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SUMMARY JUDGMENT IN AUTOMOBILE NEGLIGENCE CASES: A PROCEDURAL ANALYSIS AND SUGGESTIONS

Morris D. Forkosch†

In New York, as in other states, legislative response to overcrowded conditions in courts has led to increasingly frequent disposition of cases by the use of summary judgment procedure. Though originally restricted to specified contract actions and actions to enforce judgments, summary judgment was available by 1959 in all but matrimonial actions.¹ With the 1959 amendment² the courts began to apply summary judgment procedure in negligence actions,³ and the practice was continued with enactment of Rule 3212 of the Civil Practice Law and Rules (CPLR).⁴ Nevertheless, court dockets continue to burgeon and, as automobile negligence cases contribute increasingly to the congestion of our judicial machinery, the need for greater reliance on the summary judgment procedure becomes more apparent.

In theory, when "there is no bona fide issue of fact bearing on the liability issue, the plaintiff's remedy is to move for summary judgment."⁵ In practice, however, courts quickly find a "bona fide issue of fact" in automobile negligence cases. They affirm that summary judgment can be invoked only in rare instances,⁶ because negligence

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¹ See CARMODY-FORKOSCH *NEW YORK PRACTICE* § 701 (8th ed. 1963) [hereinafter cited as CARMODY-FORKOSCH]. Even in a matrimonial action, summary judgment can be used in favor of a defense based on documentary evidence or official records.

² The 1959 amendment to N.Y.R. Civ. Prac. 113, [1959] N.Y. Laws 2269, extended summary judgment to negligence actions by allowing its use in all but matrimonial actions. The current rule is N.Y.R. CIV. PRAC. 3212.

³ For early citations, see CARMODY-FORKOSCH *NEW YORK PRACTICE* § 465 (7th ed. 1956, Supp. 1960 at 153.)

⁴ "Except . . . with respect to a matrimonial action, any party may move for summary judgment in any action, after issue has been joined." N.Y.R. CIV. PRAC. 3212(a).

⁵ *Binniger v. Grillo*, 28 App. Div. 2d 1100, 284 N.Y.S.2d 189-90 (1st Dep't 1967). The court stated: "it appears that the plaintiff has a *clear case* on the liability issue . . ." *Id.* at 1100, 284 N.Y.S.2d at 189 (emphasis added).

⁶ *Regnal Realty Corp. v. McBride Transp., Inc.*, 25 App. Div. 2d 703, 268 N.Y.S.2d 103 (3d Dep't 1966); *Connell v. Buitekant*, 17 App. Div. 2d 944, 234 N.Y.S.2d 336 (1st Dep't 1962); *Schneider v. Miecznikowski*, 16 App. Div. 2d 177, 226 N.Y.S.2d 944 (4th Dep't 1962); *Steinbach v. Denker*, 13 App. Div. 2d 795, 215 N.Y.S.2d 628 (2d Dep't 1961). See also note 17 *infra*.

cases do not lend themselves to such precipitate disposition.⁷ Indeed, the courts are inclined not to grant summary judgment even when the only real issues are collateral to that of negligence.⁸

This judicial reluctance probably stems from two factors. First, our concept of negligence depends upon the "reasonable man" standard, which is flexible and ordinarily can be applied only after full development of the facts upon trial.⁹ The constitutional right to a jury trial serves only to reinforce the traditional judicial inclination to retain the law-fact division of labor that dumps "reasonableness" issues into the lap of the jury.¹⁰ A second, unexpressed factor that probably leads courts to deny summary judgment is fear that a general loss of judicial business would otherwise result; liberal use of summary procedures could lead to a form of computer determination or, eventually, to a compensation system of recovery not based upon negligence.

Judicial hesitancy to use the summary judgment procedure in automobile negligence cases has caused its "usefulness under the present practice [to be] . . . sharply circumscribed,"¹¹ thereby impairing the ability of the courts to handle the rising flood of cases.¹² The present

⁷ *Hajder v. G. & G. Moderns, Inc.*, 13 App. Div. 2d 651, 213 N.Y.S.2d 880 (1st Dep't 1961).

⁸ *E.g.*, *Grisanzio v. Cafiso*, 28 App. Div. 2d 718, 282 N.Y.S.2d 629 (2d Dep't 1967), in which defendant alleged that plaintiff and he were engaged in the course of their common employment at the time of the accident, and thus that plaintiff's exclusive remedy was workmen's compensation. The Appellate Division for the Second Department held that summary judgment could not be granted, because there was a triable issue "whether, as plaintiff maintains, his work day on the date of the accident terminated at the close of the conference in New York . . ." *Id.* at 718, 282 N.Y.S.2d at 630.

⁹ *See, e.g.*, *Gerard v. Inglese*, 11 App. Div. 2d 381, 382-83, 206 N.Y.S.2d 879, 881-82 (2d Dep't 1960) (footnote omitted):

[E]ven when there is no dispute as to the physical facts of the accident and when there is no claim of contributory negligence, [the difficulty] . . . is that the unresolved issue still remains as to whether the defendant used such reasonable precautions to avoid the accident as would ordinarily be used by careful, prudent persons under the circumstances Ordinarily such issue must be decided on trial Evidence of the physical facts may establish negligence *prima facie*, but in such a case the court may seldom direct a verdict though the plaintiff's evidence is not contradicted or rebutted by the defendant. Whether negligence is established *prima facie* by direct or circumstantial evidence, the question as to whether the defendant was at fault in what he did or failed to do is ordinarily one of fact, to be determined by the jury, unless the jury is waived

See also *Gatto v. Kruger*, 28 App. Div. 2d 1007, 284 N.Y.S.2d 118 (2d Dep't 1967); *Cooper v. Greyhound Bus Corp.*, 13 App. Div. 2d 173, 215 N.Y.S.2d 281 (3d Dep't 1961).

¹⁰ *See generally* *Gerard v. Inglese*, 11 App. Div. 2d 381, 206 N.Y.S.2d 879 (2d Dep't 1960); *CARMODY-FORKOSCH, supra* note 1, §§ 732-35.

¹¹ *Cooper v. Greyhound Bus Corp.*, 13 App. Div. 2d 173, 215 N.Y.S.2d 281, 282 (3d Dep't 1961).

¹² In *Donlon v. Pugliese*, 27 App. Div. 2d 786, 787, 277 N.Y.S.2d 334, 336 (3d Dep't 1967), a three-justice majority wrote:

situation compels a search for a more flexible formula; the latest cases indicate a growing judicial disenchantment with the current practice and a desire to find a method by which automobile negligence cases can be decided without trial. At present, however, courts generally feel constrained to follow the weight of precedent in the area and do not take the initiative in looking for a solution.

Maintaining the status quo or adopting a whole new system of compensation, however, are not the only alternatives for disposition of automobile negligence cases. A middle path is relaxation of the strict judicial approach to summary judgment procedure. By a close analysis of undisputed facts the courts will find many more cases ripe for summary judgment than they do at present. One virtue of this solution is that the courts will continue to make ad hoc determinations, and thus will be able to deny such motions whenever the interests of justice require. The purpose of this article is to suggest the relaxation of the strict judicial approach to summary judgment motions in automobile negligence cases and to recommend standards for judicial consideration.

I

SUMMARY JUDGMENT IN NEW YORK LAW

A. *Power To Grant Summary Judgment*

CPLR 3212(g) authorizes the court, "if practicable, [to] ascertain what facts are not in dispute *or are incontrovertible*," and then to "make an order specifying such facts," so that they may "be deemed established for all purposes in the action."¹³ As indicated by the italicized words, some facts that are in dispute may be judicially "ascertained" to be "incontrovertible." This statutory power should not be limited to matters of judicial notice or the like, for such matters can be held "incontrovertible" without the statute. Thus, rule 3212(g) must, to some extent, give a court power not only to ascertain what facts are not in issue, but also to decide, or determine, actual issues.¹⁴

When the remedy of summary judgment was expanded to cover tort actions, which then constituted, and still do, the most prolific cause of calendar congestion and delay and the most massive obstruction to prompt and expeditious disposition of Court business, the clear intent was to furnish another weapon in aid of the later objective; and it seems the unquestionable duty of Special Term and applicable Judges to utilize it in cases as clear as this, rather than to strain to find issues, however nebulous, which may preserve an unfounded claim for litigation or negotiations.

¹³ (Emphasis added).

¹⁴ See *Kaiser v. State*, 55 Misc. 2d 576, 285 N.Y.S.2d 874 (Ct. Cl. 1967); *Greiff v. Mazzei* (Sup. Ct. 1968), N.Y.L.J., Feb. 1, 1968, at 18, col. 4.

This issue-determining power might be viewed as an infringement of the jury's function. If used properly, however, it is merely another tool for determining that "the issue is not genuine, but feigned." The problem today is that courts are too timid in affirming, on any given record, that there is no triable issue. This statutory grant assures that courts, in determining that any apparent issue is feigned, need not too gingerly avoid intruding upon the jury's fact-finding functions.

B. *Issues that Must Be Undisputed*

The general requirement that a court find no triable issue before granting summary judgment was limited by CPLR 3212(c), which provides that "[t]he existence of a triable issue of fact as to the amount or the extent of the damages shall not bar the granting of summary judgment." Despite the apparent clarity of the language, the courts have held that a denial of the *existence* of damages will foreclose summary judgment.¹⁵ Yet, neither a plaintiff nor an attorney is likely to bring a suit when no damage has occurred. At least when there is some believable proof of damages, the defendant's mere denial should not prevent summary judgment.¹⁶ Since the extent of damages, even if

¹⁵ In *Steinbach v. Denker*, 13 App. Div. 2d 795, 215 N.Y.S.2d 628, 629 (2d Dep't 1961), the majority wrote:

There is a sharp conflict as to the force of the impact between the two vehicles and as to the injuries which resulted from the collision. Under the circumstances, without full testimony as to the happening of the accident in order to determine the nature and extent of the injuries and whether they could have resulted from this accident, the damages cannot be properly assessed.

The sole dissenter stressed the majority's agreement that there was no issue of liability, quoted the rule's language, and contended that the defendant's claim of no injuries was belied by his attorney's affidavit in opposition: "He does not challenge the claim of personal injuries; in fact, he refers to plaintiff's allegation of 'whiplash injuries.'" *Id.* at 796, 215 N.Y.S.2d at 629 (dissenting opinion). A similar factual contradiction between the majority and a lone dissenter is found in *Rubin v. Andino*, 11 App. Div. 2d 663, 201 N.Y.S.2d 567 (1st Dep't 1960). See also *Smith v. Marbury*, 18 App. Div. 2d 936, 284 N.Y.S.2d 503 (2d Dep't 1963); *Chmela v. Vought*, 15 App. Div. 2d 812, 225 N.Y.S.2d 480 (2d Dep't 1962); *Sonnino v. Gol-Pak Corp.*, 15 App. Div. 2d 740, 224 N.Y.S.2d 143 (1st Dep't 1962); *Goldman v. Reese*, 13 App. Div. 2d 994, 216 N.Y.S.2d 746 (2d Dep't 1961); *Ruppert v. Building Materials Dist., Inc.*, 10 App. Div. 2d 621, 196 N.Y.S.2d 322 (1st Dep't 1960).

¹⁶ In a more recent case than those cited in note 15 *supra*, the Second Department, with Justice Christ, the *Steinbach* dissenter, now Acting P.J., held:

Defendant's negligence is clear. The dissenting Justices assert that a question of fact exists as to whether any injury at all was sustained, thus necessitating a plenary trial of all the issues That rule is inapplicable here. The proofs show that the injured plaintiff was hospitalized for three weeks after the accident for injuries sustained as a result thereof. This is sufficient basis to narrow the necessity for proof to an assessment of damages.

Brodersen v. Katzman, 26 App. Div. 2d 693, 272 N.Y.S.2d 636-37 (2d Dep't 1966). Of course the earlier cases were not overruled, but merely held to be "inapplicable." Since Justice Christ concurred with the majority in *Goldman v. Reese*, 13 App. Div. 2d 994, 216 N.Y.S.2d

negligible, can be contested in the separate hearing limited to the issue,¹⁷ rule 3212(c) should be interpreted broadly to allow summary judgment whenever the issues concerning negligence are undisputed.

Proximate cause issues may appear to be an exception to this rule. If defendant argues that his negligence did not proximately cause plaintiff's injuries, perhaps a plenary trial should be held, for the issue of proximate cause strikes more at the issue of liability than at damages. Yet, rule 3212(c) refers to the "amount or the extent" of damages, and thus is authority for granting summary judgment even when issues other than the mere monetary amount of damages remain. In many cases even arguable proximate cause issues could be left to the later proceeding, because all the facts of the case need not be developed to resolve the issue. For example, if defendant negligently injures plaintiff, and if there is intervening negligence on the part of the physician, deciding whether defendant's negligence caused the full damage will not require complete proof concerning how the initial injury was inflicted. In any ordinary trial the court regularly excludes proof of damages that are not shown to be related or connected to defendant's acts. This general experience and understanding should be brought to bear upon the evidence and pleadings at summary judgment so that, when only damage issues exist, whether about their extent, existence, or proximate cause, summary judgment will be denied only when resolution of the proximate cause issue will require full development of the evidence concerning negligence.¹⁸

A second limitation on the necessary scope of a case ripe for summary judgment is that absence of contributory negligence often is just

746 (2d Dep't 1961), however, the quoted language most likely means only that, when plaintiff presents sufficient believable proof of damages, the mere denial of defendant will not prevent summary judgment. This, of course, is somewhat short of the rule recommended here, that, except in very rare cases, plaintiff's presentation of some believable proof of damages will be sufficient for summary judgment.

17 N.Y.R. CIV. PRAC. 3212(c) [hereinafter cited as CPLR] provides that
 [for] a triable issue of fact as to the amount or the extent of the damages
 [t]he court shall order an immediate hearing before a referee, before the court, or
 before the court and a jury . . . to assess the amount or the extent of the damages.

The court can then grant summary judgment.

18 It might seem that allowing the proximate cause issue to be determined at the separate hearing on damages would frustrate rule 3212, for the entire liability case arguably could then be presented in the special hearing. Nevertheless, this view is more theoretical than realistic. First, summary judgment presumably will not be granted in cases actually requiring full development of the facts; as the courts become more experienced in using the summary judgment rule, they should become better at recognizing such cases. Second, judges have discretionary power to exclude evidence not sufficiently relevant or material to the issue in the special hearing.

part and parcel of the issue of defendant's negligence. While presenting his case, plaintiff may "at the same time [have] presented the facts which establish the elements of a defense and require a jury determination."¹⁹ Also, in some cases the facts of the accident themselves raise a suspicion of contributory negligence that is not adequately overcome by a mere denial. Thus, if plaintiff tripped down a stairway or was struck by defendant's car while crossing an unmarked street, plaintiff's lack of contributory negligence can only be affirmed after he has been subjected to cross-examination at trial. Often, however, real issues of contributory negligence will not be raised unless defendant has affirmative proof or has suggested to his attorney promising lines of inquiry to be made in cross-examining plaintiff. Consequently, regardless of how the burden of proof is allocated at trial, plaintiff's case on a pretrial summary judgment motion often should be viewed as adequate, provided only that he has alleged absence of contributory negligence. Triable issues concerning contributory negligence will exist only if defendant pleads or otherwise presents particular facts tending to show contributory negligence.

C. *The Prima Facie and Res Ipsa Loquitur Concepts*

The primary obstacle to summary determination, of course, is the litigant's right to a plenary trial. As Cardozo expressed it: "To justify a departure from that course and the award of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried."²⁰ The requirements, however, are not as rigid as might appear at first glance. In an automobile negligence case in New York a plaintiff must ordinarily prove defendant's negligence, his own freedom from contributory negligence, and damages. To ensure submission of his case to the jury, plaintiff must *present* a prima facie case.²¹ Similarly, to prevent a pretrial motion by defen-

¹⁹ DiSabato v. Soffes, 9 App. Div. 2d 297, 307, 193 N.Y.S.2d 184, 196 (1st Dep't 1959).

²⁰ Curry v. Mackenzie, 239 N.Y. 267, 270, 146 N.E. 375, 376 (1925) (citations omitted). See CARMODY-FORKOSCH, *supra* note 1, § 700, at 649: "If we look at the motion as a preliminary 'trial' to determine if issues of fact exist, and *not* to determine them if they are found to be present, then the *rationalé* of this procedural device becomes apparent." (Emphasis in original).

²¹ See CARMODY-FORKOSCH, *supra* note 1, § 707 (Supp. 1967-68 at 468), concerning defendant's motion to dismiss upon plaintiff's case:

The granting of such a motion requires "a determination by the trial court that by no rational process upon the proof submitted could the jury have based a finding in favor of plaintiffs." *Sisson v. City of N.Y.*, 20 AD2d 695, 246 S.2d 846, citing *Blum v. Fresh Grown Preserve Corp.*, 292 N.Y. 241. For example, where plaintiffs make out a prima facie case, in a p.i. trial, on the issue of negligence and freedom from contributory negligence, the court is without power to direct

dant for summary judgment, a plaintiff's pleadings, affidavits, and depositions must *disclose* a prima facie case—*i.e.*, evidentiary facts sufficient, "if adduced at trial [to] . . . preclude the court from directing a verdict for the defendant as a matter of law."²² A prima facie case, of course, does not require a finding for the plaintiff. It merely constitutes sufficient evidence to permit a verdict for the plaintiff.²³

A *res ipsa loquitur* case is a special type of prima facie case. It arises from an injury-causing event that ordinarily would not occur absent defendant's negligence.²⁴ Thus, plaintiff need not produce evidence concerning what defendant actually did; evidence proving the circumstances of the injury will be sufficient to defeat the motion for a nonsuit and take the case to the jury. Although the *res ipsa* doctrine will ordinarily not shift the burden of producing evidence to the defendant,²⁵ as a practical matter his failure to bring forth rebutting evidence will probably result in a verdict for plaintiff.

a verdict, *Reisner v. N.Y. Kasher Provisions, Inc.*, 25 AD2d 511, 267 S.2d 70, although a verdict is against the weight of the credible evidence when the court is "not required to give credence to a story so inherently improbable that we are morally certain it is not true." *Lopez v. Union Settlement Assn.*, 25 AD2d 520, 267 S.2d 219, quoting *Bottalico v. City of N.Y.*, 281 AD 339, 119 S.2d 704.

²² *Galumbeck v. E.J. Korvette, Inc.*, 55 Misc. 2d 113, 284 N.Y.S.2d 353, 354 (N.Y. City Civ. Ct. 1967). See *Ullery v. National Car Rental Sys., Inc.*, 28 App. Div. 2d 1111, 284 N.Y.S.2d 576, 577 (1st Dep't 1967), granting defendant's motion because plaintiff had no cause of action where, as lessee of the truck, and a passenger at the time of the accident, "[h]e had the legal right to control its operation, and the negligent conduct of the operator is imputable to him." Cf. *DiSabato v. Soffes*, 9 App. Div. 2d 297, 193 N.Y.S.2d 184 (1st Dep't 1959).

²³ In *Rehm v. United States*, 183 F. Supp. 157 (E.D.N.Y. 1960), the district court, in applying *res ipsa loquitur* under New York law, stated:

The proper meaning of "prima-facie case" is that quantum of evidence tending to prove each material fact that a plaintiff must introduce to sustain his burden of going forward with the evidence, *i.e.*, render himself immune from a nonsuit. With the evidence in this posture, the trier of the facts *may* reasonably find for the plaintiff by drawing the permissible inferences favorable to him. This does not mean that the plaintiff is entitled to a directed verdict or that the burden is shifted to the defendant.

Id. at 159 (emphasis in original). See also *Mott v. B. Gertz, Inc.*, 146 N.Y.S.2d 521 (N.Y. City Ct. 1955).

²⁴ See *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 115-16, 38 N.E.2d 455, 459 (1941); *Curley v. Ruppert*, 272 App. Div. 438, 71 N.Y.S.2d 578 (1st Dep't 1947).

²⁵ [T]he doctrine of *res ipsa loquitur* relieves a plaintiff from the burden of producing direct evidence of negligence, but it does not relieve a plaintiff from the burden of proof that the person charged with negligence was at fault. *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 115, 38 N.E.2d 455, 459 (1941). See Rosenthal, *The Procedural Effects of Res Ipsa Loquitur in New York*, 22 CORNELL L. Q. 39 (1936). Professor Prosser criticized the use of "res ipsa loquitur" as "a definite obstacle to any clear thought," W. PROSSER, *TORTS* § 40, at 232-39 (3d ed. 1964), but it is used in all states and here presented as set forth in *Galbraith v. Busch*, 267 N.Y. 230, 196 N.E. 36 (1935).

In some negligence cases "the prima facie proof is so convincing that the inference of negligence arising therefrom is inescapable, if not rebutted by other evidence."²⁶ In these cases defendant's failure to offer an explanation should result in a directed verdict for plaintiff.²⁷ Although this circumstance might arise in any negligence case, it is particularly likely to occur in a *res ipsa loquitur* context. After all, in order to qualify as a *res ipsa* case, the plaintiff's evidence must establish that the accident ordinarily would not have occurred absent defendant's negligence, with the defendant offering no contrary evidence. We might call such a convincing case a "special *res ipsa*" case.

Both the *res ipsa* and special *res ipsa* concepts are the products of evolution. As a type of case became more commonplace, negligence could be inferred more readily, and the burden of producing evidence shifted gradually to the defendant. This evolutionary process holds the key to relieving court congestion by reducing the number of automobile negligence trials, for automobile cases tend to be of recurrent types.

First, courts should expand the special *res ipsa* category, and, second, they should more closely relate the criteria for a directed verdict and those for a summary judgment. When *res ipsa* facts are undisputed in pretrial proceedings, courts should more willingly treat them as special *res ipsa*, thereby forcing defendant to offer some substantial explanation. If none is forthcoming, summary judgment should be granted.

II

FROM RES IPSA TO SPECIAL RES IPSA

The procedural difference between ordinary *res ipsa loquitur* and special *res ipsa loquitur* was pointed out in the landmark case of *George Foltis, Inc. v. City of New York*.²⁸ A break occurred in an underground water main installed by the city. Plaintiff introduced evidence that the

²⁶ *Gerard v. Inglese*, 11 App. Div. 2d 381, 383, 206 N.Y.S.2d 879, 882 (2d Dep't 1960) (citation omitted). See also *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 38 N.E.2d 455 (1941).

²⁷ *Gerard v. Inglese*, 11 App. Div. 2d 381, 206 N.Y.S.2d 879 (2d Dep't 1960); *DiSabato v. Soffes*, 9 App. Div. 2d 297, 193 N.Y.S.2d 184 (1st Dep't 1959). But see *Salomone v. Yellow Taxi Corp.*, 242 N.Y. 251, 151 N.E. 442 (1926), where plaintiff had established prima facie evidence of negligence and defendant offered no exculpatory proof; the court reversed summary judgment for the plaintiff and held that the negligence issue had to go to the jury.

²⁸ 287 N.Y. 108, 38 N.E.2d 455 (1941).

city failed to shut off the main within a reasonable time after it received notice of the break, but produced no evidence that the break was caused by the city's negligence. The city introduced no evidence showing the cause of the break, but did offer evidence showing that, whatever the cause, it was not attributable to negligence of the city. The court upheld plaintiff's contention that proof of the facts permitted application of the *res ipsa* doctrine, which the court said involved "a commonsense appraisal of the probative value of circumstantial evidence."²⁹ Although the city had "produced evidence intended to meet the *prima facie* case established by the plaintiff,"³⁰ it did not completely rebut plaintiff's case. The trial court therefore felt that the inference of negligence was dictated as a matter of law, and it directed a verdict in favor of the plaintiff.³¹

On appeal, Chief Judge Lehman, rejecting the view that the *res ipsa* facts were conclusive of the city's negligence, espoused the traditional view of the doctrine.

The direction of a verdict in favor of the plaintiff might be justified if the rule of *res ipsa loquitur* created a full presumption in favor of the plaintiff. It is without logical foundation if *res ipsa loquitur* is only a common-sense rule for the appraisal of the probative force of evidence which enables an injured person, in proper case, to establish *prima facie* that the injury was caused by the defendant's negligence, though the injured person may be unable to produce direct evidence of want of care in any particular.³²

Cases from other jurisdictions were then cited for the proposition that

even where a defendant does not produce [any] evidence to rebut the plaintiff's *prima facie* case established by the application of the rule of *res ipsa loquitur*, it is for the jury to determine whether the inference of negligence should be drawn.³³

The trial court, it was felt, was incorrect in relying on the earlier case of *Hogan v. Manhattan Railway Co.*,³⁴ a *res ipsa* case in which the defendant offered no evidence and in which a directed verdict for plaintiff was affirmed,

for the reason that the undisputed evidence raised a presumption of negligence against the defendant.

²⁹ *Id.* at 115, 38 N.E.2d at 459, quoting *Galbraith v. Busch*, 267 N.Y. 230, 234, 196 N.E. 36, 38 (1935).

³⁰ *Id.* at 118, 38 N.E.2d at 461.

³¹ *Id.* at 114, 38 N.E.2d at 459.

³² *Id.* at 119, 38 N.E.2d at 461.

³³ *Id.* at 119, 38 N.E.2d at 462. For the cases pro and con, and a discussion of the procedural effect, see W. PROSSER, *supra* note 25, § 40, at 232-39.

³⁴ 149 N.Y. 23, 43 N.E. 403 (1896).

A verdict for the defendant on the record as it stands would be set aside as contrary to the evidence.

. . . .

The plaintiff sustained the burden of proof and it was incumbent upon the defendant to offer evidence, if any existed, to rebut the presumption of negligence.³⁵

The *Foltis* opinion commented that

in no case has it been held that a verdict may be directed where [as here] evidence is presented by the defendant which weakens such inference, even though it does not conclusively rebut it. Very little evidence might suffice to rebut a presumption.³⁶

Chief Judge Lehman continued to distinguish *Foltis* from a special res ipsa case:

There may be cases where the *prima facie* proof is so convincing that the inference of negligence arising therefrom is *inescapable if not rebutted* by other evidence. We need not now determine whether that was true in the *Hogan* case. In most cases it is not true and it is certainly not true here where the plaintiff's evidence, even while unrebutted, left serious doubt whether the break in 1938 was due to conditions which might have been avoided by the exercise of care in 1929.³⁷

Chief Judge Lehman then attempted to formulate a correct procedural definition of res ipsa loquitur:

Where a plaintiff establishes *prima facie* by direct evidence that injury was caused by negligence of the defendant the court may *seldom* direct a verdict, though the plaintiff's evidence is not contradicted or rebutted by the defendant. In such cases the question of whether the defendant was in fault in what he did or failed to do is ordinarily one of fact to be determined by the jury unless the jury is waived. The practice should be the same where under the rule of *res ipsa loquitur* the plaintiff establishes *prima facie* by circumstantial evidence a right to recover.³⁸

The *Foltis* opinion, then, affirms that a special res ipsa case "seldom" arises. Nevertheless, in the case itself defendant had presented some rebuttal evidence, which had to be weighed by a jury against the res ipsa case presented by plaintiff. Thus, the broad rule

³⁵ *Id.* at 25-26, 43 N.E. at 403, *quoted* in *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 120, 38 N.E.2d 455, 462 (1941).

³⁶ *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 120-21, 38 N.E.2d 455, 462 (1941).

³⁷ *Id.* at 121, 38 N.E.2d at 462 (emphasis added).

³⁸ *Id.* at 122, 38 N.E.2d at 463 (emphasis added).

suggesting that most *res ipsa* cases must be given to the jury even if un rebutted is dictum, if not mere prediction.

Although the *Foltis* view might have been reasonable in 1941, today it seems unnecessarily conservative, at least with respect to automobile negligence cases. Experience reveals that, when a plaintiff presents a *res ipsa* case and defendant offers nothing, the jury will nearly always return a verdict for plaintiff. Many automobile accidents are of regularly recurring types. There is no reason that the courts cannot begin to categorize the resulting lawsuits and define when the "proof is so convincing that the inference of negligence arising thereupon is inescapable if not rebutted by other evidence."³⁹ Of course, if a court waits until all the evidence is presented at trial, as in *Foltis*, then little, if any, of the court's time is saved by directing a verdict. Since the jury might occasionally find for defendant, it might seem fairer at that point to let the jury decide the case. But on a summary judgment motion the court has an opportunity to save considerable time. In a *res ipsa* case in which defendant has offered or suggested nothing substantial in rebuttal, justice seems best served, in the long run, by granting summary judgment for plaintiff, *i.e.*, treating the case as special *res ipsa*.⁴⁰ Reaching such a conclusion seems perfectly in keeping with the court's power under rule 3212(g) to "ascertain what facts are not in dispute or are incontrovertible."⁴¹

III

FROM NONSUIT TO RES IPSA TO SPECIAL RES IPSA

*Pfaffenbach v. White Plains Express Corp.*⁴² illustrates how, with closer analysis of the facts of each case, the courts can narrow the scope

³⁹ *Id.* at 121, 38 N.E.2d at 462.

⁴⁰ *But see* *Weiss v. Garfield*, 21 App. Div. 2d 156, 158, 249 N.Y.S.2d 458, 460 (3d Dep't 1964), in which, speaking of the standards for directing a verdict contained in former Civil Practice Act § 457a, the court said:

In pursuance of this section it has been held that even if a court would under the circumstances of the case, on a trial, set aside a verdict as contrary to the weight of evidence, it would nevertheless not be justified in granting summary judgment and that summary judgment is authorized only where, if the same facts which appear in the moving and opposing papers were adduced upon the trial, the court would be warranted in directing a verdict.

CPLR 4401 sets no test for when the motion for directed verdict shall be granted and therefore replaces the prior legislative standard with a standard relying on case law. *See* CARMODY-FORKOSCH, *supra* note 1, § 707 (Supp. 1967-68 at 468). The language in *Weiss* is therefore no longer authoritative.

⁴¹ *See* pp. 816-17 *supra*.

⁴² 17 N.Y.2d 132, 216 N.E.2d 324, 269 N.Y.S.2d 115 (1966).

of proof required of a plaintiff in avoiding a nonsuit. It also reveals how the courts can find more cases to be of the traditional *res ipsa* variety, and the opinions evince a judicial approach that will aid in finding many of these to be special *res ipsa* cases and thus ripe for summary judgment. Thus, although the case only decided whether the plaintiff had established a *prima facie* case sufficient to go to the jury, it suggests how the courts might in some cases avoid the necessity of trial altogether.

The plaintiff, a passenger in a northbound car, was injured when defendant's truck, "moving southerly on the road, came over into the northbound lane and struck the car" ⁴³ At trial the defendant offered no explanation of the accident and presented no proof concerning negligence. The judgment on the jury's verdict for the plaintiff was reversed on appeal but reinstated by the Court of Appeals, which held: "In such a situation, showing this and nothing more, a case of negligence is made out *prima facie* sufficient to go to the jury to determine liability."⁴⁴ The court also distinguished some earlier cases, relied on by the appellate division, that suggested the plaintiff should have been nonsuited. The court added:

Thus there should be more legal flexibility on what is negligence as applied to the control of moving vehicles and the question left open to . . . the jury where the record shows a skid, or the explanation for a skid, or a car on the wrong side of the road, or the explanation of why it is there, or the need for the passenger in a car to act in relation to its operation.⁴⁵

In a concurring opinion Judge Burke sought to narrow the court's holding:

I would reverse solely on the ground that proof of "mere skidding" is *prima facie* evidence of negligence in this case where plaintiff was *not* a passenger in defendant-respondent's car. There are obvious distinctions between a plaintiff who is a guest-passenger and one who is a stranger. The former not only assumes some risk in accepting the gratuitous transportation but also is in the advantageous position of having the opportunity to observe whether the defendant exercised reasonable care in the operation of the vehicle. . . . On the other hand, the stranger who is injured by defendant's vehicle's skidding into the opposite flowing lane of traffic or up onto a sidewalk, under conditions known to the defendant alone, is at a singular disadvantage.⁴⁶

⁴³ *Id.* at 134, 216 N.E.2d at 324, 269 N.Y.S.2d at 116.

⁴⁴ *Id.* at 135, 216 N.E.2d at 325, 269 N.Y.S.2d at 116.

⁴⁵ *Id.* at 136-37, 216 N.E.2d at 325, 269 N.Y.S.2d at 117.

⁴⁶ *Id.* at 136-37, 216 N.E.2d at 325-26, 269 N.Y.S.2d at 117 (concurring opinion). The

Thus, Judge Burke objected to the majority's apparent lumping together of all passengers, and would recognize a *prima facie* or *res ipsa* case only if the plaintiff was not a passenger in defendant's vehicle. He believed that, if the plaintiff was defendant's passenger, added issues would immediately be suggested, *e.g.*, assumption of risk or contributory negligence in failing to warn or advise defendant of dangers.⁴⁷ Further, such a plaintiff might know what acts of defendant caused the skid into the wrong lane.

The difference between the majority and Judge Burke is not extraordinarily important, since under either rule the defendant can cross-examine a passenger-plaintiff, as well as present his own evidence, concerning any particular facts suggesting the defendant was not negligent or showing that the plaintiff assumed some risk. The majority only held that such a plaintiff need not affirmatively present such matters. The difference is important, however, if one contemplates granting summary judgment to the plaintiff in *Pfaffenbach*. After all, if one affirms that the proof was sufficient to go to the jury, then it must have been assumed that the accident ordinarily would not have occurred unless defendant were negligent. If the case appeared on summary judgment and the defendant offered nothing, the motion should have been granted. If the plaintiff had been defendant's passenger, however, at least an issue concerning assumption of risk might have required a jury's finding.

The *Pfaffenbach* majority rationalized its holding in the following manner:

Rigidity of legal rules which piece together conduct in the management and control of a moving vehicle in separate compartments under "negligent" and "non-negligent" labels has not only failed to succeed as an instrument of adjudication; it has succeeded in confusing the business of deciding motor vehicle accident cases consistently. Modern experience suggests we can be less certain of the precision of our categories in this field of adjudication than we had confidently assumed a generation or so ago.⁴⁸

majority does not refer to "mere skidding." Apparently the defendant skidded over into the opposite lane in which plaintiff was riding. See Brief for Respondent at 3-4, *Pfaffenbach v. White Plains Express Corp.*, 17 N.Y.2d 132, 216 N.E.2d 324, 269 N.Y.S.2d 115 (1966).

⁴⁷ See the majority's statement that whether "the need for the passenger in a car to act in relation to its operation" should be left to the jury. The full quotation is at p. 325 *supra*. But, after stating that plaintiff had established a *prima facie* case, the majority added: "The same rule, open to additional factual evaluation of his own responsibility for events, would apply to the passenger in a car which goes out of control." 17 N.Y.2d at 135, 216 N.E.2d at 325, 269 N.Y.S.2d at 116.

⁴⁸ *Id.* at 136, 216 N.E.2d at 325, 269 N.Y.S.2d at 117.

This language suggests that more cases should go to the jury and not less, and thus might seem to suggest that summary judgment should not be granted more often. Nevertheless, the discussion was used to overcome the appellate division holding that the plaintiff should be nonsuited. The real thrust of the court's opinion is that "there should be more legal flexibility on what is negligence as applied to the control of moving vehicles . . ."⁴⁹ This flexibility was revealed, if not resolved, by the conflict between Judge Burke and Judge Bergan concerning what a defendant's passenger would have to prove. The courts should analyze the facts of each particular case and decide who, as a practical matter, would submit more evidence if other matters were relevant and available. In *Pfaffenbach*, the defendant would have done so, and, since plaintiff's evidence at least strongly suggested the defendant's negligence, this was sufficient to allow the case to go to the jury.

This reasoning will also be helpful on motions for summary judgment. Sometimes the plaintiff's uncontested allegations will constitute a *res ipsa* case. If it is clear that any further relevant evidence or contentions would be presented by the defendant and he has presented none, and if the facts of the case do not raise suspicions (*e.g.*, possible contributory negligence) requiring cross-examination of the plaintiff,⁵⁰ then summary judgment for the plaintiff would often be appropriate.

It is also arguable that, in any *res ipsa* case in which the defendant has offered or contested nothing, summary judgment should be granted to the plaintiff. Courts decline to take negligence cases from the jury, even when the facts concerning what happened are uncontested, because it is supposedly the jury's function to test the defendant's conduct against the reasonable man standard. But the unique element of a *res ipsa* case is that, unless the defendant comes forth with evidence, no one knows what he did. Thus, the role of the jury in such a case is reduced to determining whether negligence will be inferred; and this function is preserved even though the evidence has already met the legal test that the injury would not ordinarily have occurred if the defendant had not been negligent. Submitting the case to the jury, then, merely makes

⁴⁹ See full quotation at p. 826 *supra*.

⁵⁰ If an issue such as contributory negligence did lurk in plaintiff's case (*e.g.*, plaintiff pedestrian was struck by defendant's car at night while plaintiff was crossing the street at an unmarked intersection), it would be unusual for defendant not to argue, in opposition to a motion for summary judgment, that he ought to have an opportunity to cross-examine plaintiff and to have the jury decide whether to believe plaintiff. Thus, again, if defendant is actually silent, the court need not be very concerned that issues for the jury lurk in the case. To think otherwise is only to abide by the long-discarded principle that a defendant has a right to put the plaintiff to his proof.

possible capricious results: in identical cases the juries could reach diametrically opposite results, even though the reasonable man standard is irrelevant.

The recommendations of this article are not as far-reaching as the above argument. All *res ipsa* cases in which the defendant is silent need not be resolved without trial.⁵¹ But the argument does suggest that courts can and should more often decide that "the *prima facie* proof is so convincing that the inference of negligence arising therefrom is inescapable, if not rebutted by other evidence."⁵² What is needed is the judicial flexibility, as displayed in *Pfaffenbach*, to analyze a case closely and the judicial willingness to conclude that the plaintiff's evidence can lead to only one result.⁵³

IV

THE PATTERN OF NEW YORK LAW

In *Gerard v. Inglese*⁵⁴ the Appellate Division of the Second Department stated that "proof merely of the sudden swerving of an automobile from the highway is not *prima facie* evidence of negligence . . ."⁵⁵ The court nevertheless granted summary judgment, because in a deposition defendant

herself . . . furnished the evidence that the accident occurred while she was driving at a speed of from 40 to 45 miles an hour, with one hand on the steering wheel, lighting a cigarette with the other and with her eyes off the road.⁵⁶

⁵¹ One reason for not accepting the argument wholeheartedly is that the *res ipsa* concept becomes somewhat confused in automobile negligence cases. Except when plaintiff is a passenger in defendant's car, he usually cannot prove what defendant did, but only what the instrument in defendant's control (the car) did. Thus, with the one exception, most automobile negligence cases are technically *res ipsa* ones. Perhaps because it is readily accepted that cars do not go out of control absent the driver's negligence, the *res ipsa* terminology and analysis is often neglected. The *Pfaffenbach* court did not mention *res ipsa*, although the case fits that mold. Thus, the *res ipsa* test—whether such injuries would not occur absent defendant's negligence—is, in a summary judgment context, merely a test whether, absent proof from defendant, plaintiff's evidence is quite convincing.

⁵² *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 121, 38 N.E.2d 455, 462 (1941).

⁵³ See *DiSabato v. Soffes*, 9 App. Div. 2d 297, 193 N.Y.S.2d 184 (1st Dep't 1959), where the court, granting summary judgment for the plaintiff, determined that defendant had failed to demonstrate any triable issue of fact and held that defendant's leaving the car with the ignition on was negligence as a matter of law.

⁵⁴ 11 App. Div. 2d 381, 206 N.Y.S.2d 879 (2d Dep't 1960).

⁵⁵ *Id.* at 383, 206 N.Y.S.2d at 882.

⁵⁶ *Id.*

From these facts and the swerve, the inference of "negligence is not only reasonable but is, in our opinion, inescapable in the absence of an explanation consistent with reasonable care."⁵⁷

In several types of cases a pattern to the law has become visible. In cases of brake failure,⁵⁸ slipping foot (brake to accelerator),⁵⁹ skidding,⁶⁰ and wrong-lane driving,⁶¹ proof of the one fact has been held

⁵⁷ *Id.* See also *Barscz v. Tofany*, 29 App. Div. 2d 710, 286 N.Y.S.2d 49 (3d Dep't 1968), in which a driver's license was suspended for making a left turn without signalling.

In *Composano v. Queensboro Motor Corp.* (Sup. Ct. 1967), N.Y.L.J., Nov. 20, 1967, at 19, col. 2, the court granted summary judgment where an automobile slid off a wash rack and struck the ladder on which plaintiff was standing, causing him to fall. The defense was that the mere fact the car "moved off a wash rack does not suggest negligence," but the court said: "this argument does not contain the additional fact that an employee of the defendant was in the automobile at the time it moved off the rack." *Id.*

⁵⁸ In *Cohen v. Crimenti*, 24 App. Div. 2d 587, 588, 262 N.Y.S.2d 364 (2d Dep't 1965), the court said: "The mere fact that the brakes may have failed would not, in and of itself, serve to impose liability upon the defendants . . . nor, on the other hand, would the fact that the said defendant testified that brakes failed when they had previously worked *ipso facto* absolve the defendants from liability . . ." See also *Frank v. Smith*, 16 App. Div. 2d 826, (2d Dep't 1962); *Dranikoff v. Pecoraro* (Sup. Ct. 1966), N.Y.L.J., Dec. 8, 1966, at 20, col. 3.

⁵⁹ *E.g.*, *Sambrosky v. Callahan* (Sup. Ct. 1967), N.Y.L.J., Apr. 12, 1967, at 21, col. 3, where the court stated: "Merely showing that the defendant driver's foot slipped from the brake to the accelerator is not enough to warrant summary judgment . . . absent other evidence to establish careless driving . . ." See also *Beyer v. Esposito* (Sup. Ct. 1967), N.Y.L.J., Feb. 24, 1967, at 20, col. 6.

In *Porte v. Lange* (Sup. Ct. 1966), N.Y.L.J., Mar. 10, 1966, at 17, col. 5, summary judgment was granted. The defendant's wet shoe slipped off the brake pedal as she reached to open the window on the other side of the car, and the car lurched forward hitting another car.

⁶⁰ *Donlon v. Pugliese*, 27 App. Div. 2d 786, 277 N.Y.S.2d 334 (3d Dep't 1967) (summary judgment granted, citing *Pfaffenbach*); *Norman v. Druzick*, 11 App. 2d 1039, 206 N.Y.S.2d 256 (2d Dep't 1960) (excessive speed causing the skid a fact question for the jury); *Gooch v. Shapiro*, 7 App. Div. 2d 307, 182 N.Y.S.2d 744 (1st Dep't 1959) (no other evidence indicating negligence, verdict for defendant).

In *Filipiak v. Steffen* (Sup. Ct. 1968), N.Y.L.J., Jan. 17, 1968, at 19, col. 1, while driving 30-35 miles per hour on Williamsburgh Bridge in drizzle on wet pavement and iron grating, the driver applied brakes to reduce speed on a curve. The cause of skidding was held to be for the jury. In *Fitzpatrick v. Chiu* (Sup. Ct. 1967), N.Y.L.J., Dec. 20, 1967, at 18, col. 6, when plaintiff stopped for a red light, defendant claims that he skidded on wet pavement as he applied the brakes, that it was impossible to turn into the left lane as traffic was going in the opposite direction, and that nobody was injured. The court held that a question of fact existed as to questions of negligence and "serious" injury. See also *Velten v. Kirkbride*, 20 App. Div. 2d 546, 245 N.Y.S.2d 428 (2d Dep't 1963); *Adams v. Leon*, 18 App. Div. 2d 998, 237 N.Y.S.2d 579 (2d Dep't 1963) (loss of control during U-turn on sand and gravel); *Flurry v. Elsworth*, (Sup. Ct. 1968), N.Y.L.J., Jan. 10, 1968, at 22, col. 2 ("wet, slippery spot"); *Streisand v. DeSabato* (Sup. Ct. 1967), N.Y.L.J., May 5, 1967, at 21, col. 4.

⁶¹ See *Pfaffenbach v. White Plains Express Corp.*, 17 N.Y.2d 132, 216 N.E.2d 324, 269 N.Y.S.2d 115 (1966); *Campbell v. Towber*, 26 App. Div. 2d 628, 272 N.Y.S.2d 643 (2d

sufficient to constitute a prima facie case, but not alone adequate for granting summary judgment for plaintiff: In cases involving facts such as backing up,⁶² rear end collisions,⁶³ blackout and sleepiness,⁶⁴ swerv-

Dep't 1966), *aff'd*, 19 N.Y.2d 844, 227 N.E.2d 321, 280 N.Y.S.2d 408 (1967); Breckir v. Lewis, 21 App. Div. 2d 546, 251 N.Y.S.2d 77 (1st Dep't 1964), *aff'd sub nom.* Breckir v. Pleibel, 15 N.Y.2d 1027, 207 N.E.2d 865, 260 N.Y.S.2d 178 (1965). All these cases involved appeals after jury trials. *But see* Jackson v. Timmons, 29 App. Div. 2d 664, 286 N.Y.S.2d 66 (2d Dep't 1967); Boyles v. Freeman, 29 App. Div. 2d 559, 286 N.Y.S.2d 56 (2d Dep't 1967).

In Blixton v. MacNary, 23 App. Div. 2d 573, 574, 256 N.Y.S.2d 362, 363 (2d Dep't 1965), summary judgment was denied plaintiff, the court stating:

[E]ven where there is no dispute as to the physical facts or a claim of contributory negligence, an issue remains as to whether reasonable precautions were used by plaintiff to avoid the accident, and this question is essentially one of fact The mere fact that defendant's vehicle was on the wrong side of the road does not constitute negligence as a material of law

But see the argument, pp. 820-21 *supra*, and the strong implication in Breckir v. Lewis, *supra*, that summary judgment is often appropriate in such cases.

⁶² Summary judgment for plaintiff was granted in Kowgios v. Johnson, Drake & Piper, Inc., 25 App. Div. 2d 739, 269 N.Y.S.2d 945 (1st Dep't 1966), Cohen v. Blitz, 52 Misc. 2d 345, 275 N.Y.S.2d 614 (N.Y. City Civ. Ct. 1966), and Jackson v. Smalheiser, (Westchester County Ct. 1967), N.Y.L.J., Dec. 29, 1967, at 19, col. 2. Summary judgment was denied in Savastano v. Higgins (Sup. Ct. 1967), N.Y.L.J., Nov. 16, 1967, at 19, col. 6.

⁶³ Summary judgment for plaintiff was denied in Connell v. Buitekant, 17 App. Div. 2d 944, 234 N.Y.S.2d 336 (1st Dep't 1962), Schneider v. Miecynikowski, 16 App. Div. 2d 177, 226 N.Y.S.2d 944 (4th Dep't 1962), and Steinbach v. Denker, 13 App. Div. 2d 795, 215 N.Y.S.2d 628 (2d Dep't 1961).

In Jasper v. Parent (Sup. Ct. 1968), N.Y.L.J., Jan. 25, 1968, at 21, col. 2, summary judgment was denied when the only fact before the court was that there was a rear end collision while plaintiff was stopped for a red traffic light. The court stated: "The overwhelming weight of opinions in this department is against the granting of summary judgment under facts similar to the instant case." *See also* Cordes v. Terry, (Sup. Ct. 1968), N.Y.L.J., Jan. 8, 1968, at 21, col. 4; Donlon v. Smith (Sup. Ct. 1967), N.Y.L.J., Oct. 2, 1967, at 21, col. 5; Strauss v. Parent (Sup. Ct. 1967), N.Y.L.J., Mar. 15, 1967, at 20, col. 1; Kraus v. Parkinson (Sup. Ct. 1967), N.Y.L.J., Jan. 13, 1967, at 19, col. 4 (even though defendant had pleaded guilty to a traffic violation).

Summary judgment for plaintiff was granted in Rodriguez v. Allen (Sup. Ct. 1968), N.Y.L.J., Feb. 6, 1968, at 22, col. 2. Plaintiff had stopped for a traffic light and defendant admitted "stepping on the accelerator when she intended to step on the brake," thus colliding with plaintiff. Rejecting the affidavit of an attorney associated with defendant's attorney, the court noted that plaintiff's motion "is in effect unopposed." *See also* Berberich v. Mathieu, 17 App. Div. 2d 780, 232 N.Y.S.2d 595 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 1081, 190 N.E.2d 421, 240 N.Y.S.2d 28 (1963); Puzzi v. Palladino (Sup. Ct. 1966), N.Y.L.J., Oct. 21, 1966, at 19, col. 6 (driver "lost control" and hit car stopped in traffic, with no excuse offered); Romano v. Bile, 39 Misc. 2d 543, 241 N.Y.S.2d 708 (N.Y. City Civ. Ct. 1963).

⁶⁴ Summary judgment was granted plaintiff in Frydendahl v. Marsac (Sup. Ct. 1967), N.Y.L.J., Sept. 5, 1967, at 20, col. 2, Stanley v. Burnside, 20 Misc. 2d 932, 192 N.Y.S.2d 452 (Sup. Ct. 1959), *aff'd*, 10 App. Div. 2d 652, 199 N.Y.S.2d 408 (2d Dep't 1960), and Martin v. Koehler, 40 Misc. 2d 762, 244 N.Y.S.2d 142 (Nassau County Dist. Ct. 1963).

Summary judgment for plaintiff was denied in Donahue v. Romahn, 10 App. Div. 2d 637, 196 N.Y.S.2d 887 (2d Dep't 1960); Kvalheim v. Stockdale (Sup. Ct. 1968), N.Y.L.J., Feb. 5, 1968, at 20, col. 1, and Muller v. Pauling (Sup. Ct. 1967), N.Y.L.J. July 28, 1967, at 10, col. 4.

ing,⁶⁵ and taking one's eyes off the road⁶⁶ summary judgment has sometimes been granted for plaintiff. Summary judgment has been readily granted when defendant failed to stop for a stop sign⁶⁷ and if he was convicted of reckless driving for the very act proximately causing plaintiff's injury.⁶⁸

CONCLUSION

The backlog of automobile negligence cases has reached Brobdignagian proportions, and the future is very bleak. Even with additional manpower, our courts need a new means for moving cases along. The suggestion made here is to grant summary judgment more often in these cases. This can be accomplished by relaxing somewhat the traditional requirements for a *res ipsa* case and recognizing that many *res ipsa* cases are ripe for summary judgment (*i.e.*, the special *res ipsa* ones) unless defendant offers an explanation or other controverting evidence. Even if defendant offers something, the willingness to recognize special *res ipsa* cases will allow the courts more closely to examine what defendant offers in rebuttal, and often to decide that the issues truly are feigned. Thus, it might be hoped that, as certain types of automobile negligence cases continue to recur, the courts will more readily infer negligence and grant summary judgment.

In *Vignola v. Britts*, 11 App. Div. 2d 801, 205 N.Y.S.2d 215 (2d Dep't 1960), the court thought an issue for the jury was whether defendant "had any warning of the likelihood of his falling asleep." Nevertheless, when plaintiff was not a passenger in defendant's car, he could not know about any warning, and defendant could deny it without fear of contradiction. At least in cases of falling asleep, defendant's denial of warning should be rejected as incredible. Blackout or heart attack cases, however, raise a possibility of no prior warning.

⁶⁵ Summary judgment for plaintiff was denied in *Rosenthal v. Monastra*, 27 App. Div. 2d 749, 277 N.Y.S.2d 432 (2d Dep't 1967). *But see* *Gerard v. Inglese*, 11 App. Div. 2d 381, 206 N.Y.S.2d 879 (2d Dep't 1960).

⁶⁶ Summary judgment for plaintiff was granted in *McCormack v. Maass* (Sup. Ct. 1967), N.Y.L.J., Apr. 26, 1967, at 22, col. 4 (defendant took eyes off road to adjust radio), and *Leonc v. Jorgenson* (Sup. Ct. 1966), N.Y.L.J., Oct. 20, 1966, at 17, col. 1 (defendant leaned over to pick up cigarette dropped on floor).

Summary judgment for plaintiff was denied in *Haloran v. Klos* (Sup. Ct. 1966), N.Y.L.J., Mar. 7, 1966, at 17, col. 7.

⁶⁷ *See* *Marrella v. Hurwitz* (Sup. Ct. 1967), N.Y.L.J., Apr. 26, 1967, at 22, col. 1, where only an attorney's hearsay affidavit was submitted in opposition. The court stated: "No triable issue is raised. In the first place, 'failure to see a car approaching in unobstructed view is incredible as a matter of law'" (citation omitted). *See also* *Hood v. Murray*, 25 App. Div. 2d 163, 268 N.Y.S.2d 281 (3d Dep't 1966).

⁶⁸ *DiBone v. Gambucci*, 54 Misc. 2d 446, 282 N.Y.S.2d 855 (N.Y. City Civ. Ct. 1967). *See also* *Kaufman v. Hahn Bros. Fireproof Warehouses, Inc.* (Sup. Ct. 1967), N.Y.L.J., Nov. 10, 1967, at 17, col. 2; *Cooper v. Mallory*, 51 Misc. 2d 749, 273 N.Y.S.2d 583 (Sup. Ct. 1966). When a question of proximate cause appears from plaintiff's papers, however, the motion is denied. *Susinno v. Smith* (Sup. Ct. 1968), N.Y.L.J., Jan. 26, 1968, at 21, col. 8.