IN THE HIGH COURT OF NEW ZEALAND **CP 289/00**
WELLINGTON REGISTRY

UNDER	Part VII of the High Court Rules
IN THE MATTER	of the Civil Aviation Act 1990
BETWEEN	**AVIATION INDUSTRY ASSOCIATION OF NEW ZEALAND (INCORPORATED)** First Plaintiff
AND	**AIRCRAFT OWNERS' AND PILOTS' ASSOCIATION (INCORPORATED)** Second Plaintiff
AND	**ROYAL NEW ZEALAND AERO CLUB (INCORPORATED)** Third Plaintiff
AND	**NEW ZEALAND WARBIRDS ASSOCIATION (INCORPORATED)** Fourth Plaintiff
AND	**SPORT AVIATION ASSOCIATION OF NEW ZEALAND (INCORPORATED)** Fifth Plaintiff
AND	**NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS (INCORPORATED)** Sixth Plaintiff
AND	**AVIATION MEDICAL SOCIETY OF AUSTRALIA AND NEW ZEALAND (INCORPORATED)** Seventh Plaintiff
AND	**LEONARD DUDLEY CADOGAN COWPER** Eighth Plaintiff

AND **LEWIS JAMES DAY**

Ninth Plaintiff

AND **DONALD KEITH HALE**

Tenth Plaintiff

AND **PETER MORTON FRANKS**

Eleventh Plaintiff

AND **ROBERT JAMES GUNSON**

Twelfth Plaintiff

AND **ALBERT ERNEST MCTAINISH**

Thirteenth Plaintiff

AND **CIVIL AVIATION AUTHORITY OF NEW ZEALAND**

Defendant

Dates of Hearing: 18th, 19th, and 20th June 2001.

Counsel: **C.S. Withnall Q.C., for Plaintiffs**
G.W.R. Palmer and C.W. Hickford for Defendant

Date of Judgment **24th August 2001.**

RESERVED JUDGMENT OF HON. JUSTICE JOHN HANSEN

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[1] This judicial review concerns the respective powers of the Director of Civil Aviation (DCA), the delegated powers of the principal medical officer (PMO), and those of the aviation medical assessors (AMA), and designated medical examiners (DME's). Although the focus in this proceeding is on AMA's.

[2] Central to the dispute is whether or not certain parts of a medical manual issued by the Civil Aviation Department infringe upon powers granted to AMA's by the regulations. Although the plaintiffs maintained that the attack was against all parts of the manual that purported to infringe on the regulatory duties of the AMA's, the principal focus, indeed almost the sole focus, of the plaintiffs' case was the so called 1% rule in relation to cardiovascular assessment.

[3] The corporate plaintiffs all have an interest in medical certification of pilots, and the individual plaintiffs claim to be affected by the actions of the director. No issue has been taken with the standing of any plaintiff.

[4] For reasons that follow I am satisfied the contentions of the plaintiffs have been made out, and it is appropriate to make the declarations sought.

[5] In the course of submissions, on behalf of the plaintiffs and the defendant, a vast amount of material was referred to. Both counsel relied on numerous sections of the Civil Aviation Act 1990, portions of the rules, the Medical Manual and much other material. In deference to counsels' very extensive submissions, I will refer to them at somewhat greater length than is my practice. Before turning to the cases advanced by the parties, it is appropriate to set out the relevant statutory matters relied on by these parties.

CIVIL AVIATION ACT 1990:

An Act—
(a) To establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety; and
(b) To ensure that New Zealand's obligations under international aviation agreements are implemented; and
(c) To consolidate and amend the law relating to civil aviation in New Zealand

"2 Interpretation
In this Act, unless the context otherwise requires,—
…………………………..

Aviation related service means any equipment, facility, or service (including any air traffic service but excluding any service of the Transport Accident Investigation Commission) operated in support of or in conjunction with the civil aviation system; and includes the provision of aeronautical products:…..

Convention—

(a) Means the Convention on International Civil Aviation signed on behalf of the Government of New Zealand in Chicago on the 7th day of December 1944; and

(b) Includes—

(i) Any amendment to the Convention which has entered into force under Article 94(a) of the Convention and has been ratified by New Zealand; and

(ii) Any Annex or amendment thereto accepted under Article 90 of the Convention; and

(iii) The international standards and recommended practices from time to time accepted and amended by the International Civil Aviation Organisation pursuant to Article 37 of the Convention:…..

[**Director** means the person who is for the time being the Director of Civil Aviation under section 72I of this Act:]

ICAO means the International Civil Aviation Organisation established under the Convention; and includes any successor to the Organisation:

4. Application of Act

(1) [Except as provided in section 53A and section 96A of this Act,] this Act and all regulations and rules made under this Act shall apply to the following:

(a) Every person, aircraft, aerodrome, aeronautical product, air service, and aviation related service, in New Zealand:

7. Requirement for aviation document

(1) Rules made under this Act may require that an aviation document shall be required by or in respect of all or any of the following:…

(b) Aircraft pilots:

(c) Flight crew members:…..

(p) Aviation communications services:

(q) Any persons, services, or things within any of the classes specified in paragraphs (a) to (p) of this subsection:

(r) Such other persons, aircraft, aeronautical products, aviation related services, facilities, and equipment operated in support of the civil aviation system, or classes of such persons, aircraft, aeronautical products, aviation related services, facilities, and equipment operated in support of the civil aviation system, as may, in the interests of safety or security, be specified in the rules.

(2) The requirements, standards, and application procedure for each aviation document, and the maximum period for which each document may be issued, shall be prescribed by rules made under this Act.

(3) Subject to any rules made under this Act, an aviation document may be issued by the [Director] for such specified period and subject to such conditions as the [Director] considers appropriate in each particular case.

(4) Any person in respect of whom any decision is taken under this section may appeal against that decision to a District Court under section 66 of this Act.

8 Application for aviation document

(1) Every application for the grant or renewal of an aviation document shall be made to the Director in the prescribed form or, if there is no prescribed form, in such form as the Director may require.

9. Grant or renewal of aviation document

(1) After considering any application for the grant or renewal of an aviation document, the Director] shall, as soon as is practicable, grant the application if or she is satisfied that—

(a) All things in respect of which the document is sought meet the relevant prescribed requirements; and

(b) The applicant and any person who is to have or is likely to have control over the exercise f the privileges under the document—

(i) Either holds the relevant prescribed qualifications and experience or holds such foreign qualifications as are acceptable to the [Director] under subsection (2) of this section; and
(ii) Is a fit and proper person to have such control or hold the document; and
(iii) Meets all other relevant prescribed requirements; [and
(c) It is not contrary to the interests of aviation safety for the document to be granted or renewed.]
(2) For the purpose of granting or renewing an aviation document, the [Director] may, subject to any provisions in the rules, accept such foreign qualifications or recognise such foreign certifications as he or she considers appropriate in each case.
(3) It shall be a condition of every current aviation document that the holder [and any person who has or is likely to have control over the exercise of the privileges under the document] continue to satisfy the fit and proper person test specified in subsection (1)(b)(ii) of this section [ ].
(4) Where the Director declines to grant an application for the grant or renewal of an aviation document under this section, the applicant may appeal against that decision to a District Court under section 66 of this Act.]…….

12 General requirements for participants in civil aviation system
(1) Every person who does anything for which an aviation document is required (in the succeeding provisions of this section called a participant) shall ensure that the appropriate aviation documents and all the necessary qualifications and other documents are held by that person.
(2) Every participant shall comply with this Act, the relevant rules made under this Act, and the conditions attached to the relevant aviation documents……..

14. Functions of Minister
(1) The principal functions of the Minister under this Act shall be to promote safety in civil aviation at a reasonable cost, and to ensure that New Zealand's obligations under international civil aviation agreements are implemented.
(2) Without limiting subsection (1) of this section, the Minister shall also have the following functions:
(a) To administer New Zealand's participation in the Convention and any other international aviation convention, agreement, or understanding to which the Government of New Zealand is a party:….
(3) For the purposes of subsection (1) of this section, a cost is a reasonable cost where the value of the cost to the nation is exceeded by the value of the resulting benefit to the nation.

15 Director may require or carry out safety and security inspections and monitoring
(1) The Director may in writing require any person who—
(a) Holds an aviation document; or
(b) Operates, maintains, or services, or does any other act in respect of any aircraft, aeronautical product, aviation related service, air traffic service, or aeronautical procedure,— to undergo or carry out such inspections and such monitoring as the Director considers necessary in the interests of civil aviation safety and security.
(2) The Director may, in respect of any person described in paragraph (a) or paragraph (b) of subsection (1) of this section, carry out such inspections and monitoring as the Director considers necessary in the interests of civil aviation safety and security.
(3) For the purposes of any inspection or monitoring carried out in respect of any person under subsection (2) of this section, the Director may in writing require from that person such information as the Director considers relevant to the inspection or the monitoring.]…….

17 Power of Director to suspend aviation document or impose conditions
(1) The Director may suspend any aviation document issued under this Act or rules made under this Act or impose conditions in respect of any such document, if he or she considers such action necessary in the interests of safety, and if he or she—
(a) Considers such action necessary to ensure compliance with this Act or rules made under this Act; or
(b) Is satisfied that the holder has failed to comply with any conditions of an aviation document or with the requirements of section 12 of this Act; or

(c) Is satisfied the holder has contravened or failed to comply with section 49 of this Act; or]
(d) Considers that the privileges or duties for which the document has been granted are being carried out by the holder in a careless or incompetent manner.
(2) Without limiting the general provisions of subsection (1) of this section, the Director may suspend any aviation document relating to the use of any aircraft, aeronautical product, or the provision of any service, or impose conditions in respect of any such document, if he or she considers that there is reasonable doubt as to the airworthiness of the aircraft or as to the quality or safety of the aeronautical product or service to which the document relates.
(3) The suspension of any aviation document or conditions imposed in respect of any such document shall remain in force until the Director has determined, after due investigation, the action to be taken in respect of the causes requiring the suspension or imposition of conditions; but the duration of any such suspension or conditions shall not exceed 14 days unless the Director directs that a further specified period is necessary for the purposes of the investigation.
(4) If, after investigation, the Director considers such action to be warranted, he or she may suspend for a further period the aviation document or impose further conditions, and he or she shall cause the appropriate endorsement to be made on the document concerned.
(5) Any person whose aviation document has been suspended or made subject to conditions under this section shall forthwith produce that document to the Director for appropriate endorsement.
(6) The whole or any part of an aviation document may be suspended under this section.
(7) Any person in respect of whom any decision is taken under this section may appeal against that decision to a District Court under section 66 of this Act.

18 Power of [Director] to revoke aviation document
(1) If, after an investigation under section 17 of this Act, the Director believes that any relevant aviation document should be revoked, the Director may revoke that document.]
(2) Where the [Director] proposes to revoke an aviation document, the [Director] shall give notice in accordance with section 11 of this Act, which shall apply as if the proposed revocation were a proposed adverse decision under [ ] this Act.
(3) Any person whose aviation document has been revoked shall forthwith surrender that document to the [Director].
(4) Any person in respect of whom any decision is taken under this section may appeal against that decision to a District Court under section 66 of this Act.

19 Criteria for action taken under section 17 or section 18
(1) The provisions of this section shall apply for the purpose of determining whether an aviation document should be suspended or made subject to conditions under section 17 or revoked under section 18 of this Act.
(2) Where this section applies, [ ] the Director [ ] may have regard to, and give such weight as [ ] the Director considers appropriate to, the following matters:
(a) The person’s compliance history with transport safety regulatory requirements:
(b) Any conviction for any transport safety offence, whether or not—
(i) The conviction was in a New Zealand Court; or
(ii) The offence was committed before the commencement of this Act:
(c) Any evidence that the person has committed a transport safety offence or has contravened or failed to comply with any rule made under this Act.
(3) The [ ] Director shall not be confined to consideration of the matters specified in subsection (2) of this section and may take into account such other matters and evidence as may be relevant.
(4) The [ ] Director may—
(a) Seek and receive such information as the [ ] Director thinks fit; or
(b) Consider information obtained from any source.
(5) If [ ] the Director proposes to take into account any information that is or may be prejudicial to a person, [ ] the Director shall, subject to subsection (6) of this section, as soon as is practicable disclose that information to that person and give that person a reasonable opportunity to refute or comment on it.
(6) Nothing in subsection (5) of this section shall require [ ] the Director to disclose any information the disclosure of which would be likely to endanger the safety of any person [, or

to disclose any information before suspending an aviation document or imposing conditions in respect of an aviation document under section 17 of this Act.]
(7) Where [ ] the Director determines not to disclose any information in reliance on subsection (6) of this section,—
(a) The [ ] Director shall inform the person of the fact of non-disclosure and that the person may seek a review by an Ombudsman of that non-disclosure pursuant to the Official Information Act 1982; and
(b) The provisions of that Act shall apply to that non-disclosure as if, following a request under that Act for the information withheld, the information had been withheld in reliance on section 6(d) of that Act……

28 Power of Minister to make ordinary rules
(1) The Minister may from time to time make rules (in this Act called ordinary rules) for all or any of the following purposes:
(a) The implementation of New Zealand's obligations under the Convention:……
(c) Any matter related or reasonably incidental to any of the following:
(i) The Authority's functions under section 72B of this Act:
(ii) The Director's functions under section 72I of this Act:
(iii) The Minister's functions under section 14 of this Act:]
(d) Any other matter contemplated by any provision of this Act.
(2) Any ordinary rule may apply generally or with respect to different classes of aircraft, aerodromes, aeronautical products, aeronautical procedures, or aviation related services, or with respect to the same class of aircraft, aerodrome, aeronautical product, aeronautical procedure, or aviation related service in different circumstances.
(3) Any ordinary rule may apply generally throughout New Zealand or within any specified part or parts of New Zealand.
(4) The commencement of any ordinary rule may be wholly suspended until it is applied by the Minister by notice in the Gazette.
(5) No ordinary rule shall be invalid because it confers any discretion upon or allows any matter to be determined or approved by the [Authority or the Director] or any other person, or allows the [Authority or the Director] or any other person to impose requirements as to the performance of any activities.
(6) No breach of any ordinary rule shall constitute an offence against this Act unless that offence is prescribed in regulations made under this Act.
(7) Every ordinary rule is hereby deemed to be a regulation for the purposes of the Regulations (Disallowance) Act 1989, but shall not be a regulation or an instrument for the purposes of the Acts and Regulations Publication Act 1989.
(8) So far as the bylaws of any local authority are inconsistent with or repugnant to any ordinary rule made under this Act in force in the same locality, the bylaws shall be construed subject to the rules.
(9) Notwithstanding section 28 of the State Sector Act 1988, the Minister shall not delegate his or her power to make ordinary rules under this Act.

29 Rules relating to safety and security
Without limiting the power conferred by section 28 of this Act, in the interests of safety or security within the civil aviation system the Minister may make all or any of the following ordinary rules:
(a) Repealed
(b) Rules providing for the use of aerodromes and other aviation related facilities, including but not limited to the following:
(i) The provision of identification procedures for persons, aircraft, and any other aviation related things:
(ii) The prevention of interference with aerodromes and other aviation related facilities:
(c) General operating rules, air traffic rules, and flight rules, including but not limited to the following:
(i) The conditions under which aircraft may be used or operated, or under which any act may be performed in or from an aircraft:
(ii) The prevention of aircraft endangering persons or property:
(d) Rules providing for the control of things likely to be hazardous to aviation safety, including but not limited to the following:

(i) The safe carriage of firearms and other dangerous or hazardous goods or substances by air:
(ii) The construction, use, or operation of anything likely to be hazardous to aviation safety…………

30 Rules relating to general matters
Without limiting the power conferred by section 28 of this Act, the Minister may make ordinary rules for all or any of the following purposes:
(a) The designation, classification, and certification of all or any of the following:…..
(ii) Aircraft pilots:
(iii) Flight crew members:……
(xvii) Any other person who provides services in the civil aviation system, and any aircraft, aeronautical products, aviation related services, facilities, and equipment operated in support of the civil aviation system, or classes of such persons, aircraft, aeronautical products, aviation related services, facilities, and equipment operated in support of the civil aviation system:
(b) The setting of standards, specifications, restrictions, and licensing requirements for all or any of those persons or things specified in paragraph (a) of this section, including but not limited to the following:
(i) The specification of the privileges, limitations, and ratings associated with licences or other forms of approval:
(ii) The setting of standards for training systems and techniques, including recurrent training requirements:
(iii) The setting of medical standards for personnel:
(iv) The requirement for proof of access to appropriate weather services:
(v) The specification of standards of design, construction, manufacture, maintenance, processing, testing, supply, approval, and identification of aircraft and aeronautical products:
(vi) The requirements for notification of insurance coverage for [air services]:
(vii) The format of aviation documents, forms, and applications, including the specification of information required on all application forms for aviation documents:
(viii) The provision of information to the [Authority or the Director] by applicants for or holders of aviation documents:
(c) The conditions of operation of foreign aircraft and international flights to, from, or within New Zealand:
(d) The definitions, abbreviations, and units of measurement to apply within the civil aviation system.
[(e) Prescribing the design and colours of the New Zealand Civil Air Ensign, and where and by whom it may be flown.]……

32 Procedures relating to rules
(1) Every ordinary rule shall—
(a) Be signed by the Minister; and
(b) Contain a statement specifying the objective of the rule and the extent of any consultation under section 34 of this Act; and
(c) Set out fully the requirements of the rule, except where by reason of size or length certain information is incorporated in the rule by reference under section 36 of this Act…..

33 Matters to be taken into account in making rules
(1) The ordinary rules made by the Minister and the emergency rules made by the Director shall not be inconsistent with the following:
(a) The standards of ICAO relating to aviation safety and security, to the extent adopted by New Zealand:
(b) New Zealand's international obligations relating to aviation safety and security.
(2) In making any rule the Minister or the Director, as the case may be, shall have regard to, and shall give such weight as he or she considers appropriate in each case to, the following:
(a) The recommended practices of ICAO relating to aviation safety and security, to the extent adopted by New Zealand:
(b) The level of risk existing to aviation safety in each proposed activity or service:
(c) The nature of the particular activity or service for which the rule is being established:
(d) The level of risk existing to aviation safety and security in New Zealand in general:
(e) The need to maintain aviation safety and security:

(f) The costs of implementing aviation safety and security measures:
(g) The international circumstances in respect of aviation safety and security:
(h) Such other matters as the Minister or the Director considers appropriate in the circumstances.

34 Procedure for making ordinary rules
(1) Before making any ordinary rule, the Minister shall—
[(a) Publish a notice of his or her intention to make the rule in the daily newspapers published in Auckland, Hamilton, Wellington, Christchurch, and Dunedin, respectively, and publish the notice in the Gazette; and]
(b) Give interested persons a reasonable time, which shall be specified in the notice published under paragraph (a) of this subsection, to make submissions on the [proposed ordinary rule]; and
(c) Consult with such persons, representative groups within the aviation industry or elsewhere, Government departments, and Crown agencies as the Minister in each case considers appropriate[; and]
[(d) Consult with the Environmental Risk Management Authority, established under the Hazardous Substances and New Organisms Act 1996, about the contents of any rules which relate to the transportation of hazardous substances as defined in section 2 of that Act.]
(2) Subject to subsection (3) of this section, every ordinary rule shall be notified in the Gazette and be made available by the [Authority] for purchase by members of the public at a reasonable price, and the notification shall specify a place where the rule is available for inspection free of charge and for purchase.
(3) Where for reasons of security it is inappropriate to notify a rule under subsection (2) of this section, the Minister shall notify such persons as he or she considers appropriate or necessary in the circumstances and service of notification may be effected in such other manner as the Minister considers appropriate or necessary in the circumstances, and the rule shall apply only to the persons so notified.
(4) Every ordinary rule shall come into force on the 28th day after the date of its notification in the Gazette or on such later day as may be specified in the rule or under section 28(4) of this Act or, where notified by service on any person under subsection (3) of this section, immediately upon service of the rule upon that person and in respect of that person only……..

36 Incorporation by reference
(1) The following may be incorporated by reference into a rule made by the Minister or the Director:
(a) Standards, requirements, or recommended practices of international aviation organisations:
(b) Standards, requirements, or rules prescribed under law by any other contracting State of ICAO:
(c) Standards, requirements, or rules of any aviation sport or aviation recreational organisation:
(d) Any other written material or document that, in the opinion of the Minister or the Director, as the case may be, is too large or impractical to be printed as part of the rule.
[(2) Any material incorporated in a rule by reference under subsection (1) of this section shall be deemed for all purposes to form part of the rule; and, unless otherwise provided in the rules, every amendment to any material so incorporated by reference that is made by the person or organisation originating the material shall, subject to subsection (2A) and subsection (3) of this section, be deemed to be part of the rule.
(2A) The Director shall, by notice in the Gazette, specify the date on which any amendment to material incorporated by reference under subsection (1) of this section shall take effect.]
(3) All material incorporated by reference under subsection (1) [or subsection (2)] of this section shall be made available at the Civil Aviation Registry for inspection by the public free of charge.

37 Exemption power of Director
(1) The Director may, if he or she considers it appropriate and upon such conditions as he or she considers appropriate, exempt any person, aircraft, aeronautical product, aerodrome, or

aviation related service from any specified requirement in any rule made under section 28 or section 29 or section 30 of this Act.
(2) Before granting an exemption under subsection (1) of this section, the Director shall be satisfied in the circumstances of each case that—
(a) The requirement has been substantially complied with and that further compliance is unnecessary; or
(b) The action taken or provision made in respect of the matter to which the requirement relates is as effective or more effective than actual compliance with the requirement; or
(c) The prescribed requirements are clearly unreasonable or inappropriate in the particular case; or
(d) Events have occurred that make the prescribed requirements unnecessary or inappropriate in the particular case,—
and that the risk to safety will not be significantly increased by the granting of the exemption.
(3) The number and nature of exemptions granted under subsection (1) of this section shall be notified as soon as practicable in the Gazette.
(4) Nothing in this section shall apply in any case where any rule specifically provides that no exemptions are to be granted. ….

72I Director of Civil Aviation
(1) The Authority shall from time to time appoint a chief executive of the Authority, who shall be known as the Director of Civil Aviation.
(2) The Director shall have and may exercise such functions and powers as may be conferred or imposed on the Director by this Act, or regulations or rules made under this Act, and such functions and powers as may be delegated to the Director by the Authority under section 23 of this Act.
(3) Without limiting subsection (2) of this section, the Director shall—
(a) Exercise control over entry into the civil aviation system through the granting of aviation documents under this Act; and
(b) Take such action as may be appropriate in the public interest to enforce the provisions of this Act and of regulations and rules made under this Act, including the carrying out or requiring of inspections and audits.
[(3A) Without limiting subsection (2) of this section, where the Director believes on reasonable grounds—
(a) That an unsafe condition exists in any aircraft or aeronautical product; and
(b) That condition is likely to exist or develop in any other aircraft or aeronautical products of the same design,—
the Director may, by notice in the Gazette, issue an airworthiness directive in respect of aircraft or aeronautical products, as the case may be, of that design.
(3B) An airworthiness directive made under subsection (3A) of this section shall come into force on the date specified in the notice.]
[(4) In performing or exercising any functions or powers in relation to—
(a) The granting of aviation documents; or
(b) The suspension of aviation documents; or
(c) The revocation of aviation documents; or
(d) The granting of exemptions; or
(e) The enforcement of the provisions of this Act or any other Act, or of rules or regulations made under any such Act,—
in respect of any particular case, the Director shall act independently and shall not be responsible to the Minister or the Authority for the performance or exercise of such functions or powers.] ”

<u>CIVIL AVIATION RULES</u>

Part 1 – Flexibility - in relation to the issue of a medical certificate under Part 67, means the discretion to issue a medical certificate where an applicant fails to meet the medical standards prescribed for a medical certificate but use of the medical certificate does not jeopardise flight safety:….

67.03 Application

(a) Applicants attending a medical examination for a medical certificate issued under this Part shall –

(1) produce satisfactory proof of identity; and

(2) produce for inspection any licence held for which the certificate is required, and the most recent medical certificate held, if any; and

(3) provide a written undertaking that –

(i) the information to be provided at the time of the medical examination or examinations for the issue of the medical certificate will be correct to the best of their knowledge; and

(ii) they will not withhold any relevant information; and

(4) provide a written authority for the release to the Director and the relevant Aviation Medical Assessor of any medical information about the applicant held by any registered medical practitioner, hospital or other organisation; and

(5) comply with the medical examination requirements stipulated by the Aviation Medical Assessor or Designated Medical Examiner performing the examination.

(b) Applicants who comply with the requirements and standards prescribed in this Part are entitled to a medical certificate.

67.05 Aviation medical assessors and designated medical examiners

(a) The Director may appoint any medical practitioner as a Designated Medical Examiner or as an Aviation Medical Assessor.

(b) Designated Medical Examiners and Aviation Medical Assessors shall have the powers specified by 67.07 and 67.09.

(c) The Director shall maintain a register of Designated Medical Examiners and Aviation Medical Assessors.

67.07 Medical examinations

Any Designated Medical Examiner or Aviation Medical Assessor may perform the general medical examination required for a medical certificate.

67.09 Issue of medical certificates

(a) Any Aviation Medical Assessor may, with the exercise of flexibility as appropriate, issue a medical certificate. Aviation Medical Assessors are graded according to the classes of medical certificate they may issue, as follows:

(1) Aviation Medical Assessor Grade 1, who may issue a medical certificate of any class described in this Part, provided the applicant meets the medical fitness standards prescribed for the medical certificate. This may be on the basis of a medical examination report completed by the same Aviation Medical Assessor Grade 1, or by another medical practitioner who is an Aviation Medical Assessor or a Designated Medical Examiner:

(2) Aviation Medical Assessor Grade 2, who may issue a Class 2 medical certificate to an applicant who meets the medical fitness standards prescribed for that class of certificate.

(b) Any restriction or condition necessary in the interests of safety shall be endorsed on any medical certificate issued under this Part.

Subpart B – Medical Standards

……..

67.53 General requirements

(a) **Impairment or sudden incapacity:** Applicants shall be free from any risk factor, disease or disability which renders them either unable, or likely to become suddenly unable, to perform assigned duties safely. These may include adverse effects from the treatment of any condition and effects of drugs or substances of abuse.

(b) **Medical deficiency:** Applicants shall be free from any of the following that result in a degree of functional incapacity likely to interfere with the safe operation of an aircraft or with the safe performance of their duties:

(1) congenital or acquired abnormality:

(2) active, latent, acute or chronic disability, disease or illness:

(3) wound, injury, or outcome of operation.

67.55 Class 1 medical certificate

(a) To be eligible for a Class 1 medical certificate an applicant must comply with 67.53 and paragraphs (b) to (m) of this rule.

Physical and mental standards

(b) Applicants shall have no established medical history or clinical diagnosis of –

…………………..

(6) **Cardiovascular:** Any disease or abnormality, or result of disease or surgical operation, which affects the heart or circulatory system and is of a severity likely to cause functional disorder or sudden incapacity. Evidence of myocardial ischaemia or infarction, or significant hypertension, shall be disqualifying unless acceptable and effective treatment has controlled any additional risk of functional disorder or sudden incapacity. Disorders of cardiac rhythm requiring a pacemaker shall be disqualifying. Applicants with evidence strongly suggestive of coronary artery disease, including the presence of excessive cardiovascular risk factors, shall be assessed as unfit unless normal myocardial perfusion can be demonstrated.

67.57 Class 2 medical certificate

(a) To be eligible for a Class 2 medical certificate an applicant must comply with 67.53 and paragraphs (b) to (n) of this rule. In this rule, references to the use of a licence include the act of flying an aircraft solo under 61.105.

Physical and mental standards

(b) Applicants shall have no established medical history or clinical diagnosis of –

………………………………….

(6) **Cardiovascular:** Any disease or abnormality, or result of disease or surgical operation, which affects the heart or circulatory system and is of a severity likely to cause functional disorder or sudden incapacity. Evidence of myocardial ischaemia or infarction, or significant hypertension, shall be

disqualifying unless acceptable and effective treatment has controlled any additional risk of functional disorder or sudden incapacity. Disorders of cardiac rhythm requiring a pacemaker shall be disqualifying. Applicants with evidence strongly suggestive of coronary artery disease, including the presence of cardiovascular risk factors, shall be assessed as unfit unless normal myocardial perfusion can be demonstrated.

67.59 Class 3 medical certificate

(a) To be eligible for a Class 3 medical certificate an applicant must comply with 67.53 and paragraphs (b) to (l) of this rule.

Physical and mental standards

(b) Applicants shall have no established medical history or clinical diagnosis of –

…………………………………..

(6) **Cardiovascular:** Any disease or abnormality, or result of disease or surgical operation, which affects the heart or circulatory system and is of a severity likely to cause functional disorder or sudden incapacity. Evidence of myocardial ischaemia or infarction, or significant hypertension, shall be disqualifying unless acceptable and effective treatment has controlled any additional risk of functional disorder or sudden incapacity. Disorders of cardiac rhythm requiring a pacemaker shall be disqualifying. Applicants with evidence strongly suggestive of coronary artery disease, including the presence of cardiovascular risk factors, shall be assessed as unfit unless normal myocardial perfusion can be demonstrated."

BILL OF RIGHTS 1688 – Section 1

1. That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyment is illegal."

[6] The 1% rule is where the average person's risk for a coronary event exceeds 1% per annum.

BACKGROUND

[7] The background to the present Act, Regulations and Medical Manual has been set out in affidavits filed both on behalf of the plaintiffs and the defendant. For the plaintiffs it is set out fully in the affidavit of Dr. Robin Griffiths, who is the President of the seventh plaintiff**.** He was previously employed by the CAA. On behalf of the defendant, there are affidavits of Mr Ward, the Director, and Dr. Callaghan, the PMO at the relevant time.

[8] All of these affidavits, to varying degrees, put forward interpretations of events and the relevant documentation that it is for the Court to determine.

[9] In 1988 there was a review of Civil Aviation safety regulations, and the resources, structure and functions of the New Zealand Ministry of Transport, Civil Aviation Division. It was prepared under the auspices of a steering committee representing the Ministry of Transport, the Treasury, the States Services Commission, and the Department of Trade and Industry. It was carried out by a New Zealand and a Swedish consultancy company. That report, which was produced to the Court, is known as the Swedavia McGregor Report.

[10] The report made various recommendations. Central, and most importantly, it recommended the establishment of a stand alone CAA separate from the Ministry of Transport. Comprehensive changes were recommended to the legislation to make sure it was more easily understood and more effectively applied. Relevant for present purposes was a recommendation that flight crew licences should be issued for life, with the currency being validated for an agreed period by the issuing of CAA medical certification. Previously, medical certification had been carried out by medical officers employed by the Department. The report recommended the appointment of what are called in the report "super DME's" who would be doctors having higher medical training, namely a post graduate diploma in aviation medicine. The report also noted that computer aided screening of pilots for medical risk could assist in devising rules for assessment, particularly in the area of coronary artery disease. The suggestion appears to be the genesis of the 1% rule.

[11] Dr. Griffiths' evidence details the process leading to the coming into effect of the new Act and Regulations, and his understanding of them.

[12] The report also recognises that in the then political climate decentralisation, and people taking responsibilities for their own actions was a factor to be taken into account. This could be said to be the genesis of the devolution of responsibility.

THE PLAINTIFFS' CASE

[13] Mr Withnall opened in the following manner:

> "The gist of this case is the old bogie of bureaucracies, familiar to all lawyers who advise bureaucracies, and those advising people who sue them. It is the coupling of bureaucratic belief that what they intended to be included in

> legislation was included legislation, with the adoption and implementation of a manual that does not reflect the law as enacted. ”

[14] The plaintiffs argue that the identification of the law, as interpreted by the CAA, and identification of CAA procedural policy, identified in the manual, is not only inconsistent with the law, but is, in fact, repugnant to it.

[15] Mr Withnall accepted that the views of Dr. Griffiths could not control or define what is said in the legislation. (See ***Te Runanga O Ngai Tahu v Waitangi Tribunal*** (unreported HC Wellington, CP7/01 4 April 2001, McGechan J at para.69). However, Mr Withnall said it was relevant to bear in mind that the recommendations in the report pointed strongly towards decentralisation and devolution of responsibility, which is recognised in the long title set out earlier. He stressed the reference to the division of responsibility.

[16] It is against this background that Mr Withnall advanced the plaintiffs' interpretation of the Act and the Regulations, and the place of the manual.

[17] The amended statement of claim, at paragraph 62, pleads the manual is invalid in that it purports to require AMA's to exercise their statutory powers in compliance with standards, in particular, in relation to the 1% rule, which are not those of the Act or Rules. It is claimed to be repugnant in three particulars. The first alleges contrary to law, the manual seeks to derogate from the statutory powers of the AMA's. Secondly, it seeks, contrary to law, to substitute standards determined by the defendant for those that are contained in the rules. Thirdly, it seeks to suspend the law, or the execution of the laws, without the consent of Parliament, contrary to s.1 of the Bill of Rights 1688 (England).

[18] Mr Withnall submitted, correctly in my view, that the validity of tertiary legislation vis a vis secondary or primary legislation, is that the power to create subordinate legislation cannot be wider than the head legislation, and can only be exercised to promote the policy and objects of that legislation – ***Rowling v Takaro Properties Limited*** [1975] 2 NZLR 62, 67-88 (CA), ***Van Gorkom v Attorney-General*** [1978] 2 NZLR 387, 390-391 (CA). Mr Withnall submitted that if one assumed that

the manual was tertiary legislation, it cannot contradict, or contravene, the Act or the Rules.

[19] However, the defendant's position is not that the manual is tertiary legislation. The defendant's position is that it is not an instrument that is competent to suspend the law, or derogate from any provision in the CAA rules, but that it is an administrative guideline within the powers of the CAA to issue, and it would be impossible to administer a medical certification system in an operational sense without such a manual.

[20] Mr Withnall submitted the decision of Thorpe J in ***Ankers v Attorney-General*** [1995] 2 NZLR 595, 605-607, was instructive. That case involved the right to special benefits under s.61G of the Social Security Act 1964, and directions issued by the Minister to the Director General of Social Welfare, pursuant to s.5(2) of the Act. Those directions dealt with:

> "The special benefit could be allowed for the lesser of the difference between an applicant's income less fixed costs and a standard income less $20, or 30% of the applicant's fixed costs."

[21] There was a provision that the $20 guideline could be disregarded in special circumstances, and a benefit of more than 30% of fixed costs could be made in "exceptional circumstances". The departmental manual allowed departure from guidelines in "very exceptional circumstances". The guidelines directed staff to ask applicants about special circumstances, but such evidence was usually not sought, particularly after August 1991, when a computer calculation was routinely applied.

[22] At page 606 Thorpe J said:

> "3.1 *Misinterpretation and non-compliance with ministerial directions*
> The first claim of misinterpretation arises from the conversion in the manual of the exempting effect of "special circumstances" (in relation to the $20 "gap") and of "exceptional circumstances" (in relation to the 30 per cent limit) into a single reference to "very exceptional circumstances", which is related only to the $20 provision.
>
> No response to this complaint was made on behalf of the department. Clearly the instruction in the manual is both inaccurate and inadequate and the shortcoming one which goes some way past the category of "technical" defect.

The next complaint was of failure in practice to consider individual circumstances. The findings of fact already made support this complaint. It was contended for the department that provided an applicant filled out the application form reasonably, included all details of financial circumstances and commitments, and gave a statement of reasons why the applicant required a special benefit, that would sufficiently disclose individual circumstances. The evidence does not support that contention. It is relevant to this point that the form seeks details of financial expenditure but not of the reasons for that expenditure. In most cases it would be the reasons for expenditure rather than the expenditure itself which was a special circumstance. In any event, on the whole of the evidence it is reasonably clear that special circumstances were seldom considered at first instance, and that at least since the introduction of the computer programme there was in most cases no second stage review of the result produced by application of the formula, but simply an acceptance of that result.

The third complaint was of failure to seek and consider evidence of special or exceptional circumstances. Not only the evidence given for the applicants but also the evidence of Mr Thomas confirms that at first instance the direction in cl 11.7001 of the manual that customers be asked "to detail exactly what they see their special circumstances are" was not observed, at least in the majority of cases.

The significance in administrative law of "misinterpreting voluntarily adopted rules or guidelines" was considered in *Chiu v Minister of Immigration* [1994] 2 NZLR 541. At p 550 the Court concluded that the significance of such action "depends upon the context in which the misinterpretation occurs" but that in the majority of cases it would "vitiate the decision upon the ground that it constitutes an error of law . . . produces unreasonableness in the administrative law sense . . . frustrates a legitimate expectation . . . or causes a delegate to stray beyond the authorised scope of his delegation".

A general disregard of the instruction in cl 11.7001 must necessarily, in my view, be categorised as "unreasonable" as that term is used in administrative law.

A further complaint made by Mr Harrison sought to apply the statement by Richmond J in *Hamilton City v Electricity Distribution Commission* [1972] NZLR 605, 639, that:

". . . the basic question must always be whether in the exercise of a particular discretion the person or body entrusted with the discretion exercised it in a real and genuine sense."

The essence of this argument was that at least at first instance the effective decision was made by a mechanical analysis of input data, and therefore by a computer, rather than by the Director-General or his delegate. That argument, while not of compelling cogency, nevertheless has considerable merit.

> I accordingly find for the applicants on the first head of ground 3, and also find that, subject to identification of the particular applicants similarly affected, a similar result would be justified in the cases of the majority of the other applicants for special benefits or renewals of special benefits since 1 April 1992.

[23] In relation to that citation, it is the plaintiffs' contention that the terms of the manual, in particular the 1% rule, is a "misinterpretation" of the rules. Effectively, it is argued on behalf of the plaintiffs that the manual and its application required the AMA's to disregard the rules in favour of the 1% rule in this manual.

[24] Furthermore, Mr Withnall argues that if the document is merely a statement of policy and a practice guideline, it must allow for exceptions. (See ***British Oxygen Company Limited v Board of Trade*** [1971] AC 610). The 1% rule fails to do this.

[25] Central to the plaintiffs' argument is a contention that the AMA's are statutory officers, and only they, in terms of the statute and the rules, are authorised to issue medical certificates. Mr Withnall submitted that the scheme of the Act means the only power relating to medical certification residing in the DCA is the power to grant exemptions.

[26] The power to make rules can be found in s.28 of the Civil Aviation Act set out earlier. (In the context of this case it is unnecessary to consider emergency rules). Section 29 provides for rules relating to safety and security. Section 33 sets out matters that are to be taken into account in making the rules. In particular s.33 2(b) and (d) refer to the level of risk existing to aviation safety in each proposed activity or service, and the level of risk existing to aviation safety and security in New Zealand in general.

[27] The rules relating to medical certification are found in Part 67 of the Civil Aviation Act and have been set out earlier.

[28] Mr Withnall argued that appointments under rule 67.05 are appointments as statutory officers. He said they carry out the statutory function of issuing medical certificates, and are the only people that can do that.

[29] Mr Withnall pointed to rule 67.09 that allows any AMA to issue a medical certificate, with exercise of flexibility as appropriate. He referred to the definition of "flexibility" found in Part I set out earlier. Mr Withnall next referred to the provisions of rule 67.13, and submitted that this was only applicable where an AMA had made a determination that an applicant was not eligible for a medical certificate. Firstly, sub-rule (a) allows an applicant to seek a review from the AMA who has made the decision, or from any other AMA. Sub-clause (b) requires that an application seeking a review from a second AMA must provide the reviewing AMA with the name of the first assessor who determined ineligibility. Finally, sub-clause (c) provides for an applicant determined not eligible after an assessment or review, to request the Director to grant an exemption under s.67.15.

[30] That rule authorises the Director to conduct a "special medical assessment", and he may decide that an exemption from one or more applicable medical standards may be safely permitted. The relevant section in the Act relating to the power under r.67.15 is section 37(2) that requires that four matters must be satisfied before the Director can grant an exemption. They are that the requirement has been substantially complied with; the action or provision is as effective with the compliance that would exist as with actual compliance; the prescribed requirements are clearly unreasonable or inappropriate in a particular case; or events have occurred making the requirement unnecessary or inappropriate in a particular case. Overriding all that is the requirement that the risk to safety will not be significantly increased by the granting of the exemption.

[31] Mr Withnall, therefore, submitted that the law relating to medical certification is that an AMA, and only an AMA, determines on an original or a review assessment whether medical standards have been met. These may be met with the application of flexibility. The DCA has power in relation to medical certificates only when an AMA has determined that the standards are not met, even with flexibility, and the grant of exemption falls within the limited circumstances provided for in s.37.

[32] In this case it was accepted that the Director's powers under s.67.15 have been delegated to the PMO, and it is to be noted that the PMO relevant to this case is not an AMA.

[33] Mr Withnall submitted, therefore, that there were five possible steps:

> "(a) Examination (DME or AMA) (Rule 67.07), assessment (AMA) (Rule 67.09), full compliance with all requirements of the rule – issue of certificate (AMA) (Rule 67.09).
> (b) Examination, assessment, some non-compliance which the AMA, in the exercise of experience and clinical judgment and expertise, considers it not to be a threat to safety, exercise of flexibility – issue of certificate (AMA) (Rule 67.09(a)).
> (c) Examination, assessment, determination by AMA of non-compliance (including risk factors in terms of 67.53(a) and Rule 67.55 for class 1 licences or 67.57 for class 2 licences or 67.59 for class 3 licences and the requisite degree of likelihood) AMA not satisfied that safety not compromised, AMA declines to issue certificate. (Rule 67.09) Applicant seeks review and/or special assessment.
> (d) Review Assessment by same or another AMA (rule 67.13).
> (i) AMA satisfied applicant meets standards, with or without exercise of flexibility, issues certificate.
> (ii) AMA not satisfied, declines. Applicant then seeks special assessment.
> (e) Special assessment carried out (rule 67.15).
> (i) Director grants exemption from one or more standards in Rule 67 then issues certificate with exemption endorsed.
> (ii) No exemption. No certificate. "

[34] The plaintiffs accept the need for a medical manual, the purpose of which is to ensure consistency of decision making. However, Mr Withnall submitted that the manual must be consistent with the law contained in the Act and the Rules.

[35] The plaintiffs submit, firstly, the provisions of the manual relating to the 1% rule are inconsistent with the rules and invalid. Secondly, the way in which the defendant acts and proclaims as a matter of policy that it intends to act does two illegal things:

(i) It removes the legal duty of the AMA's to determine, with flexibility where appropriate, whether applicants meet the standards provided for in part 67, sub-part B, and substitutes for that the decision of the PMO.

(ii) It insists a test which has the function of screening applicants into streams is to be treated as a diagnostic standard.

[36] The plaintiffs submit that the 1% rule as a screening test has validity, as it is capable of streaming applicants into those to whom a certificate can be issued without more, and those who require further investigation. The plaintiffs submit that further investigation is under the control of the AMA's and the final decision rests with them.

[37] Mr Withnall referred to ***Archives & Records Association of New Zealand v Blakeley*** [2000] 1 NZLR 607 (CA), paragraph 50, as authority for the proposition that the AMA's, as statutory officers, have independent statutory authority which it is unlawful for them to exercise under dictation.

[38] Mr Withnall referred to a number of documents produced to the Court that he said made it clear that the 1% rule was not a screening test, and was a direction in the manual purporting to derogate from the statutory powers of AMA's to assess applicants against the standards in r.67 Part B. That part sets out various medical standards. Of particular importance, in the context of this case, are the provisions of r.67.53 set out earlier. He said the doctors were instructed to comply with the manual, and this was a continuing instruction of a rigid application of a rule without the exercise of flexibility that the rules granted to the AMA's.

[39] Next, Mr Withnall submitted that the terms of the manual and the position taken by the PMO in other documents before the Court substitutes the 1% standard for the terms of r.67.53, 55, 57 and 59. This is said to occur in two ways. Firstly, it is saying, in effect, that a person who has more than a 1% risk of having a cardiovascular incident in the next twelve months has either "a risk factor disease or disability which renders them unable or likely to become suddenly unable to perform assigned duties safely;" (rule 67.53(a)), or has "evidence strongly suggestive of coronary artery disease." (rule 67.55(b)(6), rule 67.57(b)(6)).

[40] Mr Withnall said this meant two things, either it was adding an additional standard to the rules, or it was substituting the 1% rule for the words quoted. The submission was that this was inconsistent with the relevant rules, and was ultra vires. If the manual is considered as tertiary legislation, it is a case of repugnancy. (***Combined State Unions v State Services Co-ordinating Committee***[1982] 1 NZLR

742 (CA), 745). If, as conceded, it is a manual and not legislation, then it cannot alter a rule (***Chen v Minister of Immigration*** [1992] NZAR 261, 269 (CA)).

[41] Paragraph 62(c) of the amended statement of claim alleges a breach of s.1 of the Bill of Rights Act 1688 of England. Mr Withnall submitted that this is yet another case where the Government requires a reminder from the Courts that it does not have executive power to change the law. (See ***Fitzgerald v Muldoon*** [1976] 2 NZLR 615, ***Professional Promotions & Services Ltd v Attorney-General*** [1990] 1 NZLR 501, ***Alan Johnston Sawmilling Limited v Governor-General*** (unreported HC, Wellington, CP140/97, 9 June 1999, Wild J).

[42] Section 1 is set out above.

[43] In the ***Fitzgerald*** case and the ***Professional Promotions & Services Limited*** case, Ministerial statements were held to have the effect of changing the law, while in the case of ***Alan Johnston Sawmilling Limited***, it was a regulation.

[44] In the ***Fitzgerald*** case, Wild CJ held what was done was purporting to suspend the law without the consent of Parliament. The Chief Justice determined, by reference to the powers of the Prime Minister, in the position occupied by him, which was as leader of the government elected to office, and where he made a statement in the course of official duties, the suspension of the Act was made by regal authority.

[45] In ***Professional Promotions & Services Limited*** the Ministers concerned were of commerce and broadcasting. They announced it would be no longer necessary to obtain a warrant, or authorisation, to commence new broadcasting services, both of which were required by the then Broadcasting Act. Jeffries J noted that it was unclear from the ministerial statement whether it meant that allocation of spectrum would be by way of a regime which was undisclosed, or, effectively, that no licences at all should be granted. His view was that the first interpretation would breach the "execution of laws" part of s.1, and in the latter it would be the suspending of the laws. He did not discuss whether the action was by way of regal authority, presumably deciding on the basis that a Minister in the course of his duty was no different from the Prime Minister.

[46] In the ***Alan Johnston*** case, the Regulations and conditions attached to them were held to defeat the exemption granted in s.67A(1)(b)(i) of the Forests Act 1949. This was held by Wild J to be a suspension of the Act. At page 20 he said:

> "In New Zealand in 1999, I see the relevant application of the Bill of Rights 1688 as being to prevent the Executive (which is the Sovereign in Right of New Zealand, through her representative the Governor-General, and her Ministers, acting in council – the Executive Council) suspending the operation or benefit of laws passed by the Parliament of New Zealand."

[47] From this Mr Withnall submitted there were two issues in this case. Are the provisions in the manual and directions issued by the PMO a suspension of the Civil Aviation Rules, or a suspension of the execution of the law? Secondly, was that by "regal authority"?

[48] In relation to the second question, Mr Withnall referred to the discussion by Wild J about the purposes of s.1 being to prevent the Executive of New Zealand which was the Sovereign in the Right of New Zealand suspending laws. He submitted in the 17th century there was no idea of statutory authorities or organisations in respect of Government. Nor was there anything recognisable as a Department of State. Mr Withnall submitted that over the years it is clear Government has grown into the institution of government departments, statutory authorities and organisations. He submitted that they are all acting in the public interest, and created by operation of the Crown in the Right of New Zealand. All have an overriding obligation to act in the public interest. (See ***Mercury Energy Limited v Electricity Corporation of New Zealand*** [1994] 2 NZLR 385 (PC)). He said Government was now complex, which had led the Crown in the Right of New Zealand to choose a variety of means of putting its policies in the public interest into action. Mr Withnall submitted that where they confer on a statutory authority or organisation their own power to regulate and govern an area in the stead of the Crown, those statutory authorities, or organisations, are covered by the purpose behind s.1. He submitted Wild J's identification of the purpose of s.1 was accurate, and it is scarcely surprising that he did not state it more widely than was needed for the purposes of the case before him. In this case, he submitted, the actions of the defendant in making its manual, and the PMO in issuing her directions, were actions of "regal authority".

[49] Accordingly, the plaintiffs submitted there were the following issues for determination:

(a) Do the Rules authorise the DCA to issue a medical certificate?

(b) If not, is the power of the DCA limited to the granting or refusing of an exemption from Rule 67 Part B following an application for a special assessment?

(c) Do those provisions of the manual purport to prevent an AMA issuing a medical certificate where the applicant has been assessed as having more than a one percent risk of a cardiovascular incident within the coming 12 months?

(d) If so, is that consistent with the Rules?

(e) Do those provisions of the manual purport to prescribe a standard with which applicants for a medical certificate must comply, or do they provide for a 'screening test' in the light of which further tests may be ordered?

(f) If a standard, is that consistent with the Rules?

(g) If a screening test, is the decision to decide what further investigations should be made within the power of the AMA, or within the power of the DCA?

(h) If a screening test, is the decision whether the further investigations result in the applicant meeting the standards prescribed in the rules, (with the exercise of flexibility if appropriate), within the power of the AMA, or within the power of the DCA? "

THE DEFENDANT'S CASE SUMMARY

[50] On the other hand, Sir Geoffrey Palmer, for the defendant, took a completely different and purposive approach to the legislation.

[51] He said the prime purpose of the Civil Aviation Act was to promote aviation safety, and that suffuses the whole statute, the Regulations, the Medical Manual, and the exercise of the powers of the DCA and PMO.

[52] Sir Geoffrey submitted that the AMA's and DME's were not statutory officers. The only relevant statutory officer was the DCA, under the Civil Aviation Act. The AMA's perform medical certification services as approved contractors,

whose fees are paid by applicants. Furthermore, he pointed out that any applicant applying to be appointed an AMA, and the appointment documents themselves, show that AMA's formally undertake an obligation to comply with the guidelines and practices in the Medical Manual.

[53] The defendant submitted that the CAA would be unable to administer the medical certification system if it could not impose responsibilities on AMA's and DME's as certified representatives of the CAA, and as part of the aviation regulatory system. Enforcement responsibilities under the Act are the responsibility of the director, and s.72I(3)(b) empowers the DCA to take such action as may be appropriate in the public interest to enforce this responsibility.

[54] The defendant's position was that the existence of the Medical Manual was implied by the Civil Aviation Act and rules; acknowledged in regulations; and was necessary for the implementation of the International Civil Aviation Organisation (ICAO) Chicago Convention. That latter document has specific reference to a medical manual. The Medical Manual did not purport to override the law, as expressed in the Aviation Rules Part 67, or the Act, but they were simply administrative guidelines and recommended practices that explicate the bare prescriptive expressions in the sub-part B of r.67 of the Civil Aviation Rules, which contain the medical standards.

[55] In relation to the 1% rule, it was the defendant's position that this threshold for an incapacitating event explicates r.67.53(a) of the Civil Aviation Rules Part 67. It does not supplant the rule, but addresses mandatory requirements that any application for a medical certificate in any class "shall be free from any risk factor , disease or disability which renders then either unable, or likely to become suddenly unable, to perform assigned duties safely." He pointed to occasions when AMA's have issued notices of unfitness where applicants exceeded the risk threshold of 1%, and occasions where AMA's have not issued notices of unfitness, but have entered into discussions with the CAA. On some occasions this led to the issue of a medical certificate. Sir Geoffrey submitted, on the balance of probabilities, the plaintiffs could not establish that the CAA had enforced the 1% per annum risk as rigidly asserted by the plaintiffs. Reference was made to the evidence from Dr Kathleen

Callaghan, the present PMO, and from Dr Peter Dodwell, the former PMO and an AMA, to show that the 1% provision in the Medical Manual was used as a screening risk detection instrument.

[56] Essentially, the defendant took the position that it was for AMA's to undertake routine medical assessments and issue medical certificates where nothing untoward occurred. Anything outside of the routine had to be referred to the PMO for a special assessment to be carried out. It was said the fee structure supported this. Sir Geoffrey submitted `that in-house responsibility for special assessments was crucial in assuring the prime objective of aviation safety. That is said to be because the CAA has a centrally located reservoir of knowledge and information about assessments of various cases, and such centralisation is essential for consistency.

THE DCA

[57] Sir Geoffrey submitted the DCA is the only true statutory officer in the medical certification process. He said the DCA possesses powers, pursuant to s.37 of the Act, to issue exemptions "if he or she considers it appropriate". That, of course, ignores the significant restrictions imposed by s.37.

[58] The defendant says it is the DCA who has the discretion to determine exemptions from prescribed standards that do not jeopardise flight safety. Accordingly, the defendant submits that the DCA is the principal decision maker exercising discretion in the medical certification system in a fashion consistent with operational (human factors) flight safety. He contrasted this with the powers of the AMA who have no ability to exempt. He further submitted that there was no fettering of the appropriate discretion of AMA's because of the procedural recourse to seek reconsideration through a review assessment and special medical assessment.

[59] Next, Sir Geoffrey referred to New Zealand's international obligations. He submitted that Part 67 of the CAA rules are an integral part of meeting New Zealand's obligations under the International Civil Aviation Organisation, International Standards and Recommended Practices – Personnel Licensing – Annex 1 to the Convention on International Civil Aviation 1944 (the Chicago Convention).

[60] He submitted that although the direct text of Annex 1 had not been incorporated into New Zealand domestic law, the substance of Annex 1 had been clearly implemented in our domestic law.

[61] He said there has been no breach of the Bill of Rights 1688 by the actions of the CAA and the PMO. This is, firstly, because the issuing of directions to AMA's regarding compliance with standards and the 1% per annum risk were not actions by "regal authority". Secondly, even if they were held to be acting by "regal authority" the making of the medical manual and issuing directions to AMA's regarding compliance with standards and the 1% per annum risk do not suspend the law, or suspend execution of the law.

[62] Sir Geoffrey submitted that this case was not about the CAA bureaucracies trying to illegally amend the law. He said it was about the capacity of the Department and its Director to run regulatory processes that govern civil aviation in accordance with s.14 of the Act, i.e., "promote safety in civil aviation at reasonable cost". The defendant submits the law gives the DCA wide powers, which are not subject to Ministerial direction, in particular, s.72(C) of the Act, and s.72(I)

[63] He also placed emphasis on s.15(2), which gives the DCA, in relation to anyone holding an aviation document, (as relevant here), power to carry out such inspections and monitoring as the DCA considers necessary. He said this clearly gives power to the DCA to look closely at all aspects of medical certification within the civil aviation system, and that power is substantial.

[64] Sir Geoffrey seemed to somewhat overstate the position when he suggested the plaintiffs' submissions are to the effect that AMA's are independent statutory officers who are not accountable to the Director. He submitted this was an imaginary legal world which does not exist. I did not take Mr Withnall to suggest that AMA's were in no way accountable, and they are clearly subject to the audit and monitoring provisions of the Act and the rules.

[65] The defendant's position was that the case was one about risk assessment, and that the ultimate risk assessor must be the regulator. The control of risk was through

the rules. It is submitted that if the plaintiffs succeed the risk is that standards of civil aviation safety will be compromised, and there will be no adequate means of control. It was suggested that a Court would be taking a grave risk to allow this to occur.

[66] Sir Geoffrey quite properly pointed to over blown and emotional statements by various opponents of the 1% rule. It is unnecessary to set them out here, suffice to say it is an issue that has created significant controversy, vigorous debate, and obviously, at times, over emotional reactions. Since the hearing the parties filed a joint memorandum accepting that a very emotive statement attributed to Dr Ross Ewing did not emanate from him.

[67] Sir Geoffrey referred to the functions of the Minister, and also the provisions of s.12(3) which requires all persons participating in the civil aviation system to do so in accordance with the overall purpose of the Act, (i.e. civil aviation safety). He also pointed to Part VIA of the Act, and in particular s.72A which sets up the Civil Aviation Authority, whose activities are to promote safety in civil aviation at a reasonable cost, pursuant t 72B(1).

[68] Finally Sir Geoffrey pointed to the provisions of s.71I(3). He said all of this shows that the DCA is vested with very wide powers, and they must all be directed towards the one common purpose that suffuces the whole act (i.e. aviation safety).

THE ACT AND RULES – PURPOSIVE APPROACH

[69] The defendant submitted that in considering the ultra vires principle it is important in assessing such questions to interpret provisions in the light of their stated purpose. (See ***Patel v Chief Executive of the Department of Labour*** [1997] 1 NZLR 102). In the context of this case, he said that meant the guide for the Court should be the clear prevailing concern for civil aviation safety under the principal act.

[70] Further, he submitted that it is essential for the rules and the Medical Manual to be interpreted in the light of the purpose of the Civil Aviation Act.

[71] Sir Geoffrey submitted the rules are the result of the exercise of the Minister's powers, and the manual is a guide to the application of those rules. Therefore, they

must be interpreted against the background of the principal purpose of their source (i.e. aviation safety under the Civil Aviation Act). He rehearsed the rule making provisions of the Act, and pointed to the fact that the rules made under the Act are deemed to be regulations for the purpose of the Regulations (Disallowance) Act 1989. This means that Parliament can disallow the rules by a resolution, and they are all subject to scrutiny by the Regulations Review Committee under the Standing Orders of Parliament.

STATUTORY OFFICERS

[72] Next, Sir Geoffrey submitted that the AMA's were clearly not statutory officers. He said, in fact, they were approved contractors, which is evidenced by the fees paid by applicants for a certificate laid down by the Civil Aviation Charges Regulations (No.2) 1991. He said this was contrary to the plaintiffs' submission alleging they were statutory officers exercising statutory powers to be conferred on them by the rules.

[73] The defendant accepts the correctness of the plaintiffs' submission that the Act itself does not deal with medical certificates. For this reason it was said that they cannot be statutory officers in the ordinary sense of the word, being individuals occupying a position, or status, created directly by statute. He said the only way the plaintiffs could derive this status comes from the secondary legislation in r.67.05.

[74] However, the defendant submitted that it was the director who appoints AMA's, which is indicative of the approved contractor nature of the relationship. He said where a statutory officer is appointed one would expect the relevant primary statute to specify detailed matters relating to appointment, including criteria for appointment, term of office etc. He said in the absence of such provisions in the Civil Aviation Rules, and given that the content and terms of the relationship are left entirely to the director, this is consistent with a contractual relationship.

[75] Sir Geoffrey submitted that r.67.05's primary purpose was to confer the relevant power on the Director to appoint AMA's, rather than to create that office. He said this is supported was by s.72I(2), which allows such powers to be conferred on the Director by rules or regulations. He pointed to rules 67.07 and 67.09 which,

combined, empower AMA's to issue medical certificates and prescribe the limits of that power. So it is said the rules only concern themselves with AMA's in so far as it is necessary to circumscribe their ability to issue medical certificates. Their number and their terms and conditions are left entirely to the Director. They apply to the CAA to be appointed, and once appointed they enjoy the status of being sanctioned as sufficiently knowledgeable about aviation medicine as to be part of the Government's certification system through a Crown Entity. Their responsibilities are to comply with the Medical Manual, which is made clear in the application for appointment and re-appointment.

[76] The defendant says their primary duty is to examine an applicant by way of a general medical examination so as to assess whether the medical standards in the rules, Part 67, have been met. If met, the AMA may issue a medical certificate. If not, an exemption is required. Essentially this harks back to the earlier submission that only routine matters can be dealt with by AMA's, and all other matters are to be dealt with by the centralised medical unit of the defendant.

[77] Sir Geoffrey said this found support in the Swedavia McGregor Report at footnote 10 on page 101, which reads:

> "Under this proposal a return medical check may occasionally diagnose a pilot as presenting a high enough risk for the Medical Examiner to decline to give him a new medical certificate on the spot. More commonly, however, the pilot will be diagnosed as having entered a 'group at risk' and will be referred for further evaluation. After such evaluation his medical certificate might be withdrawn."

[78] The report refers to a few severe cases where the DME may refuse to issue a new medical certificate. (i.e. a pilot with a recent head injury may exhibit symptoms that unquestionably justify grounding him immediately, he will then remain grounded until it is proven that he is once again fit to fly). In terms of the report, in all other cases the DME issues a medical certificate, and sends a medical return to CAD's principal medical officer. If in the DME's judgment the pilot has entered "a group at risk" he will draw it to the early attention of the PMO. The PMO will check all returns anyway. Medical returns are screened by the PMO's staff according to criteria that identify whether the pilot has entered "a group at risk". It is envisaged

that there will be use of established medical relationships (such as, for cardiac problems, those arising from the Framingham Study, aided by a micro computer).

[79] Sir Geoffrey also pointed to the appendices to the Medical Manual, which, again, stresses the acceptance by AMA's to comply with professional standards and recommended practises stated in the manual. They are required to respond promptly to instructions from the PMO, and appendix 2 states that AC67.05 explains the Medical Manual as having the status of a code of conduct setting out a standard practice expected of AMA's.

[80] Sir Geoffrey submitted that the terms and conditions in the appendices flesh out the relationship existing between AMA's and the DCA, and that AMA's consent to adhering to guidelines in the Medical Manual. He said this does not mean the Medical Manual constitutes the binding rules. He said, in fact, to the contrary, and then referred to the standard form letter sent to each new AMA, which has the following clause:

> " **Legal Liability:** As with any certificate which a doctor issues, you are responsible in law for the correctness of any CAA medical certificate you issue. However, provided you have complied with the CAA's procedures as laid down in the Medical Manual, the CAA would provide reasonable advice if you were the subject of civil court proceedings. In the USA such proceedings have been surprisingly rare (a handful of cases against AME's in 20 years), and in every case the FAA was able to support the AMA because correct procedures were followed. Nevertheless, it would be wise to check with either Medical Protection Society or Medical Defense Union regarding your cover."

It is suggested that this shows that AMA's can lawfully depart from the standards in the Medical Manual.

[81] Sir Geoffrey then sought to distinguish the ***Archives & Records Association of New Zealand v Blakeley*** (supra) case from the present situation. He said in that case the Chief Archivist was the statutory officer who was charged with the custody, care, control, and administration of all public archives. He said that strong statement of primary responsibility is more analogous to the DCA who has primary responsibility for aviation safety in New Zealand than to the AMA's. He said it shows clearly it is the DCA who is the relevant statutory officer under the Act.

[82] He pointed to the fact that that case at page 614 stressed the independence of statutory officers, and it was this independence of decision making that is a characteristic of the DCA's functions and powers.

[83] Sir Geoffrey submitted that given that AMA's are not statutory officers, then the CAA and the DCA can instruct them as to how medical assessments should be carried out. He said such guidance is part of the Director's overall responsibility for the civil aviation system and its safety, and is particularly appropriate given they are certified representatives of the CAA.

ADMINISTRATION OF THE LICENCING SYSTEM

[84] The defendant further submitted the manual was necessary for the administration of the civil aviation licensing system. Without it the CAA would not be able to fulfil its statutory responsibilities under the Act. In order for the DCA to discharge his primary responsibility for aviation safety, the CAA must have control over the way that the rules are interpreted and applied. This is the only way to give an interpretation of the rules consistent with aviation safety, and consistent throughout the country. The defendant's position is that without such guidelines the rules would be subject to as many interpretations as there are AMA's.

[85] Sir Geoffrey submitted that a case relied on by Mr Withnall ***Ankers v Attorney-General*** (supra) makes it clear that administrative guidelines are desirable to ensure that decisions are made consistently. He cited from page 600:

> "So long as that assessment remains a guide, and is subject to reconsideration in the light of the applicant's overall situation and particularly with regard to any special circumstances affecting the applicant, it is not, in my view, an objectionable mechanism: and indeed may be a necessary aid to carrying out the Director-General's obligations."

[86] Sir Geoffrey further submitted that the manual is acknowledged in the Civil Aviation Charges Regulations (No.2) 1991, which specifies a fee for providing a copy for the Medical Manual.

[87] The case for the CAA is that the manual is an administrative guideline explicating the rules Part 67. The defendant submits it adds by way of recommended

practice to the prescriptive expressions in sub-part B of the rules which contain the medical standards. It is necessary to ensure the consistency in approach to certification.

[88] Sir Geoffrey accepted it was subordinate to the Act and the rules, but said it explicated the operational meaning of any "risk factor" under r.67.53(a). Secondly, that it had an integral relationship with the rules, and can be inferred from the rules; and, thirdly, an "assessment" by an AMA under Part 67 is not necessarily the exercise of an AMA's discretion in each and every case. Guidance is appropriate because Parliament thought guidance would be desirable for the CAA, per Lord Denning in ***Laker Airways Ltd v Department of Trade*** [1977] QB 643, 698. (See also ***R v Immigration Appeal Tribunal ex parte Bakhtaur Singh*** [1986] 1 WLR 910; ***Gillick v West Norfolk and Wisbech Area Health Authority*** [1986] AC 112). But the guidance seems to be from the DCA, not Parliament.

[89] The defendant next referred to r.67.53(a), and the requirement that applicants "shall be free from any risk factor". The Medical Manual, Volume 1, page 2 states:

> "This Manual forms a Code of Practice to which DMEs and AMAs must conform when conducting CAA medical examinations. Failure to comply with the procedures and standards specified in the Manual will be taken into account when audits of AMAs are conducted by staff of the Authority. However AMAs and DMEs do have the right to show they can achieve compliance with the standards in some other way than is detailed in the Manual, and the system does not preclude the use of alternative methods of assessing applicants. However, such alternatives may only be used where the variance has been notified to the Authority, and approved. Further editions of the Manual may evolve as a result of this. Standardisation of medical examinations and assessments in this way will encourage consistent, high standards of professional practice."

[90] Sir Geoffrey submitted that this can be viewed consistently with the expression of principle in ***British Oxygen Co. Ltd v Minister of Technology*** (supra), where Lord Reid stated:

> "There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it

could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say – of course I do not mean to say that there need be an oral hearing."

[91] The Medical Manual in Volume II Chap.3 addresses cardiology, and in the defendant's submission seeks to assist AMA's with the meaning or significance of "any risk factor" which applies to every class of medical certificate (i.e. classes 1,2 and 3). This guidance arises, it is said, from a sense of prudence with a view to meeting the ultimate purpose of safety in civil aviation at a reasonable cost.

[92] The section dealing with the 1% rule is 3.1.2(f) which states:

" (f) **ACTION POINTS FOR AMA's:** For simplicity in guiding AMAs about levels of risk at which certain actions are (or are not) permitted, CAA continues to use a '1% rule' for all three situations of pilots [Rule 67.53(a) applies to all three situations], and asks cardiologists to advise in particular cases what level of risk per annum applies. The '1% rule' should be borne in mind through this chapter.

- *CAA has adopted a 1% per annum risk for an incapacitating event as the boundary between 'unacceptable' and 'borderline' risk. A risk exceeding 1% per annum (at any age) must be rejected by an AMA.*
- *The figure of 0.1% per annum will define the boundary between "borderline" and 'good' risk. The AMA may use discretion for risks in the 'borderline' range, provided no identified cardiac condition (or family history) exists, but lipid estimation is essential to clarify such borderline cases. Lipid estimation may be omitted by the AMA only in those cases under age 40 years where other risk factors give a 'good' estimate of risk (below 0.1%pa).*
- *For the convenience of AMAs one method for assessing such risk is presented as Appendix B to this chapter. It has been revised in 1997 by the National Heart Foundation.*
- *If more complex methods are needed to assess a borderline case (e.g. stress ECG, isotope scans or angiography) the case must be referred for Special Assessment."* (Emphasis to original, underlining my emphasis).

[93] This relevant portion was drafted in late 1996. It is the position of the defendant that the then PMO , Dr Peter Dodwell, now a witness for the plaintiffs, referred to the 1% rule in a letter dated 21 November 1996. Sir Geoffrey referred to the consultation with members of the Cardiac Society in addressing this particular problem, which led to the amended cardiology chapter in the Medical Manual.

[94] The defendant says that the general requirements under 67.53(a) are directed towards determining, or detection, of characteristics or factors in an applicant. Those of relevance are the ones that could be said to render an applicant "either unable or likely to become suddenly unable to perform assigned duties". Stress was placed on mandatory term of "shall be free", and Sir Geoffrey submitted there must be a methodology for the detection of risk factors. This, he said, is what the 1% rule does, and he pointed to the evidence of Dr Callaghan to the effect that the abolition of screening would mean that it would be necessary to wait for an event to happen before taking action, as opposed to using data to help anticipate the event.

[95] Reference is then made to a letter from Dr Dodwell that supports the defendant's interpretation of application of the 1% rule. The rule refers to "likely to suddenly become unable" and Sir Geoffrey submitted that applying some mathematical formula shows the absurdity of the plaintiffs' position. He said it would be improbable that passengers in an aircraft, for instance, would be satisfied with a pilot in an aircrew operating with a 49% risk of an incapacitating event. He said a real, or significant possibility of something occurring, as the term "likely" is defined (see ***Commissioner of Police v Ombudsman*** [1988] 1 NZLR 385 (CA)) could lead to such an absurdity. He cited the decision of Schiemann J in ***R v Secretary of State forTransport ex parte Pegasus Holdings (London) Limited*** [1988] 1 WLR 990 (QBD), and said in the context of aviation a percentage chance of pilot error is not relevant, but it is the "disastrous consequence of what would happen if something did happen" that is important. At page 1000 Schiemann J said:

> "[One] has to bear in mind the magnitude of the risk, by which I mean not so much the high percentage chance of it happening but the disastrous consequences of what would happen if something did happen. It is the old problem that one has with installations of nuclear power, or vehicles such as aeroplanes carrying a large number of people, that, if something goes wrong, then very many lives will be lost."

[96] Furthermore, the defendant's position is the screening risk detection approach to 67.53(a) is significant because it applies to areas of "risk factor" other than cardiology. Sir Geoffrey referred to the evidence of Dr Callaghan at page 70 which relates to the dangers from severe head injuries which may lead to a risk of post traumatic epilepsy, which are captured by the same risk appraisal methodology.

[97] The defendant next referred to the possible tension between r.67.53(a) concerning any risk factor, and the specific cardiovascular standards in r.67.55, 67.57 and 67.59. But, the defendant says that 67.53 is directed towards detecting the presence of risk factors of diseases or disabilities, with a view to assisting the CAA in monitoring those factors. The cardiovascular standards are referred to identically, except for the word "excessive" is deleted for class 2 and 3 licences.. These are additional specific factors to be taken into account, according to Sir Geoffrey, and leads to a cascading heirarchy of concerns that AMA's and other participants must be sensitive to.

[98] Sir Geoffrey also stressed the fact that AMA's do not possess the specialist training for performing myocardial perfusion scans, or other necessary cardiology testing.

[99] This is to be contrasted with the scheme and arrangement of the legislation put forward by Mr Withnall.

INTERNATIONAL OBLIGATIONS

[100] Sir Geoffrey stressed the Medical Manual, although not a statute, assisted New Zealand to fulfil its international obligations under the Convention. He said the notes to chapter 6 of Annex 1 state that the standards and recommended practices on their own cannot be sufficiently detailed to cover all possible individual situations. A further note states:

> "Guidance material to assist licensing authorities and medical examiners is published separately….."

[101] He referred to ***New Zealand Airline Pilots' Association Inc v Attorney-General*** [1997] 3 NZLR 269, at 284 (CA), where the Court noted that:

> "[M]any provisions of such treaties call for administrative action…..rather than legislative action."

The defendant submits that in this case administrative action, i.e., the promulgation of the Medical Manual is called for by the Convention, and subsequently the Act. However, that does not make the manual legislation.

[102] Sir Geoffrey said this is further highlighted by the introduction to r.67:

> "The objective of Part 67 is to define a regulatory safety boundary that will ensure New Zealand pilots and air traffic controllers continue to be medically examined and assessed to a standard that meets or exceeds International Civil Aviation Organisation Annex 1 requirements. Part of this objective will be met through the devolution of routine medical assessment."

[103] The statement of objective is part of the rule, as it is a statutory requirement under s.32(1)(b). There is a clear indication of a primary objective of the part, and a further indication of the weight to be given to the Chicago Convention.

[104] Next, Sir Geoffrey developed, at length, the relationship of these obligations to medical assessment. Central to this argument were submissions relating to the implementation of Annex 1 in New Zealand domestic law. He referred at considerable length to the definitions section, particularly that relating to accredited medical conclusion:

> "***Accredited medical conclusion.*** The conclusion reached by one or more medical experts acceptable to the Licensing Authority for the purposes of the case concerned, in consultation with flight operations or other experts as necessary."

[105] He submitted that this was central to the use of the term "flexibility" in the Act, and referred to the comments in Annex 1 relating to flexibility. Reference was made to Clause 1.2.4.8, which reads:

> 1.2.4.8 If the medical Standards prescribed in Chapter 6 for a particular licence are not met, the appropriate Medical Assessment shall not be issued or renewed unless the following conditions are fulfilled.
>
> a) accredited medical conclusion indicates that in special circumstances the applicant's failure to meet any requirement, whether numerical or otherwise, is such that exercise of the privileges of the licence applied for is not likely to jeopardize flight safety;"

The difficulty with this is the term "accredited medical conclusion" does appear in the rules, but only in three specific instances in r.67, and is not found in the cardiology section.

[106] The CAA argues that while the rules, Part 67, do not themselves require "accredited medical conclusion" under 67.05, the general requirement for exemptions in the rules, coupled with the minimum international standards under Annex 1,

dictates that the DCA is the central person who decides what "flexibility" is appropriate in terms of the acceptability of medical experts consulted by AMA's, and the level of acceptable deviation from medical standards.

[107] Accordingly, it is submitted "flexibility as appropriate" must be read as "acceptable to the DCA".

BILL OF RIGHTS 1688

[108] Finally, Sir Geoffrey expanded on the Bill of Rights 1688 considerations.

[109] In particular, he referred to the ***Alan Johnston Sawmilling*** case, and the reference to Wild J in the passage already cited to the Executive Council. Sir Geoffrey submitted that contrary to the plaintiffs' assertion, Wild J was specifically closing off any fallacy that "regal authority" includes the actions of a statutory organisation. He said the chain of authority from a Sovereign in Right of New Zealand to a statutory organisation such as the CAA, or the employee of such a statutory organisation, is too protracted to substantiate a claim that the statutory organisation, or officer is acting by "regal authority". Accordingly, he submitted that the plaintiffs cannot possibly sustain a claim that the actions of the CAA and PMO are actions by "regal authority". Sir Geoffrey said the plaintiffs' submissions have arisen because they have failed to appreciate the necessary link to the Sovereign that by "regal authority" commands, and the decision of Wild J in the ***Alan Johnston Sawmilling*** case confirms this.

[110] Furthermore, he submitted that the actions of the CAA and PMO, even held to be acting by "regal authority" do not suspend the law, or suspend execution of law. Suspension of law involves a disregard to the supremacy of Parliament, as is made clear in ***Fitzgerald v Muldoon*** (supra) when Wild CJ quoted from ***Dicey*** to explain the principal:

> "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever, and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. "

[111] Sir Geoffrey stressed that Wild J., in the ***Alan Johnston*** case, also referred to the supremacy of Parliament, explaining that "the Executive is not permitted to act contrary to Parliament's intentions, as expressed in the statutes it has enacted."

[112] Next, Sir Geoffrey set out the establishment of the CAA under Part VIA of the Civil Aviation Act, and said s.72B makes it clear that the CAA is charged with establishing and monitoring adherence to safety and security standards within the civil aviation system. Section 72I appoints a director, which "shall have and may exercise such functions and powers as may be conferred or imposed on the Director by this Act, or regulations or rules made under this Act, and such functions and powers as may be delegated to the Director by the Authority under section 23 of this Act".

[113] In relation to this litigation, it was submitted that 72I(3) is significant:

> The Director shall -
> "(a) Exercise control over entry into the civil aviation system through the granting of aviation documents under this Act; and
> (b) Take such action as may be appropriate in the public interest to enforce the provisions of this Act and of regulations and rules made under this Act, including the carrying out or requiring of inspections and audits. "

[114] Sir Geoffrey pointed to sections 22, 23 and 23A of the Act, and said the functions and powers of the Minister of Transport, the CAA, and the director may be delegated down the chain of command to employees such as the PMO. It is noted an instrument of delegation has been produced, and no issue is taken with this by the plaintiffs.

[115] Part 67 of the rules, it is submitted, further define the functions of the CAA and its only statutory officer. Sir Geoffrey submitted a survey of the functions and powers of the CAA's employees, and other positions created under the Act and the rules illustrates that the CAA and the PMO, through her delegated authority, in making the Medical Manual and issuing directions to AMA's regarding compliance with standards, in particular the 1% per annum risk decision threshold, are unmistakably implementing the law, not suspending it.

[116] Sir Geoffrey submitted s.1 of the Bill of Rights Act, 1688 has not been breached, because the CAA is not purporting to suspend the roles of AMA's. Rather,

through the Medical Manual, and the issue of directions, they are attempting to ensure that the functions of the Minister and the CAA in terms of safety standards, meeting international obligations, and fulfilling the overall requirements of the Act are met.

REMEDIES

[117] Finally, Sir Geoffrey turned to remedies and discretions. He pointed to the fact that the declarations sought are a discretionary remedies, which has been recognised by the plaintiffs.

[118] He submitted there are a number of significant reasons why the Court, even if it found the actions of the defendant unlawful, should decline to make a declaration. These he summarised as:

> "(a) The requested declarations will trespass on the policy underlying the Civil Aviation Act and Civil Aviation Rules, namely the promotion of sufficient levels of safety in civil aviation.
>
> (b) The request declarations will cause considerable and serious administrative inconvenience and difficulty for the CAA and Director of Civil Aviation, who will be prevented from carrying out his duties under the Civil Aviation Act.
>
> (c) The requested declarations will impinge upon and prejudice the wider public interest in public safety in all areas of civil aviation and may undermine public confidence in it.
>
> (d) The requested declarations will be superseded and therefore made futile by:
>
> (i) Enactment of the Civil Aviation Amendment Bill (No.2), referred to by the Plaintiffs at the end of their submissions and currently before the Transport and Industrial Relations Select Committee, and
>
> (ii) The outcome of the ministerial review into the Civil Aviation Rules, Part 67, and in particular the so-called '1% rule'."

[119] Furthermore, Sir Geoffrey submitted the Court should consider, before granting relief, whether the relief requested encroaches into the realm of public policy. He submitted policy was a matter for Government, not the Courts, and Courts should be loath to trespass into such areas. He referred to the decision in ***Glaxo New Zealand Ltd v Attorney-General*** (1990) 4 TCLR 170, where Jeffries J declined to

grant a declaration of invalidity of certain decisions of the Health Department, despite having found procedural unfairness. This was done because the Court "did not wish to trespass on policy".

[120] He submitted that the standards and guidelines for issuing medical certificates in this case fall squarely within the policy domain. The CAA are explicitly empowered to establish and monitor safety standards pursuant to s.72B. He submitted that if the Court intervened and made the declarations sought, the Court would be making policy as to the appropriate level of risk. He said that is for the CAA, and not to be settled by the Courts.

[121] Further, he submitted that the Court must have regard to the level of administrative inconvenience in determining whether or not to grant the discretionary relief. In ***Turners & Growers Exports Ltd v Moyle*** (unreported HC Wellington CP 720/88 15 December 1988, McGechan J) the Court declined to declare the regulations invalid despite procedural unfairness, because the Judge considered such a declaration would cause "confusion and prejudice to the important kiwifruit industry". It was submitted that in this case, if the declarations are made, there will be considerable confusion and prejudice to the civil aviation industry, and, more importantly, to civil aviation safety.

[122] Next, Sir Geoffrey referred to ***R v Monopolies and Mergers Commission ex parte Argyll Group plc*** [1986] 1 WLR 763, where the English Court of Appeal stated, "the Courts must have a proper awareness of the needs of public administration". Reference was also made to G.D.S. Taylor, ***Judicial Review*** (1991) 55, where the learned author states:

> "When deciding whether to grant relief…. the Court may…. take into account the public interest and exercise its discretion in recognition of what it considers to be the most expeditious course of action."

In this area, he said, the bottom line is public safety, and the public interest requires the discretionary relief sought be declined.

[123] Finally, Sir Geoffrey submitted that as a matter of judicial efficacy the Courts should be slow to grant a remedy where to do so would achieve no purpose. He

referred to the Civil Aviation Amendment Bill (No.2), which at the time of the hearing was before the Transport & Industrial Relations Select Committee. Effectively, Sir Geoffrey submitted that the contents of that bill answer the concerns in large part of the plaintiffs, and that the plaintiffs, indeed, recognise that if the bill was law, the Court would almost certainly exercise its discretion against issuing the requested declarations.

[124] There is also a Ministerial Review of Civil Aviation Rules Part 67, and the terms of that are to review the 1% threshold test, its application, and to make recommendations on its suitability, or otherwise, for New Zealand, and to review and make recommendations on Rule Part 67, especially in relation to the recommendations on its suitability, or otherwise, for New Zealand, and to review and make recommendations on sub-part B in relation to the medical standards.. Sir Geoffrey submitted that it is likely the outcome of that review may also supersede any declarations made by the Court.

[125] For these reasons, even if the plaintiffs succeed on all other grounds, Sir Geoffrey submitted the relief sought should be refused.

DECISION

[126] As I said earlier, I have set out the arguments at some length. However, the issues may not be so complex. First, is the 1% rule a screening test or an absolute rule? Secondly, are AMA's statutory officers or not? Thirdly, can the Act and the rules be interpreted as suggested by Sir Geoffrey to accord with the CAA's view of New Zealand's international obligations, or does the wording exclude such a course as the plaintiffs' contend? Finally, if the 1% rule is an absolute, does it operate to suspend the law, and, if so, is it by "regal authority"?

[127] The first matter to determine is whether the 1% test has been applied as an absolute, or as a screening test. That is because it is conceded by the plaintiffs that if it is simply used as a screening test, no objection can be taken.

[128] The defendant argues it has only been used as a screening test. It points to the fact that the PMO was prepared to enter into discussions regarding certain specific

pilots, and also to a letter written by the plaintiffs' witness, Dr. Dodwell, when he was PMO.

[129] This was a letter to Dr Preitner, dated 16th January 1988, and where relevant reads:

> "I am sure you remember our discussion of that day, regarding your concerns. As a careful person, you had read the CAA guidance on assessment of cardiovascular risk factors, and attended the CAA presentation on this at the September conference. You estimated Mr ---to be in the range of 1 – 2% per annum. This exceeds the 1% limit, beyond which you were aware an AMA may not assess. Facing a number of similar cases you were beginning to feel uncomfortable with the policy as far as private pilots were concerned. We discussed the options, and I confirmed that the only way for him to demonstrate that he was better than this 1 – 2% estimate would be by special assessment after presenting the report of a cardiologist (including a treadmill ECG)".

[130] The plaintiffs' response is threefold. Firstly, Mr Withnall submitted that the PMO only entered into discussions once controversy over the 1% rule erupted. Secondly, he pointed to Dr Dodwell's affidavit in reply, where he deposed that his approach to the 1% rule that he adopted consistently was that it identified the boundary of a "comfort zone" for AMA's. He said his stance was to assure AMA's if they issued a medical certificate below that level they would have the backing of the CAA, but if above, the authority would not stand behind the AMA's. Dr Dodwell also pointed to his view that the manual records procedures which are "an acceptable means of compliance". He took the view that the rigid requirements were contained in the rules or the Act. He also pointed to the fact that AMA's were at liberty to negotiate "an alternative means of compliance". He said his letter to Dr Preitner has to be read in that light. Thirdly, Mr Withnall submitted that there is nothing in the rules that allow the PMO to usurp the function of the AMA's in the way suggested by Dr Callaghan.

[131] As well, the plaintiffs point to a large body of documentary evidence to show that the 1% rule was intended to be rigidly applied, and was far more than a screening test.

[132] The plaintiffs rely on the following:

(a) Document 17 at page 193 which is a letter to Mr Presland which states:

"*You have been referred by your AMA for Special Medical Assessment because you exceed the 1% per annum risk for an incapacitating event which as (sic) been adopted by the CAA as the boundary between acceptable and unacceptable risk."*

(b) Document 1695 at page. 195 of vol.1. Again, it is a letter to Mr Presland, and, where relevant reads:

"However, Judge Hardings findings do not challenge the validity of the '1% rule' or the Medical Manual but address only an identified deficiency of procedure. Consequently, the decision provides no basis for you or anyone to require the CAA to return a certificate without the appropriate assessment and associated procedures (in this case the request for a special medical assessment and accompanying fee). However, in your case, we will waive the required fee as you currently have a claim against the CAA for costs resulting from CAA v Presland. This fee waiver will be incorporated into any consideration by the CAA of your claim."

(c) Document 1743 at page 197, which is an email from the PMO to Dr Griffiths, which deals with the use of the flight fit computer test.

(d) Document 1747 at page 199 to Shirley Delany.

"As example, it would not be acceptable to say to a pilot undergoing an assessment that you disagreed with the '1%' rule and in your view he should be allowed to fly, even though he was outside the acceptable level of risk……….

This is not to say that an AMA or DME cannot hold a different view from the CAA – only that the proper place to express those disagreements is to the CAA directly or via routes such as this AMA list. If there is evidence that a particular rule is wrong, then let's debate it and, if necessary, change the rule. The recent revision of the Medical Manual gives a specific, structured opportunity to do this, and it is good to see a number of you taking that opportunity."

Mr Withnall stressed the reference there to "rule" was if the 1% was, in fact a rule.

(e) Document 1748 at page 201, which attaches an email sent to all DME/AMA's.

(f) Document 2011 at page 205 of vol. 1, which is an email from the PMO.

"Dear Robert
Thanks for the posting, but I think the reference to Flightfit is a red herring. If an applicant exceeds 1% under any of the accepted assessment tools (NHF charts, CASA tables etc) then 'a risk exceeding 1% per annum at any age must be rejected by an AMA.' That's directly ex-manual. Just a reminder though that there are options for what happens after that – as per my email of 19th January 2000:"

(g) Document 2084 at page 207 of vol.1 which is an email from Peter Vujcich to Dr Callaghan, and encloses the earlier email from Dr Callaghan.

(h) Document 2084 at page 208

"In the meantime, someone who is clearly over 1% needs to request a Special Medical Assessment because an AMA cannot apply flexibility in this case."

(i) Document 2273 at page 212, which is a letter from the Acting Manager, Personnel Licensing to Bartlett Partners. At page 216, in answer to Q.24 the following appears:

"The Director of Civil Aviation does not have or require, any medical qualifications. The original question was 'Who in the event the 1% is equaled or exceeded, becomes the final arbiter on issues or not of a medical certificate.' Legally, the Director of Civil Aviation has the final decision on matters of civil aviation certification, but the Director's decisions (whether medical, or to do with any other aspect of flight safety) will always have regard to relevant expert advice. In the case of medical certification of pilots and ATCs this advice would come from the Principal Medical Officer and relevant independent medical advisors or, in the case of an appeal against a decision, the Medical Review Board."

Mr Withnall submits this, again, changes the role of AMA's.

(j) Document 2347 at page 218, which is a letter from the PMO to the editor of the Airline Owners & Pilots Association of New Zealand. That reads:

"…Once an individual's risk of an incapacitating event rises above 1% per annum, an AMA is no longer permitted to issue a CAA medical certificate but must refer the candidate for special medical assessment."

(k) Document 2395 at page 222, which is a letter from PMO to the President of AOPA. It reads:

"The Medical Manual refers to 'the 1% rule'. This is an issue of semantics. It is not a 'rule'.in the sense of being a Civil Aviation Rule

issued pursuant to the Civil Aviation Act 1990. However, it is a ''rule' in the general sense of being 'a statement of what is allowed, for example in a game of procedure' (Collins Dictionary). In the case of the Medical Manual it is there for the guidance of those performing medical assessments as a statement of the level of risk allowable in considering the likelihood of sudden incapacitation as a result of cardiovascular disease."

(l) Document 2395 at page 227, which is a letter to counsel for the plaintiffs. The whole letter is not produced, but Mr Withnall relies on the passage at page 228, which is produced. That reads:

"I am aware from your letter to the CAA prior to the trial that you considered that 'the delay in issuing Mr Presland's medical certificate was unlawful and, in particular that the over seventy 1% rule is ultra vireos.' However, with respect, the District Court made no finding against the 1% rule and neither did it rule against the need for Special medical Assessments in appropriate cases. Had it done either the CAA would have appealed, if necessary, to the highest possible tribunal because such a ruling would have been unfounded as a matter of law as well as being fundamentally adverse to the interest of public safety. The judgment did identify the need for the option of assessments and review assessments and the CAA has addressed this. However any demand for the issue of a medical certificate without reference to relevant medical requirements (including the 1% rule) and procedures (including special Medical Assessments where appropriate) is not only not mandated by Judge Harding's decision but effectively would seek to place the CAA in conflict with Rule Part 67 and its Medical Manual – neither of which are annulled by the judgment."

(m) Next, Mr Withnall referred to Exhibit 25 to Dr Griffiths' affidavit. That is a form letter to all DME's and AMA's. That letter, according to the submission, properly sets out the ratio of the Presland decision at paragraph 2:

"Judge C.J. Harding held that the policy whereby 'all assessments [are] to be carried out at the CAA Personnel Licensing Unit by means of special medical assessment' is not in conformity with the steps set out in the Civil Aviation Rules, Part 67 – Medical Standards and Certification. According to the ruling 'Special Medical Assessments' can only occur after a 'review assessment' has been conducted under Rule 67.13 (headed 'Review Assessments') or an applicant for a medical certificate is advised of the option under Rule 67.1[c] to seek an exemption from the Director of the CAA"

However it continues:

"Contrary to some of the views circulating in the industry, the validity of the so-called 'one per cent rule', the special medical assessment

procedure and the Medical Manual are not challenged in the judgment.

The District Court made no findings against the 1% rule and neither did it rule against the need for Special Medical Assessments in appropriate cases. Had it done either the CAA would have appealed, because such a ruling would have been unfounded in law as well as being fundamentally adverse to the interest of public safety."

(n) Finally, Exhibit 22 to Dr Griffiths' affidavit, which is a letter from the Director of Civil Aviation to the Executive Director of the first plaintiff.

"Dear Tom
Medical Assessment Methods

The comments contained in your letter of 2 March are noted and echo similar sentiments expressed to us by Hugh and the Editor of the Aviation News.

Firstly I would like to reassure you that there has been no change in the CAA's attitude to consultation with industry. We continue to place a high store in the value of early and full consultation where new procedures or regulations are to be brought into effect. I totally endorse your view that the introduction of new policies and supporting rules are better understood and are likely to receive a higher level of voluntary compliance if a proper consultation process has been undertaken.

In the case of medical assessments, put quite simply, there has been no change in 'policy'. The 'policy' currently being applied to special medical assessments is the same as it was last year and the year before. Any pilot who presents himself or herself for assessment to an Aviation Medical Assessor cannot be issued with a medical certificate by that AMA if there is evidence of a risk of sudden incapacitation during the ensuing 12 months which is greater than 1%. In these cases, the applicant has to be referred for special medical assessment.

I imagine the question you will ask is 'If there has been no change in policy, why do you think everyone is up in arms?' The answer to that is that the single most likely cause of sudden incapacitation arises from cardio-vascular causes. The method of assessing that risk has been to use tables prepared by the National Heart Foundation that give an indication of the estimated risk for the general population in broad age bands. It became clear over a period of time that a number of medical assessors were applying a discretion they were not authorised to apply in interpreting the results obtained by reference to those tables. The reason behind this was the broad-brush approach taken in the National Heart Foundation tables. The application of discretion by some and not others created inconsistency in how individuals were

being treated. To rectify this the Principal Medical Officer reminded all medical assessors of the requirement to refer any case for special medical assessment where the 1% risk level was breached. In so doing she was actually reminding them of the existing policy as defined in the CAA Medical Manual. At the same time, an improved assessment system is being trialled,(sic) which is more specific to the individual being assessed. This is explained in the brochure and you will have seen from it that the proposed assessment system currently on trial has the effect of producing a more accurate result in individual cases, extending the age limit at which many individuals are likely to go beyond the 1% threshold.

I need to make it clear that there was no recent change in the CAA's medical assessment policy. The letter sent to AMA's by the Principal Medical Officer was an instruction to individuals holding a delegation from the CAA that they should exercise that delegation in accordance with the existing written instruction in the CAA medical Manual. As such it was in the nature of an operational manager reminding a contractor of their contractual obligations. It has to be acknowledged that this letter was headed 'Change of Policy'. It may be that loose use of these words misled others into seeing this as a change of policy, when that has not, in reality, been the case. What subsequently happened was that some individuals interpreted this as a 'clampdown' on pilots medical standards with absolutely no justification for coming to that conclusion. We have endeavored to correct this misunderstanding by the article on our website and the production of the brochure 'The CAA is not out to get older pilots' with the intention of reassuring pilots that we are seeking to keep them flying so long as it is medically safe to do so.

You will appreciate that because we were applying existing policy, no justification for cost benefit analysis or wider consultation was indicated, and that remains the case. An inordinate amount of concern about medical assessments has been generated by a few individuals in flying club newsletters and in the aviation media who have continued to fuel the debate by misinformation.

The current CAA procedures are in line with those practised (sic) by the JAA in regard to private pilots. The USA operates similar procedures for commercial pilots but accepts individual clinical assessments for private pilots as evidence of their fitness to fly."

[133] On this evidence I am satisfied, on the balance of probabilities, that the defendant has used the 1% rule as a rigid cut off point. It has done so in keeping with its view of the medical certification process, i.e., that routine medical assessments may be carried out by AMA's, but all other cases must be referred to the PMO as a delegate of the DCA. The evidence makes it clear that the PMO and the DCA treat

any case that falls outside the 1% rule as non-routine, requiring referral for a special assessment. In other words, an AMA is obliged to refuse a medical certificate for anyone who fails the 1% rule. I accept some dialogue has been entered into, but that does not affect my view of the way the DCA and PMO approached the 1% rule.

[134] Furthermore, the defendant's argument on this ground is predicated on the basis that the DCA issues medical certificates. For reasons that follow, I do not believe the DCA can.

THE STATUTORY SCHEME

[135] As noted earlier, the defendant's approach to the statutory scheme was to submit that because of the overall purpose of the Act was aviation safety, and because of our international obligations under the Chicago Convention, the Director was entitled, by way of the manual, to impose the 1% rule.

[136] It is not without significance that Annex 1 to the Convention, and the Manual of Civil Aviation Medicine predate the Act. If it was intended they form part of New Zealand domestic law it would have been a simple matter to incorporate them by reference, pursuant to s.36.

[137] It is also not without significance that s.34 sets down a procedure for the making of ordinary rules. It is not suggested matters contained in the manual, particularly the 1% rule, have been through the procedure in s.34.

[138] For reasons to be given, I do not consider that the interpretation of the scheme submitted by the plaintiffs is inconsistent with the obligations under the Chicago Convention. Quite clearly, the process of a Court in interpreting the Act and the rules is to give effect to the international convention if the wording allows.

[139] The starting point for interpretation is enshrined in the classic formula expressed in ***Heydons*** case [1584] 3 Co Rep. 7a. In ***CIR v Alcan New Zealand Limited*** [1994] 3 NZLR 439, McKay J., in delivering the decision of the Court stated at page 443:

“It would be a mistake to read this passage as putting revenue statutes in some different category from other legislation with their own particular rules of interpretation. All statutes are to be interpreted on the same basic approach enshrined in the classic formula expressed in Heydon's Case (1584) 3 Co Rep 7a. That formula speaks of ascertaining what was the previous law, what was the mischief and defect for which it did not provide, what is the remedy devised by Parliament, and what is the construction which will suppress the mischief and advance the remedy. The modern equivalent in New Zealand has been given statutory force, and makes no distinction between revenue statutes and other statutes. Section 5(j) of the Acts Interpretation Act 1924 provides:

> “ Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

The first proposition of Lord Donovan, in the passage cited from the Privy Council in *Mangin's* case, is that words are to be given their ordinary meaning.

This is fundamental to all statutory interpretation. There must be a strong and sufficient reason before words can be given some other meaning which they are capable of bearing in a particular context. If the object of a tax statute is to frustrate tax avoidance devices which would otherwise be legitimate, that alone may not be enough. If, however, the words are capable of more than one meaning and the object of the legislation is clear, then the words must be given "such fair, large and liberal construction" as will best ensure the attainment of the object of the Act.

The statements by Lord Donovan (including his citation from Turner J) that moral precepts are not applicable to revenue statutes, and that there is no room for intendment, no equity about a tax, no presumption, must be similarly understood. In the complex economic world of the present day it is perhaps inevitable that anomalies can be found in our tax laws. The statements referred to sound a note of caution against too readily assuming that the legislation has a particular objective which the words of the statute must be made to fit. Not infrequently the particular purpose is unclear. Parliament may have tolerated anomalies in the interests of avoiding excessive complexity. In such cases the safest guide to meaning will be found in the actual words of the statute. As was said by Richardson J in *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 at p 549:

> "That is a matter of statutory construction and the twin pillars on which the approach to statutes mandated by s 5(j) of the Acts Interpretation

Act 1924 rests are the scheme of the legislation and the relevant objectives of the legislation. Consideration of the scheme of the legislation requires a careful reading in its historical context of the whole statute, analysing its structure and examining the relationships between the various provisions and recognising any discernible themes and patterns and underlying policy considerations.

Certainly the scheme and purpose approach to statutory analysis will not furnish an automatic easy answer to these interpretation problems. Tax legislation reflects historical compromises and it bears the hands of many draftsmen in the numerous amendments made over the years. It is obviously fallacious to assume that revenue legislation has a totally coherent scheme, that it follows a completely consistent pattern, and that all its objectives are readily discernible."

One should certainly approach the question of statutory interpretation on the premise that the legislature will not have intended absurdity or injustice. It would be a mistake, however, to regard these as the only situations in which words may be understood in some other meaning of which they are capable. One should always have regard to the total context of the words used and to the purpose of the legislation in order to arrive at the meaning intended. This does not mean some forced meaning to fit a preconceived idea of purpose, but a proper approach to ascertain the true meaning. The true meaning must be consonant with the words used, having regard to their context in the Act as a whole, and to the purpose of the legislation to the extent that this is discernible."

[140] More recently this has been reinforced by Randerson J in ***Jack v Manukau City Council*** (unreported HC Auckland M1698/99 14th December 1999) at paragraphs 14 to 16:

"[14] It is axiomatic that words in a statute prima facie bear their plain and ordinary meaning: *Attorney-General v Associated News papers Ltd* [1994] 1 All ER 556, 561 (HL) and *CIR v Alcan New Zealand Ltd* [1994] 3 NZLR 439, 443 (CA). Section 5(1)of the interpretation Act 1999 provides:

'The meaning of an enactment must be ascertained from its text and in the light of its purpose.'

[15] Despite the change in statutory language from s5(j) of the Acts Interpretation Act 1924, I am satisfied that the approach described by Richardson J (as he then was) in *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513, 549 remains applicable under the new Act. That approach rests upon the 'twin pillars' of the scheme of the legislation and its relevant objectives .

> [16] Where Parliament has taken the unusual course of providing a specific objects clause for an Act, then it is the duty of the Court to attach significance to and obtain assistance from such a prominent and unusual feature: *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc.* [1988] 1 NZLR 78, 88 per Cooke P (as he then was)."

[141] In approaching interpretation in this case, the decision of the Court of Appeal in ***New Zealand Air Line Pilots' Association Inc v Attorney-General*** [1997] 3 NZLR 269 (CA) is also relevant. At page 285, Keith J., in delivering the decision of the Court, said:

> "The conclusion is clear: the Chicago Convention as a whole does not form part of the law of New Zealand. We should perhaps make it explicit that that conclusion does not call into doubt the obligation and the ability of New Zealand to comply with the convention and annexes. Rather the point is that the giving of full effect to the provisions of those texts in the law of New Zealand is required in some cases and not in others, and that, if national legal effect is needed, the effect might be given more or less directly.

[142] Also of relevance is the passage at page 289:

> "We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations, eg *Rajan v Minister of Immigration* [1996] 3 NZLR 543 at p 551. That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text. So this Court in interpreting guardianship legislation enacted to give effect to the Hague Convention on the Civil Aspects of International Child Abduction has said that it is incumbent on it to construe the Act in a manner that will as far as possible give effect to that purpose, *Gross v Boda* [1995] 1 NZLR 569 at pp 573 and 574. And it read the general language of the Employment Contracts Act 1991 conferring jurisdiction on the Employment Court as not overriding the customary international law of sovereign immunity. In the absence of such an approach almost any general statute would displace well-settled doctrines accepted by New Zealand in its international relations, *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 at pp 430 and 438. In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates. A related instance appears in the references to good faith compliance with obligations in the Charter of the United Nations and the Vienna Convention on the Law of Treaties in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at p 682; see also *Commissioner of Inland Revenue v JFP Energy Inc* [1990] 3 NZLR 536 at p 540.

[143] The Swedavia McGregor Report that led to the Act and Regulations was a review of a centralised Government department and recommended sweeping reforms. In my view, the Act should be read against that backdrop.

[144] The defendant's position is that the primary purpose of the Act is aviation safety. Clearly, that is a factor of enormous significance, but it ignores the full wording of the long title, which I repeat:

> "An Act—
> (a) To establish <u>rules of operation and divisions of responsibility</u> within the New Zealand civil aviation system <u>in order to promote aviation safety</u>; and
>
> (b) To ensure that New Zealand's obligations under international aviation agreements are implemented; and
>
> (c) To consolidate and amend the law relating to civil aviation in New Zealand " (My emphasis)

[145] Therefore, in my view, it is clear that the purpose of the Act is to put in place rules of operation, and to address the responsibility of various players in the aviation industry in order to promote aviation safety. In my view, the purpose of the Act is safety through rules, and the division of responsibility of those involved in the industry. It is quite clear that the drafters of the Act and the rules determined to place matters of medical certification within the rules. One cannot ignore the reference to "divisions of responsibility" in the long title.

[146] In my view, the medical certification function is not vested in the DCA, as submitted by Sir Geoffrey. While there is power to promote safety at reasonable cost (s.14) and power to monitor and inspect, (s.15), and powers to enforce (s.72I), the mechanism of the grant of medical certificates is to be found in the rules.

[147] Rule 67.03 requires applicants to submit to medical examination by an AMA or DME. Rule 67.05 empowers the Director to appoint AMA's and DME's. Rule 67.07 gives powers to DME's and AMA's to carry out general medical requirements. Rule 67.09 gives power to any AMA to issue a medical certificate. That may be done with the exercise of flexibility, the definition of which was set out earlier. Rule 67.13 grants applicants the power to seek review, either from the original AMA, or

from a second AMA. If a second AMA is involved, there are certain requirements on an applicant. Rule 67.13(c) is critical. That allows an applicant who is determined not eligible to apply to the Director under s.67.15 for a special medical assessment. It is, in my view, plain that the Director may only become involved once an AMA has declined an application for a medical certificate. Then, and only then, can the Director conduct a special assessment, and grant an exemption. The clear wording can not be read down by reference to New Zealand's international obligations.

[148] Sir Geoffrey argued that the flexibility contended for by the plaintiffs effectively give AMA's carte blanche to issue medical certificates as and where they see fit. He said that this would lead to great inconsistency. However, when one considers the definition, it allows a medical certificate to be granted to an applicant who fails to meet the medical standards where the use of the medical certificate does not jeopardise flight safety. In my view, this imposes a very serious obligation on an AMA. Their obligations are not to the patient but to aviation safety. Although there have been suggestions in the course of this case that AMA's would favour patients in issuing certificates, no evidence has been produced to support such a view.

[149] If there is a failure to meet medical standards, it is inconceivable that an AMA would fail to carry out further tests, and, where appropriate, to refer applicants for specialist advice. For example, if a patient even narrowly exceeded the 1% rule, an AMA would be expected to refer for expert cardiology assessment and advice. It seems to me the interpretation contended for by Sir Geoffrey means that there is no flexibility vested in AMA's, and makes the term in the rule quite meaningless. For AMA's to act in this way is in keeping with the devolution and decentralisation which was behind the civil aviation reforms.

[150] Sir Geoffrey's complaint that such an interpretation will threaten civil aviation safety requirements, and lead to inconsistencies seems to me to overlook the very significant powers vested in the Director. There is power in s.15 to require such inspections and monitoring as the Director considers necessary in the interests of civil aviation safety and security, and that extends to any person holding an aviation document, or who does "any other act in respect of the matters set out in sub-

paragraph b”. Sub-section 3 gives a the Director power to require the persons concerned to supply information.

[151] Section 17 gives the Director power to suspend aviation documents where it is considered necessary to comply with the Act; that the holder has failed to comply with conditions; has contravened or failed to comply with s.49; or where the Director considers the privileges or duties which the document grants has been carried out in a careless or incompetent way. Sub-section 2 gives power to the Director to suspend any aviation document, where he considers there is reasonable doubt as to the quality, or safety, of the aeronautical service to which the document relates. Following an investigation under s.17, the Director has power under s.18 to revoke any aviation document. Section 19 gives the Director power to take into account any other matters, or evidence he considered relevant, for the purposes of the s.17 and 18.

[152] There are also extensive powers under s.72. The defendant relied on s.72I(3)(b), which grants powers to the Director to take such action as may be appropriate in the public interest to enforce the provisions of the Act, and Regulations and Rules under the Act, including inspection and audits. However, as Mr Withnall, correctly, in my view, pointed out, sub-section (2) of 72I grants the Director such functions and powers as may be conferred or imposed by the Act or Regulations, or Rules made under the Act. It follows these are powers of enforcement conferred by the Act, and are not powers at large. Having said that, there are significant auditing, suspension and inspection powers granted to the Director.

[153] In my view, all of these powers give ample authority to the DCA to ensure that AMA’s abide by the regulatory requirements, and that consistency is applied. If they fail to meet their obligations the DCA could have them removed.

[154] The defendant sets significant store by the medical standards found in sub-part B of rule 67, and the fact that they needed to be “fleshed out” by a Medical Manual. In particular, there was reference to r.67.53(a) which requires applicants to be free from any risk factor, disease or disability which renders them “either unable, or likely to become suddenly unable, to perform assigned duties safety”.

[155] The defendant's stance was that the use of the term "likely" without more, could lead to a situation where a medical certificate could be granted if there was only a 49% chance of incapacitation. However, as Mr Withnall pointed out, the term "likely" is not unknown to the law, and is frequently interpreted by the Courts. He referred to the decision of Cooke P. in ***Commissioner of Police v Ombudsman*** [1988] 1 NZLR 385 (CA) where the President referred to various authorities, and defined "likely" in law, meaning "a distinct or significant possibility". Obviously, the term must be interpreted in context, and in civil aviation safety, in my view, would be given a severely restricted meaning. (See ***R v Secretary of State forTransport ex parte Pegasus Holdings (London) Limited*** (supra)).

[156] In my view, the flexibility granted is in accordance with our international obligations, and there is not a requirement for a rule such as the 1% rule by way of manual to meet those obligations. The plaintiffs readily recognise the need of a manual to explicate the standards set out in r.67. Sir Geoffrey pointed to the need for centralisation of specialist information, as it is set out in the Convention. He also relied on the Manual of Civil Aviation Medicine 2nd Ed. 1985, published pursuant to the Chicago Convention, to say that flexibility carried a more limited meaning than that submitted by the plaintiffs. The relevant passage is 1.2.4.8 set out earlier.

[157] The difficulty confronting this argument is that the term "accredited medical conclusion" does not occur in the section of r.67 dealing with cardiovascular matters. It appears in three parts of r.67, which are not relevant for present purposes

[158] Furthermore, it is to be noted in the foreword to the document just referred the following is stated;

> "When consulting the Medical Manual it should be remembered that it is intended as guidance material only and as such has no regulatory status. Its users should, when ever in doubt, always make reference to the text of the current edition of Annex 1 for up to date information on SARP's".

As well, as Mr Withnall pointed out, the international documents recognise that AMA's must approach their task by applying their knowledge, experience and expertise. This, he submitted, was exactly what flexibility was about. Annex 1, Chapter 6, Note 2 reads:

> *"Note 2. – The standards and Recommended Practices established in this Chapter cannot, on their own, be sufficiently detailed to cover all possible individual situations. Of necessity many decisions relating to the evaluation of medical fitness must be left to the judgement and discretion of the individual designated medical examiner. The evaluation must, therefore, be based on a medical examination conducted throughout in accordance with the high standards of medical practice. Due regard must be given to the privileges granted by the licence applied for or held by the applicant for the Medical Assessment, and the conditions under which the licence holder is going to exercise those privileges in carrying out assigned duties." (*My emphasis)

[159] As noted earlier, as Mr Withnall pointed out, all of the international documents referred to by Sir Geoffrey predate the reforms and the devolution. He pointed out it would have been a simple matter to incorporate all, or part, of the international documents by reference pursuant to s.38 He said what has occurred is that the Act set out quite deliberately to devolve the medical certification function, with flexibility, to the AMA's.

[160] Sir Geoffrey maintained the DCA must have powers to direct AMA's as he was responsible for risk assessment. However, we are dealing here with ordinary rules that are made by the Minister. The risk assessment is his. (See s.33(1) and, in particular, 2(b) and (d).

[161] In considering this Act, the mischief to be addressed is made plain in the report referred to above. It can be found in Section 1 and the recommendations, as relevant here can be seen in 12.2.2 and 12.2.3 of the report. The answer, in my view, is that the Legislature determined to achieve this through a stand alone CAA, and to achieve safety and meet international obligations through the rules and by devolution and division of responsibility.

[162] Finally, I accept Mr Withnall's submission that one cannot contract out of statutory or regulatory obligations.

[163] In my view, giving the AMA's the powers as contended for by the plaintiffs are not inconsistent with our international obligations as Sir Geoffrey suggests. It is consistent with the passage cited above, and the obligations to comply are further enhanced by the extensive powers of the Director to inspect, audit and revoke,

referred to above. In any event, if the submission is correct, and they are inconsistent with the international obligations, then that is simply in accord with the clear meaning of the relevant rules. The international obligations cannot alter that clear meaning on the basis of the authorities referred to above.

[164] Mr Withnall submitted that if the AMA's were statutory officers, then they could not contract out of their statutory obligations. The defendant did not suggest this was incorrect.

[165] In my view, the AMA's are statutory officers. They are not appointed by the primary legislation (the Act) but by the secondary legislation, the rules. Only they can issue medical certificates, which is a statutory function under the rules. I accept, as Sir Geoffrey submitted, that their terms and conditions and their appointments are within the control of the Director. But it has to be noted that the Act specifically leaves matters of medical certification to the rules. It is my finding that AMA's alone may grant, or decline medical certificates. The only power vested in the Director is in the medical certificate area to grant exemptions following a special assessment where a medical certificate has been declined. It is my view that the issuing of a medical certificate, pursuant to the Regulations, is the exercise of a statutory function by statutory officers.

[166] Such a view is supported by the terms of appointment that places a legal obligation on the AMA's.

[167] In this regard Mr Withnall referred to ***Dowd v W.H. Boase & Co. Ltd McFarlane & Coggins v Griffiths (Liverpool) Ltd*** (1945) 1 All ER 605. In that case liability attached to the person who had the right to direct how a function is to be carried out. Two passages from ***Airwork (NZ) Ltd v Vertical Flight Management Ltd*** [1999] 1 NZLR 641 are also instructive. At page 654 Salmon J, in delivering the judgment of the Court said:

> We accept the submission of Mr Withnall QC that Airwork alone had not only the right to direct how to fly and the right to delegate to the pilot the ultimate control of the aircraft but it also had statutory duties to do so and was responsible under the Act for the pilot's actions. We accept too, that Airwork

did direct and control. Effectively all that was left with Vertical was the responsibility for paying the pilots. The policy evident in the authorities is that the person with the real control over the actions of the employee is the person who has vicarious liability for those actions. What the cases illustrate is that it is unusual and indeed, exceptional, for the services of a person to be lent to another with the borrower assuming full control over the actions of that person. But that is what happened here. As Viscount Simon said in *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 at p 12:

> "I would prefer to make the test turn on where the authority lies to direct, or to delegate to, the workman, the manner in which the vehicle is driven. It is this authority which determines who is the workman's 'superior' ."

In this case that authority lay with Airwork.

Mr Barrow, Airwork's operations manager, acknowledged that Airwork was responsible for the checking and training of pilots, for liaison with civil aviation authorities regarding helicopter operations, and for the issue of daily orders or notices to pilots with regard to their flying operations, and that in that respect he did not differentiate between the pilots employed directly by Airwork and those such as the Eagle pilot who were employed by Vertical.

It is true that the ultimate responsibility for the safety of the operation of an aircraft is that of the pilot. Section 13 of the Civil Aviation Act gives that principle statutory form. But the fact is that in these circumstances the pilots were effectively beyond the control of Vertical and by contrast, under the complete control of Airwork. Whichever way the test is put, we have no doubt that it has been discharged in this case and that the Judge's conclusions in this regard were correct."

[168] If the AMA's are liable that is consistent with their having control of their function, i.e., assessing for and issuing medical certificates. What Sir Geoffrey contends for is that the AMA's are legally liable and the DCA is not, despite the fact that the DCA can direct them. I do not accept that.

[169] Finally, I am satisfied the actions of the defendant are actions of 'regal authority' and purport to suspend the law or the execution of the law. In my view, Wild J in the ***Alan Johnston*** case correctly identified the purpose behind s.1 of the Bill of Rights when he stated:

> "In New Zealand in 1999, I see the relevant application of the Bill of Rights 1688 as being to prevent the Executive (which is the Sovereign in Right of New Zealand, through her representative the Governor General and her

> Ministers, acting in council – the Executive Council) suspending the operation or benefit of laws passed by the Parliament of New Zealand."

[170] Sir Geoffrey submitted that the rules were not passed by Parliament, although there was a supervisory function and the Bill of Rights Act 1688 had no place. On the other hand, Mr Withnall noted that the system of Government has evolved dramatically since the Act of 1688, and that Government departments are acting in the public interest and created by operation of the Crown in Right of New Zealand. It was submitted that the limitation suggested by Sir Geoffrey on the statement of Wild J., cited above, is not correct. It was the plaintiffs' submission it was only cited as widely as necessary for the case. He said in this case complex Government has meant the Crown in the Right of New Zealand has chosen to delegate statutory authority, or organisation, of their power to regulate and govern, instead of the Crown. Such statutory authorities, or organisations, are still covered by the purpose behind s.1.

[171] I consider Mr Withnall's submission correct. It is necessary to recognise the form of modern government. Otherwise, the delegation mechanism that applied in this case could simply be used by Government as a means of avoiding having its actions being reviewed by the Courts. Government has chosen to delegate its powers and the exercise of them to the DCA. The attempt to use the manual and the directions of the PMO are in "regal authority" and, clearly, purport to suspend the law, or the execution of the law. Effectively, the purport of the 1% rule in the manual is to remove the term "flexibility" completely from the powers granted to the AMA's and in the rules to grant medical certificates. This is more concerning in the context of this case, because it appears the defendant is purporting to issue medical certificates when the Act and Regulations do not, in my view, give such power to the defendant, the Director, or the PMO through delegation. The power is to exempt from medical standards in limited circumstances.

[172] The cases referred to earlier in support of the proposition that there is not the inflexibility in the 1% rule as submitted by the plaintiff illustrate this. It is also inherent in the defendant's position that routine examination should be carried out and medical certificates granted by AMA's, but all else should be referred to the

centralised medical unit of the defendant. Then, after special assessment, a medical certificate can be granted. In fact, that is not the case. The only power vested in the DCA, or his delegate, is to grant exemptions following a special assessment.

[173] In light of the above, the defendant's issues can be answered as follows:

(a) Do the rules authorise the DCA to issue a medical certificate?

No. The power is to grant exemptions, following an AMA declining a medical certificate and a special assessment.

(b) If not, is the power of the DCA limited to granting or refusing an exemption from one or more applicable medical standards in r.67 Subpart B following an application for special assessment?

Yes.

(c) Does only the AMA have power to issue flexibility in terms of r.67.09(a), or does the DCA have that power also?

The power to exercise flexibility in the grant of a medical certificate is vested in the AMA. If an applicant does not comply with the requirements and standards of Part 67, and that non-compliance means the use of a medical certificate would, in the judgment of the AMA, jeopardise flight safety the applicant can only obtain a medical certificate if the DCA first issues an exemption. The non-exercise of flexibility and refusal of a medical certificate is a pre-condition to an applicant for exemption.

(d) Do the provisions of the manual purport to prevent an AMA issuing a medical certificate where the applicant has been assessed as having more than a 1% risk of a cardiovascular incident within the coming 12 months?

Yes.

(e) If so, is that consistent with the rules?

No.

(f) Do the provisions of the manual purport to prescribe a standard with which applicants for medical certificates must comply, or do they provide for a "screening test" in the light of which further tests may be ordered?

The provisions of the manual, in relation to the 1% rule, purport to prescribe a standard.

(g) If a standard, is that consistent with the rules?

No. Only if it was a screening test and applied as such would it be consistent with the rules.

(h) If a screening test, is the AMA obliged to issue a notice of unfitness if the applicant has been assessed as having more than 1% risk of a cardiovascular incident within the coming 12 months?

The answer is no. If a screening test, it would oblige an AMA to carry out further testing, inevitable reference to an expert, and the exercise of flexibility, as defined in rule 1.

(i) If the a screening test, is the decision to decide what further investigation should be made within the power of the AMA, or within the power of the DCA?

The AMA.

(j) If a screening test, is the decision whether the further investigations result in the applicant meeting the standards prescribed by the Rules (with the exercise of flexibility of appropriate), within the power of the AMA, or within the power of the DCA?

The AMA.

[174] I do not consider any of the above findings in any way compromise aviation safety, as somewhat dramatically suggested by the defendant. There are ample powers vested in the DCA to ensure that that does not happen. Furthermore, those responsible for the Act and regulations have made a clear determination to vest certain powers in AMA's. Clearly, those powers must be exercised in accordance with the AMA's heavy obligations.

REMEDIES

[175] I have set out earlier the reasons why Sir Geoffrey maintains the relief sought by the plaintiffs should not be granted. One of the reasons related to the Civil Aviation Amendment Bill (No.2) which at the time of the hearing was awaiting a report from the Select Committee. That has since come to hand.

[176] As a consequence, I issued a Minute dated 4th July, which was responded to by the parties. In the defendant's memorandum, Clause 2 of the Civil Aviation Amendment Bill (No.2) was noted, and that stipulates that nothing in sub-sections 1, 2, 3 or 4 affects the rights of any person under any judgment given in proceedings

issued before the 20th February 2001. The defendant conceded the review proceedings remained unaffected, and requested the Court to address the legal issues. Accordingly it seems to me unnecessary to address this ground further. In this regard Mr Withnall furnished to the Court copies of documents obtained under the Official Information Act, that had been placed before the Select Committee, together with counsels' comments in relation to them. They were received in a sealed envelope. In the circumstances, given the defendant's objection, I have not thought it appropriate to open the envelope and consider those documents.

[177] I do not consider the requested declarations trespass on matters of policy underlying the Act and the rules, because the policy and the legislation recognises the division of responsibilities and makes a conscious decision to invest flexibility and the exercise of clinical judgment in the AMA's. Nor will it prevent the CAA, or the DCA carrying out the duties imposed under the Act. For the reasons given earlier, I do not think declarations impinge upon, or prejudice public safety in the areas of civil aviation, nor should it undermine public confidence. The declaration sought simply requests the Court to recognise what I consider to be the clear meaning of the rules.

[178] Finally, the Court has not been advised as to what stage the Ministerial review into the Civil Aviation Rules Part 67, and the 1% rule have reached. I accept that the recommendations from such a review may impinge upon any declarations made, but there is no time frame given to the Court for that. In the circumstances, this is not a ground to refuse a declaration.

[179] Accordingly, there will be a declaration in terms of paragraph (a) of the statement of claim.

[180] It does not seem to me to be appropriate to quash all parts of the manual referred to in Prayer (b). The plaintiffs' concern is with the imposition of the 1% rule as an absolute rule, rather than as a screening test. It is only those parts of the rule that ought to be quashed. Before formulating the final wording of a declaration, it seems to me to be appropriate to discuss the matter further with counsel. To that end, the Registrar is requested to convene a telephone conference at a time suitable to counsel.

[181] For the sake of completeness, I note that the first plaintiff discontinued these proceedings.

[182] It is clear the issues traversed in this case have created a great deal of disharmony within civil aviation circles in New Zealand. To some extent, the report of the Select Committee on the Amendment Bill referred to earlier recognises this disharmony. It is not conducive to the interests of all parties in the industry and the public for such disharmony to continue. One would hope that the issues can be discussed sensibly by the parties, although the review process may have already overtaken this need.

[183] Memoranda as to costs are to be filed within 21 days of the handing down of this decision.

Signed at____________am/pm on_________________________2001.