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By Hon. George M. Heymann  
Law and the Evolution  
of Elevation

# New York's Scaffold Law and the Evolution of Elevation

By Hon. George M. Heymann

**S**ection 240(1) of the Labor Law, commonly referred to as the “Scaffold Law,” is often invoked with respect to worker-related injuries that involve heights.

Enacted in 1921, § 240(1) “descended from the 1885 ‘Act for the protection of life and limb’ which imposed liability on anyone ‘who shall knowingly or negligently furnish and erect . . . improper scaffolding . . .’”<sup>1</sup> The law was expanded in 1947 to include coverage for workers who fell from elevated devices other than scaffolds, and the title of the statute was changed from “Safe scaffolding required for use of employees” to the current “Scaffolding and other devices for use of employees.”<sup>2</sup> A 1969 amendment placed responsibility for safety practices at construction/building sites squarely on “[a]ll contractors and owners and their agents.”<sup>3</sup> In the final amendment, passed in 1981, owners of one- and two-family homes “who contract for but do not direct or control the work” were exempted.<sup>4</sup>

In the three decades since, courts in a myriad of cases have sought to interpret and clarify this statute, creating a body of law that is constantly evolving in the attempt to reconcile the often inconsistent decisions.

Despite the differences in interpretation and application, the first paragraph of § 240(1) is succinctly worded, containing two distinct criteria, each of which comes into play when an injured worker seeks recovery under this

statute. In relevant part, Labor Law § 240(1) reads as follows:

All contractors and owners and their agents, . . . [1] in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure [2] shall furnish or erect, or cause to be furnished or erected for the purpose 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. (Numbers in [ ] added.)

Part one of this provision sets forth and limits the specific type of job that a worker must be doing at the time of his or her injury. The second part pertains to the various devices necessary to protect the worker from injury while in the performance of his or her duties. The list is not exhaustive because the language includes “other devices” employed to provide “proper protection.”<sup>5</sup>

Note that the statute itself makes no mention of height or elevation differentials. Such language and its applica-

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tion evolved from the courts, as the use of devices such as “scaffolds,” “hoists” and “pulleys” refers to working above and/or the lifting or lowering of objects from one level to another. Similarly, there is no mention of “strict” or “absolute” liability, which was a term applied by the Court of Appeals, as will be discussed below.

Much has also been written with respect to the nature of the job undertaken, as well as whether “proper protection” was provided by the employer; whether, in fact, “proper protection” was required; and whether the absence of “proper protection” was the proximate cause of the resultant accident and injury.

This article will highlight the major decisions rendered by the Court of Appeals regarding Labor Law § 240(1) from 1991 to the present and include discussion of several recent Appellate Division and state Supreme Court cases.<sup>6</sup>

### **Rocovich**

In *Rocovich v. Consolidated Edison Co.*,<sup>7</sup> the Court of Appeals stated that Labor Law § 240(1) “is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed,” and reaffirmed its earlier interpretation: The statute “impos[es] absolute liability for a breach which has proximately caused an injury.”<sup>8</sup> Contributory negligence by the injured worker is of no consequence; the duty of an owner’s liability under this provision is nondelegable.<sup>9</sup>

The Court proceeded to address injuries resulting from “those occupational hazards”<sup>10</sup> that were intended by the Legislature to warrant absolute protection, and injuries occasioned by different types of hazards that would not be protected. Because the statute prescribes the use of “scaffolding” and “ladders,” it is “evident” that they are “for the use or protection of persons in gaining access to or working at sites where elevation

poses a risk.”<sup>11</sup> In considering all the devices listed, the Legislature “contemplated hazards” involving the force of gravity “because of a difference between the elevation level of the required work and a lower level . . . of the materials or load being hoisted or secured.”<sup>12</sup> Determining that the hazards incurred were “special hazards,” the Court “believe[d] that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides.”<sup>13</sup>

In this case, Rocovich, a construction worker, was removing and repairing the insulated covering on recessed pipes on the roof of the defendant’s building. In the center of the recess was a trough, 18 to 36 inches wide and 12 inches deep, filled with about 5 inches of hot oil. As he was about to step across it, the plaintiff slipped and his right foot and ankle became immersed in the hot oil.

Based on its interpretation of the type of hazard that warrants protection under Labor Law § 240(1), the Court declined to apply it in the plaintiff’s favor. While acknowledging that an elevation-related risk is not always determined by the extent of the elevation differential, the Court found it “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).”<sup>14</sup>

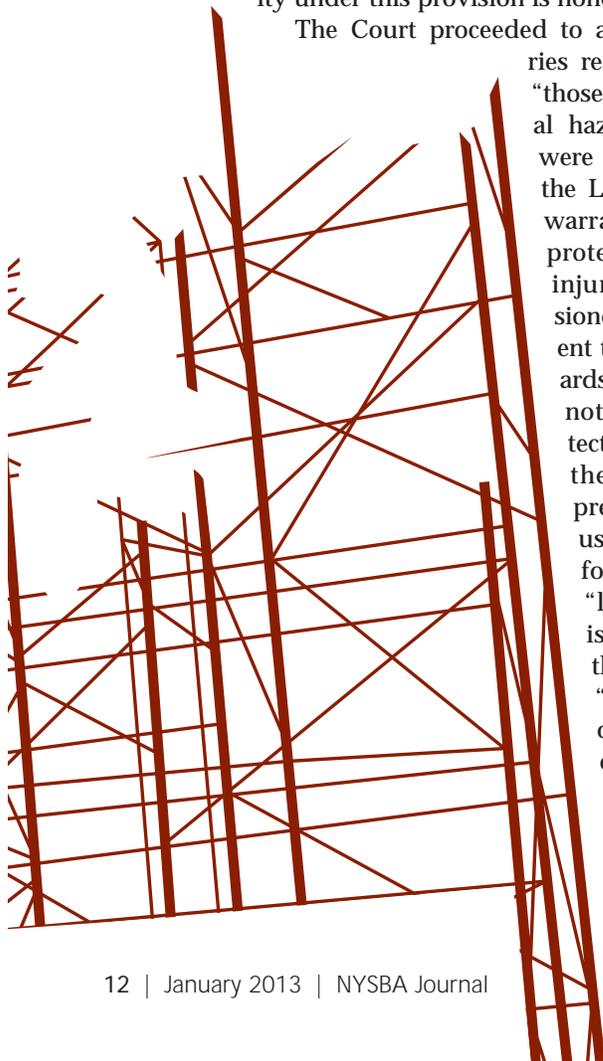
Thus, because the nature of the plaintiff’s job did not require any of the protective devices listed in the statute, his injury was not deemed to comport with the “thrust” of the statute’s intent to protect against the risks involved in “relative differences in elevation.”<sup>15</sup>

### **Ross**

In *Ross v. Curtis-Palmer Hydro-Electric Co.*,<sup>16</sup> the plaintiff, Ross, was a welder who was working on welding a seam at the top of a 40- to 50-foot shaft. In order to weld the seam, a temporary platform was installed and Ross had to sit at the edge of the platform and “extend one leg forward against the top edge of the shaft and stretch forward and down with his upper torso and head to reach the seam that needed welding.”<sup>17</sup> Ross had complained about working in this contorted position and had requested a ladder but was told that he had to use the platform. After approximately 22 hours working from the platform he experienced difficulty and pain when he tried, but failed, to straighten up. Despite subsequent surgery he remained disabled.

As in *Rocovich*, the Court of Appeals had to determine whether this was a hazard contemplated by Labor Law § 240(1). Here, the Court decided that the plaintiff’s disabling back pain was not “the kind of harm that is typically associated with elevation related hazards,”<sup>18</sup> holding that the plaintiff’s argument that his injury was “related to the effects of gravity” “misconstrues the import of our analysis in *Rocovich*.”<sup>19</sup>

Again, the Court referred to “special hazards,” emphasizing that these “do not encompass any and all perils that



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may be connected in some tangential way with the effects of gravity.”<sup>20</sup> They are limited to gravity-related accidents such as “falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured.”<sup>21</sup> The Court distinguished this case because the plaintiff’s injuries did not flow directly from the application of the force of gravity to an object or person. Here, the “makeshift ‘scaffold’” served the objective of the statute by preventing the plaintiff from falling down the shaft – a “device that did not malfunction and was not defective in its design.”<sup>22</sup> The harm Ross suffered was not one contemplated by the statute and it would not be even if the device used was inadequate, defectively designed or malfunctioned.

### **Rodriguez and Misserritti**

In *Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*,<sup>23</sup> the Court of Appeals, in a brief memorandum decision, dismissed the plaintiff’s cause of action based on Labor Law § 240(1):

Plaintiff in this case was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240(1). In placing a 120-pound beam onto the ground from seven inches above his head with the assistance of three other co-workers, Rodriguez was not faced with the special elevation risks contemplated by the statute.<sup>24</sup>

In 1995, in *Misserritti v. Mark IV Construction Co., Inc.*,<sup>25</sup> the Court of Appeals reaffirmed the limitations of seeking relief under the “scaffold law.” The opinion, written by Judge Ciparick, continued the theme stated in *Rodriguez*, that injuries resulting from hazards that are not elevation-related are from “other types of hazards [that] are not compensable under the statute even if proximately caused by the absence of \* \* \* [a] required safety device.”<sup>26</sup> The wife of the decedent worker could not recover under Labor Law § 240(1) because the collapse of the fire wall he was working on was the type of “ordinary and usual peril a worker is commonly exposed to at a construction site and not an elevation-related risk subject to the safeguards prescribed” by the statute.<sup>27</sup>

The plaintiff-wife had sued on the theory that her husband had been hired to perform masonry work and that his injuries occurred when a completed concrete-block fire wall collapsed. She alleged that the defendant had a nondelegable duty to furnish the appropriate safety devices (i.e.: braces) to give the decedent the proper protection during his employment.

Once again, reciting the holdings and reasoning in *Rocovich* and *Ross*, the Court concluded:

In this context, we construe the “braces” referred to in section 240(1) to mean those used to support elevated work sites not braces designed to shore up or lend support to a completed structure. \* \* \* There is no showing that the decedent was working at an elevated

level at the time of this 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.<sup>28</sup>

### **Melo**

Relying on its holding in *Misserritti*, the Court of Appeals denied recovery pursuant to Labor Law § 240(1) in *Melo v. Consolidated Edison Co. of NY*.<sup>29</sup> In this case, a steel plate was being hoisted to a vertical position at street level before being lowered over an unfilled trench. The steel plate was attached to the shovel part of a backhoe connected by a chain and hook at each end. The plaintiff, Melo, and a co-worker were directing the covering of the trench as the plate was being raised to a vertical position, perpendicular to the ground with the edge touching the ground. As they were maneuvering the steel plate, it became unhinged and fell on the plaintiff’s foot and shoulder. The Court based its determination on the fact that the steel plate was resting on the ground.

While the force of gravity may have caused the steel plate to fall as it was being moved by an allegedly defective hoist, one of the safety devices enumerated in the statute, the steel plate was resting on the ground or hovering slightly above the ground – and thus was *not elevated* above the work site. Thus, it could not be said that the statute was implicated “‘either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured.’”<sup>30</sup>

### **Narducci**

Building upon *Rocovich*, *Ross*, *Rodriguez* and *Misserritti*, the Court of Appeals next addressed the issue of falling objects in *Narducci v. Manhasset Bay Associates*.<sup>31</sup> *Narducci* actually comprised two cases consolidated in one decision. In the first case, the plaintiff, Narducci, was removing steel window frames from the third floor of a fire-damaged warehouse. As he stood on a ladder working on a window frame, he saw “a large piece of glass from an adjacent window frame falling toward him.”<sup>32</sup> Although he turned away, the glass hit him in the face and severely cut his right arm. He did not fall from the ladder, nor did the ladder malfunction in any way.

In the second, the plaintiff, Caparrelli, an electrician, was injured while installing fluorescent light fixtures into a dropped ceiling. He lifted the light fixture into the grid while standing halfway up an 8-foot ladder to reach the 10-foot ceiling. He was descending the ladder intending to relocate its position so he could secure the fixture, when the fixture began to fall. In an attempt to stop it from hitting him, Caparrelli reached out to hold it, but it slipped, cutting his right hand and wrist. Like Narducci, he did not fall from his ladder.

Both plaintiffs alleged that they should have been provided a scaffold to perform their jobs and, therefore,

were entitled to compensation under Labor Law § 240(1). Holding that absolute liability is imposed only after a violation of the statute has been established, contingent upon the contemplated hazards, not every worker who falls at a construction site and not every object that falls on a worker triggers the extraordinary protections of the statute.<sup>33</sup>

The Court distinguished between falling workers and falling objects, as each is a different type of hazard. While the former creates a hazard by working in an elevated situation where the worker might fall and be injured “in the absence of adequate safety devices,”<sup>34</sup> the latter is “associated with the failure to use a different type of safety device (i.e., ropes, pulleys, irons) also enumerated in the statute.”<sup>35</sup> Because the risks are dissimilar, the hazards of one type of accident cannot be “‘transferred’ to create liability for a different type of accident.”<sup>36</sup>

In denying Narducci’s Labor Law § 240(1) claim, the Court found that the falling glass was the result of a pre-existing building condition due to the fire and not the result of the absence of any securing or hoisting devices listed in the statute. The incident was “clearly a general hazard of the workplace”<sup>37</sup> and not one contemplated in the statute. Moreover, this was not an elevation-related accident because Narducci did not fall from his ladder; nor was it alleged that the ladder did not function properly. Thus, there was no causal connection between the ladder and the injury.

As to Capparelli, while his injury could be classified as “gravity related” it was not the type envisioned by the statute.<sup>38</sup> Although he was working on a ladder, standing approximately 4 to 5 feet off the ground to reach a 10-foot-high ceiling, there was no “hoisting” of the light fixture and no height differential between him and the falling fixture. In what appears to be a first for the Court, Judge Ciparick held that the exclusion of gravity-related accidents that can be distinguished from those intended by the Legislature “made [ ]the *de minimus* elevation differential in this case appropriate.”<sup>39</sup>

Sixteen years later, Judge Ciparick revisited the issue of falling objects and *de minimus* elevation differentials in *Wilinski v. 334 East 92nd Housing Development Fund Corp.*<sup>40</sup>

In the joint cases of *Toefer v. Long Island Rail Road* and *Marvin v. Korean Air, Inc.*,<sup>41</sup> the Court of Appeals denied recovery under Labor Law § 240(1) where the injuries were the result of the plaintiffs’ falling off flatbed trucks – while in the process of removing the cargo in the first instance and alighting therefrom in the second. The Court concluded that the flatbed trucks “did not present the kind of elevation-related risk that the statute contemplates.”<sup>42</sup>

In both instances, the injured workers fell only 4 to 5 feet to the ground. The Court rejected their arguments that the safety devices listed in the statute would have prevented the respective accidents; therefore, Labor Law § 240(1) was not applicable.

### *Joblon and Broggy*

As previously noted, Labor Law § 240(1) not only pertains to tasks that are elevation-related, it also limits the nature of the work to be performed in order for it to be implicated in seeking recovery thereunder.

In *Joblon v. Solow*,<sup>43</sup> an electrician was directed to install a clock on the wall of an office building. Because there was no outlet in that particular room, the plaintiff had to chop a hole through the concrete wall to the adjoining room and run electrical wiring from the electrical source to the hole. To accomplish this the plaintiff stood on a partially opened ladder leaning against the wall because, due to the dimensions of the room, the ladder could not be completely opened. Joblon’s co-worker held the ladder securely while Joblon was performing his duties. At one point, however, the co-worker left the room, and Joblon ascended the now unsecured ladder to complete his task. While doing so, the ladder shifted, and Joblon fell backward, sustaining injuries.

The Court of Appeals was now confronted with the “highly elusive goal of defining with precision statutory terms within” Labor Law § 240(1), having found “that no precedent of this Court four-square controls the definition of the term ‘altering’ as used in” that statute.<sup>44</sup>

The Court found that Joblon’s work was more complicated than merely standing on a ladder to hang a clock; the work he performed “was a significant physical change to the configuration or composition of the building.”<sup>45</sup> The Court refused to limit relief only to construction sites because it “would eliminate possible recovery for work performed on many structures falling within the definition of that term but found off construction sites.”<sup>46</sup> Here, the plaintiff’s job was more than a simple routine activity – he made a “*significant* physical change to the configuration or composition of the building or structure. \* \* \* It is not important how the parties generally characterize the injured worker’s role but rather what type of work the plaintiff was performing at the time of the injury.”<sup>47</sup>

*Joblon* is a prime example of how the different courts’ definitions and interpretations of each element of Labor Law § 240(1) can yield differing results for the respective parties of a lawsuit involving this statute.

Almost a decade after *Joblon*, a worker who sustained injury while cleaning the interior window in an office building could not recover under the scaffold law because he failed to establish the need for any safety device and, therefore, no liability could attach to the defendant.

In *Broggy v. Rockefeller Group, Inc.*,<sup>48</sup> the plaintiff window washer was not a steady building employee of the defendant but worked in various buildings, bringing his own bucket and tools to perform his duties. At the time of his accident, the plaintiff was not using a ladder but was standing on top of a desk to reach the top of the window – approximately 10 feet from the floor. The desktop was level with the sill, but the edge of the desk

next to the window had a “gallery,” a one-inch wide, four-inch high protective edge that projected above the desktop. As Broggy was washing the interior side of the window, a co-worker washing the outside of the same window signaled that he wanted to come inside. While lifting the bottom sash of the window, the plaintiff was standing with his left leg on the window sill and his right foot on the desktop. Expecting the bottom sash to remain open the plaintiff removed his hands, and the window suddenly “slammed down.” To avoid injury to his foot, Broggy quickly moved his left leg. His instep got caught in the gallery causing him to fall backward onto the desktop and then the floor.

In his lawsuit, Broggy sought recovery on the theory that he was using the desk as an elevated platform or scaffold while doing commercial cleaning. He further alleged that the “defendants [ ] fail[ed] to provide plaintiff with the safety devices necessary ‘to overcome the elevation differential of approximately four feet between the floor and the window so as to perform his task safely.’”<sup>49</sup>

The Court of Appeals pointed out that “altering” and “cleaning” are discrete categories of activity protected under section 240(1). Notably, in *Joblon*, we rejected the defendants’ argument that only altering performed as part of a building construction job was covered by section 240(1). \* \* \* The crucial consideration is not whether the cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under section 240(1); or whether a window’s exterior or interior is being cleaned. Rather, liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against.<sup>50</sup>

In this case, the plaintiff could not establish that a ladder was required to perform his duties and that he could not have successfully cleaned the windows from the floor level using extension poles with his wand and/or squeegee. Failure to show that “he stood on the desk because he was obliged to work at an elevation to wash the interior of the windows”<sup>51</sup> was fatal to his claim. The plaintiff did not, as a matter of law in this case, need protection from the effects of gravity.

### Breaking With *Misserritti*

Query: Can a worker recover for his injuries that were neither caused by him falling nor from a falling object hitting him, where the injuries were a “direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential”?<sup>52</sup>

In *Runner v. New York Stock Exchange, Inc.*,<sup>53</sup> the Court of Appeals answered this issue of first impression in the affirmative. Unlike the previous cases discussed, Runner was in the process of *lowering* an 800-pound reel of wire down a set of four stairs. Using a makeshift pulley, Runner was at the top of the stairs holding on to a 10-foot

rope acting as a counterweight while the reel of wire was descending the steps. As the reel began to pick up speed it pulled the plaintiff toward it, and he jammed his hands against a metal bar to which the rope was tied, causing his injuries.

The relevant inquiry here was whether the harm to the plaintiff-worker flowed directly from the application of the force of gravity to the object even if that object did not fall on the worker. The Court reasoned that had Runner been at the bottom of the stairs and the reel descended onto him causing injury, he would be protected by the statute. Therefore, since “the injury to plaintiff was every bit as direct a consequence of the descent of the reel,” he should be entitled to the same legal recourse as if he were in its path and was injured as it rapidly descended.<sup>54</sup>

Finally, the Court held that the elevation differential was not *de minimus* “given the weight of the object . . . over the course of a relatively short descent.”<sup>55</sup>

In October 2011, the Court of Appeals broke new ground in its departure from *Misserritti* by holding that a worker is not categorically barred from recovery under Labor Law § 240(1) where he or she “sustains an injury caused by a falling object whose base stands at the *same level* as the worker.”<sup>56</sup>

In *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, Judge Ciparick described how the “jurisprudence defining the category of injuries that warrant the special protection of Labor Law § 240(1) has *evolved* over the last two decades centering around a core premise: that a defendant’s failure to provide workers with adequate protection from reasonably preventable gravity-related accidents will result in liability.”<sup>57</sup>

Explaining the Court’s progression of the cases discussed above, it was pointed out that while rejecting *Misserritti*’s “categorical exclusion” of injuries resulting from falling objects on the same level of the injured worker, it “declin[e]d to adopt the ‘same level’ rule, which ignores the nuances of an appropriate section 240(1) analysis.”<sup>58</sup> Relying on *Runner*, the Court held that it is not “the precise characterization of the device employed” or whether it was the fall of the worker or an object falling on the worker, but whether injury was a direct consequence of the employer’s failure to provide adequate safety devices to prevent accidents caused by a “physically significant elevation differential.”<sup>59</sup>

Wilinski was injured during the demolition of the brick walls of a vacant warehouse. After the demolition of the floor and ceiling, two 10-foot vertical pipes, 4 inches in diameter, remained standing on the ground unsecured. They were not scheduled to be removed at that time. Although the plaintiff expressed his concerns to his supervisor about leaving the pipes unsecured, no measures were taken to secure them. Wilinski, 5 feet, 6 inches tall, was standing on the ground when debris from a nearby wall being torn down hit the pipes, causing them to fall approximately 4 feet before striking and injuring him.

Applying *Runner*, the Court precluded *Wilinski* from recovery, but not simply because he and the pipes were on the same level when he was struck. The harm flowed directly from the force of gravity generated by the pipes in their descent, and the 4-foot height differential was not *de minimus* as a result of that force. Notwithstanding that there was a “potential causal connection between the object[s] inadequately regulated descent and plaintiff’s injury,”<sup>60</sup> there still remained an issue of fact as to whether the plaintiff’s injury was a direct consequence of the defendant’s failure to provide adequate protection to prevent the pipes from falling. Thus, neither party was entitled to summary judgment.

The Court distinguished this case from others where summary judgment dismissal was warranted. Where objects that fall and injure workers are themselves the “target of demolition” it would be “illogical” to secure them as it would be “contrary to the objectives of the work plan.”<sup>61</sup> Such was not the case here where the removal of the pipes was not part of that phase of the demolition project and thus should have been secured.

Only a month after *Wilinski*, the Court of Appeals applied the same rationale in *Salazar v. Novalex Contracting Corp.*<sup>62</sup> Here, the Court denied recovery to a worker who was injured when he stepped backward into a trench. The plaintiff, Salazar, was pouring and spreading concrete over a basement floor that contained 3 - to 4 - foot - deep trenches for pipes when he was injured. The plaintiff claimed that the defendant should have provided a protective device to cover the trenches. The Court held that to do so would be “illogical,” “impracticable” and “contrary to the . . . work plans in the basement” because the goal was to fill these trenches with cement.<sup>63</sup> The defendant was entitled to summary judgment “given that Labor Law § 240(1) should be construed with a commonsense approach to the realities of the workplace at issue.”<sup>64</sup>

In *Ortiz v. Varsity Holdings*,<sup>65</sup> the issue was whether Ortiz, who was injured when he fell to the ground off a 6-foot dumpster, was performing a job that created an elevation-related risk encompassed in the scaffold law. The defendants moved for summary judgment, claiming this was not such a case. The plaintiff asserted that his task of filling the dumpster and rearranging the contents therein as it filled up required him to stand on the 8-inch ledge at the top of the dumpster.

The Court held that neither side was entitled to summary judgment. Based on the record before it, the Court “[could not] say as a matter of law that equipment of the kind enumerated in section 240(1) was not necessary to guard the plaintiff from the risk of falling from the top of the dumpster.”<sup>66</sup> Liability is contingent upon the failure to use, or the adequacy of, one of the enumerated devices, so a question of fact remained as to whether the task the plaintiff performed created an elevation-related risk of the kind these devices are intended to prevent. The Court also

noted that “courts must take into account the practical differences between ‘the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation tasks envisioned by Labor Law § 240(1).”<sup>67</sup>

Most recently, the Court of Appeals decided *Dahar v. Holland Ladder & Manufacturing Co.*<sup>68</sup> As in *Broggy*, the plaintiff’s duties involved “cleaning.” Here, the plaintiff was cleaning a 7-foot-high manufactured steel wall module prior to it being shipped to its final destination. It was necessary for the plaintiff to stand on a ladder to perform his task. While working, the ladder broke and the plaintiff fell to the ground. He sought recovery under Labor Law § 240(1) asserting that (1) he was “cleaning,” one of the tasks enumerated in the statute; and (2) the wall module was a “structure.” The Court rejected this argument, stating that it 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).<sup>69</sup>

### Lower Courts Weigh In

In the nine weeks between July 19, 2012, and September 18, 2012, five Appellate Division decisions and two Supreme Court decisions were rendered with respect to issues pertaining to the application of Labor Law § 240(1).

In *Oakes v. Wal-Mart Real Estate Business Trust*,<sup>70</sup> “apparently the first extended analysis” of *Wilinski*,<sup>71</sup> the Appellate Division, Third Department, denied recovery to a worker injured in a force-of-gravity accident.

The supervisor of a construction project, Oakes’ legs were crushed as he was walking between two steel trusses, each measuring 30 feet long by 52 feet in height and 1 foot wide. As he was checking the steel components, one of the vertically positioned trusses, standing on its 1-foot side, was struck by an unsecured bar joist being carried by a forklift, causing it to fall on top of him.

The appellate court distinguished this case from *Wilinski*, noting that “[i]n light of the Court[ ] [of Appeals’s] continued reliance upon *Rodriguez* in [*Ortiz*] a case decided after both *Runner* and *Wilinski* it cannot be said that an elevation differential posed ‘the special elevation risks contemplated by the statute’ simply because the force of gravity acting on a heavy object caused severe injuries when the object fell.”<sup>72</sup>

Here, the plaintiff was not only on the same ground level as the truss, he was approximately the same height or slightly taller. Thus, “[n]otwithstanding the substantial weight of the [10,000-pound] truss and the significant force generated as it fell due to the force of gravity, however, there was *no* elevation differential present here, let alone a ‘physically significant elevation differential.’ \* \* \* Under these circumstances, plaintiff was exposed to ‘the usual and ordinary dangers of a construction site, and [not] the extraordinary elevation risks envisioned by Labor Law § 240(1).”<sup>73</sup>

In *Toney v. Raichoudhury*,<sup>74</sup> Toney was killed when a crate, one of six that had been unloaded from a flatbed trailer truck, fell and crushed him. The crates, each weighing approximately 2,000 pounds, were lifted off the truck by a crane and placed on the ground so that two crates would stand upright and parallel to each other. The workers would tilt the crates toward each other so they would touch at the top and then connect them with braces to form an “A.” As Toney and a co-worker were tilting two of the crates, one shifted, causing both crates to fall. Neither crate was attached to the crane at that time.

The defendants moved for summary judgment on the ground that the falling crates were at the same level as the worksite where Toney was standing and did not constitute an elevation-related risk under Labor Law § 240(1). Unlike the falling pipes in *Wilinski* relied on by the plaintiff, the crates did not fall from a substantial height. The plaintiff argued that the fact that the falling crates and the deceased were at the same level was irrelevant because the crates were inadequately secured.

In rejecting the defendants’ argument, the Supreme Court found that the failure to secure the crates before removing them from the crane was a violation of the statute. While the crates stood only about 9 inches above the decedent’s head, the elevation differential was not *de minimus* considering their weight and the amount of force they were capable of generating over even a short distance. “Moreover, [t]he sufficiency of an elevation differential and a fall from a height for purposes of [liability under the scaffolding law] cannot be reduced to a numerical bright-line test or an automatic minimum/maximum quantification.”<sup>75</sup>

*Cappabianca v. Skanska USA Building, Inc.*<sup>76</sup> concerned a construction site accident. The plaintiff was cutting bricks with a stationary wet saw; the saw and its stand sat on a wooden pallet that lay on the concrete floor. The plaintiff was standing on an adjacent pallet of the same height, operating the saw using its foot pedal, arm lever and cutoff switch. To keep the blade and bricks cool and to provide lubrication while cutting, the saw sprayed water on them; the water was supposed to be directed to an attached tray. But the sprayer malfunctioned, the water sprayed all over and the floor became slippery. As a result, the pallet on which the plaintiff was standing shifted and he lost his footing, injuring his knee as it became caught between the two pallets.

In affirming dismissal of the plaintiff’s Labor Law § 240(1) claim, the Appellate Division, First Department, held that his “accident could not give rise to liability under the statute because he was at most 12 inches above the floor and was not exposed to an elevation-related risk requiring protective safety equipment.”<sup>77</sup>

The specified tasks enumerated in Labor Law § 240(1) must take place in [or on] a “building” or “structure,” and what constitutes a “structure” requires determination on a case-by-case, fact-specific basis.

In *McCoy v. Abigail Kirsch at Tappan Hill*,<sup>78</sup> the Appellate Division, Second Department, determined that, under the facts of that case, the canopy under which a Jewish wedding ceremony was performed, a “chupah,” qualified as a “structure” for the purposes of seeking recovery under Labor Law § 240(1). Here, the court noted that

a structure, by implication, may include constructs that are less substantial and perhaps more transitory than buildings. \*\*\* In this action, the chupah consisted of various interconnected pipes 10 feet long and 3 inches wide, secured to steel metal bases supporting an attached fabric canopy. A ladder plus various hand tools were required to assemble and disassemble the chupah’s constituent parts in a process that would take an experienced worker more than a few minutes to complete. The chupah here is more akin to the things and devices which the courts of this state have recognized as structures than to the things and devices that have not be recognized as structures.<sup>79</sup>

*Britez v. Madison Park Owner*<sup>80</sup> concerned a plaintiff who was injured when he fell off a scaffold approximately 6 feet high. He had needed a scaffold to do taping work at the top of a 12-foot-high wall, but the only one available was a pre-assembled model that had no safety railings or mesh, which, the plaintiff alleged, would have prevented him from falling backward.

The court held that the plaintiff established *prima facie* entitlement to partial summary judgment on his liability claim under Labor Law § 240(1), because he demonstrated that the scaffold did not provide proper protection and he was not given any other devices to prevent him from falling. The defendants failed to establish that the “plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; [and] that he chose for no good reason not to do so.”<sup>81</sup>

The Appellate Division, Second Department, affirmed the dismissal of the plaintiff’s Labor Law § 240(1) claim in *Rodriguez v. D&S Builders, LLC*<sup>82</sup> as the plaintiff failed to raise a triable issue of fact. The defendants “established their *prima facie* entitlement to [summary] judgment [of dismissal] as a matter of law by demonstrating that the plaintiff’s decedent was not exposed to an elevation related hazard inasmuch as, at the time the decedent was struck by a bundle of forms, the forms were not being hoisted or secured, and the decedent was working on a flatbed truck at the same level as the bundle of forms.”<sup>83</sup>

In *Rivera v. Fairway Equities LLC*,<sup>84</sup> the plaintiff was injured when a metal hamper filled with sand fell on him after being lifted by a forklift off a flatbed truck. The plaintiff and two co-workers were instructed by their supervisor to hold a bag while sand was poured into it. When the sand would not pour out of the hamper, the operator of the forklift tried to shake the hamper by using a lever of the forklift which, allegedly, caused the hamper to tilt forward and fall on the plaintiff. The hamper was 3- to 4-feet tall and approximately

3 to 4 feet off the ground while held aloft by the forklift. The plaintiff was employed by non-party Bolinet Construction, a sub-contractor hired to erect the building's cinder block walls. The operator of the forklift was employed by Miron Building Supply LLC, who supplied and delivered construction materials to the jobsite.

The plaintiff moved for partial summary judgment against Miron under Labor Law § 240(1). Miron contended that “the fall of the hamper from the forklift simply did not involve a fall from a height sufficient to warrant the special protections provided under Labor Law § 240(1).”<sup>85</sup>

The court held that

in light of the heavy weight of the sand-filled hamper, the obvious force it generated in the three to four foot fall from the forks of the forklift, and the absence of any brace or other Labor Law § 240 device securing the hamper to the forklift, the plaintiff has demonstrated, as a matter of law, that Labor Law § 240(1) was violated. In opposition, Miron has failed to demonstrate the existence of a factual issue with respect to whether section 240(1) was violated. This finding, however, does not end the inquiry, as Miron also asserts that it may not be held liable because it was not an owner, contractor or agent under section 240(1).<sup>86</sup>

However, “[t]he absence of proof of a direct contractual connection with the owner or general contractor weighs against finding that Miron was delegated any authority by the owner or general contractor.” Thus, the plaintiff’s motion for partial summary judgment was denied.

Finally, the Appellate Division, First Department, in *Fabrizi v. 1095 Avenue of the Americas, LLC*,<sup>87</sup> addressed the element of foreseeability in all Labor Law § 240(1) cases as “an issue whose discussion . . . is long overdue.”<sup>88</sup>

The plaintiff, an electrician, was overhauling a building’s electrical system, which required him to run a galvanized steel conduit up through the building’s floors. The conduit on each floor met and abutted the conduit from the floors below and above; these were held together by compression couplings. On each floor, the conduit rose several feet and was connected and attached to a “pencil box” by a compression connector. While drilling new holes for a pencil box’s new location, the conduit fell from its compression coupling above, falling on top of the plaintiff’s hand and causing injury. Prior to the accident, the plaintiff had requested screw couplings to hold the conduits in place during this task; these were never provided.

While agreeing with the majority that there was an issue of fact as to whether a protective device was required for the plaintiff to safely perform his duties and whether the defendant failed to provide such device, the concurring opinion focused on the aspect of foreseeability in all actions under the Scaffold Law.

Absent a foreseeability requirement, then, we leave owners and contractors with no reasonable way to determine when the statute applies and therefore when they are required to provide the safety devices

enumerated therein. After all, an accident cannot trigger the extraordinary protections of Labor Law § 240(1) merely because it is gravity related. Otherwise, virtually every accident would fall within the purview of Labor Law § 240(1), and defendants would never be able to forecast when safety devices are required. \* \* \* [I]t is beyond cavil that in cases pursuant to Labor Law § 240(1) and, more particularly, as is the case here, cases involving injury by virtue of a falling object, the dispositive issue for purposes of the statute’s applicability, is not as argued by defendants, whether an object falls from a permanent structure or whether at the time of injury the object was being hoisted or secured. Instead, the pertinent and indeed dispositive inquiry is whether it was reasonably foreseeable at the outset that the task assigned to a worker exposed him/her to a gravity-related hazard, so that he/she should have been provided with one or more of the safety devices required by the statute.<sup>89</sup>

Whether future decisions by the trial and appellate courts will incorporate the element of foreseeability remains to be seen, for, as the court noted, it “remains a point of contention in our very own department.”<sup>90</sup>

## Conclusion

Thus, we end where we began: Labor Law § 240(1) has been and continues to be a statute that will yield differences of opinions between the courts at all levels regarding the nature of a worker’s tasks that fall within the statute; the devices, if any, to be provided and used to protect the worker; the nature and degree of the elevation and height differentials, vis-à-vis the worker and the distance he or she falls or that which an object falls causing injury to the worker; and, now, whether foreseeability must be an element to be considered.

In all actions predicated on Labor Law § 240(1), it is incumbent upon the courts to make every effort to ensure that the “ultimate responsibility” to safely protect the workforce remains where it belongs, with the owners and contractors of the construction sites, as the Legislature intended.<sup>91</sup>

Barring further clarity of the statute by legislative amendment, the courts will continue to confront the “highly elusive goal of defining with precision the statutory terms”<sup>92</sup> of the ever-evolving Scaffold Law. ■

1. Barry R. Temkin, *New York’s Labor Law Section 240: Has It Been Narrowed or Expanded by the Courts Beyond the Legislative Intent?*, 44 N.Y. L. Sch. Rev. 45 (2000), n.31.

2. *Id.* nn.38, 42; Labor Law § 240(1).

3. Temkin, *supra* note 1, n. 47. See *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991) (the legislative purpose behind this enactment is to protect “workers by placing ‘ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor’ ( ), instead of on workers, who ‘are scarcely in a position to protect themselves from accident’”).

4. Temkin, *supra* note 1, p. 47. Although not relevant to this article, the amendment further exempted architects and professional engineers “who do not direct or control the work for activities other than planning and design.” Labor Law § 240(1)

5. Labor Law § 240(1); see *supra* note 3.
6. For additional comments on this subject, see N.Y. PJI - Civil, Vol. 1B, § 2:217 [Injured Employee – Action Under Statute Imposing Absolute Liability], pp. 425–89
7. *Rocovich*, 78 N.Y.2d 509.
8. *Id.* at 513; In *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280 (2003) the Court of Appeals noted that the words strict or absolute liability did not appear in the current statute or its predecessors. It was the Court that began to use that terminology in 1923 and its context here is different from its use elsewhere. Under these circumstances there must be a violation of the statute (i.e., failure to provide protective devices) and that said violation was a contributing or proximate cause for the worker’s injury.
9. *Rocovich*, 78 N.Y. 2d 509.
10. *Id.* at 513.
11. *Id.* at 514 (emphasis added).
12. *Id.*
13. *Id.*
14. *Id.* at 514–15.
15. *Id.* at 515
16. 81 N.Y.2d 494 (1993).
17. *Id.* at 498.
18. *Id.* at 500.
19. *Id.*
20. *Id.* at 501 (emphasis in original).
21. *Id.*
22. *Id.*
23. 84 N.Y.2d 841 (1994).
24. *Id.* at 843–44 (citing *Ross*, 81 N.Y.2d 494; *Rocovich*, 78 N.Y.2d 509).
25. 86 N.Y.2d 487 (1995).
26. *Id.* at 490.
27. *Id.* at 489.
28. *Id.* at 491.
29. 92 N.Y.2d 909 (1998).
30. *Id.* at 911–12.
31. 96 N.Y.2d 259 (2001).
32. *Id.* at 266.
33. *Id.* at 267.
34. *Id.* at 268.
35. *Id.*
36. *Id.*
37. *Id.* at 269.
38. *Id.* at 270.
39. *Id.* However, in *Quattrocci v. F.J. Sciamme Constr. Corp.*, 11 N.Y.3d 757, 758–59 (2008), the plaintiff was struck and injured by falling planks that were part of a makeshift platform used to facilitate the installation of an air conditioner over a doorway. There, the Court of Appeals held that the falling object liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured.
40. 18 N.Y.3d 1 (2011).
41. 4 N.Y.3d 399 (2005).
42. *Id.* at 408.
43. 91 N.Y.2d 457 (1998).
44. *Id.* at 460–61.
45. *Id.* at 465.
46. *Id.* at 464. The Court defined “Astructure” for the purposes of Labor Law § 240(1) as “any production or piece of work artificially built up or composed of parts joined together in definite manner.”
47. *Id.* at 465.
48. 8 N.Y.3d 675 (2007).
49. *Id.* at 679.
50. *Id.* at 681.
51. *Id.*
52. *Runner v. N.Y. Stock Exchange, Inc.*, 13 N.Y.3d 599, 603 (2009).
53. *Id.*
54. *Id.* at 604
55. *Id.* at 605
56. *Wilinski v. 334 E. 92nd HDFC*, 18 N.Y.3d 1, 5 (2011).
57. *Id.* at 7 (emphasis added).
58. *Id.* at 9.
59. *Id.* at 10.
60. *Id.* at 11.
61. *Id.*
62. 18 N.Y.3d 134 (2011).
63. *Id.* at 140.
64. *Id.*
65. 18 N.Y.3d 335 (2011).
66. *Id.* at 339.
67. *Id.*
68. 18 N.Y.3d 521 (2012).
69. *Id.* at 526.
70. 99 A.D.3d 31 (3d Dep’t 2012).
71. John Caher, *Parsing Recent Precedent, Panel Declines to Apply Gravity Liability*, N.Y.L.J., July 20, 2012.
72. *Oakes*, 99 A.D.3d at 39.
73. *Id.* at 39–40. (emphasis in original).
74. 36 Misc. 3d 1202(A) (Sup. Ct., Kings Co. 2012).
75. *Id.* at \*8 (citations omitted).
76. 950 N.Y.S2d 35 (1st Dep’t 2012).
77. *Id.* at 41.
78. 99 A.D.3d 13 (2d Dep’t 2012).
79. *Id.* at 16–17.
80. 36 Misc. 3d 1233(A) (Sup. Ct., N.Y. Co. 2012).
81. *Id.*
82. N.Y.L.J., Sept. 14, 2012, p. 26, col. 1.
83. *Id.*
84. 36 Misc. 3d 1236(A) (Sup. Ct., Kings Co. 2012). Fairway and several other defendants did not appear in this action, and default was taken against them in an order dated June 1, 2009.
85. *Id.* at \*3.
86. *Id.* (citations omitted).
87. 98 A.D.3d 864 (1st Dep’t 2012).
88. *Id.* at 866.
89. *Id.* at 869, 872 (citations omitted).
90. *Id.* See Letters to the Editor, Foreseeability and Labor Law § 240(1) by David H. Perecman, Chair of the Labor Law Committee of the N.Y.S. Trial Lawyers Ass’n (N.Y.L.J., Sept. 27, 2012, p. 6, col. 4), in which he states his opposition to the inclusion of the element of foreseeability in Labor Law § 240(1) cases (“ [T]he imposition of a foreseeability requirement runs counter to and will serve to defeat the guiding principles behind § 240(1). \* \* \* [T]o actually graft on to the statute a concept like what is reasonably foreseeable would eviscerate the statute and create havoc.”).
91. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991).
92. *Joblon v. Solow*, 91 N.Y.2d 457, 460–61 (1998).

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