

--- N.Y.S.3d ----, 178 A.D.3d 633, 2019 WL 7173672
(N.Y.A.D. 1 Dept.), 2019 N.Y. Slip Op. 09387

**1 Doris Dees, as Administrator of the Estate
of William Tate-Mitros, Deceased, Respondent,

v

MTA New York City Transit, Also Known as New
York City Transit Authority, et al., Appellants.

Supreme Court, Appellate Division,
First Department, New York
10666, 112752/08
December 26, 2019

CITE TITLE AS: Dees v MTA N.Y. City Tr.

HEADNOTES

Municipal Corporations

Notice of Claim

Amended Notice—Bus Mounted Sidewalk and Rear Tire Ran
over Decedent's Foot

Trial

Evidence

Admissible Prior Consistent Statements as to Where
Decedent Stood When Hit by Bus

Damages

Inadequate and Excessive Damages

Pain and Suffering

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of
counsel), for appellants.

Alexander J. Wulwick, New York, and Theodore Friedman,
P.C., New York (Theodore Friedman of counsel), for
respondent.

Judgment, Supreme Court, New York County (Shlomo S.
Hagler, J.), entered August 28, 2018, which, upon a jury
verdict, awarded plaintiff's decedent \$2.5 million for past pain
and suffering and \$2 million for future pain and suffering
over 10 years, unanimously modified, on the facts, to vacate
the award for future pain and suffering, and to direct a new
trial of those damages, unless, within 30 days after service of
a copy of this order with notice of entry, plaintiff stipulates
to a reduction of the award for future pain and suffering to

\$1,000,000, and to entry of judgment in accordance therewith,
and otherwise affirmed, without costs.

Based on the evidence presented at trial, the jury's finding
that, due to negligence, a rear tire of an articulated bus
ran over decedent's right foot when the bus mounted the
sidewalk as it was pulling into a bus stop was rational (*see*
Cohen v Hallmark Cards, 45 NY2d 493, 498-499 [1978]).
The jury could reasonably have credited the expert testimony
of Nicholas Bellizzi, a forensic engineer who opined, based
on a review of the pleadings and General Municipal Law
§ 50-h and deposition testimony and an examination and
measurements of the accident location, that it was physically
feasible for the right side of the bus to mount the sidewalk and
run over decedent's foot with its rear wheel.

To the extent Bellizzi's opinion is inconsistent with decedent's
claim that only the rear tire mounted the sidewalk, the jury
was entitled to credit Bellizzi's expert opinion concerning the
mechanics of the incident rather than decedent's observations.
Decedent admitted that everything happened very quickly and
he was just making assumptions as to what occurred based
on *634 what he recalled seeing. As to other discrepancies
between decedent's trial testimony and earlier testimony,
including those related to his distance from the curb and
whether he actually saw the tire run over his foot, decedent
testified similarly that he was merely making "guesses"
or assumptions based on his recollection of the fast-paced
sequence of events, and the jury was entitled to credit that
testimony.

The jury was also entitled to credit decedent's explanation for
the discrepancy between his initial notice of claim, which said
that he was standing at a corner when the accident occurred,
and his amended notice of claim and subsequent statements,
in which he said that he was in the middle of the block.
We note that, regardless of the lack of clarity as to how the
accident occurred, the evidence demonstrates that decedent
consistently told his doctor, emergency medical personnel,
police officers, and treating physicians that a bus ran over his
foot. Moreover, decedent's biomechanical engineering expert,
Dr. Calum McRae, testified that the injuries were consistent
with a tire rolling over the foot.

Defendants' challenges to the trial court's evidentiary rulings
are unavailing. Any error in allowing decedent to answer a
leading question as to whether he told his treating physicians
that he had been run over by a "double bus" was harmless,
in light of the wealth of other evidence showing that he was

hit by such a bus. Decedent's statement to his attorney, in correcting an inaccuracy in the notice of claim, that he was in the middle of the block and the subsequent amended notice of claim filed by his attorney were admissible as prior consistent statements (*see Abrams v Gerold*, 37 AD2d 391, 393-394 [1st Dept 1971]).

While we affirm the jury award for past pain and suffering, we find that under the circumstances, the jury award for

future pain and suffering deviates materially from what would be reasonable compensation to the extent indicated herein (CPLR 5501 [c]). Concur—Friedman, J.P., Webber, Kern, Moulton, JJ.

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