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NEW YORK'S LABOR LAW SECTION 240: HAS IT BEEN NARROWED OR EXPANDED BY THE COURTS BEYOND THE LEGISLATIVE INTENT?

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BARRY R. TEMKIN[1]

I. INTRODUCTION

On Tuesday, July 21, 1998, a twenty five story elevator support tower collapsed during construction of the new Conde Nast building on West 43rd Street in Manhattan, showering Times Square with tons of deadly debris from the 700-foot-high scaffolding and killing an eighty-five-year-old woman in a nearby hotel room.[2] Three hundred feet of scaffolding materials were hurled to the street and buildings below.[3] New York City Buildings Commissioner Gaston Silva described the collapse as "the most serious and dramatic construction failure of this decade."[4] The disaster closed the Times Square area for days, and riveted public attention as never before on the risks and dangers inherent in the use of scaffolding in industrial construction.[5] Although no workers were injured, it is not unlikely that the Times Square tragedy will lead to heightened awareness and scrutiny of the laws governing the safety of workers on scaffolds at construction job sites.

Few areas in the field of tort litigation are as significant yet misunderstood as the so-called "Scaffold Act,"[6] embodied in Article 10 of the

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1. Barry R. Temkin is a senior trial attorney at Jacobowitz Garfinkel & Lesman in Manhattan, a former Assistant District Attorney in Kings County, and a 1982 graduate of the University of Pennsylvania Law School. Mr. Temkin received a B.A. (*magna cum laude*) in 1979 from the University of Rochester. The author wishes to acknowledge the assistance of Robert Travisano in researching the legislative history of the Labor Law, and of Janice Tuchman for her assistance in researching the Times Square disaster.

2. *See* Steven Greenhouse, *Scaffold Collapses, Paralyzing Times Square,* N.Y. TIMES, July 22, 1998, at A1.

3. *See* Nadine M. Post, *Causes Probed as Crippled Hoist Comes Slowly Down,* ENGINEERING NEWS RECORD, August 10, 1998, at 10.

4. *See* David W. Chen, *Mayor Faults Offer of Aid for Victims of Collapse,* N.Y. TIMES, July 24, 1998, at B5.

5. *See Making Times Square Safe,* N.Y. TIMES, July 25, 1998, at A12; *Times Squares Troubles Probed,* ENGINEERING NEWS RECORD, August 24, 1998, at 12.

6. N.Y. LAB. LAW § 240 (1999 Pocket Part, Historical and Statutory Notes).

New York State Labor Law,[7] which obligates contractors and landowners to protect the safety of workers on scaffolds, ladders, and other height-related devices. No less an authority than New York's Chief Judge Judith Kaye recently acknowledged "the highly elusive goal of defining with precision statutory terms within Labor Law Article 10 so as to minimize the need for litigation."[8] Judge Kaye's goal is elusive indeed, with a significant rift emerging among the four departments of the Appellate Division, yielding conflicting interpretations of a judicially crafted exception to the Labor Law. More specifically, the Appellate Division departments are in disagreement as to the definition and the scope of the "routine cleaning and maintenance" exception to Labor Law Section 240. In fact, both the Court of Appeals[9] and the Appellate Division[10] have explicitly acknowledged the conflict, yet it remains far from resolved.[11] As will be suggested in this article, in light of the strict liability imposed on owners and contractors under Article 10 of the Labor Law, the courts have created the routine cleaning and maintenance exception, which has no support in the legislative history, in order to prevent excessive and, occasionally, absurd coverage of routine activity.

In a closely related problem, the departments of the Appellate Division had been grappling with the scope of coverage of the Labor Law, specifically, whether the strict liability protection of the Scaffold Act is available to all work-related falls from a height, or whether the statute is limited to injuries taking place at traditional construction sites. This issue was resolved[12] by the Court of Appeals' 1998 decision in *Joblon v. Solow,*[13] which extended the reach of Sections 240 and 241 of the Labor Law to accidents occurring away from construction sites.[14] In so doing, it will be argued, the Court has extended the scope of absolute liability afforded by the Labor Law substantially beyond that intended by the Leg-

7. N.Y. LAB. LAW § 240 (McKinney 1986).

8. Joblon v. Solow, 695 N.E.2d 237, 239 (N.Y. 1998).

9. *See id.* at 240.

10. *See* Malsch v. City of New York, 662 N.Y.S.2d 458 (1st Dep't 1997).

11. *See, e.g.*, Kelner, *Window Washers and Beyond: Labor Law Section 240(1)*, N.Y.L.J., Sept. 22, 1998, at 3 ("The question has engendered inconsistent decisions at the Appellate Division level.").

12. *See id.* at 7 (whether "cleaning" was "conducted at the site of a construction project or in non-construction context," according to the author, "may now be resolved by the Court of Appeal Decision in *Joblon* . . . .").

13. 695 N.E.2d 237 (N.Y. 1998).

14. *See id.* at 242.

islature, *i.e.,* to afford protection to construction workers from the dangers of working on scaffolds. Indeed, in a footnote,[15] the *Joblon* Court seemingly invited the Legislature to revise the Labor Law should it disagree with the Court's interpretation of its reach. In light of the absolute liability imposed on owners and contractors for a statutory violation of Section 240, the Legislature should seriously consider the Court of Appeals' invitation.

II. SCOPE OF LABOR LAW SECTION 240

Section 240 of the New York Labor Law obligates contractors and property owners to protect the safety of workers engaged in height-related construction of a building or structure.[16] The statute mandates safety devices to protect employees engaged in building, demolition, painting, cleaning, and other enumerated areas of construction work. In its current format, Section 240(1) of the Labor Law provides that:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing a building or structure, shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed, and operated as to give proper protection to a person so employed.[17]

Section 240 further imposes the requirement of a safety rail on outdoor scaffolding over twenty feet in height,[18] and mandates that *all* scaffolding be capable of bearing "four times the maximum weight required to be dependent therefrom or placed thereon when in use."[19]

Additional protections for workers engaged in construction, excavation, or demolition work are imposed by Section 241 of the Labor Law which, among other things, obligates owners, contractors, and their

15. *See id.* at 241, n.2.
16. *See* N.Y. Lab. Law § 240 (McKinney 1986).
17. *Id.*
18. *See id.* § 240(2).
19. *Id.* § 240(3).

agents "to provide reasonable and adequate protection and safety" to persons working "or lawfully frequenting" a job site at which "construction, excavation or demolition work is being performed."[20] Section 241 further requires compliance with safety regulations promulgated by the State Department of Labor.[21] Although the owner's and contractor's duties under Labor Law Section 241 are not delegable, this is not a strict liability provision, and evidence of the plaintiff's comparative negligence is admissible.[22] In contrast to Section 240, which holds the owner or contractor absolutely liable regardless of fault, Section 241 renders them vicariously responsible for the negligence of others which contributed to the plaintiff's accident.[23]

Moreover, window cleaners are protected, in addition, by Section 202 of the Labor Law, which applies to "protection of the public and of persons engaged at window cleaning and cleaning of exterior surfaces of buildings."[24] Window washers are entitled to the concurrent benefit of both Sections 240 and 202, as the former and not the latter imposes absolute liability on owners and contractors.[25]

The Court of Appeals, in interpreting the Labor Law, has recognized the legislative intent of placing "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor," rather than on workers who are "scarcely in the position to protect themselves from accident."[26] Sec-

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20. N.Y. Lab. Law § 241 (McKinney 1986).

21. *See id.* § 241 (Subsections 1 through 4 of Section 241 impose specific requirements for filling in or planking the floor of a building undergoing construction).

22. *See* Zimmer v. Chemung Co. Performing Arts, Inc., 482 N.E.2d 898, 901 (N.Y. 1985).

23. *See* Rizzuto v. L.A. Wenger Contracting Co., 693 N.E.2d 1068 (N.Y. 1998) (Section 241 "imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein"). *Id.* at 1070.

24. N.Y. Lab. Law § 202 (McKinney 1986).

25. *See* J.P. Miller, Williamson v. 16 West 57th Street Co., N.Y. L.J., December 28, 1998, at 30; *See also* Kelner, *Window Washers and Beyond: Labor Law Section 240(1)*, N.Y. L.J., Sept. 22, 1998, at 3 ("Although window washers have a statutory remedy under certain circumstances under Labor Law § 202, they are not precluded from also seeking protection from the statutory absolute liability protection of Labor Law § 240(1).").

26. Zimmer v. Chemung County Performing Arts, Inc, 482 N.E.2d 898, 901 (N.Y. 1985) (quoting from Koenig v. Patrick Construction Company, 298 N.Y. 313, 318

tion 240 "represents the culmination of a long legislative effort to provide safety and protection for persons using scaffolding and other devices."[27] The Court of Appeals has observed that "this statute is one for the protection of workmen from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which is was thus framed."[28]

The significance of Labor Law Section 240 in construction-related tort litigation cannot be overstated. The statute imposes absolute liability on contractors and owners for injuries that were proximately caused by the lack or insufficiency of safety devices.[29] The plaintiff's comparative negligence may not be asserted as a defense to such an action.[30] Thus, the New York Scaffold Law is a powerful weapon in the tort litigator's arsenal, and the crucial question of its applicability to a particular case is likely to be determinative of its outcome, especially in situations where there is evidence of comparative negligence on the part of the plaintiff.

III. THE LEGISLATIVE HISTORY

New York's Labor Law, including the scaffolding provisions of Section 240, was enacted in 1921,[31] as part of a comprehensive, 170-page, 475-paragraph package of labor legislation[32] which included laws regulating child labor,[33] sweatshops,[34] factory work, "washrooms for every mercantile establishment,"[35] explosives,[36] and mines and tunnels.[37]

(1948)); *accord*, Gordon v. Eastern Ry. Supply, Inc., 626 N.E.2d 912 (N.Y. 1993) ("The purpose of the section is to protect workers by placing the ultimate responsibility for work site safety on the owner and general contractor, instead of the worker themselves.").

27. Connors v. Boorstein, 173 N.Y.S.2d 288, 289 (N.Y. 1958).

28. Quigley v. Thatcher, 207 N.Y. 66, 68 (1912) (quoting Zimmer, 482 N.E.2d 898, 901 (N.Y. 1985)).

29. *See* Gordon v. Eastern Ry. Supply, Inc., 626 N.E.2d 912, 914 (N.Y. 1993).

30. *See, e.g.*, Douglas Wylly, *Plaintiff's Negligence in Labor Law § 240 Cases*, N.Y. L.J., Sept. 6, 1996, at 1.

31. N.Y. Labor Law § 240 is descended from the 1885 "Act for the protection of life and limb," which imposed liability on anyone "who shall knowingly or negligently furnish and erect ... improper scaffolding ...." Connors v. Boorstein, 173 N.Y.S.2d 288, 289 (N.Y. 1958). In contrast, the present day § 240 imposes liability for a failure to provide proper protection, regardless of fault. *See* Zimmer v. Chemung Co. Performing Arts, 482 N.E.2d 893 (N.Y. 1985).

32. 1921 N.Y. Law Chap. 50.

33. *See id.* § 383.

The original text of Labor Law Section 240 was entitled "Safe scaffolding required for use of employees," and required employers and supervisors properly to protect the safety of their workers on scaffolds:

> A person employing or directing another to perform labor of any kind in the erection, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other mechanical contrivances which shall be so constructed, placed and operated as to give proper protection to a person so employed or directed.[38]

Other provisions required safety rails on scaffolds more that twenty feet from the ground or floor,[39] and for all scaffolding to be able to bear four times "the maximum weight required to be dependent therefrom...."[40]

The 1947 Amendments to the Labor Law[41] changed the title of Section 240 to "Scaffolding *and other devices* for use of employees,"[42] and expanded the statute's coverage accordingly to workers falling from elevated devices other than scaffolds. As the State Labor Department explained, the bill was intended to cover additional height-related devices beyond scaffolding, "in accordance with both modern construction practices and what is believed to be the original intent of this section."[43]

In an effort to clarify the scope of contractor responsibility for jobsite safety and reduce finger-pointing among contractors and subcontractors, the Legislature, in a 1969 amendment, changed the applicability of Labor Law Section 240 from "[a] person employing or directing an-

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34. *See id.* § 373-382.

35. *Id.* § 378.

36. *See id.* § 450-63.

37. *Id.* § 400-404.

38. 1921 N.Y. Laws Chap. 50, § 240. The above-quoted language is similar to and derived from 1911 N.Y. Laws Chap. 693.

39. 1921 N.Y. Laws Chap. 50 § 240.

40. *Id.*

41. 1947 N.Y. Laws Chap. 683.

42. *Id.* at § 240 (emphasis added).

43. New York State Legislative Annual 188 (1947).

other to perform labor," to "[a]ll contractors and owners and their agents."[44] The purpose of the 1969 amendment was to place "responsibility for safety practices at building construction sites where such responsibility actually belongs, on the owner and general contractor."[45] The owner and general contractor should be responsible, reasoned the bill's sponsors, because they hire and control the various building trades at a construction site and "are primarily responsible for the erection of the building."[46]

Only two further amendments have been made in Labor Law Section 240 since 1969: amendments exempting from coverage the owners of one-and two-family homes who do not control or supervise work on the house,[47] and architects and engineers who do not actively supervise the construction or demolition of a building.[48] The legislative history indicates that both exceptions were intended to protect persons who had no control or supervision over daily worksite safety during construction or demolition.[49] State Assemblyman Orazio, who introduced the 1981 amendment, noted in an accompanying memorandum that the underlying statute applied to "the physical construction or demolition of a building."[50]

Thus, the development of the modern Labor Law evinces an intent to require owners and contractors, at construction projects involving the erection or demolition of a building or other structure, to take precautions to ensure the proper protection of workers using scaffolding and other height related devices. What was left to the courts was the definition and application of statutory terms such as "cleaning" and "altering." This, as will be seen, would be accomplished with inconsistent and sometimes, illogical results.

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44. 1969 N.Y. Laws Chap. 1108 § 1.

45. N.Y. State Legislative Annual 407 (1969) (memorandum by Senator Calandra and Assemblymen Armen).

46. *Id.*

47. 1980 N.Y. Laws Chap. 670.

48. 1981 N.Y. Laws Chap. 241.

49. N.Y. State Legislative Annual 407 (1969) (memorandum of Assemblyman Angelo F. Orazio); Letter from Florence Dreiezen, Deputy Industrial Commissioner, State of N.Y. Dep't of Labor to Hon. Richard A. Brown, Counsel to the Governor of NY (June 27, 1980) (on file with New York Law School Law Review); 1980 N.Y. Laws Chap. 670.

50. 1980 N.Y. State Leg. Ann., *supra* note 49.

IV. THE ROUTINE CLEANING AND MAINTENANCE EXCEPTION

Although Section 240 of the Labor Law, by its terms, explicitly protects workers involved in the "cleaning" of a building or structure, the Court of Appeals has long held that the statute is inapplicable to routine cleaning and maintenance.[51] In *Connors v. Boorstein,*[52] the plaintiff was a domestic employee who was injured when she fell from a step-ladder "while cleaning a storm window on the outside of her employer's private residence."[53] The Court of Appeals held that Labor Law Section 240 did not apply to routine cleaning by a domestic worker because the statutory protections were intended to benefit construction workers, reasoning: "It follows, as a matter of logic and common sense, that the word 'cleaning' as used in this context, has reference to the 'cleaning' incidental to building construction, demolition and repair work and not to the cleaning of the windows of a private dwelling by a domestic."[54]

In *Smith v. Shell Oil Company,*[55] the Court of Appeals declined to extend Section 240 of the Labor Law to the claim of a worker who was injured when he fell from a ladder while changing a light bulb in an illuminated sign at a gas station. In affirming summary judgment for the defendant, the Court of Appeals reasoned that, "changing a light bulb is not 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.'"[56]

The Court of Appeals next addressed the routine cleaning and maintenance doctrine in *Brown v. Christopher Street Owners, Corp.,*[57] which held that Section 240 of the Labor Law does not protect a window washer who fell and injured himself while washing the exterior windows of a residential apartment. In ruling that summary judgment had been properly granted dismissing the plaintiff's complaint, the Court of Appeals held that the "cleaning" encompassed under the statute "does not

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51. *See* Connors v. Boorstein, 173 N.Y.S.2d 288, 289 (N.Y. 1958).

52. *Id.*

53. *Id.*

54. *Id.* at 290. This aspect of *Connors* has been substantially eroded, if not overruled, by the Court of Appeals' 1998 decision in *Joblon v. Solow,* 672 N.Y.S.2d 286, 290, discussed *infra* Part V.

55. 654 N.E.2d 1210 (N.Y. 1995).

56. 640 N.Y.S.2d at 963 (quoting from N.Y. Lab. Law § 240 (1)).

57. 663 N.E.2d 1251 (N.Y. 1996).

include the routine, household window washing at issue here,"[58] distinguishing the case before it from cleaning all of the windows of a "large, non-residential structure" such as a school.[59]

A. *Recent Second Department Cases*

Application of the routine cleaning and maintenance doctrine has been anything but uniform among the various departments of the Appellate Division. Recent decisions have placed the Second and Fourth Departments of the Appellate Divisions squarely at odds with the First Department in their interpretations of the routine cleaning and maintenance exception to the Labor Law. For example, the Second Department, in a string of cases, has followed *Smith* and *Brown* to hold that Labor Law Section 240 is not applicable to injuries incurred while changing light bulbs and cleaning light fixtures in a school auditorium,[60] opening an elevator door with a broom handle in order to prepare the elevator for a routine visit by exterminators,[61] or changing light bulbs and tightening loose wire nuts.[62] Similarly, in *Cosentino v. Long Island Railroad,* [63] the Second Department held that Labor Law Section 240(1) was not applicable to a telephone company employee who had a height-related accident while splicing telephone cables and picking up new lines at a subway station. In rejecting the plaintiff's claim in *Cosentino*, the Second Department reasoned that:

> It is clear that liability under Labor Law Section 240(1) was not meant to apply to routine maintenance in a non-construction context.... In view of the strict liability imposed by the statute and the fact that such liability is generally imposed only to guard against inordinate dangers, we find no reason to strain the language of the statute to encompass the routine activities involved with telephone service, which is clearly distinguishable from the

58. *Id.*

59. *Id.*

60. *See* Bermel v. Board of Education, 647 N.Y.S.2d 548 (1996). *But see Brown*, 87 N.Y.2d at 940, in which the Court of Appeals suggested that washing the windows of a school *should* be considered protected activity.

61. *See* Vanerstrom v. Strasser, 659 N.Y.S.2d 77 (2d Dep't 1997).

62. *See* Haghighi v. Bailer, 657 N.Y.S.2d 774 (2d Dep't 1997).

63. 607 N.Y.S.2d 720 (2d Dep't 1994).

risks associated with the construction or demolition of a building.[64]

B. *Recent First Department Cases*

The departments of the Appellate Division generally agree that while changing light bulbs is not covered by the statute, replacing light fixtures does bring an injured plaintiff within the ambit of Section 240(1) of the Labor Law. Rulings in the First,[65] Second,[66] and Fourth Departments[67] have established that replacing a light fixture is different from replacing a light bulb and thereby distinguishable from the type of routine cleaning and maintenance described by the Court of Appeals in *Brown* and *Smith*. However, the First Department has gone even further by holding that an injury sustained while changing a light bulb is covered by the Scaffolding Law when "clearly related to, and an integral part of, the construction work being accomplished by the workers at the site."[68] In *Binetti v. MK West Street Co.*,[69] the First Department reversed an order granting summary judgment against a plaintiff who fell from a ladder while providing a system of temporary lighting "to assist the workers on the construction site."[70] Since the plaintiff was injured while providing lighting at a construction site, the First Department reasoned that the protections of Section 240(1) of the Labor Law did apply.[71]

In fact, the routine maintenance and cleaning maintenance exception does not appear to have a pulse at all in the First Department. In *Buendia v. New York National Bank*,[72] the First Department suggested that the plain language of Labor Law Section 240(1), by including the word "cleaning" as protected conduct, required it simply to apply the statute to

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64. 607 N.Y.2d at 720-21 (citations omitted). *But see Joblon*, 91 N.Y.2d at 457 (eliminating requirement that accident occur in the course of construction).

65. *See* Clemente v. Growing Tunneling Corp., 653 N.Y.S.2d 922 (1st Dep't 1997).

66. *See* Purdie v. Crestwood Lake Heights Section Corp., 646 N.Y.S.2d 815 (2d Dep't 1996).

67. *See* Cook v. Presbyterian Homes of Western New York, 655 N.Y.S.2d 701 (4th Dep't 1996).

68. *See* Binetti v. MK West Street Company, 657 N.Y.S.2d 648 (1st Dep't 1997).

69. *Id.*

70. *Id.* at 649.

71. *See id.*

72. 637 N.Y.S.2d 70 (1st Dep't 1996).

all cleaning, however routine.[73] In *Bustamante v. Chase Manhattan Bank,*[74] the First Department applied Section 240(1) of the Labor Law to cover the claim of a worker who fell from a ladder while cleaning the tops of partitions in a bank's offices. In ruling that summary judgment was erroneously granted to the defendant by the trial court, the First Department distinguished and limited the routine cleaning and maintenance doctrine: "While a narrow limitation to § 240(1) exists for workers who are injured while engaged in the routine cleaning of windows of *private* residences...that limitation does not apply to workers injured while cleaning offices."[75] Thus, since cleaning office partitions is presumably routine cleaning, the First Department limited the *Brown* exception to routine *residential* cleaning. In so doing, the First Department simply ignored the Court of Appeals' 1995 decision in *Smith v. Shell Oil Co.,*[76] which, as mentioned, denied the Section 240 claim of a worker who was injured while changing a light bulb on a commercial sign at a gas station.[77]

C. *Recent Third Department Cases*

The Third Department, in *Chapman v. IBM Corp.,*[78] applied the routine maintenance doctrine to affirm an order granting summary judgment dismissing the complaint of a worker who was injured in a fall from a basketball backboard which he was trying to fix in the gymnasium of the country club where he worked. Although the Appellate Division partially based its decision on the fact that gymnasium repairs were not part of the plaintiff's customary job duties, the court further reasoned that the repair to the basketball backboard was "routine maintenance in a non-construction, non-renovation context," and was accordingly not covered by Section 240 of the Labor Law.[79] Less than one year later, the same court reached a contrary result in *Vernum v. Zilka,*[80] which held that snow and ice removal from the roof of a private residence was *not* rou-

73. *See id.*
74. 659 N.Y.S.2d 284 (1st Dep't 1997).
75. *Id.* at 285.
76. 654 N.E.2d 1210 (N.Y. 1995).
77. *See supra* Part IV.
78. 649 N.Y.S.2d 228 (3d Dep't 1996).
79. *See id.* at 229.
80. 660 N.Y.S.2d 599 (1997).

tine cleaning and maintenance within the meaning of Section 240 of the Labor Law, and was accordingly entitled to the statute's protection. In holding that the statute did apply to snow and ice removal, the Third Department distinguished *Brown* and limited the routine cleaning and maintenance exception to "truly domestic" household cleaning, reasoning that:

> Here, plaintiff was hired to remove snow and ice, not for the purpose of improving his employer's personal household living conditions, but rather to protect or enhance the value of buildings for the basis of a business or investment enterprise, or to improve the return that could be obtained therefrom. Hence, his labor cannot be considered "domestic" in nature, such that it could be said to lie beyond the intended scope of the statute. In these circumstances, there is no basis for concluding that the plain language of the statute, which affords safeguards to those engaged in the "cleaning....of a building," does not apply....[81]

Thus, the Third Department concluded that removing snow and ice from the roof of a rented single family residence is distinguishable from washing the windows of a residence, as was the case in the Court of Appeals' decision in *Brown*. In so doing, the Third Department did not attempt to distinguish the Court of Appeals' decision in *Smith*, which rejected the Labor Law claims of a maintenance mechanic who was changing a light bulb at a gas station, or its own ten-month-old decision in *Chapman*,[82] which denied Labor Law coverage to a maintenance worker who was injured while fixing a basketball backboard at a country club. Rather, the court appears to have been attempting to navigate uncharted waters.

In *Perchinsky v. State*,[83] a case decided the same month as *Vernum v. Zilka*, the Third Department further complicated matters by holding that the Scaffold Law did *not* apply to a worker who was injured while stringing decorative wires to the walls of a state armory in preparation for a Lions Club performance. In ruling that summary judgment should have been granted dismissing the complaint, the Appellate Division rea-

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81. *Id.* at 601.

82. 649 N.Y.S.2d 228.

83. 660 N.Y.S.2d 177 (3d Dep't 1997).

soned that the plaintiff's activities in the case before it were not protected:

> Similarly, in order to be entitled to the protection of Labor Law § 240(1), a worker must establish that he or she was performing work necessary and incidental to the construction, renovation or repair of a building or a structure.... Here, stringing wire to hang kites as part of decorating the interior of a structure in conjunction with an entertainment/commercial enterprise is far removed from the risks associated with the construction, renovation, demolition or alteration of a building or structure.[84]

Of course, the plaintiff in *Vernum v. Zilka*[85] was not engaged in the "construction, renovation or repair of a building or structure,"[86] but was simply removing snow and ice from the roof of a single family residence in Saratoga County, an activity which would seem to be no less routine than fixing a basketball backboard in a gym[87] or stringing decorations in an armory.[88] Thus, applicability of the routine cleaning and maintenance doctrine is far from settled in the Third Department. Indeed, the Third Department's interpretations of the statute have been inconsistent with each other.

D. *Recent Fourth Department Cases*

The Fourth Department, in a string of decisions, has applied the routine maintenance and cleaning doctrine to exclude from coverage of the Scaffold Law a variety of routine functions. For example, in *Howe v. 1660 Grand Island Boulevard Inc.*,[89] the Fourth Department rejected the Section 240(1) claims of a maintenance worker who fell from a ladder while attempting to disable an electric eye which controlled outdoor flood lights. In ruling that the defense was entitled to summary judgment, the Fourth Department stated: "Plaintiff was not engaged in the 'repairing' or 'altering' of a 'building or structure'...but was merely per-

84. *Id.* at 180.
85. 660 N.Y.S.2d 599.
86. *Perchinsky,* 600 N.Y.S.2d at 180.
87. *See Chapman,* 649 N.Y.S.2d 228.
88. *See Perchinsky,* 660 N.Y.S.2d 177.
89. 619 N.Y.S.2d 227 (4th Dep't 1994).

forming routine maintenance in a non-construction, non-renovation context."[90] In a more recent decision, *Williams v. Perkins Restaurant, Inc.*,[91] the plaintiff was a maintenance worker under contract to clean the kitchen exhaust system at a restaurant when she fell from a ladder after cleaning grease from the exhaust fans and vent. The Fourth Department ruled that the plaintiff was involved in routine cleaning and maintenance "in a non-construction, non-renovation context" and was thereby not entitled to the protection of the Scaffold Law.[92] A similar result was reached in *Becker v. Clearview Acres, Ltd.*, [93] which denied coverage under Labor Law Section 240(1) for a plaintiff who was injured while removing a part of a degreasing machine which was located on the floor of a factory.

In summary, the precedents throughout the State indicate that the routine cleaning and maintenance exception to the Scaffold Law has been applied to limit and reject claims in the Second Department[94] and the Fourth Department,[95] but has been eschewed by the First Department, which has apparently limited *Smith* and *Brown* to their respective facts.[96] The Third Department has both accepted and rejected the routine maintenance and cleaning defense, sometimes on logically indistinguishable facts.[97] However, as will be suggested in the following section of this article, the entire landscape of Labor Law litigation has shifted and many of the foregoing precedents may have to be re-evaluated in light of the Court of Appeals' 1998 decision in *Joblon v. Solow*.[98]

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90. *Id.*

91. 667 N.Y.S.2d 567 (4th Dep't 1997).

92. *Id.*

93. 656 N.Y.S.2d 1001 (4th Dep't 1997).

94. *See, e.g.*, Bermel v. Board of Education, 647 N.Y.S.2d 548 (2d Dep't 1996), Haghighi v. Bailer, 657 N.Y.S.2d 77 (2d Dep't 1997).

95. *See, e.g.*, Cook v. Presbyterian Homes of Western New York, 655 N.Y.S.2d 701 (4th Dep't 1996).

96. *See* Bustamante v. Chase Manhattan Bank, 659 N.Y.S.2d 284 (1st Dep't 1997).

97. *Compare* Vernum v. Zilka, 660 N.Y.S.2d 599 (3d Dep't 1997) *with Perchinsky*, 660 N.Y.S.2d 177 (3d Dep't 1997).

98. 695 N.E.2d 237 (N.Y. 1998).

V. "ALTERING" A BUILDING OR STRUCTURE WITHIN THE MEANING OF SECTION 240: *JOBLON V. SOLOW*

As seen above, the characterization of any given conduct as routine cleaning and maintenance can determine the outcome of a Labor Law case, particularly in the Second and Fourth Departments. As was the case with "cleaning," Section 240 of the statute explicitly mentions "altering" as a covered activity. Whether a given activity is characterized as routine cleaning and maintenance on the one hand, or "altering" a structure on the other hand, can be conclusive of whether a contractor is granted summary judgment dismissing the complaint, or is held absolutely liable, respectively. By way of illustration, the Second Department held, in 1993, that a plaintiff who was injured "as he was switching cable television attachments on a utility pole" was entitled to recovery under Section 240 of the Labor Law because the transfer of cable television service "constituted an alteration to the structure" of the pole.[99] Less than two months later, the same court found that a telephone company worker who had a height-related injury while splicing telephone cables in the subway was *not* entitled to protection under Section 240(1) of the Labor Law because he was engaged in "routine maintenance in a non-construction context."[100] Thus, different results were obtained in the same court in cases involving *telephone* cable and *television* cable.

In addition, in the definition of "altering," as was the case with routine maintenance and cleaning, there has been a divergence between the First and Second Departments. For example, the Second Department, in 1992, held, "that the installation of an antenna on a rooftop is not an alteration within the purview of Labor Law Section 240."[101] However, the First Department, in 1997, explicitly rejected Second Department precedent in holding that Labor Law Section 240 *does apply* to cover a worker who was injured while installing a rooftop radio antenna.[102] Recent decisions have extended the protection of Labor Law Section 240 under the "altering" theory to workers engaged in installing cable television,[103] in-

99. Tauriello v. New York Telephone Company, 605 N.Y.S.2d 373, 374 (2d Dep't 1993) (citations omitted).

100. Cosentino v. Long Island Railroad, 607 N.Y.S.2d 720 (2d Dep't 1994).

101. Kesselbach v. Liberty Haulage, Inc., 582 N.Y.S.2d 739, 740 (2d Dep't 1992).

102. *See* Malsch v. City of New York, 662 N.Y.S.2d 458 (1st Dep't 1997).

103. *See* Tauriello v. New York Telephone Co., 605 N.Y.S.2d 373 (2d Dep't 1993); *see also*, Dedario v. New York Telephone, 557 N.Y.S.2d 794 (4th Dep't 1990).

stalling a fire alarm,[104] and installing a gas meter.[105] However, the First Department held, in 1997, that summary judgment should be granted dismissing the complaint of a plaintiff who was injured while changing an electrical switch on a rooftop air conditioner in order to replace a seized electrical contact in the course of routine maintenance.[106]

There has also been a disagreement among the departments as to whether Section 240 of the Labor Law applies to workers who are injured while repairing machines on a factory floor. For example, in *Cox v. International Paper, Co.*,[107] the plaintiff was injured while replacing piping in a paper machine on the floor of a factory. The Third Department held that the plaintiff, who was employed by an independent contractor and not by the factory itself, was engaged in "altering" and not routine maintenance of the machine, as the project of replacing the machine's pipes cost over $20,000, took several days to complete, and included the rerouting of some piping to a new location.[108] However, four months later, a divided Fourth Department, in *Becker v. Clearview Acres, Ltd.*,[109] held that summary judgment had been properly granted for the defendant in a case in which the plaintiff was injured while removing several components from inside a degreaser machine located on a factory floor. Although the majority decision in *Becker* held that summary judgment was appropriate since the plaintiff "was engaged in routine maintenance in a non-construction, non-renovation context,"[110] the dissent claimed "that, at a minimum, a factual dispute was raised by affidavits claiming that the degreaser machine in question had not been repaired in eighteen months."[111]

Thus, the Court of Appeals was confronted with a Balkanized landscape when, on April 10, 1998, it issued its decision in *Joblon v. Solow*,[112] which defined the term "altering" within the meaning of Labor Law Sections 240(1) and 241(6). The plaintiff in *Joblon* performed ongoing services as "house electrician" for commercial office space in

104. *See* Tate v. Clancy-Cullen, 575 N.Y.S.2d 832 (1st Dep't 1991).
105. *See* Golda v. Hutchinson, 632 N.Y.S.2d 364 (4th Dep't 1995).
106. *See* Rowlett v. Great South Bay Assoc., 655 N.Y.S.2d 16 (1st Dep't 1997).
107. 651 N.Y.S.2d 230 (3d Dep't 1996).
108. *See id.* at 232.
109. 656 N.Y.S.2d 1001 (4th Dep't 1997).
110. *Id.* at 1001 (citations omitted).
111. *See id.*
112. 695 N.E.2d 237 (N.Y. 1998).

which no construction was underway.[113] The plaintiff was injured when he fell from a ladder while chiseling a hole in a wall in order to run extended wiring for the installation of an electric wall clock.[114]

The Court of Appeals, in determining a question of law certified to it by the United States Court of Appeals for the Second Circuit,[115] acknowledged that the departments of the Appellate Division had reached inconsistent results on essentially indistinguishable facts,[116] and defined "altering" as follows:

> We conclude that "altering" within the meaning of Labor Law § 240(1) requires making a *significant* physical change to the configuration or composition of the building or structure. Such a rule implements the legislative purpose of providing protection for workers, is fully consistent with our precedents and at the same time excludes simple, routine activities we have previously placed outside the scope of the statute.[117]

On the facts before it, the Court of Appeals, in an opinion written by Chief Judge Kaye, concluded that the plaintiff's conduct in chiseling a hole through a concrete wall and extending the electrical wiring "is more than a simple, routine activity and is *significant* enough to fall within the statute."[118] The Court rejected the defendant's argument that Section 240 of the Labor Law was restricted to accidents sustained in the course of a building construction job, holding that the statute applies to work on structures found away from construction sites as well.[119] Indeed, the Court acknowledged that Article 10 of the Labor Law was entitled "Building Construction, Demolition and Repair Work," and that the legislative history did, in fact, make reference to ensuring safety at "building construction jobs."[120] However, Judge Kaye wrote that prior prece-

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113. *See id.*

114. *See id.*

115. Joblon v. Solow, 135 F.3d 261 (2d Cir. 1998). The plaintiff had commenced a diversity action in the United States District Court for the Southern District of New York. Joblon v. Solow, 914 F. Supp. 1044 (S.D.N.Y. 1996).

116. *See Joblon*, 695 N.E.2d at 240.

117. *Id.* at 241.

118. *Id.* at 242 (emphasis added).

119. *See id.* at 241.

120. *Id.* at 240 (quoting from 1969 Legis. Ann. at 407).

dents had already expanded the scope of Section 240 to employees engaged in cleaning a railway car,[121] repairing an electrical sign[122] and other non-construction or demolition jobs,[123] and that should the Legislature so intend, it could explicitly limit the scope of absolute liability to workers engaged in construction:

> Defendants' complaint, that even defining "altering" as we do today will allow too many Labor Law Section 240(1) claims to go forward, is better addressed to the Legislature. The Legislature can, of course, revise the statute to limit its reach if it so intends (*see, e.g.,* L. 1980, ch.670, Section 1 [creating exception for owners of one and two-family dwellings]).[124]

The impact of *Joblon* on future Labor Law claims is difficult to predict. Since the *Joblon* Court held that the application of its definition of "altering" presented a "close" question on the facts before it,[125] it would seem logical that *either* knocking a hole in concrete blocks, *or* extending electrical wire, without the other activity, would *not* pass muster under Section 240(1). If that interpretation can be urged, *Joblon* could actually represent a partial restriction in the reach of the law, as previous Appellate Division decisions have held that the installation or change of cable television wires, in and of itself, was sufficient to constitute an alteration.[126] Those decisions should be subject to reconsideration, as the *Joblon* definition would appear to require both an extension of electrical wiring and some kind of physical change to the structure itself, e.g., a hole in a wall. And Judge Kaye wrote in *Joblon* that the act of merely hammering a nail into a telephone pole would not suffice to "alter" it.[127]

In fact, the Court of Appeals' application of the significant physical change test to the facts before it is subject to question on the Court's own terms. The test announced in *Joblon* required a significant physical change to a "building or structure." Mr. Joblon, using a chisel, knocked a

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121. *See* Gordon v. E. Ry. Supply, 626 N.E.2d 912 (N.Y. 1993).

122. *See* Izrailev v. Ficarra Furniture of Long Island, Inc., 517 N.E.2d 1318 (N.Y. 1987).

123. *See Joblon,* 695 N.E.2d at 240.

124. *Id.* at 241, n.2.

125. *See id.* at 241.

126. *See Tauriello,* 605 N.Y.S.2d at 374; *see Dedario,* 557 N.Y.S.2d at 796.

127. *See Joblon,* 695 N.E.2d at 241.

hole in a wall big enough to run an electrical wire through. This is hardly a significant change to a commercial office building.[128] It is unlikely that Joblon's hand-chiseled hole showed up on a blueprint or required a permit from the buildings department. Thus, it is open to question whether the act of drilling one hole in the wall of a multi-story office building should be considered an "alteration" of the building.

Thus, while *Joblon* clarified the law by eliminating the need for an accident to take place on a traditional construction work site in order to qualify for Section 240 treatment, it leaves open for interpretation which facts would constitute a "*significant* physical change to the configuration or composition of the building or structure."[129] This definition does little to resolve the dispute between the First and Second Departments over whether installing an antenna to the top of a building would be covered[130] or between the Third and Fourth Departments as to whether replacing a part in a broken machine on a factory floor would be covered.[131]

Joblon does not overrule *Connors v. Boorstein*[132] or *Brown v. Christopher Street Owners Corp.*[133] Indeed, Judge Kaye wrote in *Joblon* that the window washer in *Brown* would not meet the "significant physical change" test, since the definition of altering "excludes simple, routine activities we have previously placed outside the scope of the statute."[134] Nonetheless, *Joblon* has eroded the precedential value of any decision explicitly premised on the fact that the plaintiff's injury did not take

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128. According to Judge Sweet's decision in the District Court, Joblon had been working on routine assignments at the office building at 9 East 57th Street in Manhattan for ten days prior to his accident. *See Joblon,* 914 F. Supp. at 1046.

129. 695 N.E.2d at 241. *See,* Joseph Kelner & Robert S. Kelner, *Elevation-Related Injuries and the Labor Law,* N.Y. L.J., June 23, 1998, at 3 ("In *Joblon,* the Court has provided a succinct definition of 'alteration,' but it is unclear whether this definition will resolve the conflict or merely create new conflict over the interpretation of what constitutes '*significant* physical change.'").

130. *Compare* Malsch v. City of New York, 232 A.D.2d 1 (finding altering), *with* Kesselbach v. Liberty Haulage, 182 A.D.2d 741, 742 (not altering).

131. *Compare* Cox v. Int'l Paper Co., 651 N.Y.S.2d 230, 232 (finding altering), *with* Becker v. Clearview Acres, 656 N.Y.S.2d 1001 (not altering).

132. 149 N.E.2d 721 (N.Y. 1958).

133. 663 N.E.2d 1251 (N.Y. 1996).

134. 695 N.E.2d at 241. On the other hand, the window washer in *Brown* was engaged in cleaning, and not "altering" so the *Joblon* "significant physical change" definition should be inapplicable. This dicta could engender confusion as to whether the significant physical change test should be applicable to cleaning as well.

place at a traditional construction site.[135] Indeed, it has been held that *Joblon* "eliminated the contention that to invoke Labor Law Section 240(1) the particular activity must occur at a construction site."[136]

But is that what the Legislature intended? Although contemporaneous evidence of the background to the original 1921 legislation is scarce,[137] it appears that the 1947 amendments to Section 240 were proposed to broaden its scope to include other height-related devices beside scaffolding, "in accordance with both modern *construction practices* and what is believed to have been the original intent of this section."[138] A 1947 memorandum by the State Labor Department explaining Section 240 refers to inspection by the Labor Commissioner of "all devices used in construction work ..."[139]

The sponsors of the 1969 amendments were clear that they sought to ensure safety "at building *construction jobs*" by acknowledging that owners and general contractors are responsible "for the erection of the building."[140] An accompanying memorandum of the State AFL-CIO, which had supported and requested the bill, suggested that it was intended to protect "workers in construction, excavation and demolition work."[141] Indeed, the whole point of the 1969 amendment was to shift the responsibility away from smaller subcontractors and onto larger, more financially responsible owners and general contractors, an argument which assumed the existence of a complex, multi-party construction project.

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135. *See, e.g., Connors,* 149 N.E.2d 721 (N.Y. 1958); *Chapman,* 649 N.Y.S.2d 228 (3d Dep't 1997); *Cosentino,* 607 N.Y.S.2d 720; *Perchinsky,* 660 N.Y.S. 2d 177 (3d Dep't. 1997).

136. Lescano v. Sylvan-Lawrence, No. 10567/95, slip op. at 3 (N.Y. Sup. Ct., Richmond County, Sept. 29, 1998) (Mastro, J.).

137. The original 1921 bill jacket, on file in the microfilm collection at the New York Public Library, contains no memoranda or letters interpreting the Labor Law. (N.Y. State Library, Legislative Reference Section, Bill Jacket Collection [1921]).

138. Mem. of State Lab. Dep't, N.Y. Legis. Annual 1947 at 188 (emphasis added).

139. *Id.*

140. Mem. of Sen. Calandra and Assemb. Amann, N.Y.S. Legis. Annual 1969 at 407 (emphasis added).

141. Mem. of State AFL-CIO, N.Y.S. Legis. Annual 1969 at 408. The AFL-CIO memorandum also referred to a change in Section 241 of the Labor Law, which reinstituted specific safety requirements for the planking of floors, the protection of elevator shafts, and general provisions for worksite safety. *See id.*

The debate on the 1980 and 1981 amendments to Section 240 was equally filled with references, implicit and explicit, to construction work. For example, the State Department of Labor urged the Governor *not* to sign the 1980 amendment, exempting individual homeowners from liability, because: "The workmen employed in the performance of such work on one and two-family dwellings need that protection as much as, if not more so, than workmen employed *on other construction sites.*"[142] The New York County Lawyers' Association supported the same amendment because it "exempts small homeowners from requirements to provide suitable conditions for *construction work.*"[143] The sponsor of the 1981 amendment sought exemption for architects and engineers who are not involved in the "physical construction or demolition of a building and who ha[ve] no control over the methodology of the construction safety..."[144]

Moreover, the Court of Appeals has, in its prior pronouncements on the subject, recognized the legislative intent to place "ultimate responsibility for safety practices at *building construction jobs* on the owner and general contractor.[145] The *Connors* Court observed that the statutory protection was available to persons engaged in cleaning which was "incidental to building construction, demolition and repair work..."[146]

Thus, it is apparent that the Legislature enacted and amended the Labor Law in order to impose a coherent, non-delegable duty on owners and general contractors to provide safety protection for construction workers involved in building and demolishing buildings and other structures. Was the *Joblon* court faithful to this long and well-documented legislative history? Or did it abandon the statute's intent in an effort to devise a bright-line test of simple application?

Viewed in the context of the Labor Law's legislative history, it is doubtful that the plaintiff in *Joblon* was engaged in the sort of inherently

142. Letter from Florence Dreizen, Deputy Industrial Commissioner for Legal Affairs, Counsel's Office, State Department of Labor, to Hon. Richard A. Brown, Counsel to the Governor, (June 27, 1980) (emphasis added) (N.Y. State Library, Legislative Reference Section, Bill Jacket Collection).

143. Letter from Richard A. Givens, Chairman, Committee on State Legislation, New York County Lawyers' Association (June 17, 1980) (N.Y. State Library, Legislative Reference Section, Bill Jacket Collection).

144. Mem. of Assemb. Angelo F. Orazio, N.Y.S. Legis. Annual 1981 at 139.

145. Zimmer v. Chemung Co. Performing Arts, 482 N.E.2d 898 (N.Y. 1985) (emphasis added) (citing 1969 N.Y. Legis. Ann. at 407).

146. Connors v. Boorstein, 149 N.E.2d 721, 723 (N.Y. 1958).

hazardous activity for which the extraordinary protection of absolute liability should be imposed. Joblon himself was hired as a house electrician to perform ongoing services in an office.[147] He fell from a ladder which he himself failed to secure while chiseling a hole in a wall in order to install an electrical clock.[148] No construction was ongoing. Joblon's work was controlled by his supervisor, presumably a master electrician, and not by any representative of the owner, who may not have been aware that Joblon was climbing up on an unsecured ladder in a small, dark closet.

Under these circumstances, it is difficult to understand what public policy would be advanced by preventing the building owner from asserting, and the jury from considering, Joblon's comparative negligence, which appears to have been considerable. Is it fair and reasonable to expect the building owner to anticipate that an electrician would decide to use an unsecured ladder to perform the routine installation of an electrical clock? Rather, it seems inconsistent with the legislative intent to afford a "house electrician" the same legal benefits and protections which have been found necessary for construction workers who are ordered to scale unprotected and exposed scaffolding. The same question can be raised of other applications of strict liability in a non-construction context, such as cleaning the tops of office partitions[149] or removing snow and ice from the roof of a private residence.[150] Clearly, these cases are not consistent with the legislative intent any more than was the case in *Joblon.*

By the same token, where is the legislative support for the routine cleaning and maintenance exception? After all, the Legislature chose the words "altering, painting, cleaning or pointing" in 1921, and the same language has survived to this day. The legislative history is bereft of any intention to limit the law's reach to any one particular kind of cleaning. The courts which devised the routine cleaning and maintenance exception did so as a matter of common sense, in order to avoid the absurd result of affording strict liability to the case of any employee who falls from a step stool while changing a lightbulb or washing a window or cleaning an office partition.

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147. *See Joblon*, 695 N.E.2d at 239.

148. *See id.*

149. *See* Bustamante v. Chase Manhattan Bank, N.A., 659 N.Y.S.2d 284 (1st Dep't 1997).

150. *See* Vernum v. Zilka, 660 N.Y.S.2d 599 (3d Dep't 1997).

Thus, the Court of Appeals was probably correct when it wrote in 1958 that the statutory term "cleaning" refers "to the cleaning incidental to building construction, demolition and repair work..."[151] By this analysis, it should not matter whether the cleaning is "routine"[152] or the alteration is "significant."[153] What the Legislature intended was to protect workers who climb on scaffolds at construction sites, however routine or humble the task. In this regard, the First Department was probably on the right track when it applied Section 240 to the case of a plaintiff who fell from a ladder while providing temporary lighting at a construction site,[154] notwithstanding the routine nature of his work. Furthermore, the Third Department honored the legislative intent when it wrote that, "in order to be entitled to the protection of Labor Law § 240(1), a worker must establish that he or she was performing work necessary and incidental to the construction, renovation or repair of a building or structure."[155]

Thus, it appears that the most faithful rendering of the legislative intent would be to provide coverage under Section 240 for all height-related work, however routine and humble, at a *construction site*, and to require workers in a non-construction setting to prove negligence in order to recover. Perhaps then, the Legislature should consider the Court of Appeals' invitation[156] to revisit the reach of the Labor Law's strict liability provisions, and narrow their applicability to actual construction work. At the same time, it could eliminate, as unnecessary, the routine cleaning and maintenance exception.

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151. Connors v. Boorstein, 149 N.E.2d at 723 (denying claim of domestic worker injured while cleaning windows).

152. Brown v. Christopher Street Owners Corp., 663 N.E.2d 1251 (N.Y. 1996).

153. *Joblon*, 695 N.E.2d at 239.

154. *See* Binetti v. MK W. St. Co., 657 N.Y.S.2d 648, 649 (1st Dep't 1997).

155. *Perchinsky*, 660 N.Y.S.2d at 180. *See also* Cosentino v. Long Island RR., 607 N.Y.S.2d 720, 721 (2d Dep't 1994) ("In view of the strict liability imposed by the statute and the fact that such liability generally is imposed only to guard against inordinate dangers, we find no reason to strain the language of the statute to encompass the routine activities involved with telephone service, which is clearly distinguishable from the risks associated with the *construction or demolition of a building*.") (emphasis added).

156. *See Joblon*, 695 N.E.2d at 241, n.2.

VI. SUMMARY AND CONCLUSION

The application of Labor Law Section 240 by the various departments of the Appellate Division has been largely inconsistent. The judicially-created exception for routine maintenance and cleaning has been applied consistently by the Second and Fourth Departments, all but ignored in the First Department, and partially adopted, with blatantly inconsistent results, in the Third Department. As a result, the benefit of absolute liability has been extended to workers injured while shoveling snow,[157] changing light fixtures,[158] and cleaning office partitions,[159] but denied to workers splicing telephone cable wires,[160] deactivating elevators,[161] or repairing a paper machine on a factory floor.[162] Given these widely divergent results among the different departments, the issue is abundantly ripe for clarification by the Court of Appeals or the Legislature. Insofar as the Legislature never intended absolute liability to be extended to every routine workplace accident, it is likely that some version of the routine cleaning and maintenance exception will continue to exist, unless *Joblon* is legislatively overruled.

The Court of Appeals' 1998 decision in *Joblon* has removed the requirement that an accident take place on a traditional construction site in order to qualify for Section 240 coverage, thereby expanding the scope of absolute liability to protect any worker who sustains a height-related injury while making a significant alteration to a building or structure. The Legislature should consider whether the Court of Appeals has interpreted the Labor Law too broadly, beyond the original intent to protect construction workers who ascend scaffolds at building construction sites.

The *Joblon* "*significant* physical change" test should narrow the scope of activities previously classified as alterations. A domestic worker who falls from a ladder while washing windows or changing a light bulb will still be engaged in simple, routine activities, and will not be aided by *Joblon*. Whether a given activity is protected altering or unprotected maintenance will continue to be adjudicated on a case-by-case basis. It is hoped that this article, by outlining the inconsistencies in the

157. *Vernum*, 660 N.Y.S.2d. 599 (3d Dep't 1997).
158. Clemente v. Growing Tunneling Corp., 653 N.Y.S.2d 992 (1st Dep't 1997).
159. *Bustamante*, 659 N.Y.S.2d 284 (1st Dep't 1997).
160. *Cosentino*, 607 N.Y.S.2d 720 (2d Dep't 1994).
161. *See Vanerstrom*, 659 N.Y.S.2d at 78.
162. *See Becker*, 656 N.Y.S.2d at 1001.

various departments, will help promote uniformity in application of the law, and interpretation of this important legislation in a manner consistent with its original intent.