

DROPPING IN ON THE CAUSATION CONTROVERSY
IN STRICT LIABILITY SCAFFOLD CASES

By Julian D. Ehrlich

The issue of proximate cause in analysis of the so-called scaffold statute, Labor Law §240(1), moved into the spotlight following the 1998 Court of Appeals case of *Weininger v. Hagedorn & Co.*¹ In his March 10, 1999 New York Law Journal article entitled *In Scaffold Cases, Courts are Moving from Absolute to Relative Liability*, Judge Andrew V. Siracuse noted that this case has been described by members of the plaintiff's bar as the end of strict liability under section 240 through a reintroduction of comparative negligence by the backdoor of proximate cause.² On the other hand, Judge Siracuse found the holding of *Weininger* "unexceptional"³ when considered in light of facts not discussed in the Court of Appeals decision.

This disparity exemplifies the stark differences, confusion and angst in how to approach proximate cause in Labor Law §240 cases.

Has the "exceptional protection"⁴ of the strict liability standard of Labor Law §240 fallen to a lower level via proximate cause analysis?

The following review of recent decisions dealing with the issue reveals decidedly different outcomes based on seemingly similar accident facts. Accordingly, identifying trends is problematic.

What is clear is that it is more important than ever for a skilled practitioner (1) to develop what will be decisive facts through investigation, depositions, discovery for trial and (2) to understand the key language in the developing case law to use in support of the practitioner's position.

The statute itself is silent as to how causation should be analyzed.⁵ However, as with the Pattern Jury charge for many other torts, the applicable jury charge, PJI 2:217,⁶ requires the jury to find first a failure to provide proper protection, then that the construction, placement, operation and maintenance of the scaffold, hoist, etc., was a substantial factor in causing the plaintiff's injury.

Why is the proximate cause analysis of this statute different from that of other torts? The courts frequently have to grapple with the concepts contained in the following four questions:

1. Where does foreseeability fit in light of the duty defined in the statute?
2. What constitutes proper protection?
3. When do the plaintiff's acts constitute the sole proximate cause of the accident?

4. When are the plaintiff's injuries due to other hazards not compensable under the statute?

The decision as to who is to judge the answers to the above questions determines in the first instance whether a summary judgment motion is granted to the plaintiff or the defendant or instead referred to the jury to determine fact issues.

There has been disagreement in the courts with respect to the issue of foreseeability. In *Secord v. Willow Ridge Stables, Inc.*,⁷ Judge Andrew V. Siracuse stated “[f]oreseeability is a gauge for duty in negligence cases, but in the face of the flat unvarying standard set out in Section 240(1) it has no application at all.”⁸

However, the Second Department took a different view in the often-cited case of *Mack v. Altmans Stage Lighting Company, Inc.*⁹ In fact, the court in *Mack* stated that “when, as here, liability is sought to be imposed without regard to fault, there is even more reason to require a nexus between the wrongful act and the injury.”¹⁰ The court explained that in the §240 case “[f]oreseeability also plays a role in the proximate cause equation, albeit quite different from that in determining the scope of duty.”¹¹ The court opined that foreseeability provides a rough gauge as to whether the chain of causation is broken by an intervening act since “[a] defendant remains liable for all normal and foreseeable consequences of his acts.”¹²

Regardless of whether or not it is proper to consider foreseeability in this context, courts since *Mack* have repeatedly done so.

Similarly with respect to proper protection the courts have grappled with the concept of the reasonableness. The Court of Appeals in *Zimmer v. Chemung County Performing Arts, Inc.*¹³ held that

the primary distinction between sections 240 (subd. 1) and 241 (subd. 6) is that the latter requires a determination of whether the safety measures actually employed on a job site were ‘reasonable and adequate,’ while the former is mandatory in its nature and imposes absolute liability for any injury arising from its breach. The question of circumstantial reasonableness is therefore irrelevant under subdivision 1 of section 240.¹⁴

Nonetheless, as discussed below, there is no shortage of decisions that, seem to consider the reasonableness of protection under the circumstances. This is particularly true in situations where there is nothing wrong with the ladder or scaffold or there is a question as to whether such a device was even needed. Moreover, in at least one case the court held that in addition “the totality of the circumstances” will determine whether the defendants are entitled to the separate but related defense that plaintiff was a recalcitrant worker.¹⁵

It is clear since *Weininger* that when the plaintiff's acts constitute the sole proximate cause of the accident, no §240 claim will lie. How is proximate cause to be distinguished from the plaintiff's comparative negligence? When is the chain of causation broken? When do the defendant's acts constitute a substantial cause of events producing the plaintiff's injuries?

The following three considerations were set forth in *Mack*: (1) the aggregate numbers of factors involved that contribute towards the harm and the effect which each has in producing it; (2) whether the defendant has created a continuing force active up to the time of harm, or whether the situation was acted upon by other forces for which the defendant is not responsible, and (3) the lapse of time.¹⁶

Frequently, defendants can argue that the plaintiff's acts were the sole proximate cause, while plaintiffs can argue that their acts are comparative negligence that is not to be considered.

With regard to whether the plaintiff was injured by other types of hazards not compensable under the statute, the Court of Appeals held in *Ross v. Curtis-Palmer Hydro-Electric Co.*¹⁷ that §240 "was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device."¹⁸ Other types of hazards are considered in a myriad of situations.

The remainder of this article will examine the above concepts, dispositive facts and prevailing arguments in seven common §240 scenarios.

Although many decisions give only a brief description of facts and arguments, the losing side often seems to have failed to develop or advocate proven arguments.

NOTHING WRONG WITH THE LADDER OR SCAFFOLD

Cases both before and after *Weininger* deal with the situation where a plaintiff falls from a scaffold or ladder that neither fails nor is improperly placed. Typically, the cause of the fall is either unknown or is due to some activity taking place in the area.

If the ladder does not fail, has the defendant met the duty to provide proper protection?

In a traditional analysis of any tort, the plaintiff must prove the four elements of a tort in sequence: (1) duty, (2) breach, (3) causation, and (4) damages. If any element is not met along the way, further analysis is not necessary. The jury charge for a §240 case in PJI 2:217 follows this step-by-step method.

In addition, support for this approach is found in Judge Fischer’s decision in *Guite v. Cooke Brothers of Brockport, Inc.*,¹⁹ wherein he states “[c]lose examination shows that the issues of ‘proper protection’ and proximate cause are discrete.”²⁰

Following the classic approach, if the proper protection is found to be in place, then there is no breach and thus no need to consider proximate cause.

Nonetheless, cases have intertwined the concepts. For example, in *Weber v. 1111 Park Avenue Realty Corp.*,²¹ the First Department, citing *Zimmer*, reasoned that “if proximate cause is established, the responsible parties have failed, as a matter of law, to give ‘proper protection.’”²²

Does this mean there can be liability under §240 where the defendant provided proper protection? The remainder of the court’s analysis in *Weber* indicates otherwise.

In *Weber*, the court considered a situation where the plaintiff, who was installing a sheet rock ceiling while standing on a ladder, was shocked by temporary light cables causing him to fall.²³ The court denied the plaintiff’s motion for summary judgment under Labor Law §240 and, referring to *Weininger*, stated that “[i]n similar circumstances, where injury resulted from a fall from a ladder not alleged to be defective in any way, the Court of Appeals recently stated ‘a reasonable jury could have concluded that plaintiff’s actions were the sole proximate cause of his injuries, and consequently that liability under Labor Law § 240(1) did not attach.’”²⁴

Indeed, the conclusion in *Weber* appears to interpret *Weininger* as supporting the notion that where there is nothing wrong with the ladder or scaffold, there should be an issue of fact as to whether plaintiff's sole negligence was the proximate cause of the accident for plaintiff. Thus, where there is nothing wrong with the ladder, plaintiff should not be given summary judgment.

Judge Fischer in *Guite* stated “[t]here is a split in the departments of the Appellate Division concerning whether summary judgment should be granted in such a case [where the ladder did not fail], and the question arises whether the recent Court of Appeals opinion in *Weininger*, . . . resolves this conflict.”²⁵

However, there are cases in all four departments denying plaintiffs' summary judgment motions based, at least in part, on the fact that the ladder or scaffold did not fail.²⁶ In fact, several Second and Third Department cases have gone further and actually held the dismissal of plaintiff's claims on this basis proper.

In *Custer v. Cortlandt Housing Authority*,²⁷ the court dismissed a plaintiff's §240 claim where there was no evidence to suggest that the ladder in any way failed, the plaintiff testified that he was satisfied that the ladder was stable, and the foreman testified at deposition that the ladder was still standing after the fall and had not moved at all. The foreman and a co-worker did not hear the ladder rattling or the plaintiff crying out prior to observing plaintiff fall through the air.²⁸ The court found that the plaintiff, who

claimed amnesia, could only speculate that he must have slipped.²⁹ The court mentions in a footnote that the plaintiff had admitted a history of passing out and falling at work and that the foreman testified that plaintiff appeared to be unconscious at the time of the fall.³⁰

The court in *Smith v. Wisch*³¹ reached an outcome similar to that of *Custer*. In *Smith*, the plaintiff was found dead on the ground below a sundeck, which he accessed earlier by a ladder.³² The railing of the sundeck was also found broken on the ground near plaintiff but the ladder was in place.³³ There was no eyewitness account of how the plaintiff came to fall or where he was just before he fell.³⁴ However, plaintiff's co-worker had warned the plaintiff on many occasions not to lean on any fence.³⁵ In dismissing the plaintiff's 240 claim, the court held:

The circumstances of the deceased's fall imply the absence of any causative defect as clearly as they imply its presence and therefore would subject a jury to speculative evaluation of the merits of the action. Where a jury would be compelled to speculate upon various possible causes of an accident "which may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then the plaintiff is not entitled to recover, and the evidence should not be submitted to the jury."³⁶

However, similar facts do not necessarily lead to similar outcomes. *Custer* and *Smith, supra*, are to be compared with *Saldana v. Saratoga Realty Associates Limited Partnership*.³⁷ In *Saldana*, decided just two years prior to *Custer*, the same court that decided *Custer* actually granted the plaintiff's summary judgment under §240 where the plaintiff similarly claimed no memory of the accident and was last seen before the accident climbing a ladder to a mezzanine five to ten minutes prior to his fall.³⁸ After a crash was heard the plaintiff was found unconscious on the concrete floor under the mezzanine with the ladder on the floor beside him.³⁹ The court held that "[a]lthough plaintiff has not established the precise manner in which the accident occurred, it is undisputed that he was injured as a result of a fall, either from the ladder itself, which was neither tied nor secured in any fashion, or from the elevated mezzanine area where he was assigned to work."⁴⁰ The court went on to hold that

the only reasonable inference that may be drawn from this record is that plaintiff's injuries were the consequence of defendant's failure to furnish an appropriate safety device 'so constructed, placed and operated' as to provide proper protection from the special gravity-related hazards associated with working at a significant height above the ground.⁴¹

What facts are decisive? The position of the ladder after the accident? One plaintiff's admission that he thought the ladder was stable? One plaintiff's history of passing out?

One lesson to be learned by contrasting *Custer* and *Smith* with *Saldana* is that the position of the ladder after the accident can be dispositive and thus should be explored during investigation and depositions.

An additional important but often overlooked issue concerning proper protection to be explored during investigation and discovery is whether use of a ladder or scaffold was even necessary to accomplish plaintiff's task.

In *Curtis v. Halmar Corporation*,⁴² the court upheld a defendants' verdict where a jury found a section 240 violation but no proximate cause. In *Curtis*, the plaintiff was allegedly injured when he fell from a ladder that kicked out from under him while he was attempting to use a drill at a five to six-foot-high railway platform.⁴³ Of note is that the plaintiff was five feet three inches tall and after the fall accomplished his task without the use of the ladder.⁴⁴ In upholding the jury's finding of no proximate cause, the court held that

the jury could have found either that the accident had not occurred as the plaintiff claimed or that no safety device was necessary to perform the task which allegedly injured the plaintiff. Thus, the jury could reasonably have concluded that the failure by the plaintiff to provide safety

devices was not a substantial factor in causing the plaintiff's injury.⁴⁵

Is there proper protection where the ladder performs its primary function but is involved with another danger?

In *Adams v. Owens-Corning Fiberglass Corporation*,⁴⁶ the court dismissed a §240 claim where the plaintiff, a self-employed master electrician, used an aluminum extension ladder (provided by the general contractor) in order to reach a junction box where he was to connect some wires. The wires became electrified and since the plaintiff was not wearing insulated gloves, his muscles contracted making it impossible for him to release the wires or climb down the ladder.⁴⁷ He asked another worker to kick the ladder out so the weight of his falling body would free him from the uninsulated wires.⁴⁸ He sustained multiple injuries after falling to the concrete floor. In dismissing the claim the court noted that the “ladder did not slip, collapse or otherwise fail to perform its function of protecting Adams from falling.”⁴⁹ Indeed, the ladder prevented the plaintiff from falling and but for his directions that his coworkers kick the ladder from under him, he undoubtedly would have been fatally electrocuted.⁵⁰

It is interesting to compare *Adams* to *Sprague v. Peckharn Materials Corp.*,⁵¹ in which the court denied plaintiff's section 240 motion where he fell from a ladder after the ladder's right leg sank into the gravel on the ground.⁵² The court found that an absence of any ladder defect precluded summary judgment.⁵³

As Judge Siracuse pointed out in his NYLJ article, surely a ladder resting on unstable soil is improperly placed.⁵⁴

Also of note in this category is *Capalbo v. Lederle Laboratories, Inc.*,⁵⁵ where the court denied the plaintiff's motion to amend his complaint to assert a Labor Law §240 claim.⁵⁶ In *Capalbo*, the plaintiff had originally pled that his fall from a ladder was due to a defective drill bit becoming lodged in a reinforced steel bar, causing the drill to spin around and hit the plaintiff in the chest, knocking him off the ladder.⁵⁷ Moreover, the plaintiff in *Capalbo* had originally provided an expert report indicating that the prime contributing factors to his injury were the improper design and/or manufacture of the drill's safety clutch and the failure of defendants to warn the plaintiff of the drilling hazard caused by hidden steel bars in the wall.⁵⁸ In denying the plaintiff the ability to even allege a Labor Law §240 violation, the court noted that the plaintiff's deposition testimony refuted any claim that the ladder was defective or unsafe, or that the absence of any protective device was a substantial cause of his injury.⁵⁹

The tone of the *Capalbo* decision suggests that the court punished the plaintiff for attempting to add a §240 claim as an afterthought to a situation where such a violation is routinely pled.

What if the safety device works as intended but the plaintiff is still injured?

In *Kyle v. City of New York*,⁶⁰ the trial court dismissed the plaintiffs' Labor Law §240 claims where the plaintiffs, ironworkers working under the 59th Street Bridge, were standing on a platform that buckled and collapsed. As a result, the plaintiffs were suspended in their safety body harnesses 130 feet above the river until they were rescued by a crane.⁶¹ The trial court found "the safety equipment provided and actually used by the plaintiffs worked as intended and prevented them from free falling."⁶² In the trial court decision plaintiffs' injuries were not specified and the decision does not indicate whether the plaintiffs argued that another device should have been used.

However, the First Department reversed.⁶³ In its decision, the First Department provided more details of the accident adding that plaintiff Kyle fell 30 feet although he was equipped with a body harness, lanyard and "yo-yo" which operated like a retractable dog leash.⁶⁴ He dangled for 45 minutes and his injuries included cervical derangement and radiculopathy, disc bulge at C5-C6, C6-7. The court held "it is evident that the safety device provided proved inadequate to shield plaintiff from the harm which flowed directly from the application of the force of gravity to his person."⁶⁵

What if the plaintiff had only fallen a foot but suffered the same injuries? Is the equipment provided inadequate by definition if the plaintiff is injured?

Cases where nothing is wrong with the ladder are to be distinguished from cases where a functioning ladder is insufficient and another device should have been used. In *Dunn v. Consolidated Edison Co. of New York, Inc.*⁶⁶ and *Choi v. Bayside K.M. Realty*,⁶⁷

the plaintiffs were knocked off ladders by objects they were working on and the courts granted plaintiffs' §240 motions on the ground that the ladders were inadequate devices for the work taking place.

Based on *Dunn* and *Choi*, defendants must prepare a logical explanation for the choice of one device over another.

COWORKERS' ACTS

Another area that highlights how slight fact differences can result in different outcomes is the scenario where the plaintiff's injuries are caused by a coworker knocking into the scaffold.

As discussed above, in *Adams* the court dismissed the plaintiff's §240 action where plaintiff instructed the coworker to kick out the ladder to avoid electrocution.⁶⁸ However, in *Mooney v. PCM Development Company*,⁶⁹ the plaintiff fell off a scaffold after it was struck by a mechanical lift.⁷⁰ In granting the plaintiff's §240 motion, the court held "[t]he risk that the scaffold might be struck by another piece of equipment operated in the same area was neither so extraordinary nor so attenuated as to constitute a superseding cause sufficient to relieve [defendants] of liability."⁷¹

Nonetheless, in *Bernal v. City of New York*,⁷² the court denied a plaintiff's section 240 motion where the plaintiff fell while a coworker attempted to lower him on a Hi-Lo

to a scaffolding that collapsed when the Hi-Lo bumped into it.⁷³ The court noted that on prior occasions the parties had not used the Hi-Lo to access the scaffold but rather the workers had climbed the scaffolding structure itself.⁷⁴ The court held “[g]iven this evidence, a reasonable fact-finder might conclude that the coworker’s conduct was the sole proximate cause of the plaintiff’s injuries or that the coworker’s conduct constituted an unforeseeable superseding, intervening act.”⁷⁵

Is a co-defendant’s knocking into a ladder foreseeable or not? Does it depend upon the circumstances (i.e. circumstantial reasonableness)?

In *Girty v. Niagara Mohawk Power Corporation*,⁷⁶ the court granted plaintiff’s §240 motion where the plaintiff was secured to a utility pole by a safety belt and gaffs he wore on his legs, but was nevertheless slammed several times into the pole after it was struck by another worker driving a truck into a steel support wire.⁷⁷ Although the plaintiff only fell one foot until his safety belt caught on the line, the court found “his injuries were the proximate result of the failure of the devices he was using to ‘give proper protection’”.⁷⁸ The court found for the plaintiff even though the plaintiff did not fall to the ground and his injuries did not result solely from the impact of his fall but were also caused when his body was slammed several times into the shaking utility pole.⁷⁹

It is difficult to reconcile the holding in *Girty* with that in *Kyle*, since both cases involve plaintiffs injured even though the safety belt device worked.

SNOW, WIND, RAIN, BEES AND GREASE

Another scenario where proximate cause comes into play is when the plaintiff's injury resulted from combination of use of the ladder or scaffolding with exposure to the elements. Arguably, every natural element involved in the various plaintiffs' accidents in the following cases is foreseeable, but the outcomes go both ways.

In *Ross v. Threepees Realty Corp.*,⁸⁰ the court dismissed plaintiff's §240 claim where he fell from a ladder after being stung by a bee.⁸¹

In *Zeitner v. Herbmax Sharon Associates*,⁸² the court denied plaintiff's §240 motion where plaintiff admitted that a gust of wind caused him to fall off a ladder while he was holding a storm window with both hands.⁸³ The court found that since there was no evidence of placement or positioning problems with the ladder, there were unresolved material issues of fact with regard to proximate cause.⁸⁴

However, in *Robinson v. NAB Construction Corp.*,⁸⁵ the court granted plaintiff's §240 motion where plaintiff fell off a scaffold-ladder during a rainstorm.⁸⁶ The court held that

[e]vidence of rain, or other 'concurrent cause,' at the time of the accident does not create a triable issue of fact as to proximate cause where plaintiff has met her burden in

establishing her §240 claim. If anything, the readily foreseeable occurrence of rainy conditions at an outdoor construction site highlights defendants' negligence in failing to provide statutorily-prescribed safety measures.⁸⁷

The court in *Robinson* did not state what the missing measures were. Further, it is difficult to distinguish how a bee sting or a gust of wind would not be as foreseeable as rain at an outdoor construction site. Are these the "other hazards" that are not elevation related referred to in *Ross v. Curtis-Palmer Hydro-Electric Co.*?

In *Arce v. 1133 Building Corporation*,⁸⁸ the court granted the plaintiff summary judgment under §240 where plaintiff testified that he fell from an unsteady ladder even though defendants contended that the plaintiff may have fainted due to heat.⁸⁹ The court stated that "even if the testimony of defendants' expert witness were sufficient to raise a fact question on the cause of plaintiff's fall, partial summary judgment would still have been properly granted to plaintiffs because defendants failed to provide proper protection to plaintiff, e.g., a scaffold, in the event he became overcome by heat, which was foreseeable under the circumstances."⁹⁰

Similarly, in *Nephew v. Barcomb*,⁹¹ the court granted plaintiff's §240 motion where plaintiff slipped on a slightly pitched roof where he was removing snow and ice.⁹² Dispositive in *Nephew* was that "no safety device was provided to protect plaintiff from a fall from a pitched roof covered with snow and ice...."⁹³ Unavailing to defendants was

that plaintiff actually slid several feet along the roof to the edge before attempting to grab a ladder to arrest his fall.⁹⁴

However, in *Fernicola v. Benenson Capital Company*,⁹⁵ the court dismissed the plaintiff's Labor Law §240 claim where he slipped on grease on a rung of a scaffold, noting that the scaffold was not defective and did not move or collapse.⁹⁶

Is providing a slippery, greasy scaffold providing and operating a proper device?

ESCAPE

Yet another situation where lack of proximate cause may defeat a §240 claim is where the plaintiff voluntarily attempts to leave a safe but inconvenient area. Foreseeability weighs heavily here.

Most recently in *Egan v. A.J. Construction Corp.*,⁹⁷ the Court of Appeals held that plaintiff's §240 claim was not only properly dismissed but that plaintiff's actions constituted a superseding event terminating defendant's liability.⁹⁸ In *Egan*, the plaintiff and 25 to 30 other construction workers were caught in an elevator that stalled.⁹⁹ When plaintiff jumped to the lobby floor, he felt a shock in his spine.¹⁰⁰ The Court of Appeals held that "[a]s a matter of law, plaintiff's act of jumping out of a stalled elevator six feet above the lobby floor after the elevator's doors had been opened manually was not foreseeable in the normal course of events resulting from defendants' alleged

negligence.”¹⁰¹ Of importance to the court’s decision was that the plaintiff was not threatened by any injury while in the stalled elevator and that he was aware that the operator had telephoned for assistance.¹⁰²

It should be noted that the *Egan* case reversed the Appellate Division’s divided First Department decision and has been the subject of criticism by Professor David Siegel in the February 2000 issue of *New York State Law Digest*.¹⁰³

Similar to *Egan* is *Antonik v. New York City Housing Authority*,¹⁰⁴ where the court held plaintiff’s §240 claim was properly dismissed where plaintiff had fallen to his death attempting to exit a stalled elevator.¹⁰⁵ As in *Egan*, critical to the court’s decision was that the plaintiff was not in an emergency situation and merely had to wait for the operator to restart the stalled elevator.¹⁰⁶

Also, in *George v. State of New York*,¹⁰⁷ the court held a plaintiff’s §240 claim properly dismissed, rejecting the so-called “danger invites rescue” doctrine.¹⁰⁸ In *George*, the plaintiff twice jumped eight feet to a protective debris shield where a coworker had fallen instead of using a ladder 100 feet away.¹⁰⁹ The court held that “the claimant was not compelled to jump to his coworker’s aid as a result of any negligence of the defendant and accordingly any such negligence was not a proximate cause of his injuries.”¹¹⁰ Further “his gratuitous and unnecessary second jump was the sole and superseding proximate cause of his injuries.”¹¹¹

Similarly in *Mack*, the court held that the plaintiff's §240 claim was properly dismissed where a plaintiff, stranded on a roof after wind blew the ladder down, decided to lower himself using a worn, old rope that broke.¹¹² In so holding, the court noted that plaintiff was not in any immediate danger, although no alternative means of descent was discussed.¹¹³

However, if the court finds the jump necessary to avoid a danger caused by a §240 violation, plaintiff will be granted judgment. Such was the case in *Cosban v. New York City Transit Authority*,¹¹⁴ where the plaintiff jumped from a crane that was in the process of falling due to defective wood cribbing.¹¹⁵

Is examining the emergency nature of plaintiff's situation a consideration of circumstantial reasonableness?

MISUSE

A number of decisions -- including *Weininger* itself -- deal with situations where plaintiff misused the device in question or failed to use the proper method to accomplish the task at hand. How is misuse to be distinguished from plaintiff's comparative negligence, which cannot be considered?

In cases favorable to defendants, plaintiff's misuse raises the specter of whether plaintiff's actions were the sole proximate cause of the injury. However, here as in the

other areas, the decisions frequently contain only abbreviated descriptions of facts and arguments.

In *Weininger* itself, although not mentioned in the Court of Appeals decision, there was evidence that plaintiff was standing on a cross bar of the ladder, thus misusing the device.¹¹⁶ There the Court of Appeals held “in the circumstances presented, a reasonable jury could have concluded that plaintiff’s actions were the sole proximate cause of his injuries and consequently liability under Labor Law §240(1) did not attach.”¹¹⁷

Weininger is consistent with *Anderson v. Schul/Mar Construction Corp.*,¹¹⁸ where the court held plaintiff’s §240 motion properly denied where there was testimony that plaintiff missed a wrung while descending the ladder as a person would descend a staircase, i.e., facing away from and not holding on to the ladder, carrying a cup of coffee in one hand and his breakfast in the other.¹¹⁹

Another misuse case is *Vouzianas v. Bonasera*,¹²⁰ where the court denied plaintiff’s §240 motion since the “plaintiff’s conduct in disassembling the extension ladder at issue, and in using only the top half which lacked non-skid pads, constituted an unforeseeable, independent, intervening act which was a superseding cause of the accident.”¹²¹ Unfortunately, no additional facts are given.

In another misuse case, *Martin v. A-1 Compaction, Inc.*,¹²² the court held a plaintiff's §240 claim properly dismissed where plaintiff was fatally injured jumping up and down on a conveyor belt of a wood chipper in order to collapse the belt so the chipper could be moved.¹²³ Dispositive to the court's decision was the evidence that the conveyor belt could be folded while workers stood on the ground.¹²⁴

Martin is consistent with the earlier similar case of *Richardson v. Matarese*,¹²⁵ where the court denied plaintiff's §240 motion.¹²⁶ In *Richardson*, the plaintiff fell through a floor while rolling an 800-pound radiator.¹²⁷ Since there was evidence that the plaintiff was instructed to break up the radiator and throw the pieces out the window, the court found "there is an issue of fact as to whether a violation of Labor Law §240 was a proximate cause of the plaintiff's injuries."¹²⁸

Accordingly, another subject to explore through investigation and discovery is whether there was a more appropriate alternative method to accomplish the task plaintiff was undertaking.

Other instances where the court has denied the plaintiff's §240 motions include *Ossorio v. Forest Hills South Owners, Inc.*,¹²⁹ where there was evidence that plaintiff cut the rope of the scaffold on which he was standing,¹³⁰ and *Tweedy v. Roman Catholic Church of Our Lady of Victory*,¹³¹ where the plaintiff may have untied a rope of a scaffold and then stepped on the unsecured section.¹³²

However, the above cases no doubt would be subject to criticism that the plaintiff's negligence is not to be considered in §240 analysis.¹³³ Indeed, in other misuse cases the courts do not seem reluctant to grant plaintiffs judgment under §240.

In *Lawrence v. Forest City Ratner Companies*,¹³⁴ the court granted the plaintiff summary judgment under Labor Law §240 where plaintiff fell 16 feet off a scaffold that broke in two.¹³⁵ In *Lawrence*, the court stated “[t]o the extent that plaintiff may have failed to lock the wheels of the scaffold, it cannot be said that this was the sole proximate cause of the accident.”¹³⁶

Also, in *Vanriel v. Weissman Real Estate*,¹³⁷ the court granted the plaintiff's §240 motion rejecting defendants' arguments that plaintiff fell because of his own failure to activate a locking device for scaffold wheels.¹³⁸

Similarly, in *Orcutt v. American Linen Supply Company*,¹³⁹ the Court granted a §240 motion to the plaintiff where plaintiff drove a manlift into a hole, finding this to be a foreseeable consequence in this situation created by defendant's negligence in not barricading holes in the floor.¹⁴⁰

Also, in *Clark v. Fox Meadow Builders, Inc.*,¹⁴¹ the court granted the plaintiff's §240 motion where plaintiff removed the plywood cover over an opening and subsequently fell in the opening, stating “it cannot be said that removal of the plywood cover was an unforeseeable intervening act.”¹⁴²

It is interesting to note is that many of these decisions rely in large part on their consideration of foreseeability.

In *Smizaski v. 784 Park Avenue Realty*,¹⁴³ the court granted plaintiff's §240 motion where he fell 30 feet off a scaffold despite wearing a safety line.¹⁴⁴ The defendants offered the explanation that the plaintiff failed to engage a rope grab that would have arrested his fall, and was in fact holding it in the open, disengaged position as he fell.¹⁴⁵ In finding for the plaintiff the court held that since the rope grabbing mechanism could be accidentally held in the disengaged position, it was defective.¹⁴⁶ Since plaintiff's conduct was foreseeable, it was not considered a superseding cause.¹⁴⁷

In an obvious understatement that resonates throughout this topic, the court held “[u]ndeniably the distinction between the situation when a worker’s conduct is the sole proximate cause of an accident, and when it is merely a contributing factor, can be difficult to discern under a given set of facts.”¹⁴⁸

INTOXICATION

Another cluster of cases discusses the related issue of plaintiff's intoxication.

In *Kijak v. 330 Madison Avenue Corp.*,¹⁴⁹ the court found that plaintiff's fall from a flimsy ladder established a §240 violation as a matter of law despite evidence of the smell of alcohol on plaintiff's breath in the hospital.¹⁵⁰ The court found that “defendants

offered no evidence of how much the plaintiff had to drink, when he drank it, whether or not he was intoxicated or whether or not his intoxication was even a contributing cause of his fall, let alone the sole cause.”¹⁵¹

In *Hodge v. Crouse Hinds Division of Cooper Industries*,¹⁵² the court considered evidence of plaintiff’s intoxication to be merely contributing negligence “admissible only as proof that such intoxication was the sole proximate cause of the accident.”¹⁵³ Since lack of safety devices was found to be a proximate cause, the intoxication was not a defense.¹⁵⁴

In *Tate v. Clancy-Cullen Storage Co., Inc.*,¹⁵⁵ the court similarly found a §240 violation as a matter of law where a plaintiff unsecured by a safety belt fell, despite defendant’s submission of an affidavit from a biological psychologist who concluded from a review of hospital and medical records that plaintiff was intoxicated.¹⁵⁶ The court deemed the plaintiff’s intoxication was merely evidence of contributing negligence not to be considered after the §240 violation was found to be a contributing cause.¹⁵⁷

The consistent approach is that intoxication can only be admissible as evidence if it would allow the fact-finder to conclude that the plaintiff’s actions were the sole proximate cause of the injuries.

PERILS TOO TENUOUSLY CONNECTED TO GRAVITY

In *Ross*, the Court of Appeals held that the special hazards to which the statute applies “do not encompass any and all perils that may be connected in some tangential way with the effects of gravity.”¹⁵⁸ What are such perils?

In *Califano v. Brodcom West Development Co.*,¹⁵⁹ the court dismissed the plaintiff’s Labor Law §240 claim where the plaintiff was startled by the crash caused by the falling of an improperly secured crane wrecking ball.¹⁶⁰ Plaintiff’s start caused him to drop steel tools he was carrying and fall to the ground.¹⁶¹ The court held that the fact that the noise was caused when part of the hoist fell to the ground is not sufficient to bring plaintiff’s accident within the purview of the statute.”¹⁶²

Also in *Stark v. Eastman Kodak Company*,¹⁶³ the court dismissed the plaintiff’s §240 claim where plaintiff stepped off the second rung of the ladder with greater force than expected because he believed he was on the bottom rung.¹⁶⁴ The court found the plaintiff’s actions to be the sole proximate cause of the accident.¹⁶⁵

However, in *Mattesi v. Tishman Speyer Properties*,¹⁶⁶ the court granted the plaintiff’s summary judgment motion where plaintiff was pulled and then crushed into machinery when rope used to hoist a heavy load broke.¹⁶⁷ The court found the plaintiffs injuries here to have directly flowed “from the improper rope.”¹⁶⁸

CONCLUSION

In sum, it is more important than ever that defendants be prepared not only to oppose plaintiffs' summary judgment motions but also attempt to lay ground work for a potential motion to dismiss plaintiffs' §240 actions. It is essential to conduct early investigation by contacting the plaintiff's foreman and coworkers to determine potential contrary versions of the accident or plaintiffs' misuse of equipment or methods, and to develop any inconsistencies in plaintiffs' versions. Mere speculation and alleged contradictions that do not raise *bona fide* credibility issues will not suffice.¹⁶⁹

The above discussion is certainly not exhaustive of every case discussing proximate cause in the §240 scenario but rather is intended to serve as a guide and framework as to where counsel's efforts should be focused. The disparate holdings underscore that the area is developing and ripe for practitioners to test where courts will draw the line cutting off proximate cause.

L:\JDE1\danyarticle.doc

¹ 91 N.Y.2d 958, 672 N.Y.S.2d 840 (N.Y. 1998).

² J. Breakstone, *Notes & Decisions*, New York State Trial Lawyers Association *Bill of Particulars* December 1998, at 16.

³ Siracuse, *In Scaffold Cases, Courts are Moving from Absolute to Relative Liability*, N.Y.L.J., March 10, 1999.

⁴ *Ross v. Curtis Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 500-501, 601 N.Y.S.2d 49, 52 (1993).

⁵ Labor Law §240 states:

Scaffold and other devices for use of employees: 1. All contractors and 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. 2. No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers as provided for Article One Hundred Forty Five of the Education Law, Architects as provided for in Article One Hundred Forty Eight of such law who do not direct or control the work for activities other than planning and design. This

exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provision of law.

N.Y. Labor Law § 240(1) (McKinney 1983).

⁶ 1A PJI ¶ 2:217 provides:

Injured Employee—Action Under Statute Imposing Absolute Liability.

Section 240 of the Labor Law requires all (contractors, owners) in the (erection, demolition, repairing, altering, painting, cleaning, pointing) of a (building, structure) to furnish or erect for the performance of such work (*[specify device such as:]* scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, other devices), which shall be so (constructed, placed, operated, maintained) as to give proper protection to the person performing such work.

Plaintiff was (employed, engaged) in the (*[state operation such as:]* erection, demolition, etc.) of a (building structure). If defendant breached this statutory duty and such breach was a substantial factor in causing plaintiff's injuries, the statute imposes liability whether or not defendant was at fault and whether or not there was any fault on the part of plaintiff that contributed to the injury.

If you find that the (scaffolding, hoists, etc.) being used by plaintiff as so (constructed, placed, operated, maintained) as to give proper protection to plaintiff, you will find for defendant on this issue.

If you find that the (scaffolding, hoists, etc.) was not so (constructed, placed, operated, maintained) as to give proper protection to plaintiff in the performance of the work, and that the (construction, placement, operation, maintenance) of the (scaffolding, hoists, etc.) was a substantial factor in causing plaintiff's injury, you will find for plaintiff on this issue.

⁷ 179 Misc. 2d 566, 684 N.Y.S.2d 867, 871 (Monroe County 1999).

⁸ *Id.*

⁹ 98 A.D.2d 468, 470 N.Y.S.2d 664 (2nd Dept. 1984).

¹⁰ *Id.* at 666.

¹¹ *Id.*

¹² *Id.*

¹³ 65 N.Y.S.2d 513, 524, 493 N.Y.S.2d 102, 107 (1985).

¹⁴ *Id.*

¹⁵ *Jastrzebsky v. North Shore School District*, 233 A.D.2d 677, 680, 637 N.Y.S.2d 439, 442 (2nd Dept. 1996).

¹⁶ *See Mack*, 470 N.Y.S.2d at 667.

¹⁷ *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 500, 601 N.Y.S.2d 49, 52 (1993).

¹⁸ *Id.*

¹⁹ 178 Misc.2d 948, 682 N.Y.S.2d 816, 821 (Monroe County 1998).

²⁰ *Id.*

²¹ 253 A.D.2d 376, 676 N.Y.S.2d 174, 175 (1st Dept. 1998).

²² *Id.* (citing *Zimmer*, 493 N.Y.S.2d at 107.)

²³ *See Weber*, 676 N.Y.S.2d at 175.

²⁴ *Id.*

²⁵ *Guite*, 682 N.Y.S.2d at 819.

²⁶ *Eitner v. 119 West 71st Street Owners Corp.*, 253 A.D.2d 641, 677 N.Y.S.2d 555 (1st Dept. 1998); *Alava v. City of New York*, 246 A.D.2d 614, 668 N.Y.S.2d 624 (2nd Dept. 1998); *Zgoba v. Easy Shopping Corp.*, 246 A.D.2d 539, 667 N.Y.S.2d 426 (2nd Dept. 1998); *Kahn v. Convention Overlook, Inc.*, 232 A.D.2d 529, 648 N.Y.S.2d 946 (2nd Dept. 1996); *Romano v. Hotel Carlyle Owners Corp.*, 226 A.D.2d 441, 641 N.Y.S.2d 50 (2nd Dept. 1996); *Gange v. Tilles Investment Co.*, 220 A.D.2d 556, 632 N.Y.S.2d 808 (2nd

Dept. 1995); *Briggs v. Halterman*, 699 N.Y.S.2d 795 (3rd Dept. 1999); *Spenard v. Gregware General Contracting*, 248 A.D.2d 868, 669 N.Y.S.2d 772 (3rd Dept. 1998); *Karas v. Corning Hospital*, 262 A.D.2d 1039, 692 N.Y.S.2d 626 (4th Dept. 1999).

²⁷ 697 N.Y.S.2d 739 (3rd Dept. 1999).

²⁸ *See id.* at 740.

²⁹ *See id.* at 741.

³⁰ *See id.* at 740 n. 2.

³¹ 77 A.D.2d 619, 430 N.Y.S.2d 115 (2nd Dept. 1980).

³² *See id.* at 116.

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.* at 117.

³⁶ 430 N.Y.S.2d at 117 (citations omitted).

³⁷ 235 A.D.2d 744, 652 N.Y.S.2d 374 (3rd Dept. 1997).

³⁸ *See id.* at 374.

³⁹ *See id.*

⁴⁰ *Id.* at 375.

⁴¹ *Id.* (citations omitted).

⁴² 250 A.D.2d 570, 672 N.Y.S.2d 409 (2nd Dept. 1998).

⁴³ *See id.* at 410.

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ 260 A.D.2d 877, 688 N.Y.S.2d 788 (3rd Dept. 1999).

⁴⁷ *See id.* at 789.

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 790.

⁵¹ 240 A.D.2d 392, 658 N.Y.S.2d 97 (2nd Dept. 1997).

⁵² *See id.* at 98.

⁵³ *See id.*

⁵⁴ *See Siracuse, supra* note 2, at ____.

⁵⁵ 257 A.D.2d 556, 683 N.Y.S.2d 284 (2nd Dept. 1999).

⁵⁶ *See id.* at 285.

⁵⁷ *See id.*

⁵⁸ *See id.* at 286.

⁵⁹ *See id.*

⁶⁰ 701 N.Y.S.2d 269 (N.Y. Sup. 1999).

⁶¹ *See id.* at 270.

⁶² *Id.*

⁶³ ____A.D.2d____, ____N.Y.S.2d____ (1st Dept. 2000) (NYLJ May 15, 2000)

⁶⁴ *Id.* at ____.

⁶⁵ *Id.*

⁶⁶ N.Y. L.J., October 26, 1999 at ____ (Sup. Ct. October __, 1999)

⁶⁷ N.Y. L.J., June 15, 1999, at 33 (Sup. Ct. June __, 1999)

⁶⁸ *See Adams*, 688 N.Y.S.2d at 789.

⁶⁹ 238 A.D.2d 47, 656 N.Y.S.2d 655 (2nd Dept. 1997).

⁷⁰ *See id.* at 656.

⁷¹ *Id.* at 656 (citations omitted).

⁷² 217 A.D.2d 568, 628 N.Y.S.2d 823 (2nd Dept. 1995).

⁷³ *See id.* at 824.

⁷⁴ *See id.*

⁷⁵ *Id.* (citations omitted).

⁷⁶ 262 A.D.2d 1012, 691 N.Y.S.2d 822 (4th Dept. 1999)

⁷⁷ *See id.* at 1013-14.

⁷⁸ *Id.* (citation omitted).
⁷⁹ *See id.*
⁸⁰ 258 A.D.2d 575, 686 N.Y.S.2d 448 (2nd Dept. 1999).
⁸¹ *See id.* at 450.
⁸² 194 A.D.2d 414, 599 N.Y.S.2d 234 (1st Dept. 1993).
⁸³ *See id.* at 234.
⁸⁴ *See id.*
⁸⁵ 210 A.D.2d 86, 620 N.Y.S.2d 337 (1st Dept. 1994).
⁸⁶ *See id.* at 338-39.
⁸⁷ *Id.*
⁸⁸ 257 A.D.2d 515, 684 N.Y.S.2d 523 (1st Dept. 1999).
⁸⁹ *See id.* at 524.
⁹⁰ *Id.* (citation omitted).
⁹¹ 260 A.D.2d 821, 688 N.Y.S.2d 751 (3rd Dept. 1999).
⁹² *See id.* at 754.
⁹³ *Id.*
⁹⁴ *See id.* at 753.
⁹⁵ 252 A.D.2d 569, 676 N.Y.S.2d 610, 611 (2nd Dept. 1998).
⁹⁶ *See id.*
⁹⁷ 94 N.Y.2d 839, 702 N.Y.S.2d 574 (1999).
⁹⁸ *See id.*
⁹⁹ *See id.*
¹⁰⁰ *See id.*
¹⁰¹ 702 N.Y.S.2d at 576.
¹⁰² *See id.*
¹⁰³ Siegel, *Court of Appeals Grant Summary Judgment in Negligence Case After Lower Court Ruled Against It Raises Again the Use of Summary Judgment in Tort Cases*, New York State Law Digest, No. 482, February 2000.
¹⁰⁴ 235 A.D.2d 248, 652 N.Y.S.2d 33 (1st Dept. 1997).
¹⁰⁵ *See id.* at 34.
¹⁰⁶ *See id.*
¹⁰⁷ 251 A.D.2d 541, 674 N.Y.S.2d 742 (2nd Dept. 1998).
¹⁰⁸ *See id.* at 743.
¹⁰⁹ *See id.*
¹¹⁰ *Id.* at 744.
¹¹¹ *Id.* at 743 (citation omitted).
¹¹² *See Mack*, 470 N.Y.S.2d at 666.
¹¹³ *See id.*
¹¹⁴ 227 A.D.2d 160, 641 N.Y.S.2d 838 (1st Dept. 1996).
¹¹⁵ *See id.*
¹¹⁶ *Weininger*, 672 N.Y.S.2d at 841.
¹¹⁷ *See id.* (citation omitted).
¹¹⁸ 212 A.D.2d 493, 622 N.Y.S.2d 310 (2nd Dept. 1995).
¹¹⁹ *See id.*
¹²⁰ 262 A.D.2d 553, 693 N.Y.S.2d 59 (2nd Dept. 1999).
¹²¹ *Id.* (citation omitted).
¹²² 262 A.D.2d 537, 692 N.Y.S.2d 450 (2nd Dept. 1999).
¹²³ *See id.*
¹²⁴ *See id.*
¹²⁵ 206 A.D.2d 353, 614 N.Y.S.2d 424 (2nd Dept. 1994).
¹²⁶ *See id.* at 426.
¹²⁷ *See id.*
¹²⁸ *Id.* at 425-26 (citation omitted).
¹²⁹ 251 A.D.2d 475, 675 N.Y.S.2d 360 (2nd Dept. 1998).
¹³⁰ *See id.*

-
- ¹³¹ 232 A.D.2d 630, 648 N.Y.S.2d 685 (2nd Dept. 1996).
¹³² *See id.*
¹³³ *See* Siracuse, *supra* n. 3, at p. 1.
¹³⁴ ___ A.D.2d ___, 701 N.Y.S.2d 429 (1st Dept. 2000).
¹³⁵ *See id.*
¹³⁶ *Id.* (citation omitted).
¹³⁷ 262 A.D.2d 56, 691 N.Y.S.2d 446 (1st Dept. 1999).
¹³⁸ *See id.*
¹³⁹ 212 A.D.2d 979, 623 N.Y.S.2d 457 (4th Dept. 1995).
¹⁴⁰ *See id.* at 458.
¹⁴¹ 214 A.D.2d 882, 624 N.Y.S.2d 685 (3rd Dept. 1995).
¹⁴² *Id.* at 687.
¹⁴³ 264 A.D.2d 364, 694 N.Y.S.2d 371 (1st Dept. 1999).
¹⁴⁴ *See id.* at 373
¹⁴⁵ *See id.*
¹⁴⁶ *See id.* at 374.
¹⁴⁷ 694 N.Y.S.2d at 374.
¹⁴⁸ *Id.* (citations omitted).
¹⁴⁹ 251 A.D.2d 152, 675 N.Y.S.2d 341, 342 (1st Dept. 1998).
¹⁵⁰ *See id.*
¹⁵¹ *Id.*
¹⁵² 207 A.D.2d 1007, 616 N.Y.S.2d 822 (4th Dept. 1994).
¹⁵³ *Id.*
¹⁵⁴ *Id.*
¹⁵⁵ 171 A.D.2d 292, 575 N.Y.S.2d 832, 833-4 (1st Dept. 1991).
¹⁵⁶ *See id.* at 834-35.
¹⁵⁷ *See id.*
¹⁵⁸ 81 A.D. 500, 501, 601 N.Y.S.2d 49, 52 (1993).
¹⁵⁹ N.Y. L.J., Jan. 11, 2000 at ___ (Sup. Ct. Jan. __, 2000).
¹⁶⁰ *See id.*
¹⁶¹ *See id.*
¹⁶² *Id.*
¹⁶³ 256 A.D.2d 1134, 682 N.Y.S.2d 749 (4th Dept. 1998).
¹⁶⁴ *See id.* at 750.
¹⁶⁵ *See id.*
¹⁶⁶ N.Y. L.J., Feb. 3, 2000 at ___ (Sup. Ct. Feb. __, 2000).
¹⁶⁷ *See id.*
¹⁶⁸ *Id.*
¹⁶⁹ *See Wasilewski v. Museum of Modern Art*, 260 A.D.2d 271, 688 N.Y.S.2d 547 (1st Dept. 1999).