

## Court Applies Highway Defect Statute To Contractor Electrocuted While Paving Sidewalk

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PD&P recently obtained summary judgment in favor of the Town of Webster in a case involving the non-fatal electrocution of a contractor's foreman while performing reconstruction work on a public sidewalk. The town entered into an agreement with the Commonwealth to reconstruct School Street, a local public way. The agreement provided that the town would handle project design and the Commonwealth would be responsible for project oversight. The Commonwealth then contracted out its obligations under the agreement to general contractor J.H. Lynch & Sons, Inc. The plaintiff, Albert Bruso, was an employee of J.H. Lynch, who was electrically shocked by an exposed wire owned by National Grid while compacting asphalt on the sidewalk adjacent School Street. Mr. Bruso sued National Grid for negligence and National Grid, in turn, filed third-party claims against the town and the Commonwealth for indemnity and contribution. No party sent written notice of the claim to either the town or the Commonwealth.

Both the town and the Commonwealth moved for summary judgment at the close of discovery, arguing that the Highway Defect Statute, M.G.L. c. 84, § 15 (M.G.L. c. 81, § 18, with regard to the Commonwealth) exclusively governed National Grid's third-party claims, and that such claims failed because National Grid neglected to serve written notice upon the third-party defendants as required by the statutes. In opposition, National Grid rejected the notion that electricity constituted a highway defect within the meaning of Chapters 81 and 84 and maintained, instead, that the Massachusetts Tort Claims Act (MTCA), M.G.L. c. 258 applied to workers injured on a public way during public works projects overseen by a public employer. Although National Grid conceded that it never sent written notice to the town or the Commonwealth, it argued that its claims nevertheless survived because the MTCA specifically exempts third-party claimants from the written notice requirements. Finding that electricity actually constitutes a "highway defect," and, strictly construing the exclusivity provision of Chapter 84, where the injury occurred on a public way (opposed to a state highway under Chapter 81) the court ruled in favor of the town and the Commonwealth and entered final judgment in favor of both.

The decision is notable for several reasons. First, as a matter of first impression, the court held that electricity can constitute a defect in a way within the meaning of Chapter 84. Second, the court stayed true to the exclusivity provision of Chapter 84, despite the unique "negligent supervision" aspect of Bruso's injury and the fact that he was not using the way as a "traveler" at the time.

Ever since the passage of the MTCA in 1978, litigants have persistently (and with increasing ingenuity) attempted to bring their "public way" cases within the ambit of the MTCA, presumably to enjoy its comparatively generous \$100,000 cap on liability and its relaxed notice provisions. As National Grid did here, litigants typically argue that special circumstances take their claim outside the realm of the Highway Defect Statute and its \$5,000 cap on liability, and place them instead under the umbrella of the MTCA. To date, this argument was successful in only one scenario. Gallant v. City of Worcester, 383 Mass. 707 (1981) (holding that highway *fatality* claims fall under the MTCA because the Highway Defect Statute only applies to *injuries*). Third, the decision is also significant in that the court held the third-party litigant must comply with the written notice provisions of Chapter 84, even though written notice is not required of third-party litigants under the MTCA. The court recognized that Chapter 258 expressly exempts third-party litigants from the notice provisions while Chapter 84 does not. Finally, to the extent the Commonwealth assumed responsibility for the reconstruction of School Street under its agreement with the town, the Commonwealth's liability was controlled by Chapter 84. As the court reasoned, any



entity - even the Commonwealth - can become the "person by law obliged to repair" the public way and thus be subject to the liability provisions (and, as here, the protections) of the Highway Defect Statute.

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