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Leo A. Bird v. Clover Leaf-Harris Dairy : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

LEO A. BIRD,
Plaintiff and Respondent,

vs.

CLOVER LEAF-HARRIS DAIRY,
Defendant and Appellant.

Case No.
6333

BRIEF OF RESPONDENT

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In the Supreme Court of the State of Utah

LEO A. BIRD,
Plaintiff and Respondent,

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Defendant and Appellant.

Case No.
6333

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Leo A. Bird, the plaintiff and respondent in this case, commenced suit on the above entitled action in the City Court of Salt Lake City. The action was tried before Judge Bryan P. Leverich, sitting without a jury. After a judgment for plaintiff as prayed, the appellant appealed to the Third Judicial District Court where the same was tried de novo before Judge Herbert M. Schiller, sitting without a jury. Plaintiff again obtained a judgment as prayed.

The facts as established by the pleadings and evidence

are very simple. The appellant by its pleadings admitted the following matters: 1. The jurisdictional facts; 2. The ownership and occupancy of the buildings known as the Clover Leaf-Harris Dairy, located at 723 South State Street, Salt Lake City, Utah; 3. Plaintiff's son, Montell Bird, visited defendant's plant and worked as a milk sampler, and that he was an invitee while pursuing such activity; 4. That said plaintiff's son parked plaintiff's car, on the 6th day of March, 1939, on defendant's premises and under a projection attached to the north wall of one of defendant's buildings—the building in question; 5. That a portion of said north wall fell and collapsed upon the said automobile and that by reason thereof, damage was sustained by plaintiff, and the damage was stipulated to be \$633.77. The evidence further reduced the issues to the following matters, namely: 1. Whether or not the doctrine of *res ipsa loquitur* is applicable under the facts alleged and proven; and 2. The status occupied by Montell Bird, plaintiff's son, while he was on the premises of the defendant Dairy.

Appellant's brief is so replete with misstatements of the evidence, and statements purporting to be facts but which are not supported by the evidence, all of which may influence the court on matters not involved in the case that respondent feels constrained to point out a few of these incongruities, and in connection therewith respondent incorporates herein, to further reflect the misstatements of appellant, the findings of fact by the court:

The cause having come on regularly for trial on the 21st day of March, 1940, Robert S. Spooner appearing as

counsel for plaintiff, and Thatcher & Young appearing as counsel for defendant; a trial by jury having been waived by counsel for the respective parties, the cause was tried by the Honorable Herbert M. Schiller who found the following facts:

FINDINGS OF FACT

1. That the plaintiff is, and at all times hereinafter mentioned was, a resident of Salt Lake City and County, State of Utah; that the Clover Leaf-Harris Dairy is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Utah with its principal place of business in Salt Lake City, Utah.

2. That on or about the 6th day of March, 1939, the plaintiff was the owner of a 1938 Studebaker Sedan automobile. That on the date aforesaid the defendant owned and occupied all the buildings known as the Clover Leaf-Harris Dairy and which were and are located at 723 South State Street, Salt Lake City, Utah. That on the date aforesaid, and for more than a year prior thereto, plaintiff's son, Montell Bird, was regularly employed by the Federated Milk Producer's Association, and that on said date was working for said Association at the defendant's Dairy with the consent, approval and permission of the defendant.

3. That on or about the 6th day of March, 1939, said Montell Bird had borrowed the plaintiff's automobile for the purpose of going to work at Defendant's Dairy, and that such use and bailment was for the sole benefit of Montell Bird and not for the use or benefit of the plaintiff;

and that the said Montell Bird on the date aforesaid parked the plaintiff's automobile along side the north wall of a building owned and occupied by the defendant, and at a place where others had parked their automobiles.

4. That on the date aforesaid, and while plaintiff's automobile was parked along side the north wall of defendant's building which was 125 feet long and two stories in height, and which was an instrumentality peculiarly, exclusively and completely within the control and management of the said defendant, and while the plaintiff's automobile was parked by the aforesaid wall with the consent and permission of the defendant, the said wall collapsed and fell down and upon plaintiff's car. That the defendant knew or should have known of the unsafe and unsound condition of said wall and that the damage to plaintiff's automobile was proximately caused as a result of the careless and negligent maintenance of said wall in an unsound and unsafe and dangerous condition. That as a direct and proximate result of the careless and negligent maintenance of an unsafe, unsound and dangerous wall which fell and collapsed upon plaintiff's automobile, plaintiff suffered damages to his said automobile in the sum of \$633.77.

On page 2, appellant's statements, that, "The space between the garage and shop is reserved exclusively for company trucks entering and leaving the garage and for making necessary repairs," and, "This was reserved for entrance to the garage," are apparently designed to influence the court to believe that every one who came on the premises was immediately aware of this "exclusive" reservation of space for company trucks either by signs posted

or by oral or written notice actually given. This is not supported by the evidence in any particular. There is no evidence that Montell Bird had notice, actual or constructive, of this "exclusive" parking area. Again, on page 3, appellant states, "Certain employees sometimes left their cars under the east canopy. However, it was in violation of positive rules announced both orally and by written notice posted on walls, and also printed bills which were at times placed in offending cars." It is true employees did park their cars in this "exclusive" area, and appellant's evidence is that notices were posted, not in this area, but on an employee's bulletin board, but there is no evidence that printed bills were ever placed in offending cars.

At the first trial there was no mention of a Mr. Meyers, a company representative, assisting in the routine inspection three months prior to the collapse of the wall. It was never claimed that Mr. Meyers is a building expert or came for the purpose of an inspection. However, it seems to us that had Mr. Meyers been present this fact would have been established at the first trial.

On pages 4, 9 and 11, appellant refers to the plaintiff's son as Leo Montell Bird. Leo A. Bird is the plaintiff and Leo Montell Bird is his son, and it was Montell Bird who worked at defendant's premises and parked the plaintiff's car. No evidence was offered to show agency, actual or implied, but on the contrary plaintiff established that Montell Bird borrowed the car for his own use and not for the use or benefit of Leo A. Bird, the plaintiff.

There is no evidence that "no company official or employee saw Montell drive plaintiff's car there (by the wall

in question).” There is some evidence, however, that Mr. Gallagher and Mr. Johnson were not aware of the presence of the car.

ARGUMENT

Appellant devotes the major portion of its brief admitting Montell Bird was an invitee on its premises until he parked a Studebaker automobile by the north wall of a particular building and at that moment he became a trespasser or licensee, consequently eliminating the possibility of liability unless the company committed wilful or wanton acts of destruction upon the car.

Appellant admits that Montell Bird had the right to enter its premises and work in its plant. He had an express invitation to enter for a purpose connected with the business in which the Dairy was engaged. The appellant further concedes that he could park a car in the rear of the plant and leaving this area walk past the building in question to reach his destination without losing his personality as an invitee. Further narrowing appellant's own position, it is apparent in all parts of the brief and the transcript that appellant had no objection to Mr. Bird riding his bicycle onto the premises and placing it inside the garage directly ahead of where the car was parked. The evidence shows that he sometimes rode a bicycle to work and when he did he placed it there. The evidence for plaintiff tends to show that Montell drove a Chevrolet Coupe which he bought after the accident, this was in April, 1939. So when appellant says Montell drove a Ford Coupe, he means a Chevrolet Coupe. Mr. Johnson, a witness for appellant, testified he

had seen Montell in a Chevrolet Coupe in the vicinity of this garage and that he had not admonished him on his parking habits. Montell Bird did testify that he had parked plaintiff's car at various places. Sometimes it was parked in the lot, sometimes along the south part of the driveway and the west side of the garage in question where cars were permitted to be parked by appellant's evidence, and sometimes where it was parked on the day in question. Now appellant's counsel says that respondent's position is absurd, but consider the palpable inconsistencies and unreasonableness of their argument. They say, if Montell Bird had walked to work, entered appellant's premises and walked back by the garage, which is about fifteen feet from where he engaged in his activities, and the wall fell on him, he would have been an invitee; if he rode his bicycle to work and placed it inside the garage immediately ahead of the space where the Studebaker was parked, and was in the act of leaving the garage when the wall fell on him, he would have been an invitee, as Johnson, a witness for appellant, on page 43 of Transcript of testimony testified this was not objectionable; again, if he parked in the rear parking area and was passing the garage on his way to work (which he would necessarily have to do) when the wall fell on him, he would have been an invitee; and to go further, if he parked along the south side of the driveway or the west part of the garage wall, walked around to the north section of the same building, and the wall fell on him, he still would have been an invitee, for Johnson again testified, Transcript of testimony p. 42, that this parking was not objectionable, but when Mr. Bird parked plaintiff's car

where he had parked before on several occasions, and where employee's cars were parked at the time, he became a trespasser! Whatever mental legerdemain appellant's counsel employed to arrive at this startling conclusion I fail to apprehend, it certainly was not taken from legal authority.

In *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, the court holds, among other things:

To be an invitee the visitor must come onto the premises for a purpose connected with the business in which the occupant is engaged or which he permits to be carried on. There must be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant.

The above rule covers the situation which existed in the case at bar. Plaintiff's son was employed by the Federated Milk Producer's Association and was assigned to appellant's Dairy to carry on his duties. He worked in such capacity for the better part of a year and one half in an important section of the Dairy. Every can of milk was sampled by him for its milk and cream content. Appellant was benefitted in that it was required to pay only such sums as the samples indicated they were worth in accordance with a set scale; also, precise contents of each container as to the proportions of cream and milk were ascertained, and many other benefits not necessary to here enumerate as appellant concedes the work was connected with the business. Also, the uncontradicted evidence is that Montell Bird usually had to take the samples with him

(Tr. 28) and this would necessitate some sort of conveyance to and from work.

The court will observe that in discussing appellant's position I have insisted that Montell Bird was either an invitee or a trespasser. This contention is based upon appellant's own evidence and admission. For the cases show that it is a non sequitur to say there is no knowledge or permission of certain conduct and then say that such conduct made the actor a licensee, to be a licensee there must be some knowledge or consent on the owner's part to the conduct in question. He was then either an invitee or a trespasser, and from all the admissions, evidence and findings it certainly could not be determined that he was a trespasser.

The Plummer case is approved in *Kinsman v. Barton & Co.*, 141 Wash. 311, 251 Pac. 563, which held among other things:

An invitee is one who either expressly or impliedly is invited onto the premises of another in connection with the business carried on; a licensee is not a trespasser because he has permission to enter for other purposes not connected with the business.

The appellant also cites *Kinsman v. Barton* as an authority for its position, but upon a superficial reading of the case it will be observed that the facts distinguish it from the one at bar, although the general rule is adopted. In the *Kinsman* case plaintiff conducted a lunch stand business on defendant's premises which was not in any way connected with its business and was not required to pay rent

therefore. Plaintiff stepped in a hole, causing the injury complained of, which was as apparent to her as it was to the defendant. This situation, of course, is widely different from the one at bar.

It has often been held that the duty of keeping premises in repair and in a safe condition extends to means of ingress and egress which, although not the proper ways, the owner of premises permits customers and others to use them without taking precaution to prevent such use.

Landy vs. Olson and Suley Sash & Door Co., 171 Minn. 440, 214 N. W. 659

Campbell vs. Sutliff, 193 Wis. 370, 214 N. W. 374

Certainly the parking of cars would come under the same rule as does walking in and out of premises. All the cases cited by appellant are based upon facts which show that the injury or damage caused came as a result of some affirmative act on the plaintiff's part which in turn caused the neglect attributed to the defendant to result in such injury or damage. There could be no suggestion in the case at bar that the act of parking a car had anything to do with the collapse of the wall, as the wall would have collapsed anyway. The simple truth, as shown by the evidence and the tenor of appellant's brief, is, that no one cared who parked by this garage when the trucks were out until it appeared that plaintiff wanted reimbursement for the damage done his car. If the parking situation was as serious as the company officials would now have the court believe certainly six employees would not have had their cars parked by this garage. Until Mr. Bird was informed not to use this area what reason would he have not to park there?

The brief written by appellant at the request of Judge Schiller contained this statement, and which is again stated on page 6 of its present brief: "Even though they (the company officials) saw the car standing there, which is denied, yet they might have supposed it to belong to some visiting guest of the company officials who perchance was invited to place his car under the canopy." Now, no one needed to "box the boy's ears" to prevent his parking in this place, even though Mr. Young would have the court think so. If any one had informed him that notwithstanding employees parked by this wall, and notwithstanding other invitees parked there, that he was forbidden this privilege no doubt he would have ceased—but what reason would Montell Bird have, or any other person similarly situated have, not to park as he did, especially when he needed a conveyance to carry samples?

The principle announced in *Gavin vs. O'Connor*, cited by appellant is correct, but the facts distinguish it considerable from the facts in the case at bar. I cannot conceive of a way to reconcile the two cases for the facts of cases give rise to the many principles of law. Appellant cites, 45 C. J. at page 816 and quotes therefrom, but it will be observed that the section does not contemplate a situation where the person on the premises is already an invitee by express invitation, it contemplates a situation where plaintiff is attempting to establish his status without a showing of express invitation.

An invitee does not lose his status as such because of a slight deviation from the usual course of travel or passage, *Ellington v. Rich*, 102 S. E. 510, which held a deviation of

twenty-five feet not to alter the status although it was not necessary to go in that place.

Also see, *Southeastern Portland Cement Co. v. Bustellas*, 216 S. W. 268.

In addition to the statement of appellant's counsel relative to the case of Loney vs. Laramie Auto Company, the court said, "Nor would it seem unreasonable to hold that the owner of premises should anticipate what is usually and customarily done by an invitee within the scope of, and to carry out the purpose of, the invitation." Also in *Heckman v. Sisters of Charity*, cited by appellant, the court allowed recovery primarily on the proposition that if there is a deviation from the invitation there must be shown to have been some notice given by the defendant to apprise the plaintiff of its wishes.

It is notable that the majority of the cases deal with defects in premises which are, or should be, as obvious to the invitee or the licensee as there are, or should be, to the owner of the premises. In the case at bar there is no doubt that the defect which existed could not have been discovered by Montell Bird without inspection of the wall. At page 82 of the transcript of testimony, Mr. Gallagher, manager of the Dairy, testified the inspection was a routine quarterly inspection. Witnesses for appellant testified that they had no knowledge of a defect in the structure of the garage. Well, certainly, had they testified otherwise there would be no defense at all. The point is, should they have had some knowledge of such a defect.

The owner of premises is under a positive duty not only to exercise reasonable care to provide safe premises but also is under a duty to discover the use or uses invitees

are putting their premises to and use reasonable care to protect them in that extended use. Some of the cases cited below deal with both points and others deal with only the first mentioned.

Winteroud vs. Christensen, 68 Utah 546, 251 Pac. 360

Blanchette vs. Union Street Railway Co., 248 Mass. 407, 143 N. E. 310

Elie vs. Lewiston Railway Co., 112 Me. 178, 91 Atl. 786

Holmes vs. Drew, 151 Mass. 587, 25 N. E. 22

Hupfer vs. National Distilling Co., 114 Wis. 279, 90 N. W. 191

Pauchner vs. Wahem, 211 Ill. 276, 83 N. E. 202

Dobbie vs. Pacific Gas & Electric Co., 95 Cal. App. 781, 273 Pac. 630

Appellant's attorney's have set forth several cases dealing with licensees and trespassers, but from the admissions made, the pleadings, the evidence, the findings, and even the cases and argument of appellant's brief, there can be no doubt that Montell Bird was at all times an invitee. We contend there never was a deviation for there never was notice given. Further, that if notice had been given so as to make a deviation, the deviation was not of such nature as to cause Montell Bird to lose his status, but notice, actual or constructive, was never alleged nor proven.

We now come to the question of whether the doctrine of *res ipsa loquitur* is applicable in this case. In connection with consideration of the doctrine many of the cases hereinafter cited supplement the question raised as to Mr. Bird's status while he was on appellant's property for the two propositions here raised go hand in hand in most cases as

stated in appellant's brief. I call the Court's attention to the well known and famous case of *Byrne v. Boadle*, 2 H & C. 722 Exchequer (1863). In this case the plaintiff received injury when she was struck upon the head by a barrel which fell out of defendant's building. Plaintiff offered no proof of negligence other than this. The court held that the evidence showing the barrel to have hit plaintiff and that it emanated from defendant's building was sufficient to cast the burden of proving that the barrel fell without negligence by the defendant. To the same effect under similar circumstances is *Inland and Seaboard Coasting Co. v. Tolson*, 139 U. S. 551.

A leading Utah case, *Angerman v. Edgemon*, 76 Ut. 394, 290 Pac. 169, and exhaustively treated at 79 A. L. R. 40, lays down the law in Utah on these facts:

Plaintiff conducted a millinery shop on the ground floor of a building leased by defendants who conducted a hotel business on the 2nd and 3rd floors. On the day in question a considerable flow of water escaped from the toilet fixtures on the 3rd floor and in due time seeped through to plaintiff's shop damaging some dresses. Plaintiff alleged general negligence and also made specific allegations of negligence.

The defendant's evidence showed that the most modern plumbing equipment had been installed throughout, and that, only a few days prior they had employed skilled workmen to inspect the plumbing, and that no defects were found, and that they did not know what caused the water to over-flow. The plaintiff relied on the doctrine as no specific acts were shown.

On appeal from a judgment for plaintiff, the Supreme Court held that the doctrine of *res ipsa lo-*

quitur applied as the plaintiff had no means of ascertaining wherein the defendants were negligent, and notwithstanding no specific acts of negligence were shown as alleged, and notwithstanding the evidence produced by defendants. The Court going on the principle that such a thing does not occur in the ordinary course of events unless there is some negligence on defendant's part in some particular.

At this point the Court's attention might be drawn to several cases cited by appellant for the purpose of attempting to apprise the court of the limitations on the doctrine.

In *Denver vs. Spencer*, plaintiff alleged specific acts of negligence and also attempted to rely on the doctrine. In some jurisdictions the rule has been laid down that one cannot allege specific acts of negligence and failing therein, either to prove the same or offer proof, fall back on the doctrine for support. The matter is treated at 79 A. L. R. 40, as above stated, and it will be seen that in Utah the plaintiff would have recovered. *Kennedy vs. Hawkins* goes off on about the same grounds and for the same reasons as the above Colorado case as this jurisdiction has the same rule. However, a close consideration of the facts show that the defendant did not have exclusive control of the things which gave rise to the injury, and also, that other persons were instrumental in altering the conditions. In *Zoccolillo vs. O. S. L.* the court refused to apply the doctrine yet it would seem that this case is somewhat out of line with the Utah cases decided both before and after. However, the court was particularly attracted to the proposition that neither plaintiff nor her family registered complaint with the defendant's servants relative to the temperature of the train, and that

had such complaint been made perhaps the plaintiff's injury would have been avoided or greatly minimized. The Court did however, lay down this rule, notwithstanding, "When a thing which causes injury, without the fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence that the injury arose from defendant's want of care."

In another Utah case, *Dearden vs. San Pedro*, 33 Utah 147, 93 Pac. 271, the Utah court applied the doctrine to a case where a brake chain had been broken and plaintiff sustained injury when a flying switch was attempted by the engine and water car and as a result of the broken brake chain the cars collided with a passenger car carrying plaintiff. Also see,

Ugbla vs. Brokaw, 102 N. Y. Supp. 857

It is not necessary to give proof of the owner's knowledge of the unsafe condition of the building,

Gray vs. Boston Gaslight Co., 114 Mass. 149, 19 Am. Rep. 324

Butts vs. National Exchange Bank, 72 S. W. 1083

Waterhouse vs. Jos. Schlitz Brewing Co., S. Dak. 94 N. W. 587

this would necessarily have to be the rule or the doctrine of *res ipsa loquitur* would be a theory without possibility of application.

The case of *J. C. Penny Co. vs. Forrest*, 183 Okl. 106,

180 Pac. 2nd 640, is in line with the Angerman case and very much like the one at bar. The facts were briefly these :

Plaintiff received injury while in the defendant's store when a merchandise carrier fell from the overhead system used for carriage in the store. Examination disclosed an iron casting holding a bolt on the appliance broke which permitted the mechanism to fall upon plaintiff.

The defendant showed the system was approved in over a thousand stores, and that an inspection made just a week prior had disclosed no defects.

Plaintiff relied upon the doctrine of *res ipsa loquitur* although specific acts of negligence were alleged.

The court applied the doctrine precisely as does the Utah court, and further held the sufficiency of the evidence to be a matter for the jury or the court sitting without a jury to determine—as does the Angerman case.

In the absence of satisfactory explanation that the falling of a building, a wall or a part thereof, was accidental, and no showing is made as to unusual happenings or events which caused the same to fall, the land owner is liable, *Sinhovitz vs. Peters Land Co.*, 64 S. E. 93. The court said on page 95, paragraph 2, "The evidence showed that a pane of glass, without apparent cause, fell from the window of defendant's building injuring plaintiff. The plaintiff had the right to be where she was, and the duty was upon defendant to use ordinary and reasonable care in the construction and maintenance of the building so as not to occasion injury—Barring human intervention—panes of glass do not fall from windows unless the glass is either not placed

properly in the sash at the start or unless by reason of lapse of time the sash and glass stand in need of repair.”

Appellant cites *Nucek vs. Weaver* which at first blush appears to be contrary to our position, but on perusal seems to confirm it. Without here recording the defendant's defense, I call the Court's attention thereto as compared with the defense offered by the Dairy in the case at bar. In every case the Court will read in connection herewith it cannot help but be impressed by the inadequacy of the defendant's evidence in the present case compared with those cited—and in the cited cases the evidence was insufficient and inadequate. I think it reasonable to assume an indisposition on the part of defendant not to offer so complete a defense but rather to trust in some sort of divine providence to furnish one. For if an investigation were made to determine the cause of the collapse of this wall the findings were not offered in evidence, and if an investigation was not made then we submit there must be some reason therefor which is known only by the officials of the company. No act of God was ever suggested as being the proximate cause of this accident. Normally the collapse of any structure upon one's land would stir at least a mild interest as to the cause thereof in the landowner's mind—especially when about \$4000.00 worth of damage was done to cars belonging to employees and invitees. The Court will observe that in all cases cited an investigation was made and the findings put in evidence as a defense even though it was not always found to eliminate liability.

The case of *Nucek vs. Weaver and Pickwick Corp. vs. Messinger*, both cited by appellant, and several cases cited

by respondent hold that the sufficiency of the evidence in explanation of the accident is for the jury, or the court sitting without a jury, to decide. The ruling in the Pickwick case shows that the issue on appeal turned on a matter of improper instruction given by the trial judge which precluded the defendant from offering evidence which might have explained the cause of the accident.

Mr. Justice Larson will undoubtedly be surprised at the construction placed on part of his opinion in *White vs. Pinney*, which is cited by the appellant, and which is set out in quotation therefrom on page 17 of appellant's brief. Most cases hold that a presumption arises from the application of the doctrine, but the Utah court has for some time held it to be an inference which makes the doctrine effective as an evidentiary matter. How does this alter the application of the doctrine? One line of decisions holds it to be a rebuttable presumption, while another line of decisions, as explained by Justice Larson in the Utah case, holds the burden of going forward with the evidence shifts to the defendant to show that he was not guilty of negligence. Perhaps the quantum of proof is greater under one view than under the other, but this is the extent of divergence. The rule announced by Justice Larson is certainly more equitable and less onerous for it allows the defendant to produce evidence which would explain the accident, its cause, and show the amount of care he exercised in apprehension of just such damage. But the mere statement of this rule does not constitute evidence sufficient to meet the evidentiary inference, there must be affirmative proof which will satisfy a jury, or a trial judge sitting without a jury, that he has exercised

all the care prudent men would have exercised under the circumstances and that he has exercised all care commensurate with the damages to be apprehended. Appellant failed utterly to offer in evidence any explanation from which a judge or jury could determine whether or not he had met the requirements set up by Justice Larson.

The law is well settled in Utah, as in other states, that the sufficiency of the evidence in explanation of the accident is for the jury, as the court sitting without a jury, to determine considering all the evidence introduced.

Angerman vs. Edgemon, 76 Utah 394, 290 Pac.

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Nucek vs. Weaver, 54 Pac. 2nd 768

J. C. Penney Co. vs. Forrest, 183 Okl. 106, 180

Pac. 2nd 640

There are several well considered decisions all of which hold that buildings properly constructed and properly maintained do not fall from slight causes but only from adequate or substantial causes, and that when a building, or a wall thereof, does fall without apparent cause, in the absence of explanatory circumstances, negligence will be presumed.

Mullen vs. St. John, 57 N. Y. 567

Patterson vs. Jos. Schlitz Brewing Co., 91 N. W.

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Readman vs. Conway, 126 Mass. 374

City of Denver vs. Solomon, 31 Pac. 507

Looney vs. McLean, 129 Mass. 295

Volmar vs. Manhattan Ry. Co., 134 N. Y. 418.

There are cases of liability when buildings fall onto other property, and which charge the landowners with a

positive duty to keep their premises in safe condition and repair and to guard against structural defects which the use of ordinary care will reflect.

Schariff vs. Southern Illinois Const. Co., 92 S. W. 126

Hudgins vs. Ham, 240 Fed. 387-5th Circuit, 24 Minn. 501,

Respondent has never claimed, nor does he now claim, that property owners are insurers of the safety of others and their property which are rightfully on the premises, but we certainly claim the protection which reasonable care would insure and which all the decisions hold we have a right to claim.

On page 4 of its brief appellant states that as many as four men would get on the canopy attached to the wall and shovel off the accumulated snow without causing indications of weakness or *excessive* strain. If *any* strain were shown at any time from such practice the company was put on notice that accidents might occur, and precaution should have been taken for the safety of those who might come in contact with this wall. Obviously, this was not done.

The rule in *Dugal vs. Peoples Bank*, 34 N. E. 581, holds that an owner of a building would be liable for negligently allowing snow and ice to accumulate on the roof or projection and, although he may and can build any way he pleases in accordance with municipal ordinance, and the style adopted is not negligence per se, nevertheless, it imposes a greater degree of care and watchfulness to prevent accidents as a result of such construction. The testimony

of the plant foreman is that this canopy was put up two years after the construction of the building, and there is no evidence that the building was constructed to accommodate the strain it would necessarily exert.

From a full consideration of all the cases it is evident that appellant sums up all its evidence and defense in one short paragraph as stated concisely on page 4 of its brief, which says, "None of the officers or employees of the company knew anything in or about the building, or the canopy (although this is questionable from the statement made as to excessive strain in the paragraph just below), suggesting inherent weakness or need or repair or replacements." Appellant's attorneys either do not wish to understand the doctrine of *res ipsa loquitur* and the cases they have read in connection therewith or they refuse to recognize that these many cases make sense. On page 20 of appellant's brief its attorneys argue a set of facts entirely foreign to this case. They even become so irritated in their distaste for the doctrine as applied to their tautological set of facts that they irefully condemn the rule announced by Justice Larson which they had reveled in but a few pages before.

As has been said in many of the cases, walls or buildings in the ordinary course of events do not collapse or fall down. There is some reason such as fire, earthquake, improper construction or improper maintenance or the like. It might well be said that a building once constructed some day will fall down. This, however, presupposes failure of owners to make necessary repairs. The appellant offers not one scintilla of evidence that repairs had ever had been made in twenty years, or that the building was properly

constructed even though built by a contractor, nor that the canopy was properly and sufficiently constructed for safety, nor that the north wall of the garage was held up by any more than the east and west end walls and the roof, nor what the cause of the accident might have been. A wall 125 feet long and two stories high does not just collapse without exhibiting considerable indication of its weakness or defective condition long before such collapse occurs.

The appellant has admitted by pleadings, by the evidence, and by its brief that Montell Bird was an invitee while working on its premises, and we contend, and the court so found, that there was never a deviation, slight or otherwise. How can they now complain because the court found their admissions to be true? No question of contributory negligence has been raised. No claim is made that Montell Bird had any notice or knowledge that parking by this wall was prohibited. Employees and other visitors regularly parked in this space, and the evidence shows that this space was not used by company trucks from early morning until after one p. m. All defendant's evidence relative to parking is frivolous and cannot command respect.

We submit that the complaint did state a cause of action; that the plaintiff's evidence was sufficient and the defendant's evidence insufficient under all the cases, and that the court made proper finding of fact and correctly applied the law thereto; and that judgment should be affirmed with costs to respondent.

Respectfully submitted,

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