

REFORMING NEW YORK LABOR LAW SECTION 240(1)

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I. INTRODUCTION

Section 240(1) of New York’s Labor Law is unique in state law. No other state has a similar statute. It imposes a nondelegable, absolute liability on owners and general contractors for construction-related injuries, even though the liable party does not perform the work, supervise the work, or employ the injured worker.¹ Moreover, the injured worker is not responsible for his own comparative negligence.² The current scope of this liability renders owners and general contractors de facto insurers of the worksite with uncontrollable and limitless liability. Unlike insurance companies whose liabilities are limited to their policy limits or workers’ compensation carriers whose obligations are statutorily limited, owners and general contractors have no such protection or liability caps.³ Nothing in the language of the statute makes this so. In recent years, there have been several efforts to reform the statute legislatively, but these efforts have failed.⁴ Judicial interpretation is responsible for the expansion of liability and judicial reform is necessary and appropriate to correct the current imbalance.

II. THE RATIONALE

The “Scaffold Law” was first enacted in 1885⁵ and in its current

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¹ N.Y. LAB. LAW § 240(1) (McKinney 2014); *Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc.*, 1 N.Y.3d 280, 287, 803 N.E.2d 757, 761, 771 N.Y.S.2d 484, 488 (2003); *Koenig v. Patrick Const. Corp.*, 298 N.Y. 313, 316–17, 83 N.E.2d 133, 134 (1948).

² *Blake*, 1 N.Y.3d at 286, 803 N.E.2d at 760, 771 N.Y.S.2d at 487; *Koenig*, 298 N.Y. at 317, 83 N.E.2d at 134.

³ See LAB. LAW § 240(1).

⁴ See Assemb. 03104, 2013 Leg., 236th Sess. (N.Y. 2013).

⁵ *Blake*, 1 N.Y.3d at 284–85, 803 N.E.2d at 759, 771 N.Y.S.2d at 486.

version provides that:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.⁶

According to the Court of Appeals, section 240(1) was enacted because

[w]orkmen . . . who ply their livelihoods on ladders and scaffolds, are scarcely in a position to protect themselves from accident. They usually have no choice but to work with the equipment at hand, though danger looms large. The legislature recognized this and, to guard against the known hazards of the occupation, required the employer to safeguard the workers from injury caused by faulty or inadequate equipment.⁷

The court further explained:

By its force, certain safeguards [were] legislatively commanded for the safety of those engaging in the work described. Instead of simply defining the general standard of care required and then providing that violation of that standard evidences negligence, the legislature imposed upon employers or those directing the particular work to be done, a flat and unvarying duty. [Thus,] the language of the section makes crystal clear: the employer or one directing the work “*shall furnish*” or cause to be furnished equipment or devices “*which shall be so constructed, placed and operated as to give proper protection*” to the one doing the work. For breach of that duty, thus absolutely imposed, the wrongdoer is rendered liable without regard to his care or lack of it.⁸

The Court of Appeals declared that “this statute is one for the protection of workmen from injury and undoubtedly is to be

⁶ LAB. LAW § 240(1).

⁷ *Koenig*, 298 N.Y. at 318–19, 83 N.E.2d at 135.

⁸ *Id.* at 318, 83 N.E.2d at 135 (quoting LAB. LAW § 240(1)).

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construed as liberally as may be for the accomplishment of the purpose for which it was thus framed.”⁹ The declaration that the statute should be “construed as liberally as may be” first appears in *Quigley v. Thatcher*.¹⁰ It is without citation or explanation.¹¹ Despite this, this rule of construction has been used in approximately 100 decisions interpreting Labor Law section 240 and as a rationale in every case where the Court of Appeals has expanded its reach.¹²

III. PLAINTIFF’S CONDUCT NOT CONSIDERED

Originally, the statute made employers liable but, left [them] free to invoke the plaintiff’s contributory negligence. Indeed, throughout all the scaffold law’s amendments, including the present section 240(1), the statutory language has never explicitly barred contributory negligence as a defense. [The Court of Appeals], however, did so in 1948, reasoning that the statute should be interpreted that way if it is to meet its objective. Since then [the Court of Appeals has] steadfastly held that contributory negligence will not exonerate a defendant who has violated the statute and proximately caused a plaintiff’s injury.¹³

The court explained that,

[o]nly when the statute is designed to protect a definite class of persons from a hazard of definable orbit, which they themselves are incapable of avoiding, is it deemed to create a statutory cause of action and to impose a liability unrelated to questions of negligence. This rule is based upon the view that, not being dependent upon proof of specific acts of negligence on defendant’s part, the cause of action may not be defeated by proof of plaintiff’s want of care. Thus, it has been said, “If the defendant’s negligence consists in the violation of a statute enacted to protect a class of persons

⁹ *Koenig*, 298 N.Y. at 319, 83 N.E.2d at 135 (quoting *Quigley v. Thatcher*, 207 N.Y. 66, 68, 100 N.E. 596, 596 (1912)) (internal quotation marks omitted).

¹⁰ *Quigley*, 207 N.Y. at 68, 100 N.E. at 596.

¹¹ *Id.*

¹² See Citing References—§ 240. Scaffolding and Other Devices for Use of Employees—WestlawNext, WESTLAW, <http://www.westlawnext.com> (search N.Y. Lab. Law § 240) (last visited Jan. 7, 2014).

¹³ *Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc.*, 1 N.Y.3d 280, 286, 803 N.E.2d 757, 760, 771 N.Y.S.2d 484, 487 (citation omitted).

from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such statute.”¹⁴

It would be strange, therefore, if the same negligence could defeat the operation of the statute.¹⁵

Contributory negligence meant that if the plaintiff was even one percent responsible for his injuries, he was barred from recovery.¹⁶ This harsh rule was eliminated in 1975 and was replaced by the rule of comparative negligence.¹⁷ The legislature intended CPLR section 1411 to be “applicable not only to negligence actions, but to all actions brought to recover damages for personal injury, injury to property or wrongful death *whatever the legal theory* upon which the suit is based.”¹⁸ Despite this, the courts have never fully analyzed why it should not apply to Labor Law section 240. The court in *Bland v. Manocherian*,¹⁹ concluded “that the diminishment of liability by a comparative evaluation of the injured party’s culpability would, indeed, be disallowed where thus proscribed by public policy.”²⁰ It concluded that it was against public policy based upon *Zimmer v. Chemung County Performing Arts, Inc.*,²¹ which relied on *Koenig v. Patrick Construction Corp.*²² The court seems to treat “contributory negligence” and “comparative negligence” as synonyms; however, proof of contributory negligence results in dismissal of the worker’s case, whereas comparative negligence merely results in a reduction in the damages recoverable by the worker.²³ The “public policy” rationale is difficult to understand,

¹⁴ *Koenig*, 298 N.Y. at 317, 83 N.E.2d at 134 (quoting RESTATEMENT (FIRST) OF TORTS §483 (1934)).

¹⁵ See *Quigley*, 207 N.Y. at 68, 100 N.E. at 596.

¹⁶ Mark C. Dillon, *The Extrapolation of Defendants’ Liabilities Under CPLR Article 16 Where the Plaintiff Is Contributorily Negligent: An Update Toward Resolving a Perceived Ambiguity of CPLR 1601*, 73 ALB. L. REV. 79, 80 (2009).

¹⁷ N.Y. C.P.L.R. 1411 (McKinney 2014).

¹⁸ *Arbegast v. Bd. of Educ.*, 65 N.Y.2d 161, 166–67, 480 N.E.2d 365, 369, 490 N.Y.S.2d 751, 755 (1985) (quoting ADMIN. BD., N.Y. STATE JUDICIAL CONFERENCE & N.Y. STATE OFFICE OF COURT ADMIN., ANNUAL REPORT ON THE ACTIVITIES AND ADMINISTRATION OF ALL STATE-LEVEL TRIAL AND APPELLATE COURTS IN NEW YORK FOR THE PERIOD OF 1 JANUARY THROUGH 31 DECEMBER, 1975, at 240 (1976), available at <https://www.ncjrs.gov/pdffiles1/Digitization/42768NCJRS.pdf>) (internal quotation marks omitted).

¹⁹ *Bland v. Manocherian*, 66 N.Y.2d 452, 488 N.E.2d 810, 497 N.Y.S.2d 880 (1985).

²⁰ *Id.* at 461, 488 N.E.2d at 813, 497 N.Y.S.2d at 883.

²¹ *Zimmer v. Chemung Cnty. Performing Arts, Inc.*, 65 N.Y.2d 513, 482 N.E.2d 898, 493 N.Y.S.2d 102 (1985).

²² *Id.* at 521, 482 N.E.2d at 901, 493 N.Y.S.2d at 105.

²³ See *Bland*, 66 N.Y.2d at 457–58, 488 N.E.2d at 811–12, 497 N.Y.S.2d at 881–82.

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since the rule barring contributory negligence was a judicial interpretation to satisfy what it *perceived* to be the legislature's intention whereas the legislature *explicitly* announced its intention to apply comparative negligence to all actions for personal injury "whatever the legal theory."²⁴ Did the court really mean to say that an act of the legislature violates public policy, rather than define it?

IV. ABSOLUTE LIABILITY

The court concluded that the duty imposed upon owners and general contractors by the statute was "a flat and unvarying" one, rendering them liable for a violation of their proscriptions even though the actual work might have been performed by an independent contractor.²⁵

This nondelegable duty was made designedly broad to reach those who were thought to have the over-all responsibility for the construction of a building in which the Legislature deemed a particular employment inherently hazardous, irrespective of fault and despite lack of control. Thus, a violation of [the statute], causing injury to a member of the protected class was held to have imposed absolute, first instance liability upon an owner or general contractor unrelated to questions of negligence.²⁶

"Prior to 1969, this section placed liability for its violation upon 'A person *employing* or *directing* another to perform labor'; it now unqualifiedly places liability upon 'All contractors and owners and their agents,' duplicating the language of section 241."²⁷ Under both amended sections, an owner no longer need be the employer of the worker or one directing his labor in order to be subject to liability.²⁸ "Furthermore, section 240 no longer contains any provision spelling out responsibility of subcontractors for compliance with the duties that section imposes."²⁹ The fact that

²⁴ N.Y. STATE JUDICIAL CONF., THIRTEENTH ANNUAL REPORT OF JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CIVIL PRACTICE LAW AND RULES, 1975 N.Y. Sess. Laws 1479, 1484 (McKinney).

²⁵ *Koenig v. Patrick Const. Corp.*, 298 N.Y. 313, 318, 83 N.E.2d 133, 135 (1948).

²⁶ *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 298, 376 N.E.2d 1276, 1278, 405 N.Y.S.2d 630, 632 (1978).

²⁷ *Haines v. New York Tel. Co.*, 46 N.Y.2d 132, 136, 385 N.E.2d 601, 603, 412 N.Y.S.2d 863, 865 (1978); *see also* Act of May 26, 1969, ch. 1108, 1969 N.Y. Laws 2950, 2951 (detailing the change in section 240's language).

²⁸ *Allen*, 44 N.Y.2d at 300, 376 N.E.2d at 1279, 405 N.Y.S.2d at 634.

²⁹ *Haines*, 46 N.Y.2d at 136, 385 N.E.2d at 603, 412 N.Y.S.2d at 865.

the amendments removed subcontractors and employers from its scope reinforces the conclusion that the legislature intended the duty to be nondelegable.

Section 240 is

“a self-executing statute which, containing its own specific safety measures, does not defer to the rule-making authority of the [Industrial Board of Appeals].” Thus, a violation of section 240(1) or the first five subdivisions of section 241 creates absolute liability.³⁰

Moreover, “the failure to provide any protective devices for workers at the worksite establishes an owner or contractor’s liability as a matter of law.”³¹ According to the Court of Appeals, Labor Law section 240(1) is

as “absolute” in the sense that owners or contractors not actually involved in construction can be held liable, regardless of whether they exercise supervision or control over the work. Intending the same meaning as absolute liability in Labor Law § 240(1) contexts, the Court in 1990 introduced the term “strict liability” and from that point on used the terms interchangeably.

....

. . . [T]he phrase “strict (or absolute) liability” in the Labor Law § 240(1) context is different from the use of the term elsewhere. Often, the term means “liability without fault”, as where a person is held automatically liable for causing injury even though the activity violates no law and is carried out with the utmost care. Illustrations include blasting activities, keeping wild animals and discharging petroleum. We also refer to strict liability when discussing products liability arising out of a defective design or the failure to warn. In these instances, manufacturers of defective products may be held “strictly liable” for injury caused by those products, regardless of privity, foreseeability or reasonable care.³²

In each of these examples however, the party to be charged is

³⁰ *Zimmer v. Chemung Cnty. Performing Arts, Inc.*, 65 N.Y.2d 513, 522, 482 N.E.2d 898, 902, 493 N.Y.S.2d 102, 106 (1985) (quoting *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 160, 433 N.E.2d 115, 118, 448 N.Y.S.2d 132, 135 (1982)).

³¹ *Zimmer*, 65 N.Y.2d at 521, 482 N.E.2d at 901, 493 N.Y.S.2d at 105.

³² *Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc.*, 1 N.Y.3d 280, 287–88, 803 N.E.2d 757, 761–62, 771 N.Y.S.2d 484, 488–89 (2003) (citations omitted).

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typically the party engaged in the injury causing activity, whereas under Labor Law 240, the owner and general contractor are not engaged in the injury causing activity and are never the direct employer controlling the actions of the injured worker or the means and methods of the work.³³

Despite this absolute liability,

[a]t no time . . . did the Court or the Legislature ever suggest that a defendant should be treated as an insurer after having furnished a safe workplace. The point of Labor Law § 240(1) is to compel contractors and owners to comply with the law, not to penalize them when they have done so.³⁴

Thus, we have a statutory scheme to hold owners and general contractors strictly liable for injuries to workers where they do not perform the work; do not control the means and methods of the work; may not be present when the work is being performed; and the plaintiff is not responsible for his or her own negligence. While the duty has been flat and unvarying, the scope of the hazards to be protected against has been ever expanding. As it expands, it forces the owner and general contractor closer and closer to becoming the insurers of the worksite.

V. EXPANDING INTERPRETATION

In *Rocovich v. Consolidated Edison Co.*,³⁵ the court addressed *the nature of those occupational hazards* which the Legislature intended should warrant the absolute protection that the statute affords. Manifestly, a violation of the statute 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.”³⁶

To ascertain the sort of risk contemplated by section 240(1), we look first to the statutory wording. While section 240(1) does not purport to specify the hazards to be avoided, it does specify

³³ *Id.* at 287, 803 N.E.2d at 761, 771 N.Y.S.2d at 488.

³⁴ *Id.* at 286, 803 N.E.2d at 760, 771 N.Y.S.2d at 487; *Sanatass v. Consol. Investing Co., Inc.*, 10 N.Y.3d 333, 338, 887 N.E.2d 1125, 1128, 858 N.Y.S.2d 67, 70 (2008) (“[The Court of Appeals has] cautioned that an owner is not ‘an insurer after having furnished a safe workplace’ and that an accident, in and of itself, does not establish a statutory violation.” (citations omitted) (quoting *Blake*, 1 N.Y.3d at 286, 803 N.E.2d at 760, 771 N.Y.S.2d at 487)).

³⁵ *Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 583 N.E.2d 932, 577 N.Y.S.2d 219 (1991).

³⁶ *Id.* at 513, 583 N.E.2d at 934, 577 N.Y.S.2d at 221 (quoting *De Haen v. Rockwood Sprinkler Co.*, 258 N.Y. 350, 353, 179 N.E. 764, 765 (1932)).

protective means for the hazards' avoidance. The statute prescribes the types of devices that "shall be so constructed, placed and operated" as to avoid the contemplated hazards, which include "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices."³⁷

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.

The various tasks in which these devices are customarily needed or employed share a common characteristic. All entail a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured. The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. It is because of the special hazards in having to work in these circumstances, we believe, that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides.³⁸

This interpretation provided a reasonably understandable "hazard of definable orbit."³⁹ In a further attempt to define the scope, the Appellate Division, First Department explained that the "special hazards," however,

do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather the "special hazards" referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured.⁴⁰

³⁷ N.Y. LAB. LAW § 240(1) (McKinney 2014).

³⁸ *Rocovich*, 78 N.Y.2d at 513–14, 583 N.E.2d at 934, 577 N.Y.S.2d at 221–22.

³⁹ *Koenig v. Patrick Const. Corp.*, 298 N.Y. 313, 317, 83 N.E.2d 133, 134 (1948).

⁴⁰ *Vornfett v. Port Auth.*, 238 A.D.2d 134, 134, 656 N.Y.S.2d 14, 15 (App. Div. 1st Dep't 1997) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501, 618 N.E.2d 82, 85,

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The Court of Appeals further explained:

Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*. 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, stay or hoist.⁴¹

Unfortunately, the application of this interpretation has evolved and represents a moving target for defendants. In 1991, the *Rocovich* court, applying its test and denying recovery to the plaintiff, held that

[w]hile the extent of the elevation differential may not necessarily determine the existence of an elevation-related risk, it is difficult to imagine how plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk which called for any of the protective devices of the types listed in section 240(1).⁴²

In 2003, however, a plaintiff standing on top of a "boulder jackhammering it in order to break it down and remove it from an area under excavation in a section of the basement floor" in the owner's paper factory, was able to invoke Labor Law section 240(1) when he fell sixteen inches "from the boulder, injuring his back, right knee and ankle."⁴³ The Third Department found that "the work surface was sufficiently elevated so as to fit within the intended protective scope of Labor Law § 240(1)."⁴⁴

In 2010, the Appellate Division, Third Department rendered judgment for an ironworker who

was working on the first story of the structure when he fell from a beam to a concrete floor 15 feet below and was injured. Plaintiff was wearing a harness and lanyards at the time of the accident, but he was not tied off to anything. . . . [D]efendants failed to submit any evidence that plaintiff

601 N.Y.S.2d 49, 52 (1993)).

⁴¹ *Ross*, 81 N.Y.2d at 501, 618 N.E.2d at 86, 601 N.Y.S.2d at 53.

⁴² *Rocovich*, 78 N.Y.2d at 514–15, 583 N.E.2d at 934, 577 N.Y.S.2d at 222.

⁴³ *Amo v. Little Rapids Corp.*, 301 A.D.2d 698, 699, 754 N.Y.S.2d 685, 686 (App. Div. 3d Dep't 2003).

⁴⁴ *Id.* at 699–700, 754 N.Y.S.2d at 686–87.

knew or should have known that he was expected to anchor his safety harness and chose for no good reason not to do so.⁴⁵

Despite being furnished with an enumerated device to protect the plaintiff, the defendant's duty was not discharged because of the subjective expectation of the plaintiff's employer.⁴⁶ The statute is no longer a "shall furnish" statute. Grafted on is a subjective component as to what the employer, not the owner or general contractor, "expects." Recognizing that the parties to be charged do not control the work and do not employ the plaintiff, how can one foresee, or provide for, the state of mind of the employer?

This evolution has resulted in the current interpretation of Labor Law section 240(1):

[The Court of Appeals'] jurisprudence defining the category of injuries that warrant the special protection of Labor Law § 240(1) has evolved over the last two decades, centering around a core premise: that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability.⁴⁷

This seems to be a direct refutation of the comparatively limited scope of the statute as defined by the *Rocovich* court. Now, there does not need to be a falling person or falling object. There merely needs to be the effects of gravity. This abrogation begins with *Runner v. New York Stock Exchange, Inc.*⁴⁸

In *Runner*:

Plaintiff and several coworkers had been directed to move a large reel of wire, weighing some 800 pounds, down a set of about four stairs. To prevent the reel from rolling freely down the flight and causing damage, the workers were instructed to tie one end of a 10-foot length of rope to the reel and then to wrap the rope around a metal bar placed horizontally across a door jamb on the same level as the reel.

⁴⁵ *Murray v. Arts Ctr. & Theater of Schenectady, Inc.*, 77 A.D.3d 1155, 1156–57, 910 N.Y.S.2d 187–88 (App. Div. 3d Dep't 2010).

⁴⁶ *See id.* at 1157, 910 N.Y.S.2d at 188 (noting that the defendants' argument that it was common sense for the plaintiff to use the furnished harness was unsuccessful).

⁴⁷ *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 7, 959 N.E.2d 488, 492, 935 N.Y.S.2d 551, 555 (2011).

⁴⁸ *See Runner v. N.Y. Stock Exch., Inc.*, 13 N.Y.3d 599, 604, 922 N.E.2d 865, 868, 895 N.Y.S.2d 279, 282 (2009) (noting that the appropriate question in such cases is whether harm resulted from the force of gravity).

The loose end of the rope was then held by plaintiff and two coworkers while two other coworkers began to push the reel down the stairs. As the reel descended, it pulled plaintiff and his fellow workers, who were essentially acting as counterweights, toward the metal bar. The expedient of wrapping the rope around the bar proved ineffective to regulate the rate of the reel's descent and plaintiff was drawn horizontally into the bar, injuring his hands as they jammed against it. Experts testified that a pulley or hoist should have been used to move the reel safely down the stairs and that the jerry-rigged device actually employed had not been adequate to that task.⁴⁹

The Court of Appeals acknowledged that “[t]he occurrence . . . did not involve the traversal of an elevation differential either by plaintiff or an object that hit him,” but rejected the argument “that gravity must operate directly upon either the plaintiff or upon an object falling upon the plaintiff if there is to be” liability under Labor Law section 240(1).⁵⁰ Rather, it held that the “special hazards” covered by section 240(1) are not so limited and include “those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.”⁵¹

This interpretation leads to *Wilinski v. 334 E. 92nd Housing Development Fund Corp.*, where the worker was demolishing a building when he was struck by two vertical plumbing pipes which tipped over and fell on him.⁵² The pipes, which were metal and four inches in diameter, stood at approximately ten feet and toppled over to fall at least four feet before striking the worker, who was five feet, eight inches tall.⁵³ The court concluded that the height differential was not de minimis “given the ‘amount of force [the pipes] w[ere] []able [to] generat[e]’ over their descent. Thus, plaintiff suffered harm that ‘flow[ed] directly from the application of the force of gravity to the [pipes].”⁵⁴ Here, there is an object, at the

⁴⁹ *Id.* at 601, 922 N.E.2d at 866, 895 N.Y.S.2d at 280.

⁵⁰ *Id.* at 604, 922 N.E.2d at 867, 895 N.Y.S.2d at 281.

⁵¹ *Id.*

⁵² *Wilinski*, 18 N.Y.3d at 4, 959 N.E.2d at 490, 935 N.Y.S.2d at 553.

⁵³ *Id.*

⁵⁴ *Id.* at 10, 959 N.E.2d at 494, 935 N.Y.S.2d at 557 (alteration in original) (citations omitted) (quoting *Runner*, 13 N.Y.3d at 604, 922 N.E.2d at 868, 895 N.Y.S.2d at 282).

same level as the worker, and recovery is based on the specific facts of the distance that the object falls and the weight of the object. Thus, gravity-related, as opposed to elevation related, accidents will result in liability. How does one protect against gravity? It also leads to the absurd result that if the worker had been standing next to the same pipe and it fell over onto his toe, he would not recover because the distance of an inch or two would be de minimis. Moreover, the scientific definition of the “force” generated by a falling object is mass multiplied by gravity, which varies based on the distance from the equator, but is generally defined as 9.81 meters per second squared.⁵⁵ Nowhere, in any case applying *Wilinski*, does the court actually compute the force it uses to determine whether the defendant is liable. Nowhere is there any discussion of how much or how little force is enough.

In the current landscape, absolute liability is assessed against defendants in unpredictable and varied ways. In *Nechifor v. RH Atlantic-Pacific LLC*,⁵⁶ the plaintiff fell “approximately 12 feet as he attempted to descend from the top of a scaffold by climbing down the side frame of the scaffold.”⁵⁷ The court granted summary judgment to the plaintiff, stating: “Even assuming that plaintiff knew that a ladder or other appropriate safety devices were readily available to him, there is no evidence that plaintiff knew that he was expected to use the safety devices for the assigned task.”⁵⁸

In *Henningham v. Highbridge Community Housing Development Fund Corp.*,⁵⁹ summary judgment for plaintiff under Labor Law section 240 was granted where plaintiff’s coworkers were throwing debris from the roof into a chute and the chute became clogged.⁶⁰ The plaintiff went to unclog it and stuck his head into the chute.⁶¹ He told his coworkers the chute was clear and one of them then dropped a cinderblock on his head.⁶² In *Soltero v. City of New*

⁵⁵ A. H. Cook, *A New Absolute Determination of the Acceleration due to Gravity at the National Physical Laboratory, England*, PHIL. TRANSACTIONS ROYAL SOC’Y LONDON, 211, 211, 213 (1967).

⁵⁶ *Nechifor v. RH Atl.-Pac. LLC*, 92 A.D.3d 514, 938 N.Y.S.2d 308 (App. Div. 1st Dep’t 2012).

⁵⁷ *Id.* at 514, 938 N.Y.S.2d at 309.

⁵⁸ *Id.*

⁵⁹ *Henningham v. Highbridge Cmty. Hous. Dev. Fund Corp.*, 91 A.D.3d 521, 938 N.Y.S.2d 1 (App. Div. 1st Dep’t 2012).

⁶⁰ *Id.* at 521–22, 938 N.Y.S.2d at 1.

⁶¹ *Id.* at 522, 938 N.Y.S.2d at 1.

⁶² *Id.* at 522, 938 N.Y.S.2d at 1–2.

York,⁶³ the plaintiff was granted summary judgment when he fell off a two-foot high ledge in a subway tunnel that was slippery.⁶⁴ In *Andresky v. Wenger Construction Co.*,⁶⁵ while the plaintiff was on a scaffold emptying a container of concrete, the container shifted, and when it was almost empty, it fell off the scaffold and the plaintiff fell with it.⁶⁶ The plaintiff was granted summary judgment.⁶⁷ The court found the container was not properly secured.⁶⁸ In addition, a plaintiff was granted summary judgment when “he fell 15 feet from an opening in a ‘sidewalk shed.’”⁶⁹ The court found no triable question of fact even though the plaintiff had just covered the opening with a tarp and then walked over the tarp.⁷⁰ The court found that the plaintiff had not been provided with an appropriate anchorage on the sidewalk shed.⁷¹ The plaintiff had a harness and a safety line but he did not have a “proper anchorage” in that the plaintiff was supposed to hook onto the fire escape.⁷²

In *McCallister v. 200 Park, L.P.*,⁷³ the plaintiff recovered where the base of the scaffold was at the same level as the plaintiff and the scaffold only fell a short distance since its total height was four feet.⁷⁴ The combined weight of the scaffold, its load, and the force it was able to generate over its descent was not de minimis.⁷⁵

In *Marrero v. 2075 Holding Co. LLC*⁷⁶

[p]laintiff testified that he sustained physical injuries when he was walking across plywood planks covering fresh concrete. The plywood planks buckled and shifted. As a result, an A-frame cart containing Sheetrock and two 500-pound steel beams tipped over toward the plaintiff. The

⁶³ *Soltero v. City of New York*, 93 A.D.3d 578, 940 N.Y.S.2d 491 (App. Div. 1st Dep’t 2012).

⁶⁴ *Id.* at 578, 940 N.Y.S.2d at 491.

⁶⁵ *Andresky v. Wenger Constr. Co.*, 95 A.D.3d 1247, 945 N.Y.S.2d 186 (App. Div. 2d Dep’t 2012).

⁶⁶ *Id.* at 1248, 945 N.Y.S.2d at 187.

⁶⁷ *Id.* at 1249, 945 N.Y.S.2d at 187.

⁶⁸ *Id.*

⁶⁹ *Tzic v. Kasampas*, 93 A.D.3d 438, 438–39, 940 N.Y.S.2d 218, 220 (App. Div. 1st Dep’t 2012).

⁷⁰ *Id.* at 439–40, 940 N.Y.S.2d at 221.

⁷¹ *Id.* at 439, 940 N.Y.S.2d at 220–21.

⁷² *Id.*

⁷³ *McCallister v. 200 Park, L.P.*, 92 A.D.3d 927, 939 N.Y.S.2d 538 (App. Div. 2d Dep’t 2012).

⁷⁴ *Id.* at 927–29, 939 N.Y.S.2d at 539–40.

⁷⁵ *Id.* at 928–29, 939 N.Y.S.2d at 540.

⁷⁶ *Marrero v. 2075 Holding Co. LLC*, 106 A.D.3d 408, 964 N.Y.S.2d 144 (App. Div. 1st Dep’t 2013).

steel beams fell, landing on his left calf and ankle. While the record did not specify the height, the uncontroverted evidence show[ed] that the steel beams fell a short distance from the top of the A-frame cart to plaintiff's leg. Given the beams' total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis.⁷⁷

As can be seen, the current interpretation of the Labor Law fails to give notice to the owner and general contractor of what their duty is. The fundamental justification for imposing absolute liability has been completely undermined. The underlying premise for absolute liability is that the statute, by its terms, tells the party what is required—to protect a definite class, from a hazard of definable orbit, by furnishing or erecting devices enumerated in the statute. The present interpretation of the Labor Law, where liability is imposed without a worker working at or accessing a height, or a material or load being hoisted or secured, makes it impossible for the defendant to avoid liability.

VI. FORESEEABILITY MUST BE AN ELEMENT

Implicit in the statute, is the owner's ability, in the first instance, to be able to identify the hazards and make provision for them. The owner, when he/she contracts to have a building erected, can foresee that workers will need to work at heights and that loads will need to be hoisted. He/she can furnish and erect the enumerated safety devices, but cannot control whether that safety device is used. The owner cannot foresee ahead of time that breaking up a floor in the basement will require scaffolding, ladders, or a safety harness. He/she cannot know that during the course of demolition, a pipe might be knocked over and hit a short worker in the head.

The court seems to be applying a but-for test which questions, after the fact, whether the enumerated device would have prevented the accident, rather than examining whether a reasonably prudent contractor would have recognized the need for the enumerated device to safely perform the work in the first place.

This element of foreseeability is implicit in the statute. One cannot furnish and erect if one cannot foresee the hazard to be guarded against. Otherwise, the owner becomes the insurer of the

⁷⁷ *Id.* at 409, 964 N.Y.S.2d at 146.

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worksite.

At the beginning of the modern construction of the statute, the court recognized the element of foreseeability:

[W]e think that the defendants could be held to have foreseen or to have been obliged to foresee that their structure would be used as plaintiff was using it at the time of his accident, and that they, doing nothing to prevent this use, were bound to comply with the requirements of the statute in keeping it in proper condition for his use.⁷⁸

This element still exists but it is not expressed in that term.

In *Broggy v. Rockefeller Group, Inc.*,⁷⁹ the Court of Appeals stated that “[t]he burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff.”⁸⁰ There, the plaintiff, a window washer, was equipped with tools consisting of a wand, a squeegee and a bottle of soap.⁸¹ Using these tools, he was able to wash windows whose tops were nine or ten feet above the floor, while standing on the floor.⁸² Despite this, the plaintiff elected to clean one of the windows by standing on a desk, from which he subsequently fell.⁸³ The court ruled that “[t]o recover under section 240(1) . . . plaintiff must establish that he stood on the desk because he was *obliged* to work at an elevation to wash the interior of the windows.”⁸⁴ The court found that he failed to meet this burden because

[p]rior to his accident, plaintiff had cleaned the interior of eight other windows of exactly the same height as those in Room 810, and the record does not show that he needed a ladder or other protective device. The only “tools” that he testified to having used were a wand, a squeegee and a bottle of soap.⁸⁵

In *Swiderska v. New York University*,⁸⁶ the Court of Appeals explained that

⁷⁸ Quigley v. Thatcher, 207 N.Y. 66, 69, 100 N.E. 596, 597 (1912).

⁷⁹ Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675, 870 N.E.2d 1144, 839 N.Y.S.2d 714 (2007).

⁸⁰ *Id.* at 681, 870 N.E.2d at 1147, 839 N.Y.S.2d at 717.

⁸¹ *Id.* at 677, 870 N.E.2d at 1145, 839 N.Y.S.2d at 715.

⁸² *Id.* at 678, 870 N.E.2d at 1145, 839 N.Y.S.2d at 715.

⁸³ *Id.* at 679, 870 N.E.2d at 1145–46, 839 N.Y.S.2d at 715–16.

⁸⁴ *Id.* at 681, 870 N.E.2d at 1147, 839 N.Y.S.2d at 717 (emphasis added).

⁸⁵ *Id.* at 682, 870 N.E.2d at 1148, 839 N.Y.S.2d at 718.

⁸⁶ Swiderska v. N.Y. Univ., 10 N.Y.3d 792, 886 N.E.2d 155, 856 N.Y.S.2d 533 (2008).

[i]n *Broggy* . . . we held that commercial window cleaning comparable to the activity at issue here is encompassed within Labor Law § 240(1) if it created the type of elevation-related risk that the statute was intended to address. In this case, plaintiff established that she was injured while cleaning 10-foot-high windows in a college dormitory with a rag, which *required* her to climb upon pieces of furniture in order to complete her work—creating an elevation-related risk—and she was not provided a ladder, scaffold or other safety device of the kind contemplated under the statute.⁸⁷

These two decisions set forth the same standard. If the plaintiff is provided with tools to do the work without the necessity of encountering an elevation-related risk, Labor Law section 240(1) is not applicable.⁸⁸ In *Broggy*, the plaintiff could reach the top of the windows with the tools provided, whereas in *Swiderska*, the window cleaner equipped with only a rag was required to climb on the furniture in order to perform her work.⁸⁹ In *Ortiz v. Varsity Holdings, LLC*,⁹⁰ the court reiterated the standards established in *Broggy*:

After several hours of [throwing debris into a] dumpster [which] was filling up . . . Ortiz and his colleagues climbed up it, using footholds built into the side, and began to rearrange the debris inside to make more room. It started to rain, making the surface of the dumpster slippery. Ortiz was injured when, while holding a wooden beam and standing at the top of the dumpster, with at least one foot on the narrow ledge, he lost his balance and fell to the ground. . . . To recover . . . Ortiz must establish that he stood on or near the ledge at the top of the dumpster because it was necessary to do so in order to carry out the task he had been given . . . [and] must establish that there [was] a safety device of the kind enumerated in section 240(1) that could have prevented his fall, because 'liability is contingent upon . . . the failure to use, or the inadequacy of' such a device."⁹¹

⁸⁷ *Id.* at 793, 886 N.E.2d at 156, 856 N.Y.S.2d at 534. (emphasis added) (citation omitted).

⁸⁸ *Id.*; *Broggy*, 8 N.Y.3d at 681, 870 N.E.2d at 1147, 839 N.Y.S.2d at 717.

⁸⁹ *Swiderska*, 10 N.Y.3d at 793, 886 N.E.2d at 156, 856 N.Y.S.2d at 534; *Broggy*, 8 N.Y.3d at 682, 870 N.E.2d at 1148, 839 N.Y.S.2d at 718.

⁹⁰ *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 960 N.E.2d 948, 937 N.Y.S.2d 157 (2011).

⁹¹ *Id.* at 338–40, 960 N.E.2d at 949–50, 937 N.Y.S.2d at 158–59 (quoting *Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 267, 750 N.E.2d 1085, 1089, 727 N.Y.S.2d 37, 41 (2001)).

In *Salazar v. Novalex Contracting Corp.*,⁹² the court held that Labor Law section 240(1) liability “depends on whether the injured worker’s *task creates* an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against.”⁹³ In *Soto v. J. Crew, Inc.*,⁹⁴ the court again reaffirmed *Broggy* stating:

We went on to hold in *Broggy* that the complaint had properly been dismissed because plaintiff failed to surmount the second Labor Law § 240(1) hurdle that required proof in admissible form that the *task* he had been assigned *necessarily* created “an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against.”⁹⁵

The Third Department has recognized and applied this rule stating that liability under Labor Law section 240(1) “is further dependent ‘on whether the injured worker’s *task creates* an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against.”⁹⁶ In *Canosa v. Holy Name of Mary Roman Catholic Church*,⁹⁷ the court held that

the defendant made a prima facie showing of its entitlement to summary judgment dismissing the Labor Law § 240(1) cause of action through the submission of an expert affidavit concluding that the injured plaintiff was provided with adequate safety devices, and was the sole proximate cause of his accident because he *needlessly* exposed himself to an elevation risk by standing on the scaffold platform to unhook the planks instead of doing so from the ground or using an available ladder.⁹⁸

In *Ortiz*, the court required the plaintiff to prove that he stood on the ledge at the top of a dumpster from which he fell “because it was necessary to do so in order to carry out the task he had been given.”⁹⁹ This language that recognizes that exposure to an

⁹² *Salazar v. Novalex Contracting Corp.*, 18 N.Y.3d 134, 960 N.E.2d 393, 936 N.Y.S.2d 624 (2011).

⁹³ *Id.* at 139, 960 N.E.2d at 395, 936 N.Y.S.2d at 626 (emphasis added) (quoting *Broggy*, 8 N.Y.3d at 681, 870 N.E.2d at 1147, 839 N.Y.S.2d at 718).

⁹⁴ *Soto v. J. Crew, Inc.*, 21 N.Y.3d 562, 998 N.E.2d 1045, 976 N.Y.S.2d 421 (2013).

⁹⁵ *Id.* at 567, 998 N.E.2d at 1048, 976 N.Y.S. at 424 (emphasis added) (quoting *Broggy*, 8 N.Y.3d at 681, 870 N.E.2d at 1147, 839 N.Y.S.2d at 718).

⁹⁶ *Mohamed v. City of Watervliet*, 106 A.D.3d 1244, 1245, 965 N.Y.S.2d 637, 639 (App. Div. 3d Dep’t 2013) (quoting *Salazar*, 18 N.Y.3d at 139, 960 N.E.2d at 395, 936 N.Y.S.2d at 626).

⁹⁷ *Canosa v. Holy Name of Mary Roman Catholic Church*, 83 A.D.3d 635, 920 N.Y.S.2d 390 (App. Div. 2d Dep’t 2011).

⁹⁸ *Id.* at 637, 920 N.Y.S.2d at 392–93 (emphasis added).

⁹⁹ *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339, 960 N.E.2d 948, 950, 937 N.Y.S.2d

elevation-related risk must be *necessary* to the task being performed by the plaintiff, *obliging* or *requiring* him to be exposed to an elevation-related risk, which then implicates the requirement of a safety device, is really just another way of saying that, given the work to be performed, it must be foreseeable that an enumerated device is necessary to perform the task.

The express recognition of the element of foreseeability in determining the application of Labor Law section 240, coupled with a return to the *Rocovich* test of falling worker or falling object would remedy several ills. It would better define the orbit of hazards to be protected against. The statute is draconian in its application of liability without fault or worker accountability and it needs to be limited to the protection from the extraordinary hazards of work at heights, not every hazard occasioned by gravity. The law must give fair notice of the hazards to which it applies. While it cannot catalog the full scope of its reach, its universe can be defined and limited by asking the question: would a reasonably prudent contractor under similar circumstances have recognized the need for an enumerated device to protect against the elevation related hazard?

VII. CONCLUSION

Over the course of the last century, the court has taken a statute designed to protect workers who were unable to protect themselves from the extraordinary hazards of working at or raising materials and loads to heights, and turned it into a remedy for every injury caused by gravity that a safety device might have, in hindsight, prevented. By expanding this remedy as far as it has, the court has made it impossible for the owner and general contractor to know what is required and what needs to be furnished. Limiting the reach of the statute to its original scope of furnishing safety devices for reasonably foreseeable elevation-related hazards is necessary. The introduction of comparative negligence would address the original assumption, that the worker be incapable of avoiding the harm, without barring him or her from recovery in the way that contributory negligence did. While this could be done by the legislature, the application of Labor Law section 240 from its very beginning has been a product of the judiciary and it is altogether

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appropriate that the judiciary reform it.