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Still Debating What 'Falls' Within Labor Law §240(1)

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AS NEW YORK Labor Law §240(1) continues to be interpreted and re-interpreted by the courts, 240(1) case law involving falling objects is perhaps the most dynamic. Some reasonably observed that the New York Court of Appeals' December 2009 decision in *Runner v. New York Stock Exchange Inc.*[1] would simplify identifying which falling object cases come under the statute's protection. A particularly discordant recent appellate division decision, examined later in this article, reveals that there is still much room for debate.

Examining a thread of seminal Court of Appeals falling object decisions allows one to discern certain concrete borders of the statute's protective shield, but also raises many questions. Perhaps more interestingly, it provides an insight into a particularly organic, complex and often confounding area of jurisprudence where one must be cautious in declaring any bright line test. The same decision can be cited to reach diametrically opposite results, and there is always room to debate where the law stands.

A good place to start is the Court's landmark 2001 decision in *Narducci v. Manhasset Bay Associates*.[2] There, two cases were reviewed, *Narducci* and *Capparelli*, both involving workers injured in similar falling object scenarios. The first involved a worker who was standing on a ladder removing steel window frames when he was struck by a falling piece of glass.[3] In the second case, another worker on a ladder was installing a light fixture into a dropped ceiling grid, when he rested the fixture against the edges of the grid, and then began to descend the ladder. Suddenly, the fixture fell down toward the worker, and as he reached out to stop it from striking him, it cut his hand and wrist.[4]

The Court unanimously held that 240(1) did not apply to protect either worker. Post-*Narducci*, the decision was often characterized by the following quote: "…for section 240(1) to apply…a plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute."[5]

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That proclamation seemed to require that a falling object actually be in the process of being hoisted or secured in order to invoke the statute. The Court, however, offered a more expansive interpretation of 240(1) later in the very same decision.

In dismissing Narducci's case, the Court found that "the glass that fell on plaintiff was not…a load that required securing for the purposes of the undertaking at the time it fell…".[6] As a result, *Narducci* became somewhat misunderstood and controversial. Read as a whole, it holds that an object requiring securing should be secured whether anyone was undertaking to secure the object or not.

In dismissing the *Capparelli* plaintiff's case, the Court found that the height differential between the light fixture and the worker was not significant enough to trigger 240(1)'s protections.[7] Stating a proposition that the Court would later revisit in 2009, the *Narducci* Court found that "[t]he fact that gravity worked upon this object which caused plaintiff's injury is insufficient to support a Section 240(1) claim."[8]

'Outar' Did Not Resolve the Questions

Some of the confusion over *Narducci* should have been resolved by *Outar v. City of New York*.[9]

Outar was a case involving a New York City Transit Authority worker who was struck by a falling dolly. Before falling, the dolly had been stored on top of a wall that was approximately five and one-half feet high. If only focused on the "while being hoisted or secured" language of *Narducci*, one might have expected that the *Outar* Court would have dismissed plaintiff's 240(1) claim.

In fact, it did the opposite. In a very short decision, the Court found that the falling dolly triggered the protections of 240(1) because it was, "…an object that required securing for the purposes of the undertaking."[10] The only case cited in the *Outar* decision was *Narducci*.

The dolly in *Outar*, just as the piece of glass and light fixture in *Narducci*, was not being hoisted or secured prior to falling. The elevation difference between the dolly in *Outar* and the fixture in *Capparelli* was no different; if anything, the dolly fell a shorter distance than the fixture. Yet the *Outar* Court believed 240(1) was designed to protect the track worker from that unsecured dolly. As such, *Narducci* and *Outar* were highly fact-driven decisions involving the nature of the work, the relationship of the object to the work and an implicit analysis about the fairness of requiring that the object in question had been secured.

It is worth noting that the *Narducci* and *Outar* Courts could have submitted a question to the jury about whether the objects in question required securing, but neither did. This provides one insight into why 240(1) case law is so dynamic and hotly litigated. Since it is an absolute liability statute that creates clear winners and losers, and because its effectiveness depends upon providing clear guidance to construction owners, contractors and workers about what constitutes a safe work site, the courts rightly feel obliged to delve into the facts and decide whether they invoke the statute's protections.

One result is the courts' constant struggle to create bright line, general 240(1) standards.

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Another is practitioners' ability to extrapolate seemingly global propositions of law from what is a litany of often highly contextual decisions. This process has led to continued debate about the significance of *Narducci*, despite some subsequent decisions that have at least clarified, if not outright dismantled any precedential value it once had.

Clarifying Decision

One such clarifying decision was in *Quattrocchi v. F.J. Sciame Const. Corp.*[11]

The first sentence of the Court of Appeals' decision reads, "[a]s our holding in *Outar v. City of New York* indicates, 'falling object' liability under Labor Law 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured…".[12]

The *Quattrocchi* case involved a carpenter who was injured while making a delivery when he bumped into a swinging door. On top of that door rested a number of planks, causing "at least three" of them to fall down approximately two feet and strike the worker.[13] The planks had been placed atop the doors by another contractor to temporarily support an air conditioner that had already essentially been installed at the time of the accident. Evidence existed that the plaintiff, after asking permission, had specifically been instructed to not pass through the doorway.[14]

Some reasonably observed that the New York Court of Appeals' decision in 'Runner v. New York Stock Exchange Inc.' would simplify identifying which falling object cases come under the statute's protection; a particularly discordant recent appellate division decision reveals that there is still much room for debate.

As it did in *Outar*, the Court found that 240(1) applied to Quattrocchi's accident. Unlike *Outar*, however, the *Quatrocchi* Court found that there was an issue of fact to be determined by a jury; specifically, whether the planks were adequately secured in light of the purposes of the plank assembly, and whether the plaintiff caused the accident after disregarding a warning not to enter the doorway area.[15]

The Court could have more narrowly framed the triable issue as whether the plaintiff had been recalcitrant or the sole proximate cause of his accident by virtue of his ignoring a direct order and pressing through the precarious doorway. Instead, the Court probably agreed with the majority First Department reasoning that the planks' purpose was to secure the air conditioner, which was already secure, and the planks quite possibly would have remained in place if not for the conduct of the plaintiff.[16]

Notably, the First Department decision was only by a 3-2 margin, and the dissent would have dismissed the plaintiff's case entirely. The dissent argued that the placement of the planks atop the doors did not create a situation in which the securing devices enumerated in 240(1) were "necessary" or "expected."[17] The dissent can be viewed as following in the *Narducci* tradition of making a gate-keeping fact-intensive decision that the falling object in question did not seem like the type of falling object the statute contemplated. The Court of Appeals rejected the dissent's reasoning in that regard.

The Role of Gravity

In *Runner v. New York Stock Exchange Inc.*,[18] the plaintiff and his co-workers were moving a large wheel of wire, weighing some 800 pounds, down a set of "about four stairs." The loose end of a rope that was used as a makeshift hoist was then held by plaintiff and two co-workers while others pulled the reel down the stairs. As the reel descended, it pulled the plaintiff and his fellow workers horizontally into the metal bar.[19]

The defendants argued that the plaintiff neither fell, nor had an object fall onto him, and therefore 240(1) should not apply. The Court disagreed, finding in the plaintiff's favor and holding that, "[t]he relevant inquiry—one which may be answered in the affirmative even in situations where the object does not fall on the worker—is rather whether the harm flows directly from the application of the force of gravity to the object."[20]

Runner dispelled the notion that cases falling under the ambit of 240(1) can neatly and comprehensively be categorized into "falling worker" and "struck by a falling object" cases. *Runner* also appeared to clarify that a significant height differential between the worker and falling object is not necessary to find liability under 240(1). The reel being lowered in *Runner* was at substantially the same or a slightly lower elevation than the plaintiff, and the plaintiff was pulled horizontally into the metal bar.

It should be noted, however, that the *Runner* Court was not totally unconcerned with also finding a significant elevation differential. The Court did observe that the height differential was significant given the weight of the reel and the "force it was capable of generating."[21] However, the height differential described by the Court was not that between the worker and object, but rather between the object and the bottom of the staircase below the plaintiff. Significantly, the Court focused on "force" and lacked concern for the number of feet or inches that the reel fell.

The significance of *Runner*, and the complexity of 240(1) case law, are better understood after examining the pre-*Narducci* Court of Appeals decision in *Melo v. Consolidated Edison Co. of New York Inc.*[22] There, the plaintiff was performing excavation and backfill work, when he and a co-worker were covering a trench with a heavy steel plate. The plate was attached, by chain, to the shovel of a backhoe. As the plate was being maneuvered to the trench, its bottom edge was touching the ground. The hook became unfastened and the plate toppled over, falling onto the plaintiff.[23]

The *Melo* Court upheld the dismissal of plaintiff's case, finding that, "[w]hile the force of gravity may have caused the steel plate to fall as it was being moved by an allegedly defective hoist…the steel plate was resting on the ground or hovering slightly above the ground. The steel plate was not elevated above the work site. Thus, it could not be said that the statute was implicated…".[24]

It is rather difficult to reconcile the *Runner* and *Melo* decisions. Mr. Melo, just like Mr. Runner, was hurt on the job because a hoist failed and a foreseeable gravity-related injury directly ensued. In neither case was there a traditionally understood elevation differential between the worker and the object. Yet Melo had no viable 240(1) case and Runner did.

It is neither unusual, nor particularly noteworthy that the Court's interpretation of a statute such as 240(1) has changed over the years. What is interesting, however, is that both the *Runner* and *Melo* Courts cited to the same decision, *Ross v. Curtis-Palmer Hydro-Electric Co.*,[25] to justify their opposite outcomes.

Just like *Narducci*, *Ross* is a 240(1) decision that contains multiple quotes, which can be extracted to easily justify different results.[26] Ironically, *Ross* was not a falling object case at all, but was prominently cited as authority for two seminal, and at least arguably irreconcilable falling object cases. In that respect, it represents another example of the complex nature of 240(1) falling object case law.

Recent First Department Case

What significance do *Narducci* and its progeny have in the wake of *Runner*? One recent First Department decision, *Makarius v. Port Authority of New York and New Jersey*,[27] presents this very emerging debate.

In *Makarius*, plaintiff and his co-worker were attempting to repair a break in a domestic water pipe located in an electrical closet. Plaintiff was standing on the ground, supporting the ladder on which his co-worker stood. A transformer that had been affixed to the wall six or seven feet above the ground then fell and struck plaintiff in the head. The transformer was secured by lag bolts at the time of the incident, but was set to be reinforced by knee braces, which had not yet been installed. The sheetrock wall on which the transformer had been affixed was wet due to the leaking broken pipe plaintiff and his co-worker were repairing.[28]

A divided court dismissed plaintiff's 240(1) claim by a 3-2 majority. The importance of this particular case is yet to be known, but its educational value is apparent in the rather contentious concurring and dissenting opinions of Justices Nelson Roman, James McGuire and Karla Moskowitz. Those opinions contain a spirited debate about the scope of 240(1)'s falling object protection and the real meaning of *Narducci* and *Runner*.

Justice Roman's decision to dismiss plaintiff's 240(1) claim was based largely on his finding that the transformer fell "less than two feet" before striking the top of plaintiff's head, which represented to him an insignificant height differential between the transformer and the injured worker. Incidentally, the planks in *Quattrochi* were two feet above the plaintiff's head, yet the Court of Appeals had no issue with that elevation differential triggering the statute's protections.

Furthermore, in a pre-*Runner* decision, the First Department determined that an electrical panel positioned at the same height above the ground as the transformer in *Makarius* (six to seven feet) did pose a significant enough elevation differential to invoke 240(1). In that case, *Cardenas v. One State Street, LLC*,[29] the First Department imposed liability even though the "elevation differential was slight" because the "activity clearly posed a significant risk to plaintiff's safety."[30] While there were other distinguishing factors in *Cardenas*, the height differential justification in *Makarius* appears somewhat tenuous.

Justice Roman then cited a line of cases, including *Narducci* and *Melo*, for the proposition that a significant height differential is a requirement before imposing liability under the statute. He then acknowledged *Runner*, but concluded that, "[c]learly a significant height differential between the work being performed and the object being hoisted or secured continues to be a required element of the statute."[31]

Reading the *Runner* decision as a whole, one could certainly have come away with the opposite impression. Indeed, the *Runner* Court specifically cautioned that *Narducci* does not provide an exhaustive list of 240(1) falling object scenarios, that 240(1) has been interpreted too narrowly and that the "governing rule" looks at whether the harm flowed from the application of gravity to an object or person.[32]

Given those holdings, coupled with the prior clarifying opinions in *Outar* and *Quattrochi*, it could be argued that *Narducci* now has very little precedential value at all. Justice Roman's decision highlights the continuing difficulty in identifying exactly where falling object case law stands; and should caution practitioners against prematurely determining what a new 240(1) decision really means.

Justice McGuire's concurring opinion in *Makarius* agreed with Justice Roman that the plaintiff's 240(1) case should have been dismissed, but provided another basis for the dismissal. Justice McGuire further found that the transformer was not an object that required securing, and was "completely unrelated to plaintiff's task…"[33]

First, one could take issue with the characterization of "completely unrelated." The transformer was located directly over plaintiff's head, had been installed shortly before the accident during the same project, was awaiting its final securing braces and was affixed to a wall that was being soaked by the very broken pipe that plaintiff and his co-worker were repairing. Was the relationship of the transformer to the plaintiff's work so tangential that it should have been deemed completely unrelated as a matter of law?

In *Quattrochi*, the Court of Appeals left it to a jury to decide whether the planks that fell on the plaintiff were adequately secured. There, the planks had no relationship to the plaintiff's delivery work, other than that he passed through the doorway on which they rested.

Justice Moskowitz' *Makarius* dissent maintained that 240(1) should have applied. Justice Moskowitz argued that the lag bolts securing the transformer qualified as 240(1) safety devices and failed to protect the plaintiff from the effects of gravity. There was a dispute between Justices Moskowitz and McGuire about whether the safety bolts did qualify as statutory safety devices. Each had enough authority to support either position.[34]

This debate could be considered unnecessary. There was no safety device at all securing the dolly in *Outar*, and the doors supporting the planks in *Quattrocchi* certainly were not statutorily enumerated devices. Yet both of those falling objects were covered by 240(1).

Honing in directly on the larger question posed in this article, the dissent criticized the majority's narrow reading of the statute, and boldly observed that *Runner*'s expansive holding rendered decisions such as *Narducci* "no longer viable"[35]

This is perhaps the quintessential example of the complexity of 240(1) falling object case law. Within the same appellate division decision, one Justice refers to a *Narducci* holding as a clear continuing precedent, while another deems the decision no longer viable.

1. 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009).
2. 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001).
3. See id. at 265-66.
4. See id. at 266-67.
5. Id. at 268.
6. Id.
7. Based on the decision, the light fixture fell over two feet prior to striking the plaintiff.
8. Id. at 270, citing *Rodriguez v. Tietz Ctr. for Nursing Care*, 84 N.Y.2d 841, 616 N.Y.S.2d 900 (1994); *Terry v. Mutual Life Ins. Co.*, 265 A.D.2d 929, 695 N.Y.S.2d 808 (4th Dept. 1999); *Sutfin v. Ithaca Col.*, 240 A.D.2d 989, 659 N.Y.S.2d 555 (3rd Dept. 1997).
9. 5 N.Y.3d 731, 799 N.Y.S.2d 770 (2005).
10. Id. at 732.
11. 11 N.Y.3d 757, 866 N.Y.S.2d 592 (2008).
12. Id. at 758
13. See *Quatrocchi*, 44 A.D.3d 377, 378, 843 N.Y.S.2d 564 (1st Dept. 2007).
14. See id. at 378-79.
15. See *Quattrocchi*, 11 N.Y.3d at 758.
16. See *Quattrocchi*, 44 A.D.3d at 381-82.
17. Id. at 382.
18. 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009).
19. See id. at 602.
20. Id. at 604.
21. Id. at 605.
22. 92 N.Y.2d 909, 680 N.Y.S.2d 47 (1998).
23. See id. at 910-11.
24. Id. at 911.
25. 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).
26. Compare the following quotes from *Ross*:

…Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person. Id. at 501.

[t]he "special hazards" referred to [in the Court's 240(1)-defining *Rocovich v. Consolidated Edison* decision] are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. Id.

27. 76 A.D.3d 805, 907 N.Y.S.2d 658 (1st Dept. 2010).
28. See id. at *2, 3, 8.
29. 68 A.D.3d 436, 890 N.Y.S.2d 41 (1st Dept. 2009).
30. Id. at 437.
31. *Makarius*, 76 A.D.3d 805 at *3.
32. See *Runner*, 13 N.Y.3d 599 at 603-04.
33. *Makarius*, 76 A.D.3d 805 at *5.
34. McGuire pointed to *Misseritti v. Mark IV Const. Co. Inc.*, 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995) (which interpreted the "braces" listed in 240(1) as referring to those used to support elevated work sites, rather than those designed to lend support to a completed structure). Moskowitz referred to 240(1)'s reference to "other devices," the expansive approach of *Runner*, and the fact that the lag bolts were necessary to protect plaintiff from the transformer falling on his head. See *Makarius* at *4-9.
35. *Makarius*, 76 A.D.3d 805 at *9.