In Defense of Preserving Labor Law §240(1)

Generally, in our columns we address topics in the field of personal injury law which we feel will be helpful to the bar. This column is somewhat different in intent. We feel compelled to reply to the “Perspective” column written by Jason Beckerman and Ryan Kearney. Their column is titled “Accountability in Elevated Construction Accidents” (NYLJ, May 8, 2013). It supports a proposed amendment to Labor Law §240(1) allowing comparative negligence as a defense. The amendment would gut the statute which protects construction workers in New York.

Labor Law §240(1) was enacted to protect workers exposed to gravity-related hazards requiring the use of the types of devices enumerated in the statute. Kerner v. New York Stock Exchange, 13 N.Y.3d 530 (2009), and Milstein v. 334 East 92nd Housing Development Fund, 18 N.Y.3d 1 (2011), which we have discussed in previous articles, were important decisions in which the Court of Appeals examined the relevant criteria in determining liability under this statute. Owners, general contractors, and their agents will be held absolutely liable where a violation of Labor Law §240(1) is a proximate cause of injuries. To prevail, the plaintiff must prove that the statute was violated, and that the violation was a proximate cause of the injuries sustained. Comparative negligence is not a defense to §240(1).2

Our courts have recognized a very limited defense to a cause of action under Labor Law §240(1), when there is a total absence of a statutory violation and the worker found to be the only or “sole proximate cause” of the accident. This defense should not be confused with comparative negligence. The failure to properly furnish and erect all safety devices necessary to safeguard the worker performing an enumerated task is a violation of §240(1). If a statutory violation is a proximate cause, then no action by the worker can be the sole proximate cause.

The authors of the “Perspective” column staunchly support a current proposed amendment to §240(1) which would permit comparative negligence as a defense “where safety equipment or devices have been made available and if a statutory violation is a proximate cause, then no action by the worker can be the sole proximate cause.”

In defense of this current proposed amendment, Beckerman and Kearney launch an attack on the plaintiff’s bar, contending that any objections by plaintiff’s attorneys to diluting the protection afforded by this statute are “dishonest and self-serving.” They further assert that the existing law is no more than a “windfall for a small group of plaintiff’s attorneys.” In launching their ad hominem attack on advocates of the present statute, the authors of the article pointedly ignore both the long-established legislative intent of Labor Law §240(1) and the painstaking efforts by the judiciary to implement the intended safeguards. As an aside, we note that Shakespearean “Kill all you lawyers” attacks usually do not come from other attorneys.

They further state that increased insurance costs are causing major developers to look to other states for project sites. Their lamentation of the demise of the New York construction business is refuted by a front page article in The New York Times on Sunday, May 19, 2013, titled “Sky High and Going Up Fast: Luxury Towers Take New York.” The article quoted a spokesperson for an international real estate firm who stated: “There’s a great deal of interest in New York, which is seen as relatively cheap compared to other global cities.” We recommend that these disgruntled authors tour the many new development sites in New York, and perhaps their worry about the impending decline of our city will decrease.

Our Legislature and courts have implemented a safety standard designed to protect workers engaged in hazardous elevation-related tasks. New York law addresses a fundamental imbalance of power at the construction site. Although the authors of the Perspective column bemoan “the often outrageous culpable conduct by plaintiffs,” they overlook the purpose of this statute to protect workers from intimidation by those controlling their jobs. There are too many work sites where workers toil in the absence of adequate safeguards and are treated as fungible commodities—when they are injured, they are...
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discarded. The courts understand that the legislative intent was to
protect these workers.

Courts Recognize Purpose

The legislative and judicial his-
tory of this statute is one of con-
stant rejection of an affirmative
defense of comparative negligence
to diminish recovery by a worker
injured while performing a task
within the scope of §240(1). In its
landmark decision in Zimmer v.
Chemung County Performing Arts,
65 N.Y.2d 513, 493 N.Y.S.2d 102
(1985), the Court of Appeals noted
the important legislative purpose
of this statute:

We begin our analysis by again
observing that the legislative
history of the Labor Law, parti-
cularly sections 240 and 241,
has made clear the Legislature's
intention to achieve the purpose
of protecting workers by plac-
ing "ultimate responsibility for
construction jobs" on the owner
and general contractor. . . . Instead of
placing the responsibility on the
worker, who "may be in a posi-
tion to protect himself from acci-
dent" (internal citation omitted).

In specifically addressing Labor
Law §240(1), the courts stated:

We gave early recognition to
this legislative intent when we
declared with respect to section 240, which was then
substantially in its present
form, that "this statute is one
for the protection of workmen
from injury and unobstructedly
is to be construed as liber-
ally as may be for the accom-
mplishment of the purpose for
which it was thus framed..." (Quigley v. Thatcher, 207
NY 65)

A defense of contributory negli-
gence was specifically rejected by
the court:

Thus, we hold unavailable to a
defendant owner charged with
a violation of section 240 the
defense of the worker's con-
tributory negligence, noting
that "both sound reason and
persuasive decisions, involving
statutes whose content and
purpose are similar to section
240, require the conclusion
that that statute does not per-
mit the worker's contributory
negligence to be asserted as a
defense.

Although the scope of the stat-
ute has evolved over time, com-
parative negligence has never
been held to be a defense so as
to erode the protections provided
by this statute. In Blake v. Neigh-
borhood Housing Services of New
York City, 1 N.Y.3d 280, 771 N.Y.S.2d
484 (2003), the Court of Appeals
exhaustively reviewed the legis-
lative history of the statute and
stated in language as important
today as it was in 2003:

Most tellingly, the lawmakers
fashioned this pioneer legis-
lation to "give proper protec-
tion" to the worker. Those
words are at the heart of the
statute and have endured
through every amendment.

In Blake, the court clearly
held that if a statutory violation
is a proximate cause of an injury,
then liability is properly imposed,
regardless of fault by the worker.
It held:

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 occu-
py the same ground as a plain-
tiff'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.

The court further held that if
the record established conclu-
sively that no violation of Labor
Law §240(1) was a proximate
cause of the accident and that
plaintiff's own acts or omissions
were the sole cause of the acci-
dent then defendant could
be granted summary judgment.
Thus, the defense of sole prox-
imate cause was articulated by
the Court of Appeals. However,
this defense is narrow in scope.
The courts have been diligent
in not allowing it to evolve into
comparative negligence under a
different guise. Even as the courts
have recognized that there are
occasions when the worker is
solely to blame, those occasions
are rare and have been carefully
distinguished from a worker's
comparative negligence, which
is not a defense.

In Gallagher v. New York Post,
14 N.Y.3d 83, 896 N.Y.S.2d 732
(2010), the Court of Appeals
made it clear that the incursion
into absolute liability under a
defense of sole proximate cause
would be limited. The current
amendment intended to introduce
a broad comparative negligence
standard as an affirmative defense
flouts the legislative and judicial
history of this statute.

No Amendment is Needed

In criticizing §240(1) and advo-
cating its erosion, Beckerman
and Kearney cite case law in
support of their position. However,
upon closer examination, it is appar-
tent that these cases have not been
fully and fairly explained and, in
actuality, present compelling rea-
sons to leave §240(1) unaltered.
For example, they cite Sergeant v.
Murphy Family Trust, 284 A.D.2d
991, 726 N.Y.S.2d 537 (4th Dept.
2001) to bolster their position
that comparative negligence
should be an affirmative defense
where there is evidence of intox-
ication or drug use. However, the
case in Sergeant do not support
this assertion. Although plaintiff
in Sergeant apparently did have
a high blood alcohol level, his
intoxication was not the prox-
imate cause of the accident.

He had been directed to go
onto the roof to receive instruc-
tions from his foreman. At the
time of the accident, as he was
walking on the roof, he stepped
onto yellow insulation. Unbe-
knownst to him, the roof panel
underneath had been removed so
that the insulation had no under-
lying support. The worker fell at
least 21 feet to the floor below. It
was undisputed that on the date
of the accident, no safety devices
were in place to prevent work-
ers from falling through or off the
roof. Thus, a blatant violation
of §240(1) was a proximate cause
of this accident. Defendants
should not be exonerated in whole
or in part from such an extreme
violation of safety standards. This
case, rather than supporting the
position of the defense columnist,
illustrates why the present statute
should not be changed.

Beckerman and Kearney fur-
ther cite Reavelly v. Yorkers Race-
way, 88 A.D.3d 561, 931 N.Y.S.2d
579 (1st Dept. 2011) to support
their argument that the amend-
ment is needed to rein in the
scope of §240(1). So too, the facts
in this case actually illustrate how
dangerous the amendment would
be for helpless workers. Plaintiff,
a carpenter using a circular saw,
was working on a wall at the edge
of a trench. He was injured when
he lost his balance after slipping
on viscous waterproofing which
had not fully dried. As he endeavored to keep from falling over the edge of the unprotected trench in the absence of fall protection, he cut his hand with the saw.

The court held that the absence of safety equipment to keep plaintiff from falling into the trench was a statutory violation and a proximate cause of the accident. It was an elevation-related hazard for which no safety devices were provided. However, what is especially significant is that the worker was placed into this dangerous situation by his supervisor. The court observed that he [plaintiff] was directed to make the cut immediately and did not want to delay his supervisor by waiting until he could be certain the surface was safe. Plaintiff was following an instruction from his supervisor to perform an unsafe act when the accident occurred. This is a striking example of the need to protect workers in an unequal work environment.

The perspective column writers' extreme discontent with Silvia v. Bow Tie Partner, 91 A.D.3d 1143, 979 N.Y.S.2d 202 (3d Dep't 2010) is also difficult to fathom. They call this decision a "disturbing outcome." When, in fact, on appeal, the case was remanded to the trial court for a jury to resolve issues of fact as to whether plaintiff's actions were the sole proximate cause. Defendants contend proper scaffold planks were available but plaintiff continued to use a makeshift plank, which broke. They further reference Gallen v. BFP 300 Madison II LLC, 18 A.D.3d 403, 795 N.Y.S.2d 579 (1st Dep't 2005) to support their advocacy of an affirmative defense of comparative negligence. They incorrectly represent that the worker was provided with safety devices he chose not to use. To the contrary, the court observed that "there is no evidence that he deliberately refused to use safety devices provided."

Plaintiff was injured when one of the hooks supporting the scaffold on which he was working dislodged, causing him to fall. The proximate cause of the accident was the collapse of the scaffold. Although one of the defendants asserted that the plaintiff was provided with a safety harness and did not use it, the affidavits submitted by plaintiff stated that not only was there no place for plaintiff to "tie-off" such a harness but also that plaintiff's supervisor did not instruct him to do so. Clearly, the harness was useless under these conditions. It should be noted that had plaintiff been shown to be recalcitrant by refusing to use safety equipment which was properly placed and provided, he might have been denied recovery under the existing theory of sole proximate cause. Comparative negligence would not have changed the outcome.

The authors of the "Perspective" column, clearly protective of real estate developers, many of whom appear on the Forbes list of billionaires, state that insurance rates have been raised. They neglect to mention that certain insurance companies required massive taxpayer bailouts after their gambling with derivatives crashed the world's financial system in 2008. In an attempt to stimulate the economy, the Federal Reserve has been compelled to bring interest rates to near zero. The insurance companies, which formerly earned huge sums on their investment income, are now raising their rates in order to regain the profits lost as a result of the lower yields on their investments. There should be no amendment to Labor Law §240(1).