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## Negligence and Incompetence

I was with the Canadian Transportation Appeal Tribunal (TATC) for over ten years and the following paraphrased excerpts from one of my early 'Hearing Determinations' may provide additional context over Negligence and Incompetence. The Determination stands as jurisprudence in the Canadian Legal system; albeit, other jurisprudence may have been submitted since. Nevertheless, 'gross negligence' is not a simple topic as we must also understand and consider what '*due diligence*', '*duty of care*' and specifically - '**Incompetence**' means - amongst other legal terms. Primarily, I speak to 'negligence' and 'incompetence' under a real life situation that resulted in the Suspension of the Appellant's Canadian Aviation Document. Since law vary in every country, you should always seek professional legal counsel.

The following case example was classified a 'Designated Provision' Under Canadian Law pursuant to section 7.1 of the Aeronautics Act, and as such, was essentially treated as a "Strict Liability Offence". In a Strict Liability case, the Minister need only prove that the alleged offence (*actus reus*) was committed, there is no requirement for the Minister to prove there was intent (*mens rea*) to commit the offence, or as in this instance, to be incompetent. Therefore, the Minister must prove on a balance of probabilities, that the Appellant was incompetent while exercising his duties as an AME.

Should the Minister prove that the alleged offences were committed, or as in this case, a series of allegations demonstrating incompetence, the evidentiary burden shifts from the Minister to the Document Holder, who must then substantiate that all reasonable care (*due diligence*) was exercised to prevent the offence from occurring, or that the allegations as rendered by the Minister were unfounded. The evidentiary shift to the Document Holder is expressly provided under Section 8.5 of the Aeronautics Act, providing the Document Holder with a viable defence against "*prima facie*" offences. In this case, the Appellant was not charged with any one particular offence but deemed 'incompetent' by his actions or lack thereof; consequently, the process has a different composition and therefore given *raison d'être* the Minister need only prove based on a scale of probabilities, that the applicant was 'incompetent' in the performance of his duties as an AME.

Various dictionaries define 'incompetence'; however, the three definitions rendered in TATC (CAT) File No. C-0163-02 are the most relevant.

Black's Law Dictionary defines 'incompetence as "*lack of ability, legal qualification, or fitness to discharge the required duty*".

Funk and Wagnall's New Standard Unabridged Dictionary of the English states – *"Incompetence, incompetency. 1. General lack of capacity of fitness, or lack of the special qualities required for a particular purpose; insufficiency; inability. INCOMPETENT: 1. Not competent; not having the ability necessary or desirable for any purpose; unable to do properly what is required."*

Webster's Third New International Dictionary, Unabridged, 1976 Ed. – *"INCOMPETENCE. The state or fact of being incompetent; as (a): lack of physical, intellectual, or moral ability: INSUFFICIENCY, INADEQUACY."*

In addition to the Dictionary meaning of the word 'incompetence', it is important to examine judicial review of the meaning. One excellent and well-quoted case was between Re Mason and the Registered Nurses Association of B.C. (ref. 102 DLR (3<sup>rd</sup>) page 225), wherein, are presented five decision principles, which help define incompetence. They are as follows:

1. *The particular definition placed upon the word "incompetency" should be moulded by the object of the enactment in which the word appears.*
2. *All the definitions of "incompetency" focus on the lack of ability, capacity or fitness for a particular purpose.*
3. *The want of capacity, ability or fitness may arise from a lack of physical or mental attributes. However, a person not lacking physical or mental attributes may nonetheless be incompetent by reason of a deficiency of disposition to use his or her abilities and experience properly.*
4. *Negligence and incompetence are not interchangeable terms. A competent person may sometimes be negligent without being incompetent. However, habitual negligence may amount to incompetence.*
5. *A single act of negligence unaccompanied by circumstances tending to show incompetency will not of itself amount to incompetence.*

The words 'negligence' and 'incompetence' are often employed synonymously and are often thought of as being interchangeable. However, both words are quite different, though they might seem related, even to the point of having an effect upon the other's application. In review of the five principles, item 4 clearly states, "Negligence and Incompetence are not interchangeable terms. A competent person may sometimes be negligent without being incompetent". It continues by stating - "However, habitual negligence may amount to incompetence". The word "habitual" is defined as "formed or acquired by habit; usual, customary". In addition, we should also consider principle number 5, where we will see that: "A single act of negligence unaccompanied by circumstances tending to show incompetency will not of itself amount to incompetence".

All very well and good but what about the final Determination?

*.... The Minister provided the Tribunal with a vast array of evidence representing a broad selection of work performed by the Applicant. The Minister presented evidence of defects that when viewed on their own merit, might be construed as 'exclusively negligent', while other*

*presented evidence, clearly demonstrated a coherent case of 'habitual negligence' tantamount to incompetence, ultimately proving on a balance of probabilities, that Mr. X was incompetent in the performance of his duties as a professional AME....*

*... In the context of this case, I have analysed the definition of the word "Incompetence" and tested the meaning against the evidence supported by both parties. I determined that rather than one or two specific situations or instances against an Applicant, there must be (to sustain a balance of probabilities) substantial evidence in support of a sequence of events that clearly demonstrates the Applicant is 'incompetent' and not merely 'negligent' in the performance of his/her duties as an AME. I have also examined the context of when 'negligence', through serial or habitual practice, develops into incompetence....*

*... the Minister has successfully proved on a 'balance of probabilities', that the Document Holder was incompetent as per definition, in the performance of his duties as a Licensed AME. Mr. X did not exercise 'due diligence' in the execution of his duties, nor did he conduct himself as a professional AME would be expected to perform those duties. To answer the question Did Mr. X do everything that a reasonable person (AME) would have done during the course of the Annual Inspection or a similar situation? The tribunal believes that he did not.*

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