Center for Justice & Democracy's
Public Policy Clinic at
New York Law School
185 West Broadway, New York, NY 10013
212.431.2882

Student Contributor: Zach Perecman

FAQ: THE IMPORTANCE OF NEW YORK'S SCAFFOLD LAW

What is the "scaffold law?"

New York's "scaffold law" (also known as Labor Law § 240 and 241) requires "all contractors and owners and their agents…to give proper protection" to construction workers who work at heights.[1] It was enacted in 1885 to "safeguard construction workers who were finding themselves facing increasing dangers while working at ever-greater heights."[2] Lawmakers were concerned with the "unsafe conditions" and "widespread accounts of deaths and injuries in the construction trades."[3] Because they saw contractors and owners of jobsites as "best able to control the workplace and provide for its safety," legislators believed it was essential that a law be in place to provide them with strong incentives to maintain workplace safety.[4] In 2003, New York's highest court, the Court of Appeals, reiterated, "The objective was – and still is – to force owners and contractors to provide a safe workplace…."[5]

Is construction really that dangerous?

Yes. According to the U.S. Department of Labor, "[T]he fatal injury rate for the construction industry is higher than the national average in this category for all industries."[6] The Bureau of Labor Statistics reported 4,383 fatal work injuries" in 2012, which included 75 in New York City alone.[7] Construction and extraction occupations accounted for 25 of those fatalities, the majority of which involved workers between the ages of 25 and 34.[8] The Occupational Safety and Health Administration also reports that "[e]ach year, falls consistently account for the greatest number of fatalities in the construction industry."[9]

---

[1] N.Y. Lab. Law § 240 (McKinney 2013).
[2] Kirk Semple, "Contractors and Workers at Odds Over Scaffold Law," *New York Times*, December 17, 2013, http://www.nytimes.com/2013/12/18/nyregion/campaign-underway-to-amend-scaffold-law-protecting-construction-workers.html.
[3] *See Blake v. Neighborhood House. Servs. of N.Y.C., Inc.*, 1 N.Y.3d 280, 284–85 (2003).
[4] *Id.* at 286.
[5] *Ibid.*
[6] Occupational Safety & Health Administration, *Worker Safety Series: Construction* (viewed March 11, 2014), https://www.osha.gov/Publications/OSHA3252/3252.html.
[7] Bureau of Labor Statistics: New York-New Jersey Information Office, *Fatal Work Injuries in New York City – 2012*, September 18, 2013, http://www.bls.gov/ro2/cfoi9660.pdf.
[8] *Id.*
[9] Occupational Safety & Health Administration, *Worker Safety Series: Construction* (viewed March 11, 2014), https://www.osha.gov/Publications/OSHA3252/3252.html.

Why is "strict liability" important to ensure workplace safety?

Contractors and owners of construction sites are best able to control safety on the sites.[10] In fact, workers have little or no control over equipment on the worksite and are hardly in a position to protect themselves from danger.[11] Also important is the fact that in a construction accident, the worker's conduct cannot be completely independent from that of the contractor and owner, as would be true in, say, a car accident. In every situation, the contractor/owner/employer will have provided the worker certain devices to use for the job and the worker will use those devices. Thus, the conduct of the worker will never be independent from the duty of contractors, construction site owners and employers to provide proper devices.

That is why, since 1923, the New York Court of Appeals has repeatedly held that the scaffold law is a strict/absolute liability statute[12] and that comparative negligence is not a defense to a claim under the scaffold law.[13] This means that if contractors or owners do not provide "proper protection" to workers as required by the scaffold law, and this results in a worker's injury, contractors and owners will be held liable (responsible) for the worker's injury and the worker cannot be blamed.[14]

Does the scaffold law protect undocumented workers?

Yes. This is extremely important as "[u]ndocumented workers are among the most vulnerable and exploited workers in our country, as frequent victims of unpaid wages, dangerous conditions and uncompensated workplace injuries, discrimination, and other labor law violations."[15] It is essential that such workers are entitled to recover in court as those "who attempt to remedy the abuse routinely face physical and immigration-related threats and retaliation."[16] In 2006, New York's highest court ruled that undocumented workers injured at a work site as a result of a scaffold law violation can recover lost wages, as long as the worker has not given false papers to his/her employer.[17]

Are there already limits on the liability of an owner or contractor under current law?

Yes. Under current law, an accident alone does not establish liability.[18] In order to be liable under the scaffold law, the defendant must have violated the required safety standards

---

[10] *See Blake v. Neighborhood House. Servs. of N.Y.C., Inc.*, 1 N.Y.3d 280, 284–85 (2003).
[11] *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 318 (1948).
[12] *See, e.g.*, *Maleeny v. Standard Shipbuilding Corp.*, 237 N.Y. 250, 253 (1923).
[13] *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313 (1948). Under comparative negligence, if the plaintiff was also negligent in the accident, his/her damages will be reduced in proportion to his/her relevant fault. *See* Dan B. Dobbs et al., *The Law of Torts* § 220 (2d ed. 2013); N.Y. C.P.L.R. 1411 (McKinney 2014).
[14] *See generally* Lee S. Kreindler et al., *New York Law of Torts* § 12:85 (2013). As Dan B. Dobbs describes in his famous treatise, *Law of Torts*, "Strict liability is imposed upon a defendant without proof that he was at fault." *See* Dan B. Dobbs et al., *The Law of Torts* § 437 (2d ed. 2013). While the justifications are somewhat unique in each type of strict liability scenario, the general idea is that, "for some activities involving *special dangers*…liability can be imposed without fault." *Id.* at § 433 (emphasis added).
[15] Workplace Fairness, "Hidden America: Undocumented Workers" (viewed March 21, 2014), http://www.workplacefairness.org/sc/undocumentedworkers.php.
[16] *Id.*
[17] *See* Lee S. Kreindler et al., *New York Law of Torts* § 21:52 (2013), citing *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338 (2006).
[18] *See Blake v. Neighborhood House. Servs. of N.Y.C., Inc.*, 1 N.Y.3d 280, 289 (2003).

established by the courts.[19] The worker must then also establish causation.[20] Second, if the contractor/owner has provided the worker with "proper protection" under the scaffold law, and the accident was solely caused by the worker's negligence (*i.e.*, being intoxicated at work, etc.), the worker's claim will fail.[21] This is called the "sole proximate cause" defense.[22] Lastly, under the "recalcitrant worker" defense, the worker's claim will fail if contractors/owners have provided him/her with "proper protection" and specific instructions, and the worker failed to listen to those instructions.[23]

How do owners and contractors want to change the scaffold law?

Worksite owners, contractors and liability insurance companies have recently mounted a strong campaign to change the scaffold law[24] to "establish a comparative negligence standard for claims under Labor Law § 240 and 241 with respect to a recalcitrant worker."[25] Although contractors, owners and insurance companies defend this bill as being restricted to "limited circumstances," in practice, at least one of those limited circumstances will *always* be alleged, completely defeating the safety purpose behind the scaffold law's strict liability standard.[26] In other words, in every situation where a contractor/owner fails to provide the "proper protection," they will still be able to try to blame the worker.[27] This totally undermines the safety incentives behind the scaffold law.

Are there any legitimate justifications for these changes to the scaffold law?

No. Proponents of this bill claim that high payouts in scaffold law cases lead to excessive insurance rates and fewer construction jobs. First, construction is very much on the rise in New York.[28] Second, there are no independent data identifying why the insurance industry may be increasing rates (if they are) or any connection whatsoever between rates and claims. Because there is virtually no transparency in this area, the insurance industry should be required to release closed claims information so the public and government officials can see if there is price-gouging, and if there is a problem, determine the proper way to solve it. If rates are too high and are unjustified by claims history, which is likely, the solutions to that problem lie with better insurance regulation. The solutions do not lie with stripping away the rights of workers and making worksites less safe.

---

[19] *See id.*
[20] *Ibid.*
[21] *Id.* at 292.
[22] *Ibid.*
[23] *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 40 (2004).
[24] S111, 2013-14 Reg. Session (N.Y. 2013).
[25] The defenses would apply if the plaintiff's conduct relates to: "a criminal act, use or drugs or alcohol, failure of the employee to use safety devices furnished at the job site, failure to comply with employer instructions regarding the use of safety devices at the job site, or failure of the employee to comply with safe work practices in accord with safety training programs provided by the employer." S111, 2013-14 Reg. Session (N.Y. 2013).
[26] *Ibid*.
[27] N.Y. Lab. Law § 240 (McKinney 2013).
[28] "Home Construction Rises, as Do Building Permits," *Reuters*, September 18, 2013, http://www.nytimes.com/2013/09/19/business/home-construction-and-building-permits-rise.html.

What are some examples of scaffold law cases that show the importance of current law?

***Gjonaj v. 30 W. 26th St. Associates* (2013).** Tom Gjonaj, a 60-year-old window washer, was cleaning the second floor windows of an office building at 30 West 26th Street in Manhattan. Gjonaj had suspended himself from the building by attaching his window washer's belt to a bolt on the outside of the building. The bolt ripped out of the building wall and Gjonaj fell 15 to 20 feet to the ground, suffering multiple fractures of his left arm, pelvis and hip. He underwent several surgeries and procedures. He brought suit under the scaffold law; the defendants, who tried to blame Gjonaj, settled.[29]

***Nechifor v. RH Atlantic-Pacific* (2012).** Gheorghe Nechifor fell approximately twelve feet from a rolling scaffold that was being used to build a sidewalk bridge. The scaffold lacked the proper means to reach the upper level platform, specifically a ladder that was designed to be attached to the scaffold. All parties agreed that the ladder was not on the scaffold that day and that the scaffold was not safe for use that day. Nechifor was required to climb on the scaffold side bars in order to climb up and down the scaffold. This was the way workers on the site regularly used the scaffold, without ladders or safety equipment, as they weren't provided with any. On the day Nechifor fell, the scaffold bars were wet from melted snow and he slipped on one of the bars while descending the scaffold. Defendants claimed Nechifor should have used a lifeline to climb up and down the scaffold or used some other ladder to get up and down the scaffold, also alleging that he intentionally jumped off the scaffold. The trial court granted summary judgment in favor of Nechifor since defendants had a duty to furnish proper safety devices. The Appellate Division affirmed; the case recently settled before trial.[30]

***Ordonez v. 346 West 17th Street, LLC.* (2012).** Thirty-three-year-old Jose Ordonez, an asbestos-removal specialist, was working at a renovation site at 346 West 17th Street in Manhattan. Ordonez and a co-worker entered an aerial-lift's basket and were elevated to 20 feet in order to address a ramp. The base of the lift unexpectedly rolled down an inclined surface and overturned, causing both workers to plummet to the ground. Ordonez suffered spinal fractures, rib fractures, disc herniations, a concussion, a subdural hematoma and a laceration on the back of his head. He has also sustained brain damage, leading to depression, moodiness and impairment of cognitive functions, including memory. He experiences seizure-like symptoms, suffers from residual pain and limitations and cannot return to work. Ordonez's condition will require lifelong treatment. Ordonez sued under the scaffold law, maintaining that the aerial lift was not properly secured and that he was not provided with a harness or any other type of device that could have prevented his fall. Defense counsel tried to blame Ordonez, arguing that he should have secured the basket to the ramp. The trial court granted Ordonez's motion for summary judgment, finding that defendants were liable under the scaffold law.[31]

***Ritacco & DeGiacomo v. One Bryant Park, LLC.* (2012).** Marble setters Ernest Ritacco (28) and Sergio Diacomo (37) were working at a construction site at One Bryant Park in Manhattan. While working on the ground, beneath a scaffold, the arm of a crane on the building's 60th floor struck a steel bucket containing 100 pounds of materials. The bucket was knocked off the building, falling onto and smashing the scaffold's plywood roof, propelling debris about the site

[29] 2013 NY Jury Verdicts Review LEXIS 53 (15230/2010, April 18, 2013)
[30] 2011 WL 11073450 (N.Y. Sup. Ct. June 18, 2011), *aff'd* 92 A.D.4d 514 (1st Dept. 2012).
[31] 2012 Jury Verdicts LEXIS 6777 (104175/08, March 2, 2012).

and knocking Ritacco and DeGiacomo down a stairway. Both workers suffered multiple back injuries, requiring spinal fusions and other surgeries, and experience permanent residual pain and limitations that prevent resumption of manual labor. Ritacco and DeGiacomo sued under the scaffold law, arguing that Tishman Construction failed to provide adequate protection. Defense counsel conceded liability and the case settled.[32]

Romanczuk v. Metropolitan Insurance and Annuity Co. **(2010).** Andrzej Romanczuk and three co-workers were renovating bulkhead walls on the roof of Building 453 in Manhattan's Peter Cooper Village Stuyvesant Town complex. In order to perform the required work, Romanczuk had to access the bulkhead from a scaffold, which was provided by his employer, Westchester Plaza. As a result, Romanczuk was required to climb the inside rungs of the scaffold and step from the scaffold to the roof. His co-workers had accessed the roof in this way and his supervisor was aware of it. As Romanczuk was about to place his foot on the roof while stepping from the scaffold, the scaffold moved towards and away from the wall, causing him to fall three meters between the wall and the scaffold. Romanczuk argued that: 1) the scaffold should have been attached to the wall by an arm in order to prevent its movement; 2) the scaffold did not have the proper planking or any guardrails; and 3) he was not given any safety equipment, such as a safety belt. He testified that "he was given instructions by either his boss or supervisor…that he either used his own tools provided to him by his employer" and that "he never received any instructions as to how he should perform his work from any of the defendants." Defendants argued that Romanczuk actually fell backwards because his shoelace became caught on the clip of the scaffold and that he would not have fallen if he were wearing long pants, instead of shorts, to cover his shoelaces. The trial court granted summary judgment to Romanczuk since defendants had a duty to provide a proper scaffold and safety devices; the Appellate Division affirmed the ruling.[33]

Zafar v. City of New York **(2000).** Zafar was struck by a brick that fell five stories from a NYC-owned construction site. A co-worker had wedged the brick under a pulley to help the pulley move more freely. Zafar suffered a fractured skull and subdural hematoma, resulting in "significant cognitive deficit manifesting itself in difficulties with memory and concentration." He also suffered a fractured orbit, partial loss of vision in one eye and a loss of smell and taste. The employer claimed Zafar was not even working on the day in question and had probably visited the site for personal reasons. The city argued that Zafar had probably been hit by a brick during a mugging at the site. The investigating police officer testified that there had been no mugging at the site on the day Zafar was injured. A jury found defendant liable under the scaffold law.[34]

[32] 2012 Jury Verdicts LEXIS 15721 (400129/09, March 14, 2012).
[33] 2009 N.Y. Slip Op. 30636(U) (Trial Order) (Sup. Ct. N.Y. County Mar. 19, 2009), *aff'd* 72 A.D.3d 592 (1st Dept. 2010).
[34] 2000 NY Jury Verdicts Review LEXIS 776 (104367/93, March 17, 2000).