



How the District Court has applied the principles of due diligence – and what this means for senior leaders

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Abstract

Many senior leaders know all too well the duty of due diligence – be that in a financial or legal context.

When it comes to health and safety, however, the duty of due diligence has until now been largely untested. Since the introduction of the Health and Safety at Work Act 2015 (HSWA) CEOs, senior leaders and Directors have been aware of the new duties placed on them as individuals, but with a lack of case law or precedent that awareness or focus may have drifted.

WorkSafe NZ (2019) defines due diligence as: *HSWA creates a due diligence duty on an officer. This means an officer must take appropriate, proactive steps to ensure the person conducting a business or undertaking (PCBU) complies with HSWA.*

In late November 2024 for the first time the duty of due diligence on an individual Officer was tested with a guilty verdict in the District Court in the case against former Port of Auckland (POAL) CEO Tony Gibson (*Maritime NZ v Anthony Michael Gibson*, 2024).

New precedent

This is the first time a CEO of a major New Zealand company has been found guilty under the Act.

The charges were brought by Maritime NZ following the death of Pala'amo Kalati at the Port in 2020. Maritime NZ charged Mr Gibson and following a trial, he was found guilty on two of the three charges.

In his verdict, Judge Bonner set out a particularly instructive paragraph, paragraph 80, relating to general principles of an officer's duty of due diligence. It's these principles which outline in more concrete terms, the scope of an officer's obligations under HSWA, which should act as a key indicator to senior leadership teams and Boards across the country – even to those who believe they're at the top of their game in regard to health and safety leadership and governance.

While at the time of writing (March 2024) this decision is still subject to appeal - it's important not to underestimate some of the expectations this case sets out for officers.

What all Officers should learn from paragraph 80

In paragraph 80 of his decision, Judge Bonner sets out the general principles relating to the exercise of an Officer's duty of due diligence. This paragraph, and in fact the judgement in its entirety should be mandatory reading for all CEOs, Directors and those holding Officer positions.

The key aspects paragraph 80 identifies focus around four key areas for Officers.

Work as imagined vs work as done

The concept of work-as-imagined (WAI) and work-as-done (WAD) originate from ergonomics and human factors (Hollnagel & Clay-Williams, 2022; Hollnagel & Wears, 2015) but are now widely accepted as good practice for all Officers to understand, particularly as they seek to verify the effectiveness of the controls for the critical risks identified for the organisation.

In Judge Bonnar's decision he makes several references to this throughout this verdict and how it applies to the expectations of Officers. It also makes clear that CEOs have an important role to play and not just rely unquestioningly on advice from health and safety advisors or consultants. Paragraph 80 sets out three key areas for Officers and CEOs in particular to consider:

- a. *An officer in a large PCBU does not need to be involved in day-to-day operations in a hands-on way but cannot simply rely upon others within the organisation who may be assigned health and safety obligations or roles, or who may have more specialised skills or experience, to discharge the duties of oversight and due diligence.*

- b. *The officer must also acquire and maintain sufficient knowledge of the operations of the PCBU and the work actually carried out “on the shop floor” to adequately identify and address actual workplace hazards and risks.*
- c. *An officer cannot assume that the PCBU is compliant with its duties under the HSWA in the absence of being told otherwise, or simply assume that the information they receive from their subordinates as to the adequacy or effectiveness of the PCBU’s health and safety system and hazard controls is accurate and sufficient. An officer must be proactive in relation to health and safety issues and in a position to properly monitor, verify and interrogate the information they receive.*

Employing health and safety staff with proper skills and experience

The Court found that while an Officer may not have the specialised skills or experience in health and safety, there will be others within the PCBU with assigned health and safety obligations or roles. It is the Court’s view that it is the Officer’s responsibility to *“ensure that these people have the necessary skills and experience to properly execute their roles and they must adequately and regularly monitor their performance to ensure they are properly discharging their functions in ensuring the PCBU’s compliance with its duties.”*

A key learning for all Officers here will be that while many will be completing the adequate checks and balances on employment of these roles, how often are they ‘regularly monitoring’ their performance?

Ensuring proper systems, verification and monitoring are in place

The duty to verify under HSWA has now been in existence for close to a decade and for those senior leaders and Officers the Forum engages with, it’s largely a well-known duty. What is often unclear is the ‘how’. I hear regular reports of Boards and Executive Leadership Teams doing a stellar job in this area, while others often going out as groups on a ‘patsy, tick-box’ visit, which neither satisfies the duty or the opportunity to properly and curiously engage with the workers at the front line.

Judge Bonner makes three key points in relation to this in paragraph 80, as well as throughout his judgement. In particular in paragraph 80 he finds:

(h) An officer does not satisfy the due diligence duty by merely putting in place policies or procedures as to how work is to be carried out. The officer must ensure that entrenched and adequate systemic processes are put in place to ensure that the PCBU complies with its duties. In any large organisation, the existence and adequacy of such systems are key.

(i) An officer must ensure that there are effective reporting lines and systems in place within a PCBU to ensure that necessary information in relation to health and safety, workplace risks, hazards and controls flows to the officer and others in the organisation with governance and supervisory functions. Again, the existence of appropriate systems to monitor, record and direct the flow of relevant information is key, especially in larger organisations.

(k) Due diligence also requires the officer to engage upon, or arrange, an effective process of monitoring, review and/or auditing of the PCBU’s systems, processes and work practices to ensure that those systems and processes are achieving their purposes and that relevant safety standards and policies are, in fact, being adhered to.

What is a ‘hands on’ CEO?

The verdict describes Mr Gibson as ‘hands on’. While paragraph 80 sets out:

(e) An officer in a large PCBU does not need to be involved in day-to-day operations in a hands-on way but cannot simply rely upon others within the organisation who may be assigned health and safety obligations or roles, or who may have more specialised skills or experience, to discharge the duties of oversight and due diligence. The officer must personally acquire and maintain sufficient knowledge to reasonably satisfy him or herself that the PCBU is complying with its duties under the Act.

It is the Business Leaders’ Health and Safety Forum’s view that this **does not** mean CEOs should be ‘hands off’, in fact it is our view that CEOs and Officers should be actively leading, hands on and inherently understand their critical risks and controls.

So, where does this leave Officers?

In late 2024, following this verdict, the Forum released a summary of actionable insights for CEOs to our 430+ members across the country. This paper was informed by expert legal and governance opinion from a just-released webinar series on the case itself.

Judge Bonnar's decision sets out a clear path for all Officers under HSWA and there are key learnings for anyone involved in a leadership position in a New Zealand organisation.

The Forum released a six-point action plan for CEOs.

1. **Review your approach to critical risks and controls** across the organisation, including asking these questions of yourself, your leadership team and board as well as your H&S advisors:
 - a. What are our critical risks?
 - b. What are the controls for these critical risks?
 - c. How effective are these controls?
 - d. What are you basing your judgement of that efficacy on?
 - e. If you have soft controls in place, why? And, if these are the most appropriate controls ensure you document the reasons for this.
2. **Complete the Institute of Directors 'Good Practice Governance Self-Assessment'** (Institute of Directors, 2024) – along with your Board and Executive Leadership Team – set out in the Institute of Directors' Good Governance Guide (Institute of Directors & WorkSafe, 2024) – and agree the gaps and actions to address those.
3. **Map where the key accountabilities, roles and responsibilities** for health and safety sit across your organisation and apply rigor to your assessment about how well these are understood and are being met.
4. **Review all current internal and external recommendations from audits, reviews and investigations** – what is their status? Have you accepted them all? If so, how are they tracking? If not, are you clear why not and is that documented? Do you understand the limitations of these audits and reviews?
5. Review how you, the Executive Leadership Team and the Board demonstrate safety leadership and gain an **understanding of 'work as done'**. Consider:
 - a. When and where are your visits taking place? Do they account for work that is potentially 24/7? Across different locations?
 - b. How are you showing up to these visits? Are you authentic and working on building relationships with workers, or just asking H&S questions focused on compliance?
 - c. How are you recording these visits, sharing learnings, and ensuring all feedback is reported on and responded to?
 - d. What insights are you gathering from other sources, including workers, H&S representatives, your health and safety committee, monitoring by leaders and H&S teams and internal and external audits?
 - e. In larger more complex or multi-site businesses, are you doing cross-site and cross team learning?
 - f. Is the information in your routine reports and from other sources providing you with genuine insights about the effectiveness of your risk management?
6. Purposefully reflect on **your leadership work as CEO**, ask yourself: How am I going to hold myself to account for setting the tone from the top? How do I "turn up" on health safety in different situations across the business? How do I respond to bad news? How do I

purposefully maintain that focus and attention through the year? Am I benchmarking stats, or different approaches by other leaders?

Furthermore, in March 2024, the Forum worked with Maritime NZ, WorkSafe NZ, Institute of Directors and the GM Safety Forum to pull together some key messages and lessons for CEOs as Officers, following this verdict.

These were published on the Forum's website¹, but in particular CEOs will take particular interest in these key points:

- Officer due diligence failings that the regulators focus on will often occur in circumstances where a PCBU's safety gaps have been present over time, or across a range of incidents or issues and insufficient action has been undertaken to address them.
- While Mr Gibson's case is fact-specific it has three general cautionary lessons for Officers, in particular that CEOs:
 - deal with specific risks promptly
 - if an incident or issue occurs, seek to understand the cause and what actions are being taken
 - seek assurance any actions and recommendations are progressed in a timely way, and explore all types of controls.

The Forum has committed to working with the agencies above to provide additional guidance to Chief Executives of large companies around their due diligence obligations. This work will get underway in May 2025.

This landmark judgement from the District Court provides applied principles of due diligence for the first time in New Zealand. The judgement itself should be compulsory reading for all senior leaders, no matter their industry or business size.

References

- Hollnagel, E., & Clay-Williams, R. (2022). Work-as-Imagined and Work-as-Done. In R. L. Wears & E. Hollnagel (Eds.), *Implementation Science: The key concepts*. Routledge.
<https://doi.org/10.4324/9781003109945-52>
- Hollnagel, E., & Wears, R. L. (2015). *Why is Work-as-Imagined Different from Work-as-Done?* CRC Press.
- Institute of Directors. (2024). *Health and Safety Governance* [Self assessment]. Author, Wellington
<https://www.iod.org.nz/resources-and-insights/guides-and-resources/health-and-safety-a-good-practice-guide#>
- Institute of Directors, & WorkSafe. (2024). *Health and Safety Governance* [Good Practice Guide]. Author, Wellington <https://www.iod.org.nz/resources-and-insights/guides-and-resources/health-and-safety-a-good-practice-guide#>
- Maritime NZ v Anthony Michael Gibson* [2024] NZDC27975 Auckland District Court.
- WorkSafe. (2019). *Officers' due diligence* [Position Paper 1058WKS-11]. Author, Wellington
<https://www.worksafe.govt.nz/>

¹ <https://www.forum.org.nz/resources/insights-from-the-maritime-v-gibson-verdict/>