

Full judgement available at <http://donstaniford.typepad.com/files/judgment-28-september-2012-adair-re-mainstream-canada-v-staniford-09-28.pdf>.

Subject matter: where the flaw in Mainstream Canada's argument emerges.

[166] This is essentially the argument advanced by Mainstream: that Mr. Staniford's statements are verifiable and capable of proof, and therefore must be found to be statements of fact.

[167] The EWCA did not agree with Eady J. The court explained the flaw in Eady J's reasoning, and thus also a flaw in Mainstream's argument, in this way (underlining added):

[16] What a passage of prose means when read in context is, however, not the critical question in a case such as this. The critical question, at least for present purposes, is whether its meaning includes one or more allegations of fact which are defamatory of the claimant, or whether the entirety of what it says about the claimant is comment

...

[18] . . . [T]he subject-matter of Dr Singh's article was an area of epidemiology in which the relationship of primary fact to secondary fact, and of both to permissible inference, is heavily and legitimately contested. The issue posed by the judge is in reality two distinct issues: first, was there any evidence to support the material claims? and secondly, if there was not, did the BCA's personnel know this? If, as Dr Singh has contended throughout, the first issue is one of opinion and not of fact, the second issue ceases to matter.

[19] In our judgment Eady J, notwithstanding his very great experience, has erred both in conflating these two elements of the claim [i.e., the "two distinct issues" in para. 18] and, more particularly, in treating the first of them as an issue of verifiable fact.

...

[22] . . . It is one thing to defame somebody in terms which can only be defended by proving their truth, even if this ineluctably casts the court in the role of historian or investigative journalist. It is another thing to evaluate published material as giving no evidential support to a claim and, on the basis of this evaluation, to denounce as irresponsible those who make the claim. Recent years have seen a small number of high-profile libel cases in which the courts, however reluctantly, have had to discharge the first of these functions. But these have been precisely cases in which the defendant has made a clear assertion of highly damaging fact, and must prove its truth or lose.

[23] The present case is not in this class: the material words, however one represents or paraphrases their meaning, are in our judgment expressions of opinion. . . .

...

[26] What "evidence" signifies depends heavily on context. To a literalist, any primary fact – for example, that following chiropractic intervention a patient's condition improved – may be evidence of a secondary fact, here that chiropractic works. To anyone (and not only a scientist) concerned with the establishment of dependable generalisations about cause and effect, such

primary information is as worthless as evidence of the secondary fact as its converse would be. The same may equally well be true of data considerably more complex than in the facile example we have given: whether it is or not is what scientific opinion is there to debate. If in the course of the debate the view is expressed that there is not a jot of evidence for one deduction or another, the natural meaning is that there is no worthwhile or reliable evidence for it. That is as much a value judgment as a contrary viewpoint would be.

[27] The pleadings in the present case usefully illustrate this. Dr Singh's defence includes, in §8(25), a survey of controlled clinical trials on the efficacy of chiropractic in treating infantile colic, none of which, he contends, affords objective support for the BCA's claim. The BCA, in §9(23) of its reply, relies (among other studies) on a 1989 observational study of 316 children One need go no further in order to see how value-laden the word "evidence" is in the present context