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## Civil Procedure—Prima Facie Case

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the complaint, a motion to dismiss the complaint should be denied.<sup>8</sup> The remedy available for the defendant at this time should be in the form of a motion for a bill of particulars or a motion to make the complaint more definite and certain.<sup>9</sup>

The policy behind the instant case is illustrative of the modern deviation from the old system of strict pleading and its corresponding harshness. The new trend is toward a more liberal system of pleading similar to the notice type of pleading found in the federal courts, and is an attempt by the courts to alleviate the evils of an overcrowded court calendar and an already complex legal procedure as well as to insure that a just claim will be heard.

### Prima Facie Case

*Andersen v. Bee Line*<sup>10</sup> was a wrongful death action arising out of a collision between defendant's bus and a car driven by plaintiff's decedent. Plaintiff introduced oral testimony of a disinterested witness which inferentially established defendant's negligence, while defendant presented photographs showing the vehicles after the collision in a position which tended to contravert the oral evidence. The jury returned a verdict for plaintiff which the Appellate Division reversed on the ground that, as a matter of law, plaintiff had not established a prima facie case.<sup>11</sup>

In a wrongful death action a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence.<sup>12</sup> It is also established that a court, in deciding a motion to dismiss, must consider the facts adduced at the trial in the aspect most favorable to the plaintiff, who is entitled to the benefit of every favorable inference which can be reasonably drawn from those facts.<sup>13</sup>

In line with these rules the Court, in reversing (4-3) the Appellate Division, pointed out that a jury could reasonably draw the inference that the bus continued in the unlawful course indicated by plaintiff's witness to the point where it struck

8. *Condon v. Associated Hospital Service*, 287 N. Y. 411, 40 N. E. 2d 230 (1940); see also *Dyer v. Broadway Central Bank*, 252 N. Y. 430, 169 N. E. 635 (1930).

9. *Barrett Mfg. Co. v. Sergeant*, 149 App. Div. 1, 133 N. Y. Supp. 526 (1st Dep't 1912); N. Y. R. Civ. PRAC. 115. Any party may require any other party to give a bill of particulars of his claim or a copy of the items of the account alleged in the pleading . . . ; N. Y. R. Civ. PRAC. 102. If any matter contained in the pleading be so indefinite, uncertain or obscure that the precise meaning or application thereof is not apparent, the court may order the other party to serve such amended pleading as the case may require . . .

10. 1 N. Y. 2d 169, 134 N. E. 2d 457 (1956).

11. *Andersen v. Bee Line*, 283 App. Div. 714, 127 N. Y. S. 2d 344 (2d Dep't 1954).

12. *Noseworthy v. City of New York*, 298 N. Y. 76, 80 N. E. 2d 744 (1948).

13. *Sagorsky & Son v. Malyon*, 307 N. Y. 584, 123 N. E. 2d 79 (1954).

the decedent's car, and that the bus driver, while bringing his bus to a stop, turned back into his own lane where defendant's photographs showed it.

The dissent, while not challenging the existence of these rules, disagreed with the majority's interpretation of the facts. The inferences seen by the majority as reasonable were found by the minority to be insufficient to establish logically that the proximate cause of the accident was due to the negligence of the defendant. Furthermore, such inferences which might be possible are found by the dissent to be contradicted by the "actual physical facts" as established by the photographs. What the dissent failed to consider, however, is the fact that the photographs in question did not show the "actual physical facts" at the crucial point of impact but only a picture of the vehicles as they came to rest after the bus had pushed the car a distance of 29 feet from the point of impact.

Since the weight of authority in this jurisdiction supports the proposition that where there is a conflict of evidence, as in the instant case, it is within the province of the jury to decide on the issue of credibility and give appropriate weight to the proffered evidence,<sup>14</sup> the majority of the Court was doubtlessly correct in reinstating the verdict of the jury.

### Summary Judgment

The object of a motion for summary judgment is to save the moving party from the burden of a trial, where there is no substantial or genuine question of fact involved.<sup>15</sup> Official records which provide a defense sufficient as a matter of law, will entitle the defendant to a summary judgment, unless the plaintiff raises an issue as to the verity or conclusiveness of this evidence by affidavit or other proof.<sup>16</sup>

In *Maddaus v. Goffen*,<sup>17</sup> the plaintiff performed services for an estate in its death action against a railroad company, but he withdrew as its counsel before the final adjudication. In subsequent actions instituted by the railroad company and estate to determine whether the plaintiff had any lien upon the recovery awarded to the estate, the plaintiff by affidavit, disclaimed any such lien. He then brought

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14. *Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474 (1910); *Meiselman v. Crown Heights Hosp.*, 285 N. Y. 389, 34 N. E. 2d 367 (1941); *Sadowski v. Long Island R. R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497 (1944).

15. *Richard v. Credit Suisse*, 242 N. Y. 346, 152 N. E. 110 (1926).

16. N. Y. R. Civ. PRAC. §113. When an answer is served in any action . . . setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established prima facie by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

17. 2 N. Y. 2d 32, 137 N. E. 2d 22 (1956).