

Appeals Court Upholds Trial Judge's Dismissal of New York Wrongful Death Case of Grossly Intoxicated Woman Run Over By Subway Train - Case May Prompt Renewed Calls for "Loser Pays" Rule

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Again and again, people fall onto subway tracks in New York City and get maimed or killed. And often they do so after getting drunk. And just as often they or their estates sue the New York City Transit Authority claiming that the train conductor should have been able to prevent the accident.

We've written about these types of cases before, [here](#) and [here](#). And our friend Walter Olson at Overlawyered has been following and discussing these cases with insight, intellect and intrigue, for example, [here](#).

This week, an appeals court ruled on the latest case to come down the pike (er, the tracks) - [Bacic v. New York City Transit Authority](#). On July 9, 2003, **Maria Bacic was found dead under a subway car** in Queens that had been pulling out of the station on its way to Manhattan. She died from blunt trauma and in the lawsuit that followed her estate claimed the motorman should have seen her attempting to board between two subway cars.

Why would anyone try to jump or climb aboard between subway cars? It's deadly dangerous!



The case went to trial in Queens County in October 2007 and **at the close of evidence the judge granted the defendant's motion to have the case dismissed** (without presenting it to the jury for deliberations). The problem for the plaintiff was a lack of any eyewitnesses and a totally circumstantial evidence case.

All plaintiff had to go on was an expert engineer's opinion that because one of Ms. Bacic's shoes was found on the subway platform the train's conductor should have seen the decedent, or at least her shoe that was later found on the platform. But, **there was evidence that Ms. Bacic:**

- **had consumed 10-13 drinks before being dropped off at the subway station**
- **had a blood alcohol level of .21 (above .20 is considered gross intoxication) and**
- **was so drunk she was just shy of the coma level**

How many drinks are too many?



In affirming the trial judge's dismissal of the Bacic case, the appeals court emphasized that the **expert's testimony was "entirely speculative"** and "did not constitute proof from which negligence could reasonably be inferred."

The judges completely rejected the plaintiff's argument that that the key issue was only whether the jury should have been permitted to determine whether the subway conductor had negligently failed to observe plaintiff or her slipper before signaling the motorman to proceed.

In addition to the entirely speculative nature of plaintiff's argument (it was based on plaintiff's expert's analysis of what he thought had happened), there remains the **utter stupidity of trying to board a subway train between cars while nearly comatose from drinking alcohol!**

This case will cause many to consider anew the issue of whether there should be a "loser pays" system in the United States. That's one of the measures urged by the so-called tort reformers who contend that there are too many frivolous lawsuits and that they are a huge burden, especially for small businesses forced to pay lawyers fees win or lose.

In Britain, France, Germany and Canada there are "loser pays" rules that require the losing party in a lawsuit, whether plaintiff or defendant, to pay the winner's reasonable attorney's fees.



The [loser pays rule has been studied by Marie Gryphon of The Manhattan Institute](#). She and others argue that the loser pays system would benefit all because it would:

- reduce litigation costs
- better compensate prevailing litigants and
- better align tort law with its goal of deterring socially harmful conduct

Some states have considered its implementation (e.g., [Georgia](#) and [Minnesota](#)). Without doubt, though, most lawyers representing plaintiffs in tort suits will oppose any loser pay rules ([Boston's Robert Feinberg](#) and [Atlanta's Ken Shigley](#) have already weighed in as staunch opponents).

Whether one agrees or not that the loser pays rule would be beneficial to all, it is surely worth discussing and will be discussed and considered more and more as litigation costs continue to spiral upwards. The public clamor in favor of loser pays may swell such that some form of it may become the law soon.

As new measures are introduced and the loser pays issue moves more to the forefront, we will revisit this topic.