

LIABILITY UNDER THE NEW YORK LABOR LAW

I. INTRODUCTION

Overview of Construction Litigation Under the Labor Law

One of the most significant liability exposures to an owner and contractor at a construction site in New York is an injury to a construction worker. New York, in contrast to most states, imposes liability on owners and contractors for practically all accidents occurring at a construction site, regardless of whether the owner or contractor exercised supervision or control over the work at the site. In addition, the standard for imposing liability on owners and contractors is not limited to ordinary negligence. Owners and contractors can be subject to “absolute liability” for certain violations of the New York Labor Law.

New York law also provides that in most cases an employee may not sue his employer (or co-worker) for injuries sustained during the employment relationship. The employee’s sole remedy against the employer is workers’ compensation. As such, in most injured construction worker cases, the employee sues the owner and the general contractor, as well as any other contractor at the site who may have liability. The owner and contractors may then, in limited circumstances, bring a third-party action against the employer.

This has created a fertile area of litigation between the employer’s workers compensation insurer, and the employer’s general liability insurer. Litigation also arises between the employer’s general liability insurer and the general liability insurer for the third-party plaintiff (usually the owner and/or general contractor) on the issue of ultimate responsibility for the worker’s injuries. These are complex litigation cases which involve numerous defendants and third-party claims, as well as complex liability and insurance issues.

The following chapters analyze the New York Labor Law’s imposition of a non-delegable duty and potentially absolute liability upon owners and contractors, with a particular emphasis on sections 200, 240, and 241 of the Labor Law. Chapter 12 addresses the New York State Workers’ Compensation Law, and its immunization of employers against suits brought by injured employees, as well as the exception carved out by the New York legislature which permits an employer to be made a third-party defendant in a suit brought by an injured employee. Chapter 13 addresses the indemnification and insurance coverage issues that may arise in these types of litigations.

In 1921, the New York State Legislature enacted legislation which is known as the “Safe Place to Work” Statute. Over the years, the Legislature has amended the Labor Law to address concerns over the safety of workers at construction sites. New York Labor Law Sections 200, 240, and 241 are the most often cited sections in construction litigation and set forth the duties of employers and others involved in the construction industry concerning the health, safety, and welfare of their employees.

II. SECTION 200: THE GENERAL DUTY TO PROTECT THE HEALTH AND SAFETY OF EMPLOYEES.

Section 200 provides:

General duty to protect the health and safety of employees.

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.ⁱ

Under the common law, an employer has a duty to provide its workers with a safe place to work and section 200 of the New York Labor Law is a codification of this common law duty.ⁱⁱ Section 200 adopts the common law standard of reasonable care; consequently, the statutory test does not differ from that in an ordinary negligence action.ⁱⁱⁱ Under Section 200, the employer has a duty to make and keep the work area safe.^{iv}

As a predicate to imposing liability upon an owner or contractor under Section 200, the owner or contractor must be in control of the construction site. In *Russin v. Louis N. Picciano & Son*, the New York Court of Appeals established that

liability under Section 200 is conditioned upon a party's authority to control the activity bringing about plaintiff's injuries.^v The Court held that:

An implicit precondition to this [common law duty] to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.^{vi}

In general, an owner and contractor's duty to provide a safe place to work under section 200 is not breached when the injury arises from a defect in a subcontractor's work.^{vii} However, the owner or contractor may be in breach of his duty under section 200 if he or she exercises supervisory control over the subcontractor's plant, tools, and materials.^{viii}

An additional predicate to liability under Section 200 is that the owner or contractor have actual or constructive notice of the unsafe condition.^{ix}

Because a claim under section 200 is based on ordinary negligence, the defenses of comparative fault and assumption of the risk are applicable.^x

III. SECTION 240: SCAFFOLDING AND OTHER DEVICES FOR USE BY EMPLOYEES.

Section 240 creates liability for a variety of hazards associated with construction work involving heights. Section 240 also prescribes that certain safety devices be furnished to construction workers.

Section 240 is composed of three subdivisions. Subdivision 1 imposes a general duty upon to provide proper protection to workers engaged in construction activities involving heights. Subdivisions 2 and 3 set forth specific requirements regarding scaffolding.

A. SECTION 240(1)

Section 240(1) requires owners, contractors, and their agents to provide workers with scaffolding and other devices necessary to adequately protect workers. 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 painting 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.^{xi}

The New York courts have broadly interpreted the phrase "owners, contractors and their agents" under section 240(1).^{xii} In analyzing whether a person or entity falls within the terms of the statute, the courts analyze the relationship of the person or entity to the site or function, and the relationship of the person or entity to the injured plaintiff. New York courts have held that owners, general contractors, construction managers, architects, subcontractors and providers of supplies, tools and equipment are subject to the requirements set forth in section 240(1).

For the purposes of section 240(1), an "owner" has been held to be, among other things, a grantor or grantee of property^{xiii}, a lessor^{xiv}, a party, under contract to purchase property, but who contracted for construction to be done on the property^{xv} and, similarly, a lessor who contracted for construction to be done^{xvi}.

Although the statute uses the term "contractors," not all contractors will be held liable. Thus, the title by which the a party is known is not determinative. The analysis depends upon whether the contractors have been delegated to supervise and control the work giving rise to the duties imposed under those statutes such that they become the statutory agents of owners.^{xvii}

In *Russin v. Louis N. Picciano & Son, supra*, the Court of Appeals defined the term "agent" for the purposes of sections 240 and 241. The Court held that in order to hold an entity liable as an "agent" under sections 240 and 241, the entity must have been delegated the power to supervise, coordinate and control the construction activity at the work site.

The Court held as follows:

Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirements of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory agent of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having non-delegable liability as an “agent” under sections 240 and 241. To hold otherwise and impose a nondelegable duty upon each contractor for all injuries occurring on a job site and thereby make each contractor an insurer for all workers regardless of the ability to direct, supervise and control those workers would lead to improbable and unjust results and would directly contravene the express legislative history accompanying the 1969 amendments to these provisions.^{xviii}

In most situations, this means that the general contractors will be held liable under the statute. In addition, depending upon whether it had authority to manage and supervise phases of the construction project, then the court may find that the construction manager is a “contractor” under section 240(1) as well.^{xix}

B. SECTION 240(2)

Section 240(2) deals specifically with scaffolding over 20 feet high. This subdivision requires such scaffolding to have a safety rail rising at least 34 inches above the platform of the scaffolding, and provides that scaffolding must be fastened to a building or structure.

Section 240(2) provides:

Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.^{xx}

This provision of the statute is not heavily litigated as the facts to give rise to the applicable cause of action are generally not in dispute.^{xxi}

C. SECTION 240(3)

Section 240(3) is self-explanatory, and provides as follows:

All scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent there from or placed thereon when in use.^{xxii}

D. NON-DELEGABLE DUTY UNDER SECTION 240

Section 240 imposes liability on owners and contractors regardless of whether they exercise supervision or control over the work. An owner or contractor cannot avoid liability to an injured worker by claiming that the owner or contractor “delegated” the duty to provide a safe workplace to another party.^{xxiii}

E. LIABILITY OF ARCHITECT AND ENGINEERS UNDER LABOR LAW 240

In 1981, the Legislature amended section 240 of the Labor Law so as to provide a statutory defense to engineers, architects, and landscape architects.^{xxiv}

The defense reads as follows:

No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers as provided for in article one hundred forty-five of the education law, architects as provided for in article one hundred forty-seven of such law, or landscape architects as provided for in article one hundred forty-eight of such law who do not direct or control the work or

activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provision of law.^{xxv}

Interesting, however, even before enactment of 240, engineers, architects and others who could be denied as design professionals were not held liable for injuries to a worker during construction so long as they did not have the right or the duty to supervise and control the work.^{xxvi} The statutory modification merely conforms section 240 and 241 with the common law. As such, in order to impose liability under section 240 or section 241 it must be shown that the professional erected or controlled the work which gave rise to the plaintiff's injuries.

Kerr v. Rochester Gas & Electric^{xxvii} is both illustrative and clearly outlines the relevant law when it comes to holding design professionals liable under section 240 of the Labor Law. In that decision, the plaintiff, a carpenter injured after falling through an unguarded hole at a construction project, sued, among others, the engineering firm contracted by the owner. In determining whether the engineering firm could be held liable under 240, the court considered whether the firm had obtained "the authority to supervise and control" the work and, therefore, had become an agent of the owner and therefore liable.^{xxviii}

After reviewing the applicable written agreement, the court concluded that the engineering firm had no authority to supervise and control the injured worker. The court also noted that the agreement did not provide for the engineering firm to direct the construction procedures or safety measures used by the various contractors. Therefore, lacking the right to supervise and control, the court concluded that no liability could be imposed under these statutes. Summing up, the court stated that these types of design professionals are not "agents" with the overall authority envisioned by the statute and therefore are not responsible under the Labor Law.^{xxix}

F. ABSOLUTE LIABILITY UNDER SECTION 240

Section 240 also imposes "absolute liability" on owners and contractors who fail to provide safety devices for workers. "Absolute liability" means liability without fault if the statute is violated. Under this theory, an owner or contractor can be liable even if the owner or contractor exercised due care.^{xxx}

In *Zimmer v. Chemung County Performing Arts Inc.*, *supra*, the New York Court of Appeals held that section 240 must be applied liberally to accomplish the legislative purpose of protecting workers from injuries. The legislative purpose underlying section 240, according to the Court, is to impose an absolute duty upon the owner or contractor.^{xxxi}

Once it is determined that an owner or contractor failed to provide the safety devices required by section 240, absolute liability is unavoidable regardless of whether the injured worker's own negligence contributed to his accident, or whether the injured worker assumed a known risk.^{xxxii}

The New York Court of Appeals has narrowly defined the extent of liability under section 240(1). In *Rocovich v. Consol. Edison Co.*,^{xxxiii} the Court held that the occupational hazards that warrant statutory protection arise out of an examination of the protective devices utilized, i.e., scaffolding, hoists, ladders, stays and slings. Some of these devices are for the use or for the protection of laborers gaining access or working at levels where elevation poses a risk, while others, i.e., hoists, blocks, braces, irons, and stays are used to lift or secure materials or loads at an elevation. The uses of these statutorily set forth devices all involve "the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured."^{xxxiv}

The New York Court of Appeals expanded on *Rocovich* by stating that "Labor Law Section 240 (1) was designed to prevent those types of accidents in which the scaffold, 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."^{xxxv} The Court further noted that the right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold.

Elevation differential is the predominant factor in evaluating the potential liability of an owner or contractor. As a threshold matter, the difference between the elevation level of the required work area and a lower level, or the elevation level where the worker is positioned and the higher level of materials or loads being hoisted must be determined.

In *Melo v. Consolidated Edison Company of New York*^{xxxvi} and *Ross v. Curtis-Palmer Hydro-Elec. Co.*,^{xxxvii} the New York Court of Appeals held that § 240 only covers elevation-related hazards. Therefore, injuries resulting from other types

of hazards are not compensable under the statute, even if they were proximately caused by the absence of adequate scaffold or other safety devices.

The list of required safety devices set forth in section 240, all of which are used in connection with elevation differentials, evinces a clear legislative intent to provide “exceptional protection” for workers against the “special hazards” that arise when the work site is either itself elevated or is positioned below the level where the materials or loads are hoisted or secured. The “special hazards” do not encompass all perils that may be connected in some tangential way with the effects of gravity.^{xxxviii} These special hazards referred to 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 (i.e., the force of gravity to an object or person). There is no right of recovery for other types of harm, even if the harm in question was caused by an inadequate, malfunctioning, or defectively designed scaffold, stay or hoist.

Under New York law, an owner cannot escape absolute liability under section 240 by showing that necessary safety devices were generally available at the work site.^{xxxix} As set forth by the Court in *Kaffke v. New York State Elec. & Gas Corp.*,^{xl} the necessary safety devices must be available and in place for use at the workstation by the worker, and must be visible at the worker’s immediate work site.^{xli}

While it is well settled that an injured worker’s contributory negligence is not a defense to a Labor Law § 240(1) claim, an owner or contractor can potentially defeat liability under the “recalcitrant worker” defense if the owner or contractor can show that the injured worker refused to use the safety devices that were properly provided by the owner or employer.^{xlii}

Impact of Blake decision

In *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003), New York’s highest court, the New York Court of Appeals issued one of its most significant decisions with respect to strict liability under the Scaffold Law.

Mr. Blake, who operated his own construction company, was injured while on a ladder he owned, and had set up improperly. The ladder was steady, and in proper working condition. The Court of Appeals held that section 240(1) did not apply, because the accident occurred due to the way in which the plaintiff set up and used the ladder, not because of a defect or malfunction.

In *Blake*, the Court held that the term strict liability is uniquely defined for the purposes of section 240. Under §240, strict liability requires that a statutory violation caused the accident. The Court also held that a fall from a scaffold or ladder is not in itself sufficient to establish a lack of proper protection.

Blake changes the Labor Law in the following ways:

- (1) A defendant can argue that the plaintiff’s selection of the safety device caused the accident - for example, if the plaintiff was using a ladder when a scaffold was available, §240(1) may not apply.
- (2) A defendant can argue that a plaintiff’s use of the safety device caused the accident. For example, if a claimant sets up a ladder that falls, as in *Blake*, §240(1) may not apply.
- (3) A defendant can argue that the safety device was not defective. For example, if a claimant falls from a scaffold with no defects that remains in use afterwards §240(1) may not apply.

Post *Blake*, the legal burden is as follows:

- (1) Plaintiff must show a statutory violation of §240, i.e., failure to give proper protection to a worker, as evidenced by the collapse of a scaffold or ladder causing injury to a worker.
- (2) The burden then shifts to the defendant to show no statutory violation existed, and that the plaintiff was the sole cause of the accident.
- (3) The fact that a ladder or scaffold collapsed without explanation gives plaintiffs a presumption in their favor that ladder was defective.

- (4) Defendant is entitled to summary judgment if a 240(1) violation is not the proximate cause of the accident, and the plaintiff is the sole cause of the accident.

Post Blake Decisions

Plaintiffs can still prevail on 240(1) claims post *Blake*, and many Courts have denied post *Blake* motions for summary judgment or a directed verdict. Nevertheless, with extensive discovery and investigation, these cases are now potentially defensible on liability. In summary, *Blake* is not a panacea, but it helps level the playing field. The following are some significant post *Blake* decisions:

- *Fernandez v. Equitable*, 4 A.D.3d 69, 772 N.Y.S.2d 14 (1st Dept. 2004) – a plaintiff laborer was granted summary judgment under section 240(1), regardless of whether his actions made a ladder “wobble,” because he was injured while trying to prevent himself from being injured while on a defective ladder.
- *Smith v. DuPont*, 2004 U.S. Dist. LEXIS 8014 (U.S. Dist. Ct.-Western District of N.Y.) – The defendant was granted summary judgment on a section 240(1) claim, where plaintiff could not establish a violation or that the violation was the proximate cause of the accident, as plaintiff electrician admitted he mis-stepped off a ladder.
- *Plass v. Sotloff*, 5 A.D. 3d 365, 773 N.Y.S.2d 84 (2d Dept. 2004) - The plaintiff, a self-employed drywall contractor, set up his own scaffold improperly and as a result fell to the ground. The Court held that the plaintiff was the sole proximate cause of his injuries and he could not recover under Labor Law section 240.
- *Montgomery v. Federal Express Corp.*, 4 N.Y.3rd 805, 828 N.E.2d 592 (2005) – The plaintiff, a helper hired by an elevator company, was assigned to do work in an elevator motor room located four feet above the roof of the building. There were no ladders in the immediate vicinity, but ladders were available at the job site. The Court held that plaintiff’s choice to use a bucket to get up, and then jump down, was the sole cause of his injury, and was therefore not entitled to recover under Labor Law Section 240(1).

The Cahill decision

Approximately one year after the *Blake* decision, in December 2004, New York’s Court of Appeals, narrowed the scope of Labor Law Section 240 further, in *Cahill v. The Triborough Bridge and Tunnel Authority*, 4 N.Y.3rd 35, 823 N.E.2d 439, 790 N.Y.S.2d 74 (2004).

Mr. Cahill sued the Triborough Bridge and Tunnel Authority under Labor Law Section 240(1).

He was employed in the reconstruction and repair of the Triborough Bridge in July 1999. Mr. Cahill’s work required him to scale up and down wall-like concrete structures known as “forms.” A manlift that he could use was present at the site. When a manlift was not available, (if it was being used by another worker) Mr. Cahill was expected to climb and to descend by using safety lines affixed to the forms. Employees such as Mr. Cahill wore safety harnesses that could be attached to a hook on the safety line.

Mr. Cahill had been trained in the use of a safety line and admonished on a prior occasion when he neglected to use the line while working at a height elevation. On the day he fell, Mr. Cahill did not use the safety line. (The man lift was unavailable, so he attempted to descend by safety lines attached to lanyards).

In its *Cahill* decision, the Court held that Section 240(1) did not apply where the plaintiff was provided with adequate safety devices and trained in their use. Specifically, the Court stated that plaintiff had adequate safety devices available that he knew how to use, and was expected to use them in the course of his employment. However, plaintiff neglected to use the devices. The Court found that it was the plaintiff’s decision to descend without the safety devices that was the proximate cause of his injury.

Impact of Cahill decision

Cahill changes the Labor Law in the following ways:

- (1) Defendants are more likely to be successful in arguing that a plaintiff's failure to use an available safety device proximately caused the accident. For example, if the plaintiff was afforded a safety harness that was required to be hooked to a safety line and did not utilize it, Section 240(1) may not apply.
- (2) Defendants can argue that a plaintiff was previously advised as to how to use a safety device and was admonished on prior occasions for not using the safety device.
- (3) In essence, this decision makes the recalcitrant worker defense a viable one. Prior decisions had required that plaintiff disobey a direct order to use a safe piece of equipment, as opposed to a dangerous one, before the recalcitrant worker defense applied.

Plaintiffs can still succeed under Section 240(1) post *Cahill*. However, *Cahill* opens the door to additional defenses on liability.

In fact, subsequent to *Cahill*, New York courts have recently held that if the plaintiff is found to have been the sole proximate cause of the accident then the plaintiff's Labor Law 240 claim will be dismissed.

In *Robinson v. Burns Brothers Contractors, Inc.*, 2006 N.Y. Lexis 648 (April 4, 2006), the New York Court of Appeals dismissed the plaintiff's Labor Law Section 240 claim in a case where the plaintiff failed to ask for a proper ladder for the work that he was doing. In *Robinson*, the plaintiff fell off a ladder while installing pipe hanger systems on overhead steel beams. The plaintiff was using a six-foot ladder and the ceiling was 12 to 13 feet from the floor. The plaintiff also testified that there were eight-foot ladders that he had available to him. He claimed that he asked for an eight-foot ladder but one was not brought to him; however, he knew where such ladders were kept. Both plaintiff and defendant moved for summary judgment on the Labor Law Section 240(1) claim.

The Court found for the defendant and dismissed the plaintiff's Labor Law Section 240(1) claim. The Court found that, for liability to attach, the owner or contractor must breach a statutory duty to provide the plaintiff with proper protection, and this breach must be the proximate cause of the plaintiff's injuries. The Court found that there were adequate safety devices for the plaintiff (i.e. the eight-foot ladders), and that the plaintiff's failure to make use of the proper ladder was the proximate cause of his injuries.

In reaching its decision, the Court cited *Montgomery v. Federal Express Corp.*, 4 N.Y. 3d 805, a 2005 Court of Appeals case that found for the defendant in a Labor Law Section 240 case. In *Montgomery*, the plaintiff was injured when he jumped from an elevator motor room to a roof, rather than going to get a ladder and using the ladder to climb up to the roof. The Court again found that the plaintiff's decision to not use an available ladder was the sole cause of his injury and found for the defendant.

In sum, the courts have been tending to find that in order for there to be a ruling of liability against a defendant for a Labor Law Section 240 claim, there must be some evidence that the proper safety device was not made available to the plaintiff. The courts have begun to put the onus on the plaintiffs to avail themselves of proper safety equipment, as long as it is made available at the work site. Therefore, if it can be proven that the proper safety equipment was present on the work site, but simply not used by the plaintiff, then the filing of a summary judgment motion may lead the court to dismiss the Labor Law Section 240 claim.

G. CONSTRUCTION ACCIDENTS COVERED BY § 240

In *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993) (*appeal after remand*, 241 A.D.2d 650, 660 N.Y.S.2d 172 (3d Dept. 1997)), the New York Court of Appeals expanded on *Rocovich*, and held that "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, 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." The Court further noted that the right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning, or defectively designed scaffold.

Elevation differential is the predominant factor in evaluating the potential liability of an owner or contractor. As a threshold matter, the difference between the elevation level of the required work area and a lower level, or the elevation level where the worker is positioned and the higher level of materials or loads being hoisted must be determined.

In *Melo v. Consolidated Edison Company of New York, Inc.*, 92 N.Y.2d 909, 702 N.E.2d 832, 680 N.Y.S.2d 47 (1998) and *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993) the New York Court of Appeals held that § 240 only covers elevation-related hazards. Therefore, injuries resulting from other types of hazards are not compensable under the statute, even if they were proximately caused by the absence of adequate scaffold or other safety devices.

The list of required safety devices set forth in section 240, all of which are used in connection with elevation differentials, evinces a clear legislative intent to provide “exceptional protection” for workers against the “special hazards” that arise when the work site is either itself elevated or is positioned below the level where the materials or loads are hoisted or secured. The “special hazards” do not encompass all perils that may be connected in some tangential way with the effects of gravity. See *Narrow v. Crane-Hogan Structural Sys. Inc.*, 202 A.D.2d 841, 609 N.Y.S.2d 372 (3rd Dept. 1994). These special hazards referred to 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 (i.e., the force of gravity to an object or person). There is no right of recovery for other types of harm, even if the harm in question was caused by an inadequate, malfunctioning, or defectively designed scaffold, stay or hoist.

Under New York law, an owner cannot escape absolute liability under section 240 by showing that necessary safety devices were generally available at the work site. See *Harrington v. State of New York*, 277 A.D.2d 856, 715 N.Y.S.2d 807 (3rd Dept. 2000). As set forth by the Court in *Kaffke v. New York State Elec. & Gas Corp.*, 257 A.D.2d 840, 685 N.Y.S.2d 305 (3rd Dept. 1999) the necessary safety devices must be available and in place for use at the work station by the worker, and must be visible at the worker’s immediate work site.

While it is well settled that an injured worker’s contributory negligence is not a defense to a Labor Law § 240(1) claim, an owner or contractor can defeat liability under the “recalcitrant worker” defense if the owner or contractor can show that the injured worker refused to use the safety devices that were properly provided by the owner or employer. See *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 613 N.E.2d 556, 597 N.Y.S.2d 650 (1993).

In deciding *Ross*, the New York Court of Appeals held that § 240 only covers elevation-related hazards. Therefore, post-*Ross*, injuries resulting from other types of hazards are not compensable under the statute, even if they were proximately caused by the absence of adequate scaffold or other safety devices.

Following *Melo* and *Ross*, there was little disparity among the First, Second, Third, and Fourth Departments of the Appellate Division of the New York Supreme Court, regarding liability under Section 240.

The decisions in the First and Second Departments emphasized the height differential. In *Limauro v. City of New York Dept. of Env’t Prot.*, 202 A.D.2d 170, 608 N.Y.S.2d 196 (1st Dept. 1994), plaintiff stepped off of a ladder from the last rung, and his foot went down through an opening in the floor beneath the ladder, causing him to fall to a depth up to his knee. The court held that a ladder improperly placed above a hole failed to provide a means for a worker to negotiate height differential safely.

The Second Department, pre-*Ross*, expanded the scope of Section 240 to include construction accidents involving the unloading of material, and accidents resulting from the improper placing of material using hoists and other lifting devices. See, e.g., *Mack v. Altmans Stage Lighting Co.*, 98 A.D.2d 468, 470 N.Y.S.2d 664 (2nd Dept. 1984); *Kahn v. Gates Construction Corp.*, 103 A.D.2d 438, 480 N.Y.S.2d 351 (2nd Dept. 1984) (*appeal after remand*, 133 A.D.2d 141, 518 N.Y.S.2d 815 (2d Dept. 1987)); *Gjersten v. Mawson & Mawson, Inc.*, 135 A.D.2d 779, 522 N.Y.S.2d 891 (2nd Dept. 1987); *Nelson v. Ciba-Geigy*, 268 A.D.2d 570, 702 N.Y.S.2d 373 (2nd Dept. 2000).

Courts have somewhat limited the scope of liability, however, and have held that objects falling from “minuscule heights” up to four feet above the worker were not included as elevation-related injuries. See *Schreiner v. Cremosa Cheese Corp.*, 202 A.D.2d 657, 609 N.Y.S.2d 322 (2nd Dept. 1994); *Rocovich, supra*.

The Third Department has emphasized that in order to establish liability under section 240, the injury at issue must be a result of a gravity-related accident where a protective device was required because of the elevation differential between the work site and the higher or lower level. See *Paolangeli v. Cornell University*, 187 Misc. 2d 559, 723 N.Y.S.2d 835 (Sup. Ct. Tompkins County 2001); *Toohar v. Willets Point Contracting Corp.*, 213 A.D.2d 856, 623 N.Y.S.2d 431 (3rd Dept. 1995); *DeLong v. State Street Associates, L.P.*, 211 A.D.2d 891, 621 N.Y.S.2d 172 (3rd Dept. 1995). A Third Department case has broadly interpreted § 240(1), holding the section applicable where a workman hurt his back trying to prevent a piece of sheetrock from falling. *Sasso v. NYMED Inc.*, 238 A.D.2d 799, 656 N.Y.S.2d 509 (3d Dept. 1997). The court reasoned

that § 240(1) was applicable because the accident was “a direct consequence of the application of gravity to the sheetrock.” *Id.* at *1.

Since *Melo* and *Ross*, the Fourth Department has conservatively applied section 240, where work was conducted at or on the same level as the work site and where the risk was the result of “a myriad of common everyday work activities not involving heights.” See *Luckern v. Lyonsdale Energy Limited Partnership*, 281 A.D.2d 884, 722 N.Y.S.2d 632 (4th Dept. 2001) (holding that no elevation-related hazard existed where plaintiff was injured while on top of a 12-foot-high condenser tank and was drawn partially inside the tank); prior cases included *Maracle v. DiFranco*, 197 A.D.2d 877, 602 N.Y.S.2d 481 (4th Dept. 1993) (finding no falling object where plaintiff was lifting wall of house to set it in place and was injured, but wall was at same level as work site); *Lehner v. Dormitory Auth.*, 201 A.D.2d 948, 607 N.Y.S.2d 820 (4th Dept. 1994) (No elevation-related hazard where plaintiff was injured when struck by a falling block from a stack of concrete blocks approximately five feet high).

H. CONSTRUCTION ACCIDENTS NOT COVERED BY § 240

The Court of Appeals has enumerated numerous activities which are not covered pursuant to Section 240, including “routine maintenance.” Section 240 (1) applies where an employee is engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” However, the Court of Appeals has made the distinction between repairing and routine maintenance. In *Smith v. Shell Oil Co.*, 85 N.Y.2d 1000 (2003), the Court of Appeals held “Although repairing is among the enumerated activities (covered by Section 240), we have distinguished this from routine maintenance. The work here involved (removing covers from an air conditioning unit) replacing components that require replacement in the course of normal wear and tear. It therefore constituted routine maintenance and not repairing or any of the other enumerated activities,” *Id.* at 1002. See also *Esposito v. New York City Industrial Development Agency, et al.*, 1 N.Y.3d 526 (2003).

However, the Court of Appeals has made a distinction between altering as opposed to routine maintenance when evaluating enumerated activities under this section. In *Prats v. Port Authority of New York and New Jersey*, 100 N.Y.2d 878 (2003) the Court of Appeals held: “Altering requires making a significant physical change to the configuration or composition of the building or structure,” *Id.* at 882. Plaintiff fell from a ladder while helping another worker inspecting equipment while carrying out a contract requiring the leveling of floors, laying of concrete, and rebuilding of walls to replace large air filtering systems in a large office building. The Court of Appeals held that the work was not easily distinguishable from other parts of the construction project, and therefore opined that plaintiff’s work was altering as opposed to routine maintenance. The question whether a particular inspection falls within the protections of Section 240(1) must be determined on a case by case basis, depending on the context of the work.

In *Meis v. ELO Organization, LLC*, 286 A.D.2d 1010, 731 N.Y.S.2d 609 (1st Dept. 2001), the plaintiff was injured when a ventilation pipe dislodged from above and fell on him. The Court concluded that the injury was not covered under Labor Law § 240(1) since the dislodging of the ventilation pipe was not attributable to the kind of extraordinary elevation-related risk that the statute was intended to guard against but was the result of a structural infirmity of a sort routinely encountered during construction site work.

Additionally, in *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001) the Court of Appeals held that in order for Section 240(1) to apply, the plaintiff must show more than simply that an object fell causing injury to a worker. “Plaintiff must show that the object fell while being hoisted or secured, because (emphasis added) of the absence or inadequacy of a safety device of the kind enumerated in the statute,” *Id.* at 268.

Relying on *Narducci*, our firm successfully argued that Section 240(1) did not apply in *Sierzputowski v. City of New York*, 14 A.D.2d 606, 789 N.Y.S.2d 214 (2nd Dept. 2005) (Plaintiff injured when vibrations caused a large piece of steel to fall from an adjacent boiler). The Court held that the plaintiff’s injury was not the result of a special hazard associated with gravity-related accidents covered by Section 240.

IV. SECTION 241: CONSTRUCTION, EXCAVATION AND DEMOLITION WORK

Section 241 protects employees engaged in construction work involving hazards other than heights. A duty is imposed on owners, contractors, and their agents to furnish safety equipment, and to employ certain safety practices to avoid a variety of hazards associated with construction work. Section 241 is comprised of 10 subdivisions. Subdivisions 1 through 5 and subdivision 7 set forth specific requirements regarding construction hazards ranging from the use of planking to asbestos removal. These subdivisions only apply to specific hazards and/or specific construction work.

The first five subdivisions of section 241, similar to section 240, impose a nondelegable duty and absolute liability upon owners and contractors. *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 433 N.E.2d 115, 448 N.Y.S.2d 132 (1982) (*reh'g denied*, 56 N.Y.2d 805 (1982); *remand* 89 A.D.2d 626, 452 N.Y.S.2d 1021 (3d Dept. 1982)).

Subdivision 6 of section 241 sets forth the general duties of owners and contractors. A duty is imposed upon owners and contractors to provide “reasonable and adequate” protection to workers engaged in construction work. Owners and contractors are also under a duty to comply with construction site safety rules and regulations promulgated by the New York State Department of Labor. Section 241(6) provides:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith. N.Y. Labor Law § 241(6) (McKinney 2001).

A violation of section 241(6), similar to section 200, does not constitute negligence as a matter of law resulting in absolute liability. *See Long v. Forest (supra)*. However, while an owner or contractor is not liable under section 200 unless he exercises control over the work at the construction site, the owner’s and contractor’s duty is nondelegable under section 241(6). *Lagzdins v. United Welfare Fund-Security Div. Marriott Corp.*, 77 A.D.2d 585, 430 N.Y.S.2d 351 (2nd Dept. 1980).

Because a claim under section 241(6) is based on ordinary negligence, the defenses of comparative negligence and assumption of the risk are applicable. *See Siragusa v. State*, 117 A.D.2d 986, 499 N.Y.S.2d 533 (4th Dept. 1986), *appeal denied*, 68 N.Y.2d 602, 505 N.Y.S.2d 1026 (1986) (claims pursuant to section 241(6) are subject to the defenses of comparative negligence and assumption of the risk).

The *Ross* decision has had a restrictive effect on the application of section 241(6). In *Ross*, the Court of Appeals held that a breach of a “specific” or “concrete” Industrial Code Violation (12 N.Y.C.R.R. Chapter 23) is required to maintain a cause of action under this section. A simple general reference to a code violation will not suffice. *See Kanarvogel v. Tops Appliance City, Inc.*, 271 A.D.2d 409, 705 N.Y.S.2d 644 (2nd Dept. 2000) (*appeal dismissed*, 95 N.Y.2d 902, 739 N.E.2d 1147 (2000)); *Noetzell v. Park Avenue Housing Development Fund Corporation*, 271 A.D.2d 231, 705 N.Y.S.2d 577 (1st Dept. 2000).

ⁱ N.Y. Labor Law § 200(1) (McKinney 2001).

ⁱⁱ *See Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 631 N.E.2d 110, 609 N.Y.S.2d 168 (1993); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993).

ⁱⁱⁱ *See Higgins v. 1790 Broadway Associates*, 261 A.D.2d 223, 691 N.Y.S.2d 31 (1st Dept. 1999) (duty to provide safe place to work under section 200 is not absolute, but rather, is governed by generally applicable standards of the prudent man, the foreseeability of harm, and the rule of reason); *Employers Mutual Liability Ins. Co. v. Di Cesare & Monaco Concrete Constr. Corp.*, 9 A.D.2d 379, 194 N.Y.S.2d 103 (1st Dept. 1959); *Mancino v. 1051 5th Ave. Corp.*, 20 A.D.2d 771, 247 N.Y.S.2d 725 (1st Dept. 1964), *mot. granted*, 14 N.Y.2d 879 (1964), *aff'd*, 16 N.Y.2d 527, 208 N.E.2d 452, 260 N.Y.S.2d 642 (1965); *Seigel v. Prima Concrete Construction Corp.*, 27 A.D.2d 946, 279 N.Y.S.2d 95 (2nd Dept. 1967); *Manon v. Wallen*, 201 A. D.2d 367, 607 N.Y.S.2d 337 (1st Dept. 1994); *Shaheen v. International Business Machines Corp.*, 157 A.D.2d 429, 557 N.Y.S.2d 972 (3rd Dept. 1990).

^{iv} *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993); *Otero v. Cablevision of New York*, 186 Misc. 2d 651, 719 N.Y.S.2d 807 (Sup. Ct. Kings County 2000).

^v 54 N.Y.2d 311, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981)

^{vi} *Id.* at 317, 445 N.Y.S.2d at 129 (citations omitted).

^{xxxii} See *Torillo v. Kiperman*, 183 A.D.2d 821, 584 N.Y.S.2d 112 (2nd Dept. 1992); *Berndt v. Aquarello*, 139 A.D.2d 920, 527 N.Y.S.2d 910 (4th Dept. 1988); see *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 482 N.E.2d 898, 493 N.Y.S.2d 102 (1985) (*appeal after remand*, 130 A.D.2d 857, 515 N.Y.S.2d 918 (3d Dept. 1987); *reconsideration denied*, 65 N.Y.2d 1054, 484 N.E.2d 1055 (1985)).

^{xxxiii} ., 78 N.Y.2d 509, 583 N.E.2d 932, 577 N.Y.S.2d 219, (1991)

^{xxxiv} *Rocovich*, 78 N.Y.2d at 514, 577 N.Y.S.2d at 222.

^{xxxv} See *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993).

^{xxxvi} 92 N.Y.2d 909, 702 N.E.2d 832, 680 N.Y.S.2d 47 (1998) and *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993)

^{xxxvii} 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993)

^{xxxviii} See *Narrow v. Crane-Hogan Structural Sys. Inc.*, 202 A.D.2d 841, 609 N.Y.S.2d 372 (3rd Dept. 1994).

^{xxxix} See *Harrington v. State of New York*, 277 A.D.2d 856, 715 N.Y.S.2d 807 (3rd Dept. 2000).

^{xl} 257 A.D.2d 840, 685 N.Y.S.2d 305 (3rd Dept. 1999).

^{xli} See *Powers v. Lino Del Zotto & Sons Builders Inc.*, 266 A.D.2d 668, 698 N.Y.S.2d 74 (3rd Dept. 1999).

^{xlii} See *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 613 N.E.2d 556, 597 N.Y.S.2d 650 (1993); *Traver v. Valente Homes, Inc.*, 20 A.D. 3rd 856, 799 N.Y.S.2d 318 (3rd Dept. 2005).