

Understanding the Labor Law - Construction Site Accidents

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TRIAL LAWYERS SECTION

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Mr. Adams is a Member in the firm's Litigation department and has extensive experience litigating in construction negligence, labor law, product liability, transportation negligence, employment litigation and other complex and catastrophic injury litigation. Mr. Adams heads the firm's New York Labor Law team and is the editor of the firm's monthly electronic newsletter Labor Law Pointers, which provides a review and analysis of the most current and significant New York State Labor Law cases. He leads the firm's 24-Hour Emergency Response Team for construction site accidents.

Mr. Adams is admitted to practice in the State of New York and the United States Courts for the Second Circuit Court of Appeals and the Western, Northern, Eastern and Southern Districts of New York. He is a past President of the Western New York Defense Trial Lawyers Association, a member of the New York State Bar Association, (Trial Lawyers, Torts, Insurance and Compensation and the Labor and Employment Law sections), a member of the Bar Association of Erie County and a member of the Western New York Trial Lawyers Association.

Noted for his excellent reputation in Construction Litigation by New York Super Lawyers Magazine, Mr. Adams is a frequent speaker and lecturer on New York State Labor Law and risk transfer issues.

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The New York Labor Law imposes liability on Owners and Contractors for failure to provide a safe place to work. New York State is the only state which has such a law imposing absolute liability on owners, contractors and their agents without the culpable conduct of the plaintiff being considered for any elevation related injury. These cases are always among the highest verdicts recorded in the state every year. Understanding the law is essential not only for handling these cases but also for counseling clients on their safety practices, contract language and accident investigation.

We will address the different section of the Labor Law, their similarities and differences, and the essential elements necessary to analyze and handle these cases.

NEW YORK STATE LABOR LAW

THREE MAIN SECTIONS:

Labor Law § 240 (1)

- Elevation related risk
- Absolute Liability if there is a violation that is the proximate cause of the injury
- **DEFENSES:**
 - Sole proximate cause
 - Recalcitrant worker

Labor Law § 241 (6)

- Violation of specific rule (Code Rule 23)
- Liability is established if the violation was the proximate cause of the injury
- DEFENSE: Culpable conduct of the plaintiff

Labor Law § 200

- NEGLIGENCE
- DEFENSE: Culpable Conduct of the plaintiff

Each section asks the same four questions

Each section answers these questions differently.

- Is this a statutory defendant?
- Is the project “covered” by the statute?

- Is the injured party “protected” by the statute?
- Is the accident an “event” within the contemplation of the statute.

Thus it becomes a basic equation;

(Statutory defendant) x (covered project) x (protected worker) x (covered event) =
liability

If any element is missing, there is no liability under the statute.

LABOR LAW § 240 (1)

- Absolute liability
- Culpable conduct of plaintiff not an available defense
- Defenses:
 - Sole proximate cause
 - Recalcitrant worker

§ 240. Scaffolding and other devices for use of employees

1. 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.

STATUTORY DEFENDANTS

- Contractors
 - Party with authority to enforce safety standards and choose responsible subcontractors. Mergenhagen v. Dish Network Service L.L.C., 64 A.D.3d 1170 (4th Dept. 2009) (status is dependent on their right to exercise control, not whether they in fact did so).

- Owners
 - Actual titleholder. Nephew v. Barcomb, 260 A.D.2d 821 (3rd Dept. 1999)
 - Leaseholder of the property. Walp v. ACTS Testing Labs Inc., 28 A.D.3d 1104 (4th Dept. 2006).
 - One who contracts to have the work performed for his benefit. Scaparo v. Village of Illion, 13 N.Y.3d 864 (2009). Example is owner of easement. Fisher v. Coghlan, 8 A.D.3d 974 (4th Dept. 2004).

- Agents –

- A third party with authority to supervise and control job. Weber v. Baccarat, Inc., 70 A.D.3d 487 (1st Dept. 2010).
- Subcontractors who control the work that caused the plaintiff's injury. Zervos v. City of New York, 8 A.D.3d 477 (2nd Dept. 2004); Russin v. Picciano & Son, 54 N.Y.2d 311 (1982).
- Construction Manager with authority to direct and control the work. Rodriguez v. JMB Architecture, LLC, 82 A.D.3d 949 (2nd Dept. 2011); Lodato v. Greyhawk North America, LLC, 39 A.D.3d 491 (2nd Dept. 2007).

Scheduling authority is not enough

- Owners of one and two family homes
 - Who direct or control the work. Byrd v. Roneker, 90 A.D.3d 1648 (4th Dept. 2011) (direction and control exists if owner specifies how work should be performed).
 - Where the work was residential (not commercial) in nature. Landon v. Austin, 88 A.D.3d 1127 (owners of one and two-family dwellings exemption does not apply to owners who use their residences purely for commercial purposes).
 - Renovation for *resale or rental* qualifies as work being performed for a commercial purpose. Id.

COVERED PROJECTS

1. Altering/Renovating –

Liability requires a *significant* physical change to the configuration or composition of the building or structure. Sanatass v. Consolidated Investing Co., Inc., 10 N.Y.3d 333 (2008).

-Installation of draperies. Wormuth v. Freeman Interiors, Ltd., 34 A.D.3d 1329 (4th Dept. 2006).

-Installation of new phone system. Schick v. 200 Blydenburgh, LLC, 88 A.D.3d 684 (2nd Dept. 2011).

-Boarding up windows. Santiago v. Rusciano & Son, Inc., 92 A.D.3d 585 (1st Dept. 2012).

-Not applying advertisements to billboard. Hatfield v. Bridgedale, LLC, 28 A.D.3d 608 (2nd Dept. 2006).

2. Repairing –

Troubleshooting and investigating malfunctions are protected activities. Pieri v. B & B Welch Associates, 74 A.D.3d 1727 (4th Dept. 2010).

Repair of nonfunctioning door – Lofaso v. J.P. Murhpy Associates, 37 A.D.3d 769 (2nd Dept. 2007)

Replacing transformer on building roof's HVAC unit - Bruce v Fashion Square Associates, 8 A.D.3d 1053, 1054, 778 N.Y.S.2d 823 (2004).

3 Erecting – not specifically been defined by the New York Court of Appeals.

-Attachment of power screen not erecting because the power screen came already assembled. Hodges v. Boland's Excavating and Topsoil, Inc., 24 A.D.3d 1089 (3rd Dept. 2005).

4 Demolition –

-Removal of a large air conditioning duct attached to the ceiling considered demolition. Salinas v. Barney Skanska Constr. Co., 2 A.D.3d 619 (2nd Dept. 2003).

-Cutting and removing horizontal pipe 9-10 feet above ground considered demolition. Durmiaki v. International Business Machines Corp., 85 A.D.3d 960 (2nd Dept. 2011).

5 Painting – painting is protected activity and need not be incidental to other listed activities. Artoglou v. Gene Scappy Realty Corp., 57 A.D.3d 460 (2nd Dept. 2008)

Where work is being done on or to a;

1. Building or

2. Structure –

Pipeline. Convey v. Iroquois Gas Transmission System, L.P., 218 A.D.2d 197 (3rd Dept. 1996).

Telephone pole. Sarigul v. New York Telephone Co., 4 A.D.3d 168 (1st Dept. 2004).

Airplane. Wong v. City of New York, 65 A.D.3d 1000 (2nd Dept. 2009).

NON-COVERED PROJECTS

1. Cleaning

-Cleaning a product in the course of a manufacturing process Dahar v. Holland Ladder & Mfg. Co., 18 N.Y.3d 521 (2012);

-Cleaning leaves from gutter Berardi v. Coney Island Ave. Realty, LLC, 31 A.D.3d 590 (2nd Dept. 2006);

-Routine household window washing Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675 (2007).

-Commercial cleaning not covered where the cleaning is routine and regular, does not require specialized equipment or expertise, does not generally require significant elevation risk and it is unrelated to construction. Soto v J. Crew Inc., 2013 NY Slip Op 06603

2. Maintenance –

-Removing garage door motor from its box was routine maintenance Ventura v. Ozone Park Holding Corp., 84 A.D.3d 516 (1st Dept. 2011);

-Debris that is removed from movable dam parts each time dam sections are lifted or lowered constitutes routine maintenance Len v. State of New York, 74 A.D.3d 1597 (3rd Dept. 2010).

3. Wallpapering. Schroeder v. Kalenak Painting & Paperhanging, Inc., 27 A.D.3d 1097 (4th Dept. 2006)
4. Excavating
5. Inspecting, Measuring, Estimating

COVERED PERSON

A “person so employed”

1. Covered

- Plaintiff must demonstrate he was hired by an owner, contractor or their agent – not a volunteer; and
- Was permitted or required to work at the worksite at issue.

Stringer v. Musacchia, 11 N.Y.3d 212 (2008).

2. Not covered if not engaged in a protected activity

- Plaintiff is not covered if not performing work integral or necessary to completion of construction project, nor a member of a team that undertook an enumerated activity under contract. Coombs v. Izzo General Contracting, Inc., 49 A.D.3d 468 (1st Dept. 2008).
- Investigatory work prior to the commencement of an enumerated activity is not protected. Vasquez v. Minadis, 86 A.D.3d 604 (2nd Dept. 2011).

Failure to “to give proper protection” resulting in a:

1. Falling Worker

- a. Must be subjected to an elevated related risk, such as worker’s 12-15 feet fall into an excavated trench. Bell v. Bengomo Realty, Inc., 36 A.D.3d 479 (1st Dept. 2007).
- b. Worker’s fall just under 2 1/2 feet when a handrail detached was not deemed a covered event because worker was not subjected to any "exceptionally dangerous conditions posed by elevation differentials," nor was the handrail one of the types of safety devices enumerated in the statute. Mattingly v. AES Corp., 291 A.D.2d 862 (4th Dept. 2002).

2. Falling Object

- a. A worker is *not* categorically barred from recovery where an injury is caused by a falling object whose base stands at the same level as the worker. Wilinski v. 334 East 92nd Housing Development Fund Corp., 18 N.Y.3d 1 (2011).
- b. Liability “is not limited to cases in which the falling object is in the process of being hoisted or secured.” Quattrocchi v. F.J. Sciamè Constr. Corp., 11 N.Y.3d 757 (2008).

- c. “Related to a significant risk inherent in ... the relative elevation ... at which materials or loads must be positioned or secured.” Perillo v. Lehigh Constr. Group, Inc., 17 A.D.3d 1136 (4th Dept. 2005)
- d. “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.” Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259 (2001).

However, “[t]he inquiry does not depend on whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.” Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599 (2009).

DEFENSES

1. Recalcitrant worker

Liability “does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident.” Gallagher v. New York Post, 14 N.Y.3d 83 (2010).

2. Sole Proximate Cause

-Misuse of a safety device. Blake v. Neighborhood Housing Services of N.Y., 1 N.Y.3d 280 (2003).

-When worker decided to climb onto main roof, without instruction, worker's decision was sole proximate cause of injuries. Serrano v. Poppovic, 91 A.D.3d 626 (2nd Dept. 2012)

-Failing to use an available and proper safety device. Robinson v. East Medical Center, LP, 6 N.Y.3d 550 (2006).

-Five basic requirements, there needs to be 1) an available and 2) appropriate safety device which 3) the plaintiff was instructed to use or knew he was required to use and 4) the plaintiff did not use or improperly used 5) for no good reason.

LABOR LAW § 241 (6)

Liability: based on violation of the New York State Industrial Code

Defenses: Culpable conduct of the plaintiff

Negligence

Assumption of Risk

§ 241. Construction, excavation and demolition work

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their

agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.;

Statutory defendant – same as 240(1)

1. Owners
2. Contractors
3. Agents
4. Owners of one or two family homes who direct or control the work

COVERED PROJECTS

1. Construction (Alteration and Painting not specifically mentioned)
2. Excavation
3. Demolition

NON-COVERED PROJECTS

1. Repair. Mata v. The Park Here Garage Corp., 71 A.D.3d 423 (1st Dept. 2010).
2. Interior decorating. Rajkumar v. Budd Contracting Corp., 77 A.D.3d 595 (1st Dept. 2010).
3. Tree Removal. Crosset v. Wing Farm, Inc., 79 A.D.3d 1334 (3rd Dept. 2010).

PROTECTED WORKER

Persons employed thereon

-Volunteers are not protected. Stringer v. Musacchia, 11 N.Y.3d 212 (2008).

-Seeking employment is covered. DeFreece v. Penny Bag, 137 A.D.2d 744 (2nd Dept. 1988).

2. Lawfully frequenting the premises

-Need to be engaged in construction activity or in the class of persons to be protected. Vasquez v. Minadis, 86 A.D.3d 604 (2nd Dept. 2011); Davis v. Wind Sun Constr., Inc., 70 A.D.3d 1383 (4th Dept. 2010).

-Plaintiff injured while delivering materials to the work site for use at construction site was covered. Whit v. Village of Port Chester, 92 A.D.3d 872 (2nd Dept. 2012).

WORKERS NOT PROTECTED

- Plaintiff inspecting work is not covered. Mordkofsky v. V.C.V. Development, 76 N.Y. 2d 573 (1990)
- Pedestrians not employed are not covered. Morales v. 569 Myrtle Ave., LLC, 17 A.D.3d 418 (2nd Dept. 2005).
- Plaintiff delivering to vendor is not covered. Haines v. Dick's Concrete Co., Inc., 84 A.D.3d 732 (2nd Dept. 2011) (“plaintiff was **not** delivering the masonry materials to a

construction site; rather, he was delivering them from a supplier to a vendor. Therefore, the plaintiff's work is not a covered activity . . .”).

COVERED EVENT

Statutory requirement

- “so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety”
- And “The commissioner may make rules to carry into effect the provisions of this subdivision”
 - Rules are: Code Rule 23, New York State Industrial Code and 12 NYCRR – Part 23. All the same these rules are the same, just maintained in different locations.

OSHA violations do not trigger liability

Regulation must establish a specific safety requirement.

A. General duty is not sufficient

e.g. “All load carrying equipment shall...safely support the loads intended to be imposed thereon (12 NYCRR §23-1.5(c))

Regulation must establish a specific safety requirement.

B. Specific duty triggers §241 (6)

e.g. “All passageways shall be kept free from...obstructions or conditions that could cause tripping.” (12 NYCRR §23-1.7(e)(1))

LABOR LAW §200

§ 200. General duty to protect health and safety of employees; enforcement

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

1. Liability is based on common law negligence
2. Defense – Culpable conduct.

DEFENDANT:

Not defined in statute, but, courts apply this section to:

1. Owners and

2. Contractors

Who direct and control the work where the injury is caused by the means and method by which the work is being done. Where the claim is for a dangerous condition on the work site it is a general negligence standard the same as a premises liability case.

COVERED PROJECT

“All places to which this chapter applies...”

General construction site

General construction activity

PROTECTED WORKER

“...all persons employed therein or lawfully frequenting such places...”

Same as Labor Law §241(6)

COVERED EVENT

Occurs because of the failure to:

“..provide reasonable and adequate protection to the lives, health and safety...”

Standard: General negligence

RISK TRANSFER IN LABOR LAW CASES

Two legal theories:

1. Common Law Indemnity

- a. Against non-employer - no limitations

- b. Against employer - limited by Workers' Compensation Reform Act of 1996 to

cases where the plaintiff has sustained a "*grave injury*":

GRAVE INJURIES

Workers Compensation Law §11:

1. Death
2. Permanent & total loss of use of an arm, leg, hand or foot
3. Amputation of an arm, leg, hand or foot
4. Loss of multiple fingers or toes
5. Paraplegia or quadriplegia
6. Total and permanent blindness or deafness
7. Loss of nose or ear
8. Loss of index finger
9. Brain injury resulting in total disability

2. Contractual indemnity
 - a. Enforceable against employer and non-employer
 - b. Cannot be indemnified for your own negligence