D v Kong Sim Guan
[2003] SGHC 165

Case Number : Suit 150/2002, 204/2002

Decision Date : 31 July 2003

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Tan Teng Muan and Ms Deanna Kwok (Mallal and Namazie) for plaintiff; Dr Myint Soe and Deepak Raja (MyintSoe Mohamed Yang and Selvaraj) for defendant

Parties : D — Kong Sim Guan

Civil Procedure – Rules of court – Complaint against father alleging sexual abuse of infant daugther – Whether appropriate for father to conduct legal proceedings on behalf of infant as next friend – Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 76 r 3(7)(c)(iii)

Tort – Defamation – Absolute privilege – Whether statements to Complaints Committee of Singapore Medical Council protected by absolute privilege

Tort – Defamation – Qualified privilege – Whether medical practitioner motivated solely by need to defend his professional reputation in making statements

Tort – Negligence – Duty of care – Whether duty of care owed by medical practitioner to third persons who might be adversely affected by contents of practitioner's report

1 This is a consolidated hearing of two suits: Suit 150/2002 was a claim by D on his own behalf and as next friend of his seven-and-a-half-year-old daughter ("the child") against the defendant Dr Kong Sim Guan ("Dr Kong") for alleged negligence in the psychiatric assessment of the child; Suit 204/2002 was a claim by D against Dr Kong for alleged defamation.

Suit 150/2002 (Negligence): a preliminary issue

2 The negligence alleged against Dr Kong in the Statement of Claim was as follows:

> …
>
> 5. The 1st Plaintiff [child] was referred to the Defendant [Dr Kong] for an assessment following a police report by her mother that the 1st Plaintiff may have been sexually abused by the 2nd Plaintiff [D].
>
> 6. After negligently assessing the 1st Plaintiff and her mother, the Defendant negligently rendered a written opinion dated 25 July 2000 … concluding that the 1st Plaintiff had been sexually abused by the 2nd Plaintiff.

The complaint was that the father (D) had sexually abused the child. Whether this complaint was true or not remained an open question. It seemed therefore rather inappropriate for the alleged wrongdoer (D) to be suing Dr Kong on behalf of the alleged victim (the child).

3 The Rules of Court ("the Rules") recognise the need for caution before a person is allowed to conduct legal proceedings on behalf of an infant as next friend. Order 76 r 3(7)(c)(iii) specifically prohibits any person from so doing unless the solicitor acting in the matter files Form 190, prescribed under the Rules, certifying that the next friend has "no interest in the cause or matter in question adverse to the person under disability". No such certificate was filed when D, in February 2002, initiated these proceedings. It was filed only when

Dr Kong moved to have the claim on behalf of the child struck out for lack of compliance of O 76. The certificate filed was signed by Mr Tan Teng Muan ("Mr Tan"), counsel for D in these proceedings.

4 Despite that certification, I had concerns about the propriety of allowing D to proceed with this action in the name of the child: it seemed to me, on a perusal of the pleadings, that there was an obvious conflict of interest between D and the child and that it would be inappropriate to allow D to continue the action on behalf of the child.

5 I voiced these concerns to Mr Tan and to Dr Myint Soe (who appeared for Dr Kong). Mr Tan explained that he had issued the certificate because his client (D) had denied any improper conduct with the child. I reminded Mr Tan that in filing such a certificate he was acting as an officer of the court and not in the partisan interests of his client: the highest professional standards would therefore be expected. I told Mr Tan that a mere denial by D of improper conduct would not detract from the fact that there was a conflict. Mr Tan, on hearing these views, requested that the hearing be adjourned to the next day to enable him to take instructions from his client. I granted the request.

6 The next day, Mr Tan applied for leave to withdraw the action instituted by D on behalf of the child. I granted the application but reserved for further consideration the question of costs occasioned by the discontinuance in order to consider whether I should – under O 59 r 8 of the Rules – require Mr Tan to bear the costs of the withdrawal personally. The trial thereafter proceeded with D as the only plaintiff.

7 In the final submissions at the end of the hearing, Mr Tan stated that in giving the certificate he had relied not merely on D's word but on the fact that the French courts had ultimately granted joint custody to D and his former wife. Mr Tan said that he inferred from this that the French courts had found no merit in the allegations of child sexual abuse. Mr Tan also pointed out that Dr Kong had applied to strike out the action instituted by D on behalf of the child as an abuse of process. The assistant registrar dismissed that application and that decision was upheld on appeal. The issue of conflict, Mr Tan pointed out, was relevant to the application to strike. Mr Tan pointed out that when this court raised the question of the propriety of the O 76 certificate that he had issued – a question not formulated in such clear terms at the hearing of the strike application – he immediately realised the problem and advised his client to withdraw that action.

8 I was satisfied with the explanation given by Mr Tan and ordered that the costs occasioned by the discontinuance of the action on behalf of the child be borne by D.

The factual background

9 D and his wife, E, were French citizens. The couple first met at a nudist beach. In the words of Mr Tan, they practice naturism. They have only one child – a daughter (the child) – born in France in 1994.

10 D is a lawyer. E is a medical doctor. In 1998, D came to Singapore to take up a posting as an executive in the Singapore branch of a French bank. His family accompanied him. In Singapore, E did some voluntary work at a hospital and after some months secured full-time employment in the clinical research section of that hospital. Sometime in 1999, the child started attending a playschool.

11 According to D, his matrimonial relationship with E – which was already under strain in France – took a turn for the worse in Singapore. It would appear that differences between them arose because

E suspected that D, who had been a homosexual prior to their marriage, was returning to his homosexual ways. D on his part suspected that E was having an extra-marital affair.

12 On 19 May 2000, E in a complaint to the Family Court alleged that D had physically assaulted her and obtained a personal protection order for herself and the child. On 7 June 2000, D applied for and obtained a personal protection order as against E. On 9 June 2000, E together with the child left the matrimonial home. On 13 June 2000 (as will be elaborated upon below), E learnt that the child had told her teachers about D stroking her vagina and allowing her to handle his penis. She (E) made a police report on the same day.

13 On 14 June 2000, E applied to the Family Court in Singapore for custody, care and control of the child and maintenance for the child. Also on 14 June 2000, D commenced proceedings in the French courts for divorce. On 15 June 2000, D cross-applied to the Family Court in Singapore for interim custody, care and control of the child pending the outcome of the proceedings in France. On 6 August 2000, E and the child left Singapore for good.

The child at playschool

14 The children at the playschool are encouraged to have a nap during their lunch break. Ms F, a teacher at the playschool, observed that the child had the habit of putting her hand on her panties and rubbing herself. She conveyed these observations to Mrs G, the principal of the playschool. Mrs G too noted similar behaviour. Mrs G told the court that she also saw the child hugging a bolster in a rocking motion and rubbing herself against a mattress.

15 In February 2000, after returning from a holiday in Australia with her father, the child told her classmates and Ms F that she and D had stayed at a place where people walked about naked, ate naked, slept naked and did everything naked. She also stated that she slept naked with D and that D allowed her to touch his penis but had asked her "not to squeeze too hard as you will hurt it". Ms F reported what the child had said to Mrs G.

16 Sometime thereafter when Ms F saw the child rubbing her vagina, Ms F asked the child why she was doing that. The child told Ms F that her father does it for her at night so that she can sleep. Ms F asked the child to describe how her father did it. The child demonstrated by touching Ms F's arms, thigh and crotch.

17 During lunch break on another occasion, Ms F again asked the child why she liked to rub herself before she slept. The child replied that it made her feel good. The child also said that she would go to her father's bed at home and she needed her father to rub her to get to sleep. She demonstrated what he did by stroking Ms F's back, thigh and crotch.

18 Ms F reported this conversation to Mrs G who in turn informed Mrs H, a director of the playschool. On Mrs H's suggestion, Mrs G tried to find out from the child what her father was doing to her. Mrs G testified that the child was initially hesitant to respond saying that it was a "secret" between her and her father but later told her that he touched her so that she can sleep and said words to the effect that it was so nice that she felt like flying and demonstrated that feeling by making flying movements with her outstretched arms.

19 The account given in court by Ms F and Mrs G as to what the child had told them was not challenged.

The police/MCDS reports

20 At about 11am on 13 June 2000, Mrs G received a telephone call from E. Apparently E had, that morning, heard from Mrs H about what the child had told her teachers and wanted more information from Mrs G. Mrs G briefly told E what she had seen and heard from the child and from Ms F. Mrs G testified that E appeared surprised and upset and within the hour turned up at Mrs G's office and suggested that they immediately make a police report. Mrs G agreed and the two set off to the Tanglin Police Station.

21 At the police station, Mrs G wrote out her report and was about to sign it when she received a phone call from Mrs H that the school should not make a report but should instead report the matter to the Ministry of Community Development and Sports ("MCDS"). Mrs G therefore did not sign the report and returned to the playschool.

22 E remained at the police station and made the police report. That report was produced in court as an agreed document. It read:

> I am the mother of [the child], a girl of 5½ years who is studying in [playschool].
>
> On 13/6/00, in a teleconversation with her teacher [Mrs G], she informed me that the child told her that:
>
> 1. [D], my husband, had masturbated the child.
>
> 2. [D] also made her masturbate him.
>
> I want the police to investigate this.
>
> [Mrs G] told me that the incidents were first reported to [Ms F] in early March 2000 and a week subsequently to her. [Mrs G] also told me that the child was able to give a good description of what happened.
>
> That is all.

That evening E referred the child to Dr Margaret Holloway, a paediatrician, for a medical examination. Dr Holloway found no evidence of sexual assault but stated in her report (which was produced in court by D) that: "These findings are in no way incompatible with the events of the reported disclosure by the child, and do not contradict the validity of the details of such a disclosure".

23 On 14 June 2000, Mrs H sent a report chronicling what Ms F and Mrs G had seen and heard from the child to the MCDS ("the School Report"). Mrs H was not called as a witness in these proceedings but the testimony in court of Mrs G and Ms F was broadly consistent with what Mrs H had summarised in the School Report. On the right margin of the School Report, Mrs H had noted her own comments including comments on the action taken by the playschool.

Dr Kong Sim Guan

24 M/s Salem Ibrahim & Partners ("Salem Ibrahim"), the solicitors acting for E in her matrimonial disputes with D, arranged for Dr Kong, a consultant psychiatrist practising at the Psychiatric &

Behavioural Medicine Clinic (Ang & Kong) at Mount Elizabeth Medical Centre, to give a psychiatric report on possible sexual abuse committed by D on his child. For this purpose Dr Kong interviewed E on 19 June 2000 and obtained from her, details of what E had learnt from the playschool and other relevant information. According to Dr Kong, E told him that she had tried to question the child on the alleged sexual activities with the father and felt useless as a mother because the child had refused to answer, saying it was a "secret". She therefore decided to refer the child to a child psychiatrist.

25 Amongst the matters that Dr Kong recorded in his clinical notes of what E told him at this interview were:

(a) The child's teachers and principal had learnt from the child that she was sexually stimulated by her father and that the father had induced the child to masturbate him;

(b) The teachers had noted the child masturbating herself in class.

Dr Kong told the court that in the context of what E had been told by the teachers, he understood the word "masturbate", as used by E, to mean "touching or rubbing of the genitals: a kind of stimulation not necessarily resulting in an orgasm (in the case of the child) or ejaculation (in the case of the father)". Dr Kong told the court that what the child told him was consistent with E's account to him of what the teachers had told her.

26 From his interviews with E, on 19 June 2000 and 5 July 2000, Dr Kong got to know about the backgrounds of E and D: how they met; their decision to get married; the birth of the child; D's homosexual leanings; their matrimonial problems; and their relationship with the child. The impression Dr Kong had of the child on 19 June 2000, when he saw the child briefly after interviewing the mother, was that she was a talkative and intelligent girl who, being a five-year-old, was still naïve and immature. He saw the child again in play assessments on 23 and 30 June; 4 and 5 July 2000.

The preliminary report

27 On 4 July 2000, Dr Kong was informed by Salem Ibrahim that E had planned to take the child with her on a trip to South Africa but D had applied to court for an injunction restraining E from so doing. If the injunction was granted, the child would be with D whilst E was in South Africa and Salem Ibrahim asked Dr Kong for his professional opinion whether this, in view of the allegations against D, would be prudent.

28 As the application for the injunction was scheduled for hearing on 5 July 2000, Dr Kong's response was needed on an urgent basis. Dr Kong on 5 July 2000 sent the following response to Salem Ibrahim:

> This is to confirm that the abovenamed is currently undergoing psychological assessment of her social and emotional adjustment. This assessment is likely to be completed shortly and a report will be tendered in due course.
>
> In the interim, it is my opinion that the child should be under the care, control and supervision of her mother. Pending the outcome of the investigation, I am of the view that it is not in the interest of the child that she should be with the father for the moment and if the child is to remain in Singapore, she should be in the care of her mother only.

D failed to obtain the injunction he sought. He ascribed that failure to the contents of the report of 5 July 2000 of Dr Kong. No court documents or other evidence was, however, tendered in support of

this assertion.

The MCDS/police investigations

29 Towards the end of June 2000, Karina Lim ("Mrs Lim"), a child protection officer with MCDS, contacted Dr Kong. Mrs Lim told Dr Kong that MCDS was interviewing D over the allegations of child sexual abuse contained in the School Report and asked Dr Kong for a copy of his psychiatric assessment of the child. Mrs Lim followed up, on 6 July 2000, with a written request for his report. In that letter, she specifically asked Dr Kong for a "fast response".

30 Dr Kong told the court that in that conversation with Mrs Lim, Mrs Lim gave him an account of what was stated in the School Report and that what Mrs Lim told him was consistent with what E had told him on 19 June 2000. He also told the court that Mrs Lim had requested him not to interview D or the teachers until MCDS completed its interviews.

31 About that time, Dr Kong also received a phone call from one Inspector Patrick Tham ("Insp Tham"), a police officer. Insp Tham told Dr Kong that the police were conducting investigations on the report of child sexual abuse made by E and would be interviewing D and the child. Dr Kong told Insp Tham that he was then interviewing the child and asked Insp Tham to permit him to complete his interviews before the police saw the child. Insp Tham, after ascertaining Dr Kong's credentials, agreed to that request and asked Dr Kong not to interview D until the police investigations were over. Insp Tham also asked Dr Kong for a copy of his psychiatric report on the child when it was ready.

32 Dr Kong completed his report ("the Kong Report") on 25 July 2000 and sent copies thereof to Salem Ibrahim, MCDS and the police.

E and child leave Singapore

33 On 4 August 2000, Dr Kong learnt from E that she had obtained employment in the United Kingdom and would, on 6 August 2000, be leaving Singapore with the child to take up residence in the United Kingdom. That was the last occasion that Dr Kong saw the child or E. Effectively, the doctor-patient relationship between Dr Kong and the child ceased from that time.

34 After E's departure from Singapore, her solicitors applied for a stay of the custody and maintenance proceedings in Singapore on the grounds that the French courts where D had commenced divorce proceedings were a more

convenient forum for the issue of custody, *etc*, to be determined. The district court granted that application despite objections from D. That decision was upheld, on appeal, by Lai Kew Chai J.

The Kong Report

35 In the Kong Report, Dr Kong summarised what he heard from the child during each of the sessions that he had with her. Until the later part of the session on 30 June 2000, the child did not say anything significant. In the later part of the session on 30 June 2000, the child noticed the genitals of a male anatomically correct doll that was in Dr Kong's consultation room and commented that it (the penis) was called "*zizi*" in French. The Kong Report goes on to say:

> To a question from me, she said that she had seen a real one, her father's "*zizi*" and in fact, had touched it and father would laugh. She then mentioned that the female genitalia was "*pila*" and

her dad had touched it, something she called "*toucher-pila*" (I found out later that this was French for touching the female genitalia.) She enjoyed the *toucher-pila*.

36 The session on 4 July 2000 started with the child doing a drawing. Dr Kong formed the impression that the drawing was replete with phallic symbols. Having completed the drawing, the child talked of her father and said he was strong and fun to be with. Dr Kong followed up on this statement. To quote from his report:

> When asked whether it was "*tushi pila*", she put her finger to her lips and said "shh". It started a long time ago, from the time she was three. She would crawled [*sic*] into father's bed and put daddy's hand on her *pila* and she would be touching his *zizi*. Sometimes, they would do it in a secret place, got a big fluffy bear and curled up in a cupboard and she would pull her father in, father would be naked on waking up. They would then touch each other in the private parts. It happened almost every day in the first house, not in the second house as dad was not there. They did not want Auntie to know when they play *toucher pila*, anyhow Auntie was in the kitchen preparing breakfast.

The "Auntie" referred to by the child was the family maid who helped to look after the child.

37 During the 4 July 2000 session, the child also told Dr Kong about a game she plays with her father in the car when he takes her to the playschool. Dr Kong reports:

> She would sing a song about the sun and the moon. Towards the end of the song, she would substitute the actual lyrics with the words "*toucher pila*" and she would pull her father's hand to put it inside to touch her *pila*.

Dr Kong did not on that day try to probe further into the matter.

38 During his session with the child on the next day (5 July 2000), Dr Kong started talking to the child about the father playing "*toucher–pila*" with her. Dr Kong reported that the child was defensive and said that actually she started the game. Dr Kong commented that it was not a good game to which she responded that it was all for fun with emphasis on the word "fun". In his report Dr Kong goes on to say:

> I then said that the police might be interested in what is happening. "No, they would not know, father would not tell them". But I replied saying that others may tell the police if they knew. At this, she was a bit frightened. I reassured her and she then replied boldly "I will tell them I did it for fun".

As the child was tense, Dr Kong turned her attention to some toys that were in the room and the session ended soon after. Dr Kong said that he mentioned the police to the child because he wanted to prepare her for the police interviews which were in the offing.

39 Dr Kong formed the view, after the many sessions he had with the child and the two sessions he had with E, that D had involved the child in sexual activities with him. In the final part of the Kong Report under the heading "Opinion", Dr Kong stated:

> Given the account of the child in play therapy and what the mother had reported, it is my opinion that the father had involved the child in sexual play and activities probably from sometime after January 1998 until about June 2000.

> This repeated and continuing sexual activity and stimulation throughout the period in question amounted to child sexual abuse as the child was only a preschooler and such activity was both socially and developmentally inappropriate for the child. This is particularly so as the sexual activity crossed generational boundaries and tantamount [*sic*] to an incestuous kind of relationship.

Thereafter Dr Kong made some general comments and concluded:

> In this sense, the father had not fulfilled the responsibility of a father to her but had instead treated her as a sexual equal. More probably, in view of his own sexual needs, he is treating his young child as an object for his own personal gratification without due regard and consideration of how his activity would affect the child's mental health both now and in the future. This is both socially unacceptable and to my mind against what is the accepted behaviour of a responsible parent.
>
> Given the deterioration of sexual relationships between the father and mother, in my opinion it is likely that the sexual activity the father encouraged in the child was a substitute for the sexual gratification which the father desired. In this sense, the father's behaviour is entirely selfish and did not have the interest of his daughter at heart at all. In view of the father's behaviour towards the child being of an inappropriate and self-centred nature, it is my recommendation that the father should not be granted custody or access to the child. Where access is to be granted on legal grounds, such access must always be supervised until the child is mature enough to distinguish right from wrong.

Dr Kong gave his report after interviewing two persons: the child and the mother. It is clear from a reading of the Kong Report that he did not interview D or the teachers.

40 Dr Kong, in the course of his testimony, admitted that it would be desirable when conducting an assessment of a child's allegations of sexual abuse to interview the alleged perpetrator as well as the person/s to whom the child had narrated the incidents. He told the court that he had not attempted to interview D or the teachers at that stage because of what had been asked of him by MCDS and the police. Dr Kong told the court that Mrs Lim's account to him of the contents of the School Report indicated that what the child had told the teachers was consistent with what the child had told him.

Dr Wong Sze Tai/the Wong Report

41 In order to rebut the conclusions in the Kong Report, D, on 1 August 2000, consulted Dr Wong Sze Tai ("Dr Wong"), a child psychiatrist practising at the Gleneagles Medical Centre. The consultation was arranged by Mr Tan. Dr Wong interviewed, *inter alia*, D and the teachers at the playschool and put up a report that, together with its enclosures, totalled about 750 pages.

42 Dr Wong's conclusion, as stated in his report dated 28 September ("the Wong Report"), was as follows:

> Based on the evidence I have gathered from carrying out all the above tasks, I arrive at the conclusion that the allegation of child sexual abuse against [D] is false, *ie* fictitious.

It is to be noted that Dr Wong's assessment that the allegations of child sexual abuse were false was given without the benefit of any interview with the child. I highlight this point because Dr Wong in his report was most critical of the fact that Dr Kong had given his report without interviewing D.

43 The Wong Report, as its sheer volume would indicate, contained a very detailed examination of the Kong Report and whatever Dr Kong had noted in his clinical records. I will not, because of its sheer length, attempt to even summarise the contents of the Wong Report. Suffice it to say that almost every act/omission particularised in the Statement of Claim to support the allegations of negligence against Dr Kong was derived from the Wong Report.

D

44 D testified that MCDS and the police had, after their respective investigations, exonerated him from the allegations of child sexual abuse. I have difficulty in understanding how D arrived at that conclusion. I formed the view that the more likely scenario was that with the child having left Singapore on 6 August 2000, MCDS and the police could not bring their investigations to a conclusion and therefore decided not to take further action in the matter.

45 That view was supported by the response from the MCDS to an appeal made to the Minister by D. In that response, the Deputy Secretary of the Ministry specifically told D:

> As you are aware, we have ceased all intervention/investigation into this case because your daughter left Singapore and the matter is therefore no longer within our jurisdiction. *At the time of ceasing investigation, we had not reached any conclusive findings*. As such, there is no issue of revising our findings. [emphasis added]

Lai Kew Chai J, in dismissing D's appeal against the stay order granted by the Family Court, took a similar view as to the reasons why the police ceased their investigation. To quote from his judgment at [8]:

> The police ceased their investigation after the daughter left Singapore. She was no longer within the jurisdiction of the police.

The judgment is reported in *Re A (an infant)* [2002] 2 SLR 137.

46 In any event, the question whether D did or did not sexually abuse the child was not an issue in these proceedings and I do not have to make any determination on that. I note, however, that Dr Wong, without the benefit of interviewing the child, came to the conclusion that D did not behave in any sexually improper way towards his child.

47 In his testimony, D admitted that the child would at times try to put his hand on her crotch but said that he always discouraged such behaviour and suggested that E may have been more permissive towards the child in this regard. D also admitted that he had taken the child to a nudist colony in Australia but denied any inappropriate sexual contact with the child. He told the court that he had allowed the child to examine his penis but that was for educational purposes. It was D's case that E, in order to bolster her claim for custody and maintenance, had coached the child into saying things that would incriminate D.

The claim

48 D, in his Statement of Claim, accepted that the child had been referred to Dr Kong by E for an assessment following her police report that the child may have been sexually assaulted by D. D's case was that Dr Kong was negligent in arriving at the opinion he gave in the Kong Report. D's case, as

pleaded in para 6 of the Statement of Claim, was that "after negligently assessing the child and [E]", Dr Kong "negligently rendered" the written opinion of 25 July 2000 (the Kong Report) concluding that the child had been sexually abused by him (D).

49 The negligence relied on by D, as particularised in his Statement of Claim, can broadly be summarised as follows:

(a) failure to interview D and the teachers; failure to complete all interviews with the child and failure to complete the process of assessment evaluation and/or validation before rendering his written opinion and/or recommendation;

(b) uncritical acceptance of the evidence of the child and E; incorrect interpretation of the child's behaviour and verbalisations and failure to consider alternative explanations for the allegations;

(c) failure to ascertain what the child had told E; what E had told the child about Dr Kong's attendance on the child; whether other professionals had been consulted;

(d) faulty and traumatic interview techniques;

(e) disregarding the child's repeated denials of sexual abuse and omitting, misrepresenting and/or falsifying the narrations by the child and E to make them consistent with the desired diagnosis and conclusions stated in the Kong Report; and

(f) failing to amend the Kong Report upon discovering that the child was capable of weaving elaborate stories and refusal to take into account evidence provided by D showing that E had coached the child.

50 The damages/loss allegedly suffered by D as a result of the alleged negligence and for which he claimed compensation were:

(a) being denied overnight access to the child;

(b) being unable to prevent the child being taken out of Singapore by the mother [E];

(c) being denied overnight access to the child by the French court;

(d) emotional pain, distress, anguish and social isolation caused by Dr Kong's endorsement of E's false allegations;

(e) stigmatisation and suspicion by the United Kingdom police, school authorities and child protection services to whom E had shown the Kong Report;

(f) personal inconvenience in having to travel to England every fortnight to exercise the day-time access to the child granted by the French court;

and as Special Damages, D claimed the following as at the date of the writ:

Psychiatric and lawyer's fee $ 85,427.14

Fees of French court-appointed expert	$ 1,692.93
Travelling expenses for exercise of access	$ 92,205.09
	$ 179,325.16

The tort of negligence

51 To quote Lord Wright in *Lochgelly Iron and Coal Company Limited v M'Mullan* [1934] AC 1 at 25, the tort of negligence requires "more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing". It was not seriously in dispute between the parties that to establish negligence, the plaintiff needs to show that the defendant owed him a duty of care to protect him from the kind of harm suffered; that the defendant was in breach of that duty; and that it was the defendant's breach of that duty which was the cause of the plaintiff's injury.

The duty of care

52 In *Smith v Eric S Bush* [1990] 1 AC 831, a surveyor instructed by a building society failed to spot a serious defect in a house and the building society granted a mortgage to the plaintiffs. Lord Griffiths asked the question: "[I]n what circumstances should a duty of care be owed by the adviser to those who act upon his advice?" and gave the following answer (at 864 to 865):

> I would answer – only if it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, that there is a sufficiently proximate relationship between the parties and that it is just and reasonable to impose the liability.

In that case, the surveyor knew that the survey fee had been paid by the purchaser. The surveyor also knew that the survey report would be relied on by the purchaser in order to decide whether or not to purchase the house. Dealing with these factors, Lord Jauncey of Tullichettle said at 871 to 872:

> In these circumstances they [the surveyors] must be taken not only to have assumed contractual obligations towards the building society but delictual obligations towards Mrs Smith, whereby they became under a duty
>
> towards her to carry out their work with reasonable care and skill. It is critical to this conclusion that the appellants knew that Mrs Smith would be likely to rely on the valuation without obtaining independent advice.

It is clear that this knowledge on the part of the surveyor was the key factor in the court holding that the surveyor owed a duty of care to the purchaser.

53 The approach in *Smith v Eric S Bush* was endorsed in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617 to 618 where Lord Bridge stated:

> What emerges [from the recent decisions] is that, in addition to the foreseeability of damage,

> necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed *a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other*. [emphasis added]

Lord Oliver at 633 put it even more forcefully when he said:

> Thus the postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement of what has been called a "relationship of proximity" between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be "just and reasonable".

and at 651 he emphasised:

> It has to be borne in mind that the duty of care is inseparable from the damage which the plaintiff claims to have suffered from its breach. It is not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained.

In *Caparo's* case, the House of Lords decided that auditors owe no duty of care to potential investors who rely on the accounts of a company audited by them.

54 It is to be noted that both *Smith* and *Caparo* were cases instituted by the parties (the purchaser and the potential investors respectively) who relied on the report. In the present case, D did not rely on the Kong Report at all. Indeed, Dr Kong could not – particularly since his conclusions were adverse to D – have foreseen that D would rely on his report. All that Dr Kong could have foreseen was that D may seek the services of another psychiatrist – as D did in this case – to counter his (Dr Kong's) adverse conclusion.

55 Mr Tan, in his closing submissions, relying on the following passage in the judgment of Lord Slynn in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 653,

> As to the first question, it is long and well-established, now elementary, that persons exercising a particular skill or profession *may* owe a duty of care in the performance to people *who it can be foreseen will be injured if due skill and care are not exercised*, and if injury or damage can be shown to have been caused by the lack of care. Such duty does not depend on the existence of any contractual relationship between the person causing and the person suffering the damage. *A doctor, an accountant and an engineer are plainly such a person. So in my view is an educational psychologist or psychiatrist* and a teacher including a teacher in a specialised area, such as a teacher concerned with children having special educational needs. [emphasis added]

submitted that as it was plainly foreseeable that D would suffer damage if Dr Kong did not exercise due care and skill in assessing the child, Dr Kong was under a duty of care to D.

56 In the *Phelps* case, a local authority in pursuance of its statutory duty towards children had engaged a child psychologist to examine Phelps. The child psychologist had negligently failed to discover a psychological defect that Phelps (his patient) was suffering from. The question before the court was whether, in those circumstances, the child psychologist owed a duty of care to Phelps. It

was that question that Lord Slynn was addressing in the paragraph relied on by Mr Tan. The House of Lords in that case found that even though the child psychologist was engaged by the local authority he had nevertheless a duty of care to his patient Phelps.

57 What Lord Slynn stated, in the paragraph relied on by Mr Tan, was that where it can be foreseen that a person will be injured if skill and care is not exercised by a professional, a duty of care "may" arise. In saying that, Lord Slynn was doing no more than repeating the law on duty of care as stated in *Caparo*. Indeed, in the same page of his judgment, Lord Slynn, quoting *Caparo* as authority, accepted that the question to be determined in claims based on negligence is whether the damage relied on is foreseeable and proximate and whether it is just and reasonable to recognise a duty of care. Mr Tan's submission based on the *Phelps* case that foreseeability will (by itself) give rise to a duty of care was therefore not tenable.

58 As discussed above, duty of care is a complex concept in which a number of elements have to be present before it can arise. In the present case, before it can be said that Dr Kong owed a duty of care to D, one would have to consider whether there was a relationship of proximity between Dr Kong and D and whether considering the circumstances, it was reasonable to impose such a duty on Dr Kong. It will also be necessary to consider whether the

damage suffered by D can be said to be caused by the breach of that duty by Dr Kong. It is only when all these factors are present that a duty of care will arise towards D.

59 It would have been helpful to D's case if he was able to illustrate that there was a recognised category of cases where the courts had held that a medical practitioner owed a duty of care to third persons who may be adversely affected by the contents of a medical report issued by that practitioner. In the present case, D was not able to show that such a category of cases existed.

Proximity/reasonableness

60 Mr Tan submitted that the proximity or neighbourhood factor in this case was very high as Dr Kong, in assessing the child and writing his report, would have had D very much in mind. I agree that Dr Kong would have had D very much in mind in assessing the credibility of the child – after all D was the "suspect" who had allegedly abused the child. But having D in mind is not sufficient for a duty of care to arise: there must exist a relationship of proximity or some compelling reason that makes it just and reasonable for that duty to arise.

61 I was unable in this case to find a relationship of proximity between Dr Kong and D or any compelling reason that made it just and reasonable for a duty of care to be imposed. To the contrary, Dr Kong was assessing a child who had made statements to her teachers strongly indicative of D having sexually abused her. D was not Dr Kong's patient: he was in fact the "suspect" in this case. In the circumstances, I did not think it was reasonable to impose on Dr Kong a duty of care towards D. If Dr Kong was negligent in the way he assessed the child – towards whom, on the authority of *Phelps*, he owed a duty of care – he would be liable in negligence to the child: but he owed no such duty to D and would therefore not be liable in negligence to D.

62 In this context, the case of *M v Newham London Borough Council* [1994] 2 WLR 554, is instructive. That was a case where a psychiatrist had been called upon by the local authority to assess whether a child (M) had been sexually abused. The psychiatrist came to the conclusion that the child had been abused by the mother's cohabitee and concluded that the mother could not protect M from further abuse by the cohabitee. The mother as well as M (through her next friend)

sued the local authority and the psychiatrist for damages for personal injuries arising out of breach of statutory duty and negligence. They alleged that the psychiatrist had failed to investigate the circumstances with proper care.

63 In dealing with the question of duty of care, Sir Thomas Bingham MR stated at 574 of the report of that case:

> The psychiatrist would in my view have recognised the mother as someone foreseeably likely to be injured if, as a result of her advice, the child were to be taken away from the mother. But the mother was not in any meaningful sense the psychiatrist's patient. The psychiatrist's duty was to act in the interests of the child, and that might very well mean acting in a way that would be adverse to the personal interests of the mother; she was concerned with those interests only to the extent that they could have an impact on the interests of the child. In this situation of potential conflict, I do not think the psychiatrist can arguably be said to have owed a duty of care to the mother …

It is interesting to note that whilst Sir Bingham took the view that the psychiatrist in that case owed a duty of care to the child and not to the mother, the other two judges took the view that as the psychiatrist was engaged by the Local Council in furtherance of the Local Council's statutory obligations, the psychiatrist did not owe a duty of care either to the child or to the mother. This majority view was upheld by the House of Lords.

64 The considerations that led the Court of Appeal and the House of Lords in the above case to conclude that the psychiatrist owed no duty of care to the mother would apply in our present case. Dr Kong too, similarly, owed no duty of care to D. This finding by itself is enough to dismiss D's claims against Dr Kong in negligence. I will, however, go on to consider the other matters raised.

The causal connection

65 Dr Kong's assessment of the child was but one aspect of the evidence placed before the authorities (both here and in France) by E and D in connection with their disputes over the child. Besides the Kong Report, there was a whole host of other matters (including the Wong Report when it became available) that was put in evidence. The burden was on D to show a causal connection between the Kong Report and the damages D allegedly suffered: D had to show that the Kong Report was "the" determining factor in decisions adverse to D taken by the authorities. D was unable to do so. Indeed there was insufficient evidence to show even that the Kong Report was "a" determining factor in this regard.

66 An order of a French court dated 6 October 2000 is instructive in considering the question of causation. That order referred to the Kong Report and the Wong Report but because the two were conflicting the court ignored both reports for the reason, as stated in the order, that: "Debate did not, naturally, permit to establish the facts". The French court granted custody to E and its reason for doing so, as stated in that order, was:

> Even though it may hurt the father, it is appropriate to say that if he is totally free to live up to his sexual choices as an adult, the way of life which those entail cannot be considered as corresponding to the interest of the child.

It would appear from the order of the French court that custody was granted to E not because of the

conclusions in the Kong Report but because the sexual choice D had made (bi-sexuality) did not correspond with the interests of the child. On appeal by D, a French Appeal Court set aside that order and granted joint custody to E and D. At that stage the child, when interviewed by a court-appointed psychiatrist, had apparently denied any inappropriate behaviour towards her by D. It is not clear from the evidence the extent, if any, to which this denial affected the decision of the French appellate court.

67 D, in my view, had failed to prove a causal link between the acts/omissions of Dr Kong and the injuries for which D was seeking compensation. That failure by itself is again sufficient to dismiss D's claim against Dr Kong in negligence. I will add that the claim by D for compensation in respect of emotional pain, social isolation and stigmatisation allegedly suffered by D as a consequence of the Kong Report could more appropriately – as in consolidated Suit 204/2002 – be the subject matter of a claim in defamation against Dr Kong. I will deal with D's claim in defamation against Dr Kong in Suit 204/2002 later in this judgment.

68 As D had not proved that Dr Kong owed him a duty of care, D's claims in negligence against Dr Kong based on a breach of that duty were without merit and ought to be dismissed. However, as so much time was spent on the issue of professional negligence, I will briefly review that issue.

Professional negligence

69 Whether a professional was negligent in the course of his work must be judged against the scope and nature of the work undertaken by that professional. In the present case, the scope of Dr Kong's work was to assess the credibility of the child *vis-à-vis* the statements she had made to her teachers about the sexual contact between her and D. Dr Kong assessed the child over a number of days and came to the conclusion that her assertions could be true. Anyone reading the Kong Report would know that the opinion expressed therein was based only on interviews with E and the child and without interviewing D or anyone else.

70 The failure to interview D was one of the main criticisms levelled against Dr Kong. Dr Kong told the court that he would have liked to have interviewed D before giving his report but refrained from contacting D because MCDS and the police had asked him to leave the interviewing of D to them. Dr Kong readily acceded to this request by the authorities. It should be noted, in this

context, that Dr Kong was a psychiatrist in private practice and, as he was engaged by E and not by any investigative authority, did not have any investigative powers.

71 Although D criticised Dr Kong for releasing the Kong Report without having interviewed D, I noted that the psychiatrists called by D also gave reports and arrived at conclusions without interviewing all relevant witnesses. In particular, Dr Wong – a most vocal critic of Dr Kong and the main witness of D – exonerated D of any misconduct towards the child without interviewing the child! Dr Wong had good reason for not trying to interview the child: the child was no longer in Singapore. Equally, Dr Kong had good reason for not trying to interview D: he had been asked by the police not to do so.

72 It seems to me that even if there was a rule that a psychiatrist conducting an assessment of the credibility of a person ought to interview all relevant persons before arriving at a conclusion, that rule cannot be an inflexible one. In general terms, a psychiatrist cannot be guilty of any impropriety if, for good reason, the psychiatrist is unable to interview a relevant person and it is apparent from the report he issues – as was the case in both the Kong and the Wong Reports – that the opinion

expressed was arrived at without that interview. I would note that even if Dr Kong had tried to interview D
– considering that D had at about that time refused to be interviewed by a psychiatrist appointed by the court in France – D may not have agreed to be interviewed by a psychiatrist appointed by E.

73 It was suggested to Dr Kong that had he interviewed D he could have performed some tests on D which would indicate if D had any pre-disposition to child sexual abuse. Whilst that may be so, such tests (despite what Dr Jean-Claude Bossard, the French psychiatrist who interviewed D in 2002 appeared to say) cannot really give definitive answers. As Dr Kong and Dr Danya Glaser – a leading psychiatrist from London called as an expert witness by Dr Kong – pointed out, even if these tests do not indicate any such pre-disposition, it would not follow that D had not committed the acts of sexual abuse described by the child. I cannot therefore accept the submissions of Mr Tan that Dr Kong was in breach of his duty of care to D by failing to conduct these tests on him or interview him.

74 In any event, it is evident from the testimony of Dr Glaser that Dr Kong, being a child psychiatrist, would not be the proper person to assess such proclivity in an adult. Bearing in mind that Dr Kong was not engaged by any public investigative authority but by E, questions as to who was to pay for the services of that adult psychiatrist would also arise. In our adversarial system, if D felt that undergoing psychiatric evaluation would assist him in countering the allegations in the Kong Report, it would be for D to arrange for this evaluation. By consulting Dr Wong that is what D did.

75 Another major criticism of Dr Kong was his failure to verify with the teachers what the child had told them. Such verification, it was submitted, was relevant to the issue of validating what the child had said to Dr Kong. Dr Kong told the court that he did not interview the teachers because what the child told him fitted in with what the teachers had reported to MCDS and he therefore did not see any pressing need to further interview the teachers.

76 Dr Glaser had, in her Affidavit of Evidence-in-Chief, characterised this omission to validate what the child had told Dr Kong with what the child had told her teachers as his greatest omission. However, Dr Glaser did not, at the time she swore her Affidavit of Evidence-in-Chief, know that MCDS had in fact given Dr Kong an account of what was contained in the School Report. When this fact was made known to her, Dr Glaser withdrew her criticism and accepted that knowledge of the contents of the School Report would be a sufficient validation of what the child had said to Dr Kong. I see no reason to disagree with Dr Glaser.

77 Another allegation of negligence that took up considerable time was the suggestion by D that Dr Kong, when presented with "evidence" that E had coached the child, refused to revise the Kong Report. This "evidence" was in the form of a video-recording taken on 5 August 2000 (the day prior to E and the child leaving Singapore) at the offices of Salem Ibrahim where D had a private meeting with the child. It was alleged that at the meeting the child
– using paper and colour pens brought to the meeting by D – drew a picture of a flower that had strong phallic overtones. A friend of D – who testified on D's behalf in these proceedings – was present at this meeting.

78 The friend – using a video-camera that D had also brought with him
– recorded this drawing. The recording did not show the child executing the drawing but showed the child talking about the drawing to D. It was submitted by Mr Tan that this drawing coupled with what the child said to D was "evidence" that the child had been coached by E – herself a medical doctor
– to make such phallic drawings in order to strengthen E's case for custody. It was further submitted that refusal by Dr Kong to revise the Kong Report when presented with this "evidence" constituted negligence.

79 The submission that E had coached the child to make phallic drawings in order in some way to improve her chances of obtaining custody of the child was sheer speculation. I was therefore not surprised that Dr Kong did not wish to revise his report in spite of this "evidence". In any event, by the time this "evidence" was presented to Dr Kong, not only had Dr Kong completed his report but E and the child were no longer in Singapore. Bearing in mind that Dr Kong was not an investigator employed by any investigative authority but merely a private psychiatrist employed by E to assess the child, there could not have been any continuing obligation on Dr Kong to evaluate new "evidence" at the demand of the person suspected of having abused the child.

80 D also alleged that Dr Kong was negligent in not having discerned that E had coached the child into making the statements about D. On this alleged coaching, Dr Glaser had this to say:

> If the child's description had been based on coaching by her mother, this would have needed to have been repeated and very systematic for the child to be able to respond so immediately to seeing the male doll's genitalia and to immediately go on to use the term *toucher* "*pila*". It is also unlikely that she would have spontaneously described her enjoyment of it. Moreover, the coaching by her mother would have needed to include the notion of secrets.

I agree with that assessment by Dr Glaser. It seemed to me highly unlikely that E had coached the child into saying what she said to the teachers or what she said to Dr Kong. In any event, Dr Kong was a trained and experienced child psychiatrist and there was no reason to conclude that he was not alert to the possibility that a child who was in the centre of an acrimonious custody battle could have been coached into saying the things she said.

81 D also made allegations that Dr Kong had been selective and biased in his report and had omitted to take into account matters such as the note in his clinical notes that the child denied child sexual abuse. In this regard, much was made about an entry "Deny CSA" in Dr Kong's clinical notes. I found no merit in these allegations that Dr Kong had been selective and biased in his assessment. With regard to the note "Deny CSA", I accept Dr Kong's explanation that that was merely his shorthand way of noting that the child had denied any invasive sexual contact.

82 To succeed in discrediting Dr Kong's methodology or conclusions, D would have to show that no professional man of ordinary skill would have adopted that methodology or arrived at those conclusions if he was acting with ordinary care (*Hunter v Hanley* [1955] SC 200 at 206). This was a heavy burden on D. In spite of the immensely detailed testimony adduced on his behalf and the protracted cross-examination of Dr Kong and other witnesses called by Dr Kong, D came nowhere near to discharging that burden. In this regard, I accept the evidence of Dr Glaser, that there was nothing seriously remiss about the way Dr Kong assessed the child. Dr Glaser, on the basis of the documents which she had read, was of the view that "it is likely that Dr Kong had reached the correct conclusion, namely, that the child is likely to have been sexually abused by her father".

83 For the above reasons, I find no substance in D's claims that Dr Kong had been negligent in his assessment of the child.

Suit 204/2002 (Defamation)

84 In this suit, D alleged that Dr Kong had – in certain passages of an explanation Dr Kong sent to the Complaints Committee of the Singapore Medical Council ("SMC") in answer to a complaint to the SMC made against Dr Kong by D – defamed him and sought damages therefor. The complaint to the SMC, in effect, was that:

(a) Dr Kong had not conducted a sufficiently thorough diagnostic investigation into the complaint of E and in dereliction of his professional duty to his patient failed to follow good clinical practice in his assessment and as a result came to the wrong conclusion that the child had been sexually assaulted by D. By not following good clinical practices, Dr Kong also failed to uncover the fact that E had fabricated the allegations and had coached the child for the purpose of Dr Kong's evaluation.

(b) As D and E were patients of Dr Kong's partnership, Dr Kong, in undertaking the brief for E to assess the child, was in an immediate and obvious position of conflict of interest.

That complaint was dated 4 January 2001. Amongst the documents annexed to the complaint was the Wong Report.

85 As required by s 40 of the Medical Registration Act (Cap 174) ("the Act"), the SMC referred the complaint to its Complaints Committee. The Complaints Committee decided to call upon Dr Kong to answer the allegations against him. Accordingly, on 8 February 2001, acting under s 40(20) of the Act, the Complaints Committee sent a copy of the complaint and a copy of the Wong Report to Dr Kong and invited him to give his written explanation.

86 On 26 February 2001, Dr Kong gave to the Complaints Committee a detailed response ("the Response") to the complaint. Included in this Response was a section headed "A Rebuttal" which dealt specifically with the detailed criticisms levelled against Dr Kong in the Wong Report. These criticisms were the mainstay of the negligence alleged against Dr Kong in Suit 150/2002.

87 The Complaints Committee had authority, under s 41 of the Act, to:

(a) dismiss a complaint if it was able to conclude that the complaint was without merit;

(b) issue a letter of advice/warning if it decided that there was misconduct but it was of a nature that could be sufficiently dealt with by the issue of such letter;

(c) in respect of complaints not dealt with under (a) or (b), order that a Disciplinary Committee hold a formal inquiry into the complaint.

The Complaints Committee informed Dr Kong on 24 September 2001 that it had concluded that there was no evidence of professional misconduct on his part and that it had ordered that the complaint be dismissed.

88 The fact that the Complaints Committee dismissed the complaint without even issuing a letter of advice amounted to a complete exoneration by the Complaints Committee – and hence the SMC – of all the allegations of misconduct in the complaint by D.

The alleged defamatory words

89 Three passages from Dr Kong's Rebuttal were singled out by D as being defamatory of him and these formed the basis of D's claim in Suit 204/2002. I set out below these three passages and the defamatory meaning that D attributed to each passage:

Passage (a):

The unusual pictures drawn during the access on August 5:

> Could it be possible that the girl was coached to draw such a drawing by [D], who according to [E], is an accomplished artist? Taking all these facts into consideration, it would appear that the phallic drawing incident during the access of August 5 was stage-managed by [D] and his friend.

In their natural and ordinary meaning, the said words meant and were understood to mean that it was D who coached the child to draw the phallic drawing mentioned therein, and that the whole incident was plotted, controlled and produced by D and his friend. The words in their natural and ordinary meaning meant and were understood to mean that D was capable of plotting to fabricate evidence to incriminate E and that he actually did it.

Passage (b):

> **The so-call [*sic*] fib about play in the cupboard (page 22):**
>
> After an escorted tour of [D's] residence with [D] as the guide, of course, Dr Wong concluded that the sexual play disclosed to me by the child are all lies. The cupboards are too small, I should have see [*sic*] them for myself. I have been fooled. Have I? Please examine page 6 of 7 of [E's] email (Email B) (line starting with "Regarding the cupboard …) in which she indicated that there was indeed a huge cupboard in the home in which such sex-play could have taken place.
>
> This is an example of what psychiatrist should not do and that is to play detective. Dr Wong was probably shown what he was supposed to see only. If he had left it to the police, they would done a better job, even if [D] were to tear away the cupboard and renovated his residence entirely.

In their natural and ordinary meaning, the said words meant and were understood to mean that D escorted Dr Wong on a tour of his residence so that Dr Wong was only shown what he was to see and not the allegedly incriminating evidence and that D had destroyed evidence that could have incriminated him.

Passage (c):

> **Omission to interview the perpetuator [*sic*] (page 29):**
>
> I have already covered this in my letter of defence and I shall not repeat myself. Arthur Green (page 32) whom Dr Wong quoted to support his contention of false allegation here wrote in the book he co-edited with Diane Schetky (quoted by Dr Wong on page 37) entitled *Child Sexual Abuse: A handbook for Health Care and Legal Professionals*, that fathers who engaged in incestuous acts with their daughters have the following characteristics: 1) domineering and tyrannical, 2) alcohol abuse,
> 3) unstable employment, 4) social and physical isolation, 5) sexual deviation and 6) background of emotional deprivation and physical
> and sexual victimization. Under sexual deviation, … "… most incestuous fathers went through a period of hypersexuality before initiating incest." This is highly relevant as Dr Wong claimed that this is not a case of sexual abuse but that of a highly eroticised child. There is a fine thin line between sexual abuse and hyper-eroticism but first I shall consider Dr Wong's hypothesis of the child being hyper-erotic. At least, in his opinion, Dr Wong is willing to allow that the child has been eroticised and since the child is close to father, it has to be the father who initiated it (page 42).

In their natural and ordinary meaning, the said words meant and were understood to mean D had one

or more of the social depravations and mental and behavioural disorders of fathers who engaged in incestuous acts with their daughters listed in the said paragraph, including a pathological obsession with sex and that he was a father who was likely to sexually abuse the daughter and that it was possible that D had an incestuous relationship with the child and that he initiated incest with the child.

90 Dr Kong raised privilege – both absolute and qualified – as his defence to the claim in defamation.

Qualified privilege

91 In his Rebuttal, Dr Kong was defending himself against allegations that he was incompetent, negligent and partisan in his professional assessment of the child. If Dr Kong could not satisfy the Complaints Committee that those allegations were baseless, he faced the prospect of having to appear before a Disciplinary Committee and his professional reputation and future was at risk. Dr Kong's response to these allegations was therefore understandably robust.

92 In defending his conduct, Dr Kong – much as Dr Wong had done in criticising Dr Kong – made inferences and suggested explanations in connection with the events that had happened different from the inferences and suggestions made by Dr Wong. It is the inferences and suggestions contained in the three passages quoted above that are said to be defamatory.

93 In passage (a), to the extent that it was suggested that E had coached the child, Dr Kong was making the point that, if there was any coaching at all, the coach may have been D. That, in my view, was a fair point to make. Indeed, when considering the evidence that was adduced by D relating to the child making the phallic drawings at the offices of Salem Ibrahim, the thought also crossed my mind that the whole episode could have been stage-managed by D. Similarly, in passage (b), Dr Kong was pointing out to the Complaints Committee the possibility that D may not have shown to Dr Wong all the cupboards that had been in the apartment. These were possibilities that the Complaints Committee, in its deliberations on the merits of the complaint made by D, was entitled to take into account.

94 In passage (c), Dr Kong was drawing the attention of the Complaints Committee to certain general attributes – highlighted in the textbook "*Child Sexual Abuse*" by Arthur Green and Diane Schetky – of fathers who engaged in incestuous acts with their daughters. The learned authors of that textbook had opined that "sexual deviation", which they defined to include "a pathological obsession with sex … which expresses itself in excessive sexual fantasy and sexual activity, excessive nudity bordering on exhibitionism", was an indicative factor in the development of such incestuous relationships. I cannot see anything objectionable in Dr Kong drawing the attention of the Complaints Committee to the views expressed by textbook writers on issues relevant to the matters before the Committee.

95 Suggestions that a person was or may be guilty of sexual abuse would, if untrue, be defamatory of that person unless those suggestions were made in a situation protected by privilege. D did not dispute that the alleged defamatory words were published on an occasion of qualified privilege. He, however, pleaded in his Reply that "the defendant had exceeded the said privilege and/or acted with malice". The burden of proving that this was so rested with D.

96 I was satisfied that Dr Kong, in making the statements in passages (a), (b) and (c), was motivated solely by the need to defend his professional reputation. I also formed the view that it was appropriate for Dr Kong to have included the three passages complained of in his explanation to the

Complaints Committee. The defence of qualified privilege therefore applied in this case. I found that in making these statements Dr Kong was not motivated by malice and had not in any way exceeded the limits of qualified privilege.

Absolute privilege

97 Having found that the passages impugned by D were protected by qualified privilege, I do not have to go on and consider whether these passages were also protected by absolute privilege. I do so only for the sake of completeness.

98 It was Dr Kong's case that the proceedings of the Complaints Committee, like proceedings before the Disciplinary Committee of the SMC, were protected by absolute privilege. D's position was that proceedings before the Complaints Committee were not protected by absolute privilege: he did not dispute that proceedings before the Disciplinary Committee were so protected.

99 Absolute privilege attaches to statements made before courts of law. It also extends to evidence before tribunals which, although not courts of law, nevertheless act in a manner similar to that in which a court of law acts (*O'Connor v Waldron* [1935] AC 76). To what degree that similarity must exist before the defence of absolute privilege attaches is not a matter capable of precise definition: it must depend on the circumstance of each case. As Lord Diplock put it in *Trapp v Mackie* [1979] 1 WLR 377 at 379:

> No single touchstone emerges from the cases; but this is not surprising for the rule of law is one which involves the balancing of conflicting public policies, one general: that the law should provide a remedy to the citizen whose good name and reputation is traduced by malicious falsehoods uttered by another; the other particular: that witnesses before tribunals recognised by law should, in the words of the answer of the judges in *Dawkins v Lord Rokeby*, LR 7 HL 744, 753 "give their testimony free from any fear of being harassed by an action on an allegation, *whether true or false*, that they acted from malice." [emphasis added]

The public interest in ensuring that people involved in litigation are as free as possible to speak without fear of reprisals is the *raison d'etre* of absolute privilege.

100 In the same case, Lord Diplock went on to identify some factors that ought to be looked at to identify tribunals that act in a manner similar to a court of law. These were:

(a) Under what authority the tribunal acts;

(b) The nature of the question into which it is its duty to inquire;

(c) The procedure adopted by it in carrying out the inquiry; and

(d) The legal consequences of the conclusion reached by the tribunal as a result of the inquiry.

Dr Myint Soe submitted that these four steps outlined by Lord Diplock as a guide to ascertaining if absolute privilege existed, were satisfied in this case.

The authority of the tribunal

101 It is established law that to attract the defence of absolute privilege the tribunal has to be one that is recognised by law. The disciplinary powers of the SMC (whether exercised through the Complaints Committee or Disciplinary Committee or both) are "recognised by law" in that disciplinary

powers are conferred on the SMC by the Act. The proceedings of the Complaints Committee therefore fell within the first step.

The nature of the question to be determined

102 The question before the Complaints Committee in this case was whether the complaint and the contents of the Wong Report disclosed professional misconduct by Dr Kong, in particular whether Dr Kong had been negligent, incompetent and partisan in his assessment of the child. If the Complaints Committee found that there was misconduct but that the misconduct was of a minor nature which could be dealt with by a letter of advice/warning, the Complaints Committee could, as noted earlier, proceed to issue the letter of advice/warning. If the Complaints Committee decided that the complaint was unmeritorious, it could dismiss the complaint. All other cases will be referred by the Complaints Committee to a Disciplinary Committee.

103 The questions to be determined by the Complaints Committee had much in common with judicial proceedings in a court of law. The fact that the Complaints Committee could make decisions in regard only to unmeritorious complaints and misconduct of a minor nature does not, in my view, detract from the fact that the issues before the Complaints Committee were in the nature of a *lis inter partes*. The proceedings before the Complaints Committee, in my view, satisfied the second step discussed in *Trapp v Mackie*.

The procedure adopted

104 The procedures followed by the two disciplinary arms of the SMC – the Complaints Committee and the Disciplinary Committee – are somewhat different. The Complaints Committee does not conduct oral hearings: the complainant and even the medical practitioner concerned does not have the right to appear personally before the Complaints Committee to testify. The procedure of the Complaints Committee in this regard is different from that of a court of law. The Disciplinary Committee, however, conducts its proceedings in a manner very similar to a court of law: witnesses are called for the Prosecution and for the Defence and cross-examination is permitted. That being so – and this was not challenged by Mr Tan – evidence led before the Disciplinary Committee and the proceedings of the Disciplinary Committee would be covered by absolute privilege.

105 Would the fact that witnesses do not testify before the Complaints Committee make the proceedings before the Complaints Committee so different from a court of law that the defence of absolute privilege is not available in respect of the explanation proffered to the Complaints Committee by the practitioner?

106 Lord Fraser in the *Trapp* case took the view that there was no single element whose presence or absence would conclusively determine the availability of absolute privilege as a defence. He said (at p 388):

> Consideration of the cases shows that, provided the tribunal is one recognised by law, there is no single element the presence or absence of which will be conclusive in showing whether it has attributes sufficiently similar to those of a court of law to create absolute privilege.

I would adopt that statement of the law. To determine whether absolute privilege attaches to a tribunal, one would have to take an overview of all the characteristics and determine whether, taken as a whole, its proceedings are sufficiently akin to that of a court of law for absolute privilege to attach.

The legal consequences of the tribunal's decision

107 Whatever decision the Complaints Committee arrived at would have legal consequences on Dr Kong akin to decisions in a court of law. If the Complaints Committee – as it did in this case – decided to dismiss the complaint, Dr Kong would be exonerated from the serious accusations levelled against him. If the Complaints Committee decided to issue a letter of advice/warning, then that would be a finding that Dr Kong's conduct was, to the extent found by the Complaints Committee, improper. If the Complaints Committee decided to refer the matter to a Disciplinary Committee, Dr Kong would have to defend himself before the Disciplinary Committee. The fact that the Complaints Committee would – in more serious cases – refer the complaint to a Disciplinary Committee does not, in my view, detract from the legally binding consequences of the Complaints Committee's decision. As Lord Fraser stated in *Trapp* at 388: "It is not essential that the tribunal itself should have power to determine the issue before it."

Step towards the administration of justice

108 In *Watson v M'Ewan* [1905] AC 480, the House of Lords considered the giving of statements by clients/witnesses to their solicitors in preparation for litigation as "steps towards the conduct of litigation" and extended the protection of absolute privilege to such statements. To quote from the judgment of the Earl of Halsbury LC at 487:

> It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice – namely, the preliminary examination of witnesses to find out what they can prove.

A similar view was expressed in the *Trapp* case where Lord Fraser stated at 388:

> Cases such as *Dawkins*, LR 7 HL 744 and *Barratt* [1905] 1 KB 504, show that absolute privilege may apply if the *inquiry is a step leading directly towards determination of an issue* by the authority who appointed it. In each case the object of the tribunal, its constitution and its manner of proceeding must all be considered before the question can be answered. [emphasis added]

It would appear from these cases that statements that were a necessary prelude to litigation were covered by absolute privilege.

109 In *Taylor v Director of the Serious Fraud Office* [1998] 3 WLR 1040, the absolute immunity from suit was extended further to cover investigators who, in the course of their public duty of investigating crime, speak or write to persons who may be able to assist in the investigation and to those who gave information to the investigators. The rationale for this extension was stated by Lord Hutton at 1058 to 1059:

> [J]ust as the preliminary examination of a witness by a party's solicitor out of court is a step towards the administration of justice which requires to be protected, I consider that the investigation of a suspected crime is a step towards the administration of justice so that the protection of absolute privilege should be given to those who, in the course of their public duty in investigating a suspected crime, speak or write to persons who may be able to provide relevant information, and to such persons in respect of what they say or write to the investigators, and to the giving of information by investigators to their colleagues who are also concerned with the investigation.

In that case, Lord Hutton added that if this protection was not given, police officers and investigators who conducted investigations into serious crimes and persons who gave information to them, "might be unrighteously harassed with suits". The investigation of a complaint by the Complaints Committee would fall within the scope of the kind of investigations envisaged in *Taylor*.

110 Under the disciplinary machinery set up by the Act, the referral by the Complaints Committee of certain complaints to the Disciplinary Committee is an essential step in the inquiry and disposal of the complaint. Following the reasoning in *Watson*, as the explanation by Dr Kong to the Complaints Committee was a necessary step in the adjudication of the complaint by the SMC, the protection of absolute privilege available before the Disciplinary Committee would extend to the explanation given to the Complaints Committee.

111 When a practitioner is called upon by the Complaints Committee to give his explanation to a complaint that has been made against him, the practitioner gives that explanation in order to defend himself and in the knowledge that the complaint and his explanation may well be referred to a Disciplinary Committee where he will be cross-examined on that explanation. It would, in my view, be somewhat illogical if the practitioner had the benefit of absolute privilege in respect of that explanation at the Disciplinary Committee stage but denied that privilege in respect of the same explanation at the Complaints Committee stage. Taken in its entirety, the exercise by the SMC of its disciplinary functions are sufficiently similar to proceedings in a court of law for absolute privilege to attach to the explanation given by Dr Kong to the Complaints Committee. The defence of absolute privilege raised in this case is therefore a complete answer to the claims in defamation brought against Dr Kong in Suit 204/2002.

112 For the above reasons, I dismiss with costs the claims against Dr Kong in Suit 150/2002 and Suit 204/2002.

Plaintiff's claims in Suits 150/2002 and 204/2002 dismissed.

Reported by Tammy W J Low.