

# Principles for Principals

## Legal Perspective of Principal/Contractor Relationship

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# Legal perspective on the principal/contractor relationship

## A principal's duty to take all practicable steps

- **Starting point - section 18**
- **Limitations on section 18**
- **All practicable steps – section 2A**
- **Key factors in a successful defence under section 18**
- **Some factors looked at by the Courts in convictions under section 18**



# Legal perspective on the principal/contractor relationship

The starting point

- Section 18
- Section 2(2)



# Legal perspective on the principal/contractor relationship

## 18 Duties of Principles

- (1) Every principal shall take all practicable steps to ensure that—
  - (a) No employee of a contractor or subcontractor; and
  - (b) If an individual, no contractor or subcontractor,—

is harmed while doing any work (other than residential work) that the contractor was engaged to do.
- (2) Subsection (1) of this section shall be read subject to section 2(2) of this Act.



# Legal perspective on the principal/contractor relationship

## Section 2(2)

- (2) For the avoidance of doubt, it is hereby declared that—
- (a) A person may at the one time be 2 or more of any of the following: a contractor, an employer, a person who controls a place of work, a principal, a self-employed person, and a subcontractor; and this Act may impose duties on or in respect of the person accordingly; and
  - (b) This Act may at the one time impose the same duty on 2 or more persons, whether in the same capacity or different capacities; and
  - (c) A duty imposed by this Act on any person is not diminished or affected by the fact that it is also imposed on 1 or more other persons, whether in the same capacity or in different capacities.



# Legal perspective on the principal/contractor relationship

*Central Cranes Limited v Department of Labour [1997] 3 NZLR 694 (Court of Appeal)*

- Contractor's employee working on a crane 41 metres above ground without fall protection
- Contractor acknowledged expert in crane erection
- Industry practice to leave safety issues to employees
- Section 18 duty can not be discharged by engagement of competent contractor
- Scope of a principal's duty under section 18 depends on the circumstances
- Whether a principal discharges its duty is a question of a fact and degree
- What may be practicable for an employer may not be practicable for a principal



# Legal perspective on the principal/contractor relationship

## Limitations on imposition of duty

- The parties must be in a contractual relationship – *Holdsworth Group Limited v DOL* (unreported, High Court, Auckland, AP 54/96 19 August 1996) Salmon J)
- The contractor must be engaged for “gain or reward” – *DOL v P F Olsen Limited [2002] DCR 943*



# Legal perspective on the principal/contractor relationship

## All practicable steps

### 2A All practicable steps

- (1) In this Act, all practicable steps, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to:
  - (a) the nature and severity of the harm that may be suffered if the result is not achieved; and
  - (b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
  - (c) the current state of knowledge about harm of that nature; and
  - (d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and
  - (e) the availability and cost of each of those means.
- (2) To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.





# Key concepts in definition of “all practicable steps”

- All practicable steps turns on what steps are “reasonably practicable” in the circumstances
- Reasonably practicable is narrower than practicable
- What is reasonably practicable is a matter of fact and degree in each case
- A person must weigh the risk, nature and severity of harm on one hand and the sacrifice involved in the measures necessary for avoiding the risk on the other (whether they be money, time or trouble)
- If a measure or precaution is practicable it must be taken unless in the whole of the circumstances it would be unreasonable



# Key concepts in definition of “all practicable steps”

- Determining what steps are required includes an obligation to foresee the risk of harm to workers
- The cases say employers have this obligation but likely to extend to Principals too
- Workers may overlook hazards, act unwittingly, irrationally or disobediently



# Key concepts in definition of “all practicable steps”

- The assessment of risk must be made against the background of the current state of knowledge of the factors set out in section 2A (a) to (e)
- Knowledge is judged objectively not subjectively
- Knowledge includes knowledge acquired through common sense, similar situations and historical experience.
- The knowledge is that held by a substantial, but not necessarily absolute, consensus of view, and is available by exercise of reasonable diligence.



# Legal perspective on the principal/contractor relationship

*DOL v G R Hassett (trading as Hassett Builders) and Apex Construction Limited*

- A contractor's employee fell 2.2 metres from a residential construction site and became a tetraplegic.
- Both the contractor and principal defended the charges arising from the accident arguing that it was not reasonably practicable to install fall protection under 3 metres
- The defendants relied on the so called "3 metre rule".
- Judge Morris found that there was a known risk of harm of falls under 3 metres and the measures required to protect against this harm were known and easily implemented.
- The principal, Apex, was fined \$2000 and ordered to pay reparation of \$10,000.



# Legal perspective on the principal/contractor relationship

## Key factors in successful defence

- *DOL v Metrowater* (unreported, District Court, Auckland, 6 September 2000, Judge Mathers)
- The case arose out of the death of a contractor's employee (Stargate) and two subcontractor's employees (Aquatech) who were carrying out work in a sewer in an incomplete manhole.



# Legal perspective on the principal/contractor relationship

Metrowater successfully argued that it had taken all practicable steps. These steps included:

- Metrowater's health and safety policy identified working in confined spaces as a hazard
- Metrowater reviewed and approved its subcontractor's health and safety policy
- Stargate's health and safety policy specified that any subcontractors would be inducted into its health and safety regime or Stargate would need to approve the subcontractor's policy
- Stargate's policy had detailed procedures for controlling the hazard
- Stargate inducted each employee into its health and safety regime including giving drainage staff a hazard management handbook to read and sign
- The victim had passed the company's confined space training course
- Stargate reviewed and approved Aquatech's health and safety policy which included managing hazards posed by working in confined spaces
- Metrowater and Stargate undertook random audits of the work carried out by or on their behalf to ensure it complied with their health and safety regimes
- Metrowater told Stargate's employee that the manhole was incomplete.



# Legal perspective on the principal/contractor relationship

Some factors looked at by the Courts in recent section 18 convictions

- *Grayson Engineering Limited* (unreported, District Court, Auckland, 10 November 2006)
- *Blacktop Construction Limited* (unreported, District Court, Auckland, 7 March 2007)
- *Hanham & Philp Contractors* (unreported, District Court, Christchurch, 26 November 2007)





# Legal perspective on the principal/contractor relationship

## Summary - Legal principles

- A principal is required to take all practicable steps to ensure no employee of a contractor or subcontractor is harmed while doing any work they are engaged to do
- A principal cannot discharge its duty under section 18 by merely engaging a competent contractor
- Determining what practicable steps a principal must take depends on the circumstances
- What maybe practicable for an employer may not be practicable for a principal
- A principal must weigh the risk, nature and severity of harm on the one hand and the sacrifice involved in the measures for avoiding the risk on the other (whether they be money, time or trouble)
- The assessment of what steps are practicable includes foreseeing that workers overlook hazards, act unwittingly, irrationally or disobediently
- It also includes knowledge of the risk of harm acquired through common sense, similar situations and historical experience
- The assessment of risk must be made against the background of current knowledge of the risk





# Legal perspective on the principal/contractor relationship

## Summary - Factual considerations

- The principal needs to implement an efficient method of communicating the planned programme of work on the project and ensuring all parties receive the relevant health and safety information relating to that work and checking that the work is being done safely. To achieve this goal
- The principal should assess hazards on the site, of any work it carries out and relating any plant that it brings onto the site and have in place controls to protect its workers and those of its contractors and subcontractors
- The principal should also assess the generic hazards that the project involves
- The principal should review the contractor's health and safety policy and procedures to determine whether they adequately cover the type of work being carried out on the project
- The contractor's health and safety documentation should include a site and job specific hazard analysis and control procedures
- The principal should impose a similar obligation on its contractors to obtain subcontractor's health and safety documentation covering these issues



# Legal perspective on the principal/contractor relationship

## Factual considerations cont...

- Depending on the nature of the work, the principal may need to require its contractors and subcontractors to undertake task analysis of each new task to identify and control hazards before commencing work
- Regular project control meetings, contractor meetings, and/or tool box meetings should be undertaken through out the job covering new work and how the hazards associated with the work are going to be managed. Written minutes should be kept.
- The principal should conduct audits of the site to ensure the work is being undertaken safely and audits of the health and safety documentation to ensure contractors and subcontractors are undertaking appropriate hazard assessments before they undertake work
- Unsafe work practices on site should be disciplined through warnings, written warnings and dismissal where appropriate