

LABOR LAW §240 - HISTORICAL PERSPECTIVE - AN OVERVIEW

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The legislative history of Labor Law §240 reveals the statutory intent to provide maximum protection for workers engaged in construction activities. The evolution of the current statute from its inception in 1885 reflects a clear legislative awareness that anything less than the broad and compelling coverage mandated is ineffective to provide the requisite protections against the multitude of elevation related hazards facing workers in the construction field.

A) The Origin of Labor Law §240.

The genesis of Labor Law §240 dates back to 1885 when its predecessor statute, Labor Law §18, was enacted imposing criminal liability upon anyone knowingly or *negligently* providing a scaffold, hoist, stay, ladder or other mechanical contrivance that failed to provide proper protection to workers building, repairing, altering or painting a house, building or other structure.

Relative to the era of its enactment, the penalties imposed for a violation of the statute, to wit: a fine of up to Five Hundred (\$500) Dollars and/or imprisonment for not less than thirty (30) days or more than six (6) months, were rather harsh, underscoring the compelling legislative intent to protect workers so employed.

1) The Original Enactment - Labor Law §18 [L.1885, Ch.314].

Any person employing or directing another to do or perform any labor in erecting, repairing, altering or painting of any house, building or other structure within this State who shall knowingly or negligently furnish or erect, or cause to be furnished for erection...such unsuitable or improper scaffolding, hoists, stays, ladders, or other mechanical contrivances as will not give proper protection to the life and

limb of any person so employed or engaged, shall be deemed guilty of a misdemeanor, and on conviction shall be fined not to exceed Five Hundred Dollars, or imprisonment in a county jail for not less than thirty days or more than six months, or by both such fine and imprisonment, in the discretion of the court.

2) Case Law Application of Original Enactment of Labor Law §18.

Utilization of Labor Law §18 as a predicate for civil liability ensued shortly after its enactment. However, the statutory language "knowingly or negligently" resulted in judicial interpretation that liability remained governed by traditional principles of negligence.

See e.g. Kimmer v. Weber, 151 N.Y. 417 (1897) [In a wrongful death action where scaffold collapsed, judgment in favor of plaintiff reversed. No proof of negligence on the part of defendant builder].

Solarz v. Manhattan R. Co., 8 Misc.2d 656 (N.Y. Supr. Ct., 1894) [Unexplained breaking down of scaffold *prima facie* evidence of negligence sufficient for presenting case to the jury].

B) Amendment of 1897 - Strict Liability Imposed.

Recognizing that Labor Law §18 did not accomplish the level of protection intended, the legislature amended the statute by deleting the words "knowingly or negligently" [L.1897, Ch.415]. This amendment recast Labor Law §18 to impose the strict liability that is the hallmark of its successor statute, Labor Law §240(1).

Case law after the 1897 amendment implemented the statute unevenly. Although correctly recognizing the non-delegable nature of the duty now imposed, the courts continued, in varying degrees, to analyze statutory liability under traditional negligence principles, notwithstanding the fact that the word "negligently" had been unequivocally deleted.

See e.g. Stewart v. Ferguson, 164 N.Y. 553 (1900) [1897 amendment omitting "knowingly or negligently" from Labor Law §18 is a positive prohibition laid upon the master without exception upon account of his ignorance or the carelessness of his servants].

Conley v. Lackawana Iron & Steel Co., 94 App.Div. 149 (4th Dept., 1904)
[Tipping of scaffold planks caused by negligence of fellow servant barred defendant's liability. Additionally, court found plaintiff assumed the risk inherent in his employment requiring use of scaffold].

C) Amendments of 1902 and 1909 - Assumption of Risk and Contributory Negligence Defenses Relaxed.

In response to the almost routinely successful assertion of assumption of the risk and contributory negligence defenses in actions brought under Labor Law §18, the legislature, through two separate enactments [L. 1902, Ch. 600 §3 and L. 1909, Ch. 36 §202], modified these defenses. As evident to the legislature, the protection intended under Labor Law §18 (as well as other worker protection sections) had been subverted by the absolute bar to liability under the assumption of the risk defense which included risks unavoidably assumed by the nature or location of the work or awareness of the particular risk that came to fruition. In order to remedy this problem, which was resulting in many nonsuited actions and defense verdicts, these sections were enacted to eliminate the complete bar to liability through assumption of the risk as a defense based simply upon continued presence at the job site with knowledge of the risk.

Under the resulting statute, Labor Law §202, the employee's continuation of work at the same location after learning of the risk was no longer either an assumption of that risk or contributory negligence as a matter of law. Both defenses remained viable as fact issues which turned upon the specific knowledge of the worker as to the risk and the reasonableness of the worker's conduct relative to the specific risk that resulted in the injury. The evolution towards true strict liability began here.

See, Warren v. Post & McCord, 128 App.Div. 572 (1st Dept., 1908) [Labor Law §18 imposes an absolute duty which cannot be delegated. The fact that plaintiff

participated in erection of scaffold does not bar recovery where defendant furnished defective plank].

Nixon v. Thompson-Starrett Co., 131 App.Div. 152 (2nd Dept., 1909) [The fact that the scaffold upon which plaintiff stepped tipped, causing his fall, was *prima facie* evidence that it was not safely laid in violation of Labor Law §18].

D) Amendment of 1910 - Assumption of Risk Defense Abolished.

In an action brought to recover damages for personal injury...owing to any cause, including open and visible defects, for which the employer would be liable but for the hitherto available defense of assumption of risk by the employee, *the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such employee, or after he had been informed of the danger of personal injury therefrom shall not be, as a matter of fact or as a matter of law, an assumption of the risk therefrom.* [L.1910, Ch.352] (emphasis added).

The prior enactment of Labor Law §202 did not achieve the degree of protection intended by the legislature. In order to reinforce the all-encompassing protection sought, the amendment of 1910 extended Labor Law §202 to expressly end assumption of the risk as a defense based upon a worker's actual knowledge of the specific risk, even after having been warned of the danger, both as a matter of law *and fact*. Thus, assumption of the risk was effectively eliminated as a basis for summary disposition as well as a question of fact for the jury under Labor Law §18, and all the other Labor Law statutes governing construction safety.

In the landmark case of Quigley v. Thatcher, 207 N.Y. 66 (1912), the Court of Appeals recognized Labor Law §18 as establishing a policy of comprehensive worker protection and, as such, "...undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed..." *Id.*, at 68. In Quigley the defendant/general contractor was held liable for injuries resulting from a defective scaffold notwithstanding the

fact that he had expressly disclaimed any responsibility for its safety to his subcontractor, plaintiff's employer.

Bonhoff v. Fischer, 210 N.Y. 172 (1914) [Vicarious liability imposed upon sub-contractor/employer for injuries sustained by a worker who fell from a scaffold erected by the general contractor. Duty imposed by Labor Law §18 is absolute and cannot be avoided because scaffold erected by another contractor].

See also, Maloney v. Cunard Steamship Co. Ltd., 217 N.Y. 278 (1916) [Cardozo, J.], [In an action pursuant to Labor Law §18 a worker's mere use of an obviously dangerous device would not bar recovery under the still viable doctrine of contributory negligence because to do so would resurrect the abolished defense of assumption of the risk. Contributory negligence resulting from a worker's inattention, to the extent that it aggravated the specific danger resulting in injury, remained a question of fact for the jury].

Feldman v. Robert E. MacKay Co., 174 App.Div. 848 (2nd Dept., 1916) [Duty imposed by Labor Law §18 is absolute and cannot be delegated. The fact that plaintiff participated in erecting the structure which fell does not bar recovery. Note: inexplicably and without discussion of Labor Law §202, the court held that the question of assumption of the risk was a question for the jury].

Additionally, the amendment of 1910 converted contributory negligence to an affirmative defense, shifting the burden of both pleading and proof to defendants. See, Labor Law §202-a [repealed L. 1921, Ch. 121].

E) Labor Law §240.

In 1921 Labor Law §18 was renumbered as Labor Law §240 [L. 1921, Ch.50]. The language of Labor Law §240 added cleaning and pointing as protected activities; and the specifically enumerated devices covered were expanded to include slings, hangers, blocks, pulleys, braces, irons and ropes.

Comparatively little of consequence changed in the application of the slightly modified and renumbered statute from earlier case law under the predecessor statute, Labor Law §18,

except to the extent that the comprehensive protections intended were, by case law, reinforced.

See e.g. Maleeny v. Standard Shipbuilding Corp., 237 N.Y. 250 (1923) [Extension of Labor Law §240 absolute duty to cases involving Federal Maritime Law is constitutional under state police power to preserve life and health. However, New York State Law of contributory negligence shall be applied and not the Federal Admiralty Law of comparative negligence].

Johnson v. Coggins, 249 App.Div. 859 (2nd Dept, 1937) [Fall off a scaffold is *prima facie* evidence of negligence under Labor Law §240 even though the defendant exercised care "to the highest degree". Dismissal of complaint at *nisi prius* based upon failure to prove negligence reversed].

1) Contributory Negligence Defense Abolished - The Koenig Case.

In what is, perhaps, the singularly most significant extension of the protection under Labor Law §240, the Court of Appeals in Koenig v. Patrick Construction Corp., 298 N.Y. 313 (1948) [Fuld, J.] expressly and unequivocally abolished the contributory negligence defense. Relying upon the firm principle that a plaintiff's carelessness is no bar to his/her recovery under a statute which imposes liability regardless of negligence, the Court reasoned that, if Labor Law §240 liability is not dependent upon a defendant's negligence, the cause of action may not be defeated by a plaintiff's lack of care. Id., at 317.

Significantly, the court in Koenig, in articulating the statutory mandate, carefully noted that, instead of simply defining a general standard of care required as evidence of negligence, the legislature imposed a *flat and unvarying duty* to protect workers against the known hazards of faulty or inadequate equipment. Indeed, as observed by the Court,

If the employer could avoid this duty by pointing to the concurrent negligence of the injured worker in using the equipment, the beneficial purpose of the statute might well be frustrated and nullified. *** Such an interpretation manifestly rules out contributory negligence as a defense to an action predicated upon violation of the statute to the injury of one in the protected class. Id., at 319.

2) The "Employing and Directing" Requirement.

Initially, the predecessor statute to Labor Law §240, Labor Law §18, gave an injured worker a statutory right of action directly against his/her employer or anyone directing the work being performed. The statute predated the Workers' Compensation bar to a direct action by a worker against an employer. See, Workers' Compensation Law §11 [L. 1913, Ch.816; and L. 1922, Ch.615]. The "employing and directing" requirement posed a significant obstacle to plaintiffs relegated to actions against persons or entities other than their now statutorily immune employers.

Although a general contractor who undertook to supply any of the enumerated instrumentalities under Labor Law §§18 and 240, either directly or by delegation to another, remained bound to comply with the statute (see §B, supra), a general contractor would be exempt from statutory liability in the absence of direction or control of the injured worker by the contractor against whom liability was asserted.

See, e.g. Sarnoff v. Charles Schad, Inc., 22 N.Y.2d 180 (1968) [Scaffolding subcontractor who neither employed nor directed plaintiff cannot be held liable under Labor Law §240(1)].

DeLeon v. Corbetta Constr. Co., 6 A.D.2d 831, aff'd 5 N.Y.2d 1009 (1959) [In the absence of evidence that defendants directed plaintiff in the performance of his work, there can be no liability under Labor Law §240].

Galbraith v. Pike & Son, 18 A.D.2d 39 (4th Dept., 1963) [Plaintiff required to show that defendant either (1) gave direction as to the manner plaintiff was to perform his work, or (2) directed plaintiff to use the equipment that resulted in the injury].

Olsommer v. Walker & Sons, 4 A.D.2d 424 (4th Dept., 1957) [General contractor's inspection and coordination of subcontractors work, in the absence of direct instruction, is insufficient to impose Labor Law §240 liability for injury to subcontractor's employee].

As is quite evident from the cases dealing with this issue, defendants' strategy at trial focused upon distancing themselves from any direction or control of the work being performed by the injured worker. With a fair degree of regularity they were successful, resulting in nonsuits as a matter of law or defense verdicts when direction and control were presented as an issue of fact. The 1969 amendment to Labor Law §240 closed this avenue of escape.

F) The Amendment of 1969 - Expansion of Comprehensive Protection.

Two significant changes were made by the legislature in the 1969 amendment of Labor Law §240 [L. 1969, Ch.1108]. First, the phrase "contractors and owners and their agents" was substituted in place of "a person employing or directing another". This was a dramatic expansion of the entities subject to liability for violations of Labor Law §240.

Second, the word "directing", which was included at the end of paragraph 1 in the 1921 recodification and renumbering of the statute, was deleted. Thus, the legislature unequivocally abolished the requirement that plaintiff prove sufficient involvement in the work producing the injury in order to hold a defendant liable and imposed pure vicarious liability on contractors, owners and their agents.

It must be noted that there was vigorous and well coordinated opposition by insurance associations, building contractors and defense attorneys who maintained that, if passed, the reformulated Labor Law §240 would discourage new building investment and, paradoxically, would detract from safety by diffusing ultimate responsibility for job site safety. The New York State Department of Labor and the New York AFL-CIO, on the other hand, maintained that the statutory changes were necessary to add a clearer and stronger deterrent to violations; to end the tactical shifts of responsibility between contractors and

subcontractors in attempting to avoid liability; to assure sufficient financial responsibility for work-site injury losses; and to place ultimate responsibility for safety upon the entities that benefit from and/or have control over the work being performed.

As post 1969 amendment cases arose, the courts began to construe Labor Law §240 in a manner consistent with the manifest legislative intent.

See e.g. Rocha v. State of New York, 45 A.D.2d 633 (3rd Dept., 1974) [Labor Law §240 unambiguously places a nondelegable duty on owners and, as such, the State, as an owner, was held liable for plaintiff's fall from a scaffold. The State's argument that the statute does not impose liability for actions of an independent contractor was rejected].

Kelly v. Diesel Constr. Div. of Carl A. Morse, Inc., 35 N.Y.2d 1 (1974) [Statute mandates liability against owners and contractors in the first instance so that they cannot escape liability for accidents caused by subcontractors or suppliers. Statute also encourages insurers to be more insistent that their insureds maintain safety standards necessary to avoid accidents].

The Court of Appeals in Haimes v. New York Tel. Co., 46 N.Y.2d 132 (1978), clearly and emphatically crystallized the legislative mandate underlying the 1969 amendment of Labor Law §240:

In calling a halt to its earlier backtracking, the Legislature minced no words. Referring expressly to both sections 240 and 241, its stated purpose in redrafting these statutes was to fix "ultimate responsibility for safety practices...where such responsibility belongs, on the owners and general contractors". Id., at 136; citing N.Y. Legis. Ann., 1969, p.407.

Continuing, the Court in Haimes stated:

***The legislature apparently decided...that over-all compliance with safety standards would be achieved by placing primary and inescapable responsibility on owners and general contractors rather than on their sub-contractors who, often occupying an inferior economic position, may more readily shortcut on safety unless those with superior interests compel them to protect themselves. Id., at 137.

Further elucidation of the legislative intent in the 1969 amendment was made in Zimmer v. Chemung County Perf. Arts, Inc., 65 N.Y.2d 513 (1985) where, addressing the defendants' arguments that they could not be held liable where their safety measures were reasonable, the Court observed that, because Labor Law §240(1) is mandatory and imposes absolute liability for its breach, reasonableness is, therefore, irrelevant. Id., at 523.

See also, Bland v. Manocherian, 66 N.Y.2d 452 (1985) [Legislative policy underlying Labor Law §240 is to impose a flat and unvarying duty upon the owner and contractor irrespective of any contributing culpability on the part of the injured worker].

Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509 (1991) [Although specific risks not expressly stated, the exceptional protections of Labor Law §240(1) are directed at gravity related hazards as evidenced by the purposes of the specifically enumerated protective devices].

See also, Coleman v. City of New York, 91 N.Y.2d 821 (1997) [Fee owner bound by Labor Law §240, notwithstanding complete absence of involvement or presence at the job site or benefit from the work performed.] see also, Celestine v. City of New York, 86 A.D.2d 592, aff'd 59 N.Y.2d 938 (1983).

G) Amendment of 1980 - Owners of One and Two-Family Homes Conditionally Exempted.

Labor Law §240 was amended to exempt from absolute liability "...owners of one and two-family dwellings who contract for but do not direct or control the work..." [L. 1980, Ch. 670]. The purpose of the amendment, as stated by the Law Revision Commission to the 1980 Legislature, was to relieve such owners of statutory liability who are not in a position to know about or provide for the responsibilities of absolute liability and who have no involvement in carrying out the work being performed other than contracting another for its performance. Where, however, the homeowner participated in the work, liability under the statute remained unaffected.

See Cannon v. Putnam, 76 N.Y.2d 644 (1990) [Although concededly there was a commercial usage on other areas of defendant's property, the work being performed was for solely residential purposes and not directed or controlled by defendant, exempting him from statutory liability].

Lombardi v. Stout, 80 N.Y.2d 290 (1992) [Owner who was remodeling a one family house into a two family house for commercial rental purposes was not within the class of owners the legislature intended to insulate from Labor Law §240 liability].

H) Amendment of 1981 - Exemption of Engineers and Architects

Under this amendment engineers and architects who do not direct or control the work, whose involvement does not extend beyond planning and design, are exempt from Labor Law §240 liability. [L. 1981, Ch.242].