

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2016-004-004518
[2017] NZDC 13915**

COMMERCE COMMISSION
Prosecutor

v

THE 123 MART LIMITED
Defendant

Hearing: 27 and 28 June 2017
Appearances: A McClintock, S Lowry and G Barkle for the Prosecutor
M Lloyd for the Defendant
Judgment: 7 July 2017

RESERVED JUDGMENT OF JUDGE R G RONAYNE

Verdicts

[1] I return the following verdicts:

Charges	Particulars	Date	Verdict
CRN-16004502258	Rattle	1/4/13 to 30/6/13	Guilty
CRN-16004502259	Rattle	1/4/13 to 30/6/13	Guilty
CRN-16004502260	Rattle	1/4/13 to 30/6/13	Guilty
CRN-16004502261	Trumpet		Dismissed
CRN-16004502262	Trumpet		Dismissed
CRN-16004502263	Trumpet		Dismissed
CRN-16004502264	Trumpet		Dismissed
CRN-16004502265	Magnetic Alphabet	1/4/13 to 30/6/13	Guilty
CRN-16004502266	Magnetic Alphabet	1/7/13 to 16/6/14	Guilty
CRN-16004502267	Magnetic Alphabet	17/6/14 to 8/5/15	Guilty
CRN-16004502268	Magnetic Alphabet	9/5/15 to 12/10/15	Guilty
CRN-16004502269	House Set	1/4/13 to 30/6/13	Guilty
CRN-16004502270	House Set	1/7/13 to 16/6/14	Guilty
CRN-16004502271	House Set	17/6/14 to 8/5/15	Guilty
CRN-16004502272	House Set	9/5/15 to 10/10/15	Guilty
CRN-16004502273	Snake	30/1/14 to 16/6/14	Guilty
CRN-16004502274	Snake	17/6/14 to 8/5/15	Guilty
CRN-16004502275	Snake	9/5/15 to 9/10/15	Guilty
CRN-16004503698	Dream House Sets (x 2)	6/1/15 to 2/6/16	Guilty
CRN-16004503700	Fairy Doll	5/6/14 to 21/6/16	Guilty
CRN-16004503701	Beaut Dolls Set	5/10/15 to 8/6/16	Guilty
CRN-16004503702	Musical Band Set		Dismissed

Introduction/issues

[2] The defendant faces 17 active charges. The charges allege various offences arising from the retail supply of toys by the defendant. There is some repetition of charges relating to particular products. That repetition properly arises from the need to distinguish various date ranges and from a statutory increase in penalties during

the period of the alleged offending. It was acknowledged by the prosecutor that the evidence was deficient in relation to charges relating to a trumpet and musical band set and they are accordingly dismissed pursuant to s 147 Criminal Procedure Act 2011.

[3] A considerable number of agreed facts have been tendered to the Court pursuant to s 9 Evidence Act 2006 (see paras [28]-[44]).

[4] As a result, counsel have been able to helpfully define the issues narrowly.

[5] The prosecutor alleges:

- (i) that the toys failed properly conducted tests regarding reasonably foreseeable abuse; and
- (ii) the toys are the subject of the regulations applying to toys for use by children aged 36 months and under.

[6] The position of the defendant is that:

- (i) the toys were not properly tested in accordance with the applicable rules; and
- (ii) in any event the toys (with the exception of the rattle) are not for use by children aged 36 months and under and, accordingly, the regulations relied upon by the prosecutor do not apply.

[7] Accordingly, the issues for determination are:

- (i) Were the tests properly conducted?
- (ii) Were the toys “manufactured, designed, labelled or marketed for use by children up to and including 36 months of age”?

[8] It is accepted that, bearing in mind the criminal standard of proof, if the answer to the two foregoing questions is in the affirmative then guilty verdicts inevitably follow.

Approach

[9] In this judgment, I adopt the approach endorsed by Heath J in *R v Sullivan*.¹

[12] I conducted this trial without a jury. In *R v Connell*, the Court of Appeal explained the extent of the reasons that should be given for a trial Judge's verdicts.² Generally, all that is required is a statement of the ingredients of each charge, any relevant rules of law or practice, a concise account of the facts, and a plain statement of the essential reasons why the verdicts have been returned. When the credibility of witnesses is involved and important evidence is either accepted or rejected, that too should be stated explicitly.³

[10] Moreover, I am assisted by the remarks of Palmer J in *Laulu v Attorney-General*⁴ (admittedly in the context of a judicial review) as follows:

[12] However, I agree with the submissions of Ms Copeland, for the Attorney-General, that the District Court is not required to refer to all the evidence before it.⁵ Judge Ronayne referred to aspects of the affidavits and cross-examination of Mr Laulu. He did not have to refer to everything. Mr Tenet has not identified any particular piece of evidence, not referred to, which would justify overturning the decision. As I have said in another judgment.⁶

Challenging the amount of weight placed on various factors by a decision-maker is less than propitious of a successful judicial review. It is a tacit acknowledgement that the decision-maker took a relevant consideration into account. It usually signals disagreement about the outcome of the decision without being able to impugn it.

¹ *R v Sullivan* [2014] NZHC 2501.

² *R v Connell* [1985] 2 NZLR 233 (CA).

³ *Ibid* at 237.

⁴ *Laulu v Attorney-General* [2016] NZHC 3202.

⁵ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [34]-[35].

⁶ *AI (Somalia) v Immigration and Protection Tribunal* [2016] NZHC 2227, [2016] NZAR 1471 at [49].

General principles

[11] The prosecutor has the burden of proving the charges beyond reasonable doubt and must do so separately in relation to each charge. The defendant does not have to prove anything. Proof beyond reasonable doubt is a very high standard of proof. It is not enough for the prosecutor to persuade me that the defendant is probably guilty, or even very likely guilty of any of the charges. I must be sure that all the elements of any charge have been proved before entering a guilty verdict. If, after careful and impartial consideration of the evidence, I am sure that the defendant is guilty I must find it guilty. On the other hand, if I am not sure of the defendant's guilt, I must find it not guilty.⁷

[12] In this case, the defendant has not called any evidence. That fact alone does not add to the case for the prosecutor.

[13] In coming to my conclusions regarding the facts, I am entitled to draw inferences. Any inference drawn needs to be a logical deduction from other facts that I have found proven.

[14] This case relies largely upon consideration of the relevant statutory and regulatory provisions and consideration of the expert evidence of two witnesses. Extensive facts have been responsibly agreed and put before the Court under s 9 Evidence Act 2006.

Legal provisions

[15] The relevant portions of the statutory and regulatory provisions are set out below (Fair Trading Act 1986 ("FTA")):

30 Compliance with product safety standards

- (1) If a product safety standard in respect of goods relates to a matter specified in section 29(1), a person must not supply, or offer to supply, or advertise to supply those goods unless that person complies with that product safety standard.

⁷ *R v Wanhalla* [2007] 2 NZLR 573 (CA) at [49].

- (2) If 2 or more product safety standards in respect of goods relate to a matter specified in section 29(1), a person must not supply, or offer to supply, or advertise to supply those goods unless that person complies with one of those product safety standards.

...

[16] Section 29 FTA provides for the making of regulations governing product safety standards.

[17] The relevant part of the Product Safety Standards (Children's Toys) Regulations 2005 ("the Regulations") provides:

4 Application

- (1) These regulations apply to toys manufactured, designed, labelled, or marketed for use by children up to and including 36 months of age whether or not the toys are manufactured, designed, labelled, or marketed for use by children over that age.

...

[18] It should also be noted that under the general provisions of the standards dealing with test methods, this passage appears:

If a toy or its packaging is not aged-labelled in a clear and conspicuous manner, or (based on such factors as marketing practices and the customary patterns of usage of a toy by children) is inappropriately age-labelled and is intended or appropriate for children up to and including 96 months, it shall also be subjected to the most stringent test requirements.

[19] The regulations do not, themselves, include product safety standards. Instead, they incorporate by reference an Australian/New Zealand standard. The relevant version of that standard is AS/NZS ISO 8124.1:2002 (incorporating amendment nos 1, 2 and 3). This joint Australia/New Zealand standard was prepared by a joint technical committee CS-018, Safety of Children's Toys. It was approved on behalf of the Council of Standards Australia on 30 April 2002 and on behalf of the Council of Standards New Zealand on 18 April 2002. It was published on 16 May 2002. It is apparent from the documentation that there was wide representation on the joint technical committee, including such organisations as the Australian Chamber of Commerce, the Australian Retailers Association and the

Commerce Commission of New Zealand. Also on the committee were the New Zealand Ministry of Health and the New Zealand Toy Distributors Association. The objective of the standard is to provide a specification for general safety, construction and labelling requirements for toys complying with the proposed standard. The standard is an extensive document.

[20] The standard regarding the mechanical and physical properties of toys applies to all toys. The standards are applicable to a toy as it is initially received by the consumer and, in addition, they apply after a toy is subjected to reasonably foreseeable conditions of normal use and abuse. The standards also specify acceptable criteria for structural characteristics of toys, such as shape, size, contour, etc. The standards go on to specify requirements and test methods for toys intended for use by children in various age groups. Those requirements vary according to the age group for which a particular toy is intended. The standards do not purport to cover or include every conceivable potential hazard.

[21] Relevant to this case, the prosecutor says that the toys, the subject of the charges, need to pass a Small Parts Test and “reasonably foreseeable abuse tests”. The latter includes a drop test and a tension test.

[22] In the general section of the standards addressing test methods, the following passage appears:

If during a test the toy has been materially affected, eg by a clamp or similar test equipment, further relevant testing shall be carried out on a new toy.

Unless otherwise specified in the test method, each sample shall, prior to testing, be subjected to a temperature of $21^{\circ}\text{C} \pm 5^{\circ}\text{C}$ for at least 4 h. ... The testing shall commence within five min after the toy has been removed from the preconditioning atmosphere.

[23] The Small Parts Test requires that the toy or any removable component be placed into a “small parts cylinder” (“SPC”). The dimensions of the SPC are defined. The inner circumference of the cylinder is 32 millimetres. Its length is 25 millimetres on the shortest side and 57 millimetres on the longest side. This means that the cylinder is flat at one end, but angled at a 45 degree bevel at the other.

If a toy, or detachable component can fit completely within the cylinder, it is deemed to constitute an ingestion/inhalation hazard.

[24] Reasonably Foreseeable Abuse Tests include a drop test. That requires toys to be dropped a specified number of times from a specified height onto a specified impact surface. There are technical requirements regarding the nature of the surface.

[25] The Tension Test requires a force of 70 N \pm 2N to be applied both parallel and perpendicularly to the major axis of the test component "evenly over a five s period and maintain for 10 s".

[26] In *Commerce Commission v Myriad Marketing Ltd*,⁸ Panckhurst J commenced his judgment thus:

[1] What is a toy? That is the issue in this case. ...

[27] The "toy" under consideration in the *Myriad* case was quite different to the items under consideration in this case. However, comments of general application made by Panckhurst J are nevertheless apposite and are set out below:

[32] To my mind the key words "*manufactured, designed, labelled, or marketed*" for use as a plaything by children under three are capable of shades of meaning. What might be broadly termed objective and subjective approaches to their interpretation are sensibly open on a reading of regulations 3 and 4 in their particular context.

[33] It follows, I think, that a purposive approach is required. Section 5(1) of the Interpretation Act 1999 mandates as much:

"Ascertaining meaning of legislation – (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose."

As to purpose s29 of the Fair Trading Act 1986 provides that regulations may be made "*in respect of goods of any description or any class ... prescribing for the purpose of preventing or reducing the risk of injury to any person, a product safety standard ...*". Further, such regulations may relate to "*the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods*", their testing, or "*markings, warnings, or instructions*" which accompany them.

[34] Hence, expressly, the purpose of regulations made pursuant to s29 is the prevention of, or reduction in, the risk of injury to persons arising from

⁸ *Commerce Commission v Myriad Marketing Ltd* (2001) 7 NZBLC 103-404.

products. How far is such purpose of assistance in the interpretation of regulations 2 and 3?

[35] I accept the submission of counsel for the Commission that the subjective intention of the manufacturer or marketer of a product cannot determine for what and for whom, such product was manufactured, designed, labelled, or marketed in terms of the regulations. Such an approach would rob the regulations of much of their effectiveness. The purpose of the regulations, safety of products, may be thwarted.

[36] On the other hand, I do not accept that because a product is attractive to children up to three years of age as a plaything it is, therefore, a toy. That would be to substitute for the plain words of the regulations a test or approach other than that which they convey. In my view the operative element is usage. The test is whether the particular product is "*for use*" as a plaything by children exactly three years of age or under. In determining usage regard is to be had to the manufacture, design, labelling, or marketing of the product. These are alternative concepts. If in relation to any one, with regard to usage, a positive answer results (eg the product is manufactured for use as a plaything by children up to three years), then the regulations apply.

[37] It follows that the required approach is an objective one. The test is whether viewed through the eyes of a reasonable person it can be said that the object or product in question was either manufactured, designed, labelled, or marketed as a plaything for use by children up to three years? If on that objective basis the answer is yes, then NZS 5822:1992 applies.

Agreed facts

[28] The agreed facts set out relevant background information regarding the defendant and the prosecution's investigations.

[29] The defendant, during the charge period, owned and operated approximately 60 retail stores throughout New Zealand with a multi-million dollar turnover and a very large number of product lines.

[30] Three investigations have been carried out.

[31] The first investigation in 2012-2013 involved the Commission making a test purchase of three types of toys, including the baby rattle. The toys were tested for compliance with the regulations. It was concluded that the baby rattle and two other toys did not comply with the small parts test.

[32] On 28 August 2012, the Commission sent a letter to the defendant advising that the baby rattle and the other two toys did not comply with the regulations.

Receipt of that letter was acknowledged. The letter was followed up with a phone call from a Commission investigator. An employee of the defendant asked if the defendant could re-label non-compliant toys as not being suitable for children under three years of age. It was explained to the defendant that if a toy was one to which the product safety standard (adopted under the toy regulations) applied, then it had to comply with the product safety standard and that labelling it as being unsuitable for children under the age of three years did not negate the need for it to comply. The baby rattle was given as an example of such a toy. That position appeared to be understood by the employee.

[33] In March 2013, the Commission sent the defendant a formal warning letter advising that seven toys did not comply with the toy regulations. The baby rattle was one of those toys. The letter said in part:

... initiate checks of any toys that you supply to ensure those covered by the standard meet the requirements of it. You are also advised that when making future orders that you advise manufacturers and distributors that the toys must meet the standard and that warning labels will not remove this requirement.

[34] The 2015 investigation identified toys offered for sale by the defendant which had small parts that were choking hazards. The toys were the trumpet, the magnetic alphabet, the house set and the snake. The result was that various charges were laid on 4 May 2016.

[35] The 2016 investigation revealed that the defendant had continued to supply and offer to supply toys that, in the Commission's view, breached the regulations. A further 10 additional charges (including some charges relating to clothing labelling in respect of which guilty pleas have been entered) were laid on 11 August 2016. The relevant charges relate to the Dream House sets, the Fairy Doll, the Musical Band set, Beaut Dolls set and some clothing.

[36] Various facts are admitted regarding the extent of sales relating to the various toys.

[37] From 1 April 2013 to 7 May 2015, 187 baby rattles were sold.

[38] After test purchases were made by the Commission at the defendant's Christchurch store on 7 May 2015, telephone and email contact was made by the Commission with the defendant. The defendant then offered, in an email dated 8 May 2015 an explanation as to how the Christchurch store had come to sell the baby rattles in the following terms:

We just confirmed this item also has been issued from Commerce Commission few years ago so we disposed the items straight away as soon as we were issued. However, our new shop manager at Maxout store in Christchurch have found these at the deepest side of storage and displayed it. After the investigation from the system, only Maxout store was involved in this matter so I informed our area manager James to dispose it immediately.

The above explanation was untrue. There had been regular sales of the baby rattle at stores other than the Christchurch store subsequent to a warning letter sent on 25 March 2013.

[39] From 1 April 2013 to 12 October 2015, 3,111 magnetic alphabets were sold.

[40] From 1 April 2013 to 10 October 2015, 890 house sets were sold.

[41] From 30 January 2014 to 9 October 2015, 431 snakes were sold.

[42] From 6 January 2015 to 2 June 2016, approximately 913 Dream House sets were sold.

[43] From 5 June 2014 to 21 June 2016, approximately 2,225 Fairy Dolls were sold.

[44] From 5 October 2015 to 8 June 2016, approximately 1,210 Beaut Dolls sets were sold.

The evidence

Product testing – general evidence

[45] The prosecutor called Charles Wheeler to give expert evidence regarding product testing. A second expert, Prudence Vincent, also made observations

regarding physical attributes of some of the toys. Her observations were of self-evident matters that the Court could also see.

[46] Until his very recent retirement, Mr Wheeler was the general manager of Materials and Testing Laboratories ("MTL" in which he also has an ownership stake).

[47] MTL carries out a wide variety of testing procedures for both the Commerce Commission and individual importers. MTL is accredited by International Accreditation New Zealand ("IANZ") which itself is affiliated to a worldwide organisation which certifies competency and adherence to standards. This ensures that test results, for example, carried out in New Zealand, will be accepted in Europe and the United States. More specifically, MTL has been accredited by IANZ to test children's toys, including small parts tests, drop tests and load tests.

[48] Mr Wheeler gained assistance in giving his evidence from his own notes of testing.

[49] Mr Wheeler's personal experience with MTL commenced in 1983.

[50] Mr Wheeler was cross-examined regarding his qualifications and experience, but there has been no serious challenge to the admissibility of Mr Wheeler's expert evidence. The real contest is whether Mr Wheeler carried out his assessment of small parts, the drop test and the tension test properly such that the Court can rely on the results bearing in mind the standard of proof.

[51] Mr Wheeler was challenged as to the dimensions of the SPC which he used to check the size of small parts. However, it was not directly suggested to him that the SPC he used was incorrectly dimensioned. I am satisfied the SPC he used was dimensioned in accordance with the relevant standards.

[52] Mr Wheeler was challenged regarding the surface onto which items were dropped in the drop test. I am satisfied, on the totality of the evidence, that the surface complied with the standards as did the conduct of the tests.

[53] Mr Wheeler was challenged as to the manner in which he carried out the tension tests.

[54] I am satisfied that the loading device used in the tension test complied with the standards. I am also satisfied that the appropriate force was applied. I am not satisfied that Mr Wheeler's timing of the application of the force was sufficiently accurate. He indicated that he timed the application of the force in his head. His demonstration of his internal clock did not leave me with confidence that the test was carried out with the sufficient degree of accuracy to make it reliable. It was primarily for that reason that in respect of two items, namely the trumpet and the musical band set, charges were not pursued. In respect of those two items, the prosecutor relied solely on the outcome of the tension test. The remaining items I deal with below.

Baby Rattle

[55] The properly conducted drop test resulted in two yellow hearts detaching. Those fitted within the SPC. Thus the baby rattle failed the "reasonably foreseeable abuse tests".

Magnetic Alphabet

[56] Fifteen pieces of this alphabet set fitted within the SPC. It thus failed the "small parts test".

World of Toys House Set

[57] Nine separate pieces within this toy fitted into the SPC. It thus failed the small parts test. Three doors and a small shard of plastic detached in the drop test. All of those items fitted within the SPC. It thus failed the "reasonably foreseeable abuse tests".

Snake

[58] One piece of this toy which could be assembled or dismantled fitted within the SPC. It thus failed the small parts test.

Dream House Set

[59] This comprised two different iterations of the toy. One with a mirror and coat hangers and eight pieces that fitted within the SPC and thus failed the small parts test. The other with a chair and bureau had five pieces which fitted within the SPC and thus failed the small parts test.

Fairy Doll

[60] In its complete form and as tested by Mr Wheeler, this did not fail the small parts test. However, shoes were easily detachable from the doll. Those fitted within the SPC and thus failed the small parts test.

Beaut Dolls

[61] In its complete form and as tested by Mr Wheeler, this did not fail the small parts test. However, shoes were easily detachable from the doll. Those fitted within the SPC and thus failed the small parts test.

“For Use” test

[62] Although not strictly a “test”, to the extent that any of the toys failed the reasonably foreseeable abuse tests, this Court then has to determine whether it is established beyond reasonable doubt that the toy is intended for children up to and including 36 months of age.

[63] The prosecutor has proceeded on the basis that all of the toys the subject of the charges are toys intended for children up to and including 36 months of age.

[64] Whether the toys are so intended has been addressed by the expert evidence of Prudence Vincent.

[65] Mr Lloyd did not object, on behalf of the defendant, to the admissibility of Ms Vincent's expert opinions. However, he submitted in closing that the Court should nevertheless be cautious as to what weight it places on her evidence.

[66] Ms Vincent qualified to practice as a psychologist in 1970 and is duly registered. Her formal qualifications are BA (Honours) Psychology; Post Graduate Diploma in Education; Post Graduate Diploma in Educational Psychology; Diploma in Business Studies (endorsed Alternative Dispute Resolution). She has given evidence on many occasions and, amongst other work, contracts with government ministries and the Commerce Commission. She is an Associate Fellow of the British Psychological Society and a member of the New Zealand Psychological Society. She has spent two years teaching primary school children before training as a Psychologist. For 13 years, she worked in Psychological Services in England and New Zealand servicing schools and pre-school facilities, government and community agencies concerned with children and young people, and the Family Court. For several years she was (when the position existed) Director of the Department of Social Welfare's Specialist Services. She has carried out post graduate research. The primary focus of her practice has always been children, young people and their families. She has extensive experience of working with children and young people in the education, welfare, and Court interfaces.

[67] Ms Vincent was asked to provide an opinion on whether the subject toys are "manufactured, designed, labelled, or marketed" for use by children up to and including 36 months of age.

[68] Ms Vincent was asked to provide an opinion on a range of toys beyond those the subject of the charges. She concluded that some of the toys provided to her were not for use by children aged 36 months or under.

[69] Ms Vincent carefully set out in some detail in her evidence the material upon which she relied as part of the process in formulating her opinions. Self-evidently,

overlaying the materials, Ms Vincent drew on her qualifications and experience. The material relied upon is set out below.

Legislative Materials

- (i) The Product Safety Standards (Children's Toys) Regulations 2005
- (ii) Australian/New Zealand Standard: Safety of Toys: Published 2002

Academic Literature

- (iii) "*From Birth to Five Years: Children's Developmental Progress*"⁹
- (iv) "*Spontaneous Play in Early Childhood: From Birth to Six Years*"¹⁰

Age Determination Guidelines

- (v) Standards New Zealand: Technical Report on Safety of Toys¹¹
- (vi) International Standards Organisation, Technical Report on the Safety of Toys¹²
- (vii) "*Age Determination Guidelines*" produced by the US Consumer Product Safety Commission¹³

⁹ *From Birth to Five Years: Children's Developmental Progress*. Mary D. Sheridan. Revised and update by Marion Frost and Dr Ajay Sharma, 1997, and published by ACER Press 1998. Obtainable from the NZ Council For Educational Research. ISBN 0 86431 2695.

¹⁰ *Spontaneous Play in Early Childhood: From Birth to Six Years*. Mary Sheridan, published by NFER, UK, 1977, ISBN 0 85633 122 8.

¹¹ *Standards New Zealand: Technical Report on Safety of Toys*, SA/NZ TR ISO 8124:82016, Part 8: Age Determination Guidelines, Published 7 November 2016.

¹² International Standards Organisation, *Technical Report on the Safety of Toys ISO/TR 8124-8: 2014 (E)*, Published 1 September 2014.

¹³ *Age Determination Guidelines: Relating Children's ages to toy characteristics and play behaviour: 2002*: produced by the US Consumer Product Safety Commission.

- (viii) European Commission Enterprise and Industry Directorate-General, Guidance Document No. 11, on the application of the directive on the Safety of Toys¹⁴
- (ix) Consumer Product Safety Bureau of Canada, Toys: Age Classification Guidelines¹⁵
- (x) European Committee for Standardisation, Classification of Toys – Guidelines¹⁶
- (xi) Danish Standards Association, Classification of Toys – Guidelines¹⁷

[70] Ms Vincent explained in detail her methodology. First, she identified a list of characteristics that indicate whether a toy is manufactured, designed, labelled or marketed for use by children up to and including 36 months of age. She did this by surveying the academic literature and the age determination guidelines that she had consulted as well as applying her approximate 45 years of experience as a psychologist specialising in issues surrounding children. She explained that the list she had created was non-exhaustive. She considered each of the toys against the characteristics that she had identified.

[71] As to the first part of her approach, Ms Vincent noted that her survey of the academic literature and approaches taken in other jurisdictions and drawing upon her own experience, she found that surveyed material was generally consistent with her experience as a practitioner in the field of child psychology.

[72] Ms Vincent noted that her review of the approaches taken in the United States, Canada and the European Union for determining the age of children

¹⁴ European Commission Enterprise and Industry Directorate-General, Guidance Document No. 11, on the application of the directive on the Safety of Toys (88/378/EEC), Published 6 April 2009.

¹⁵ Consumer Product Safety Bureau of Canada, Toys: Age Classification Guidelines, 1998-01-13.

¹⁶ European Committee for Standardisation, Classification of Toys – Guidelines, CR14379, April 2002.

¹⁷ Danish Standards Association, Classification of Toys – Guidelines, DS/CEN/CR 14379, 12 June 2002.

for whom the toy is intended revealed a recognition that the assessment is a matter of fact and degree that must be carried out on a toy by toy basis. Perhaps, self-evidently, there is a recognition in the material that, due to the myriad types of toys available, it is not possible to lay down rules that establish bright lines between toys for use by children 36 months and under and those for use by older children. The indicia of whether a toy is for use by a particular age group arising from her review of other jurisdictions was also non-exhaustive.

[73] It was Ms Vincent's opinion that the foregoing is a sensible approach because some characteristics of a toy will appeal to younger children with less developed cognitive function and motor skills and some characteristics will appeal to older children.

[74] Ms Vincent found the American Age Determination Guidelines to be of particular assistance. Those were developed on the basis of a survey of more than 200 academic articles, together with research studies on the purchasing decisions of adults and children's interactions with toys. Those guidelines suggest 13 characteristics that can be used to analyse toys and their age appropriateness. Ms Vincent agreed with those characteristics based on her 45 years experience.

[75] Given the age range which she was focusing on, she left out some characteristics such as brand recognition.

[76] In Ms Vincent's opinion, the most helpful characteristics were:

- (i) Size and shape of parts and overall dimensions;
- (ii) Number of parts;
- (iii) Interaction between parts;
- (iv) Materials;
- (v) Motor skills required;

- (vi) Colour and contrast;
- (vii) Cause, effect and associated cognitive ability;
- (viii) Sensory elements;
- (ix) Realism, detail and recognisability.

[77] Ms Vincent explained to the Court in some detail at a more granular level what underpinned each of the characteristics. Simply by way of example in respect of a factor such as “number of parts” a younger child will be attracted to simpler toys with few parts whereas complex toys with multiple parts may be beyond their comprehension. By way of further example, in respect of materials: some materials such as metal are more suitable for older children than for younger children. The use of softer material may indicate suitability for younger children. The strength of the material is also important given that children aged 36 months and under bite, mouth and disassemble objects and toys. Much of what Ms Vincent had to say with regard to the underlying detail of the various criteria seemed to accord with commonsense.

[78] Ms Vincent then applied the criteria to each of the toys.

[79] For all toys considered, Ms Vincent took a consistent approach by first giving a description of the toy, its packaging and labelling and then made observations regarding its characteristics.

Baby Rattle

[80] Ms Vincent noted what she called an “ambivalent title” on the packaging. She considered that “My Baby Concert” could be read as suitable for a baby or as a miniature replica. She thought that this toy was probably intended to be a toy musical instrument, but that it bears a strong resemblance to a baby’s rattle. Either a rattle or a toy musical instrument made noise.

[81] Ms Vincent noted inconsistent safety warnings. The packaging has a reasonably bold “3M+” highlighted in orange which, in her opinion, would be read as an indication that the toy is suitable for children three months and over. However, there are also warnings noted by Ms Vincent on the packaging that the toy is not suitable for children under three years, because of the presence of small parts. Those warnings are in relatively small print, but also in symbol form.

[82] Ms Vincent, by application of the assessment characteristics, made the following observations:

(i) **Size and shape of parts and overall dimensions**

The toy was of a size and weight that a baby or young child could easily grasp and shake it.

(ii) **Number of parts**

The toy was one piece but with beads on a cord threaded through it. It was observed to be a toy very simple for a child 36 months and under to use.

(iii) **Interaction between parts**

This was observed to require simple interaction.

(iv) **Materials**

A child 36 months and under could mouth and bite the toy without breaking the plastic.

(v) **Motor skills required**

This required the handle to be grasped and the toy moved to make a sound. Ms Vincent thought that this was achievable by very young children.

(vi) **Colour and contrast**

Ms Vincent observed that the toy consisted of clear contrasting colours that would attract children 36 months and under.

(vii) **Cause, effect and associated cognitive ability**

For this, Ms Vincent observed that a shaking causes a sound. Most children, in her opinion, would have already learnt to shake a rattle as this is a very common product given to babies.

(viii) **Sensory elements**

Ms Vincent opined that this toy would appeal to young children due to movement, noise and the visual stimulation of the beads.

(ix) **Realism, detail and recognisability**

In Ms Vincent's opinion, children 36 months and under would recognise this as a toy to be shaken with the characteristics of a rattle. There is a bear image on the toy which suggests that it is for young people.

[83] In cross-examination, it was suggested to Ms Vincent that she had not observed specific children with the specific toys. Her response was that she has often had the opportunity to observe children with toys, but she would not risk observing them with these specific toys because of the very risk adverse climate in which everyone now operates. She was not prepared to take the risk of using these toys with children because of the possibility of small parts coming off. Nor did Ms Vincent consult with manufacturer's designers or marketers of toys. She did, however, carry out internet research.

[84] Ms Vincent accepted that a number of the toys assessed had warnings regarding choking hazards on their labelling. She was not prepared to concede, however, that that in itself suggests that they are not designed, manufactured or intended for children under three. She accepted, however, that labelling is a factor to be taken into account.

[85] Ms Vincent accepted that she had placed considerable reliance upon the American Age Determination Guidelines.

[86] Ms Vincent made the point that, while she had not observed children using the toys assessed for this case, she has seen children using similar toys.

[87] Aside from the foregoing there was no specific challenge regarding Ms Vincent's assessment of the age suitability of the baby rattle.

Magnetic Alphabet

[88] Ms Vincent described this toy as packaged in a plastic bubble on a cardboard backing which had the label "Magnetic Letters and Numbers" although there were no numbers. Essentially, this is a set of plastic letters, each with a small magnet attached. There are two reasonably visible warnings on the packaging, one stating that the toy is suitable for children over the age of three and the other noting that it is a choking hazard. There is also a symbol suggesting unsuitability for children under the age of three.

[89] Ms Vincent, by application of the assessment characteristics, made the following observations:

(i) **Size and shape of parts and overall dimensions**

Ms Vincent observed that the letters ranged in height and width from approximately 1.5 to three centimetres.

(ii) **Number of parts**

There were 26 individual letters.

(iii) **Interaction between parts**

Ms Vincent observed that there is no mechanical interaction or interlocking. The letters can be used to create initials, words or to move on and off a magnetic surface or sort by colour and shape.

(iv) **Materials**

Ms Vincent observed that the letters are relatively soft plastic with some being flexible, depending on their shape.

(v) **Motor skills required**

Ms Vincent observed that children 36 months and under would be able to hold and manipulate the individual pieces on and off a metal surface.

(vi) **Colour and contrast**

The set consists of a variety of clear, bright colours attractive to children 36 months and under.

(vii) **Cause, effect and associated cognitive ability**

Ms Vincent observed that small children would be able to move the letters from a metal surface and place them back. Small children would be interested in the magnetic power. Because of the use in building literacy skills, it was Ms Vincent's observation that they may be used even with young children.

(viii) **Sensory elements**

Ms Vincent thought that there would be visual interest, but there would be more interest in the cause and effect of moving them.

(ix) **Realism, detail and recognisability**

It was Ms Vincent's evidence that from the age of two years on, children may recognise the initial of their name and one or two other letters. She thought that parents may use them as a teaching tool.

[90] Ms Vincent opined that the magnetic alphabet was suitable for use by children under and over the age of 36 months.

[91] The principal reason for Ms Vincent's opinion is that letters are bought as an early familiarisation tool and then for learning about the alphabet. Ms Vincent, here, drew on her clinical experience seeing magnetic letters used on fridge doors for the purpose of exposing children aged 36 months and under to the alphabet. She has observed children taking the letters off and putting them on. She has seen this in one particular case with a child aged 15 months, but in that case the letters were of a size that complied with product safety standards.

[92] Ms Vincent said that, while it might be assumed by a manufacturer that children under the age of three would not be mature enough to engage in and be interested in educational play, in her view, such a view is inconsistent with reality. She indicated that parents may introduce children to letters and numbers from an early age and that children under the age of three can develop simple alphabet recognition skills. This early recognition has increased since the advent of activities for under threes on computers and iPads.

[93] Ms Vincent pointed out that the SA/NZS Technical Report notes that alphabet and simple number learning toys are for use by children from two years of age. Ms Vincent is also supported in her opinion by the American Age Determination Guidelines which state that with respect to magnetic letters and numbers at age two, such toys teach colour, shapes, letter and sounds.

[94] In cross-examination it was simply noted again that Ms Vincent's opinion is that this toy was suitable for children under and over 36 months of age.

House Set

[95] Ms Vincent described this as a hinged plastic toy house with 15 smaller items of furniture. It is packaged in a plastic bubble, but does not have a descriptive title. There are four warnings on the toy set that it is suitable for children over the age of three and that it contains choking hazards. One of the warnings is under the price sticker.

[96] Ms Vincent, by application of the assessment characteristics, made the following observations.

(i) **Size and shape of parts and overall dimensions**

The items range in height and width. The house is approximately 10 centimetres by five centimetres. The furniture ranges between one centimetre and four centimetres. Ms Vincent observed that it is easy for a young child to handle because of its size and weight.

(ii) **Number of parts**

Ms Vincent observed that there are 16 parts. Some of these are more recognisable than others. Children 36 months and under may focus on some, but not all of the parts.

(iii) **Interaction between parts**

Ms Vincent was of the view that the parts were recognisable to a child aged two to three and could be manipulated for imaginary play in the two to three years age range.

(iv) **Materials**

The toy is constructed in relatively strong plastic with the exception of a flexible mirror attached to a dressing table.

(v) **Motor skills required**

This toy was observed to be easy to handle and manipulate with a pincer grasp which exists in most children by age one.

(vi) **Colour and contrast**

The toy is described as colourful and clear. It is made in primary colours and is attractive to children 36 months and under.

(vii) **Cause, effect and associated cognitive ability**

In Ms Vincent's opinion, this toy is intended for imaginative play. Ms Vincent observed that children aged 36 months and under engage in make-believe or imaginative play using real and miniature representations. House play is very close to this age group's experiences of the world and, therefore, those which they are likely to act out and play. A child aged 36 months and under may not use all of the objects in this set.

(viii) **Sensory elements**

Ms Vincent considered this toy to be appealing visually because of its colours and what the items represent. It would be interesting for a child to move and place objects and open and close the house.

(ix) **Realism, detail and recognisability**

Most of the objects would be recognisable as miniatures of real life furniture.

[97] Ms Vincent opined that this toy is for use by children 36 months and under as well as older children. The principal reason for her opinion is that developmentally children are interested in imitating domestic activities with miniature toys from the age of about two and particularly from the age of two and a half years. She further pointed out that while it might be assumed by a manufacturer that children under the age of three years would not be mature enough to engage in and be interested in dolls house play with miniature furniture, purchasers would be likely to think otherwise. Ms Vincent said that the literature supports the use of miniature toys as play material for children aged 36 months and under.

Dream House Set with Mirror and Coat Hangers and

Dream House Set with Chair and Bureau

[98] These two toys were very similar, but were analysed individually by Ms Vincent. Each product is essentially a miniature room set made of plastic. Each

set consists of larger pieces with one set having nine items in total and the other seven. Both sets include a plastic doll with clothes, artificial hair and small removable shoes.

[99] Ms Vincent, by application of the assessment characteristics, made similar observations with respect to both sets.

(i) **Size and shape of parts and overall dimensions**

The objects were easy for young children to handle.

(ii) **Number of parts**

Both sets had similar numbers of parts.

(iii) **Interaction between parts**

It was observed that there was some very small accessories and that children under the age of 36 months might not recognise some of the smaller items, but could handle some of them.

(iv) **Materials**

Both dolls were made of soft squeezable plastic which children under the age of 36 months enjoy squeezing. Very small shoes came off the dolls.

(v) **Motor skills required**

Manipulation by children under the age of 36 months of the larger objects was possible.

(vi) **Colour and contrast**

Both sets included brightly coloured items attractive to children under the age of 36 months.

(vii) **Cause, effect and associated cognitive ability**

Both sets are designed for imaginative play. The miniature items come within the everyday experience of children.

(viii) **Sensory elements**

The pieces in the sets would appeal to children under the age of 36 months, both visually because of their bright colours and cognitively because they would recognise and identify the larger pieces.

(ix) **Realism, detail and recognisability**

Children would recognise the larger items as miniatures, but to varying degrees depending upon the age of the child. The small accessories may not be recognisable to children under the age of 36 months and thus may be left aside.

[100] In respect of both Dream House sets, Ms Vincent opined that these toys were intended for use by children both under and over the age of 36 months.

[101] In respect of both sets, the principal reason for her conclusions was that the products comprise of miniature domestic objects, some of which are within the pretend play repertoire of children aged 36 months and under. Ms Vincent also said that, while it might be assumed by a manufacturer that children under the age of three would not be mature enough to engage in and be interested in dolls house play with miniature furniture, purchasers are likely to think otherwise. Children from the age of two would recognise the larger pieces and miniatures. Interest in the larger pieces would lead to inspection and manipulation of the smaller pieces. Ms Vincent pointed out that she is supported in her opinion by the literature and SA/NZS Technical Report and the American Age Determination Guidelines.

Windup Snake Set

[102] Ms Vincent described this product packaged in a cellophane bag with no title. Three very small warnings against a coloured background indicate the toy being suitable for children over the age of three and being a choking hazard for children under the age of three. Given the packaging, it is apparent that this toy comes unassembled, but when assembled is designed to wiggle when moved by hand or mechanically wound.

[103] Ms Vincent, by application of the assessment characteristics, made the following observations:

(i) **Size and shape of parts and overall dimensions**

The snake is approximately 15 centimetres long when assembled. It is small, light and easy to handle. It could be grasped and held from about six months of age. It is very light.

(ii) **Number of parts**

The snake comes in three separate parts which require assembly. An adult or older child would need to assemble it. It has wheels.

(iii) **Interaction between parts**

The interlocking of the parts may be of interest to children aged two to three years, but they would be challenged re assembling it without assistance.

(iv) **Materials**

The snake is made of hard plastic with the exception of the windup mechanism.

(v) **Motor skills required**

Ms Vincent is of the view that a child nine months of age and over could slide the snake around without using the windup mechanism.

Children over that age, but under 36 months of age could wind it up if shown how. Such children would enjoy the resulting movement.

(vi) **Colour and contrast**

The toy is brightly coloured with strong, simple colours and would be appealing to children under the age of 36 months.

(vii) **Cause, effect and associated cognitive ability**

Ms Vincent indicated that children from 18 months of age enjoy “push pull toys”. Children from the age of about 12 months would be interested in watching the snake move and wobble once wound up by an adult. It might also be used by a small child as a rattle.

(viii) **Sensory elements**

Ms Vincent describes the toy as visually attractive and that it also makes a noise when shaken.

(ix) **Realism, detail and recognisability**

It was not clear to Ms Vincent that this toy would be easily recognised.

[104] Ms Vincent opined that this toy is for use by children under and over the age of 36 months. The principal reason for her opinion is that the toy is simple and appeals to several senses. It is Ms Vincent’s opinion that the American Age Determination Guidelines would probably include this item under rattles and push pull toys. She indicates that she is also supported by the literature. She is also supported by SA/NZS Technical Report which identifies simple vehicles as being for use by children from 18 months on.

[105] Cross-examined, Ms Vincent conceded that this yellow snake is not an item readily found in the guidelines.

Fairy Doll

[106] Ms Vincent described this toy as being packaged in a bubble on cardboard backing. It consists of a small plastic doll with moveable limbs and plastic wings joined with studs. There are four text warnings that the item is not suitable for children under the age of three years because of small choking hazards.

[107] Ms Vincent, by application of the assessment characteristics, made the following observations:

(i) **Size and shape of parts and overall dimensions**

The doll is light and easy for a child under the age of 36 months to hold and handle.

(ii) **Number of parts**

The detachable wings would be difficult for a child under the age of 36 months to reattach.

(iii) **Interaction between parts**

The legs and arms can move and the head can be twisted around.

(iv) **Materials**

The body and limbs are firm, but the head is soft and squeezable which would appeal to a child under the age of 36 months.

(v) **Motor skills required**

A child age of 36 months and under could hold the doll and manipulate the limbs.

(vi) **Colour and contrast**

The doll is brightly coloured and shiny.

(vii) **Cause, effect and associated cognitive ability**

This is a toy, in Ms Vincent's opinion, designed for imaginative play. A child 21 months and over could use the doll for pretend play.

(viii) **Sensory elements**

This toy is described as visually interesting, appealing to children 36 months and under, because it is recognisable as a figure or a fairy and has moving parts.

(ix) **Realism, detail and recognisability**

It is said that most children under three and particularly from the age of two would recognise this toy as a doll or a fairy. This is to be contrasted with fashion dolls for older children which are designed to resemble young adults. Children 36 months and under would be interested in inspecting the dolls characteristics and undressing it.

[108] Ms Vincent opined that this toy is intended for use by children under and over 36 months of age.

Beaut Dolls Set

[109] Ms Vincent described this item as consisting of two small plastic dolls and some accessories such as a handbag and two dresses. The doll's hair is tied up with bands. Clothes can be removed and small shoes are removable. There is one warning on the front, indicating that the toy is suitable for children over the age of three years.

[110] Ms Vincent, by application of the assessment characteristics, made the following observations:

(i) **Size and shape of parts and overall dimensions**

The dolls are approximately 10 centimetres long and four centimetres wide, but include smaller accessories.

(ii) **Number of parts**

There are nine parts in total, including the two dolls and accessories.

(iii) **Interaction between parts**

It appears that the intention is for the clothes to be changed. It is possible for some children 36 months and under to do that, but the clothes do not properly fit.

(iv) **Materials**

The doll is plastic with firm body and limbs. The head is soft and squeezable which appeals to children under the age of 36 months.

(v) **Motor skills required**

A child aged 36 months and under would be able to hold the dolls and manipulate the limbs and would also be able to undress the dolls.

(vi) **Colour and contrast**

This toy is colourful and shiny to some degree.

(vii) **Cause, effect and associated cognitive ability**

This toy is described as being for imaginative play. A child 21 months of age and over could use these dolls for pretend play.

(viii) **Sensory elements**

Ms Vincent describes the dolls as visually interesting and that the appeal would arise from them being recognisable as human dolls with moving parts.

(ix) **Realism, detail and recognisability**

Most children under three and particularly from the age of two would recognise these toys as dolls and be interested in inspecting, undressing and possibly using them in imaginative play.

[111] Ms Vincent opined that this toy is intended for use by children under and over the age of 36 months.

[112] Examples of the toys were produced as exhibits. With the exception of the “Beaut Dolls” which was shared between Mr Wheeler and Ms Vincent, two examples of each toy were produced. Having had the opportunity to assess the toys, I note that, at a commonsense level, nothing I observed offends against or contradicts Ms Vincent’s assessments.

Submissions

[113] The prosecutor submitted that the testing carried out by Mr Wheeler can be relied upon with the possible exception of the tension test which was, at least in respect of timing of each test, found wanting.

[114] As to the overall testing methods, it was submitted that Mr Wheeler and his equipment were certified by IANZ. A failure to state specific detail on any certificates produced is not fatal.

[115] As to the criticism that only one toy in each range was tested, the prosecutor submitted that given the low cost mass produced nature of the items, the scope of the testing was adequate. The Court was invited to draw a logical and commonsense available inference that if a toy has failed a test then the entire range is caught. In any event, said the prosecutor, the relevant standards do not envisage testing every toy coming to the market.

[116] The prosecutor summarised the testing evidence in this way:

- (i) Four toys failed because of small parts fitting into the SPC.

- (ii) Two toys (baby rattle and house set) failed the drop test.
- (iii) Insofar as the baby rattle is concerned, because the “for use” issue is not taken with this toy, the charges relating to the baby rattle are proven.
- (iv) Insofar as the balance of the toys is concerned, the “for use” issue needs to be examined.
- (v) The “for use” issue arises in relation to the magnetic alphabet, the house set, the snake, the Dream House (two toys), the fairy doll and the Beaut Dolls. Are these toys “for use” by children 36 months and under.

[117] It was submitted that the *Myriad* decision requires an objective test and that Ms Vincent’s evidence appropriately applies that test so her concluded opinions can be relied upon.

[118] It was further submitted that the fact that toys might also be manufactured, designed, labelled and marketed for older children makes no difference to the application of the relevant regulations provided any particular toy is also for use by children 36 months and under.

[119] It was submitted that labelling alone, aside from being confusing in some instances, does not address the real issue. It is not appropriate that traders can easily label their way around a safety issue which could also lead to parents coming to treat labelling as entirely meaningless. Regardless of labelling, safety issues remain.

[120] The Court in *Myriad* emphasised the need for a purposive approach to the rules. The subjective intention of a manufacturer or marketer is not determinative.

[121] It was submitted by the prosecutor that Ms Vincent’s approach at a more granular level is not only appropriate, but that there is no other realistic alternative to that approach. Ms Vincent is said to have taken an appropriately holistic approach rather than focusing on one characteristic such as attractiveness alone. The Court

was invited to bear in mind that at issue here is the appropriate application of safety regulations.

[122] For the defendant, Mr Lloyd submitted that the Court should place considerable weight on the certificates produced by Mr Wheeler regarding testing results and that when looked at closely, some if not all certificates are faulty. Mr Lloyd, however, accepted that the certificate is just one aspect of the evidence and that the Court is entitled to take into account all of the evidence given by Mr Wheeler, not just the certificates.

[123] The overall attack by Mr Lloyd on Mr Wheeler's testing evidence was to the effect that there has not been a proper independent audit of either Mr Wheeler, his methods or his equipment.

[124] Mr Lloyd also said that, in certain respects, Mr Wheeler failed to follow the standards, for example, by failing to test whether or not a toy had been materially affected by one test before going on to another. He was also critical of a lack of detail in Mr Wheeler's evidence establishing proper preconditioning of toys before testing or the timing of the removal of toys from the preconditioning atmosphere.

[125] Mr Lloyd, while accepting that labelling alone is no answer, submitted that labelling is a strong indicator that products are not designed or manufactured or marketed for children under the age of three and thus there is "a kind of an absurdity" in the detailed assessment as to the suitability of the toys made by Ms Vincent.

[126] Mr Lloyd said that the *Myriad* decision requires toys to be assessed through the eyes of a reasonable person and thus a strong factor that can be taken into account is how an item is labelled.

[127] Mr Lloyd conceded, as he was bound to, that labelling does not make a toy safe if small parts detach from it, for example, in a drop test.

[128] Mr Lloyd was critical of the fact that Ms Vincent had not gone into a shop and made a comparison of the toys in question with other toys being targeted for young children.

[129] Mr Lloyd characterised the evidence of Ms Vincent as simply boiling down to one proposition “These toys based on my assessment are attractive to under threes”. Mr Lloyd argued that the test that should be applied is how a reasonable person would assess a toy and that that should not be done “through the eyes of a child psychologist who has been asked to analyse abstruse academic literature et cetera and form opinions about the attractiveness of these toys to three olds”. Mr Lloyd suggested to the Court, perhaps, with respect, misunderstanding the role of this particular expert, that she was giving evidence as a child psychologist to tell the Court what a child may think. With respect, that submission gives the Court a sense of putting up a straw man to knock it down.

[130] Mr Lloyd in essence submitted that Ms Vincent’s evidence is simply too narrow to properly assist the Court with any objective assessment of the toys.

[131] Mr Lloyd argued that testing just one toy was insufficient to enable the Court to draw the inference that all toys had the same failings. None of the applicable rules require multiple tests. Mr Theobald gave evidence for the prosecutor. He is the chief adviser with the Commerce Commission. He participated in two voluntary interviews of representatives of the defendant. At no point did the defendant claim that there had been any change in product manufacturers. There is thus no proper basis to suggest that the toys tested were not properly representative of the toys sold.

Analysis

Mr Wheeler

[132] Mr Wheeler was properly qualified and certified to carry out the testing. Additionally, he has many years of relevant experience. I am satisfied that, with one exception, Mr Wheeler’s testing was careful and thorough.

[133] The exception was Mr Wheeler's use of his internal mental clock to essentially guess or estimate the timing of the tension tests. In respect of the tension test, I am not satisfied that they were carried out with sufficient accuracy and care to enable the Court to rely on them. However, I do not accept that it is appropriate to then extrapolate from that shortcoming to a general rejection of the results of other tests.

[134] The small parts test was carried out properly. It is simple in the extreme. The MTL laboratory is properly certified and I accept that the SPC was the correct dimensions. I accept the results of the small parts test.

[135] The drop test was also a simple test. It was suggested in cross-examination of Mr Wheeler that the equipment used may not have complied with the relevant standards. However, Mr Wheeler and his equipment were certified by IANZ.

[136] There were variations and even shortcomings in his certificates which summarise the results of testing. However, the Court is not reliant solely on certificates. I heard from Mr Wheeler. All of the evidence should be considered. I am satisfied that the drop tests were properly conducted in accordance with the standards.

[137] The result is that the toys failed testing in these ways:

- (i) Baby rattle – two hearts detached in the drop test and those detached parts fitted within the SPC thus the baby rattle failed both the drop test and the small parts test.
- (ii) Magnetic alphabet – 15 pieces failed the small parts test.
- (iii) House set – the house set failed both the drop test and the parts which detached in that test and nine other pieces failed the small parts test.
- (iv) Snake – one of the component parts failed the small parts test.

- (v) Dream House set with mirror and coat hangers – eight parts failed the small parts test.
- (vi) Dream House set with chair and bureau – five parts failed the small parts test.
- (vii) Fairy doll – as an intact item, no parts failed the small parts test. However, shoes easily detached (with or without a tension test) and those failed the small parts test. This is easily observable by an examination of the exhibit.
- (viii) Beaut Dolls – as an intact item, no parts failed the small parts test. However, shoes easily detached (with or without a tension test) and those failed the small parts test. This is easily observable by an examination of the exhibit.

Ms Vincent

[138] Ms Vincent's evidence addressed how the objective test established by the *Myriad* decision should be applied on a toy by toy basis.

[139] Ms Vincent has extensive experience of working with young children. She has taught young children and has about 45 years experience as a "child psychologist".

[140] Her methodology, in my view, showed thoroughness and care.

[141] Ms Vincent appears to have consulted appropriate other literature. For example, in addition to New Zealand standards, Ms Vincent has relied upon research articles and the American Age Determination Guidelines. The latter is an extensive work produced by the US Consumer Product Safety Commission which is an independent federal regulatory agency established in 1993 by the American Consumer Product Safety Act. The American guidelines appear to have been based on very wide research. For example, the guidelines append a bibliography of background reference material running to approximately 13 pages. Ms Vincent said

these guidelines were developed "... on the basis of a survey of more than 200 academic articles, together with research studies on the purchasing decisions of adults and children's interactions with toys". Particular assistance was gained from these guidelines because they assess toys in relation to different ages and stages of development.

[142] Ms Vincent has chosen various criteria to apply in her assessment of the toys in question. None of those criteria appear to offend against commonsense. The application of those criteria, in my view, results in a rigorous approach without sacrificing flexibility.

[143] The additional advantage of Ms Vincent's approach is that it is not overborne by the labelling used for the toys. I observe that the regulatory scheme to be applied here is focused on safety. The onus should be on traders to sell safe toys. Self-evidently, labelling alone will not make a toy safe. This is reflected in the New Zealand standards.¹⁸

[144] Ms Vincent's approach accords with the need to apply a "for use" test to determine whether an item is a plaything or merely something which happens to be attractive to children aged 36 months or under.¹⁹

[145] Ms Vincent has been thorough and methodical. Once she reached a conclusion regarding each toy, she has then cross-checked against such reference material as the American Age Determination Guidelines, SA/NZS Technical Report and other literature, for example Canadian Guidelines. Her approach is the antithesis of arbitrary.

[146] Insofar as Ms Vincent's approach to labelling is concerned, the Court cannot ignore the obvious fact that labelling is, in any event, transitory at the point of sale. It is probably fair to say that on any Christmas Day in New Zealand, most labelling has gone by lunchtime.

¹⁸ See [18] *supra*.

¹⁹ See *Myriad* at [36].

[147] In short, Ms Vincent's approach is the correct approach and I accept her evidence.

Result

[148] The result is as follows: both the baby rattle and the house set (CRNs ending 2258, 59, 60, 69, 70, 71 and 72) failed the drop test. The resulting detached parts for the baby rattle then failed the small parts test. For the house set, the detached parts and nine other parts of the house set failed the small parts test.

[149] The snake (CRNs ending 2273, 74 and 75), the magnetic alphabet (CRNs ending 2265, 66, 67 and 68), both Dream House sets (CRN ending 3698), the Fairy Doll toy (CRN ending 3700) and the Beaut Dolls (CRN ending 3701) failed the small parts test.

[150] I return guilty verdicts in relation to each of the foregoing charges.

A handwritten signature in black ink, appearing to read 'R G Ronayne', written in a cursive style.

R G Ronayne
District Court Judge

