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## Procedure—Motion for Dismissal of Complaint

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## PROCEDURE

*Motion For Dismissal of Complaint*

*Stein v. Palisi*<sup>1</sup> was an action for injuries sustained by a nineteen-month-old child, found injured beside the road after defendant's taxicab had passed. The evidence presented at the trial was wholly circumstantial. The Court held, that the Appellate Division's dismissal<sup>2</sup> of the complaint was error, since sufficient evidence had been presented to raise a question of fact.

In New York a complaint is not subject to dismissal on the ground that the jury's verdict is against the weight of the evidence,<sup>3</sup> where the evidence presented by the plaintiff is sufficient to make out a prima facie case;<sup>4</sup> the court's power in such cases is limited to the ordering of a new trial. Dismissal is granted only where the court concludes that the jury could by no rational process base a finding in favor of the plaintiff on the evidence presented; the criterion was established by the leading case of *Blum v. Fresh Grown Preserves Corp.*,<sup>5</sup> and it has been held wholly circumstantial evidence may constitute the basis of a prima facie case.<sup>6</sup> In ruling on the motion, the Court is bound by the rule that the facts adduced at the trial are to be considered in the light most favorable to the plaintiff, who must be given the benefit of every favorable inference which can be drawn from the facts proved.<sup>7</sup>

In the instant case, the testimony presented indicated that the defendant had notice of children playing in the vicinity, and that immediately subsequent to the accident he was seen driving "very fast" out of the area; the Court points out that these circumstances reasonably warrant an inference by the jury that a reasonably prudent man would have driven with greater care than did the defendant.<sup>8</sup> The jury could also find that such negligence was the proximate cause of the injury.

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1. 308 N. Y. 293, 125 N. E. 2d 575 (1955).

2. 283 App. Div. 1119, 131 N. Y. S. 2d 648 (2d Dep't 1955).

3. *Caldwell v. Nicolson*, 235 N. Y. 209, 139 N. E. 243 (1923); *Imbrey v. Prudential Ins. Co.*, 286 N. Y. 434, 36 N. E. 2d 651 (1941).

4. *Sagorsky v. Malyon*, 307 N. Y. 584, 123 N. E. 2d 79 (1954); *Holtfoth v. Rochester General Hospital*, 304 N. Y. 27, 105 N. E. 2d 610 (1952). N. Y. CIV. PRAC. ACT § 482 provides for the dismissal of plaintiff's complaint before or at the close of plaintiff's evidence, or at the close of all the evidence, with or without prejudice.

5. 292 N. Y. 241, 54 N. E. 2d 809 (1944). See N. Y. CIV. PRAC. ACT § 457-a, held to be another test for dismissal of a complaint and for directing a verdict.

6. *Garippa v. Wisotsky*, 305 N. Y. 571, 111 N. E. 2d 443 (1953); *Noseworthy v. City of New York*, 298 N. Y. 76, 80 N. E. 2d 744 (1948).

7. *Dewald v. Seidenberg*, 297 N. Y. 335, 79 N. E. 2d 430 (1948); *Osipoff v. City of New York*, 286 N. Y. 422, 36 N. E. 2d 646 (1941).

8. *Hammer v. Bloomingdale Bros.*, 215 Ap. Div. 308, 213 N. Y. Supp. 743 (1st Dep't 1926); *Day v. Johnson*, 265 App. Div. 383, 39 N. Y. S. 2d 203 (4th Dep't 1943).

on the basis of evidence indicating the absence of any other cars in the vicinity, and on an expert's testimony that the nature of the child's injury was such as is most frequently found to have been caused by contact with an automobile.

The Court cites several cases in support of this decision which involved injury to adults where no direct evidence was available as to what happened at the time of the accident;<sup>9</sup> the instant case is even stronger in that the plaintiff child was as a matter of law<sup>10</sup> incapable of contributory negligence.

### *Summary Judgment*

In *Elgar v. Kress & Co.*,<sup>11</sup> the defendant moved for summary judgment in an action brought to enjoin a nuisance caused by defendant's loading operations, which allegedly interfered with the quiet use and enjoyment of the plaintiff's premises. The Court, reversing the Appellate Division,<sup>12</sup> denied the motion on the ground that the allegations in the complaint raised an issue of fact as to the nuisance, and that summary judgment could not be granted under these circumstances.

It is well established that the purpose of summary judgment is to dispose of unmeritorious claims at a pre-trial stage, and may be granted only in the absence of a genuine issue.<sup>13</sup> Under Rule 113 of the Rules of Civil Practice it has been held<sup>14</sup> that a defendant is entitled to summary judgment, outside of the nine categories enumerated therein, in *any* kind of action where his defense is based on affidavits and on facts established prima facie by documentary evidence or official record, and the plaintiff fails to show by affidavit facts sufficient to raise an issue as to the verity of such documentary evidence.<sup>15</sup>

The Court held that the complaint in the case at bar could not be dismissed on motion, even though it is generally held that normal operations of a loading platform as an incident of permitted use are not subject to restraint as a nuisance.<sup>16</sup> Since the defense to the nuisance was based solely on affidavits, and was not supported by any documentary evidence or official record of the kind necessary

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9. *Scantlebury v. Lehman*, 305 N. Y. 713, 112 N. E. 2d 784 (1953); *Klein v. Long Island Ry. Co.*, 278 App. Div. 980, 105 N. Y. S. 2d 999 (2d Dep't 1951).

10. *Verni v. Johnson*, 295 N. Y. 436, 68 N. E. 2d 431 (1946).

11. 308 N. Y. 533, 127 N. E. 2d 325 (1955).

12. 280 App. Div. 621, 116 N. Y. S. 2d 527 (1st Dep't 1952).

13. *Hanna v. Mitchell*, 202 App. Div. 505, 196 N. Y. Supp. 43 (1st Dep't 1922);

*Brawer v. Mendelson*, 262 N. Y. 53, 186 N. E. 200 (1933).

14. *Lederer v. Wise Shoe Co.*, 276 N. Y. 459, 12 N. E. 2d 544 (1938).

15. *Pross v. Foundation Properties*, 158 Misc. 304, 285 N. Y. Supp. 796 (1935); *McGrevey v. McGrevey*, 279 App. Div. 705, 108 N. Y. S. 2d 643 (4th Dep't 1951).

16. *Gravenhorst v. Zimmerman*, 236 N. Y. 22, 139 N. E. 766 (1923); *Solof v. Heitner*, 280 App. Div. 937, 115 N. Y. S. 2d 918 (2d Dep't 1952).