

## **THE SCAFFOLD ACT: RECENT DEVELOPMENTS, INCLUDING THE SUCCESSFUL *AMICUS CURIAE* BRIEF SUBMITTED BY THE COMMITTEE ON THE DEVELOPMENT OF THE LAW**

By James K. O'Sullivan\* and Andrew Zajac\*\*

The Committee on the Development of the Law submitted an *amicus curiae* brief to the New York Court of Appeals in a case entitled Capparelli v. Zausmer.<sup>1</sup> On May 10, 2001, the Court of Appeals issued a decision whereby it decided Capparelli jointly with another case, Narducci v. Manhasset Bay Associates.<sup>2</sup> The Court's opinion was a significant pronouncement concerning Labor Law §240(1) and falling objects. We are pleased to advise that the decision was highly beneficial to the defense community. This article will discuss both cases and their import, and it will examine several other recent Court of Appeals decisions which have construed the statute.

Labor Law §240(1), the statute which imposes absolute liability on owners and contractors for certain gravity-related injuries suffered by workers at construction and renovation sites, has been subjected to increasing strident calls for its legislative repeal.<sup>3</sup> Critics contend that the statute has been construed too broadly by the courts, resulting in increased insurance costs and consequent harm to the construction industry in New York. Many of its critics, however, may be failing to take note of the increasing trend of the Court of Appeals in recent years to, if not narrow the reach of the statute, at least reject the invitation of workers' advocates to continue its expansion. The most recent decision of the Court of Appeals in Narducci and Capparelli continues this trend.

The statute has been construed to protect workers from the "extraordinary risks" associated with construction sites, such as the danger of falling from a height, or the danger that "materials or load" will fall on them. These two types of risks are generally referred to in case law as the "falling object" and the "falling worker" tests.<sup>4</sup> As stated above, Narducci and Capparelli concerned the "falling object" test.

In Narducci, plaintiff was injured while standing on an extension ladder about six feet from the ground, removing the first of several damaged window frames, when a pane of glass from the adjoining window fell towards him. He turned to avoid being hit by the glass, but was severely cut on his right arm. Plaintiff did not fall from his ladder, nor did the ladder malfunction in any way. Plaintiff's claim under Labor Law was premised on the contention that if he had been provided with a type of moveable scaffold, he would have been able to begin his work at the top of the windows, and would not have been subject to the risk of injury from falling glass. The Supreme Court denied motions by defendants for dismissal of the §240 cause of action. A divided First Department panel affirmed.

In Capparelli, plaintiff was installing a light fixture onto the grid work of a dropped ceiling. The fixture was approximately four feet long, two feet wide and five inches high. Plaintiff was provided with an eight foot stepladder in order to reach the grid work, which was approximately ten feet above the floor. After placing the fixture onto the grid work, plaintiff began to proceed down in order to move the ladder so he could secure the fixture. After plaintiff took one step down the ladder, the fixture fell. To prevent the fixture from striking him, plaintiff attempted to catch it. In so

doing, the plaintiff sustained a laceration to his wrist. By plaintiff's own testimony, the fixture fell only a foot to a foot-and-a half. As in Narducci, plaintiff did not fall from the ladder. Plaintiff moved for summary judgment on the issue of §240 liability and third-party defendant cross-moved to dismiss that claim. The Supreme Court denied both motions. The Fourth Department modified by dismissing the Labor Law §240(1) claim, holding that plaintiff's injuries stemmed from the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law §240.

Neither of these plaintiffs could recover under Labor Law §240, the Court of Appeals held. In Narducci, the Court of Appeals rejected plaintiff's claim by ruling that the pane of glass could not be considered "material or load being hoisted or secured," the *sine qua non* of a "falling object" claim under the statute. For the statute to apply, plaintiff must show more than simply that an object fell causing injury to a worker. "A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute."<sup>5</sup>

The decision does not precisely define the term "material or load being hoisted or secured" but it hints that the falling object must be something that has been brought to the structure in furtherance of the construction or renovation. The Court took great pains to note that the glass that fell "was part of the pre-existing building structure as it appeared before the work began. This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected."<sup>6</sup>

Nor was the fact that plaintiff was working at an elevation sufficient to bring the scenario within the ambit of the statute. Plaintiff did not contend that the ladder on which he was standing malfunctioned, and he was not injured as the result of a fall. Therefore, the ladder had no legally sufficient causal connection to the injury to invoke §240 protection.

In Capparelli, the light fixture apparently would have qualified as "material or load being hoisted or secured" under this test, as it was something being added to the renovated structure, not a part of the pre-existing premises. However, plaintiff had no "falling object" claim because of the *de minimis* height differential between plaintiff and the falling object. The mere fact that gravity contributed to the occurrence of the accident did not render this one of the "extraordinary" risks common in construction sites that the statute was enacted to prevent.

Narducci appears to be the latest in a series of decisions by the Court which construe the statute narrowly so as not to go beyond the Legislature's intended purview. For example, in Misseritti, *supra*, note 3, plaintiff was severely injured while working at ground level when a fire wall collapsed onto him. Plaintiff premised his Labor Law §240 claim on the absence of "bracing" on the wall. Notwithstanding that a "brace" is a safety device enumerated in the statute, the Court of Appeals dismissed the claim. The Court construed "braces" referred to in the statute as those used to provide support for elevated work sites, not braces designed to shore up completed structures. Thus, the Court held that the plaintiff was not faced with the extraordinary perils contemplated by the statute. Rather, plaintiff's injuries were the "type of peril a construction worker usually encounters on

the job site."<sup>7</sup> The quoted language amounts to a highly significant exception to the protection of the statute.

In construing §240 narrowly in recent years, the Court of Appeals has engrafted terms and conditions onto the statute that do not appear on its face. In Brown v. Christopher Street Owners' Corp.<sup>8</sup> the plaintiff was injured when he fell while cleaning windows of a residential cooperative apartment. Notwithstanding that "cleaning" is one of the enumerated protected activities in Labor Law §240, the Court held that the statute did not apply to "routine, household window washing."<sup>9</sup> The Court differentiated this situation from the painting of a house or the cleaning of all of the windows of a large, nonresidential building, which the Court stated are activities covered by the statute. In Joblon v. Solow<sup>10</sup>, the Court was faced with the question as to how extensive an alteration to a building or structure must be in order to trigger the protection of the statute. "Altering" is one of the statute's protected activities. The Court held that in order for the statute to apply, the alteration "requires the making of a *significant* physical change to the configuration or composition of the building or structure," notwithstanding that such a condition does not appear on the face of the statute.<sup>11</sup> However, it should also be noted that certain aspects of the Joblon holding were favorable to injured workers. The Court held that the seemingly routine task of the plaintiff in Joblon of chopping a hole through a block wall to route conduit pipe and wire through a hole to mount a clock was a statutorily-protected alteration. The Court also held that the statute's reach is not limited to accidents occurring at construction sites.

In Melber v. 6333 Main Street, Inc.,<sup>12</sup> plaintiff utilized 42-inch stilts in order to accomplish his work of installing metal studs on top of a drywall. Nothing out of the ordinary occurred while he performed his work. However, because he needed a clamp which was a distance away, he ambulated down a hallway without removing his stilts. In so doing, he tripped and fell over an electrical conduit protruding from the floor. In reversing the Appellate Division and dismissing the §240(1) claim, the Court of Appeals held that this case fell outside of the limited class of hazards covered by the statute. The Court noted that a different situation would have been presented had the stilts failed while he was working on the drywall. However, since the plaintiff's injuries were unrelated to the need for the stilts in the first instance, i.e. the work at the top of the wall, the statute did not provide the plaintiff with a remedy for his fall of three and-a-half feet.

Finally, it is noteworthy that in the Court's most recent pronouncement concerning the statute in Narducci and Capparelli, discussed above, the Court cited with approval a law review article that questions the Court's decision in Joblon v. Solow, *supra*, specifically with respect to the holding that the scope of Labor Law §240 is not limited to construction sites<sup>13</sup> The author states the following with respect to §240 and the Court's holding in Joblon:

[I]t appears that the most faithful rendering of the legislative intent would be to provide coverage under Section 240 for all height-related work, however routine and humble, at a *construction site*, and to require workers in a non-construction setting to prove negligence in order to recover.

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The Court of Appeals' 1998 decision in *Joblon* has removed the requirement that an accident take place on a traditional construction site in order to qualify for Section 240 coverage, thereby expanding the scope of absolute liability to protect any worker who sustains a height-related injury while making a significant alteration to a building or structure. The Legislature should consider whether the Court of Appeals has interpreted the Labor Law too broadly, beyond the original intent to protect construction workers who ascend scaffolds at building construction sites.

The Court's citation to the article is intriguing. Perhaps it is a signal that it is willing to reconsider its holding in *Joblon*, or, perhaps it is an implicit invitation to the Legislature to revisit the statute in light of the Court's decisions.

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1. The brief was authored by Andrew Zajac, Dawn C. DeSimone, Elizabeth Anne Bannon, Kathleen D. Foley and Richard B. Polner
  2. \_\_\_ N.Y.2d \_\_\_, \_\_\_ N.Y.S.2d \_\_\_, 2001 WL 499257
  3. See Hargobin v. K.A.F.C.I. Corp., \_\_\_ A.D.2d \_\_\_, \_\_\_ N.Y.S.2d \_\_\_, 2001 WL 463238(1st Dep't)
  4. Misseritti v. Mark IV Const. Co., 209 A.D.2d 931, 932, 619 N.Y.S.2d 473, 473, (4th Dep't 1994), aff'd, 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995) (court's emphasis, citations omitted)
  5. Narducci v. Manhasset Bay Associates, supra
  6. Id. The opinion also indicates that the fact that no one was working above plaintiff was a factor militating against a finding that the glass was a "falling object"
  7. 86 N.Y.2d at 491, 634 N.Y.S.2d at 38
  8. 87 N.Y.2d 938, 641 N.Y.S.2d 221 (1996)
  9. Id. 87 N.Y.2d at 939, 641 N.Y.S.2d at 221
  10. 91 N.Y.2d 457, 672 N.Y.S.2d 286 (1998)
  11. Id. 91 N.Y.2d at 465, 672 N.Y.S.2d at 290 (court's emphasis)
  12. 91 N.Y.2d 759, 676 N.Y.S.2d 104 (1998)
  13. Barry R. Temkin, New York's Labor Law 240: Has it Been Narrowed or Expanded by the

Courts Beyond the Legislative Intent? 44 New York Law Sch. L.Rev. 45 (2000). Mr. Temkin is associated with the law firm of Jacobowitz Garfinkel & Lesman, New York, New York

14. 44 New York Law Sch. L.Rev. at 67-68