



THE NEW YORK SCAFFOLD LAW: AN OBSOLETE, INEQUITABLE LAW

OCTOBER 2017

For too long, New Yorkers have lived with the unintended consequences of New York's Labor Law §240, a 19th-century statute commonly called the "Scaffold Law": enormous legal settlements, prohibitive insurance rates, and, as a result, materially higher costs for infrastructure and building projects.

For one category of injured workers—those who suffer gravity-related accidents—the Scaffold Law imposes absolute liability as well as the potential for draconian damages, not on the worker's employer, who is already liable under workers' compensation, but on parties who often have little to no supervisory control (i.e., property owners and general contractors). Absolute liability is imposed on these third parties with no limits on damages and no consideration of fault or disregard of instructions by the worker. The Scaffold Law is at odds with workers' compensation law and also with principles of fairness and proportion embodied in modern tort law. New York is the only state with the law still on its books.

Congressman John J. Faso recently announced a bill to bar the application of the absolute liability standard for federally-funded projects. This reform will help reduce the costs of projects in New York and lessen the effects of an inequitable law.

The Scaffold Law dramatically raises costs for New Yorkers. The Scaffold Law contributes to higher construction costs in New York. Largely as a result of the Scaffold Law, New York's general liability insurance costs for construction are the highest among the 50 states.

According to one estimate, New York taxpayers spend \$785 million annually for the insurance costs associated with public at-height construction projects due to the Scaffold Law.¹ Insurance to cover potential Scaffold Law claims for the new Tappan Zee Bridge is expected to cost roughly \$200 million.² A Port Authority official estimated that the planned \$13 billion tunnels under the Hudson River as part of the Gateway Project, which will alleviate a critical bottleneck and permit the repair of existing century-old tunnels, will incur between \$180 and \$300 million in additional insurance costs.

Already faced with higher construction costs, the added cost of insurance in New York can tip the scales against a project altogether. Insurance costs associated with the Scaffold Law were so high that several disaster relief organizations gave up on helping New York families affected by Superstorm Sandy, choosing instead to help those in neighboring states.³

The Scaffold Law is unfair. The Scaffold Law effectively grants a special right to a select group of injured workers: A worker that suffers a gravity-related injury on a project site may sue the property owner or general contractor—parties who exercise far less supervisory control than an employer—without regard to fault and without limits on damages. The following cases highlight some of the absurd consequences:

- A worker’s intoxication was not considered in determining liability because it was not the *sole proximate cause* of the injury.⁴
- An injured worker prevailed on his claim despite allegedly having ignored instructions not to proceed until safety equipment was provided.⁵
- A worker’s failure to use the locking devices on the scaffold’s wheels was deemed irrelevant in a Scaffold Law claim.⁶

Moreover, as courts have interpreted the Scaffold Law expansively in recent decades, the amount of damages sought under the law has increased dramatically: In 2012, 16 out of the 30 largest settlements in New York involved the Scaffold Law, with the highest amounting to \$15 million.⁷ The number of cases citing the Scaffold Law also increased fivefold from a yearly average of 63 cases during 1990-1992 to an average of 330 cases annually during 2010-2012, despite relatively constant employment in the construction sector throughout this period.⁸

Meanwhile, most other injured workers are only entitled to workers’ compensation benefits, including the medical costs of treatment and a portion of their lost wages; they can sue a third party for damages only in proportion with the degree of such party’s fault for the injury. The result is the unequal treatment of workers who have suffered serious injuries: One class of workers can recover millions of dollars in damages even if at fault for the injury, while another class cannot.

The Scaffold Law has long been superseded by other laws. When enacted in 1885, the Scaffold Law was intended to protect construction workers at a time when the first skyscrapers were being built and there were few laws to protect worker safety. Therefore, the best way to ensure their safety was by imposing an absolute obligation on those directing their work. While the Scaffold Law has remained largely the same over the years,⁹ subsequent laws have struck a different balance between fairness and rightful compensation: Workers’ compensation permits recovery for medical costs and lost wages irrespective of fault, but only in strict accordance with a formula. In exchange for being required to obtain workers’ compensation coverage, employers are generally granted immunity from lawsuits for other damages. For workers who suffer a gravity-related injury, however, the Scaffold Law grants the benefits of both absolute liability and the potential recovery of virtually limitless damages. The Scaffold Law is an anachronism, imposing enormous costs to provide benefits to a single category of workers.

The special protections afforded by the Scaffold Law have also become outmoded in modern tort law. The Scaffold Law was enacted when tort law prevented injured workers from recovering any damages if they were even minimally at fault for their injury. However,

modern tort law has long retired the old harsh rule in favor of “comparative negligence,” which allows courts to reduce damages in proportion with any negligence on the part of the plaintiff. Personal injury actions against a property owner or general contractor for gravity-related injuries should follow the same general rule.

There is no public policy rationale we can find for treating gravity-related injuries any differently from other types of serious injuries that occur on a project site. Liability for all injuries that occur on construction sites should be determined according to the formula set forth in workers’ compensation, and when there’s a basis for a third-party lawsuit, based on the respective fault of the parties involved.

The Scaffold Law is a classic example of obsolete law, and is indicative of a problem with American law generally. Just like other obsolete laws, the Scaffold Law is now defended only by the special interests that have formed around them, including the plaintiff’s bar that benefit from the growth of legal cases and settlements under the law. The failure of government to adapt old laws to new realities predictably causes public programs to fail in significant ways—raising costs and causing unjustifiable inequities.

¹ Michael R. Hattery, R. Richard Geddes, and David L. Kay, “The Costs of Labor Law 240 on New York’s Economy and Public Infrastructure,” The Nelson A. Rockefeller Institute of Government, December 31, 2013.

² Matt Chaban, “Builders, Insurers Stepping Up Effort to Dismantle Scaffold Law,” *Crain’s New York*, March 17, 2013.

³ Celeste Katz, “Document Drop: Relief Groups Call NY Scaffold Law a Drag on Post-Sandy Rebuilding,” *New York Daily News*, April 22, 2014.

⁴ *Sergeant v. Murphy Family Trust*, 284 A.D.2d 991 (4th Dep’t 2001).

⁵ *Singh v. Barrett*, 192 A.D.2d 378 (1st Dep’t 1993).

⁶ *Haystrand v. County of Ontario*, 207 A.D.2d 978 (4th Dep’t 1994).

⁷ VerdictSearch, “[Top New York Settlements of 2012](#),” last accessed October 2017.

⁸ *Supra* note 1.

⁹ Prior to amendments in 1969, the Scaffold Law applied to employers.