Aviation medical decisions – judicial determinations (Part 2)

In this issue of *The Legal Lounge*, I conclude my two part series on recent judicial determinations on aviation medical decisions, focusing on a current New Zealand case.

Rights of judicial challenge against New Zealand aviation medical decisions

The options to review or judicially challenge aviation medical decisions in New Zealand were discussed in detail in the July 2011 edition of *The Legal Lounge*. To briefly re-cap, a person affected by an adverse medical decision may seek a medical convener review and/or appeal the decision to the District Court. A District Court appeal under s66 of the Civil Aviation Act (CA Act) is treated as a hearing 'de-novo', that is, the Judge may consider any relevant information and hear any evidence he or she considers fit, and come to his or her own view on the facts and medical issues in dispute. Under section 66(2) of the CA Act, the Judge may confirm, reverse or modify the decision appealed against. The Judge may also consider and rule on any legal issues that are in dispute. Questions of law may be further appealed to the High Court and, if leave is granted, to the Court of Appeal.

The medical appeal summarised below is one which many readers will already be familiar with to some extent, and it has already been the subject of articles in *NZ Aviation News*. However it is useful to revisit it in this column, as it is a rare example of a case which has now gone through the full appeals process on a point of law, and is currently back before the District Court for judicial determination of the substantive medical issue in dispute.

Ian Douglas Andrews* v *The Director of Civil Aviation [2010] NZCA 505 (9 November 2010)

The Facts

Mr Andrews is in his mid to late 60's, and is the holder of a NZ private pilot licence issued in 1986. In 1991 he suffered what the Court of Appeal referred to as "probably a minor stroke", and did not fly again until 1994. Between then and 2006 Mr Andrews has been issued with unrestricted Class 2 medical certificates at various times, permitting him to exercise the privileges of his NZ PPL. This was on the basis that he was assessed by his ME as having a five-year risk of six per cent, of suffering from a further cardiovascular event. The relevant General Direction issued by the Director under Part 2A of the CA Act dictates that a five-year risk of less than ten per cent "may be interpreted as not being of aeromedical significance".

In 2007 Mr Andrews' medical file was reviewed as part of a routine random audit by the CAA central medical unit. The 1991 incident was noted and Mr Andrews was required to undergo medical tests including a stress echocardiogram. Pending the outcome of those tests, a notice of conditions and restrictions was issued by Dr Preitner on behalf of the Director, preventing him from carrying passengers, towing gliders and flying over built-up areas. This notice was to last for ten days in accordance with s27I(6). Before the results of the tests were known, Dr Preitner then issued a further notice under s27I(7) imposing the same restrictions for the balance of the validity of Mr Andrew's medical certificate, purportedly on the basis that he had "reasonable grounds to believe that the appellant might be unable to safely exercise the privileges to which the certificate related". This was based on a view formed by Dr Preitner (and other CAA medical personnel) that Mr Andrew's five-year risk of a further cardiovascular event was between 10 to 20 per cent.

In the interim, Mr Andrews underwent the stress echocardiogram which produced a result "normal with no evidence of ischaemia", although mild left ventricular hypertrophy was noted, consistent with treated hypertension. After the CAA obtained the test results the medical file was referred to a neurologist, Dr Wallis, who gave an opinion that Mr Andrews did not meet the relevant medical standard. As a result the CAA refused to remove the conditions on his medical certificate. Mr Andrews appealed against that decision to the District Court.

District Court Decision (No 1)

A substantial amount of expert evidence was heard before the District Court in relation to Mr Andrew's medical history and, having regard to the relevant criteria, whether he met the relevant medical standard or could be considered medically fit to exercise the privileges of his NZ PPL, with or without conditions. However, Judge Tuohy did not make a determination on the medical issues and evidence before him at that time.

This was on the basis that the Judge ruled that the Director did not have the power under s27I(1) or (2) of the Act to suspend or impose conditions on a medical certificate solely on the basis that he held a different view from a non-CAA medical examiner, on the same information, in respect of a matter covered by the prescribed medical standards. In reaching this view, Judge Tuohy considered that this difference of opinion could not as a matter of law amount to "reasonable grounds" for belief under s27I that a person could not safely exercise the privileges to which the medical certificate relates. The Judge also considered that the specific powers of the Director to require further investigation of a medical certificate holder's medical condition, and to withdraw a medical certificate within 60 days of issue under s27H(2) and (3), militated against a broader interpretation of the powers to suspend or impose conditions under section 27I of the CA Act. The Judge thus favoured the view that s27I could only be invoked where there was a change in medical condition under s27C, or new medical information arose under s27H, that might give rise to a reasonable belief that a person may not be able to safely exercise the privileges of the licence. This decision was appealed by the CAA to the High Court.

High Court and Court of Appeal Decisions

On appeal to the High Court, Justice Fogarty reversed Judge Tuohy's finding on the point of law, ruling that the Director could rely on section 27I to suspend or impose conditions on a medical certificate on the basis that he held a different view, on the available medical evidence, as to whether or not a relevant medical standard was met. On appeal by Mr Andrews, the Court of Appeal agreed with the High Court ruling. In the latter decision, the Court of Appeal stated that while the exercise of s27I may arise from a change in medical condition, or new information about a medical condition becoming known, it was not constrained only to such situations. The Court of Appeal accordingly held that the Director could, in principal, use s27I to suspend or impose conditions on a medical certificate on the basis that he had reached a different view in relation to a matter addressed in a prescribed medical standard than that held by a non-CAA medical examiner.

However, the Court of Appeal stressed that whether he could use the s27I powers for this purpose in any particular case, would depend on the circumstances and whether the "reasonable grounds" standard is made out. In this respect, the Court noted that the "reasonable grounds" relied on must have a proper medical basis, and be able to be justified under judicial scrutiny.

Final determination on whether the Director's medical decision was based on "reasonable grounds"

It is my understanding that this case has now been reverted back to the District Court Judge to decide whether the medical basis relied on in forming the Director's view in this case did constitute "reasonable grounds" to impose the conditions on Mr Andrew's medical certificate. While on one level, the case may be confined to its facts, on another level, it is the first time since Part 2A of the CA Act was enacted that we will have a real opportunity to see how the District Court will assess what may constitute reasonable grounds for the Director to form a medical view that justifies departing from the medical view of a non-CAA medical examiner that a relevant medical standard is met, particularly in the absence of any new information that was not before the ME. This question is in my view even more pertinent in situations where the ME has had the benefit of expert medical opinion on a client's particular medical condition, before reaching their assessment. For this reason, I consider the decision is likely to have far greater ramifications for future civil aviation aeromedical decision making in New Zealand. I am sure we all await the final outcome with interest.

As an aside, it is my understanding that Mr Andrews is still legally able to fly without restrictions in the US, under the privileges of his US issued private pilot licence and medical certificate.

In the next edition of *The Legal Lounge,* I will discuss what legal and non-legal options may exist if you are generally "unhappy" with how you have been treated by the CAA or other government entities. I will also provide some tips on how to deal with lawyers, and things you can do to save on costs in the event you do need to engage a lawyer, in an aviation related dispute.

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