

### CONSTRUCTION LAW

# The Need to Reform The Scaffold Law

By  
**Kenneth M.  
Block**



In recent months there has been a crescendo of support for the reform of New York Labor Law §240, commonly known as the “Scaffold Law,” which imposes strict liability for construction site gravity-related injuries.<sup>1</sup> The reform sought, in the form of bills pending in both houses of the New York state Legislature, would allow for the application of comparative fault in the consideration of damages for a gravity-related injury.<sup>2</sup> At present, comparative fault cannot be considered; once a violation of the statute is found, 100 percent of the plaintiff’s damages must be assessed against the defendant (usually contractors and owners), notwithstanding the plaintiff’s comparative fault.<sup>3</sup>

Reform proponents argue that the imposition of such strict liability has led to skyrocketing insurance costs, resulting in the loss of many thousands of construction jobs.<sup>4</sup> Separately, studies have shown that the Scaffold Law, which was designed to reduce worker injuries, has had the opposite effect and has contributed to an increase in such injuries.<sup>5</sup> We agree with the reform proponents and believe that the time has now come to bring New York in line with every other state in the union and permit



the consideration of comparative liability in a Scaffold Law litigation.

#### Background

The Scaffold Law was intended to address a subset of work-related construction injuries caused by hazards which “[relate] to the effects of gravity.”<sup>6</sup> The law requires contractors and owners “in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building...[to] furnish or erect...scaffolding...and other

devices... to give proper protection” to workers.<sup>7</sup> The law has been interpreted to impose strict liability upon the defendant where the defendant was a necessary proximate cause of the plaintiff’s injury, irrespective of whether the plaintiff’s own negligence played a substantial part in the occurrence.<sup>8</sup> As a result, the law deprives the defendant of any comparative negligence defense, such that a plaintiff could be 99 percent responsible for his own injury and still recover 100 percent of the damages.<sup>9</sup>

KENNETH M. BLOCK is a member of Tannenbaum Helpert Syracuse & Hirschtritt. RICHARD W. TROTTER, an associate of the firm, contributed to the preparation of this article.

This bar of comparative negligence in the context of the Scaffold Law is a deviation from New York's well-established rule that "the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant... bears to the culpable conduct which caused the damages."<sup>10</sup> Compounding the impact of this aberration is the willingness of New York courts to expand the application of the Scaffold Law to a wide array of factual circumstances beyond those seemingly intended by the law.<sup>11</sup> This, combined with the imposition of strict liability, has turned the rule of comparative negligence on its head, with serious implications for New York law and policy.

### Scope of the Law

In *Runner v. New York Stock Exchange*, the issue of the applicability of the Scaffold Law was certified to the New York Court of Appeals.<sup>12</sup> The plaintiff had been injured while moving a large object down a set of four stairs by using a make-shift pulley created by him and the other workers.<sup>13</sup> As the workers descended the stairs, the make-shift pulley system failed and the plaintiff was pulled forward into a metal bar, injuring his hands.<sup>14</sup> The Court of Appeals held that the Scaffold Law was intended to address the "pronounced risks arising from construction work site elevation differentials" and that, even though the height differential in this case was small (i.e. only four steps) it could not be considered de minimis given the weight of the object being moved.<sup>15</sup> This factor, combined with the defendant's failure to provide the required protection against the risk of a gravity-related injury, provided sufficient grounds for the application of the Scaffold Law, even though the plaintiff was pulled horizontally into the steel bar.<sup>16</sup>

In *Kempisty v. 246 Spring Street*, the Appellate Division, First Department, reversed a ruling by the Supreme Court that the Scaffold Law did not apply to a case involving a plaintiff injured by a large steel block that fell a short distance and crushed his foot.<sup>17</sup> Like the

Court of Appeals in *Runner*, the court in *Kempisty* held that the law applied even though the distance involved was very small.<sup>18</sup> Similar results were reached by the First Department in *Marrero v. 2075 Holding Co.*,<sup>19</sup> and *Rodriguez v. DRLD Development*,<sup>20</sup> where the involvement of very small height differentials did not preclude application of the law.

The time has now come to bring New York in line with every other state in the union and permit the consideration of comparative liability in a Scaffold Law litigation.

In *Marrero*, the First Department applied the Scaffold Law when a cart containing sheetrock tipped over and landed on the plaintiff's leg.<sup>21</sup> In *Rodriguez*, the First Department invoked the law where sheetrock boards were leaning against a wall and fell.<sup>22</sup> In both cases, plaintiffs were injured by objects located on the same level that they were and that fell a very short distance to cause their injury. According to New York courts, the mere fact that an object was located on the same level as the injured party and "fell" only a very short distance is no bar to the application of the Scaffold Law.<sup>23</sup>

### Comparative Negligence

With the Scaffold Law applicable to a broad array of cases, the unavailability of comparative negligence as a defense has become increasingly unjustified. For example, several courts have held that a plaintiff's intoxication at the time of the incident cannot constitute a defense to a Scaffold Law claim.<sup>24</sup> In *Sergeant v. Murphy Family Trust*, the Appellate Division, Fourth Department, granted a plaintiff's motion for partial summary judgment under the law despite the fact that he had a blood-alcohol level of .27 at the time of the accident.<sup>25</sup>

In *Podbielski v. KMO-361 Realty*, the Appellate Division, Second Department, also ruled in favor of a plaintiff who was

intoxicated at the time of his injury because his intoxication was not the sole proximate cause of the accident.<sup>26</sup> Finally, in *Bondanella v. Rosenfeld*, the Appellate Division, Fourth Department, confirmed that a plaintiff's intoxication is no defense to a claim under the Scaffold Law unless it was the sole proximate cause of his injury.<sup>27</sup>

The rejection of comparative negligence also produces unfair results in cases involving a more run-of-the-mill brand of fault by the plaintiff. For example, in *Probst v. 11 W. 42 Realty Investors*, the Appellate Division, Second Department, refused to dismiss a plaintiff's Scaffold Law claim despite the fact that the defendant had presented evidence that plaintiff had access to a ladder and failed to use it, disregarding instructions to use one when needed.<sup>28</sup>

Outcomes like those in *Probst*, *Sergeant*, *Podbielski* and *Bondanella*, where the plaintiff's own fault is irrelevant unless it is the sole-proximate cause of his injury, are made possible by the disregarding of comparative negligence. The current interpretation of the Scaffold Law produces unfair results for defendants that would have otherwise have had a valid comparative negligence defense in any other context. Indeed, the Court of Appeals itself has stated that "[the Scaffold Law], one of the most frequent sources of litigation in the New York courts, provides rights to certain workers going well beyond the common law" and "imposes liability even on contractors and owners who had nothing to do with the plaintiff's accident."<sup>29</sup> Moreover, the law also has a number of profoundly negative effects on New York public policy.

### Adverse Consequences

Increased scrutiny of the effects of the Scaffold Law has yielded a number of startling conclusions regarding its impact on the cost of construction in New York. One study concluded that the law is primarily responsible for a "massive withdrawal of underwriters" from the New York construction insurance market.<sup>30</sup> With reduced competition, New York insurance premiums have

skyrocketed. New York's general liability premium rates are approximately 300 percent higher than in New Jersey. A study by Willis of New York identifies the law as the primary reason for New York's staggering insurance costs relative to its neighbors.<sup>31</sup> Of all general liability claims greater than \$1 million, 78 percent are Scaffold Law claims.<sup>32</sup>

Increased scrutiny of the effects of the Scaffold Law has yielded a number of startling conclusions regarding its impact on the cost of construction in New York.

Increased insurance costs have also had dramatic effects on private and public entities seeking to build in New York. For example, the New York City School Construction Authority (SCA) estimates its 2014 liability insurance to cost as much as \$125 million, or as much as it paid for its policies for 2011, 2012 and 2013 combined.<sup>33</sup> By contrast, according to the Associated General Contractors of New York State (AGC), if the SCA were to operate in New Jersey its insurance costs for 2014 would be approximately \$25 million.<sup>34</sup> The AGC directly attributes New York's inflated insurance costs to the Scaffold Law. By their estimation, the law, in its current form, costs the SCA and New York taxpayers approximately \$75 to \$100 million annually. In addition, a separate study by the Pacific Research Institute concluded that reforming the law could create as many as 86,000 jobs in New York.<sup>35</sup>

Supporters of the current Scaffold Law claim that it increases worker safety, but Illinois revoked its own strict liability statute in 1995 and has seen construction site fatalities decrease by 30 percent and construction injuries decrease by 53 percent since that time.<sup>36</sup> Supporters also argue that a repeal of the law would disproportionately impact minority workers; however, the increased

insurance costs caused by the law erect substantial barriers to smaller minority and woman-owned businesses that would otherwise be able to compete for work in New York. Supporters of the law also argue that insurance companies should open their books in order to justify increased costs. Finally, the law's supporters claim that it promotes fairness, but by imposing strict liability and depriving defendants of any comparative negligence defense, the law stacks the legal deck against contractors and property owners.

### Conclusion

The Scaffold Law was intended to promote worker safety in a narrow set of circumstances involving increased risk due to considerable vertical distances and the serious injuries that could occur as a result of such distances. By expanding the reach of the law to a variety of other contexts, and by imposing strict liability and depriving defendants of a comparative negligence defense, New York courts have created a statutory framework that is not only inconsistent with broader New York law, but also promotes unjust results. The Scaffold Law has considerable consequences for New York policy in that it increases costs to public and private entities, inhibiting job growth and leading to otherwise avoidable taxpayer expenditures. The Scaffold Law should be reformed so as to narrow its scope, eliminate strict liability and allow for a defense of comparative negligence.

.....●.....

1. See *Rocovich v. Con. Ed.*, 78 N.Y.2d 509, 514 (1991); see also *Torres v. Our Townhouse*, 91 A.D.3d 549 (1st Dept. 2012).

2. See N.Y. Senate Bill S111-2013 (Gallivan); see also N.Y. Assembly Bill A.3104-2013 (Morelle).

3. See *Rocovich*, 78 N.Y.2d at 514; see also *Torres*, 91 A.D.3d 549; see *Kempisty v. 246 Spring Street*, 92 A.D.3d 474, 474 (1st Dept.); see *Seargeant v. Murphy Fam. Trust*, 284 A.D.2d 991 (4th Dept. 2001).

4. Sandra Parket, *Cuomo Should back reform of state's costly Scaffold Law*, Rochester Business Journal, Nov. 22, 2013.

5. See Willis of New York, Letter to Silverstein Properties and Gotham Organization, Jan. 31, 2013; see also *The Cost of Labor Law 240 on New York's Economy and Public Infrastructure*, New York Civil Justice Institute, The Nelson A. Rockefeller Institute of Government, Feb. 19, 2014.

6. See *Rocovich*, 78 N.Y.2d at 514.

7. N.Y. Labor Law §240(1).

8. See *Rocovich*, 78 N.Y.2d at 513 (stating that "we have interpreted the section as imposing absolute liability for a breach which has proximately caused an injury"); see also *Runner v. N.Y.S.E.*, 13 N.Y.3d 599, 603 (2009) (noting that the Scaffold Law is a "strict liability statute").

9. See *Seargeant v. Murphy Fam. Trust*, 284 A.D.2d 991 (4th Dept. 2001) (partially granting plaintiff's motion for summary judgment even though he was intoxicated at the time of the accident).

10. CPLR §1411.

11. See *Kempisty*, 92 A.D.3d at 474 (applying the Scaffold Law to case involving an injury caused by a heavy object falling an extremely short distance).

12. *Runner*, 13 N.Y.3d at 601.

13. *Id.*

14. *Id.* at 603.

15. *Id.* at 603-04.

16. *Id.* at 605.

17. *Kempisty v. 246 Spring Street*, 92 A.D.3d 474, 474 (1st Dept. 2012).

18. See *id.* at 474-75.

19. *Marrero v. 2075 Holding Co.*, 106 A.D.3d 408, 409 (1st Dept. 2013).

20. *Rodriguez v. DRLD Dev.*, 109 A.D.3d 409, 410 (1st Dept. 2013).

21. *Marrero*, 106 A.D.3d at 409.

22. *Rodriguez*, 109 A.D.3d at 409.

23. See *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1 (2011) (finding that injuries caused by falling pipes located on the same level as the plaintiff flowed directly from the application of gravity to the pipes).

24. See *Seargeant*, 284 A.D.2d 991; see also *Podbielski v. KMO-361 Realty Assoc.*, 294 A.D.2d 552 (2d Dept. 2001); *Bondanella v. Rosenfeld*, 298 A.D.2d 941 (4th Dept. 2002).

25. See *Seargeant*, 284 A.D.2d at 991-92.

26. See *Podbielski*, 294 A.D.2d at 552-53.

27. See *Bondanella*, 298 A.D.2d at 941-42.

28. *Probst v. 11 W. 42 Realty Invs.*, 106 A.D.3d 711, 712-13 (2d Dept. 2013).

29. *Dahar v. Holland Ladder & Mfg. Co.*, 18 N.Y.3d 521, 524 (2012).

30. Meg Green, "Mass Withdrawal of Construction Liability Writers in NY Traced back to Scaffold Law," AM Best, Oct. 3, 2012.

31. See Willis of New York, Letter to Silverstein Properties and Gotham Organization, Jan. 31, 2013; see also *The Cost of Labor Law 240 on New York's Economy and Public Infrastructure*, New York Civil Justice Institute, The Nelson A. Rockefeller Institute of Government, Feb. 19, 2014.

32. See *id.*

33. See Kirk Semple, "Contractors and Workers at Odds over Scaffold Law," N.Y. Times, Dec. 17, 2013.

34. Scaffold Law Impact: NYC School Construction Authority (SCA); The Associated General Contractors New York State, LLC, *The Scaffold Law*.

35. Sandra Parket, "Cuomo Should back reform of state's costly Scaffold Law," Rochester Business Journal, Nov. 22, 2013.

36. See Willis of New York, Letter to Silverstein Properties and Gotham Organization, Jan. 31, 2013; see also *The Cost of Labor Law 240 on New York's Economy and Public Infrastructure*, New York Civil Justice Institute, The Nelson A. Rockefeller Institute of Government, Feb. 19, 2014.