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Trying a Labor Law Case with a Sole Proximate Cause Defense

By Ben Rubinowitz and Evan Torgan

Although Labor Law Section 240 was designed to protect workers, making owners and general contractors strictly liable for height-related workplace safety violations, over the years the trial of those cases has become fraught with difficulty. While originally written by the legislature to protect workers in dangerous occupations at all costs – even from themselves -- it has instead become a statute giving rise to the recalcitrant worker/sole proximate cause defense, allowing for many more defense verdicts. While Labor Law cases are still among the best liability cases tort lawyers handle, they must be tried more artfully and carefully than ever before.

Let us take the following fact pattern, based upon an actual Appellate Division decision, where a small business owner is hired by the General Contractor to paint a commercial building and falls from the A-frame ladder that he brought to the worksite himself. To make matters worse, he falls because the back legs of the ladder he placed sink into the grass that became wet from his power washing, and an employee of the building's owner says that the plaintiff was intoxicated at the time, although neither the police report nor the hospital

records bear that out. In addition, the general contractor's safety foreman, who had worked with the plaintiff on prior occasions, allowed him to begin work after hours, after all the other contractors, including the safety foreman, had left for the day.

The first thing a trial lawyer must have is an intimate knowledge of the law. Go to the Pattern Jury Instructions, because the jury's decision will hinge on the law. The PJI charge 2:217, for purposes of this article says, in pertinent part:

> Section 240 of the Labor Law requires all contractors [and] owners in the painting of a building to furnish or erect for the performance of such work ...devices such as scaffolding . . . ladders . . . and other devices, which shall be so constructed, placed, as to give proper protection to the person performing such work.
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> If defendant breached this statutory duty and such breach was a substantial factor in causing plaintiff's injuries, the statute imposes liability whether or not defendant was at fault and whether or not there was any fault on the part of the plaintiff that contributed to the injury.
>
> If you find the (scaffolding, ladder) was not so constructed or placed, as to give proper protection to the plaintiff in the performance of the work and that was a substantial factor in causing plaintiff's injury, you will find for the plaintiff on this issue.
>
> If you conclude that the plaintiff's action was the only substantial factor in bringing about the injury, you will find for the defendant on this.

Thus, a 240 case is not a negligence case at all. In reality, it is purely an action brought under a statute, the violation of which imposes strict and absolute liability on the owner and

general contractor. Therefore, you do not have to prove fault or negligence, and comparative negligence of your client is not a defense. The worker's behavior is only a defense if it is, in fact, the sole proximate cause, the only substantial factor, in causing the injury. Not only do we as lawyers have to realize this, but the potential jurors have to as well.

Therefore, recitation of these principals is critical during the voir dire of the potential jurors. You must make sure you do not lead the jurors to believe that it is a negligence case; if you fail to do this from the start, you will not succeed, especially in a case with this type of fact pattern. Therefore, your introductory comments to the prospective jurors have to be properly stated:

> Q: I represent a man who was injured while painting a building at a construction site. It is our contention that both the owner of the building and the general contractor who brought in my client to do that work violated the Labor Law of the State of New York in failing to furnish proper equipment and give him proper protection in order for him to do the work. It is our position that as a result of their failure to give him proper protection he was hurt, and hurt severely.
>
> So I would like to make it clear that we are not saying the defendants in this case were negligent. That is not something that we will be showing you here. Nonetheless, we are saying that they are responsible for my client's injuries. We are simply saying they violated a statute, the Labor Law, and that they did not provide proper protection for him

at the job site nor did they furnish him with proper equipment. Did I make myself clear on that?

In every case, a discussion with the jurors about their ability to follow the law is important, but in a labor law case it is critical:

Q: At the end of this case, after all the evidence is in, and after the closing remarks of all the lawyers, the judge will instruct you on the law. And I'm telling you right now, that the law is the most critical part of this case. And it is really important that everyone on the jury follows it. What do you think about that?

Q: Can you assure me that you will, in fact, follow the law?

Q: Can you follow the law even if you don't agree with it?

Q: Can you follow the law even if you don't necessarily like what your verdict would have to be if you followed it?

Q: Can you assure me that if we prove the owner and the general contractor on this job violated the labor law by failing to provide him with either proper equipment, properly place it or provide adequate protection, and that failure caused his injury, that you will say that in your verdict?

Q: And if we don't prove that, will you be able to say that as well?

Opening statements in a labor law case cannot just outline the evidence. They must track the law by using its operative terms as well. Although it is improper for a lawyer to tell the jury what the law is, there is a proper way to incorporate portions of operative terms of the jury charge regarding the labor law in the opening statement.

> On June 1st, 2010, John Roberts was hired by the general contractor on the job, Ace Contracting, to paint this building while it was under construction. In order to paint the side of this two story building he had to first power wash it. And because he had to power wash it, what he really needed was a scaffold, because he had to move constantly from his left to his right every few moments. Unfortunately, neither the owner nor the general contractor furnished or erected for him in the performance of his work – specifically his painting and power washing – scaffolding, which would have given him proper protection while performing such work.

By presenting it this way, the jury will be familiar with operative terms throughout the trial, which the judge will be instructing them on at the end of the case.

If possible, call the general contractor's site safety foreman on your direct case. Utilize him as if he is your own expert witness, but always remain in control by asking tight, leading, suggestive questions of this adverse witness. Because a witness such as this is adverse, leading questions are permitted:

Q: Sir, you are an employee of one of the defendants in this case,

Q: You were actually the site safety foreman on the job where Mr. Roberts was injured, right?

Q: And your primary responsibility was safety, wasn't it?

Q: Safety of the workers, true?

Q: As the safety foreman, sir, you would agree with me that the safety of the workers on the construction site was your most important consideration, wasn't it?

Q: And your job specifically was to ensure that my client had a safe place to work, true?

Q: And to do that you had to be conversant with The Labor Law of the State of New York, specifically Section 240, true?

Q: As a matter of fact, if there was one thing you knew you and your employer had to do at a minimum, it was to comply with that section, right?

Q: And that is because my client was involved in painting the

Q: And that puts him squarely within the protections of section 240 of the labor law, right?

Q: You would agree with me sir: that you always want to make sure that workers are safe, true?

Q: And toward that end, your responsibility is to do site inspections, true?

Q: And because you are such a caring and careful site safety foreman -- you always want to do that, don't you?

Q: And if you cannot do it, you make sure someone from your company does, true?

Q: It would certainly be wrong not to do a site inspection, wouldn't it?

Q: Now, John Roberts set up the work site after you left for the day, didn't he?

Q: You knew he was working after hours, true?

Q: And there is no question about it, you were not there at the time, true?

Q: You'd agree, sir, and there is no question, first of all, that the A-frame ladder Mr. Roberts used was not the proper device for him to use while power washing ant painting true?

Q: He should have in fact been furnished with an extension ladder or a scaffold, true?

Q: And although your attorney told this jury in his opening statement that Mr. Roberts should have brought better equipment, the truth is that, that was the general contractor's job, wasn't it?

Q: And not just the job of the general contractor, but the responsibility of the owner of the property as well, right?

Q: And the fact that the ladder was badly placed, there is nothing that states it was Mr. Robert's job to place it appropriately, true?

Q: As a matter of fact there were only two entities on this job with the responsibility to have the ladder appropriately placed, right?

Q: The General Contractor?

Q: And the owner?

Your construction safety expert should testify after all the relevant liability witnesses – good and bad – have had their say. It is only after all the important testimony is either known, or in evidence, that the expert should be called. After properly qualifying the expert based upon education, training and experience, take advantage of the liberal use of hypothetical questions. Although hypothetical questions are no longer required in New York

state courts, it is an excellent opportunity to restate the relevant facts of your case, so take advantage of it.

Q: Madame Expert, I would like you to assume the following is true. That on June 2, 2010, John Roberts was power washing and preparing to paint the second floor of a building under construction. He arrived there at 5:15 p.m., after everyone involved in the project had left for the day. At the same time, he had permission from the site safety foreman to work alone at that time. He was provided no scaffold, no extension ladder and used the only ladder he had: an A- frame ladder, where he placed the front legs on the concrete next to the building and the back legs on the only place they could go: on the grass. Of course the grass got soaked from the power washing, the back right leg sunk in to the grass and the ladder tipped over causing John to fall.

My question is, do you have an opinion, to a reasonable degree of safety engineering certainty, as to whether it was appropriate for the site safety foreman not to show up and inspect the work site?

Q: Why do you say that?

Q: Do you have an opinion, again, to a reasonable degree of safety engineering certainty, as to what the proper devices that should have been furnished to Mr. Roberts to provide for his safety?

Q: Madame Expert, do you have an opinion, to a reasonable degree of certainty, as to whether that A frame ladder being used in the situation that we described conformed with the standards of safety practice within the construction community?

Q: Do you have an opinion, to a reasonable degree of safety engineering certainty, as to what substantial factors, if any, caused this accident?

Q: Do you have an opinion as to whether or not John Robert's actions were the sole proximate cause, or only substantial factor in causing this accident?

Q: What is the basis for that opinion?

The summation is the time to put all of these issues together: dealing with the non-delegable duty of the owner and general contractor to provide proper protection to your client; the fact that comparative negligence is not a defense; dealing with the accusation of intoxication; and ultimately the sole proximate cause defense.

So the question is this: If the sole proximate cause of John Robert's injury, the only substantial factor causing his injury, was the bad placement of the ladder by John himself, why did the defense have to come up with the theory that he was intoxicated when it is clear from the police and ambulance personnel that he wasn't? Because the defense must believe that nothing short of him getting up on that ladder drunk would exonerate the defendants from absolute liability in this case.

First of all, there is no way that John can be held responsible for using the wrong ladder. It is obvious, that the A-frame ladder was the wrong way to go. And that is because of the way the building was situated near the sidewalk and grass, that the only way to use that A-frame was to have the front legs on the concrete, and the rear legs on the grass. The problem was that he had to power wash the wall before he applied the paint. The water made the grass wet, the right rear leg of the ladder sunk into the grass, the ladder tipped and John's life was changed forever.

So obviously – as our expert said, and the defendant's safety foreman said: the proper device to protect John would have been a scaffold. And although

they say that John is an experienced journeyman painter and should have supplied his own scaffold, this is clearly not the case.

There is nothing in the law, no instruction that you will hear that says John Roberts, the subcontractor, had a duty to furnish a proper scaffold or ladder in this case. And you will certainly hear nothing that says John Roberts, the subcontractor, had a duty to provide a scaffold or ladder that was properly placed. On the contrary, there were only two entities with a non-delegable duty – a duty that they couldn't give to anyone else – to provide adequate and proper protection to John Roberts, and those are simply the two defendants in the case - - the owner and the general contractor.

So it doesn't matter for our analysis that John placed the ladder himself, or that he did so poorly. It doesn't matter that he had the wrong safety device rather than a scaffold or extension ladder, because it wasn't his job to bring the proper equipment. That job, that responsibility belongs to Chump Tower and General Contracting, Inc.

And you also cannot blame John for placing the ladder in the wrong spot or putting it on the grass. That was the defendants' responsibility.

There is a reason we have these labor laws to protect the working men and women in our country. Because: they are the people who do the tough jobs. They are the one ones who do the heavy lifting for us; climb the high buildings; take the risks that we don't. And they need protection. They need someone looking out for them. Could you imagine a worker going to the owner of a building on a construction site and saying: "I'm sorry. I'm not going up there. It isn't safe. You have to build me a scaffold." How long do you suppose that guy would keep his job? How about until the end of business that day. And once word gets around that this worker is trouble, always complaining about improper equipment, do you think he would ever get another job? Of course not!

So we as a society that recognizes that our workers need protection, put the onus on the building owners and general contractors who have the safety foremen who run these jobs, and the wherewithal to have the proper equipment. And this owner and this general contractor failed, and failed miserably.

So because these companies realize they violated the statute that is designed to protect John Roberts, they have to come up with another reason to relieve themselves of liability. And that is: Blame the victim, which they do.

But the truth is this isn't a negligence case. That means that they don't get a break even if you find that John is partially to blame. Because the only thing that matters is that his own behavior is the only substantial factor. They know it isn't . It is a combination of factors: Failing to provide a scaffold; failing to provide an extension ladder; failing to properly place the ladder he had.

The absolute only way they can win is if they convince you that John was drunk and that his intoxication is the sole cause of this accident. So they have their long time loyal worker come in to defend the company. They can't defend the case on the facts; they can't win it on the labor law which clearly exists to protect workers like John. So they come up with alcohol and say he was drunk.

But where is the evidence? There is none. The police officer testified John wasn't intoxicated. The Emergency Medical Technicians said he had no alcohol on his breath and even put that in an official document. And John had surgery that night. If he had alcohol in his blood stream do you think they would have put him under general anesthesia and operated? Not a chance.

The bottom line is this: The defendants failed to have a site safety inspector at the job site while work was being conducted. The defendants failed to provide proper equipment while work was being conducted. And the defendants failed to provide a safe place to work - - all clear violations of the labor law.

The trial of a Labor Law case calls for different strategies than that of the typical personal injury case. The crux of the action is a failure to comply with a statute that was designed to protect workers who cannot protect themselves; it is not a lack of ordinary care. It is important to call the adverse witnesses necessary to prove your case before calling your expert, making sure your expert deals with the departure from accepted standards of safety practices, as well as the sole proximate cause defense. From jury selection through summation, it is critical to invoke the operative legal terms that the judge will use in instructing the jury, so the jury realizes the legal requirements throughout the trial. This way, the jury will understand that the sole proximate cause defense is inconsistent with the facts of the case as well as the purpose of the labor law: to protect workers in dangerous jobs, especially from themselves.

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