

## Trial counsel conduct prompts court to vacate \$1.2M verdict

*The following post was taken from The Litigators' Blog, which is hosted on the website of Krokidas & Bluestein at [www.kb-law.com](http://www.kb-law.com).*

It is not often that the conduct of trial counsel results in the Appeals Court vacating a trial court judgment. However, in *Fyffe v. Massachusetts Bay Transportation Authority*, the Appeals Court vacated a \$1.2 million judgment against the MBTA.

In its decision, the court found that, in his closing argument, plaintiff's trial counsel improperly had argued facts that were not in evidence, argued concepts of liability despite the fact that the parties had stipulated to liability, and told the jurors that they were the conscience of the community and had a duty to safeguard users of public transportation in the future.

The plaintiff in *Fyffe* sought damages against the MBTA when the trolley she was riding in struck another trolley, allegedly as a result of the operator texting his girlfriend while operating the trolley.

In a prudent and prescient trial maneuver, the MBTA stipulated to liability, leaving only the issue of damages to be tried to the jury.

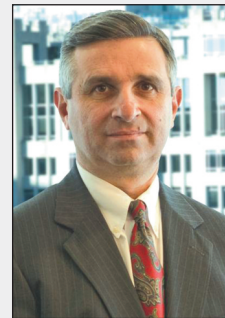
In his opening statement, despite stipulating to liability, plaintiff's counsel described the trolley operator's texting his girlfriend at the time of the accident, and, after admonishment by the trial judge, persisted in the same type of assertion.

Further, despite the trial judge's explicit caution during a bench conference against referring

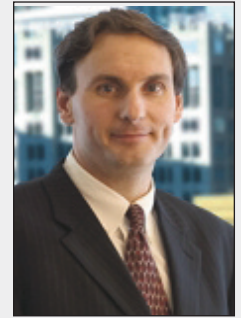
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### **BLOG OF THE WEEK**

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to facts that would not be supported by evidence, plaintiff's counsel argued that, "at the crash, people were thrown from their seats in the train against the walls and on the floor. People are seen with contorted extremities, bleeding, necks are snapped, and ..." — at which point defense counsel objected.

The Appeals Court cited a panoply of instances of misconduct in plaintiff's counsel's closing argument. Among them were counsel's assertions that each juror had a duty to explain to the other jurors the reason or reasons for deciding an issue; that the MBTA had failed to take corrective action to prevent collisions from happening in the future; that the MBTA had "forced the plaintiff to bring the lawsuit"; that it was an "important coverage case" and there may be "media coverage"; that it was the MBTA's choice to save money on a seat without a head restraint; that the jury was to be the "conscience of the community"; and, in closing, that "you are the guardians of the safety of all of the moms, all of the dads, and all of the children, and all of the grandparents that ride in these trains."

The scope of the trial lawyer's misconduct was equaled only by the extraordinary patience

of the trial judge in dealing with it. On defense counsel's exasperated objection to plaintiff's counsel's closing, the judge gave a curative instruction to the jury, which the Appeals Court found did not sufficiently address the scope and depth of the attorney's misconduct.

In deciding that the judge's final charge was not sufficiently curative as a matter of law, the Appeals Court applied the standard set forth in criminal cases and concluded that, ultimately, the attorney's misconduct deprived the defendants of a fair trial.

The Appeals Court distinguished cases involving an isolated remark or even several remarks that are followed by a curative instruction from suits like the one at bar, in which the conduct of the experienced plaintiff's counsel "permeated" the opening statement and closing argument.

The court also was influenced by the fact that plaintiff's counsel deliberately disregarded the judge's directives, openly argued with the judge, and forcefully and repeatedly made irrelevant and prejudicial statements.

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