
(1945) 07 CAL CK 0020
In the Calcutta High Court
Case No : Suit No. 1667 of 1943

Manindra Nath Mukkerjee

APPELLANT

Vs

Mathuradas Chatturbhuj

RESPONDENT

Date of Decision : 10-07-1945

Acts Referred:

Citation : (1945) 07 CAL CK 0020

Judgement

Khundkar, J.—This is an action for damages for injury caused to the plaintiff by the fall, from the roof of the defendant's premises, of a cinema advertising device, called a banner, which is an article made of the cloth within a wooden frame. According to the defendant's witness Amitava Roy, the frame is of pinewood 2 inches wide by 1/2 an inch thick.

2. The defendant is the proprietor of a motion picture exhibition establishment called the Rupali Cinema situated in Ashutosh Mookerjee Road. The portion of the building which abuts on the street is one-storied. On the roof of this, about four feet from its western edge, overlooking the street, there stands a sky sign which is a more or less permanent structure consisting of a steel frame held firmly in place in an upstanding position by means of masonry and iron attachments. It is 12 feet high by 36 feet wide. On this framework and firmly attached to it in a vertical position there is galvanized iron sheeting, the surface of which, facing westwards towards the street, was intended to carry advertising designs. The galvanized sheeting covers, according to the defendant's manager, B. N. Basu Mullick, the whole surface of the framework. The defendant obtained a licence to erect this sky sign from the Calcutta Municipality in December 1938. The plan which he submitted along with his application for a licence was a plan of the construction above described. It did not show any specific advertising sign as a part of the construction, although the definition of a sky-sign under S. 3, cl. (65), Calcutta Municipal Act, for which, under the Act, a licence has to be taken out, includes the advertising sign itself and not the framework only. The construction described above advertised nothing, and, as just stated, the intention was that advertising designs would be displayed on or against the galvanized sheeting. It

appears that both the defendant and the Municipal authorities entertained the idea that paper posters would be pasted on the galvanized sheeting. The evidence is that this was what was frequently done. But the defendant also proceeded to advertise the entertainments provided at the Rupali Cinema in a somewhat different manner. Banners similar to the one with which we are concerned in this case were displayed from the sky sign. There is in the framework of the sky sign no contrivance by means of which such banners could be held firmly and securely in place?no slots, bolts, grooves, flanges or screws. The banners were held against the galvanized sheet by means of cheep coir ropes which were fastened to the four corners of the wooden frame which contained the cloth design, and these ropes were then carried over and under the metal frame of the sky sign, and knotted to certain angles and iron rods behind. The lower portion of the wooden frame of the banners did not rest on the ground.

3. On the 5th July 1943, at about 7.15 P. M. a banner (produced in Court and found to measure twelve feet in length and three and half feet in width) within a wooden frame, fell from its position against the sky sign of the Rupali Cinema. A very narrow space ? according to the evidence for the defendant, four feet? intervened between the sky sign and the edge of the roof, so that there was nothing to intercept or break the fall. The contraption fell on the plaintiff, who was passing along the pavement. Apparently the wooden frame struck him on the head, for he sustained a cut thereon, which the medical evidence has described as severe, and which bled profusely. On behalf of the defendant it was sought to be suggested that the plaintiff was struck not by the banner but by a corrugated iron sheet, described as a "shade", one or more of which fell at the same time, the weather being stormy, from the roof on an adjoining shop. The evidence in support of this suggestion is totally insufficient, and as a defence it was indeed not seriously pressed.

4. The manager of the cinema establishment, B. N. Bose Mullick, who has deposed as a witness for the defendant, came out on to the pavement, and his evidence is that he invited the plaintiff to come into the cinema, but the plaintiff declined. Three constables of the armed police who were off duty, and were passing by, went to the plaintiff's assistance and rendered first aid. By one of them he was removed to the Sambhu Nath Pandit Hospital, where he was bandaged and put to bed. As haemorrhage continued, an operation had to be performed to tie the severed blood vessels, late at night. The plaintiff remained in the hospital for five days. His case is that, after his discharge, he was bed-ridden for about one month during which period he was attended on daily by Dr. A. M. Datta. His case further is that he has had pain and suffering both mental and physical; his general health which was good before the occurrence has been seriously undermined, and his expectation of life shortened. The accident has injuriously affected his efficiency and capacity for work, and his chances of promotion to a higher official post than that which he at present holds have in consequence disappeared. He claims Rs. 10,450 as damages under the following

heads :

Rs. (1) Doctors fees... 240

(2) Cost of medicine and special
diet... 200

(3) Cost of conveyance for going
to and returning from hospital... 10

(4) For pain and suffering, shortened expectation of life and permanent injury...
10,000.

5. The defence, apart from the faint suggestion that the plaintiff was not struck by the banner but by something else, is as follows: In the first place, it is for the plaintiff to establish that there was negligence on the part of the defendant or his servants which caused the fall of the banner. Not only has the plaintiff not established this, but the evidence adduced on behalf of the defendant shows that all reasonable care was exercised by the defendant's manager who personally supervised the tying of the banner to the sky-sign frame on 12th June 1943. A new rope purchased on the 11th June was used. On the 5th July, the manager examined the banner and found, it in position and intact. Each of the four corners of the frame of the banner was tied to the sky-sign by 3 strands of this rope which was securely knotted to the supports of the sky-sign frame. No one could be expected to do more, and the banner fell because of a storm of unusual severity which occurred in the afternoon of the 5th July. The injury which the plaintiff sustained was not severe and he is not entitled to any damage.

6. The following issues were framed :?

Issues: 1. Has this Court jurisdiction to entertain this suit? 2. Was the plaintiff injured on the 5th of July 1943, as alleged in the plaint ? 3. What was the nature and extent of the plaintiff's injuries? 4. Was the occurrence due to storm or to some other unavoidable and unexpected cause ? 5. Was it due to negligence or carelessness of the defendant ? 6. To what relief, if any, is the plaintiff entitled ?

7. The objection as regards jurisdiction was withdrawn and issue No. 1 does not arise. The plaintiff's case is that the banner would not have fallen but for the defendant's negligence in not having it properly secured. He has called no evidence, but relies on the doctrine of *res ipsa loquitur* which places the burden of proving due care on the defendant, and contends that for injury caused by the fall from the defendant's premises of an article which was potentially capable of causing harm, and which had been brought into those premises by the defendant, the latter is liable under the principle laid down in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220.

8. The defendant denies that the maxim *res ipsa loquitur* or the rule in (1868) 3 H. L. 330 applies to the facts here established and in the alternative contends

that, even if that be so, the evidence adduced by him shows that he took every reasonable precaution, and that the fall of the banner occurred in spite of that and because of a storm, which brings this case within the exception of act of God or vis major. To this the plaintiff replies that there was no storm such as would exempt the defendant from liability, and that the fall of the banner was due to the failure of the defendant to take ordinary precautions. The cause of action is founded on negligence, and as stated, the plaintiff invokes the rule in (1868) 3 H.L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220, which is a special though very strict application of the law relating to negligence, for, as the Lord Justice Clerk in dealing with (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 said in (1876) 3 R. 461 *Chalmers v. Dixon* (1876) 3 R. 461 at p. 464, "I think that culpa does lie at the root of the matter." Alderson B. described negligence as

the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do: (1856) 11 Ex. 781 *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781 : 25 L. J. Ex. 212 at p. 784.

This is the definition of negligence most often quoted, but Beven in his well-known work on "Negligence" considers that, though as a description it is invaluable, the formula is too wide, for a definition. Pollock, in his book on Torts, states with reference to this definition, that

we have always to remember, that negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care."

9. In (1883) 11 Q. B. D. 503 *Heaven v. Fender* (1883) 11 Q. B. D. 503 : 52 L. J. Q. B. 702 : 49 L. T. 357 at p. 607, Brett M. R. laid down the following definition of negligence :

Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes a duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.

10. In (1860) 5 H. & N. 679 *Vaughan v. Taff Vale By. Co.* (1860) 5 H. & N. 679 : 29 L. J. Ex. 247 : 2 L. T. (N.S.) 394: 8 W. R. 549 at p. 688, Willes J. defined negligence as "the absence of care according to the circumstances;" and Bowen L. J. in (1887) 18 Q. B. D. 685 *Thomas v. Quartermaine* (1887) 18 Q.B.D. 685:56 L.J. Q.B. 340:57 L.T. 587 : 35 W. R. 555 at p. 694, said that it was simply "neglect of some care which we are bound by the law to exercise towards somebody."

11. These definitions bring into prominence the element of a duty which the defendant owes to another person. Who that person may be, is indicated by Lord

Atkins in (1933) A. C. 562 Donoghue v. Stevenson (1932) 1932 A. C. 562 :101 L.J.P.C. 119 : 147 L. T. 281 at p. 580 :

You must take reasonable care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be ? persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

12. Professor Winfield in his "Text-Book of the Law of Tort" has expressed the essentials of negligence in the following words:

Negligence as a tort is a breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff. Thus its ingredients are : (1) A legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of duty; (2) breach of duty; (3) consequential damage to B.

13. In determining whether the first ingredient here mentioned is established in the present case, one has to ask whether the defendant, an occupier adjoining a public thoroughfare, owed any duty to the plaintiff who was a passer-by thereon. In considering whether the second ingredient is present, one has to start with the fact that the plaintiff has offered no evidence to show that the defendant had kept the banner on the roof of the premises in a manner which argued want of due care. It has accordingly to be seen whether want of such care may be inferred from the mere fact that the banner fell into the street, that is to say, whether the maxim *res ipsa loquitur* applies. After referring to the cases which illustrate this maxim, Pollock (Law of Torts, Edn. 14, at p. 418) says :

Construing the principles affirmed in these authorities, we see that the proprietor of property abutting on a highway is under a positive duty to keep his property from being a cause of danger to the public by reason of any defect either in structure, repair, or use and management, which reasonable care and skill can guard against.

14. This learned author explains the maxim *res ipsa loquitur* as exemplified in the decided cases in the following words (P. 415) :

Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence. In other words the burden of proof is on the occupier of the building. If he cannot show that the accident was due to some cause consistent with the due repair and careful management of the structure, he is" liable.

15. In Salmond's Law of Torts (Edn. 9 at p. 470) the matter is stated in this general form:

The rule that it is for the plaintiff to prove negligence, and not for the defendant

to disprove, it, is in some cases one of considerable hardship to the plaintiff; because it may be that the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident, but he cannot prove how it happened so as to show its original in the negligence of the defendant. The hardship is avoided to a considerable extent by the rule *res ipsa loquitur*. There are many cases in which the accident speaks for itself, so that it is sufficient for the plaintiff to prove the accident and nothing more. He is then entitled to have the case submitted to the jury, and it is for the defendant, if he can, to persuade the jury that the accident arose through no negligence of his.

16. This maxim is really a rule of evidence relating to the burden of proof and may be compared with the provisions of S. 106 of the Indian Evidence Act.

17. To continue the quotation from Salmond:

The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused... On the other hand, if the defendant produces a reasonable explanation, equally consistent with the negligence and no negligence the burden of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, still remains with the plaintiff.

18. I would refer briefly in their historical sequence to the important cases which illustrate the maxim *res ipsa loquitur*. In (1863) 2 H. & C. 722 *Byrne v. Boadle* (1863) 2 H. & C. 722 : 33 L. J. Ex. 13 : 9 L. T. (N. S.) 450 : 12 W. R. 279, a barrel of flour fell from a window in the defendant's warehouse and knocked down, and injured the plaintiff who was walking below along the public street. It was held that this was enough to raise against the defendant a presumption of negligence which it was for him to rebut, it being the duty of persons who keep barrels in a warehouse to see that they do not roll out. Pollock C. B. said (p. 727):

There are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can a presumption of negligence arise from the fact of an accident.

19. In (1865) 3 H. & C. 596 *Scott v. London and St. Katherine Docks Co.* (1865) 3 H & C. 596 : 34 L. J. Ex. 220: 13 L. T. (N. S.) 148 : 13 W. R. 410, the plaintiff was a Customs House Officer, who, while on his way from one part of the docks to another, was knocked down by some bags of sugar which fell on him from a crane which was lowering them from the defendant's warehouse. Erle C. J. in the Court of Exchequer Chamber said:

Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management, use, proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the

accident arose from want of care.

20. In (1866) 4 H. & C. 403 *Briggs v. Oliver* (1866) 4 H. & C. 403 : 35 L. J. Ex. 163 : 14 L. T. 412 : 14 W. R. 658, a packing case belonging to the defendant which was insecurely propped against his premises fell on the plaintiff. The majority of the Court, Piggott and Bramevell B.B., held that these facts constituted evidence of the defendant's negligence:

Packing-cases carefully placed in a proper position do not naturally tumble down of their own accord; and we have no right to assume that the fall of this packing-case was caused by the act of someone who was not the defendants' servant.

21. (1871) 6 Q. B. 759 *Kearney v. London & Brighton Ry. Co.* (1871) 6 Q. B. 759 : 40 L. J. Q. B. 285 : 24 L. T. 913 : 20 W. R. 24, which was chronologically a later case than (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 extended the principle of (1868) 2 H. & C. 722 *Byrne v. Boadle* (1863) 2 H. & C. 722 : 33 L. J. Ex. 13 : 9 L. T. (N. S.) 450 : 12 W. R. 279 to the falling of a brick from the arch of a railway bridge in consequence of which a person walking on a highway spanned by the bridge received an injury. A train had passed immediately before. There was no evidence as to the condition of the bridge and the brickwork, except that after the accident other bricks were found to have fallen out. The maxim *res ipsa loquitur* was held to apply:

The defendants were under the common law liability to keep the bridge in safe condition for the public using the highway to pass under it.

The fact that a brick was loose and "fell out of the pier of the bridge without any assignable cause except the slight vibration caused by a passing train" afforded *prima facie* a presumption that the defendants had not used reasonable care and diligence to keep the bridge in safe repair.

22. I come now to (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 which, strictly speaking, is not an illustration of the mere principle of *res ipsa loquitur* because the liability arising from that principle can be repelled by proof that the defendant was not negligent, whereas under the rule in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 it is no defence to say that the defendant took every possible precaution to prevent the escape of the injurious thing. The facts of the case are sufficiently stated in the head-note of the report :

A was the lessee of mines. B was the owner of a mill standing on land adjoining that under which the mines were worked. B desired to construct a reservoir and employed competent persons, an engineer and a contractor, to construct it. A had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and earth of the surrounding land. No care was taken by the engineer or contractor to block up these shafts, and

shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded A's mine :

23. Held that A was entitled to recover damages from B, in respect of this injury.

24. The Court of Exchequer had by a majority decided in favour of the defendant. The Court of Exchequer Chamber unanimously reversed this decision and held the defendant liable, and the House of Lords affirmed their decision. The judgment of the Court of Exchequer Chamber was delivered by Blackburn J. It was quoted with approval by Lord Chancellor Cairne in the House of Lords, and has become classical. Blackburn J. said:

We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient... and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should he be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts or water, or filth or stench.

25. I shall deal with act of God or *vis major* later on, in its proper place, in the sequence of the present argument, but, here, I would pause to call attention to the fact that Blackburn J. expressly mentions it as a possible defence to the principle of liability which he was expounding. As has been elsewhere pointed out (see Pollock 14th Edn., p. 393),

act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effects. It is enough that the accident should be such as human foresight could not be reasonably expected to anticipate; and whether it comes within this description is a question of fact.

26. It is this element which distinguishes (1875) 10 Ex. 255 *Nichols v. Marsland* (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693, cited on behalf of the defendant in the present case from (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220, and I will refer to it later when I come to deal with the alternative answer of the defendant which is that the fall of the banner was due to a storm.

27. At the moment, I am considering the first position upon which the defence has taken its stand, which is that the facts of the present case take it completely out of the principle of (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 and also the rule expressed in the maxim *res ipsa loquitur*, so that the onus of proving negligence by affirmative evidence of acts or omissions by the defendant showing want of the due care lies on the plaintiff.

28. I shall refer now to cases which illustrate the strict rule of liability enunciated in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 and in some of which the maxim *res ipsa loquitur* also has generally been applied. Before I do so, however, I will call attention to what, I think, are the essential features of the cases in which the rule of strict liability of which (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 is a type has been applied. They are expressed in the following words: By Lord Moulton in (1913) A. C. 263 *Rickards v. Lothian* (1918) 1913 A. C. 263 : 82 L. J. P. c. 42 : 108 L. T. 225 at p. 280: "It must be some special use bringing with it increased danger to others....." By Atkin L. J. in (1920) 2 K. B. 487 *Belvedere Fish Guano Co. v. Bainham Chemical Works* (1920) 2 K. B. 487 : 89 L. J. K. B. 631 : 123 L. T. 211 at p. 502:

Where a person brings upon land of which he is in de facto possession for purposes of his business dangerous materials which would not naturally be upon the land, he is under an obligation to keep those materials under control, so as not to cause mischief to his neighbours.

29. By Scott L. J. in (1938) 1 ALL E.R. 579 *Hale v Jennings* (1938) 1 All E. R. 579:

The fundamental rule of the principle is that the liability attaches because of the occupier of land bringing on to the land something which is likely to cause damage if it escapes.

30. These observations cover the cases of articles potentially dangerous, that is to say such as are likely to cause injury upon escaping, or while in the process of escaping from their places of confinement.

31. In (1876) 1 Q. B. D. 314 *Tarry v. Ashton* (1876) 1 Q. B. D. 314 : 45 L. J. Q. B. 260: 34 L. T. 97, the defendant was the occupier of a house from which a lamp projected over the street, and he had employed a competent person who was not his servant to put it in repair. The lamp fell and injured the plaintiff. It was found as a fact that there had been negligence on the contractor's part and that the lamp had fallen because of the decayed condition of the attachment of the lamp to its bracket, which had escaped notice. Lush and Quinn JJ. held that the defendant was liable on the ground that although he had employed an apparently competent person to repair the lamp, yet that did not excuse him from his duty to maintain it in a safe condition. This view is undoubtedly an application of the rule in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220. In *Beven on Negligence* (Edn. 4, p. 22) the

case is cited as an illustration of the proposition that, if

the injury had arisen from an ordinary casualty of the highway, negligence in addition to accident would have to be proved to affect the defendant with liability. So soon as it is clear that the accident is not one of those incident to the highway, the occurrence of it raises a presumption of the defendant's default.

32. This observation has to be borne in mind in connection with some of the cases cited by Mr. Mukerjee for the defendant which are cases in which injury had resulted from street accidents.

33. In (1921) 1 A.C. 521 Attorney General v. Cory Brothers & Co. (1921) 1 A. C. 521 : 90 L. J. Ch. 221 : 125 L. T. 98, a colliery company had deposited colliery debris on a hill side under licence from the owners of the land. After heavy rain a landslide occurred. As the evidence showed that the landslide was caused by the weight of the debris, the colliery company were found liable under the rule in (1868) 3 H.L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 for damage caused by the escape of the debris. (1936) 1 ALL E. R. 557 Shiffman v. Venerable Order of St. John Jerusalem (1936) 1 All E. R. 557 was a case in which the Order of St. John of Jerusalem had, on the occasion of a national holiday, erected a casualty tent in a public park where large crowds gathered. Outside the tent they had put up a flag pole which was insecurely kept in position by guy ropes. As the result of children, who could not be kept away, swinging from the ropes, the pole fell and injured the plaintiff. In holding that the defendants were liable to pay damages on the ground of negligence, Atkinson J. said:

I do not think it is necessary to decide it, but there is another ground upon which I think liability may well rest. I cannot myself see why this is not within the rule in (1868) 3 H. L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220. The defendants erected something exceptional, something which would be easily caused to fall, and something which, if it fell, was likely to do mischief to others, for if it fell it was certain to fall on land of which they were not in occupation, and upon which the public had a right to be.

The italics, which are mine, bring out points of close resemblance with the facts out of which the present action has arisen.

34. In (1938) 1 ALL E. R. 579 Hale v Jennings (1938) 1 All E. R. 579 the defendant had erected in a public amusement park an apparatus similar to a roundabout called a Chair-O-plane. While this was in the process of rotation, one of the chairs became detached and struck and injured the plaintiff who was the proprietor of a neighbouring shooting-gallery. In holding that the defendant was liable on the fundamental principle enunciated in (1868) 3 H.L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 the Court of Appeal found that the Chair-O-plane was an inherently dangerous thing in the sense that it was likely to cause damage if it escaped. (1868) 3 Q. B. 733 Jones v. Festiniog Rly. Co. (1868) 3 Q. B. 733 : 37 L. J. Q. B. 214 : 18 L. T. 902 : 17 W. R. 28 at p.

736 was a case of damage caused by sparks from a railway engine. Blackburn J. in this case said:

The general rule of common law is correctly given in (1865) 1 Ex. 265 *Fletcher v. Rylands* (1865) 1 Ex. 265 : 35 L. J. Ex. 154 : 14 L.T. (N. S.) 523 : 14 W. R. 799 that where a man brings or uses a thing of a dangerous nature on his own land he must keep it in at his peril; and is liable for the consequences if it escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engine from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part.

35. This case was followed in (1880) 5 Q. B. D. 597 *Powell v. Fall* (1880) 5 Q. B. D. 597 : 49 L. J. Q. B. 428 : 43 L. T. 562 which was a case of damage caused by sparks from a traction engine. In (1936) A.C. 108 *North Western Utilities Ltd., v. London Guarantee & Accident Co. Ltd.* ("36) 23 AIR 1936 P. C. 27 : 159 I.C. 704 : 1936 A. C. 108 : 105 L. J. P. C. 18 : 154 L. T. 89 : 52 T.L.R. 93, a public utility company was held liable for the destruction of a building by a fire occasioned by the escape of gas from one of its pipes which had been fractured, although the fracture was caused by the operations of the city authority in constructing a sewer. It was stated in this case that the rule in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 was not limited to cases where the defendant had been carrying or accumulating the dangerous thing on his own land.

36. I turn now to the cases cited by Mr. Mukerjee on behalf of the defendant in his endeavour to show that neither the maxim *res ipsa loquitur* nor the rule in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 apply to the facts of the present case. In (1890) 63 L. T. 756 *Crisp v. Thomas* (1890) 63 L. T. 756 the plaintiff was a scholar in a voluntary school who was injured by the fall of a blackboard from its easel, and the action was for damages on the ground of negligence on the part of a girl who, deputising for a teacher, had put the blackboard on the easel. It was held that the mere fall of the blackboard was not evidence of negligence. Lord Esher M. R. said:

The application of the maxim *res ipsa loquitur* depends upon whether the judge in each particular case can see that the mere fact of a thing happening is more consistent with there having been negligence than not. The facts of the case here are not more consistent with negligence than with accident.

Lopes L. J. distinguished the case from that of (1865) 3 H. & C. 596 *Scott v. London and St. Katherine Docks Co.* (1865) 3 H & C. 596 : 34 L. J. Ex. 220: 13 L. T. (N. S.) 148 : 13 W. R. 410 by saying that what had happened in the latter case and other similar cases was more consistent with there having been negligence in someone than otherwise. Kay L. J. observed that there was no comparison between the case and (1865) 3 H. & C. 596 *Scott v. London and St.*

Katherine Docks Co. (1865) 3 H & C. 596 : 34 L. J. Ex. 220: 13 L. T. (N. S.) 148 : 13 W. R. 410:

To say that every accident in a school is to be likened to that, and to say that there must be negligence whenever an accident happened, is a contention quite untenable. It is not a dangerous thing to use a blackboard.

37. The ratio decidendi of (1890) 63 L.T. 756 *Crisp v. Thomas* (1890) 63 L. T. 756 in substance was that a blackboard is not a potentially dangerous article. The contrast between the facts in (1890) 63 L. T. 756 *Crisp v. Thomas* (1890) 63 L. T. 756 and those in (1865) 3 H. & C. 596 *Scott v. London and St. Katherine Docks Co.* (1865) 3 H & C. 596 : 34 L. J. Ex. 220: 13 L. T. (N. S.) 148 : 13 W. R. 410 being noted, it remains only to call attention to certain admitted circumstances of the present case, such as the size, shape and material of the thing called a banner, the proximity of the position which it had occupied to the public street, and the height from which it fell. These circumstances make it impossible for me to hold that (1890) 63 L.T. 756 *Crisp v. Thomas* (1890) 63 L. T. 756 has any application here. (1862) 142 E. R. 926 *Hameck v. White* (1862) 143 E.R. 926 : 31 L. J. C. P. 129 : 10 W. R. 230 : 5 L. T. 676 is a case which has been illuminatingly discussed in various passages in *Beven on Negligence*, and I do not think I can do better than to quote what that learned and distinguished commentator says about this case :

Defendant, in order to try a horse which he had bought at Tattersoll's the day before was riding it in Finsbury Circus at a slow pace. The horse was restless and the defendant held the reins tightly, omitting nothing to avoid an accident. The horse, however, swerved on to the pavement, where the deceased was walking, knocking him down, and injured him fatally. An action was brought under Lord Campbell's Act. The Court thought the facts did not disclose any cause of action... "I am of opinion", said Erle C. J., "that a man is not to be charged with want of caution because he buys a horse without having had any previous experience of him. There must be horses without number ridden every day in London of whom the riders know nothing. A variety of circumstances will cause a horse to become restive. The mere fact of restiveness is not even *prima facie* evidence of negligence."

38. The witness who deposed to the fact of the defendant being on the footpath, also deposed to the fact that he was there unwillingly, and thus displaced the presumption of negligence that his evidence had raised. The only question was as to the effect of restiveness in a horse unaccompanied by any other fact implying negligence. The decision of the Court in effect was, that the use of horses for riding and driving being recognised, and certain places being proper for them to be used in, while their natural disposition is uncertain, those who ride them do not guarantee against the effects of the waywardness of their dispositions. A doubt has been suggested whether Finsbury Circus was a proper place "to try" a horse in. Though it was not contested so to be in the year 1862, the point might be disputed today.

39. In another passage Beven distinguishes (1862) 142 E. R. 926 Hameck v. White (1862) 143 E.R. 926 : 31 L. J. C. P. 129 : 10 W. R. 230 : 5 L. T. 676 from (1863) 2 H. & C. 722 Byrne v. Boadle (1863) 2 H. & C, 722 : 33 L. J. Ex. 13 : 9 L. T. (N. S.) 450 : 12 W. R. 279 by pointing out that in the one case the cause of injury was animate and in the other inanimate:

A man who has barrels on his premises is bound to put them in such a position that they will not fall out on the highway; if they do, as they have no power of motion in themselves, the very fact of movement argues negligence. A man who has a horse is also bound to take care that he does not do damage; but since the horse has a power of motion of his own which it is not necessary for the owner in all cases to provide against his exerting, an accident caused by the exercise of this power does not necessarily argue want of care in the owner; for the motion of a horse may arise from his own unforeseen impulse, in which case the owner is not liable; thus, while in the case of a barrel it is enough to show that it moved from its position and caused the injury, in the case of a horse mere unexplained movement will not warrant the same conclusion.

40. The passages I have quoted make it sufficiently plain that different considerations arise, and the principles of liability are not the same when a horse is ridden through a thoroughfare, and when a large advertising device falls from a sky-sign into the public roadway. (1875) 10 Ex. 261 Holmes v. Mather (1875) 10 Ex. 261 : 44 L.J. Ex. 176 : 33 L.T. 961:23 W.R. 364 was another case of injury resulting from equine vagaries. A groom was driving his master, the defendant, in a carriage drawn by a pair of his master's horses, when the animals bolted, and in spite of the best endeavours of the groom to bring them under control, they knocked down and injured the plaintiff. It was held that the action was not maintainable. Bramwell B. said:

If I am being run away with, and I sit quiet and let the horses run, wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them, but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that it is my act of guiding them that brings them to the place where the accident happens : Surely it is impossible.

Cleasby B. said:

I sum up all in these words: in my opinion the horses were not driven there by the defendant's servant, but they went there in spite of him, so far as he directed them at all.

41. In my judgment, (1875) 10 Ex. 261 Holmes v. Mather (1875) 10 Ex. 261 : 44 L.J. Ex. 176 : 33 L.T. 961:23 W.R. 364 may be distinguished in the same way as that indicated in (1862) 142 E. R. 926 Hameck v. White (1862) 143 E.R. 926 : 31 L. J. C. P. 129 : 10 W. R. 230 : 5 L. T. 676. In (1875) 10 Ex. 261 Holmes v. Mather (1875) 10 Ex. 261 : 44 L.J. Ex. 176 : 33 L.T. 961:23 W.R. 364, Bramwell B. made the following observation:

For the convenience of mankind in carrying on the affairs of life, people as they go along the roads must expect, or put up with such mischief as reasonable care cannot avoid.

This was said with reference to mischief incidental to the ordinary traffic on a highway. Reference has been made above to Bevan's comment on (1876) 1 Q. B. D. 314 *Tarry v. Ashton* (1876) 1 Q. B. D. 314 : 45 L. J. Q. B. 260: 34 L. T. 97. This author has further remarked (Bevan on Negligence, Edn. 4, p. 138):

The maxim *res ipsa loquitur* does not apply to an accident on a highway. Those who go on a highway or have their property adjacent and sustain personal hurt there or damage to their property lying beside it can only show a right to recover by affirmative evidence of fault in the person doing the damage. The fact of an accident raises no presumption. A man crossing the road is knocked down by a cart. Merely to prove this shows no cause of action. The plaintiff must go further and specify some breach of duty on the part of the defendant; the cart was driven too fast, or was on the wrong side of the road, or swerved, or was not properly constructed, or was overloaded ? hence the accident: some fact imputing blame as the cause of the accident. It is as much the duty of foot-passengers attempting to cross-street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot-passengers.

See in this connection (1860) 8 C. B. (N. S.) 568 *Cotton v. Wood* (1868) 8 C. B. (N.S.) 568 : 29 L. J. C. P. 333 per Erle C. J. at p. 571.

42. (1909) 2 K. B. 652 *Wing v. London General Omnibus Co.* (1909) 2 K. B. 652: 78 L. J. K. B. 1063: 101 L. T. 411 was a case arising out of an injury sustained by a passenger in a motor omnibus which had skidded on a greasy roadway and struck a lamp post. There was no evidence of negligence on the part of any servant of the defendants in control of the vehicle or of any fault in its construction. The case was conducted on the assumption that, when a road is in a slippery condition, a motor omnibus has a tendency to skid, and it was this circumstance which afforded the basis for the decision of the Court that the defendants were not liable. Vaughan L. J. said:

I do not think that an accident resulting from the tendency of motor omnibuses, however well constructed and designed, to skid is any evidence of negligence or nuisance.

Fletcher Moulton L. J. (pp. 663 & 664) observed :

Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened. An accident in the case of traffic on a highway is in marked contrast to such a

condition of things. Every vehicle has to adapt its own behaviour to the behaviour of other persons using the road, and over their actions those in charge of the vehicle have no control.

At p. 666 there is the following passage in the judgment of Fletcher Moulton L. J.:

No witness was called to prove either that this particular motor omnibus was or that motor omnibuses generally were unmanageable, or dangerous to such an extent as to constitute a nuisance in the eye of the law or to call into play the doctrine in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220.

43. What has been said is, I think sufficient to dispose of any supposed similarity between the present type of case and cases which are concerned with accidents occurring in course of traffic moving in the streets.

44. As regards the remaining cases on which Mr. Mukherjee has relied in support of his argument that neither the rule in (1863) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 nor the doctrine *res ipsa loquitur* apply, the distinction between those cases and a case like the present, which arises out of the escape from the defendants' premises of a potentially dangerous thing brought there by the defendant himself, should be reasonably apparent from a brief statement of the facts of the cases relied upon, and a bare indication of what the decision in each instance really amounted to

45. (1891) 1 Q. B. D. 86 *Stanley v. Powell* (1891) 1 Q. B. D. 86: 60 L. J. Q. B 52: 63 L. T 809: 39 W. R. 76 was a case illustrative of what has been called "inevitable accident." The defendant, who was one of a shooting party, fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree, which was between him and the bird and not in line with the plaintiff, and the pellet accidentally wounded the plaintiff, who was engaged in carrying cartridges and game for the party. The jury found that the defendant was not guilty of any negligence in firing as he did, and Denman J., held that the defendant was not liable for negligence because there was none, nor for trespass to the person because the harm was accidental in the sense that there was no neglect or want of due caution on the defendant's part. It is interesting to note that Beven (Edn. 4, p. 710) has made the following comment upon this decision:

If, then, the reasoning of Denman J., in (1891) 1 Q. B. D 86 *Stanley v. Powell* (1891) 1 Q. B. D. 86: 60 L. J. Q. B 52: 63 L. T 809: 39 W. R. 76 is correct, it is manifest that the contention of the present chapter is wrong, and that in effect the law of England is that a man must in all circumstances be on the alert to avoid receiving injury and cannot, unless in exceptional cases, throw the risk of acting on him doing the act: That the law of England is not so must be apparent to every student of the judgment of Blackburn J., in (1865) 1 Ex. 265 *Fletcher v. Rylands* (1865) 1 Ex. 265 : 35 L. J. Ex. 154 : 14 L.T. (N. S.) 523 : 14 W. R. 799

46. Inevitable accident according to Pollock, (*Law of Torts*, Edn. 14, p. 107),

means an accident "not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to take." In (1932) 146 L.T. 391 *Fardon v. Harcourt Rivington* (1932) 146 L. T. 391, Lord Dunedin said: "People must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities." It is plain that the phrase "fantastic possibilities" was evoked by the special facts of that case which were of a most unusual kind. The headnote of the report is in these terms:

The defendant parked his saloon car in a street with its back against the pavement. The car was left shut with a dog inside it. There was no evidence that the dog had a vicious propensity. When the plaintiff, who had parked his car near the defendant's car, was walking past the defendant's car the dog, which had been barking and jumping about the car, jumped up against the window in the rear of the defendant's car, smashing a panel, whereby a glass splinter flew out and entered the plaintiff's eye, with the result that the plaintiff lost his eye. In an action for damages for personal injuries: Held, that the danger of a piece of glass being knocked by a dog out of small window at the back of the car, and of a splinter of glass hitting a passerby on the pavement, was such an unlooked for event that no reasonable man could say that a person ought to be convicted of negligence for not taking any precautions against it.

47. In the House of Lords, Lord Dunedin referred to (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 as having no bearing on the facts.

(1868) 3 H.L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 dealt with the duty cast upon a person who put on his land something which was dangerous if it escaped to the land of another, to keep the thing on his own land at his own peril, and, if it escaped, then he was answerable for the consequences, whether the escape was due to negligence or not; but there is nothing that is parallel to that circumstance in this case.

48. In (1932) 48 T. L. R. 577 *Jones v. London County Council* (1932) 48 T.I.R. 577, the headnote of the report is sufficient to indicate how obviously that case is distinguishable :

The infant plaintiff, who was 17 years of age and was an unemployed person undergoing a compulsory course of instruction at a county council instruction centre, was ordered by the council's instructor, a man of experience, to take part in an organised game called "riders and horses," in which one boy mounted the back of another and endeavoured to bring to the ground the foot of the boy who was acting as "rider" in an opposing pair. During the game the infant plaintiff, who was taking the part of a "horse," fell on the wooden floor and seriously injured his arm. In an action against the Council for negligence, on the ground that the game was so dangerous in itself that to order a boy to play it amounted to negligence, the evidence of the instructor was that for 20 years he had seen the game played without serious accident. Held, that there was no evidence of

negligence, and therefore the action failed.

49. Scrutton L. J. thought there could hardly be any physical exercise in which an accident might not happen, and to say that physical exercises were dangerous because an accident might happen at some time seemed to go beyond what a jury could reasonably find.

50. (1932) A. C. 562 Donoghue v. Stevenson (1932) 1932 A. C. 562 :101 L.J.P.C. 119 : 147 L. T. 281 was a case which does not in any view help the defendant. The plaintiff in that case had suffered ill effects from drinking ginger beer from a sealed bottle which contained the decomposed remains of a snail. The manufacturer of the beverage was held to be under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article was free from defect likely to cause injury to health.

51. In (1933) 2 K. B. 297 Culter v. United Dairies Ltd. (1933) 2 K. B. 297 : 102 L. J. E. B. 663: 149 L. T. 436 the defendants' servant while endeavouring to secure his employers' horse which was displaying restiveness in a field, cried out for help, whereupon the plaintiff went over an intervening hedge and attempted to hold the animal, which reared and threw him to the ground thereby injuring him. The horse had been employed to draw the defendants' milk van, and there being evidence that it had bolted on two previous occasions, the jury found that the defendants were negligent in employing that particular horse to draw their van. It was held that the defendants' negligence, if any, could not be said to be the cause of the accident, inasmuch as there was a novus actus interveniens, namely, the plaintiffs attempt to hold the horse, which he must have known was attended with risk, and, therefore, that the principle of *volenti non fit injuria* applied and precluded the plaintiff from recovering. Scrutton L. J. observed:

If a horse bolts in a highway and a bystander tries to stop it and is injured, the owner of the horse is under no legal liability to the injured person.

52. The circumstances of fact and the principle of law involved in (1933) 2 K. B. 297 Culter v. United Dairies Ltd. (1933) 2 K. B. 297 : 102 L. J. E. B. 663: 149 L. T. 436 render that case plainly inapplicable here. In (1926) 2 K. B. 332 Noble v. Harrison (1926) 2 K. B. 332 : 95 L. J. K. B. 318; 135 L. T. 325 the facts were as follows : A branch of tree growing on the defendant's land and overhanging a highway broke and damaged the plaintiff's vehicle which was passing thereon. It was found as a fact that neither the defendant nor his servants knew that the branch was dangerous, and that the fracture was due to a latent defect not discoverable by any reasonably careful inspection. It was held that the defendant was not liable inasmuch as he had not created the danger and had no knowledge, actual or imputed of its existence. The precise scope of this decision and its real ratio are brought out in a passage in the judgment of Rowlatt J. in which the cases in (1868) 3 H. L. 330 Rylands v. Fletcher (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 and (1876) 1 Q. B. D. 314 Tarry v. Ashton (1876) 1 Q. B. D. 314 : 45 L. J. Q. B. 260: 34 L. T. 97 are referred to and distinguished :

There remains one other question?namely, whether, inasmuch as the tree in fact overhung the road, the defendant was not under an absolute obligation to support it. The point is suggested by the judgment of Lush and Quain JJ. in (1876) 1 Q.B.D. 314 *Tarry v. Ashton* (1876) 1 Q. B. D. 314 : 45 L. J. Q. B. 260: 34 L. T. 97. In that case a lamp attached to the defendant's premises overhung the highway, and it was held by the two learned Judges referred to that he was bound to prevent it falling at his peril. The reasoning proceeds really upon the same lines as that in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 and I think, fails to apply to this case on the same grounds. It may be that where a heavy object is suspended over a highway, and must fall into it unless supported by artificial means which can only be kept in order by the person in possession of the premises, such person is bound absolutely to maintain the attachments. But a branch of a tree is not kept from falling by artificial attachments to be maintained by man, but by the natural processes which develop the tree, and it is only when accident or decay interfere that human intervention is required I see no ground for holding that the owner is to become an insurer of nature, or that the default is to be imputed to him until it appears, or would appear upon proper inspection, that nature can no longer be relied upon.

53. (1926) 2 K.B. 332 *Noble v. Harrison* (1926) 2 K. B. 332 : 95 L. J. K. B. 318; 135 L. T. 325 was followed in a very recent case, (1945) 1 ALL E.R. 459 *Cunliffe v. Banks* (1945) 1 All E. R. 459, in which a motor cyclist ran into a tree which had been growing upon the defendant's estate and had, owing to its diseased condition, fallen across the highway. Both cases are distinguishable in the same way. In the present case, it scarcely needs to be stated that the immediate cause of the fall of the banner was the failure of an artificial attachment for which the defendant's servants were responsible, to wit a rope, and there can be no question here of any latent defect in any thing, natural or artificial, which was not discoverable by careful inspection. In (1938) 159 L. T. 408 *Simons v. Winslade* (1938) 3 All E. R. 774 : 159 L. T. 408 the plaintiff, a customer of a public house, while going through the yard slipped on some vomit, and falling, sustained injuries. The yard had been inspected by the defendant who was the proprietor of the establishment a few hours previously and it was then in good order. It was held that the defendant was not liable.

54. As regards the maxim *res ipsa loquitur* it is to be noted that the plaintiff gave evidence only of the circumstances in which he fell, and that the defendant did in fact testify that he had inspected the yard prior to the occurrence. As regards the rule in (1868) 3 H.L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 that question did not arise, as is apparent from the grounds on which the decision was based. Greer L. J., in delivering the judgement of the Court of Appeal said :

The duty of an "invitor" towards his "invitee" was expressed in (1866) 9 L. T. at p. 486 : 1 C. P. 274 *Indermaur v. Dames* (1866) 1 C. P. 274 : 9 L. T. at p. 486 at

p. 287 as follows : "The "invitee" was entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knew or ought to have known. We think that there was no evidence which enabled the Court to say that the danger to which the plaintiff was put was one of which the defendant either knew or ought to have known. He could only have known of it by keeping a man constantly in the yard of the licensed premises to warn him when any filth was deposited in the yard. That would be to place on the defendant as an "invitor" a greater duty than he owed to the plaintiff as an "invitee".

55. It is very clear that this case is an illustration of quite another principle from that underlying (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220. It relates to the duty of care which the occupier of premises owes to persons whom he invites into those premises. As Professor Winfield says (Test Book of the Law of Torts 2nd Edn., P- 610) "It falls short of strict liability of the kind set up in (1868) 3 H.L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220. " (1945) 1 ALL E. R. 106 *Norah Read v. Lyons & Co. Ltd.* (1945) 1 All. E. R. 106 was a very recent decision of the Court of Appeal on which strong reliance was placed by Mr. Mukerji. The relevant facts are stated in the judgment of Du Parq L. J. (p. 118):

The appellants in this action were in occupation of a factory at which high explosive shells were made. They managed the factory and controlled the manufacture of the shells. They admit that high explosive shells are "dangerous things." The respondent worked in the factory, though not as a servant of the appellants, and while she was there her position was that of an invitee. On an occasion when she was present in the factory a shell exploded, whereby she suffered injuries. No negligence on the part of the appellants was proved, or alleged. It is consistent with the case pleaded, and with the evidence, that they took the utmost care for the respondent's safety. There is no doubt that they were carrying on a lawful business.

It was held that the appellants were not liable for damages. On behalf of the respondent it had been argued that the principle in (1868) 3 H. L. 330 applied because that principle was not escape from the defendant's land, but escape from the defendant's control, so that there would be liability in the case of injury resulting from non-natural user of the land. As a formulation of the essential principle of liability underlying (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 and other cases of that type, this argument did not find favour with the Court. Mackinnon L. J. (at p. 117) said with reference to the judgment of Blackburn J. in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220:

There can be, in my opinion, no doubt that, that doctrine, as so enunciated, was limited to the operation of the source of danger brought by a plaintiff upon his land, if it caused damage outside the limits of his land to the person or property of & neighbour.

Referring to (1894) 2 Q. B. 281 *Pointing v. Noakes* (1894) 2 Q. B. 281 : 63 L. J. Q. B. 549 : 70 L. T. 842 : 42 W. R. 506, Du Parq L. J. pointed out (at p. 119) that in that case the Court showed no disposition to extend the rule in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 to cover dangerous things which had not escaped from the defendant's land:

There is no instance recorded in the reports of any challenge, either successful or unsuccessful, to the interpretation put upon the rule in (1894) 2 Q. B. 281 *Pointing v. Noakes* (1894) 2 Q. B. 281 : 63 L. J. Q. B. 549 : 70 L. T. 842 : 42 W. R. 506 until, as recently as 1936, that interpretation was reaffirmed and adopted by Lewis J. in (1936) 2 All E. R. 781 *Howard v. Furness Houlder Argentine Lines Ltd.* (1936) 2 All E. R. 781.

Du Parq L. J. also observed (at p. 118) :

There can be no doubt that a manufacturer of explosives, which he knows to be dangerous, is under a duty to take a high degree of care, but I had supposed it to be well settled that, if he fulfilled that duty, he would not be liable to any person using his premises for the consequences of an accidental explosion.

Scott L. J. summed up his conclusions in the following words, which express the gist of the decision in the cases :

In the result I hold that the particular doctrine of strict liability laid down in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 has no application to accidents incidental to the process of manufacture occurring to persons present on the premises, whether as servants or as invitees or licensees.

56. The questions which I have set out from the judgment should suffice to indicate certain important limits to the (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 rule which the case in (1845) 1 ALL E. R. 106 *Norah Read v. Lyons & Co. Ltd.* (1945) 1 All. E. R. 106 has brought out. At the same time the words quoted serve also to underline those divergences in the circumstances which render the decision in (1945) 1 ALL E. R. 106 *Norah Read v. Lyons & Co. Ltd.* (1945) 1 All. E. R. 106 inapplicable to the present case. The plaintiff here was not an invitee and was not on the defendant's premises at all, the accident did not occur in any process of manufacture, and the article which caused the injury to the plaintiff, being potentially dangerous, had been brought by the defendant on to his premises, and had escaped therefrom. That the principle in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 is not to be unduly attenuated in consequence of the decision in (1945) 1 ALL E. R. 106 *Norah Read v. Lyons & Co. Ltd.* (1945) 1 All. E. R. 106 is clear from the variety of the circumstances in which the principle has been successfully invoked. It has for instance been applied to the bursting of hydraulic mains. In (1914) 2 K. B. 772 *Charing Cross Electricity Supply Co., v. Lon Hydraulic Power Co.* (1914) 2 K. B. 772 : 83 L. J. K. B. 1352: 111 L. T. 198, the plaintiff company's underground

electric cables were damaged by water escaping from mains of the defendant company which they had laid under the streets, and which had burst. It was held that in the absence of statutory authorisation the defendants were liable notwithstanding that they had been guilty of no negligence. (1915) 84 L. J. P. 161 *Hatfield v. Glasgow* (1915) 84 L. J. P. 161:112 L.T. 703 was cited by Mr. Mukerji as an instance of circumstances which do not attract the maxim *res ipsa loquitur*. This was a case of a collision between ships at sea, and I do not see how it can have any application.

57. Two Indian cases were cited on behalf of the defendant which arose out of damage caused by water escaping from its confines on the defendants' lands and causing damage to the property of the plaintiffs. In 1 I. A. 364 *Madras Railway Co. v. Zamindar of Carvetnagaram* ("73-74) 1 I. A. 364 : 3 Sar 391 : 14 Beng, L. R. 209 (P. C.), a zemindar was held by the Privy Council not to be liable for damage caused by the overflow, due to an extraordinary flood, of water tanks which it was his duty to maintain on his zemindary as part of a system of irrigation recognised by law and custom as essential to the welfare of the people. Their Lordships distinguished (1868) 8 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 on the ground that the zemindar was charged under Indian Law with the duty of maintaining the tanks in question for the benefit of large numbers of people, and that his rights and liabilities were analogous to those of persons or corporations upon whom statutory powers had been conferred and statutory duties imposed. The Right Hon. Sir Robert Collier, delivering the judgment of the Judicial Committee, quoted the following words of Chief Justice Cockburn in (1860) 5 H. & N. 679 *Vaughan v. Taff Vale By. Co.* (1860) 5 H. & N. 679 : 29 L. J. Ex. 247 : 2 L. T. (N.S.) 394: 8 W. R. 549,

where the Legislature has sanctioned and authorised the use of a particular thing, and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of Legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the person using it is not responsible.

Regarding (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 their Lordships said (page 385):

In that case the defendants for their own purposes brought upon their land and there accumulated a large quantity of water by what is termed by Lord Cairns "a non-natural use" of their land. They were under no obligation, public or private, to make or maintain the reservoir; no rights in it had been acquired by other persons, and they could have removed it if they thought fit.

In my opinion these observations apply with equal force to the displaying by the defendant in the present case, of the advertising banner on the roof of his cinema house.

58. The other Indian case upon which Mr. Mukerji relied, 3 Cal. 776 *Ramlal Singh v. (sic) Dhary Muhton* ("77) 3 Cal. 776, was one in which the principle laid down

by the Privy Council in 1 I. A. 364 Madras Railway Co. v. Zamindar of Carvetnagaram ("73-74) 1 I. A. 364 : 3 Sar 391 : 14 Beng, L. R. 209 (P. C.), was applied. In this case Ainslie J. observed as follows:

Now, the law as laid down in English textbooks is, no doubt, a very useful guide; but it must not be taken to override the customs of this country, customs arising from the extreme necessity of preserving water and thereby preserving the means of cultivating large tracts of land which would otherwise be waste.

This case also involved the defence of act of God or vis major with which I shall presently deal.

59. A careful consideration of the cases discussed above has satisfied me that the maxim *res ipsa loquitur* applies to the facts relative to the occurrence in the present case. The plaintiff's version of those facts, supported as it is by the evidence of Raj Deo Ojha, Ram Laish Singh, and Savajit Singh who are independent and, in my opinion, truthful witnesses must be accepted as a correct statement of the circumstances under which the plaintiff received his injury, and the suggestion that he was struck by an article or articles described as "shades" which fell from the roof of a neighbouring building at the same time as did the banner, must be dismissed as a theory which has no foundation and is opposed to the evidence. This conclusion casts the burden of proving exercise of due care on the defendant. Evidence to rebut the presumption of negligence has been given on his behalf, but I am not impressed by it. It is, however, unnecessary at the moment to discuss its inherent infirmities, or to go to the length of saying, at this stage, that what was stated by the defendant's manager, Basu Mullick, regarding the precautions which he took to see that the banner was properly fastened to the frame of the sky sign was materially untrue. I shall refer to this aspect of the matter later. This, in my judgment, is a case in which the indisputable facts attract the rule in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220, and that being so, the defendant is called upon to answer his liability for the injury caused to the plaintiff by the falling banner not by merely showing that due care was exercised but in one of modes which alone constitute a defence to liability in cases of the *Rylands v. Fletcher* *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 type. One of these is the defence of act of God or vis major, and the defendant has in fact raised it by contending that the fall of the banner was caused by a storm of unusual severity. The evidence adduced in support of this contention will have to be examined for the purpose of seeing whether it proves that, such a storm took place as would amount to act of God or vis major as that concept has been understood in the Law of Torts. Therefore before approaching the evidence regarding the weather which prevailed at the time when the banner fell, it will be necessary first to consider the cases in which act of God or vis major has been discussed.

60. Professor Winfield, following Pollock, has defined act of God as "an operation of natural forces so unexpected that no human foresight or skill could reasonably

be expected to anticipate it." In (1917) A. C. 556 *Greenock Corporation v. Caledonian Railway* (1917) 1917 A.C. 556: 86 L. J. P. C. 185: 117 L. T. 483 at p. 581, Lord Parker said:

(1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220 saved the question whether the act of God might not have afforded a defence, and this question was answered in the affirmative in (1876) 10 Ex. 255 *Nichols v. Marsland* (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693 in which the act of God had been established by the finding of the jury, though I have some doubt whether that finding was correct.

61. Mr. Mukerji has relied strongly upon (1876) 10 Ex. 255 *Nichols v. Marsland* (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693, in support of his contention that the state of the weather at the time when the banner fell was so stormy that the defendant may plead act of God as an answer to the plaintiff's claim. The facts of that case were as follows: There were some artificial lakes on the defendant's land which had been formed by damming up a stream. Owing to an extraordinary rainfall, greater and more violent than any the witnesses could remember, the stream and the lakes burst their banks and the water inundated the plaintiff's land and carried away some county bridges. The plaintiff, who sued on behalf of the county, contended that the defendant was liable on the principle of (1868) 8 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220, but the Court of Exchequer Chamber decided that the defendant could not be held liable for an extraordinary act of nature which could not be reasonably anticipated.

62. With reference to the view taken of act of God in (1876) 10 Ex. 255 *Nichols v. Marsland* (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693 Fry J. said, in (1878) 9 Ch. D. 503 *Nitro-Phosphate and Odam's Chemical Manure Co. v. S. London & St. Katherine Docks* (1878) 9 Ch. D. 503 : 39 L. T. 433: 27 W. R. 267 at p. 516 :

In order that the phenomenon should fall within that rule, it is not in my opinion necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. That appears to me to be the view which has been taken in all the cases, and notably by Lord Justice Mellish in the recent case in (1876) 10 Ex. 255 *Nichols v. Marsland* (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693.

This statement was assented to by Lord Coleridge, C. J. in (1881) 7 Q. B. D. 418 *Dixon v. Metropolitan Board of Works* (1881) 7 Q. B. D. 418 : 50 L. J. Q. B. 772 : 45 L. T. 312 : 30 W. R. 83 at pp. 421 and 422. (1876) 10 Ex. 255 *Nichols v. Marsland* (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693 was distinguished in (1917) A. C. 556 *Greenock Corporation v. Caledonian Railway* (1917) 1917 A.C. 556: 86 L. J. P. C. 185: 117 L. T. 483. Professor Winfield has dealt with this matter in a short compass at p. 53 of his *Text Book of the Law of Tort* (2nd Edn.):

The principle underlying (1876) 10 Ex. 255 *Nichols v. Marsland* (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693 is unquestioned, but the decision itself has aroused adverse criticism in later cases, notably in (1917) A.C. 556 *Greenock Corporation v. Caledonian Railway* (1917) 1917 A.C. 556: 86 L. J. P. C. 185: 117 L. T. 483. The corporation, in laying out a park, constructed a concrete paddling pool for children in the bed of a stream and thereby altered its course and obstructed its natural flow. Owing to rainfall of extraordinary violence, the stream overflowed at the pond and a great volume of water, which would have been safely carried off by the stream, in its natural course, poured down a street and flooded the property of the railway company. It was held by the House of Lords that this was not *damnum fatale* (the equivalent in Scot's Law of the "act of God") and that the Corporation was liable. Some of the noble and learned Lords cast doubt upon the finding of facts by the Jury in (1876) 10 Ex. 255 *Nichols v. Marsland* (1875) 10 Ex. 255 : 44 L. J. Ex. 134 : 33 L. T. 265 : 23 W. R. 693.

In (1917) A. C. 556 *Greenock Corporation v. Caledonian Railway* (1917) 1917 A.C. 556: 86 L. J. P. C. 185: 117 L. T. 483 Lord Finlay observed:

It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time.

and on this point Lord Dunedin said :

The appellants argue that.....if they can show that this rainfall was much in excess of what had been previously observed in Greenock that is enough. I do not think that you can rightly confine your view to Greenock alone. No one can say that such rainfall was unprecedented in Scotland; and I think the appellants were bound to consider that some day Greenock might be subjected to the same rainfall as other places in Scotland had been subjected to.

The italics are mine. They serve to remind one of the fact that, in the present case, the incident happened during the monsoon, a season in which stormy weather is not unusual and storms of considerable severity are by no means unprecedented. Whether the climatic disturbances of the 5th July 1943 amounted to a severe storm at all is a question of fact which I shall deal with later upon the evidence. The *Great Western Railway of Canada v. Braid* and *The Great Western Railway of Canada v. Fawcett* (1863) 1 Moo. P. C. (N. S.) 101 : 8 L. T. (N. S.) 31: 11 W. R. 444 were two appeals from Canada which were heard together by the Privy Council. They arose out of two suits for damages for deaths occasioned by a railway accident which was caused by the collapse of an embankment. The case was earlier than (1868) 3 H.L.330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220, and it is interesting to note that two of the matters which it involved are the principle of the maxim *res ipsa loquitur*, and the defence taken on behalf of the railway company, that the collapse of the embankment was due to storm of such an extraordinary nature that no experience could have anticipated its occurrence. Lord Chelmsford,

delivering the judgment of the Judicial Committee, said regarding the former matter (at p. 115):

There can be no doubt that when an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to prima facie evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it.

Regarding the second matter, his Lordship said (at p. 120):

Their Lordships, without attempting to lay down any general rule upon the subject, which would probably be found to be impracticable, think it sufficient for the purposes of their judgment in these cases to say that the railway company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur.

His Lordship referred to what the witnesses had said in describing the storm, and then went on to make the following comment (p. 121):

In the whole of this evidence there is nothing more proved than that the night was one of unusual severity, but there is no proof that nothing similar had been experienced before, nor is there anything to lead to a conclusion that it was at all improbable that such a storm might at any time occur.

His Lordship after referring to the report of the company's engineer, said (page 122) :

Whatever his meaning may be, it is evident that the embankment was insufficiently provided with means of resisting the storm, which, though of unusual violence was not of such a character as might not reasonably have been anticipated and which, therefore ought to have been provided against by all reasonable and prudent precautions.

63. (1868) 1 Moo. P. C. (N. S.) 101 (1863) 1 Moo. P. C. (N. S.) 101 : 8 L. T. (N. S.) 31: 11 W. R. 444 as well as (1917) A. C. 556 Greenock Corporation v. Caledonian Railway (1917) 1917 A.C. 556: 86 L. J. P. C. 185: 117 L. T. 483, were followed by the Privy Council in (1922) 3 A. C. 555 City of Montreal v. Watt & Scott, Ltd. (1922) 2 A. C. 555 : 91 L. J. P. C. 239 : 38 T. L. R. 1 where it was laid down that it was the duty of a municipality in constructing sewers, to make them capable of coping with the amount of water which might be expected from time to time in the course of years.

64. In 3 Cal. 776 Ramlal Singh v. (sic) Dhary Muhton ("77) 3 Cal. 776, Ainslie J. followed (1877) 2 Ex. D. 1 Nichols v. Marsland (1877) 2 Ex. D. 1 : 46 L. J. Ex. 174: 38 L. T. 725 : 25 W. R 173, and said:

This case seems to us to apply distinctly to the present. It appears from the judgment of the Judge that the damage in the present instance was caused by an unusual inundation which he describes as bringing down four times the

ordinary quantity of water. It must be taken that the damage was caused by the act of God, and not by the act of the defendants, who are not shown to have failed in making provision for properly dealing with such quantities of water as might reasonably be expected to accumulate.

65. The cases considered above bring us back to the definition of act of God or vis major contained in Professor Winfield's book, which, at the expense of repetition, I would quote again: "an operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it." I shall now examine the evidence regarding the "storm" which is alleged by the defence to have taken place on the 5th July 1943.

66. It was suggested in cross-examination to the plaintiff's witnesses Raj Deo Ojha, Ram Laish Singh, and Savajit Singh, that there was a storm or strong wind at the time when the banner fell, but they all categorically denied it. It was similarly suggested to Mr. S. N. Gupta that the weather was stormy on the evening of the 5th July, but he maintained that though there was cloud and rain there was no storm. The witness Raj Deo Ojha conceded that when the banner fell there was a gust of wind, and the plaintiff admitted that this might have been the case.

67. The defendant's witness Basu Mullick, the manager of the Rupali Cinema, deposed on the other hand that on the 5th July the weather was cyclonic. The question is set at rest by the evidence of Bishnupada Shaha, who is employed as the Chief Observer in the Weather Office of the Meteorological Department at Alipore. This witness is a Master of Science of the Calcutta University and gave evidence as an expert. He impressed me as being disinterested and independent. From the records of his department he testified that on the afternoon and evening of the 5th July there was not a great deal of rain and that the velocity of the wind was as follows : From 5.30 P. M. to 7.14 P. M. it was moderate, i. e. from 8 to 10 miles per hour. From 7.14 to 8.40 P.M. it was rather high, the maximum gust being about 27 miles per hour at about 7.46 P. M. From 8.40 P. M. to 11.30 P.M. the wind was again moderate, i. e. from 8 to 10 miles per hour. The witness described the phenomena which occur in different states of wind velocity: at 22 to 27 miles per hour, large branches of trees are put in motion, whistling is heard in telegraph wires, and umbrellas are held with difficulty. At 28 to 33 miles per hour whole trees are in motion and inconvenience is felt in walking against the wind. At 34 to 40 miles per hour, twigs are broken off and walking is impeded. At 41 to 48 miles per hour slight structural damage occurs, and loosely fastened corrugated iron is removed from roofs. The witness further stated that wind velocities of from 31 to 48 miles per hour are sometimes experienced in Calcutta during norwester squalls, and that gusts of from 28 to 38 miles per hour are not uncommon in the monsoon season. This evidence puts an end to the plea of act of God, for, if it is accepted, as I think it must be, then it is idle to say that the force of the wind was so unexpected that no foresight could reasonably be expected to anticipate it.

68. Although this conclusion is sufficient to fasten liability on the defendant upon the principle in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220, I would go further and hold that the presumption of want of due care on the part of the defendant or his servants which the maxim of *res ipsa loquitur* raises against them has not been rebutted. In not taking precautions against winds which are not unusual during the monsoon months, the defendants were *prima facie* negligent, and the fact that the banner fell in a wind which was not above 27 miles per hour in velocity, goes a long way to discredit all the elaborate evidence of Basu Mullick and Amitava Boy regarding the tying of the banner to the framework of the sky sign on the 11th June by three strands of new coir rope. I cannot believe this evidence, for, if it is true, the banner would not have fallen. As stated before, it was made fast in a position flat against the galvanised sheeting of the sky sign structure. If the wind was from the west, that would have pressed against the sky sign frame, not torn it away from there. If the wind was from the east, the banner would have been in the lee of the sheeting, which would have kept the wind away from it. I find that there is some confusion in the transcript of the evidence of Bishnupada Shaha as to whether the wind that evening was from the south-west or a south-east, but, for the reason just stated, I do not think that matters much. It certainly does not support the explanation advanced by Basu Mullick, that a strong wind either from the north or the south tore into the narrow space between the galvanised sheeting and the banner, and caused the ropes to part in spite of their having been securely tied. Port or starboard, windward or leeward, it makes no difference to Basu Mullick. And then the ropes at all the four corners parted at the same time. Had one gone, and the others held, the banner would not have fallen into the street, and the evidence given to show that every precaution was taken to see that the banner was securely fastened to the sky sign frame might not have been so transparently untrue. I hold that the defendant is liable upon the principle in (1868) 3 H. L. 330 *Rylands v. Fletcher* (1868) 3 H. L. 330 : 37 L. J. Ex. 161: 19 L. T. 220, and I further find that there was negligence on the part of his servants for which he is responsible in law, inasmuch as proper care was not taken to secure the banner in such a way as to prevent it from being blown into the street during monsoon weather.

69. I come now to the question of damages. The plaintiff, who is 51 years of age, is employed as a clerk in the Department of the Viceregal Estates which is under the Public Works Department. His salary and allowance amount to Rs. 228 per month, and he is entitled to free quarters.

70. The plaintiff's evidence is that when the banner fell on him, it felled him to a sitting posture and stunned him. On regaining consciousness he discovered that he was bleeding profusely from the head. Two or three persons, who turned out to be armed police constables, and who were off duty at the time, came to his assistance and lifted the banner off his person. One of these men bandaged his head, and he was then taken by one of them in a rickshaw to the Shambhunath Pundit Hospital. There he was again bandaged, admitted as an indoor patient,

and put to bed. As the bleeding persisted, he was operated upon under a general anaesthetic that night. He remained in the hospital for five days till the 10th June, when, at his own request, he was allowed to go home. Dr. A. M. Dutta, from this hospital, attended him daily at his house for more than one month. He paid Dr. Dutta Rs. 240 for his services, and he had to spend Rs. 200 on medicines and special diet, and Rs. 10 for conveyance to and from the hospital. He had to apply for one month's leave of absence from his post, and was unable to return to it till after the 8th August 1943, on which date he was examined by Lt. Col. Thakur who certified him as fit to resume his duties.

71. The plaintiff's evidence regarding the occurrence is supported by the witnesses, Raj Deo Ojha, Ram Laish Singh and Savajit Singh. His evidence regarding the subsequent facts finds corroboration in the testimony of the following witnesses. Mr. S. N. Gupta, the Supervisor of the Viceregal Estates, and the plaintiff's immediate official superior, Dr. S. K. Mitra, Resident Medical Officer of the Shambhunath Pundit Hospital, Dr. A. M. Dutta, House Surgeon at that hospital, and Dr. N. N. Chanda, another House Surgeon at the same hospital.

72. The cut on the plaintiff's head is described by the doctors as three and a half inches long, one inch wide, and bone-deep. There is no doubt that the wound bled for several hours before the hemorrhage was stopped by the tying of certain blood vessels. Apart from pain in the head, the plaintiff said he suffered for a few days from severe pain in the shoulder. His evidence further is that before the accident he had enjoyed perfect health, and had taken no leave for about 8 years, that since the mishap his health has deteriorated to such an extent that he suffers from nervousness when he goes out, he cannot concentrate on his work as before, he is not capable of protracted effort, his memory has been affected and his eyesight impaired. He stated that, in the usual course, he had a chance of being selected to fill a higher official appointment upon a salary which might have reached Rs. 400 per month, but as his efficiency has been reduced his superior officer, Mr. Gupta, was unable to recommend him for such a selection. This statement is fully endorsed by Mr. Gupta, who also deposed that the plaintiff was a hard-working and experienced man who enjoyed perfect health before the accident, but that since then the state of his health has been such as to have caused a considerable falling off in his efficiency.

73. Dr. A. M. Dutta, who treated the patient while he was in hospital, and later attended upon him at his house, has testified that the condition of the wound which was healing nicely for the first few days, suddenly deteriorated. Upon examination the witness found that the plaintiff had both diabetes and high blood pressure. In the witness opinion the diabetes might possibly have been the result of a disturbance of the automatic nervous system brought on by a shock to the brain caused by the head injury. I might here say that on this point the witness has been contradicted by a Dr. Treu, who was examined as a medical expert on behalf of the defence, but who had never examined the plaintiff. I do not take Dr. Datta's opinion as to the cause of the diabetes from which the plaintiff was

suffering into consideration in assessing damages, and in estimating that I shall leave diabetes out of account altogether. But Dr. Datta asserted that the plaintiff's injury was, by reason of its location and extent, a serious injury. The effect of Dr. Datta's evidence was that, in his opinion, the state of health to which this injury had brought the plaintiff was symptomatic of a shortened expectation of life and a reduced capacity for work. I have no reason whatever for not accepting the testimony of the witnesses referred to above in all the particulars just indicated, save and except the statement of Dr. Datta that the diabetes, and perhaps the blood pressure, from which he found the plaintiff to be suffering, may possibly have been due to his injury. This is a pure matter of speculative opinion and it would be safer not to place any reliance upon it. But as it is only that, it reflects in no way upon the rest of Dr. Datta's evidence, which finds ample support in the evidence both of the plaintiff and of his immediate official superior, Mr. S. N. Gupta.

74. A number of cases have been cited by both sides upon the question of assessment of damage, but not all of these have application here. I shall refer briefly to certain decisions which, in my opinion, afford some guidance in the special facts of the present case.

75. (1879) 4 Q. B. D. 406 Phillips v. L. & S. W. Ry. (1879) 4 Q. B. D. 406 was a case which arose out of a railway accident in which the plaintiff, an eminent medical practitioner, sustained injuries, for which he claimed damages against the railway company. The jury awarded the plaintiff ?7,000. The Queen's Bench Division directed a new trial on the ground of inadequacy of damages. An appeal from that order was dismissed by the Court of Appeal, reported in (1879) 5 Q. B. D. 78 Phillips v. L. & S. W. Ry. Co. (1879) 5 Q. B. D. 78 : 41 L. T. 121 : 28 W.R. 10. The second trial took place before Lord Coleridge C. J., and the jury awarded the plaintiff ?16,000 as damages. The defendant again moved for a retrial, but a rule was refused, and this decision was upheld by the Court of Appeal ? reported in (1879) 5 C. P. D. 280 Phillips v. L. & S. W. Ry. Co. (1879) 5 C. P. D. 280 : 49 L. J. Q. B. 233 : 42 L. T. 6. Bramwell L. J. referred (p. 287) to the summing up of Lord Coleridge at the second trial, and said:

I think that the direction of Lord Coleridge was such as is usually given and was right. I have tried as Judge more than a hundred actions of this kind, and the direction, which I, in common with other Judges have been accustomed to give the jury has been to the following effect; you must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering; of course it is almost impossible for you to give to an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider under all the circumstances what is a fair amount to be awarded to him. I have never known a direction in that form to be questioned.

76. In (1936) 1 K.B. 192 Owen v. Sykes (1936) 1 K. B. 192 : 105 L. J. K. B. 32 : 154 L. T. 82 the plaintiff, a medical practitioner, who was thirtynine years of age

and an athlete, sustained through the negligence of the defendant's servants, injuries having permanent results which necessitated his employing an assistant to help him to carry on his practice for the rest of his life, and also prevented him from following his athletic career. The action was tried without a jury, and the Judge awarded ₹10,000 as damages. The Court of Appeal held, that although if they had tried the case in the first instance, they would probably have awarded a smaller sum as damages, yet they would not reduce the amount awarded by the trial Judge, as they were not satisfied that the Judge acted upon a wrong principle of law, or took an erroneous view of the evidence as to the damage suffered by the plaintiff, or made some mistake in giving weight to evidence that ought not to have affected his mind, or in leaving out of consideration something that ought to have affected his mind, or that the amount was so high or so low as to make it an erroneous estimate of the damage to which the plaintiff was entitled.

77. This decision adopted the criterion laid down by Greer L. J. in (1935) 1 K. B. 354 *Flint v. Lovell* (1935) 1 K.B. 354 : 104 L. J. K. B. 199 : 152 L. T. 231 at p. 360, which case is an authority for the proposition that in assessing damages, a Judge is entitled to take into consideration as one of the elements of damage, the fact that the plaintiff's normal expectation of life has been materially shortened. That principle was approved by the House of Lords in (1937) A. C. 826 *Rose v. Ford* (1937) 1937 A. C. 826 : 106 L. J. K B. 576 : 157 L. T. 174 : 1937-3 All E. R. 359 where Lord Wright said (p. 847):

I think he has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts not only in regard to pain, suffering and disability, but in regard to the continuance of life for its normal expectancy. A man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given.

In (1938) 3 ALL E.R. 483 *The Aizkarai Mendi* (1938) 3 All E.R. 483:1938-P 263 :107 L.J.P. 141 : 159 L. T. 490, the principle enunciated in (1937) A.C.826 *Rose v. Ford* (1937) 1937 A. C. 826 : 106 L. J. K B. 576 : 157 L. T. 174 : 1937-3 All E. R. 359 regarding assessment of damages or loss of expectation of life was applied. In (1938) 1 K.B. 257 *Roach v. Yates* (1938) 1 K.B. 257 : 107 L.J.K.B. 170: (1937) 3 All E.R. 442, a bricklayer, aged thirty-two, sustained such serious injury to the brain as to render him permanently unfit for work, and so incapable of looking after himself that his wife and sister-in-law, whose total wages amounted to ₹3 a week, had to give up their employments to attend on him day and night, and his expectation of life was shortened from thirty to sixteen years. At the time of the accident he was earning an average wage of ₹3-10-0 a week. Damages to the extent of ₹6542 including special damage of ₹542 were awarded. In this case it was held by the Court of Appeal that in assessing damages, it was proper to take into account the following amongst other elements: in respect of the man's prospective loss of wages, the sum which he would have earned

during what, but for the accident, would have been his normal life according to actuarial tables; in respect of his physical and mental pain and suffering, and the shortening of his life, a sum in estimating which it should be kept in view that no amount of money could fully compensate him for his injuries, and that the most that could be done was to award him such compensation as was reasonable in all the circumstances of the case.

78. In (1904) 2 K.B. 250 *Johnstone v. G. W. Railway* (1904) 2 K. B. 250 : 73 L. J. K. B. 568 : 91 L. T. 157 : 52 W. R. 612, the plaintiff, a man of twenty-eight years of age, had qualified as a marine engineer and had a good prospect of obtaining an appointment as a superintending engineer. Owing to injuries received in a railway accident he was rendered incapable of filling such a position, and the jury awarded him ?3,000 as damages. In declining to interfere with the verdict, the Court of Appeal held that the jury were entitled to take into consideration the possibility that the plaintiff would never be able to accept the position of a superintending marine engineer. *Yaughan Williams* L. J. approved of the direction given to the jury by the trial Judge, which was based on (1873) 8 Ex. 221 *Rowley v. London & N. W. Railway* (1873) 8 Ex. 221 : 42 L. J. Ex. 153 : 29 L.T. 180 : 21 W. R. 869;

There are the accidents of life and other elements which have to be taken into consideration which ought to prevent you giving him such a sum as would be simply an investment for him, and enable him to do nothing. Still he is entitled to a fair sum, considering the position for which he was fitted, and the position in which he is now.

79. (1941) A. C. 157 *Benham v. Gambling* (1941) 1941 A. C. 157 : 110 L. J. K. B. 49 : 164 L. T. 290 : (1941) 1 All E.R. 7, was a case in which a father brought an action claiming damages in respect of the death of his child aged 2? years, who was so injured in a motor accident that he died the same day. Lord Simon L. C., delivering the judgment of the House of Lords, observed with reference to the shortening of life as a consideration in assessing damages (at p. 166) :

it is necessary for the Court to be satisfied that the circumstances of the individual were calculated to lead, on a balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence.

80. These cases make it apparent that considerations which may be permitted, in circumstances where they arise, to influence an assessment of damages include; (1) pain and suffering, (2) loss of earnings or loss of a prospect of lucrative employment, and (3) a shortened expectation of life provided that life held a positive measure of happiness. Upon the evidence to which I have referred, and which I accept as representing a strictly truthful account of the condition to which the plaintiff has been reduced by the accident I am bound to hold that he has suffered, firstly, bodily pain, the physical discomfort and mental anguish of greatly impaired general health and disability; secondly, loss of the prospect of enjoying for 4 or 5 years a more lucrative position than that which he now holds,

and, thirdly, a shortened expectation of life that held promise of the happiness which flows from labour efficiently and easily performed. I do not think Rs. 5,000 would be either too large or too small a figure in which to express an estimate of the injury which the plaintiff has suffered.

81. As regards special damages, I accept the plaintiff's evidence that he had to spend Rs. 450 in connection with medical treatment, and I think it is a moderate estimate. In the result, my findings upon the issues raised at this trial are as follows :

82. On issue No. 1? This Court has jurisdiction to try this suit. As stated before jurisdiction was conceded, but I should also say that the defendant's admission that he used to receive his business letters, by appointment with the post-man at 5, Dhurumtolla Street places the matter beyond doubt. On Issue No. 2 ? The plaintiff was injured on 5th July 1943, as alleged in the plaint. On Issue No. 3? The plaintiff sustained a cut on the head 3? inches long, 1 inch wide, and bone deep which has brought about a general deterioration of his health, and a reduction of his power to concentrate on his work. On issue No. 4 ? The occurrence was not due to a severe storm or to any unavoidable or unexpected cause. On issue No. 5 ? It was due to the negligence of the defendant's servants. On issue No. 6? The plaintiff is entitled to a decree for Rs. 5450. I decree the suit for that amount with costs. Before I leave this case there is a word I wish to say in the public interest.

83. The plaintiff, an inoffensive passer-by in public thoroughfare, was severely injured by an advertising device consisting of a picture on cloth in a wooden frame 12 ft. by 3? ft. which fell from its attachment on a sky sign framework erected on the roof of the Rupali Cinema House. I have found that the mishap was due to the negligence of the person or persons who had caused this contrivance to be fastened to the frame of the sky sign by means of ropes, and I have awarded the injured man a sum of Rs. 5450 as damages both general and special.

84. If the present lot of the pedestrian in Calcutta is to be aggravated by danger from the falling of articles attached to licensed sky-signs in such a way that a monsoon gust will blow them into the streets, then a new terror will be added to life. This is a matter which the Calcutta Municipality can control.

85. It is not helpful to say, as the Chief Law Officer or the Corporation, who was called as a witness by the Court, has said, that because a sky sign is, according to its definition in the Act, not a sky-sign till an advertisement is displayed from it, the licensee has the right to tie things to the framework and that he commits no violation of the conditions of his licence unless he has neglected to take proper precautions. The fact remains that the Municipality can, if it will, enforce frequent and regular supervision of licensed sky-signs so as to prevent occurrences like the one which has given rise to this action for damages. An unsatisfactory state of things is disclosed by the evidence of the Municipality's

District Building Surveyor, who deposed as follows :

Q. 73. Is it not the duty of the Corporation to inspect from time to time to see whether the proprietor of the cinema is making proper use of the sky signs or not ? Ans. The difficulty is this, there is only one building inspector for 2/3 wards and when something wrong happens to it they don't get time to inspect it.

Q. 74. Did the Corporation take any steps against the owner of the Rupali ?

Ans. I don't find anything in the record.

86. Winfield cites the instance of the eighteen Jews upon whom the Tower of Siloam fell, narrated in the New Testament, as an illustration of a tendency to regard the catastrophe as a punishment for the sins of the injured person. I am sure the Citizens of Calcutta would not wish to see sky-signs embellishments classified as instruments of destiny in the same category as the biblical tower. I hope the matter will receive the early consideration of the Municipal authorities.

87. There is one other matter. It is pleasant to be able to bring to the notice of the police authorities an instance of laudable conduct by constables. The men of the armed police, Raj Deo Ojha, Ram Laish Singh, and Savajit Singh, especially the first named, (that they were all off duty at the time), displayed commendable initiative as well as kindness in rendering first aid to the injured man, and in removing him with promptitude to the hospital. Conduct like this deserves praise and encouragement, and one hopes it may be emulated by others in the rank and file of the Indian Constabulary.