

# Tightening the Labor Law: Falling Objects and §240(1)

It is no secret that New York's Labor Law §240(1) has narrowed in scope as the courts have continued to restrict its application over the last several years. This statute places liability on the owner or general contractor of a construction site when a worker's injuries are the proximate cause of a failure to provide proper safety devices enumerated under the statute.

While courts are certainly protective of a worker's rights under the Labor Law, they have simultaneously recognized that owners and contractors are not insurers and cannot be held responsible for each and every injury suffered at a work site. The courts have resolved these two views by limiting the application of this safe workplace statute to only those hazards specifically contemplated by the statute and also by questioning the somewhat sacrosanct belief that workers cannot protect themselves from work-site dangers. This article explores how the courts have addressed and tightened liability under Labor Law 240(1) with respect to injuries due to "falling objects" at construction sites.

## Labor Law 240(1)

Since its enactment in 1885, §240(1) of New York's Labor Law has aimed to provide a safe workplace for employees under the pain of damages to those responsible for maintaining safe working conditions. The core aspects of this statute, including such language as "scaffolding, hoists, stays, ladders...erection, repairing, altering or painting," (which refers to the applicable devices and types of labor performed) have essentially endured the Legislature's amendments over the past century.

It is in the common law history of 240(1) where one sees



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how the courts have interpreted the general language of the statutes and determine what types of accidents fall under its sway. The common law over the years has focused on narrowing the instances where workers will be afforded the great protections of the strict liability that the statute provides.

The common law has evolved again to include those cases where the injury was the 'foreseeable consequence' of a failure to adequately secure the object.

The Court of Appeals has reiterated time and again that not every accident at a work site entails a Labor Law violation.<sup>1</sup> Contractors, owners and their agents cannot be liable when they provide the protections that are deemed necessary to protect the workers from each and every height-related risk associated with the work being performed.<sup>2</sup> Therefore, "liability is contingent upon the existence of a hazard contemplated in 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein," and those general hazards associated with a construction site are not covered.<sup>3</sup>

The case law of Labor Law 240(1) has resolved that only two types of gravity-related accidents are covered. One involves the falling worker—a person who is injured from a fall from a height—

and the other the falling object—a person who is injured from an object that falls from a height.

## Falling Objects

Initially, the Court of Appeals prescribed the requirement that there be an appreciable height difference between the work site and the falling object in *Melo v. Consol. Edison Co.*<sup>4</sup> In *Melo*, the Court dismissed the plaintiff's complaint where the injury was caused by a steel plate resting or hovering slightly above the ground. The Court held that the statute only applies "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 being hoisted or secured."<sup>5</sup>

The same reasoning was used in *Piccinich v. New York Stock Exch.*,<sup>6</sup> where the Appellate Division, First Department, also found that Labor Law 240(1) was inapplicable when an air conditioner fell upon plaintiff's hand from a height of only three inches and by the Appellate Division, Fourth Department, where an ironworker was struck by an object positioned at the same level as the work site when a 2,000-pound bundle of steel slid off a forklift and fell about three feet onto plaintiff's foot.<sup>7</sup>

The Appellate Division, Third Department, however, declined to extend *Melo* in *Stang v. Garbellano*,<sup>8</sup> and determined that *Melo* was not dispositive where the injury was caused by the lack of specifically enumerated Labor Law 240(1) safety devices (i.e., nylon slings and a tag line), which would have prevented an improperly hoisted and secured sign from falling on the worker's arm.

The First Department also granted plaintiff partial summary judgment in *Thompson v. St. Charles Condominiums*<sup>9</sup> when a scaffold collapsed and caused bricks to fall on top of him from an elevation of four feet. The court explained that "there is no 'seven-foot rule' or other definitive height differential at which 240(1) begins" » Page 9

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# Labor Law

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to apply, but the statute must apply to the collapse of a scaffold, the purpose of which is to hold construction supplies and workers at a raised level."<sup>10</sup> The 240(1) violation was premised on the fact that the case involved a falling scaffold, a device specifically listed under the statute. However, the court simultaneously acknowledged that insignificant height differentials, such as where the falling object is at the same level as the work site, are often not actionable.<sup>11</sup>

A further limitation on liability was added and required that the falling object needed to have been in the process of being either hoisted or secured and fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute.<sup>12</sup> In *Narducci*, the Court of Appeals determined that 240(1) was inapplicable where a piece of glass, which was not involved in the renovation process, fell on him while he was standing on a ladder at the third floor exterior of a building removing window frames. The falling glass was neither being hoisted nor part of a load that required securing for purposes of the work being undertaken. It was not a "situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected."

However, recent case law has added a refinement to the requirement that the falling object must have been in the process of either being hoisted or secured to invoke 240(1) liability. When the falling object is stationary, that is, not being hoisted or secured, at the time of the accident, but the fall was a foreseeable consequence of the failure to provide a safety device as enumerated by the statute, then 240(1) liability may apply.<sup>13</sup>

In *Ourer v. City of New York*, the Court of Appeals affirmed the Appellate Division, Second Department's decision granting the plaintiff summary judgment when an unsecured dolly, which was used in the plaintiff's work and stored on top of a "bench wall" that was five and one-half feet high and adjacent to the work site, fell and hit the worker.<sup>14</sup> Likewise, in *Boyle v. 42nd Street Development Corp.*, the First Department found liability when a worker sustained personal injuries resulting from a falling object that was not properly secured, although it was not being hoisted or secured at the time of the accident. In *Boyle*, the workers were installing stringers, steel components that form the sides of metal stairs. The stringers were being moved from the ground level through an open elevator shaft by an electrical chain fall, which was erected in the elevator shaft. While one of the workers positioned two floors above the plaintiff was working, one of the threaded rods came loose and tumbled down the elevator shaft and struck the plaintiff.

Because the threaded rod fell as a result of being inadequately secured, the court found that the plaintiff's claim fell within the protection of 240(1), even though the rod that struck the plaintiff was not in the process of being "hoisted or secured." The court's reasoning turned on the fact that the falling object was an integral part of the renovation/construction work that included the hoisting or securing of objects and foreseeably required securing.<sup>15</sup>

In a one-paragraph decision, the court held that liability under a falling object theory is not restricted to situations where the object is actually being hoisted or secured but where the object "required securing for the purposes of the undertaking." Following the same rule, but reaching an opposite conclusion, the First Department affirmed the court's reasoning turned on the fact that the falling object was an integral part of the renovation/construction work that included the hoisting or securing of objects and foreseeably required securing.<sup>15</sup>

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summary judgment for the defendants in *Buckley*,<sup>16</sup> where it was determined that the plaintiffs failed to demonstrate that the worker's injury was a foreseeable consequence of a failure to provide proper safety devices of the type enumerated in the statute. In *Buckley*, an elevator, which utilized counterweights, was inspected prior to beginning the work and was determined to be in proper order. However, during an initial test run, the counterweight frame struck a spike protruding from the wall of the shaft which caused some of the counterweights to fall out of the frame, one of which struck the plaintiff.

The First Department held that it was not foreseeable that counterweights posed an elevation-related hazard inherent in testing the functioning of the elevator. An object which requires securing must present a foreseeable risk. "What is essential to a conclusion that an object requires securing is that it present a foreseeable elevation risk in light of the work being undertaken."

In *Berber*, the court held that Labor Law 240(1) would not apply when the evidence demonstrated that the plaintiff was injured as a piece of sheet rock, which he was removing from a dolly that was

dam 1661 Park LLC, weighed in on how the common law will evolve over the years on this issue.

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1. *Mendicino v. Mendicino Bay Assoc.*, 96 N.Y.2d 259, 750 N.E.2d 1065, 1019, 727 N.Y.S.2d 37, 45 (2001).  
2. *Feller v. Conning Inc.*, 90 N.Y.2d 219, 682 N.E.2d 950, 669 N.Y.S.2d 349 (1997).  
*Berbert v. Fifth Ave. Dev. Co.*, 2008 N.Y. Slip Op 512441, 1-2 (N.Y. Slip Op. 2008).  
3. *Narducci*, 96 N.Y.2d 259 at 267; *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).  
4. 92 N.Y.2d 909, 702 N.E.2d 832, 660 N.Y.S.2d 47 (1999).  
5. *Id.* at 911-912, quoting *Masseri v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 637 N.E.2d 1318, 634 N.Y.S.2d 35 (1995).  
6. 257 A.D.2d 438, 683 N.Y.S.2d 517 (1st Dep't. 1999).  
7. *Melichri et al. v. Wolshart Stores*, 222 A.D.2d 1010, 655 N.Y.S.2d 889 (1st Dep't. 1995).  
8. 262 A.D.2d 853, 692 N.Y.S.2d 229 (3d Dep't. 1999).  
9. 303 A.D.2d 152, 756 N.Y.S.2d 530 (1st Dep't. 2003).  
10. *Id.*  
11. *Id.*  
12. *Doucove v. Atlantic Dev. Group, LLC*, 18 A.D.2d 331, 736 N.Y.S.2d 46 (1st Dep't. 2003) citing *NY State Thruway Authority v. 267-269th St. Dev. Co.*, 274 A.D.2d 159 at 176; *Donat v. 260th St. Dev. Co.*, 274 A.D.2d 152 at 1110.  
13. 832 N.E.2d 1185 (2005); *Buckley v. Columbia Commner. and Preparation*, 2007 N.Y. Slip Op 6452 (1st Dep't. 2007).  
14. *Ourer v. City of New York*, 286 A.D.2d 671, 730 N.Y.S.2d 138 (2d Dep't. 2001).  
15. *Buckley*, supra, 38 A.D.3d 404 at 407.  
16. *Buckley*, supra.  
17. *Berber v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 637 N.Y.S.2d 35 (1995).  
18. *New York Supreme Court*, June 16, 2008. Plaintiff testified that the dolly was at most six inches off the ground by virtue of the wheels of the dolly.  
19. *Martin v. AP-Anstadium 1661 Park LLC*, 875 N.Y.S.2d 242, 60 A.D.3d 824 (2d Dep't. 2009).

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