

172 A.D.2d 284, 568 N.Y.S.2d 380  
(Cite as: 172 A.D.2d 284, 568 N.Y.S.2d 380)

**FIND Request:** 172 A.D.2d 284, 285

Supreme Court, Appellate Division, First Department, New York.

Jesse FEASTER, Plaintiff-Respondent,

v.

NEW YORK CITY TRANSIT AUTHORITY, Defendant-Appellant.

April 16, 1991.

Plaintiff who fell to subway tracks as train was entering station and who was run over by train, resulting in amputation of leg, brought suit against city transit authority. The Supreme Court, New York County, Solomon, J., entered jury verdict in favor of plaintiff in the sum of \$2,180,158.50, and defendant appealed. The Supreme Court, Appellate Division, held that: (1) it was reversible error for court to deny defendant's request to instruct jury on emergency doctrine; (2) it was reversible error to permit plaintiff, over objection, to read motorman's deposition testimony in which he acknowledged that on two prior occasions he had operated a train which had struck a person on or near the tracks; and (3) it was reversible error to permit plaintiff's counsel, on cross-examination, to impeach defendant's engineering expert by eliciting that witness had previously testified as defendant's expert in a similar case in which jury returned a \$6 million verdict against defendant.

Reversed and remanded.

West Headnotes

**[1] Appeal and Error 30 ↪1067**

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1067 k. Failure or Refusal to Charge. Most Cited Cases

**Urban Railroads 396A ↪30**

396A Urban Railroads

396AII Regulation and Operation

396Ak23 Injuries from Operation

396Ak30 k. Actions. Most Cited Cases

Where plaintiff fell to subway tracks as train was entering station and was run over, resulting in amputation of his leg, it was reversible error for trial court to deny defendant's request to instruct jury on emergency doctrine, as jury was presented with questions whether train was travelling at a reasonable speed, whether motorman reacted reasonably under all the circumstances, and whether motorman was in fact confronted with an emergency.

**[2] Evidence 157 ↪106(1)**

157 Evidence

157IV Admissibility in General

157IV(A) Facts in Issue and Relevant to Issues

157k106 Character or Reputation

157k106(1) k. In General. Most Cited

Cases

**Negligence 272 ↪1635**

272 Negligence

272XVIII Actions

272XVIII(C) Evidence

272XVIII(C)4 Admissibility

272k1635 k. Similar Facts and Transactions; Other Accidents. Most Cited Cases  
(Formerly 272k125)

Plaintiff may not adduce evidence tending to demonstrate that a person alleged to have committed a negligent act has previously committed similar acts or is generally negligent.

**[3] Appeal and Error 30 ↪1043(6)**

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

172 A.D.2d 284, 568 N.Y.S.2d 380  
(Cite as: 172 A.D.2d 284, 568 N.Y.S.2d 380)

30XVI(J)6 Interlocutory and Preliminary Proceedings

30k1043 Interlocutory Proceedings

30k1043(6) k. Discovery and Depositions. Most Cited Cases

**Urban Railroads 396A** ↪ **30**

396A Urban Railroads

396AII Regulation and Operation

396Ak23 Injuries from Operation

396Ak30 k. Actions. Most Cited Cases

It was reversible error in negligence suit arising out of subway accident to permit plaintiff, over objection, to read to jury motorman's deposition testimony in which he acknowledged that on two prior occasions he had operated a train which had struck a person on or near the track, as testimony was an attempt to establish in minds of jury that motorman was routinely negligent.

**[4] Appeal and Error 30** ↪ **1048(7)**

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)9 Witnesses

30k1048 Rulings on Questions to Witnesses

30k1048(7) k. Credibility, Impeachment, Contradiction, and Corroboration of Witnesses. Most Cited Cases

**Evidence 157** ↪ **560**

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k560 k. Contradiction and Impeachment. Most Cited Cases

It was reversible error to permit plaintiff's counsel, on cross-examination, to impeach defendant's expert by eliciting that witness had previously testified as defendant's expert in a similar case in which jury returned a \$6 million verdict against defendant, as amount of damages awarded had nothing to do with credibility of witness; moreover, court's curative instruction that jury was to ignore "some of the par-

ticulars that he may have heard just before" was inadequate.

**\*\*381** Before SULLIVAN, J.P., and CARRO, WALLACH, KUPFERMAN and KASSAL, JJ.

**\*284** MEMORANDUM DECISION.

Order and judgment, Supreme Court, New York County, entered on October 2, 1989, and October 18, 1989, respectively, after trial before Jane S. Solomon, J., upon a jury verdict in favor of plaintiff in the sum of \$2,180,158.50, unanimously reversed, on the law, the judgment vacated and the matter remanded for a new trial, without costs.

[1] Where plaintiff fell to the subway tracks as a train was entering the IRT 125th Street station and was run over by the first half of the first car, resulting in the amputation of his left leg above the knee, it was reversible error for the trial court to deny defendant's request to instruct the jury on the emergency doctrine as set forth in P.J.I. 2:14. As was the case **\*285** in Rivera v. The New York City Transit Authority, 77 N.Y.2d 322, 567 N.Y.S.2d 629, 569 N.E.2d 432, the jury being presented with questions of whether the train was travelling at a reasonable speed, whether the motorman reacted reasonably under all the circumstances and whether he was in fact confronted with an emergency, it should have been instructed in the context of such doctrine. *Id.*, at 328, 567 N.Y.S.2d 629, 569 N.E.2d 432.

[2][3] Also, it being well settled that a plaintiff may not adduce evidence tending to demonstrate that a person alleged to have committed a negligent act has previously committed similar acts or was generally negligent, it was reversible error to permit plaintiff, over objection, to read the motorman's deposition testimony in which he acknowledged that on two prior occasions he had operated a train which had struck a person on or near the tracks. While plaintiff's counsel ostensibly sought to rehabilitate his expert's assumption concerning the motorman's reaction time, it is evident that such information served only to show the motorman's involvement in two prior accidents and was an attempt to establish in the minds of the jury that, as a motorman, he was routinely negligent.

[4] Likewise, it was severely prejudicial to permit plaintiff's counsel, on cross-examination, to im-

172 A.D.2d 284, 568 N.Y.S.2d 380  
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peach defendant's engineering expert by eliciting that he had previously testified as defendant's expert in a similar case in which the jury returned a six million dollar verdict against defendant. The only possible purpose of such testimony was to impeach the witness because he was on the losing side in another, factually distinguishable case where the verdict was in the millions of dollars. Clearly, the amount of damages awarded had nothing to do with the witness's credibility. Equally irrelevant was the fact that both of defendant's experts had testified in the prior case. Under the circumstances, the court's curative instruction that the jury was to ignore "some of the particulars that you may have heard just before" was inadequate.

Finally, on remand, we leave to the trial court's sound discretion the question of the admissibility of the computer generated videotape simulation of the accident sought to be introduced by defendant.

N.Y.A.D. 1 Dept., 1991.  
Feaster v. New York City Transit Authority  
172 A.D.2d 284, 568 N.Y.S.2d 380

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