Chapter 2
MOTOR VEHICLE NEGLIGENCE

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PART A: PROCEDURAL CONTEXT

§ 2.01 Procedural Context—Motor Vehicle Negligence

Article 51 of the Insurance Law, “The No-Fault Law,” abolishes the right of a “covered person” to bring suit for basic economic loss against another “covered person” for the negligence of such a person in the use and operation of a motor vehicle in New York State. Article 51 further limits the right to sue for non-economic loss in all cases except where a “serious injury” has been sustained.

To analyze the effect and operation of the No-Fault Law, one must understand the definition of three fundamental terms:

1. Basic economic loss consists of medical expenses, lost earnings and other defined expenses incurred as the result of the accident. Basic economic loss payable to each eligible person cannot exceed $50,000 and does not include any loss sustained on account of death.

2. First party benefits is closely related to basic economic loss. Under the no-fault system, first party benefits are payments to an eligible person in reimbursement of basic economic loss. First party benefits are paid by the no-fault insurer and may be recovered from no one else. The $50,000 is the maximum amount that the no-fault insurer is obligated to pay and does not represent a threshold requirement that must be met before further economic loss may be recovered in a common law negligence suit.

3. Non-economic loss includes pain and suffering.

While this chapter will address the general insurance issues regarding basic economic loss, first party no-fault benefits (reimbursement for basic economic loss), Uninsured Motorist coverage and Supplementary Uninsured Motorist coverage, the primary focus of this chapter will provide an overview of the substantive law and will examine the procedural considerations for the preparation and litigation of a third party tort action to recover non-economic damages sustained in a motor vehicle accident, from the initial interview to the settlement and/or trial of the action.

In addition to establishing a serious injury, the plaintiff must prove that the defendant breached the duty of care owed by a motorist, and that the defendant’s breach was a proximate cause of the plaintiff’s injuries. Whether a particular driver was at fault for the occurrence of an accident will often depend on the statutory standard of care established in the Vehicle and Traffic Law (VTL), or, in the City of New York, the New York City Traffic Regulations, which are permitted by the Legislature to supersede the provisions of the VTL. At trial, particular
attention must be paid to charging the jury on the correct statute or ordinance governing the duties owed by the motorists involved in the accident.

In a motor vehicle accident case, the attorney must be wary of all the insurance issues and must also consider the potential liability of defendants other than the persons immediately involved in the accident; for example, the manufacturer of a vehicle or one of its component parts, or the governmental agency responsible for design or maintenance of the roadway. Special requirements for the filing of a notice of claim, and shortened statutes of limitation, will apply if a governmental agency is a potential defendant. Additionally, in the event of negligent medical treatment rendered to the accident victim, although the plaintiff has separate causes of action against the original driver-wrongdoer and the negligent health care provider, the practitioner may include in the claim against the original driver wrongdoer, the damage caused by the subsequent medical negligence. If the case should settle, plaintiff’s counsel must be cognizant of the operation of the General Obligations Law and its effect on settlement with one out of several tortfeasors.
PART B: INVESTIGATING MOTOR VEHICLE NEGLIGENCE CASES

§ 2.02 Checklist for Investigating Motor Vehicle Negligence Cases

☐ Conduct initial client interview. For example:

Understand goals of initial interview. See § 2.03[1] below.
Gather information to determine if claim is timely, or if shortened statute of limitations or notice of claim requirement applies. See § 2.03[2] below.
Understand ethical rules and take appropriate action to avoid conflicts of interest, if other family members seek representation. See § 2.03[3] below.
Evaluate whether plaintiff has sustained serious injury. See § 2.03[4] below.
Evaluate whether claim must be asserted against MVAIC. See § 2.03[6] below.
Explain provisions of retainer agreement, and request that client execute retainer agreement, and that client execute medical authorizations. See § 2.03[7] below.
Provide client with information and instruction sheets. See § 2.03[8] below.
Obtain and record detailed narrative regarding occurrence of accident. See § 2.03[9] below.

☐ Begin investigation if decision is made to accept case. Scope of investigation will depend on circumstances and complexity of case. For example:

Obtain police and accident reports, as well as driving and insurance records. See § 2.04[5] below.
§ 2.03 Conducting Initial Client Interview

[1] Understanding Goals of Initial Interview

In the event of a motor vehicle accident, there are at least four sources from which a claimant can potentially recover a combination of benefits: the tortfeasor, the uninsured motorist (UM) carrier, the Motor Vehicle Accident Indemnification Corporation (MVAIC), and the supplementary uninsured motorist (SUM) carrier.

During the initial interview, counsel should evaluate the possible value of the client’s claim. If one of the vehicles involved was a “hit and run” vehicle, the accident should be reported to the police and counsel should prepare a letter placing his client’s UM carrier on notice that a claim will be made. In the event the client is not covered by a UM endorsement, notice should be given immediately to MVAIC. In the event the tortfeasor appears to be covered by insurance, counsel should place the tortfeasor’s carrier on notice and request the disclosure of the policy limits.

Strategic Point: Where an insured fails to give proper notice to an insurer, an injured party can give notice him or herself, thereby preserving his or her right to proceed directly against the insurer.

Most importantly, counsel should place immediately the client’s SUM carrier on notice of a possible claim, especially where the client’s injury
is more than superficial. When a lawsuit is commenced, a copy of the summons and complaint should be sent to the potential UM/SUM carrier pursuant to Ins. Law § 35-d, placing the UM/SUM carrier on notice of the commencement of the legal action. Failure to send this correspondence in accordance with Ins. Law § 35-d may preclude a possible future SUM/UM claim.

**Timing:** The policy of insurance will require that SUM notice be given “as soon as practicable.” This means that the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured.

A notice of a potential SUM claim may be premature if sent before the issuance of a disclaimer of insurance to the offending vehicle. In *Matter of State Farm v. Linero*, 13 A.D.3d 546, 786 N.Y.S.2d 580 (1st Dep’t 2005), plaintiff, while riding as a passenger in a vehicle, was injured in a two-car collision on March 16, 2001. Plaintiff’s attorney allegedly sent two notices, including a SUM notice, to the insurer of the vehicle in which she was a passenger. On July 3, 2002, the insurer of the offending vehicle denied coverage. Consequently, the SUM notice allegedly given prior to July 3, 2002, was premature; whether notice was given as soon as practicable would be measured based on the timeliness of notices sent subsequent to the July 3, 2002 disclaimer letter. Letters sent by plaintiff’s counsel in August and September of 2002, were found to satisfy the “as soon as practicable” requirements of the SUM endorsement.

**Strategic Point:** Counsel should inquire whether client, or any relative (by marriage, adoption or blood) residing in the same household, has an auto insurance policy. If so, in addition to putting the client’s insurance carrier on notice of a potential UM/SUM claim, counsel should also notify any other insurance carriers of resident relatives as potential excess carriers.

At the initial interview, counsel should obtain the client’s signature on the necessary forms, including HIPAA compliant authorizations, and obtain as much information as possible about the accident. Obtain a copy of the client’s declaration page, the policy itself, and all endorsements.
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Keeping in mind that under New York’s No-Fault Law, regardless of liability, a plaintiff may not sue to recover damages for non-economic loss, including pain and suffering, absent a showing of “serious injury,” practitioner must give special attention to obtaining medical records and reports, to be prepared to address the serious injury threshold, either on motion or at trial.

It is important to instruct the client not to discuss the case with anyone, including his or her own insurance company. The client should be advised to refer any such calls to the attorney. Any mail he or she receives with respect to the accident should also be forwarded to the attorney.

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**Strategic Point:** Given the shortened 30-day time limit for filing the notice of claim for first party no-fault benefits for basic economic loss, counsel should inquire at the initial interview whether or not the client has filed such notice and if not, take appropriate steps to protect the client’s claim for such benefits. See § 2.03[5] below.

Defense counsel also needs to review the UM and SUM endorsements to determine whether coverage has been triggered, whether an exclusion applies and/or whether the plaintiff has complied with the policy requirements, including providing prompt notice of the claim, as well as a copy of the summons and complaint served upon the tortfeasor.

**PRACTICE RESOURCES:**


At the outset, the attorney must elicit the information necessary to determine whether the potential claim is within the statute of limitations period, and whether a notice of claim against a governmental entity, if necessary, has been or can be filed in a timely manner. See § 2.06 below. If a governmental entity is a potential defendant, shortened statutes of limitations are also applicable. See § 2.11[4] below.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Ch. 12 (statute of limitations).
- Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 201 et seq. (limitations of time).
- New York Practice Guide: Negligence Ch. 6 (statute of limitations).
- LexisNexis® AnswerGuide® New York Civil Litigation Ch. 4 (statute of limitations).
- CPLR 203, 210, 214.

[3] Avoiding Conflicts of Interest

Since automobile accidents frequently involve members of the same family, an attorney must advise the parties of the potential conflict of interest that arises when counsel represents parties with adverse interests in the same action. Representation of a plaintiff driver and a plaintiff passenger in the same vehicle raises at least a potential conflict of interest, since a passenger is almost always well-advised to sue all drivers whose negligence may have contributed to the occurrence of an accident. Representation of a driver and passenger has been held to create a conflict of interest in violation of Disciplinary Rule 5-105(a).

Disciplinary Rule 5-105 provides that parties may consent to continued representation by the same attorney despite a potential conflict of interest. However, the consent must follow full disclosure. In addition, the consent must satisfy an objective standard, requiring that the lawyer not represent parties with potential conflicts of interest unless a disinterested attorney would believe that the lawyer could competently represent the interests of each client under the same circumstances. Moreover, if an actual (as
opposed to potential) conflict of interest arises in the case, counsel will be disqualified from representing either client.

Guardians may not sue personally and as representatives of their wards when the children have potential claims against the guardian for negligence in the operation of the vehicle. In an accident in which children were allegedly injured as passengers in a vehicle owned by the father and driven by the mother, the father could not represent the children as guardian, due to his adverse interest as owner. In such a case a guardian ad litem must be appointed to represent the children. For example, in *Boyd v. Trent*, 287 A.D.2d 475, 731 N.Y.S.2d 209 (2d Dep’t 2001), the same attorney could not represent the father individually and as guardian. Plaintiff’s counsel in that case was permitted to continue to represent the plaintiff father in his individual capacity.

In *Alcantara v. Mendez*, 303 A.D.2d 337, 756 N.Y.S.2d 90 (2d Dep’t 2003), a case involving a two-car collision, an attorney represented, as plaintiffs: (1) an adult passenger in the vehicle owned by the father that the mother was driving; and (2) the mother, in her capacity as guardian of the children. The driver of the second vehicle asserted a counterclaim alleging that the mother was negligent. The mother’s pecuniary interests were adverse to the children, requiring that the mother be removed as guardian. As counsel would be required to prove the mother’s negligence as a driver to establish the liability of the owner, he could not continue to represent any of the plaintiffs. Continued representation would violate the rule requiring an attorney to preserve the client’s confidences, as well as the rule requiring an attorney to represent a client zealously.

**Warning:** An attorney who represented both the driver and the passengers as plaintiffs violated Disciplinary Rule 5-105(a) and was held not entitled to collect any fee for the period of the representation. See *Quinn v. Walsh*, 18 A.D.3d 638, 795 N.Y.S.2d 647 (2d Dep’t 2005).

**PRACTICE RESOURCES:**

- 3–11 *Personal Injury: Actions, Defenses, Damages* § 1.05[1] (duty to avoid conflicts of interest).

Plaintiff’s attorney should attempt to determine the extent of the client’s injuries as soon as practicable in the lawsuit. A determination of the full extent of plaintiff’s injuries may not be possible until the plaintiff’s medical records are received, including MRI reports. Plaintiff’s counsel must ascertain if the plaintiff is able to meet the statutory serious injury threshold; in general, only if the client’s injuries meet the requirements of the serious injury threshold is the injured party entitled to bring an action for personal injury against the responsible parties. The serious injury threshold must also be satisfied to pursue an UM/SUM claim. Counsel also must monitor the course of the treatment, and be prepared to submit evidence explaining any “gap” in plaintiff’s treatment. See § 2.08[7][c] below.

PRACTICE RESOURCES:


[5] Obtaining No-Fault Benefits

Under New York’s No-Fault Insurance Law, Article 51 a person injured in a motor vehicle accident may apply for reimbursement of his or her basic economic losses, including medical expenses and lost wages, subject to a cap of $50,000. Counsel should inquire if the client purchased additional Personal Injury Protection (APIP) over and above the $50,000 minimum required by law (PIP). To recover, plaintiff, upon sustaining such a basic economic loss, need only connect such loss to injuries sustained in the subject accident. Since these benefits are available regardless of fault, with respect to PIP, there is no corresponding right of subrogation for the carrier reimbursing an injured plaintiff for items of basic economic loss; APIP does, however, carry a right of repayment to the paying carrier against a tortfeasor. Counsel must take the necessary steps to ensure that the client receives no-fault benefits that may be due and therefore, it is important, if it has not already been done, during the initial interview, to prepare a no-fault application for the client to sign. The no-fault application should be sent by certified mail, return receipt requested to the no-fault carrier.
Warning: New York Ins. Department Reg. 68, NYCRR tit. 11, pt. 65, as revised, reduces the time limit for filing a notice of claim from 90 to 30 days. 11 NYCRR §§ 65-1.1, 65-2.4(b). It reduces the time in which to submit proof of loss due to medical treatment from 180 to 45 days, and proof of work loss from as soon as reasonably practicable to 90 days. 11 NYCRR §§ 65-1.1, 65-2.4(c). It relaxes the standard for accepting late filings, replacing the previous rule with a standard excusing a missed deadline when there is a clear and reasonable justification for the delay. 11 NYCRR §§ 65-1.1, 65-2.4(b), (c). Claims may never be denied as untimely when the reason for the delay is the failure of an employer or other third party to provide information necessary to establish proof of claim for lost wages. 11 NYCRR § 65-3.5(m).

When the injured party dies as the result of a motor vehicle accident, the estate of the decedent is entitled to a $2,000 death benefit from the no-fault carrier. In addition, the amount of the tortfeasor’s insurance policy’s bodily injury limits available to the estate of the decedent will be double the limit of the applicable policy.

If the client was injured in a motor vehicle accident while a passenger on a bus, the primary no-fault carrier will be the insurance company of the client’s motor vehicle, or a relative who lives with the client. In this instance, the bus operator’s insurance carrier should also be sent a no-fault application. If neither your client nor a relative with whom the client resides has an insured motor vehicle, then the bus operator’s insurance company will be the primary no-fault carrier.

If an uninsured defendant motorist is involved, the attorney should contact the MVAIC, which is authorized under Ins. Law Article 52 to provide economic assistance for victims of unidentified or uninsured motorists. See § 2.08[2][a] below.

If the client was the operator or passenger of a motorcycle involved in an accident, the client will not be eligible to receive no-fault benefits. If the client was a pedestrian struck by a motorcycle, counsel should file a claim with the insurer of the motorcycle. If it is not insured, then your client may file the claim with the insurer of a household family relative who had an auto policy at the time of the accident. If there was no auto policy in the household, file a claim with the Motor Vehicle Accident Indemnification Corporation (MVAIC).
Exception: An individual injured while operating a motorcycle or riding as a passenger on a motorcycle is not a covered person and is not eligible for no-fault benefits. Because these individuals are not eligible to receive no-fault benefits, they are not subject to the serious injury threshold in any subsequent personal injury action.

Timing: The no-fault carrier must be sent a written no-fault application within 30 days of the accident. This application should be sent by certified mail so that there is proof that the application was sent within the requisite 30-day period. Pursuant to Insurance Regulation 68, written notice is effective upon mailing. The date of the accident is not included in the computation of the 30-day period. If the attorney cannot ascertain the correct no-fault carrier and the 30-day period is expiring, counsel should send a no-fault application to MVAIC while the correct carrier is determined, rather than making a late filing of the notice with an explanation to the correct carrier. Although MVAIC will most likely not provide benefits, following this procedure will provide evidence that counsel took all possible steps to place a carrier on notice within the 30-day period.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶¶ 1401.17a, 3016.21 (no-fault insurance).
- New York Practice Guide: Negligence § 31.03[1][h], 31.12[1], [3] (no-fault and contribution; Form 31-1, Form 31-3).
- Bender’s Forms of Pleading § 40 (no-fault motor vehicle insurance).
- 9–43 Personal Injury: Actions, Defenses, Damages § 8.02 (no-fault automobile insurance).


A person who is injured by an uninsured or unidentifiable motorist may be entitled to benefits under the Motor Vehicle Accident
Indemnification Corporation (MVAIC) Act (Ins. Law § 5201 et seq.)
A notice of claim must be filed with the corporation. See § 2.08[3] below.

PRACTICE RESOURCES:

- *New York Practice Guide: Negligence* §§ 10.06, 10.19, 24.01[5], 31.04 (MVAIC claims; initial client interview).
- *Bender’s Forms of Pleading* Form No. 40:10, Form No. 40:11, Form No. 41C:89 (petition compelling MVAIC to pay benefits; complaint for judgment against MVAIC; complaint by pedestrian against MVAIC).

[7] Executing Documents at Initial Meeting

Several forms must be signed by the client at the initial meeting with the attorney, in addition to the no-fault application discussed in § 2.03[5] above, including a retainer agreement and medical authorizations. Authorizations are required to obtain the client’s medical information. Detailed information must be obtained from any physician or medical professional who has treated the client, and from any hospital where the client has been treated since the accident. Medical authorizations must comply with HIPAA.

Plaintiff’s counsel should obtain authorizations to determine plaintiff’s medical history and condition prior to the accident, to assess if a preexisting condition has been exacerbated by the accident, and the extent to which the present accident has affected the plaintiff’s physical condition and capabilities.

**Warning:** The Department of Motor Vehicles requires that an individual involved in an accident in the State of New York that causes a fatality, personal injury or damage over $1,000, report the accident within 10 days thereof. Failure to do so is a misdemeanor. The MV-104 police accident report is the standard report that should be prepared by the attorney with information provided by the client and sent to the Department of Motor Vehicles.

PRACTICE RESOURCES:


VTL § 605.

[8] Providing Client With Information and Instruction Sheets

In some cases, it may be useful to provide the client with written instructions to keep a daily log of his or her symptoms, limitations, and complaints of pain. Some clients may benefit from written instructions concerning those items that have been discussed during the initial interview. Standard forms may be adapted to this end.

PRACTICE RESOURCES:

New York Practice Guide: Negligence §§ 31.13[1], [2] (Form 31-15, instructions to clients on damages; Form 31-16, basic case instructions to clients).

[9] Obtaining Client’s Narrative

The facts relating to the accident should be elicited after a full narrative from the client. If necessary, the client should be instructed to draw diagrams showing the relative position of vehicles, roadway conditions, or other objects. The names and addresses of the persons involved in the accident as well as eyewitnesses must be obtained.

Counsel should be satisfied that all of the relevant facts have been explored. The scope of the examination should include each of the following subjects concerning the accident:

1. The traffic and weather conditions at the time of the accident;
2. The time periods involved;
3. Plaintiff’s use of corrective lenses, state of mind, or use of drugs or alcohol, including prescription medication;
4. Whether plaintiff was working at the time of the accident (thereby raising potential Workers’ Compensation issues);
5. Whether there were other occupants, and whether the other occupants or the client were wearing seat belts; and,
6. If client was the pedestrian, whether he or she was within a crosswalk, whether he or she looked for traffic or saw the vehicle that struck him or her, and whether, if there was a traffic control device, it was in favor of the plaintiff.
§ 2.04 Planning Investigation

[1] Investigating Crash Site

The attorney may visit the crash site personally, but if the attorney does so, he or she should be accompanied by an investigator who can later testify in court concerning the taking of photographs and observations of the conditions at the accident scene. Photographs and video should be taken to memorialize the circumstances, and measurements taken. If possible, a second investigation should be undertaken at a time when transient conditions, including weather conditions, match those that existed at the time of the accident.

| Strategic Point: | The investigation of the accident site should be undertaken as soon as possible after the first contact with the client. In addition to the fact that witnesses’ memories may fade with the passage of time, physical changes may occur at the crash site subsequent to the accident that may make it difficult or impossible to prove at trial the conditions existing at the time of the accident. |

Examination should be made of the vehicles involved, and photographs (interior and exterior) of the vehicles, taken. Examination of the vehicles must be undertaken by an expert before the vehicles, if severely damaged, are destroyed.

PRACTICE RESOURCES:

- *New York Practice Guide: Negligence* Ch. 5 (preliminary investigation and gathering of evidence).
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[2] Photographing Client

Photographs should also be taken of the client, to show the extent of the injuries he or she received in the accident.

PRACTICE RESOURCES:

- New York Practice Guide: Negligence § 31.05 (investigating crash).

[3] Conducting Interviews of Eyewitnesses

Eyewitness accounts should be obtained as soon as possible, when memories are fresh. Based on the information elicited, a written record should be prepared of the witness’s statement regarding the accident, which may be provided to experts to assist them in their evaluations. A potential witness who has little or no recollection of the relevant facts and circumstances should be asked to sign a statement reflecting the witness’s lack of knowledge, which could be used later to impeach the witness if the witness suddenly purports to remember details concerning the accident that he or she did not recall in the investigatory interview.

Standard checklists are available to assist in the examination of witnesses.

PRACTICE RESOURCES:

- New York Practice Guide: Negligence §§ 31.05[3][a], 31.14[3], [4] (investigating eyewitnesses; Form 31-20, checklist designed to assist the practitioner in obtaining data from an eyewitness; Form 31-21, suggested form of witness statement).


An attorney handling a motor vehicle accident case, even a case that does not appear to be complex, will nevertheless often need to obtain an expert. Initially, it is inevitable that expert medical testimony will be required to establish that the serious injury threshold has been met; medical expert testimony will also be required to establish the extent of damages at trial. With respect to liability issues, the purpose of an expert is tri-fold—to collect empirical data from an accident, to analyze all data and to render an opinion as to the mechanics of the accident, including, how the accident occurred. Accordingly, it may be necessary to hire a traffic engineer who can testify as to the effect of road conditions, or an accident reconstruction expert to testify as to the speed, direction, and impact of the vehicles involved in the accident.
**Strategic Point:** Prepare a base information packet for the expert to review. To the extent available, documents should include, but are not limited to, the complaint, bill of particulars, photographs of the scene and all vehicles involved, mechanical condition of all vehicles, including prior service records, police accident reports and all MV-104s, witness statements, deposition transcripts of all parties and witnesses, weather reports for the date in question, condition of the surface of the roads, and admissible medical records.

Additional expert testimony will be required to establish a products liability claim. It may be necessary to engage experts to perform vehicle crash tests or other scientific testing if a products liability claim is involved.

If the plaintiff has loss of earnings in excess of basic economic loss payable under no-fault, an economist may be required to establish the financial loss sustained by the plaintiff.

**Strategic Point:** The cost of expert witnesses must be weighed in any particular case against the potential recovery.

**PRACTICE RESOURCES:**

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Ch. 4515 (form of expert opinion).
[5] Obtaining Police and Accident Reports; Driving and Insurance Records

Plaintiff’s attorney must gather the facts from all possible sources, as well as obtain information relating to the available insurance coverage. In doing so, utilize the following sources of information:

1. New York State Department of Motor Vehicle accident reports;
2. New York State driver’s records;
3. Insurance and registration information;
4. Police accident reports, photographs, diagrams; and
5. Driver’s records for all persons involved in the occurrence, including the client.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶¶ 3101.59, 3101.60 (disclosing accident reports).
- New York Practice Guide: Negligence § 31.14 (Form 31-23, Request for Copy of Accident Report; Form 31-24, Report of Motor Vehicle Accident; Form 31-25, Request for Copy of Aided/Accident Record; Form 31-26, Request for Insurance Information).
- CPLR 3101(g).

[6] Obtaining Medical Records

An attorney should have a supply of HIPAA compliant forms on hand signed by the client. The client should be advised of the need for information regarding his or her health both before and after the accident, since the state of the plaintiff’s health prior to the accident is relevant in determining damages.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶¶ 3101.29b, 3122.01a (disclosure of medical records, objections).
§ 2.04[7] NEW YORK NEGLIGENCE 2–24

- LexisNexis® AnswerGuide® New York Civil Disclosure Ch. 17 (physical or mental examinations).
- CPLR 3101, 3122.

[7] Examining Wreckage

The condition of the vehicles involved in the accident should be documented in photographs, taken at various angles (both interior and exterior). Information must be obtained from body shops concerning the extent of the repairs to the vehicles. Research may indicate if the particular make or model of vehicle involved in the accident has been involved in an unusual number of similar accidents, or if a recall has been issued for the particular vehicle.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶¶ 3101.00, 3101.46 (disclosure of and protection for photographs).

[8] Investigating Road Conditions for Potential Claims Against Governmental Entities

The condition of the road, the slickness of the surface, the degree of a particular curve, the gradation, the presence or absence of signage, and other road design or maintenance issues may have contributed to the occurrence of the accident. Neighboring businesses or homeowners may be aware of an excessive number of traffic accidents at a particular location, and may be a source of information for an investigator. If a viable claim appears to exist, an expert should be consulted.

With respect to the duty of a governmental entity to maintain the roads in a safe condition, see § 6.09[4] below.

PRACTICE RESOURCES:

- New York Practice Guide: Negligence §§ 31.02[7], 31.05[7][a] (road conditions).
[9] Investigating Weather Conditions

Weather conditions may play a major role in traffic accidents. Official weather records should be obtained to support the eyewitness accounts of the prevailing weather conditions.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Ch. 226 (liability for weather conditions).
- New York Practice Guide: Negligence §§ 31.02[8][d], 31.05[7][b] (weather conditions).
- 4–12 Personal Injury: Actions, Defenses, Damages § 3.35 (weather conditions).
PART C: EVALUATING MOTOR VEHICLE CASES

§ 2.05 Checklist for Evaluating Motor Vehicle Cases

☐ Determine applicable statute of limitations. See § 2.06 below.

☐ Organize facts of case. See § 2.07 below.

☐ Identify no-fault issues. For example,
   - Identify first party beneficiaries. See § 2.08[1][a] below.
   - Determine degree of non-economic loss. See § 2.08[1][b] below.
   - Identify parties who are excluded from coverage. See § 2.08[1][c] below.
   - Give notice to Motor Vehicle Accident Indemnification Corp. (MVAIC), in cases of uninsured and underinsured defendants. See § 2.08[3] below.
   - Calculate economic loss. See § 2.08[5][a] below.
   - Determine medical coverage. See § 2.08[5][b] below.
   - Determine coverage when defendant is government entity. See § 2.08[6] below.
   - Establish serious injury, or lack of serious injury, on motion for summary judgment. See § 2.08[7] below.

☐ Identify applicable theories of liability in motor vehicle case.
   - Establish liability arising out of negligent operation of motor vehicle involving backing up; coasting; following; driving on wrong side of road; passing; rear-end collision; speeding; driving too slowly; turning; starting and stopping; or failing to signal. See § 2.09[1][a] below.
   - Establish liability for failure to maintain motor vehicle properly. See § 2.09[1][b] below.
   - Establish liability for failure to keep proper lookout. See § 2.09[1][c] below.
   - Establish liability for operating motor vehicle while under influence of alcohol or other illegal substances. See § 2.09[1][d] below.
Establish liability for negligent use of motor vehicle. See § 2.09[1][e] below.

Establish liability for violation of statutes and ordinances governing operation of motor vehicle. See § 2.09[1][f] below.

Establish governmental liability. See § 2.09[1][g] below.


Identify appropriate plaintiffs. See § 2.10 below.

Identify appropriate defendants. See § 2.11 below.

Determine appropriate elements of damages that are recoverable, including punitive damages. See § 2.12 below.

Raise mitigation defenses, including indemnification and contribution, comparative negligence, joint and several liability, assumption of risk, acts of god and inevitable accident, defense of workers’ compensation law, and failure to wear seat belt. See § 2.13 below.

Search Advisor:

Torts > Transportation Torts > Motor Vehicles
Torts > Procedure > Commencement
Torts > Negligence > Proof of Negligence

Investigate Parties on lexis.com®. See § Intro.09 above.

§ 2.06 Determining Applicable Statute of Limitations

Most automobile actions will be governed by a three-year statute of limitations. CPLR 214 generally requires that an action to recover for personal injury or property damage must be brought within three years of the date of the accident. Tolls for infancy or insanity, if applicable, will extend the applicable limitations period.

If plaintiff’s injuries are aggravated by the subsequent malpractice of a doctor, dentist, or podiatrist, the statute of limitations applicable to medical malpractice applies. See § 7.05 below.
§ 2.06  

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If the injured party has died within the statute of limitations period, and less than one year remained at the time of the death, CPLR 210(a) gives the decedent’s personal representative a one-year extension from the date of death within which to commence an action for pain and suffering on behalf of the decedent. On the other hand, CPLR 210(b) provides that if the potential defendant dies within the statute of limitations period, the action is tolled for a period of 18 months after the death of the potential defendant.

EPTL § 5-4.1 permits a wrongful death action to be brought within two years from the date of the decedent’s death.

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**Exception:** If the statute of limitations for pain and suffering expired before the death of the potential plaintiff, the action will remain time barred; EPTL § 5-4.1 does not revive the statute of limitations for pre-death pain and suffering for an additional two year period after death.

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In the lower civil courts, including the New York City Civil Court, city courts, district courts, and justice courts, CPLR 203(b)(5) provides for a toll of 60 days on any statute of limitations if, prior to the expiration of the period, a summons and complaint or summons with notice is served on a specified county official (within the City of New York) or the Sheriff (outside of the City of New York) in which defendant resides or is employed, or was known to have resided or been employed, or in which the cause of action arose.

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**Warning:** There are special statutes of limitations, generally 1 year and 90 days, and sometimes less, governing actions against governmental entities and public benefit corporations. For these entities, there are also notice of claim requirements. See § 2.11[3] below.

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PRACTICE RESOURCES:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Ch. 201 et seq. (limitations of time).
§ 2.07 Organizing Facts of Case

After conducting interviews of witnesses and investigating the scene of the accident and the condition of the vehicles involved in the accident, plaintiff’s attorney must analyze the facts as they appear and formulate a theory as to the cause of the accident. Do not overlook the possibility of bringing an action against the municipality based on road design or maintenance, or a products liability action.

**Warning:** Under no circumstances should an action be brought if it is wholly unsupported by the facts. CPLR 8303-a provides that if the claim in a personal injury, wrongful death, or property damage action is found to be frivolous, the court shall award to the successful party costs and reasonable attorney’s fees, which are not to exceed $10,000.

**PRACTICE RESOURCES:**


§ 2.08 Identifying No-Fault Issues in Motor Vehicle Cases

[1] Defining No-Fault

[a] Identifying First Party Beneficiaries

First party coverage is motor vehicle insurance maintained by the owner of a vehicle that covers passengers and drivers of a vehicle and pedestrians who may have been struck by a vehicle. Also covered are bicyclists, a person about to enter his own car, a passenger alighting from
§ 2.08[1][b] NEW YORK NEGLIGENCE 2–30

a bus, pedestrian victims of motorcycle accidents and passengers on a bus who are covered by the auto insurance policy in their own household. If there is no such policy, the bus company is liable for first party benefits. This type of coverage is commonly referred to as Personal Injury Protection (PIP).

Pursuant to Ins. Law § 5103(a)(2), a liability insurance policy must provide for payment of first party benefits to the named insured and members of the named insured’s household, including a spouse, child or relative who regularly resides in the insured’s household, for loss arising out of the use or operation of an uninsured motor vehicle or motorcycle within the United States or Canada, and an insured motor vehicle or motorcycle outside of New York State and within the United States or Canada.

[b] Determining Degree of Non-Economic Loss

A tort action for non-economic loss (for example, pain and suffering) is only permitted if plaintiff has sustained a “serious injury” as defined in Ins. Law § 5102(d). After many years of interpretation and litigation, attempts to determine in any particular case whether plaintiff has suffered a “serious injury,” especially in cases involving neck and back disc injuries, remain exceedingly difficult and complex.

The statute defines “serious injury” as: personal injury that results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Strategic Point: Where plaintiff is attempting to establish a “serious injury”, the special verdict sheet should contain separate interrogatories with respect to each theory of serious injury asserted. A jury’s finding that the plaintiff sustained an injury within any of the categories set forth in the insurance law, separately listed on the verdict sheet, satisfies the no-fault threshold, thereby eliminating that issue from the case and
permitting plaintiff to recover any damages proximately caused by the accident.

The last three categories, which entail “soft tissue” injuries, are frequently the categories under which damages are sought for neck and back disc injuries. Consequently, these three categories of serious injury are subject to a great deal of litigation. See § 2.08[7] below (categories of serious injury and methods of defining and proving serious injury).

[c] Identifying Parties Excluded from Coverage

Parties excluded from coverage include occupants of an uninsured motor vehicle (unless otherwise covered under another policy of insurance held by the named insured or members of his household); motorcycle occupants, and a person injured while occupying his own uninsured motor vehicle. Insurers may exclude, by express provision, persons who intentionally injure themselves, are injured as a result of operating a vehicle while intoxicated or while their ability to drive is impaired by drug use, are injured while committing a felony or seeking to avoid arrest, those participating in a speed race, and those operating or occupying a vehicle known to them to be stolen.

Strategic Point: In a case where there are claims against covered and uncovered defendants, the complication of trying a case where different damage rules apply can be avoided by severing the claims (CPLR 603, 1002(c), 5012).

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶¶ 1401.17a, 3016.21 (no-fault insurance).
- Bender’s Forms of Pleading § 40 (no-fault motor vehicle insurance).
- 9–43 Personal Injury: Actions, Defenses, Damages § 8.02 (no-fault automobile insurance).
§ 2.08[2][a] NEW YORK NEGLIGENCE 2-32


[a] Understanding Uninsured Coverage

VTL § 312 permits a motor vehicle to be registered in New York only if the owner furnishes proof of financial security. The section does not provide any method for compensating persons injured in accidents involving unidentified, uninsured or underinsured motor vehicles. No-Fault benefits are available to persons injured by unidentified or uninsured drivers, but these benefits are only available to covered persons, and do not compensate non-economic loss or economic loss in excess of basic economic loss.

Two statutory schemes provide coverage for accident victims who are injured as a result of uninsured or underinsured drivers. The first, Ins. Law § 3420(f), requires liability policies to include an uninsured motorist (UM) endorsement and optional underinsured motorist (UIM) endorsements. The second, Ins. Law Article 52, creates the “Motor Vehicle Accident Indemnification Corporation.” Direct claims against MVAIC may be made under certain circumstances. See § 2.08[3] below (direct claims against MVAIC).

Pursuant to Ins. Law § 3420(f)(1), the UM endorsement covers accidents involving:

1. Uninsured motor vehicles;
2. Unidentified vehicles that leave the scene of an accident;
3. Motor vehicles registered in New York that did not have a policy of liability insurance in effect at the time of the accident;
4. Stolen vehicles;
5. Motor vehicles operated without the permission of the owner;
6. Insured motor vehicles where the insurer disclaims liability or denies coverage; and
7. Unregistered vehicles.

The UM endorsement provides that the insurer agrees to pay to the insured sums that the insured or his legal representative are entitled to recover as damages from an owner or operator of an uninsured, unidentified or stolen vehicle, within certain limits, that is, $25,000 for bodily injury and $50,000 for wrongful death on account of the injury or death of one person in any one accident, and $50,000 for bodily injury and $100,000 for wrongful death on account of the injury or death of more than one person in any one accident.
[b] Understanding Underinsured Coverage and Supplementary Uninsured/Underinsured Coverage

The supplementary uninsured/undamaged endorsement covers bodily injury damages up to a maximum of $250,000 due to injury or death of one person in any one accident, and up to $500,000 due to injury to or death of two or more persons in any one accident.

UIM coverage applies only when the limits of liability of the policy held by the other motorist are less than the limits of liability contained in the UIM coverage endorsement. When the limits of liability of the policies held by the plaintiff and the other driver are the same, the other driver is not an “underinsured motorist” and the UIM coverage does not apply. This rule applies even if, due to the fact that there are multiple plaintiffs, the plaintiff’s ability to recover is limited by the fact that plaintiff must share the pool of available insurance coverage with other plaintiffs.

[c] Bringing Proceedings to Contest Uninsured Claims

When plaintiff demands arbitration of an UM claim under a policy of insurance, the defendant may seek to stay arbitration. Usually, a motion to stay arbitration must be brought within the 20-day period specified in CPLR 7503(c).

Exception: In Matarasso v. Continental Cas. Co., 56 N.Y.2d 264, 451 N.Y.S.2d 703 (1982), the Court held that a motion to stay arbitration may be brought beyond the CPLR 7503(c) 20-day period, when the parties never agreed to arbitrate, as distinct from situations in which there is an arbitration agreement that is claimed to be invalid or unenforceable because there has not been compliance with conditions set forth in the arbitration agreement.

The applicable burden of proof and burden of persuasion with respect to claims to stay arbitration is set forth in State Farm Mut. Auto. Ins. Co. v. Yeglinski, 79 A.D.2d 1029, 435 N.Y.S.2d 47 (2d Dep’t 1981). A hearing is generally required to determine whether the offending vehicle was insured at the time of the accident. The insurer has the initial burden of coming forward with proof that the offending vehicle was insured. The admission into evidence of a police accident report containing the offending vehicle’s insurance code designation constitutes prima
facie evidence that the offending vehicle was insured. The insurer may also establish a prima facie case by submitting a Department of Motor Vehicles FS-25 form or similar document. The burden then shifts to the offending vehicle’s purported insurer, or if the purported insurer is not made a party, then to the insured, to prove that the offending vehicle was never insured, or that the insurance on the offending vehicle was canceled. If the purported insurer or claimant submits sufficient evidence to rebut the insurer’s prima facie case, the claimant’s insurer must present additional proof of insurance to prevail.

If a policy was issued for the offending vehicle, the focus of the hearing will be whether the alleged insurer of the offending vehicle validly cancelled the policy. A statement from the DMV that the insurance was canceled, or evidence that there was compliance with the procedures for cancellation, will be sufficient to prove that the offending vehicle was uninsured.

PRACTICE RESOURCES:

- 18–85 Personal Injury: Actions, Defenses, Damages §§ 1.02[3], 5 (underinsured or uninsured motorist coverage; causes of action against underinsured or uninsured motorists).
- Bender’s Forms of Pleading Form No. 40:8, Form No. 40:9 (complaints against insurers for reimbursement of medical expenses; complaint against insurer for overdue first party benefits).

A person who is injured in an accident involving an uninsured vehicle not covered under an uninsured motorist endorsement (UM) will be permitted to bring a claim against MVAIC. Payment by MVAIC is limited to $25,000 for injury to one person and $50,000 for death of one person in any one accident; and $50,000 for injury to more than one person and $100,000 for death to more than one person in any one accident. Ins. Law § 5210.

Ins. Law §§ 5206 and 5208 provide that MVIAC may investigate, settle and pay any claim or judgment asserted by a “qualified person” against a “financially irresponsible motorist.” Ins. Law § 5202(b) defines a “qualified person” as:

1. A resident of New York State or the legal representative of such person (other than an insured or the owner of an uninsured motor vehicle and the spouse when a passenger in that vehicle); or
2. A resident of another state or country (or his or her legal representative), when that other jurisdiction provides to residents of New York State benefits substantially similar in character to those provided by the MVAIC.

A “financially irresponsible motorist” means the owner or operator of an uninsured motor vehicle, involved in an accident resulting in personal injury or death, who did not have in effect at the time of such accident either a policy of insurance or a certificate of self-insurance.

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**Timing:** Ins. Law § 5208(a) provides that notice of claim against MVAIC must be filed within 180 days of the accrual of the cause of action against the financially irresponsible motorist, or within 180 days of an insurer’s disclaimer of liability or denial of coverage. The time is shorter (90 days) if the cause of action is against a person whose identity is unascertainable. Ins. Law § 5208(c) provides that the claimant may apply to court for leave to file a late notice within one year after the beginning of the filing period. The extension must be supported by good reason for the delay. In *Carty v. Davis*, 140 A.D.2d 66, 529 N.Y.S.2d 103 (2d Dep’t 1988), the court held that even where good reason for the delay is present, the claimant may be estopped from filing a late notice if the application is not made within the statutory one-year period.
§ 2.08[4] NEW YORK NEGLIGENCE 2–36

PRACTICE RESOURCES:

- **New York Practice Guide: Negligence** §§ 10.06, 10.14[8], [9], [10], 10.19, 24.01[5], 31.04[2][c] (MVAIC claims).

- **Bender’s Forms of Pleading** Form No. 40:10, Form No. 40:11, (petition compelling MVAIC to pay benefits; complaint for judgment against MVAIC).


Ins. Law § 5217 provides that in hit-and-run accidents, there must be physical contact between the vehicle causing the injury and the claimant or the vehicle that the claimant was occupying at the time of the accident. The requirement of physical contact has been extensively litigated. In *Allstate Ins. Co. v. Killakey*, 78 N.Y.2d 325, 574 N.Y.S.2d 927 (1991), the Court held that physical contact occurs when the accident originated in a collision with an unidentified vehicle or in a collision with an integral part of an unidentified vehicle. Recovery was not barred for injuries caused when a wheel, tire, and tire rim of a hit-and-run vehicle was propelled across a highway and struck the windshield of decedent’s car, causing decedent to crash. The object falling from or propelled from the offending hit-and-run vehicle must be a part of the unidentified vehicle. Snow and ice falling from a hit and run vehicle are not integral parts of the vehicle, so that contact between snow and ice and a claimant’s vehicle does not constitute a “collision” between them.

PRACTICE RESOURCES:

- **New York Practice Guide: Negligence** § 31.01[3][c][ii] (hit and run accidents).

- **Bender’s Forms of Pleading** Form No. 41C:89 (complaint in hit and run accident).


[5] Determining Covered Damages

[a] Calculating Economic Loss

No-Fault benefits provide compensation for basic economic loss sustained as a result of personal injuries incurred in a motor vehicle accident. Basic economic loss means up to $50,000 per person for all qualified out-of-pocket damages, except wrongful death damages, within the limits specified in the statute. Basic economic loss can also include an option to purchase an additional $25,000 of coverage, which the insured or his or her legal representative may specify will be applied to loss of income from work and/or psychiatric, physical, or occupational therapy and rehabilitation after the initial $50,000 of basic economic loss has been exhausted.

First party recovery of lost wages is limited to $2000 per month for a maximum of three years from the date of the accident causing the injury. Self-employed persons are entitled to receive loss of earnings benefits by establishing loss of profits as the result of the accident.

[b] Determining Medical Coverage

Medical and other health service expenses are covered without limitation as to time, provided that within one year after the date of the accident causing the injury, it is ascertainable that further expenses may be incurred as a result of the injury. Medical coverage is subject to the total cap of $50,000 per person for basic economic loss, meaning the total amount of medical expenses, lost earnings, and other covered expenses.

PRACTICE RESOURCES:


The plaintiff must first look to his or her own policy for coverage for no-fault benefits. In the event the plaintiff is not insured under a policy, the plaintiff may look to the governmental entity for coverage.
Establishing Serious Injury on Motion for Summary Judgment

[a] Meeting Defendant’s Initial Burden

Under the No-Fault Law, to maintain an action for personal injury, a plaintiff must establish that a serious injury has been sustained. In the context of a motion for summary judgment on the threshold issue of serious injury, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury.

**Strategic Point:** On a threshold summary judgment motion, the initial burden of proof rests with the movant, which is usually the defendant. The defendant must adduce proof in admissible form (for example, an affidavit of a chiropractor or an affirmation of a physician) establishing that plaintiff has not suffered a serious injury (a feat that, in the past, has been referred to as proving a negative). This burden is generally met by the defendant’s submission of the affidavits or affirmations of defendant’s independent examining neurologists and/or orthopedists indicating that their examinations have revealed that plaintiff has no neurological abnormalities or deficits, or no orthopedic injuries or deficits, that plaintiff has a normal range of motion, and that plaintiff’s subjective complaints of pain are unsupported by any objective medical evidence. These affidavits establish a prima facie case even if the defendant’s experts acknowledge positive MRI reports or similar tests performed by plaintiff’s expert or treating physicians indicative of an injury. The mere existence of reports of disc herniations does not establish a serious injury, since there must also be symptoms of an injury to constitute a serious injury.

The submission of a medical affirmation or affidavit that is based on a physician’s personal examination and observations of plaintiff is an acceptable method of establishing a prima facie case of the absence of
a serious injury. However, the affirmed report of the defendants’ medical expert must set forth the objective tests he or she performed during the examination of the plaintiff that lead the physician to conclude that the plaintiff suffered no limitation of range of motion or other serious injury.

When a defendant’s motion is sufficient to raise the issue of whether a “serious injury” has been sustained, the burden shifts to the plaintiff. It is then incumbent upon the plaintiff to produce prima facie evidence, in admissible form, to support the claim of serious injury.

In general, the court requires sworn statements from both sides. A medical report in itself, which is signed but not sworn or affirmed, does not constitute admissible evidence.

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**Exception:** In moving for summary judgment, the defendant may rely on the unsworn reports of plaintiff’s treating or examining physician and is not required to produce affidavits or affirmations of medical experts to make the requisite showing, provided, of course, that the reports are sufficiently complete and, combined with the other proof, demonstrate that the plaintiff did not suffer a serious injury. *Seymour v. Roe*, 301 A.D.2d 991, 755 N.Y.S.2d 452 (3d Dep’t 2003).

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When a claim is raised under the “permanent consequential limitation of use of a body organ or member,” “significant limitation of use of a body function or system,” or “a medically determined injury or impairment of a non-permanent nature that prevents the injured person from performing substantially all of the material acts that constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment,” then, to prove the extent or degree of physical limitation, plaintiff must submit either:

1. An expert’s designation of a numeric percentage of plaintiff’s loss of range of motion, or
2. An expert’s qualitative assessment of plaintiff’s condition.

In the event that a qualitative assessment is submitted, it must demonstrate that:

1. The evaluation had an objective basis, and
2. The evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system.
Warning: A chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice. A physician is permitted to affirm his or her findings pursuant to CPLR 2106.

PRACTICE RESOURCES:


[b] Meeting Plaintiff’s Burden

If defendant has met defendant’s burden and established a prima facie case, the plaintiff must adduce *objective* medical evidence showing the existence of a serious injury. A cervical strain is a soft tissue injury, and mere soft tissue injury, even if persistent or protracted, will not qualify as a serious injury in the absence of competent medical evidence establishing a meaningful impairment or limitation as a result of the pain. The plaintiff’s medical affirmation or affidavit must contain medical findings that are based on the physician’s own examination, tests and observations and review of the record rather than manifesting only the
plaintiff’s subjective complaints, and that quantitatively or qualitatively establish a limitation of range of motion or impairment.

**Strategic Point:** The No-Fault Law requires medical evidence. Plaintiff’s own subjective complaints of pain are insufficient to establish a serious injury. Moreover, the mere statement by a medical provider that a serious injury exists does not raise an issue of fact without an objective basis for the medical opinion.

The plaintiff’s medical findings must be submitted in a competent statement under oath (or affirmation, when permitted) and must demonstrate that plaintiff sustained at least one of the categories of “serious injury” as enumerated in Ins. Law § 5102(d). A physician’s affidavit that is premised on plaintiff’s subjective complaints of pain is insufficient to establish a prima facie case of serious injury. The same is true for mere conclusory statements contained in physician’s sworn statements. Plaintiff’s own affidavit is likewise insufficient in itself to defeat a defendant’s motion for summary judgment.

**Strategic Point:** Plaintiffs often attempt to rely on unsworn MRI reports that purport to show that plaintiff has sustained a bulging or herniated disc. These unsworn reports are not admissible in evidence and thus are not sufficient to defeat defendant’s motion for summary judgment. There exists, however, a line of cases that permits the plaintiff to rely on unsworn MRI reports if defendant has submitted or relied on the same report in moving for summary judgment.

If the defendant produces evidence that the plaintiff’s medical condition is due to preexisting conditions or illnesses, the plaintiff must rebut that evidence to raise an issue of fact. In *Carrasco v. Mendez*, 5 A.D.3d 716, 773 N.Y.S.2d 605 (2005), the defendant’s expert and one of plaintiff’s own treating physicians presented evidence that plaintiff’s lumbar disc bulges were due to a preexisting degenerative condition. While plaintiff’s expert stated, in a conclusory fashion, that plaintiff’s injuries were causally related to the accident, he entirely failed to rebut the evidence of degenerative changes. In the absence of this evidence,
the complaint was dismissed. By comparison, in *Brown v. Dunlap*, 6 A.D.3d 159, 774 N.Y.S.2d 147 (2005), decided at the same time as *Carrasco*, the evidence of a pre-existing condition was weak, and two of defendant’s experts conceded causation. In view of the weakness of the evidence of a preexisting condition, plaintiff’s failure to specifically address the preexisting condition was held not to be significant.

**Strategic Point:** Counsel should keep in mind that an aggravation of a pre-existing injury or injuries occurring subsequent to the accident may be used to meet the serious injury threshold (*Guerra v. Fuez*, 145 A.D.2d 873, 536 N.Y.S.2d 200 (3d Dep’t 1988); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dep’t 1989)).

**Warning:** It has been held that proof of a herniated disc, without more, is not prima facie evidence of a serious injury within the meaning of the No-Fault Law, and that the plaintiff has the additional burden of presenting objective evidence of the extent or degree of the alleged physical limitations resulting from this disc injury.

**PRACTICE RESOURCES:**

Understanding Doctrine of “Gap in Treatment”

Numerous cases have dismissed no-fault claims based on a “gap” in treatment, essentially, an interruption in treatment for an extended period of time, during which either no physical therapy or other treatment is rendered, or the complete cessation of treatment. The rule that now appears to have been established is that an unexplained gap in treatment will warrant dismissal of the complaint, while the proffering of an acceptable excuse will raise an issue of fact warranting trial.

In *Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005), the Court of Appeals decided three cases, two of which involved gaps in treatment. In *Pommells*, the Court observed that while plaintiff demonstrated the existence of a herniated disc and objective medical evidence of physical limitation, the plaintiff entirely failed to explain why he had ceased physical therapy nine months after the accident. In addition, plaintiff failed to address the effect of an intervening kidney disorder on his condition. Based on these facts, summary judgment was granted dismissing the complaint.

By contrast, in *Brown v. Dunlap*, 4 N.Y.3d 566 (2005), the two and one-half year period during which plaintiff received no treatment was addressed in the affirmation of defendant’s treating physician. The physician stated that further treatment would have been palliative in nature only, and that plaintiff’s physical therapy was terminated with instructions to the plaintiff to exercise at home. The cessation of treatment was explained sufficiently to withstand defendants’ summary judgment motion.

**PRACTICE RESOURCES:**

Using Evidence of Straight Leg Raising Test and Other Range of Motion Tests

On a motion for summary judgment, for the plaintiff to avoid dismissal of the complaint, the courts have consistently required more than the plaintiff’s own subjective complaints of pain to establish an issue of fact as to the existence of a serious injury. The requirement has been, and continues to be, that the plaintiff must adduce objective medical proof of injury. There exists a battery of standardized “range of motion” tests, chief among them the straight leg raising test. Other tests often involved in these motions are the Soto-Hall’s test; the foramina-compression test; the Valsalva test; the Adams test; and the Yeoman’s test. The straight leg raising test and other range of motion tests are ostensibly accepted in the medical community as authoritative. Until recently, many courts had accepted these tests in themselves as objective medical evidence of serious injury.

In Brown v. Achy, 9 A.D.3d 30, 776 N.Y.S.2d 56 (1st Dep’t 2004), the court cast doubt on the use of the straight leg raising test as well other standard range of motion tests that are based on plaintiff’s complaints of pain. Without determining the issue, the court held that range of motion testing combined with other objective evidence, including MRI reports, EMG studies, or possibly muscle spasm, if in proper form and adequately explained, will constitute objective evidence. Whether range of motion testing will be found adequate at the summary judgment stage of litigation, without other supporting evidence, is an issue that must await future resolution.

Warning: To establish a quantitative limitation of range of motion, the expert must provide a numerical range of motion that is considered to be normal. If the expert fails to do that, the expert may still establish a limitation by qualitative evidence, including statements that the plaintiff can not shovel snow, or lift objects over his or her head.

PRACTICE RESOURCES:

§ 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases

[1] Identifying Theories of Liability

[a] Establishing Liability from Negligent Operation of Motor Vehicle

[i] Determining Liability for Backing Up; Coasting; Following; Driving on Wrong Side of Road; Passing; Rear-End Collisions

The circumstances under which negligence predicated on the operation of a vehicle may be established include:

1. Backing Up: VTL § 1211 provides that a driver must not back his or her vehicle unless such movement can be made with safety and without interfering with other traffic. In addition, a driver may not back his or her vehicle on any shoulder or roadway of any controlled access highway;

2. Coasting: Ancient cases describe the practice of operating a vehicle with the power off, which is termed “coasting.” It is said that the practice does not constitute negligence. It is unlikely that any cases of this nature will be encountered in present times;

3. Following: The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and condition of the highway. VTL § 1129.

4. Driving on the wrong side of the road and passing: VTL § 1130(1) provides that when a highway has been divided into two roadways by a space, barrier, or other clearly indicated dividing section constructed to impede traffic, a driver must only use the right hand roadway unless otherwise directed by a police officer or traffic control device. VTL § 1120 provides that when an obstruction requires a driver to drive to the left of the center of the road, he or she must yield the right-of-way to vehicles
traveling in the proper direction on the unobstructed part of the highway within such a distance as to cause an immediate hazard. VTL § 1125 provides that no driver should ever drive to the left side of the road if the vehicle is approaching the crest of a grade or a curve where the driver’s view is obstructed within such distance as to create a hazard in the event another vehicle may approach from the opposite direction; or the vehicle is approaching within 100 feet of or traversing any railroad grade crossing; or the view is obstructed upon approaching within 100 feet of any bridge viaduct or tunnel. VTL § 1123(a) provides that the driver of a vehicle may overtake and pass on the right of another vehicle only when the vehicle overtaken is making or about to make a left turn; on a street or highway with unobstructed pavement of sufficient width for two or more lanes of moving vehicles in each direction; or on a one-way street where the roadway is free from obstructions and of sufficient width for two or more lanes of moving vehicles. When passing is prohibited by roadway markings, passing constitutes negligence per se. For example, in Baldwin v. Degenhardt, 82 N.Y.2d 867, 609 N.Y.S.2d 563 (1993), a dump truck driver attempted to pass a garbage truck by crossing the center line, then quickly pulled back into his lane when he saw an oncoming vehicle, resulting in a collision with the garbage truck. The violation of the statute prohibiting the crossing of a double solid line was held to be negligence per se.

A rear end collision creates a prima facie case of negligence of the part of the operator of offending vehicle and imposes a duty upon that operator to offer a non-negligent explanation for a collision, sufficient to overcome the inference of negligence (Garces v. Karabelas, 17 A.D.3d 633, 794 N.Y.S.2d 75 (2d Dep’t 2005)). An inference of negligence that emanates from a rear end collision may be rebutted by a reasonable excuse, for example: mechanical failure; a sudden stop of the vehicle ahead; or an unavoidable skidding on wet pavement. For instance, in Stern v. Chang, 2005 U.S. Dist. LEXIS 9779 (S.D.N.Y. 2005), difficulty in stopping on an icy road constituted a non-negligent explanation for a rear end collision, warranting a trial, when defendant testified that he was traveling at 20 miles per hour and maintaining a distance of 20 car lengths from the forward vehicle.

Rear end collisions, because of the inference of negligence that arises from the collision, are often the subject of motions for summary judgment by plaintiffs. In many cases, the motion will be granted, even though the defendant submits an affidavit, or testifies at a deposition, that the accident was not his or her fault. Mere conclusory allegations on the part of the operator of the offending vehicle without supporting evidence are not sufficient to rebut the inference of negligence. The following cases
have held that defendant failed to come forward with a non-negligent explanation:

1. In a case in which plaintiff rear-ended another vehicle, plaintiff’s allegation that the defendant stopped suddenly in the middle of an intersection at a yellow light was not a sufficient non-negligent explanation, and plaintiff’s complaint was dismissed. *Malone v. Morillo*, 6 A.D.3d 324, 775 N.Y.S.2d 312 (1st Dep’t 2004);

2. When defendant admitted that plaintiff’s vehicle was stopped before defendant rear-ended plaintiff’s vehicle, defendant’s claim that plaintiff failed to timely activate her turn signal did not raise an issue of fact as to the cause of the collision sufficient to defeat plaintiff’s motion for summary judgment. *Toulson v. Young Han Pae*, 6 A.D.3d 292, 774 N.Y.S.2d 706 (1st Dep’t 2004); and,

3. Allegations that the defendant driver did not recall seeing brake lights on plaintiff’s vehicle before the collision, or that defendant heard squealing brakes and cars hitting each other before the collision, were insufficient to rebut the inference of negligence. *Macaulay v. ELRAC, Inc.*, 6 A.D.3d 584, 775 N.Y.S.2d 78 (2d Dep’t 2005).

**Strategic Point:** When the plaintiff’s vehicle is struck in the rear, it is prudent to make a motion for summary judgment on the issue of liability prior to the plaintiff’s deposition. If the motion is successful, plaintiff’s deposition will be limited solely to the issue of damages. If the motion for summary judgment is denied, plaintiff’s counsel will at the very least, in most cases, gain the benefit of ascertaining the basis of the defenses regarding liability.

**PRACTICE RESOURCES:**

- *Warren’s Negligence in the New York Courts* Ch. 228 (motor vehicle liability).
- *Bender’s Forms of Pleading* § 41 (complaints for negligent operation of motor vehicle).
- 4–12 *Personal Injury: Actions, Defenses, Damages* § 1.02[2][d][iv] (duty to keep proper lookout).
§ 2.09[1][a]  NEW YORK NEGLIGENCE  2–48

- **Ng v. Reid,** 259 A.D.2d 601, 686 N.Y.S.2d 780 (2d Dep’t 1999).

[ii] Determining Liability for Speeding; Driving Too Slowly; Turning; Starting and Stopping; Failing to Signal

Liability for negligence in the operation of a motor vehicle may be predicated on:

1. Speeding: VTL § 1180 requires that a driver proceed at a reasonable speed under the conditions existing. VTL § 1180(a) establishes 55 or 65 m.p.h. as the maximum speed limit;

2. Driving Too Slowly: VTL § 1181(a) provides that driving at such slow speed as to impede normal traffic is prohibited, except when reduced speed is necessary for safe operation or in compliance with law. VTL § 1181(b) provides that whenever a minimum speed limit has been established on a highway, a vehicle must not be driven at a speed below such limit, except when entering upon or exiting from the highway, when preparing to stop, or when necessary for safe operation. VTL § 1120 provides that any vehicle proceeding at less than the normal speed of traffic must drive in the extreme right lane or as close to the right curb as practicable, except when overtaking and passing another vehicle or when preparing to make a left turn at an intersection or into a private drive;

3. Turning: VTL § 1160 requires that all turns made by a vehicle at an intersection must be made from a position that is appropriate to the direction of the turn to be made. No turn may be made in any direction unless and until the turn can be made with reasonable safety. For vehicles intending to turn at an intersection, VTL § 1160(a) provides that the approach for a right turn and the right turn are required to be made as close as possible to the right-hand curb or edge of the roadway. VTL § 1163 mandates that no driver can turn a vehicle to enter a private road or driveway before ascertaining that such movement can be made with reasonable safety, and without giving an appropriate signal. The turn signal must be given continuously during no less than the last one hundred feet traveled by the vehicle before turning;
4. Starting and Stopping: VTL § 1162 states that a vehicle that is stopped, standing, or parked may not be moved unless and until such movement can be made with reasonable safety; and,

5. Failing to Signal: Failing to signal is negligence. VTL § 1165 provides that signals may be given by hand, or mechanically. VTL § 1163(b) requires that a signal of intention to turn right or left when required must be given continuously during at least the last 100 feet traveled by the vehicle before turning.

**Exception:** New York City Traffic Regulations preempt State law within the City of New York as to speeding. See § 2.09[1][f] below.

**PRACTICE RESOURCES:**

- *Warren’s Negligence in the New York Courts* Ch. 228 (motor vehicle liability).
- *Bender’s Forms of Pleading* § 41 (complaints for negligent operation of motor vehicle).
- 4–12 *Personal Injury: Actions, Defenses, Damages* § 1.02[2][d][iv] (duty to keep proper lookout).

[b] **Establishing Liability for Failure to Properly Maintain Motor Vehicle**

Owners and operators of motor vehicles have a duty to maintain vehicles in a reasonably safe condition, and to equip the vehicle as required by statute. Various provisions of the VTL require functioning horns, seat belts, lights, brakes and other equipment. A violation of a safety equipment statute requires proof that the operator or owner of the
motor vehicle discovered, or should have discovered, the defective equipment. Notice of the defect may be actual or constructive, for example, by an actual inspection, or by a failure to inspect under circumstances under which a reasonably prudent person would have conducted an inspection.

VTL § 375 provides that every motor vehicle operated on the public highways must have adequate brakes in good working order and sufficient to control the vehicle at all times when it is in use. The statute does not impose strict liability. An unexpected brake failure, if there is proof that the defendant exercised reasonable care to keep the brakes in good working order, is not negligence.

VTL § 375 sets forth the requirements for lights on motor vehicles. An unexcused failure to display lights constitutes negligence.

VTL § 375(35) details the requirements for acceptable tires. Operation of a vehicle with knowledge or constructive notice of defective tires constitutes negligence.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Ch. 228 (motor vehicle liability).
- New York Practice Guide: Negligence § 31.02[b][iv], [10] (liability for failure to maintain motor vehicle).
- Bender’s Forms of Pleading § 41 (complaints alleging duty to maintain motor vehicle).
- 4–12 Personal Injury: Actions, Defenses, Damages § 1.02[d][v] (duty to maintain motor vehicle).

[c] Establishing Liability for Failure to Keep Proper Lookout

[i] Pedestrians

VTL § 1146 mandates that a motorist must exercise due care to avoid colliding with any bicyclist, pedestrian or domestic animal upon any roadway and must give a warning by sounding the horn when necessary. Motorists have been found not to be negligent when pedestrians entered
the roadway suddenly from between parked cars, or under other conditions under which a reasonably prudent driver would not have been able to see or avoid a collision with the pedestrian.

VTL § 1151 provides that a driver must yield to a pedestrian in a crosswalk at an uncontrolled intersection, but that a pedestrian must not suddenly leave the curb and walk or run into the path of a vehicle when it is impractical for the vehicle to stop. A pedestrian crossing the roadway outside of a crosswalk (or an unmarked crosswalk at an intersection) must yield the right of way to vehicles.

At an intersection controlled by a traffic signal, VTL § 1111 provides that a pedestrian crossing with the signal has the right of way.

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**Exception:** The sections of the VTL pertaining to pedestrians and crosswalks do not apply in the City of New York. See § 2.09[1][f] below.

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A pedestrian is not required to cross at a crosswalk, but must exercise reasonable care under the circumstances. The driver is bound to see what is within his or her vision under VTL § 1151(a).

A driver has a duty to warn a pedestrian by sounding his or her horn when necessary pursuant to VTL § 1146.

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**Exception:** A child is not liable for failing to comply with a statute unless the child is of sufficient age to understand the statute. In an accident involving a child, the child must exercise that degree of care of which he or she is capable.

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**PRACTICE RESOURCES:**

- *Warren’s Negligence in the New York Courts* § 228.09 (liability for injuries to pedestrians).
- *New York Practice Guide: Negligence* § 31.02[2][b][iii], [9][b] (failure to maintain proper lookout; pedestrians).
- *4–12 Personal Injury: Actions, Defenses, Damages* §§ 1.02[2][d][iv][J], 3.23 (duty to keep proper lookout, pedestrians).
§ 2.09[1][c]  New York Negligence  2–52

- **Levy v. Town Bus Corp.**, 293 A.D.2d 452, 739 N.Y.S.2d 459, 460 (2d Dep’t 2002).

[ii] Road Conditions and Traffic Controls

Evidence of skidding out of control is prima facie evidence of negligence. Skidding on ice, however, does not establish negligence. The prima facie case can be rebutted by evidence that ice or other conditions were present; that the driver was proceeding with caution, or at a slow rate of speed; and that despite precautions, the driver skidded due to the presence of natural conditions that could not be avoided in the exercise of reasonable care.

The right of way at intersections is governed by statute. VTL § 1140(a) requires that a driver approaching an uncontrolled intersection yield the right-of-way to a vehicle that has entered the intersection from a different highway, and VTL § 1140(b) requires that the driver of the vehicle on the left yield to the driver of the vehicle on the right if both drivers enter the intersection at approximately the same time. If the intersection is controlled by stop or yield signs, the general provisions of VTL § 1140 do not apply and the more specific requirements of VTL § 1142 control. VTL § 1142(a) requires that a driver of a vehicle approaching a stop sign shall stop, as required by VTL § 1172, and after having stopped shall yield the right of way to any vehicle that has entered the intersection from another highway, or that is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection. VTL § 1142(b) provides that the driver of a vehicle approaching a yield sign shall slow down to a speed reasonable for existing conditions, or shall stop if necessary as provided in VTL § 1172, and shall yield the right of way to any pedestrian legally crossing the roadway on which he is driving, and to any vehicle in the intersection or approaching on another
highway so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection.

When an intersection is controlled by a traffic light, the drivers are required to obey the traffic signals, in accordance with VTL §§ 1110 and 1111. A driver entering an intersection with a green light is not generally required to reduce his or her speed. Nevertheless, a driver entering an intersection with a green light may not do so wantonly or recklessly, and must exercise reasonable care under all of the pertaining circumstances.

**Exception:** VTL § 1142(b) (driver approaching yield sign) specifically does not apply in the City of New York. When an intersection accident occurs in the City of New York, the New York City Traffic Regulations control, and not the VTL. Reference must be made to New York City Traffic Regulations § 4-03 (Traffic Signals); § 4-04 (Pedestrians); and § 4-07(a) (Other Restrictions on Movement), governing the duty of motorist approaching yield signs.

**Strategic Point:** If a driver is involved in a collision with a pedestrian in a crosswalk or a vehicle in the intersection, after driving past a yield sign without stopping, such collision shall be deemed prima facie evidence of his or her failure to yield the right of way.

**PRACTICE RESOURCES:**

- *Warren’s Negligence in the New York Courts* Ch. 228 (motor vehicle liability).
- *New York Practice Guide: Negligence* § 31.02[2][b][iii], [7][e], [9] (failure to maintain proper lookout).
- 4–12 *Personal Injury: Actions, Defenses, Damages* § 1.02[2][d][iv] (duty to keep proper lookout).
§ 2.09[1][d]  New York Negligence  2–54


[iii] Falling Asleep at Wheel

The Second and Fourth Departments have held that a driver’s falling asleep at the wheel gives rise to a presumption of negligence. Generally, in those departments, the plaintiff will be entitled to summary judgment, or a directed verdict on liability. The Third Department follows a slightly different rule, requiring that plaintiff prove that the driver was negligent in continuing to drive with knowledge of the likelihood of falling asleep.

PRACTICE RESOURCES:

- *Warren’s Negligence in the New York Courts* Ch. 228 (motor vehicle liability).
- *New York Practice Guide: Negligence* § 31.02[2][b][iii], [9][c] (failure to maintain proper lookout).
- *Bender’s Forms of Pleading* Form No. 41A:93 (complaint where defendant fell asleep at wheel).

[d] Establishing Liability for Operating Motor Vehicle While Under Influence of Alcohol or Other Illegal Substances

[i] Dram Shop Act; General Obligations Law

The so-called Dram Shop Act (GOL § 11-101) permits a person injured by an intoxicated driver to bring an action against the establishment that served the driver if the driver was visibly intoxicated at the time the driver was served alcohol.

The subject of Dram Shop Act liability is discussed in § 3.07[7][e] below.
Intoxicated Driver

A violation of the statute prohibiting driving while intoxicated constitutes negligence per se, although it must still be proved that this negligence was a proximate cause of the accident. VTL § 1192 provides that no person may operate a motor vehicle while his or her ability to operate such a vehicle is impaired by drugs or by the consumption of alcohol, or while he or she is intoxicated.

In Sweeney v. McCormick, 159 A.D.2d 832, 552 N.Y.S.2d 707 (3d Dep’t 1990), the court held that evidence of a defendant’s intoxication, without additional evidence showing wilful, wanton, or reckless conduct, will not support an award of punitive damages.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Chs. 54, 228 (intoxicated persons; motor vehicle liability).
- Bender’s Forms of Pleading Form No. 41B:23, Form No. 121:3, Form No. 121:6 (complaints against tavern owner).
- Defense of Drunk Driving Cases: Criminal, Civil Chs. 1, 9 (elements and theories of liability).
- Reese v. Sierra, 17 A.D.3d 439, 792 N.Y.S.2d 629 (2d Dep’t 2005).

Establishing Liability for Negligent Use of Motor Vehicle Arising from Owner

Effective August 10, 2005, and applicable to actions filed on or after that date, the federal Transportation Equity Act preempts VTL § 388 with respect to vehicle leasing and rental companies. The constitutionality of this law has not yet been subject to judicial scrutiny. Although the new statute is a significant benefit for the rental and leasing industries, rental companies will still be exposed for accidents involving their vehicles, including insurance that must be provided for the vehicle operator as well as negligent entrustment, products liability and negligent maintenance, and employee use.

VTL § 388 provides that every owner of a motor vehicle used or operated in New York State is liable for death or injuries to person or
property resulting from negligence in the use or operation of the vehicle by any person using or operating it with the express or implied permission of the owner. Under VTL § 388, the vehicle itself need not be a proximate cause of the injuries. In *Argentina v. Emery World Wide Delivery*, 93 N.Y.2d 554, 693 N.Y.S.2d 493, 495 (1999), plaintiff was injured when a steel plate fell on him while he was unloading cargo from a truck. The Court held that loading and unloading a vehicle was encompassed within the “use and operation” language of VTL § 388, and imposed vicarious liability on the truck’s owner.

An owner includes a person having title to a vehicle. The holder of a security interest in an automobile is generally not liable as an owner under VTL § 388, even if it takes action consistent with its rights as a lienholder under Article 9 of the Uniform Commercial Code when the party from whom it obtained the security interest defaulted on its obligations. However, banks have been found to be owners when a lease by the driver was assigned to the bank, the bank assumed the lessor’s rights and interests, and the certificate of title was in the bank’s name. An owner includes a lessee or bailee of a motor vehicle having the exclusive use thereof, under a lease or otherwise, for a period greater than 30 days, pursuant to VTL § 128.

VTL § 388 creates a presumption that a person operating an automobile does so with the consent of the vehicle’s owner. The presumption can only be overcome by substantial evidence to the contrary.

An owner, for instance, an employer, who specifically restricts the use of the vehicle may not be liable as an owner if the restriction is violated. In *Murdza v. Zimmerman*, 99 N.Y.2d 375, 756 N.Y.S.2d 505 (2003), plaintiff was struck by a van that had been entrusted to a woman by her employer. At the time of the accident, the van was being driven by the woman’s boyfriend. The employer was not liable as a statutory owner under VTL § 388 because its employee handbook specifically prohibited use of the van by the woman’s boyfriend. The Court drew a distinction between the employer and a commercial car rental agency that places large numbers of vehicles on the road. Car rental companies are generally held liable when the person to whom the car is leased permits another driver to operate the vehicle.

Where an employee (as opposed to an independent contractor) is driving his or her own motor vehicle in the business of his or her employer and negligently causes injury, the employer may be liable. For an employer to be held liable for the negligence of his employee while that employee was driving his own vehicle, the evidence must show that
at the time of the accident, the vehicle was being used by the driver in
furtherance of the business of the employer, that the driver was acting
within the scope of his authority, and that he had the express or implied
consent of the employer. An employee is acting within the scope of his
or her employment when he or she is engaged in an activity that is in
furtherance of the employee’s duties to the employer, and where the
employer is in some manner, directly or indirectly, exercising control
over the employee’s activities. See § 2.11[2] below (vicarious liability
under VTL § 388).

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts § 228.04 (liability
  of owner for negligence of driver).
- New York Practice Guide: Negligence §§ 31.01[4], 31.02[12]
  (use of vehicle by someone other than owner; liability of owner).
- 4–12 Personal Injury: Actions, Defenses, Damages § 3.01[2]
  (form complaints in actions against owner).
- Alexander v. Radix, 12 A.D.3d 544, 785 N.Y.S.2d 94 (2d Dep’t
  2004).
  Dep’t 2005).
- Drake v. County of Herkimer, 15 A.D.3d 834, 788 N.Y.S.2d 770
  (4th Dep’t 2005).
- Kelly v. Fleet Bank, 271 A.D.2d 654, 706 N.Y.S.2d 190 (2d Dep’t
  2000).
- Ryan v. Sobolevsky, 4 A.D.3d 222, 772 N.Y.S.2d 310 (1st Dep’t
  2004).
- Tikhonova v. Ford Motor Co., 4 N.Y.3d 621, 797 N.Y.S.2d 799
  (2005).

[f] Establishing Liability for Violation of Statutes and
Ordinances Governing Operation of Motor Vehicle;
New York City Traffic Regulations

A violation of a traffic statute constitutes negligence. It is error for
a trial court to refuse to charge an applicable statute, or to substitute a
standard of care other than that imposed by the statute. On the other hand,
while a statutory violation constitutes negligence, the plaintiff must still
establish that the violation was a proximate cause of the accident.
Emergency circumstances may justify noncompliance with a statute.
Warning: Certain statutes may impose absolute liability, and in those cases, comparative negligence is not a defense. A violation of VTL § 1174(a), which requires motorists to come to a full stop when a school bus has stopped for the purpose of receiving or discharging school children, and the bus is operating signals as required by the statute, imposes absolute liability.

A violation of a traffic ordinance constitutes some evidence of negligence. It has been held to be error for the court to charge a jury that a violation of an ordinance constitutes negligence.

VTL § 1642 permits a city having a population in excess of one million, which means the City of New York, to supercede the provisions of the VTL with respect to, among other things, establishing minimum speed limits, the operation of emergency vehicles, the right of way of vehicles and pedestrians, use of the highway by pedestrians, and the turning of vehicles. New York City has adopted traffic regulations, and these are the controlling law within the city. It is important at trial, that the proper New York City ordinance be charged if the VTL is superceded, and that the jury be instructed by the court that a breach of the New York City Traffic Regulations is only some evidence of negligence.

New York City Traffic Rule § 4-02(d)(2)(e) specifically provides that the following provisions of the VTL do not apply in the City of New York: VTL § 1112 (pedestrian control signal indicators); VTL § 1142(b) (driver approaching yield sign); VTL § 1150 (pedestrians subject to traffic regulation); VTL § 1151 (pedestrians’ right of way in crosswalks); VTL § 1152 (crossing other than at crosswalks); VTL § 1153 (provisions relating to blind or visually impaired persons), VTL § 1156(b) (pedestrians on roadways where sidewalks are not provided), VTL § 1157 (pedestrians soliciting rides); VTL § 1171 (vehicles stopping at railroad grade crossings); VTL § 1201 (stopping, standing or parking outside of business or residence districts); VTL § 1202 (stopping, standing or parking prohibited in specified places) and VTL § 1234 (bicycling or in-line skating on roadways, shoulders and paths). In addition, other provisions of the VTL should not be charged in the City of New York when a New York City Traffic Regulation applies. In Fox v. Lyte, 143 A.D.2d 390, 532 N.Y.S.2d 432 (2d Dep’t 1988), the court held that VTL § 1180(c), relating to speeding, is superceded by City of New York Traffic Regulations. In Ferreira v. New York City Transit Authority, 146 A.D.2d 771, 538 N.Y.S.2d 412 (3d Dep’t 1991).
Authority, 79 A.D.2d 596, 433 N.Y.S.2d 508 (2d Dep’t 1980), the court held that New York City Traffic Regulation § 81(c)(2), relating to double parking, rather than VTL § 1202, applied in New York City; the city regulation, unlike the statute, permitted temporary stopping to receive and discharge passengers.

PRACTICE RESOURCES:

- *Warren’s Negligence in the New York Courts* Ch. 228 (motor vehicle liability).
- 4–12 *Personal Injury: Actions, Defenses, Damages* §§ 1.03, 2.03 (violation of statute or ordinance).

[g] Establishing Government Liability

The State and municipalities have a nondelegable duty to maintain roads in a reasonably safe condition, and will be liable for a breach of that duty even if the dangerous condition of the road that caused the injury was created by an independent contractor. Such claims may be subject to prior written notice laws, and the requirement of the service of a notice of claim. See §§ 6.09[4][b] and 6.09[7] below (governmental liability for negligence in design or maintenance of roads; liability of public agencies as common carriers, including duty to provide safe place to alight).

Municipalities are liable for ordinary negligence in the operation of motor vehicles, and are governed by the usual rules of negligence concerning the operation of motor vehicles.

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Exception: The standard of reckless disregard of known risks, a standard higher than ordinary negligence, governs the operation of emergency vehicles engaged in emergency operations. See §§ 2.09[2][b] and 6.09[1][c][ii] below.

Gen. Mun. Law §§ 50-a and 50-b provide that every city, town and village, apart from New York City, shall be liable for the negligent operation within the state of a municipally owned vehicle by any person authorized to operate the vehicle, who at the time of the injury or accident was acting in the discharge of his or her duties and within the scope of his or her employment, and shall hold harmless the negligent employee. Any person appointed to operate a motor vehicle is deemed to
be an employee for purposes of the statute, thus making the law applicable to officers or agents who may otherwise not be covered. Gen. Mun. Law § 50-c, which is similar to Gen. Mun. Law §§ 50-a and 50-b, applies to motor vehicles driven by police officers and paid (as opposed to volunteer) firefighters in the course of performing their duties. Every city, town, village and fire district, except for New York City, is required to be liable for and to save harmless any police officer or paid firefighter who negligently operates a motor vehicle on a public street or highway of the municipality or fire district while acting in the performance of his or her duties and within the scope of his or her employment.

PRACTICE RESOURCES:

- *Warren's Negligence in the New York Courts* §§ 33.07, 33.09, 45.02, 71.02, 189.02, 231.07, 231.08 (municipal liability).

[2] Identifying Applicable Standard of Care

[a] Establishing Conduct to Be That of Reasonable and Prudent Person

In a motor vehicle accident, the standard of conduct is that of reasonable care. A prima facie case is made out by the fact that a car went out of control, crossed into the wrong lane of travel, or rear-ended another vehicle. Summary judgment on liability was granted to the plaintiff passenger in *Dudley v. Ford Credit Titling Trust*, 307 A.D.2d 911, 762 N.Y.S.2d 905 (2d Dep’t 2003), a case in which a car suddenly accelerated, left the road, and struck a tree. This evidence established a prima facie case of negligence, which defendant driver failed to rebut.

When a driver is faced with an emergency that he or she did not create, the driver will not be held liable for a failure to exercise the best or wisest judgment in that emergency, but is only required to do what may reasonably be expected of the average prudent motorist under similar circumstances. In *Kuci v. Manhattan and Bronx Surface Transit Operating Authority*, 88 N.Y.2d 923, 646 N.Y.S.2d 788, 789 (1996), the Court held that it was error for the trial court to refuse to charge the jury with the emergency doctrine, in a case involving an injured passenger who fell when the bus in which he was riding suddenly swerved to avoid a car. The fact that the bus driver knew that cars may make sudden turns
did not preclude the jury from considering whether the driver had not anticipated being cut off by the particular car.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts § 2.02 (defendant’s duty of care).

[b] Determining if Actor Has Special Status

In 1996, GOL § 11-106 abolished the common law firefighter’s rule barring actions based on negligence by police officers and firefighters injured in the line of duty, except as to actions against the plaintiff’s employer or co-employee. Consequently, a police officer or firefighter may now sue another driver under the common law. The injured police officer or firefighter may also bring suit under special statutory causes of action available to them under Gen. Mun. Law §§ 205-a and 205-e.

If, however, a police officer or firefighter wants to sue a governmental employer, a common law negligence claim may not be used. Only in a case in which a statute, rule or ordinance has been violated and caused injury to a firefighter or police officer, the injured party may sue his or her employer or a co-employee under Gen. Mun. Law §§ 205-a and 205-e. For example, a violation of VTL § 1104(e) may serve as a predicate for Gen. Mun. Law § 205-e liability, as that section mandates a reasonably defined standard of care that does not require the trier of fact to second-guess an officer’s split-second weighing of choices. See § 6.09[3] below (restrictions against common law actions against employer or co-employee).

VTL §§ 114(b) and 1104 provide special standards for the conduct of emergency operations, which include authorized emergency vehicles
responding to accidents, medical emergencies, police calls, or fires. When
the statutes apply, the plaintiff must demonstrate that the operator of the
emergency vehicle acted with reckless disregard for the safety of others
by intentionally performing an unreasonable act in disregard of an
obvious risk. See § 6.09[c][ii] below. VTL § 1104 imposes a duty to
use lights and sirens in certain instances. When going through red lights,
an ambulance must employ a siren; the use of flashing lights alone is
not sufficient.

 Plaintiffs injured as a result of police chases must overcome the
statutory standard of reckless disregard to recover. The Court of Appeals
has held that a police car chasing a stolen van at 60 miles per hour in
a 35 mile per hour zone on a sparsely populated residential street was
not reckless as a matter of law, and the municipality was not liable when
the stolen van struck another vehicle. The Court of Appeals has also held
that a police officer who struck a pedestrian while responding to a call
was not liable for a momentary lapse in judgment in taking his eyes off
of the road.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts § 92.03 (elimination
  of firefighter’s rule).
- Warren’s Negligence in the New York Courts §§ 33.07, 33.09,
  45.02, 69.02, 71.02, 189.02, 231.07, 231.08 (municipal liability).
- New York Practice Guide: Negligence § 33.02, 33.04[b][a], 33.05[a]
  (standard of care in motor vehicle cases; special status of police
  officers and firefighters).
- Criscione v. City of New York, 97 N.Y.2d 152, 736 N.Y.S.2d
  656 (2001).
- Gonzalez v. Iocovello, 93 N.Y.2d 539, 548, 693 N.Y.S.2d 486
  (1999).
- Hughes v. Chiera, 4 A.D.3d 872, 772 N.Y.S.2d 772 (4th Dep’t
  2004).
- McAndrews v. City of New York, 100 N.Y.2d 603, 769 N.Y.S.2d
  151 (2003).
- O’Banner v. County of Sullivan, 16 A.D.3d 950, 792 N.Y.S.2d
  230 (3d Dep’t 2005).
- Rodriguez v. Incorporated Vil. of Freeport, 801 N.Y.S.2d 352
  (2d Dep’t 2005).
[3] Establishing Duties of Care

[a] Driving at Reasonable Speed

VTL § 1180(a) requires the operator of a motor vehicle to drive at a reasonable rate of speed under the circumstances. Speeding in itself may constitute negligence, but proximate cause must also be established to hold the driver liable. Even if not exceeding the posted speed limit, an operator of a motor vehicle must drive at an appropriate reduced speed when approaching and crossing an intersection, railway grade crossing, curve, or the crest of a hill, when traveling on a narrow or winding road, or when any special hazard exists with respect to pedestrians or other traffic because of weather or highway conditions. Conversely, a driver may not operate a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic, except if necessary for safe operation or in compliance with law.

Exception: Speeding within the City of New York is generally governed by the New York City Traffic Regulations, and not VTL § 1180. See § 2.09[1][f] above.

[b] Maintaining Control of Motor Vehicle

The fact that a car is out of control establishes a prima facie case of negligence, in violation of the driver’s duty to maintain control of the vehicle at all times. The prima facie case of negligence can be rebutted by a showing of an emergency situation, or an unavoidable skidding on ice, or other non-negligent explanation for the accident. For example, in Simpson v. Eastman, 300 A.D.2d 647, 753 N.Y.S.2d 104 (2d Dep’t 2002), a truck driver testified that he was traveling at 5 to 7 miles per hour, that rain and sleet were falling on the roadway on top of snow and ice from a previous storm, and that he stepped on the brake and turned his wheel, but was unable to stop and struck a taxi cab. His testimony was sufficient to support a jury verdict that he was not negligent.

[c] Maintaining Proper Lookout

The driver of an automobile is expected to observe everything in plain view. A driver is charged with the duty to see that which, under the facts
and circumstances, he should have seen by the proper use of his senses. The failure to look, or not looking carefully, constitutes negligence.

[d] Maintaining Vehicle Equipment

As noted in § 2.09[1][b] above, the operator and owner of a motor vehicle have a duty to maintain the equipment, including seat belts and lights, and the vehicle itself, in working order. Statutory requirements regarding the maintenance and use of equipment on a motor vehicle are set forth in VTL §§ 375 and 376. A vehicle must be equipped and maintained for use on public highways in such a way that it does not become a dangerous instrumentality. Negligence may be predicated on an accident that occurs when the defendant knew or should have known of the possibility of equipment failure. Violation of the safety equipment statute is not negligence per se; rather, proof is required that the defect was the proximate cause of the injury or damage, and that the operator or owner of the vehicle discovered, or should have discovered, that there was a defect in the equipment that could result in injury if not repaired. There is, however, a limited class of cases in which violation of a statutory mandate to maintain a vehicle will result in negligence per se. See § 2.09[4][b] below.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts § 2.02 (defendant’s duty of care).
- 4–12 Personal Injury: Actions, Defenses, Damages § 1.02[2][b], [d] (duty of care in motor vehicle cases).


[a] Determining if Breach of Duty Is Proximate Cause of Harm

For an operator of a motor vehicle to be held liable for the plaintiff’s injuries, the operator’s conduct must be a proximate cause of those injuries. Injury must have been foreseeable, and the chain of causation must not be broken by intervening or superceding causes. By way of illustration, absence of proximate cause has been found in the following motor vehicle cases:
1. In Whitehead v. Reithoffer Shows, Inc., 304 A.D.2d 754, 759 N.Y.S.2d 125 (2d Dep’t 2003), plaintiff stopped behind a dis-
abled tractor trailer in the right lane of a highway. When plaintiff
subsequently tried to maneuver around the tractor trailer, the
approach of another vehicle caused him to swerve back to his
right and collide with the back of the tractor trailer. The court
found that the tractor trailer did not proximately cause the
accident and only furnished the condition or occasion for the
occurrence of the accident;

2. In Aprea v. Franco, 292 A.D.2d 478, 739 N.Y.S.2d 727 (2d Dep’t
2002), although a truck driver was negligent in proceeding slowly
into the left lane to execute a U-turn, plaintiff failed to exercise
reasonable care in observing and reacting to the vehicle in front
of him. There was sufficient support for the jury’s conclusion
that plaintiff’s conduct was the sole cause of the accident; and,

Dep’t 2000), defendant stalled in the far right lane of a four-lane
road. Plaintiff’s vehicle was struck in the rear while attempting
to pass defendant’s vehicle on the right shoulder. Defendant’s
conduct was not a proximate cause of the accident, because
plaintiff was able to come to a complete stop prior to being struck
while trying to pass on the shoulder.

[b] Defining Negligence Per Se

An unexcused violation of the New York Vehicle and Traffic Law
constitutes negligence per se. In Dalal v. City of New York, 262 A.D.2d
596, 692 N.Y.S.2d 468 (2d Dep’t 1999), the Appellate Division, Second
Department, held that failure to wear prescription glasses was negligence
per se, because VTL § 509(3) proscribes operating a vehicle in violation
of any license restriction. Similarly, in McMahon v. Butler, 73 A.D.2d
197, 426 N.Y.S.2d 326 (3d Dep’t 1980), the court found that the
defendant’s failure to comply with a statute requiring that all vehicles
be equipped with seat belts constituted negligence per se.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Chs. 1, 2, 4
determining negligence).
- New York Practice Guide: Negligence Ch. 2 (law of negligence).
- Feeley v. St. Lawrence Univ., 13 A.D.3d 782, 788 N.Y.S.2d 179
(3d Dep’t 2004).
- Hellenbrecht v. Radeker, 309 A.D.2d 834, 766 N.Y.S.2d 81 (2d
Dep’t 2003).
Although there frequently are inferences of negligence in motor vehicle cases, for instance, when a vehicle rear-ends another vehicle, the doctrine of res ipsa loquitur is not frequently applied in motor vehicle cases. Res ipsa loquitur was specifically held not to apply in the following cases:

1. When a tractor trailer rolled over, since the company that loaded the cargo was not in exclusive possession of the truck. *Perrin v. Chase Equipment Leasing, Inc.*, 9 A.D.2d 839, 780 N.Y.S.2d 256 (4th Dep’t 2004);

2. When a truck ran over the plaintiff’s foot. *Provenzano v. City of New York*, 238 A.D.2d 221, 724 N.Y.S.2d 738 (1st Dep’t 2001); and

3. When a repair company serviced plaintiff’s car’s brakes four days before the accident, as the repair company did not control the car at the time of the accident. *Breslin v. Rij*, 259 A.D.2d 458, 686 N.Y.S.2d 91 (2d Dep’t 1999).

Res ipsa loquitur has, however, been applied in cases in which objects broke free from the defendant’s vehicle, when the evidence showed that the object would not have come loose absent negligence. The doctrine was applied in *Pollock v. Rapid Industrial Plastics Co., Inc.*, 113 A.D.2d 520, 497 N.Y.S.2d 45 (2d Dep’t 1985), a case in which plaintiff, who was standing beside the highway, was hit by a tire that was rolling along the highway at a fast speed. Although the defendant denied ownership, the tire was identified as the defendant’s. The tire had apparently become disengaged from one of the defendant’s trucks immediately before the plaintiff’s injury. The defendant kept no records that would indicate whether one of its trucks was in the area at the time of the injury. The Appellate Division held that the plaintiff had presented a prima facie case of res ipsa loquitur and reversed the trial court’s dismissal of the plaintiff’s case. The court noted that a fully inflated truck tire mounted on a rim rolling down an expressway at high speed is an occurrence that does not usually happen absent negligence.

**PRACTICE RESOURCES:**

- *New York Practice Guide: Negligence* §§ 2.06[2], 12.03, 31.02[3], [5], [6] (res ipsa loquitur; proximate cause; violation of statute; res ispa loquitur in motor vehicle cases).
- 4–12 *Personal Injury: Actions, Defenses, Damages* §§ 1.02[3], 1.03, 1.06, 2.04 (proximate cause; violation of statute; res ispa loquitur in motor vehicle cases).
Establishing Causality

[a] Determining Proximate Cause

Defendant’s conduct, whether in violating a statute or ordinance, or based on common law negligence, must be established to be a proximate cause of the damages sustained by the plaintiff. A defendant will be liable only when his or her negligence is a proximate, rather than the remote, cause of the plaintiff’s injuries. For example, in Inserro v. Rochester Drug Cooperative, Inc., 258 A.D.2d 923, 685 N.Y.S.2d 554 (4th Dep’t 1999), the driver of a delivery van was not liable when plaintiff struck the van in the rear, although the van was illegally double parked. Because plaintiff had been following too closely at a speed of almost 30 m.p.h., the jury could reasonably find that the illegal double parking was not a proximate cause of the accident.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts §§ 2.05, 4.01[3], 228.03[10][f], [13][b] (proximate cause).
- 4–12 Personal Injury: Actions, Defenses, Damages § 1.02[3] (proximate cause in motor vehicle cases).
[b] Determining Forseeability

The operator of a motor vehicle is liable for the plaintiff’s injuries only if the injury was a foreseeable consequence of the operator’s act or omission. A reasonable person under similar circumstances must have been able to foresee a risk of harm to the plaintiff.

PRACTICE RESOURCES:

- New York Practice Guide: Negligence §§ 2.05[3], [4], 31.02[3][b] (proximate cause).

[c] Identifying Intervening or Superceding Causes

In Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 434 N.Y.S.2d 166 (1980), the plaintiff construction worker was injured when a passing motorist, having forgotten to take his medication, suddenly suffered an epileptic seizure and lost control of his car. The car crashed through a wooden barricade, which had been placed at the construction site by the defendant contractor, and struck the plaintiff, a worker. The plaintiff was burned by splatter from a kettle of boiling liquid enamel that had also been struck by the motorist’s car. In holding that the driver’s negligence was not an intervening cause, the court found that it was not necessary for the plaintiff to demonstrate the precise manner in which the accident happened or that the extent of injuries was foreseeable. Liability depended upon whether the intervening act was a normal or foreseeable consequence of the situation created by the defendant’s negligence—here, the failure to properly secure the work area by proper barricades.

PRACTICE RESOURCES:

§ 2.10 Identifying Appropriate Plaintiffs in Motor Vehicle Cases

[1] Determining Injured Parties

[a] Driver

The driver is clearly an appropriate plaintiff. However, the owner of a vehicle is not liable for injury caused by or to an unauthorized user of the vehicle of whose presence the owner is not aware.

[b] Passenger

A passenger is an appropriate plaintiff. The fact that the passenger is also an owner of the vehicle does not preclude the passenger from maintaining an action against the other owners. The operator of a vehicle owes a duty to the passengers to exercise reasonable care and not to expose them unreasonably to danger. New York does not have a so-called “guest statute” that protects driver’s from suits by passengers, or imposes a duty of gross negligence or intentional misconduct. Liability of the driver to the passengers may be based on ordinary negligence, including losing control of the vehicle, failing to avoid a collision, or failing to provide the passengers with a safe place to alight from the vehicle.

As to comparative negligence on the part of the passenger, it has been held that a passenger may be found comparatively negligent for knowingly riding with a drunken driver, failing to protest reckless driving by the operator, failing to leave the vehicle being operated in a dangerous manner when leaving the vehicle could have been done safely, or in causing distraction to the driver.

The driver and owner of a vehicle are both liable for negligence causing injury to the passengers of another vehicle.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts § 228.08 (motor vehicle liability for injuries to passengers).
§ 2.10[1][c] New York Negligence 2–70


[c] Pedestrian

The driver of a motor vehicle owes a duty to drive at a reasonable speed and to keep a proper lookout to avoid hitting pedestrians. The driver has a duty under VTL § 1146 to exercise due care to avoid colliding with a pedestrian on the roadway, and to warn pedestrians by sounding the horn when necessary.

When pedestrians are crossing a street, the following statutes establish the proper standard of care:

1. Pedestrian in marked or unmarked crosswalk and traffic control signals are not in place or not operating: VTL § 1151 provides that the driver must yield the right of way, but in addition, the pedestrian has a duty not to leave the curb or other place of safety and not to enter the path of a vehicle when the vehicle is so close that it is impractical for the driver to yield;

2. Pedestrian in marked or unmarked crosswalk and traffic control signals are in place or are in operation: VTL § 1111 provides that a pedestrian crossing with a green light has the right of way; and,

3. Pedestrian not in crosswalk: VTL § 1152 provides that the pedestrian must yield the right of way.

VTL § 1152(c) states that it is unlawful for a pedestrian to cross an intersection diagonally.

VTL § 1156 (which does not apply in the City of New York) provides that when no sidewalk is provided, the pedestrian shall walk facing traffic on the left side of the roadway or shoulder, and move as far to the left as practicable upon the approach of a vehicle. The statute provides that when a sidewalk is available, it is unlawful for the pedestrian to walk in the roadway.

VTL § 1234 (which does not apply in the City of New York) requires that a bicycle be operated to the right-hand side of the roadway in such a manner as to avoid undue interference with traffic, except when making a left turn, or when conditions exist that render it unsafe to stay to the right, including the presence of fixed objects, animals or pedestrians. When a bicycle path is provided, bicyclists must use the path and not the roadway. Bicycles are subject to all of the rules of the road that have reasonable application to them.

With respect to children playing or present in the street, the driver must use the same degree of reasonable care to observe them, maintain
a proper speed, and sound the horn if necessary. The driver is not under a duty to use extreme care.

PRACTICE RESOURCES:

- *Warren’s Negligence in the New York Courts* § 228.09 (liability for injuries to pedestrians).
- *4–12 Personal Injury: Actions, Defenses, Damages* §§ 1.02[2][d][iv][J], 3.23 (pedestrians).

[d] Vehicle Owner

As noted in § 2.10[1][b] above, a vehicle owner is a proper plaintiff in a personal injury case and may maintain an action against a co-owner based on VTL § 388.

[e] Family Member or Dependent

A plaintiff who is a passenger riding in a vehicle may sue any person whose negligence proximately caused injury to the plaintiff. The negligence of a driver who is a husband, wife or parent of the injured passenger will not be imputed to the plaintiff passenger. To the extent that this was previously the law, it has long since been abolished. Consequently, the negligence of a mother in failing to restrain her children, aged 2 and 4, in car seats could not be imputed to the children so as to diminish their recovery.

Ins. Law § 3420(g) does provide for interspousal immunity in that it provides that no policy or contract of insurance is deemed to insure against any liability of an insured because of the death of, or injuries to, his or her spouse. A case that often arises is that of one spouse injured in a collision, while he or she was a passenger in a motor vehicle owned and operated by the other spouse. In that situation, it frequently occurs that the injured spouse sues the driver of the second automobile, who then asserts a claim against the plaintiff’s spouse for an apportionment of damages. Ins. Law § 3420(g) does not relieve the insurer of an obligation to defend and indemnify the third party defendant spouse, because the plaintiff spouse does not need to prove the culpable conduct of the other spouse in the main action.
§ 2.11[1] New York Negligence 2–72

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts § 228.08 (liability for injuries to passengers).
- Boyd v. Trent, 297 A.D.2d 301, 746 N.Y.S.2d 191 (2d Dep’t 2002).

§ 2.11 Identifying Appropriate Defendants in Motor Vehicle Cases

[1] Identifying Negligent Operators of Motor Vehicles

It is the attorney’s function to decide who can be held liable for plaintiff’s injuries and to serve process on each party involved. The most obvious choice when determining whom to sue are those individuals who can be shown to have driven negligently, whether or not they are the owners of the vehicle. It may be difficult to identify the driver, for instance, in a wrongful death case in which all of the occupants of the vehicle are killed, or in a hit-and-run accident. In these cases, circumstantial evidence is admissible to attempt to establish the identity of the driver.

The driver’s lack of a valid license is irrelevant to the issue of negligence and proximate cause, but it may be raised on cross-examination as affecting the credibility of the driver.

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Exception: It has been held that the absence of a license due to the age of the driver gives rise to a presumption that the underage driver lacked the requisite skill and care to operate a vehicle.

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PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts § 228.04[4] (negligent use or operation not limited to driving).
- 4–12 Personal Injury: Actions, Defenses, Damages § 1.11 (actions by and against specific persons).
[2] Identifying Vicariously Liable Owners

An owner of a vehicle is liable for negligence in the use and operation of the vehicle with the owner’s permission. An owner is a person having title to the vehicle, a person entitled to use and occupancy subject to a security interest of another person, or a bailee or lessee for a period in excess of 30 days. Registration has been held to constitute prima facie evidence of ownership. A person who transfers ownership but fails to follow proper procedure, for example, removing license plates, may be estopped from denying ownership.

There are and continue to be numerous cases interpreting the requirement that the owner is liable only for permissive use. VTL § 388 creates a strong rebuttable presumption that the use of the vehicle is with the owner’s permission, and only substantial evidence will overcome the presumption. For example, in Cherry v. Tucker, 5 A.D.3d 422, 773 N.Y.S.2d 405 (2d Dep’t 2004), the defendant rental agency argued that the vehicle had been used without permission at the defendant’s lot by a security guard who was not permitted to drive the vehicles. The defendant rental agency argued that the car had been stolen by the defendant security guard, but had not filed a report for 12 days, filing the report only on the day the vehicle was recovered. The court found that issues of fact existed that required denial of defendant’s motion for summary judgment.

VTL § 388 provides that an owner is vicariously liable for the negligent operation of a vehicle. The statute gives rise to a presumption that the person driving the vehicle does so with the owner’s consent, which can be overcome only by substantial evidence that the vehicle was not operated with the owner’s consent. Counsel will consequently seek to join those who would be vicariously liable for the drivers’ negligence as defendants, including the owners of the vehicles and the drivers’ employers if the vehicles were being operated in the course of the drivers’ employment.

Liability may attach to the owner of the vehicle under VTL § 388, even if the driver of the vehicle is immune from suit. For example, the owner of a vehicle leased to a diplomat was held to be liable for the injury to a passenger resulting from negligent operation of the vehicle by the diplomat, even though the diplomat was himself immune from suit by virtue of diplomatic immunity under 22 USCS § 254d. Moreover, 28 USCS § 1364, which permits direct suits against insurers of diplomats in federal court, was held not to be an exclusive remedy and did not bar an action in New York state courts under VTL § 388. See § 2.09[e] above (further discussion of diplomatic immunity).
Strategic Point: A statutory owner who is injured in an accident involving his or her own vehicle is not barred from bringing an action against other statutory owners. A plaintiff who was injured as a passenger in a leased company vehicle provided to her by her employer, which was being driven by her husband at the time of the accident, could properly sue the owner of the vehicle. The Court of Appeals held that, assuming the plaintiff was an owner as a lessee for more than 30 days, no legal impediment existed to a suit against other statutory owners.

PRACTICE RESOURCES:

- New York Practice Guide: Negligence §§ 31.01[4], 31.06[2][b] (use of vehicle by person other than owner; choosing appropriate defendants).
- 4–12 Personal Injury: Actions, Defenses, Damages § 3.09 (vicarious liability).
- Ashkenazi v. Hertz Rent a Car, 18 A.D.3d 584, 795 N.Y.S.2d 624 (2d Dep’t 2005).
- Somma v. Castellano, 17 A.D.3d 568, 793 N.Y.S.2d 480 (2d Dep’t 2005).

[3] Identifying Defendants With Product Liability

Thought should be given to a possible case against the manufacturer of the vehicle, or the manufacturer of component parts. Such actions are frequently based on tire failure.
In *Chevere v. Hyundai Motor Co.*, 4 A.D.3d 226, 774 N.Y.S.2d 6 (1st Dep’t 2004), a jury verdict in favor of plaintiff based on defective design was upheld, in light of evidence that the plaintiff’s decedent would have survived a relatively minor intersection accident had she been wearing both a manual lap belt as well as a shoulder belt; the decedent was wearing only the motorized shoulder belt.

**Exception:** *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000), held that claims based on failure to install an airbag system are precluded by federal regulations.

**Strategic Point:** When a product liability claim is asserted, effort should be made to preserve the vehicle, or the component part that malfunctioned. In *Abulhasan v. Uniroyal-Goodrich Tire Co.*, 14 A.D.3d 900, 788 N.Y.S.2d 497 (3d Dep’t 2005), an action predicated on a tire blow out, serious questions existed as to the identity of the manufacturer of the tire; the plaintiff’s failure to preserve the tire constituted spoliation, which warranted dismissal of the complaint.

**PRACTICE RESOURCES:**

- *New York Practice Guide: Negligence* Ch. 29 (products liability).

**[4] Identifying Defendant Governmental Entities**

In addition to those physically involved at the crash site, the attorney must decide whether a possible case exists against the municipality charged with responsibility for construction and maintenance of the road and any other governmental entity or private company to whom the work may have been subcontracted. Sharp turns in the road, steep embankments, missing or misplaced signage, and other conditions may implicate municipal liability.

**Timing:** For a claim against a municipal corporation, the
attorney must comply with the applicable time periods set forth in Gen. Mun. Law §§ 50-e and 50-i for satisfaction of conditions precedent and statutes of limitations. Gen. Mun. Law § 50-e provides that in a tort case, a notice of claim must be served on the municipal corporation within 90 days after the claim arises. In a wrongful death case, the time period within which a plaintiff must satisfy this condition precedent is also 90 days, but the period does not begin to run until the appointment of a representative of the decedent’s estate.

Exception: The practitioner should be aware that not every governmental agency is a municipal corporation governed by Gen. Mun. Law §§ 50-e and 50-i. Scattered throughout the Consolidated and Unconsolidated Laws of New York are specific statutes governing suits against particular municipal agencies and public authorities that have their own rules governing timely filing of notices of claim and statutes of limitations.

If the State of New York is to be made a party defendant, the provisions of the Court of Claims Act apply. A claim made against the State because the negligence of its employee caused personal injuries to the plaintiff must be filed within 90 days after the accrual of the claim, unless the plaintiff, within that time files a written notice of intention to file a claim, in which case the plaintiff has two years to file the claim after its accrual. In a wrongful death action, the claim must be filed within 90 days after the appointment of the personal representative of the deceased, unless within that time the claimant files a written “notice of intention” to file the claim. This will then allow the claimant to file the claim within two years from the date of death. It should be noted that both Ct. Cl. Act § 10(6) and the General Municipal Law permit the late filing of a notice of claim under certain circumstances.

Warning: In the City of New York, where the plaintiff is injured while riding as a passenger on a municipal bus, the attorney should file claims with both the New York City Transit Authority (NYCTA) and the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA). These municipal agencies are both located at the same address: 130 Livingston
Street, Brooklyn, New York. They are, however, separate legal entities, and service of a notice of claim on one of these agencies does not constitute service of a notice of claim on both. In addition, Access-A-Ride vehicles provide transportation for persons who are unable to use public bus or subway service for some or all of their trips. The NYCTA administers Access-A-Ride through private carriers under contract to the NYCTA. Therefore, a notice of claim is required when the plaintiff’s accident involves an Access-A-Ride vehicle. Some buses that operate in the Bronx are owned and operated by municipal agencies located in the County of Westchester. Plaintiff’s counsel should investigate if this is the case and file a notice of claim with the proper municipal agency.

PRACTICE RESOURCES:

- New York Practice Guide: Negligence §§ 6.02[9], [10], 6.08[2], 10.02, 31.02[7][a] (notice of claim—when required; governmental liability).

[5] Identifying Third Parties

The negligence contributing to an accident may be caused by concurrent negligence arising out of the negligence of other motorists, faulty repair of a vehicle by a service station, faulty road design or maintenance of a road by a governmental authority or its contractor, or by product liability due to construction or design defects in the vehicles involved in the accident. In every case, the possible contributing negligence of concurrent third party tortfeasors should be considered.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts §§ 228.03[13], 228.04[10], 228.06 (contributory negligence; joint and several liability).
- New York Practice Guide: Negligence §§ 31.03[1], [2], 31.06[2][b] (contribution; contributory negligence; choosing appropriate defendants).
- 4–12 Personal Injury: Actions, Defenses, Damages § 1.11 (action against third parties).
[6] Identifying Successive Tortfeasors

The question of aggravation of injuries by successive tortfeasors must also be considered. For example, the plaintiff may have been the victim of medical malpractice at the hospital to which he or she was taken after the accident. In such an event, the plaintiff may join the physician and hospital as defendants in the motor vehicle action.

Warning: Plaintiff must be cognizant of the notice of claim requirements and truncated statutes of limitations for public hospitals owned by governmental agencies and their employee physicians.

If a medical malpractice claim is going to be pursued, the attorney must be aware of the requirement set forth in CPLR 3012-a that a certificate of merit setting forth reasonable grounds for the suit accompany the complaint, as well as the other procedural requirements that pertain to medical malpractice actions.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Ch. 7 (notice of claim practice).
- Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 1401.11 (contribution and successive tortfeasors).
- New York Practice Guide: Negligence § 31.03[1][d] (contributory negligence; choosing appropriate defendants).

§ 2.12 Determining Appropriate Damages in Motor Vehicle Cases

[1] Distinguishing Between Compensatory and Punitive (Exemplary) Damages

Compensatory damages redress concrete losses. Punitive damages are intended to punish extreme conduct. In motor vehicle cases, punitive damages most often involve drunk driving cases, but they may also be appropriate in cases involving drag racing.

An award of punitive damages requires a showing of willful, wanton, or reckless conduct. The plaintiff must establish a conscious disregard of the rights of others. Punitive damages may be awarded in a case
involving the sale of liquor to a minor in violation of GOL § 11-101(1). But even in a case involving drunk driving, evidence of intoxication alone will not support an award of punitive damages, absent a showing of additional wanton or reckless conduct, including driving at an excessive speed on a crowded street, or fleeing the scene of an earlier accident. Such conduct was found to exist in *Bondi v. Bambrick*, 308 A.D.2d 330, 764 N.Y.S.2d 674 (1st Dep’t 2003), when defendant, having previously been convicted of drunk driving, drove recklessly over the double yellow line, and was shown to have a blood alcohol level of .42.

**Strategic Point:** A claim for punitive damages is not a separate cause of action. If the complaint alleges facts supporting an award of punitive damages, they need not even be specifically demanded.

**PRACTICE RESOURCES:**

- *Warren’s Negligence in the New York Courts* § 233.02 (compensatory damages compared to punitive damages).
- 4–12 *Personal Injury: Actions, Defenses, Damages* §§ 4.01, 4.03 (compensatory and punitive damages in motor vehicle cases).

[2] **Calculating Amount of Damages**

In the event plaintiff seek damages in excess of basic economic loss, counsel must be prepared to verify the client’s financial damage claims. Copies of the client’s employment records must be subpoenaed. Frequently, an economist will be called as an expert to calculate the plaintiff’s past and projected loss of benefits, taking into account increases in salary and other benefits.
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Copies of medical bills must be obtained, and proof of the cost and necessity of future medical treatment established, if medical expenses are claimed to exceed basic economic loss.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Chs. 233, 234 (damages; proof of damages).

§ 2.13  Raising Appropriate Defenses in Motor Vehicle Cases

[1]  Asserting Affirmative Defenses

CPLR 1412 provides that plaintiff’s culpable conduct is an affirmative defense that must be pleaded and proved by the defendant.

⚠️ Warning: Depending on the circumstances, the emergency doctrine may constitute an affirmative defense that must be pleaded when the facts of the emergency are known only by the defendant, for instance, when the defendant was reacting to a medical emergency. In Bello v. NYCTA, 12 A.D.3d 58, 738 N.Y.S.2d 648 (2d Dep’t 2004), plaintiff was allegedly injured on a bus when the driver made a sudden stop due to reports by the passengers of a suspicious parcel. Since plaintiff had knowledge of the underlying facts concerning the alleged emergency, the defendant was not required in that case to plead the emergency doctrine as an affirmative defense.

The statute of limitations is an affirmative defense subject to waiver if not raised in either a pre-answer motion to dismiss, or the answer itself. The statute of limitations may be raised as a defense by a CPLR 3211 motion to dismiss before service of a party’s responsive pleading, but the failure to raise the defense by way of pre-answer motion does not preclude a party from raising the defense in a responsive pleading. To avoid waiver, the defendant who fails to raise the defense in a pre-answer motion, or in the answer, must move to amend the answer to raise the defense. Courts follow a liberal policy in allowing amendment of the answer under CPLR 3025(b) when there is no surprise or prejudice to the opposing party.
Timing: The affirmative defense of lack of personal jurisdiction is waived if not raised by pre-answer motion, or by way of answer. In Iacovangelo v. Shepard, 5 N.Y.3d 184, 800 N.Y.S.2d 116, the Court held that if the defendant fails to assert the defense in a pre-answer motion or in the answer, the defense is timely raised if the defendant amends the answer as of right within 20 days after service of the original answer pursuant to CPLR 3025(a). CPLR 3211(e), effective January 1, 1997, provides that an objection that the summons and complaint was not properly served is waived if, having been raised in a pleading, the defendant does not move for judgment on that ground within 60 days after serving the pleading, unless the court extends the time upon the ground of undue hardship. Defense counsel should review all of the facts and be prepared to timely move for dismissal if the circumstances warrant.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Ch. 9 (affirmative defenses).
- Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 3211.25 (dismissal based on affirmative defense).
- CPLR 3211.


Indemnification may arise from contract, or by common law principles. It shifts liability from a non-negligent, vicariously liable tortfeasor to one whose wrong caused the injury. Indemnification may be available in a motor vehicle accident based on contract in cases involving leased vehicles. In ELRAC, Inc. v. Masara, 96 N.Y.2d 847, 729 N.Y.S.2d 60 (2001), the Court held that an indemnification clause in a car rental agreement requiring the renter to indemnify the rental company is valid and enforceable only for amounts exceeding the statutory minimum liability requirements, and is unenforceable for amounts under the statutory minimum.

Contribution allows one tortfeasor to recover from another tortfeasor a proportionate share of the damages paid to the plaintiff. A defendant
in a motor vehicle case who pays more than his or her proportionate share of the damages may obtain contribution from other joint tortfeasors.

**Exception:** It must be kept in mind in a motor vehicle case that CPLR Article 16 (CPLR 1601 et seq.) does not apply. The old rule of joint and several liability still pertains in many motor vehicle actions. Note, however, that since the Vehicle and Traffic Law definitions exclude police and fire vehicles, the drivers and owners of those vehicles (presumably municipalities) do obtain the benefit of Article 16’s several-only liability limitations.

**PRACTICE RESOURCES:**

- *Warren’s Negligence in the New York Courts* Ch. 8 (indemnity and contribution).
- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Ch. 1401 et seq. (contribution).
- *New York Practice Guide: Negligence* Ch. 3 (contribution).
- CPLR 1401 et seq.

[3] **Assessing Comparative and Contributory Negligence**

[a] **Joint and Several Liability**

Concurrent tortfeasors in a motor vehicle case are jointly and severally liable.

In a case in which plaintiff sustains injury in an automobile accident, and later sustains injury due to medical malpractice, the general rule is that the successive tortfeasor (the malpractice defendant) may not seek contribution from a prior tortfeasor. The original tortfeasor is liable for both the injuries caused directly by his or her negligence and also for the additional or aggravated injuries caused by the malpractice, whereas the malpractice defendant is liable only for the additional damage occasioned by the malpractice. Logic suggests that the original tortfeasor
may seek contribution from the malpractice defendant, and not vice versa. Nevertheless, an exception applies when plaintiff seeks to recover damages from all of the defendants for the same injury because the injuries are incapable of any reasonable or practicable division. In that case, the malpractice defendant, even if a subsequent tortfeasor, may assert a cross claim for contribution from the original tortfeasor.

GOL § 15-108(a) provides that a release given to one tortfeasor does not discharge any of the other tortfeasors from liability to the plaintiff, unless the release expressly states otherwise. GOL § 15-108(a) states that the release reduces the claim of the injured plaintiff against the other tortfeasors to the extent of any amount stipulated by the release, or in the amount of the consideration paid for the release or the amount of the released tortfeasor’s equitable share of the damages, whichever is largest. Pursuant to GOL § 15-108(b), (c), a tortfeasor who has obtained his or her own release from liability is not entitled to contribution from any other person, nor may any other person seek contribution from that tortfeasor.

Strategic Point: GOL § 15-108 effectively precludes settlement in many cases. See § 2.29 below.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Ch. 11 (comparative negligence).
- Warren’s Negligence in the New York Courts § 228.06 (joint and several liability).
- New York Practice Guide: Negligence § 31.03[1][a][iv] (joint and several liability).

[b] Assumption of Risk

Under CPLR 1411, comparative negligence principles govern all of plaintiff’s culpable conduct, including assumption of risk and contributory negligence, negligence, breach of warranty, violation of a statute giving rise to civil liability, and intentional misconduct.

A passenger in a vehicle may be negligent in accepting a ride from a driver known to be drunk or reckless. In Posner v. Hendler, 302 A.D.2d
509, 755 N.Y.S.2d 255 (2d Dep’t 2003), a passenger was injured when the driver of an automobile was driving at speeds in excess of 100 m.p.h. and in an erratic fashion before striking a tree. The court found that there were questions of fact as to whether the passenger’s own conduct, in failing to protest the driver’s conduct or demand to be let out of the car, should reduce any recovery. See § 2.10[1][b] above.

PRACTICE RESOURCES:

- New York Practice Guide: Negligence § 3.06 (comparative negligence).

[c] Acts of God and Inevitable Accident

The mere occurrence of an accident does not establish liability on the part of the defendant; accidents may occur absent negligence. While a motorist has a duty to control a vehicle and exercise reasonable care, and many accidents may give rise to an inference of negligence, that inference may be rebutted. An accident that results from skidding on ice or a slick roadway, even though defendant took all possible precautions, is not necessarily negligence, although it may be. Likewise, the failure of the vehicle, under circumstances indicating that the driver had no knowledge of an equipment defect, or any reason to suspect a defect, will not render that driver negligent.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Chs. 11, 13 (comparative negligence and contributory negligence; acts of god).
- New York Practice Guide: Negligence Ch. 3 (comparative negligence).
- 4–12 Personal Injury: Actions, Defenses, Damages §§ 1, 2, 5, 6 (comparative negligence in motor vehicle cases).

A worker injured in a car driven by a co-employee while engaged in business is covered by Workers’ Compensation. For these employees, Workers’ Comp. Law § 29(6) provides that workers’ compensation benefits are the sole remedy, and an action against the owner or co-employee is barred. A non-employer owner of the vehicle, whose liability is predicated solely on the fact of ownership under the vicarious liability provisions of VTL § 388, is not liable for an injury to the plaintiff incurred during the course of the employer’s business when the accident’s occurrence is due to the negligence of the plaintiff’s co-employee or employer. However, if the owner of the vehicle, who is not the injured party’s employer or co-employee, is guilty of some affirmative acts of negligence that may have contributed to the plaintiff’s injuries, including the maintenance and rental of a defective vehicle to the plaintiff’s employer, then the owner may be subject to suit and may implead the employer and co-employee for contribution.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts § 42.01 (workers’ compensation).

[5] Raising Failure to Wear Seat Belt in Mitigation

In addition to the common law duty to make use of an available seat belt, there is also a statutory duty. Pursuant to VTL § 1229-c, operators of a motor vehicle must be restrained by a safety belt, and must ascertain that their passengers are also properly restrained. Failure to wear a seat belt is relevant only in mitigation of damages and, therefore, in a bifurcated trial, evidence of failure to use an available seat belt must be precluded from the liability portion of the case. The seat belt defense applies only if the defendant is able to adduce evidence that the failure
to wear a seat belt exacerbated the extent of plaintiff’s injuries. For example, in a passenger’s wrongful death case, in which the passenger was partially ejected from the car and killed when the car flipped over, the evidence showed that the passenger would have died regardless of whether he was wearing a seat belt. In view of that evidence, a seat belt mitigation defense was precluded.

**Strategic Point:** Failure to wear a seat belt must be specifically raised as an affirmative defense; defendant pleading only plaintiff’s culpable conduct will not suffice.

**Strategic Point:** The defense of failure to use an available seatbelt is not relevant in determining whether the serious injury threshold has been met.

**PRACTICE RESOURCES:**

- 4–12 Personal Injury: Actions, Defenses, Damages §§ 5[6], 6 (defense of failure to wear seat belt).
Emergency Doctrine

The emergency doctrine applies when a party is confronted with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation, or consideration. A driver is not required to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic. Indeed, such a scenario presents an emergency situation, and the actions of the driver presented with such a situation must be judged in that context.

PRACTICE RESOURCES:

PART D: DETERMINING CAUSE OF ACTION AND NECESSARY ALLEGATIONS

§ 2.14 Checklist for Determining Cause of Action and Necessary Allegations

☐ Prepare summons and complaint.

☐ Assert appropriate allegations against defendant. See § 2.16[1] below.


☐ Prepare answer.

☐ Form appropriate response. See § 2.17[1] below.


☐ Demand bill of particulars. See § 2.17[3][a] below.

☐ Prepare and serve bill of particulars. See § 2.17[3][b] below.

☐ Prepare subsequent filings. See § 2.18 below.

☐ Search Advisor:

Torts > Transportation Torts > Motor Vehicles
Torts > Procedure > Commencement
Torts > Negligence > Negligence Generally

☐ Investigate Parties on lexis.com®. See § Intro.09 above.

§ 2.15 Preparing Appropriate Pleadings

CPLR 3012-a requires that a certificate of merit be filed with the complaint (except if the plaintiff is not represented by an attorney) in medical, dental, and podiatric malpractice actions. A medical malpractice claim may be part of the case if, for example, the plaintiff’s injuries were aggravated by a doctor’s negligence.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 3012-a.00 (certificate of merit).
§ 2.16 Preparing Summons and Complaint

[1] Asserting Allegations Against Defendants

The complaint contains the plaintiff’s allegations against the defendant and sets forth the plaintiff’s injuries and prayer for relief. The complaint should contain information sufficient to place the defendant on notice of the occurrence.

In a typical case, the plaintiff and defendants are named and identified by the car that they were occupying at the time of the accident. The particular vehicle is further identified by make and license plate number. A complaint based on a motor vehicle accident should allege:

1. That defendant owned or operated the vehicle, or is otherwise responsible for the damages;
2. Plaintiff’s status at the time of the accident, for example, passenger, pedestrian, driver of a colliding vehicle, etc;
3. The approximate time and place the accident occurred;
4. That defendant’s negligence caused the accident; and
5. That plaintiff has suffered a serious injury and suffered damages exceeding the no-fault threshold caused by the negligent conduct of the defendant. The negligence of the defendants may be stated in conclusory terms.

CPLR 3015 requires that if any party is a corporation, that fact must be stated in the complaint. If one of the defendants is a municipality or public authority, the complaint must allege that at least 30 days have elapsed since the service of the notice of claim, as required by Gen. Mun. Law § 50-i.

If the action involves the State as the party responsible for the maintenance or design of a state road, the action can only be brought in the Court of Claims.

If wrongful death is claimed, the elements that should be alleged in an action for wrongful death are:

1. The death of a human being;
2. A wrongful act, neglect or default of the defendant;
3. Which proximately caused the death of the decedent;
4. Survival of distributees who suffered pecuniary loss by reason of the death; and

5. The appointment of a personal representative of the decedent.

Verified complaints are not required but are frequently employed in automobile accident cases. CPLR 3021 allows the attorney to verify the complaint if the plaintiff’s residence is outside the county within which the attorney has his or her office. It is often preferable to have the client verify the complaint, since a complaint verified by counsel has no probative value in the event an application is made for a default judgment.

In a personal injury action, no monetary demand should be placed in the complaint. If the action is brought in Supreme Court, the ad damnum should simply state that the damages sought exceed the jurisdictional limits of all lower courts.

PRACTICE RESOURCES:

- **Warren’s Negligence in the New York Courts** § 6.01 (serving summons).
- **New York Practice Guide: Negligence** § 31.18[1], [5] (Form 31-33, complaint suitable for fairly simple two-car accident case; Form 31-37, complaint in case of pedestrian hit by automobile).
- **LexisNexis® AnswerGuide® New York Civil Litigation** § 1.10 (preparing summons and complaint).

[2] **Enumerating Injuries Suffered**

Plaintiff must allege that he or she has sustained a serious injury within the meaning of Insurance Law Art. 51. The plaintiff is not required to state the details of his or her injury or loss, but only that the statutory criteria have been met. See CPLR 3016(g).

PRACTICE RESOURCES:


[3] **Asserting Demand for Relief**

Plaintiff must set forth a prayer for relief, as required by CPLR 3017. Since New York has adopted a comparative negligence standard, plaintiff need not plead freedom from fault.
PRACTICE RESOURCES:


[4] Selecting Venue

The general rule for personal injury actions is that the proper venue is any county in which any one of the parties resides. CPLR 503(a). The statute refers to residence, and a person may be legally domiciled in one county where he or she maintains a permanent home, and has a residence in another. The concept of residence turns on whether the person has a significant connection with the locality as a result of living there for some length of time during the course of a year. If the person does, he or she is a resident.

The rules governing the residence of various entities provide:

1. A domestic corporation or a foreign corporation that has obtained authorization to do business in New York is a resident of the county in which its principal office is located;

2. Actions against counties, municipalities, school districts and district corporations and their officers, boards or departments should, in general, be brought in the county in which the entity is located;

3. Actions against the City of New York shall be in the county within the city in which the cause of action arose, or if it arose outside the city, in the County of New York;

4. An action by or against a public authority shall be venued in the county in which the authority has its principal office or where it has the facilities involved in the action;

5. An action against the New York City Transit Authority must be in the county within the city in which the cause of action arose, unless it arose outside the city, in which case the proper venue is New York County;

6. Actions against the Port Authority of New York and New Jersey may be brought in any county wholly or partly within the Port of New York District, which includes Rockland, Westchester and Nassau Counties and all of New York City; and,

7. Actions against the State of New York are to be tried in the Court of Claims in the district in which they arose.

When a public entity is brought into an action as a third party defendant, plaintiff’s original choice of venue remains a proper venue, and the burden is on the governmental entity to show that it is entitled to a discretionary change of venue pursuant to CPLR 510(2) or (3).
§ 2.17 Preparing Answer

[1] Forming Appropriate Response

The time within which the defendant must respond to the summons, whether served with the complaint or with notice, depends on the manner in which the summons was served. If it was served by first class mail pursuant to CPLR 312-a, defendant’s appearance is due within 20 days of defendant’s service of a signed acknowledgment of receipt. If it was personally delivered to the defendant within the state, defendant has 20 days from the date of delivery within which to respond pursuant to CPLR 320(a). If it was served under any other circumstances, defendant has 30 days from the date service was “complete.”

If the summons was served without the complaint, the plaintiff must serve the complaint within 20 days of the service of either a notice of appearance or a demand for a complaint. Upon service of the complaint, the defendant has 20 days to respond with an answer or motion. If defendant does make a motion addressed to the complaint, the time to answer is extended until 10 days after service on defendant of a copy of the order deciding the motion, together with notice of entry.

**Strategic Point:** Defendants’ attorneys will frequently request a stipulation to extend the time to answer. By providing
the defense attorneys with affidavits of service of the complaint upon the defendants, defendants’ attorneys will usually waive jurisdictional defenses in exchange for an extension of time to file an answer.

The plaintiff must serve a reply or responsive motion within 20 days of service of a counterclaim. A cross-claim defendant must serve an answer or responsive motion within 20 days of service on him or her of a cross-claim containing a demand for an answer.

All of the defendant’s potential responses to plaintiff’s service of process—demand for a complaint, notice of appearance, answer, or responsive motion—are papers whose service is governed by CPLR 2103. If plaintiff is represented by an attorney, service is to be made on counsel pursuant to CPLR 2103(b).

Timing: Gen. Constr. Law § 20 requires that the day from which a time period is computed be excluded from the computation. For example, if a demand for a complaint is served on the first day of a month, that day is excluded from determining the applicable time period, and the last day on which the complaint may be timely served is the twenty-first. In addition, if the last day to serve a paper falls on a Saturday, Sunday or public holiday the paper may be served on the next succeeding business day pursuant to Gen. Constr. Law § 25-a. Lastly, with respect to service on an attorney, CPLR 2103(b)(2) provides that for service on an attorney by mail, it is the date of mailing, not the date of receipt, which is the date of service; the time allowed for the response is extended by five days. Note that five extra days are never added to the time for responding to service of the summons, even if the summons service included the use of the mail.

Strategic Point: Many lawyers interpose objections to service of process as part of boilerplate clauses in answers. CPLR 3211(e) requires that a party move to dismiss on the ground of improper service of process within 60 days after service of an answer raising that defense, or the objection is waived. CPLR 3214(b) provides that disclosure is not stayed
by a motion based on improper service of process, unless the court orders otherwise.

The answer must address the plaintiff’s allegations. An allegation may be denied “on information and belief,” or the answer may “deny knowledge and information sufficient to form a belief” regarding an allegation. An allegation may be admitted, and those that are not denied are deemed admitted. In the answer, a defendant must raise any defenses he may have to the complaint, and is required by CPLR 3018 to plead as an affirmative defense any defense that is likely to take the other party by surprise, or raise issues of fact not appearing on the face of a prior pleading. This would include such matters as the statute of limitations, lack of service, culpable conduct on the part of the plaintiff, and failure to wear a seatbelt. Affirmative defenses in motor vehicle actions, and time requirements for motions asserting affirmative defenses, are discussed in § 2.13[1] above.

If the complaint is verified, the answer must be verified.

A party may object to the method of service of process and move to dismiss the suit for lack of jurisdiction over the defendant. CPLR 3211(a)(8).

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts § 9.05 (affirmative defenses must be included in answer).
- Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶¶ 305.09, 3011.05 (answering pleadings).
- LexisNexis® AnswerGuide® New York Civil Litigation Ch. 3 (responding to initial pleadings).


If a defendant interposes a counterclaim, plaintiff must serve a reply.

Defendants may bring cross-claims against each other as part of the answer. No answer to a cross-claim need be made unless an answer is demanded in the cross-claim.

A defendant may add another party, for indemnity or contribution, by way of a third-party complaint.
Third party practice is discussed in § 2.18[1] below.

PRACTICE RESOURCES:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Ch. 3019 (counterclaims and cross-claims).
- *New York Practice Guide: Negligence* §§ 11.05, 11.06 (counter-claims; cross-claims).
- *LexisNexis® AnswerGuide® New York Civil Litigation* § 3.05[3], [4] (asserting counterclaims; asserting cross-claims).


[a] Preparing Demand

In an action to recover for personal injury, CPLR 3043 permits the following information to be obtained:

1. The date and approximate time of day of the occurrence;
2. The approximate location of the occurrence;
3. A general statement of the acts or omissions constituting the negligence claimed;
4. Where notice of a condition is a prerequisite, whether actual or constructive notice is claimed;
5. If actual notice is claimed, a statement of when and to whom it was given;
6. A statement of the injuries and a description of those claimed to be permanent, with specifics as to those injuries or economic losses that would, under the No-Fault Law, entitle a party to bring a suit;
7. The length of time confined to bed and to house;
8. The length of time incapacitated from employment; and
9. The total amounts claimed as special damages for medical bills (including doctor, hospital and nursing care) and loss of earnings. Updating of the information by means of supplemental bills may be obtained without leave of court.

[b] Preparing Bill of Particulars

After the joinder of issue, a demand for a bill of particulars may be served. Technically, a bill of particulars only amends a pleading and
is not a disclosure device, but in many ways it obtains information in the same way as a demand for disclosure. A party is required to particularize only those claims as to which the party has the burden of proof. The bill of particulars in a negligence action must be verified. If the party (usually plaintiff) does not have sufficient information to fully comply with the demand, the party must provide the information on hand and set forth reasons why full compliance is not possible. While CPLR 3042(b) permits a party seeking a bill of particulars to proceed by way of a motion in the first instance, this procedure is rarely employed.

- **Timing:** The party receiving the demand has 20 days within which to respond by serving the bill of particulars, or 10 days to move to vacate or modify the demand.

**PRACTICE RESOURCES:**

- *Warren’s Negligence in the New York Courts* §§ 11.07(11)(b), 232.05 (bill of particulars required when pleading diminution of damages; damages must be stated in bill of particulars).

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶¶ 3101.12, 3102.03 (bill of particulars).


- *LexisNexis® AnswerGuide® New York Civil Litigation* Ch. 6 (disclosure and bill of particulars).


[4] **Demanding and Moving for Change of Venue**

[a] **Demanding and Moving for Change of Venue as of Right**

CPLR 511 provides that defendant must serve a demand on the plaintiff that the venue be moved to a county deemed proper by the defendant and designated in the demand. This demand must be served with or before
the answer. The plaintiff then has five days within which to consent in writing to the change of venue. If the plaintiff does not serve such a consent, the defendant may make a motion to transfer venue to the proper county. This motion must be made within 15 days of the time of service of the defendant’s demand to change venue.

*** Strategic Point: CPLR 511 provides that when a demand to change venue is served, if plaintiff does not respond, the motion to change venue may be made in the county in which defendant seeks to place venue. If plaintiff does serve the affidavit, the motion to change venue must be heard in the county in which the plaintiff initially placed venue.

Defense counsel must be alert to venue based on illusory residences, as well as the joinder of a tenuous claim against a defendant who is sued only as a basis for fixing venue in a certain county. When plaintiff adds a party to place venue in a particular county, and later voluntarily discontinues the action against that party, plaintiff has demonstrated that venue was based on an improper party. In that instance, a motion to change venue by the remaining defendants should be granted.

Plaintiff’s initial choice of an improper venue does not preclude a cross motion for a change of venue pursuant to CPLR 510(3) addressed to the court’s discretion.

When the defendant fails to serve a timely demand for a change of venue, and in addition, fails to move for a change of venue within the 15-day requirement set forth in CPLR 511, defendant is not entitled to a change of venue as of right. In that instance, defendant may still move for a change of venue, but must make the same showing as is required for a discretionary change of venue pursuant to CPLR 510(3).

Timing: Strict compliance with the time requirements set forth in CPLR 511(a) and (b) is required when defendants allege that venue was improperly placed in the first instance. However, a defendant who fails to timely serve a demand and fails to timely move for a change of venue may still move for a change of venue as of right if defendant’s noncompliance was caused by plaintiff’s willful omissions and misleading statements, so
long as defendant moves promptly after ascertaining plaintiff’s true residence.

**PRACTICE RESOURCES:**

- *Warren’s Negligence in the New York Courts* Ch. 5 (choice of law and jurisdiction).
- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Ch. 501 et seq. (venue).
- *New York Practice Guide: Negligence* § 7.05, 7.08, 7.13 (venue).
- *LexisNexis® AnswerGuide® New York Civil Litigation* Ch. 5 (venue).
- **CPLR 501 et seq.**

[b] **Seeking Discretionary Change of Venue**

Venue may also be transferred from a proper county to another otherwise improper county based upon the convenience of material witnesses and the ends of justice. A motion to transfer venue on these grounds is allowed by CPLR 510(2) and (3). The motion must be made within a reasonable time after commencement of the action. The movant must spell out how and why the evidence of the witnesses, whose convenience will be served, is material. The witnesses for whose convenience the change of venue is sought does not include:

1. The parties themselves, or
2. Expert witnesses.

The moving party ordinarily must show that both the convenience of witnesses and the ends of justice will be served by the proposed change. As to the convenience of witnesses, the moving papers should include the following:

1. An affidavit of merits;
2. The names, addresses and occupations of the witnesses demonstrating that the county where the trial is desired would serve
their convenience, and that the chosen county is inconvenient; and,

3. A statement of the party or the witnesses themselves disclosing the substance of the testimony that the proposed witnesses will give, and that the testimony will be necessary and material at trial.

**Strategic Point:** It is often stated that in personal injury cases, the action should be tried in the county in which the tort took place. This rule properly stated is that all things being equal, a transitory action should be tried in the place where the cause of action arose. Therefore, the parties may readily overcome this rule by making a proper showing that all things are not equal, and that the convenience of witnesses will be served by a change of venue in the particular case.

**PRACTICE RESOURCES:**

- Warren’s *Negligence in the New York Courts* Ch. 5 (choice of law and jurisdiction).
- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Ch. 501 et seq. (venue).
- *New York Practice Guide: Negligence* § 7.05, 7.08, 7.13 (venue).
- *LexisNexis® AnswerGuide® New York Civil Litigation* Ch. 5 (venue).
- CPLR 501 et seq.

**§ 2.18 Preparing Subsequent Filings**

[1] **Raising Cross-Claims and Third Party Claims**

If the answer contains a cross-claim against a codefendant who has not appeared, it must be served on that party in the manner required for service of a summons pursuant to CPLR 3012(a). There need be no
answer to a cross-claim unless the cross-claim contains a demand for an answer. If an answer is demanded, it must be served within 20 days of service of the cross-claim. If no demand is made, the cross-claim is deemed denied or avoided. If the answer contains a counterclaim, the plaintiff must serve a reply within 20 days of service of the counterclaim.

The filing procedure also applies to a defendant’s commencement of a third-party claim (impleader) against another person, for instance, a claim for indemnity or contribution. The defendant/third-party plaintiff may, at any time after service of his or her answer, commence a third-party claim by filing a third-party summons and complaint with the clerk of the court in the county in which the main action is pending pursuant to CPLR 1007. No new index number is assigned to the third-party claim, but the third-party plaintiff must pay the same fee that would be required for commencement of an action: $210 pursuant to CPLR 8018(a)(1), (3). The date of filing the third-party claim must be inscribed on the face of the third-party summons. The third-party summons and complaint and all prior pleadings in the action must then be served on the third-party defendant. A copy of the third-party complaint must also be served on plaintiff’s counsel.

A third-party defendant must respond to the third-party summons and complaint either by serving an answer, making a motion to dismiss pursuant to CPLR 3211(a), or making a motion to correct the third-party complaint pursuant to CPLR 3024. Whatever the response may be, it must be served on all parties who have appeared in the action. The time limit for the third-party defendant’s response is the same as that which would apply to an original defendant: 20 days if service of the third-party papers was made by personal delivery in New York or 30 days after service is complete if service was made under any other circumstances. Similarly, the response may be served in the same manner as other litigation papers. In the answer to a third-party complaint, the third-party defendant may assert any counterclaim or cross-claim against any other party in the action.

The original plaintiff may amend the complaint to assert a direct claim against the third-party defendant, without the need to obtain court leave, if the amended complaint is served within 20 days after service on the plaintiff of the third-party defendant’s answer to the third-party complaint. CPLR 1009.

PRACTICE RESOURCES:

To sue an out-of-state defendant in New York, the court must be able to exercise jurisdiction over the defendant. For example, in Johnson v. Ward, 4 N.Y.3d 516, 797 N.Y.S.2d 33 (2005), an automobile accident occurred in New Jersey, although at the time all of the drivers were New York residents, and the defendant had registered his vehicle in New York. At the time the action was commenced, defendant had relocated to New Jersey. Plaintiff brought an action in New York County, and defendant moved to dismiss for lack of personal jurisdiction. Plaintiff argued that long-arm jurisdiction could be asserted over defendant pursuant to CPLR 302(a)(1). The Court held that jurisdiction could not be asserted over defendant, since long-arm jurisdiction requires a substantial relationship between the defendant’s transactions in New York (maintaining a New York license and registration) and plaintiff’s cause of action. As the accident in New Jersey bore no relationship to the defendant’s possession of a New York license, long-arm jurisdiction could not be exercised over the defendant.

In determining whether an action should be dismissed on the ground of forum non conveniens, the court weighs various factors, none of which is controlling, including:

1. The residency of the parties;
2. The potential hardship to witnesses;
3. The availability of another forum;
4. The situs of the accident; and,
5. The burden on New York courts.

Applying these factors in Economos v. Zizikas, 18 A.D.3d 392, 796 N.Y.S.2d 338 (1st Dep’t 2005), the Appellate Division, First Department reversed the trial court and dismissed an action arising out of an accident that occurred in Bronx County, when all of the parties were New Jersey residents.
On the other hand, in *Grizzle v. Hertz Corporation*, 305 A.D.2d 311, 761 N.Y.S.2d 161 (1st Dep’t 2003), the Appellate Division retained jurisdiction in New York. The accident occurred in Jamaica. The plaintiff passengers were residents of New York City, as was the driver of the vehicle in which the plaintiffs were passengers. As the majority of the parties either resided in New York, or were willing to travel there for trial, dismissal based on forum non conveniens was not warranted.

In a negligence action, when there exists a conflict between the law of New York and the law of another jurisdiction, an interest analysis based upon significant contacts governs the methodology for determining which law applies. The significant contacts are almost always the domicile of the parties, and the location of the place of the accident’s occurrence.

**PRACTICE RESOURCES:**

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶¶ 327.01, 327.02, 327.03 (forum non conveniens).
- *LexisNexis® AnswerGuide® New York Civil Litigation* §§ 5.01, 5.09, 5.10 (forum non conveniens).
- CPLR 305(a), 306-a(a).
PART E: COMMENCING ACTION IN MOTOR VEHICLE CASES

§ 2.19 Checklist for Commencing Action in Motor Vehicle Cases

☐ Commence action.

☐ File pleadings in supreme court or county court. See § 2.20[1][a] below.

☐ Serve the complaint in supreme court or county court. See § 2.20[1][b] below.

☐ Commence action in city courts and other courts. See § 2.20[1][c] below.

☐ Move for default judgment. See § 2.20[1][d] below.


☐ Search Advisor:

☐ Torts > Transportation Torts > Motor Vehicles

☐ Torts > Procedure > Commencement

☐ Investigate Parties on lexis.com®. See § Intro.09 above.

§ 2.20 Commencing Action

[1] Filing Summons and Complaint in Proper Jurisdiction

[a] Interposing Claim in Supreme Court, County Court or Court of Claims

In the supreme court and county court, which are the two principal courts of original jurisdiction, an action is commenced by filing either:

1. A summons and complaint, or

2. A summons with notice with the court clerk.

Filing is defined in CPLR 304 as delivery of the summons and complaint or summons with notice to the clerk together with the required filing fee. CPLR 8018(a)(1), (3) provides that the filing fee for the assignment of an index number is $210. Upon the delivery and fee payment, the clerk assigns an index number to the action which must
then be inscribed on the face of the summons. Plaintiff’s attorney has the responsibility of ensuring that the index number and date of filing are inscribed on the summons before it is served on the defendant.

In the Court of Claims, procedural and jurisdictional requirements are unwaivable, and caution is advised. Claims are interposed in the Court of Claims by filing a claim, or a notice of intention to file a claim. See § 6.18 below.

**Strategic Point:** It is the act of filing in supreme court and county court which commences the action for the purpose of the statute of limitations.

**PRACTICE RESOURCES:**

- *Warren’s Negligence in the New York Courts* Ch. 6 (commencement by filing).
- *LexisNexis® AnswerGuide® New York Civil Litigation* Ch. 1 (initial pleadings).
- CPLR 305(a), 306-a(a).

[b] **Serving Complaint in Supreme Court, County Court or Court of Claims**

CPLR 306-b provides for service of the summons and complaint, summons with notice, or third-party summons and complaint within 120 days after their filing in negligence actions. If service is not made within the 120-day period, the court, upon motion, shall dismiss the action without prejudice as to that defendant, meaning that the action can be re-commenced so long as the statute of limitations has not expired.

The court is permitted to extend the time for service upon good cause shown or in the interest of justice. The “interest of justice” and “reasonable diligence” are separate standards. Under the interest of justice standard, a showing of reasonable diligence in attempting to effect service is not required, but that factor is but one factor to be considered by the court. The court should also consider whether the statute of limitations has expired, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and the existence of prejudice to defendant.
Strategic Point: Attorneys may be held vicariously liable in legal malpractice for the negligent failure of their chosen process servers to make effective service; lawyers have nondelegable duty to exercise care in the service of process, and the responsibility cannot be avoided by assigning this task to independent contractor. Counsel should carefully review the affidavit of service for potential problems. Proper service of process on the defendant is an essential component of the court acquiring jurisdiction.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts § 6.05 (service in filing courts).
- Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶¶ 304.01, 306-a.01, 403.02 (service in filing courts).
- LexisNexis® AnswerGuide® New York Civil Litigation §§ 1.02, 1.07, 2.14, 2.24, 4.06 (service in filing courts).
- CPLR 304, 306-a, 403(b) (service in filing courts).

[c] Commencing Action in City Courts and Other Courts

Effective September 8, 2005, all actions and proceedings commenced on or after that date in the New York City civil, district and city courts are deemed commenced when “filed;” the town and village courts were not included in this legislative amendment so they remain “service” courts, in that actions in those courts are deemed commenced when process is served.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Ch. 6 (commencement by filing).
[d] Moving for Default Judgment, and Moving to Vacate Default

In certain situations, a default judgment may not be entered unless an additional notice has been served on the defendant by mail. The requirement of service of an additional notice applies when the nonappearing defendant is a New York corporation or authorized foreign corporation served pursuant to BCL § 306. Plaintiff must mail a copy of process to the defendant by first class mail. The additional first class mailing of the notice may be performed simultaneously with, or after, service of process. An affidavit attesting to the additional service by first class mail must be submitted to the court at least 20 days before the entry of the default judgment. CPLR 3215(g)(4).

Strategic Point: In Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 760 N.Y.S.2d 727 (2003), the Court of Appeals held that the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists, and that at the early stages of litigation it would be unreasonable to expect a plaintiff to meticulously sort out the negligent acts assignable to each defendant. The Court declined to determine whether noncompliance with CPLR 3215(f) renders a default judgment a nullity. Consequently, while the plaintiff need not go overboard in making out a factual basis for the claim against the defaulting defendant, as it is not clear if an insufficient predicate for the judgment may be subject to future attack by the defaulting defendant, counsel should take seriously the effort to establish a prima facie case. Satisfying the motion court may not be the final consideration.

Timing: If the plaintiff fails to move for a judgment by
default within one year from the defendant’s default, the action
may be dismissed as abandoned under CPLR 3215(c).

The application for a default judgment must be supported by an
affidavit of merit, a copy of a verified complaint, or, if a governmental
entity is involved, a copy of the notice of claim. The sworn allegations
must make out a prima facie case. On application within one year of
any such defendant’s default, the court may enter an ex parte order
directing that proceedings for the entry of judgment, the making of an
assessment, the taking of an account or proof, or the direction of a
reference be conducted at the time of or following the trial or other
disposition of the action against the defendant who has answered.

Warning: The Appellate Division has held that a verified
complaint that was verified by counsel has no value in moving
for a default judgment. The complaint must be verified by the
plaintiff if it is to have any value in establishing the claim.

There is a judicial preference to decide cases on their merits. The party
seeking to vacate a default must demonstrate both a reasonable excuse
for the default and a meritorious defense or cause of action pursuant to
CPLR 5015(a)(1), as well as an absence of willfulness and a lack of
prejudice to the opposing party. The sufficiency of the defaulting party’s
affidavit is ordinarily left to the discretion of the motion courts. A
proposed answer should accompany a motion to vacate, although some
courts have found that the failure to do so is not fatal when the
defendant’s affidavit sufficiently sets forth the existence of a meritorious
defense to plaintiff’s claim.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR Chs.
  317, 3215, 5015 (default judgment).
- New York Practice Guide: Negligence §§ 9.05, 9.06, 9.07, 9.30,
  16.06, 16.10, 16.44 (moving for default judgment).
- LexisNexis® AnswerGuide® New York Civil Litigation §§ 7.10,
  7.11, 11.09, 11.10 (moving for default judgment).
- CPLR 317, 3215, 5015.
- Beaton v. Transit Facility Corp., 14 A.D.3d 637, 789 N.Y.S.2d
  314 (2d Dep’t 2005).


[2] Effecting Proper Service on Defendants

Any person who is at least 18 years old and not a party to the action may serve a summons. A summons may be served on any day of the week other than Sunday. The summons may be served on a holiday unless it falls on a Sunday. Service of process on Saturday on a defendant who actually observes that day as the Sabbath is invalid, if the plaintiff knows that the defendant is a Saturday-Sabbath observer.

VTL § 253 provides that the use or operation by a non-resident of a vehicle in this state, or the use or operation in New York of a vehicle in the business of a non-resident, or the use or operation in New York of a vehicle owned by a non-resident if used in New York with his permission, express or implied, “shall be deemed equivalent to an appointment by such non-resident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision in which such non-resident may be involved while using or operating such vehicle in [New York].”

Process is served in such a situation by mailing a copy of the summons to the Secretary of State of New York. Such service has been held to toll the statute of limitations, although this would not be relevant in supreme and county courts, as a result of the recent amendments to CPLR 203 and 304. Additionally, plaintiff’s attorney must mail notice of the service and a copy of the summons and complaint by certified or registered mail with return receipt requested to the defendant at his out-of-state residence. An affidavit of compliance with the provisions of the statute, together with the copies of the documents involved, must then be filed with the clerk of the court.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 301 et seq. (service).
- LexisNexis® AnswerGuide® New York Civil Litigation Ch. 2 (service of process).
Motor Vehicle Negligence § 2.20[3]

- CPLR 301 et seq.


Discussion of the statute of limitations in motor vehicle actions is set forth in § 2.06 above. Counsel should be particularly aware of tolling provisions, and truncated statute and notice of claim requirements for actions against governmental entities.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Ch. 12 (statute of limitations).
- Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 214 (statute of limitations for personal injury and property damage actions).
- New York Practice Guide: Negligence Ch. 6 (statute of limitations).
- LexisNexis® AnswerGuide® New York Civil Litigation Ch. 4 (statute of limitations).
- CPLR 214.
PART F: SEEKING DISCLOSURE IN MOTOR VEHICLE CASES

§ 2.21 Checklist for Seeking Disclosure in Motor Vehicle Cases

- Initiate early disclosure.

- Determine sanctions for failure to comply with disclosure requests. See § 2.22[3] below.

- Comply with court directives for filing note of issue. See § 2.24 below.


  Search Advisor:
  - Torts > Transportation
  - Torts > Motor Vehicles
  - Torts > Procedure > Commencement
  - Torts > Procedure > Discovery

- Investigate Parties on lexis.com®. See § Intro.09 above.

§ 2.22 Initiating Early Disclosure

[1] Inspecting Vehicles and Accident Sites

Plaintiff should serve a demand for discovery and inspection of the defendant’s vehicle at the earliest possible date. Often vehicles are destroyed after accidents, depriving the plaintiff of an opportunity to obtain important evidence as to liability. See § 2.22[3] below (citing cases).

PRACTICE RESOURCES:

- New York Practice Guide: Negligence § 31.05 (investigating crash site).

- LexisNexis® AnswerGuide® New York Civil Disclosure Ch. 16 (notice for discovery and inspection).
[2] Conducting Depositions

An examination before trial is an important disclosure device. An examination before trial may be employed to discover information in the possession of the adverse party, to obtain statements to be used at trial for impeachment, or to preserve the testimony of a witness who may not be available at trial due to illness, death, or other reasons.

With respect to the substance of the questions and answers, the scope of the examination is broader than that permitted at trial. Unless a question clearly violates the witness’ constitutional rights, a privilege recognized in law, or is palpably irrelevant, the questions should be permitted and answered subject to objections. All objections other than as to form are preserved for the trial and may be raised at that time. An attorney should not direct the witness not to answer a question unless the question infringes on a privilege, is so improper that answering it may result in substantial prejudice, or is palpably irrelevant or unduly burdensome. In certain counties, the assigned “ex parte” judge, judge assigned for trial, or other judge may consent to make an immediate ruling on an objection during the course of a deposition.

Exception: Failure to appear for a deposition may warrant sanctions. In an automobile case, where the defense attorney is frequently hired by the defendant’s insurer, it is not unusual that defense counsel will not be aware of the location of the defendant. In a motor vehicle case, when the defendant fails to appear for depositions, defense counsel will not avoid the striking of the answer by merely showing that the whereabouts of the defendant are unknown. On a motion for sanctions, counsel for defendant must demonstrate that reasonable good faith efforts were made to locate the defendant by submitting: (1) an affidavit from an investigator detailing the efforts made to locate the defendant; and (2) an affidavit by counsel detailing other efforts made to locate the defendant.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3113 et seq. (depositions).
[3] Seeking Remedies for Failure to Preserve Evidence

The failure to preserve evidence, or the negligent or intentional destruction of evidence, is sometimes referred to as spoliation. When the loss or destruction of evidence by a defendant violates a disclosure right, a sanction may be imposed, ranging from preclusion to striking a pleading. The loss or destruction of the evidence need not be willful or intentional, although those facts may affect the nature of the sanction.

Evidence disposed of before a claim is made may be excusable under appropriate circumstances. The striking of defendant’s answer is generally reserved for cases in which, as a result of the spoliation of evidence, plaintiff suffers extreme prejudice, for example, the inability to prove the case, or a particular element of the case. For example, in Cameron v. Nissan 112 Sales Corporation, 10 A.D.3d 591, 781 N.Y.S.2d 661 (2d Dep’t 2004), a one-car collision case alleging product liability, plaintiff’s attorney photographed the vehicle, after which it was destroyed by plaintiff’s insurer. The Appellate Division noted that as defendant failed to support its allegations that it could not defend the case without an actual inspection of the car, and in view of the fact that the destruction of the car was not deliberate, the sanction of dismissal was not appropriate. The court remanded for consideration of a lesser sanction. On the other hand, in Abulhasan v. Uniroyal-Goodrich Tire Co., 14 A.D.3d 900, 788 N.Y.S.2d 497 (3d Dep’t 2005), an action predicated on a tire blow out, when serious questions existed as to the identity of the manufacturer of the tire, the plaintiff’s failure to preserve the tire constituted spoliation which warranted dismissal of the complaint.

In many cases involving the destruction of motor vehicles that have warranted a sanction for spoliation, there has generally been a claim that the vehicle was in some way defective, meaning that the destruction of the vehicle deprived a party from determining whether in fact the instrumentality was defective. In Squitieri v. City of New York, 248
A.D.2d 201, 669 N.Y.S.2d 589 (1st Dep’t 1998), the destruction by the City of New York of a street sweeper, which a city worker had been operating when he was overcome with carbon monoxide fumes, was held to warrant dismissal of city’s third-party defective design claim against the manufacturer. Although the court concluded that the City had not acted in bad faith, the destruction of the sweeper prevented the manufacturer from countering the design defect claim with evidence of the city’s misuse, alteration, or poor maintenance of the vehicle.

In other cases, when prejudice has not been shown, no sanction has been imposed, although a missing evidence charge may be permitted at trial allowing the jury to draw the strongest inference possible against the defendant based on the loss of evidence.

PRACTICE RESOURCES:

- *Prince, Richardson on Evidence* § 3-141 (presumptions regarding non-preservation of evidence).
- CPLR 2301 et seq.

**§ 2.23 Determining Sanctions for Failure to Comply With Requests**

In some counties, if the making of a disclosure motion becomes necessary, the motion will be calendared for an appearance and argued before the court. Courts have wide latitude in fashioning sanctions for failure to comply with disclosure requests, ranging from preclusion, to striking a pleading, to monetary sanctions.

PRACTICE RESOURCES:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶ 2308.01a (sanctions for failure to comply with subpoena).
§ 2.24 Moving Case Toward Trial

When a plaintiff fails diligently to pursue disclosure and fails to file a note of issue, plaintiff may be served with a CPLR 3216 notice. The notice may be served by the defendant, but in recent years it is more commonly served by the court itself, as part of the court system’s initiative to actively dispose of pending cases. The power of the court to dismiss under CPLR 3216 is separate and distinct from the power of the court to strike a pleading for failure to appear at a court conference under 22 NYCRR § 202.27.

The statute requires that the notice be served by registered or certified mail. When receipt of the CPLR 3216 notice is not contested, noncomplying service, including service by regular mail or personal delivery, has been held to be a mere irregularity that does not affect the validity of the notice.

Warning: In Giannoccoli v. One Central Park West Associates, 15 A.D.3d 348, 790 N.Y.S.2d 159 (2d Dep’t 2005), the court held that a compliance conference order that: (1) sets forth a note of issue date; and (2) provides that failure to file a note of issue by that date will result in dismissal of the action, constitutes a notice that has the same effect as a valid CPLR 3216 90-day notice. A conference order that lacks the language that failure to comply will result in dismissal is not tantamount to a CPLR 3216 notice.

The plaintiff served with a CPLR 3216 notice may either serve a note of issue, or move pursuant to CPLR 2004 for an extension of time to serve a note of issue. An affidavit of merit is not required if plaintiff moves for an extension within the 90-day period. Plaintiff need only demonstrate either a need for the extension, or good cause for the past delay. In determining whether good cause exists, the court may consider factors including the length of the delay, whether defendant has been
prejudiced by the delay, the reason given for the delay, and whether the plaintiff was in default before seeking the extension.

If plaintiff fails to either timely file a note of issue, or timely seek an extension, and permits the 90-day period to expire, CPLR 3216(e) allows the court to grant a defendant’s motion to dismiss, or to dismiss the action by its own initiative if the court served the 90-day notice, unless plaintiff demonstrates a justifiable excuse and meritorious cause of action. A plaintiff who fails to take action is in default of the notice, and therefore must demonstrate a reasonable excuse and submit an affidavit of merit.

It has been suggested by some plaintiffs and some courts that plaintiff may simply file a note of issue without completing disclosure in response to the service of a CPLR 3216 notice. Unless the court specifically permits the filing of a note of issue without a statement of readiness in an appropriate case (for instance, when the court sets forth a disclosure schedule), clearly the filing of an empty note of issue would accomplish nothing and circumvent the entire legislative purpose underlying CPLR 3216.

PRACTICE RESOURCES:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Ch. 3216 (want of prosecution).
- *LexisNexis® AnswerGuide® New York Civil Litigation* Chs. 8, 9 (pretrial formalities; trial).
- *Bender’s Forms of Pleading* Form No. 133:8, Form No. 133:19 (attorney’s failure to prosecute; attorney’s failure to respond to 3126 motion).
- *CPLR* 3216.
§ 2.25 Moving for Severance or Consolidation

Severance of claims is a matter of judicial discretion and is used in furtherance of convenience or to avoid prejudice. A court may order a severance of claims, or may order a separate trial of any claims or issues. CPLR 603. Consolidation is commonly used when actions pending before a court involve a common question of law or fact. Under those circumstances, the court, upon motion, may order a joint trial of any or all the matters in issue. CPLR 602.

In the event disclosure in actions that have been joined for trial does not proceed in a timely manner, resulting in one case being ready for trial while the other is not, the plaintiff may consider moving for a severance to try the ready case. If the action, which has been joined to the motor vehicle action, is a third-party action seeking declaratory judgment as to insurance issues, severance will normally be granted irrespective of disclosure issues, as it is generally held that a third-party action against an insurer for a judgment declaring an obligation to defend and indemnify should be severed from the underlying action in which the defendant claims entitlement to coverage from the third-party defendant insurer.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 603 (severance and separate trials).
- CPLR 603.
PART G: ACHIEVING SETTLEMENT IN MOTOR VEHICLE CASES

§ 2.26 Checklist for Achieving Settlement in Motor Vehicle Cases

☐ Negotiate satisfactory settlement agreement.
   Evaluate agreement. See § 2.28 below.
   Take special precautions in cases involving multiple defendants. See § 2.29 below.

☐ Resolve liens and coverage issues.
   Protect insurer’s rights and right to payments from insurer in settlements. See § 2.30[2] below.

☐ Prepare and execute releases. See § 2.31 below.

☐ Search Advisor:
   Torts > Transportation Torts > Motor Vehicles
   Torts > Procedure > Settlements

☐ Investigate Parties on lexis.com®. See § Intro.09 above.

☐ Investigate Jury Verdicts and Settlements on lexis.com®. See § Intro.10 above.

§ 2.27 Negotiating Satisfactory Settlement

In certain cases, there may be multiple plaintiffs with injuries and only a limited amount of insurance coverage. In these cases, there is an incentive for a particular plaintiff to be the first to settle, since an insurer may generally settle with less than all of the claimants under a particular policy, even if the settlement exhausts the policy proceeds.

Exception: In cases involving a vehicle for hire, the rule is
otherwise. The insurer must settle ratably with all claimants as required by VTL § 370.

Care should be taken not to jeopardize underinsured motorist coverage in accepting a settlement.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 5047 (settlement).
- 18–85 Personal Injury: Actions, Defenses, Damages § 1.03[b] (failure to negotiate settlement).
- CPLR 5047.

§ 2.28 Evaluating Settlement Agreement

Motor vehicle cases, like other tort cases, will settle depending on the strength of the case as to liability, the amount of insurance coverage, the injury involved, and the other factors that go into valuing a case. Whether any particular settlement is fair and reasonable will therefore depend on a myriad of factors. Counsel should adequately research similar cases and evaluate the circumstances to arrive at an acceptable range for settling the action.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 5047 (settlement).
- CPLR 5047.
§ 2.29 Effecting Multi-Party Settlement

GOL § 15-108(a) provides that a release given to one tortfeasor does not discharge any of the other tortfeasors from liability to the plaintiff, unless the release expressly states otherwise. The statute provides that the release reduces the claim of the injured plaintiff against the other tortfeasors to the extent of any amount stipulated by the release, or, in the amount of the consideration paid for the release or the amount of the released tortfeasor’s equitable share of the damages, whichever is largest. Pursuant to GOL § 15-108(b), (c), a tortfeasor who has obtained his or her own release from liability is not entitled to contribution from any other person, nor may any other person seek contribution from that tortfeasor.

 نيوز Strategic Point: The effect of GOL § 15-108 is to prevent settlement in many cases — especially settlement by a defendant with a small policy who tenders the entire policy to “get out” of the case. For example, suppose plaintiff accepts a small settlement from Tortfeasor A, in the amount of $10,000. The jury determines that plaintiff is entitled to $200,000 in damages, and apportions the liability of settling Tortfeasor A at 50%, and 50% to the non-settling Tortfeasor B. Plaintiff’s claim is reduced by $100,000 (because plaintiff’s claim is reduced by the amount of the settlement, $10,000, or the released Tortfeasor A’s equitable share of the judgment, $100,000, whichever is greater). Plaintiff’s acceptance of the $10,000 settlement in this example reduces plaintiff’s net recovery by $90,000.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 5047 (settlement).
- CPLR 5047.
§ 2.30 Resolving Liens and Outstanding Coverage Issues

[1] Resolving Workers’ Compensation Liens

When a covered person is injured by a motor vehicle in the course of his or her employment, both the no-fault and the workers’ compensation laws come into play. The injured party may not elect between workers’ compensation and no-fault benefits. The lien and offset provisions of the workers’ compensation laws may be applied only against recoveries from the third-party tortfeasors who are responsible for the claimant’s injuries. Workers’ Comp. Law § 29(5) requires either the carrier’s consent or a compromise order from the court in which a third-party action is pending for a claimant to settle a third-party action and continue receiving compensation benefits. Workers’ Comp. Law § 29(1) provides that a workers’ compensation carrier has the right to assert a lien against the proceeds of a claimant’s third-party action. However, the carrier may not assert a lien against proceeds received pursuant to Ins. Law § 5104(a) “for compensation and/or medical benefits paid which were in lieu of first party benefits which another insurer would have otherwise been obligated to pay under [the No-Fault Automobile Insurance Law]” (Workers’ Comp. Law § 29(1-a)).

PRACTICE RESOURCES:


In settling motor vehicle cases, the claimant must not waive the subrogation rights of his insurer. A claimant who does not protect these rights may forfeit the right to payments from his or her own insurer. For example, in Weinberg v. Transamerica Ins. Co., 62 N.Y.2d 379, 477 N.Y.S.2d 99 (1984), the insured lost his right to receive payments for...
extended economic loss from his insurer. In reaching this determination, the Court emphasized that this outcome was due to the plaintiff’s settlement with the tortfeasor without reserving the right of subrogation of his insurer. Under the standard “Additional Personal Injury Protection Endorsement,” which was part of the insured’s policy, the plaintiff had agreed not to prejudice those rights. Hence, the plaintiff lost his right to recover extended economic loss from the insurer. Furthermore, if an insured enters into a settlement with a third party tortfeasor, either without protecting the insurer or by failing to comply with a consent to settlement provision in the insurance policy, then the insured party will be unable to assert an uninsured motorist claim against an insurer. In the event of a dispute between the claimant and his insurer about the scope of the settlement agreement, the burden is on the insured to show that the release did not prejudice the subrogation rights of the insurer.

Strategic Point: A settling claimant may protect the insurer’s rights, and thus the claimant’s right to payments from the insurer, by including a clause in the release given to the defendant’s insurer which recites, “Receipt of payment of any of the above funds in no way reflects payment or release of the obligation to pay by any no-fault carrier no-fault payments to [name of claimant].”

Ins. Law § 5104(b) provides that a covered person may not compromise a claim against a non-covered person or that person’s insurer, for less than $50,000, without either the written consent of the claimant’s insurer or the approval of the court. For example, a covered person who was the victim of an auto accident who, in addition to his no-fault claim against his insurer, had a products liability claim against the manufacturer of the car, could not settle his claim against the latter without the permission of the insurer or judicial approval, unless his recovery exceeded $50,000.

PRACTICE RESOURCES:

§ 2.30[3]  NEW YORK NEGLIGENCE  2–122

- State Farm Mutual Ins. Co. v. La Forte, 125 A.D.2d 563, 509 N.Y.S.2d 632 (2d Dep’t 1986).

[3] Settling Uninsured Motorist Claims

A plaintiff who has a claim under his or her policy for uninsured or underinsured motorist coverage is prohibited by the policy endorsement from compromising the claim against the tortfeasor without the permission of the insurer.

PRACTICE RESOURCES:

- New York Practice Guide: Negligence § 24.01 (settling uninsured motorist claims).
- 18–85 Personal Injury: Actions, Defenses, Damages § 5 (Form No. 6: cause of action for bad faith settlement with uninsured motorist).

[4] Settling MVAIC Claims

Claims against the Motor Vehicle Accident and Indemnification Corporation may be settled by its board of directors. However, the board must be satisfied that the settlement is fair and that the amount payable does not exceed that which could have been awarded pursuant to a judgment. Ins. Law § 5213(a) provides that prior to approving the settlement the board must find that the claimant:

1. Is a “qualified person” within the meaning of Ins. Law § 5202;
2. Was not at the time of the accident operating an uninsured motor vehicle or driving when his license had been suspended or revoked;
3. Has complied with the notice of claim provisions of Ins. Law § 5208;
4. Is not making the application on behalf of an insurer who is in fact liable for the claim;
5. Is not pursuing a claim against a person who is in fact insured for the liability; and
6. Would not be able to collect a judgment against the financially irresponsible motorist within a reasonable time.

Payment of the settlement must be conditioned upon an assignment by the claimant to the MVAIC of his rights against the tortfeasor. Judicial approval of the settlement is not required unless the claimant is an infant or judicially declared incompetent.

PRACTICE RESOURCES:


[5] Settling Infant’s Claims

The claim of an infant cannot be settled without judicial approval. CPLR 1207 authorizes the court to approve an infant’s settlement in the best interests of the infant. In doing so, the court has wide discretion in inquiring as to the reasonableness of the settlement. A purported settlement made without judicial approval may be set aside if the settlement is not in the best interests of the child.

At times, the court and attorneys may determine that a settlement is in the best interests of the infant, but the guardian does not desire to settle the case. The general rule is that the court cannot force the guardian to accept a settlement unless the refusal of the guardian to settle the action on behalf of the infant is arbitrary and capricious. The standard of proof is high, and guardians are seldom removed and replaced to effectuate a settlement.

PRACTICE RESOURCES:

- Weinstein, Korn & Miller, New York Civil Practice: CPLR Chs. 1207, 1208 (settlement of action by infant).
§ 2.31 Preparing and Executing Releases

Settlement agreements or stipulations require that certain formalities be followed. A settlement is not binding unless:

1. The settlement is made in open court; or
2. The settlement is in a writing subscribed by the party or his attorney; or
3. The settlement is reduced to the form of an order and entered.

The Uniform Rules for the Supreme Court and the County Court, 22 NYCRR § 202.26(f), provide that if an action is settled or discontinued by stipulation at a pretrial conference, minutes of the stipulation shall be made at the direction of the court, and the transcribed stipulation is enforceable as though made in open court.

It is customary, if settlement is made in court, to exchange general releases within a specified period after the date of the settlement.

PRACTICE RESOURCES:

- Warren’s Negligence in the New York Courts Ch. 10 (releases).
- Warren’s Negligence in the New York Courts § 14.02 (release does not entitle defendant to contribution).
PART H: TRYING MOTOR VEHICLE CASES

§ 2.32 Checklist for Trying Motor Vehicle Cases

☐ Conduct pretrial activities subsequent to filing of note of issue, including:

☐ Make preparations for trying case.
  Contact client, witnesses, and experts. See § 2.34 below.

☐ Prepare for commencement of trial, by preparing motions in limine and memoranda of law for commencement of trial. See § 2.35 below.

☐ Present evidence. See § 2.36 below.

☐ Enforce judgment. See § 2.37 below.

☐ Search Advisor:
  Torts > Transportation Torts > Motor Vehicles
  Torts > Negligence > Negligence Generally

☐ Investigate Experts on lexis.com®. See § Intro.07 above.

☐ Investigate Witnesses on lexis.com®. See § Intro.08 above.

☐ Investigate Jury Verdicts and Settlements on lexis.com®. See § Intro.10 above.

§ 2.33 Engaging in Pre-Trial Conferences, and Other Pre-Trial Activities


Pursuant to CPLR 3212(a), a motion for summary judgment must be made no later than 120 days after the filing of the note of issue, unless good cause exists to excuse the untimeliness of the motion. The court may set an earlier date no earlier than 30 days after the filing of the note of issue. The mailing of the note of issue extends the deadline for action by an additional five days. In Brill v. City of New York, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004), the Court of Appeals held that the good cause required to excuse the late filing of a motion for summary judgment was
separate and distinct from the underlying merits of the motion. A finding of good cause under CPLR 3212(a) mandates a satisfactory explanation for the delay, and the substantive merits of the underlying request for summary judgment are not relevant for the purpose of determining good cause. Ongoing disclosure after the filing of the note of issue appears to constitute good cause. In Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), a case decided prior to Brill, the Court had previously held that because permitted disclosure was ongoing after the filing of the note of issue, and the moving party acted promptly after disclosure was concluded, good cause existed to excuse the noncompliance with the 120-day time limitation. Good cause was found to exist for an untimely summary judgment motion when defense counsel was ill, and when office operations were disrupted by the events of September 11, 2001; but when counsel further delayed without excuse for an additional three months when these disabilities had been resolved, the motion was denied as untimely.

- **Timing:** CPLR 2211 provides that a motion is made when the notice of motion or order to show cause is served.

**PRACTICE RESOURCES:**

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3212* (summary judgment).
- *Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 901.14* (plaintiff’s motion for summary judgment).
- CPLR 901, 3212.
[2] Seeking Post-Note of Issue Disclosure

The Uniform Rules for the Supreme Court and County Court, 22 NYCRR § 202.21(d), requires that a party seeking disclosure after the filing of a note of issue must demonstrate unusual or unanticipated circumstances that arose subsequent to the filing of the note of issue that would warrant additional disclosure.

The service of a supplemental response to disclosure indicating for the first time that the plaintiff intended to call an expert to testify about the plaintiff’s disability and lost future earnings constituted unusual or unanticipated circumstances justifying an order compelling the plaintiff to submit to an interview and vocational testing with a vocational rehabilitation expert. On the other hand, the fact that defendant’s expert physician was on an extended sabbatical in Switzerland, and would testify only in exchange for a $10,000 fee plus airfare and hotel expenses, was held not to warrant an additional medical examination.

PRACTICE RESOURCES:


[3] Engaging in Pre-Trial Conferences

[a] Conducting Settlement Conferences

Plaintiff’s counsel should attend settlement conferences prepared to argue the case and present cogent arguments, supported by photographs, expert’s reports, and other materials. Defense counsel should likewise be prepared to argue the merits of the case. Every court is different; some judges will argue the merit or lack of merit of an action as a means of arriving at a valuation, whereas other courts will refrain from examining the merits of the action, but will instead attempt to adjust the demand and offer until a number is reached that is satisfactory to both sides. In either event, preparation and familiarity with the file will likely be
appreciated by the court, and will certainly put counsel in a better position
to argue the merits of the case.

If there are cases that involved similar injuries to those sustained by
the plaintiff, those cases should be copied and brought to the court.

[b] Addressing Dismissal or Other Sanctions for
Failing to Appear or Proceed to Trial

The present court system, through its policy of differentiated court
management, may have an interest in pushing the case to trial which
exceeds that of counsel. Be aware that if the date for trial is established
more than two months in advance, the Rules of the Chief Administrator,
Rule 125.1(g), provides that if the attorney is actually engaged elsewhere,
the attorney must produce a substitute to try the case.

If plaintiff’s counsel is simply not ready to proceed, the court may
strike the case from the trial calendar, or impose sanctions under Part
130 of the Rules of the Chief Administrator. Defense counsel may
similarly be sanctioned, or required to pay costs.

PRACTICE RESOURCES:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR*
  § 3402.09 (pretrial conference requirement).
  (pretrial conference).
- *LexisNexis® AnswerGuide® New York Civil Litigation* §§ 8.10,
  8.11, 8.12 (pretrial conference).

§ 2.34 Preparing for Trial

Preparation for trial includes contacting the plaintiff, experts, and other
witnesses and notifying them of the date of trial, and the anticipated date
that their testimony will be needed. Counsel will review the file, prepare
an opening, and obtain a set of marked pleadings to furnish to the court
in accordance with CPLR 4012.

Subpoenas must be served for documents and witnesses. CPLR 3122-a
requires that when medical records are subpoenaed, the patient’s author-
ization must accompany the subpoena. The authorization must satisfy the
requirements of HIPAA. The subpoena must state in boldface type that
the records need to be provided only if the authorization accompanies
the subpoena. If no authorization is provided, the statute provides that
the medical provider need not comply with the subpoena.
§ 2.35 Commencing Trial

At the commencement of the trial, a motion in limine should be made to exclude, limit or admit trial evidence. The drawback of making a motion in limine is that the movant loses the element of surprise, and allows the adversary additional time to oppose the motion. On the other hand, the motion allows the movant a greater degree of certainty in the presentation of the case, and permits the court to make a more studied and thorough analysis of the issue. In addition, if the ruling is obtained before jury selection and opening statements, counsel’s presentation of the case to the jury can be tailored to the evidence that counsel knows will be admitted, or will be excluded. A motion in limine may used in the following instances:

1. To obtain a ruling that certain evidence is subject to a privilege. Moving in advance avoids the necessity of forcing the witness to assert the privilege before the jury, leaving a negative impression;

2. To obtain a ruling that accident or incident reports are, or are not, admissible, or that certain parts of a business record, for instance, a hospital report, should be excluded as hearsay;

3. To exclude expert testimony as based on Frye (see § 2.36[2] below);

4. To exclude expert testimony based on a failure to comply with CPLR 3101(d) or 22 NYCRR § 202.17; or,

5. To exclude a surveillance video.

PRACTICE RESOURCES:

- *LexisNexis® AnswerGuide® New York Civil Litigation* Ch. 8 (pretrial formalities).
- *LexisNexis® AnswerGuide® New York Civil Litigation* Chs. 8, 9 (pretrial formalities; trial).
§ 2.36 Presenting Evidence

[1] Presenting Testimony as to Speed of Vehicles

Persons of ordinary intelligence who have an opportunity to observe the relative speeds of automobiles, may testify as to speed of a particular automobile on a particular occasion. It has been held permissible for persons observing a car traveling along a roadway in front of their residence to estimate the speed of the vehicle, or for drivers to estimate the speed of cars passing them.

PRACTICE RESOURCES:

- LexisNexis® AnswerGuide® New York Civil Litigation Ch. 10 (trial evidence).

[2] Presenting Expert Testimony on Accident Reconstruction or Crash Tests

In a proper case, an accident reconstruction expert may be permitted to testify as to speeds, impacts, stopping distances, and other matters beyond the knowledge of lay persons. In addition, expert testimony is admissible to clarify issues relating to the application of accepted professional standards, including, for example, the proper procedures employed in police chases. The testimony may be challenged on a number of grounds. First, expert testimony may be precluded following a hearing under Frye v. United States, 293 F 1013 (D.C. Cir. 1923), if the proposed testimony states opinions or methodologies not accepted in the scientific community. For example, in Styles v. General Motors, 20 A.D.3d 338, 799 N.Y.S.2d 38 (1st Dep’t 2005), plaintiff’s experts conducted a two-stage crash test on a single vehicle similar to one involved in a roll-over accident. The first phase of the test involved lowering the vehicle at a certain angle onto its roof, and the second involved dropping the vehicle from a certain height. Although the Appellate Division found each phase of the test to be in accordance with
widely accepted techniques, the matter was remitted for a post-trial Frye
hearing on the ground that plaintiff failed to establish that conducting
all of the testing on a single vehicle, which would clearly be weakened
after the first phase of the testing, was generally accepted in the scientific
community.

Scientific evidence as to experiments, for example, crash testing, is
admissible so long as the proponent of the test establishes a substantial
similarity between the conditions existing at the time of the accident and
the conditions under which the experiment is conducted.

The testimony of an expert may also be excluded on procedural
grounds, based on a failure to comply with CPLR 3101 (d). In Nigro
v. Moore, 277 A.D.2d 632, 716 N.Y.S.2d 446 (3d Dep’t 2000), the court
precluded the testimony of plaintiff’s accident reconstruction expert on
the ground that plaintiffs made no showing of good cause for having
retained their reconstruction expert more than three years after the
commencement of the action, and just a few weeks prior to trial.

PRACTICE RESOURCES:

- LexisNexis® AnswerGuide® New York Civil Litigation Ch. 10
  (trial evidence).
- Bonilla v. New York City Transit Auth., 295 A.D.2d 297, 742
  N.Y.S.2d 903 (2d Dep’t 2002).
- Litts v. Wayne Paving Co., 261 A.D.2d 906, 689 N.Y.S.2d 840
  (4th Dep’t 1999).
- Selkowitz v. County of Nassau, 45 N.Y.2d 97, 408 N.Y.S.2d 10
  (1978).

[3] Requesting Charges and Verdict Sheets

Counsel should not wait until the last moment to determine which jury
charges will be requested, and which statutes or ordinances should be
included in the charge. Delay and last minute arguments may result in
an error in the charge. Especially within the City of New York, in which
the VTL may be superceded by the New York City Traffic Regulations,
extra attention should be paid to the specific ordinance or statute that
was violated.

With respect to the verdict sheet, if the case is bifurcated, it is likely
that the issue of liability will be tried first, followed by a trial on damages.
The issue of serious injury will be tried at the damages phase of the trial.

If the case is not bifurcated, and liability and serious injury are tried
together, a question may arise as to whether the verdict sheet should order
the questions first as to serious injury, and then as to liability, followed by damages; or whether the verdict sheet should order the questions as to liability, then serious injury, and then damages. There is no case suggesting that one approach is better than the other. Logic suggests that the “threshold” questions of damages be asked first, but the practice varies from judge to judge. It is required, however, that each serious injury category be made the subject of a separate interrogatory, and that the question of serious injury not be asked in one question, for example, “Has plaintiff sustained a serious injury?”

Be aware of the potential for an inconsistent verdict if the jury rejects the categories of serious injury that require a permanent injury, and yet awards damages for plaintiff’s life. In Wymer v. National Gas Fuel Distribution Company, 217 A.D.2d 920, 629 N.Y.S.2d 929 (4th Dep’t 1995), the court held that since the jury rejected all charged categories of serious injury except for the final category of a medically determined injury or impairment of a nonpermanent nature, an award of some future injuries could be sustained, but an award of lifetime injuries was inconsistent. Other cases, including Kelly v. Belasco, 226 A.D.2d 880, 640 N.Y.S.2d 652 (3d Dep’t 1996), adhere to the proposition that once a serious injury is found, any damages supported by the weight of the evidence may be sustained, and thus are seemingly inconsistent with Wymer.

Similarly, in Preston v. Young, 239 A.D.2d 729, 657 N.Y.S.2d 499 (3d Dep’t 1997), the court held that when the jury found that plaintiff had not suffered a permanent consequential limitation of use of a body organ or member, but that plaintiff had sustained a significant limitation of use of a body function or system, an award of permanent injuries was not inconsistent. In Bellamy v. Kaplan, 309 A.D.2d 583, 765 N.Y.S.2d 365 (1st Dep’t 2003), the jury again found that plaintiff did not suffer a permanent and significant limitation of use of a body organ or member, but did sustain a significant limitation of use of a body function or system. The First Department followed Preston, reasoning that the significant limitation category does not negate a finding of permanency.

It must be noted that the issue of inconsistency in the verdict is waived unless counsel raises the issue prior to the discharge of the jury.

PRACTICE RESOURCES:

§ 2.37 Enforcing Final Judgments

If a plaintiff diligently notifies the defendant driver’s insurer of the claim and the commencement of the action, a default judgment may be enforced directly against the insurer. Ins. Law § 3420 permits a direct claim against an insurer when:

1. The plaintiff obtains a judgment against the insured up to the policy limits;
2. The plaintiff waits 30 days from service of the judgment with notice of entry on the insured and the insurer, following which the judgment remains unsatisfied; and
3. An action is commenced under the statute.

When the insurer disclaims, its defenses in a direct action are limited to the defenses it would have had against its insured; it may not raise defenses extending to the merits of plaintiff’s claim.

An insurer that seeks to defend a direct action under *Preston v. Young*, 239 A.D.2d 729, 657 N.Y.S.2d 499 (3d Dep’t 1997) on the ground that the insured failed to cooperate must demonstrate:

1. That it acted diligently in seeking to bring about the insured’s cooperation;
2. That its efforts were reasonably calculated to obtain the insured’s cooperation; and
3. That the attitude of the insured was one of willful and avowed obstruction.

It is not sufficient for the insurer merely to make telephone calls, which went unanswered, without sending an investigator to the residence locations known to it or to question neighbors with regard to the insured’s whereabouts.

**Strategic Point:** In *American Transit Company v. Sartor*, 3 N.Y.3d 71, 781 N.Y.S.2d 630 (2004), which involved a collision between a taxicab and a private vehicle, the Court held that the failure of the insured (or the injured party) to give notice of the commencement of the action under the defendant taxicab’s commercial policy, relieved the insurer of the duty to indemnify. Thus, VTL § 370(4), which requires the insured to
notify the insurer within five days of the accident’s occurrence, was held not to affect the requirements of the policy of insurance. The insurer was not obligated to pay the default judgment obtained by plaintiff. Plaintiff’s counsel should avoid this result by notifying the insurer of the commencement of the action.

PRACTICE RESOURCES:

- *LexisNexis® AnswerGuide® New York Civil Litigation* Ch. 11 (judgments).