A view from the bench

In the Fourth Department, at least, there was once a level of predictability about Labor Law cases. The Appellate Division had laid out the principles applicable to all three major sections—Labor Law §§ 200 (1), 240 (1) and 241 (6)—with almost geometric clarity in *Nagel v Metzger* (103 AD2d 1). Section 200 (1) merely restated the principles of common law negligence. A construction worker was not entitled to sue his or her employer, but could go after parties higher in the contractual chain—a general contractor or the owner of the property—if they had created a hazard by their own negligence.

Section 241 (6) extended this right to all construction workers who had been injured as a result of *anyone's* negligence. The owner and general contractor was vicariously liable for the negligence of the plaintiff's employer or anyone else below them in the contract chain. This was the broadest type of Labor Law liability, limited only by the plaintiff's own comparative negligence. In these cases it was common for defendants to bring in subcontractors in a third-party action, so that ultimate responsibility for negligence rested on the actual tortfeasor. In a

way, then, the scheme operated to allow an employee to circumvent the Workers' Compensation Law by suing the employer at second hand.

The most exclusive group was the one covered by Section 240 (1). The list of safety devices in the statute itself had long been ignored, and by the time *Nagel* was decided the section was generally read as providing absolute liability for any gravity-related construction injury. As under Section 241 (6), the main action under Section 240 (1) often accumulated a train of third-party (and sometimes even fourth-party) actions, as each contractor and the owner were vicariously liable for a violation committed by any party below them in the chain. For these actions, uniquely, the negligence of the plaintiff was not a defense.

Very little of this structure remains intact. The third-party actions under §§ 240 (1) and 241 (6) have all but vanished, since the Legislature cut them off except in cases of "grave injury." Plaintiffs under Section 241 (6) must now prove not only negligence but the violation of the state Industrial Code containing a specific standard of conduct. The scope of liability under the Scaffold Law, Section 240 (1), has narrowed in unpredictable ways. Only Section 200 (1) jurisprudence has remained constant, but that section was never of much use to injured workers anyway.

These changes can be traced through a series of important decisions from the Court of Appeals. The first of these was *Ross v Curtis–*

Palmer (81 NY2d 494), which imported Industrial Code standards into Section 241 (6) liability. The Fourth Department had specifically held that this section imposed liability for negligence whether or not a regulation was alleged to have been violated:

> Neither subdivision 6 of Section 241 of the Labor Law, nor the administrative regulations promulgated thereto, provide a new theory for a cause of action. Rather, subdivision 6 merely imposes vicarious liability on owners only where the predicate cause of action of common-law negligence exists against the contractor, subcontractor, or employee. There is no need to show that a violation of administrative regulations occurred to establish a predicate cause of action in negligence. * * * If the Board chose not to promulgate regulations pursuant to this subdivision due to lack of time or resources, certainly this failure should not be interposed to defeat the legislative intention of imposing liability on owners (*Nagel v Metzger*, 103 AD2d 1, 7 - 8).

This seemed to be a reasonable conclusion from the policy that the Court of Appeals itself had found in the Labor Law: to encourage the engagement of reputable contractors. Since owners and contractors were vicariously liable, they would choose to hire only those contractors with adequate safety records and the insurance to pay off an indemnification claim (*see, Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 301).

Other courts, such as the Third Department, had ruled otherwise *(see, e.g., Simon v Schenectady North Congregation of Jehovah's Witnesses,* 132

AD2d 313). But it was not until *Ross* that the Court of Appeals addressed this issue squarely. While repeating that liability under the subdivision did not depend on supervision or control, the Court addressed itself entirely to the adequacy of the plaintiff's "allegations regarding the regulations defendants purportedly breached" (81 NY2d, at 502):

> [P]laintiff relied exclusively on 12 NYCRR § 23-1.25 (d), which requires that "[a]ll persons engaged in welding or flame-cutting * * * be provided where necessary with proper scaffolds installed and used in compliance with th[ese regulations]." Plaintiff does not contend that any particular regulatory requirement regarding the design, capacity or placement of scaffolds was violated. Rather, he contends only that the "scaffold" with which he was provided was not a "proper" one within the meaning of 12 NYCRR § 23-1.25 (d), because it was not "of such kind and quality as a reasonable and prudent [person] experienced in construction * * * operations would require in order to provide safe working conditions." Plaintiff derives this standard from 12 NYCRR § 23-1.4 (a), which provides for its application whenever the regulations in the Industrial Code employ "such general terms as adequate, effective, equal, equivalent, firm, necessary, proper, safe, secure" (81 NY2d, at 502).

The Court rejected the plaintiff's appeal to these regulations. In the general scheme of the Labor Law, common-law rules are found in section 200 (1), while "'specific, positive commands' applicable to all contractors

and owners are contained in Labor Law § 240 (1) * * * and in Labor Law § 241 (1) - (5)" (81 NY2d, at 503).

> Labor Law § 241 (6) is, in a sense, a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rulemaking authority (81 NY2d, at 503).

The court did not mention that section 200 (1) is every bit as much a "hybrid", as it, too, contains a grant of rulemaking authority. Even more telling in its absence is the notion that section 241 (6) aims at expanding the parties reachable rather than expanding or specifying a basis for recovery. No previous court had seen section 241 (6) as a hybrid; it was read as a vicarious liability statute. Under *Ross* , however,vicarious liability has been made subject to a small class of regulatory violations.

After citing cases—including *Long v Forest-Fehlhaber* (55 NY2d 154) —differentiating between statutes with specific, concrete standards and those merely incorporating common law, the Court held that only the breach of a specific, concrete specification provides a cause of action under section 241 (6). The regulation cited by the plaintiff

> is not so much a "specific, positive command" (*Allen v Cloutier Constr. Corp., supra* [44 NY2d] at 297) as a routine incorporation of the ordinary tort duty of care into the Commissioner's regulations. As such, it cannot by itself be relied upon as the source of an owner's or general contractor's nondelegable

> duty to all workers assigned to perform construction chores on the premises (81 NY2d, at 504).

The Court thus rejected the case law, exemplified by *Nagel*, which had held that section 241 (6) addressed itself precisely to "the ordinary tort duty of care". Indeed, the Court's description of the statutory scheme leaves no doubt that section 241 (6) liability is not to be confused with common law negligence:

> In the past, recovery for breach of the common-law duty of care, as embodied in Labor Law § 200 (1), could only be had if the injured employee could demonstrate that the named defendant had a direct hand, through either control or supervision, in the injury-producing work. If plaintiff's argument were to succeed, however, injured workers could readily circumvent that requirement * * * [and] Labor Law § 200 (1) would be rendered all but superfluous in industrial-accident litigation. Such a result could not have been within the Legislature's intention and was certainly not contemplated by our Court when we held that an owner or general contractor could be held liable for violations of rules promulgated pursuant to Labor Law § 241 (6) without regard to Labor Law § 200 (1)'s requirement of supervision or control over the work (*see, Allen v Cloutier Constr. Corp., supra*) (81 NY2d, at 504–505, *some citations omitted*).

This passage is worth some comment. First of all, it misstates the holding in *Allen*, which spoke of violations of the statute itself, not of the rules. Secondly, if the previous interpretation of 241 (6) circumvented

anything, it was the exclusivity provision of the Workers' Compensation Law. The owner or contractor liable under section 241 (6) was not liable in a vacuum; he was liable for another's negligence, and all the elements of negligence, including direction or supervision, had to be pleaded and proved against the actual tortfeasor. Moreover, it is the exclusivity provision rather than any interpretation of section 241 (6) that all but renders section 200 (1) superfluous. Finally, it shows that the Court has abandoned *Allen's* economic analysis and its holding that the subdivision was enacted to encourage the hiring of reputable contractors. All of these changes flow from the implicit decision to de-emphasize vicarious liability and its logical and policy consequences.

With these passages the Court eliminated the bulk of traditional section 241 (6) litigation, at least in the Fourth and First Departments. But the Court went beyond even the Third Department's requirement that Industrial Code violations be pleaded and proved. Not all regulations would support an action:

> [F]or purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the "[g]eneral descriptive terms" set forth and defined in 12 NYCRR § 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not (81 NY2d, at 505).

The First and Fourth Departments had allowed recovery for negligence, and the Third only for violations of regulations. Ross now limited recovery to negligent violations of regulations that set specific and concrete standards. Those which merely set general standards or repeat the principles of common law negligence will not support an action.

Litigation under Section 241 (6) has thus become significantly more complex and recovery significantly more ad hoc. The plaintiff must show both negligence and an appropriate regulatory violation. This would not be so problematic if the Industrial Code were anything like a comprehensive and current set of standards. Unfortunately for Labor Law plaintiffs, it is not. Preempted years ago by Federal law, the New York Industrial Code had rested unamended and unconsulted until *Ross* gave it this peculiar afterlife. All attempts to use OSHA regulations as a basis for Section 241 (6) liability have been struck down. As a result, Labor Law § 241 (6) has become something like a lottery. The only way to find out if a given fact pattern can be brought within a specific provision of the Industrial Code is to check the Code. Because of the incomplete and outdated nature of the Code, whether or not one exists seems to be an entirely random affair.

The Scaffold Law, Section 240 (1), is the most notorious of New York's "plaintiff friendly" laws and the one most often attacked by

construction and insurance interests. The history of Scaffold Law interpretation is long and complex, but it follows the common pattern of slow swings from one extreme to the other. When I first came on the bench in the mid–1970s the tide was running in the plaintiffs' favor, to crest in the mid-eighties with the two cases of *Zimmer v Chemung County Performing Arts* (65 NY2d 513) and *Bland v Manocherian* (66 NY2d 452). Previously interpreted to require the use of certain enumerated safety devices at construction sites and often held inapplicable to negligent plaintiffs, after these decisions the Scaffold Law became an insurance–like obligation confined to sites where the usual hazards of construction work are increased by differences in elevation between work places.

This trend had been developing for some time. The statute is now read as imposing absolute liability on owners and contractors, the absoluteness of the liability being tied to the unavailability of comparative fault as a defense. Yet for the first half–century of the statute's existence courts frequently addressed the question of the plaintiff's fault (*see, for example, Wingert v Krakauer*, 76 App Div 34, 42). When, in 1948, the Court of Appeals eliminated questions of comparative or contributory negligence, it explicitly did so as a change in the law (*Koenig v Patrick Constr. Corp.,* 298 NY 313, 317).

The scope of the duty imposed then broadened as the available defenses shrunk. It was once held that the law required no duty beyond

"what is reasonable and practicable" (*Italiano v Jeffery Gardens Apts. Section II,* 3 AD2d 677, *affd* 3 NY2d 977). In *Zimmer* and *Bland,* though, the owner's and general contractor's liability was extended to cases where no safety devices were available which could have prevented the accident. For some years the Scaffold Law was the defense attorney's greatest nightmare.

The tide in favor of plaintiffs is clearly running out. Other chapters in this work can document that process in much greater detail. I would like to point out three milestones in the narrowing of liability: the appearance of the "sole proximate cause" defense, the return of recalcitrance as an issue, and the sudden contraction of the "falling object" rule in the case of *Narducci v Manhasset Bay Assoc.* (96 NY2d 259).

Although the case itself does not appear to be a change in the law, the "sloe proximate cause" defense took its departure from *Weininger v Hagedorn and Co.* (91 NY2d 958). What most "chilled the plaintiff's bar" (Breakstone, Jay, "Notes & Decisions", New York State Trial Lawyers' Association *Bill of Particulars*, December 1998, at 16) was the apparent breadth of the Court of Appeals's pronouncement; as reported in the very brief memorandum decision, the plaintiff "fell from a ladder", and the Court held that the trial judge had improperly directed a verdict for the plaintiff; "a reasonable jury could have concluded that the plaintiff's

actions were the sole proximate cause of his injuries, and consequently that liability under Labor Law § 240 (1) did not attach" (91 NY2d, at 960).

This does indeed seem like a break from the past, and there is nothing in the Appellate Division decision that would lead one to a different conclusion. In the lower court, in fact, "[t]he only issue presented *** [was] whether [plaintiff] *** was engaged in the alteration or repair of a structure" (241 AD2d 363, 364). The one mention of the circumstances of the accident is a single sentence in the dissent: plaintiff "was standing on the second or third step of a six-foot metal A-frame ladder *** when the ladder collapsed" (*id.*, at 364-365).

The record on appeal, however, shows that there was evidence before the court that plaintiff was standing on the crossbar of the ladder, a misuse of the device and an act that goes beyond mere negligence. The evidence was controverted by the plaintiff, but clearly raised a question of fact that required a jury finding. The omission of this key fact from all the written decisions is surprising, because it is the best explanation of the Court of Appeals' holding. While the testimony was questionable, it would clearly have been possible for a reasonable jury to conclude that the accident was caused by this misuse rather than any defect in the ladder itself or its placement or operation; this issue of fact would preclude a directed verdict or summary judgment.

The suggestion of a change in the language of the *Weininger* case was taken up immediately by the Appellate Divisions. In *Sprague v Peckham Materials Corp.* (240 AD2d 392), for example, the plaintiff was repairing an air-conditioning unit while standing on a ladder. He "fell from the ladder on which he was standing when the right leg of the ladder sank into the gravel surface upon which it had been positioned" (240 AD2d at 393). The Second Department held that he was engaged in the repair of a structure, and was thus entitled to the protection of the statute. It went on, however, to state:

> Given the absence of evidence demonstrating that the ladder was defective in any way, the issue if whether the ladder provided the injured plaintiff with proper protection as required under the statute is a question of fact for the jury (*id.,* at 393–4).

This reasoning is not above criticism. While there was no allegation that the ladder was defective, the Court did find that the accident was caused at least in part by the ladder's being placed on gravel. Labor Law § 240 (1) does not limit itself to the condition and design of the safety devices themselves; the obligation it rests on owners and contractors is to have devices "so *constructed, placed and operated* as to give proper protection". Surely a ladder resting on uneven or unstable soil is not properly placed, and other cases have fastened the responsibility for consequences of

improper placement on owners and contractors (*see, for example, Haimes v New York Tel. Co.*, 46 NY2d 132; *Cardile v D'Ambrosia*, 72 AD2d 544). Since any comparative negligence on the part of the employee is not to be considered, the plaintiff in *Sprague* would appear to have met the Court of Appeals' test:

> Although the plaintiff is "required to show that the violation of section 240 of the Labor Law was a contributing cause of [his accident]" (*Phillips v. Flintkote Co.*, 89 AD2d 724, 725), and this issue should be determined by the jury, where there is no view of the evidence at trial to support a finding that the absence of safety devices was not *a* proximate cause of the injuries, the court may properly direct a verdict in the plaintiff's favor. If proximate cause is established, the responsible parties have failed, as a matter of law, to "give proper protection." (*Zimmer v Chemung County Performing Arts,* 65 NY2d 513, 524, *citations omitted, emphasis added*).

The emphasis on the *Zimmer* court's use of the indefinite article, "*a* proximate cause", is not merely a grammatical quibble. Under the Court of Appeals' language the worker simply has to exclude the possibility that the accident was *unconnected* with a violation of section 240 (1). If there is no reasonable view of the evidence in which the accident was unrelated to a defect in the device or its placement or operation, the plaintiff should recover as a matter of law. It would be different if the plaintiff had to

establish that the violation was *the* proximate cause, which suggests the exclusion of any *other* factor in the accident.

Courts, though, now see fact issues in cases which were once decided as a matter of law. The Third Department held in *Beesimer v Albany Avenue/Route 9 Realty* (216 AD2d 853):

> The rule in this Department is that when a worker injured in a fall was provided with an elevation-related safety device, the question of whether the device provided proper protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact, except where the device collapses, slips or otherwise fails to perform its function of supporting the workers and their materials (216 AD2d at 854, citations omitted).

As that court noted, the Fourth Department has a different rule. What is surprising, perhaps, is that the Fourth Department might well have decided the same case on a question of law. That court has drawn a distinction between a fall *from* a height and a fall *at* a height. Since the *Beesimer* plaintiff was injured in a slip on an elevated surface, the result would depend on whether he merely fell to the surface of the scaffold (in which case he would not recover) or began to fall off the scaffold. Since in the latter event the device was self-evidently not so built as to prevent such slips from turning into falls from a height, its inadequacy must have

contributed to the fall. Plaintiff would then have prevailed on a summary judgment motion.

Another exemplary case is *Bernal v City of New York* (217 AD2d 568). In *Bernal* the plaintiff was being lowered from a scaffold on a "Hi-Lo", a mechanical device that had not been used before for this purpose. The "Hi-Lo" hit the scaffold, which then collapsed, injuring the plaintiff. The court affirmed the trial judge's denial of summary judgment to the plaintiff, stating:

> a reasonable fact-finder might conclude that the co-worker's conduct was the sole proximate cause of the plaintiff's injuries or that the co-worker's conduct constituted an unforeseeable superseding intervening act (217 AD2d, at 217-8).

Bernal suggests that the protection of section 240 (1) does not extend to accidents caused by co-workers — making a co-worker's negligence a defense where the worker's own fault is supposedly irrelevant. In addition, it incorporates foreseeability, a negligence concept, into what had been a form of absolute liability based on the type of danger involved.

The Court of Appeals took up the sole proximate cause question once again in the recent case of *Blake v Neighborhood Housing Services of New York* (1 NY3d 280). Here the plaintiff had been injured when his

ladder collapsed, and a jury verdict had been returned in favor of the defendant. The Court of Appeals affirmed, taking the opportunity to discuss the statute's history and the concept of absolute liability. It discussed *Weininger* in terms that are consistent with the a/the distinction outlined above:

> Under *Labor Law § 240 (1)* it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation. That is what we held in *Weininger*, a holding the Appellate Division has consistently understood and applied (1 NY3d, *supra*, at 290–291).

In other words, the plaintiff does not have to negate his own conduct as a defense. He need show only that there is some degree of causation running from a violation of the statute to the happening of the accident.

The key in *Blake* is not the theoretical discussion but the interpretation of the facts, and what is the most important in the case was what was *not* said. In the defendant's account, the accident was caused by the plaintiff's failure to lock extension clips on his ladder. This negligent failure was the sole proximate cause of the accident. In affirming this finding, that Court of Appeals stated, in part:

> Plaintiff relies heavily on *Bland v Manocherian (66 N.Y.2d at 457)*. There, the jury found that the ladder in question was not "placed so as to give proper protection to the plaintiff" and that "improper placement of the ladder [was] a proximate cause of the accident" (*id.*). We held that "the jury was clearly entitled to find that, under the circumstances, defendants failed to satisfy the responsibilities imposed by *section 240 (1)* in that they had not 'erected' or 'placed' the ladder from which plaintiff fell in such a manner, or with such safeguards, as necessary to provide plaintiff with 'proper protection' while he was working on defendants' building" (*id. at 460*) (1 NY3d, *supra*, at 291).

In *Bland,* said the *Blake* court, "there was testimony that 'the floor upon which the ladder was placed was bare, highly polished and shiny' and that 'no safety equipment, safety belts, hard hats, scaffolding or anything else, was used to protect plaintiff from falling through the fourth floor window or to secure the ladder to insure that it remained steady and erect while plaintiff was applying pressure to that window'" (*loc. cit.*) In *Blake*, by contrast:

> the affirmed findings of fact were supported by the record, enabling the jury to conclude that there was no violation of the *Labor Law*. The record in *Bland* fairly suggested that better safety devices could have prevented the accident. In our case, the ladder was undisputedly in proper working order, and no further devices were necessary (1 NY3d, at 292).

With respect, the more important question is whether the case could have been decided as a matter of law. Under existing principles the answer was clear. Judge Titone, dissenting in the *Bland* case, noted that *Zimmer* and *Bland* essentially imposed "a duty upon an owner to follow a worker and verify that the worker has 'properly placed' a ladder" (66 NY2d, *supra*, at 464). *Bland* should presumably have controlled *Blake;* the only real difference between the two cases is that in *Bland* the ladder was said (on uncertain authority) to have been placed improperly, whereas in *Blake* the problem was that it was improperly *operated*.

If *Blake* now means that owners have no duty "to follow a worker and verify that the worker is 'properly operating' a ladder" there can be few objections on grounds of practicality. Nonetheless, by refusing to overrule *Bland* the Court let stand the owner's absolute liability for improper placement while eliminating it for improper operation. It is ironic that the Court concluded by stating

> If liability were to attach even though the proper safety devices were entirely sound and in place, the Legislature would have simply said so, or made owners and contractors into insurers (1 NY3d, *supra*, at 292).

A look at the statute might lead one to think that the Legislature did just that. By enacting Section 240 (1) it imposed liability for injuries caused by devices that were not "so constructed, placed and *operated* as to give

proper protection to a person … employed" in construction (*emphasis added*). Of these three requirements, only construction and placement now seem to remain alive, and as *Sprague* suggests, "placement" may soon go the way of "operation".

Closely related to the "sole proximate cause" defense is the older recalcitrant worker defense. This has had a long and checkered history beginning with the Fourth Department case of *Smith v Hooker Chems. & Plastics Corp.* (89 AD2d 361) and the court's seeming retreat from it in *Heath v Soloff Constr. Corp.* (107 AD2d 507). Put briefly, a worker who knowingly refuses to use an available safety device and is injured as a result of his refusal cannot recover under Section 240 (1). In keeping with the absolute nature of Section 240 liability, however, this defense cannot be invoked when the worker's conduct is merely negligent.

In several cases decided in quick succession the Court of Appeals, like the Fourth Department, defined and narrowed the rule at the same time. In *Stolt v General Foods Corporation* (81 NY2d 918) the plaintiff fell from a ladder he had been instructed not to climb. The Court held that the "so-called 'recalcitrant worker' defense * * * requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer. It has no application where, as here, no adequate safety devices were provided. * * * [A]n instruction by the employer or

owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a 'safety device'" (81 NY2d, at 920, *citations omitted*).

In *Hagins v State of New York* (81 NY2d 921), decided at the same time as *Stolt*, a laborer fell from the top of an unfinished abutment wall. The Court held that

> [t]he State's allegations that the claimant had repeatedly been told not to walk across the abutment are not alone sufficient to create a triable issue of fact under the "recalcitrant worker" doctrine that was recognized in *Smith v Hooker Chems. & Plastics Corp*, since that defense is limited to cases where a worker has been injured as a result of a refusal to use available safety devices provided by the employer or owner. Furthermore, the State cannot rely on claimant's own negligence in using an unsafe route to cross the road as a "supervening cause" of his injuries, sine the accident was plainly the direct result of the failure to supply guardrails or other appropriate safety devices (81 NY2d, at 922 - 923, *citations omitted*).

The Court of Appeals' severest limits on the defense appear in *Gordon v Eastern Railway Supply* (82 NY2d 555). As the record at the Appellate Division shows, the plaintiff was sandblasting a railroad car from a ladder he had been instructed not to use for this purpose. In addition, a scaffold was available in the area where the work was being performed. There was even a question as to the cause of the accident, it

being the defendant's contention that Gordon was propelled off the ladder by the force of a defective sandblaster's operation.

None of these arguments carried any weight with the Court of Appeals. In rejecting the recalcitrant worker theory, the Court held:

> Defendant's claim here rests on their contention that plaintiff was repeatedly instructed to use a scaffold, not a ladder, when sandblasting railway cars. We have held, however, that an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a "safety device" in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment (82 NY2d, at 563).

Since the "available, safe and appropriate equipment" *was* in the sandhouse in *Gordon*, the distinction drawn by the Court seems unreal; the choice to use the ladder was necessarily one to refuse the use of the scaffold. All the same, the decision is a sensible one; Gordon's conduct in sandblasting from the ladder was negligent, and in Labor Law 240 decisions the refusal to admit the plaintiff's negligence as a defense runs deeper than the recalcitrant worker theory.

In the Fourth Department, at least, the recalcitrant worker maintained a merely nominal existence, being invoked only to be rejected; a typical example was *Haystrand v County of Ontario* (207 AD2d 978), where the defense was held unavailable when the plaintiff failed to

engage the locks on a scaffold he owned; he sued the owner of the building when he fell, and recovered, because, in the Court's view, his "failure * * * would go only to the issue of his own negligence, which is not a relevant consideration in a Labor Law § 240 (1) cause of action" (207 AD2d 978).

Since that case, however, a number of Third Department cases—and some from the First and Second Departments as well—have suggested a retreat from the principles set out in the Fourth Department and Court of Appeals cases. Most striking is *Hickey v C.D. Perry & Sons* (223 AD2d 799), because the facts in that case closely parallel those in *Hagins*. Plaintiff fell when he tried to cross a sluiceway on a plank, which broke under his weight. Defendants had several times removed similar makeshift bridges, placing ladders on the nearby dam to allow workers to climb to the crest of the dam and cross.

The Third Department denied Hickey summary judgment, holding that "a factual question is presented as to whether these [ladders] were adequate safety devices, which cannot be resolved by way of summary judgment" (223 AD2d, at 800). The recalcitrant worker defense similarly required "resolution in a trial forum" (*loc. cit.*).

The *Hickey* court cites *Gordon*, but the Appellate Division decision seems at odds with that case's strong stand on the recalcitrant worker defense. Even harder to reconcile is the holding in *Hagins*, where the

Court of Appeals affirmed a grant of summary judgment in favor of a worker injured when crossing a ditch via an unapproved route. What most colors the decision, though, the Third Department rule, previously cited, that "when a worker injured in a fall was provided with an elevation-related safety device, the question of whether the device provided proper protection within the meaning of Labor Law § 240(1) is ordinarily a question of fact" (*Beesimer v Albany Ave./Route 9 Realty, supra*, 216 AD2d 853).

This principle has become one of the touchstones for Scaffold Law cases, and in every department more and more motions for summary judgment are being denied. As a hard-and-fast rule it would forbid summary judgment in virtually every case where a worker falls from a scaffold. Further, it is hard to understand how such a rule could be squared with *Gordon,* where the Court of Appeals affirmed a grant of summary judgment for a fall from a ladder because "[t]he ladder did not prevent plaintiff from falling; thus, the 'core' objective of section 240(1) was not met" (82 NY2d at 561). In the evolving world of the Scaffold Law, though, this is clearly the dominant tendency.

A different kind of narrowing has taken place with respect to the "falling object" test. The Fourth Department, always interested in distilling and stating principles of Labor Law, had announced in *Staples v Town of Amherst* (146 AD2d 292) that "absolute liability under Labor Law

§ 240 (1) may be imposed only upon a showing that the injured worker fell from an elevated work surface or was struck by an object falling from an elevated work surface" (146 AD2d, at 293). The Court of Appeals more or less accepted the "falling worker" test, but it did not address "falling objects" until two appeals were brought before it in 2001.

The plaintiff in *Narducci v Manhasset Bay Assoc.* (270 AD2d 60) was removing window frames while standing on a ladder. A pane of glass fell from the adjacent window and struck him. He argued that he would not have been injured had he been able to work on a scissors jack; this would have allowed him to stand above the windows and thus avoid the danger from falling objects. The First Department held that he had stated a valid claim under the Scaffold Law, and the defendant appealed.

At about the same time the Court received an appeal from a Fourth Department case, *Capparelli v Zausmer Frisch Assoc.* (256 AD2d 1141). Here the plaintiff, also standing on a ladder, was installing light fixtures in a ceiling grid a short distance above his head. One of the fixtures fell on him, and he sued. The Appellate Division, in a brief memorandum, adopted the Court of Appeals's formulation in *Rodriguez v Tietz Ctr. For Nursing Care* (84 NY2d 841, 843): the accident resulted from "the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240 (1)." In this case the plaintiff appealed.

The Court of Appeals, addressing both cases in a single decision, began with something of a puzzle:

> Labor Law § 240(1) "'is to be construed as liberally as may be for the accomplishment of the purpose for which it was * * * framed'" (*Koenig v Patrick Constr. Corp*., 298 N.Y. 313, 319, *quoting Quigley v Thatcher*, 207 N.Y. 66, 68), however, this principle operates to impose absolute liability only *after* a violation of the statute has been established (96 NY2d 259, 267, *emphasis in the original*).

Since absolute liability is "flat and unvarying" (*Koenig v Patrick Constr. Corp*., *supra*, 298 NY 313, 318), and thus can be neither liberally nor strictly construed, at what stage *is* the statute to be given its broad application? The continuation of the paragraph does not clear this up:

> Even "a violation of [Labor Law § 240(1)] cannot 'establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of the injury'" (*Rocovich v Consolidated Edison Co.,* 78 NY2d 509, *quoting DeHaen v Rockwood Sprinkler Co.,* 258 N.Y. 350, 353) (*loc. cit.)*

This looks, at first, to be nothing more than a restatement of the obvious requirement of proximate cause. It soon becomes clear, though, that the Court had something different in mind. The line of cases running from *Zimmer* through *Staples* measured liability by generic standards: once there was a work site with two levels, and a worker was injured by a

gravity-related fall—his own or an object's—there was by definition a violation of the statute, and liability flowed automatically.

The *Narducci* Court shaped liability along more prescriptive lines. Even if the accident involved an elevated work surface, a fall and an injury, there would still be no cause of action unless the fall involved one of two specific hazards. "Labor Law § 240(1) applies to both 'falling worker' and 'falling object' cases," conceded the Court; but

> [w]ith respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to "a significant risk inherent in * * * the relative elevation * * * at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co., supra*, 78 NY2d at 514). Thus, for section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute(*see, e.g., Pope v Supreme-K.R.W. Constr. Corp*., 261 AD2d 523; *Baker v Barron's Edu. Srv. Corp*., 248 AD2d 655) (96 NY2d, at 267-268, *emphasis in the original*).

The language of the section, so rarely cited after *Zimmer*, here returned with a vengeance.

But there is more to it than that. The *Narducci* Court restricts liability not only through reference to the type of safety device used, which is a colorable interpretation of the statute, but also by the activity which resulted in the accident. No matter how inadequate the device in

question, there can be no cause of action for a falling object unless the object fell "while being hoisted or secured". It would seem that once the object has come to rest and been stayed, braced, or otherwise held in place, all responsibility to the workers below ceases.

Where does this restriction come from? The Court's repeated citations to *Rocovich* suggest that it began with this passage, construing the list of devices in Section 240 (1):

> Some of the enumerated devices (e.g., "scaffolding" and "ladders"), it is evident, are for the use or protection of persons in gaining access to or working at sites where elevation poses a risk. Other listed devices (e.g., "hoists", "blocks", "braces", "irons", and "stays") are used as well for lifting or securing loads and materials employed in the work (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513-514).

The rest of the *Rocovich* decision seems to adhere to the single standard cited above, the risk resulting from a significant elevation differential, and it does not appear that Court intended to enunciate separate tests for falling worker and falling object cases. But that is what the *Narducci* Court did, and by glossing the earlier case's distinction—omitting, it would appear, the qualifier "as well"—it effectively divided the statute in two:

> In addition, the fact that an injured plaintiff may have been working at an elevation when the object fell is of no moment in a "falling object" case, because a different type of hazard is involved. Working at an elevation does not

> increase the risk of being hit by an improperly hoisted load of materials from above. The hazard posed by working at an elevation is that, in the absence of adequate safety devices (e.g., scaffolds, ladders), a worker might be injured in a fall. By contrast, falling objects are associated with the failure to use a different type of safety device (e.g., ropes, pulleys, irons) also enumerated in the statute (*see, Ross v Curtis-Palmer Hydro-Electric Co., supra,* 81 NY2d at 501). Because the different risks arise from different construction practices, the hazard from one type of activity cannot be "transferred" to create liability for a different type of accident (96 NY2d at 268).

As a practical matter, certain of the enumerated devices not mentioned in this passage, such as braces and stays, are used to keep material and objects in place after they have been hoisted and secured, and one might well argue that if one of these were to fail and the material were to fall the Scaffold Law would be violated. In addition, it is quite conceivable that a defect in a scaffold itself might, in a collapse, endanger workers below even though they were not standing in that portion of the scaffold that failed. In neither of these cases would the injury meet the new test, yet they would seem to be squarely within the intention of the statute. Although the *Narducci* court mentioned "improperly hoisted or improperly secured objects" (96 NY2d at 270), the collapse of a pile of inadequately-secured bricks falling on a worker below would not meet its

explicitly-worded test, because the accident did not occur *as the bricks were being hoisted or secured.*

The Court's intentions are more noticeable because the results it reached could easily have been justified by the *Staples* rule. The Fourth Department, after all, had already rejected the Scaffold Law claim in *Capparelli*, and in *Narducci* itself there was no elevated work surface; the plaintiff was struck by a window that was exactly at his level. Indeed, in both cases the same accident would still have taken place had the workers been tall enough (or the ceiling low enough) for them to work while standing on the floor. None of the "peculiar hazards" of work at a height were involved in these accidents.

In discussing both cases, though, the Court stressed the new standard. *Narducci* was reversed because "the glass was not an object being hoisted or secured" (96 NY2d at 269). *Capparelli* was affirmed because the plaintiff was at ceiling level, so his was not a case "that entails the hazards presented by 'a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured' "(*loc. cit., citing Rocovich v Consolidated Edison*, 78 NY2d at 514).

The effect of this change—and it is a real one—can be seen in cases such as the Fourth Department decision *Matter of Fischer v State of New York* (291 AD2d 815). There the plaintiff was working in a trench, and a

backhoe above him dislodged a piece of concrete, which fell on him. Just as in *McCloud*, the worker was struck by a falling object, and the object fell from what was clearly a work surface elevated with respect to him. But the complaint was dismissed, because "the piece of concrete did not fall 'while being hoisted or secured', nor did it fall 'because of the inadequacy of a safety device of the kind enumerated in the statute'" (291 AD2d, at 816, *citing Narducci*).

The parameters of "falling object" liability have now been restricted to certain specified hazards, during specified activities and involving specified devices. It is hard not to see this as a significant retreat from the position staked out in *Zimmer*, a retreat that offers even less protection than a reading of the statute itself would support. The interesting question now is whether something similar is in store for "falling worker" liability.