the defendant's property, working on his scaffold, what work were you doing? A Putting on plaster board.

Q And you were putting on plaster boards on what? A On the ceiling.

Q On the ceiling of whose building? A Mr. Stephen Pellegrino's.

Q That ceiling was about how high from the floor? A About eighteen feet.

Q And the cross-member planks of the scaffold upon which you stood were about how high from the floor? A Between ten and twelve feet.

Q In working on that scaffold, laying plaster boards, just how did you go about your work? A We would have to stand up and with our head against the plaster board—

Q The head underneath the plaster board? A Yes, sir.

Q And what did you do to the plaster board? A Hold the plaster board with our head, until we got nails and put them in the ends to keep it there.

Q In holding your head under the plaster board, did you press it against the ceiling? A Yes, sir.

Q And while your head was in that position that you have described, how did you fasten the plaster board to the ceiling? A By nails.

Q And in what did you carry those nails? A In an apron.

Q In an apron? A Yes, sir.

Q And you had pockets in the apron? A On one side.

Q On one side? A Yes, sir.

Q Were there any other nails anywhere about your person or on that scaffold at the time, other than the nails which you had in that pocket in your apron? A No, sir.

Q Were there any plaster boards on the scaffold—I had better withdraw that. While you were thus engaged in work, what, if anything, happened to you? A The plank broke.

Q Was it one of these two long planks that were resting in the sockets of the horses, or was it one of the cross-member planks that were laid

across the other longer ones? A One of the cross-member planks.

By the Court.

Q That is, laid from one horse to the other?

Mr. Rinzler: No, it was—

A It was laid from one horse to the other.

Mr. Rinzler: No, laid on the two parallels.

The Court: The witness says it was laid from one horse to the other.

The Witness: One plank rests from one horse to another horse, and then we rested the planks on the two planks.

By Mr. Rinzler.

Q Assuming that these two sheets of paper are the horses? A Yes, sir.

Q Assuming that there was a plank connected in sockets of each of these horses? A Yes, sir.

Q Was it one of those planks that broke or was it one of the planks that were laid across that plank? A One of the planks laid across.

Q And that is what you call a cross-member plank? A Yes, sir.

By the Court.

Q Then, the plank that broke was lying in the same direction as the horses? A No, the horses set in the direction of this way like (illustrating). Now, the plank comes across this way (illustrating), just in the opposite direction of what the horses is, because the horses set here, and there is one horse setting here and one horse setting here.

Abram Holmes, direct.

Q How does the horse stand; does it stand this way (illustrating) or that way (illustrating)? A It stands that way (illustrating). There is one horse over here, one horse over here, one horse over here, and one horse over here. Then we put it into a socket, and then we lay these planks on top.

By Mr. Rinzler.

Q Which were the longer planks, the two planks that were connected in the sockets of the horses, or the cross-member planks? A Well, they were about the same.

Q They were about the same? A Yes, sir.

Q So that there may be no misunderstanding, was the plank that broke resting in one of the sockets of the horses or was it one of the planks laid across the two planks which rested in the sockets of the horses? A One of the planks laid across.

Q And that you have described as a cross-member plank? A Yes, sir.

Q Now, what happened to that cross-member plank? A It broke in half.

Q Were you standing on that, or another cross-member plank? A I was standing directly on that board.

Q At the time when it broke in half, what had you just been doing? A Just putting a plaster board to the ceiling.

Q Was it already on the scaffold? A Just onto my head, ready to be fastened.

Q Ready to be nailed? A Yes, sir.

Q And is that the time when this cross-member plank gave way and broke? A Yes, sir.

Q And when that cross-member plank, upon which you were standing, broke and gave way

from underneath you or from under you, what, if anything, happened to you? A Why, I fell on a concrete floor—fell to the concrete floor.

Q Was it a concrete floor in the building? A Yes, sir.

Q And you fell a distance of about how many feet? A About ten feet, I should judge.

Q And as you struck the concrete floor, just describe the position of your body as it struck the floor? A I struck on my side.

Q Which side? A Left side.

Q The left side? A Yes, sir.

Q Were you or not rendered unconscious? A For about a second.

Q For about a second? And did you get up unassisted, or did anybody help you up? A No, sir, I was helped.

Q How did you get up? A I couldn't get up.

Q Well, who picked you up? A Waterman.

Q Mr. Waterman? A Yes, sir.

Q Was he there when you fell or did he afterward arrive? A He came after I fell.

Q And who else was present when he picked you up? A Mr. Lee Anderson.

Q Where were you taken from Pellegrino's building? A I was placed in Mr. Anderson's car and—

Q How did you get to Anderson's car? A They helped me out to Mr. Anderson's car.

Q You mean these two men? A Yes, sir.

Q Having put you in Mr. Anderson's car, you were taken home, I understand? A Yes, sir.

Q And how were you taken from the car into the house? A Carried in.

Q Well, were you then out of bed or had you to be confined to bed? A Had to be confined to bed.

Q And you had to be confined to bed for a period of about how long? A Eleven weeks and three days.

Q During that period of eleven weeks and three days, did you have your doctor attend you? A Yes, sir.

Q Who? Doctor Mirabile? A Yes, sir.

Q Now, what was done to you first, by way of treatment? A They gave me a hypodermic to quiet my pains.

Q Before I go to that point, Peter Schlossman was Cornelius Schlossman's brother, wasn't he? A Yes, sir.

Q Whom did he work for? A Cornelius Schlossman.

Q For Cornelius Schlossman? A Yes, sir.

Q On the same job that you were on? A Yes, sir.

Q Doing the same kind of work? A Yes, sir.

Q Now, at the time that a cross-member plank of that scaffold gave way and broke and you fell, was there anybody or anything else on the scaffold other than yourself, the nails in your pocket, and the plaster board that was already being fastened to the ceiling, with your head underneath it—was there anybody else or any other object on the scaffold? A No, sir.

Q Nobody else but you? A That's all.

Q And you had nothing on your person excepting those nails? A That's all.

Q And the hammer, I assume, in your hand? A Yes, sir.

Q What, if anything, had you observed about the appearance of the cross-member plank that gave way and broke when you fell? A It was all covered with mortar and plaster.

Abram Holmes, direct.

Q Was there anything about the appearance or condition or anything that surrounded the scaffold or any of its parts, that in any way indicated to you any insecurity or danger or unsafe condition? A No, sir.

Q Now, you say, the doctor then first gave you what? A A hypodermic.

Q And what was that done for? A To quiet the pains.

Q Did you suffer any pain at that time? A Suffered pains and torture—God only knows, and today has left me a cripple.

Q What was done with your body or limbs, if anything, by way of treatment? A Well, I was sent to the hospital.

Q What hospital? A Hackensack Hospital.

Q How long were you there? A I was there four days.

Q And then what? A I was taken home because I dreaded the hospital and I wanted to be near my wife.

Q We don't care about that. Now, you got home. Describe to me, will you, the first treatment that was given you? What was it? A When I got to the hospital, you mean?

Q Yes. A I was taken upstairs and put on the X-ray table, and X-rays were taken of me. After the X-rays were taken of me the doctors came down and put my arm and my leg and my hip and pelvis bone in plaster cast.

Q They put a plaster cast about your hip, your leg, and your arm? A Yes, sir. I was in plaster from below here (indicating) all the way up underneath my arm.

Q Both legs? A Both legs.

Q From both knees up to your— A Almost underneath the arms.

Q Was the plaster cast about both legs or one? A Yes, sir, about both.

Q Was there any plaster cast about the right or left arm? A About the left arm.

Q And where was it about your body, to the point up to below the armpits? A About to here (indicating), I should judge about two inches underneath my armpits.

Q Up to about two inches underneath your armpits you were all encased, enclosed, in plaster? A Yes, sir.

Q How long were you in the plaster cast? A Well, my arm and both legs—my arm was six weeks in plaster.

Q Your arm was in plaster six weeks? And how about the plaster about the legs? A Eleven weeks and three days before they were removed.

Q When was the plaster cast removed from about your body? A Eleven weeks and three days.

Q When I said about your body, I mean from the waistline up to two inches below the armpits? A Yes, sir.

Q Then, it was eleven weeks and three days? A Yes, sir.

Q And from the left arm it was removed in six weeks? A Yes, sir.

Q Now, what effects if any did you suffer to your person or body? A A broken scapula.

Q A broken what? A Shoulder blade. The left shoulder blade was broken; tore the muscles and the cords of my arm.

Q Which arm are you speaking of? A My left arm.

Q What about the muscles and cords of your left arm? A They were all torn and loose. My

hip was dislocated and my pelvis here was broken.

Q You are indicating your pelvis? A Yes.

Q That is above the thigh? A Yes, sir, that is above the thigh.

Q A little opposite the waistline? A Yes, sir.

Q On the left-hand side? A Yes, sir.

Q What else? A My leg was left three inches short and very weak.

Q Since the cast was removed from your left arm, in what position did you necessarily have to keep that arm? A In the same position that it is today.

Q And has it always been in that same position in which it now is? A Since the accident.

Q And what is that position? A It is in a very crooked position.

Q Well, where do you hold it by way of position in respect to your body? A In my shirt.

Q In your shirt? A Yes, sir.

Q Resting between what? A Between my two buttons of my shirt.

Q So that, your arm is bent at the elbow? A Yes, sir.

Q Your left arm? A Yes, sir.

Q Resting between two buttons of the shirt? A Yes, sir.

Q Can you by any means or method or by any assistance straighten that arm or in any way or manner change its position? A No, sir.

Q Have you ever been able to do that since the accident? A No, sir.

Q When did you first observe that your arm was in the present condition that you describe?

A As soon as the doctor took it out of the cast. The doctor noticed it himself.

Q That was six weeks after the accident? A Yes, sir.

Q Now, Mr. Holmes, in what condition, if any, is your left arm and hand as the result of the injuries that you suffered in this accident? A It is dead.

Q What is dead? A My arm is dead all the way down.

Q What, if any, feeling is there in the arm? A No feeling.

Q None at all? A No, sir.

Q What is the condition of your left hand as the result of this accident? A The left—

Mr. Rosenkrans: I object to that. He can tell what condition his left hand is in now, as compared with what it was before. He cannot say that it is as result of the accident.

The Court: I sustain the objection.

Q Well, prior to this accident, was there anything abnormal about any part of your body or person, as far as you have ever been able to ascertain? A Yes, sir.

Q Was there anything abnormal—I mean other than normal? A Yes, sir.

Q What? A My hand.

Q Before the accident? A Oh, before the accident? No, sir.

Q What was your condition before the accident? A Big, strong, healthy, big fellow.

Q What did you weigh before the accident? A One hundred sixty-five pounds.

Q And what about your weight since the accident? A One hundred twenty-nine.

Q So that, you have lost how many pounds? A From 165 to—

Q From 165 to 129? A Yes, sir.

Q What was your general appearance before you were hurt in this accident? A Healthy, big, strong-built fellow.

Q Ever have any difficulty or trouble doing your work? A No, sir.

Q Had you worked regularly? A Off and on, when I had it to do.

Q What is the condition of your nerves, your nerve state since the accident? A The nerve states is all gone. I have no nerve at all —they are all shot to pieces.

Q Did you have any trouble with any nerve disorder before the accident? A No, sir.

Q Now, the arm, was there anything whatsoever the trouble or matter with that arm before the accident? A No, sir.

Q What is its present appearance? A Left it crippled.

Q What, if anything, is the present condition of your left hand since the accident? A It is all drawed up.

Q Drawed up in what shape? A In a claw-foot shape.

Q Now, have you ever had any, or the slightest use of that left arm since you were hurt in that accident? A No, sir.

Q Have you ever been able to use it to any degree or extent? A No, sir.

Q Have you any strength whatsoever or use in that left hand? A No, sir.

Mr. Rinzler: Mrs. Holmes, would you mind removing that coat for a minute?

(Mrs. Holmes did as requested.)

Mr. Rinzler: Raise the right sleeve. That is raised now, is it?

The Witness: Yes, sir.

Mr. Rinzler: Now, the left sleeve is raised. Now, just let me remove it. Take that out.

(Mrs. Holmes takes the arm out of the sleeve. The witness groans.)

Q Was your left arm ever before the accident in the condition that it is in now, at all? A No, sir.

Q Was the hand ever before the accident in the condition it is now? A No, sir.

Q Can you hold your arm in any other position other than in the position where you have it now, that is, bent at the left elbow, the hand at the right side of the body? A No, sir.

(Mrs. Holmes then replaced the sleeve of the shirt and the coat.)

Q Your right arm, I understand, is all right? A Yes, sir.

Q Mr. Holmes, now, is your left leg today and since the accident of the same length as it was prior to the accident? A No, sir, it is three inches shorter.

Q Is that three-inch shortening of the leg what you have had ever since the accident? A Yes, sir.

Q Now, just what strength, about how much strength have you in the left leg? A Very little.

Q What is the general feeling in the left leg? A Like it is sleeping all the time.

Q Have you ever since the accident, Mr. Holmes, been able to walk without the aid of

somebody or person or with the aid of some object like a cane? A I have to have the cane.

Q Since you have been hurt in this accident, have you ever been able to dress yourself or undress yourself; remove your clothing? A No, sir.

Q Whose assistance do you get? A By my wife.

Q Did you ever have any such trouble before the accident? A Never.

Q Can you walk without the cane? A No, sir.

Q That you have with you? A No, sir.

Q Can you stand up upon your left leg without the cane? A No, sir.

Q Can you stand up upon both legs without a cane? A No, sir.

Q Did you ever have any such difficulties before this accident? A Never.

Q Now, Mr. Holmes, how often did the doctor call on you and treat you during the eleven weeks and three days after the accident? A Twice a day for the first two months, and then he came every day at the last month, until he gave me up.

Q How long did he continue to treat you regularly? A Well, he is treating me sometimes at the present time, now.

Q No, until what time—to what month did he treat you regularly? A To the 26th day of April.

Q This year? A Yes, sir.

Q And since that time he has still been treating you? A Yes, sir.

Q About how many times since April? A I should judge he gave about twenty different calls.

Abram Holmes, direct.

Q About twenty calls on you since April? Now, what is your ability to sleep and rest since the accident? A I cannot sleep.

Q What is your difficulty? A The pain and the suffering, pain going through all the time.

Q What, if anything, is used by you, on doctor's advice, to put you to sleep and better your rest? A Sleeping powder.

Q Sleeping powder? A Yes, sir.

Q And in what quantity do you use the sleeping powders? A Well, they come in a capsule, and sometimes I will have to require one and sometimes two, according to just how hard the pains is.

Q And what else, if anything, is done to you at times to put you to sleep and relieve your pain? A Hypodermic.

Q And about how many hypodermics have you had used on you since the accident? A Well, I couldn't tell. I don't know how many. I had a severe number of them.

Q A severe number? A Yes, sir.

Q Well, more than twelve? A Yes, sir, more than that.

Q Less than twenty or more than twenty? A Yes, sir.

Q I don't know what "Yes" is. Is it less than twenty or more than twenty? A I think it is around twenty or more. Of course, I never kept track of them.

Q Did you ever in your lifetime before the accident have to use a sleeping powder or capsule or hypodermic needle? A No, sir.

Q Did you ever have a hypodermic injection? A No, sir.

Q Never had it injected into you prior to the accident? A No, sir.

Q Well, now, are those pains all gone or not? A No, sir, I am still suffering this pain in the right arm now, this very minute.

Q This very minute? When is the last time you have had a hypodermic injection? A October 1st.

Q And when was the last time you used sleeping capsule or tablets? A Last night.

Q Now, Mr. Holmes, you are married? A Yes, sir.

Q Living with your wife and children? A Yes, sir.

Q How many children have you? A Four.

Q The lady that assisted in removing your coat from your person was your wife? A That is my wife.

Q At the time of this accident, what was your income, salary, or wages? A $66 a week.

Q Since you were hurt in this accident have you ever received or earned any salary or wages whatever? A No, sir.

Q Have you ever since the accident been able to work? A No, sir.

Q When, after the accident was the first time that you were able to walk? A In May, by the aid of a cane.

Q The first time you started to, or were able to walk? A Yes, sir.

Q Then, you say, you walked with a cane? A Yes, sir.

Q Have you been using a cane since? A Yes, sir.

Q Now, about how much money have you spent altogether for the sleeping tablets and medication and so forth—medicine? A My doctor's bill is $205.

Q $205? A Yes, sir.

Abram Holmes, cross.

Q Did you have to pay extra for your sleeping powders and medicines, or is that part of the doctor's bill? A I had to pay for them.

Q Extra? A Extra, yes, sir.

Q About how much did you have to pay extra? A Well, I couldn't tell, because I didn't think it was necessary to get a bill for anything like that.

Q Was it approximately five—ten; what was it? A I should judge it was in the neighborhood of $10 to $15.

Q What was the hospital charge; do you remember? A I do not.

Cross examination by Mr. Rosenkrans.

Q What was your trade, Mr. Holmes? A I am a lather.

Q What was your trade? A A lather.

Q And how many years had you worked at it? A The last twenty-nine or thirty years.

Q And as a lather were you accustomed to work upon scaffoldings? A Yes, sir.

Q Sometimes built them yourself?

Mr. Rinzler: I object to it, if your Honor please, as not relevant or material, to the issues in this case, and also as not proper cross examination.

The Court: I will allow it.

Mr. Rinzler: I ask for an exception.

Q You sometimes built them yourself? A Yes, sir.

Q And often assisted with fellow-workmen in the construction of the scaffolds? A Yes, sir.

Q You know how they should be built?

Mr. Rinzler: I object to it, if your Honor please. I think that is irrelevant and immaterial.

The Court: I will allow it.

Mr. Rinzler: Exception.

The Court: It will certainly go to the question of contributory negligence.

Q You know how they should be constructed? A Certainly.

Q And you know of what materials they should be built? A Yes, sir.

Q You know, of course, as a result of your long experience of twenty-nine years, that scaffolds do sometimes break? A Sometimes, yes, sir.

Q And you test the fitness of the planks when you build a scaffold? A Sir?

Q Do you test the fitness of the planks when you are building a scaffold?

Mr. Rinzler: I object, if you Honor please, on the ground that what this man does in building a scaffold is not relevant or material to the issue.

The Court: I will allow it.

Mr. Rinzler: Exception.

The Court: Answer the question.

A Would you kindly give me that again?

Q (Question repeated by the stenographer.) A Not necessarily.

Q Well, do you—whether necessarily or otherwise? A Never done it. Nobody does.

Mr. Rosenkrans: I move that "Nobody does" be stricken out.

The Witness: No, there is no one examines a plank or a board when they come to the job. They are supposed to be fully sound and safe.

Mr. Rosenkrans: I move that the remarks of the witness be stricken out.

The Court: Strike it out.

Mr. Rinzler: If your Honor please, it was in answer to counsel's question.

The Court: The answer is yes or no.

Mr. Rinzler: And it is plain that counsel speculated upon an answer. He permitted the answer to be given, and then asked that it be stricken out, after he had speculated upon what the answer would be.

The Court: Same ruling.

Mr. Rinzler: Exception.

Q You say, then, that it is not your practice to find out, when you are yourself building the scaffold or helping some fellow-workmen to build one, whether or not the materials that you are using are fit to become a part of the scaffold? A It is a very hard problem.

The Court: Answer the question. If you don't understand it, have it read over again.

Q (Question repeated by the stenographer.) Yes or no? A No, sir.

Q What hour do you say that the material out of which the scaffoldings for this job were built came to the premises of the defendant, in Garden street, Passaic? A I should say a little after nine o'clock.

Q In the morning? A Yes.

The Court: Which day?

The Witness: On the 16th day of January.

Q The 16th day of January? A Yes, sir.

Q When you say they were brought there by the defendant's direction, what do you mean by that? A Why, I mean that Mr. Pellegrino said —gave his driver orders.

Q Did you hear him give his driver orders? A Yes, sir, I did.

Q Where was the driver at the time? A Standing by his truck on the sidewalk.

Q Where? A On Garden street.

Q In front of this building? A Yes, sir.

Q Then, you say, that the driver went somewheres and came back with a load of materials? A Yes, sir.

Q And what kind of materials were upon the truck? A There were plank, horses.

Q Planks of what sort of wood? A Wood.

Q What kind of wood? A Well, now, I didn't examine what kind of wood they are. I don't know—whether they are spruce or hemlock or what—one or the other.

Mr. Rinzler: He said he had not examined it, if your Honor please.

Q Well, were they either spruce or hemlock? A I don't know what they were.

Q Why do you suggest that they were either spruce or hemlock?

Mr. Rinzler: Objected to. He did not suggest that. He said, "I don't know whether they were hemlock or spruce or what they were."

The Court: I doubt he said "or what they were." I will allow the question.

Q Why do you suggest that they were either spruce or hemlock? A I said I didn't examine the plank, and I cannot tell, because I am no expert on wood.

Q Well, you spoke of spruce. A Anyhow, you couldn't tell what they were, all covered up with mortar and plaster. You would have to take half a day to knock the plaster off before you could really examine the plank.

Mr. Rosenkrans: I move to strike it out.

Mr. Rinzler: I object. Counsel speculated and let him answer before he objected.

The Court: I overrule the objection.

Mr. Rinzler: Exception.

Q Did you mention spruce and hemlock because that is a sort of wood out of which scaffolds are normally built? A Many of them is.

Q A spruce plank is regarded as a proper kind of material? A Yes, sir.

Q Now, don't you know that all the planks that were upon the defendant's premises while you were there doing this work were spruce planks? A I couldn't swear to it.

Q Well, you won't say it is not so, will you? A I cannot swear to it. I cannot say it was, and I can't say it was not.

Q Now, do you recall the dimensions of these planks? I think you have already said they were all about the same size? A Yes, sir.

Q Now, do you recollect the dimensions? A I should judge about twelve-foot planks.

Q Twelve feet long? A Yes, sir.

Q And about eight wide? A About ten wide.

Q By two thick? A Yes, sir.

Mr. Rinzler: Is that ten inches or ten feet?

Mr. Rosenkrans: Ten inches.

Mr. Rinzler: I just wanted to get the record straight.

Q Now, are those dimensions proper dimensions? A Yes, sir.

Q To use in the construction of a scaffold? A Yes, sir.

Q And safe dimensions for a man working upon a scaffold to stand upon?

Mr. Rinzler: I object. There is no proof as to what the condition of the plank was.

The Court: I will allow it.

Mr. Rinzler: Exception.

The Court: He asked if the dimensions were safe dimensions.

A Yes, sir.

The Court: You said yes?

Mr. Rosenkrans: Yes.

Q Now, who was Peter Schlossman? A Cornelius Schlossman's brother.

Q And you say that Peter worked for Cornelius? A Yes, worked for Cornelius, and worked with me.

Q Worked side by side with you? A Yes, sir; we were partners.

Q In the laying of these plaster boards over the ceiling? A Yes, sir.

Q And how many days did Peter work by your side? A We worked January 16th, which was on a Friday, and on Saturday morning, we didn't work on the Saturday morning, that is the 17th. The 18th was Sunday. The 19th was Monday, and I couldn't get into the building because the place was locked up. On the 20th I was locked in by a snowstorm in Garfield, and the 21st I went there and was let in by Rafter's chauffeur.

Q Now, how many worked there on the 16th? A Mr. Schlossman and myself.

Q Peter Schlossman and yourself? A Yes, sir.

Q And who built that scaffold? A Mr. Peter Schlossman.

Q What were you doing? A Carrying boards in while he was assembling the scaffold.

Q How long did it take to build it? A I couldn't judge. I couldn't see. It might have been a half an hour, might have been an hour, but I was carrying the plaster boards in, and he was assembling the scaffold, after I was carrying in the planks—I was carrying planks in and laid them on the floor, and he assembled the scaffold, while I was carrying in 150 plaster board.

Q Now, you don't recall how many planks you carried in, I suppose? A About ten plank—ten to twelve plank.

Q It was an abundance for the purpose? A Yes, sir.

Q About what time was the scaffold built that morning? A Well, about ten o'clock be-

fore we got well started—it might have been a little after ten o'clock.

Q How long would you judge you and Peter were working there? A Sir?

Q How long did you and Peter work? A We worked until half-past four that day. We used all the plaster board up and we couldn't come in—

Q Now, Mr. Holmes, in the course of that work that day, which was done there by you and Peter, the scaffold was shifted from place to place? A Yes, sir.

Q As the building progressed? A Yes, sir.

Q You would do one part of the ceiling and then you moved the scaffolding to some other place? A Yes, sir.

Q And completed that, too? A Yes, sir.

Q And then moved it again? A Yes, sir.

Q And who did that work of moving the scaffold? A Mr. Peter Schlossman.

Q What were you doing? A I was busy getting boards ready for to start the next ceiling.

Q How many times were they moved that day? A Twice.

Q Do you know how many square feet or square yards? A Well, the length of the planks. There was six or eight length of the plank crossing—

Q No, how many square yards or square feet of ceiling surface did you complete that day? A No, I couldn't.

Q About how many? A I couldn't say.

Q Is this a large building? A We don't work by the yard or foot; we work by the board.

Q I understand that. Was this a large building? A Yes, sir, it is a warehouse.

Q How big, approximately? A Well, it is quite a big building; I couldn't say how big or anything, or how wide. These planks—

Q Now, wait, Mr. Holmes. A I didn't work there no two days.

Q You worked there part of two days, didn't you? A Yes, sir.

Q And you are familiar with the building? A I worked on the building before.

Q Now, cannot you give this jury some rough idea of the dimensions of the room?

Mr. Rinzler: I object to a rough idea, if your Honor please.

The Court: I allow it. Let him give the best idea he can.

The Witness: Well, I should judge about twenty-four feet wide and about a hundred feet long. I believe it is over a hundred feet long.

Q And was the entire first floor made up of a single room? A Yes, sir.

Q It was not divided off into departments? A No, sir.

Q Or cut up into separate rooms? A No.

Q And did that room contain anything? A Contained a lot of old furniture—or brand-new furniture—some old furniture.

Q Boxes? A Boxes, yes, sir. The boxes were on the furniture, though.

Q Around the furniture? A Yes, sir.

Q And you and Peter used these boxes on the 16th day of January? A No, sir.

Q In laying planks from one to the other? A No, sir.

Q You say that is not so? A No, sir, it is not so. There was horses brought and used for that purpose.

Q Now, your employer did not come around there any time on the 16th of January? A No, sir.

Q When you left, quit work at half-past four on January 16th, had you completed that part of the ceiling on which you were working? A Yes, sir.

Q Under which your scaffold was put? A Yes, sir.

Q And on the 21st you went there to work alone? A Yes, sir.

Q What hour did you get there? A Got there eight—a little before eight o'clock.

Q And when did you get hurt? A Between the hour of ten and eleven.

Q And then when you got there at eight o'clock in the morning, that part of the ceiling under which the last scaffolding of January 16th had been placed, having been completed, you had to shift the scaffold again, didn't you, to some new place? A It had to be, but I didn't do it.

Q You say you didn't do it? A I didn't do it, because I—

Q Wait. You say that on the 21st day of January, when you arrived in the building at eight o'clock— A I didn't get in at eight o'clock.

Q What hour? A I had to wait until Mr. Rafter's man came to open the building for me to let me in, and he came to open up and took his automobile out.

Q Who was he, a tenant of the warehouse? A Yes, he was Mr. Rafter's chauffeur.

Q When you entered the building, at whatever hour it was, you say that the scaffolding was standing in the same position as it was when you and Peter left it on the 16th, on the afternoon of the 16th? A No, sir.

Q Well, it was in a new place, you say? A When we left?

Q You say it was in a new place? A Yes, sir.

Q And you went upon it? A Yes, sir.

Q Did you make any—did you feel if there was any give or any rock to it, as you stepped upon it? A No, sir.

Q Did you do anything to learn whether it has been constructed in a proper manner or built out of the proper materials? A No, sir.

Q At the moment when you were hurt was the scaffold in the same position in which it was found by you to be when you entered the warehouse? A Yes, sir.

Q On that morning? A Yes, sir.

Q That is, in the two hours or two hours and a half in which you worked there, as you say, you had not any occasion to move it? A I didn't have no occasion to move it.

Q And had you stood before upon that this morning, the 21st of January—upon the plank which broke with you? A Yes, sir, I went all over that scaffold.

Q And had you stood upon this very plank? A Stood on all the planks.

Q And worked with your feet planted upon this very plank? A Yes, sir, because I was coming across.

Q And how long before? A Well, I couldn't judge how long before, because we walked from one plank to another, working on the ceiling.

Q Well, you had been upon this very plank? A Yes, sir.

Q Which eventually broke? A Yes, sir.

Q At an earlier hour that morning than the hour when it broke with you? A Yes, sir.

Q And had worked at some—stood there for some time? A Had worked on different planks —I was from one to the other.

Q Yes, but I mean on this very plank? You stood upon this very plank that morning? A Yes, sir.

Q And there was no give that you noticed? A Not a thing.

Q No rocking? A No, sir.

Q Will you tell us how this scaffold was built, again? You speak of there being four horses. Yes.

Q Placed in a square? A Yes, sir.

Q One up against the other? A No. One horse sets here (illustrating), and the other horse sets there (illustrating).

Q The four horses occupy four corners? A Yes, sir.

Q And then there were planks? A There was a plank laid across this way (illustrating).

Q One plank? A Yes, sir, on its edge; the plank is on its edge.

Q On the edge? A Yes, into a socket between two pieces of two by four. The two by four is laid right from the bottom.

Q So that, each of these two horses would be connected with a single plank? A Yes, sir.

Q Standing on its edge? A Yes, sir.

Q And how were these cross pieces laid? A One from this plank over to the other plank (indicating), about ten inches apart—about ten plank on the scaffold.

The Court: You might ask him what the purpose of them was. I imagine what it was.

Q What was the purpose of laying the planks in that way? A So we could reach the ceiling.

Q Well, how much surface over the scaffold is contained in this way—how much surface did you have to stand upon—how wide? A Why, I told you ten or twelve inch planks. That is what they were; some ten to twelve inch. Some was ten, some was twelve.

Q You did not count the planks that were on the scaffold? A About ten plank.

Q About? You don't know exactly? A I ain't sure; I can't say, sir.

Q And you don't recall just how many plank you carried into the building? A No.

Q It might have been twelve or fourteen? A It might have been twelve or fourteen; I can't say.

Q The plank upon this scaffolding were about how many feet from the ground? A Sir?

Q How many feet from the cement floor were the planks in the scaffold? A About ten or twelve feet—between ten and twelve.

Q Now, this is a warehouse? A Yes, sir.

Q Any heat in it? A No, sir.

Q What kind of a day was the 21st day of January? A A kind of a cold day.

Q A cold January morning? A Yes, sir.

Q Thermometer around zero? A No, I don't think so.

Q Well, you know? Do you recollect? A Well, it was not so cold that a man could not work. Of course, the building was enclosed and there was factories upstairs running by steam, and the steam pipe came up on the outer walls.

Q On the outer walls? A On the outer walls. And then they would run over at the ceiling where we were working, that way, which kept the building pretty fair.

Q Did you have on your coat when you were working there? A Yes, sir, it was winter time. I had a coat with the sleeves cut out.

Q That was so that your arms could have freedom to work with? A Yes, sir.

Q It was cold enough to retain your coat? A Yes, just have a coat on to your body, as I am just explaining it to you before.

Q And you stood a half hour outside of the building? A No, sir; I went down in the cellar, where the janitor was, and waited until Mr. Rafter's store would open.

Q You got in the building about eight-thirty? A Yes, sir.

Q You got hurt around ten-thirty to eleven? A Between ten and eleven; I couldn't say the exact minute.

Q So, you had been there between two hours and two hours and a half at work? A Yes, sir.

Q You had been there continuously? You had not gone out to warm yourself anywheres? A No, sir; I didn't go out—stayed right on the job.

Q Now, between the time you started to work and the time Mr. Waterman came in, after you were injured, had anybody been in that building? A No, sir.

Abram Holmes, re-direct.

Q Now, you say that these planks were all covered with mortar and cement? A Yes, sir—plaster.

Q And was that a common condition for the planks to be in?

Mr. Rinzler: I object to that as not relevant.

The Court: I will allow it.

Mr. Rinzler: Exception.

Q Was that a common condition for planks to be in which are used in the construction of a scaffold? A Yes, sir.

Q Do you recall whether there were any new planks among the lot of planks that you say you carried into this building? A No, sir.

Q By "No, sir," you mean that you don't recollect, or that there were none? A I mean that there were none.

Q But every plank there carried with it a sign that it had been in actual practical use? A Yes, sir.

Q In a scaffold somewheres? A Yes, sir.

Re-direct examination by Mr. Rinzler.

Q Mr. Holmes, Mr. Pellegrino instructed his driver to get those planks on what date? A On the 16th day of January, 1925.

Q What date was it that he instructed Peter Schlossman to build the scaffold?

Mr. Rosenkrans: That is objected to.

The Court: I sustain the objection.

Q That was not the day of the accident, was it? A No, sir.

Abram Holmes, re-direct.

Q What was the date of the accident? A The 21st day of January, 1925.

Q Had you worked on January seventeenth? A No, sir.

Mr. Rosenkrans: I object to it because he has been over it.

The Court: I think it has been testified to.

Mr. Rinzler: I don't think I have asked the question.

The Court: Yes, but he has answered it. He outlined the things he did from the sixteenth to the twenty-first.

Mr. Rinzler: No, I didn't understand whether he had worked from the sixteenth to the twenty-first.

The Court: He said he had not worked from the sixteenth to the twenty-first, as I understand it.

Q The planks being covered with mortar and plaster, could you tell what kind of wood the plank was made of? A No, sir.

Q And were they covered with plaster and mortar when they were delivered to the place? A Yes.

Q To have the scaffold built? A Yes, sir.

Q I show you this bill and ask you if you will refresh you insofar as the amount of the hospital bill is concerned (handing a paper to the witness)? A Yes, sir.

Q What was the amount of your hospital bill? A Forty-one dollars.

Re-cross examination by Mr. Rosenkrans.

Q How long have you known Peter, the brother of your employer? A Quite a few years.

Q And what is his business—Peter's? A The same as I.

Q He often builds scaffolds, does he? A Oh, yes.

Q Knows how to build them? A Yes, sir; he knows how to build them.

Q And you often worked on scaffolds that he had built?

Mr. Rinzler: I object, if your Honor please. This is not proper re-cross.

The Court: I will allow it.

Mr. Rinzler: Exception.

A Yes, sir.

Q And you relied upon his judgment on the sixteenth of January as to the manner of the construction of the scaffold? A Yes, sir.

Q And as to the material that went into it? A Yes, sir.

JOHN A. WATERSTON, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Rinzler.

Q Where do you live, Mr. Waterston? A 36 Lincoln street, Passaic.

Q How long have you lived at Passaic? A All my life.

Q Were you in the building owned by Pellegrino on Garden street, on January 21, 1925? A Yes, sir; I was.

Q I understand you did not see this accident? A No, sir.

Q Did you arrive in the warehouse of the building after it happened? A No, sir; it happened that I was in my office out in the front. You see, my office is right at the front of the warehouse.

Q Did you come into the warehouse after the accident? A No, sir; the gentleman came into my office to ask me to call up Schlossman.

Q Who brought him into your office? A He came in himself.

Q Alone? A Alone.

Q Was Anderson there? A No, Anderson had not yet arrived.

Q Do you know where he was taken from there? A No. He asked me to call up Schlossman.

Q Where was he taken from there? A Taken from where?

Q From your office. A He went back into the warehouse again.

Q And then where did he go? A That I don't know.

Q Whom do you work for? A I work for myself—in business for myself.

Q You don't know where he went from there? A All I know, he went into the warehouse, and after he went into the warehouse, why, then, he called me again.

Q Did Anderson take him home? A Anderson and I—well, I have to explain that.

Q Didn't Anderson take him home? A Anderson took him home in his car; yes, sir.

Q In the automobile? A In the automobile.

Q And he drove him home? A He drove him home.

Cross examination by Mr. Rosenkrans.

Q You were called into the warehouse? A Beg pardon?

Q How did you first learn that the plaintiff was hurt? A Well, he came into my office and asked me to call up Mr. Schlossman.

Q That is, he walked out of the warehouse? A Walked out of the warehouse into my place.

Q Where he was hurt a year ago? A Yes, sir.

Q And then you telephoned for him? A I telephoned for Mr. Schlossman. I couldn't get him on the phone, so Mr. Holmes went back into the warehouse again, and, of course, I went in the back there. I hollered through to Mr. Holmes. I said, "I can't get Mr. Schlossman." He says—

Mr. Rosenkrans: I object to this conversation.

The Witness: I sent an emergency call, and the operator, of course, cut the party off and got Mr. Schlossman. So Schlossman said, "I will be over in about fifteen or twenty minutes." So we waited, and in the meantime Anderson came in, and I asked Anderson to help me out with the man and take him home, so we first made a regular sling of our arms and carried him out of the place. He could not move then.

Q About what time was it? A Oh, it was around eleven o'clock, I believe.

John A. Waterston, re-direct.

Q Do you recall whether it was warm or cold? A It was a pretty cold morning, and it was about a foot and a half of snow on the ground. We had to carry him through a little runway we had in the street there.

Q Was the snow frozen hard? A Well, it was and it was not; I couldn't explain that; it is so long ago I don't remember.

Q Well, at that hour, eleven o'clock in the forenoon? A It was pretty cold at that hour.

Q It was not thawing much? A It was not thawing much that morning; no, sir.

Q Did you notice a broken plank? A No, sir; I was not in far enough for that—only to carry the man out.

Re-direct examination by Mr. Rinzler.

Q You merely directed your attention and took an interest in getting him out of the place? A That is all I took an interest in.

Q And you made a sling to help him out of the place? A That is because the man could not move.

Q That is a fact, that he could not move? A He could not move, no.

Q He could not walk? A No.

Q And so you helped carry him out and into the automobile? A Anderson and I made a sling of our hands and carried him out that way.

Q Into the automobile? A Into the automobile.

NICHOLAS FREDERICK MIRABILE, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Rinzler.

Q Doctor, you are a licensed physician of New Jersey? A Yes, sir.

Q Practicing in New Jersey? A I am, yes. I have been in practice in New Jersey for about close to two years.

Q Are you the doctor who attended and treated Mr. Holmes? A Yes, sir.

Q When you first examined him where was he? A In his home.

Q And about how long after the accident happened? A It must have been two days after the accident.

Q And what condition did you find him in? A Condition? Well, I found him to be suffering from a fracture—what I thought at that time to be a fracture of the scapula.

Q Of the scapula? A Yes, sir. It corresponds to the shoulder blade.

Q Was that the left or right shoulder? A Left. And a fracture of the pelvis, and also I thought that he had an injury of the bladder, because I found blood in the urine.

Q Is that bloody condition still present or not, in passing urine? A Occasionally I have found streaks of blood. I have examined the urine since.

Q How long did you continue treating this man? A I instructed him to go to the hospital. In fact, I didn't want to have anything to do with the case, thinking it was so serious, to my estimation, and I told him to go to the hos-

pital, and he went to the hospital. Then, I got notice that he wanted to come out, said he couldn't stand the hospital.

Q Then, when he came out, did he have anything about his arms or legs or foot? A Yes. The arm was in a sling and the pelvis was also in a cast.

Q How long was his body in a cast? A Six weeks; shoulders and the pelvis eleven weeks. The reason for the eleven weeks for the pelvis was that he showed bladder symptoms yet.

Q And when you removed the cast from his left arm, what, if anything, did you observe about the condition of the arm? A Well, at that time I couldn't—the only thing I could observe, that the arm had suffered—that is, from lack of nutrition; the arm was in this sling. Then, I started to practice motion on it and the massage.

Q Was he able to use the left arm? A No, sir. I had weights on for a while, and I tried to extend it with weights.

Q Has he ever since he been hurt in this accident been able to use or exercise that left arm? A No, sir.

Q What position does he have to keep the left arm in? A He has to rest it like that (indicating).

Q Bent at the elbow? A Yes, sir.

Q What is the present condition of his left hand? A It is more or less a claw-foot, contracted.

Q What is contracted? A The fingers, the muscles are contracted.

Q It is what you call a claw-foot hand? A Yes, sir.

Q Will he ever be able to use the left arm or hand? A I don't think so; I doubt very much.

Q Now, what, if anything, is the present trouble with his left leg? A It is close to three inches shortened, by measure.

Q And about how much strength has he in the left leg? A I couldn't judge it to have much strength.

Q You cannot judge him to have much strength? A No.

Q Can he stand without a cane? A I doubt it.

Q Can he walk without a cane? A I don't think so.

Q Will he ever be able to walk without a cane? A Unless there is a miracle performed.

Q Unless there is a miracle performed? What have you to say about his present nerve condition? A His present action?

Q Yes. A Well, especially—I have been called at nights, when the weather changed, to go to him—

Q No, answer the question, please. A That he is a nervous wreck.

Q Did or does he take sleeping tablets? A Well, I give him some lumonal—bromides.

Q What is that for? A To quiet down the nerves and give him rest.

Q Have you ever given him hypodermics? A I have.

Q What is that for? A To put him to sleep.

Q Were the injuries that he received painful? A I judge them to be. I never had them, but I judge them to be.

Q Doctor, you judge them to be painful? A Well, we can only judge just by what the patient tells. We cannot feel the pain.

Q In your opinion, will the claw-foot shape or position of the fingers of his left hand ever disappear? A I don't think so.

Q What charge did you make for your services? A $205. That is including the X-ray.

Q Is that reasonable? A Yes, I consider that reasonable.

Q Did the X-ray show a fracture? A Yes, sir.

Mr. Rosenkrans: No questions.

CHARLES RUSSELL, called as a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Rinzler.

Q Doctor, are you a licensed practicing physician in the State of New Jersey? A Eighteen years.

Q Doctor, did you examine Mr. Abraham Holmes, the plaintiff in this case? A Twice.

Q Do you recall the dates when you first examined him? A Yes, May and yesterday.

Q Do you remember what his condition was as disclosed by your examination made last May? A He had—

Q The diagnosis you made? A This man had a history of a fracture through the shoulder blade, where the head of the bone of the arm fits into it, and having been in the hospital for that condition, followed by—as a result of a fall of several feet, and followed by a nerve injury of the muscles supplying the arm. The bone in the socket was not injured and was not displaced,

but the nerves leading from the—underneath the arm down, and supplying the arm, were in some way injured, so that he had a contraction of the muscles of the arm, rather than a real paralysis, and that contraction caused a stiffness or rigidity of the muscles, so that he could not use his hand, but held it at right angles, with his thumb across the palm of the hand. He could not open and close the hand. As a result of that disuse, the muscles had shrunk about half their normal size, about fifty per cent. So, the diagnosis of the arm condition would be a paralysis of the so-called brachial nerves, the arm nerves, there being an injury to them in some way. Following that, besides that element, he had injury to the pelvis or base of the spine, which caused him to have a somewhat similar condition of the left leg. There was no fracture of the bones of the pelvis or of the left leg, but the shortening is a result of constant contractions of the muscles of that leg, caused by curvature of the spine, and not due to any bone injury of itself. So, from disuse of that leg there is some shrinkage of the muscles, perhaps a third. Because of these two disabilities, two injuries or conditions, he has a useless arm at this time —cannot open or close his hand. He can bend his elbow, perhaps, a quarter as much as he ought to, back and forth, just a little bit, and he cannot lift his shoulder more than about a quarter as much as he would ordinarily, he cannot lift the elbow on a level with the shoulder. There was also a history of bladder bleeding, but so far as I could determine, no injury to the bladder existed when I examined it either time.

Q Doctor, in your opinion, will he ever again be able to use the left arm or left hand? A

Well, not as well as he—he is going to have some improvement in his arm. He was hurt, it is nearly a year now since he was hurt, and he has shown no improvement since last May, that I will say, but perhaps under skilled and prolonged treatment that arm would show some improvement. At present it seems to be totally disabled. Baking and massage and electricity and manipulation and prolonged treatment of that kind will, with co-operation on his part, probably restore some function of that arm and hand, though he would not be able to work with it as a laborer, so far as I can determine.

Q He would not? A No.

Q Will he ever be able to use it to work with as a laborer, hammering plaster boards, and so forth? A Well, that is not an easy question to answer until you could see what progress he would make under very skillful treatment for some three or six months, but as far as can be determined now, he will not have a useful arm, I can say that.

Q He will not? Will he ever, in your opinion, doctor, have a normal left arm or normal left hand? A I have answered that. I do not think it will be quite—I do not think it will be quite normal.

Q The left leg, is there much strength in the left leg? A Not at the present time. That is the lesser of his disabilities. He can get around with that leg and this apparent shortening—that is, the apparent shortening is a shortening due to the tilt of the pelvis, as in contrast with what we call an actual shortening, where the bones are injured and overlap and the leg is short. So, this apparent shortening, due to a spasm or contraction of the muscles—from what cause I am

not absolutely certain, because the X-ray does not show any bone injury.

Q Speaking about the nerve injury, what have you to say about his present state or condition? A In regard to what?

Q Nerve condition. A His general health?

Q General health. A Oh, he is not a nervous man, especially. I think his incondition is not due to any nervous—natural nervous condition, as far as general constitutional condition is concerned, due to the result of ill health. This here nerve condition I speak of is entirely local, not general.

Q Doctor, can this man straighten or extend his left arm at all? A No, he cannot.

Q Can he pick up objects with his left hand? A He cannot.

Q Can he move the fingers of his left hand? A Only very slightly.

Q Can he exercise his shoulder, the left shoulder, or left arm? A Not at all.

Q In your opinion, will this man ever again be able to do plaster board work or be a lather, nailing and fastening plaster boards to a ceiling over his head, he standing on a scaffold? A Well, I can't tell you. I don't think he would be able to do regular—his regular work, I mean, again.

Q Now, the treatment that you speak of, what have you to say about the probable expense of such treatment? A Well, that would depend upon him. He need not go to expense, because the State of New Jersey supplies the clinics in various cities, various centers where they give free treatment for just such cases—unless he preferred to go to some specialist.

Q You say it requires a specialist, extra skilled? A Yes, it requires men used to that sort of work.

Q What would such skillful treatment in all probability cost? A That could hardly be estimated, but if he went to a private specialist, it might be in thousands.

Q What? A Might be thousands of dollars, I mean. I don't know what it would cost.

Q Will you tell the jury about your qualifications, doctor?

Mr. Rosenkrans: I concede that.

The Court: The qualifications are conceded.

Q Where did you graduate from? A Academic, I graduated from Illinois College.

Q And then? A Medical, I graduated from Harvard. Hospital, I graduated from New York Skin and Cancer Hospital, and special courses in Polyclinic Hospital, and graduated, two years as house surgeon of Boston City Hospital, various other hospitals that I have been connected with, but I have taken no special training.

Q You had experience in the State Department as physician? A Yes.

Q In what way, doctor? A I was for one year examiner for the State of New Jersey in all compensation cases, in Passaic County.

Q About how many cases have you examined in that year, in that capacity? A For the State of New Jersey?

Q Yes. A About, between five and ten thousand, I should say.

Q That is aside from your own practice? A In various capacities.

Q And in addition to that you had your own private practice? A Naturally.

Cross examination by Mr. Rosenkrans.

Q Doctor, you say it is nearly a year since this accident occurred. Do you know the date on which it happened? A January 21, 1925.

Q That is less than nine months? A Yes, it is.

Q Nine months? A Yes, nine months ago.

Q You saw him in May? A I saw him in May.

Q And you have seen him recently? A Yesterday.

Q And you say there has been no substantial improvement in his left arm? A No improvement in the arm since I saw him last May.

Q Do you know whether or not he has taken any steps likely to bring about improvement in the left arm? A No, I don't know definitely about that. I understood he was under the care of some physician.

Q But medicines, internal medicines, that won't help his left arm? A Very slightly, if any.

Q The thing he needs, as I understand you, is massage and manipulation? A Exercises.

Q Exercises? To what do you attribute the present partial incapacity of his left arm? A Some injury to the brachial nerves.

Q And the problem of his physician is to stimulate the regrowth and restoration of nerve cells; isn't it? A Yes, and muscular development, muscle restoration.

Q And the approved methods of bringing that about are exercise and manipulation and massage, aren't they? A Surely.

Q Now, if he were your patient, would you recommend as likely—as worth his while and likely to bring about beneficial results in the line of improvement, a course of exercise and massaging, manipulation? A Yes, I should turn him over to some clinic that has lots of time and facilities for doing that sort of work.

Q And would you expect to find, after the passage of several months, some substantial improvement in his condition? A Yes—six months would be better, when you speak of substantial improvement.

Q And if he went to some competent man for six months or a year, do you think it is probable that he would be largely restored in the use of his left arm? A I wouldn't say largely restored. He would get back some function that he has lost, and the amount of his restoration would depend in some measure on his co-operation, on his persistence and will power. No amount of treatment is going to do him any good unless he co-operates.

Q And you don't know whether since his accident he has laid down and done nothing, or not? A No, I don't know the details of what he has done since he was hurt.

Q Have you inquired from him? A Yes, I understood only that he was under the care of some physician.

Q That is, taking drugs, internal medicines? A Well, I didn't ask that.

Q Now, his left leg, you say that is a minor matter? A No, I didn't say that. I said it is the least important, as far as disability is concerned, because he can get around. When a man has a crippled arm, he is helpless.

Q How much shorter is his left leg? A Apparent shortening of two and a half inches, but that is not a real shortening, as I explained.

Q Well, now, a shortening of two and a half or three inches often happens after a man has had a fracture of the leg? A Yes, but we don't need to consider that. This man hasn't a fracture.

Q I say, it often happens—other people going through life who get around with one leg two and a half or three inches shorter than the other? A Oh, very readily, when he gets used to it.

Q And the condition of this left leg, is that, in your judgment, susceptible of improvement by proper treatment? A Yes.

Q What treatment? A A similar nature to the arm. You would have to include treatment to his back as well.

Q Do you know whether or not there are hospitals and similar institutions where a man needing such treatment as you say would be advisable for the plaintiff may receive such treatment without cost to him?

Mr. Rinzler: I object to it, if your Honor please. A man is not obliged to become a charity patient or take charity.

The Court: I think it is proper.

Mr. Rinzler: Exception.

A Yes.

The Court: It was brought out on direct examination.

Re-direct examination by Mr. Renzler.

Q He is, then, in such a case a charity patient, doctor? A Certainly.

JEANETTE HOLMES, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Rinzler.

Q Mrs. Holmes, you are the wife of the plaintiff, Abram Holmes? A Yes, sir, I am.

Q Do you remember the date of this accident? A I do.

Q Do you know what it was? A Twenty-first day of January, 1925.

Q You did not see the accident? A No, sir.

Q Where was your husband when you first saw him? A In the house.

Q How did he get in? A By two men carrying him in.

Q Where was he put? A He was put in a big rocking chair, and then we got him in bed.

Q How long was he confined to bed? A Eleven weeks and a few days.

Q Beg pardon? A Eleven weeks and a few days.

Q During that period did you notice whether or not his body was encased in anything? A I do. He was that way when I brought him home from the hospital.

Q Did the doctor put any plaster about his person? A He had his left arm up this way

(indicating), when he came home from the hospital, and he was in plaster cast through his hips.

Q Treated by a doctor right along? A Yes.

Q What kind of treatment did he get? A Well, the doctor called on him twice a day for a time. I used to have to call him in the afternoon to put hypodermics in, and sometimes we had him besides for his nerves.

Q Did he ever get any electrical massage treatments? A He did.

Q From whom? A Dr. Mirabile.

Q Before Mr. Holmes was hurt in this accident, what was his general state of health? A He was always healthy—big and husky.

Q Did he ever have any trouble or sickness besides an ordinary cold that one would get occasionally? A No.

Q Did he ever suffer with any ailment or disease other than a cold? A No.

Q Now, since the accident, has he ever had the use of or been able to use his injured arm? A No.

Q Or his hand? A No.

Q In what position does he hold his left arm? A Always in this position (illustrating).

Q Bent at the elbow? A Yes.

Q Did you notice his present condition of the left hand? A When?

Q Well, today or yesterday? A Today?

Q Yes. A Yes.

Q What is it? A It is in a claw-foot shape.

Q Did his left hand ever have that condition before the accident? A Never.

Q Was anything the matter with his left arm or hand, as far as you know? A Never.

Q And, as far as you knew, before the accident, did he have the normal use and exercise of that left arm and hand? A Yes, sir.

Q Has he ever gone to work or been able to work since the accident? A No.

Q Was anything ever the matter with Mr. Holmes' left leg before this accident? A No.

Q What is the condition now? A Well, he has got a short leg, and he is very weak on it; he cannot stand.

Q Does he always have to walk with a cane? A Always.

Q How does he dress and undress? A I do it.

Q Can he do it himself? A No.

Q Has he ever been able to dress or undress since the accident? A No.

Q Do you know how much wages he would bring home before he was hurt in the accident—salary or wages—Mr. Holmes was earning before he was hurt in this accident? A Sixty-six dollars a week.

Q How old a man is he? A Forty-nine.

Q And the children? A Eleven, eight, six and two.

Q How old are you? A I am thirty-two.

Q Has he ever received any salary or wages since he was hurt in this accident? A No.

Cross examination by Mr. Rosenkrans.

Q These electrical treatments you say your husband took, how long did he take them? A Sir?

Q How long did he take these electrical treatments? A He took twenty or twenty-two electric treatments.

Q When? A From Dr. Mirabile.

Q When? A Right after he was taken out of the bandages.

Q When was that? A Well, he was taken out of the cast when he could get up; then he took his electrical treatments.

Q Over how long a period, can you tell? A I cannot remember that.

Q You are his wife, aren't you? A Yes.

Q And you take care of him? A I do.

Q You cannot remember the number of treatments that he took? A I told you twenty or twenty-two.

Q You cannot recall the period of time during which he took them? A Well, I cannot say, within two weeks, three weeks or four weeks—I cannot say, because I have had a doctor all the time for him since he has been hurt.

Q Well, if he took twenty treatments—you are sure of that, are you? A I am.

Q And you say he may have taken them in two weeks? A Sir?

Q He may have taken them in two weeks? A I didn't say that. I said I am not sure about two weeks, three weeks or four weeks. I am not sure of the time.

Q You mean by that he may have taken them in two weeks? A I don't mean nothing of the kind. I didn't say it.

Q How many a day did he take? A He took electric treatment every day and two massages a day.

Q Of this same doctor? A Yes, sir.

Q And at the utmost for a month? A Yes, sir.

Q Then he gave it up? A Well, there was no more need.

Q All right; he gave it up? A No, he didn't give it up.

Q He ceased to take it? A The doctor said it was not necessary.

Mr. Rinzler: We rest.

Mr. Rosenkrans: If the Court please, I move for a non-suit upon two grounds:

First, that the plaintiff appears to have been guilty of contributory negligence.

Secondly, no breach of any duty owing by the defendant to the plaintiff has been shown here, or no negligent performance of any duty.

The evidence is that the plaintiff is a man forty-nine years of age; that at the time of the accident he weighed 169 or 170 pounds; that he had been for twenty-nine years following the trade in which he met with this misfortune; that he knew, had gathered from his experience, in what manner scaffolds should be built and of what material they should be built; and, further, that he knew that scaffolds sometimes break. Now, the evidence also is that with this knowledge in his head, that is, the knowledge of how a scaffold should be built and that planks in scaffolds sometimes break, he ventured upon a scaffold on this twenty-first day of January, without having sounded the planks or made the least test to discover whether they were safe for his use. Now, in this jurisdiction the plaintiff is not permitted to do that. You cannot throw all prudence to the winds and make no tests on your own account and assume that the master or some other person has provided you with absolutely safe appliances to work with. You cannot do it in this jurisdiction, I say, because the rule here is not that the master is under an obligation, an absolute obligation, to

supply his servant with even a reasonably safe place. All he has to do here is to use reasonable care that the appliances are reasonably safe. That is the measure of duty in New Jersey; and here is a plaintiff who goes upon boards which he perceives in advance are partially covered by kalsomine, without taking any precaution on his own account. Now, it also appears that these boards had been upon the premises several days before this accident, and that they had been brought there by the defendant, and in quantities larger than was necessary for the construction of the scaffold upon which the plaintiff was hurt. He says he carried in fourteen or sixteen planks, I think he said, and at the utmost only ten were used—about ten—in the construction of this scaffold on which he was hurt. It appears that these planks, or some of them, were in use throughout all the sixteenth of January in a scaffold or scaffolds, and that nobody discovered that there was any defect in them. And it is shown, also, by the plaintiff that on the morning of the injury he was upon this scaffold for two to two and a half hours, upon this very plank, part of that time, and then it suddenly broke.

Now, the second ground of my motion is, to put it specifically, that the plaintiff's case fails to show what it was that caused this plank to break. They don't say there was any possible defect in it or knot or former breakage, or what. They simply say that it broke, and there they leave us. Now, it is for the Court to say, first whether or not negligence can be inferred from the facts shown, not for the jury to say whether it ought to be. I think here, in these circumstances, the Court is bound to say that the jury

cannot legitimately infer negligence from the meager facts which are proven.

(Argument by counsel for defendant and counsel for plaintiff.)

The Court: The portion of the complaint here, to the effect that it was the duty or the obligation, or that the obligation was assumed by the defendant, to construct the scaffold, has not been sustained, and therefore we are at the point of the case where the defendant here has furnished the material to the master of the plaintiff for the construction of this scaffold. Now, I do not think his duty would go beyond a reasonable inspection of the material that he furnishes, and I do not feel that there is any proof here that such a reasonable inspection would have disclosed any trouble with this plank. This plank, it is admitted by the plaintiff, was somewhat covered with plaster, and he also admitted that he used the plank, and it was used. Now, assuming that *res ipsa loquitur* did not apply, why, then, there is an entire failure to show why this plank broke, and there is proof that it was used in the same manner that it was used just before it broke—that is, it was used previously and worked all right, and that it was then really out of the defendant's possession for some time, and was used again and did break. So, that, for these reasons, I will grant the motion for a non-suit on the second item, and deny the motion on the ground of contributory negligence.

Mr. Rinzler: Will your Honor allow me an exception?

The Court: You may have an exception.

New Jersey Court of Errors and Appeals

Abram Holmes, Plaintiff-Appellant, vs. Stephen Pelligrino, Defendant-Respondent.	Action at Law On Appeal

BRIEF IN BEHALF OF RESPONDENT.

STATEMENT OF THE CASE

Holmes sued Pelligrino for damages for personal injuries resulting from plaintiff's fall from a scaffold while engaged, as an employee of an independant contractor (Cornelius Schlossman), in ceiling with plaster board a room in a building owned by Pelligrino. Pelligrino furnished, not the ***scaffold,*** but the ***materials*** for the scaffold, which was built, out of ***part*** of the materials so provided, by a fellow servant (Peter Schlossman) of plaintiff. The complaint charged Pelligrino with negligence in the ***maintenance*** of the scaffold and declares that, in consequence of such negligence, a "plank gave way and broke, by means of which plaintiff fell" (Case, page 7, paragraph 7). The evidence showed the bare fact of the breaking of a plank, and there stops; it does not show that the plank was defective, or that, if defective, its collapse was due to a defect in it, or what, in fact, caused the breaking of it. It affirmatively appeared from plaintiff's own testimony, that plaintiff made no examination of the safety of the scaffold and

no test of the soundness of the plank, but relied upon the judgment of his fellow servant (Peter Schlossman, whom plaintiff pronounced to be a competent scaffold builder), both as to the manner of the construction of the scaffold and as to the materials out of which it was built (Case, page 47, lines 1-30). He testified that he has followed the trade of a lather for 29 or 30 years, and sometimes built scaffolds himself, often assisted his co-laborers in erecting them, knew how they should be built (Case, page 31, lines 11-14) and that they sometimes break (Case, page 3, lines 15-18).

A motion for non-suit was put upon two grounds: (1) that plaintiff was guilty of contributory negligence; and (2) that no omission, or negligent performance of any duty owing by Pelligrino to plaintiff was shown by the evidence (Case, p. 66, lines 8-15). The trial court, declining to grant the motion upon the first ground, non-suited plaintiff upon the second (Case, page 68, lines 32-35). Plaintiff appeals from the judgment of non-suit.

ARGUMENT.

I.

THE TRIAL COURT RIGHTLY NON-SUITED PLAINTIFF.

THE EVIDENCE.

Plaintiff testified what goes into the making of such a scaffold as the one in question, "four horses--

two planks, one plank on each side of the horses, into a socket, then we have cross members, going across where we can stand on to reach the ceiling" (Case, page 13, lines 1-10); that defendant's truck driver, at the instance of defendant, brought these materials for a scaffold to the premises on January 16, 1925 (Case, page 13, lines 15-27), shortly after 9. A. M. (Case, page 33, lines 34-40); that he, plaintiff, was told by Pelligrino to carry the horses and planks into the building from the sidewalk where the driver unloaded them (Case, page 14, lines 29 to bottom and page 15, lines 1-6); that at that time plaintiff was employed by Cornelius Schlossman to work in Pelligrino's Building (Case, page 11, lines 21-28) that Peter Schlossman, a brother of Cornelius Schlossman, was likewise employed by Cornelius Schlossman on the same job to do the same kind of work (Case, page 21, lines 13-23; page 36, last 7 lines and page 37, lines 1-19); in speaking of Peter Schlossman, plaintiff said "we were partners" (Case, page 16, last 2 lines); that when the materials for the scaffold were gotten into the building, Pelligrino "said to Mr. Peter Schlossman: Get the scaffold up, and get it ready, so your brother's men can get to work on it. I don't want to delay the job any longer, or I don't want your brother coming here and say I am holding the men up on account of my scaffold is not here" (Case, page 15, lines 20-30). He then continued.

> Q. Now, after Mr. Pelligrino addressed those remarks to Peter Schlossman, who, I understand, is Cornelius Schlossman's

brother, did anybody examine the scaffold? A. Yes, sir.

Q. Who examined the scaffold? A. Mr. Peter Schlossman.

(By *examining* "the scaffold," plaintiff plainly meant the materials for the scaffold, the scaffold not being then yet erected.)

The scaffold, plaintiff continues, was put up at once (Case, page 16, lines 16-17) by Peter Schlossman, plaintiff himself carrying in the planks and horses and laying them on the floor and bringing in the plaster boards (Case, page 37, lines 20-33, and completed about 10 A. M. (Case, page 37, last 2 lines and page 38, lines 1-5), and used by plaintiff and his fellow servant, Peter Schlossman, in putting plaster boards on the ceiling of defendant's premises (Case, page 16, lines 19-38).

There was not the faintest evidence that defendant "supervised and directed the erection" of the scaffold, or that "he was present when it was erected," the statements to that effect and in these words in plaintiff's brief notwithstanding (plaintiff-appellant's brief, page 18, last 4 lines and page 20, lines 18-20).

Plaintiff further testified that he and his co-laborer worked there on January 16, (Case, page 37 lines 1-19) until 4:30 P. M. (Case, page 38, lines 8-11); that as the work of the ceiling the room progressed, the scaffold was moved from one position to another (Case, page 38, lines 12-29); that no work upon the ceiling was done, at least, by plaintiff after January 16, until January 21 (Case, page 37, lines

1-19); that on January 21, plaintiff worked upon the ceiling single handed (Case, page 30, lines 18-19), arriving at defendant's premises a little before 8 A. M.; that when they quit their day's work on January 16, the part of the ceiling under which the scaffold then stood was quite finished, and that when he entered the building on Jan. 21, the scaffold then stood in a new position—it does not appear by whom it had been moved (Case, page 30, lines 12-17 and lines 24-32) and that plaintiff fell and was injured between 10 and 11 A. M. of that day (Case, page 40, lines 22-23).

The record is silent as to whether the scaffold had been meanwhile (between January 16 and January 21) taken down and rebuilt, or remained wholly as it was on January16, save for a change in its position on the floor, or, whether any plank or planks had been substituted for one or more of the orignal constituents of it.

The scaffold formed a sort of square; there were two pairs of horses; each pair was joined by a single plank set up edgewise the opposite ends of each plank resting in "sockets" in the horses; a sort of platform or flooring was formed by laying other planks termed "cross members" from one edgewise set plank to the other; and upon this platform the men stood to reach the ceiling (Case, page 19, lines 11-16; page 42, lines 21 to bottom, and page 43, lines 1-12). These cross planks were about 12 feet long by 8 to 10 inches in width and 2 inches thick (Case, page 35, last 6 lines and page 36, lines 1-32) they were either of spruce or hemlock and were proper and

safe in respect to their dimensions (Case page 34, lines 24-27); and this is the testimony of the plaintiff himself. The cross member planks were about the same in dimensions as the two planks which carried them (Case, page 19, lines 11-16). In the whole structure of the scaffold about ten planks were used,—a less number then was available on the premises, plaintiff saying that he carried from the street into the building twelve or fourteen planks (Case, page 43, lines 20-28). The platform of the scaffold was about 10 or 12 feet above the floor (Case, page 43, lines 32-35).

Plaintiff further testified that on January 21, ***he worked upon the scaffold for two or two and a half hours*** (Case, page 44, lines 25-32), having no occasion meanwhile to shift it (Case, page 41, lines 23-31); ***that he stood upon and moved upon as well the identical plank which ultimately broke under his feet*** as all the other planks, and found no give or rock about it, and that he did not sound or test it or any part of the whole of the scaffold (Case, page 41, lines 32 to bottom and page 42, lines 1-21);that all the planks in and on the scaffold were covered with mortar and plaster (Case, page 21, lines 36-40); that that is the ordinary and usual condition of scaffold planks (Case, page 45, lines 1-16); and that all bore the sign of prior practical use in the scaffold (Case, page 45, lines 24-27).

We observe here that evidence quoted in plaintiff's brief (plaintiff-appellant's brief, page 11, last line and page 12, lines 1-5) to the effect that no one examines a plank or a board when they come to a job,

but assumes the same to be fully sound and safe, was rightly struck out of the record (Case, page 32, lines 19 to bottom and page 33, lines 1-20), and counsel for plaintiff, as they are aware, have no right to allude to it.

Finally, a "cross member" plank broke in half (Case, page 17, last 8 lines and page 18, lines 1-5) plaintiff was standing directly upon it at the time, putting plaster boards on the ceiling (Case, page 19, lines 26-38); and plaintiff fell to the concrete floor and was injured (Case, page 19, last 2 lines and page 20, lines 1-10).

A.

REGARDLESS OF WHETHER THE JURY MIGHT, OR MIGHT NOT, HAVE LEGITIMATELY INFERRRED FROM THE EVIDENCE THAT THE DEFENDANT HAD UNDERTAKEN, NOT MERELY TO PROVIDE MATERIALS FOR A SCAFFOLD, BUT TO CONSTRUCT IT ALSO, THERE IS NO EVIDENCE THAT DEFENDANT DID NOT USE THE CARE REQUIRED OF HIM; AND THE CASE DOES NOT FALL WITHIN THE RULE OF RES IPSA LOQUITUR.

It is conceded that he fulfilled his duty in the choice of the servant (assuming that Peter Schlossman became defendant's servant for the purpose) who built the scaffold (Case, page 47, lines 1-30).

The builder of the scaffold was observed by plaintiff to have inspected the materials out of which he constructed it (as we understand his testimony) or

(at least) "examined the scaffold", when built. (Case, page 15, lines 30 to bottom).

There is no evidence, either affirmative or inferential, that reasonable care in the inspection of the materials out of which the scaffold was construed would have disclosed that the plank in question was not reasonably safe for such use The planks were of the ordinary and common material (Case, page 34, lines 23-29 and page 35, lines 21-27) and proper and safe in size (Case, page 36, lines 1-30). On the day the scaffold was set up (January 16) it sustained the weight (Case, page 16, lines 19-38) from 10 A. M. to 4.30 P. M., of ***two*** plaster board men, plaintiff and his fellow servant, Peter Schlossman, who built it (Case, page 37, lines 1-19 and page 38, lines 8-11). During that day it was shifted from one site to another (Case, page 38, lines 12-29). On the morning of Jan. 21, it was used by plaintiff for two or two and one-half hours, in the course of which time, as he specifically says, he walked upon and stood upon the very plank in question (Case, page 41, lines 32 to bottom and page 42, lines 1-21) and found no sign of defect or weakness in it (Case page 22, lines 1-8, page 41, lines 16-18; and page 42, lines 15-20). There was mortar and plaster upon it and its appearance and condition in that respect were not distinguishable from the ordinary appearance and condition of planking used in or on scaffolds (Case, page 21, lines 36-40; and page 45, lines 1-16).

If the plank had failed on January 16, when first stepped upon by the plasterers, and plaintiff had shown why it failed, the doctrine of res ipsa loquitur might be applicable. ***But the evidence is that it stood up under the strain and use***

of two laborers all that day, and under the strain and use of one for two or two and one-half hours on January 21, without giving on either day any sign of unfitness, that the scaffold was shifted from time to time as the work progressed, was built in the usual way and of the usual materials and had evidently been used many times and that no cause was given for the breaking of the plank.

In the case of Fukare vs. Kerbaugh, 72 N. J., 254, (Court of Errors and Appeals):

> Fukare was one of a gang of men in employ of Kerbaugh, engaged in the construction of a railroad embankment. The embankment was constructed in this way: A trestle was erected by connecting several bents of timber by stringers upon the top of them; across the stringers were laid ties, and upon the ties, rails. Dirt cars were run upon these rails and the loads of dirt dumped sideways in and about the trestle so as to form the embankment. In order to enable the convenient dumping of the cars a platform was constructed so as to be at the side of the cars when dumped, and upon which the men might stand and lift up one side of the car with crowbars, and so dump it; the platform was made by putting hemlock timbers, four inches by four and eight feet long, under the rails and wedging them, one end being wedged under one rail and the timber passing under the other rail and projecting beyond it some three feet, and upon the projecting part of these timbers planks were laid side by side The

planks were fourteen feet long and three or four were laid side by side. As the railroad embankment was completed the platform was moved along the trestle work, and erected in continuation. Several hundred feet had been built in this way. The platform was erected by the men there employed, with the materials mentioned furnished by Kerbaugh. ***Fukare was injured by a fall which he had because of the breaking of one or more of the timbers upon which were the planks on which he was standing and assisting in dumping a dirt car by using a crowbar and pulling down on it. There is no cause shown for the breaking of the timber. The same sort and dimension of timber, and the same method of construction, had been used for some months upon this very work for the purpose of this platform, and had for a very considerable time been used by the defendant upon other similar work for a like purpose without any accident happening.*** The plaintiff was one of the gang of men engaged in the common service of constructing the embankment and the building of the platform was one of the incidents of that construction. Proper and sufficient materials had been furnished for that construction.

The duty of the master, in this connection, was to use reasonable care that proper material in sufficient quantities for the construction of this platform be provided, and there being nothing in the evidence to show that there was any failure on his part in this respect

the plaintiff has failed to make out a case for a recovery.

In ***Baldwin vs. Atlantic City R. R. Co., 64 N. J. L., 232*** (Court of Errors & Appeals, March 5, 1900) the single question presented by the bill of exceptions was whether the non-suit was proper.

> The sole evidence tending to charge the defendant company with liability for that injury is contained in the following sentences of plaintiff's testimony, given on his direct examination, viz: "Well, I went to board the train; I made the cut and went on toward the train—toward the switch—and then I went to board the train, and as I got on the train the step gave away with me—either gave way or turned under; it let me fall back—just turned right under and cut my foot off". And the answer given by him when asked on cross examination: "What was the matter with the step of the car'", viz: "The step was loose and it gave way when I stepped on it".
>
> The contention on the part of plaintiff is thus stated in the brief of counsel, viz: "The master is bound to furnish his servant reasonably-safe tools. * * * Therefore, the affirmative on the plaintiff is to establish that he was injured by the use of an instrument not reasonably safe. * * * The master in this case did injure his servant by an unreasonably-defective tool; therefore, the master is liable."
>
> This argument is based on incorrect premise.

It is incorrect to characterize the master's duty to the servant as an absolute duty to furnish his servant with reasonably-safe implements and appliances. On the contrary, it has been settled by many concurring decisions in this court and the Supreme Court that the master's duty does not require him to insure the reasonable safety of tools with which, or places about which, his servant is employed, but will be satisfied by his exercising reasonable care that such tools and places shall be reasonably safe for his workman's use.

Fenderson v. Atlantic City Railroad Co., 27 Vroom, 708; Steamship Co. v. Ingebregsten, 28 Id., 400; Comben v. Belleville Stone Co., 30 Id., 226; Electric Co. v. Kelley, 31 Id., 360; S. C. 32 Id., 289; S. C. 28 Id., 100; Atz v. Manufacturing Co., 30 Id., 41; Belleville Stone Co. v. Comben, 32 Id., 353; S. C. 33 Id., 449.

The mere fact that an appliance furnished by the master and used by the servant turned out to be unsafe will not evince the master's liability for the injury resulting from its use unless the circumstances established by the evidence justify the inference that the master had not used reasonable care in originally procuring the appliance or in observing its condition and keeping it reasonably safe for use.

Such was the conclusion of this court in Fenderson v. Atlantic City Railroad Co., ubi supra. ***In that case the plaintiff's injury was occasioned by the breaking of a***

> ***coupler, and the only proof offered to establish the liability of the company was the fact that the coupler broke.*** A non-suit was sustained in this court on the ground that the evidence was insufficient to warrant a verdict charging negligence on the employer. The case before us presents the same feature, and the trial judge rightly applied it when he decided the motion for non-suit in this case.
>
> The judgment must be affirmed.

In the case at bar, (using the language of the case above quoted) ***the circumstances established by the evidence do not justify the inference*** that the master had not used reasonable care in originally procuring the plank or in observing its condition and keeping it reasonably safe for use; for the accident occurred on January 21, 1925; on January 16, 1925, after the scaffold had been erected, ***both plaintiff and his co-laborer worked together on the scaffold*** in laying plaster boards over the ceiling. They worked on the scaffold ***all that day*** with exception of the half hour consumed in building the scaffold, and during that day the two men worked all over the scaffold and shifted the scaffold from place to place as the work progressed (Case, page 38); on January 21, 1925, plaintiff worked for ***two or two and a half hours*** on the scaffold, "he went all over the scaffold," "stood on all the planks" and "worked with his feet on the very plank," which afterwards broke (Case, page 41); the planks were either spruce or hemlock, were proper and safe in respect to their dimensions, and were covered

with mortar and cement, a common condition for planks to be in used as they were, and every plank showed that it had been in actual practical use.

Furthermore, as heretofore pointed out in our review of the testimony in this case, there is no evidence, either affirmative or inferential, that a reasonable care in the inspection of the materials out of which the scaffold was constructed, would have disclosed that the plank in question was not reasonably safe for such use.

> The general rule is that a master is not liable for injuries resulting to a servant by reason of latent defects of which he is ignorant and which could not be discovered in the exercise of reasonable care and diligence.
>
> In the absence of evidence that an inspection would have disclosed the defect which caused the injury, the mere failure to inspect will not warrant holding the master liable.
>
> Reasonable care in the matter of inspection, when inspection is required, requires a master to make such an examination and test as a reasonably prudent man would deem necessary, under the same circumstances, for the discovery of possible defects, and he is not required, unless put upon notice as to the possible existence of defects, to employ unusual or extraordinary tests.
>
> ***Stassett vs. Taylor Iron and Steel Co., 82 N. J. L., 631.*** (Court of Errors and Appeals, 1912).

In the case of ***Randolph vs. N. Y. Central R. R. Co. 69 N. J. L., page 420,*** Mr. Justice Swayze, speaking for the Court of Errors and Appeals, says, on page 422:

> The duty of the employer is to exercise reasonable care and skill in making inspections and tests at proper intervals. Steamship Co. v. Ingebregsten, 28 Vroom, 400, Atz v. Manufacturing Co., 30 Id., 41; appeared in Baldwin y. Atlantic City Railroad Co., 35 Id., 232. This duty is satisfied if the master uses "such reasonable precaution as a man of ordinary prudence would use for the safety of himself and his workmen under the circumstances." ***The master is not bound to exercise extraordinary care or the highest diligence.*** We think this duty is satisfied if the master exercises the same care that is ordinarily exercised, and that one engaged in practical operations is not bound to make either the inspections or the tests which may be possible in a laboratory or upon a small scale and outside of the practical conduct of affairs. The evidence leads us to the conclusion that the ordinary and reasonable inspection did not require the examination with a glass, or by means of water, suggested by Olsen, nor do we think that it required that the hose be subjected to the extraordinary pressure which he suggested.

The scaffold, as well as the plank in question, had been walked all over by two men working on it one day and in addition to this, by the plaintiff further

working on it for two hours on the day of the accident. If the master had tested the plank on the day the scaffold was erected, there is nothing in the evidence to infer that that test would have disclosed the defect in the plank; for his test under the law, need only to have been a practical one, and we know no more practical way of testing the strength of a plank than by raising one end and walking upon it. There is no evidence that such a test would have disclosed a defect in the plank in question because the workmen themselves walked on it for the whole of one day and two hours of another before it gave way.

From the above cases and the application therein of the principles of law pertaining thereto, we insist that the doctrine of ***res ipsa loquitur*** does not apply in the case at bar. ***It does not come within the rule.***

The situations in the two cases first considered by us are most similar to the situation in the case at bar.

The cases cited by the attorney for the defendant, that are within the rule, seem to us to present a situation widely differing from the situation in the case at bar.

In Mackenzie vs. Oakly, 94 N. J. L. 66, (Pages 12-13 of plaintiff's brief), ***the plaintiff was an invitee,*** riding in an automobile, ***operated by*** defendant, which skidded and ran into a telephone pole, severely injuring plaintiff. "The skidding of the machine was apparently due to the fact that

a shower of rain had come up unexpectedly, ***which made the road*** slippery and dangerous, while the automobile was proceeding over a ***high crowned*** road, at a speed not to ***exceed from eighteen to thirty miles per hour,*** according as one may view the credibility of the witnesses." ***"The legal status thus created was that of an invitee, to whom the duty of due care was owing."*** "In this respect the case was properly submitted to the jury as one of fact. ***The situation presented is within*** the rule applicable to an accident, which suddenly and for no apparent cause happens, and yet from the very fact of its occurrence an abnormal situation is presented ***which bespeaks negligence in operation,*** under the rule of res ipsa loquitur, which calls upon the defendant for an explanation to exculpate herself from the legal inference or presumption of negligence arising therefrom." "The situation thus presented evoked an issue of fact for the jury as to whether the defendant's explanation was sufficiently exculpatory. The jury having found for the plaintiff, the legal inference results that the explanation offered was not sufficient, and we are not therefore inclined to disturb the verdict upon the principle of legal liability upon which it was submitted."

The situation in that case was that the ***plaintiff was an invitee,*** to whom the ***duty of due care was owing by defendant in operating her car, and that while the car was being operated at from eighteen to thirty miles an hour over a high crowned road, made slippery and dangerous by rain, it skidded and ran into a telephone pole.***

Naturally, in that case it was for the jury to

say, whether the skidding was ***a mere accident*** or due to ***negligence in operation*** of the car.

It seems needless to remark that the situation in that case is entirely different from the one in the case at bar; ***and the situation is the determining factor as to whether the rule of res ipsa loquitur applies.***

In the case of Higgins vs. Goerke-Kirch Co., 91 N. J. L. 464, (page 13 of plaintiff's brief), the ***situation was likewise entirely different from the case at bar.***

This is also a case of an ***invitee.*** The plaintiff, while visiting defendant's department store, for the purpose of purchasing an ice box, was shown by one of the sales ladies a number of ice boxes standing open for inspection. Plaintiff, while examining one of the boxes, placed her hand on its upper edge for the purpose of enabling her to inspect its lower compartment and while bending down for that purpose, the lid of the box dropped upon her hand, injuring her fingers, the damage to which is sought to be compensated by a recovery in the suit. The testimony on behalf of the defendant presented no substantial variation from that offered for the plaintiff, except to show that the lid was held back by a chain, at an angle of forty five degrees, ***to prevent it falling backward. The inference remained*** that there was no resistance presented by chain, or otherwise, to prevent the lid falling forward, as it did on this occasion. Upon this state of facts, the learned trial court ordered judgment for the defendant, from which the appeal was taken.

In that case, there was sufficient testimony upon

which negligence could be predicated. The plaintiff's expert, (Kutoff) testified to a custom of the trade of keeping the lids upon such boxes closed, which practise, if followed in this instance, would have made the accident impossible. There was in addition the conspicuous fact that the plaintiff was an invitee, which fact cast upon the defendant the duty of using reasonable care for her safety. "The test of negligence in such a situation is whether under the circumstances the defendant used reasonable foresight to prevent harm or damage to the plaintiff lawfully upon its premises". * * * "The case at bar is distinctly actuated by the fact that the plaintiff occupies the status of an invitee to the premises of another, whereby the duty is cast upon the inviter to use reasonable care and foresight to protect one who occupies the status of a guest from harm, or at least to refrain from careless or indifferent conduct in the management and control of its property, upon exhibition, which may prove injurious to one casually examining it, whether the property be a work of art or a domestic utensil, and which examination presents the conspicuous reason for the presence of a guest upon the premises. * * * ***If it be asked what the defendant did that bespeaks negligence, it may be confidently answered, that his tort feasance consisted in doing nothing to render reasonably safe for the inspection of its guests an article which confessedly in its situation was dangerous, and which, by the exercise of right business foresight, it would have known to be dangerous to this invitee to inspect it and who were unconscious of the danger.***"

In the case of Sheridan v. Foley, 58 N. J. L., 230, (cited in plaintiff's brief on page 13), the situation likewise greatly differs from the situation in the case at bar.

In that case an action was brought to recover for personal injuries received by the plaintiff while at work upon a building, and on the trial it appeared, according to the plaintiff's evidence, that ***the defendant, Foley, had a contract with the owner to do mason work on the building, and that the plaintiff's employer had a contract to do the plumbing.*** That while the plaintiff was at work laying a sewer pipe at the foot of one of the walls of the building which the defendant's employees were then engaged in erecting, he was struck upon the head and seriously hurt by a brick which fell, either from the scaffold upon which certain of the defendant's employees were at work engaged in laying a wall or else from the hod of one of the defendant's hod carriers, as he was ascending the ladder to the scaffold with a hod of bricks. Upon this evidence the trial judge non-suited the plaintiff, on the ground that, as he viewed the case, there was nothing in the law or facts that would justify the court in allowing the case to go to the jury.

The opinion in this case was written by Chief Justice Gunmere, and we quote from same.

> It cannot be denied that it was the duty of the defendant ***to so carry on the work upon which he was engaged*** as not to injure other persons ***who were employed upon other work*** upon the same premises, and that if the plaintiff was injured through the carelessness of the defendant, or his

servants, in the performance of their work, he is entitled to compensation for such injury.

It is urged, however, on behalf of the defendant, that the plaintiff was bound, in order to entitle him to a verdict, to prove affirmatively that the injury which he received was caused by the negligent act of the defendant, or of his servant; that the mere proof that the plaintiff was injured by a brick falling from the hod of one of the defendant's hod carriers, or from a scaffolding upon which some of the employees of the defendant were engaged in laying a wall, does not, standing alone, raise any presumption of negligence; and that, as there was no evidence offered to show under what circumstances the brick fell, there was nothing in the case to warrant the jury in inferring that the injury complained of was a result of the carelessness of the defendant or his employees.

Then after a discussion of the general principle of the law of res ipsa loquitur, and a discussion of cases in which the maxim applies, the Chief Justice decided that that case was within the rule, using the following language:

The facts in the present case bring it within the application of this principle. ***The bricks were in the custody of the defendant's servants*** at the time when this one fell, and ***it was their duty to so handle them*** as not to endanger others who were engaged in other work upon the same premises. ***This brick could not have fallen of***

> ***itself,*** and the fact that it fell, in the absence of explanation by the defendant, raises a presumption of negligence.

In discussing the maxim res ipsa loquitur, the Chief Justice said in that case:

> 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 action arose from want of reasonable care.

Then the Chief Justice proceeds to show that the case he is discussing is not within the general principle but ***is within the class of cases*** where the maxim res ipsa loquitur applies. And in demonstrating that it is in that class of cases he shows that it is similar to the case of Kearney vs. London, &c. Ry. Co. and Byrne vs. Voadle.

The situations in both cases of Kearney vs. London, &c. Ry. Co. and Byrne v. Voadle, are entirely different from the situation in the case at bar. In the former of these cases, the plaintiff was passing along a highway under a railway bridge when a brick fell from one of the piers on which the girders of the piers rested, and injured him. The bridge had been built and in use for three years. As the defendants were bound to use due care in keeping the bridge in proper repair, ***so as not to injure persons passing***

along the highway, so unusual an occurrence as the falling of the brick was prima facie evidence from which the jury might infer negligence in the defendant.

In the Byrne vs. Voadle case, the plaintiff was injured by the falling of a barrel from the window of defendant's shop, and there was no evidence to show what caused the barrel to fall. The court held this case within the doctrine of res ipsa loquitur upon the reasoning that "a barrel could not roll out of a warehouse without some negligence, and to say that the plaintiff who was injured by it must call witnesses from the warehouse to prove negligence, seems to me preposterous. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident alone would be prima facie evidence of the negligence".

In the case at bar, the defendant neither exercised nor had any control over the scaffold in question; and in the case at bar the jury could not have inferred from the situation, that if the defendant had inspected the board in question, he could have discovered its defect, because, as heretofore pointed out in this brief, plaintiff walked upon the board for a day and two hours before it gave way.

The above opinion of the Chief Justice, as well as the two cases cited by him, when carefully read, fortify our position that, whether the doctrine of res ipsa loquitur applies or not, depends upon the situation in each particular case.

In the case of Mc Pherson vs. Hudson and M. R. Co., 127 Atl. page 23 (cited on page 15 of plaintiff's

brief), the plaintiff was a passenger, and the defendant a common carrier. The opinion in this case was written by Mr. Justice Katzenbach, and the following quotation from his opinion will demonstrate how far this case is afield from the case at bar.

> ***The plaintiff was a passenger. The defendant was a common carrier. A carrier is bound to use a high decree of care to protect a passenger from danger that foresight can anticipate.*** Rivers v. Railroad Co., 83 N. J. L., 513, 73 A., 883. At the close of the plaintiff's case, the facts proven did not, in our opinion, warrant the granting of the motion to nonsuit. ***The presumption was that the center door was opened by an employee of the defendant. The open door was an invitation to the plaintiff to enter the car. When the door was suddenly closed, catching the plaintiff, the presumption was that it was closed by an employee of the defendant. From these facts there arose a presumption of negligence on the part of the defendant. It was such an accident that its mere happening charged the defendant with negligence,*** and placed upon it the burden of showing that the plaintiff's injury was not due to any fault on its part. The doctrine of res ipsa loquitur applied. The motion to nonsuit was, we think, properly denied.

The case of Prendible vs. Conn. River Mfg. Co., 35 N. E., 675 (cited in defendant's brief on page 17), did not turn upon the application of the

doctrine of res ipsa loquitur, as will appear by the following syllabus of that case.

A stage erected to enable defendant's employees to pile wood is a part of defendant's ways, works, and machinery, within Acts 1887, c. 270, giving a cause of action to an employee who, without negligence, is injured by reason of any defect in the "ways, works, and machinery" used in his employer's business, which arose from, or had not been discovered or remedied owing to the negligence of the employer or his superintendents.

Whether the staging was properly constructed for the purpose for which it was used was for the jury.

Where C was foreman of the gang to which the plaintiff belonged, and looked to see if the men were on hand at the proper time, and placed men at work where he saw fit, and hired plaintiff on his application to him for a job, and the staging on which plaintiff was injured was erected under his direction, and C ordered him to go on the scaffold at the time of the accident, the jury were warranted in finding that C's principal duty was superintendence.

Where C ordered or permitted a whole cart load of woood to be put on the staging at the time plaintiff was injured, when it had been the custom to put only half a load on at a time, the jury might properly infer negligence on C's part.

The case of Stewart vs. Ferguson, 58 N. E., 662, (cited in plaintiff's brief on page 17) turned upon the application of sections 18 and 19 of a New York statute, under the laws of 1897, c. 415 §18, 19. As quoted by plaintiff in his brief, "its fall (meaning the scaffold) in the absence of other producing cause, ***points to the omission of the duty enjoined by the statute upon the defendant to the plaintiff in its construction, and points to it with that reasonable certainty*** which usually tends to produce conviction in the mind in tracing events back to their causes and thus creates a presumption."

In the case of Hutchins vs. Wolfe, 19 L. R. A., 1917, page 500 (cited on page 18 of plaintiff's brief), the doctrine of res ipsa loquitur did not arise at all. That case turned upon the duty of a master to his servant in selecting and furnishing materials for a scaffolding, the duty of the servant in inspecting such material, and a question of contributory negligence on the part of the plaintiff.

The other cases cited in plaintiff's brief on the doctrine of res ispa loquitur, we have not distinguished from the case at bar, for the simple reason that we have not access to them.

We note in concluding under this point in plaintiff's brief, he states that defendant directed the erection of the scaffold, and was present when it was erected and supervised the erection. These statements are contradictd by the testimony; and

there is nothing in the testimony to draw such an inference. He further states that the scaffold is in defendant's possession, and that defendant knows just what happened to the scaffold, and could very easily explain the occurrence. There is not a scintilla of evidence that the scaffold is in the possession of plaintiff, or that he knew just what happened to the scaffold, and could very easily explain the occurrence. The fact is that, according to the plaintiff's own testimony, he was the only one present when the accident happened, and naturally he is the only one that knows just what happened to the scaffold, and the only one that could very easily explain the occurrence. The trouble in this case is, not that the defendant is seeking to suppress the facts, but that the plaintiff declines to testify as to the facts. He just says that the plank gave way and broke, and for some reason best known to himself, does not see fit to let the court and jury know why the plank gave way and broke.

We respectfully submit that the doctrine of res ipsa loquitur does not apply to the case at bar. As we have heretofore pointed out, that doctrine is governed ***by the situation*** in the case to which it is to be applied or not applied; and that doctrine, in accordance with its application by the New Jersey Court of Appeals, should not be applied in ***a situation like*** that in the case at bar. We further respectfully submit that there was no omission or negligent performance of any duty owing by defendant to plaintiff.

B.

THE CASE AT BAR DOES NOT COME IN THAT CLASS OF CASES, WHERE THERE IS A PUBLIC DUTY TO EXERCISE CARE AND SKILL ON THE PART OF THOSE HAVING CHARGE OF INSTRUMENTS, WHICH, IF MISMANAGED, ARE HIGHLY DANGEROUS TO THE LIVES AND PERSONS OF THOSE WHO HAPPEN TO BE IN THEIR NEIGHBORHOOD.

This argument is in answer to the argument raised on pages 7-10, inclusive of plaintiff's brief.

Plaintiff premises his argument on this point on the proposition that there is not the least conventional relation between the plaintiff and defendant in the case at bar, and that there was no duty, arising from contract, incumbent on the defendant in favor of the plaintiff, but that there is a duty due from the defendant to the public by force of the transaction.

(1) In the case at bar, plaintiff and Peter Schlossman, who built the scaffold, were fellow servants (Case, page 21, lines 13-23; page 36, last 7 lines; and page 37, lines 1-19). Plaintiff carried the planks in and laid them on the floor, and his fellow workman built the scaffold (Case, page 37, line 30; and page 14, lines 29 to bottom; and page 15, lines 1-6). Plaintiff says that about ten planks were used in the scaffold, and that he carried in twelve or fourteen planks (Case, page 43, lines 20-30); and elsewhere in speaking of the planks out of which the scaffold was constructed, he says that there "was an abundance for the pur-

pose" (Case, page 37, lines 37-38). He further testifies that his co-worker, Peter Schlossman, often built scaffolds, knew how to build them, and that plaintiff often worked upon scaffolds which Schlossman built, and that ***on January 16th plaintiff relied upon Schlossman's judgment both as to the manner of the construction of the scaffold and as to the material which went into it*** (Case, page 47, lines 1-29).

Plaintiff and his fellow-servant used the scaffold in performance of their work for their employer, Cornelius Schlossman.

Defendant neither constructed the scaffold, nor controlled or directed how it should be built, nor exercised any control of the use of it after it was erected.

Under such a state of facts, the principle enunciated in Van Winkle vs. The American Steam Boiler Co., 52 N. J. L., page 240, does not apply. The case referred to is relied upon by plaintiff in his brief to substantiate the proposition under discussion (Plaintiff's Brief, page 7, bottom, and pages following). On page 10 of his brief, plaintiff says that the case of Van Winkle vs. Steam Boiler Co.

> clearly lays down the rule that there is a public duty to exercise care and skill incumbent on those having charge of instruments which, ***if mismanaged,*** are highly dangerous to the lives and persons of men who happen to be in their neighborhood, and for the non-performance of such duty a person specially injured thereby is entitled to sue.

The case at bar is controlled by the principle applied in Callahan vs. Trustees of Phillips Academy (Mass.) 62 N. E., 260. In that case the planking for a scaffold was furnished by an independent contractor (the plaintiff's employer). The defendant provided the uprights and the ledger boards for the scaffold. A defective ledger board broke and caused the servant of the independent contractor to fall. The court said, in effect, that the burden was "on the plaintiff to prove a violation of defendant's duty to see that such materials" as it provided "should be suitable for the purpose; and to prove such violation, he had to prove that there were not suitable boards" in the whole quantity supplied "from which a proper scaffold could be made."

In the case at bar, the evidence is that the defendant supplied a larger quantity of material than was put into the scaffold; and there is no evidence that sufficient suitable plank could not have been found among the surplus provided, (assuming that the plank which broke was, in fact, defective).

> 2. "In Van Winkle vs. American Steam Boiler Co., the owner was held to a high degree of care, but ***the case was decided on demurrer; and called for no ruling on the quantum of evidence.***"

We quote from the opinion of Mr. Justice Parker, speaking for this court, in Levendusky vs. Empire Rubber Mfg Co., 84 N. J. L., 698.

In the Van Winkle case, the plaintiff was injured by the explosion of a large steam boiler, and

in the Levendusky case by the explosion of a vulcanizer. A careful perusal of this case clearly shows that the Court of Errors and Appeals said, in effect, that nothwithstanding the Van Winkle case, the rule applied in that case is unsettled. The opinion reads:

> We assume the condition most favorable to plaintiff, that at the moment of the explosion the relation of master and servant did not exist as between the plaintiff and defendant, and that defendant's duty to him was the same as to any passerby on the highway. Whether in such a case proof of the occurrence of this explosion, without more, would establish a prima facie case of negligence is not satisfactorily settled. Some of the cases discriminate between the duty of exercising ordinary care and that of exercising a high degree of care, recognizing a presumption of negligence in the latter case but not in the former * * * Others recognize it in the case of injury to a stranger but not if the injured party be a servant. * * * It is laid down that the explosion of a steam boiler is not, per se, evidence of negligence. * * * Such is the rule in New York. * * * In our own State it was held in the Supreme Court that the owner of a steam boiler is not liable for its explosion in the absence of negligence. * * *

Thereupon follows the observation quoted by us that the case was decided on demurrer, &c.

In deciding that case, Justice Parker continues:

> We need not undertake to reconcile the conflicting authorities or to judge between them, for the case falls plainly within the rule laid down in Bahr vs. Lombard, Ayers & Co., 24 Vroom, 233.

He then disposes of the case in favor of the defendant ***upon the theory that if the plaintiff's case showed him to be possessed of material but undisclosed evidence, the mere proof of the occurrence of an accident raises no presumption of negligence, to rebut which the defendant can be called upon to offer testimony.***

It is upon the same theory the case at bar should be disposed of.

Plaintiff was a lather of twenty-nine years experience and was familiar with the building of scaffolds (Case, page 31); he described in detail how the scaffold is built (Case, page 13), and says that he sometimes built them himself (Case, page 13, lines 36-37). After the accident he was unconscious for about a second (Case, page 20, lines 16-17). His witness, Waterson, testified that after the accident plaintiff came into his office, which was located in front of the warehouse, and asked him to call up Schlossman; that plaintiff came into the office by himself, unaccompanied and unassisted, and then returned into the warehouse again (Case, page 48). This witness further says that Mr. Schlossman told him over the telephone that he would be over in about 15 or 20 minutes, and that in the meantime a man named Anderson came in, and that the witness and Anderson helped plaintiff into an automobile (Case, page 49). After Anderson arrived, the witness and Anderson ***went into the***

warehouse and helped plaintiff out and into an automobile (Case, page 48). In his direct examination, plaintiff's witness, Waterson, was silent in regard to the broken plank; and on cross examination (Case, page 50), when asked:

> Q. Did you notice a broken plank? A. No, sir. I was not in far enough for that —only to carry the man out.

Plaintiff did not produce Anderson at all nor accounted for his absence.

Plaintiff does not say that he did not go into Waterson's office and returned to the warehouse. The evidence is that he did both these things and does not explain why he went back alone into the place where he received his injury or what he did after he got back there.

In the case of Bahr vs. Lombard, Ayers & Co., the court, after discussing the application of the doctrine of res ipsa loquitur, continues:

> In the present case it is not necessary to discuss either the existence of such a doctrine or its harmony with the accepted canons of proof, for the reason that its application, in any event, must depend upon whether the party invoking it has adduced all of the testimony reasonably within his power, for it is in such cases only that the rule in question is applied by those who maintain its soundness.* * *In any aspect of the law, therefore, it must be conceded that unless a plaintiff has presented the testimony which was reasonably within his power, he can derive no benefit from the proposed doctrine.

In the case at bar, Schlossman, who was to arrive upon the premises in about fifteen minutes, must have been interested in the cause of the accident. Plaintiff did not call him as a witness.

3. So far as our diligent researches have discovered, the broad doctrine under discussion has never been applied to scaffold cases in this jurisdiction.

In Levendusky vs. Empire Rubber Mfg. Co., this court seemed to be in doubt as to whether that doctrine applied even in so highly dangerous an instrument as a steam boiler.

In Heckel vs. Ford Motor Co., 128 Atl., 242, this court applied the doctrine where plaintiff was injured by the bursting of a pulley attached to a Fordson tractor, which was connected with a circular saw. After the tractor had been running but a short time, there was an explosion and plaintiff was struck by a piece of metal. Of course, this is an instance of a highly dangerous instrument operated under power. Even in this case the court did not hold the manufacturer of the instrument to the highest degree of care; for it held that the manufacturer of an appliance that will become highly dangerous, when put to the uses for which it is designated and intended, because of defects in its manufacture, owes to the public a duty, irrespective of any contractual relation, to use ***reasonable care*** in the manufacture of such an appliance.

We think the judgment of non-suit should stand.

Respectfully submitted,
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New Jersey Court of Errors and Appeals

ABRAM HOLMES, *Plaintiff-Appellant,* *vs.* STEPHEN PELLIGRINO, *Defendant-Respondent.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*

BRIEF IN BEHALF OF THE APPELLANT.

(1)

Statement of the Case.

This appeal brings before this court for review a judgment of non-suit rendered in the Supreme Court at the Bergen Circuit by Judge William A. Smith in an action wherein Abram Holmes brought suit against Stephen Pelligrino to recover damages for personal injuries sustained by him on January 21, 1925, when he fell from a scaffold while he was plastering the ceiling of one of the rooms in defendant's premises. The defendant provided the scaffold and it was claimed that due to its defective condition the plaintiff was caused to fall (p. 2; p. 11, ll. 10-20).

At the close of the plaintiff's case, counsel for the defendant moved for a non-suit on two grounds; first, that the plaintiff was guilty of contributory negligence; and second, that there was no breach of any duty owing by the defendant to the plaintiff and no negligent performance of any duty (p. 66). The motion was granted, an exception was noted (p. 68) and this exception is preserved in the grounds of appeal (p. 1). It is from the judgment entered

on that ruling that the present appeal is taken (p. 9).

(2)

Grounds of Appeal.

But one ground of appeal is urged, as follows (p. 1):

> "The trial court non-suited the plaintiff when thereunto moved by the attorney for the defendant, whereas said motion should have been denied and the issues submitted to the jury for their decision."

(3)

Brief of the Argument.

I.

The trial court erred in non-suiting the plaintiff.

In non-suiting the plaintiff the trial court based its decision on the ground that "the portion of the complaint here, to the effect that it was the duty or the obligation, or that the obligation was assumed by the defendant, to construct the scaffold, has not been sustained, and therefore we are at the point of the case where the defendant here has furnished the material to the master of the plaintiff for the construction of this scaffold." This statement is rather ambiguous, although what the court intended to say is quite clear, namely, that he failed to find any duty on the part of the defendant to use reasonable care to provide the plaintiff with a scaffold reasonably safe to be used as such.

It is our contention that the law cast a duty on the defendant to exercise care and skill to

have the scaffold reasonably safe for the plaintiff and that for the non-performance of that duty the plaintiff is entitled to sue because he was injured thereby.

We shall first give a resume of the facts and then proceed to a discussion of the law.

(a)

The plaintiff was the only witness called to prove the facts concerning the liability of the defendant for the accident. He was the only person on the defendant's premises at the time the accident happened. He was employed by one Schlossman as a plasterer or latherer. At the time of the accident on January 21, 1925, he was working on the premises of the defendant in Gardner street, Passaic (p. 11, l. 10, to p. 12, l. 10). His work was that of putting plaster boards on the ceiling of the premises about eighteen feet from the floor (p. 12, ll. 10-20). The defendant furnished the scaffold (p. 12, ll. 30-35). He was at the premises on January 16, 1925, when the material of which the scaffold was built was brought into the defendant's premises. The scaffold consisted of four wooden horses and two lengthwise planks which fit into sockets, and these lengthwise planks had cross planks or cross members which were laid across the lengthwise planks (p. 12, l. 35, to p. 13, l. 10). This material was brought to the premises at the direction of the defendant by the defendant's driver who operated the defendant's truck to the premises (p. 13, ll. 10-30). When the material was brought to the premises the defendant ordered Peter Schlossman, who was a brother of the plaintiff's employer, to construct a scaffold so that the plaintiff's employer could

go ahead with the work, for the defendant did not want the job delayed (p. 13, ll. 30-40). When the scaffold was delivered to the premises, defendant said to Peter Schlossman, "Get the scaffold up so that your boys can go ahead on this job and get to work—get on the scaffold and get to work" (p. 14, ll. 1-10). Plaintiff assisted Peter Schlossman in carrying in the planks from the sidewalk to the building, having been ordered to do so by the defendant (p. 14, ll. 30-40). After the material had been brought in the defendant said to Peter Schlossman, "Get that scaffold up and get it ready so that your brother's men can get to work on it. I don't want to delay this job any longer; I don't want your brother coming here and say I am holding the men up on account of my scaffold is not here and put up" (p. 15, ll. 20-35). After the scaffold was put up at the direction of the defendant by Peter Schlossman (p. 15, l. 30, to p. 16, l. 20), the plaintiff used the scaffold in the defendant's building putting up the plaster board on the ceiling (p. 16, ll. 30-40). The ceiling was about eighteen feet above the floor and the cross members or cross planks upon which he was standing were between ten and twelve feet from the ground (p. 16, l. 30, to p. 17, l. 10). In doing the work the plaintiff would stand on the cross plank with his head underneath the plaster board, which he would hold with his head, while he put the nails in it to hold it to the ceiling (p. 17, ll. 10-30). While he was doing that work, the plank upon which he was standing broke, precipating him to the floor below (p. 17, l. 30, to p. 18, l. 30). The lengthwise planks running from one horse to another did not break but it was the cross plank or the cross member laid across the lengthwise planks that did (p. 19, ll. 10-20). The cross member

gave way and broke in half while the plaintiff was standing directly upon it about to put a plaster board to the ceiling and as he was in the act of nailing the plaster board to the ceiling (p. 19, ll. 20-40). The floor below was made of concrete and he fell on his side on the floor (p. 20, ll. 10-20) and suffered very serious injuries, according to the testimony of the doctors as well as that of the plaintiff.

At the time the cross member plank gave way and broke, the plaintiff was the only one on the scaffold and no one else was present (p. 21, ll. 20-35). The plank that gave way was all covered with mortar and plaster and there was nothing about its appearance or condition which indicated that it was insecure or in an unsafe condition to be used (p. 22, ll. 1-10).

On cross examination the plaintiff testified that he was accustomed to working on scaffolds and occasionally built them himself; that he sometimes assisted his fellow workmen in the construction of scaffolds and that he thought he knew how they should be constructed and of what materials they should be built. He denied, however, that where the scaffold was built for him that it was his practice or that of the trade to test the fitness of the planks in order to determine whether they were proper for a scaffold (p. 32, ll. 20-40). He never would examine a scaffold provided for him and that nobody does. It was not his practice to find out for himself whether or not the materials that are used are proper to form part of a scaffold (p. 33, ll. 20-40). He did not examine the wood of which the planks were made and he did not know whether they were made of spruce, hemlock or some other wood (p. 34, ll. 30-40). He did not examine the plank to determine what wood it

was made of and he was no expert on wood (p. 35, ll. 1-10). Furthermore, he said, "Anyhow, you could not tell what they were made of, covered up with mortar and plaster. You would have to take off a day to knock the plaster off before you could really examine the plank" (p. 35, ll. 1-15). The planks were about twelve feet long and about eight inches wide by two inches thick (p. 35, l. 35, to p. 36, l. 10). Those dimensions were all right for planks in a scaffold (p. 36, ll. 10-20). While the scaffold was being built the plaintiff was carrying in one hundred and fifty plaster boards (p. 37, l. 10). Whenever the scaffold was moved it was moved by Mr. Peter Schlossman, brother of the plaintiff's employer (p. 38, ll. 20-25). The building in which the work was being done was a warehouse; a very large building (p. 39, ll. 1-10). Plaintiff had not worked there two days when the accident happened (p. 39, ll. 10-15). He had worked on the scaffold for two hours and a half prior to the accident and had used all of the planks to stand on them in putting up the plaster board. At no time had he moved the scaffold (p. 41, ll. 20-40).

The foregoing is a resume of all the plaintiff's testimony with respect to the facts concerning liability of the defendant.

In *Andre* v. *Mertens*, 88 N. J. L. 626, this court held that in passing upon motions to nonsuit the court cannot weigh the evidence but must take as true all evidence which supports the view of the party against whom the motion is made and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor. Where fair-minded men might honestly differ as to the conclusions to be drawn from the facts, whether controverted

or uncontroverted, the question at issue must go to the jury. *Nolan* v. *Bridgetown, &c., Traction Co.*, 74 N. J. L. 196. It must, therefore, be taken as true in this case that the defendant not only owned the warehouse building in which the work was being done, but that he provided the material of which the scaffold was constructed and directed the construction thereof. He said, speaking to the brother of the plaintiff's employer, "I don't want your brother coming here and say I am holding the men up on account of my scaffold is not here and put up" (p. 15, ll. 30-40). The jury, if it believed this testimony, had the right to conclude that as between the plaintiff's employer and the defendant, the latter was to not only provide but construct and erect in position for use the scaffold upon which the work of the plaintiff was to be performed. The defendant's driver with the defendant's truck brought the planks and wooden horses to the building where the defendant was and the defendant personally supervised the construction of the scaffold and demanded its erection immediately so that the plaintiff's employer would not charge him with failing to live up to his part of the bargain, whatever it was, to provide, construct and erect a scaffold upon which the plaintiff might work. The jury had a right to find that the scaffold was thus constructed in the presence of the defendant, under his direction and orders, and the legal question arises whether the facts stated charged the defendant with any duty to the plaintiff.

The leading case on the subject in this State is *Van Winkle* v. *The American Steam Boiler Co.*, 52 N. J. L. 240, which has been recently approved and followed by this court in *Heckel* v. *Ford Motor Co.*, 128 Atl. 242. In the Van

Winkle case Chief Justice Beasley, at page 248, in support of the doctrine he was there enunciating, refers to the case of *Heaven* v. *Pender*, 11 Q. B. Div. 503, which is directly in point with the case at bar. Quoting from the Van Winkle case, at page 248:

> "It is conceived that the well known case of Heaven *v.* Pender, 11 Q. B. Div. 503, falls properly within this category. This was the affair to be adjudicated: A dock owner, in hiring his dock, supplied, under a contract with the ship owner, a painter's stage, to be slung in the ordinary way, outside of the ship, in the process of painting her. The plaintiff, a man in the employ of the master painter, was hurt in using the sling, owing to its imperfect condition. The suit was against the owner of the dock by the employe thus injured, and consequently there was not the least conventional relation between these parties to the action. There was no duty, arising from contract, incumbent on the defendant in favor of the plaintiff; but it would seem that there was a duty due from the former to the public by force of the transaction. The stage in question appears to belong to the class of instruments dangerous, if out of order, in a very high degree, to the bodies, and even lives, of those who might use them; and hence, as the stage in question was greatly out of order, it was manifest that the defendant had been grossly negligent; he had failed to discharge the duty imposed on him by law to exercise the greatest care when the personal safety of others was dependent on his conduct. This would seem to have been the necessary element in the case leading to the result attained, for it is not to be supposed that if the stage had been provided, not as a standing place for the workmen, but as a place of deposit for their tools and paint, and the injury, by the giving way of the stage, had been confined to damage done such articles alone, it would have been

held that the action had been well brought. On the theory of a breach of duty as just indicated, the case is not to be distinguished, in respect to the application of legal rules, from the case already cited from 4 C. P. Div."

The reasons upon which the rule rests are stated by Chief Justice Beasley at page 246 of the Van Winkle case. Speaking of the case then being decided, he said:

"The plaintiff was the owner of the adjacent property, near to the place of this boiler; the machine, unless carefully operated, was dangerous to everything in its immediate neighborhood; no one could open his eyes and not see this situation, for, in this respect, *res ipsa loquitur;* plainly, therefore, the owner of the machine, even according to the limited rule adopted by the courts of this country, was answerable to the plaintiff for the results of the careless management of such machine; and so, for a like reason, as we think, must every person be similarly responsible who participates in a substantial degree in such management, whether he be a contractor with the owner, or his servant, or even if he be a mere volunteer. The situation itself creates the duty to exercise care and skill in a high degree in every one who meddles in a matter fraught with such peril to the property of another. The defendant, the insurance company, as soon as it took part, practically, in the management of this machine, became subject to a duty in that particular by virtue of its contract with the Ivanhoe Paper Mill Company to conduct itself with care and skill and by virtue of the law to a similar duty towards the plaintiff; and it is the violation of this latter duty which, we think, forms a legal foundation for this action.

And it would seem that there is a broader ground that the one above defined on which the present case can be based. It is this,

that in all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, *ipso facto,* imposes as a public duty the obligation to exercise such care and skill. The law hedges round the lives and persons of men with much more care than it employs when guarding their property, so that, in this particular, it makes, in a way, every one his brother's keeper, and, therefore, it may well be doubted whether in any supposable case redress should be withheld from an innocent person who has sustained immediate damage by the neglect of another in doing an act which, if carelessly done, threatens, in a high degree, one or more persons with death or great bodily harm."

The case of *Van Winkle* v. *The American Steam Boiler Co.,* 52 N. J. L. 240, which clearly lays down the rule that there is a public duty to exercise care and skill encumbent on those having charge of instruments which, if mismanaged, are highly dangerous to the lives and persons of men who happen to be in their neighborhood; and for the non-performance of such duty, a person specially injured thereby is entitled to sue, has been repeatedly followed. See *Guinn* v. *Del. & Atl. Telephone Co.,* 72 N. J. L. 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988; *Piraccini* v. *Director General,* 95 N. J. L. 114, 112 Atl. 311; *Republic of France* v. *Lehigh Valley R. R. Co.,* 96 N. J. L. 25, 114 Atl. 242; *Barnett* v. *Atlantic City Electric Co.,* 87 N. J. L. 29, 93 Atl. 108; *Tomlinson* v. *Armour & Co.,* 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; *Heckel* v. *Ford Motor Co.,* 128 Atl. 242.

We, therefore, submit that the defendant in this case owed a duty to the plaintiff to exercise reasonable care to provide him with a scaf-

fold which would not break when being used for the very purpose for which it was being provided, and this is so, to use the language of the Van Winkle case, where the person providing the scaffold is the master, the owner of the building or even if he be a mere volunteer. The situation itself creates the duty to exercise care and skill in a high degree in every one who meddles in the matter.

(b)

The second ground upon which the trial court granted the motion for non-suit was that there was no violation of the duty of reasonable care, assuming that it was owing to the plaintiff by the defendant, because the doctrine of *res ipsa loquitur* did not apply and there was no evidence as to what caused the cross plank or cross member of the scaffold to break.

We shall not reiterate the facts which are stated above except to say that it is quite clear from the testimony that the plank which gave way and broke was one of the cross member planks which rested on the lengthwise planks, which latter planks rested in sockets on the wooden horses (p. 19, ll. 10-20). One of the cross member planks broke in half (p. 19, ll. 20-25). At the time the plaintiff was standing directly on that plank and he was just about to put a plaster board to the ceiling and was in the act of nailing the plaster board. It was then that the cross member plank gave way and broke (p. 19, ll. 25-40). It was all covered with mortar and plaster (p. 21, ll. 35-40), and there was nothing about its appearance or condition that indicated that it was in a defective or unsafe condition (p. 22, ll. 1-10). It was not cus-

tomary for plasterers or latherers to inspect scaffolding provided for them, according to the plaintiff, whose experience in using scaffolds extended over a period of more than twenty years (p. 32, ll. 10-40). The plaintiff had worked on the scaffold on January 16th and again on January 21st, the day of the accident (p. 37, ll. 1-20). On the morning of the accident he had worked for two hours and a half before it happened, but at no time did he have occasion to move the scaffold and prior to the accident he had walked all over the scaffold without falling and he had stood upon the very plank which broke in half prior to the time of the accident (p. 41, ll. 20-40).

It is clear that the manner in which the scaffold was erected had nothing to do with the accident. It was the inferior quality and unsafe condition of one of the cross member planks which caused the accident. That plank broke in half when it should have sustained the weight of the plaintiff and as a result he was precipitated from his position above the concrete floor to the concrete floor. He sustained serious injuries. After the accident he could not and did not examine the plank or preserve it because he was helpless. It remained in the defendant's possession where, presumably, it has remained ever since. Complete knowledge respecting the condition of the scaffolding, the manner in which it was constructed, the breaking of the cross member plank and the reason for its breaking is with the defendant and all that the plaintiff can do is to testify to the manner in which the accident happened. It is clear that the doctrine of *res ipsa loquitur* applies.

Mackenzie v. *Oakley,* 94 N. J. L. 66;

Higgins v. *Goerke-Kirch Co.,* 91 N. J. L. 464, and cases therein cited;

Sheridan v. *Foley,* 58 N. J. L. 230, and cases therein cited.

In the Mackenzie case, *supra,* the doctrine was applied where an automobile in which the plaintiff was a guest skidded on a highway. The defendant claimed the skidding was caused by the slippery condition of the highway due to a sudden shower; whether that explanation was sufficient the court held was for the jury.

In the Higgins case the doctrine was applied when the top lid of an icebox closed on the plaintiff's hand which she had placed on the upper edge of the box for the purpose of enabling her to inspect the lower compartment. It was held that common knowledge and experience would indicate that such an occurrence, unexplained, raised a legal presumption of negligence on the part of the defendant. The Supreme Court, in that case, referred to a number of cases, all of which were governed by the doctrine of *res ipsa loquitur,* namely, where the plaintiff, while on the sidewalk, was injured by the falling of a wall. *Mullen* v. *St. John,* 57 N. Y. 567. Where a brick fell and injured a laborer in a building in process of erection, it was held, "It will be presumed from the mere happening of such an accident, in the absence of explanation by the contractor, that it occurred from want of reasonable care." *Sheridan* v. *Foley,* 58 N. J. L. 230, *supra.*

In the latter case Chief Justice Gummere gives a number of examples of the application of the doctrine. In one the plaintiff was passing along a highway under a railroad bridge when a brick fell from one of the piers on which

the girders of the bridge rested and injured him. A train had passed over the bridge shortly before the accident but the evidence failed to disclose whether it was a train of the defendant company or of another railway company which also used the bridge. The bridge had been built and in use for three years. The Court of Queen's Bench held that the maxim applied; that as the defendants were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, so unusual an occurrence as the falling of a brick was *prima facie* evidence from which the jury might infer negligence in the defendants, and the principle was unanimously affirmed by the Court of Exchequer Chamber on the argument of the appeal. *Kearney* v. *London, &c., Railway Co.*, L. R., 5 Q. B. 411; S. C. on appeal, L. R., 6 Q. B. 759.

Another case referred to in the Foley case was that of the falling of a barrel from the window of the defendant's shop. There was no evidence to show what caused the barrel to fall, nor was there any direct evidence to connect the defendant or his servants with the occurrence. The court said: "There are certain cases which it may be said are *res ipsa loquitur*, and this seems one of them. * * * It is true that there are many accidents from which no presumption of negligence can arise, but this is not so in all cases. Suppose, in this case, the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out; and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A

barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence, seems to me preposterous. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence." *Byrne* v. *Boadle,* 2 H. & C. 722.

Again, in *McPherson* v. *H. & M. R. R. Co.,* 127 Atl. 23, affirmed 128 Atl. 231, it was held that the doctrine of *res ipsa loquitur* applied where the center door of a passenger coach, operated by air pressume, closed upon the plaintiff as she was entering the coach, although there was no proof as to who closed it or what caused it to close. The Supreme Court said: "It was such an accident that its mere happening charged the defendant with negligence. The doctrine of *res ipsa loquitur* applied."

Likewise, the doctrine has been applied to the falling or breaking of scaffolds. Thus, in *Westland* v. *Gold Coin Co.,* 101 Fed. 59, the deceased was employed in a mine nine hundred feet below the surface on a stull which had been erected by the defendant company in one of the levels of its mine so as to enable the deceased with other employees to stand thereon while breaking down the mineral bearing rock. While the deceased was at work on the stull in the usual way shortly after a blast had been fired, the stull fell and the deceased was killed. It was found that the stull was broken about in the center and two witnesses expressed the opinion that it was insufficient to support the weight which the stull was intended to carry. The defendant offered evidence that the stull was con-

structed with timbers that were usually used for that purpose. The court said: "The fact that the stull fell demonstrates that it was insufficient to support the load with which it was burdened at the time it fell. Hence, the fall of the structure suggests forcibly that the stull timbers were insufficient either in strength or number, or that the supports let into the side walls of the vein were insufficient, and that proper care had not been exercised by those who erected it. * * * A reasonable person might very well have reached the conclusions last stated by force of the maxim, *res ipsa loquitur.*"

So, in *Cleary* v. *General Contracting Co.,* 53 Wash. 254, 101 Pac. 888, the plaintiff, while in the employment of the defendant, was injured by the fall of a scaffold furnished by the defendant, and the court, in holding that the maxim applied, said: "When the servant shows that the master furnished him an instrumentality to be used for a particular purpose, that he used it for the purpose intended, in the manner intended, and that it broke when being so used, and injured him, he makes out a *prima facie* case of negligence against the master."

And the maxim was held applicable, where the collapse of a scaffold took place at a time when there was no weight on it beyond what it was intended to bear. *Cook* v. *Duncan,* 20 Sc. Sess. Cas. 2d series, 180, cited in 2 Labatt on Master & Servant, p. 2304.

In *Giles* v. *Thames Ironworks Shipbuilding Co.,* 1 Times L. R. 469, where the plaintiff recovered a judgment for injuries received because of the fall of an alleged defective scaffolding, a new trial was denied, one of the court observ-

ing that the plaintiff had proved the accident, and the defendant had chosen to offer no evidence as to the conditions of the scaffolding.

In *Prendible* v. *Connecticut River Mfg. Co.*, 160 Mass. 131, 35 N. E. 675, it was held that the doctrine applied where a staging erected by the side of a wood pile, and used for the purpose of enabling the workman to pile the wood higher, was built under the direct supervision of one standing in the place of the master, and fell while it was being used under his commands.

In *Stewart* v. *Ferguson,* 164 N. Y. 553, 58 N. E. 662, the plaintiff's intestate was killed by the fall of a scaffold upon which he was standing. There was no evidence tending to prove the cause of the fall other than the fall itself, and the trial court instructed the jury that the falling of the scaffold raised a presumption of negligence on the part of the defendant. The appellate court sustained the trial court, and said: "The evidence tended to show that this scaffold was not overloaded, but was bearing the weight usually required in the performance of the labor for which it was an appliance. *Prima facie* it was so constructed as to bear less than one-fourth the weight required by section 19. Its fall, in the absence of evidence of other producing cause, points to the omission of the duty enjoined by the statute upon the defendant to the plaintiff in its construction, and points to it with that reasonable certainty which usually tends to produce conviction in the mind in tracing events back to their causes, and thus creates a presumption."

In *Talge Mahogany Co.* v. *Hockett,* 55 Ind. App. 303, 103 N. E. 815, it was held that the doctrine of *res ipsa loquitur* applied where per-

sonal injuries were sustained by the plaintiff while working upon the defendant's premises by his invitation and using a scaffold which the defendant had agreed to furnish, the fall of the scaffold being the cause of the plaintiff's injuries. The case held that the mere falling of the scaffold cast upon the defendant the burden of explaining the accident.

A case directly in point is *Hutchins* v. *Wolfe,* 127 Minn. 337, 149 N. W. 543, 19 L. R. A. 1917f, 500, where it appeared that a plank in a scaffold broke as in the case at bar. The defendant delivered the material of which the scaffold was made to the premises and the plank formed part of the material thus sent to the premises and was provided expressly for scaffolding purposes and it was devoted to that purpose by the defendant. The court said that the doctrine of *res ipsa* applied. The court also said: "In such case the servant is not charged with the duty of examining the material so furnished to determine whether it is fit and suitable, but may rely upon the judgment of the master that it is proper and safe and that the master acted with due care in selecting the same."

Finally, it is well settled that the doctrine is particularly applicable where the question of negligence is of such a character as from its very nature almost all the evidence which could be adduced on the subject must lie in the possession of the defendant. That is the fact in the case at bar. 5 Negligence Compensation Cases Ann., p. 4.

The defendant provided the material of which the scaffold was made; he directed its erection; he was present when it was erected and supervised the erection. Not only the testimony but

the inferences to be drawn from the testimony fully support such a conclusion on the part of a jury. The scaffold was made to stand on and the plaintiff was standing on it in the manner intended by the defendant, doing the very work which the defendant desired done. There was no unusual weight put on the scaffold and the plaintiff was the only one standing upon it. The planking itself was not visibly defective or unsafe. It had been used before, presumably, by the defendant, for it was covered with mortar and plaster and the defendant knew or should have known where it was used, how often it was used and whether it could be used again. At any rate, it is in his possession and he knows just what happened to the scaffold and could very easily explain the occurrence.

We respectfully submit that the doctrine of *res ipsa loquitur* applies to this case.

(c)

One other ground was urged by counsel for the defendant in support of his motion for nonsuit, namely, that the plaintiff was guilty of contributory negligence *as a matter of law.*

The trial judge refused to so hold (p. 68, ll. 35-40). While that question might be one which the trial court would have to submit to the jury, assuming that there was some evidence to support the contention, which there was not in the case at bar, it is clear that the plaintiff could not be held guilty of contributory negligence as a matter of law when he was doing the very thing he was employed to do on the very scaffold which the defendant provided, constructed and erected; the scaffold upon which he had worked for a day and a half prior to the accident. In-

deed, he had stood on the very plank on the morning of the accident prior to the time when it broke in half and fell with him to the concrete floor below. That he was not guilty of contributory negligence as a matter of law is clear.

In the leading case of *Hutchins* v. *Wolfe,* 127 Minn. 337, 149 N. W. 543, L. R. A. 1917f, 500, it was held that where the master selects and furnishes material for scaffold purposes, to be used for that purpose only, the servants may assume that in selecting the same the master exercised due care and they are not required, before using it, to determine whether it is suitable for the purpose.

In the case at bar the plaintiff did not select the material for the scaffold. He did not even erect the scaffold. The defendant provided the material and supervised and directed the erection of the scaffolding and the plaintiff had no hand in that work. He was not a servant of the defendant at the time. It was fully completed and in condition for use when the plaintiff proceeded with his work of putting up plaster boards.

In *Hoveland* v. *National Blower Works,* 134 Wis. 342, 114 N. W. 795, 14 L. R. A. (N. S.) 1254, the court held that the presumption, if any, that a servant who selected materials for the erection of a scaffold which fell and caused his injury, picked out the particular plank which gave way and saw an auger hole in it and knew that the plank might be used in the scaffold, and evidence that the auger hole was readily observable, did not make out an affirmative case of contributory negligence justifying a non-suit where the servant testified that he did not see the hole and did not pick out the plank.

The question of contributory negligence, at most, was clearly one of fact for a jury and not one of law for the trial court.

Deronet v. *Woolworth Co.*, 89 N. J. L. 669;

Sefler v. *Vanderbeck & Sons*, 88 N. J. L. 636;

Higgins v. *Goerke-Kirch Co.*, 91 N. J. L. 464; affirmed 92 N. J. L. 424;

Baker v. *Fogg, &c., Co.*, (E. & A.) 112 Atl. 406.

II.

Conclusion.

For these reasons we respectfully submit that the judgment below should be reversed and a venire de novo awarded.

February Term, 1926.

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New Jersey Court of Errors and Appeals

ABRAM HOLMES, *Plaintiff-Appellant,* *vs.* STEPHEN PELLIGRINO, *Defendant-Respondent.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*

SUPPLEMENT TO BRIEF IN BEHALF OF THE APPELLANT.

The following should be regarded as inserted at page 11 of appellant's brief at the end of subdivision "A" of Point I.

A case directly in point on the facts is *Devlin* v. *Smith,* 89 N. Y. 470. The defendant, a contractor, built a scaffold for a painter. The painter's servant was injured. The contractor was held liable. It was held that he knew that the scaffold, if improperly constructed, was a most dangerous trap. He knew that it was to be used by the workmen. He was building it for that purpose. Building it for their use, he owed them a duty, irrespective of his contract with their master, to build it with care. At page 477, the court of last resort of N. Y. held:

> "As a general rule the builder of a structure for another party, under a contract with him, or one who sells an article of his own manufacture, is not liable to an action by a third party who uses the same with the consent of the owner or purchaser, for injuries resulting from a defect therein, caused by negligence. The liability of the builder or manufacturer for such defects is in general, only to the person with whom he contracted. But, notwithstanding this rule, liability to third parties has been held to exist when the

defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use. As where a dealer in drugs carelessly labeled a deadly poison as a harmless medicine, it was held that he was liable not merely to the person to whom he sold it, but to the person who ultimately used it, though it had passed through many hands. This liability was held to rest, not upon any contract or direct privity between him and the party injured, but upon the duty which the law imposes on every one to avoid acts in their nature dangerous to the lives of others. (*Thomas* v. *Winchester,* 6 N. Y. 397.) * * *"

"Applying these tests to the question now before us, the solution is not difficult. Stevenson undertook to build a scaffold ninety feet in height, for the express purpose of enabling the workmen of Smith to stand upon it to paint the interior of the dome. Any defect or negligence in its construction, which should cause it to give way, would naturally result in these men being precipitated from that great height. A stronger case where misfortune to third persons not parties to the contract would be a natural and necessary consequence of the builder's negligence, can hardly be supposed, nor is it easy to imagine a more apt illustration of a case where such negligence would be an act imminently dangerous to human life. These circumstances seem to us to bring the case fairly within the principle of *Thomas* v. *Winchester.*"

The case of *Devlin* v. *Smith,* 89 N. Y., p. 470, has been followed in the recent case of *MacPherson* v. *Buick Motor Co.,* 217 N. Y. 382, 111 N. E. 1050, where it was held that it is the duty of a manufacturer of automobiles who buys his wheels, to inspect them and subject them to ordinary and simple tests to see whether they are defective, and in that case, the manufacturer of an

automobile was held liable to a purchaser of one of its cars from a retail dealer for injuries resulting from a defectively constructed wheel which the manufacturer purchased from a manufacturer of wheels. It was held that the manufacturer of the automobile, irrespective of contract, was under a duty to the purchaser of the car from a dealer to make it carefully. To the same effect see *Johnson* v. *Cadillac Motor Car Co.*, 261 Fed. 878.

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