

# The Laborious Task of Litigating NY State Labor Law Claims: A Pre-Trial Defense Perspective

Matthew Rice, Joseph Rava and Peter Read write: Almost any accident on a construction site, especially those involving elevation-related hazards, may subject owners, general contractors and subcontractors to liability and, in some cases, absolute liability. The defense must focus on defeating liability, transferring risk and reducing the damages claim.

## ***New York Law Journal***

By Matthew Rice, Joseph Rava and Peter Read | November 13, 2017

In the world of personal injury litigation, perhaps no claim is more difficult to defend than one brought under the incredibly burdensome New York State Labor Law statutes. Almost any accident on a construction site, especially those involving elevation-related hazards, may subject owners, general contractors and subcontractors to liability and, in some cases, absolute liability. The defense must focus on defeating liability, transferring risk and reducing the damages claim.

## **Knowledge Is Power**

Those who litigate labor law cases will be well-versed with the statutes in play. The three relevant are New York State Labor Law §§200, 240 and 241(6).

Labor Law §200 is a codification of a common-law duty of an owner or contractor to provide workers with a safe place to work. Liability may be imposed as a result of a dangerous condition inherent in the work site or due to an unsafe work practice or procedure. In a dangerous condition case, liability attaches if either exercised supervision and control over the work bringing

about the injury *and* had actual or constructive notice of the unsafe work practice. In a dangerous condition case, the plaintiff need not demonstrate the element of control but must prove notice of the condition.

Labor Law §240 was enacted to protect workers subjected to gravity-related risks and imposes absolute liability on owners, general contractors or their agents for violations of its provisions. The hazards contemplated by this section are those related to the effects of gravity where protective devices are called for, either because of a difference between the elevation level of the required work and a lower level, or a difference between the elevation level where the worker is positioned and the higher level of materials or loads being hoisted or secured. The only tenable defense is that the plaintiff was the sole proximate cause of the occurrence.

Labor Law §241(6) imposes a non-delegable duty of care on owners, general contractors and their agents for violations of the Industrial Code of the State of New York. The plaintiff must plead and prove a violation of a specific, conduct-regulating provision of the

Industrial Code of the State of New York; that the violation constituted a failure to use reasonable care; and that it was a proximate cause of the injury. The plaintiff's comparative negligence is considered.

### **Immediate Investigation Is Critical**

At first notice of the loss, it is imperative to visit the site, photograph the scene and instrumentality involved (sequester it, if possible) and identify and take statements from witnesses. Obtain copies of any incident reports, relevant work records, all contracts, safety plans, specifications and certificates of insurance pertaining to the involved job. Review contracts for indemnity clauses paying attention to triggering language and additional insured obligations. Then set up risk transfer opportunities by tendering to responsible parties and their insurers. Lastly, always keep your client involved and engage a liability expert early.

### **Responding to the Complaint**

This is your chance to evaluate the legal claims, and evaluate the statute of limitations, jurisdictional and venue issues. In labor law cases you will want to assert a sole proximate cause defense. See *Cahill v. Triborough Bridge & Tunnel Authority*, 4 N.Y.3d 35 (2004) (holding that where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law §240 for injuries caused solely by his violation of those instructions). Additionally, be sure to assert appropriate cross claims and counter claims and commence third-party actions where appropriate.

### **Evaluating the Claim**

In evaluating liability, there are several aspects of the claim to dissect. Is the plaintiff a proper labor law plaintiff? Alternatively, is your client an agent of the owner and a proper labor law defendant? See *Russin v. Picciano & Son*, 54 N.Y.S.2d (1981); *Walls v. Turner*, 798 N.Y.S.2d 351 (2005). Labor Law §§240 and 241(6) claims are predicated on agency and, if that agency relationship to the owner does not exist, the plaintiff will have to establish that your client was negligent.

Did the project at issue involve construction, altering, repairing, cleaning or any of the other statutorily-protected activities under Labor Law §§240 or 241? For example, in *Broggy v. Rockefeller Center Group*, 8 N.Y.3d 675 (2007), the court specifically set forth the distinctions between cleaning and routine maintenance, finding commercial window cleaning was a covered activity.

Because the area of labor law is ever-evolving, be sure to consider the facts as known and research current case law. After *Wilinski v. 334 E. 92nd Hous. Dev. Fund*, 935 N.Y.S.2d 551 (2011) the courts have continued to expand the application of Labor Law §240. For example, the Appellate Division, First Department also found it applicable to cases involving steel beams stacked on an A-frame cart that fell and struck the plaintiff in the leg. *Marrero v. 2075 Holding Co.*, 106 A.D.3d 408 (1st Dep't 2013). The operative analysis concerned the size and weight of the load and the forces generated by the falling objects.

### **Paper Discovery**

Once the litigation has commenced, documentary exchanges will occur first. Tailor your Bill of Particulars demand to seek

amplification of the labor law claims and Industrial Code Rules claimed violated.

The Industrial Code rules cited must be sufficiently specific in their mandates to trigger Labor Law 241(6) liability. They must also be relevant to the action. Research the rules cited to assess how they have been viewed by the courts. For example, Rule 23-1.5 “General Responsibility of Employers” has been held to be too general to trigger liability. *Wilson v. Niagra Univ.*, 43 Ad 3d 1292, 842 N.Y.S.2d 819 (2007). Rule 23-1.6 regarding “Safety belts, harnesses, tail lines and lifelines” may be cited but, if those devices were not in use, it will not apply. *Fernandez v Stockbridge Homes*, 35 Misc.3d 1204(A) (1st Dep’t 2012) (holding that section of the Industrial Code does not apply in situations where an injured worker was not provided with any such safety devices). Be sure the rules cited have application to your case. If they do not, move for summary judgment on those claims.

Discovery items to be demanded include:

- Authorizations for all pre-and post-accident medical, hospital, diagnostics tests (X-ray, MRI, Ct Scan, EMG, etc.), physical therapy, occupational therapy, and chiropractic records;
- Authorizations for workers’ compensation (board and carrier), collateral sources, union records and all employment records, including wage, salary, attendance and personal records;
- Contracts, specifications, safety plans, daily records, payroll records, safety meeting minutes, incident reports, etc.

## Depositions

The deposition provides the opportunity to ask detailed questions about the accident,

how it occurred and the conditions prevailing. Plaintiff’s deposition must thoroughly cover the plaintiff’s educational, employment and health background. Ask about pre-accident activities, bankruptcies, prior injuries, hobbies, athletic pursuits, other lawsuits, criminal background, etc. Question the plaintiff about any electronic postings he or she makes on sites such as Facebook and Twitter, as there is often a treasure trove of information to be found there.

During the deposition, it is also important to question the plaintiff’s safety training before the occurrence. What safety equipment was available and used by the plaintiff (i.e., safety belts, harnesses, scaffolds, etc.). Find out what safety equipment the plaintiff claims should have been provided as well.

It is also crucial to get detailed information about the workplace. Use photographs, plans, and drawings (if you have them) to help define the area of the occurrence. Determine whether the plaintiff claims that anyone from your client directed or controlled his/her work.

## After the Depositions

Next, assign relevant professionals such as neurologists, orthopedists, radiologists, vocational rehabilitation specialists etc. to examine the plaintiff. When appropriate, consider the necessity of an economist or a life care planner.

You may also consider surveillance of the plaintiff. Note that construction workers often begin work at 6 a.m. and 7 a.m.; thus, commencing surveillance in the very early morning or later afternoon is best. In one of our recent cases, a plaintiff claimed he could not work in any capacity, yet our investigator caught the plaintiff slam-dunking a basketball

in a two-on-two pick-up game, and then smoking marijuana with a group of teenagers (plaintiff was in his late thirties). In another case, we located a plaintiff lifting extremely heavy pieces of sheetrock while working on a construction project (several days in a row) despite the fact he was collecting workers' compensation and claimed he was unemployable. Just a few days' work resulted in millions of dollars of savings for the clients.

### Summary Judgment

The last activity prior to trial is, most often, a motion for summary judgment. After the Note of Issue is filed, consult with your liability expert to assess the viability of a summary judgment motion or to prepare to defend an anticipated summary judgment motion by the plaintiff. You will want to assess its viability on liability and on indemnity issues and begin preparation of same. Make sure that you put forth affirmative proof in admissible form in support of your motion. Should the motion be denied, consider appealing on liability grounds where you feel you have the ability to prevail.

When using experts, consider being creative. In one case we handled, the plaintiff claimed the spreader on his ladder broke while he was using it, causing it to tip and fall. Our expert, a former design engineer for a well known ladder company, created a video depicting him standing on a ladder, and had a colleague strike the spreaders off while he stood on the ladder and remained standing

after the damage, showing the implausibility of the plaintiff's claims.

In addition, always remember that credibility can result in the denial of a motion as well. In another case we handled, the plaintiff recalled all the details with regard to his allegedly "wobbly" ladder. However, he failed to recall basic details such as the size of the room or location of windows. In fact, he stated he "did not recall" the answers to over 150 other questions. Thus, what appeared to be a very easy case for the plaintiff to establish liability, resulted in a question of fact over Labor Law §240 because of questions regarding the plaintiff's selective recollection. Here, a few hours of effective questioning greatly optimized the settlement outcome for our client.

### Conclusion

Defending labor law cases successfully can be incredibly challenging yet rewarding at the same time. The defense requires aggressive litigation, creativity, and the utmost attention to detail and preparation. A structured and coordinated litigation strategy will help put you in the best position to defend the litigation and consistently deliver positive results for the client.



---

*Matthew Rice, Joseph Rava and Peter Read  
are members of the New York Labor Law  
Litigation Practice Group at Marshall  
Dennehey Warner Coleman & Goggin.*