NEW YORK STATE LABOR LAW § 240(1)

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Liability based upon fault

Labor Law § 200

Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. *Comes v. NYS Elec.& Gas*, 82 N.Y.2d876 (1993). Each of the necessary elements of negligence must be proven for liability to be imposed.

- **A.** Where the cause of plaintiff's injury is an alleged defect in the premises, the plaintiff must submit evidence that the owner: 1) created the condition or had actual constructive notice of it; and 2) had a reasonable amount of time within which to correct the condition.
- **B.** Where the cause of plaintiff's injury is an alleged defect in the equipment on the worksite, the plaintiff must submit evidence that the owner had the authority to supervise or control the "means and methods" of the work.
- **C.** General supervision of work site is not sufficient to support a claim under § 200. In order to prevail under the statute, the injured plaintiff must prove that the owner or contractor directed or controlled the specific "means and methods" of the work of provided plaintiff with tools and equipment.

Liability based upon status

Sections 241(6) and 240(1) impose liability upon certain entities based entirely upon their status as owners or general contractors. Liability under these sections is imposed by statutory mandate rather than an assessment of fault. Owners and general contractors may be held liable under these sections simply due to their status as owner or general contractor.

Labor Law § 241(6)

Section 241(6) of the Labor Law imposes a "non-delegable duty" upon owners and general contractors to maintain a safe work site. Liability is not based upon actual fault, and an injured plaintiff need not prove that the owner or the general contractor supervised or directed the work.

In order to recover under Section 241(6), the plaintiff must plead and prove a violation of a "concrete section of the Industrial Code of the State of New York." *Ross v. Curtis Palmer*, 81 N.Y. 2d 494 (1993). A plaintiff may not rely upon a violation of OSHA, or upon the Administrative Code or Building Code of the City of New York. The Industrial Code section relied upon by the plaintiff must be applicable to the facts presented by the case, and sufficiently specific.

Critically, plaintiff's comparative negligence may be considered and apportioned on a verdict sheet.

Labor Law § 240(1)

New York's Labor Law has, for more than a century, provided special measures of protection for construction workers (*see Stewart v. Ferguson*, 164 N.Y. 553, 554 (1900); *Quigley v. Thatcher*, 207 N.Y. 66, 68 (1912); *Koenig v. Patrick Const. Corp.*, 298 N.Y. 313 318-19 (1948)). For certain types of construction site accidents, liability is placed directly on the owners and general contractors regardless of their control of the working conditions, and for some types of construction-site accidents the defendants may be held entirely liable even if the worker is to some degree at fault. Labor Law § 240(1) is on such provision.

Labor Law § 240(1) provides, in pertinent part: "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."

Justice Wallach of the First Department commented "(a)lthough the statute seems deceptively simple on its face, few legislative enactments have taxed the courts more, probably because of the infinite factual variations that are continually presented to them," and the courts continuously "face the challenge of threading our way through the luxuriant forest of existing case law." *Hargobin v. K.A.F.C.I. Corp.*, 282 A.D.2d 31, 32-3 (1st Dep't 2001).

Good intentions

Section 240 of the Labor Law, sometimes referred to as the "scaffold law" or the "ladder law", was enacted to protect construction workers from "gravity-related risks."[i] Gravity-related risks include not only instances where a construction worker falls from a height and sustains injury, but also to instances where an object falls from above.

The statute applies to incidents arising out of the "erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure." Accidents that occur during the performance of "routine maintenance" do not fall under the protection of the statute. Compare the cleaning and replacement of the filters in an air conditioner unit as "routine maintenance," with the removal of a broken motor in an air condition as unit as "repair of a structure" for the purposes of the Labor Law, *Jehle v. Adams Hotel Assoc.*, 264 A.D.2d 354 (1st Dep't 1999).

The plaintiff's comparative negligence may not be considered, there will be no apportionment of fault to a plaintiff under a claim for violation of section 240(1). Consider, however, the defense of a "sole proximate cause."

Labor Law

Applies to cases involving construction sites or where General repairs are being made.

Person employed at site, not volunteer. The injured person must be a covered worker and be engaged in covered work. The Labor Law defines an "employee" as "a mechanic, workingman or laborer working for another for hire." Labor Law § 2[5]. A person is employed if they are "permitted or suffered to work." Labor Law § 2[7]. The facts showed that Russo was not an "employee" under the Labor Law. The Court of Appeals has held that in order to come under the umbrella of the Labor Law's protection, a plaintiff must show that they were permitted to work on the building and that they were hired by the owner or contractor. *See, Whelen v. Warwick Valley Civic & Social Club*, 47 N.Y.2d 970, 971 (1979); *Mordkofsky v. V.C.V. Dev. Corp.*, 76 N.Y.2d 573 (1990).

New York's Labor Law statutes protect workers that are engaged in construction, demolition, or erection activities. Labor Law § 240(1)—commonly known as the "Scaffolding Law"—requires owners and contractors to provide proper safety devices during "demolition, repairing, altering, painting, cleaning or pointing of a building or structure." The extraordinary protections of this section, however, extend only to a narrow class of special hazards. *See, Nieves v. Five Boro Air Conditioning & Refrigeration Corp.*, 93 N.Y.2d 914 (1999).

Only work that involves the erection, demolition, repairing, altering or painting of a building or structure enjoys the protection of §240(1). *See, Kearney v. Dynegy, Inc.*, 151 A.D.3d 1037 (2d Dep't 2017); *see also, Tserpelis v. Tamares Real Estate Holdings, Inc.*, 147 A.D.3d 1001 (2d Dep't 2017). "It is not important how the parties generally characterize the injured worker's role but rather what type of work the plaintiff was performing at the time of injury." *Joblon v. Solow*, 91 N.Y.2d 457 (1998). "While the reach of Labor Law §240(1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.'" (citation omitted) *Quituizaca v. Tucchiarone*, 115 A.D.3d 924 (2d Dep't 2014).

In order to fall within the extraordinary protections afforded by § 240(1), a worker must, *at the time of the accident*, have been engaged in a "covered activity," i.e., one of the statute's enumerated activities. *See, Prats v. Port Auth. of N.Y. & N.J.*, 100 N.Y.2d 878, 880-81 (2003) and *Jock v. Fien*, 80 N.Y.2d 965, 968 (1992). The "flat and unvarying duty" imposed on owners or contractors only runs to the "one doing the work" described in the section. *See, Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 318 (1948). Thus, in determining whether a plaintiff is protected, the focus of inquiry is on the "type of work the plaintiff was performing at the time of injury." *Panek v. County of Albany*, 99 N.Y.2d 452, 457 (2003).

Labor Law § 240 falling worker/falling object "Whether to harm flows directly from the application of the force of gravity." *Runner v. New York Stock*, 895 N.Y.2d 289 (2009).

Defenses

- Homeowner exemption (1 and 2 family homes)
- Maintenance, not repair
- Statute not applicable to facts
  (ie): Object being intentionally thrown –
  Roberts v. GE, 97 N.Y.2d 737 (2002).
- Plaintiff's actions were sole proximate cause in that he failed to use or misused an appropriate safety device.
- Object did not need to be secured for the undertaking.
- Object causing accident was integral to the work

Maintenance v. Repair

- Routine maintenance is not a protected activity. *Esposito v. NYC, Indus. Dev. Agency*, 1 N.Y.3d 526 (2003).
- To determine if the activity is repair or maintenance the court focuses of the type of work performed, not its characterization, how long it takes to perform or the cost. Work that involves only the replacement of component parts in the course of normal wear and tear is considered routine maintenance and not repairing within the meaning of Labor Law Section 240 (Focus is on type of work performed) *Abbatiello v. Lancaster Studio Assoc.*, 3 N.Y.3d 46 (2004)
- Even where the item being worked on is inoperable or malfunctioning, the replacement of parts that wear out periodically is routine maintenance outside the purview of Labor Law § 240. *Esposito v. New York City Indus Dev. Agency*, 1 N.Y.3d 526 (2003)
- The fact that a job arises from a service call rather than regularly scheduled maintenance is not sufficient to render it repair work. *Barbarito v. Count of Thompkins*, 22 A.d.3d 937 (3d Dep't, 2005).
- "No heat at offices" yield question of fact as to maintenance repair (good discussion in case). *Pakenham v. Westmere*, 871 N.Y.S.2d 456 (3d Dep't 2009).

Investigation to check for asbestos is not a repair. *Martinez v. City*, 93 N.Y.2d 322 but investigation of a malfunction is covered as a repair. *Ozimek v. Holiday*, 83 A.D.3d 1414 (4th Dep't, 2011)

Removing a fixture to replace a component part is a repair. *Nowakowski v. Douglas*, 78 A.D.3d 1033 (2d Dep't 2010)
Question of fact as to whether plaintiff replacing ceiling tiles (maintenance) or installing trusses as well (repair). *Hamill v. Mutual*, 79 A.D.3d 478 (1st Dep't 2010)

Losing Balance
Holly v. County of Chautaugua, 895 N.Y.S.2d 308
Chin Sue v. City of N.Y., 83 A.D.3d 643 (2d Dep't 2011).

A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law 240. There must be evidence that the subject ladder was defective or inadequately secured and that the defect or the failure to secure the ladder was a substantial factor in causing the plaintiff's injuries.
Xidas v. Morris Park, 35 A.D.3d 850 (2d Dep't 2006).

Misuse

Standing on top step of an A-frame ladder – dismissed. *Maloney v. J.W. Pfeil*, 84 A.D.3d 1632 (3d Dep't 2011).

Medical records noted "missed step", and plaintiffs said it was possible raise question of fact. *Merriman v. Integrated*, 84 A.D.3d 897 (2d Dep't 2011)

Question of fact where A-frame ladder used in closed position. *Intragio v. City of N.Y.*, 44 A.D.3d 1008 (2d Dep't 2007).

The Development of Sole Proximate Cause

As the Court of Appeals has stressed, the mere fact that a worker fell from a ladder, without more, is insufficient as "(n)ot every worker that falls on a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)." *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259 (2001).

Over time, the courts applied this statute to an increasing number of scenarios. And while courts will liberally construe Labor Law § 240(1), it should not be implemented by decision of law in such a manner as to create a right of recovery not envisioned by the legislature. *See*, *Martinez*, *supra*.

Defendant must prove:

1. Safety devices readily available at work site,
2. even if not it immediate vicinity
3. Plaintiff knew the devices were there and he was expected to use them
4. Plaintiff, for no good reason, chose not to use them and such choice caused the accident

Blake v. Neighborhood, 1 N.Y.3d 280 (2003) (no defect with the ladder, and plaintiff's actions caused the accident.

Montgomery v. Federal Exp., 4 N.Y.3d 805 (2005) (plaintiff used upside down bucket to ascend and descend rather than obtain an available ladder).

Robinson v. East Med. Ctr., 6 N.Y.3d 550 (2006).

Miro v. Plaza, 9 N.Y.3d 948 (2007).

Gallagher v. N.Y. Post, 14 N.Y.3d 83 (2008).

Plaintiff used A frame ladder in closed position because he could not reach area with ladder in open position. Court finds question of fact. *Vargas v. NYCTA*, 54 A.D.3d 579 (1st Dep't 2008).

Plaintiff used ten-foot ladder because fourteen-foot ladders would not fit in the stairwell and elevators could not be used for the man lift. Summary judgement granted to the plaintiff as a ten-foot ladder was not appropriate for the job. Court focused on the fact that the fourteen-foot ladder and the man lift were not available.

Employer does not have to anticipate that employee with disobey instructions and need not provide additional safety devices for him. *Biaca-Neto v. Boston*, 176 A.D.3d 1 (1st Dep't 2019).

Closed ladder on top of the scaffold. Proper equipment not provided to plaintiff. *Chlebowski v. Egber*, 871 N.Y.S.2d 652 (2d Dep't 2009).

Plaintiff misusing scaffold – case dismissed. *Paz v. City of New York*, 85 A.D.3d 519 (1st Dep't 2011).

Plaintiff drove scissor lift into hole and fell – Question of fact. *Thome v. Benchmark*, 86A.D.3d 938 (4th Dep't 2011).

Use of experts on both sides – Question of fact. *Canosa v. Holy Name*, 83 A.D.3d 635 (2d Dep't, 2011).

Safety devices were provided; therefore, triable question of fact. *Continer v. Carrere*, 60 A.D.3d 133 (4th Dep't 2009).

Key Developments 2019-2020

In a 4-3 decision the Court of Appeals held that even where the base of the object that eventually strikes plaintiff is at the same level as the plaintiff there can be a question of fact as to whether the object should have been secured by one of the enumerated safety devices. There must be some elevation differential as the accident must be gravity related.

- *Wilinsky v. 334 E.*, 92nd, 18 N.Y.3d 1 (2011)
- *O'Brien v. Port Authority*, 29 N.Y.3d 27 (2017). A mere fall does not trigger Labor Law § 240, but rather there must be hazard contemplated under the statute together with a failure to use or an inadequate safety device.
- *Valente v. Lend Lease*, 29 N.Y.3d 1104 (2017). If there is an alternative safe route, then sole proximate cause.
- *Salazar v. Novalex*, 18 N.Y.3d 134. Labor Law will not be interpreted in an illogical fashion such that it would be impractical and contrary to the very work at hand.
- *Makkieh v. Judd Law*, 162 A.D.3d 468 (1st Dep't 2018). Steel plate 2 to 3 feet off the ground is at a significant elevation differential because of the weight and force it will generate.
- *Melo v. ConEd*, 92 N.Y.2d 909 where a steel plate is "hovering slightly above the ground, not 240."

Recent Labor Law rulings by the Court of Appeals

(1) In *Healy v. EST Downtown, LLC*, the Court reversed the Appellate Division, Fourth Department's decision that had granted plaintiff's summary-judgment motion on the issue of liability under sec. 240(1) and granted the defendant's motion for summary judgment. The issue before the Court was whether plaintiff's work constituted "cleaning" under sec. 240(1). The Court went through its four-art analysis under its prior ruling in *Soto v. J. Crew, Inc.*, 21 N.Y.3d 562, 568 (2013).

With respect to the first factor as to whether the work was considered "routine," the Court noted that it did "not involve a fact-specific assessment of plaintiff's regular tasks—it instead asks whether the type of work would be expected to recur with relative frequency as part of the ordinary maintenance and care of a commercial property." The unanimous Court ruled that plaintiff's work was "routine" and therefore could not constitute "cleaning" covered by sec. 240(1).

While the Court's decision does not identify what plaintiff was doing, the Fourth Department's decision (191 A.D.3d 1274) does. According to the Appellate Division, plaintiff was injured while working in a mixed-use building owned by the defendant. Plaintiff was employed as a maintenance and repair technician by the building's property manager. The building's maintenance staff, of which plaintiff was a member, was separate from its janitorial staff. Plaintiff's regular duties included making the building's rental properties ready for incoming tenants by repairing fixtures and painting. Additionally, he was tasked with responding to work orders generated by his employer in response to defendant's requests for repairs. On the day of the accident, plaintiff responded to a "[p]est [c]ontrol" work order filed by one of the building's commercial tenants. The work order complained that birds were depositing excrement from a nest that was lodged in one of the building's gutters located above the tenant's entryway. Plaintiff was injured when, while attempting to remove the bird's nest, he fell from an unsecured eight-foot ladder that moved when a bird suddenly flew out of the nest.

The Fourth Department ruled that plaintiff's work in removing the bird's nest from one of the building's gutters was not *routine* cleaning because he had never before been given such a task during his time working on the premises. The Appellate Division continued, "the reason for removing the nest was, in part, to prevent the further accumulation of bird excrement under the nest. *Id.*, at 1275-76. Plaintiff's supervisor characterized the task of removing the nest as nonroutine cleaning. *Id.*, at 1276. In addition, removing the bird's nest from the gutter, which was located above the tenant's entry door, necessarily involved elevation-related risks that are not generally associated with typical household cleaning *Id.* The Court of Appeals rejected this holding and dismissed.

(2) In *Cutaia v, The Board of Mgres of the 160/170 Varick St.*, plaintiff was working on a building renovation and was tasked with moving sinks from one bathroom to another. This required plaintiff to cut and reroute pipes in the ceiling that were located near electrical wiring. Plaintiff used an A-frame ladder to reach the pipes. But special limitations forced him to lean the ladder against the wall in a closed and unlocked position. As he stood on the ladder and attempting to connect two pipes, plaintiff received an electric shock and fell to the ground. He did not remember anything about his fall.

The 4-3 majority reversed the Appellate Division's decision and ruled that plaintiff was not entitled to summary judgment under sec. 240(1), ruling that questions existed as to whether the ladder failed to provide proper protection, whether plaintiff should have been provided with additional safety devices, and whether the ladder's "purported inadequacy or the absence of additional safety devices was a proximate cause of plaintiff's accident." The majority rejected plaintiff's expert's affidavit, holding that it was "conclusory" and insufficient to satisfy plaintiff's burden of proof. The Majority agreed with Justice Tom's dissent in the First Department (172 A.D.3d 424)

Some facts from Justice Tom's dissent provide support for this ruling. On two prior occasions during this phase of the project, plaintiff accessed the ceiling area by opening the ladder and ascending and descending the ladder several times with no incident. He had previously observed electrical BX cable as well as yellow wires near the copper pipes that he was cutting. For his third use, he concluded that the ladder would not open completely in the particular location where he had to work. As a result, he folded the ladder, leaned it against the wall with the feet positioned about two feet from the bottom of the wall on an even cement surface, and he climbed to an upper rung to continue his pipe-cutting. Plaintiff testified that under similar circumstances in the past he would solicit the help of someone to hold the ladder while he worked on it, but on this occasion, determining that the ladder was "sturdy up against the wall," he declined to seek the assistance of his nearby coworker. Notably, the ladder did not slip.

Upon inspecting, plaintiff did not observe any wires or electrical cables near the piping. Plaintiff testified that the ladder remained steady as he cut the piping over the course of several minutes. However, when he grabbed onto piping as he maneuvered a pipe joint into place, plaintiff received an electric shock that knocked him off of the ladder. Thus, it can be concluded from plaintiff's own testimony that he was propelled from where he had been located on the ladder by the force of the electrical charge rather than by the force of gravity, which was not a result of any defect in the ladder. A post-accident inspection of the location revealed that a cap was missing from the end of a yellow electrical line, used only for temporary power and lighting, which was hanging about one foot beneath the piping on which plaintiff had been working. The dissent in the First Department noted, "(w)hen an electrical shock causes a worker to fall from an A-frame ladder in the absence of evidence that the ladder was defective or that another safety device was required, factual issues pertaining to causation and liability are presented for trial, precluding strict liability favoring the plaintiff."

The dissent believed plaintiff's case as the "prototypical example of the situations the legislature sought to remedy through Labor Law sec. 240(1)" because he was provided with an inadequate ladder.

(3) In *Bonczar v. American Multi-Cinema, Inc*,, plaintiff fell from a ladder while retrofitting a fire-alarm system working at a movie theater. After ascending and descending the ladder several times, plaintiff fell when he descended the ladder, and it shifted and wobbled. The Appellate Division had previously refused to grant plaintiff summary judgment on sec. 240(1). The matter then went to trial where the jury found for the defendant. The Supreme Court refused to set aside the verdict. The primary issues on appeal involved whether the Court could review the Appellate Division's 2018 order. The unanimous Court ruled that it could not because the "nonfinal order" did not remove any issues from the case, but rather, the question of causation and liability was left undecided. Therefore, the Appellate Division's order denying summary judgment "did not necessarily affect the final judgment and thus, this Court cannot review the 2018 Appellate Division order."

The Fourth Department's 2018 ruling (158 A.D.3d 1114) provides insight as to why plaintiff's motion was denied. According to the Fourth Department's majority, "Plaintiff did not know why the ladder wobbled or shifted, and he acknowledged that he might not have checked the positioning of the ladder or the locking mechanism, despite having been aware of the need to do so." Relying on *Blake v. Neighborhood Hous.*, 1 N.Y.3d 280 (2003), "(w)e thus conclude that plaintiff failed to meet his initial burden on the motion. '[T]here is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident.'"

The Court then affirmed the judgment as a rational jury could have found in favor of defendant.

Risk Transfer & Third-Party Practice

Additional Insured – Tender
Contractual Indemnification – Tender
Common Law Indemnification (Grave Injury) & Contribution
Failure to Procure Insurance. *Inchaustegui v. 666 5th Ave.*, 96 N.Y.2d 111 (2001).

Contractual Indemnification

Partial Indemnification is permitted if clause properly written. *Brooks v. Judlau*, 11 N.Y.3d 204 (2008).
"To the fullest extent permitted by law."
Full indemnification for the indemnitee's own liability as long as indemnitee is not negligent. *Itri Brick v. Aetna*, 89 N.Y.2d 786 (1997).

Common-Law Indemnification

A doctrine which permits shifting the loss. Indemnitor: must be free of negligence and free of any actual supervision. *McCarthy v. Turner*, 17 N.Y.3d 369 (2011).
Indemnitee: must exercise actual supervision or be negligent and a cause of the accident.

In order to obtain common law indemnification, you must prove negligence or authority to control plaintiff's injury producing work. *Perri v. Gilbert Johnson*, 14 A.D.3d 681 (2d Dep't 2003).

Grave Injury
Acquired injury to the brain resulting in permanent total disability means unemployability in any capacity.
Rubeis v. Aqua, 3 N.Y.3d 408 (Court of Appeals, 2004). Death, paraplegia, quadriplegia, permanent and total loss of use or amputation of an arm, leg, hand, foot, etc. Workers' Compensation Law Section 11.

[i] Based largely upon the dissent by Judge Wilson in *Toussaint v. Port Auth. of N.Y. & N.J.* New York's Labor Law has, for more than a century, provided special measures of protection for construction workers (*see Stewart v. Ferguson*, 164 N.Y. 553, 554 (1900); *Quigley v. Thatcher*, 207 N.Y. 66, 68 (1912); *Koenig v. Patrick Const. Corp.*, 298 N.Y. 313 318-19 (1948)). For certain types of construction site accidents, liability is placed directly on the owners and general contractors regardless of their control of the working conditions, and for some types of construction-site accidents the defendants may be held entirely liable even if the worker is to some degree at fault. Labor Law § 240(1) is on such provision.

From 1850 to 1880, the number of workers between the ages of 10 to 50 killed by accidents increased by 70 percent nationally (John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law 26 [2004]). By 1912, workplace accidents killed an estimated 82,500 per year (*id.* at 26-27). Although miners and railroad workers faced the highest risks of injury, construction was also a deadly trade. Newspapers during the period are replete with graphic reports of workers falling to their deaths from rickety scaffolds (*see, e.g., Weak Scaffold Kills Two*, NY Times, Sept 13, 1896, at 11). Between 1890 and 1913, the New York World Building, the Manhattan Life Insurance Building, the Park Row Building (also known as 15 Park Row), the Singer Tower, the Metropolitan Life Tower, and the Woolworth Building each replaced its predecessor as the world's tallest building. Meanwhile, at the Wainwright Commission's hearings on the prevention of workplace accidents in 1911, New York City unions reported more than 200 accidents on construction sites in the previous year,

including at least 17 deaths (1911 Rep to Leg of the State of NY by the Comm Appointed Under Chapter 518 of the Laws of 1909 to Inquire into the Question of Employer's Liability and Other Matters: Second Report, Causes of Industrial Accidents at 93, 122).

Injured workers had little recourse. In the nineteenth century, the fellow servant doctrine regularly prevented workers from recovering from their employers when injured on the job (*see* John Fabian Witt, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 Yale L.J. 1467, 1469-70 (1998)). Widely adopted by American courts following *Farwell v Boston & Worcester Rail Road* (45 Mass 49 [1842]), the doctrine rests on the proposition that workers assume the risk of injury at work, including the risk of injury as the result of the negligence of a fellow employee (*id.* at 59; *see also Cullen v. Norton*, 126 N.Y. 1, 6 (1891); *Quigley v. Levering*, 167 N.Y. 58, 63-4 (1901)). But as industrialization accelerated, social reformers and organized labor joined forces to advocate for workplace safety and employer liability laws (*see generally* R. Rudy Higgens-Evenson, *From Industrial Police to Workmen's Compensation: Public Policy and Industrial Accidents in New York, 1880-1910*, 39 Labor History 365 [1998]; Robert Asher, *Failure and Fulfillment: Agitation for Employers' Liability Legislation and the Origins of Workmen's Compensation in New York State, 1876-1910*, 24 Labor History 198 [1983]).

Sections 240 and 241 were enacted in that first flush of progressive lawmaking. The first statute to address safety on construction sites made the failure to provide suitable scaffolds, hoists, stays, or ladders a misdemeanor (L 1885, ch 314). In 1896, a second statute was enacted to require all contractors and owners to complete the flooring or underflooring as the building progressed.

Although New York courts recognized that the statutes created causes of action for injured workers, they were reluctant to hold that violations of the statute constituted negligence as a matter of law and continued to apply the fellow servant doctrine (*see Rooney v. Brogan Constr. Co.*, 107 App. Siv. 258, 262 (2d Dep't 1905); *Kiernan v. Eidlitz*, 109 App. Div. 726, 728 (1st Dep't 1905); *Rooney v. Brogan Constr. Co.*, 147 A.D. 68, 71-2 (2d Dep't 1911)). The Court of Appeals began to shift as it recognized that the Labor Law, which was enacted "for the protection of workmen from injury . . . is to be construed as liberally as may be for the accomplishment of the purpose for which it was framed." *Quigley*, 207 N.Y at 68 (holding that a contractor could become liable to a subcontractor and his employees for the safety of a scaffold under Labor Law § 18, now § 240(1)). In 1912, the Court rejected an assumption-of-risk defense when a plaintiff was injured as a result of the employer's failure to comply with an analogous provision of the Labor Law. *See*, *Fitzwater v. Warren*, 206 N.Y. 355, 358 (1912) ("Where an employer deliberately fails to comply with the statute the courts should be loath, except in a very clear case, to hold that the employee assumes the risk of his master's violation of the law")). Not long after, in *Amberg v Kinley*, 214 N.Y. 531, 535 (1915), the Court held that when a provision of the Labor Law created a cause of action, it was "not necessary for the plaintiff to prove negligence on the part of the defendant, because the failure to observe the statute creates a liability *per se*."

By mid-century, it was settled law that § 240(1) imposed absolute liability on owners. *Koenig*, 298 N.Y. at 318; *Joyce v. Rumsey Realty Corp.*, 17 N.Y.2d 118, 122 (1966); *see also Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 522 (1985).