The Window–Washers' dilemma:

absolute liability vs. negligence in the Third Department

What connection—if any—is there between Labor Law Sections 240 (1), the Scaffold Law, and 202, which protects window washers? Although the Court of Appeals has not spoken definitively on this subject, until 1998 the answer seemed clear enough: since Section 240 (1) applies to cleaning buildings, non-domestic window washers could take advantage of both sections. This was the holding in the First Department (*see, e.g., Terry v Young Men's Hebrew Assn. of Washington Heights*, 168 AD2d 399, *affd without consideration of this point* 78 NY2d 978), the Second Department (*Williamson v 16 W. 57th St. Co.*, 256 AD2d 507), and the Fourth Department (*Harzewski v Centennial Development Corp.*, 270 AD2d 888).

In 1998, though, the Third Department broke ranks, ruling that with the enactment of Labor Law § 202, window cleaners were afforded

> absolute liability against owners of all buildings except dwellings while working at elevated heights, the precise protection afforded workers under labor Law § 240. Thus, *** to conclude that the protections of Labor Law § 240 also

> would encompass window cleaners "would have the effect of making Labor Law [202] … virtually useless". Such an interpretation clearly would be contrary to accepted rules of statutory construction (*Bauer v Female Academy of the Sacred Heart*, 250 AD2d 298, 301, *adopting the language of Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515, in construing Labor Law § 241 [6]).

There is a good deal of logical sense to this position. In 1930, when Section 202 was first enacted, the Scaffold Law was strictly construed. Section 202 thus played a major role in protecting window washers, a role that rapidly diminished after a broad reading was given to the Scaffold Law in *Zimmer v Chemung County Performing Arts* (65 NY2d 513) and *Bland v Manocherian* (66 NY2d 452). Resort to Section 202 is now rare indeed, and the Third Department may have intended to salvage some of the section's former importance.

But the Justices of that court had a further surprise in store, and they sprang it, ironically, in a second appeal of the very same case. Having held that Section 202 was the only remedy available to window washers in *Bauer* Number One, the court then permitted the defendant to raise comparative negligence as a defense, something unavailable to those parties sued under Section 240 (1). Over a vigorous dissent from Justice Lahtinen, in which Presiding Justice Cardona concurred, the Third Department held that Sections 202 and 240 (1) were parallel only at the time that Section 202 was enacted:

> Initially, respondent contends, as Supreme Court apparently concluded, that our previous decision held that a violation of Labor Law § 202, as amended in 1970 (see, L 1970, ch 822), imposed absolute liability for which

> comparative negligence was no defense. Such clearly is not the case. Our holding was that Labor Law § 202 constituted plaintiff's exclusive remedy. Our rationale for that holding was that *upon enactment* of Labor Law § 202, window cleaners were afforded absolute protection and to conclude that Labor Law § 240 also would encompass window cleaners would have the effect of rendering Labor Law § 202 useless. We did not determine, nor was the issue raised by any of the parties, what effect the 1970 amendment to Labor Law § 202 had upon the issue of liability (*see*, 250 A.D.2d 298, 300-301, *supra*) (*Bauer v Female Academy of the Sacred Heart*, __AD2d__, 712 NYS2d 706, at 708; 2000 N.Y. App. Div. LEXIS 9064, *emphasis in original*).

Since this 1970 amendment had vested enforcement of the Section in an administrative body, a violation of any regulation promulgated thereunder would now be only some evidence of negligence, and comparative negligence was available as a defense. In short, the court held that Section 202 was previously equivalent to Section 240 (1), but with the amendment in 1970 it was to be interpreted like Section 241 (6).

The dissenters argued to the contrary:

> There is nothing in the legislative history surrounding passage of the amendment to indicate an intention to abandon the absolute liability protections of the statute (see, Bill Jacket, L 1970, c 822). To the contrary, the Department of Labor memorandum attached to the bill stated that the amendment's purpose was "to strengthen existing safety standards for the cleaning of windows" (Dept. of Labor Mem., 1970 McKinney's Session Laws of NY, at 3005).

Since Section 202, unlike Section 241 (6), evolved from a strict liability statute, they concluded, the majority's interpretation of the 1970 amendment was unfounded.

The Legislature, in fact, did very little to the Section in that amendment; the statute's catchline, originally "Protection of persons engaged at window cleaning", was

amended to add "the public and of" and "and cleaning of exterior surfaces of buildings"; and a new final paragraph was added:

> Notwithstanding any other law or regulation, local or general, the provisions of this section and the rules issued thereunder shall be applicable exclusively throughout the state and the commissioner shall have exclusive authority to enforce this section and the rules issued thereunder.

That was all.

The majority interpreted this additional paragraph as eliminating the "self–executing" aspect of Section 202: "Labor Law § 202, as amended in 1970, is no longer self-executing because it defers to the safety standards set forth in the implementing regulations adopted by the Industrial Board." But taken as a whole, the new paragraph seems to this commentator, at least, to be an attempt to oust the jurisdiction of municipalities and nothing more. The Department of Labor's Memorandum in support of the bill says as much:

> In the past, there have been some problems in regard to overlapping jurisdiction between the State and large municipalities on regulation of window cleaning, and the bill specifically provides for exclusive State jurisdiction to clarify the jurisdictional questions (*Id.*).

More striking yet, the 1970 amendment to Section 202 merely repeats the language of L 1969 ch 367, which amended Section 242 of the Labor Law to read

> Notwithstanding any other law or regulation, local or general, the provisions of this article and the rules issued thereunder shall be applicable exclusively throughout the state and the commissioner shall have exclusive authority to enforce this section and the rules issued thereunder.

This identity is specifically pointed out in the Memorandum of support, and it creates further problems for the majority's reasoning. If the 1970 amendment abolished absolute liability under Section 202, the same argument would necessarily imply that the 1969 amendment abolished it for all of Article 10, including the Scaffold Law. This was surely not the Legislature's intention.

Nor do any parallels between Section 202 and Section 241 (6) provide support for the second *Bauer* decision, because both Third Department panels agreed that the pre–1970 Section imposed absolute liability; and the only reference to the industrial code in Section 241 (6) is strikingly similar to language that had been in Section 202 from the outset. Section 241 (6) states:

> The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

The original final paragraph of Section 202 read:

> The board of standards and appeals may make rules to effectuate the purposes of this section.

Moreover, the pre-amendment text of the section is replete with references to the board, none of which were taken by the *Bauer* majority to detract from the presumed intent to impose absolute liability for violation of the statute. The first paragraph alone contains four, here italicized:

> The owner, lessee, agent and manager of every public building and every contractor involved shall provide such safe means for the cleaning of the windows and of exterior surfaces of such building *as may be required and approved by the board of standards and appeal*s. The owner, lessee, agent, manager or superintendent of any such public building and every contractor involved shall not require, permit, suffer or allow any window or exterior surface of such building to be cleaned unless such means are provided to enable such work to be done in a safe manner for the prevention of accidents and for the protection of the public and of persons engaged in such work in conformity with the requirements of this chapter *and the rules of the board of standards and appeals*. A person engaged at cleaning windows or exterior surfaces of a public building shall use the safety devices provided for his protection. Every employer and contractor involved shall comply with this section *and the rules of the board* and shall require his employee, while engaged in cleaning any window or exterior surface of a public building, to use the equipment and safety devices required by this chapter *and rules of the board of standards and appeals*.

In short, the board, under whatever title, was always involved in the interpretation of Section 202 and was always empowered to promulgate regulations thereunder. The 1970 amendment did nothing to change the relationship between the statute and the regulations, and to argue, as the *Bauer* majority does, that the statute imposed absolute liability beforehand and limited liability thereafter is to ignore not only the plain meaning and legislative history of the amendment but also the role played by the board from the first enactment of Section 202.

The interpretation of the dissenters is not unreasonable. In every version of Section 202 the rules of the board are said to supplement the requirements of the section, and do not limit its absolute obligation. At one time, in fact, the statute specifically provided that "the absence of any such rules shall not relieve any person from the responsibility provided him by this section." While this language can no longer be found in the statute, its removal cannot be construed as a retreat from

absolute liability. Indeed, even the 1970 amendment appears to permit actions alleging a violation of either the section, the rules, or of both.

The position adopted by the second *Bauer* panel suggests that the Legislature was working an elaborate shell game: first removing window washers from the protection of the Scaffold Law, by giving them identical rights under Section 202, and then doing away with those rights. There is no evidence that anyone in the 1970 Legislature intended this result or thought that amending Section 202 would have that effect, and for 30 years after its passage the amendment went unnoticed by the courts. In the three other Departments this issue will presumably not arise, since virtually all window washers on public buildings can choose between the absolute liability of Section 240 (1) and whatever interpretation is given Section 202. Plaintiffs in the Third Department will not be so fortunate, unless the Court of Appeals chooses to address what seems a very confusing piece of statutory interpretation.