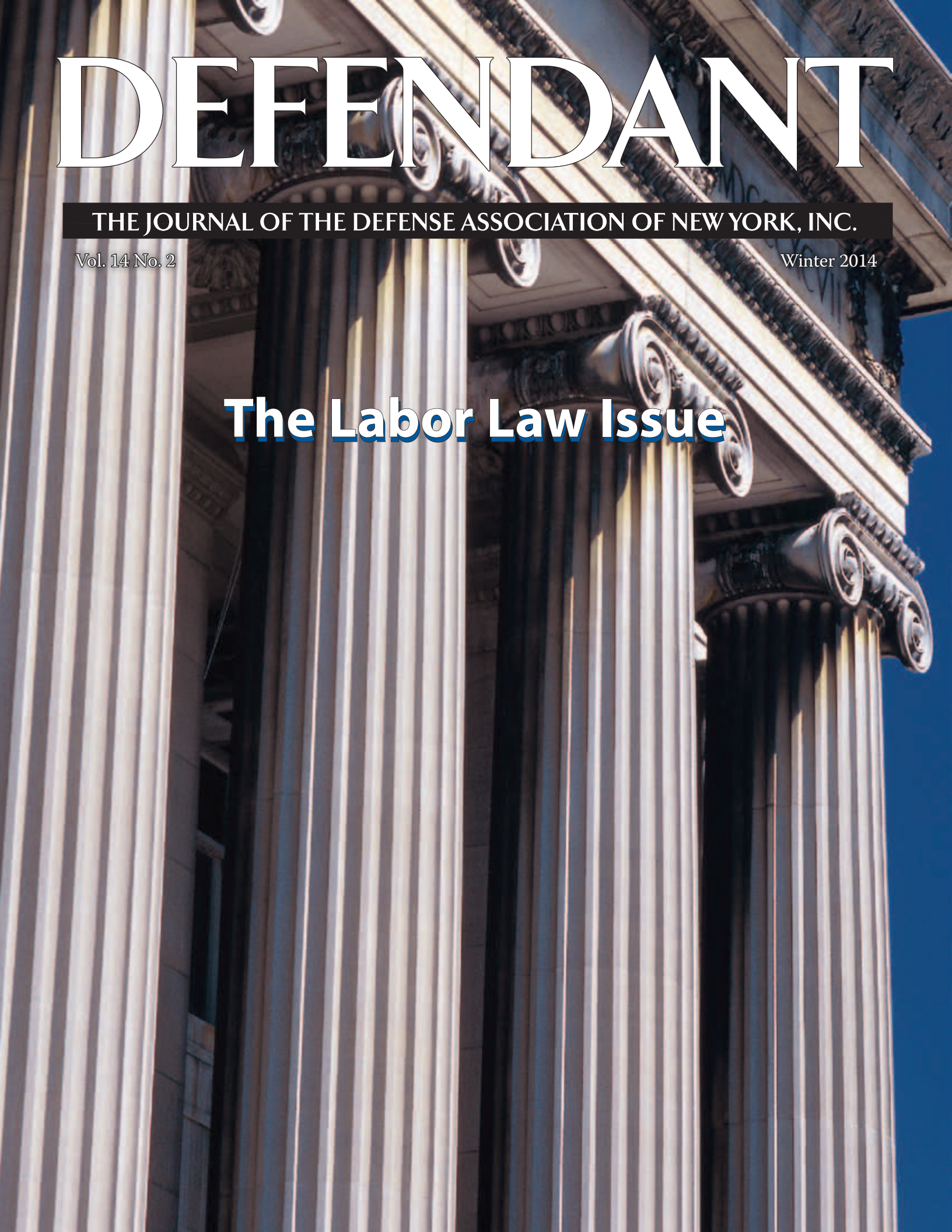

DEFENDANT

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The Labor Law Issue

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President's Column

BRIAN RAYHILL*

I am honored to preside as President of the Defense Association of New York for our 2013-2014 term. The DEFENDANT journal is one of the outstanding benefits of DANY membership. It is with great pleasure and pride that the officers and directors of DANY deliver to you this unprecedented issue of The DEFENDANT. This dedicated Labor Law issue of over 80 pages is both authoritative and timely and we know it will be a strong resource for our DANY members. We are grateful to the authors and to our Publications Committee for their time, effort and vision in bringing about this comprehensive publication. Special appreciation also goes to DANY director Bradley Corsair who oversaw and coordinated this special issue.

DANY's mission remains strong. DANY brings together by association, communication, and organization, attorneys and qualified non attorneys in the state of New York who devote substantial professional time to the handling of litigated cases primarily for the defense. DANY is committed to improving the services of the legal profession, elevating the standard of trial practice, supporting and working for the improvement of the adversarial system of jurisprudence in our courts, and facilitating and expediting trial of disputed claims.

DANY has a long and proud history of presenting CLE programs, networking events. mentoring young lawyers and recognizing the Judiciary and other leaders at our annual award ceremonies. DANY is privileged to have distinguished and dynamic officers and directors who focus on maximizing member benefits, delivering quality legal programs and recognition. DANY members are fortunate to have regular access to the directors and officers. Much of DANY's good work is completed within our active committees. Our officers, directors and past presidents all serve in important capacities and are responsible for DANY's committee projects which include our nationally recognized Amicus Committee led by Chair Andy Zajac; our CLE

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* *Brian Rayhill, Managing Attorney Epstein Gialleonardo & Rayhill.*

Does a Coupling Qualify as a "Safety Device" under the Labor Law?

JOHN J. MCDONOUGH, ESQ. * & RYAN T. KEARNEY **

In a recent decision, New York's high court provided much needed clarification on the classification of certain objects as "safety devices" under Labor Law § 240(1). *Fabrizi v. 1095 Avenue of the Americas, LLC, et al.*, 2014 N.Y. Slip Op 01206 (Feb. 20, 2014). Frequent readers of The Defendant are all too familiar with this statute, New York's well-known scaffolding law which imposes "absolute liability" for special hazards related to elevation concerns in the construction industry.

One class of cases that is covered by Section 240 is the so-called "falling object" case, which renders owners and general contractors liable for injuries caused by the failure to provide an adequate safety device to prevent the falling of objects from a height. In addition to certain enumerated safety devices under § 240(1), the statute also covers "other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." It is here where plaintiffs attempt to exploit the statute's ambiguity by expanding the definition of "safety device" to include all sorts of instrumentalities typically found at a construction site, in order to obtain the windfall of absolute liability under Section 240.

In *Fabrizi*, the plaintiff alleged that he was injured when 60-80 pounds of galvanized steel conduit that was left dangling from an overhead compression coupling fell and struck him on the hand. In support of his claim under Section 240, plaintiff argued that the defendants' failure to use a more secure "set screw coupling" constituted a failure to provide a proper safety device to adequately protect the plaintiff, which proximately caused his injuries. All parties moved for summary judgment. The Supreme Court, New York County granted the plaintiff's motion, holding that the conduit was not properly secured to provide plaintiff

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* *John J. McDonough is the Vice Chairman of Cozen O'Connor's Commercial Litigation Department.*

** *Ryan T. Kearney is an associate in the department, and both practice out of the firm's New York office.*

Does a Coupling Qualify as a "Safety Device" under the Labor Law?

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adequate protection. On appeal, the First Department modified the order, holding that the defendants' failure to provide the alternative coupling was not the proximate cause of plaintiff's incident, but otherwise affirmed the denial of defendants' motion.

A split Court of Appeals reversed, holding that the defendants had established as a matter of law that the injury was not caused by "the absence or inadequacy of an enumerated safety device." Writing for the majority, Judge Pigott explicitly rejected the plaintiff's argument that the coupling qualified as a safety device "constructed, placed, and operated as to give protection from the falling conduit." Instead, the coupling only served to provide support to the overhead conduit assembly, and both compression coupling and "set screw coupling" would have sufficiently served this purpose. Thus, the Court rejected the plaintiff's argument to the contrary, classifying it as an attempt to extend "the reach of section 240(1) beyond its intended purpose to any component that may lend support to a structure."

In a dissenting opinion, Chief Judge Lippman argued that the dispositive inquiry should not be "whether couplings can be characterized as safety devices" but rather "whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." The dissent then criticized the majority as losing focus on the defendant's burden to show a "deficient causal nexus between the failure to provide a safety device and plaintiff's injury" by "focusing myopically on whether couplings fall under the statute." Moreover, Chief Judge Lippman argued that the coupling, as a tool necessary to stabilize the conduit pipe, was "precisely the sort of device contemplated by section 240(1)," and therefore could support liability under this statute in any event.

Given the split nature of the decision, this is an issue that may be revisited in subsequent cases before the Court of Appeals. However, for the time being, defense counsel must employ this decision as a basis to defeat plaintiffs' attempts to qualify non-enumerated instrumentalities as "safety devices" sufficient to plead claims under Labor Law § 240(1).

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What Scaffold? The application of Labor Law 240 to weight rather than height in the wake of *Runner* and *Wilinski*

ADRIENNE YARON*

To the layperson, the idea behind New York's so-called "Scaffold Law" begins and ends with Lewis Hine's iconic photographs of the Empire State Building under construction.[1] Indeed, many plaintiffs' firms have one or more of these images displayed prominently in their offices. But modern Labor Law litigation has little connection to the safety hazards memorialized by Hines. Indeed, a recent line of case law has developed in which neither a scaffold nor a height difference is necessary to establish a violation of Labor Law § 240(1). In these cases, statutory liability is triggered principally due to the great weight of the injury-producing material.

The story begins with *Runner v New York Stock Exchange*.[2] Prior to *Runner*, the well-established rule, rooted e.g. in *Narducci v. Manhasset Bay Associates*,[3] was that Labor Law §240 applied (1) to protect workers working at heights from falling, and (2) to protect workers from being struck by objects falling from a height. The Court of Appeals in *Narducci* specified that "liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein,"[4] and conversely, that §240(1) is inapplicable where it is "not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected."[5] Correspondingly, a large body of case law flowed from *Narducci* that held, in no uncertain terms, that objects falling from a short or "miniscule" elevation differential simply did not fall within the ambit of Labor Law §240.

For example, in Perron v. Hendrickson/Scalamandre/Posillico,[6] the court dismissed plaintiff's claim as outside the scope of Labor Law § 240 where "the object that fell on the injured plaintiff's foot was, at most, two feet off the ground," stating: "[a]n object falling from a minuscule height is not the type of elevation-related injury that this statute was intended to protect against."[7] Similarly, in Piccinich v. New York Stock Exch.,[8] the First Department upheld the dismissal of plaintiffs' Labor Law § 240(1) cause of action "because the injury he sustained when a component of the air conditioner he was dismantling fell two to three inches onto his hand was not caused by an elevation-related risk contemplated by the statute."[9] And in Cambry v. Lincoln Gardens,[10] the Second Department could not have been more clear: "the plaintiff allegedly was injured when a large piece of metal fell from a dolly onto his foot … The risk of such an accident is not an elevation-related risk simply because there is a slight difference in elevation between the top of the dolly and the floor. An object falling from a minuscule height is not the type of elevation-related injury that Labor Law § 240(1) was intended to protect against."[11]

The *Runner* case upended this entire body of law and introduced the concept that liability under the so-called "Scaffold Law" could be imposed where there was little if any height differential between the injured person and the injury-producing implement. The *Runner* plaintiff was injured while he was being used as a human pulley to lower an 800 pound reel of wire down four steps: the reel got loose and pulled the plaintiff, injuring his hands. The Court of Appeals found that Labor Law § 240 applied, explaining liability was dependent on "a risk arising from a physically significant elevation differential."[12]

The Court of Appeals solidified this rule in Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.,[13] in which the plaintiff was struck by pipes falling from a vertical position at the same level:

> The pipes, which were metal and four inches in diameter, stood at approximately 10 feet and toppled over to fall at least four feet before striking plaintiff, who is five feet, eight inches tall. That height differential cannot be described as de minimis given the amount of force the pipes were able to generate over their descent.[14]

The shift from the *Narducci* focus on "objects falling from a height," to the new *Runner* liability standard of "physically significant elevation differential," has

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* *Adrienne Yaron is an attorney with Newman Myers Kreines Gross Harris, P.C. in New York, New York.*

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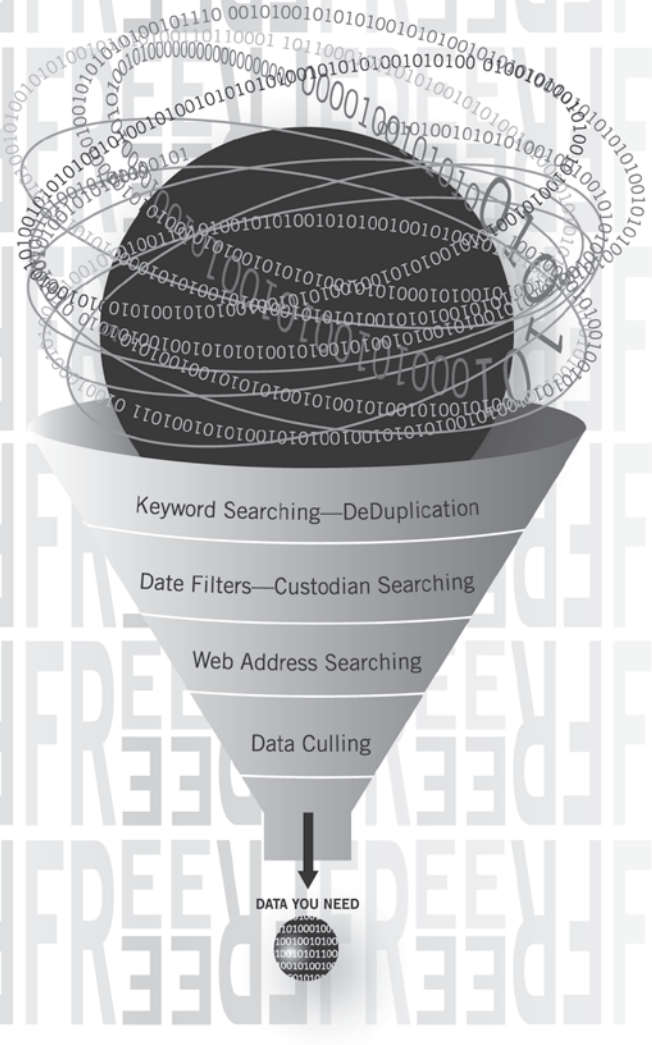

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What Scaffold? The application of Labor Law 240 to weight rather than height in the wake of *Runner* and *Wilinski*

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had the practical effect of opening the proverbial floodgates to a new line of case law under the Scaffold Law–involving scenarios in which scaffolding would have no meaningful purpose. For example, in DiPalma v State,[15] plaintiff was injured "when a large skid box containing concrete debris slid off of a forklift and struck him."[16] The Fourth Department held that "[a]lthough the skid box fell only one or two feet before it struck claimant, in light of the weight of the skid box and its contents, as well as the potential harm that it could cause, it cannot be said that the elevation differential was de minimis."[17]

The other three Appellate Division departments have reached similar conclusions in cases involving very heavy materials. In Marrero v. 2075 Holding Co, LLC,[18] the First Department found a "significant elevation differential" where plaintiff "was walking across plywood planks [that] buckled and shifted. As a result, an A-frame cart containing Sheetrock and two 500-pound steel beams … fell, landing on his left calf and ankle."[19] It accordingly granted summary judgment to the plaintiff, after such relief had been denied below.

The First Department had done the same the previous year, in Kempisty v 246 Spring St., LLC,[20] which reversed a motion court's finding "that Labor Law § 240(1) does not apply in this case because there was no appreciable height differential between plaintiff and the object being hoisted."[21] In this instance, a four-ton steel block had crushed plaintiff's foot. Citing Runner and Wilinski, the First Department's view was that "[t]he elevation differential cannot be considered de minimis when the weight of the object being hoisted is capable of generating an extreme amount of force, even though it only traveled a short distance."[22]

The Second Department applied §240(1) in a case, McCallister v 200 Park, L.P.,[23] where 450-550 pounds of disassembled scaffolding pipe was being wheeled on a baker's scaffold. The front wheels broke and caused the load to tilt forward the height of the wheels (a few inches).

Most recently, in Jackson v Heitman Funds/191 Colonie LLC,[24] the Third Department applied Labor Law § 240(1) in late 2013 to the following facts:

> [P]laintiff was injured when the handle of a roll carrier—a device used to dispense roofing material (the membrane roll)—hit him in the head as he was helping to unroll the membrane[25] … the roll carrier shifted on the slippery roof, causing the membrane roll to drop, thereby forcing the T-handle to rapidly move upward and hit plaintiff in the side of his head[26] … [The roll weighed] between 600 and 800 pounds was hoisted by the roll carrier to a height of approximately $1^1/_2$ feet off the roof's surface.[27]

These cases bear no resemblance to Lewis Hine's iconic photographs. Indeed, they have no rational connection to the "peculiar hazards" of constructing New York City's towering skyscrapers. As the Court of Appeals itself acknowledged only about a decade ago in Blake v Neighborhood Hous. Services of New York City, Inc.,[28] the Scaffold Law was created in 1885 "in response to the Legislature's concern over unsafe conditions that beset employees who worked at heights… Newspapers carried articles attesting to the frequency of injuries caused by rickety and defective scaffolds. In 1885 alone, there were several articles detailing both the extent of these accidents and the legislation directed at the problem."[29]

Yet, the Courts are now applying the statute to cases involving *no height differential whatsoever.* These are accidents that can and do occur in basements, ground level enclosures, or even outside the construction context entirely. However heavy the materials, or however dangerous the task, this amounts to a vast judicial expansion of liability, surely beyond what the legislature ever intended in this author's view.

[1] *See e.g.* http://twistedsifter.com/2012/06/vintage-photos-of-the-empire-state-building-under-construction/.
[2] 13 N.Y.3d 599 (2009).
[3] 96 N.Y.2d 259 (2001)
[4] Id. at 267
[5] Id. at 268
[6] 22 A.D.3d 731 (2d Dep't 2005)
[7] Id. at 732, *citing* Schreiner v Cremosa Cheese Corp., 202 AD2d 657, 657-658, (2d Dept. 1994) and Jacome v State of New York, 266 AD2d 345, 346-347 (2d Dept. 1999).
[8] 257 A.D.2d 438 (1st Dep't 1999)
[9] Id.
[10] 50 A.D.3d 1081 (2d Dep't 2008)
[11] Id. at 1083 (internal punctuation omitted)
[12] 13 N.Y.3d at 603
[13] 18 N.Y.3d 1 (2011)
[14] Id. at 10 (internal punctuation and citations omitted)
[15] 90 A.D.3d 1659 (4th Dept 2011)
[16] Id.

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President's Column

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Program Committee led by Chair Terry Klaum; and our Diversity initiative led by DANY officers Heather Wilshire-Clement and Gary Rome.

If you are not already a DANY member, please consider joining and involving yourself in one of the energized DANY committees such as; Education (CLE), Judiciary, Legislative, Publications, Program (Dinners and Awards), Amicus, Insurance Law, ADR, Employment Law, Medical Malpractice, Diversity and Inclusion and Young Lawyers. Your membership also provides the opportunity to author legal articles for our DEFENDANT Journal.

DANY membership options include individual and firm membership, Whether your involvement in DANY is as a firm, partner or associate, the relationships fostered and the legal knowledge gained are exceptional. DANY's reach is local, regional and national. Led by our past president Tom Maroney, DANY has expanded its collaborative relationship with DRI through resource sharing and a joint project to provide real-time legal news feed to our **defenseassociationofnewyork.org** website.

DANY's long and storied history is based on our core member group of successful and experienced practitioners who promote the benefits of active participation in DANY to other attorneys at their firms, colleagues in our field and most importantly, next generation DANY leaders and contributors.

DANY maintains important and vibrant relationships with the judiciary, other bar associations, insurers, the plaintiff's bar and the business community. Participation in DANY will provide you with the opportunity to develop long lasting relationships that promote your own practice

DANY has two upcoming major networking opportunities. On April 8, 2014 we expect a strong turnout at the Downtown Association for our latest CLE Program, **"Understanding Attorney Professional Conduct and Misconduct".** This 2 credit Ethics CLE will be headlined by **the Hon. George J. Silver and Lawton W. Squires, Esq.** We also expect a great crowd for our Thirty-Ninth Annual Charles C. Pinckney Awards Dinner on Thursday April 24, 2014 at the New York Downtown Marriott Hotel when DANY will honor the following:

- **Hon. Robert J. Miller, Associate Justice – Appellate Division Second Department with the Charles C. Pinckney Award.**
- **Hon. Barbara R Kapnick, Associate Justice – Appellate Division First Department with DANY'S Distinguished Jurist Award. .**
- **Thomas F. Segalla – Goldberg Segalla, Partner and Vice Chair of Commercial Litigation with the James S. Conway Award for Outstanding Service to the Defense Community.**
- **Peter James Johnson, Jr. – President, Leahey & Johnson, P.C. and Legal Analyst for the Fox News Channel with the DANY Public Service Award**

As always the Awards Dinner evening will start with an informative CLE event at 5:30 pm. **Hon. Ariel E. Belen (Ret.) JAMS Mediator/Arbitrator and Justice Robert J. Miller, Associate Justice of the Appellate Division, Second Department** will present a **2014 CPLR Update.** Registration forms for the April 8, 2014 Ethics CLE and the April 24, 2014 Awards Dinner can be found in this journal and at our website, **www.defenseassociationofnewyork.org** You may also contact our Executive Director Tony Celentano at (212) 313-3618 to enroll for the CLE or for tickets to the Awards Dinner

In closing, we wish to extend special thanks to immediate Past President Jim Begley for a prosperous past year as we continue to build on Jim's momentum. I encourage you to take full advantage of all that DANY has to offer. DANY embraces new members and new ideas and is committed to continuing its history of providing meaningful benefits to its members.

What Scaffold?

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[17] Id. at 1660
[18] 106 A.D.3d 408 (1st Dept. 2013)
[19] Id. at 409
[20] 92 A.D.3d 474 (1st Dept 2012)
[21] Id.
[22] Id.
[23] 92 A.D.3d 927 (2d Dept 2012)
[24] 111 A.D.3d 1208 (3d Dept 2013); Editors' Note: *Jackson* is discussed at length in the article on experts by David Persky and Bradley J. Corsair in this publication.
[25] 976 N.Y.S.2d at 284
[26] 976 N.Y.S.2d at 285
[27] 976 N.Y.S.2d at 286
[28] 1 N.Y.3d 280 (2003)
[29] 1 N.Y.3d at 284-285

Labor Law Section 240(1) The Fundamentals

STEVEN R. DYKI, ESQ.* ALAN S. RUSSO, ESQ.**

Some of the most heavily litigated personal injury cases in New York involve claims of violation of Labor Law § 240(1), also commonly known as the "Scaffold Law." The intensity of the litigation is directly connected the risk of exposure to extraordinarily large verdicts. In 2012, the top 12 largest reported verdicts and settlements for claims of violations of Labor Law § 240(1) ranged from between $5 million to $15 million.[1] Given the potential for a large recovery, the plaintiff's bar is always seeking to push the envelope and further expand the scope of the claims that can be covered by the statute.

Due to the exceptional exposure involved and the constant attempts to expand the scope of the covered claims, it is essential for the practitioner who is faced with defending an allegation of violation of Labor Law § 240(1) to understand the fundamentals of liability under the statute. A complete discussion of all the jurisprudence surrounding Labor Law § 240(1) would require dozens of bound volumes discussing literally thousands of fact specific Court decisions. This article provides a broad overview of the elements of a Labor Law § 240(1) claim and some of the issues that commonly arise to assist the practitioner in preparing a defense. However, the defense of each case is factually unique and the defense practitioner should approach Labor Law § 240(1) on a case-by-case basis.

I. Purpose and Application

Labor Law § 240 (1) was designed to prevent those types of accidents in which a scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.[2] However, not every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law.[3]

In order to recover for a violation of Labor Law § 240(1), the plaintiff must prove two main elements: (1) a violation of the statute; and (2) that the violation was a proximate cause of her injuries.[4] Once these two main elements have been established, the Courts apply an "absolute" or "strict" liability standard.[5]

Unlike a claim for common law negligence, a plaintiff is not required to establish notice of a hazardous condition or control of an unsafe work practice to establish liability upon a statutory defendant. The duties imposed by Labor Law §240(1) are non-delegable and a statutory defendant is liable even if it hired an independent contractor to perform the work on its behalf and had no notice of the conditions or direct control over the activities that caused the injury.[6]

Unlike all other personal injury lawsuits in New York, a Labor Law § 240(1) defendant is not afforded the protections of CPLR § 1411, which diminishes the amount of damages recoverable by a plaintiff based on her/his proportionate share of negligence in causing the injuries.7 Therefore, even if a plaintiff is 99% at fault for causing his injuries, the plaintiff can recover 100% of his damages if he can prove a violation of the statute, and that the violation was a proximate cause of his injuries because the plaintiff's contributory negligence is not a defense.[8]

The only defenses to liability under Labor Law § 240(1) are that the plaintiff's conduct was the sole proximate cause of his injuries (i.e. the alleged violation was not a proximate cause of the accident), or that the plaintiff failed to avail himself of the safety devices available to him, i.e. the "recalcitrant worker" defense. If these defenses are established, then there is no liability and the plaintiff is not entitled to recover any of his claimed damages.

II. Violation of the Statute

Labor Law § 240(1) states the following:

* *Steven R. Dyki is a Senior Associate in the Manhattan office of Russo & Toner, LLP.*

** *Alan S. Russo is a partner and a founding member of Russo & Toner, LLP and is located in its Manhattan office.*

Scaffolding and other devices for use of employees

1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.[9]

A. Owners, Contractors and Their Agents

As the first portion of the statutory language indicates, Labor Law § 240(1) only applies to contractors, owners and their agents. At first blush, the terms used to identify these statutory defendants seem to be relatively self-explanatory. However, the application of the terms has been the subject of a great deal of litigation to avoid the harsh effects of absolute liability under Labor Law § 240(1). Simply put, if a defendant was not the owner, contractor or agent under the statute, it will not be liable under the statute.[10]

1. Owner

The Court of Appeals has held that an owner of property, even an out-of-possession owner that did not hire the contractor to perform the work that caused the accident, can be liable for a violation of the statute.[11] However, there must be a sufficient nexus between the ownership interest and the work resulting in the injury.[12]

The Courts have also included lessees who hire a contractor and have the right to control the work as "owners" for the purposes of Labor Law § 240(1).[13] However, if the contractor performing work was hired by lessor, and the lessee does not have right to control work, the lessee is not an "owner" under the statute.[14]

The statute does provide an exception for owners of one and two family dwellings who contract for but do not direct or control the work.[15] However, if an owner of a one or two family dwelling exerts sufficient control over the manner and method of the work, the exemption will not apply.[16] Furthermore, if the owner of the one or two family dwelling owns the home for purely commercial purposes, the exemption will not apply.[17]

2. Contractors

The Court of Appeals has made it clear that the term "contractor" does not mean every contractor at a particular job site. Rather, "contractor" has been defined by the Court to include only general contractors.[18] An entity is deemed a general contractor under the Labor Law if it was responsible for coordinating and supervising the entire project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors.[19]

3. Agents

Labor Law § 240(1) also provides that "agents" of the owner or general contractor will be liable for violations of the statute.[20] The issue of whether a particular defendant is a statutory "agent" often arises in the context of construction managers and safety consultants. When the work giving rise to the duty to conform to the requirements of Labor Law § 240(1) has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control the work and becomes a statutory agent.[21] Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency.[22]

The Court of Appeals has articulated the criteria necessary to establish agency for the purposes of the Labor Law: (1) specific contractual terms creating agency; (2) the absence of a general contractor; (3) the duty to oversee the construction site and trade contractors and; (4) the authority to control activity at the work site and to stop any unsafe practices.[23]

B. Covered Activities

As indicated in the statute, Labor Law § 240(1) only applies to activities involving "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." However, if the activity the plaintiff was engaged in at the time of the alleged accident was not an activity covered by the statute, then even a statutory defendant will avoid liability. Given the harsh result of "absolute" or "strict" liability, the issue of whether a particular activity is covered by the statute has also been the subject of

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a great deal of litigation. Some of the issues that typically arise in this context appear below.

1. Repairing and Altering v. Routine Maintenance

At first blush, the terms "repairing" and "altering" would seem to include a wide scope of activities. However, the Court of Appeals has held that the terms "repairing" and "altering" in Labor Law § 240(1) do not include routine maintenance outside the scope of construction work.[24] However, the question of whether a particular activity falls within 240(1) must be determined on a case by case basis, depending on the context of the work.[25]

With regard to "repairing," the Court of Appeals has held that replacing components that require replacement in the course of normal wear and tear is not "repairing" but is routine maintenance not covered by the statute.[26] For example, replacing a torn window screen and applying wallpaper that is not part of larger project are not "repairing" activities within the ambit of Labor Law § 240(1).[27]

The Court of Appeals has defined "altering"[28] to require a significant physical change to the configuration or composition of a building or structure.[29] However, the physical change does not have to be pronounced. For example, chiseling a hole through a concrete wall is enough to constitute "altering" within the meaning of the statute.[30]

2. Cleaning

The term "cleaning" also seems relatively broad in nature.[31] However, the Court of Appeals has placed some limits on the types of cleaning that are covered. Notably, commercial window cleaning, both interior and exterior, is a covered activity.[32] However, routine household window cleaning is not covered by the statute.[33]

Furthermore, when commercial cleaning does not involve windows or cleaning during a construction project, the Court is less apt to find that the cleaning activity is covered. The Court of Appeals articulated the following criteria for an activity that is not "cleaning" under the statute: (1) the task is routine in the sense that it is the type of job that occurs on a daily, weekly or other relatively frequent and recurring basis; (2) the task requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) the task involves insignificant elevation risk comparable to those inherent in typical domestic or household cleaning; and (3) the task is unrelated to any ongoing construction, renovation, painting, alteration or repair project.[34] For example, routine commercial dusting of an elevated shelf at retail store is not "cleaning" within the meaning of the statute.[35] Nor does the cleaning of a product in the course of a manufacturing process come within the scope of "cleaning" in Labor Law § 240(1).[36]

3. Is it a structure?

Labor Law § 240(1) also requires that the covered activity be performed on "building or structure." If the covered activity is not being performed on a "building or structure," then there is no liability under the statute.[37]

The Court of Appeals has broadly defined "structure" to include "any piece or production of work artificially built up or composed of parts joined together in some definite manner.[38] Courts have found that "structure" under Labor Law § 240(1) includes a ticket booth at a convention center,[39] a chupah (a canopy under which brides and grooms stand during weddings conducted in the Jewish religious tradition),[40] and a free standing gas station sign.[41] However, courts have found that "structure" does not include temporary decorations to a building,[42] or commercial dishwashers.[43] The Court of Appeals has even found that a tree, a product of nature that is not artificially built up, can be a "structure" under Labor Law § 240(1) if the tree is being removed as part of a larger renovation project involving another building or structure.[44]

C. Gravity-Related Risk and the Failure to Provide Proper Protection

Once it is established that the defendant is a statutory defendant and the injury arose out of an activity covered by the statute, the inquiry for a violation of the statute does not end. The Court of Appeals has made clear that Labor Law § 240(1) is not to protect workers from routine workplace risks. Rather, it is to protect workers from the risks associated with the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level,[45] or a difference between the elevation level where the worker is positioned and the higher level of materials or load

being hoisted or secured.[46] The special hazards do not encompass any and all perils that may be connected in some tangential way to the effects of gravity.[47] Rather, the special hazards are limited to gravity-related accidents including, but not limited to falling from a height or being struck by a falling object that was improperly hoisted or secured.[48] In other words, the statute was designed to prevent those types of accidents in which one of the enumerated devices "proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person."[49]

When a device of the kind enumerated in the statute is not necessary or even expected, then there is no liability under the statute.[50] For example, no devices are expected to protect against the collapse of a completed wall.[51] Nor are any devices expected to protect against a window that fell from a pre-existing building structure that was not being worked on as part of a construction project.[52]

Furthermore, there are certain risks that are not covered by the statute. For example, the risk of alighting from a construction vehicle is not a gravity-related risk that calls for any of the protective devices under the statute.[53] Nor is the act of falling into a five to six inch gap between insulation boards which were stacked eight feet tall.[54]

Also, when the injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device, there is no liability under Labor Law § 240(1).[55] For example, Labor Law § 240(1) does not apply to worker descending a ladder who tripped over a defective condition on the floor when stepping from the bottom rung of a ladder to the floor.[56]

The Court of Appeals has also found that when the installation of a protective device is contrary to the objectives of the work, then Labor Law § 240(1) is not applicable.[57] For example, the installation of a cover over a trench where a worker was pouring and spreading concrete is inconsistent with the purpose of the work, and not a device required by the statute.[58]

However, once a gravity-related risk requires a safety device, then the inquiry becomes whether the device failed to provide proper protection to the plaintiff. When a safety device fails for no apparent reason, a presumption is created that the device failed to provide proper protection.[59] There are literally thousands of reported decisions for violations of Labor Law § 240(1) with allegations of the failure of a device to provide proper protection for various reasons, including hundreds of examples of scaffolds and ladders failing, items falling upon a plaintiff due to improper hoisting mechanisms, and the failure to provide a plaintiff with a harness, safety belt or lifeline when such a device is required, just to name of few.

The key issues to focus on when considering whether a device failed to provide proper protection include whether the device provided was defective, or whether an alternative device or additional device was required because the device provided was insufficient for the task being performed.

In the context of ladders, a fall from a ladder itself is not sufficient to impose liability under Labor Law § 240(1).[60] However, when a plaintiff falls from a ladder and there is no evidence that the ladder was actually defective or inadequately secured, there can still be a question of fact as to whether it provided proper protection and whether the injured worker should have been provided with additional safety devices such as a harness and lanyard.[61]

Notably, recent decisions have been expanding the scope of gravity-related risks and the failure to provide adequate protective devices covered by the statute.[62] The Court of Appeals recently made it clear that "falling object liability is not limited to cases in which the falling object is in the process of being hoisted or secured."[63] In one expansive decision, the Court of Appeals found that the statute applies to a worker who was acting as a counterweight on a makeshift pulley and dragged into the pulley mechanism after 800 pound reel being lowered rapidly descended down a small set of stairs.[64] The Court found that although the worker did not fall from a height and was not struck by a falling object, the accident arose from the type of gravity-related risk Labor Law § 240(1) was designed to protect against.[65] The Court of Appeals also found that Labor Law § 240(1) may apply to a worker who was standing at the same level as pipes that toppled over onto him if the pipes could have been secured with a device enumerated in the statute.[66]

III. Proximate Cause, Sole Proximate Cause and Recalcitrant Worker

Once it has been established that Labor Law § 240(1) has been violated, the issue becomes whether the violation of the statute was a proximate cause of the plaintiff's injuries.[67] If the violation was a proximate cause of the plaintiff's injuries, "absolute" or "strict" liability is found, and there is no reduction for the plaintiff's contributory negligence, if any.[68] A plaintiff can even be intoxicated and there will be no reduction of the damages claim for the portion of the plaintiff's comparative fault attributed to his intoxication.[69] As a result, an intoxicated worker who is 99% at fault for his injuries will receive a 100% recovery of damages.

However, if the plaintiff's conduct is the sole proximate cause of his injuries, then there can be no liability.[70] Even when a worker is not "recalcitrant" (discussed below) the Court of Appeals has held that there can be no liability when the worker's actions were the sole proximate cause of the accident.[71] For example, if a worker merely loses his balance and falls from a ladder which is not otherwise defective or inadequate, the plaintiff's conduct is the sole proximate cause of his accident.[72] Also, if a worker misuses the safety device available to him, his conduct can be the sole proximate cause of his injuries.[73]

A sub-issue encompassed within the sole proximate cause defense is the "recalcitrant worker" defense. In order to establish that a worker was "recalcitrant," the defendant must show that the devices that the plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and that the plaintiff knew he was expected to use them but for no good reason chose not do so.[74] For example, when a worker used an inverted bucket to ascend to a room rather than an available ladder, and then jumped from the room resulting in an injury, the Court of Appeals held that his conduct in refusing to use the available safety device was the sole proximate cause of his accident.[75]

IV. Conclusion

With the proliferation of multi-million dollar verdicts and settlements for violations of Labor Law § 240(1), it is expected the plaintiff's bar will continue to try and expand the factual circumstances giving rise to violations of the statute. Each Labor Law § 240(1) case is fact intensive and should be treated as such. To best defend against a Labor law § 240(1) claim, the defense practitioner should at the outset focus on the fundamental elements of the proof required to trigger the application of the statute, and then conduct additional fact specific research to develop defenses to each "new" set of circumstances that plaintiffs attempt to bring within the ambit of the statute.

[1] New York Magazine *Top 2012 Verdicts & Settlements by Category*, June 3, 2013 <http://nymag.com/nymag/advertorial/personalinjury/2013/verdicts-by-category>/

[2] Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 501 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993)

[3] Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267, 750 N.E.2d 1085, 727 N.Y.S.2d 31 (2001)

[4] *See* Blake v. Neighborhood Housing Services of New York City, 1 N.Y.3d 280, 287, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003)

[5] Id.

[6] Ross v. Curtis-Palmer Hydro Electric Co., supra.

[7] NYS CLS CPLR § 1411 (McKinney's 2013)

[8] Blake, *supra*.

[9] NYS CLS Labor § 240 (McKinney's 2013)

[10] Editors' Note: For more background about whether a party is truly a "Labor Law defendant" or a "Labor Law plaintiff," see the article of Michael Cordrey in this publication.

[11] *See* Sanatass v. Consolidated Investing Co., 10 N.Y.3d 333, 887 N.E.2d 1125, 858 N.Y.S.2d 67 (2008)

[12] *See* Id. at 341

[13] Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 320, 908 N.E.2d 869, 880 N.Y.S.2d 879 (2009) citing Frerson v. Concourse Plaza Assoc., 189 A.D.2d 609, 611, 592 N.Y.S.2d 309 (1st Dep't 1993); Sweeting v. Board of Coop. Educ. Servs., 83 A.D.2d 103, 114, 443 N.Y.S.2d 910 (4th Dep't 1981); Bart v. Universal Pictures, 277 A.D.2d 4, 6, 715 N.Y.S.2d 240 (1st Dep't 2000).

[14] Ferluckaj, *supra*.

[15] Editors' Note: For more background about the homeowner's exception, see the article of Vincent Pozzuto and Paul Zola in this publication.

[16] *See* Affri v. Basch, 13 N.Y.3d 592, 921 N.E.2d 1034, 894 N.Y.S.2d 370 (2009)

[17] *See* Lombardi v. Stout, 80 N.Y.2d 290, 296-297, 604 N.E.2d 117, 590 N.Y.S.2d 55 (1992)

[18] *See* Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981)

[19] *See* Aversano v. JWH Contracting, LLC, 37 A.D.3d 745, 831 N.Y.S.2d 222 (2nd Dep't 2007)

[20] Russin, 54 N.Y.2d at 318.

[21] Id.

[22] Blake, 1 N.Y.3d at 293.

[23] Walls v. Turner Construction Co., 4 N.Y.3d 861, 831 N.E.2d 408, 798 N.Y.S.2d 351 (2005)

[24] Prats v. Port Authority of New York and New Jersey, 100 N.Y.2d 878, 800 N.E.2d 351, 768 N.Y.S.2d 178 (2003)

[25] Id.

[26] Esposito v. New York City Indus. Dev. Agency, 1 N.Y.3d 526, 802 N.E.2d 1080, 770 N.Y.S.2d 682 (2003)

[27] *See* Chizh v. Hillside Campus Meadow Assoc., 3 N.Y.3d 664, 817 N.E.2d 819, 784 N.Y.S.2d 2 (2004); see also Schroeder v. Kalenak Painting & Paperhanging, Inc., 7 N.Y.3d 797, 854 N.E.2d 1268, 821 N.Y.S.2d 804 (2006)

[28] Editors' Note: For more background about altering, see the article of Nicholas Cardascia and Ourania Sdogos in this publication.

[29] Joblon v. Solow, 91 N.Y.2d 457, 465, 695 N.E.2d 237, 672 N.Y.S.2d 286 (1998)

[30] Id.

[31] Editors' Note: For more background about cleaning, see the article of Ross Masler in this publication.

[32] *See* Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675, 870 N.E.2d 1144, 839 N.Y.S.2d 714 (2007)

[33] *See* Brown v. Christopher Street Owners Corp., 87 N.Y.2d 938, 663 N.E.2d 1251, 641 N.Y.S.2d 221 (1996); see also Connors v. Boorstein, 4 N.Y.2d 172, 149 N.E.2d 721, 173 N.Y.S.2d 288 (1958)

[34] Soto v. J. Crew, Inc., 21 N.Y.3d 562, 568 (2013)

[35] Id.

[36] Dahar v. Holland Ladder & Manufacturing Co., 18 N.Y.3d 521, 526, 964 N.e.2d 402, 941 N.Y.S.2d 31 (2012)

[37] Editors' Note: For more background about qualification as a "building" or "structure," see the article of Catherine Everett in this publication.

[38] Caddy v. Interborough Rapid Transit Co., 195 N.Y. 415, 420, 88 N.E. 747 (1909)

[39] Pancino v. Advanstar Communications, Inc., 92 A.D.3d 656, 938 N.Y.S.2d 168 (2nd Dep't 2012), lv. denied 19 N.Y.3d 806, 973 N.E.2d 202, 950 N.Y.S.2d 104 (2012)

[40] McCoy v. Kirsch, 99 A.D.3d 13, 17, 951 N.Y.S.2d 32 (2nd Dep't 2012)

[41] Smith v. Shell Oil Co., 85 N.Y.2d 1000, 1001-1002, 654 N.E.2d 1210, 630 N.Y.S.2d 962 (1995)

[42] Tanzer v. A. Terzi Productions, 244 A.D.2d 224, 664 N.Y.S.2d 44 (1997)

[43] Chuchuca v. Redux Realty LLC, 303 A.D.2d 239, 239-240, 75 N.Y.S.2d 8 (1st Dep't 2003)

[44] Lombardi, supra. 80 N.Y.2d at 296.

[45] Editors' Note: For a discussion of recent cases involving falling workers, see the article of Marc J. Ackerman in this publication.

[46] Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 514, 583 N.E.2d 932, 577 N.Y.S.2d 219 (1991).

[47] Ross, *supra*. 81 N.Y.2d at 501.

[48] Id.

[49] Id.

[50] *See* Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 750 N.E.2d 1085, 727 N.Y.S.2d 37 (2001)

[51] *See* Misseritti v. Mark IV Construction Co., 86 N.Y.2d 487, 657 N.E.2d 1318, 634 N.Y.S.2d 35 (1995). Editors' Note: For more background about collapsing walls and structures, see the article of Leon Kowalski in this publication.

[52] *See* Narducci, 96 N.Y.2d at 268.

[53] *See* Toefer v. Long Island Rail Road, 4 N.Y.3d 399, 828 N.E.2d 614, 795 N.Y.S.2d 511 (2005); Bond v. York Hunter Construction, Inc., 95 N.Y.2d 883, 738 N.E.2d 356, 715 N.Y.S.2d 209 (2000) 54 Keavey v. New York State Dormitory Auth., 6 N.Y.3d 859, 849 N.E.2d 945, 816 N.Y.S.2d 722 (2006)

[55] Nieves v. Five Boro Air Conditioning & Refrigeration Corp., 93 N.Y.2d 914, 712 N.E.2d 1219, 690 N.Y.S.2d 852 (1999)

[56] Id.

[57] *See* Salazar v. Novalex Contracting Corp., 18 N.Y.3d 134, 960 N.E.2d 393, 936 N.Y.S.2d 624 (2011)

[58] Id.

[59] LaGiudice v. Sleepy's Inc., 67 A.D.3d 969, 890 N.Y.S.2d 564 (2nd Dep't 2009)

[60] Olberding v. Dixie Contracting, Inc., 302 A.D.2d 574, 757 N.Y.S.2d 565 (2nd Dep't 2003); Heffernan v. Bais Corp., 294 A.D.2d 401, 742 N.Y.S.2d 119 (2nd Dep't 2002)

[61] Id. Editors' Note: For more background about ladders and other devices where expert testimony was significant, see the article of David Persky and Bradley Corsair in this publication.

[62] Editors' Note: This publication has three other articles with a focus on this recent trend of expanded § 240(1) coverage; see the articles of Andrew Zajac and James O'Sullivan (especially as to falling objects), of Adrienne Yaron (same), and of Gary H. Abelson and Sanjeev Devabhakthuni.

[63] Quatrocchi v. F.J. Sciame Construction Corp., 11 N.Y.3d 757, 896 N.E.2d 75, 866 N.Y.S.2d 592 (2008)

[64] *See* Runner v. New York Stock Exchange, 13 N.Y.3d 599, 922 N.E.2d 865, 895 N.Y.S.2d 279 (2009)

[65] Id. 13 N.Y.3d at 603.

[66] *See* Wilinski v. 334 East 92nd Housing Dev. Fund Corp., 18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551 (2011)

[67] Editors' Note: For more background about proximate cause, see the article of Julian Ehrlich in this publication.

[68] Blake, *supra*.

[69] *See* Seargeant v. Murphy Family Trust, 284 A.D.2d 991 (4th Dep't 2001); Podbielski v. KMO-361 Realty Assoc., 294 A.D.2d 552 (2nd Dep't 2001); Bonadella v. Rosenfeld, 298 A.D.2d 941 (4th Dep't 2002)

[70] Weininger v. Hagedorn & Co., 91 N.Y.2d 958, 960, 695 N.E.2d 709, 672 N.Y.S.2d 840 (1998)

[71] Blake, *supra*.

[72] *See* Hugo v. Sarantakos, 108 A.D.3d 744, 970 N.Y.S.2d 245 (2nd Dep't 2013); see also Gaspar v. Pace University, 101 A.D.3d 1073, 957 N.Y.S.2d 393 (2nd Dep't 2012)

[73] Bahrman v. Holtsville Fire District, 270 A.D.2d 438, 704 N.Y.S.2d 660 (2nd Dep't 2000)

[74] Gallagher v New York Post, 14 N.Y.3d 83, 88 923 N.E.2d 1120, 896 N.Y.S.2d 732 (2010); Cahill v. Triborough Bridge & Tunnel Authority, 4 N.Y.3d 35, 39-40, 823 N.E.2d 439, 790 N.Y.S.2d 74 (2004)

[75] *See* Montgomery v. Federal Express Corp., 4 N.Y.3d 805, 828 N.E.2d 592, 795 N.Y.S.2d 490 (2005)

Editors' Note: For more background about recalcitrant workers and sole proximate cause, see the article of Christopher Renzulli and Nicholas Whipple in this publication. See also the article of David Persky and Bradley Corsair on experts in this publication, as relating to sole proximate cause.

THE HOMEOWNER'S EXEMPTION TO LABOR LAW CASES: How Much Homeowner Involvement is Too Much?

PAUL ZOLA & VINCENT P. POZZUTO *

I. The Homeowner's Exemption Defined

The requirements of Labor Law Sections 240 and 241 do not apply to "owners of one and two-family dwellings who contract for but do not direct or control the work." *Khela v. Neiger*, 85 N.Y.2d 333, 624 N.Y.S.2d 566 (1995). However, it is important to note that this exemption only applies to violations of Labor Law Sections 240 and 241, not 200.

This exemption was an amendment to the Labor Law enacted in 1980 after the Court of Appeals interpreted Sections 240 and 241 to impose strict liability on owners of construction sites. The legislative reasoning for the amendment was that "it is unrealistic to expect the owner of a one or two-family dwelling to realize, understand and insure against the responsibility sections 240 and 241 now place upon" site owners. Mem of Law Rev Commn, Bill Jacket, L 1980, ch 670.

II. What is a dwelling?

Although the word "dwelling" is not defined in the Labor Law itself, the meaning of dwelling has been inferred. The Multiple Dwelling Law defines a dwelling as "any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings." Black's Law Dictionary defines a dwelling as "the house or other structure in which a person or persons live; a residence abode;…Structure used as a place of habitation."

Several cases have also interpreted the meaning of the word dwelling for purposes of the homeowner's exemption. For example, in *Van Amerogen v. Donnini*, 78 N.Y.2d 880, 573 N.Y.S.2d 443 (1991), the Court of Appeals held that the applicability of the homeowner's exemption depends on the building's function and will not apply to homeowners who intend to use their one or two family dwelling solely for commercial purposes. In *Van Amerogen*, a worker hired by the owners of a rental property brought suit against the owners after he fell from the roof of the property and was injured. The Court of Appeals found that the house in question had been used exclusively by the owners for commercial purposes as an income-producing rental property. As such the Court found that the owners of the premises were not entitled to the legislative exemption and held that this exemption should not be "expanded to encompass homeowners who use their one- or two-family premises entirely and solely for commercial purposes and who hardly are lacking in sophistication or business acumen such that they would fail to recognize the necessity to insure against the strict liability imposed by the statute." *Van Ameroge*, 573 N.Y.S.2d 445.

In *Van Amerogen*, it was clear that the rental property was being used exclusively for commercial purposes and thus, the owner was not entitled to the exemption, but what about less clear situations such as a non-traditional dwelling or a mixed-use property?

In *Zahoransky v. Lissow*, 13 Misc. 3d 1240(A), 831 N.Y.S.2d 357 (N.Y. Sup. Ct. 2006), a yacht which had two State Rooms and the capacity to sleep six people was found to be a "dwelling" under the Labor Law. One factor considered by the Court in reaching this determination was that defendant (yacht owner) had deducted the interest on the loan for purchase of the yacht as mortgage interest from his tax returns.

With respect to combined residential and commercial use structures, the Court of Appeals has found that the existence of both residential and commercial uses on a property does not automatically disqualify a dwelling owner from invoking the exemption. *Cannon v. Putnam*, 76 N.Y.2d 644, 564 N.E.2d 626 (1990). Instead the *Cannon* Court opined that whether the exemption is available turns on the "site and purpose" of the work. *Id.* For the exemption to apply, the work giving rise to the accident must "directly relate to the residential use of the home."

* *Vincent P. Pozzuto is a member in the Manhattan office of Cozen O'Connor. Paul Zola is an associate in the Manhattan office of Cozen O'Connor..*

Bartoo v. Buell, 87 N.Y.2d 362, 639 N.Y.S.2d 778 (1996). The Court of Appeals in *Bartoo* held that even if the work also serves a commercial purpose, the owner will be shielded by the exemption from absolute liability under Labor Law §§ 240 and 241 when the owner contracts for work that directly relates to the residential use of the home.

III. Homeowner Involvement – What Degree of Activity will Preclude the Exemption?

Assuming you have gotten past the threshold questions as to whether or not the property was a "dwelling" within the meaning of the Labor Law, and whether or not the subject work related to the residential use of that dwelling; you must next consider the homeowner's degree of involvement in the work giving rise to plaintiff's claim to determine whether said involvement will preclude the applicability of the homeowner exemption.

The relevant inquiry is the "degree" to which the homeowner supervised the method and manner of the work. *Chura v. Baruzzi*, 192 A.D.2d 918, 596 N.Y.S.2d 592 (3d Dep't 1993).

Determining whether a homeowner is entitled to the benefit of the exemption is a factual issue, and depends upon the degree of supervision and control the owner exercises over the method and manner in which work was performed. *Ennis v. Hayes*, 152 A.D.2d 914, 544 N.Y.S.2d 99 (4th Dep't 1989). If the activities were "no more extensive than would be expected of the ordinary homeowner," the exemption will apply. *Sotire v Buchanan*, 150 A.D.2d 972, 541 N.Y.S.2d 873, 875 (3d Dep't 1989). *See also, Lane v. Karian,* 210 Ad2d 549, 619 N.Y.S.2d 796 (3d Dep't 1994).

If a homeowner engages in some work the Court will look to exactly what work gave rise to plaintiff's injury. *Sarvis v. Maida,* 173 A.D.2d 1019, 569 N.Y.S.2d 997 (3d Dep't 1991) (a homeowner who has the ability to perform some of the work himself is no more likely to realize, understand or insure against the responsibilities imposed by labor law §§ 240 and 241 than is a less handy homeowner who must contract for all of the work, thus the analytical focus was properly placed on the particular aspect of the work out of which the injury arose). In *Reyes v. Silfies*, 168 A.D.2d 979, 980, 564 N.Y.S.2d 925, 926 (4th Dep't 1990), the Court held that the exemption applied to a homeowner who told plaintiff what work to perform, but did not tell plaintiff how to perform the work. The *Reyes* Court went on to state that the homeowner's permission to plaintiff to use the homeowner's ladder did not constitute sufficient control or direction of the work to bar the application of the exemption. *Id.* at 168 A.D.2d 980, 564 N.Y.S.2d 926.

Even aggressive inspections and many demands for changes, such as requests to fix imperfections, will not be considered control of the work sufficient to bar the applicability of the homeowner's exemption. *Valentia v. Giusto*, 182 A.D.2d 987, 581 N.Y.S2d 939 (3d Dep't 1992). Additionally, a homeowner's periodic review of work progress, selection of brick colors, or even involvement in design considerations, is not activity that rises to the level of direction and control that would preclude the homeowner from the exemption. *Kelly v. Bruno and Son, Inc.*, 190 A.D.2d 777, 593 N.Y.S.2d 555 (2d Dep't 1993) (in order for owners of a one-family dwelling to be subject to liability under Labor Law §§ 240 or 241, there must be demonstrable evidence that the homeowner supervised the manner and method of the work to be performed). *See also, Hartman v. Galasso,* 226 A.D.2d 256, 257, 641 N.Y.S.2d 262, 263 (1st Dep't 1996) (a periodic review of progress is not enough to bar exemption where the homeowner never instructed plaintiff as to how to use the materials or perform his work); *Spinillo v. Strober*, 192 A.D.2d 515, 595 N.Y.S.2d 825 (2d Dep't 1993) (Occasional expressions of approval or disapproval of the work is insufficient to bar exemption); *Mayen v. Kalter,* 282 A.D.2d 508, 722 N.Y.S.2d 760 (2d Dep't 2001) (same); *McGuiness v. Contemporary,* 205 A.D.2d 739, 740, 613 N.Y.S.2d 697, 698 (2d Dep't 1994)(instructions about aesthetic design matters do not constitute the kind of control necessary to overcome the exemption from liability); *Tilton v. Gould,* 303 A.D.2d 49, 756 N.Y.S.2d 757 (2d Dep't 2003)(frequent site visits, reviewing plans, and general decision making without more, does not constitute supervision or control over the method and manner of the work sufficient to subject the owner to liability under Labor Law §§ 240 or 241). Even hiring workers, making changes in layout or design, and providing specific instructions is insufficient to bar exemption. *Lieberth v. Walden,* 223 A.D.2d 978, 636

N.Y.S.2d 885 (3d Dep't 1996). *See also, Lane v. Karian*, 210 Ad2d 549, 619 N.Y.S.2d 796 (3d Dep't 1994)(hiring contractors, purchasing materials and providing plans was insufficient to bar exemption).

As can be seen, Courts are hesitant to preclude the application of the exemption to homeowners and require a significant degree of participation in the work by the owner before the owner is deemed to have supervised the manner and methods of the work for purposes of liability under Labor Law §§ 240 or 241.

Generally, an owner must engage in a significant amount of the following activities in order for exemption to even potentially be precluded: decisions as to planning; considerations of alternative methods of construction; contracting with several different entities for various trades; scheduling of each contractor's work; high frequency of time spent on site; pointing out errors and requesting correction; supplying materials; supplying equipment; performing actual work; specific instructions on methods; an overall pattern of interaction; requesting certain types of material; providing directions as to safety; and providing specific directions that lead directly to an accident.

In *Rimoldi v. Schanzer*, 147 A.D.2d 541, 537 N.Y.S.2d 839 (2d Dep't 1989), the Court found an issue of fact existed as to whether the homeowner was entitled to the exemption from liability under Labor Law §§ 240 or 241 where the homeowner exercised considerable supervision over the construction of his in-ground swimming pool. The *Rimoldi* Court found that the homeowner's involvement in decision-making with respect to the location, shape and size of the pool, consideration of alternative methods of construction to comply with applicable sideline requirements, and indicating on the building permit application that the owner of the premises was the builder and supervisor of the construction, raised an issue of fact as to whether the homeowner had sufficient direction and control over the construction so as to warrant the imposition of liability under Labor Law § § 240 or 241. *Id.* at 147 A.D.2d 545, 537 N.Y.S.2d 842. *See also, Ennis v. Hayes,* 152 A.D.2d 914, 544 N.Y.S.2d 99 (4th Dep't 1989) (an issue of fact existed as to whether the homeowner was entitled to the exemption where the homeowner contracted with several entities to perform different trades on the construction of his home, scheduled when each contractor would work, was present on-site most of the time [including the day of the incident in question], frequently photographed the progress of the work, would point out mistakes and request correction, supplied the materials and some equipment to the company that employed plaintiff, and performed several construction tasks himself); *Gambee v. Dunford*, 270 A.D.2d 809, 705 N.Y.S.2d 755 (4th Dep't 2000)(there is no direction or control if the homeowner informs the worker what work should be performed, but there is direction and control if the owner specifies how that work should be performed); *Chura v. Baruzzi*, 192 A.D.2d 918, 596 N.Y.S.2d 592 (3d Dep't 1993)(issue of fact as to direction and control existed where homeowner was present at the jobsite daily doing work on his own and oversaw the project in its entirety, organized the subcontractors by telling them where to work, directed plaintiff to alter his method of taping drywall, routinely instructed plaintiff and other workers to assist him in moving supplies and materials, and frequently moved and repositioned ladders to facilitate completion of the job by subcontractors); *Garcia v. Martin*, 285 A.d.2d 391, 728 N.Y.S.2d 455 (1st Dep't 2001)(an issue of fact existed as to whether the defects in the material supplied by the homeowner, the homeowner's daily intermeddling in the work in progress, and her insistence upon the use of the defective materials constituted sufficient direction and control so as to preclude the application of the exemption under the Labor Law).

In *Young v. Krawczyk,* 223 A.D.2d 966, 636 N.Y.S.2d 897(3d Dep't 1996), the Court looked to the degree to which the homeowner controlled the actual work being performed by plaintiff at the time he was injured, as opposed to their involvement in other aspects of construction, in determining whether they were entitled to the exemption from liability. In looking at the homeowner's involvement, the Court found that requesting moisture resistant sheetrock be used in the bathrooms and that the kitchen work be completed before the remainder of the job is akin to scheduling and quality decisions ordinarily made by homeowners and does not amount to the sort of direction and control contemplated by the provisions of the Labor Law. However, when taken as part of an overall pattern of interaction between the homeowner and the various workers engaged to build the house, an issue of fact exists on the issue of liability under the Labor Law. *Id.*

THE HOMEOWNER'S EXEMPTION TO LABOR LAW CASES: How Much Homeowner Involvement is Too Much?

In *Emmi v. Emmi*, 186 A.D.2d 1025, 588 N.Y.S.2d 481, 482 (4th Dep't 1992), the Court found that the homeowner's participation in construction went far beyond the typical involvement expected of a homeowner on a construction project where the homeowner acted as general contractor, supplied the materials used by plaintiff, chose the design and made changes in the specifications for the building, performed a considerable amount of the construction himself, and acquired and constructed the scaffolding that plaintiff fell from and acknowledged his responsibility to obtain safety rails for the scaffold. The Court held that this extensive involvement constituted direction and control for purposes of liability under Labor Law § 240. *Id. See also, Florentine v. Militello*, 275 A.d.2d 990, 713 N.Y.S.2d 430 (4th Dep't 2000) (owner's agent, who supplied all of the materials and much of the essential equipment for the job [including the scaffolding implicated in the incident] and acknowledged responsibility for worker safety and the provision of safety equipment, was found to have directed and controlled the work as agent for the Estate, and as such, the estate and its agent were not entitled to the homeowner's exemption from liability); *Relyea v. Bushneck*, 208 AD2d 1077 (finding that the exemption did not apply where the owner performed some of the construction work).

IV. Section 200 Liability

Although the homeowner's exemption does not apply to Labor Law § 200 causes of action, the same test essentially applies- i.e. A lack of supervision and control over manner and methods of work should bar homeowner liability. As such, in cases where the defendant is found to be entitled to the homeowner's exemption to Labor Law §§ 240 and 241, the court will more likely than not dismiss plaintiff's Labor Law § 200 claim as well. *See e.g. Reyes v. Selfies*, *supra*.; *Mayen v. Kalter, supra; McGuiness v. Contemporary, supra.*

Who are Labor Law Section 240(1) defendants and plaintiffs?

MIKE CORDREY*

Labor Law § 240(1) is focused on construction related injuries which are "the direct consequence of a failure to provide adequate protection devices listed in the statute against a risk arising from a physically significant elevation differential."[1] Plaintiffs have tried to broaden the definition of the terms of the statute to implicate multiple defendants and many fact patterns. Defendants in turn seek to narrow the statute's reach, for proof of a violation can be a quick route to summary judgment on liability for the plaintiff.

The statute's force, while not "absolute," is often referred to as a "strict liability" law.[2] Over the years, the Court of Appeals has expanded and contracted the scope of the statute in multiple cases. Who, at present, are the defendants that can be liable, and who are the plaintiffs who can sue under this statute, is the subject of this article.

To make a Labor Law § 240(1) claim, two fundamental elements must be established:

(1) that § 240(1) was violated, and (2) that the violation was the proximate cause of the accident.[3] One should consider both the terms of the statute, and the latest court decisions, to determine whether the defendant is a proper party under the statute, and whether a worker's activity is of a type contemplated under the statute. To determine who are proper plaintiffs and defendants under the statute, Courts have concentrated on a worker's status, his or her activities at the time of injury, whether the worker falling or the object falling and causing injury was caused by a force of gravity that could have been prevented by one of the devices listed in the statute, and, what constitutes whether plaintiff was working on either a "building" or a "structure."

The Court of Appeals has defined, outside the plain reading of the statute, that comparative negligence has no role as a defense in a Labor Law § 240(1) case.[4] Additionally, through many decisions, the appellate courts have clarified what activities of workers are "routine maintenance" and "ordinary construction accidents" not covered under the statute, thereby limiting who is a § 240(1) plaintiff.

The Terms of the Statute

Labor Law § 240(1) reads as follows:

§ 240. Scaffolding and other devices for use of employees.

1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed….

Who are Labor Law § 240(1) defendants under the statute?

To determine who is a Labor Law § 240(1) defendant, one should initially look at the first two sentences of the statute. Stated there are the key words "*[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work…*" By the plain language of this phrase, "contractors" are potential defendants, and "owners" are too, as are "their agents." On the other hand, there is an exception for owners of residential "one and two family dwellings who contract for but do not direct the work."[5]

The courts have issued many decisions as to who are "owners," "contractors" and "their agents," as discussed later in this article. This wealth of decisions reflects the great variety of parties who sue and are sued, with plaintiffs seeking to include themselves and their adversaries under the statute, and with defendants advocating just the opposite.

* *Mike Cordrey is an attorney with the firm of Herzfeld & Rubin, P.C. and is located in its New York, New York office.* *Law student Anthony Lee, who is also with Herzfeld & Rubin, P.C., is thanked for his research assistance.*

Who are Labor Law Section 240(1) defendants and plaintiffs?

Who is a Labor Law § 240(1) plaintiff under the statute?

To find from reading the statute whether a plaintiff is covered, start with the last phrase of the part of the statute which says "to a person so employed." Put another way, ask yourself "who is a 'person so employed'"? The answer is that the person covered under this section must be a paid worker providing labor for an enumerated task in the statute, at a specified location set out in the statute. The Labor Law § 240(1) worker's status, therefore, is defined by the statute, although not every worker connected to a construction site or working at a height can sue under this section.

According to the statute at lines 2-3, to be a covered person, the worker must be involved " …in the *erection*, *demolition*, *repairing*, *altering*, *painting*, *cleaning* or *pointing* of a *building* or *structure*". These are critical terms that will be discussed through the case law below. However, the suggested first step is to ask whether the plaintiff's activities fit into these categories. Simply put, if the worker who is seeking to sue under this section is not a worker performing the above activities at a building or structure, then he cannot sue under this section. This is the first statutory test of who is a § 240(1) plaintiff.

Case Law Interpreting Who is a Labor Law § 240(1) Defendant and Plaintiff

Discussed now is how the courts have treated types of defendants and plaintiffs and interpreted the above activities and locations.

Defendants

Fee Owners of Property or Buildings If a party is a titled owner of a property where one of the enumerated construction type activities on a building or structure is occurring, then they can be liable under the statute for a gravity-related injury, assuming that no other viable defenses are applicable.[6] Owners can be liable for such injury under the statute even if they are unaware of the repair or construction work going on, and even if they did not contract for the work to be done.[7]

Commercial Tenants In order for commercial tenants to be considered as "owners" under the statute, they must have control or supervision over the work being performed or some contractual connection with the work being done by the plaintiff.[8]

Individual Condo Owner or Coop Owner These individuals are not held responsible for Section 240(1) under the one and two family residential property exception.[9]

Condo Association or Cooperative Corporation Generally a condominium association cannot be an "owner" under § 240(1) for work done on individual units, as it is the unit owners who own those units in fee simple.[10] On the other hand, a cooperative corporation can be held liable under § 240(1) for work being performed in an individual apartment.[11]

"Contractors" Ever since the 1969 legislative amendments expanding responsibility to include "owners" and "contractors," courts have used the legislative history language to define "contractors" to mean "general contractors."[12] Whether other contractors are liable under the section follows from the analysis provided in case law as to "agents" (see discussion below), or from whether the contractor for all intents and purposes was acting as a general contractor, despite the nomenclature with which that contractor is referred to in a contract or at the site.

"Construction Manager" In *Walls v. Turner Construction Co.*,[13] the Court of Appeals set forth four factors to consider as to whether a construction manager should be considered an "owner's agent or general contractor" under the statute: (1) the specific contractual terms creating agency, (2) the absence of a general contractor, (3) the construction manager's duty to oversee the construction site and the trade contractors, and (4) the construction manager representative's acknowledgment that his organization had authority to control activities at the work site and to stop any unsafe work practices.

"Agents" The test of whether an entity is an owner's agent under § 240(1) is whether the agent has the right to supervise and control the work that the plaintiff is performing, and the power to enforce safety standards.[14]

Plaintiffs

Whether a plaintiff will be considered protected by § 240(1) can be a function of job position, nature of work, timing of work, and/or the plaintiff's location at the time of injury. Of course, the extent of a fall of a worker or object, or the effect of gravitational force, can be important as well. To aid evaluation of whether a plaintiff should be held to be not covered by the statute, this article will now overview enumerated activities under § 240(1), the significance of work locations, and gravity-related risk. Following that is a discussion of several types of plaintiffs who are

susceptible to being excluded from the statute's scope.

Case law defining who is a plaintiff under the enumerated activities of the statute

Erecting Many Labor Law 240 cases involving new construction of a building implicitly come under the statutory phrase "erecting." Sometimes, less overt activities are deemed to be "erecting" on a job site, such as compiling a punch list.[15] Other cases have found that certain assembling activities are not covered. In *Hodges v. Bolands Excavation and Topsoil, Inc.*,[16] the plaintiff was working to assemble a power screen to be used to screen gravel. At the time of his accident, he was connecting that screen to an optional chute, and he fell from the front of a payloader. The court held that this was not "erecting" for purposes of the statute.

Demolition As with erecting, whether a plaintiff's work qualifies as demolition is not often disputed. However, there can still be an opportunity to dispute liability upon other considerations. *Amato v. State*[17] is an example. In that case, the plaintiff was standing at ground level and was hit by a falling brace which was an integral part of the structure he was involved in demolishing. As such, the brace was neither the kind of falling object nor failed safety device that could support a § 240(1) claim.

Repairing and Altering What constitutes repairing and altering are some of the most litigated definitions. Activities that are found to be "routine maintenance" by the courts are not repairs or alterations.[18] Merely replacing parts in a non-construction, non-renovation setting is routine maintenance rather than repairing, and not actionable under § 240(1).[19] If a part being replaced in a repair is for a device that is not malfunctioning or inoperable, a court is more likely to find it to be "routine maintenance" not covered under the statute.[20]

Joblon v. Solow[21] remains current Court of Appeals guidance for what constitutes an "alteration."[22] The Court found that altering "requires making a significant physical change to the configuration or composition of the building or structure."[23] In *Joblon*, the worker fell from a ladder where he was running an electric line through a concrete wall. He had to drill a hole in that wall as well as attach electrical lines to the building. The Court held this to be an alteration.[24] The Court also stated that the mere hammering of a nail into a telephone pole would not be enough to characterize it as an alteration.[25]

Painting As an enumerated activity listed in the statute, painting can give rise to a § 240(1) claim even when involving a structure other than a building.[26] Wallpapering is not painting and thus is not covered.[27]

Cleaning The fairly recent case of *Dahar v Holland Ladder & Mfg. Co.*[28] limits the reference of cleaning either to window washing of commercial buildings or multi-dwelling residential buildings, or else the cleaning must be related to some type of construction work. The even more recent Court of Appeals case of *Soto v J. Crew Inc.*[29] sustains this view, holding that dusting of a six foot high shelf in a retail store was not the type of "cleaning" that would trigger the statute, as this was "routine maintenance."

Earlier cases are still potentially relevant. A cleaner of windows of a third floor retail clothing store was held to be covered by § 240(1),[30] it being emphasized that this cleaning was not a truly domestic activity. On the other hand, long ago, a domestic employee who was cleaning a residential storm window was found not covered by the statute.[31] Likewise, a cleaner of windows of a cooperative apartment has been denied protection.[32] The claim of a handyman who was cleaning gutters at a home has been refused as well.[33]

Pointing This is a traditionally covered activity under the statute, as most pointing work is on the exterior of buildings and often at a height. For an illustrative case, see *Moniusko v. Chatham Green, Inc.*[34]

Case law defining an actionable accident location

To be eligible to sue as a plaintiff under the statute, generally the accident must occur at or nearby a building or structure.[35] The definition of a "building" is rarely challenged, but what constitutes a "structure" is often tested in the courts. The Court of Appeals defined a "structure" as "any production or piece of work artificially built up or composed of parts joined together in some definite manner."[36]

Examples of "structures" acknowledged as such by courts include an airplane,[37] a railroad car,[38] a truck under certain fact patterns[39] (though accidents on or near trucks are commonly not actionable[40]), a steel tank used in construction of a pumping station,[41] a landfill,[42] a power screen used to make sand,[43] and a pipeline.[44]

Locations and things held not to be either a building or structure include a flat highway or roadway,[45] a decorative disk being removed from a ceremonial canopy at a wedding,[46] a tree,[47] and a permanently installed stairway.[48]

Who are Labor Law Section 240(1) defendants and plaintiffs?

A plaintiff may have a weightier challenge when the accident involves a failure of a permanent building or structure, or a recently completed structure. Concerning the former, a foreseeability requirement is imposed by the First Department[49] and perhaps the Second Department,[50] and the Third Department at times has treated a permanent structure a non-actionable location altogether.[51] As for the latter, a notorious representative case is *Misseritti v. Mark IV Construction Co.*,[52] involving a collapsed completed fire wall. The plaintiff had been cleaning up at the end of a job, on ground level, next to the involved 22 foot high concrete wall that had been built during the construction project, with a scaffold next to it. The Court of Appeals considered this accident a type of peril a construction worker usually encounters on the job site, and not an elevation-related accident that § 240(1) was intended to guard against.[53]

Defining elevation-related risk

The Courts have struggled with what height differential is necessary for a fallen plaintiff to sue under § 240. Likewise, as to workers struck by falling objects, there has been much litigation about qualifications for a claim, with focus on types and weight of falling objects and what height or gravitational force was involved.

Earlier cases seeming placed emphasis on the measure of the height differential, whether it was a worker or object that had fallen.[54] A minor height involvement of say a foot off the ground was not considered significant enough,[55] and not something for which the devices listed in the statute were meant to protect against.[56] In contrast, the Fourth Department in 2005 allowed the claim of a plaintiff whose foot came off a bar he was standing on, which was 40 inches above a scaffold platform.[57] In holding that a significant elevation risk existed, that court stated that "[t]he sufficiency of an elevation differential and fall from a height for purposes of Labor Law § 240(1) liability cannot … be reduced to a numerical bright-line test or automatic minimum/maximum quantification."[58] This was a quote from a Third Department case, ultimately decided in 2003, that permitted a claim after a fall from a height of merely 15 to 16 inches.[59] At least two articles in the New York Law Journal in that era pointed out and annotated the inconsistencies in court rulings about height differentials.[60]

In more recent cases[61] such as *Runner v New York Stock Exchange*,[62] the Court of Appeals has evaluated sufficiency of elevation related risk not so much by way of measured height distances. Rather, the Court has concentrated on what gravitational force directly or indirectly causes an injury, and whether that force should have been better secured by the devices listed under the statute. While falls from a miniscule height by a worker are still good candidates for a dismissal, the present emphasis with falling object cases in particular is the extent of the force that results from the action of gravity on an object, force being a function of object weight, among other things.

Another example of Court of Appeals focus on gravitational force rather than height differential, in falling object cases, is *Wilinski v. 334 East 92nd Housing Development Fund Corp.*[63] In *Wilinski*, two vertical pipes rose from the floor to a height of about ten feet. Debris from a nearby wall that was being demolished hit the pipes, causing them to topple over and strike the plaintiff. The fact that the pipes were footed at the same level as the plaintiff did not itself support a defense. Moreover, the involved height differential could not be described as de minimis given the amount of force the pipes were able to generate.

Potentially invalid Labor Law plaintiffs

Presented now is a listing of plaintiffs who tend to be denied § 240(1) coverage, given their job positions, the nature of their work, and/or the timing of what they were doing.

Estimators and consultants on site before construction begins An estimator who is injured while evaluating pricing for proposed repair work, before a contract is executed, is not covered by § 240(1). That was the result in *Karaktin v. Gordon Hillside Corp.*,[64] where the plaintiff was engaged in measuring heating ducts in order to prepare a layout for the building's heating system, as part of an estimate of repairs. This kind of task was not considered an enumerated statutory activity.

That outcome was also reached in *Gibson v Worthington Division-of-McGraw-Edison Co.*[65] In that case, the defendant sought roof repair estimates from the plaintiff's employer. The plaintiff design engineer went to defendant's building for the purpose of inspecting the damage. While he was being shown the damaged area by defendant's maintenance supervisor, the roof gave way and plaintiff was injured. The Court of Appeals emphasized that the plaintiff's employer

was merely a potential bidder, and thus the plaintiff was not "employed" within the meaning of Labor Law sections including § 240(1). "Accordingly, plaintiff was not within the class of workers that those statutory provisions were enacted to protect."[66]

The Court of Appeals addressed an analogous matter in *Martinez v. City of New York*.[67] The plaintiff was providing asbestos inspection services at a school building. He was attempting to measure a pipe which ran to a height of eight or nine feet. To reach the pipe, the plaintiff climbed onto a desk and grasped the top of the closet to lift himself higher, and then fell and was injured. In concluding that the plaintiff was not "employed," it was emphasized that no enumerated activity was underway, and any future remedial work would be conducted by a different business. Moreover, the Court refused to deem plaintiff's work to be an "integral and necessary part" of a larger project.[68]

Volunteers It is settled that a volunteer worker is not a person "employed" to whom § 240 can apply. A case representative of this is *Whelen v. Warwick Valley Civic & Social Club*.[69] The plaintiff was injured in a fall from a defective ladder while working voluntarily and without pay in the construction of a storage owned by the defendant civic and social club, of which he was a member. In affirming the Appellate Division's dismissal, the Court of Appeals acknowledged that the Labor Law defines an individual "employed" as including one who is "permitted or suffered to work" (s 2, subd. 7). However, an "employee" is defined as "a mechanic, workingman or laborer working for another for hire" (s 2, subd. 5). Consequently, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure, and, that he was hired by someone, be it an owner, contractor or their agent. Therefore, a volunteer who offers his services gratuitously cannot claim the protection afforded by section 240.[70]

Pedestrians Plaintiffs who are not employed at a construction site, who happen to become injured while walking at or near one, are not entitled to relief under § 240. Accordingly, a plaintiff cannot rightfully contend that a defendant's common law duty of care includes a nondelegable duty imposed by § 240.[71]

Workers at job sites closed for the day *Ferenczi v. Port Auth. of N.Y. & N.J.*[72] involves the claim of an employee who was injured fairly soon after project work had ended for the day. As he was about to depart the site, he realized that he did not have his cell phone. Figuring it may have been on an elevated walkway where he had worked earlier, he climbed up there and retrieved it. He then lost his footing and fell from the walkway. In dismissing the case, the Second Department emphasized that the plaintiff was not engaged in an enumerated activity at the time of his accident. While one should not "isolate the moment of injury,"[73] here, the injury occurred after the completion of any work that conceivably could have been covered under § 240.

Workers on lunch break Treatment of claims arising during lunch breaks is somewhat unsettled, with variables including what appellate department is involved and the function of the accident location. As explained in the present PJI 2:217 Comment, the Second Department has held that an injury occurring during a worker's lunch break is not within the coverage of § 240(1),[74] albeit it entertained a § 241(6) cause of action for a lunch break accident on a later occasion, without discussing the issue.[75] Moreover, the First Department has held that Law § 240(1) applied to a worker who fell from a sidewalk bridge after the parapet wall collapsed during his lunch break.[76] That court stressed that the sidewalk bridge was used as a staging area and for storing equipment and mixing cement. Additionally, the Third Department has recognized a § 240(1) cause of action for injuries occurring when the plaintiff was leaving the work area for a lunch break.[77]

Installers of draperies Plaintiffs of this kind generally do not have a legitimate claim under § 240, because their work is typically not an enumerated activity. For example, in *Wormuth v. Freeman Interiors*,[78] the work was held to not be alteration, as it does not entail a significant physical change to the configuration or composition of a building or structure.

Installers of wallpaper For the same reason, these types of plaintiffs usually do not have valid § 240 claims either.[79]

Tree installers and trimmers With these types of plaintiff, the liability picture is cloudier. The fact that trees are installed or removed as part of a construction project can be enough for § 240(1) to be triggered.[80] However, § 240(1) does not apply to tree installation done in a separate phase from construction work or merely for cosmetic purposes outside a building, or to trimming that is part of "routine maintenance." See and

compare, *Rogers v. C/S Assoc., Ltd.*,[81] *Rivera v. Santos*,[82] and *Gavin v. Long Island Lighting Corp.*[83]

CONCLUSIONS

The tides of who are viable parties under § 240(1) ebb and flow regularly. For now, this article and the framework below may help you identify them.

Questions to ask for determining who is a Labor Law 240(1) defendant

-Was the defendant an owner, general contractor, or an agent of the owner such as a construction manager or managing agent?

-If it was one of these parties, did it control and supervise the work of the plaintiff and have the authority to stop unsafe practices, and if not, who did? If so, the defendant can be found liable under the statute, and an owner need not even control and supervise the plaintiff to be found liable.

-If the defendant allegedly was an owner or person in possession and control of the property, ask about what title or property interest existed as to the accident location, and whether the defendant contracted for the work being done, knew about it, or controlled it. Was the defendant a lessee, lessor, fee owner, individual coop owner, cooperative corporation, individual condo owner, or condo association? Each of these questions will help in determining if the defendant was a viable "owner" under the statute.

Questions for who is a Labor Law 240(1) plaintiff

-Was the plaintiff performing one of the activities defined under the statute?

-Did the plaintiff's status or activities preclude a claim under this section?

-Did the plaintiff fall from a significant height, or did an object fall on the plaintiff due to a significant force of gravity that could have been prevented by one of the safety devices listed under the statute, such as scaffolds, ladders, pulleys, etc.?

-Was the plaintiff working on a "building," a "structure," or a "completed structure" or "excavation below grade" at the time of the injury?

Obtaining answers to these questions can help to define who should or should not be a party in a § 240(1) case.

[1] *Runner v New York Stock Exchange*, 13 NY3d 599, 895 NYS2d 279 (2009)

[2] See the historical analysis by the Court on the issue of the use of the words absolute versus strict liability in *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 771 NYS2d 484 (2003)

[3] New York Pattern Jury Instruction (3rd Ed.) Section 2:217 Comment

[4] See *Koenig v Patrick Constr. Corp.*, 298 NY 313 (1948)

[5] Analysis of this exception alone could be the subject of a treatise. Simply put, this exception applies as defined to "one or two family owners of a residential property where they contract for but do not control the work." Property owned but rented out for profit does not trigger the exception. A person developing a one or two family property which they will not reside in but are just developing to sell does not gain the benefit of the protection of this section either. See, generally, *Nudi v. Schmidt*, 63 AD3d 1474, 882 NYS2d 731 (3d Dept 2009); *Parnell v. Mareddy*, 69 AD3d 915, 897 NYS2d 108 (2d Dept 2010). Editors' Note: For more background about the homeowner's exception, see the article of Vincent Pozzuto and Paul Zola in this publication.

[6] *Spagnuolo v. Port Authority of NY and NJ*, 8 AD3d 64, 778 NYS2d 23 (1st Dept 2004); see also *Durando v. The City of New York*, 33 Misc 1231(A), 941 NYS2d 537 (Sup Ct Kings Co. 2011)

[7] In *Sanatass v. Consolidated Investing Co., Inc.*, 10 NY3d 333, 858 NYS2d 67 (2008), the Court of Appeals reaffirmed that lack of knowledge by a building owner of a tenant's hiring of a contractor to do alteration work is not a sufficient defense to a deny plaintiff summary judgment on a § 240(1) claim. See also *Morales v. D and A Food Services*, 41 AD3d 352, 839 NYS2d 464 (1st Dept 2007), reversed 10 NY3d 911, 862 NYS2d 449 (2008). But cf *Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46,781 NYS2d 477 (2004), where the Court of Appeals found an owner not liable under § 240(1) where a Public Utility Law statute required the owner to allow access to cable service companies to a building, and the owner had no knowledge or control as to the plaintiff worker, who was injured while servicing a cable box on the exterior of the building when his ladder bent.

[8] See for instance *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008), where a tenant who contracted with a plaintiff's employer to install siding on a building was held to be an owner. On the other hand, in *Ferjuckaj v. Goldman Sachs & Co.*, 12 NY3d 316, 880 NYS2d 879 (2009), where the tenant had not taken possession of the premises, and had not contracted with the plaintiff's employer (a cleaning company hired by the landlord) to do the work plaintiff was doing when injured, it was held that the tenant was not an owner; the plaintiff had fallen off a desk while cleaning the interior portion of a window.

[9] See footnote 5 above. See also *Tumminello v. Hamlet Dev Co.*, 255 AD2d 575, 681 NYS2d 78 (2d Dept 1998), where a dismissal was granted for an individual condo owner who had not exercised control or supervision over the work, and *Brown v. Christopher Street Owners Corp.*, 211 AD2d 441, affd 87 NY2d 938 (1996), where an individual coop owner not held not liable under § 240(1).

[10] See *Guryev v. Tomchinsky*, 20 NY3d 194, 957 NYS2d 677 (2012). See also *Mangiameli v Galante*, 171 AD2d 162, 164, 574 NYS2d 842 (3d Dept 1991) (condominium association is not an owner where it did not own the property upon which plaintiff was to

perform his work, and there was no allegation that the association had either the authority to contract with plaintiff's employer to perform the work or the right to control the work).

[11] *DeSabato v 674 Carroll St. Corp.*, 55 AD3d 656, 868 NYS2d 209 (2d Dept 2008)

[12] In *Haimes v. New York Telephone Co.*, 46 NY2d 132, 412 NYS2d 863 (1978), the Court of Appeals observed that "the Legislature minced no words, referring expressly to both section 240 and section 241, its stated purpose in redrafting these statutes was to fix ultimate responsibility for safety practices where such responsibility actually belongs, on the owner and general contractor."

[13] 4 NY3d 861 (2005)

[14] See *Temporino v. DRA Inc.*, 75 AD3d 543, 904 NYS2d767 (2d Dept 2010); *Kittlestad v. Losco Group, Inc.*, 92 AD3d 612, 939 NYS2d 382 (1st Dept 2012); *Hooper v. Anderson*, 157 AD2d 939, 550 NYS2d 196 (3d Dept 1990)

[15] *Griffin v. New York City Transit Auth*, 16 AD3d 202 791 NYS2d 98 (1st Dept 2005)

[16] 24 AD3d 1089, 807 NYS2d 421 (3d Dept 2005)

[17] 241 AD2d 400, 660 NYS2d 576 (1st Dept 1997)

[18] *Smith v. Shell Oil Co.*, 85 NY2d 1000, 630 NYS2d 962 (1995). The cases defining what is a repair or alteration (activities covered) under the statute versus routine maintenance (not covered) are not always consistent or easy to reconcile. For instance, in *Riccio v. NHT Owners, LLC*, 51 AD3d 897, 858 NYS2d 363 (2d Dept 2008), replacing an elevator door track was found to be a repair and not routine maintenance. In *Munoz v. DJZ Realty, LLC*, 5 NY3d 747, 800 NYS2d 866 (2005), changing a billboard sign on top of a building was held not to be an "alteration." Changing of an elevator cable, in absence of evidence that the elevator was inoperable, was held to be ordinary maintenance and not a repair, in *Scaglione v. Riverbay Corp.*, 279 AD2d 254, 719 NYS2d 37 (1st Dept 2001). Injury to an electrician while replacing a switch for a rooftop air conditioner was held to be a "repair" of a fixture that had become part of the building for purposes of 240(1), in *Franco v. Jemal*, 280 AD2d 409, 721 NYS2d 51 (1st Dept 2001). A worker who fell off a ladder while replacing 50-75 feet of beverage supply lines was covered under 240, as his work was considered an alteration or repair; see *Lang v. Charles Mancuso & Sons, Inc.*, 298 AD2d 960, 747 NYS2d 663 (4th Dept 2002). Finally, in *Machado v. Triad III Associates et al.*, 274 AD2d 558, 712 NYS.2d 145 (2d Dept 2000), a night watchman injured in a collapse of a sidewalk bridge he was cleaning was held to be engaged in routine maintenance, unrelated to any construction or renovation.

[19] See *Scaglione v. Riverbay Corp*, 279 AD2d 254, 719 NYS2d 37 (1st Dept 2001), discussed in the footnote immediately above.

[20] See *Stadmuller v. Met Life Ins. Co.*, 271 AD2d 361, 707 NYS2d 158 (1st Dept 2000); *Goad v. Southern Elec. Intern. Inc.*, 263 AD2d 654, 693 NYS2d 301 (3d Dept 1999)

[21] 91 NY2d 457, 672 NYS2d 286 (1998)

[22] Editors' Note: For more background about altering, see the article of Nicholas Cardascia and Ourania Sdogos in this publication.

[23] *Id.*, 91 NY2d at 465

[24] On remand after the case was certified to the Court of Appeals, the district court found that defendants had presented questions of fact as to the proximate cause of the accident and so summary judgment was denied to plaintiff on the 240(1) claim; see *Joblon v. Solow*, 23 F Supp2d 411 (SDNY 1998).

[25] See also Temkin, B, "New York Labor Law Section 240; Has it Been Narrowed or Expanded by the Courts Beyond the Legislative Intent?," 44 N.Y.L. Sch. 45 (2000) at footnote 127 and accompanying text.

[26] *Cornacchione v. Clark Concrete Co Inc.*, 278 AD2d 800, 723 NYS2d 572 (4th Dept 2000)

[27] See *Schroeder v. Kalenek Painting*, 7 NY3d 797, 821 NYS2d 804 (2006)

[28] 18 NY3d 521, 941 NYS2d 31(2012)

[29] 21 NY3d 562, 976 NYS2d 421 (2013). Editors' Note: For more background about cleaning, see the article of Ross Masler in this publication.

[30] See *Williamson v. 16 West 57th St. Co.*, 256 AD2d 507, 683 NYS2d 548 (2d Dept 1998)

[31] See *Connors v. Boorstein*, 4 NY2d 172, 173 NYS2d 288 (1958)

[32] See *Brown v. Christopher Street Owners Corp.*, 87 NY2d 938, 641 NYS2d 221 (1996)

[33] See *Beavers v. Hannafin*, 88 AD2d 683; 450 NYS.2d 905 (3d Dept 1982)

[34] 3 Misc3d 1110(A), 787 NYS2d 679 (Sup Ct, Kings Cty 2004)

[35] See *D'Alto v. 22-24 129th St, LLC*, 76 AD3d 503, 906 NYS2d 79 (2d Dept 2010)

[36] *Lewis-Moors v. Contel of New York Inc.*, 78 NY2d 942, 573 NYS2d 636 (1991)

[37] See *Rooney v. Port Authority of NY and NJ*, 875 FSupp 253 (EDNY 2005)

[38] See *Gordon v. Eastern Ry. Supply*, 82 NY2d 555, 606 NYS2d 127 (1993)

[39] See *Hutchins v. Finch, Pruyn & Co*, 267 AD2d 809, 700 NYS2d 517 (3rd Dept 1999)

[40] Generally, drivers or workers on trucks delivering materials or taking materials from work sites are not covered under § 240(1) if they are merely alighting or descending from the truck. Those cases where truck related accidents have been covered under § 240(1) are either where the truck itself was acting as an elevated platform that the worker fell from, or where the load of materials on the truck required some type of hoisting device listed in the statute to safely move material from the ground to the truck, or from the truck to the ground. In *Burgos v. Group Management Inc.*, 271 AD2d 314, 706 NYS2d 108 (1st Dept 2000), a worker who fell from a metal platform attached to the back of a work van, while securing a rack on the roof of the van and dismantling scaffolding, was denied standing under § 240(1). In *Jacome v. State*, 266 AD2d 345, 698 NYS2d 320 (2d Dept 1999), there was no liability to a plaintiff hit with a metal plate being offloaded from a truck; unloading a truck is not an elevated risk merely because of a difference in elevation between the truck bed and the ground. Thus, unloading of concrete from a truck has been held to not be a covered type of elevated related hazard; see *Biafora v. City of New York*, 27 AD3d 506, 811 NYS2d 764 (2d Dept 2006). Further, a contractor employee injured while manually loading heavy rods into a truck has been found not to be a § 240(1) plaintiff; see *Vincent v. Dresser Industries*, 172 AD2d 1033, 569 NYS2d 878 (4th

Dept 1991); see also *Haines v. Dicks Concrete Co Inc.*, 84 AD3d 732, 922 NYS2d 514 (2d Dept 2011). Note also that highways are commonly found not to be structures. In *Dilluvio v. City of New York*, 264 AD2d 115, 704 NYS2d 550 (1st Dept 2000), the Court held that the work of placing cones on a roadway to block traffic as part of a repaving project did not involve a "structure," even if part of the roadway was an overpass. In *Vargas v. State*, 273 AD2d 460, 710 NYS2d 609 (2d Dept 2000), § 240(1) was held not applicable to a workman who fell from a truck to an elevated highway road, since that elevated highway was not considered a building or a structure; see also *Sciora v. New York State Dept of Transportation*, 226 AD2d 621, 641 NYS2d 37 (2d Dept 1996), and *Siragusa v. State of New York*, 117 AD2d 986, 499 NYS2d 533 (4th Dept 1986).

[41] See *Cabri v. ICOS Corp of America*, 240 AD2d 456, 658 NYS2d 646 (2d Dept 1997)

[42] *Bockmier v. Niagra Recycling Inc.*, 265 AD2d 897, 696 NYS2d 605 (4th Dept 1999)

[43] *Hodges v. Boland's Excavating & Topsoil Inc.*, 24 AD3d 1089, 807 NYS2d 421 (3d Dept 2005)

[44] *Covey v. Iroquois Gas Transmission System L.P.*, 218 AD2d 197, 637 NYS2d 992 (3d Dept 1996), aff'd 89 NY2d 952, 655 NYS2d 854 (1997)

[45] See *Rojas v. County of Nassau*, 210 AD2d 390, 620 NYS2d 438 (2d Dept 1994), and *Siragusa v. State*,117 AD2d 986, 499 NYS2d 533 (4th Dept 1986)

[46] See *Stanislawczyk v. 2 East 61st Street Corp*, 1 AD3d 155, 767 NYS2d 30 (1st Dept 2003)

[47] See *Crossett v. Wing Farm, Inc.*, 79 AD3d 1334, 912 NYS2d 751 (3d Dept 2010); see also Ehrlich, J., "Height Differentials Under Labor Law Section 240," N.Y.L.J. (07/08/04), and Vilensky, R., "Does Labor Law Section 240(1) Apply to Falls Below Ground," N.Y.L.J. (11/04/02).

[48] See *Monroe v. New York State Elec & Gas Corp.*, 186 AD2d 1019, 588 NYS2d 483 (4th Dept 1992), and *Mann v. Meridian Centre Assoc.*, 17 AD3d 1143, 794 NYS2d 272 (4th Dept 2005)

[49] See *Ortega v. City of New York*, 95 AD3d 125, 940 NYS2d 636 (1st Dept 2012)

[50] See *Shipkoski v. Watch Case Factory Assoc.*, 292 AD2d 587, 741 NYS2d 55 (2d Dept 2002)

[51] See *Espinosa v. Azure Holdings II, LP*, 41 AD3d 1058, 838 NYS2d 256 (3d Dept 2007), and *Avelino v. 26 Railroad Ave. Inc.*, 252 AD2d 912, 676 NYS2d 342 (3d Dept 1998)

[52] 86 NY2d 487, 634 NYS2d 35 (1995)

[53] Editors' Note: *Misseritti*'s effect is thought by many to be more limited in the wake of *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 935 NYS2d 551 (2011). For discussion about that and other background concerning collapsing walls and structures, including permanent structures, see the article of Leon Kowalski in this publication. For more background about what constitutes a building or structure, see the article of Catherine Everett in this publication.

[54] See e.g. the cases cited in *Runner v New York Stock Exchange*, 13 NY3d 599, 895 NYS2d 279 (2009)

[55] See *Rocovich v. Consolidated Edison*, 78 NY2d 509, 577 NYS2d 219 (1991), involving a 12 inch height differential from standing position to falling position.

[56] *Id.*; see also *Sousa v. American Re Fuel Co of Hempstead*, 258 AD2d 514, 685 NYS2d 279 (2d Dept 1999)

[57] *Mann v. Meridian Centre Assoc.*, 17 AD3d 1143, 794 NYS2d 272 (4th Dept 2005)

[58] *Id.*, 17 AD3d at 1145

[59] *Amo v. Little Rapids Corp.*, 301 AD2d 698, 701, 754 NYS2d 685 (3d Dept 2003)

[60] See Ehrlich, J., "Height Differentials Under Labor Law Section 240, N.Y.L.J. 7/08/04, and Vilensky, R., "Does Labor Law Section 240(1) Apply to Falls Below Ground," N.Y.L.J. 11/04/02

[61] For an excellent review of recent cases concerning elevation-related risk, see the article at 62 Syracuse L. Rev. 791 (2012) by Hon. John C. Cherundolo of Supreme Court, Onondaga County. Editors' Note: This publication has several articles devoted to this area as well, by Andrew Zajac and James O'Sullivan (especially as to falling objects), Adrienne Yaron (same), Marc J. Ackerman (falling workers), and Gary H. Abelson and Sanjeev Devabhakthuni (elevation-related risk generally).

[62] 13 NY3d 599, 895 NYS2d 279 (2009)

[63] 18 NY3d 1, 935 NYS2d 551 (2011)

[64] *Karaktin v. Gordon Hillside Corp.*, 143 AD2d 637, 532 NYS2d 891 (2d Dept 1988)

[65] 78 NY2d 1108, 578 NYS2d 127 (1991)

[66] *Id.*, 78 NY2d at 1109

[67] 93 NY2d 322, 690 NYS2d 524 (1999)

[68] *Id.*, 93 NY2d at 326

[69] 63 AD2d 646, 404 NYS2d 643 (2d Dept 1978), affd 47 NY2d 970, 419 NYS2d 959 (1979)

[70] See also Torres v. Perry Street Development Corp., 104 AD3d 672, 960 NYS2d 450 (2d Dept 2013); *Alver v. Duante*, 80 AD2d 182, 439 N.Y.S.2d 501 (3d Dept 1981).

[71] See *Camillo v. Olympia & York Properties Company*, 157 AD2d 34, 44, 554 NYS.2d 532 (1st Dept 1990) (pedestrian struck by falling construction debris)

[72] 34 AD3d 722, 826 NYS2d 329 (2d Dept 2006)

[73] *Id.*, 34 AD3d at 724, quoting from *Prats v. Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882, 768 NYS2d 178 (2003)

[74] See *Keenan v. Just Kids Learning Ctr.* 297 AD2d 708, 747 NYS2d 393 (2d Dept 2002)

[75] See *Brown v Brause Plaza, LLC*, 19 AD3d 626, 798 NYS2d 501 (2d Dept 2005)

[76] See *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 802 NYS2d 41 (1st Dept 2005)

[77] See *Kouros v State*, 288 AD2d 566, 732 NYS2d 277 (3d Dept 2001)

[78] 34 AD3d 1329, 824 N.Y.S.2d 855 (4th Dept 2006)

[79] See e.g. *Schroeder v. Kalenek Painting*, 7 NY3d 797, 821 NYS2d 804 (2006)

[80] *Lombardi v. Stout*, 80 NY2d 290, 590 NYS2d 55 (1992)

[81] 273 AD2d 523, 708 NYS2d 524 (3d Dept 2000)

[82] 35 AD3d 700, 827 NYS2d 222 (2d Dept 2006)

[83] 255 AD2d 551, 681 NYS2d 87 (2d Dept 1998)

The views expressed herein are those of the author, not those of the Herzfeld & Rubin, P.C. firm or the Defense Association of New York.

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The Butterfly Effect and Labor Law § 240 Causation

JULIAN D. EHRLICH *

Pursuant to the storied "butterfly effect," a small action can set in motion a reaction that eventually leads to a large consequence far away. In the classic example, a butterfly flaps its wings in China ultimately causing a hurricane on the other side of the world.

Perhaps sensing favorable winds in New York courts and the chance for a golden ticket to strict liability, plaintiffs' attorneys have been emboldened to make attenuated arguments that § 240 applies to injuries resulting from causes ever more remote from classic falling worker and falling object scenarios.

A plaintiff asserting § 240 must prove that the statute was violated and that the violation was a proximate cause of both the accident and the injuries.[1]

The sole proximate cause defense has generated much case law and commentary. However, as will be examined in this discussion, there are other compelling aspects of the causal nexus requirement in § 240 analysis.

For example, a creative plaintiff's attorney recently attempted to expand the reach of the statute by arguing for a "zone of danger" rule under § 240.

In *Fernandez v. Abalene Oil Co., Inc.*, the plaintiff claimed § 240 protection where he slipped and fell on snow while running towards his coworker brother, an antenna installer, who had just fallen after climbing 82 feet up on a cellular tower to tighten bolts.[2] A number of steel bolts were dislodged as a result and "rained down" towards the plaintiff.

While a slip and fall in snow is not a typical § 240 scenario, the chain of events included both a falling worker and falling objects threatening but not striking the plaintiff.

However, the Second Department held that there is no "zone of danger" rule under § 240. Moreover, the Court stated "[T]o apply the 'zone of danger' rule to a cause of action alleging a violation of Labor Law § 240 (1) would in effect, extend the owner's non-delegable duty to a person who was not injured by the particular hazard the statute was designed to guard against."[1]

Furthermore, the Court dismissed the plaintiff's claim for psychological injuries as "not a direct consequence of a failure to provide adequate protection to him against a risk arising from a physically significant elevation differential."[2]

Fernandez is difficult to reconcile with a number of earlier Second Department cases, including Van *Eken v. Consol. Edison Co.,* where a worker was injured in the culmination of a series of coworkers' actions and avoidance of a falling object.[3]

In *Van Ecken*, the plaintiff and a coworker using a 100 pound jackhammer were in a 16 to 18 feet deep trench. A third coworker above them lost his grip on a piece of plywood he was lowering. In an attempt to deflect the falling wood, the coworker in the trench let go of his jackhammer which fell and struck the back of the plaintiff's legs.

The Court held that the risk that a worker might be injured by nearby machinery as a consequence of efforts by a coworker to avoid a falling object was not so extraordinary as to constitute a superseding cause.[4]

On first blush, one differentiator between these two cases which might justify the opposite outcomes could be that the worker in *Van Ecken* was actually struck by an object. However, the Courts have increasingly found statutory protection for workers whose injuries are caused not by objects striking them but rather where their injuries are caused by avoiding falling objects or preventing falls.[3]

While the focus in *Fernandez* was on whether a duty existed to the plaintiff, the same Court in *Van Ecken* and other decisions involving risks caused by coworkers' actions have not focused on the existence of a duty but rather on whether the foreseeability of the risk constituted a superseding cause. [5]

However, a basic tenant of tort law cited from the time of Palsgraf to today that "absent a duty running to the injured person, there can be no liability

* *Julian D. Ehrlich is Senior Vice President Claims at Aon Construction Services Group.*

"however careless the conduct or foreseeable the harm." Foreseeability alone does not define duty – it merely determines the scope of duty once it is determined to exist."[6]

In the § 240 context, the Court of Appeals stated in *Gordon v. Eastern Railway Supply, Inc.*,[4] that "[d]efendants are liable for all normal and foreseeable consequences of their acts." However, the Court also recognized that "[a]n independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them."[5]

Thus, foreseeability is in play for both the duty and the causation elements of Labor Law § 240.

[1] *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).

[2] *Fernandez v. Abalene Oil Co., Inc.*, 91 A.D.3d 906, 938 N.Y.S.2d 119 (2d Dept. 2012), *appeal denied,* 19 N.Y.3d 809, 951 N.Y.S.2d 467 (2012). .

[3] *Reavely v. Yonkers Raceway Programs, Inc.*, 88 A.D.2d 561, 931 N.Y.S.2d 579 (1st Dept. 2013).

[4] 82 N.Y.2d 555, 562, 606 N.Y.S.2d 127 (1993).

[5] *Id.*

Cause and Effect

Determining the cause of an accident can be tricky.

When the cause of an accident is unknown, a defendant may defeat a plaintiff's summary judgment motion if there is a question, for example, as to whether a ladder fell as a result of rather than as a cause of the plaintiff's fall.[6]

Moreover, a plaintiff may not rely solely on the fact that he fell from a ladder to establish a violation of § 240 without evidence that the ladder's failure or inadequacy was a substantial factor in causing the fall and injuries.[7] Where a plaintiff falls off a ladder because he or she lost his or her balance and there is no evidence that the ladder was defective or inadequate, there is no liability under section 240.[8]

However, § 240 will apply where plaintiff loses his balance and falls because the ladder wobbles or is an inadequate device for the risks attendant with the type of task.9 When ladders or scaffolds fail for no apparent reason, there is a presumption that the device was inadequate.[10]

Of course, plaintiffs' attorneys have long sensed that job sites are target rich with potential contractor defendants and attempted to link losses with weak nexus to construction work. This is particularly true with motor vehicle accidents that take place in and around construction. However, the Appellate Divisions continue to dismiss claims where the job site furnishes the condition or occasion for the loss rather than the cause of it.[7]

Injuries

As in any personal injury action, plaintiff's claiming § 240 protection must not only prove that a violation caused the accident but also that all the injuries alleged were caused by the accident.

For example, in *Rice v. West 37th Group, LLC*,[8] the plaintiff was awarded judgment under § 240 and his estate claimed that as a result of injuries sustained in the fall, he was placed on a pain management program that eventually led to him accidently overdosing on medication two years later. The First Department found issues of fact as to whether the overdose was an extraordinary and unforeseeable intervening action as a matter of law precluded the defendants' summary judgment motion.

Similarly, in *Keane v. Cheslea Piers, L.P.*, the Court parsed out injuries caused by a violation of the statute from injuries caused by other factors in a series of accident events.[11] Relating particular injuries to a moment in a continuum of events in an accident may require use of medical and biomechanical experts.

[6] *Durkin v. Long Island Power Authority*, 37 A.D.3d 400, 830 N.Y.S.2d 242 (2d Dep't 2007) (issues of fact as to whether ladder shift was a subsequent effect or preceding cause of decedent's fall); *Costello v. Hapco Realty, Inc.*, 305 A.D.2d 445, 761 N.Y.S.2d 79 (2d Dep't 2003); *see also Potter v. New York City P'ship Hous. Dev. Fund Co.*, 13 A.D.3d 83, 786 N.Y.S.2d 438 (1st Dep't 2004) (plaintiff's motion denied where defendant presented a second accident version from the foreman and project manager, who testified that plaintiff told them at the site that he hopped from the ladder after hearing his knee crack while climbing down).

[7] *Hugo v., Sarantakos*, 108 A.D.3d 744, 970 N.Y.S.2d 245 (2d Dept. 2013) (section 240 dismissed where ladder did not move or slip or move and remained upright after worker fell from it); *Esteves-Rivas v. W2001Z/15CPW Realty, LLC*, 104 A.D.3d 802, 961 N.Y.S.2d 497 (2d Dept. 2007).

[8] *Gaspar v. Pace Unv.* 101 A.D.3d 1073, 957 N.Y.S.2d 393 (2d Dept. 2012); *Chin-Sue v. City of New York*, 83 A.D.3d 643, 919 N.Y.S.2d 870 (2d Dept. 2010); *Hugo* at 745, 970 N.Y.S.2d at 247.

[9] *DelRosario v. United Nations Fed. Credit Union*, 104 A.D.3d 515, 961 N.Y.S.2d 389 (1st Dept. 2013)(where live wire hit plaintiff in the face causing him to pull away).

[10] *Blake*, 1 N.Y.3d at 289 n.8.

Continued on page 59

Understanding The Recalcitrant Worker Defense

CHRISTOPHER RENZULLI* & NICHOLAS WHIPPLE**

Labor Law § 240(1) requires all contractors, owners and their agents engaged in erecting, demolishing or repairing a building or structure to furnish or erect such scaffolding, ladders, and other safety devices "as to give proper protection to a person so employed."[1] The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed."[2] The legislature intended that there would be "no burden upon a worker to guarantee his own safety."[3]

The statute imposes strict or absolute liability upon a contractor or owner who fails to provide safety devices to a worker at an elevated work site where the lack of such devices is a substantial factor in causing the worker's injuries.[4] The plaintiff's contributory negligence does not undermine a defendant's statutory liability.[5] Thus, a plaintiff who establishes a prima facie case of a statutory violation will typically succeed on his or her § 240(1) claim.

Labor Law § 240(1) defendants, however, may be able to relieve themselves of liability by asserting the recalcitrant worker defense. This affirmative defense is a complete bar to a plaintiff's recovery under the statute. Although defendants frequently invoke the defense, many find they are unable to overcome a plaintiff's § 240(1) claim due to stringent requirements that must be shown. As explained below, the respective departments in the Appellate Division have chosen to emphasize different aspects of the defense, making it more difficult for defendants to know which arguments to focus on. This article will explain the standard and history of the defense, while also providing insight into differences in its application among departments.

Standard For Defense

The recalcitrant worker defense "requires a showing that the injured worker refused to use the safety devices that were provided by the owner."[6] At least one court has identified three elements which comprise the affirmative defense: (1) an available and ready to use safety device; (2) a supervisor's immediate and active instruction regarding the use of the safety device; and (3) the plaintiff's knowing refusal to use the safety device.[7] Although the general rule is easily stated, courts have struggled to apply it in the years since its recognition. As a result, defendants who have asserted the defense have often found courts willing to strike it from the pleadings.

As the defense has developed since it was first recognized, it has become clear that the mere presence of safety devices somewhere at the job site is insufficient to establish the recalcitrant worker defense.[8] Nor will a general instruction to avoid an unsafe device or practice be adequate in establishing the defense.[9] The plaintiff-worker must deliberately refuse to use an available safety device provided by the owner or contractor.[10]

History Of Defense

The Court of Appeals has not addressed the recalcitrant worker defense directly in a number of years, but its early decisions on the defense have been instrumental in shaping the understanding of litigators and the lower courts. However, the decisions that the Court of Appeals has handed down illustrates that there is room for interpretation. For example, in Gordon v. Eastern Ry. Supply, Inc., the plaintiff was injured after he fell off a ladder while using a sandblaster to clean a railroad car.[11] Defendants established only that there was a scaffold available somewhere in the sand house and that plaintiff had attended several safety meetings that included specific warnings not to sandblast from a ladder. The defendant argued that the plaintiff was recalcitrant, because he had ignored repeated instructions to use a scaffold and not a ladder while performing the sandblasting work. In rejecting the recalcitrant worker defense, the Court of Appeals ruled that plaintiff's failure to comply with "an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices" is

* *Christopher Renzulli is a partner with Renzulli Law Firm, LLP, located in White Plains, New York.*

** *Nicholas Whipple is an associate with Renzulli Law Firm, LLP*

not the "equivalent to refusing to use available safe, and appropriate equipment," and that evidence of the instruction, by itself, does not create a question of fact to support a recalcitrant worker defense.[12] In essence, defendants needed to do more than provide general instructions; they needed to ensure that the scaffold was provided to plaintiff and not merely located somewhere on the jobsite.

Conversely, in Jastrzebski v. N. Shore Sch. Dist., the Court of Appeals affirmed the Second Department's acceptance of the recalcitrant worker defense.[13] In Jastrzebski, the plaintiff's supervisor instructed him not to use a ladder to perform his work. Instead, the supervisor directed the plaintiff to use a scaffold next to the plaintiff's worksite. As soon as the supervisor left, the plaintiff resumed using the ladder and was injured when he fell from it. The court reasoned that, unlike in Gordon, this case involved "more than an instruction to avoid using unsafe equipment or to avoid engaging in unsafe practices; rather, the plaintiff here refused to use the available, safe, and appropriate equipment."[14]

The Court of Appeals' reasoning reflected in these cases offers little guidance to litigants. Few would dispute that a worker is not recalcitrant when the proper safety device is not made available to him. The situation in Jastrzebski, however, where the scaffold was readily available and the instruction to use it immediately preceded the accident, falls on the opposite end of the spectrum. Unfortunately, many cases fall somewhere between these extremes and the Court did not provide much guidance for such cases in either opinion.

Appellate Division Approaches

In the wake of these two decisions, New York courts had a definition of the recalcitrant worker defense that was somewhat ambiguous. The courts of the Appellate Division have attempted to articulate more precise standards for the defense with mixed success. The First and Third Departments have issued opinions which emphasize standards which the Court of Appeals has not appeared to give much scrutiny in its opinions. The First Department requires the worker to disregard an "immediate instruction" in order to establish the defense.[15] In Balthazar v. Full Circle Const. Corp., the defendants argued the worker was recalcitrant because he allegedly ignored an instruction to only use ladders owned by defendant.[16] The First Department held that "the alleged instruction was neither immediate nor specifically targeted at the ladder from which he fell," and that the plaintiff did "not become recalcitrant merely by disobeying a general instruction not to use certain equipment, if safer alternatives are not supplied."[17]

The other Departments have not emphasized the need for an immediate instruction to the same degree as the First Department. The Third Department has emphasized the need for the safety device to be visible to the worker before he can be deemed recalcitrant.[18] In one case, the Third Department found a supervisor's assertion that step ladders were available at the worksite insufficient to raise a triable issue of fact.[19] The court noted that the supervisor had neither provided the plaintiff with the necessary equipment nor indicated "where it was located or that it was in place."

It is worth noting that in both the First and Third Departments, the defendant must still establish that the worker deliberately refused to use the safety device, and that his refusal caused his injury. The tests regarding the immediacy of the instruction or the visibility of the safety devices are used to help determine whether or not the devices were truly available, or the deliberateness of a plaintiff worker's refusal to use the device. It is not entirely clear why the First and Third Departments have focused on these aspects of the test, but in neither Department does that focus alter the basic requirements as stated by the Court of Appeals.

The Second and Fourth Departments do not appear to have emphasized any particular element of the recalcitrant worker defense. The Second Department states that the defendant "must establish that the injured worker deliberately refused to use available and adequate safety devices in place at the work station."[20] Similarly, the Fourth Department has said that the "defendant must establish that plaintiff deliberately or purposely refused an order to use safety devices actually put in place or made available by the owner or contractor."[21] In both Departments, this general language suggests that litigants need not tailor their arguments to specifically address concerns of visibility or immediate orders.

An Alternative Defense To Keep In Mind

As discussed above, there are stringent requirements to be met before the recalcitrant worker defense is successfully raised. But litigants should be aware of an alternative defense that could potentially be raised which carries with it a lower burden in the context of

Labor Law § 240(1) claims. In order for liability to attach to a defendant under a § 240(1) claim, the plaintiff must show not only that the statute was violated, but also that the violation was a proximate cause of the injury.[22]

Most factual scenarios which invoke the recalcitrant worker defense involve a plaintiff who consciously chooses to disregard repeated instructions by their employer. But even in cases where the recalcitrant worker defense is not raised, the Court of Appeals has held "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability."[23] Indeed, the controlling question is not whether plaintiff was recalcitrant, but whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of his accident.[24] Thus, litigants may be able to get a claim dismissed (or at least raise an issue of material fact) without raising the recalcitrant worker defense when the proximate cause prong of Section 240(1) has not been fulfilled.[25]

Unlike the recalcitrant worker defense, this sole proximate cause defense does not involve proving that plaintiff blatantly ignored repeated instructions or expressly disobeyed orders. Rather, the sole proximate cause defense focuses on the knowledge of the plaintiff that a device he is using is not proper for the work being performed, that there are other adequate safety devices available, and making an unreasonable choice to not use them.[26] This defense can also arise where the plaintiff was using a proper device, and then did something inappropriate that compromised his own safety.[27] Bear in mind, depending on the factual circumstances, the sole proximate cause defense may be more feasible than a recalcitrant worker position.[28]

CONCLUSION

Labor Law § 240(1) imposes a heavy obligation on owners, contractors and agents, made even heavier by the fact that a worker's comparative negligence will not excuse their liability. Although the recalcitrant worker defense can protect this class of defendants, its high and at times confusing standards has meant that many defendants could not avail themselves of the defense. Hopefully, this article has helped to illuminate the standard for the recalcitrant worker defense. Owners and contractors are reminded that compliance with Section 240(1)'s requirements, including supervision of workers to ensure they use the proper safety equipment, is a far surer way to avoid accidents and exposure under the statute.

[1] N.Y. Lab. Law § 240 (McKinney)

[2] Rocovich v. Consol. Edison Co., 78 N.Y.2d 509, 513, (1991); see also Quigley v. Thatcher, 207 N. Y. 66, 68 (1912); Koenig v Patrick Constr. Corp., 298 NY 313, 319 (1948).

[3] Lickers v. State, 118 A.D.2d 331 (4th Dep't 1986)

[4] Wallace v. Stonehenge Grp., Ltd., 1 A.D.3d 589 (2d Dep't. 2003).

[5] See Kouros v. State, 288 A.D.2d 566, 567 (3d Dep't 2001) ("A worker's contributory negligence, however, is not a defense to a Labor Law § 240(1) claim.")

[6] Jastrzebski v. N. Shore Sch. Dist., 223 A.D.2d 677, 679 (2d Dep't 1996).

[7] Gomez v. Preferred Rentals, 1997 WL 749389 (S.D.N.Y. 1997).

[8] Kaffke v. New York State Elec. & Gas Corp., 257 A.D.2d 840 (3d Dep't. 1999)

[9] Tennant v. Curcio, 237 A.D.2d 733, 734 (3d Dep't. 1997).

[10] Kouros v. State, 288 A.D.2d 566, 567 (3d Dep't 2001).

[11] 82 N.Y.2d 555 (1993),

[12] Id., at 557.

[13] 223 A.D.2d 677,678 (2d Dep't 1996).

[14] Id. at 680.

[15] Vacca v. Landau Indus. Ltd., 5 A.D.3d 119,120 (1st Dep't 2004) ("It is well settled in this Department that an immediate instruction is a requirement of the 'recalcitrant worker' defense.")

[16] 268 A.D.2d 96, 98 (1st Dep't 2000).

[17] Id. at 99.

[18] See Williams v. Town of Pittsburgh, 100 A.D.3d 1250, 1252 (3d Dep't 2012) (holding the recalcitrant worker defense requires proof that a safety device was available and visible at the work site and the employee deliberately refused to use it).

[19] Powers v. Lino Del Zotto & Son Builders Inc., 266 A.D.2d 668, 670 (3d Dep't 1999).

[20] Fitzsimmons v. City of New York, 37 A.D.3d 655, 657 (2d Dep't 2007); see also Akins v Central N.Y. Regional Mkt. Auth., 275 A.D.2d 911 (2000).

[21] Salotti v. Wellco, Inc., 273 A.D.2d 862 (4th Dep't. 2000); see also Stolt v. General Foods Corp., 81 N.Y.2d 918 (1993).

[22] See Kuntz v. Wnyg Hous. Dev. Fund Co., Inc., 104 A.D.3d 1337 (2d Dep't 2013); Blake v. Neighborhood Hous. Services of New York City, Inc., 1 N.Y.3d 280, 289 (2003) (finding that "an accident alone does not establish a Labor Law § 240(1) violation or causation").

[23] Robinson v. E. Med. Ctr., LP, 6 N.Y.3d 550, 554 (2006) (holding that "[p]laintiff's own negligent actions— choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work—were, as a matter of law, the sole proximate cause of his injuries").

[24] Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 40 (2004).

[25] See Navarro v. New York City Housing Auth., Index No. 2007/10 (Kings Co. Aug. 15, 2013) (unpublished) (plaintiff's motion for summary judgment on Labor Law § 240(1) denied where there was a question of fact regarding the availability of ladders).

[26] See Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 40 (2004).

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Use of Experts to Defend a Labor Law § 240(1) Claim

DAVID PERSKY* & BRADLEY J. CORSAIR**

In many cases involving Labor Law § 240(1),[1] the plaintiff will move for summary judgment on liability based on alleged violation of the statute. Defense counsel should anticipate the motion, and develop a factual and legal strategy as opposition. Use of an expert in an apt case can be an effective tool to defeat the motion and prevail at trial, or even to obtain a summary judgment of dismissal.

Even so, use of defense experts in § 240(1) litigation is less frequent than might be supposed. This article will discuss several cases, at nisi prius and appellate levels, in which experts were retained by one or more parties. By review of this kind, one develops an improved sense about when to engage an expert in a § 240 matter, and better recognition of shortcomings in a plaintiff's position.[2] Additionally, the tendencies of experts come to light.

For discussion about experts in general, we suggest reading the PJI 1:90 Comment. As the 1:90 instruction reminds us, expert opinion is permitted in a case requiring special knowledge or skill not ordinarily possessed by the average person. The opinion is expected to be based on facts the expert has come to obtain, or is asked to assume. However, it may be rejected where the true facts are different from those which formed its basis, or where it is not convincing.

In § 240 practice, an expert is a potential tool when facing even just one legal issue that could support summary judgment for either side. A classic and still important example is where the facts suggest a sole proximate cause defense; see e.g. Blake v. N.H.S. of New York City, Inc.,[3] and Weininger v. Hagedorn & Co.[4] ("a reasonable jury could have concluded that plaintiffs actions were the sole proximate cause of his injuries"). We often came across this issue in reviewing case law in the § 240 arena that involved experts. Accordingly, this issue is mentioned frequently in the balance of this article.[5]

Case Study One - A-Frame Ladder in a Closed Position

An expert's opinion can help establish that an adequate safety device was provided, but the plaintiff failed to use it properly, causing his accident. *Nalepa v. South Hill Business Campus, LLC*,[6] involving a fall from a closed A-frame ladder, is an instructive example of this. There, the plaintiff pipefitter was working at ground level in a pipe chase behind a wall in a bathroom, while his co-worker was working in the ceiling above. The co-worker called out to the plaintiff for assistance with tracing a water line, prompting the plaintiff to exit the pipe chase. When he entered the bathroom, he saw an opening in the ceiling, and an unopened A-frame ladder leaning against a bathroom wall beneath the opening. The plaintiff knew the ladder was not owned by his employer, but rather by the defendant. Still, the plaintiff decided to use the ladder, which was in the exact location that he needed to access the ceiling. The plaintiff began climbing it and when he was approximately five feet above the floor, the ladder began slipping straight out from the wall. The plaintiff fell and fractured his heel bone.

Both sides moved for summary judgment. In opposition to the plaintiff's motion, the defendant submitted an affidavit of a professional engineer. There is indication that this expert has had background in forensic engineering, investigation of building and/or structural failures, code violations, safety issues and construction practices. He opined that the subject ladder, had it been appropriately used in an open and locked position, was a stable and adequate safety device. This contradicted the plaintiff's claim of failure to give proper protection in violation of § 240(1). Based upon this proof, the court found that the defendant raised a triable question of fact as to the plaintiff's motion, and therefore denied summary judgment for alleged violation of § 240(1).

* *David Persky is a senior trial attorney with The Law Offices of Edward Garfinkel in Brooklyn, New York.*

** *Bradley J. Corsair is a trial attorney with The Law Offices of Edward Garfinkel in Brooklyn, New York. Mr. Corsair is also a member of the DANY Board of Directors, its Publications Committee, and its Education (CLE) Committee.*

The defendant used opinion of the same expert to advance its own motion. In this vein, the key was opinion that the plaintiff's actions in using this ladder in a closed, leaning posture, rather than the intended open position, was the sole proximate cause of the accident. In opposition, the plaintiff submitted an affidavit of an expert of his own choosing. This was to allege that a triable issue existed as to whether the presence of the ladder, under the surrounding circumstances, amounted to adequate protection. The plaintiff made the typical argument that a battle of experts as here should be left for jury resolution. However, the court emphasized that the plaintiff's expert's affidavit did not meaningfully rebut the position that the subject ladder -if used correctly in the open and locked position --would have provided proper protection. Nor did it sufficiently address whether the plaintiff's misuse of the ladder was the sole proximate cause of the accident.

The court's rejection of the plaintiff's expert's position shows that expert testimony should not be equivocal. Here, the plaintiff's expert did not definitively assert that the ladder, even if open and locked, would not have sufficed. Rather, he merely stated that "[w]hen the slippery nature of the floor is viewed in conjunction with the ladder's level of disrepair, *it is uncertain* whether the spreader alone, with little help from the base of the ladder, would have been sufficient to counteract these lateral forces."[7] The court considered the "it is uncertain" statement to amount to mere speculation, i.e. not an opinion at all on whether use of the ladder as intended would not have provided proper protection. Thus, the plaintiff's expert had not truly addressed the issue of the capability of this ladder to provide the safety that § 240(1) contemplates.

In contrast, the defendant's expert specifically expressed opinion to a reasonable degree of certainty that if this ladder had been opened and locked, it would have been adequate for the job at hand, and the plaintiff's misuse was the only reason he became injured. With the plaintiff having failed to provide genuine contradictory proof, the court found it established that the plaintiff had misused a suitable safety device, constituting the sole proximate cause of the accident. The defendant was therefore entitled to summary judgment.

Case Study Two-A-Frame Ladder in Closed Position, with Excuse

A different result can be expected where a plaintiff is unable to use a safety device with its intended setup, due to the physical setting of his work area. This was the case in *Leconte v. 80 East End Owners Corp.*,[8] where the plaintiff's use of a closed A-frame ladder was not a predicate for a sole proximate cause defense.

In *Leconte*, the plaintiff was injured in the course of his employment as an installer of security systems while tying cable wire to conduit piping in a boiler room. He needed a ladder to reach an area above a stairway landing where cable wire was to be placed. He claimed that he was given an eight-foot A-frame ladder by one of the building's employees. The plaintiff then purportedly tried to place the ladder in an open position on the landing, but realized it could not fit there. Consequently, the plaintiff resorted to putting the ladder in a closed position, footed on the landing and leaning against a wall. The landing was comprised of metal slats and thus a grid of gaps existed. While working on the ladder as such, the plaintiff felt it tilt to the left, as apparently one of the ladder's feet had fallen into a gap. The plaintiff fell with the ladder, sustaining injuries.

The plaintiff moved for partial summary judgment on § 240(1), which was denied by the motion court but granted on appeal to the Second Department. In support of his motion, the plaintiff submitted an affidavit of an expert said to be a certified site safety manager. She opined that the plaintiff was not provided with any fall protection in the form of a safety harness, tail line (lanyard), and lifeline. This expert added that a scaffold or a straight ladder with safety feet (shoes), if used in conjunction with a tight fitting firm / hard cover for the slatted stairway platform, would have provided proper fall protection. On the other hand, the involved A-frame ladder did not provide a safe means of vertical access to the plaintiff's working level, above the boiler room's stairway top landing and floor. Therefore, § 240(1) was violated.

In opposition, the defendants submitted an affidavit of a professional engineer apparently experienced with construction site safety, construction practices, and the Labor Law. This expert opined that with regard to § 240(1), there was "no evidence that the ladder was on the platform or that the aluminum ladder was damaged when it fell", the "steel slats provided a more than sufficiently hard surface" and "the alleged incident would not have occurred in the manner described by plaintiff."[9] Further, it was his opinion that the accident was caused by the plaintiff's "misplacement of the

ladder in an unsafe position where it could not be opened and then his causing it to tilt and fall by apparently leaning beyond the left rail of the ladder."[10]

The decision in the lower court refers to testimony that there was nothing available to cover the spaces on the platform, which would have obviated the need to keep the ladder footed directly on slats. There was also testimony that there were three other ladders available, without any discussion of whether any of those ladders would have been safe to use. The lower court ultimately denied both motions, concluding that neither side had demonstrated that the facts permit granting of summary judgment.

In reversing this outcome, the Second Department rejected the defendants' expert's position. "While the defendants' expert's affidavit suggests, with regard to the plaintiff's account of the facts, that the plaintiff may have been negligent in placing the closed A-frame ladder against the wall from atop the stairway landing in a manner that allowed a part of it to go through one of the gaps between the metal slats, 'the plaintiff's conduct cannot be considered the sole proximate cause of his injuries.'"[11]

Whereas *Nalepa* entailed misuse of an adequate ladder, *Leconte* depicts an inability to use one due to physical circumstances. A third scenario common in A-frame ladder cases is whether "another safety device was available, but went unused."[12] Attorneys defending such cases may wish to consider having expert opinion as to whether an alternative available ladder or other device would have provided adequate protection for the plaintiff, warranting summary judgment or a verdict on a sole proximate cause defense.

Case Study Three - Exploitation of a Plaintiff's Intoxication

In *Symonds v. 1114 Ave. of Americas, LLC*,[13] the plaintiff was standing on a 10 foot wooden A-frame ladder while welding pipes near a ceiling, when he fell and became injured. There were no witnesses to the incident. At his deposition, the plaintiff testified that the ladder slipped and wobbled a little bit and he lost his balance. He further testified that it felt like it twisted and that it moved from side to side. One would expect a court to consider this prima facie support for summary judgment for the plaintiff, who moved for that result.

In opposition, the defendants advanced an intoxication defense with several types of evidence. The proof included hospital records indicating that the plaintiff had consumed alcohol prior to the accident, and an affidavit of a co-employee who inspected the ladder after the accident, found there was nothing wrong with it, and put it back into service. There were also affidavits from two types of experts.

One expert was a toxicologist, who gave opinion based on the hospital records. Given a reported serum value of 105 mg/dl after assumptions about when drinking occurred and the plaintiff's weight, he concluded that the plaintiff consumed the equivalent of more than six standard size drinks. Even assuming that the plaintiff ate a heavy lunch, his blood alcohol level was greater than .07% when he fell. This arguably produced a significant degree of impairment of central nervous system function, e.g. difficulty in seeing clearly, willingness to take risks with disregard for personal safety, deficits in balance and coordination, slowed reflexes and cognitive response, and impaired judgment. All told, there was an issue as to whether plaintiff's intoxication was the sole proximate cause of his accident.

The other defense expert was reportedly a safety consultant fluent with OSHA, State and City codes. He opined that the A-frame ladder, with its horizontal braces fully extended, was a proper safety device for the job the plaintiff was performing. He noted that the plaintiff had gone up and down that ladder about 20 times on the day in issue. Moreover, since the plaintiff was working from the seventh step of a ten foot ladder, six to eight feet above the floor, there was no requirement for anyone to steady it or for it to be secured against sway. He referenced section 23–1.21(e)(3) of the New York State Industrial Code, which indicates that mechanical securing, or steadying by a person, is only required when work is being performed from a step ten or more feet above the footing. He further noted that the ladder was resting on a level concrete floor, and rubber safety feet are not required for an A-frame step ladder (only for straight and extension ladders). In addition, the plaintiff's reliance on 23–1.16 of the Industrial Code was misplaced; safety belts, harnesses, tail lines and lifelines are not required for a plaintiff working with an A-frame ladder at its seventh step.

The plaintiff's reply papers included an affidavit of a civil and environmental engineer. This expert called for extra protection given the nature of the work performed; the plaintiff was required to lean

over, and wore a welders hood that limited his vision. This supposedly warranted a ladder with non-skid treads, braced by someone holding it or by mechanical means. Without such extra protection, the ladder was prone to twist, slip and wobble, given the work the plaintiff had to do. Alternatively, this expert suggested a scaffold for this work.

In denying the plaintiff's motion, the court emphasized the documentary and defense toxicologist evidence that the plaintiff was intoxicated when the accident occurred. There was thus an issue as to the plaintiff's credibility, especially since the emergency room records indicate he told at least four medical personnel that he didn't recall how the accident happened, contrary to his deposition testimony. "This unexplained discrepancy raises an issue as to how the accident happened and as to whether in fact the ladder moved, twisted and slipped and thus caused plaintiff's fall, especially here where plaintiff was the only witness to the accident."[14]

We suspect the defense safety consultant opinion was important as well. By providing expert evidence that an involved device ordinarily provides a stable work setting, an argument that a plaintiff's intoxication caused his accident seems more compelling.

Case Study Four -Fall from a Form

Where a plaintiff uses an expert to attribute a fall to the absence of an adequate protective device, the opposing parties will frequently need to counteract with an expert of their own. *Miglionico v. Bovis Lend Lease, Inc.*[15] provides a good sense of what is expected from the defense side, albeit the defendants there did not prevail.

Miglionico involves a fall from a perimeter column form. The plaintiff and another carpenter were placing metal clamps around wooden column forms so the forms would not collapse when filled with cement. The clamps each weighed approximately 20 to 30 pounds, and were placed at 10 to 16 inch intervals from the bottom to the top of each form. To reach the upper portions of the column, the plaintiff and his coworker stood on the clamps they had already secured. When near the middle of a form, the plaintiff attempted to hand a clamp around the form to his coworker. He then fell to a wooden platform five stories below, as he was not wearing a harness, and no safety net or other safety device was in use.

The plaintiff's motion for summary judgment as to § 240(1) was supported by the same certified site safety manager referenced in our second case study above. This expert attested that the defendants' failure to provide safe elevation devices or personal fall protection "was a departure from good and accepted construction safety standards and a substantial factor in causing this accident."[16] Beyond obligation to provide a harness, lanyard, perimeter protection (netting or guardrails) or a secured ladder or scaffold, this expert opined that the defendants "had a non-delegable duty to provide Mr. Miglionico with . . . an appropriately 5,000 pound tested anchorage point."[17]

The defendants countered with the safety consultant who was a defense expert in our third case study above. He expressed that fall protection devices had been provided to all employees, and site managers had instructed employees to tie off to column rebar. Nevertheless, the Appellate Division majority perceived the motion opposition to be flawed. The defendants' expert had not overtly concluded that the accident would have been prevented, if the plaintiff had tied off to the column rebar and properly used all available safety equipment. Rather, "he stated only that 'there is no causation between the absence of [safety] railing and the plaintiff's fall.'"[18] The majority also stressed that the defendants had not shown that there was an adequate anchorage point to tie off a safety harness.

A lengthy dissent focuses on numerous lay affidavits submitted by the defendants, referring generally to numerous places where the plaintiff could have tied off. The dissent view was that such sufficed to create a triable issue as to the plaintiff's expert's conclusory opinion that there was no adequate anchorage point on which to tie off. Moreover, the dissent considered insufficient the plaintiff's expert's assertion that the defendants' duty included provision of an appropriately 5,000 pound tested anchorage point; "plaintiff's expert was not present at the scene of the accident, and her opinion that there was no appropriately tested anchorage point appears to be nothing more than speculation."[19]

"The devil is in the details" as the expression goes. Here the outcome might have been different if the defense expert had opined on all of the issues above, if that was feasible. A lesson is to be wary of bare conclusions or failure to address all elements of a claim or defense. The latter pitfall is also manifest in the next case below, but this time the plaintiff is the victim.

Use of Experts to Defend a Labor Law § 240(1) Claim

Case Study Five -Makeshift Scaffold

In *Olson v. Pyramid Crossgates Co.*,[20] the plaintiff mechanic was injured while installing temporary lighting in a vacant store space. To perform the work, the plaintiff had been provided a fourteen–foot stepladder, which he positioned near a suspended plywood platform. That platform had formerly been used to support air conditioning duct work. Its level was approximately the same as the second step from the top of the ladder, where the plaintiff had been standing to perform his work. Ultimately, the plaintiff decided to place his left foot on the platform to facilitate stringing the wire. The platform collapsed, causing him to fall and become injured.

Both sides moved for summary judgment. The lower court granted the plaintiff's motion, deeming the platform a "makeshift scaffold."[21] Since a collapsed safety device supports a prima facie liability case, the court's view of the platform as such device prompted its decision in the plaintiff's favor.

On appeal, the Third Department was able to deny the plaintiff's motion without lengthy analysis. It emphasized that the platform was furnished to support duct work, not as a safety device for the performance of the plaintiff's work. Since it was not intended as a safety device, its collapse standing alone did not amount to a § 240(1) violation.

More interesting, the plaintiff and his expert (background not identified) failed to establish an alternative § 240(1) theory, and to sufficiently contest the defense that adequate protection was provided. Strangely, the plaintiff conceded that his claim was totally unrelated to the furnished ladder, and was instead dependent on an alleged second elevation-related risk from use of the platform. However, neither the plaintiff nor his expert established that it was necessary to step on the platform, or that it obstructed the work, or that it wasn't feasible to move the ladder to complete the assignment. Consequently, "[a]s the platform was not furnished as a safety device for the performance of the work and since plaintiff has demonstrated no necessity to use it for that function, defendants were entitled to have the Labor Law § 240(1) claim dismissed."[22]

Olson serves as a reminder to stay watchful about whether a plaintiff's expert adequately addresses the element of proximate cause. Moreover, where the plaintiff has demonstrated proximate cause in a motion for summary judgment, a defense expert can help with contesting that issue, as our next case exemplifies.

Case Study Six -Use of Hoist

An expert can be useful to explain a complex construction process, and to recognize a defense that might not be seen absent the expert's insight. *Kropp v. Town of Shandaken*[23] provides a good illustration of this, in a summary judgment context.

In *Kropp*, the plaintiff was injured during a lowering operation. He was working at the bottom of a trench four to eight feet deep, connecting lengths of pipe brought to him by an excavator. The plaintiff was struck by an iron pipe measuring eighteen feet long and eighteen inches in diameter. Fittings had been attached to one end of the pipe, to enable connection with a narrower pipe. The resulting total weight was approximately 1,500 pounds. A "four way" device, i.e. a ring from which four chains with hooks were suspended, was used to lower the pipe. The ring was attached to the excavator's bucket, and the chains were hooked to slings that wrapped around the pipe. Somehow the pipe dropped as it was being moved. The parties debated the extent of the drop, why it occurred, and whether the hoisting equipment was adequate for the task at hand.

In moving for summary judgment, the plaintiff team presented a factual view that sufficed to support the motion. For starters, the plaintiff's testimony was that he was squatting in the trench with his back to the excavator, when he heard rattling chains and stood up. He then saw the pipe falling past the surface level of the trench, which struck him and pinned him briefly against a trench wall. According to an incident report, one of the chains had momentarily released. Additionally, a coworker observed that the pipe had dropped free of the hooks.

The plaintiff retained an expert who apparently has been a board-certified safety professional. He opined that the accident was caused by the use of improper hoisting equipment that failed to properly balance and secure the pipe, allowing it to slip unexpectedly in its bindings, drop downward at one end, and strike the plaintiff. He added that tag lines, hooks fitted with safety self-closing latches, and an eighteen–inch pipe clamp, among other things, should have been used.

This and the lay testimony established prima facie that the injury arose from an elevation-related hazard, and a lack of adequate safety devices that proximately caused the injury. This result was said to follow from

Runner v. New York Stock Exch., Inc. ,[24] discussed at length in other articles in this publication.

The defense camp likewise advanced its theme with a combination of lay witnesses and an expert. According to two fact witnesses, the plaintiff had signaled for the pipe to be moved, and it was lowered to the plaintiff's proximity. The plaintiff then put his hands on the pipe while at his waist level, to guide it into place. One end of the pipe then dropped downward about a foot, striking the plaintiff in the leg. These two witnesses also testified that the hooks were equipped with safety clips and did not detach from the slings, and that the pipe was still suspended from the chains and slings after the accident occurred. Further, one of them believed that the plaintiff caused the pipe to drop by pushing downward on it with his hands.

The defendants' expert is the same professional engineer referenced as in our first case study above. He opined that the hoisting mechanism was adequate and appropriate for the circumstances, and the accident occurred because the plaintiff altered the balance of the load by pushing on the pipe. The appellate court disregarded an aspect of the opinion that had assumed facts with no foundation in the lay evidence --i.e. the defendants' expert had asserted that the pipe had moved only laterally, though all other witnesses concurred that the pipe fell downward. Regardless, this expert's assertion that the hoisting equipment was appropriate for the task was accepted; it was legitimately predicated on his professional experience, and on his opinion that the plaintiff altered the balance of the pipe by pushing on it, based on witness testimony that the plaintiff had done so.

In concluding that the plaintiff's motion must be denied, the Third Department stressed, among other things, the conflicting expert opinions about the adequacy of the hoisting equipment. Issues of fact existed as to whether absence or inadequacy of a safety device proximately caused plaintiff's injuries.

Case Study Seven -Runner-esque Shift of Material and Equipment

A few weeks before this publication, the Appellate Division decided a case with facts reminiscent of the oft-discussed *Runner v. New York Stock Exch., Inc.*[25] However, unlike *Runner*, the plaintiff in this recent case has not obtained judgment as a matter of law. Rather, the defendant, aided by an expert, persuaded the Third Department to leave the liability determination for a jury.

In *Jackson v. Heitman Funds/191 Colonie LLC*,[26] the plaintiff was employed as a roofer by a contractor hired to replace a roof on a shopping center. He was injured when the handle of a roll carrier struck him as he was helping to unroll a roof membrane roll of 600 to 800 pounds. The carrier is a device used to dispense rolled roofing material. It consists of a horizontal steel pipe that is inserted through the membrane roll, and is supported at each end by a lifter, which includes a handle. This enables the material to be raised about 1 1/2 foot above the roof surface, so it can be handled with more ease. The accident occurred when the roll carrier allegedly shifted on the slippery roof, causing the membrane roll to drop. That in turn forced the handle to rapidly move upward and hit the plaintiff in the side of his head.

On appeal, it was determined that the plaintiff's injuries flowed directly from the force of the falling membrane roll on the handle. Additionally, the 1 1/2 foot drop was considered a significant elevation differential, given the substantial weight of the roll and the powerful force from its fall. Therefore, a safety device was required under § 240(1). Also to be decided, however, was whether absence of adequate safety protection proximately caused the injury. This, as we now discuss, was addressed by the parties with both lay and expert testimony.

The plaintiff contended that even if the roll carrier were considered a safety device, it was inadequate to safely hoist the membrane roll from the roof's surface. According to an assistant supervisor at the site, the roll carrier had slipped due to the icy surface there. The plaintiff also submitted an affidavit of a civil / structural engineer. In this expert's opinion, the slippery condition of the roof allowed the roll carrier to shift, causing it to come out of balance under the weight of the membrane roll. The carrier consequently failed to maintain the elevated weight in a stable position. He thus further opined that the carrier by itself was an inadequate device to maintain the roll in a stationary, stable, and elevated position, and so additional safety protection was needed. He added that the plaintiff's injuries were the direct consequence of the absence of such protection.

The plaintiff's proof justified judgment as a matter of law, and so the defendant probably would have lost the case but for its solicitation of expert involvement. The defendant opposed the plaintiff's motion with an affidavit of a civil engineer and registered roof

consultant, said to be experienced with the subject roll carrier device. He inspected the involved roll carrier, and concluded that it was an adequate safety device that did not fail, collapse or slip. Moreover, to his knowledge, there was no additional or alternative safety device that would have prevented the accident. This expert evidence created questions of fact as to whether the plaintiff's injuries were proximately caused by a lack of a protection required by § 240(1).

Thus, *Jackson* is another exemplar of the utility of an expert to advocate suitability of an uncommon safety device.

Case Study Eight -Use of Plaintiff's Injury to Dispute Liability

A physician can help oppose a plaintiff's liability position by opining that alleged injuries are not consistent with their ostensible causes. That happened in *Deshields v. Carey*.[27] There, the plaintiff claimed to have fallen from a height of ten to fifteen feet while installing siding. The base of the extension ladder he was using was said to have slipped, and the plaintiff purportedly landed on the ladder with one of his feet still on a rung.

A theory was that the ladder had retracted due to a failure to secure hooks. This was plausibly the plaintiff's fault, but could not be attributed to him with sufficient certainty. However, the defendant also pursued summary judgment with an affidavit of an orthopedic surgeon. This expert opined that the plaintiff suffered crush injuries to his foot, consistent with a pinching or crunching of this foot between two rungs of a ladder that had collapsed into itself. Moreover, the plaintiff did not have a type of fracture that is caused by a fall from a height.

Significantly, the Third Department found28 that it was not inappropriate to consider this doctor's opinion. This was despite protests that he was unqualified to offer opinion as to causation,29 and that his affidavit constituted circumstantial evidence.30

The Appellate Division ultimately concluded that the defense orthopedist's opinion was insufficient to establish that the plaintiff's actions, rather than the defendant's failure to comply with § 240(1) obligations, caused the accident. Still, *Deshields* evinces that physician opinion can help to support or oppose summary judgment, by inferring from injuries that an accident did not happen as claimed.

CONCLUSION

In this era of greater liability challenge and increasing awards, there is heightened need and justification for expert involvement. We hope our discussion of the foregoing case array has been instructive, including as to types of experts and issues they can address.

[1] § 240(1) provides, in part, that "[a]ll contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or painting of a building or structure shall furnish or erect, or cause to be erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The pattern jury instruction for § 240 is PJI 2:217. For an overview of bodily injury claims under the Labor Law in general, see PJI Div 2 G 7 Intro 2. The New York PJI was updated in December 2013.

[2] It is also helpful to be ready for the occasional mandate of expert testimony; see e.g. *Ortega v. City of New York*, 95 A.D.3d 125, 129, 940 N.Y.S.2d 636 (1st Dept 2012), where the First Department notes its requirement of expert testimony to establish foreseeability of collapse of a permanent structure. For a very recent example of impact of expert testimony in this realm, see *Garcia v. Neighborhood Partnership Hous. Dev. Fund, Co., Inc.*, 2014 NY Slip Op 00298 (1st Dept 2014); *Garcia* is discussed in the article of Leon Kowalski in this publication.

[3] 1 N.Y.3d 280, 291, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003)

[4] 91 N.Y.2d 958, 960, 695 N.E.2d 709, 710, 672 N.Y.S.2d 840, 841 (1998)

[5] Editors' Note: For more about sole proximate cause and especially the recalcitrant worker defense, see the article of Christopher Renzulli and Nicholas Whipple in this publication. As for proximate cause generally, see Julian Ehrlich's article in this publication.

[6] 39 Misc.3d 1231(A), 2013 WL 2249625 (Sup Ct, Broome Cty 2013)

[7] 2013 WL 2249625 at *4

[8] 27 Misc.3d 1217(A), 2010 WL 1779430 (Sup Ct, Queens Cty 2010), *rev'd* 80 A.D.3d 669, 915 N.Y.S.2d 140 (2d Dept 2011)

[9] 2010 WL 1779430 at *3

[10] *Id.*

[11] 80 A.D.3d at 671-672, quoting from *Rudnik v. Brogor Realty Corp.*, 45 A.D.3d at 829, 847 N.Y.S.2d 141; *Riffo– Velozo v. Village of Scarsdale,* 68 A.D.3d at 841, 891 N.Y.S.2d 418

[12] *Keenan v. Simon Property Group, Inc.*, 106 A.D.3d 586, 589, 966 N.Y.S.2d 378, 382 (1st Dept 2013)

[13] 2005 WL 831652 (Sup Ct, NY Cty 2005)

[14] 2005 WL 831652 at *6

[15] 47 A.D.3d 561, 851 N.Y.S.2d 48 (1st Dept 2008), on appeal from Sup Ct, New York Cty, 104786/03

[16] 47 A.D.3d at 562

[17] *Id.*

[18] 47 A.D.3d at 563

[19] 47 A.D.3d at 568

[20] 291 A.D.2d 706, 738 N.Y.S.2d 430 (3d Dept 2002)

Understanding The Recalcitrant Worker Defense

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[27] Editors' Note: For a few case studies illustrating how sole proximate cause positions have played out, see the article of David Persky and Bradley Corsair in this publication, regarding expert witnesses.

[28] Parenthetically, some view the recalcitrant worker defense as a category of the sole proximate cause principle, as so stated in the PJI 2:217 Comment.

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[21] 738 N.Y.S.2d at 432

[22] 291 A.D.2d at 708

[23] 91 A.D.3d 1087, 937 N.Y.S.2d 345 (3d Dept 2012)

[24] 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279, 922 N.E.2d 865 (2009)

[25] *Id.* In *Runner*, the plaintiff was exposed to a gravity-related risk while moving a heavy reel of wire down a flight of stairs.

[26] 111 A.D.3d 1208, 976 N.Y.S.2d 283 (3d Dept 2013)

[27] 69 A.D.3d 1191, 897 N.Y.S.2d 254 (3d Dept 2010)

[28] 69 A.D.3d at 1193-1194

[29] Citing *Falah v. Stop & Shop Cos., Inc.,* 41 A.D.3d 638, 641, 838 N.Y.S.2d 639 (3d Dept 2007)

[30] Citing *Dillon v. Rockaway Beach Hosp.,* 284 N.Y. 176, 179, 30 N.E.2d 373 (1940)

Any views and opinions expressed in this article are solely those of the authors. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

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EDITOR IN CHIEF
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What Exactly Is A Falling Object, Anyway?

ANDREW ZAJAC* & JAMES K. O'SULLIVAN**

It is parlance that has become familiar to New York personal injury attorneys. The types of accidents for which Labor Law § 240 (1) imposes absolute liability are of two types: "falling worker" and "falling object." But these are just general descriptions. It is a truism, frequently repeated in appellate decisions, that not all injury-producing falls – of workers or objects – are encompassed by the statute.

In particular, the parameters of the "falling object" category have proven particularly difficult to delineate. Must it fall a certain distance to qualify? Does the nature of the object matter? Must it strike the worker or, at least, cause something else to strike that worker? Does it matter why it fell? Questions like these have tormented attorneys attempting to defend claims brought under the statute for decades. In this article, we will try to explain this aspect of the statute's history, and, to the extent possible, try to provide clarifications concerning the current interpretation of the law.

Background

Only in recent decades has the Court of Appeals provided guidance on these questions. Before then, it is fair to say, confusion reigned. Judge Cardozo taught us long ago that the statute did, in fact, cover falling objects,[1] but each of the four Appellate Divisions had its own interpretations of what such objects were. That confusion reached its zenith in the 1980's. The First Department appears by then to have recognized only falling objects that were "ultra-hazardous" because of the dangers that "heights entail." [2] In that case, for example, an extremely heavy object that fell two-to-three feet because the device securing it had an inadequate lifting capacity did not invoke the statute, apparently because the court took the view that only the weight of the object, not its height, posed a danger. Some Second Department cases contained dictum that recognized only the falling worker theory, while others tacitly permitted recovery in falling object cases. The Third Department went so far as to allow recovery in cases where neither a worker nor an object fell.[3] By the end of the decade, the Fourth Department was criticizing First Department's decisions as being too restrictive, the Third's as being too lenient, and the Second's as being confused.[4]

Recent Court of Appeals Decisions

The Court of Appeals finally entered this fray in 1993 with its decision in Ross v. Curtis-Palmer Hydro-Electric Co.,[5] which made clear that the Third Department was wrong; either an object or a worker must fall to invoke the statute. Thus, plaintiff in Ross could not recover under 240 where the scaffolding with which he was compelled to work forced him into an awkward position, causing back injuries that the use of a simple ladder would have prevented. But neither he nor anything else fell.

Three years later, the Court issued a brief memorandum that seemed to restrict the meaning of "falling object" in this context.[6] There, the Second Department had held that a plaintiff who was struck in the knee by a falling steel beam which was attached to the hoist he was dismantling could recover under §240. It was enough for the Second Department that there was no safety equipment or devices provided for the dismantling of the hoist, and that the effect of gravity on the beam was the sole cause of his injuries.[7] In reversing, the Court of Appeals noted curtly that the 120 pound beam was only seven inches above his head when it fell. This was not one of the "special risks contemplated by the statute,"[8] we were advised.

This was followed by Misseritti v. Mark IV Const. Corp.[9] Decedent in that case was a mason who suffered his fatal injuries when the twenty-two-foot firewall that he and his coworkers had installed collapsed. They had just dismantled the scaffolding

* *Andrew Zajac is a member of McGaw, Alventosa & Zajac in Jericho, New York. Mr. Zajac is also a Past-President of DANY, a member of its Board of Directors and cochair of its Amicus Curiae Committee.*

** *James K. O'Sullivan is a senior member of the Appeals Unit at McGaw, Alventosa & Zajac in Jericho, New York.*

and were sweeping the floor in front of the wall, but it came apart before they could vertically brace it with wooden planks. The decision gave at least two reasons why this was not a §240 case. First, the opinion stated that the term "braces" as referred to in the statute meant those to support elevated worksites, not braces designed to shore up or lend support to a completed structure. "Nor can it be said that the collapse of a completed firewall is the type of elevation-related accident that section 240(1) is intended to guard against."[10] The decision also found it significant that decedent was not at an "elevated level" at the time of his accident.

What many observers believed to be a major pronouncement came in 2001. Narducci v. Manhasset Bay Assocs.[11] decided two cases; both of those decisions were favorable to defendants. In both cases, plaintiffs suffered lacerations caused by falling objects. In Narducci itself, plaintiff, standing on a ladder, was removing steel window frames. A frame adjoining the one in which he was working contained a shard of glass; it fell and struck him on the arm. In a companion case, Capparelli, plaintiff climbed about half-way up a step ladder to reach a 10-foot ceiling, where he was installing a light fixture. When it fell, he reached out to keep it from hitting him, but it cut his hand and wrist. Neither plaintiff fell from their respective ladders. Nor did either plaintiff have a valid 240 case, held the court. "[A] plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute."[12] The shard of glass in Narducci was not an object that needed hoisting or securing for the purposes of the endeavor, or in a position where an enumerated device would have been necessary or even expected. In Capparelli, the distance the object fell was de minimis.

Thus, after absorbing cases like Misseritti and Narducci, court observers could not have been faulted for coming to the following conclusions about falling object cases. First, the object in question must have been in the process of being hoisted or secured at the time of its fall, and that hoisting or securing device must have been inadequate. Second, the distance of the fall must have been considerable. Third, if the base of the object were at ground-level, it would not be considered to have "fallen."

Some of those conclusions would eventually be proven wrong at worst, oversimplified at best. In fact, the Court of Appeals has since extended the liability imposed under 240 by, among other things, expanding the scope of the definition of the term "falling object."

Perhaps the first indication of this trend was the memorandum decision in Outar v. The City of New York.[13] Plaintiff was lifting and replacing subway tracks when he was injured by the fall of an unsecured dolly. According to the Second Department decision, the dolly was stored on top of a "bench wall" that was $5^1/_2$ feet high, shorter than plaintiff himself. In a two-sentence decision, the Court of Appeals, affirming judgment in plaintiff's favor, stated that the elevation differential between the dolly and plaintiff was sufficient to trigger the statute, and that it was an object that required securing for the purposes of the undertaking. While not mentioned in the decision of either court, the Record on Appeal in that case indicates that plaintiff was bending over when struck in the back by the object, which weighed about 150 pounds. His injuries were very severe.

Was the weight of the object in Outar a factor in the courts' determination that it qualified as a falling object? Subsequent cases suggest that this may be so. In Sanatass v. Consolidated Investing Co.,[14] an air-conditioning unit with a weight on the order of one ton injured plaintiff when one of its manual lifts failed when the object was at a height of about seven feet. The Court of Appeals decided a different issue, but it is worthy of note that defendants did not appear to have even attempted to argue to the Court of Appeals that the de minimis exception applied.

The Court of Appeals 2009 decision in Runner v. New York Stock Exchange, Inc.[15] also cited the weight of the object as a factor militating in favor of providing protection to the worker. Its unusual facts barely, if at all, fit into the "falling object" category. Plaintiff and his coworkers were moving an 800-pound reel of wire down a staircase. To prevent it from falling down the stairs, they tied a rope to it, and attached it to a metal bar on a door jamb on the same level as the reel. Plaintiff was one of three workers who held the loose end of the rope, essentially acting as counterweights, while others began pushing it down the stairs. The reel descended too fast; plaintiff's hands were drawn horizontally toward the bar, causing injuries. Experts testified that a pulley or hoist should have been used to complete this task. This was a "falling object," against which plaintiff was protected, even though

it never struck him, held the high Court. The relevant question was whether the harm plaintiff suffered flowed from the application of the force of gravity to the object. The Court added that the elevation differential involved here could not be labeled de minimis, given the weight of the object, and thus, the amount of force it was capable of generating.

Other concepts that we once might have thought were well-settled have also come into question. In Quattrocchi v. F.J.Sciame Const Corp.,[16] the Court of Appeals made clear, in case the Outar memorandum had left any doubt, that falling object cases were not limited to those in which the object was in the process of being hoisted or secured, notwithstanding Narducci's language. In Wilinski v. 334 E.92nd-Hous. Dev. Fund,[17] the high Court, explicitly overruling several Appellate Division cases which, it stated, had misinterpreted Misseritti, held that a falling object may be covered even if its base stands at the same level as the worker.

Misseritti and Narducci were once considered the Rosetta Stones of "falling object" interpretation. Is there anything left of these holdings? Perhaps the two cases in Narducci would be decided the same way today by the Court of Appeals, if only because the injuries in those cases were not caused by the effects of gravity alone, but also by the sharpness of the objects that fell. Would Misseritti be decided the same way today? In our view, that's a highly debatable question.

One last question. Does an object deliberately dropped from above by a coworker qualify? The only Court of Appeals pronouncement on that issue has been a memorandum that reversed an Appellate Division award of summary judgment to plaintiff, and dismissed his 240 claim.[18] That memorandum cited Narducci as the basis for its conclusion. At least one Appellate Division has gone so far as to bar 240 claims in the case of negligently dropped objects.[19] We assume that there are more developments to come on this issue.

Recent Appellate Division Case Law

We conclude with a sampling of recent cases from three of the four branches of the Appellate Division which, we hope, provide more insight into how those courts are applying recent Court of Appeals precedent.

In Mohamed v. City of Watervliet,[20] plaintiff and his co-workers were engaged in street reconstruction. At the time of the incident, the plaintiff was in a 9 1/2 foot trench working approximately 3 1/2 feet underneath the bucket of a backhoe which was operated by a co-worker. The operator of the backhoe accidentally jostled the backhoe's joystick, causing the bucket to drop onto the plaintiff and crush him. Consequently, the plaintiff commenced this action alleging among other things, a violation of Labor Law §240(1). The trial court dismissed that claim on summary judgment.

In affirming, the Appellate Division, Third Department rejected the plaintiff's argument that the bucket of the backhoe was a "falling object" within the meaning of 240. In so doing, the court stated that liability under the statute "does not extend to harm caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist unless the injury itself was caused by *the application of the force of gravity to an object or person*."[21] The court concluded that "the evidence submitted . . . would establish that the backhoe bucket crushed plaintiff not because of gravity, but because of its mechanical operation by an allegedly negligent co-worker. Under these circumstances, [the trial court] properly dismissed plaintiff's section 240(1) claim because there was no falling object -the harm did not flow directly from the application of the force of gravity to an object."[22]

As we have seen, a falling object does not necessarily have to strike the plaintiff in order to bring the case within the purview of Labor Law §240(1), a point which is illustrated by Saber v. 69th Tenants Corp.[23] This accident occurred while plaintiff was removing a mirror from the ceiling of a shower stall. At the time, he was standing on a six-foot A-frame ladder outside of the shower stall, while his assistant was standing beneath the mirror on the inside. The mirror suddenly came loose; the plaintiff tried to keep the glass from falling on his co-worker. It then struck the walls of the shower stall and shattered, causing the plaintiff to lose his balance and fall from the ladder, which was wobbling at the time.

The case proceeded to trial under Labor Law §240(1), and the jury was charged only on whether the ladder provided the plaintiff with proper protection. The jury was not charged as to potential liability under the "falling object" aspect of the statute. The jury found that the defendant violated 240, but the violation was not the proximate cause of the plaintiff's injuries.

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The Appellate Division, Second Department reversed and ordered a new trial on the "falling object" theory. The court stated that "the trial court erred in falling to charge the jury in connection with Labor Law §240(1) as it applies to falling objects, such as the mirror in this case. Liability may be imposed where an object or material that fell, causing injury, was a load that required securing for the purposes of the undertaking at the time it fell. Moreover, whether the statute applies in a falling object case does not depend upon whether the object has hit the worker but whether the harm flows directly from the application of the force of gravity to the object. Here, the plaintiff contended that the accident occurred not only due to the wobbly ladder, but also because the mirror was not properly secured during the removal process, thus causing it to fall."[24]

The court added that liability could attach irrespective of whether the mirror was being purposefully removed. "While the object that fell was to be removed as part of the project, the location in which that item was situated and the lack of any device to protect the worker directly below it from a clear risk of injury raise a factual issue as to whether the object required securing for the purposes of the undertaking. The trial court erred in failing to amend the charge to the jury so as to incorporate the contention that the mirror required securing."[25]

In Maldonado v. AMMM Props. Co.,[26] the plaintiff was injured while demolishing an interior partition wall in a commercial building. The bottom part of the wall consisted of sheetrock. A single glass pane, approximately five feet wide and six feet high, had been installed in the wall about four feet above the floor on top of the sheet rock. The plaintiff was holding the glass pane while his co-worker attempted to dislodge it from its metal frame with pliers. During this process, the glass cracked and fell, causing the plaintiff to sustain injuries. The defendant moved for summary judgment dismissing the plaintiff's cause of action under 240. The trial court denied the motion.

The Appellate Division, Second Department reversed and dismissed that claim. Echoing Narducci's language, the court stated that "[n]ot every object that falls on a worker gives rise to the extraordinary protections of Labor Law §240(1). To recover, a plaintiff must show that, at the time the object fell, it was being hoisted or secured, or required securing for the purposes of the undertaking. The plaintiff also must show that the object fell *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute. Here, the glass pane that caused the plaintiff's injuries was slated for demolition at the time of the accident, and the defendants established . . . that the glass pane was not an object that required securing for the purposes of the undertaking, that is, the demolition."[27] In this case, therefore, Narducci showed life as viable precedent.

A contrary result ensued in Ross v. DD 11th Ave, LLC.[28] There, the accident occurred while the plaintiff was stripping wooden forms that had served as frames for concrete which had been poured to create concrete columns of a building under construction. The accident occurred after the plaintiff had plied a piece of wooden form from a concrete column and placed it on the floor. The plaintiff was injured when a separate piece of the form situated above the piece that he had just removed fell from the columns, striking him in the face. The trial court denied the defendants' motion for summary judgment dismissing the claim under the statute.

The Appellate Division, Second Department affirmed. The court held that "[t]he plaintiff's deposition testimony . . . presents a triable issue of fact as to whether the piece of form fell on the plaintiff "because of the absence or inadequacy of a safety device of the kind enumerated in the statute. Contrary to the defendants' contention, the securing of pieces of form to the column would not have been contrary to the objectives of the work plan, as the plaintiff testified that the forms were cut into sections and that he was removing a different section than the one that fell on him."[29]

In Moncayo v. Curtis Partition Corp.,[30] the Appellate Division agreed that, in order to establish liability under the "falling object" theory, a plaintiff must show that the item was in the process of being hoisted or secured, or that it required securing for the purposes of the task at hand. There, the plaintiff, a worker on a construction site, was struck by a piece of sheetrock which had fallen from the third floor of a building. The sheetrock slipped from the hand of another worker, McNerny, after he cut it to facilitate the installation of a grill for the air conditioning system. After it slipped from McNerny's hand, it bounced through an empty window frame before it struck the plaintiff, who was standing on the ground. The trial court dismissed the plaintiff's claim under Labor Law §240(1).

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The Appellate Division, Second Department affirmed. The court stated that "in a 'falling object' case under Labor Law §240(1), a plaintiff must show that, at the time the object fell, it was being hoisted or secured or required securing for the purposes of the undertaking. The plaintiff also must show that the object fell *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute. The statute does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected."[31] The court concluded that this case did not meet the foregoing criteria: "McNerny testified that the sheetrock debris was placed in piles and then bagged. It was not discarded in pieces through the window openings. Because those small pieces of sheetrock were not in the process of being hoisted or secured and did not require hoisting or securing, the special protection of Labor Law §240(1) was not implicated."[32] Again, Narducci's reasoning is deemed viable.

But note the difference in the result that ensued in Mercado v. Caithness Long Is. LLC.[33] In Mercado, the plaintiff was struck in the head by a pipe that fell from a height of approximately 85 to 120 feet. The pipe had fallen through a gap in a toeboard installed along a grated walkway near the top of a generator at a power plant under construction. The trial court granted the plaintiff's motion for summary judgment on liability pursuant to Labor Law §240(1).

In affirming, the Appellate Division, First Department stated the following: "It is undisputed that there was no netting to prevent objects from falling on workers and contrary to defendants' contention, plaintiff is not required to show exactly how the pipe fell, since, under any of the proffered theories, the lack of protective devices was the proximate cause of his injuries. Nor is plaintiff required to show that the pipe was being hoisted or secured when it fell, since that is not a precondition to liability pursuant to Labor Law §240(1)."[34]

The lesson of these cases therefore, is that one must analyze "falling object" cases not by trying to determine whether they were actually being "hoisted or secured" when they fell, but, under a reasonable view of the circumstances, they should have been properly hoisted or secured.

[1] De Haen v. Rockwood Sprinkler Co. of Massachusetts, 258 N.Y. 350, (1932)

[2] Yaeger v. New York Telephone Co., 148 A.D.2d 308, 538 N.Y.S.2d 526 (1st Dep't 1989)

[3] See, e.g., Gregory v. General. Elec. Co., 131 A.D.2d 967, 516 N.Y.S.2d 549 (3d Dep't 1987)

[4] Staples v. Town of Amherst, 146 A.D 2d 292, 540 N.Y.S.2d 926 (4th Dep't 1989)

[5] Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993)

[6] Rodriguez v. Margaret Tietz Center for Nursing Care, Inc., 197 A.D.2d 565, 602 NYS2d 640 (2d Dept. 1993), rev'd, 84 NY 2d 841, 616 N.Y.S.2d 900 (1994)

[7] 197 A.D.2d 565, 602 N.Y.S.2d 640 (2nd Dep't 1993)

[8] 84 N.Y.2d at 844, 616 N.Y.S.2d at 901

[9] 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995)

[10] 86 N.Y.2d at 491, 634 N.Y.S.2d at 38

[11] 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001)

[12] 96 N.Y.2d at 268, 727 N.Y.S.2d at 42, (emphasis in original)

[13] 286 A.D.2d 671, 730 N.Y.S.2d 138 (2d Dep't 2001), aff'd, 5 N.Y.3d 731, 799 N.Y.S.2d 770 (2005)

[14] 10 N.Y.3d 333, 858 N.Y.S.2d 67 (2008)

[15] 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009)

[16] 11 N.Y.3d 757, 866 N.Y.S.2d 592 (2008)

[17] 18 N.Y.3d 1, 935 N.Y.S.2d 551 (2011)

[18] Roberts v. General. Elec. Co., 97 NY 2d 737, 742 N.Y.S.2d 188 (2002)

[19] See, e.g., Banscher v.Actus Lend Lease, LLC, 103 A.D.3d 823, 960 N.Y.S.2d 183 (2nd Dep't 2013) [Co-worker's water jug which rolled down a roof and struck plaintiff did not give rise to §240 liability]

[20] 106 A.D.3d 1244, 965 N.Y.S.2d 637 (3rd Dep't 2013)

[21] 106 A.D.3d at 1245, 965 N.Y.S.2d at 640 (court's emphasis; citation omitted.)

[22] 106 A.D.3d at 1246, 965 N.Y.S.2d at 640 (citations and internal quotation marks omitted.)

[23] 107 A.D.3d 873, 968 N.Y.S.2d 103 (2nd Dep't 2013)

[24] 107 A.D.3d at 876, 968 N.Y.S.2d at 107 (citations and internal quotation marks omitted.)

[25] Id. (citations omitted.)

[26] 107 A.D.3d 954, 968 N.Y.S.2d 163 (2nd Dep't 2013)

[27] 107 A.D.3d at 954-955, 968 N.Y.S.2d at 165 (court's emphasis; citations and internal marks omitted.)

[28] 109 A.D.3d 604, 971 N.Y.S.2d 304 (2nd Dep't 2013)

[29] 109 A.D.3d at 605, 971 N.Y.S.2d at 306 (citations and internal quotation marks omitted.)

[30] 106 A.D.3d 963, 965 N.Y.S.2d 593 (2nd Dep't 2013)

[31] 106 A.D.3d at 965, 965 N.Y.S.2d at 594-595 (court's emphasis; citations and internal quotation marks omitted.)

[32] 106 A.D.3d at 965, 965 N.Y.S.2d at 595

[33] 104 A.D.3d 576, 961 N.Y.S.2d 424 (1st Dep't 2013)

[34] 104 A.D.3d at 577, 966 N.Y.S.2d at 426 (citations omitted.)

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Liability for Collapsing Walls and Structures Under Labor Law §240(1)

LEON R. KOWALSKI*

It is well known that liability under *Labor Law* §240(1) has historically applied to two factual scenarios: when a worker falls from a height, and when a worker is struck by a falling object.[1] Each scenario presents its own distinct legal analysis, especially in the wake of recent case law that has blurred earlier standards. This article explores how the collapsed structure fits within the spectrum of cases that involve the statute. As will be seen, the injured worker's location at the time of the collapse will often dictate whether the incident is viewed as a falling worker or falling object scenario, and whether the statute applies and was violated.

Naturally, the collapsing structure must be a "structure" under the statute. The definition of the term "structure" has always been an integral part of the applicability of the statute. The statute specifically states that it applies to contractors and owners and their agents engaged in the erection, demolition, etc. of a "building or structure".[2] The courts have liberally construed what a structure is under the statute. A "structure" has been defined as any production or piece of work artificially built up or composed of parts joined together in some definite manner. [3]

Clearly an erected wall created in the construction or renovation of a building would fall within such a definition; however what else qualifies as a structure? In *Lewis-Moors v. Contel of New York. Inc.*[4] the Court of Appeals held that a telephone pole with attached hardware, cable and support systems constitutes a "structure" within the meaning of *Labor Law* §240(1). An exterior electrical sign that extends across the facade of a premises has been held to be part of the building for purposes of the statute[5]. A billboard on a train trestle has also been deemed to be part of a "structure"[6]. A warm air furnace suspended from a ceiling has been deemed to be part of the building and the furnace itself is considered a "structure" under the statute.[7] A railroad car is also a structure under the statute.[8] A grave vault has also been held to be a "structure"[9] as has an underground pipeline.[10] However, a highway at grade is not a "structure"[11], but a manhole in a street is.[12] A utility pole is also a structure within the meaning of § 240.[13] The removal of a tree as part of an activity covered by *Labor Law* §240 is also protected by the statute[14], however, a tree, in and of itself, is not a "structure" within *Labor Law* §240.[15]

There are often two types of factual scenarios that involve the collapse of a structure where the statute could potentially be violated. One is the scenario where an injured worker is situated upon the structure and falls as a result of the collapse. The other is one in which the structure collapses onto an injured worker situated adjacent to or near the structure. However, the analysis is not the same for each, rather a structure that collapses onto an injured worker requires a "falling object" analysis, while the collapse of a structure upon which an injured worker is situated requires a "falling worker" analysis. As indicated, the location of the injured worker in relation to the collapsed structure dictates how the statute may (or may not) be implicated.

The Collapsing Wall or Structure as a Falling Object under Labor Law §240(1)

Where does a scenario involving a worker being struck by a collapsing wall and/or structure stand with respect to potential liability under the statute? What was once somewhat of an easy analysis under the case law has now become grayer. In *Misseritti v. Mark IV Construction Company*[16], the Court of Appeals held that the collapse of a wall was not the type of elevation-related accident that *Labor Law* §240(1) was intended to guard against[17]. In *Misseritti*, the plaintiff's decedent was a mason who was killed when a newly completed concrete-block firewall, approximately 22 feet in height, collapsed at the construction site soon after temporary bracing was removed from the wall.[18] Not only did the Court hold that the collapse of a wall was not the type of elevation-related accident that the statute was intended to guard against, the Court also concluded that the collapse of the firewall was the type of "ordinary and usual" peril a worker is commonly

* *Leon R. Kowalski is a trial attorney and practice group leader with The Law Offices of Edward Garfinkel in Brooklyn, New York. Bradley J. Corsair, a trial attorney with The Law Offices of Edward Garfinkel and member of the DANY Board of Directors, also contributed to this article.*

exposed to at a construction site.[19] Specifically, in determining that there was no evidence that the statute was violated, the court stated that they construed the "braces" referred to in the statute to mean those used to support elevated work sites, not braces designed to shore up or lend support to a completed structure.[20]

The Court noted that it was uncontroverted that prior to the wall's collapse, the deceased plaintiff and his co-worker had just dismantled the scaffolding used to erect the completed wall and were then sweeping the floor in the area of the wall. The Court also noted that they had not yet vertically braced the wall with the 2 feet by 10 feet wooden planks maintained on the work site[21] . The Court found as follows: "There is no showing that the decedent was working at an elevated level at the time of his tragic accident. Nor can it be said that the collapse of a completed fire wall is the type of elevation-related accident that section 240(1) is intended to guard against. Rather, the accident that resulted in decedent's grave injuries is the type of peril a construction worker usually encounters on the job site."[22] The court clearly stated, as indicated above, that the 2 feet by 10 feet wooden planks that would be used to brace the wall were not a "device" under the statute that could be used to prevent the wall from collapsing. The holding in *Misseritti* created somewhat of a "bright line" rule in dealing with cases of workers alleged to have been struck by the elements of a collapsing structure, such as a wall.

Misseritti was decided in 1995 and thereafter was often cited by the defense bar in arguments against the application of the statute within cases that involved collapsing walls and structures. It was also often relied upon by the court in decisions regarding the applicability of the statute in the context of a collapsing wall or structure as creating liability §240 for falling objects. For example, in *Brink v. Yeshiva Univ.,*[23] the court cited *Misseritti* in holding that the collapse of an interior chimney did not trigger liability under the statute.[24] In *Brink*, the plaintiff was working at floor level when an interior chimney, also at floor level, collapsed on him during its demolition. The court's rationale was that because both the chimney and the plaintiff were at the same level at the time of the collapse, the incident was not sufficiently attributable to elevation differentials to warrant imposition of liability pursuant to *Labor Law* §240(1).[25]

Another example can be seen in *Matter of Sabovic v. State of New York*[26] . While citing specifically to *Misseritti*, the Second Department found that the wall which collapsed was at the same level as the work site and therefore was not considered a falling object for purposes of *Labor Law* §240(1)[27] . In *Matter of Sabovic*, the claimant alleged a violation of the statute arising from an accident which occurred when a wall collapsed during the razing of a building at Pilgrim State Psychiatric Center. The court found that contrary to the claimant's contention, the wall which collapsed was at the same level as the work site and was not considered a falling object for purposes of *Labor Law* §240(1) pertaining to risks created by differences in elevation.[28]

In both *Brink* and *Matter of Sabovic*, the courts focused on the fact that the wall or structure that collapsed had a base that stood at the same level as the worker. The courts then applied the holding of *Misseritti* to those facts and found the statute inapplicable.

Reliance on *Misseritti* in this way continued until at least as recently as 2010. In *Kaminski v. 53rd Street and Madison Tower Development, LLC,*[29] the First Department, relying upon *Misseritti*, stated that the collapse of a wall is not the type of elevation-related accident that the statute is intended to guard against.[30] In *Kaminski,* the flooring of the eighth floor of a building had been largely removed with only some steel floor beams and a piece of the concrete floor remaining. The accident occurred while a co-worker, located approximately 30 feet from the plaintiff on the seventh floor, was using a long torch to cut the floor beams of the eighth floor above. The plaintiff heard someone yell, "Wall is collapsing, wall is collapsing." A portion of the exterior wall of the building then fell down onto the plaintiff, knocking him down the stairs.[31] Based upon those facts, the court affirmed the dismissal of the plaintiff's *Labor Law* §240(1) claim on a motion for summary judgment.[32]

In summary, intermediate appellate courts for years had interpreted *Misseritti* as standing for a "same level" rule, which was applied in cases such as *Brink, Matter of Sabovic* and *Kaminski* as well as others.

However, arguably inconsistent outcomes occurred in this realm, as has happened in other types of §240(1) cases. One such example is *Greaves v. Obayashi Corp.*[33] There, the plaintiff was standing on a scaffold while working on a portion of a concrete wall, when the wall collapsed. As a result, concrete blocks fell against the scaffold and knocked it over, causing the plaintiff to fall to the ground, where blocks also fell on top of

him. The portion of the wall where the plaintiff was working was neither braced nor secured.[34] The First Department found that "the accident clearly fell within the scope" of the statute because the evidence showed that the plaintiff "was struck by falling objects that could have been, but were not, adequately secured by one of the devices enumerated in the statute."[35] Based upon that rationale, the First Department reversed the lower court's decision that had denied the plaintiff's motion for summary judgment on his §240(1) claim.[36] The court specifically stated that the concrete blocks that struck the plaintiff, which came about due to the collapse of the wall, were falling objects, and the statute was violated because the blocks had not been adequately secured. *Greaves*, decided in 2008, has no mention of *Misseritti*.

The legacy of *Misseritti* was largely two-fold. First, there was the actual holding which stood for the idea that the collapse of a wall was not the type of elevation-related accident that §240(1) was intended to guard against. That was because there was no safety device contemplated by the statute which could have prevented the collapse. Second, it had a powerful effect for quite some time, having been treated as the foundation for the "same level" rule that emerged Appellate Division decisions that analyzed collapses as falling object cases.

The holding of *Misseritti* and its interpretation seemed to be a settled point of law, until 2011 when the Court of Appeals handed down *Wilinski v. 334 East 92nd Housing Development Fund Corp.*[37] It is acknowledged that *Wilinski* did not involve a collapse of a wall or structure. However, *Wilinski* deals rather directly with the scenario of an injury from a falling object whose base stood at the same level as the worker. As such, *Wilinski* bears heavily on cases involving collapsing structures, since those structures usually, if not always, have a base that stands at the same level as the worker. In addition, while *Wilinski* does not come out and overturn *Misseritti* outright, it seemingly lays the groundwork for arguments and outcomes that would potentially undermine the latter's holding[38] at least to the extent a plaintiff could demonstrate that if a protective device contemplated by the statute had been utilized, the collapse of the structure would have been prevented.

In *Wilinski,* the plaintiff and his co-workers were demolishing brick walls at a vacant warehouse. The prior demolition of the ceiling and floor above had left two metal, vertical plumbing pipes unsecured. The pipes, each four inches in diameter and rising 10 feet out of the floor upon which the plaintiff was working, were to be left standing until their eventual removal. No safety measures were taken to secure the pipes. The accident occurred when debris from a nearby wall that was being demolished struck the pipes, causing them to topple over and fall. The pipes landed on and struck the plaintiff, who was five feet, eight inches tall.[39]

The Court of Appeals in *Wilinski* specifically discussed its holding in *Misseritti*, stating "[w]e held that section 240(1) did not apply to those facts, as the firewall did not collapse due to a failure to provide a protective device contemplated by the statute. We determined that, in fact, the kind of braces referred to in section 240(1) are those used to support elevated work sites not braces designed to shore up or lend support to a completed structure. Thus the firewall's collapse, though tragic in its consequences, was simply the type of peril a construction worker usually encounters on the job site."[40]

The Court of Appeals then noted that intermediate appellate courts have cited *Misseritti* as support for the proposition that a plaintiff, injured by a falling object, has no claim under §240(1) where the plaintiff and the base of the object stood on the same level.[41] The court cited to the decisions in *Brink* and *Matter of Sabovic*, both of which involved collapsing walls or structures as indicated above, as examples of such interpretation. The Court also indicated acknowledgement that such collapsing wall / collapsing structure cases involve situations where the plaintiff and the base of the object stood on the same level. However, the Court then stated that "we do not agree that *Misseritti* calls for the categorical exclusion of injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff."[42]

The Court did endeavor to reconcile its emerging *Wilinski* decision with *Misseritti*. The Court stated that *Misseritti* did not turn on the fact that the plaintiff and the base of the wall that collapsed were at the same level. Rather, it was the absence of a causal nexus between the worker's injury, and a lack or failure of a device required by §240(1), that precluded a liability finding.[43] The Court then further distinguished the two cases by indicating that the types of protective devices prescribed by §240(1) were shown to be inapplicable to the circumstances of the decedent's injury in *Misseritti* --whereas in *Wilinski*, neither party met its

burden with respect to that issue.[44] In this regard, the Court noted that plaintiff *Wilinski* asserted, but did not demonstrate, that protective devices such as blocks or ropes could have been used to secure the pipes and prevent the accident. As for the defendants in *Wilinski*, they had asserted, but failed to demonstrate, that no protective devices were called for.[45] Accordingly, the court did not make a definitive ruling as to liability, as it had identified an unresolved issue of fact.

Wilinski is also important because the Court of Appeals declined to adopt the so-called "same level" rule, stating that such "ignores the nuances of an appropriate section 240(1) analysis."[46] The court added that adoption of a blanket "same level" rule would be inconsistent with its recent decisions of *Quattrocchi v. F.J. Sciame Constr. Corp.*[47] and *Runner v. New York Stock Exch., Inc.*[48]

Thus, in *Wilinski*, the Court of Appeals ultimately held that the plaintiff was not precluded from recovery under §240(1) simply because he and the pipes that struck him were on the same level.[49] There was a dissenting opinion, however. That was written by Justice Piggott, who perceived that the vertical plumbing pipes in *Wilinski* were akin to the completed firewall in *Misseritti*.[50] He also believed that in denying the defendants' motion for summary judgment, the majority had added confusion and uncertainty as to the import of *Misseritti*, among other cases such as *Brink* and *Matter of Sabovic*, and as to how those cases would be interpreted by the Appellate Divisions going forward. [51]

Wilinski, along with *Quattrocchi* and *Runner*, appears to represent a continued expansion of how the Court of Appeals applies and interprets the statute. While the court has not specifically overturned *Misseritti*, it has clearly diminished the effect of its holding as applied to a collapsing wall or structure scenario. Again, *Misseritti* had been treated as a foundation for the "same level" rule. With *Wilinski*, the court sent a clear message that no unconditional "same level" rule can exist. With that rule essentially dissolved, the legacy of *Misseritti* is limited to a revised version of the first of its aspects mentioned above. That is, an argument derived from *Misseritti* that the collapse of a wall or structure is not the type of elevation-related accident that §240(1) was intended to guard against because a safety device contemplated by the statute would have prevented the collapse. However, in light of *Wilinski* and the apparent disbanding of the "same level rule" the modern day issue in this vein figures to be whether a safety device contemplated by the statute would have prevented the collapse. Depending on the extent of acceptance of plaintiffs' future arguments that the use of a device envisioned by §240(1) would have been preventative, the impact of *Wilinski* on collapsing wall / collapsing structure cases may prove to be rather colossal.

The Collapsing Wall or Structure Involving a Falling Worker under Labor Law §240(1)

Where does a worker who is situated upon a structure and then falls (a falling worker) due to a collapse stand with respect to liability under the statute? The answer to this question depends largely on the nature and the use of the structure that collapses. Generally, the courts will find a violation of the statute where the structure is being utilized as a work platform or other type of safety device contemplated under the statute regardless of whether the structure is permanent in nature or not. When the structure that collapses is a permanent part of a building and is not being used as a protective device or work platform, the added element of foreseeability, which typically is not a concern in a *Labor Law* §240(1) analysis[52], becomes an issue. When the collapse involves a completed and permanent structure, the First Department and to a certain extent the Second Department as well, although with more equivocation, has required a showing of foreseeability by the plaintiff in order to make out a successful claim under the statute[53] . The First Department (relying on precedents from the Second Department as well) held in *Jones v. 414 Equities LLC*[54] that to prevail on a *Labor Law* §240(1) claim based on an injury resulting from the failure of a completed and permanent structure, the plaintiff must show that the failure of the structure in question "was a foreseeable risk of the task he was performing".[55]

In Jones, the plaintiff worked as a demolition laborer on a renovation project at a five-story apartment building. The project included the demolition of all interior walls, and the removal of all debris and bathroom and kitchen fixtures. Essentially, the interior of the building was being "gutted". However, the building's permanent wooden floors were not to be removed in the course of the project. The plaintiff was working on the second floor dragging a 50 to 60 pound piece of demolished wall across the floor to place it with other debris when the portion of the floor he was walking across collapsed, causing him to fall approximately 10 to 12 feet to the floor

below. The plaintiff supposedly did not hear anything or see anything before the floor collapsed except for a loud cracking noise. There were no holes in the second floor prior to its collapse.[56] In Jones, the Supreme Court denied the plaintiff's motion for partial summary judgment without prejudice to renew after certain disclosure and the plaintiff appealed. The First Department affirmed.[57]

The court in *Jones* found that the plaintiff established that he was engaged in demolition work, which is a protected activity under the statute and that the owner failed to provide him with adequate safety devices, which the defendant apparently did not dispute.[58] The sole issue on the appeal in *Jones* was whether, as a matter of law, the plaintiff was exposed to an elevation-related risk when he walked across the permanent floor that collapsed.[59] The court noted in *Jones* that the Court of Appeals' case law demonstrates that no bright-line test exists for determining whether a worker was exposed to an elevation-related risk.[60] Nevertheless, the court enunciated three elements that must be proven under the Court of Appeals' relevant cases, which are: (1) the task required the plaintiff to work at an elevation, (2) the plaintiff was exposed to the effects of gravity at that elevation and fell as a direct result of the force of gravity, and (3) the protective devices envisioned by the statute, e.g., ladders, scaffolds and similar devices, were designed to prevent the hazard that caused the fall.[61] The court found that the plaintiff made each of those showings in *Jones*.[62] The court noted that the critical inquiries in *Jones*, therefore, were whether the plaintiff can recover under the statute for an injury caused by the collapse of a permanent floor, and, if so, whether, in addition to the above showings, plaintiff must establish that the collapse of the floor was foreseeable.[63]

The First Department noted that while the Court of Appeals has not had occasion to review whether the collapse of a permanent floor or similar structure entails an elevation-related risk, numerous Appellate Division decisions have tackled that issue.[64] However, the court noted that its own precedents regarding whether the collapse of a permanent structure may give rise to liability under the statute were also inconsistent.[65] The court in *Jones* noted that in addressing falls through holes in permanent floors they previously found that the permanency of a structure is irrelevant in determining whether a cause of action lies under the statute[66]; however, they then also noted that several of its decisions, have indicated that the collapse of a permanent structure cannot serve as a basis for a *Labor Law* §240(1) cause of action.[67]

After doing a survey of the Appellate Division case law in *Jones*, the court found that the law is unclear on the issue of whether the collapse of a permanent floor or similar structure poses an elevation-related risk giving rise to a cause of action under *Labor Law* §240(1).[68] In *Jones,* the court ultimately decided that a plaintiff can recover under §240(1) even though he or she was injured as a result of the collapse of a permanent floor. The court then turned to whether a plaintiff must demonstrate that the collapse of the floor was foreseeable.[69] The First Department in *Jones* stated that "In light of our case law and the prevailing case law of the Second Department we conclude that plaintiff must establish that the collapse of the floor was foreseeable."[70] The court relied heavily on their holding in *Buckley v. Columbia Grammar and Preparatory*[71] in determining that foreseeability is a necessary element that must be proved by the plaintiff. In *Buckley,* the court found that the injury in that case was not proven to be the foreseeable consequence of the failure to provide proper protective devices of the type enumerated in the statute.[72] In *Jones,* seeing how its decision may seem inconsistent with the absolute liability principles of the statute, the court clearly indicated that the foreseeability requirement that it was applying would be narrowly drawn to only these type of cases involving the collapse of a permanent structure. The court went on to state that its conclusion that liability under the statute under these circumstances requires a showing that the collapse of the floor was foreseeable does not effectively relegate the plaintiff to remedies he would have anyway under general theories of negligence.[73] The court noted that the issue of foreseeability in this context is relevant only with respect to whether the plaintiff was exposed to an elevation-related risk, and only where the elevation-related risk was not apparent from the nature of the work such that the defendant would not normally be expected to provide the worker with a safety device to prevent the worker from falling.[74] The court went on to add that on a cause of action under the statute, the plaintiff is relieved from demonstrating a number of elements he or she would have to prove in a common law negligence claim, including that the defendants breached a duty of care owed to him and that defendants created or had notice of a defective condition.[75] The court noted a number of

other decisions where it found a requirement that a plaintiff in a *Labor Law* §240(1) action demonstrate that the hazard that caused the plaintiff's injuries was foreseeable in light of the task the plaintiff was performing[76] . The court ultimately decided that the plaintiff failed to make a prima facie showing that the collapse of the floor was a foreseeable risk of the task he was performing thus he failed to demonstrate his entitlement to judgment as a matter of law and as previously indicated, they affirmed the lower court's denial of the plaintiff's motion.[77]

The Second Department has also concluded that the collapse of a permanent floor can, under certain circumstances, pose an elevation-related risk and give rise to liability under the statute. In *Richardson v. Matarese*[78] the plaintiffs were injured while attempting to move an 800–pound radiator across the third floor of a building they were helping to renovate. As they moved the radiator across the floor, a set of beams underneath them disengaged from a header and the floor collapsed, sending the plaintiffs and the radiator to the floor below. The Court determined that the collapse of a permanent floor constituted a prima facie violation of *Labor Law* §240(1), expressly rejecting the defendant's arguments that the statute is not implicated because the workers were injured as the result of the collapse of a permanent, rather than a temporary structure, or as the result of the collapse of the work site itself, rather than a safety device enumerated in the statute.[79] In *De Jara v. 44–14 Newtown Rd. Apt. Corp.*[80], the accident occurred when the decedent fell from a fourth-story fire escape while working at a building painting all of the building's fire escapes.[81] While performing the work, the decedent leaned over a railing to paint the outside of one of the fire escapes, the railing broke and he fell to the ground. At the close of evidence, the Supreme Court granted the plaintiffs' motion for judgment as a matter of law on the issue of liability on their *Labor Law* §240(1) cause of action. The Second Department found that the trial court properly granted the plaintiffs' motion since the evidence that the decedent's fall was caused by the collapse of the safety device upon which he was working established a prima facie case of liability under *Labor Law* §240(1).[82] The court found that the statute was applicable since the fire escape was being used as the functional equivalent of a scaffold to protect the decedent from elevation-related risks and therefore constituted a safety device within the meaning of *Labor Law* §240(1). The court noted that the fact that the fire escape was a permanent rather than temporary structure does not preclude *Labor Law* §240(1) liability.[83]

In *Shipkoski v. Watch Case Factory Assoc.*[84] the Second Department elaborated on its holding in *Richardson*. The worker in *Shipkoski* was injured when the permanent floor he was walking on, described as the "deteriorated third floor", while measuring windows for the installation of plywood gave way causing him to fall to the floor below. There was evidence in the record on the worker's motion for summary judgment[85] that prior to the accident the floor that collapsed was in a deteriorated condition. In *Shipkoski*, the court found that there were issues of fact as to whether the building was in such an advanced state of disrepair and decay from neglect, vandalism, and the elements that the plaintiff's work on the third floor exposed him to a foreseeable risk of injury from an elevation-related hazard, and whether the absence of a type of protective device enumerated under the statute was a proximate cause of his injuries.[86] The court noted that there must be a foreseeable risk of injury from an elevation-related hazard to impose liability under the statute since defendants are liable for all normal and foreseeable consequences of their acts and therefore to establish a prima facie case pursuant to *Labor Law* §240(1), a plaintiff must demonstrate that the risk of injury from an elevation-related hazard was foreseeable, and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged.[87] The court also noted that a plaintiff "need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable".[88] The Second Department has also imposed liability on owners and contractors under the statute when a worker has fallen through a roof that collapsed, especially when there was evidence that the roof's collapse was foreseeable[89] . However, the court has also concluded that a worker who fell when the balcony on which he was standing collapsed could not recover under the statute because the balcony was not a scaffold, but rather a permanent appurtenance to the building.[90] The court has also affirmed an order dismissing the *Labor Law* §240(1) cause of action of a plaintiff who was injured when the permanent staircase on which he was walking collapsed.[91]

In *Balladares v. Southgate Owners Corp.*[92] the plaintiff was injured when, while he was preparing to take

down a brick wall using a jackhammer, the basement floor that he was standing on collapsed, causing him to fall into a hole. The Second Department held that the defendants were entitled to summary judgment dismissing the Labor Law §240(1) claim by establishing that the collapse of the basement floor was not a risk that gave rise to the need for the enumerated safety devices, but was, rather, a separate, unrelated hazard.[93] The court acknowledged that an injury resulting from the collapse of a floor may give rise to liability under the statute where the circumstances are such that there is a foreseeable need for safety devices.[94] Like the First Department's decision in *Jones* as well as the Second Department's decisions in *Balladares* and *Shipkoski,* where an injury results from the failure of a completed and permanent structure within a building, even in a building undergoing demolition or one in a dilapidated condition, a necessary element of a cause of action under the statute is a showing that there was a foreseeable need for a protective device of the kind enumerated by the statute.[95]

As noted by the First Department in *Jones,* the Third Department generally applies a rule that is inconsistent with the prevailing rule in the First and Second Departments that the collapse of a permanent floor or similar structure can give rise to liability under the statute.[96] The Third Department has often stated that a structure that serves as a permanent passageway between two parts of a building is not a device that is employed for the express purpose of gaining access to an elevated worksite and therefore no cause of action lies under the statute where a permanent structure collapses.[97] As also noted by the First Department in *Jones,* the Fourth Department has also issued decisions on the issue of whether the collapse of a permanent structure may give rise to liability under the statute.[98] In *Bradford v. State of New York*[99] , the court found that the claimants, one of whom was killed and others who were injured, were exposed to an elevation-related risk when the pedestrian bridge they were helping to erect collapsed.[100] The court held that the collapse of a work site constitutes a prima facie violation of the statute.[101] The court specifically rejected the owner's contention that it had no liability under the statute because the claimants were injured as a result of the collapse of a permanent, rather than a temporary structure.[102]

The First Department reaffirmed its position regarding foreseeability in *Ortega v. City of New York*[103] when it held that a plaintiff is not required to demonstrate that the injury was foreseeable, except in the context of a collapse of a permanent structure. The court added that outside the permanent structure collapse context, a plaintiff simply needs to show that he or she was injured while engaged in a covered activity, and that the defendant's failure to provide adequate safety devices of the type listed in *Labor Law* §240(1) resulted in a lack of protection.

Very recently, in *Garcia v. Neighborhood Partnership Hous. Dev. Fund, Co., Inc.,*[104] the court further solidified its position regarding foreseeability in holding that a plaintiff in a case involving collapse of a permanent structure must establish that the collapse was "foreseeable, not in a strict negligence sense, but in the sense of foreseeability of exposure to an elevation-related risk."[105] In *Garcia*, the plaintiffs alleged they were injured as the result of a partial collapse of the building, which included the stairwell and floor joists in the area from the second through fifth floors.[106] The court dealt with dueling motions for summary judgment. The court found that the plaintiffs established that the partial building collapse at issue was foreseeable, and that the owner and general contractor were on notice of the hazard. The court noted that in opposition, the owner and general contractor failed to raise a triable issue of fact as to the foreseeability of the building collapse.[107]

The plaintiffs were awarded partial summary judgment on their *Labor Law* §240(1) claim. In granting the plaintiff's motion in *Garcia*, the court relied upon the fact that an architect's field report dated seven days prior to the accident, noted that conditions appeared to be unsafe and the general contractor is "to make safe and shore as required".[108] In addition, the court noted that a New York City building violation issued on the date of the accident indicated that the removal of interior bearing and non-bearing partitions throughout had caused the floor joists to collapse from the top of the building to ground level at the center, and ordered that all work be stopped.[109] The court also relied upon the opinion of the plaintiff's expert engineer, who opined that various factors led to a conclusion that there was notice of an imminent danger foreshadowing the collapse. The expert also was of the opinion that the removal of weight-bearing walls, combined with the approximate 100-year age of the building and its timber joists, was a substantial and proximate cause of the foreseeable collapse.[110]

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Liability for Collapsing Walls and Structures Under Labor Law §240(1)

Continued from page 54

The court distinguished its holding in *Garcia* from *Vasquez v. Urbahn Assoc. Inc.*,[111] in which it found that conflicting testimony as to whether certain stairs were "old and destroyed", or in good condition prior to the plaintiff's accident, presented a triable issue of fact as to whether a collapse of permanent stairs was foreseeable.[112] In *Vasquez*, the court noted that "whether the collapse or failure of a permanent structure gives rise to liability under *Labor Law* §240(1) turns on whether the risk of injury from an elevation-related hazard is foreseeable".[113] The court indicated that in *Garcia* the result was different because the defendants presented no evidence concerning the condition of the building in the months preceding the collapse, while in *Vasquez* they did.[114] The court specifically noted in *Garcia* that *Vasquez* involved the foreseeability of a particular staircase collapsing and not the foreseeability of a partial building collapse comprising several floors, however the court did not elaborate on the significance of that distinction.[115] Most importantly, in *Garcia,* the court seems to refine the definition of foreseeability in this context by stating that they are going to require a showing of "foreseeability of exposure to an elevation-related risk" as opposed to traditional foreseeability.

Other types of structures that collapse often fall into a grey area that is largely fact-sensitive in the analysis of whether the statute was violated. For example, in *Lewis-Moors v. Contel of New York. Inc.*,[116] the court dealt with the collapse of a telephone pole. The plaintiff was employed as a construction supervisor by a general contractor who was removing and replacing a network of some 200 telephone poles. The plaintiff was injured while removing a pole located on Route 80 in the Town of Columbia. There was evidence that the pole was attached to a power pole across the highway by a telephone cable and a supporting guy wire, and was additionally supported by a down guy wire attached to a ground anchor. The plaintiff climbed the pole to begin the disconnecting process, and attached his safety belt to the pole. Upon disconnecting the telephone cable, the pole collapsed and fell across the road while plaintiff was still attached to the pole by his safety belt.[117] The Court found that the removal of such a pole is an activity akin to alteration or demolition of a structure and, thus, covered under *Labor Law* §240(1).[118] The Court found that the statute was violated.

The collapse of a structure with a worker situated upon it often can impose liability under *Labor Law* §240(1) for a falling worker. The courts will typically find a violation of the statute where a structure is being utilized as a work platform or is being utilized as any other type of contemplated safety device under the statute. However, the larger question presented is what is the effect of the statute when the structure that collapses is permanent in nature and is not being used as a device under the statute. In many of the cases cited above, the defendants offered an argument against the imposition of liability under the statute that the structure was permanent and therefore, the statute could not have been violated since a permanent structure is not covered by the statute. However, the issue of whether the structure is permanent in not the dispositive question; rather the more important question is whether the failure of the structure in question was a foreseeable risk of the task he was performing. The issue of foreseeability is not one that is typically seen when it comes to the application of the statute; however the courts have been pretty clear that it is a necessary element of proof when dealing with the collapse of a permanent structure. As indicated above, the Court of Appeals has not yet weighed in on this subject specifically.

CONCLUSION

In a case involving the collapse of a structure such as a wall, there is potential liability under *Labor Law* §240(1) for either a falling worker or a falling object depending upon where the injured worker was at the time of the collapse. With respect to the falling object scenario, the recent decision in *Willinski* has continued the Court of Appeals' liberal expansion of the application of the statute. With respect to the falling worker scenario, the First Department has added an element of foreseeability that must be proved by the plaintiff in order to recover for an injury resulting from the failure of a completed and permanent building structure. Under either set of facts, a separate and distinct analysis of the applicability of the statute is required.

[1] It is well settled that the protections of *Labor Law* §240(1) are limited to such specific gravity-related accidents as a worker falling from a height or a worker being struck by a falling object. *Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49 (1993)

[2] *Labor Law* §240(1) provides: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing

of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

[3] *Lewis-Moors v. Contel of New York. Inc.*, 78 N.Y.2d 942, 573 N.Y.S.2d 636 (1991)

[4] 78 N.Y.2d 942, 573 N.Y.S.2d 636 (1991)

[5] *Izrailev v. Ficarra Furniture of Long Island, Inc.*, 70 N.Y.2d 813, 523 N.Y.S.2d 432 (1987)

[6] *Gonzalez v. City of New York*, 269 A.D.2d 493, 703 N. Y.S.2d 259 (2nd Dept. 2000)

[7] *Kinsler v. Lu-Four Associates*, 215 A.D.2d 631, 628 N.Y.S.2d 303 (2nd Dept. 1995)

[8] *Gordon v. Eastern Railway Supply, Inc.,* 82 N.Y.S.2d 555, 606 N.Y.S.2d 127 (1993)

[9] *Ciancio v. Woodlawn Cemetary Association*, 249 A.D.2d 86, 671 N.Y.S.2d 466 (1st Dept. 1998)

[10] *See, Covey v. Iriquois Gas Transmission System, L.P.*, 89 N.Y.2d 952, 655 N.Y.S.2d 854 (1997)

[11] *Dilluvio v. City of New York*, 264 A.D.2d 115, 704 N.Y.S.2d 550 (1st Dept. 2000), *aff'd* 95 N.Y.2d 928, 721 N.Y.S.2d 603 (2000).

[12] *Dos Santos v. Consolidated Edison of New York*, 104 A.D.3rd 606 (1st Dept. 2013)

[13] *Dedario v. New York Telephone Co.,* 62 A.D.2d 1001, 557 N.Y.S.2d 794 (2nd Dept. 1990) and *Tauriello v. New York Telephone Co.*, 199 A.D.2d 377, 605 N.Y.S.2d 373 (2nd Dept. 1993)

[14] *Lombardi v. Stout*, 80 N.Y.2d 290, 590 N.Y.S.2d 55 (1992)

[15] *Gavin v. Long Island Lighting Co*., 255 A.D.2d 551,681 N.Y.S.2d 87 (2nd Dept. 1998)

[16] 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995)

[17] The plaintiff ultimately moved for partial summary judgment on the *Labor Law* §240(1) cause of action. The defendants cross-moved seeking dismissal of the plaintiff's cause of action alleging a violation of the statute. The Supreme Court granted the plaintiff's motion for partial summary judgment and accordingly denied the defendant's cross-motion. The Appellate Division modified, with two Justices dissenting, to the extent of granting the defendant summary judgment on the *Labor Law* §240(1) cause of action and, as so modified, affirmed. The plaintiff appealed to the Court of Appeals as of right pursuant to *CPLR* §5601(d).

[18] 86 N.Y.2d at 489

[19] 86 N.Y.2d at 491

[20] 86 N.Y.2d at 491

[21] 86 N.Y.2d at 491

[22] 86 N.Y.2d at 491

[23] 259 A.D.2d 265, 686 N.Y.S.2d 15 (1st Dept. 1999)

[24] 259 A.D.2d at 265. In *Brink,* the trial court granted the plaintiff's motion for partial summary judgment pursuant to *Labor Law* §240(1). The defendant appealed and the First Department modified (and affirmed on other grounds) and held that the incident was not sufficiently attributable to elevation differentials to warrant imposition of liability against the owner under scaffolding statute.

[25] 259 A.D.2d at 265

[26] 229 A.D.2d 586, 587, 645 N.Y.S.2d 860 (2nd Dept. 1996)

[27] 229 A.D.2d at 586. In *Matter of Sabovic*, the claimant sought leave to bring a late notice of intention to file negligence and Labor Law claims seeking to recover damages for personal injuries. The Court of Claims denied the application for leave to file the notice of intention to file claim. The claimant appealed. The Second Department affirmed and held that the claim did not "appear" to be meritorious due to the fact that the wall which collapsed during razing of building was at same level as work site and was not considered a falling object for purposes of stating a claim under statute pertaining to risks created by differences in elevation.

[28] 229 A.D.2d at 587

[29] 70 A.D.3d 530, 895 N.Y.S.2d 76 (1st Dept. 2010)

[30] 70 A.D.3d at 531

[31] 70 A.D.3d at 531

[32] In *Kaminski*, the Supreme Court, New York County denied the plaintiff's motion for summary judgment and granted the defendant's cross motion for summary judgment. The First Department affirmed, however modified on other grounds finding a genuine issue of material fact as to the plaintiff's *Labor Law* §241(6) cause of action. *Kaminski v. 53rd Street and Madison Tower Development, LLC,* 70 A.D.3d at 531.

[33] 55 A.D.3d 409, 866 N.Y.S.2d 47 (1st Dept. 2008)

[34] 55 A.D.3d at 409

[35] 55 A.D.3d at 409

[36] 55 A.D.3d at 409

[37] *Wilinski v. 334 East 92nd Housing Development Fund Corp.,* 18 N.Y.3d 1, 935 N.Y.S.2d 551 (2011)

[38] Again, in *Misseritti v. Mark IV Construction Company*, the Court of Appeals held that "the collapse of a wall was not the type of elevation-related accident that *Labor Law* §240(1) was intended to guard against". *Misseritti v. Mark IV Construction Company*, 86 N.Y.2d 487, 491, 634 N.Y.S.2d 35 (1995)

[39] 18 N.Y.3d at 4

[40] 18 N.Y.3d at 8

[41] 18 N.Y.3d at 8

[42] 18 N.Y.3d at 9

[43] 18 N.Y.3d at 9

[44] 18 N.Y.3d at 11

[45] 18 N.Y.3d at 11

[46] 18 N.Y.3d at 9

[47] 11 N.Y.3d 757, 866 N.Y.S.2d 592 (2008)

[48] 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009)

[49] 18 N.Y.3d at 10

[50] 18 N.Y.3d at 14

[51] 18 N.Y.3d at 14-15

[52] Typically, in order to prevail in a claim pursuant to *Labor Law* §240(1) a plaintiff must usually only prove a violation of the statute (i.e. that a device was not provided or that the device did not provide proper protection) and that the violation was a proximate cause of the accident. *See, Bland v. Manocherian,* 66 N.Y.2d 452, 497 N.Y.S.2d 880 (1985). The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-

related risk entailed in the activity or provides an inadequate one. S*ee, Broggy v. Rockefeller Group, Inc.,* 8 N.Y.3d 675, 681, 839 N.Y.S.2d 714 (2007).

[53] The Court of Appeals has not yet rendered a decision on whether the collapse of a permanent floor or similar structure entails an elevation-related risk within the meaning of the statute.

[54] 57 A.D.3d 65, 866 N.Y.S.2d 165 (1st Dept. 2008)

[55] 57 A.D.3d at 66

[56] 57 A.D.3d at 66-67

[57] 57 A.D.3d at 66

[58] 57 A.D.3d at 73

[59] 57 A.D.3d at 69

[60] 57 A.D.3d at 73

[61] 57 A.D.3d at 73

[62] 57 A.D.3d at 73

[63] 57 A.D.3d at 74

[64] 57 A.D.3d at 74

[65] 57 A.D.3d at 77

[66] 57 A.D.3d at 77 *citing John v. Baharestani*, 281 A.D.2d 114, 119, 721 N.Y.S.2d 625 (1st Dept. 2001) and *Carpio v. Tishman Constr. Corp. of N.Y.*, 240 A.D.2d 234, 658 N.Y.S.2d 919 (1st Dept. 1997).

[67] 57 A.D.3d at 78 *citing Buckley v. Columbia Grammar and Preparatory*, supra; *Griffin v. New York City Tr. Auth.,* 16 A.D.3d 202, 791 N.Y.S.2d 98 (1st Dept. 2005); *Carrion v. Lewmara Realty Corp.,* 222 A.D.2d 205, 635 N.Y.S.2d 4 (1st Dept. 1995), *lv. denied* 88 N.Y.2d 896, 646 N.Y.S.2d 978 (1996); *see also, Contrera v. Gesher Realty Corp.,* 1 A.D.3d 111, 766 N.Y.S.2d 200 (1st Dept. 2003)

[68] In noting the inconsistent decisions on the issue in *Jones,* the court noted that after surveying the Appellate Divisions, it found that the case law supports multiple propositions: 1. The collapse of a permanent structure constitutes a prima facie violation of §240(1) without regard to the foreseeability of the collapse; 2. The collapse of a permanent structure may give rise to liability under §240(1) if there is evidence that the collapse was foreseeable; and 3. The collapse of a permanent structure cannot give rise to liability under §240(1) regardless of whether the collapse was foreseeable. 57 A.D.3d at 78

[69] 57 A.D.3d at 79

[70] 57 A.D.3d at 79

[71] *See, Buckley v. Columbia Grammar and Preparatory*, 44 A.D.3d 263, 841 N.Y.S.2d 249 (1st Dept. 2007). In *Buckley*, the court held that since a defendant is liable only for the "normal and foreseeable consequences" of its acts, a worker who is caused to fall or is injured by the application of an external force is entitled to the protection of the statute only if the application of that force was foreseeable. *Buckley v. Columbia Grammar and Preparatory*, 44 A.D.3d at 267 *citing Gordon v. Eastern Ry. Supply,* 82 N.Y.2d 555, 562, 606 N.Y.S.2d 127 (1993), *Cruz v. Turner Constr. Co.,* 279 A.D.2d 322, 720 N.Y.S.2d 10 (1st Dept. 2001), *Nimirovski v. Vornado Realty Trust Co.,* 29 A.D.3d 762, 818 N.Y.S.2d 93 (1st Dept. 2006), and *Bush v. Goodyear Tire & Rubber Co.,* 9 A.D.3d 252, 253, 779 N.Y.S.2d 206 (1st Dept. 2004), *lv. dismissed* 3 N.Y.3d 737, 786 N.Y.S.2d 815 (2004). In *Cruz*, an electrician injured in a fall from a ladder caused by a slip on lubricant that had dripped onto the rungs was held to be entitled to the statute's protections since lubrication was commonly used to assist in pulling wires through piping, and the drippage was a foreseeable consequence of work being performed. In *Nimirovski*, the statute was found applicable where it was foreseeable that pieces of metal that dropped to the floor could strike the scaffold on which the plaintiff was working and cause it to shake, rendering the scaffold inadequate to protect him. In *Bush* the statute applied because "the absence of a proper safety device created the kind of foreseeable risk" within the statute's contemplation. *See, Buckley*, 44 A.D.3d at 267.

[72] 44 A.D.3d at 269. The plaintiff in *Buckley* was assisting in the installation of an elevator. The counterweight frame of the elevator was ascending the shaft when a nail-like spike protruding from the wall of the shaft struck the frame. Several of the counterweights housed in the frame were dislodged and fell down the shaft, striking the plaintiff who was standing in the doorway of the shaft on a sub-basement floor. Rejecting the plaintiff's contention that he was exposed to an elevation-related risk, the First Department found that a worker who is caused to fall or is injured by the application of an external force is entitled to the protection of the statute only if the application of that force was foreseeable. *See, Buckley*, 44 A.D.3d at 267. The court held "thus, the determination of the type of protective device (if any) required for a particular job turns on the foreseeable risks of harm presented by the nature of the work being performed". *See, Buckley*, 44 A.D.3d at 268. Since the dislodging and falling of the counterweights were not foreseeable risks inherent in the worker's task, no obligation arose on the part of the owner or contractor to provide the worker with a protective device contemplated by §240(1). *See, Buckley*, 44 A.D.3d at 268. *See also, Jones v. 414 Equities LLC,* 57 A.D.3d at 79.

[73] 57 A.D.3d at 79-80

[74] 57 A.D.3d at 79-80

[75] 57 A.D.3d at 79-80

[76] 57 A.D.3d at 78-79 *citing Campbell v. City of New York,* 32 A.D.3d 703, 821 N.Y.S.2d 166 (1st Dept. 2006); *Bush v. Goodyear Tire & Rubber Co.,* 9 A.D.3d 252, 779 N.Y.S.2d 206 (1st Dept. 2004), *lv. dismissed* 3 N.Y.3d 737, 786 N.Y.S.2d 815 (2004); *Cruz v. Turner Constr. Co.,* 279 A.D.2d 322, 720 N.Y.S.2d 10 (1st Dept. 2001); and *Robinson v. NAB Constr. Corp.,* 210 A.D.2d 86, 620 N.Y.S.2d 337 (1994).

[77] 57 A.D.3d at 80. The record evidence showed the following: The plaintiff was walking across the permanent floor, which was not being removed during the project, while dragging a 50 to 60 pound piece of debris. The plaintiff's deposition testimony sheds little light on the condition of the floor prior to its collapse; he only testified that he "was walking on a clean straight floor" in which there were no holes. Moreover, in his affidavit plaintiff merely averred that "portions of the second floor were old, rotted and decayed." The plaintiff offered no specifics as to which portions of the second floor were in that condition, and his characterization of the condition of the floor, i.e., "old, rotted and decayed," is unsupported by any factual details. *See, Jones, Supra* at 80.

[78] 206 A.D.2d 353, 614 N.Y.S.2d 424 (2nd Dept. 1994)

[79] 206 A.D.2d at 353–354.

[80] 307 A.D.2d 948, 763 N.Y.S.2d 654 (2nd Dept. 2003)

[81] 307 A.D.2d at 949

[82] 307 A.D.2d at 949

[83] 307 A.D.2d at 950

[84] 292 A.D.2d 587, 741 N.Y.S.2d 55 (2nd Dept.2002)

[85] The Supreme Court denied the plaintiff's motion for summary

judgment on the issue of liability on the cause of action to recover damages pursuant to *Labor Law* §240(1), finding that section to be inapplicable. The Second Department affirmed, although for a reason different from that of the Supreme Court. *See, Shipkoski v. Watch Case Factory Assoc.,* 292 A.D.2d at 588

[86] 292 A.D.2d at 588

[87] 292 A.D.2d at 588

[88] 292 A.D.2d at 588

[89] *See, Taylor v. V.A.W. of Am., Inc.,* 276 A.D.2d 621, 714 N.Y.S.2d 321 (2nd Dept. 2000); *see also, Charles v. Eisenberg,* 250 A.D.2d 801, 673 N.Y.S.2d 461 (2nd Dept. 1998); *see also, Dyrmyshi v. Clifton Place Dev. Group, Inc.,* 7 A.D.3d 565, 775 N.Y.S.2d 908 (2nd Dept. 2004)

[90] *Caruana v. Lexington Vil. Condominiums at Bay Shore,* 23 A.D.3d 509, 510, 806 N.Y.S.2d 634 (2nd Dept.2005)

[91] *Norton v. Park Plaza Owners Corp.,* 263 A.D.2d 531, 531–532, 694 N.Y.S.2d 411 (2nd Dept.1999)

[92] 40 A.D.3d 667, 835 N.Y.S.2d 693 (2nd Dept. 2007)

[93] 40 A.D.3d at 669

[94] 40 A.D.3d at 669

[95] *See, Espinosa v. Azure Holdings II, LP,* 58 A.D.3d 287, 869 N.Y.S.2d 395 (1st Dept. 2008)

[96] *See, Jones v. 414 Equities LLC,* 57 A.D.3d 65, 75, 866 N.Y.S.2d 165, (1st Dept. 2008)

[97] *See, Milanese v. Kellerman,* 41 A.D.3d 1058, 1061, 838 N.Y.S.2d 256 (3rd Dept. 2007), which dealt with a permanent staircase; *see also, D'Egidio v. Frontier Ins. Co.,* 270 A.D.2d 763, 765–766, 704 N.Y.S.2d 750 (3rd Dept. 2000), *lv. denied* 95 N.Y.2d 765, 716 N.Y.S.2d 640 (2000), which dealt with a permanent floor; *see also, Avelino v. 26 Railroad Ave. Inc.,* 252 A.D.2d 912, 912–913, 676 N.Y.S.2d 342 (3rd Dept. 1998), which dealt with a permanent floor; *Williams v. City of Albany,* 245 A.D.2d 916, 916–917, 666 N.Y.S.2d 800 (3rd Dept. 1997) -permanent stairway; *Craft v. Clark Trading Corp.,* 257 A.D.2d at 887–888, 684 N.Y.S.2d 48 -liability imposed under *Labor Law* §240(1) where the worker fell when the temporary floor on which he was standing collapsed; *but see, Beard v. State of New York,* 25 A.D.3d 989, 991, 808 N.Y.S.2d 802 (3rd Dept. 2006) -*Labor Law* §240(1) liability imposed where the worker fell when the bridge he was demolishing collapsed. The court, citing *Richardson,* rejected the defendant's contention that the worker could not recover under the statute because the bridge was a permanent structure, especially since the bridge was "not structurally sound"; *Seguin v. Massena Aluminum Recovery Co.,* 229 A.D.2d 839, 840, 645 N.Y.S.2d 630 (3rd Dept. 1996) -*Labor Law* §240(1) liability imposed where the worker fell through a decayed roof to the floor below. The court, citing *Richardson,* rejected the defendant's contention that the statute was not implicated because the worker fell as a result of the collapse of a permanent structure.

[98] *See, Jones v. 414 Equities LLC,* 57 A.D.3d 65, 76, 866 N.Y.S.2d 165, (1st Dept. 2008)

[99] 17 A.D.3d 995, 794 N.Y.S.2d 522 (4th Dept. 2005)

[100] 17 A.D.3d at 995

[101] 17 A.D.3d at 997

[102] 17 A.D.3d at 997

[103] 95 A.D.3d 125, 940 N.Y.S.2d 636 (1st Dept. 2012)

[104] 2014 NY Slip Op 00298 (1st Dept. 2014)

[105] 2014 NY Slip Op 00298 at 1

[106] 2014 NY Slip Op 00298 at 2

[107] 2014 NY Slip Op 00298 at 2

[108] 2014 NY Slip Op 00298 at 2

[109] 2014 NY Slip Op 00298 at 2

[110] 2014 NY Slip Op 00298 at 2

[111] 79 AD3d 493, 918 N.Y.S.2d 1 (1st Dept 2010)

[112] 2014 NY Slip Op 00298 at 2

[113] 79 AD3d at 495

[114] 2014 NY Slip Op 00298 at 2

[115] 2014 NY Slip Op 00298 at 2

[116] 167 A.D.2d 732, 563 N.Y.S.2d 303, *aff'd* 78 N.Y.2d 942, 573 N.Y.S.2d 636 (1991)

[117] 167 A.D.2d at 732, *aff'd* 78 N.Y.2d 942, 573 N.Y.S.2d 636 (1991)

[118] 167 A.D.2d at 733, *aff'd* 78 N.Y.2d 942, 573 N.Y.S.2d 636 (1991)

Any views and opinions expressed in this article are solely those of the authors. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

The Butterfly Effect and Labor Law § 240 Causation

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[11] 71 A.D.3d 593, 899 N.Y.S.2d 153 (1st Dept. 2010) (where injuries from a falling board plaintiff was sawing due to wave action on a floating work stage were covered under § 240 but other injuries from the wave lifting him into the bottom of the pier were deemed not protected by the statute.)

CONCLUSION

Of the four tort essential elements, i.e. duty, breach, causation and damage, it "has often been observed that the concept of proximate cause is an elusive one, incapable of being precisely defined to cover all situations."[9] As the above discussion has attempted to demonstrate, that is no different in Labor Law § 240 cases.

Temporal spatial analysis of each link the chain of events is at the eye of the storm for causation issues. Investigation and discovery must be the butterfly nets to identify what exactly happened and when for Labor Law claims that involve a series of events. Future decisions that flutter by on foreseeability and superseding and intervening causation can be expected to continue to be fact intensive.

[1] *Fernandez*, at 908-909, 938.

[2] *Id.*.

[3] 294 A.D.2d 352, 742 N.Y.S.2d 94 (2d Dept. 2002).

[4] *Id.*, at 353.

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Labor Law §240 and the Falling Worker – Recent Decisions

MARC J. ACKERMAN*

This article seeks to aid understanding about whether liability arises under Labor Law §240(1) where a worker has fallen from a height. While many fact patterns can give rise to a claim in this realm, the focus here is on recent significant decisions concerning three categories.

The first category concerns falls involving a modest height differential. There is no "bright line" minimum differential that determines whether an elevation-related hazard exists under §240(1).[1] Rather, as also seen in the "falling object" arena, the present focus is on whether the hazard is one "directly flowing from the application of the force of gravity to an object or person."[2] In analyzing whether liability attaches to an elevation-related hazard as it applies to a falling worker, factors considered include the specific nature of the work performed, the surface from which the worker fell, and the adequacy of the safety devices, or lack thereof.

The second category centers on the flatbed truck. Interestingly, recent cases demonstrate variance in the holdings among the Appellate Divisions with respect to falling from a flatbed, as opposed to falling from materials on a flatbed.

Finally, the third category is of the "near miss" variety, i.e. recent cases in which a worker had prevented him or herself from falling, but became injured nonetheless.

Height Differentials

In Rocovich v. Consol. Edison Co.,[3] the Court of Appeals dismissed a plaintiff's Labor Law §240 claim where that plaintiff slipped and fell into a twelve inch trough of hot oil. In dismissing plaintiff's claim, the court applied the following analysis:

> Plaintiff contends that there was some elevation-related risk inherent in having to work near the 12-inch trough and that a slip and fall, be it only a matter of inches, into a highly caustic substance such as heated industrial oil should be deemed within section 240(1)'s embrace. We disagree. While the extent of the elevation differential may not necessarily determine the existence of an elevation-related risk, it is difficult to imagine how plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk which called for any of the protective devices of the types listed in section 240(1).[4]

The Courts have since followed *Rocovich* in recognizing that there can be falls from modest heights at which Labor Law §240(1) does not apply. However, the Courts have not gone as far as setting forth a specific *de minimus* height at which liability is guaranteed to not attach.

In *Cappabianca v. Skanska Building, USA*,[5] plaintiff was standing on a pallet that was between four and eight inches high. A malfunctioning saw sprayed water on the pallet, causing him to fall when his foot had become caught in the three to six inch openings between the slots of the pallet. The Appellate Division upheld the trial court's dismissal of plaintiff's Labor Law §240(1) claims, finding that the accident could not give rise to liability because plaintiff was at most twelve inches above the floor, and as such, was "not exposed to an elevation-related risk requiring protective safety equipment."[6]

In *Gile v. Gen. Elec. Co.*,[7] plaintiff and his co -workers were pouring concrete into a concrete form, while standing on two by four whalers. Plaintiff fell four to six inches while removing cement from the chute of the cement truck. The Third Department reversed the lower court and granted summary judgment to the defendant dismissing plaintiff's Labor Law §240(1) claim, citing primarily the height from which plaintiff fell, and secondarily the fact that the two by four on which plaintiff was standing was not intended as a safety device to support his weight.

In *Soltero v. City of New York*,[8] plaintiff prevailed under Labor Law §240 when, while replacing old tracks, she fell from a ledge in a subway tunnel that was only two feet high . The ledge was soaked with water to control dust. The Court found that the incident arose

* *Marc J. Ackerman is an attorney with Harrington, Ocko & Monk, LLP in White Plains, New York.*

from the application of the force of gravity and the lack of an appropriate safety device.

A drywall taper using his own stilts to reach a nine foot ceiling was granted summary judgment under §240(1) in *Gatto v. Clifton Park Senior Living, LLC*,[9] when a bolt in one of the stilts broke. The stilts had only raised plaintiff about 1¥¥¥ foot off the floor. Even so, this height differential created an elevation-related hazard within Labor Law §240(1), as the stilt, by breaking, failed to perform its function.

As reflected in these cases, the height differential involved is considered in conjunction with adequacy or absence of safety devices available to a worker.

Also noteworthy is a case where the plaintiff's task concerned a permanent structure. In *Mendoza v. Highpoint Associates, IX, LLC*,[10] the plaintiff was performing an inspection in assessing what was necessary to repair a leaky roof. While he was doing this, the roof started to buckle and sink beneath his feet. This caused the plaintiff to lose his balance and strike a piece of metal as he fell onto his knee.[11] The defendant property owner proceeded to move for summary judgment. As it turned out, it did not aid the defendant that the roof did not entirely collapse, or that the plaintiff was not cast off of it. Rather, the salient issue was whether the injury resulted "from an elevation-related hazard."[12] In that regard, there was a triable issue as to "whether the flimsy, unstable condition of the roof exposed plaintiff to a foreseeable risk of injury from an elevation-related hazard, and whether the absence of a protective device enumerated under Labor Law § 240(1) was a proximate cause of his injuries."[13] As such, the case was not ripe for a summary dismissal, despite the minimal extent of the "fall."

Falls from the Back of a Flatbed Truck

Falling to the ground from the surface of a flatbed truck generally has not resulted in liability under Labor Law §240(1). In *Toefer v. Long Island Railroad*,[14] a worker used a wood lever to pry steel beams off the back of a flatbed on which he was standing. The lever struck the worker and he fell four feet from the flatbed to the ground. The Court of Appeals held that a fall from the flatbed of a truck at this height did not present the kind of elevation-related risk that Labor Law §240(1) contemplated.[15]

A distinguishing factor in *Toefer* is the Court's description of the flatbed as a "large and stable surface," atop which he was directly standing. Additionally, the worker was struck by an object that was moving either upward or horizontally, i.e. there was no "falling object" as understood at the time.

In contrast, where a worker is standing atop materials on a flatbed and subsequently falls because of the absence of a safety device, liability under Labor Law §240(1) generally attaches.

In Phillip v. 525 East 80th Street Condominium,[16] plaintiff fell from atop a load of scaffolding material nine feet high above a flatbed truck while unloading materials. Although plaintiff was provided with a safety harness, there was no location on the truck where the harness could be secured.

Similarly, plaintiff in Naughton v. City of New York [17] was standing atop bundles of curtain walls located on a flatbed truck that he was rigging to a crane. His request for a ladder in order to climb down from the bundles was refused. Thus plaintiff was required to climb on the bundles to perform his work. A tag line on one of the bundles went slack and despite Plaintiff's attempts to avoid the swinging bundle, it struck him, causing him to fall approximately fifteen feet to the ground. The failure to provide a ladder, despite plaintiff's request, was deemed a proximate cause of the accident to establish liability under Labor Law §240(1).

Likewise, in *Ford v. HRH Construction Corp.*,[18] plaintiff had to climb wooden cross braces on the end of ten foot high stacks of curtain wall panels located on a flatbed truck, to attach each panel to a strap to be hoisted for installation. Plaintiff fell from atop the stack to the ground. Because plaintiff was not given a ladder or other safety device to reach the top of the stack from which he fell, he was granted summary judgment on his Labor Law §240(1) claim.

In Intelisano v. Sam Greco Construction, Inc.,[19] plaintiff was instructed to unload bundles of insulation that were stacked ten feet high on a flatbed trailer. Because he was not provided a ladder or scaffold, he had to climb on the spare tire attached between the trailer and truck cab to reach the top . While pulling himself up, he fell to the ground. The Third Department affirmed the granting of summary judgment to the plaintiff, given the absence of a proper safety device.

Unlike the First, Second and Third Departments, the Fourth Department has not followed the distinction between falling from a flatbed and falling from materials on a flatbed. In Brownell v. Blue Seed Feeds,

Inc.,[20] plaintiff was standing on a four-foot pile of rebar stacked on a truck when the pile "shifted" or "snapped," the momentum of which threw the plaintiff off the truck and onto the ground. In determining that Labor Law §240(1) did not apply, the Court, citing *Toefer*, held that the surface of a flatbed truck does not constitute an elevated work surface for purposes of Labor Law § 240(1). The fact that plaintiff "was standing on a pile of rebar rather than standing on the bed of the truck does not move this case from one involving the ordinary dangers of a construction site to one involving the special risks protected by Labor Law §240(1)."[21]

The "Almost Falling" Worker

Another line of §240(1) cases involves workers who have "almost" fallen. Where the work entails a risk related to differences in elevation and the absence of an appropriate safety device, the Courts have generally found it of "no consequence" that the injuries sustained were a result of a worker preventing a fall.[22]

In *Reavely v. Yonkers Raceway Program*,[23] plaintiff had to lean over a portion of a wall to cut a piece of a hang wall with a saw. He was unable to stand because of a gully between himself and the wall and a ten foot unguarded trench on another side. As he was completing the cut and attempting to stand, his right foot slipped on viscous waterproofing. His body was pulled forward and, given that he had no fall protection, he hovered over the trench. Plaintiff was not injured by falling into the trench, but rather by attempting to prevent himself from falling. In a 3-2 decision, the First Department upheld plaintiff's motion for summary judgment under Labor Law §240(1), finding that the lack of a safety device was a violation of this provision, and a proximate cause of plaintiff's injuries.

In *Peters v. Kissling Interests, Inc.*,[24] plaintiff was attempting to remove window trim with a pry bar while he was standing on a window sill that was six inches wide and several feet above the floor . The plaintiff was pulling a piece of loose trim. It unexpectedly broke free from the window, and he began to fall backwards off the window sill. While plaintiff was grabbing the window sash to prevent himself from falling, the window shattered, and a piece of falling glass struck plaintiff's wrist. Plaintiff established that, even though he did not fall, the incident was a protected activity under Labor Law §240(1), given the absence of an appropriate safety device to protect him "from harm directly flowing from the application of the force of gravity,"[25] which was found to be a proximate cause of his injuries.

CONCLUSION

The Courts have continued to refrain from imposing a bright-line minimum standard as to what height, if any, a worker must fall from to qualify for a recovery under §240(1). Rather, the need for a safety device, or the sufficiency of one afforded, remains the emphasis of judicial analysis in most falling worker cases. As for flatbed truck cases, while falling directly from the bed is outside the purview of Labor Law §240, all appellate departments except the Fourth will entertain a §240 claim when a worker falls from materials thereon. Finally, it remains true that §240 liability can occur even where the worker ultimately averted a fall.

[1] *Auriemma v. Biltmore Theatre, LLC*, 82 A.D.3d 1, 9, 917 N.Y.S.2d 130 (1st Dep't 2011)(internal citations omitted)

[2] *Id.*

[3] 78 N.Y.2d 509, 583 N.E.2d 932 (1991)

[4] 78 N.Y.2d at 514-15, 583 N.E.2d at 935

[5] 99 A.D.3d 139, 950 N.Y.S. 2d 35 (1st Dep't 2012)

[6] 99 A.D.3d at 146

[7] 272 A.D.2d 833, 708 N.Y.S.2d 188 (3d Dep't 2000)

[8] 93 A.D.3d 578, 940 N.Y.S.2d 491 (1st Dep't 2012)

[9] 90 A.D.3d 1387, 935 N.Y.S.2d 366 (3d Dep't 2011)

[10] 83 A.D.3d 1, 919 N.Y.S.2d 129 (1st Dep't 2011)

[11] According to the affirmation that supported the motion, the plaintiff's right foot merely sank about an inch and a half to two inches into the surface of the roof; his foot did not even break through the surface of the roof.

[12] 83 A.D.3d at 12

[13] *Id.*

[14] 4 N.Y.3d 399, 828 N.E.2d 614, 795 N.Y.S.2d 511 (2005)

[15] See also, Lavore v. Kir Munsey Park 020, LLC, 40 A.D.3d 711, 835 N.Y.S.2d 708 (2d Dep't 2007) (The approximately five-foot elevation between the top of the truck's utility bin and the ground did not present an elevation-related risk under Labor Law §240[1])

[16] 93 A.D.3d 578, 940 N.Y.S.2d 631 (1st Dep't 2012)

[17] 94 A.D.3d 1, 940 N.Y.S.2d 21 (1st Dep't 2012)

[18] 41 A.D.3d 639, 838 N.Y.S.2d 636 (2d Dep't 2007)

[19] 68 A.D.3d 1321, 890 N.Y.S.2d 683 (3d Dep't 2009)

[20] 89 A.D.3d 1425, 932 N.Y.S.2d 623 (4th Dep't 2011)

[21] 89 A.D.3d at 1426

[22] *Reavley v. Yonkers Raceway Program*, 88 A.D.3d 561, 931 N.Y.S.2d 579 (1st Dep't 2011); *Ortiz v. Turner* Construction Co., 28 A.D.3d 627, 813 N.Y.S.2d 770 (2d Dep't 2006); *Vislocky v. City of New York*, 62 A.D.3d 785, 879 N.Y.S.2d 176 (2d Dep't 2009); *George v. Huber, Hunt & Nichols*, 242 A.D.2d 954, 662 N.Y.S.2d 898 (4th Dep't 1997)

[23] 88 A.D.3d 561, 931 N.Y.S.2d 579 (1st Dep't 2011)

[24] 63 A.D.3d 1519, 880 N.Y.S.2d 797 (4th Dep't 2009)

[25] 63 A.D.3d at 1520

What Is An Elevation-Related Risk In The Wake Of *Runner*?

GARY H. ABELSON* & SANJEEV DEVABHAKTHUNI**

Until recently, it had been axiomatic that New York's "scaffold law," Labor Law § 240(1), imposes strict liability upon landowners and general contractors, but limited liability to accidents related to the inherent effects of gravity.[1] Generally, an injured worker could not assert a § 240 claim unless he had fallen from an elevated height or had been struck by an object falling from an elevated height.

The landscape changed in 2009, however, when the United States Second Circuit Court of Appeals certified a novel question to the New York Court of Appeals: are injuries caused when a worker was pulled forward and into a device as a result of an object descending a set of stairs protected under § 240 (1)? Yes, held a unanimous Court of Appeals, in *Runner v. New York Stock Exch., Inc.*[2]

In *Runner*, the plaintiff and several co-workers moved a heavy reel of wire down a set of four stairs. To prevent the reel from rolling freely and causing damage, the workers tied one end of a rope to the reel and wrapped the rope around a metal bar placed on the same level as the reel. The plaintiff and two others held the loose end of the rope, essentially acting as counterweights. The reel was heavier than expected, and the plaintiff was pulled horizontally into the bar, injuring his hands as they jammed against it. Thus, the plaintiff never changed elevations, and he was not struck by the actual falling object, the reel. The jury found for defendants, and the trial court set aside the verdict and directed judgment for plaintiff. Defendants appealed, and the Second Circuit certified the question to the Court of Appeals.[3]

The Court of Appeals held:

> Manifestly, the applicability of the statute in a falling object case such as the one before us *does not under this essential formulation depend upon whether the object has hit the worker.* The relevant inquiry--one which may be answered in the affirmative even in situations where the object does not fall on the worker--is rather *whether the harm flows directly from the application of the force of gravity to the object.*[4]

The Court held that the injury to the plaintiff "was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel's path." *Id.* "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a *physically significant elevation differential*. *Id.* at 603 (emphasis added).

In determining whether an elevation differential is "significant" versus *de minimis*, the key issues as per *Runner* are the weight of the object and the amount of force it is capable of generating.[5] Thus, in *Runner*, the Court of Appeals expanded the application of § 240 (1) in holding that "the applicability of the statute in a falling object case . . . does not . . . depend upon whether the object has hit the worker," but "rather whether the harm flows directly from the application of the force of gravity to that object."[6]

Since *Runner*, the Appellate Division First Department has struggled with the issue of what constitutes an elevation-related risk. For example, in *Makarius v Port Auth. of N.Y. & N.J.*,[7] a five-justice panel produced three separate opinions regarding the issue of the defendant's liability under § 240 (1). In *Makarius*, the alleged injury occurred when, as plaintiff and one of his coworkers attempted to repair a water pipe, a transformer that had been affixed to the wall, at a height of approximately six to seven feet, fell and struck the head of the plaintiff, who was standing at ground level.[8] The trial court granted plaintiff partial summary judgment on the issue of the defendant's liability.

Although the above facts would appear to present a "falling object" claim, a majority of the First Department panel dismissed the § 240 (1) claim. The court distinguished *Runner*, holding that there was "no

* *Gary H. Abelson is a partner with the firm of Hiscock & Barclay and is located in its Rochester, New York office.*

** *Sanjeev Devabhakthuni is an associate with the firm of Hiscock & Barclay and is located in its Rochester, New York office.*

significant elevation differential" between the injured worker and the falling object because the transformer fell from less than two feet above plaintiff's head.[9] In an opinion dissenting as to this issue, Justices Moskowitz and Freedman maintained that under *Runner*, the accident "fell within the parameters of Labor Law § 240 (1) because a falling object struck plaintiff that a safety device had not adequately secured."[10]

Thereafter, in *DeRosa v Bovis Lend Lease LMB, Inc.*, 96 A.D.3d 652 (1st Dep't 2012), the plaintiff, the driver of a cement-mixing truck, was injured when his shirt became caught on the cement mixer's handle, throwing him up and over the truck. At the time of the accident, the plaintiff had activated switches that put the truck's mixer at full speed and then mounted the right side of the truck's rear fender, which was approximately three feet off the ground, in order to visually assess whether the consistency of the mix was appropriate.[11]

In a 4-1 decision, the First Department reversed an order granting partial summary judgment as to liability under § 240 (1), holding that the plaintiff "was not exposed to an elevation-related risk and his injury did not directly flow from the application of gravity's force."[12] The majority further held that the plaintiff failed to establish that the protection by the type of safety equipment enumerated in the statute was warranted.[13]

Justice Renwick dissented, concluding that as in *Runner*, the risk of the plaintiff's injury is protected under § 240 (1), "i.e., an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against," in part because the plaintiff's job required him to climb to the top of the truck so that he could visually assess whether the consistency of the mix was appropriate for the job.[14]

Accordingly, based on the holdings in *Makarius* and *DeRosa*, it appears that at least three justices in the First Department interpret the holding in *Runner* as being more expansive than their colleagues. This number is significant in light of the fact that the three justices would constitute a majority of an appellate panel in a given case.

In the other departments of the Appellate Division, the issue has thus far not been as divisive, but a few cases are worth defense counsel's consideration. In *Strangio v Sevenson Envtl. Servs., Inc.*,[15] the defendants successfully moved for summary judgment dismissing the plaintiff's Labor Law § 240 (1) claim for injuries sustained from being struck in the face by the handle of a hand-operated hoisting mechanism while he was raising a scaffold. The hoisting mechanism did not change elevations but rather malfunctioned, turned backwards, and struck the plaintiff's face.[16]

On appeal, in a 3-2 decision, the Fourth Department affirmed, reasoning that "the protective device, i.e., the scaffold, adequately shielded plaintiff and his co-workers on the platform from falling to the ground or sustaining other injuries as a result of the unchecked descent of the scaffold."[17] Thus, held the court, "[t]he mere fact that the force of gravity acted upon the hoisting mechanism is insufficient to establish a valid Labor Law § 240 claim inasmuch as plaintiff's injury did not result from an elevation-related risk as contemplated by the statute." *Id.* at 1893-1894. The dissenting justices concluded that because the injury was " 'the direct consequence of the application of the force of gravity to the [cranking mechanism]' . . . and that the risk to be guarded against 'arose from the force of the [scaffold's] unchecked, or insufficiently checked, descent,' the plaintiff had established a valid § 240 (1) claim."[18]

In a brief decision, the Court of Appeals apparently agreed with the dissent and reversed, holding that "[t]riable issues of fact exist as to whether the defendants provided proper protection under Labor Law § 240 (1)."[19] Thus, the Court reiterated that even where neither the injured worker nor the object that struck changed elevations, the resulting injury can still be protected under the statute.

Since *Strangio*, the Fourth Department has applied *Runner* without incident. *Compare, e.g.*, *Signs v Crawford*[20] (§ 240 (1) claim established where metal plate being hoisted by a jib fell and caught plaintiff's glove, causing injury), *Miles v Great Lakes Cheese of N.Y., Inc.*[21] (§ 240 (1) claim established where plaintiff was struck in the head by two scaffold planks, which were being raised approximately from 3.5 feet above the ground, to a level approximately 20 inches higher) and *Dipalma v State of New York*[22] (§ 240 (1) claim established for injuries caused by a "skid box" sliding off forklift and falling approximately "one or two feet," striking plaintiff), with *Bruce v Actus Lend Lease*[23] (no "falling object" claim established under § 240 (1) where roof truss that plaintiff was securing to a building under construction broke apart, striking him and knocking him off ladder) and *Timmons v Barrett Paving Materials, Inc.*[24] (no § 240 (1) claim established where there was no evidence that object that fell

causing injury to plaintiff fell because of the absence or inadequacy of a safety device).

Likewise, a survey of the Second and Third Departments reflects that there have been a few interesting cases regarding this issue. *See e.g.*, *Moncayo v Curtis Partition Corp.*[25] (injury caused by piece of sheetrock that had fallen from the third floor of building under construction not protected under § 240 (1) because sheetrock not being hoisted or secured and did not require hoisting or securing); *Andresky v Wenger Constr. Co., Inc.*[26] (valid § 240 (1) claim established where plaintiff, who was shoveling concrete out of a container raised onto a scaffold was pulled off of scaffold and injured when the container tipped off the edge); *Gutman v City of New York*[27] (order granting summary judgment dismissing complaint reversed where plaintiff allegedly was injured when, while his team was moving a rail, his team lost control, causing it to fall approximately 12 to 16 inches and strike plaintiff); *Mohamed v City of Watervliet*[28] (§ 240 (1) claim properly dismissed where evidence showed that the "falling object," a backhoe bucket, crushed the worker, not because of gravity, but because of its allegedly negligent operation); *Oakes v Wal-Mart Real Estate Bus. Trust*[29] (no liability under § 240 (1) where "falling object," a large truss, allegedly tipped over and fell at ground level, striking and injuring plaintiff, because there was no elevation differential).

In light of the fact that most of the above Labor Law cases involved decisions on motions for summary judgment, such cases, with claims asserting liability under § 240 (1), are worth monitoring to properly prepare defense strategy for owners and general contractors. Specifically, defense counsel should analyze how courts interpret what constitutes a "physically significant elevation differential," and should explore what, if any, new issues arise in this area of Labor Law jurisprudence.

[1] *See generally Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 513 (1991).

[2] 13 N.Y.3d 599, 602 (2009)

[3] Following the Court of Appeals' decision, the order setting aside the verdict and directing judgment for plaintiff was affirmed by the Second Circuit. *See* 590 F.3d 904 (2d Cir. 2010).

[4] *Id.* at 604 (emphasis added).

[5] *See id.* at 605. *See also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 10 (2011) (holding that the plaintiff was not precluded from recovery under § 240 (1) where the pipes that struck him were on the same level and fell approximately four feet before striking plaintiff).

[6] *Id.* at 604

[7] 76 A.D.3d 805 (1st Dep't 2010)

[8] *Id.* at 806

[9] *Id.* at 807-808

[10] *Id.* at 815

[11] *Id.* at 653

[12] *Id.*

[13] *Id.* at 653-654

[14] *Id.* at 660-661

[15] 74 A.D.3d 1892 (4th Dep't 2010)

[16] *Id.* at 1894

[17] *Id.* at 1893

[18] *Id.* at 1894 (dissenting opinion), quoting *Runner*, 13 NY3d at 604

[19] *Id.*, 15 N.Y.3d 914, 915 (2010)

[20] 109 A.D.3d 1169, 1169 (4th Dep't 2013)

[21] 103 A.D.3d 1165, 1166 (4th Dep't 2013)

[22] 90 A.D.3d 1659, 1659-1660 (4th Dep't 2011)

[23] 101 A.D.3d 1701, 1701-1702 (4th Dep't 2012)

[24] 83 A.D.3d 1473, 1474 (4th Dep't 2011)

[25] 106 A.D.3d 963 (2d Dep't 2013)

[26] 95 A.D.3d 1247, 1249 (2d Dep't 2012)

[27] 78 A.D.3d 886, 886 (2d Dep't 2010)

[28] 106 A.D.3d 1244 (3d Dep't 2013)

[29] 99 A.D.3d 31, 39-40 (3d Dep't 2012)

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[5] *See Losito v. Manlyn Dev. Group, Inc.*, 85 A.D.3d 983, 925 N.Y.S.2d 643 (2d Dept. 2011); *Lopez v. Boston Props., Inc.*, 41 A.D.3d 259, 838 N.Y.S.2d 527 (1st Dept. 2007).

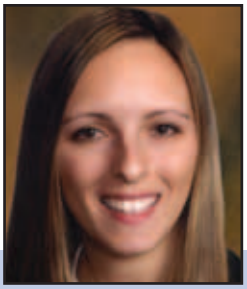
[6] *Kallem v. Mandracchia*, 2013 N.Y.App. Div. Lexis 7873 (2d Dept. 2013).

[7] *See Collins v. City of New York*, 105 A.D.3d 631, 963 N.Y.S.2d 260 (1st Dept. 2013); *Aton v. West Manor Constr. Corp.*, 100 A.D.3d 523, 954 N.Y.S.2d 76 (1st Dept. 2012).

[8] 96 A.D.3d 500, 949 N.Y.S.2d 7 (1st Dept. 2012).

[9] *Lapidus v. State of New York*, 57 A.D.3d 83, 866 N.Y.S.2d 711 (2d Dept. 2008).

What Activity Constitutes An "Alteration" Under Labor Law § 240(1)?



NICHOLAS M. CARDASCIA, ESQ.[1] & OURANIA SDOGOS[2]

At first glance, activities like boarding up windows in a building scheduled for demolition,[3] installing protective casing on wires,[4] and installing bomb blast film on a commercial lobby window[5] do not seem to significantly change the configuration or composition of a building. Yet surprisingly, courts hold that these activities do involve significant changes to qualify as alterations under Labor Law § 240(1).

One of the critical inquiries for any attorney defending a Labor Law claim is whether the plaintiff was engaged in a protected activity so as to be entitled to the protection of the Labor Law. The specific enumerated activities in § 240(1) are "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure."[6] This article will focus on whether an activity constitutes alteration so as to be brought within the protection of the Labor Law.

The Court of Appeals' attempt to define "alteration" in Joblon

In *Joblon v. Solow*,[7] the Court of Appeals first attempted to set forth a definition for what activity constitutes altering a building or structure for purposes of § 240(1). The Court declined to set a bright-line definition but held that alteration "requires making a *significant* physical change to the configuration or composition of the building or structure."[8] So, in all post-*Joblon* cases, courts have grappled with the issue of whether the activity results in a significant physical change to the configuration or composition of a building or structure. A good argument can be made that if the work is for a functional purpose it will be considered an alteration, as opposed to work that is a cosmetic change or routine maintenance.

The plaintiff in *Joblon* fell while installing an electric wall clock. To install the clock, the plaintiff had to run electrical wires from an adjacent room, which involved chiseling a hole in the dividing wall. In looking at the work the plaintiff was performing at the time of injury, the Court concluded that the work involved more than the routine act of standing on a ladder to hang a clock on a wall. The plaintiff's activity involved a significant change to the building's configuration because the plaintiff had to run a new electrical power supply to the room that required extending the wiring and chiseling a hole through a concrete wall.[9]

The Court of Appeals issued its decision in *Weininger v. Hagedorn & Co.*[10] on the same day as *Joblon*. The plaintiff in *Weininger* fell while running computer and telephone cable through the ceiling to a new telecommunications room. The Court found that this work—standing on a ladder to access a series of holes punched in the ceiling and pulling the wiring through "canals" that had been made in chicken wire in the ceiling— made a significant physical change to the building's configuration.[11]

Post-Joblon cases regarding installation of cable and telecommunications wiring

Following the lead of the Court of Appeals in *Joblon* and *Weininger*, the majority of cases at the Appellate Division level that involve plaintiffs injured while running cable wiring or telecommunications wiring have concluded that this activity makes a significant enough change to a building or structure so as to constitute an alteration.

Most recently, the First Department, in *Kochman v. City of New York*,[12] held that moving a T-1 line in a garage constituted alteration, even though the project did not involve any drilling or chiseling through walls. The court concluded that the work constituted an alteration because the plaintiff had to run new wires through the roof, along the roof, and down into another room where a new circuit would be installed and "would have needed to take steps to permanently affix the wires to the roof of the structure, and to protect them from any hazard."[13]

In a similar vein, the Third Department, in *Randall v.*

1 *Nicholas M. Cardascia is a partner in the Appellate Group at Ahmuty, Demers & McManus in Albertson, NY.*

2 *Ourania Sdogos is a recent graduate of St. John's University Law School and a law clerk at Ahmuty, Demers & McManus awaiting admission to the New York Bar.*

Time Warner Cable, Inc.,[14] held that drilling and running wiring through walls to upgrade a subscriber's cable and internet service made a significant enough change to constitute alteration.[15] And the Fourth Department, in *Enge v. Ontario County Airport Management Co.*,[16] held that drilling holes in walls and splicing and running telephone wires into a new office was sufficient enough to constitute alteration.

But to show how Labor Law cases rise or fall based on the specific facts of each case, one should look at the Fourth Department's ruling in *Cooper v. Time Warner Entertainment-Advance*,[17] where installing high-speed internet service was not alteration when it involved inspecting signals on equipment and a utility pole and the First Department's ruling in *Rhodes-Evans v. 111 Chelsea LLC*,[18] where splicing a fiber optic cable did not constitute a significant physical change to a building or structure.

In *Rhodes-Evans*, the plaintiff was a Verizon field technician assigned to splice fiber optic cable in a cable box located in a parking garage to provide new digital telephone service to a tenant in the building. Plaintiff had to use a ladder to reach the cable box, which was located ten to fifteen feet above ground level. As she was standing on the ladder and looking for the cable to splice, she realized the ladder was moving backwards. To avoid falling, she twisted and grabbed onto the cables, using her body to pull the ladder back into position. In so doing, she allegedly sustained a back injury.

In *Cooper* and *Rhodes-Evans*, the activities involved merely inspecting cable equipment and splicing cable in an existing cable box. The plaintiffs were not going to drill any holes in walls or permanently affix any wires to a building or structure. These two cases provide good examples of how Labor Law cases are determined on a case-bycase basis. At first blush, it would seem that § 240(1) should apply because both plaintiffs were working with on the installation of telecommunications systems. But the specific nature of each plaintiff's work took them out of the protection of the Labor Law. Before deciding whether a plaintiff will be entitled to the protection of § 240(1), therefore, it is important to ascertain the exact nature of the plaintiff's work at the time of the accident as well as the overall scope of the work intended to be performed.

The impact of Panek and Prats on "alteration"

In 2003, five years after *Joblon* and *Weininger*, the Court of Appeals issued two more decisions that discussed alteration in the context of § 240(1): *Panek v. County of Albany*[19] and *Prats v. Port Authority of New York & New Jersey*.[20]

In *Panek*, the plaintiff was directed to remove two 200-pound air handlers from a building that was scheduled for demolition. In the course of removing one of the air handlers, the plaintiff fell from a ladder. The Court granted the plaintiff summary judgment under § 240(1) finding that the removal of the air handlers constituted a substantial modification to the building. In citing to *Joblon*, the Court noted that the "critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury.'"[21] And the Court made clear that alteration "does not encompass simple, routine activities such as maintenance and decorative modifications."[22] Rather, in finding that the removal of the air handlers constituted a significant modification to the building, the Court appeared to rely on the substantial amount of work that was involved in removing these two heavy units.[23]

Then, in *Prats*, the Court of Appeals held that § 240(1) protects workers employed in the acts enumerated in the statute, even while performing duties ancillary to those acts. Rather than limiting its analysis to what particular activity the plaintiff was performing at the time of injury—the analysis it enunciated in *Joblon*—the Court decided that this issue must be determined on a context-specific, case-by-case basis, based upon a "confluence of factors."[24] The confluence of factors include: 1) whether the plaintiff's position on the job regularly involved an enumerated activity; 2) whether the plaintiff's employer was hired to carry out an enumerated activity; and 3) whether the plaintiff previously engaged in enumerated activities while working on the same job site and at the same location where the injury occurred.[25]

The plaintiff in *Prats* was an assistant mechanic who worked for AWL Industries overhauling air-conditioning systems at the World Trade Center complex. AWL's work also included cleaning, repairing, and rehabilitating air-handling units, including supports, anchors, and piping. Per its agreement, AWL was obligated to determine the extent of all construction. As some of the units measured 20-by-20 feet and were built into the walls, AWL was required to level floors, lay concrete, and rebuild walls to replace the large air filtering systems.

On the day of the accident, plaintiff and a co-worker were readying air-handling units for inspection. The co-worker set up a ladder to inspect the return fan, and plaintiff held the ladder. His co-worker climbed on the unit and asked plaintiff to give him a wrench. Plaintiff complied and began to climb the ladder. When he was 15 feet off the ground, the ladder slid out, and plaintiff fell. So even though the plaintiff was only going to inspect the return fan (normally inspections are activities that would fall outside the scope of § 240[26]), the Court compared plaintiff's work with the overall scope of AWL's work on site and ruled that plaintiff's activities were covered under § 240(1). The Court found that plaintiff's inspection "was not in anticipation of AWL's work, nor did it take place after the work was done," but rather the inspections were "ongoing and contemporaneous" with the other work at the site that formed a single contract.[27]

Activities not considered "alteration" and routine maintenance

In *Munoz v. DJZ Realty, LLC*, [28] the Court of Appeals declined to expand the scope of § 240(1), holding that changing the face of a billboard advertisement does not make a significant enough change to constitute alteration. The Court reasoned that this activity does not change the structure of the billboard, only its "outward appearance," and is thus "more akin to cosmetic maintenance or decorative modification."[29]

The First Department has cited *Munoz* to conclude that attaching or removing signs from a building does not constitute alteration work, even if there is drilling involved. In *Bodtman v. Living Manor Love, Inc.*,[30] where the plaintiff was drilling several holes to attach a *temporary* sign to a roof, it was not a significant enough change to constitute alteration. Likewise, in *Anderson v. Schwartz*,[31] the court held that removing an aluminum sign *temporarily* bolted to a building was not alteration. And in *Della Croce v. City of New York*,[32] attaching a bulletin board to a wall was not alteration. All of the above cases involved work that was temporary in nature and not related to the functioning of a building or structure.

As noted by the Court of Appeals in *Joblon* and *Panek*, a worker will not be entitled to the protection of § 240(1) when injured while performing work that is considered routine maintenance. The issue of whether the work being performed is an enumerated activity or routine maintenance can also be a close call, and there are many cases that discuss this issue. One of those cases was *Holler v. City of New York*.[33] In *Holler*, a stagehand was injured when struck by a falling object while assisting in the installation of a hoist motor for lifting scenery at a theater in preparation for a new show. The Second Department dismissed the plaintiff's § 240(1) claim because the work was more in the nature of "routine maintenance" done outside the context of construction work.

Similarly, a worker who fell from a ladder while installing a key box on the wall of a bank vault, which was to be used to store a duplicate key, was not altering the building.[34] The court reasoned that the building's electrical power supply was not being re-routed, and even though the worker had to use a drill and a chip hammer, the court found that "the installation of the duplicate key box was part and parcel of routine maintenance."[35]

CONCLUSION

In conclusion, whether the particular activity that a worker is performing constitutes an alteration under Labor Law § 240(1) depends on whether the activity results in a significant or permanent physical change to the configuration or composition of a building or structure. Additionally, a worker will be entitled to the protection of the Labor Law even when performing acts ancillary to an enumerated activity. The key areas of inquiry in determining whether a worker is engaged in activity that would be considered alteration are: whether the work affects the functioning of a building; whether the work involves a permanent or temporary installation; whether the work is cosmetic in nature; whether the work is more akin to routine maintenance; and, where a worker is injured while merely inspecting work, whether that inspection was ancillary to alteration work the worker previously performed or was going to perform.

There has been a considerable amount of litigation over what activities constitute a significant or permanent physical change to a building or structure, and the case law in this area continues to develop. Attached to this article is a chart that shows how the courts in New York have ruled on various types of activities and whether those activities were found to constitute an alteration or not.

[3] *Santiago v. Rusciano & Son, Inc.*, 92 A.D.3d 585, 938 N.Y.S.2d 557 (1st Dep't 2012) (holding that boarding up windows to make a building uninhabitable and protect it from vandalism in anticipation of demolition significantly changed the building's composition or structure).

Footnotes Continued on page 74

What Activity Constitutes An "Alteration" Under Labor Law § 240(1)?

Case	Activity	Protected
Belding v. Verizon N.Y., Inc., 14 N.Y.3d 751, 925 N.E.2d 577 (2010)	Applying bomb blast film to windows in the lobby of a commercial building.	YES
Sanatass v. Consol. Investing Co., 10 N.Y.3d 333, 858 N.Y.S.2d 67 (2008)	Installing an air conditioning unit to a ceiling by drilling holes and affixing metal rods to the ceiling.	YES
Munoz v. DJZ Realty, LLC, 5 N.Y.3d 747, 800 N.Y.S.2d 866 (2005)	Applying a new advertisement to the face of a billboard on top of a building.	NO
Panek v. Cnty. of Albany, 99 N.Y.2d 452, 758 N.Y.S.2d 267 (2003)	Removing two 200-pound air handlers bolted to the ceiling of an air traffic control tower.	YES
Prats v. Port Auth. of N.Y. & N.J., 100 N.Y.2d 878, 768 N.Y.S.2d 178 (2003)	Inspecting an air handling unit, where the inspection was contemporaneous with both prior and ongoing work done by plaintiff that involved alteration.	YES
Joblon v. Solow, 91 N.Y.2d 457, 672 N.Y.S.2d 286 (1998)	Installing an electric wall clock.	YES
Weininger v. Hagedorn & Co., 91 N.Y.2d 958, 672 N.Y.S.2d 840 (1998)	Running computer and telephone cable through the ceiling.	YES
Mutadir v. 80-90 Maiden Lane Del LLC, 2013 WL 5827726 (1st Dep't 2013)	Installing slot boards to support shelves in a supermarket, where plaintiff was employed by a company hired to take enumerated activities and had worked at the job site for three months prior demolishing and reconstructing the interior of the building.	YES
Kochman v. City of New York, 2013 WL 5526095 (1st Dep't 2013)	Running and affixing new wires to the roof of a building so as to move a line circuit in a garage.	YES
Amendola v. Rheedlen 125th St., LLC, 105 A.D.3d 426, 963 N.Y.S.2d 30 (1st Dep't 2013)	Installing window shades by screwing brackets into the ceiling and inserting the shades.	NO
Bodtman v. Living Manor Love, Inc., 105 A.D.3d 434, 963 N.Y.S.2d 35 (1st Dep't 2013)	Drilling several holes to attach a temporary sign to a building roof.	NO
Santiago v. Rusciano & Son, Inc., 92 A.D.3d 585, 938 N.Y.S.2d 557 (1st Dep't 2012)	Boarding up windows to make a building uninhabitable and protect it from vandalism in anticipation of demolition.	YES
Masullo v. 1199 Hous. Corp., 63 A.D.3d 430, 881 N.Y.S.2d 47 (1st Dep't 2009)	Running electrical cable from a construction trailer to a building where a waterproofing project was being conducted.	YES
Widawski v. 217 Elizabeth St. Corp., 40 A.D.3d 483, 838 N.Y.S.2d 496 (1st Dep't 2007)	Dismantling an overhead electrical box in preparation for removing an eight-foot bakery mixer bolted to the floor.	NO

What Activity Constitutes An "Alteration" Under Labor Law § 240(1)?

Rhodes-Evans v. 111 Chelsea LLC , 44 A.D.3d 430, 843 N.Y.S.2d 237 (1st Dep't 2007)	Splicing fiber optic cable in a cable box located in a parking garage to provide services to a new tenant in the building.	NO
Campbell v. City of New York , 32 A.D.3d 703, 821 N.Y.S.2d 166 (1st Dep't 2006)	Splicing an amplifier box into a cable television line.	YES
Anderson v. Schwartz , 24 A.D.3d 234, 808 N.Y.S.2d 26 (1st Dep't 2005)	Removing an aluminum sign temporarily bolted to the side of a building.	NO
Maes v. 408 W. 39 LLC , 24 A.D.3d 298, 808 N.Y.S.2d 613 (1st Dep't 2005)	Removing a large banner advertisement bolted to the side of a building.	NO
Robinson v. City of New York , 22 A.D.3d 293, 802 N.Y.S.2d 48 (1st Dep't 2005)	Helping a co-worker clear wires from a forklift being used to construct a new building.	YES
Sarigul v. N.Y. Tel. Co. , 4 A.D.3d 168, 772 N.Y.S.2d 653 (1st Dep't 2004)	Stripping insulation from pre-existing cable wire.	YES
Samuel v. Simone Dev. Co. , 13 A.D.3d 112, 786 N.Y.S.2d 163 (1st Dep't 2004)	Installing carpeting to soundproof walls in a recording studio.	YES
Acosta v. Banco Popular , 308 A.D.2d 48, 762 N.Y.S.2d 64 (1st Dep't 2003)	Bolting a duplicate key box to the wall of a bank vault with a drill hammer and a chipping hammer.	NO
Smith v. 21 W. LLC Ltd. Liab. Co. , 308 A.D.2d 312, 764 N.Y.S.2d 181 (1st Dep't 2003)	Removing an air conditioning unit by cutting through pin rods that secured the unit to the ceiling.	YES
Adair v. Bestek Lighting and Staging Corp. , 298 A.D.2d 153, 748 N.Y.S.2d 362 (1st Dep't 2002)	Focusing overhead lights above a temporary stage in preparation for a performance.	NO
Della Croce v. City of New York , 297 A.D.2d 257, 746 N.Y.S.2d 484 (1st Dep't 2002)	Attaching a bulletin board to a locker room wall.	NO
Gallagher v. Resnick , 107 A.D.3d 942, 968 N.Y.S.2d 151 (2d Dep't 2013)	Taking measurements of a building's exterior in preparation for fabricating raw materials for the building's reconstruction.	YES
Vasquez v. C2 Dev. Corp. , 105 A.D.3d 729, 963 N.Y.S.2d 675 (2d Dep't 2013)	Moving a fluorescent light fixture from one area of the ceiling to another.	YES
McLean v. 405 Webster Ave. Assocs. , 98 A.D.3d 1090, 951 N.Y.S.2d 185 (2d Dep't 2012)	Installing microconduct, a protective casing, on fiber optic cables in a building's dumbwaiter shaft.	YES

What Activity Constitutes An "Alteration" Under Labor Law § 240(1)?

Gonzalez v. Woodbourne Arboretum, Inc., 100 A.D.3d 694, 954 N.Y.S.2d 113 (2d Dep't 2012)	Replacing a worn-out component in a machine that otherwise operated.	NO
Panico v. Advanstar Commc'ns, Inc., 92 A.D.3d 656, 938 N.Y.S.2d 168 (2d Dep't 2012)	Hanging a light fixture on a ticket booth at a motorcycle show.	NO
Schick v. 200 Blydenburgh, LLC, 88 A.D.3d 684, 930 N.Y.S.2d 604 (2d Dep't 2011)	Running and attaching wires to provide telephone service to a new tenant in a warehouse.	YES
D'Alto v. 22-24 129th St., LLC, 76 A.D.3d 503, 906 N.Y.S.2d 79 (2d Dep't 2010)	Climbing down a cement truck parked outside a construction site after mixing the cement in preparation for construction.	YES
Travers v. RCPI Landmark Props., LLC, 74 A.D.3d 956, 906 N.Y.S.2d 563 (2d Dep't 2010)	Moving speakers lowered by forklift to a stage.	NO
Fuchs v. Austin Mall Assocs., LLC, 62 A.D.3d 746, 879 N.Y.S.2d 166 (2d Dep't 2009)	Replacing an elevator ceiling where the work involved disconnecting electrical wiring to remove the old ceiling, and installing a new ceiling with new lighting fixtures.	YES
LaGiudice v. Sleepy's Inc., 67 A.D.3d 969, 890 N.Y.S.2d 564 (2d Dep't 2009)	Installing an electrical exit sign where the work involved drilling and pulling electrical cable through the ceiling.	YES
Lucas v. Fulton Realty Partners, LLC, 60 A.D.3d 1004, 876 N.Y.S.2d 480 (2d Dep't 2009)	Dismantling and removing steel storage cases bolted to the floor and walls of a building.	YES
Rico-Castro v. Do & Co N.Y. Catering, Inc., 60 A.D.3d 749, 874 N.Y.S.2d 576 (2d Dep't 2009)	Cutting barbed wire on top of a 12-foot fence bolted to a warehouse floor, in preparation for moving the fence by drilling holes into the floor.	YES
Becker v. ADN Design Corp., 51 A.D.3d 834, 858 N.Y.S.2d 745 (2d Dep't 2008)	Running wires in an attic crawl space as part of re-wiring a building's telephone system.	YES
Destefano v. City of New York, 39 A.D.3d 581, 835 N.Y.S.2d 275 (2d Dep't 2007)	Installing a temporary boiler in a building.	YES
Holler v. City of New York, 38 A.D.3d 606, 832 N.Y.S.2d 86 (2d Dep't 2007)	Assisting in installing a hoist motor used to lift scenery at a theatre in preparation for a new show.	NO
Fitzpatrick v. State, 25 A.D.3d 755, 809 N.Y.S.2d 515 (2d Dep't 2006)	Replacing a photo cell that controlled a parking lot's automatic lighting, where the plaintiff's other work involved replacing an old lighting fixture with a new fixture that accepted long-lasting incandescent bulbs.	YES

What Activity Constitutes An "Alteration" Under Labor Law § 240(1)?

Lijo v. City of New York , 31 A.D.3d 503, 818 N.Y.S.2d 569 (2d Dep't 2006)	Fixing overhead electric wires that had been knocked down, where the plaintiff's other work involved repairing/altering an underground sewer line.	YES
Rodriguez v. 1-10 Indus. Assocs., LLC , 30 A.D.3d 576, 816 N.Y.S.2d 383 (2d Dep't 2006)	Pulling an electrical cable from a ceiling.	NO
Hatfield v. Bridgedale, LLC , 28 A.D.3d 608, 814 N.Y.S.2d 659 (2d Dep't 2006)	Applying an advertisement to a billboard on top of a building.	NO
Lioce v Theatre Row Studios , 7 A.D.3d 493, 776 N.Y.S.2d 89 (2d Dep't 2004)	Designing a lighting plan and installing lights for a theater production.	NO
Aguilar v. Henry Marine Serv., Inc. , 12 A.D.3d 542, 785 N.Y.S.2d 95 (2d Dep't 2004)	Retrieving soder to use in servicing a tugboat, which included replacing the bulwark, reconditioning wheels and shafts, and installing new fendering and deck winches.	YES
Cuddon v. Olympic Bd. of Managers , 300 A.D.2d 616, 752 N.Y.S.2d 715 (2d Dep't 2002)	Installing insulation on an air conditioning unit.	YES
Scotti v. Fed'n Dev. Corp. , 289 A.D.2d 322, 734 N.Y.S.2d 573 (2d Dep't 2001)	Installing a telecommunications system.	YES
Rogala v. Van Bourgondien , 263 A.D.2d 535, 693 N.Y.S.2d 204 (2d Dep't 1999)	Installing and replacing window screens at a motel.	NO
Bedassee v. 3500 Snyder Ave. Owners, Corp. , 266 A.D.2d 250, 698 N.Y.S.2d 289 (2d Dep't 1999)	Installing cable wire.	YES
Luthi v. Long Island Res. Corp. , 251 A.D.2d 554, 674 N.Y.S.2d 747 (2d Dep't 1999)	Running borrowed microphone cable through the ceiling to be used at an event, without permanently attaching it.	NO
Randall v. Time Warner Cable, Inc. , 81 A.D.3d 1149, 916 N.Y.S.2d 656 (3d Dep't 2011)	Replacing a filter on overhead cable wires, where plaintiff's prior work that day involved drilling and running wiring through walls to upgrade a subscriber's cable and internet service.	YES
Len v. State , 74 A.D.3d 1597, 906 N.Y.S.2d 622 (3d Dep't 2010)	Raising a moveable dam to turn it into a bridge.	NO
Jones v. Village of Dannemora , 27 A.D.3d 844, 811 N.Y.S.2d 186 (3d Dep't 2006)	Remove sludge from the side of a lagoon in a treatment plant, in preparation for a different employer to install a new aeration system.	NO
Hodges v. Boland's Excavating and Topsoil, Inc. , 24 A.D.3d 1089, 807 N.Y.S.2d 421 (3d Dep't 2005)	Attaching a chute to the conveyer end of a power screen used to screen gravel and make sand.	NO

What Activity Constitutes An "Alteration" Under Labor Law § 240(1)?

Smith v. Innovative Dynamics, Inc., 24 A.D.3d 1000, 809 N.Y.S.2d 216 (3d Dep't 2005)	Installing a camera on top of a pole to test a solar-powered infrared camera system used to detect ice on highways.	YES
Tassone v. Mid-Valley Oil Co. Inc., 291 A.D.2d 623, 738 N.Y.S.2d 103 (3d Dep't 2002)	Installing a satellite communication system, where the work involved mounting the dish on the roof and running wire through the building.	YES
Smith v. Pergament Enters. of S.I., 271 A.D.2d 870, 706 N.Y.S.2d 505 (3d Dep't 1999)	Running computer cables through holes cut in the walls.	YES
Custer v. Jordan, 107 A.D.3d 1555, 968 N.Y.S.2d 754 (4th Dep't 2013)	Installing siding on a home.	YES
Saint v. Syracuse Supply Co., 2013 WL 5496123 (4th Dep't 2013)	Changing the advertisement on a billboard.	NO
Zolfaghari v. Hughes Network Sys., LLC, 99 A.D.3d 1234, 952 N.Y.S.2d 367 (4th Dep't 2012)	Removing a satellite dish from a bracket and face plate attached to the outside wall of a gas station.	NO
Ferris v. Benbow Chem. Packaging, Inc., 74 A.D.3d 1831, 905 N.Y.S.2d 394 (4th Dep't 2010)	Installing a pipe system used to clean storage tanks.	YES
Andrews v. N.W. Auto Mall, 67 A.D.3d 1466, 888 N.Y.S.2d 451 (4th Dep't 2009)	Installing a security system in a building.	YES
Smith v. CSX Transp., Inc., 30 A.D.3d 1003, 818 N.Y.S.2d 369 (4th Dep't 2006)	Unlocking a rusted bullet lock on a railroad car.	NO
Wormuth v. Freeman Interiors, Ltd., 34 A.D.3d 1329, 824 N.Y.S.2d 855 (4th Dep't 2006)	Installing draperies in a home.	NO
Schroeder v. Kalenak Painting & Paperhanging, Inc., 27 A.D.3d 1097, 811 N.Y.S.2d 240 (4th Dep't 2006)	Installing wallpaper.	NO
Enge v. Ontario Cnty. Airport Mgmt. Co., 26 A.D.3d 896, 809 N.Y.S.2d 345 (4th Dep't 2006)	Running telephone wires from a hanger to a new office building, where the work involved splicing wires, drilling holes, and feeding the wire through.	YES
Cooper v. Time Warner Entm't-Advance/Newhouse P'ship, 16 A.D.3d 1037, 791 N.Y.S.2d 795 (4th Dep't 2005)	Installing high-speed internet on computers in an individual residence, where plaintiff's work consisted of checking signals on equipment and a utility pole.	NO

Chizh v. Hillside Campus Meadows Assocs., LLC , 4 A.D.3d 743, 772 N.Y.S.2d 184 (4th Dep't 2004)	Removing, repairing, and reinstalling a single window screen at an apartment complex.	NO
Scally v. Reg'l Indus. P'ship , 9 A.D.3d 865, 780 N.Y.S.2d 457 (4th Dep't 2004)	Cleaning debris off the top of an air conditioning unit on a flatbed truck, where plaintiff's work involved removing and replacing air conditioning units on a roof.	YES
Lang v. Charles Mancuso & Son, Inc. , 298 A.D.2d 960, 747 N.Y.S.2d 663 (4th Dep't 2002)	Replacing beverage supply lines at a restaurant.	YES
Primavera v. Benderson Family 1968 Trust , 294 A.D.2d 923, 741 N.Y.S.2d 816 (4th Dep't 2002)	Installing duct work on a building.	YES
Enright v. Buffalo Tech. Bldg. B P'Ship , 278 A.D.2d 927, 718 N.Y.S.2d 764 (4th Dep't 2000)	Replacing windows whose thermal seals had failed, causing them to fog.	YES
Di Giulio v. Migliore , 258 A.D.2d 903, 685 N.Y.S.2d 379 (4th Dep't 1999)	Tuning a satellite dish and running cable to connect it to a receiver inside the building.	YES

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[4] *McLean v. 405 Webster Ave. Assocs.*, 98 A.D.3d 1090, 951 N.Y.S.2d 185 (2d Dep't 2012) (holding that installing microconduct to protect fiber optic cable in a building's dumbwaiter shaft constituted alteration).

[5] *Belding v. Verizon N.Y., Inc.*, 14 N.Y.3d 751, 753, 925 N.E.2d 577, 577, 898 N.Y.S.2d 539, 539 (2010) (holding that the bomb blast film "significantly altered the configuration or composition of the structure by changing the way the lobby windows react to explosions, impacts and the elements").

[6] N.Y. LAB. LAW § 240(1) (McKinney 2013).

[7] 91 N.Y.2d 457, 672 N.Y.S.2d 286 (1998).

[8] *Id.* at 465, 672 N.Y.S.2d at 290.

[9] *Id.*

[10] 91 N.Y.2d 958, 672 N.Y.S.2d 840 (1998).

[11] *Id.* at 959, 672 N.Y.S.2d at 841.

[12] 110 A.D.3d 477, 973 N.Y.S.2d 114 (1st Dep't 2013).

[13] *Id.* at 478, 973 N.Y.S.2d at 116. [14] 81 A.D.3d 1149, 916 N.Y.S.2d 656 (3d Dep't 2011). [15] *See also Tassone v. Mid-Valley Oil Co.*, 291 A.D.2d 623, 738 N.Y.S.2d 103 (3d Dep't 2002) (holding that mounting a satellite dish and running wire through a hole drilled in the roof was sufficient to constitute alteration).

[16] 26 A.D.3d 896, 809 N.Y.S.2d 345 (4th Dep't 2006).

[17] 16 A.D.3d 1037, 791 N.Y.S.2d 795 (4th Dep't 2005).

[18] 44 A.D.3d 430, 843 N.Y.S.2d 237 (1st Dep't 2007).

[19] 99 N.Y.2d 452, 758 N.Y.S.2d 267 (2003).

[20] 100 N.Y.2d 878, 768 N.Y.S.2d 178 (2003).

[21] *Panek*, 99 N.Y.2d at 457, 758 N.Y.S.2d at 270.

[22] *Id.* at 458, 758 N.Y.S.2d at 270.

[23] *Id.* Likewise, in *Sanatass v. Consolidated Investing Co.*, 10 N.Y.3d 333, 858 N.Y.S.2d 67 (2008), the Court found that installing an air conditioning unit by drilling holes and affixing metal rods to the ceiling easily qualified as altering the building.

[24] *Prats*, 100 N.Y.2d at 883, 768 N.Y.S.2d at 181.

[25] *Id.*

[26] *See Martinez v. City of New York*, 93 N.Y.2d 322, 690 N.Y.S.2d 524 (1999).

[27] *Prats*, 100 N.Y.2d at 881, 768 N.Y.S.2d at 180.

[28] 5 N.Y.3d 747, 800 N.Y.S.2d 866 (2005).

[29] *Id.* at 748, 800 N.Y.S.2d at 866. In *Belding*, the Court distinguished *Munoz* by reasoning that plaintiff's work installing the bomb blast film was a one-time permanent job that had more of a structural effect than changing a billboard advertisement.

[30] 105 A.D.3d 434, 963 N.Y.S.2d 35 (1st Dep't 2013).

[31] 24 A.D.3d 234, 808 N.Y.S.2d 26 (1st Dep't 2005).

[32] 297 A.D.2d 257, 746 N.Y.S.2d 484 (1st Dep't 2002).

[33] 38 A.D.3d 606, 832 N.Y.S.2d 86 (2d Dep't 2007).

[34] *Acosta v. Banco Popular*, 308 A.D.2d 48, 762 N.Y.S.2d 64 (1st Dep't 2003).

[35] *Id.* at 51, 762 N.Y.S.2d at 66. For two important Court of Appeals' decisions on the issue of routine maintenance, see *Smith v. Shell Oil Co.*, 85 N.Y.2d 1000, 630 N.Y.S.2d 962 (1995) and *Esposito v. New York City Industrial Development Agency*, 1 N.Y.3d 526, 770 N.Y.S.2d 682 (2003).

CLEAN BREAK: A Retreat From Virtually Unlimited Liability Under The Labor Law

ROSS P. MASLER*

Introduction

A decade ago, in the classically understated style of a confident intellect, Albert Rosenblatt of the New York Court of Appeals noted the "good deal of litigation" generated by the various concepts and issues raised by New York's "Scaffold Law."[1] While he was speaking then of the meaning of absolute liability under New York Labor Law section 240(1), the same can be said of any number of issues, including proximate cause, elevation differentials, who is an owner or contractor within the meaning of the scaffold law, and/or what protection is required. Especially vexing to both bench and bar has been the problem of accurately defining what activities are covered under relatively nebulous categories such as "repairing, altering . . . and cleaning." Familiar as the bar is with the statute, it is reproduced here for convenience and reference:

Labor Law section 240(1) provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.[2]

Most recently, in Soto v. J. Crew,[3] the New York Court of Appeals had occasion to clarify the term "cleaning" within the meaning of the statute, and held --in an apparent break with recent, plaintiff-oriented results best exemplified by Runner v. New York Stock Exch., Inc.,[4] --that the routine cleaning the plaintiff was performing was not an activity covered under the statute. In so holding, the Court assisted future courts considering the issue by creating a four-prong test for determining when, and under what circumstances, "cleaning" is a protected activity. This article will review the history of "cleaning" within the meaning of Labor Law section 240(1), discuss the framework established by the Court in Soto, and endeavor to uncover the impact of that decision.

The Early Cleaning Cases

New York's high Court has considered at least eight cases interpreting the term "cleaning" within the meaning of the Labor Law, and the intermediate appellate courts have decided many more. Beginning with Connors vs. Boorstein in 1958, the Court of Appeals concluded "as a matter of logic and common sense" that cleaning within the meaning of the Labor Law statute referred to cleaning "incidental to building construction, demolition and repair work and not to the cleaning of the windows of a private dwelling by a domestic."[5] The Court supported that interpretation with reference to the Legislature's enactment of a separate provision dealing with window washing.[6] However, almost 45 years later, the Court of Appeals, in Bauer v. Female Academy of the Sacred Heart,[7] specificallyrejected its earlier reliance on the Legislature's enactment of a window washing provision, holding that the two Labor Law sections were not mutually exclusive, given that the Legislature had expressly included the term "cleaning" in section 240(1). Further, the Court noted that it had never prohibited the assertion of alternative Labor Law claims. The court also acknowledged that "routine, household window washing" is not protected, as it had held previously.[8]

Finally, in two other cases considered by the Court of Appeals where workers were engaged in cleaning, the issue of whether that work was a protected activity was not reached. Thus, in an early decision, the Court reversed an Appellate Division order and granted the plaintiff a new trial in an action where the plaintiff was retained to clean windows in a school under construction.[9] The plaintiff was standing on top of a ladder, approximately 16-17 feet above ground, and was scraping and removing paint from a window

* *Ross P. Masler is a member of the Appeals Unit at McGaw, Alventosa & Zajac in Jericho, New York.*

when the ladder slipped out from underneath him and he fell to the floor. However, the Court did not reach the issue of whether the work was covered under the statute, questioning, instead whether the lower court was correct in instructing the jury that it could consider plaintiffs' contributory negligence (we now know, of course, that it cannot). Many years later, the Court considered another action involving window cleaning, but decided that case on the issue of whether the appellant was an owner or contractor within the meaning of Labor Law section 240(1).[10]

One final case merits discussion --before reviewing the three important decisions involving "cleaning" issued in the five years leading into Soto --as the fact pattern is quite different from the remainder of these cleaning cases. In Gordon v. Eastern Railway Supply, Inc.,[11] the plaintiff was injured while using a ladder to sandblast the side of a railroad car. Writing for a unanimous Court, Justice Simons considered the question of who is an owner within the meaning of the Labor Law and implicitly held, but did not discuss, that the work the plaintiff was performing was an activity covered under the statute. As we will see in the discussion of Dahar v. Holland Ladder & Mfg. Co.[12] the distinction is important in the Court's current analysis of protected activities as it is the lone case where cleaning in a non-construction, non-renovation setting was protected.

The Trinity of Cleaning Cases – Broggy,[13] Swiderska,[14] and Dahar

In less than five years between 2007 -2012, the New York Court of Appeals considered the issue of "cleaning" three times, twice on its own initiative by granting leave to appeal and a third through an appeal brought as of right pursuant to CPLR section 5601(a). First, the Court reviewed the dismissal of a Labor Law section 240(1) claim in Broggy v. Rockefeller Group, Inc., where the plaintiff was using a squeegee and a wand to clean the nine or ten-foot-tall interior windows of a commercial building, and was injured after falling off the piece of furniture on which he was standing. He had cleaned approximately eight windows earlier that day without standing on any furniture and without using any other safety device. In fact, he apparently conceded that he did not need any type of ladder or platform to reach the tops of the windows. Upon arriving in the last office, the plaintiff and his coworkers noticed two large mahogany desks, one of which was directly beneath a window to be cleaned. The three men decided the desk was too big and heavy to move, so the plaintiff stood on it to complete his work and eventually lost his balance and fell to the floor.

The trial level court granted the plaintiff's motion for summary judgment on his Labor Law section 240(1) claim and denied the defendant's cross-motion to dismiss that claim. On appeal, however, the Appellate Division reversed, holding, *inter alia*, that "section 240(1)'s protections are limited to cleaning that is related to building construction, demolition and repair work; or, if not carried out at a construction site, is incidental to activities making a significant physical change to the premises."[15] The Court of Appeals granted the plaintiff leave to appeal and affirmed the dismissal of the plaintiff's Labor Law claim, but relied solely on the alternative ground advanced in the Appellate Division's decision; namely, the plaintiff's failure to establish the need for any safety device given the admissible evidence that plaintiff had cleaned at least eight other windows of the same height and did not previously need a ladder or other protective device. As for the issue of whether plaintiff's activity could be considered "cleaning" within the meaning of the statute, the Court concluded – consistent with Bauer – that protected cleaning was not strictly limited to a construction, demolition or repair project, or work incidental to another activity protected under section 240(1). Moreover, liability is dependent on whether the cleaning task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against. The plaintiff in Broggy had not demonstrated such.

A year later, the Court again granted leave to appeal to the plaintiff, in Swiderska v. New York University, a case factually similar to Broggy but with one crucial distinction. In this action, a trial level court granted summary judgment to the plaintiff in a commercial cleaning case, on the strength of admissible evidence that she was indeed required to climb onto furniture to complete her work. After being directed to clean ten-foot high interior windows in a dormitory building, the plaintiff was given only a rag and a window washing solution. She had asked for a ladder so that she could reach the tops of the windows, but she was specifically instructed by her employer to climb onto the furniture to perform her work. The Court held that the plaintiff's

need to climb onto the furniture to complete her work distinguished the case from Broggy and created "an elevation-related risk." That evidence established a violation of 240 given that the plaintiff was not "provided a ladder, scaffold, or other safety device of the kind contemplated under the statute."[16]

Conversely, in Dahar (reaching the high Court as of right, given two dissents in the Appellate Division), the plaintiff, an employee of a manufacturer, was directed to clean a steel wall module his employer had constructed before it was to be shipped to a customer. The module was at least seven feet tall and the plaintiff was standing on a ladder performing his work when the ladder broke and he fell to the ground. The plaintiff brought suit under the Labor Law, complaining that the wall module was a structure and he was engaged in cleaning, when he fell as a result of the failure of his employer to provide proper protection. The defendants moved for summary judgment and dismissal of the Labor Law section 240(1) claim, arguing, *inter alia*, that the plaintiff was not involved in an activity protected under the scaffold law at the time his accident occurred. The Court did not reach the plaintiff's argument that the wall module was a structure under the Labor Law, holding instead that the work the plaintiff was performing was not "cleaning" within the meaning of the statute. The Court reviewed every case it had previously decided involving "cleaning" and found that each, save Gordon, involved window washing. The Court noted that never before had any court applied Labor Law section 240(1) to the cleaning of a product during the manufacturing process, and concluded:

> Indeed, the logic of plaintiff's argument here would expand the protections of Labor Law section 240(1), even beyond manufacturing activities; the statute would encompass virtually every "cleaning" of any "structure" in the broadest sense of that term. Every bookstore employee who climbs a ladder to dust off a bookshelf; every maintenance worker who climbs to a height to clean a light fixture-these and many others would become potential Labor Law section 240(1) plaintiffs. We decline to extend the statute so far beyond the purposes it was designed to serve.[17]

With these fundamentals firmly established, the Court, in late 2013 (this time on leave from the Appellate Division), considered the plaintiff's Labor Law claims in Soto and found them wanting.

Soto v. J. Crew

As with so many other issues associated with this Labor Law statute, the number of decisions from the Court of Appeals in such a short time frame suggests the difficulty that the lower courts have encountered in reaching a consensus as to the manner in which the law should be applied. In Soto (the fourth cleaning case the Court considered in just six years), the plaintiff's employer was retained to provide janitorial services at a J. Crew retail store and the plaintiff was assigned to perform maintenance at the store on a daily basis. Specifically, his responsibilities included readying the store for operation by vacuuming, mopping, cleaning bathrooms and emptying garbage. Following the store opening, the plaintiff's duties during the remainder of his shift included "spot cleaning, tidying shelves, dusting, wiping down the entrance door, sweeping up debris and scraping gum from the floor, as necessary."[18] On the day of his accident, the plaintiff was asked by a store employee to dust a six-foot high wooden shelf used to display clothing. The plaintiff opened a 4foot, A-frame ladder on the floor in front of the shelf and locked it into position. The plaintiff's accident occurred as he was dusting the shelf when the ladder fell over, causing him to fall to the ground.

After discovery was completed, the defendants moved for summary judgment, arguing, *inter alia*, that the work the plaintiff was performing constituted "routine maintenance" only and, as such, was not an activity protected by the statute. The plaintiff opposed that motion (and cross moved for summary judgment on the issue), contending that commercial cleaning was a covered activity under the Scaffold Law, and that he was obligated to work at an elevated level and was not provided with proper protection. The trial level court granted the defendants' motion (and denied the plaintiff's cross-motion), holding that the "routine commercial cleaning" performed by the plaintiff was not a protected activity.[19]

An intermediate appellate court, the Appellate Division, First Department, in affirming the Supreme Court order dismissing the plaintiff's Labor Law section 240(1) cause of action, refused to interpret the term "cleaning" as broadly as plaintiff argued. Instead, it held that the "dusting of the shelf constituted routine maintenance and was not the type of activity that is protected under the statute."[20] In a concurring opinion, one judge in the Appellate Division reluctantly joined

his brethren in affirming the dismissal of the Labor Law section 240(1) cause of action, believing that neither the current decision nor the Court of Appeals' recent holding in Dahar, could be "reconciled with extensive recent precedent of the Court or the plain wording of Labor Law section 240(1)."[21] That judge then reviewed the Court's jurisprudence on the issue and concluded that "commercial cleaning [should be] a protected activity under Labor Law section 240(1)."[22]

In a unanimous decision, the New York Court of Appeals affirmed the dismissal of the plaintiff's Labor Law claim. The Court reviewed its most relevant precedents on the issue, including Dahar, Broggy and Swiderska, and noted that its decision in Broggy had rejected the conclusions of several prior courts that "cleaning" was covered under the statute only if performed in connection with construction, demolition or repair work. While the Court grudgingly refused to say so explicitly, it tacitly admitted that its various prior opinions concerning the definition of "cleaning" were difficult to reconcile with each other. Instead, the Court noted its prescience in Dahar, where it had suggested that the plaintiff's expansive interpretation of the term "cleaning" could include the dusting of a bookshelf, and concluded that this plaintiff was not engaged in a protected activity.[23] The Court held that while commercial window washing may be a covered activity, routine, household window washing is not. Further, the Court cautioned that other types of cleaning may also be covered under the Scaffold Law if they "present hazards comparable in kind and degree to those presented on a construction site."[24]

Finally, the Court --seemingly in an effort to forestall the likelihood that cleaning cases will continue to clog the court system --provided a standard to be utilized in determining when cleaning is covered. The Court adopted a four-prong test for accidents occurring while a worker is engaged in cleaning, directing that any such work is not covered under the "cleaning" category if the task:

1) is routine, in the sense that it is the type of job that occurs on a daily, weekly, or other relatively frequent and recurring basis as part of the ordinary maintenance and care of commercial premises;
2) requires neither specialized equipment or expertise, nor the unusual deployment of labor;
3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and
4) in light of the core purpose of Labor Law section 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project.[25]

The Court was quick to caution, however, that the "presence or absence of any one [element] is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other."[26]

The Court applied that analysis to the case before it and concluded that the dusting of a six-foot display shelf is routine maintenance that occurs frequently in a retail store and does not require more than one custodial employee worker or any specialized equipment or knowledge. Further, the only elevation related risks encountered are similar to those found during ordinary household cleaning, and the task was unrelated to any construction, renovation or repair project.

Impact of the Soto Decision

Somewhat surprisingly, the first (and so far, the only) appellate court to consider the issue of cleaning subsequent to the Court of Appeals' decision in Soto mentioned that case, but did not --at least expressly--discuss the Soto guidelines. In Hull v. Fieldpoint Community Association, Inc.,[27] the plaintiff was injured after falling from a roof while cleaning the gutters of a condominium development. The Appellate Division affirmed the Supreme Court's grant of summary judgment to the defendants, holding that Labor Law section 240(1) "does not apply to work that is incidental to regular maintenance, such as clearing gutters of debris."[28] Although the court did not conduct a rigorous Soto analysis, it is clear that the decision comports with the tenor and intent of that decision. Plainly, the clearing of gutters is a routine maintenance activity whether at a condominium development or a private home and requires neither many workers, nor any specialized equipment or expertise. Similarly, such "cleaning" involves only those elevation risks "inherent in typical domestic or household cleaning" and is performed in a non-construction, non-renovation context.[29] Thus, if the appellate court had conducted an analysis pursuant to the Soto test (or, if it did so without expressing it in the decision), the outcome would likely have been the same.

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Given the lack of other post-Soto reported decisions to date, a brief review of earlier cases -put through a stringent Soto analysis --might provide a glimpse as to the outcome of such cases and the efficacy of the test going forward. In fact, two Supreme Court cases decided earlier this year demonstrate both the ease and the difficulty likely to be encountered by various courts.

That the Soto test will provide assistance can be seen by comparing Quintanilla v. United Talmudical Academy Torah V'yirah, Inc., a Kings County case decided in January, 2013.[30] The plaintiff in this action was employed as a maintenance worker for an entity retained to assist a caterer in removing snow and water from an attic which was leaking into an auditorium scheduled to host a wedding. While the court's factual recitation is long and the parties' contentions contradictory, the facts necessary for a Soto analysis are straightforward and undisputed. The first element of the Soto test is easily answered as this was not a routine, frequent, or recurring activity given that the plaintiff's employer had been retained for the sole purpose of remedying the snow/water problem in the attic. Similarly, the "cleaning" the plaintiff and his three coworkers were performing, with the use of two "wet vacs" and a cloth covered mop (characterized by the court as "special water extraction equipment") reveals that the task required more than just one worker and simple cleaning equipment. Next, the elevation risk the plaintiff was subjected to was indisputably more than just those inherent in typical household cleaning given that the plaintiff was walking on a catwalk above a dropped ceiling approximately 30 feet above the floor of the auditorium. Finally, there was no ongoing construction, renovation or repair project ongoing at the premises. Thus, three of the four elements enunciated by the Court in Soto militate in favor of finding a protected activity, and the fact that the accident occurred in a non-construction, non-renovation context does not suggest otherwise. The Supreme Court concluded --in a holding which would presumably be upheld under Soto -- that:

> In view of the emergency nature of the cleaning plaintiff and his coworkers were hired to perform, the team of workers with whom plaintiff was assigned to work, the non-residential character of the building, and the task itself --a one-time removal of snow and ice requiring special water extraction equipment --the Court finds that plaintiff was engaged in "cleaning" of a non-routine, non-domestic nature at the time of his accident, as opposed to routine maintenance.[31]

A much more difficult case was considered by a New York County Judge, just weeks before the Soto decision was rendered.[32] In this action, Declercq v. WWP Office, LLC, the plaintiff and two other workers were directed by their employer to clean the walls and window ledges of a subway station. The men would utilize a ladder to apply a cleanser to the area which would soak for approximately 15 minutes, and then a hose would be used to clean the walls and window ledges. Any excess water would be either vacuumed or swept up. While the court's decision does not describe the height of the walls and ledges where the work was being done, it does indicate that the plaintiff's extension ladder kicked out from beneath him, causing him to fall approximately 20 feet to the ground. The court granted the plaintiff summary judgment on his Labor Law section 240(1) claim, holding that the plaintiff's work involved cleaning rather than routine maintenance and, as such, was a protected activity. The court rejected the defendant's reliance on the Appellate Division's decision in Soto, holding that the plaintiff's work was more similar to window washing than dusting. Similarly, the court distinguished the Court of Appeals' decision in Dahar on the ground that the work performed in this case was not the cleaning of a manufactured product as it was in Dahar.

With Declercq, unlike the Quintanilla case, the guidelines promulgated by the Court of Appeals in Soto do not provide such an easy answer. Two of the elements may support finding a protected activity, i.e. the work required more than one person and some arguably specialized equipment, and certainly involved a more significant elevation risk than generally found in household cleaning. Conversely, application of the other two criteria suggests a lack of statutory coverage. Specifically, plaintiff's employer was apparently retained by the defendant to wash the subway walls on a monthly basis, and, as in Quintanilla, there was no construction, excavation or renovation ongoing on the premises.

In light of Soto, an evaluation of whether activity is analogous to window washing -- as was done in Declercq -- seems not to be a relevant inquiry. In fact, window washing would arguably not be covered under a Soto analysis in all but the most extreme

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cases.[33] Accordingly, the Declercq court's summary rejection of the Appellate Division decision in Soto seems unlikely to withstand continued scrutiny, given the later opinion by the Court of Appeals in Soto.

A peculiar decision came out of the United States District Court, Southern District of New York just over a year ago, where the court considered an injury sustained while the plaintiff was cleaning the gutters of a commercial building. Relying solely on the New York Court of Appeals decisions in Broggy and Swiderska, the Federal court granted the plaintiff summary judgment on his Labor Law section 240(1) claim. It held that cleaning was covered, since it "clearly created an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against."[34] Apparently the court was not aware of the Appellate Division, Second Department's decision in Chavez Katonah Management Group, Inc., Co., 305 A.D.2d 358, 359, 759 N.Y.S.2d 158, 159 (2d Dep't 2003), which involved use of a leaf blower to clean the gutters of a two-family house. That was considered "routine cleaning in a non-construction, non-renovation context, and thus outside of the scope of Labor Law section 240(1)." It's also plausible that the Federal court considered Chavez distinguishable (barely) since that concerned work for a two-family house that was part of a condominium complex, rather than a commercial building. Given the Appellate Division, Second Department's subsequent decision in Hull, and certainly now with the Court of Appeal's decision in Soto, the continued viability of this Federal decision appears quite doubtful.

CONCLUSION

At first glance, the framework established by the Court in Soto would seem to go a long way toward assisting both litigants and courts in determining whether a particular activity is entitled to the extraordinary protection of Labor Law section 240(1) under the category "cleaning." It remains to be seen whether implementing what appears to be a rather straightforward and simple test is as easy and effective as intended. It seems to this author that this decision may signal somewhat of a retreat by the Court of Appeals from some of the more plaintiff-oriented decisions it has rendered recently.

Endnotes

[1] Blake v. Neighborhood Housing Services Of New York City, Inc., 1 N.Y.3d 280, 288, 771 N.Y.S.2d 484, 489 (2003).

[2] New York Labor Law section 240(1) (McKinney's 2009 & Supp. 2013).

[3] Soto v. J.Crew, Inc., 21 N.Y.3d 562, ____ N.Y.S.2d ____ (2013), aff'g , 95 A.D.3d 721, 945 N.Y.S.2d 255 (1st Dep't 2012).

[4] 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009).

[5] 4 N.Y.2d 172, 175, 173 N.Y.S.2d 288, 290 (1958).

[6] Id.. See New York Labor Law section 202 (McKinney's 2009 & Supp. 2013).

[7] 97 N.Y.2d 445, 451, 741 N.Y.S.2d 491, 493 (2002)(the plaintiff here was washing the exterior of a third floor window when he lost his balance and fell to the ground three stories below).

[8] Brown v. Christopher Street Owners Corp., 87 N.Y.2d 938, 641 N.Y.S.2d 221 (1996).

[9] Koenig v. Patrick Construction Corporation, 298 N.Y. 313, 83 N.E.2d 133 (1948).

[10] Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 880 N.Y.S.2d 879 (2009).

[11] 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993).

[12] 18 N.Y.3d 521, 941 N.Y.S.2d 31 (2012)

[13] Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675, 839 N.Y.S.2d 714 (2007)

[14] Swiderska v. New York Univ., 10 N.Y.3d 792, 856 N.Y.S.2d 533 (2008).

[15] Broggy, supra 8 N.Y.3d at 679, 839 N.Y.S.2d at 716 (as an alternative ground for reversal, the Appellate Division held that the plaintiff failed to establish the need for any protective device).

[16] Swiderska, 10 N.Y.3d at 793, 856 N.Y.S.2d at 534.

[17] Dahar, 18 N.Y.3d at 526, 941 N.Y.S.2d at 34.

[18] Soto, supra.

[19] Id

[20] Soto, supra, 95 A.D.3d at 721, 945 N.Y.S.2d at 255-256.

[21] Id. at 721, 945 N.Y.S.2d at 256.

[22] Id

[23] Soto, supra, 21 N.Y.3d 562.

[24] Id

[25] Id

[26] Id..

[27] 110 A.D.3d 961, 973 N.Y.S.2d 334 (2d Dep't 2013)

[28] Id. at 961, 973 N.Y.S.2d at 335.

[29] See Chavez Katonah Management Group, Inc., Co., 305 A.D.2d 358, 359, 759 N.Y.S.2d 158, 159 (2d Dep't 2003), also discussed infra.

[30] Quintanilla v. United Talmudical Academy Torah V'yirah, 38 Misc.3d 1215(A), 967 N.Y.S.2d 869 (Sup. Ct., Kings County, 2013).

[31] Id. at 8.

[32] Declercq v. WWP Office, LLC, 41 Misc.3d 1201 (A), ____ N.Y.S.2d ____ (Sup. Ct., N.Y. County, 2013).

[33] Under a Soto analysis, window washing performed at an extreme height or as part of a construction or renovation project would still probably be covered while routine window washing, even in a commercial setting probably would not.

[34] Robbins v. Rye Real Estate Associates, LLC, 2012 WL 4856466 (S.D.N.Y. 2012) (not reported in F.Supp.2d).

Any views and opinions expressed in this article are solely those of the author. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

All Chuppahs Are Not Created Equal Under The Labor Law: A Look Into What Constitutes A Building Or A Structure For The Purpose Of Labor Law § 240(1)

CATHERINE R. EVERETT*

Special statutory protections against the dangers of elevation-related hazards in the workplace have existed in New York State since 1885.[1] Over a century later, these protections remain and are codified in Labor Law § 240(1).[2] Section 240(1), by its terms, requires that the enumerated activities of erection, demolition, repairing, altering, painting, cleaning or pointing, be performed with reference to a "building or structure."[3]

Not every physical object upon which a worker works qualifies as a "building or structure" under the Labor Law. The law in this area makes clear that no two objects, even those with the same or similar purposes, are to be considered equal. The chuppah, pronounced "hu-pa," the canopy under which a Jewish wedding ceremony is performed, is one such object that has been recently explored in case law concerning what constitutes a "building or structure." We learn that when a unique physical object is involved, careful consideration will need to be given to determine whether it falls under the purview of the Labor Law.

The Court of Appeals has noted that because Labor Law § 240(1) is for the protection of workers from injury, it is undoubtedly to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed.[4] Consistent with the legislative objective of worker protection for elevation-related risks, the statute has been given an expansive reading in a variety of circumstances.[5]

What constitutes a "building or structure?"

The scope of what constitutes a "building or structure" is equally expansive as the interpretation of the statute as a whole. The term building has been found to include a water tank that was part of a building[6] as well as an air conditioning unit built into the wall of a building.[7] However, work performed on a cable box that is attached to a building is not.[8]

A "structure" is not limited to buildings or houses.[9] "Since the legislature definitionally applied Labor Law § 240(1) to buildings or structures, a structure, by implication, may include constructs that are less substantial and perhaps more transitory than buildings."[10]

The definition of a structure finds its roots in the 1909 Court of Appeals decision in *Caddy v. Interborough Rapid Transit Co.*[11] The 1897 statute at issue in *Caddy* provides that employers were to furnish scaffolding to workers engaged in the "erection, repairing, altering or painting of a house, building or structure."[12] The Court of Appeals found that the word "structure" has a distinct and separate meaning as "building' does from "house."[13] Therefore, in addition to buildings and houses, the statute was found to encompass other "structures" for which scaffolding would be required based upon the purpose of the statute, i.e. to fix the legal responsibility upon the "master" for the proper protection of his "servants" during the use of "scaffolding and stagings."[14]

In *Caddy*, the Court of Appeals explained that "[a] building is a structure, which, of course, includes every form of artificial house, but also many structures not included in that more restricted term; and so the word 'structure,' in its broadest sense, includes any production or piece of work artificially built up or composed of parts joined together in some definite manner."[15] In setting forth this definition, the Court explained that

> [a] scaffold is no more dangerous when used in erecting, repairing, altering, or painting a house or building, than when used for the same purpose upon any structure where the same kind of a scaffold is necessary. The dangers to the employee are the same, and the evils of the common-law rule sought to be remedied by the statute are alike in each case.[16]

The determination of whether an item is a "structure" is fact-specific and must be determined on a case-by-case basis.[17] Courts have concluded that

* *Catherine R. Everett is an associate in the Appellate Group and Insurance Coverage Group at Ahmuty, Demers & McManus in Albertson, New York.*

a bridge,[18] a grave vault,[19] a landfill,[20] a pipeline,[21] above-ground utility poles with attached hardware and cables,[22] a log truck,[23] a trench,[24] a ticket booth at a convention center,[25] a substantial free-standing Shell gasoline sign,[26] a shanty located within an industrial basement used for storing tools,[27] a crane used for construction,[28] a power screen used to screen gravel or make sand at a gravel pit,[29] a pumping station,[30] a window exhibit composed of interlocking parts at a home improvement show,[31] a wood chip stacker,[32] a railroad car,[33] an airplane,[34] a utility van,[35] a vessel undergoing dry-dock repairs,[36] metal shelving, spanning from the floor to two feet below the ceiling, affixed and bracketed to a section of wall,[37] a boiler,[38] an oil burner or furnace suspended from the ceiling of a building by rods,[39] a billboard,[40] a chuppah,[41] and most recently, a manhole,[42] all fit within the definition of "structure" set out in *Caddy*.

A tree, on the other hand, has been found not to be a "building or structure" within the meaning of the statute as it is the product of nature and not artificially built up.[43] However, tree removal as part of site preparation "is incidental and necessary to the erection of the building" and falls within the purview of § 240(1).[44]

Additionally, the repaving of a parkway or highway at grade does not constitute work on a structure.[45] This remains true where the parkway or highway passes through overpasses and bridges.[46]

Recently, the Fourth Department in *Dahar v. Holland Ladder & Mfg. Co.*, ruled that a 7-foot high, fabricated component part that was to be shipped to an off-site construction project did not constitute a structure. [47] The plaintiff appealed seeking recovery under § 240(1), arguing that at the time of his injury he was "cleaning" and the wall module was a "structure."[48] The Court of Appeals rejected the plaintiff's argument, stating that accepting the plaintiff's argument would expand the statute's coverage to "encompass virtually every 'cleaning' of any 'structure' in the broadest sense of the term" i.e., an employee standing on a ladder to clean a bookshelf or a light fixture.[49]

Other items that have been held to not qualify as structures include temporary decorations to a building used as a set for a television film,[50] a sign hung from a ceiling,[51] commercial dishwasher machines,[52] a decorative wooden disc suspended from a ceiling for use as a ceremonial wedding canopy,[53] and work being performed on the platform of a flatbed truck.[54]

All chuppahs are not created equal

The 2012 Appellate Division, Second Department decision in *McCoy v. Abigail Kirsch at Tappan Hill, Inc.*[55] is illustrative of the aspects that are explored by the Courts when determining whether the plaintiff was performing one of the enumerated tasks with reference to a structure at the time of his or her injury. The Appellate Division determined that the chuppah qualified as a "structure" for the purposes of seeking recovery under § 240(1).[56] While focusing on chuppahs, the analysis conducted by the court could equally apply to any potential "structure."

In *McCoy*, the plaintiff was disassembling the chuppah prior to his fall.[57] This particular chuppah was a 10-foot-high device made of pipe, and wood, with a fabric canopy at its top.[58] The frame consisted of metal pipes that were 10-feet-long and three-inches-wide.[59] The pipes were assembled to each other, and the vertical supports were attached to four steel plates on the floor.[60] The plaintiff was working from a six-foothigh aluminum ladder, on which two feet allegedly were missing.[61] To perform the disassembly, the plaintiff was required to use a pipe wrench, a florist knife, wire cutters, and the ladder.[62] With a coworker holding the ladder, the plaintiff was standing on the third rung from the top of the ladder which ultimately slipped and the plaintiff fell to the floor, allegedly sustaining injuries.[63]

The Second Department noted that courts, in determining each case, may consider a number of relevant factors.[64] These factors should include, but are not limited to, the item's size, purpose, design, composition, and degree of complexity; the ease or difficulty of its assembly and disassembly; the tools required to create it and dismantle it; the manner and degree of its interconnecting parts; and the amount of time the item is to exist.[65] No one factor is determinative.[66]

In reaching its decision, the Second Department reasoned that the chuppah at issue was more akin to those things and devices which the courts had previously recognized as structures. [67] In making its determination, the Court focused on the chuppah's

dimensions of the metal pipes; that the piping was secured to steel metal bases; that a ladder and various hand tools were necessary for the disassembly; and that the disassembly would take an experienced worker more than a few minutes to complete.[68] It was also noted that the chuppah at issue "consisted of intricate, interconnected parts."[69]

The Second Department made clear that its determination in *McCoy* was not to say that every chuppah qualifies as a structure under § 240(1).[70] As is the case with most things, the Second Department explained that there are wide variations of chuppahs, "some involving a series of durable interconnected parts, and others being much more simple and merely decorative in nature."[71] Consideration must be given of more than the purpose for which the purported "structure" is used.[72]

In *Stanislawczyk v. 2 E. 61st St. Corp.*,[73] the plaintiff was allegedly injured while taking down a decorated wooden disc that had been suspended for use as a ceremonial canopy at a wedding.[74] The Appellate Division held that plaintiff was not working upon a "structure" at the time of his accident and, therefore, could not recover for his injuries under Labor Law § 240(1).[75]

The assembled pipe, wood, and fabric chuppah in *McCoy* consisted of intricate, interconnected parts, whereas, the wedding canopy in *Stanislawczyk* was distinguishable as it consisted merely of a wooden disc suspended from the ceiling and was not itself assembled or interconnected with any other object.[76] The Court in *McCoy* explained that "[w]hile the items here and in *Stanislawczyk* may have been used for the same ultimate purpose, the items themselves were, in a structural sense, vastly different from one another, one being a simple one-piece object, and the other being a collection of attached pieces of wood, metal, and fabric."[77] The purpose of a particular physical object is not determinative.[78]

CONCLUSION

The decisions in *McCoy* and *Stanislawczyk* highlight the fact-specific nature of the determination of what qualifies as a structure under the Labor Law. Not all chuppahs are created equal under the Labor Law. Likewise, neither are many other objects.

There can be no denying that when the work performed by an injured plaintiff involves a physical object of a unique configuration, the determination of whether the work involves a building or structure should involve careful consideration of the item's size, purpose, design, composition, and degree of complexity; the ease or difficulty of its assembly and disassembly; the tools required to create it and dismantle it; the manner and degree of its interconnecting parts; and the amount of time the item is to exist. While many physical objects ultimately qualify as a building or structure, what may qualify in one circumstance may not qualify in another. All factors should be considered for a proper determination under the statute.

[1] *Joblon v. Solow*, 91 N.Y.2d 457, 462-63, 672 N.Y.S.2d 286 (1998).

[2] N.Y. Lab. Law § 240(1) (McKinney 2013).

[3] *Id. See also, Dilluvio v. City of New York*, 264 A.D.2d 115, 121, 704 N.Y.S.2d 550, 555 (1st Dep't 2000) *aff'd,* 95 N.Y.2d 928, 721 N.Y.S.2d 603 (2000).

[4] *Joblon, supra.,* 91 N.Y.2d at 463.

[5] *Id.*

[6] *Caraciolo v. 800 Second Ave. Condominium*, 294 A.D.2d 200, 743 N.Y.S.2d 8 (1st Dep't 2002).

[7] *Sprague v. Peckham Materials Corp.*, 240 A.D.2d 392, 658 N.Y.S.2d 97 (2d Dep't 1997).

[8] *Rhodes-Evans v. 111 Chelsea LLC*, 44 A.D.3d 430, 843 N.Y.S.2d 237 (1st Dep't 2007).

[9] *McCoy v. Abigail Kirsch at Tappan Hill, Inc.*, 99 A.D.3d 13, 15, 951 N.Y.S.2d 32 (2d Dep't 2012).

[10] *Id.,* 99 A.D.3d at 16.

[11] 195 N.Y. 415, 420, 88 N.E. 747, 749 (1909).

[12] *Id.* at *419.*

[13] *Id.*

[14] *Id.*; *see also, Garcia v. 225 E. 57th St. Owners, Inc.*, 96 A.D.3d 88, 91, 942 N.Y.S.2d 533, 536 (1st Dep't 2012); *Lewis-Moors v. Contel of New York, Inc.*, 167 A.D.2d 732, 733, 563 N.Y.S.2d 303, 305 (3d Dep't 1990) *aff'd,* 78 N.Y.2d 942, 573 N.Y.S.2d 636 (1991).

[15] *Caddy, supra.*, 195 N.Y. at 420, 88 N.E. at 749 (1909). *See also, Lewis-Moors v. Contel of New York, Inc.*, 167 A.D.2d 732, 733, 563 N.Y.S.2d 303, 305 (1990) *aff'd,* 78 N.Y.2d 942, 578 N.E.2d 434 (1991).

[16] *Caddy, supra.*, 195 N.Y. at 420-21, 88 N.E. at 749.

[17] *McCoy, supra.*, 99 A.D.3d at 16.

[18] *Dougherty v. State of New York,* 113 A.D.2d 983, 493 N.Y.S.2d 654 (3d Dep't 1985)

[19] *Ciancio v. Woodlawn Cemetery Assn.,* 249 A.D.2d 86, 671 N.Y.S.2d 466 (1st Dep't 1998).

[20] *Bockmier v. Niagara Recycling,* 265 A.D.2d 897, 696 N.Y.S.2d 605 (4th Dep't 1999).

[21] *Covey v. Iroquois Gas Transmission Sys.,* 218 A.D.2d 197, 637 N.Y.S.2d 992 (3d Dep't 1996), *affd* 89 N.Y.2d 952 (1997); *Cox v LaBarge Bros. Co., Inc.*, 154 A.D.2d 947, 547 N.Y.S.2d 167 (1st Dep't 1989). *See also, Kemp v. Lakelands Precast Inc.*, 55 N.Y.2d 1032, 449 N.Y.S.2d 710 (1982).

[22] *Girty v. Niagara Mohawk Power Corp.,* 262 A.D.2d 1012, 691 N.Y.S.2d 822 (4th Dep't 1999); *Gunderman v. Sure Connect Cable Installation, Inc.*, 101 A.D.3d 1214, 956 N.Y.S.2d 211 (3d Dep't 2012); *Lewis-Moors v Contel of N.Y.*, 78 N.Y.2d 942, 943, 573 N.Y.S.2d 636 (1991).

[23] *Hutchins v. Finch, Pruyn & Co.,* 267 A.D.2d 809, 700 N.Y.S.2d 517 (3d Dep't 1999).

[24] *Tooher v. Willets Point Contr. Corp.,* 213 A.D.2d 856, 857, 623 N.Y.S.2d 431 (3d Dep't 1995).

[25] *Panico v. Advanstar Communications, Inc.*, 92 A.D.3d 656, 938 N.Y.S.2d 168 (2d Dep't 2012).

[26] *Smith v. Shell Oil Co.*, 85 N.Y.2d 1000, 1001, 630 N.Y.S.2d 962 (1995).

[27] *Henry v. Eleventh Ave., L.P.*, 87 A.D.3d 523, 928 N.Y.S.2d 72 (2d Dep't 2011).

[28] *Cun-En Lin v. Holy Family Monuments*, 18 A.D.3d 800, 801, 796 N.Y.S.2d 684 (2d Dep't 2005); *Cornacchione v. Clark Concrete Co.*, 278 A.D.2d 800, 801, 723 N.Y.S.2d 572 (4th Dep't 2000).

[29] *Hodges v. Boland's Excavating & Topsoil, Inc.*, 24 A.D.3d 1089, 1091, 807 N.Y.S.2d 421 (3d Dep't 2005).

[30] *Cabri v. ICOS Corp. of Am.*, 240 A.D.2d 456, 457, 658 N.Y.S.2d 646 (2d Dep't 1997)

[31] *Sinzieri v. Expositions, Inc.,* 270 A.D.2d 332, 333, 704 N.Y.S.2d 293 (2d Dep't 2000).

[32] *Foote v. Lyonsdale Energy Limited Partnership*, 23 A.D.3d 924, 805 N.Y.S.2d 163 (3d Dep't 2005).

[33] *Gordon v. Eastern Ry. Supply, Inc.*, 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993).

[34] *Wong v. New York*, 65 A.D.3d 1000, 885 N.Y.S.2d 120 (2d Dep't 2009).

[35] *Moore v. Shulman*, 259 A.D.2d 975, 688 N.Y.S.2d 854 (2d Dep't 1999).

[36] *Aguilar v. Henry Marine Service, Inc.,* 12 A.D.3d 542, 785 N.Y.S.2d 95 (2d Dep't 2004).

[37] *Pino v. Robert Martin Co.,* 22 A.D.3d 549, 802 N.Y.S.2d 501 (2d Dep't 2005). [38] *Vessio v. Ador Converting & Biasing, Inc.*, 215 A.D.2d 648, 628 N.Y.S.2d 305 (2d Dep't 1995). [39] *Kinsler v. Lu-Four Associates*, 215 A.D.2d 631, 628 N.Y.S.2d 303 (2d Dep't 1995). [40] *Munzo v. DJZ Realty*, 15 A.D.3d 363, 789 N.Y.S.2d 526 (2d Dep't 2005) *rev'd on other grounds* 5 N.Y.3d 747, 800 N.Y.S.2d 866 (2005).

[41] *McCoy, supra.*

[42] *Dos Santos v. Con. Ed. Of N.Y.,* 104 A.D.3d 606, 963 N.Y.S.2d 12 (1st Dep't 2013).

[43] *Lombardi v. Stout*, 80 N.Y.2d 290, 590 N.Y.S.2d 55 (1992); *Gavin v. Long Island Lighting Co.*, 255 A.D.2d 551, 681 N.Y.S.2d 87 (2d Dep't 1998).

[44] *Mosher v. St. Joseph's Villa*, 184 A.D.2d 1000, 1002, 584 N.Y.S.2d 678 (4th Dep't 1992). *See also, Lombardi, supra.*

[45] *Dilluvio,* 264 A.D.2d at 121, 704 N.Y.S.2d 550; *see also Spears v. State of New York,* 266 A.D.2d 898, 898, 698 N.Y.S.2d 135 (4th Dep't 1999); *Matter of Dillon v. State of New York,* 201 A.D.2d 793, 607 N.Y.S.2d 474 (3d Dep't 1994); *Vargas v State*, 273 A.D.2d 460, 710 N.Y.S.2d 609 (2d Dep't 2000).

[46] *Id.*

[47] *Dahar v. Holland Ladder & Mfg. Co.*, 79 A.D.3d 1631, 914 N.Y.S.2d 817 (4th Dep't 2010), *aff'd on other grounds* 18 N.Y.3d 521, 941 N.Y.S.2d 31 (2012).

[48] *Id.*

[49] *Dahar v. Holland Ladder & Mfg. Co.*, 18 N.Y.3d 521, 525, 941 N.Y.S.2d 31, 34 (2012).

[50] *Tanzer v Terzi Prods.*, 244 A.D.2d 224, 664 N.Y.S.2d 44 (1st Dep't 1997).

[51] *Kretzschmar v New York State Urban Dev. Corp.*, 13 A.D.3d 270, 270-271, 785 N.Y.S. 2d 923 (1st Dep't 2004).

[52] *Chuchuca v Redux Realty*, 303 A.D.2d 239, 239-240, 757 N.Y.S.2d 9 (1st Dep't 2003).

[53] *Stanislawczyk v. 2 E. 61st St. Corp.*, 1 A.D.3d 155, 767 N.Y.S.2d 30 (1st Dep't 2003).

[54] *Santoro v. New York City Transit Authority*, 302 A.D.2d 581, 755 N.Y.S.2d 425 (2d Dep't 2003); *Rice v. Board of Education of City of New York*, 302 A.D.2d 578, 755 N.Y.S.2d 419 (2d Dep't 2003).

[55] 99 A.D.3d 13, 951 N.Y.S.2d 32 (2d Dep't 2012).

[56] *Id.*, 99 A.D.3d at 17.

[57] *Id.*, 99 A.D.3d at 15.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*, 99 A.D.3d at 16-17.

[65] *Id.*

[66] *Id.*, 99 A.D.3d at 17.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] 1 AD3d 155, 767 N.Y.S.2d 30 (1st Dep't 2003).

[74] *Id.*

[75] *Id.*

[76] *McCoy, supra.*, 99 A.D.3d at 17.

[77] *Id.*

[78] *Id.*

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