

CHAPTER SEVEN

**EVOLUTION OF THE LABOR LAW:
A VIEW FROM THE BENCH**

Hon. Peter B. Skelos

[7.0] I. OVERVIEW

The Scaffold Law,¹ at its core, imposes two duties on owners, contractors and their agents, subject to certain exceptions not relevant to this discussion. First, there is the duty to “furnish or erect, or cause to be furnished or erected” certain enumerated and other safety devices² to be utilized in specified construction projects. Second, the statute requires that the safety devices “be so constructed, placed and operated as to give proper protection to the person so employed.”³ These statutory obligations have been universally described by the Court of Appeals as “non-delegable” duties.⁴

However, without questioning the wisdom of the Court of Appeals, its jurisprudence the past 15 to 20 years might cause one to pose the question: Are there circumstances under which the duty to *construct, place, or operate* a safety device is indeed delegable to the worker? This chapter explores the issue in the context of the sole proximate cause⁵ and recalcitrant worker⁶ defenses. Of course, this begs the question: Has the courts’

1 N.Y. Labor Law § 240(1) (Lab. Law).

2 *Id.* (emphasis added). The statutory list of devices (scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices) is not exclusive (*see e.g. Ramirez v. Metro. Transp. Auth.*, 106 A.D.3d 799, 965 N.Y.S.2d 156 (2d Dep’t 2013) (catwalk is the functional equivalent of a scaffold); *Salzler v. New York Tel. Co.*, 192 A.D.2d 1104, 596 N.Y.S.2d 263 (4th Dep’t 1993) (aerial bucket is the functional equivalent of a ladder); *McDonald v. UICC Holding LLC*, 79 A.D.3d 1220, 912 N.Y.S.2d 710 (3d Dep’t 2010) (stairway was a device and not a passageway); *but see Fabrizi v. 1095 Ave. of Americas, LLC.*, 22 N.Y.3d 658, 2014 WL 641523 (Feb. 20, 2014) (set screw coupling was not a safety device); *Salcedo v. Swiss Ranch Estates, Ltd.*, 79 A.D.3d 843, 913 N.Y.S.2d 701 (2d Dep’t 2010) (stairway was a passageway and not a safety device)).

3 Lab. Law § 240(1) (emphasis added).

4 *See, e.g., Fabrizi.*, 22 N.Y.3d 658; *Soto v. J. Crew Inc.*, 21 N.Y.3d 562, 566, 976 N.Y.S.2d 421 (2013); *Sanatass v. Consol. Inv. Co., Inc.*, 10 N.Y.3d 333, 339, 858 N.Y.S.2d 67 (2008); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500, 601 N.Y.S.2d 49 (1993); *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317–18, 445 N.Y.S.2d 127 (1981); *Kelly v. Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 N.Y.2d 1, 5, 358 N.Y.S.2d 685 (1974); *Conte v. Large Scale Dev. Corp.*, 10 N.Y.2d 20, 30, 217 N.Y.S.2d 25 (1961); *Rufo v. Orlando*, 309 N.Y. 345, 350, 130 N.E.2d 887 (1955); *but see Gombert v. McKay*, 201 N.Y. 27, 94 N.E. 186 (1914).

5 *See Blake v. Neighborhood Housing Serv. of New York City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003); *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958, 672 N.Y.S.2d 840 (1998).

6 *See Cahill v. Triborough Bridge and Tunnel Auth.*, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004).

recognition of these defenses limited the debate as to whether the Scaffold Law should be reformed? The answer to that question is simple: No.⁷

[7.1] A. Liability Under the Scaffold Law

When considering the question of liability for a violation of the Scaffold Law from the time of its first iteration,⁸ and continuing through much of the 20th century, the Court of Appeals' jurisprudence, as it related to a consideration of the culpable conduct of a plaintiff-worker, swung wide, regardless of whether or not the Court viewed the statute as imposing an absolute duty on the contractor.⁹ This, of course, was an application of the common law rule that a plaintiff's contributory negligence would excul-

7 See, e.g., J. Beckerman, *Accountability in Elevated Construction Accidents*, N.Y.L.J. 6 (May 8, 2013); R. Green, *Labor Law §240 and CPLR 14-A Legislation: A Different Look*, N.Y.L.J. 4 (Nov. 1, 2013); R. Kelner and G. Kelner, *In Defense of Preserving Labor Law §240(1)*, N.Y.L.J. 3 (May 28, 2013); T. Segalla and J. Signor, *It Is Time to Reconsider New York's Labor Law*, N.Y.L.J. 1 (March 28, 2006); K. Semple, *Contractors and Workers at Odds Over Scaffold Law*, N.Y. Times (Dec. 17, 2013) (www.nytimes.com/2013/12/18/nyregion/campaign-underway-to-amend-scaffold-law-protecting-construction-workers.html); B. Shoot, *Proposed Legislative "Reforms" of Labor Law*, N.Y.L.J. 3 (April 16, 2013); A. Siracuse, *Proposals for Tearing Down the Scaffold Law*, 23 N.Y.L.J. (April 9, 2001); J. Stashenko, *Scaffold Law Supporters Mobilize to Counter Reform Push*, N.Y.L.J. 6 (April 15, 2015); J. Stashenko, *Business Groups Urge Repeal of Scaffold Law*, N.Y.L.J. 4 (Oct. 18, 2013); *Scaffold Law Is Falling Out of Favor With Some*, N.Y.L.J. 28 (March 15, 2001).

8 L. 1885, ch 314; L. 1892, ch 517.

9 Compare *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 317–18, 83 N.E.2d 133 (1948) (“it is our judgment that both sound reason and persuasive decisions, involving statutes whose content and purpose are similar to those of section 240, require the conclusion that that statute does not permit the worker’s contributory negligence to be asserted as a defense” (internal citations omitted)) with *Maleeny v. Standard Shipbuilding Corp.*, 237 N.Y. 250, 142 N.E. 602 (1923) (although Labor Law imposed an absolute duty to furnish a safe scaffold and the employer is liable for injuries arising out of negligence in providing an unsafe scaffold, the statute did not abrogate the common law defense of contributory negligence); *Gombert*, 201 N.Y. 27 (statute does not “impose absolute and irresistible liability” where the language does not evince a legislative intent to eliminate the defenses of assumption of risk and contributory negligence).

pate the defendant.¹⁰ In some instances, the Court of Appeals was forced to change direction because the legislature had changed the statute.¹¹

[7.2] B. Interpretation

Although the zenith of what might be considered the plaintiff-friendly interpretation of the Scaffold Law came in 1985 with the Court of Appeals' decisions in *Zimmer v. Chemung County Performing Arts, Inc.*¹² and *Bland v. Manocherian*,¹³ the sea change came about in 1948. In *Koenig v. Patrick Constr. Corp.*¹⁴ the Court of Appeals expressly overruled¹⁵ *Maleeny* and *Gombert* and eliminated from consideration the question of the plaintiff's culpable conduct.¹⁶ However, it should be noted that in the intervening years between *Koenig* and modern-day Scaffold Law litigation, the 1962 amendments placed liability only on those "employing or directing another to perform labor"¹⁷ and, for most of the decade, the statute was interpreted as imposing a duty on only those owners or general contractors who exercised control or supervision over the work by which the plaintiff was injured.¹⁸

10 See, e.g., *Kimmer v. Weber*, 151 N.Y. 417, 420–422, 45 N.E. 860 (1897) (where contractor provided materials necessary and sufficient to erect a scaffold, contractor may not be held liable for injuries where plaintiff used a deficient scaffold erected or modified by coworkers); *Butler v. Townsend*, 126 N.Y. 105, 109, 26 N.E. 1017 (1891) (common law duty to provide a safe place to work did not include duty to assure that workers erected a safe scaffold for the tasks to which the workers were assigned).

11 See *Blake v. Neighborhood Hous. Serv. of N.Y.C., Inc.*, 1 N.Y.3d 280, 284–86, 771 N.Y.S.2d 484 (2003) (discussing the history and purpose of the Scaffold Law); *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 135–36, 412 N.Y.S.2d 863 (1978) (generally summarizes the swing of the judicial pendulum in response to legislative enactments); see also *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 405 N.Y.S.2d 630 (addressing the effect of legislative changes on Labor Law § 241 litigation).

12 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985).

13 66 N.Y.2d 452, 497 N.Y.S.2d 880 (1985).

14 298 N.Y. 313, 83 N.E.2d 133 (1948).

15 See generally B. Shoot, *Overruling by Implication and the Consequent Burden Upon Bench and Bar*, 75 Alb. L. Rev. 841, 857–68 (2012).

16 *Koenig*, 298 N.Y. at 317–18.

17 L. 1962, ch 450, § 3. The statute was amended in 1969 to make it clear that the obligations imposed applied to "(a)ll contractors and owners and their agents, except for owners of one and two-family dwellings who contract for but do not direct or control the work" (See L. 1969, ch 1108 § 1; see also cases cited at note 11 *supra*).

18 See generally *Haimes v. New York Tel.* and *Allen v. Cloutier Constr. Corp.*, *supra* note 11.

[7.3] 1. *Koenig*

In *Koenig*, the Court declared the language of the statute to impose a “flat and unvarying duty,” the breach for which the wrongdoer is absolutely liable regardless of the exercise of due care.¹⁹ The *Koenig* Court based its determination, in part, on what it perceived to be the legislative intent to protect those who “are scarcely in a position to protect themselves [and] usually have no choice but to work with the equipment at hand, though danger looms large” and held that to permit the employer to “avoid this duty by pointing to the concurrent negligence of the injured worker in using the equipment” would frustrate or nullify “the beneficial purpose of the statute.”²⁰ In further support of its holding, the Court quoted from a case dating to the beginning of the 20th century for what has since become an often-repeated or paraphrased observation regarding the Scaffold Law: it “is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed.”²¹

[7.4] 2. *Zimmer*

In *Zimmer* and its companion case *Hunt v. Spitz Constr. Co., Inc.*,²² the Court declared that the statute imposes absolute liability²³ on owners and contractors for injuries suffered by a construction worker where there was a failure to provide *any* safety devices to protect the worker and the worker *is injured thereby*.²⁴ In *Zimmer*, the Court introduced the issue presented as being the determination of “the extent to which Labor Law § 240(1) imposes liability upon an owner or contractor who failed to provide *any* safety devices for workers at a building worksite, and the

19 *Koenig*, 298 N.Y. at 318; *see also Haimés*, 46 N.Y.2d at 137 (“overall compliance with safety standards would be achieved by placing *primary and inescapable responsibility* on owners and general contractors rather than subcontractors”) (emphasis added).

20 *Koenig*, 298 N.Y.2d 318–19; *see also Haimés*, 46 N.Y.2d at 137.

21 *Koenig*, 298 N.Y.2d 319 (quoting *Quigley v. Thatcher*, 207 N.Y. 66, 68, 100 N.E. 596 (1912)).

22 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985).

23 On occasion the courts employ the term “strict liability” (*see, e.g., Morton v. State of New York*, 15 N.Y.3d 50, 61, 904 N.Y.S.2d 350 (2010) (Lippman, Ch. J., dissenting); *Cammon v. City of New York*, 95 N.Y.2d 583, 590, 721 N.Y.S.2d 579 (2000); *Custer v. Jordan*, 107 A.D.3d 1555, 968 N.Y.S.2d 754 (4th Dep’t 2013); *Davis v. Wyeth Pharms., Inc.*, 86 A.D.3d 907, 909, 928 N.Y.S.2d 377 (3d Dep’t 2011); *Hook v. Quattrociocchi*, 231 A.D.2d 882, 883, 647 N.Y.S.2d 881 (4th Dep’t 1996); *see also Haimés*, 46 N.Y.2d at 137 (owners and contractors have “primary and inescapable responsibility” for the protection of workers)).

24 65 N.Y.2d 513, 524, 493 N.Y.S.2d 102 (1985) (emphasis added).

absence of such devices is *the* proximate cause of injury to a worker.”²⁵ The Court, relying on what it considered to be “the clear language of the statute and its purpose as articulated by the Legislature,” declared that “an owner or contractor under *these* circumstances is absolutely liable in damages for injuries sustained by such worker.”²⁶ In both cases, the circumstances were such that the defendants conceded that no safety devices were furnished to the injured plaintiffs. Nevertheless, the defendants in both cases offered testimony tending to show that their conduct was reasonable because, at the particular stage of their respective construction projects in which the workers were injured, the industry custom and usage either did not require the use of such safety devices, or their use would have rendered the project more dangerous.²⁷ The Court explicitly rejected the defendants’ contentions and held that “liability is mandated by the statute without regard to external considerations such as rules and regulations, contracts or custom and usage”²⁸ and that “[t]he question of *** circumstantial reasonableness is therefore irrelevant under subdivision 1 of section 240.”²⁹

In support of its determination, the Court reiterated its view that the legislature recognized the need to protect workers who are in no position to protect themselves,³⁰ its own long-held view that the statute should be

25 *Id.* at 518–19 (emphasis added) (although the Court employed the definite article, the entire jurisprudence makes it clear that a defendant will be held liable when its statutory violation was a proximate cause of the plaintiff’s injuries).

26 *Id.* at 519.

27 *Id.* The question of whether the reasonableness of a contractor’s or owner’s conduct had been considered in earlier construction accident litigation (*see, e.g., Caspersen v. La Salla Bros.*, 253 N.Y. 491, 495, 171 N.E. 754 (1930); *Wiley v. Solvay Process Co.*, 215 N.Y. 584, 109 N.E. 606 (1915)). More recently, the Appellate Division, First Department, has debated the application of the doctrine of foreseeability in Labor Law §240(1) litigation (*see Ortega v. City of New York*, 95 A.D.3d 125, 129, 940 N.Y.S.2d 636 (1st Dep’t 2012); *Vasquez v. Urbahn Assoc. Inc.*, 79 A.D.3d 493, 495 (majority), 497–98 (Acosta, J. dissenting), 918 N.Y.S.2d 1 (1st Dep’t 2010); *Espinoza v. Azure Holdings II, LP*, 58 A.D.3d 287, 289, 292–93, 869 N.Y.S.2d 395 (1st Dep’t 2008)).

28 *Zimmer*, 65 N.Y.2d at 523.

29 *Id.* at 523 (quoting *Kenny v. Fuller Co.*, 87 A.D.2d 183, 186, 450 N.Y.S.2d 551 (2d Dep’t 1982)). Only two months later, the Appellate Division, First Department, held that a court may consider rules and regulations and custom and usage in the industry as to the adequacy of the protective device. Apparently the distinguishing fact being the evidence of the presence and use of such a device (*see Smith v. Jesus People*, 113 A.D.2d 980, 981, 983, 493 N.Y.S.2d 658 (3d Dep’t 1985)).

30 *Zimmer*, 65 N.Y.2d at 520, 524.

liberally construed,³¹ and its prior determinations wherein the Court held that the duty imposed was “flat and unvarying” and without regard to the contractor’s care or lack thereof in the presence of a statutory violation.³² *Zimmer* is significant, and perhaps the high-point for injured workers, for its very specific holding that liability will be imposed even “[i]f the state of the building art is such that no devices have yet been devised to protect workers operating at such heights in dangerous work.”³³

For the purposes of this review of the Court’s sole proximate cause and recalcitrant worker jurisprudence,³⁴ it is important to note that the *Zimmer* Court imposed liability where, although ladders were *present* at Mr. Zimmer’s worksite, the safety device was not erected or provided for his use.³⁵ This issue did not go unnoticed by Judge Simons in his concurrence.³⁶ He noted that *Smith v. Hooker Chems. & Plastics Corp.*,³⁷ a case relied on by the defendants, was distinguishable by reason of the fact that “in the *Smith* case equipment was actually at the place to be used, it had been used the day before and the worker assigned to do the job had requested that it be put in place” but when that worker refused to do the job after the plaintiff himself refused to re-place the equipment, the plaintiff undertook to do the work without the safety equipment and then fell from the roof and suffered injuries.³⁸ It seems Judge Simons tacitly approved of the Appellate Division holding that “section 240(1) does not impose a duty on an owner, as a matter of law, to compel a worker who

31 *Id.* at 521 (citing *Quigley v. Thatcher*, 207 N.Y. 66, 68, 100 N.E. 596 (1912) and *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 317–18, 83 N.E.2d 133 (1948)).

32 *Id.* at 521 (citing *Joyce v. Rumsey Realty Corp.*, 17 N.Y.2d 118, 122, 269 N.Y.S.2d 105 (1966) (quoting *Koenig*, 298 N.Y. at 317)).

33 *Id.* at 523 (quoting *Zimmer v. Chemung County Performing Arts*, 102 A.D.2d 993, 995, 477 N.Y.S.2d 873 (3d Dep’t 1984) (Mikoll, J. dissenting)).

34 See *Gallagher v. New York Post*, 14 N.Y.3d 83, 896 N.Y.S.2d 732 (2010); *Robinson v. E. Med. Ctr., LP*, 6 N.Y.3d 550, 814 N.Y.S.2d 589 (2006); *Montgomery v. Fed. Express Corp.*, 4 N.Y.3d 805, 795 N.Y.S.2d 490 (2005); *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004); *Blake v. Neighborhood Hous. Serv. of New York City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).

35 *Zimmer*, 65 N.Y.2d at 519 (although the *Zimmer* Court was not called upon to specifically address the question of the plaintiff’s conduct, it is important to note that in the context of the sole proximate cause defense, and particularly its variant, the recalcitrant worker defense, whether a safety device was readily available is a core issue); see notes 95–135 *infra*.

36 *Id.* at 525–26 (Simons, J., concurring).

37 89 A.D.2d 361, 455 N.Y.S.2d 446 (4th Dep’t 1982), *appeal dismissed*, 58 N.Y.2d 824, 1983 WL 14967 (Jan. 18, 1983).

38 *Zimmer*, 65 N.Y.2d at 525.

refuses to use available satisfactory equipment to do so.”³⁹ Although couched in terms of the absence of a duty, as opposed to contributory negligence, Judge Simons’s concurrence foreshadowed future debate. Relatedly, and again for our review of later Court of Appeals jurisprudence that might be characterized as less worker-friendly, the Court’s specific reference to proximate cause (the nexus between the statutory violation and the worker’s injury) as being an essential element of Labor Law § 240(1) liability⁴⁰ cannot be overlooked.

[7.5] 3. *Bland and Wright*

In *Bland v. Manocherian* and its companion case *Wright v. State of New York*,⁴¹ unlike in *Zimmer*, the Court was squarely faced with the question of whether the injured worker’s own negligence was a factor to be considered in assessing § 240(1) liability.⁴² Interestingly, the Court did not cite to *Koenig*, *Klein*, *Gordon*, or *Stolt*. Rather, it seized the opportunity to reaffirm the rule articulated more recently in *Zimmer* “that Labor Law § 240(1) imposes absolute liability upon an owner or contractor for

39 *Id.* at 526; *but see Haimés v. New York Tel. Co.*, 46 N.Y.2d 132, 135–36, 412 N.Y.S.2d 863 (1978) (plaintiff’s decedent was an independent contractor who supplied the ladder from which he fell because he did not properly place the ladder; the Court rejected the defendant’s contention that the statute was not intended to impose the duty of “an insurer of an independent contractor’s safety”). Interestingly, Judge Simons was a member of a unanimous court on four cases in which the Court of Appeals cited to *Haimés* as authority (*see Klein v. City of New York*, 89 N.Y.2d 833, 835, 652 N.Y.S.2d 723 (1996) (plaintiff fell from a ladder which he had placed on a floor which appeared to be clean at the time he placed the ladder but which he observed to have a film or “gunk” after his fall; the plaintiff established that the defendant was prima facie liable under Labor Law § 240(1) for its failure “to ensure the proper placement of the ladder”); *Gordon v. Eastern Ry. Supply, Inc.*, 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993) (plaintiff was injured by sandblasting equipment after he fell from a ladder; the Court rejected the defendant’s contention that the plaintiff’s use of a ladder rather than a scaffold in contravention of his employer’s directives does not standing alone make the plaintiff a recalcitrant worker because “an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a ‘safety device’”) (Simons, J.); *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 920, 597 N.Y.S.2d 650 (1993) (plaintiff’s disregarded his supervisor’s instruction not to use a broken ladder unless another was present to secure the ladder was not a basis to deny liability where the defendant did not provide an adequate safety device in lieu of the broken ladder); *Hagins v. State of New York*, 81 N.Y.2d 921, 597 N.Y.S.2d 651 (1993) (defendant cannot not avoid liability where there was a failure to provide an adequate safety device notwithstanding worker’s disregard of instructions not to walk across the abutment from which he fell)).

40 *Zimmer*, 65 N.Y.2d at 524.

41 66 N.Y.2d 452, 497 N.Y.S.2d 880 (1985).

42 In *Bland*, 66 N.Y.2d at 457–58, the evidence established that the plaintiff had placed the ladder at the location where he was injured. The jury found that the ladder was not placed so as to give proper protection and that the improper placement was a proximate cause of the accident. In *Wright*, 66 N.Y.2d at 458, the plaintiff and coworker erected the scaffold which had in place only one of two planks for standing and which had no protective devices to prevent a fall.

failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure.”⁴³ Indeed, the Court of Appeals stated “[t]his interpretation of the statutory provisions is now binding precedent upon the entire court.”⁴⁴ As to both plaintiffs, each of whom had *erected* or *placed* the ladder or scaffold from which they respectively fell, the Court held that injured worker’s allegedly negligent conduct in erecting the safety device was not a factor to be considered in assessing (or diminishing) § 240(1) liability.⁴⁵

The *Zimmer*⁴⁶ and *Bland*⁴⁷ dissents criticized the Court for extending liability under Labor Law § 240(1) to that of an insurer. Although the Scaffold Law has come under much criticism, including calls for amendment or repeal,⁴⁸ and perhaps notwithstanding some cases that may reasonably be interpreted otherwise,⁴⁹ the Court stated that the jurisprudence in this state has never swung so far as to hold owners and contractors liable as insurers.⁵⁰ Whether that be a correct assessment or not, without a doubt, in the years since *Zimmer* and *Bland*, the Court of Appeals has limited the reach of § 240(1) liability by its recognition of the “sole proximate cause” defense and its variant, the “recalcitrant worker” defense.

43 *Id.* at 459.

44 *Id.*; Chief Judge Wachtler, who dissented in *Zimmer* and was joined by Judge Jasen, voted with the majority in *Bland*. Judge Titone, who took no part in *Zimmer*, dissented in *Bland*. His dissenting opinion does not cite to *Koenig*.

45 *Id.* at 459–62; *see also Haimes*, 46 N.Y.2d at 137.

46 *Zimmer*, 65 N.Y.2d at 526, 527 (Wachtler, Ch. J., dissenting).

47 *Bland*, 66 N.Y.2d at 463 (Titone, J., dissenting).

48 *See generally* note 7 *supra*.

49 *See generally* note 39 *supra*.

50 *See Blake v. Neighborhood Housing Serv. of New York City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003); *but see Haimes*, 46 N.Y.2d 132.

[7.6] II. SOLE PROXIMATE CAUSE DEFENSE

[7.7] A. Origination

The defense of sole proximate cause, in the context of Scaffold Law litigation, first appeared in modern day⁵¹ Court of Appeals jurisprudence⁵² in *Weininger v. Hagedorn & Co.*⁵³ wherein the Court held, without citation, that it was error to grant a directed verdict in favor of the plaintiff who fell from a ladder where the facts were such that “a reasonable jury could have concluded that the plaintiff’s actions were *the sole proximate cause* of his injuries, and consequently liability under Labor Law § 240(1) did not attach.”⁵⁴ Since the principal issue being litigated by the parties was the question of whether the plaintiff was engaged in altering or repairing a structure, the application of the doctrine of sole proximate cause appears almost as an afterthought, as it was determined without ref-

51 Under the Scaffold Law’s first iteration (see L. 1885, ch 314) the Court of Appeals had long ago held that a worker’s contributory negligence would permit the employer to escape liability (see *Blake*, 1 N.Y.3d at 285 (citing *Kimmer v. Weber*, 151 N.Y. 417, 421, 45 N.E. 860 (1897)) and *Butler v. Townsend*, 126 N.Y. 105, 111, 26 N.E. 1017 (1891)).

52 As the *Blake* Court recognized (1 N.Y.3d at 290), before *Weininger*, the Appellate Division had recognized and considered the doctrine of sole proximate cause in Labor Law § 240(1) litigation (see *Anderson v. Schul/Mar Constr. Corp.*, 258 A.D.2d 605, 685 N.Y.S.2d 753 (2d Dep’t 1999) (record was sufficient to support a verdict that the alleged improper placement of the ladder was not a proximate cause of the plaintiff’s injuries when he mis-stepped and fell while holding a cup of coffee and a donut as he was descending the ladder); *Clark v. Fox Meadow Builders, Inc.*, 214 A.D.2d 882, 624 N.Y.S.2d 685 (3d Dep’t 1992) (“no evidence . . . that the plaintiff’s injuries were caused exclusively by his own willful or intentional acts”); *Hodge v. Crouse Hinds Div. of Cooper Indus.*, 207 A.D.2d 1007, 616 N.Y.S.2d 822 (4th Dep’t 1994) (plaintiff’s alleged drug intoxication would be admissible as proof only if it was the sole proximate cause of his injuries; here the lack of a safety device was a proximate cause of the plaintiff’s injuries); *Tate v. Clancy-Cullen Storage Co., Inc.*, 171 A.D.2d 292, 575 N.Y.S.2d 832 (1st Dep’t 1991) (worker’s intoxication cannot be raised as a defense where plaintiff demonstrated that a statutory violation was a proximate cause of the worker’s injuries); *Bernal v. City of New York*, 217 A.D.2d 568, 568–69, 628 N.Y.S.2d 823 (2d Dep’t 1995) (summary judgment in favor of plaintiff properly denied when there was a question of fact as to whether the conduct of a *coworker* was the sole proximate cause of the plaintiff’s injuries)). Of course, because the so-called “recalcitrant worker” defense focuses on the conduct of the worker and considers whether the worker’s injuries were caused by his own conduct in refusing to use a safety device that was available at the worksite, it is a variant of the doctrine of sole proximate cause. Under the present iteration of the statute, the recalcitrant worker defense dates back to 1982 (see *Smith v. Hooker Chems. & Plastics Corp.*, 89 A.D.2d 361, 455 N.Y.S.2d 446 (4th Dep’t 1982), *appeal dismissed*, 58 N.Y.2d 824, 1983 WL 14967 (Jan. 18, 1983) (worker refused to use a safety device that was available at the worksite) (although the appellation was not used in *Smith*, this Fourth Department opinion is largely credited with establishing the “recalcitrant worker” defense; see *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39, 790 N.Y.S.2d 74 (2004)).

53 91 N.Y.2d 958, 672 N.Y.S.2d 840 (1998).

54 *Id.* at 960 (emphasis added).

erence to the underlying facts or citation to legal authority.⁵⁵ However, Supreme Court Justice Andrew Siracuse’s close examination of the record on appeal⁵⁶ reveals that the defendant offered evidence in support of its contention that there was no defect in the ladder, that the plaintiff stepped on the crossbar causing the ladder to collapse, and that the plaintiff’s misuse of the ladder was *the* sole proximate cause of his injuries.⁵⁷ Thus, as Justice Siracuse suggests, the plaintiff’s purported misuse of the ladder appears to be the most logical explanation for the Court’s holding that there was a question of fact precluding a directed verdict in favor of the plaintiff.⁵⁸

[7.8] B. Application

Almost immediately, the Appellate Division began to cite to *Weininger* when examining the question of the application of the doctrine of sole proximate cause to Scaffold Law litigation.⁵⁹ However, the Court of Appeals did not again take up the issue of a plaintiff-worker’s negligence as the sole proximate cause of injury for approximately five years until *Blake v. Neighborhood Housing Services of New York City, Inc.*⁶⁰ In *Blake*, where the plaintiff was also a self-employed independent contractor, Judge Rosenblatt described the question as “whether a plaintiff who was injured while using a ladder may prevail in a Labor Law § 240(1) action even when a jury finds that the ladder was so constructed and operated as to give him proper protection and he was *the* sole proximate cause of his injury.”⁶¹ Surely, as the question was presented, as if, and as former Chief Judge Wachtler had suggested in his dissent in *Zimmer*,⁶² the Court

55 *Weininger v. Hagedorn & Co.*, 241 A.D.2d 363, 659 N.Y.S.2d 476 (1st Dep’t 1997), *rev’d* by *Weininger*, 91 N.Y.2d at 959–60.

56 *See Secord v. Willow Ridge Stables*, 179 Misc.2d 366, 684 N.Y.S.2d 867, *aff’d*, 261 A.D.2d 965, 690 N.Y.S.2d 375 (4th Dep’t 1999)

57 *Id.* at 370–71.

58 *Id.*; *Weininger*, 91 N.Y.2d at 960.

59 *See, e.g., Eitner v. 119 West 71st St. Owners Corp.*, 253 A.D.2d 641, 642, 677 N.Y.S.2d 555 (1st Dep’t 1998); *Frank v. Meadowlakes Dev. Corp.*, 256 A.D.2d 1141, 1142, 686 N.Y.S.2d 540 (4th Dep’t 1998) (however, when referencing the statutory violation, the court applied the definite article (*the* proximate cause) as opposed to the indefinite article (*a* proximate cause); *see* note 25 *supra*); *Lardaro v. New York City Builders Grp., Inc.*, 271 A.D.2d 574, 576, 706 N.Y.S.2d 174 (2d Dep’t 2000); *Powers v. Lino Del Zotto & Son Builders, Inc.*, 266 A.D.2d 668, 670, 698 N.Y.S.2d 74 (3d Dep’t 1999) (question of apportionment of fault).

60 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).

61 *Id.* at 281 (emphasis added) (plaintiff was in the employ of his own contracting company).

62 65 N.Y.2d 513, 526, 527, 493 N.Y.S.2d 102 (1985) (Wachtler, Ch. J., dissenting).

had made owners and contractors the insurers of worker safety, the Court would have been compelled to answer the question in the affirmative. But, it did not. Indeed, any such interpretation of the statute, or its own prior jurisprudence, as imposing the duty of an insurer, was explicitly rejected by the *Blake* Court.⁶³ Judge Rosenblatt, again speaking for the Court, recognized that perhaps it was the Court itself, having previously injected the phrases “strict liability” and “absolute liability,” and their variants, that was to blame for the confusion in Labor Law § 240(1) litigation.⁶⁴ In an effort to cure any misconception, Judge Rosenblatt stated that the Court had always been steadfast in its jurisprudence: liability is premised on a statutory violation and proximate cause and further that the plaintiff’s contributory negligence cannot defeat the plaintiff’s prima facie case, the Scaffold Law being an exception to apportionment of liability under CPLR 1411.⁶⁵ He went on to explain that strict or absolute liability in the context of Labor Law § 240(1) jurisprudence is not to be confused with the concept of “liability without fault” as that concept is known in the context of “blasting activities, keeping wild animals and discharging petroleum [or] products liability” litigation.⁶⁶ The Court held that liability under Labor Law § 240(1) is not liability without fault, but that any belief that a “fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party” is a “mistaken belief.”⁶⁷ Rather, the Court held, liability is contingent, in part, upon fault, the fault being proof of “a violation of section 240(1).”⁶⁸ And, the Court held, “causation must also be established,” meaning the plaintiff must show that the statutory violation was *a* contributing cause of his injuries.⁶⁹

Although the Court would leave no doubt that sole proximate cause was a viable defense, the Court did not retreat from its long-held view that courts determining § 240(1) issues may not engage in a balancing, or comparing, of relative fault. The Court said, “comparative negligence is not a defense to absolute liability under the statute.”⁷⁰ The Court distinguished the defense of sole proximate cause from the law of “comparative

63 *Blake*, 1 N.Y.3d at 288.

64 *Id.* at 286–88.

65 *Id.* at 287.

66 *Id.* at 287–88 (internal citations omitted).

67 *Id.* at 288.

68 *Id.*

69 *Id.* at 289 (emphasis added).

70 *Id.*

fault, by which a culpable defendant is able to reduce its responsibility upon a finding that the plaintiff was also at fault” and declared “[t]hat would be impermissible under section 240(1).”⁷¹ The Court held,

it is conceptually impossible for a statutory violation (which serves as *a* proximate cause for a plaintiff’s injury) to occupy the same ground as a plaintiff’s sole proximate cause of an injury. Thus, if a statutory violation is *a* proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation.⁷²

Perhaps in an exercise of caution, so as not to permit the misinterpretation that it was reading or imposing a negligence-like standard into § 240(1) liability, the Court cited to its own jurisprudence, ancient⁷³ and current,⁷⁴ recognizing presumptions running in favor of the injured worker, that is, there may be a finding of a statutory violation by reason of a scaffold or ladder collapse or malfunction even without explanation.⁷⁵ The Court tells us that the burden then shifts to the defendant to introduce evidence sufficient “to raise a fact question—that there was *no statutory violation* and that plaintiff’s own acts or omissions were the sole cause of the accident.”⁷⁶

71 *Id.* at 289–90.

72 *Id.* at 290 (emphasis added).

73 *Id.* at 289, n. 8 citing to *Stewart v. Ferguson*, 164 N.Y. 553, 58 N.E. 662 (1900) (in the absence of some other competent producing cause, the fall of the scaffold is presumed to have been by reason of a violation of the statute).

74 *Id.* at 289, n. 8 citing to *Panek v. County of Albany*, 99 N.Y.2d 452, 458, 758 N.Y.S.2d 267 (1999) (summary judgment appropriate where “[p]laintiff’s allegation that the ladder ‘gave way’ or collapsed beneath him, causing him to fall, was uncontested”); *Klein v. City of New York*, 89 N.Y.2d 833, 835, 652 N.Y.S.2d 723 (1996) (“Plaintiff has established a prima facie case that defendant violated Labor Law § 240(1) by failing to ensure the proper *placement* of the ladder due to the condition of the floor” and without evidence to the contrary or otherwise affecting the plaintiff’s credibility, plaintiff was entitled to summary judgment (emphasis added)).

75 *Blake*, 1 N.Y.3d at 289, n. 8.

76 *Id.* (emphasis added).

In *Blake*, the Court had before it an affirmed finding of fact.⁷⁷ The jury determined, and the Appellate Division affirmed⁷⁸ that “the ladder being used by plaintiff Rupert Blake [was] so *constructed*, operated as to give proper protection to plaintiff.”⁷⁹ In addition, the jury determined that the defendant had “the authority to direct, supervise and control Mr. Blake’s work.”⁸⁰ Upon this affirmed finding of fact, the Court declared it was “inescapable . . . that the accident happened not because the ladder malfunctioned or was defective or improperly placed, but solely because of plaintiff’s own negligence in the way *he used* it.”⁸¹ Although not specified in the Court’s opinion, the brief filed on behalf of the defendant-respondent, Neighborhood Housing Service of New York City, Inc.,⁸² reveals that the plaintiff acknowledged on cross examination that the ladder was not broken, defective, unsteady or shaky, but rather that it was in good working condition.⁸³ The plaintiff was unsure as to how the accident happened; nevertheless he acknowledged that the clips or latches which hold the extension portion of the ladder in place were not defective and may very well have come up and that as the extension was sliding down he may have used his foot to stop the ladder from retracting.⁸⁴ This, the Court of Appeals tells us, was the sole proximate cause of the plaintiff’s injuries, and the plaintiff’s conduct, as the sole proximate cause of his injuries, occupies the entire sphere of causation to the exclusion of proximate cause resting on the defendant.⁸⁵ To extend statutory “liability in such a case would be inconsistent with statutory goals since the accident was not caused by the absence of (or defect in) any safety device, or in the

77 When there is an affirmed finding of fact by the Appellate Division, the jurisdiction of the Court of Appeals is limited to reviewing questions of law (see N.Y. Const. Art. VI, § 3 (a); CPLR 5601 (b)).

78 *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 284, 771 N.Y.S.2d 484 (2003) (citing *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 301 A.D.2d 366, 367, 754 N.Y.S.2d 244 (1st Dep’t 2003)).

79 *Blake*, 1 N.Y.3d at 284 (quoting the verdict sheet) (emphasis added).

80 *Id.*

81 *Id.* (emphasis added).

82 *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 2003 NY App. Ct. Briefs 153, 4 (N.Y. Aug. 7, 2003).

83 *Id.* This is, of course, a distinguishing feature not present in *Zimmer*, where it was acknowledged that no safety devices were present (see *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985)).

84 *Id.*

85 *Blake*, 1 N.Y.3d at 290.

way the safety device was *placed*.”⁸⁶ The Court rejected plaintiff’s contention that, in the absence of proper placement of the clips, the defendant failed to ensure proper placement of the ladder, *Bland v. Manocherian* was dispositive.⁸⁷ In *Bland*, the Court noted, there was evidence from which a jury could reasonably conclude that the ladder was either not “erected” safely or “placed” correctly and further that there was evidence that other safeguards, necessary to prevent the plaintiff from falling through the window, were absent.⁸⁸ Whereas, in *Blake*, as previously indicated, the affirmed jury determination was that the ladder was constructed or operated so as to give proper protection.

The result in *Blake* seems simple enough, and it flows directly from *Weininger*. In *Weininger*, the ladder was not defective and apparently collapsed only because the plaintiff stepped on the bracing or locking mechanism. In *Blake*, the ladder was not defective, but collapsed only because the plaintiff did not properly lock the clips that held the extension in place. The problem is that § 240(1) imposes the duty on owners, contractors, and their statutory agents, not only to “furnish or erect, or cause to be furnished or erected . . . scaffolding . . . ladders . . . and other [safety] devices” but also to construct, place and *operate* them so as to give proper protection to the worker.⁸⁹ It seems, therefore, following the plain language of the statute, and the Court’s holding in *Bland*, that the statutory liability should have been imposed based on the defendant’s failure to assure that the ladder was being *operated* or used by Mr. Blake correctly.

By imposing statutory absolute liability in *Bland*, *Haines* and *Klein* but rejecting the imposition of same in *Weininger* and *Blake*, apparently turning on the word *operate*,⁹⁰ the Court of Appeals tells us that those who may be found statutorily liable have an obligation to “furnish” (supply), “erect,” “construct,” “operate,” and “place” adequate safety devices, but have no obligation to assure that an adequate safety device is being properly “operated” (used)⁹¹ by the worker. Indeed, that was the founda-

86 *Id.* (emphasis added).

87 *Id.* at 291.

88 *Id.* at 291–92 (quoting *Bland v. Manocherian*, 66 N.Y.2d 452, 497 N.Y.S.2d 880 (1985)).

89 Lab. Law § 240(1) (emphasis added).

90 *But see Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279 (2009); Lab. Law § 240(1) liability arises where the plaintiff’s injuries are the direct consequence of a failure to “place and operate” a safety device involving “a risk arising from a physically significant elevation differential.”

91 *Blake*, 1 N.Y.3d at 284.

tion of Judge Titone's dissenting opinion in *Bland*. He would have imposed the obligation only to "supply [furnish] safe equipment and safety devices" as he specifically rejected the notion that the statute imposed the duty "to follow a worker and verify that the worker has 'properly placed'" the safety device in order "to satisfy the statutory mandate."⁹²

Did the *Blake* court's limitation on § 240(1) liability foretell the Court's recognition of the recalcitrant worker defense, the core of which is a worker's unreasonable failure to use a readily available safety device?

[7.9] III. THE RECALCITRANT WORKER DEFENSE

In the aftermath of *Blake*, but before again addressing the sole proximate cause defense, the Court of Appeals addressed the "recalcitrant worker" defense in *Cahill v. Triborough Bridge & Tunnel Auth.*⁹³ Brief as it may be, *Cahill* is significant for several reasons. First, the Court very succinctly reiterates the doctrines that are at the heart of Labor Law § 240(1) litigation: the duty created is strict, absolute, and non-delegable, such that where an accident is caused by a statutory violation, contractors and owners are liable regardless of whether or not they supervise the work and, in that instance, the injured worker's comparative negligence is not a defense; however, where the worker's own negligence is the sole proximate cause of his injuries, there can be no liability.⁹⁴ Next, the Court effectively described the "recalcitrant worker" defense as a variant of the "sole proximate cause" defense in that it "exemplifies" the "sole proximate cause" defense.⁹⁵ The Court then articulated the elements of the defense: (1) adequate safety devices were available; (2) the plaintiff knew that they were available; (3) the plaintiff knew that he was expected to use them; (4) the plaintiff "chose for no good reason" not to use the safety device;⁹⁶ and (5) causation—had the plaintiff "not made that choice he

92 *Bland*, 66 N.Y.2d at 464 (Titone, J., dissenting).

93 *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004).

94 *Id.* at 39

95 *Id.*

96 *See also Gallagher v. The New York Post*, 14 N.Y. 3d 83, 88, 896 N.Y.S.2d 732 (2010). In its application of this element, not seen in the Appellate Division cases applying the recalcitrant worker defense to that point, the Court seems to have injected an element of reasonableness into the equation. Will the purportedly recalcitrant worker be able to rebut the defense by showing that his recalcitrance was reasonable?

would not have been injured.”⁹⁷ Thus, there is no liability because the worker was injured not by reason of an owner’s or contractor’s failure to provide an adequate statutory safety device, but by reason of the worker’s refusal to use the statutory device that was provided—the worker’s recalcitrance was the sole proximate cause of his injuries.⁹⁸

While the *Cahill* Court’s endorsement of the “recalcitrant worker” defense and the articulation of its elements was ostensibly no departure from those articulated in *Smith v. Hooker Chems. & Plastics Corp.*,⁹⁹ *Cahill* is remarkable because its facts are distinguishable from the pre-existing Appellate Division jurisprudence on this issue. The Appellate Division previously considered the application of the recalcitrant worker defense in those instances where there was a close temporal relationship between the instruction to use the safety device and the worker’s refusal or disobedience.¹⁰⁰ In *Cahill*, however, there was no such close temporal relationship and the Court held that the plaintiff “was not the less recalcitrant because there was a lapse of [several] weeks between the instructions and his disobedience of them.”¹⁰¹

97 *Cahill*, 4 N.Y.3d at 40.

98 *But see Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 920, 597 N.Y.S.2d 650 (1993) (the owner or contractor who provides a safety device, but the device is inadequate, combined with the fact that the worker used the inadequate device notwithstanding instructions either not to use the device or only upon taking further precautions, will not be relieved of liability as the worker’s disobedience (recalcitrance) was only a contributing cause, not the sole proximate cause, of his injuries).

99 89 A.D.2d 361, 455 N.Y.S.2d 446 (4th Dep’t 1982), *appeal dismissed*, 58 N.Y.2d 824, 1983 WL 14967 (Jan. 18, 1983); *see also* notes 52 *supra* and 100 *infra*.

100 *See, e.g., Vacca v. Landau Indus., Ltd.*, 5 A.D.3d 119, 773 N.Y.S.2d 21 (1st Dep’t 2004) (“it is well settled in this Department that an immediate instruction is a requirement of the ‘recalcitrant worker’ defense”); *Jastrzebski v. North Shore Sch. Dist.*, 223 A.D.2d 677, 679, 637 N.Y.S.2d 439 (2d Dep’t 1996) (no liability where worker had been instructed to use a scaffold as opposed to the ladder on which he was working; he complied with his supervisor’s instructions, but when the supervisor walked away, the worker got off the scaffold, ascended the ladder again and fell shortly thereafter); *Hickey v. C.D. Perry & Sons*, 223 A.D.2d 799, 636 N.Y.S.2d 153 (3d Dep’t 1996) (supervisor repeatedly ordered the removal of, and did remove, a plank that workers were using to transfer from one ladder to another and that workers should descend the ladder, walk across a sluiceway before ascending another ladder; no liability where 370-pound plaintiff was traversing the plank which broke upon which he fell and was injured); *see also Morrison v. City of New York*, 306 A.D.2d 86, 759 N.Y.S.2d 863 (1st Dep’t 2003) (although the court did not make specific reference to the recalcitrant worker defense, the court noted that the defendant could not point to the conduct of the plaintiff in failing to use a ladder rather than the defective scaffold where there was no “evidence that the plaintiff disregarded an immediate specific instruction to use the ladder”).

101 *Cahill*, 4 N.Y.3d at 39.

If *Blake* may be interpreted as not to require the contractor and owner—those possessed of the non-delegable duty—to follow the worker around to make sure that the safety device is properly operated (used) has the Court in *Cahill* suggested that owners and contractors are not required to follow the worker around to ensure that the worker is indeed using the safety devices that are readily available?

[7.10] IV. RECENT DEVELOPMENTS

[7.11] A. Reasonable Foreseeability

The Court, in *Montgomery v. Federal Express Corp.*,¹⁰² following *Cahill*, seems to have embedded a reasonable foreseeability component into the sole proximate cause equation. According to the facts recited in the Appellate Division decision,¹⁰³ the plaintiff and his supervisor had been working in a motor room which was elevated above the roof floor of a multi-story building. The permanent stairs the workers used the day before to access the motor room had been taken down as part of the partial demolition of the building. Rather than searching for a safety device, such as a ladder, the plaintiff and his supervisor found a 1½-foot bucket, turned it upside down and used it to climb up to the motor room. When they were done with their work, the plaintiff followed his supervisor, who had jumped off the motor room deck onto the floor of the roof. The supervisor landed safely, but the plaintiff suffered serious injuries. The Appellate Division, reversing the Supreme Court, held that there was no Labor Law § 240(1) liability because it was not reasonably foreseeable that the plaintiff would not follow the “normal and logical response” of going to look for a ladder. The Appellate Division held that the plaintiff’s “intervening act” was the “superseding cause” of his injuries.¹⁰⁴ Although the Court of Appeals did not specifically use the word “foreseeable,” nor did it label the plaintiff a “recalcitrant worker,” it adopted the reasoning of the Appellate Division to the extent that it held that “since ladders were *readily available*, plaintiff’s ‘*normal and logical response*’ should have been to get one. Plaintiff’s choice to use a bucket to get up, and then to jump down, was the sole cause of his injury, and he is therefore not entitled to recover under Labor Law § 240(1).”¹⁰⁵ Although not set forth in either the Appellate Division or the Court of Appeals opinions, apparently there was

¹⁰² 4 N.Y.3d 805, 795 N.Y.S.2d 490 (2005).

¹⁰³ *Montgomery v. Fed. Express Corp.*, 307 A.D.2d 865, 866, 763 N.Y.S.2d 600 (1st Dep’t 2003).

¹⁰⁴ *Id.*

¹⁰⁵ *Montgomery*, 4 N.Y.3d at 806 (emphasis added).

testimony that at the time the plaintiff and his supervisor used the 1½-foot bucket to assist in climbing a height of 4 feet, there was at least one ladder on the premises and that the ladders were known to be stored in the trailer maintained by New York Elevator Co. on the ground floor of the building.¹⁰⁶

Montgomery was relied on by the Court in *Robinson v. East Medical Center, LP*,¹⁰⁷ in that the Court specifically quoted the “normal and logical response” language found in *Montgomery*.¹⁰⁸ *Robinson* did not involve a fall from a ladder in the sense that the plaintiff did not fall to the ground. Rather, he saved himself from falling to the ground and in doing so he injured his back.¹⁰⁹ Although it was undisputed that an 8-foot ladder was necessary to safely accomplish the task because of the height at which the plaintiff had to reach, no such ladder was given to the plaintiff. However, the plaintiff also acknowledged that he knew that the 8-foot ladders were stored in the garage and that the practice was for the workers to help themselves. Nevertheless, he did not go to look for one because he believed other workers might be using them. There was no affirmative proof that the 8-foot ladders were actually being used by others such that they were not available to him and there was no proof that the plaintiff was instructed to do the job with the 6-foot ladder, which was inadequate for the job.¹¹⁰ The Court of Appeals declared that there were adequate safety devices available for the plaintiff’s use and held that the “[p]laintiff’s own negligent actions—choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder’s top cap in order to reach the work—were, as a matter of law, the sole proximate cause of his injuries.”¹¹¹

[7.12] B. The Worker’s Obligation

Robinson and *Montgomery* impose on the worker the duty to use statutory safety devices that are readily available. But they beg the question: What does readily available mean? Put another way: What is the worker’s obligation to search the jobsite for an adequate statutory safety device?

106 2004 WL 5284010 (N.Y. Appellate Brief at 7–8).

107 6 N.Y.3d 550, 554, 814 N.Y.S.2d 589 (2006).

108 *Id.*

109 *Id.* at 553.

110 *Id.*

111 *Id.* (citing *Weininger, Cahill, Blake* and *Montgomery*).

The reach of *Robinson* and *Montgomery* was limited by the Court of Appeals in *Miro v. Plaza Construction Corp.*¹¹² In *Miro*, the plaintiff slipped on fireproofing material that was sprayed on the ladder.¹¹³ The plaintiff acknowledged that he could have requested another ladder, but did not do so.¹¹⁴ The Appellate Division found that the plaintiff's "normal and logical response" should have been to request another ladder since the defendant had "a lot of ladders" available at its projects.¹¹⁵ Accordingly, the Appellate Division denied the plaintiff's motion for summary judgment and, upon searching the record, granted summary judgment to the defendants on the § 240(1) cause of action.¹¹⁶ The Court of Appeals, however, on a certified question, modified that determination and held that the evidence was insufficient to establish that the ladders were readily available, and thus found that a triable issue of fact existed because "[a]ssuming that the ladder was unsafe, it is not clear from the record how easily a replacement ladder could have been procured."¹¹⁷

[7.13] C. Requirement of a Normal and Logical Response

Indeed, in *Cherry v. Time Warner, Inc.*,¹¹⁸ after examining *Montgomery*, *Robinson* and *Miro*, the First Department (the court that gave birth to the "normal and logical response" language)¹¹⁹ noted that

while the Court [of Appeals] has not effectively defined readiness or ease of availability, the *Robinson* decision indicates that the requirement of a worker's "normal and logical response" to get a safety device rather than having one furnished or erected for him is limited to those situations when workers *know the exact location* of the safety

112 9 N.Y.3d 948, 846 N.Y.S.2d 76 (2007), *modifying* 38 A.D.3d 454, 834 N.Y.S.2d 36 (1st Dep't 2007).

113 38 A.D.3d 454.

114 *Id.*

115 *Id.* at 455, 459.

116 *Id.* at 459.

117 *Miro*, 9 N.Y.3d at 949.

118 66 A.D.3d 233, 885 N.Y.S.2d 28 (1st Dep't 2009) (the plaintiff was working on the third floor of an eight-story building when he fell from a scaffold that had rails on only two of four sides).

119 *Id.* at 237 (citing to *Montgomery v. Fed. Express Corp.*, 307 A.D.2d 865, 866, 763 N.Y.S.2d 600 (1st Dep't 2003), Justice Catterson remarked: "[T]he phrase 'normal and logical' as it pertains to a worker's response to a lack of a safety device appears to have landed within the lexicon of Labor Law § 240(1) by sheer happenstance.").

device or devices and where there is a practice of obtaining such devices because it is a simple matter for them to do so.¹²⁰

[7.14] D. Readily Available Safety Devices

Relying on *Zimmer*, Justice Catterson, writing for the majority, rejected the notion that the plaintiff had the obligation to search the entire worksite for an adequately equipped scaffold.¹²¹ Interestingly, he also stated that neither *Montgomery* nor *Robinson* articulated any such standard.¹²² Indeed, in *dicta*, he noted, “[i]t is highly unlikely that the availability of a scaffold with guardrails on a different floor would qualify as ‘ready’ or ‘easy’ availability.”¹²³ Nevertheless, because the record was insufficient to establish the location of a properly equipped scaffold, the Appellate Division affirmed the denial of the plaintiff’s motion for partial summary judgment as well as the defendants’ cross motion for summary judgment, both addressed to the § 240(1) claim.¹²⁴ Because the plaintiff’s motion for partial summary judgment on his § 240(1) claim was denied notwithstanding the proof that he suffered injuries from a fall from an inadequate scaffold, *Cherry* implicitly suggests that in the context of the recalcitrant worker defense, a plaintiff moving for partial summary judgment on liability in a § 240(1) claim must come forward with specific proof to establish that an adequate safety device was not readily available in order to establish a prima facie case. Of course, in view of the denial of the defendants’ cross motion to dismiss the § 240(1) claim the defendant bears the similar burden of establishing the five elements of the recalcitrant worker defense set forth in *Cahill*, including that an adequate safety device was readily available.

The reach of *Montgomery* and *Robinson* was limited to a certain degree in *Gallagher v. New York Post*.¹²⁵ The plaintiff, an ironworker, was using a two-handed power saw to cut an opening in a metal decking. When the saw jammed, the plaintiff was propelled forward through an uncovered opening, fell to the floor and suffered injuries. That he was not secured by a protective harness, belt, lanyard, lifeline, or safety cables was not dis-

¹²⁰ *Id.* at 238 (emphasis added).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 239.

¹²⁵ 14 N.Y.3d 83, 896 N.Y.S.2d 732 (2010).

puted.¹²⁶ In his motion for partial summary judgment, the plaintiff alleged that he was injured because of the absence of any such safety equipment in the work area and because he was not provided with any safety belts or other like harnesses. The defendant cross-moved for summary judgment based, in part, on testimony that safety devices were available for use and also upon a “standing order” that the ironworkers were to be harnessed and tied off.¹²⁷ The Court of Appeals found that the plaintiff had established his prima facie case on the uncontroverted evidence that he was not provided with the requisite safety equipment and that the burden shifted to the defendant “to raise a question of fact as to whether a violation of Labor Law § 240(1).”¹²⁸ Citing to *Montgomery* and *Robinson* the Court reiterated, “[l]iability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit *not in the immediate vicinity of the accident*, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident.”¹²⁹ Citing to *Cahill*, the Court described those elements as establishing that a plaintiff’s conduct was the sole proximate cause of his injuries.¹³⁰ But the Court found that there was no proof that the safety devices were “readily available” or that the plaintiff “knew he was expected to use them.”¹³¹

Gallagher is significant in several respects. First, to the extent it addresses the question of a readily available safety device, the Court advises that the device need not be in the “immediate vicinity of the accident.”¹³² But the Court leaves us with no guideline as to determine how far away is too far to be readily available.¹³³ Second, the Court articulated a standard relating to proof demonstrating that the plaintiff was aware that he was expected to use the safety device located somewhere on the worksite. In this regard, the Court held that the defendant’s proof that there was a “standing order” to use safety equipment was insufficient to create a question of fact as to whether the plaintiff was aware “of the

126 *Id.* 86–87.

127 *Id.* at 87.

128 *Id.* at 88.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 Compare *Cherry v. Time Warner, Inc.*, 66 A.D.3d 233, 885 N.Y.S.2d 28 (1st Dep’t 2009) at note 118 *supra*.

availability of the safety devices and unreasonably chose not to use them.”¹³⁴ Without proof that the “standing order” had in fact been conveyed to the workers, including the plaintiff, the plaintiff cannot be said to be solely responsible for his injuries.¹³⁵ Thus, the defendant having failed to raise a triable issue of fact as to the plaintiff’s specific awareness of the availability of the safety device, which necessarily precluded a finding that he failed to use same for no good reason, the Court determined, at least implicitly, that absence of the safety harness and other restraining devices was a proximate cause of the accident and that the plaintiff was entitled to partial summary judgment on liability.¹³⁶

134 *Gallagher v. New York Post*, 14 N.Y.3d 83, 89, 896 N.Y.S.2d 732 (2010); *Luna v. Zoological Soc. of Buffalo, Inc.*, 100 A.D.3d 1745, 958 N.Y.S.2d 807 (4th Dep’t 2012) (although defendant submitted evidence that plaintiff was instructed not to work in a particular area and violated those instructions, the mere failure to follow instructions did not render him a recalcitrant worker); *but see Benavidez-Portillo v. GB Constr.*, 149 A.D.3d 681, 51 N.Y.S.3d 141 (2d Dep’t 2017) (defendant’s raised question of fact as to sole proximate cause defense when plaintiff fell from roof when he was not authorized or instructed to work); *Probst v. 11 West 42 Realty Investors, LLC*, 106 A.D. 3d 711, 965 N.Y.S. 813 (2d Dep’t 2013) (defendants raised a triable issue of fact in opposition to plaintiff’s *prima facie* showing of entitlement to partial summary judgment; where plaintiff’s failure to use a ladder that was readily available to him and disregarded instructions to do so presented a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries); *Saavedra v. 64 Annfield Court Corp.*, 137 A.D.3d 771, 26 N.Y.S.3d 346 (2d Dep’t 2016) (plaintiff was the sole proximate cause of his injuries where he made a makeshift platform by affixing wooden planks over rebar protruding from the floor rather than using an A-frame ladder that was available and in the immediate vicinity).

135 *Id.*; *see Anderson v. MSG Holdings, L.P.*, 146 A.D.3d 401, 44 N.Y.S.3d 388 (1st Dep’t 2017) (although plaintiff could have tied off safety harness to an anchorage point that was inconsistent with OSHA regulations, his failure to do so was not the sole proximate cause of his injuries where he was not provided with appropriate tie-off point or instructed as to appropriate tie-off point); *Fernandez v. BBD Developers, LLC*, 103 A.D.3d 554, 960 N.Y.S.2d 380 (1st Dep’t 2013) (injured worker was not the sole proximate cause of his accident when he was instructed to use a rope, his supervisor helped to fasten the rope to worker’s safety belt, but he was not instructed to shorten rope; over-length of rope did not prevent fall through an open roof); *see also Dedndraq v. ABC Carpet & Homes*, 93 A.D.3d 487, 980 N.Y.S.2d 62 (1st Dep’t 2012) (following supervisor into area where pipe was being lifted notwithstanding warnings not to do so—not sole proximate cause and not recalcitrant worker); *but see Bascombe v. West 44th Street Hotel, LLC*, 124 A.D.3d 812, 2 N.Y.S.3d 569 (2d Dep’t 2015) (issues of fact existed as to whether plaintiff was the sole proximate cause of his injuries where defendants produced evidence that safety line and harness were available and plaintiff was aware of anchor spot and that same would have prevented injuries but worker consciously failed to use the tie-down).

136 *Id.* There was conflicting testimony as to whether the plaintiff had returned to work from a prior injury without proper medical clearance. Apparently, the plaintiff had lost the tip of one of his fingers and that his inability to grip the saw may have caused him to lose his balance when the saw jammed. Resolving the question of whether the plaintiff returned to work prematurely in favor of the defendant, the Court held that while it may have contributed to the plaintiff’s loss of balance, it was not, as a matter of law, the sole proximate cause of his fall.

More recently, in *Barreto v. Metropolitan Transp. Auth.*,¹³⁷ the Court of Appeals modified that portion of the Appellate Division order which affirmed the Supreme Court order granting summary judgment in favor of the defendants and denying plaintiff's motion for partial summary judgment. Although the case discussed the plaintiff's conduct in terms of the question of sole proximate cause, the question before the Court could have been presented in the context of whether the plaintiff was a recalcitrant worker. *Barreto* demonstrates the overlap of the two defenses. The plaintiff was injured when he fell through a manhole cover as he was dismantling the containment enclosure around the manhole.¹³⁸ The defendants put in proof that the plaintiff was instructed not to dismantle the containment enclosure until the manhole cover was replaced.¹³⁹ Citing to the undisputed facts that it took two men to replace the cover and that the lights had been turned off¹⁴⁰ prior to commencing the disassembly of the containment enclosure, the Court of Appeals held that "plaintiff's conduct could not have been the sole proximate cause of his injuries," and granted plaintiff partial summary judgment on his section 240(1) claim.¹⁴¹

[7.15] E. Burden of Proof

Finally, implicit in *Gallagher* is its recognition of the allocation of the burden of proof. Here, the Court held that the plaintiff established his prima facie case on his motion for summary judgment on the proof that he fell and suffered injuries as a result of the absence of a statutorily required safety device and nothing more. The burden shifted to the defendant to establish the presence of an adequate safety device, the plaintiff's awareness of same and that he was expected to use the device.¹⁴²

137 25 N.Y.3d 426, 13 N.Y.S.3d 305 (2015).

138 *Id.* at 432.

139 *Id.*

140 The accident happened at 4:00 a.m. inside the containment enclosure. *Id.* at 431.

141 *Id.* at 433–34 (emphasis added).

142 *Gallagher v. New York Post*, 14 N.Y.3d at 88–89; see also *Valente v. Lend Lease (U.S.) Construction LMB, Inc.* 29 N.Y.3d 1104, 60 N.Y.3d 107 (2017) (reverse grant of partial summary judgment in favor of plaintiff when, viewing the evidence in the light most favorable to the defendant, there was a question of fact as to whether the plaintiff's own conduct rather than a violation of the labor law was the sole proximate cause of his accident).

[7.16] V. CONCLUSION

In the context of Labor Law § 240(1) jurisprudence, we start with the premise that the duty imposed by the statute is non-delegable and has universally been recognized as such. But we pose the question: Has the Court of Appeals, in its articulation of the sole proximate cause and recalcitrant worker defenses, delegated some responsibility to the worker? To a limited extent, the Court seems to have instructed that if an owner or contractor has furnished and properly erected a statutory safety device, the duty then passes to the worker to use it¹⁴³ and to use it properly.¹⁴⁴

The answers to the questions posed at the beginning of this chapter perhaps better lie in interpretation of the Court of Appeals' jurisprudence discussed in an article by the Appellate Divisions. However, as the foregoing case law suggests, the results are not always predictable. A fact-specific analysis is warranted on every case. Also, the cases cited show a disparity in the intermediate appellate authority on the questions of sole proximate cause and the recalcitrant worker defense. A more detailed summary of the variance in authority is left to other chapters of this book.

143 *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004).

144 *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).