NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 193-sd00

BETWEEN	THOMAS JAMES SPROTT
	Plaintiff
A N D	EDWIN ARTHUR MITCHELL
	Defendant

1755

Hearing:	14, 15 November 2000
Counsel:	TJG Allan for the plaintiff/respondent JG Miles QC and DH McLellan for the defendant/applicant
Judgment:	12 December 2000

(RESERVED) JUDGMENT OF MASTER KENNEDY-GRANT

Solicitors for the plaintiff
Grove Darlow & Partners
DX CP 24049

Solicitors for the defendant
Jones Fee
DX CP 18020

Counsel for the defendant
JG Miles QC

Introduction

[1] The plaintiff, ("Dr Sprott") sues the defendant ("Professor Mitchell") for damages for defamation arising out of an article published in *The New Zealand Herald* on 4 December 1999 quoting statements by Professor Mitchell regarding Dr Sprott.

[2] Professor Mitchell applies for summary judgment against Dr Sprott

The background

[3] On 4 December 1999, in the lead up to the SIDS 2000 Conference in Auckland in February 2000, an article was published in *The New Zealand Herald* headed "Deadlock in the nursery". The article dealt with the difference of view between Dr Sprott and what the writer of the article described as "the cot death research establishment" as to the validity of the toxic gas theory of Sudden Infant Death Syndrome ("SIDS") or (as it is more commonly referred to) "cot death" and the effectiveness as a means of preventing cot death of wrapping a baby's mattress in polythene to Dr Sprott's specifications.

[4] Towards the end of the article, the following passage appears:

> Mitchell has no doubt about the sincerity with which Sprott holds his views, but says they remain open to rigorous scientific debate – "and his tactics are aimed at preventing that debate".

[5] It is in respect of the words in "and his tactics are aimed at preventing that debate" contained in that passage that Dr Sprott brings the present proceeding.

[6] In paragraph 6 of his statement of claim Dr Sprott alleges that the words "and his tactics are aimed at preventing that debate" meant and were intended to mean that he:

> [a] Deliberately and improperly engages in practices which are designed to prevent scientific debate about cot death;

[b] Is unwilling to have his cot death theory scientifically debated;

[c] Unlawfully or improperly threatens action against those who criticise his cot death theory;

[d] Is a bigot;

[e] Is an unprofessional scientist in that he tries to prevent or stifle scientific debate;

[f] In having recourse to legal remedies acts in a manner which is unbefitting of a professional scientist (sic)

[7] In his statement of defence Professor Mitchell admits using the words complained of or words to like effect but relies on the following defences:

[a] That the words complained of are not and were not capable of bearing any of the meanings alleged in the statement of claim

[b] That, with the exception of the word "unlawfully" included in the meaning alleged in paragraph 6(c) of the statement of claim (see paragraph [6][c] of this judgment) and the entirety of the meaning alleged in paragraph 6(d) of the statement of claim (see paragraph [6][d] of this judgment), the meanings pleaded by Dr Sprott were expressions of honest opinion based on the facts set out in paragraph [8] of this judgment;

[c] That, with the exception of the word "unlawfully" included in the meaning alleged in paragraph 6(c) of the statement of claim (see paragraph [6][c] of this judgment) and the entirety of the meaning alleged in paragraph 6(d) of the statement of claim (see paragraph [6][d] of this judgment), the meanings alleged by Dr Sprott were true having regard to the matters set out in paragraph [8] of this judgment;

[d] That with the exception of the word "unlawfully" including in the meaning alleged in paragraph 6(c) of the statement of claim (see paragraph [6][c] of this judgment) and the entirety of the meaning alleged in paragraph 6(d) of the statement of claim (see paragraph [6][d] of this judgment), the meanings pleaded by Dr Sprott were expressions of honest opinion based on the facts set out in paragraph [8] of this judgment, the words were published on a privileged occasion.

[8] Professor Mitchell relies (in paragraph 7 of his statement of defence) on the following facts to support the defences of honest opinion and truth:

7.1 At the time of publication of the article the plaintiff had refused to attend the Sixth International SIDS Conference;

7.2 Before the said conference the plaintiff had threatened to discredit the Conference publicly;

7.3 The plaintiff had campaigned to undermine Red Nose Day appeals;

7.4 The plaintiff had threatened to sue doctors, educators, journalists, and various publications for defamation for publishing or intending to publish statements which the plaintiff considered attacked his theory, findings, or recommended preventative measures, relating to sudden infant death syndrome (SIDS) including (inter alia):

(1) The organisers of the SIDS 2000 conference;

(2) Professor Fleming;

(3) Dr RPK Ford;

(4) Dr Pat Tuohy;

(5) Amanda Cropp;

(6) Professor Nicholls;

(7) Mrs Stephanie Cowan;

(8) *Consumer Magazine;*

(9) *Little Treasures;*

(10) *Bounty Baby Care Guide;*

(11) *New Zealand Medical Journal*

7.5 The plaintiff had threatened to seek an injunction against the *New Zealand Medical Journal* enjoining it from publishing statements which the plaintiff considered attacked his theory, findings, or recommended preventative measures relating to SIDS;

7.6 The plaintiff had threatened the defendant with legal proceedings relating to his work on SIDS issues;

7.7 The plaintiff had refused to attend a Ministry of Health meeting of experts in the SIDS field to discuss whether mattress wrapping should be publicly endorsed as a SIDS preventative measure;

7.8 The plaintiff had tried to prevent funding of a pilot study supervised by the defendant into, among other things, the prevalence of mattress wrapping in Auckland;

7.9 The plaintiff undertook a letter writing campaign against a study carried out by Professor Bruce Taylor in 1997 examining the effect of increased carbon dioxide on babies;

7.10 The plaintiff circulated his critiques of two draft papers submitted to him to review by the New Zealand Medical Journal to various people in the SIDS field.

The defendant's application

[9] The defendant now seeks summary judgment against the plaintiff on one or more of the following grounds:

[a] That the words complained of cannot and could not have the following meanings among those alleged by Dr Sprott:

- That Dr Sprott "unlawfully" (as opposed to "improperly") "threatens action against those who criticise his cot death theory"

- That Dr Sprott "is a bigot"

[b] That, with the exception of the meanings referred to in sub-paragraph [a] of this paragraph, the meanings alleged by Dr Sprott were

expressions of honest opinion by Professor Mitchell based on facts truly stated;

[c] That, with the exception of the meanings referred to in sub-paragraph [a] of this paragraph, the meanings alleged by Dr Sprott were true.

Preliminary points

[10] In the course of the argument before me, two points arose which, in this judgment, I choose to describe as preliminary points:

[a] The true meaning of the word "bigot";

[b] The significance of the absence of a notice by Dr Sprott under s39(1) of the Defamation Act 1992.

[11] The first point was resolved by Mr Allan, who appears for Dr Sprott, withdrawing the allegation that the words complained of were and are capable of having the meaning that Dr Sprott "is a bigot".

[12] The second point was resolved by my inviting Mr Allan to make an application for an extension of time within which to serve a s39(1) notice on behalf of Dr Sprott and granting that application when made. I extended the time for serving the notice to Tuesday 21 November 2000. The notice has been duly served.

The approach to be adopted to a defendant's summary judgment application

[13] The Court of Appeal has, very recently, set out the approach to be adopted where a defendant seeks summary judgment against a plaintiff. In its decision of 9 November 2000 in *Westpac Banking Corporation v MM Kembla New Zealand Limited* (CA 50/00) the Court gave the following guidance to judges at first instance as to how they should approach the determination of defendants' summary judgment application:

> [58] The applications for summary judgment were made under Rule 136(2) of the High Court Rules which permits the Court to give judgment against the plaintiff "if the defendant

satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed".

[59] Since Rule 136(2) permits summary judgment only where a defendant satisfies the Court that the plaintiff cannot succeed on any of its causes of action, the procedure is not directly equivalent to the plaintiff's summary judgment provided by Rule 136(1).

[60] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under Rule 186. Rather Rule 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike out is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.

[61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in *McGechan on Procedure* at HR 136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.

[62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

[63] Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately

available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim. That would permit a defendant, perhaps more in possession of the facts than the plaintiff (as is not uncommon where a plaintiff is the victim of deceit), to force on the plaintiff's case prematurely before completion of discovery or other interlocutory steps and before the plaintiff's evidence can reasonably be assembled.

[64] The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.

[14] Although the Court of Appeal did not refer in this judgment to its earlier judgment in *Pemberton v Chappell* [1987] 1 NZLR 1 in relation to plaintiffs' summary judgment applications, the earlier decision contains a useful guide as to on what is meant by "satisfies" in r 136(1) and (2). The relevant passage is in Somers J's judgment at 3/49-4/17 of the report:

> At the end of the day R136 requires that the plaintiff "satisfies the Court that a defendant has no defence". In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence. See eg *Wallingford v Mutual Society* (1880) 5 App Cas 685, 693; *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99; *Orme v De Boyette* [1981] 1 NZLR 576. On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.
>
> Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident - that is to say, satisfied - that the defendant's statements as to matters of fact are baseless. The need to scrutinise affidavits, to see that they pass the threshold of credibility, is referred to in *Eng Mee Yong v Letchumanan*

[1980] AC 331, 341 and in the judgment of Greig J in *Attorney-General v Rakiura Holdings Ltd* (Wellington, CP 23/86, 8 April 1986).

The structure of the balance of this judgment

[15] The balance of this judgment comprises the following sections:

[a] The inter-relationship of the three defences (paragraphs [16]-[19])

[b] Are the words complained of capable of having the meanings alleged by Dr Sprott? (paragraphs [20]-[25])

[c] Are the meanings alleged by Dr Sprott statements of opinion or statements of fact? (paragraphs [26]-[37])

[d] Are the facts alleged in paragraph 7 of Professor Mitchell's statement of defence true? (paragraphs [38]-[62])

[e] Are there other facts which are relevant to the determination of the truth, or genuineness as opinion, of the meanings alleged by Dr Sprott? (paragraphs [63]-[66])

[f] Do the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts establish the truth of the meanings alleged by Dr Sprott or, in the case of those meanings or parts of meanings which are statements of opinion, provide support for the argument that the opinions in question were genuinely held by Professor Mitchell? (paragraphs [67]-[74])

[g] The consequences of the above findings. (paragraph [75])

[h] Orders (paragraph [76]).

The inter-relationship of the three defences

[16] The first defence, that the words complained of do not have the meanings alleged, is quite distinct from the second and third defences. To the extent that it is

established, it becomes unnecessary to consider the second and third defences because there is no defamation.

[17] If the words complained of are capable of the meanings, or of any of the meanings or any part of the meanings, alleged, it becomes necessary to consider the second and third defences. The first step in that process is the determination of the character of the words complained of: are they a statement of opinion or a statement of fact? If the former, the defences of truth and honest opinion may be available to the defendant; if the latter, only the defence of truth can be available.

[18] The distinction between the defences of truth and honest opinion is set out in paragraph 139 of the Defamation title in the *Laws of New Zealand*. This reads as follows:

> The defence of truth may be raised in the case of both defamatory statements of fact and defamatory opinion. However, the defence of honest opinion (formerly "fair comment") applies only to opinion and not to statements of fact. Where the words complained of contain both defamatory statements of fact and defamatory expressions of opinion, it is essential to plead truth as well as honest opinion.
>
> Where the defence of truth is raised, it is necessary to prove in respect of both statements of fact and expressions of opinion that the imputations in the matter complained of, or the publication taken as a whole, was true or not materially different from the truth. In a defence of honest opinion it is necessary to prove that the statements of fact on which the opinion is based are true or not materially different from the truth, and that, having regard to those facts and to any other facts generally known at the time and proved to be true, the comment on those facts is genuine opinion. The defence of honest opinion will fail unless the comments were the genuine opinion of the defendant, the latter being the author of the material. ...

[19] Paragraph 12.3 of *Gatley on Libel and Slander* (9th edition, 1998) is also of assistance, although related to the parallel English defences of justification and fair comment:

> Justification is a defence to any imputation contained in the words complained of, whether of comment or of fact, but if that is the plea the defendant must show that his comment is "correct". The defendant who pleads fair comment does not take upon himself this burden: the issue is not whether the jury agrees with his opinion of the plaintiff's conduct but whether it is a comment which might fairly be

made on the facts referred to. On the other hand, fair comment is narrower than justification in that it is not applicable to pure statements of fact, as opposed to opinions or inferences. ...

Are the words complained of capable of having the meanings alleged by Dr Sprott?

[20] Mr Miles, QC, for Professor Mitchell, accepts that the words complained of are capable of having the meanings alleged in paragraph 6 of the plaintiff's statement of claim (see paragraph [6] of this judgment) except for the word "unlawfully" in the meaning alleged in paragraph 6(c) of the statement of claim and the entirety of the meaning alleged in paragraph 6(d) of the statement of claim.

[21] As already noted, Mr Allan indicated in the course of argument that Dr Sprott abandoned the allegation that the words complained of have and had the meaning that "he is a bigot". That being so, the only issue as to the meaning of the words complained of relates to the inclusion in the meaning alleged in paragraph 6(c) of the statement of claim (see paragraph [6][c] of this judgment) of the word "unlawfully".

[22] The question whether the words complained of are capable of the meaning that Dr Sprott "unlawfully" (as opposed to "improperly") "threatens action against those who criticise his cot death theory" is a question of law.

[23] In the course of the argument:

[a] Mr Miles asked what law Dr Sprott could have broken by threatening action against those who criticise his cot death theory;

[b] Mr Allan declined to say how the threatening of action by Dr Sprott against those who criticise his cot death theory might be unlawful;

[c] I suggested that the threatening of action against those who disagree with one might, conceivably, constitute a breach of their rights under s14 of the New Zealand Bill of Rights Act 1990 (the freedom of expression section); and

[d] Mr Miles indicated that, if I made such a finding and, as a result, declined to grant summary judgment on the first defence, and I also declined to grant summary judgment on either the second or the third defences, he would amend Professor Mitchell's statement of defence to extend reliance on the defences of honest opinion and truth to cover the meaning of "unlawfulness" in paragraph 6(c) of the statement of claim as well as that of "impropriety" in that paragraph.

[24] In the course of preparing this judgment, I have come to the conclusion that I was in error when I suggested that the threatening of action against those who disagree with one might, conceivably, constitute a breach of their rights under s 14 of the New Zealand Bill of Rights Act 1990 (see paragraph [23][c] of this judgment). That suggestion was predicated on the possibility of the Act being relied on between individuals as well as between individuals and the Government. On the authority of the decisions of the Court of Appeal in *R v Accused* (1998) 16 CRNZ 162 at 168/20-35 and *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 at 584/11-12 that is not possible.

[25] I therefore find, for the purposes of this summary judgment application only, that the words "and his tactics are aimed at preventing that debate" are not capable of the meaning that Dr Sprott "unlawfully threatens action against those who criticise his cot death theory".

Are the meanings alleged by Dr Sprott statements of opinion or statements of fact?

[26] In the course of his submissions in reply, and in answer to questions from me, Mr Miles, for Professor Mitchell, submitted that, in considering the availability of the defence of honest opinion, I should ask myself the question "Are the meanings alleged statements of opinion or statements of fact?" not "Are the words complained of statements of opinion or statements of fact?". Mr Allan agreed with this proposition.

[27] In a memorandum filed two days after the hearing, Mr Miles sought to correct this submission, submitting that the correct question was, rather, "Are the

words complained of statements of opinion or statements of fact?". He relied, in support of this corrected submission, on his reading of the judgment of Anderson J in *Weir v Karam* (High Court Auckland, CP139/98, 20/9/00). He supported this submission by:

[a] Suggesting that Anderson J's use of the word "meaning" in his summing up to the jury (quoted at paragraph [10] of his judgment on the application for a new trial) and in paragraph [11] of his judgment on the subsequent application, cannot be "literally correct" because it would be wrong for the Court to "direct the jury to consider whether the meanings are opinions since this would entitle a plaintiff to construct meanings which were in the nature of facts not opinions";

[b] Suggesting that Anderson J appears to accept (in paragraph [16] of his judgment) that the correct approach is to ask the question in relation to the words.

[28] I have considered this further submission carefully but am not persuaded of its accuracy, for the following reasons:

[a] It is clear from paragraphs [6] to [8] of Anderson J's judgment that what he was talking about in the section of his judgment in which those paragraphs and also the paragraphs relied on by Mr Miles appear was whether the meaning was opinion, not whether the words were opinion.

[b] I am confirmed in the view that this was the approach adopted by Anderson J in that judgment, and that it is the correct view, by what is said in paragraphs 12.31 and 12.32 of *Duncan and Neill on Defamation* (2nd ed, 1983). In those paragraphs, the authors of that text, talking of the English defence of fair comment, make the following statements:

> 12.31 In considering whether (according to the objective test) the words used are fair

> comment, the test has to be applied to the meanings in which the words would be understood and not to the meaning intended by the defendant. ...
>
> 12.32 ... It is submitted that in every case, including a case where the defence of fair comment is raised, the jury has to decide as to the meaning of the words and then (where appropriate) apply the objective test of fair comment to that meaning.

(I have not found the other texts on the subject of any assistance on this point.)

[29] Given that I am of this view, I have, in this judgment, asked myself the question "Are the meanings alleged by Dr Sprott statements of opinion or statements of fact?" and not the question "Are the words complained of by Dr Sprott statements of opinion or statements of facts?".

[30] It is not always easy to determine whether a particular meaning is a statement of opinion or a statement of fact.

[31] Mr Miles has referred me to paragraphs 12.6 and 12.7 of *Gatley on Libel and Slander* (9th edition, 1998), which read as follows:

> 12.6 **The distinction**. The fundamental rule is that, subject to what is said below, the defence applies to comment but not to imputations of fact. If the imputation is one of fact the defence must be justification or privilege. However, the matter is complicated for two reasons: first, there may be difficulty in distinguishing comment and fact; secondly, a statement of fact which is an inference from other facts stated or referred to may be a comment for the purposes of the defence. Though "comment" is often equated with "opinion" this is an over-simplification. More accurately it has been said that the sense of comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.". It is possible to distinguish at least three situations:
>
> (1) A statement may be a "pure" statement of evaluative opinion which represents the writer's view on

something which cannot be meaningfully verified – "I do not think Jones is attractive".

(2) A statement which is potentially one of fact or opinion according to the context – "Jones' behaviour was disgraceful".

(3) A statement which is only capable of being regarded as one of fact – "Jones took a bribe" – but which may be an inference drawn by the writer from other facts.

12.7 **Fact and comment: the significance of supporting facts.** The question whether words are fact or comment is in the first instance for the judge: if he is satisfied that they must fall into one of the categories he should so direct the jury, but if in his opinion reasonable people could take either view he must leave the matter to the jury. If a defamatory allegation is to be defended as fair comment it must be recognisable by the ordinary, reasonable reader as comment and the key to this is whether it is supported by facts, stated or indicated, upon which, as comment, it may be based. To write of someone that he is "a disgrace to human nature" is a defamatory allegation of fact. But if the words were "He murdered his father, and therefore is a disgrace to human nature", the latter words appear from the context to be merely comment. "If a statement in words of fact stands by itself naked, without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words were addressed, there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact, and then if untrue there would be no answer to the action". So if the defendant alleges that a person has been guilty of disgraceful or incompetent conduct, or has been actuated by corrupt or dishonourable motives and does not state what those disgraceful or incompetent acts are, or assign any grounds from which such motives can reasonable be inferred, his allegations are allegations of fact and not comments. The underlying reason of policy is said to be that to "state accurately what a man has done, and then to say that such conduct is dishonourable or disgraceful, is comment which may do no harm, as everyone can judge for himself whether the opinion expressed is well founded or not. Misdescription of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no opportunity for judging for himself of the character of the conduct condemned, nothing but a false picture being presented for judgment. The force of this reasoning is somewhat diminished by the clear rule that the facts commented on do not have to be set out in the article

complained of but may be merely indicated therein and many readers may not in practice be in a position to make such a judgment. Nevertheless they normally have at least the opportunity to do so; and it is probably correct to say that words which are clearly comment are likely to be treated with more caution by the reasonable reader and hence are less damaging than assertions of fact.

[32] Mr Allan, for his part, has referred me to passages in:

[a] Gillooley: *The Law of Defamation in Australia and New Zealand* (1998) at pp124 and 125:

> Defamatory statements may be classified as either statements of fact or statements of opinion, depending upon their form and content. A statement of facts asserts some objectively verifiable matter, eg "It rained yesterday" or "The President of the USA lives at Buckingham Palace". The truth or falsity of the assertion is irrelevant to its classification – it is the mode of presentation that is important. In contrast, a statement of opinion (or comment) expresses "a deduction, inference, conclusion, criticism, judgment, remark, observation, etc" which is based upon factual matters, eg "It will rain tomorrow" or "I believe her to be totally unscrupulous". Since the defence of fair comment is only available with respect to statements of opinion, cases in which the defence is raised usually involve a somewhat tortuous dissection of the matter complained of into assertions of fact and expressions of opinion. ...
>
> In order to qualify as a comment for present purposes, the statement in question must be a pure expression of opinion – it must not be intertwined with or impliedly make any factual assertion. The actual language used and the context in which it appears must be examined in order to determine the nature of a given statement. The test to be applied is objective: would the ordinary reasonable person have understood the statement as an expression of opinion? The intention of the maker of the statement is irrelevant.

[b] *Carter-Ruck on Libel and Slander* (4th edition, 1992) at p 106:

> Comment is statement of opinion: it is the inference which the writer or speaker draws from the facts. Assertions of facts are not protected by this defence.

> Comment must appear as comment; it must not be so mixed up with statements of fact that the reader or listener is unable to distinguish between reports of facts and comment. "Any matter, therefore, which does not indicate with reasonable clearness that it purports to be comment and not statement of facts cannot be protected by the plea of fair comment". The reason is apparent: to state accurately and clearly what a man has done and then to express an opinion is comment which cannot do any harm or work injustice. The reader is then put in a position to judge for himself whether the opinion expressed is well-founded or not. If there is any doubt whether the words are statements of fact or comment the question is one to be decided by the jury subject to the judge ruling that the words are reasonably capable of being comment.

[33] In the context of summary judgment, I find the opening words of paragraph 12.7 of Gatley (see paragraph [31] above) particularly important:

> The question whether the words are fact or comment is in the first instance for the judge: if he is satisfied that they must fall into one of the categories he should so direct the jury, but if in his opinion reasonable people could take either view he must leave the matter to the jury.

In my view, it is a necessary corollary of this passage that, if or to the extent that I am of the view that the words complained of, giving them the various meanings which they are capable of bearing, could be either statements of fact or statements of opinion, I ought not to grant summary judgment on the basis of the defence of honest opinion.

[34] Given that the context of the statement is relevant to the question of whether the statement is one of fact or of opinion, I have been faced with a difficulty in this case, which was not referred to by either counsel. The difficulty is this: Professor Mitchell was not the author of the article in which the words complained of appear. He did not publish the article. He published the defamatory words (and he admits that he spoke them or words to like effect) on the occasion of an interview of him by the author of the article which formed the basis or part of the basis of the article. The correct context for determining whether the words complained of, in their various meanings, are a statement of fact or a statement of opinion is arguably,

therefore, not the article but the interview. Of the interview, of course, I know nothing except what I can deduce from the content of the article as having been likely to have been said in the interview.

[35] Counsel, who include one of the most experienced defamation lawyers in the country, have not concerned themselves with this difficulty. I therefore do no more than note it and proceed on the basis that the context of the statement is the wider context of the entirety of the evidence before the Court, which may be taken to have been traversed in the course of the interview or to be implicit in the article.

[36] For the purpose of this summary judgment application only, I make the following findings in respect of the various meanings alleged in paragraph 6 of the statement of claim (see paragraph [6] of this judgment) :

[a] Dr Sprott deliberately and improperly engages in practices which are designed to prevent scientific debate about cot death:

In this meaning, the words are arguably either a statement of fact or a statement of opinion.

[b] Dr Sprott is unwilling to have his cot death theory scientifically debated:

In this meaning, the words are arguably either a statement of fact or a statement of opinion.

[c] Dr Sprott unlawfully or improperly threatens action against those who criticise his cot death theory:

In this meaning, the words complained of are arguably partly a statement of fact and partly either a statement of opinion or a statement of fact. The words "threatens action against those who criticise his cot death theory" are arguably a statement of fact. The words "Unlawfully or improperly" are, in my view, capable of being either a statement of fact or a statement of opinion.

[d] Dr Sprott is a bigot:

This meaning is no longer relied on: see paragraph [11] of this judgment.

[e] Dr Sprott is an unprofessional scientist in that he tries to prevent or stifle scientific debate:

In this meaning, the words complained of are arguably partly a statement of fact and partly a statement of opinion. The words "tries to prevent or stifle scientific debate" are arguably a statement of fact. The words "is an unprofessional scientist in that" are, in my view, a statement of opinion.

[f] In having recourse to legal remedies Dr Sprott acts in a manner which is unbefitting a professional scientist:

In this meaning, the words complained of are arguably partly a statement of fact and partly a statement of opinion. The words "In having recourse to legal remedies" is arguably a statement of fact. The words "acts in a manner which is unbefitting of a professional scientist" (sic) are, in my opinion, a statement of opinion.

[37] In case I am wrong in holding that the correct question on this aspect of the case is "Are the meanings alleged by Dr Sprott statements of opinion or statements of fact", I hold, for the purpose of this summary judgment application only, that the words complained of are a statement of opinion.

Are the facts alleged in paragraph 7 of Professor Mitchell's statement of defence true?

[38] I set out in paragraphs [39]-[62] my findings as to the truth of the various facts alleged in paragraph 7 of the statement of defence (see paragraph [8] of this judgment).

[39] In doing so, I have also set out in relation to each of the facts alleged other facts which are relevant to the two questions:

[a] Are the facts alleged true (the subject of this section of this judgment)?

[b] Taking the alleged facts and the other relevant facts into account, are the meanings alleged by the plaintiff true or are they honestly held opinions (the subject of the next section of this judgment)?

[40] It may be that, conceptually, the issue of whether there are other relevant facts should be considered in the next section of this judgment; but I have considered them in this section in order to keep the facts (as opposed to my conclusions on the facts) together.

[41] Counsel are agreed that Professor Mitchell cannot rely on facts which came into existence after the date on which the article in *The New Zealand Herald* was published (or, if I am right in raising the point set out in paragraph [30] of this judgment, after the date of the interview) for the purpose of the defence of honest opinion but that he can do so for the purpose of the defence of truth.

[42] I make the following findings as to the truth of the allegation that at the time of publication of the article Dr Sprott had refused to attend the Sixth International SIDS Conference (paragraph 7.1 of the statement of defence)

[a] On the evidence before the Court, there is no doubt that, if this matter went to trial, a judge or jury could find that Dr Sprott was invited to speak at the conference and declined the invitation.

[b] However, in judging whether that fact, if found, would satisfy a jury as to the truth of the meanings alleged by the plaintiff or, if or to the extent that the meanings alleged are statements of opinion, as to the genuineness of those opinions, regard should, arguably, be had also to the reasons why Dr Sprott declined the invitation. Those reasons are

contained in exhibits "B", "E" and "H" to Professor Mitchell's affidavit in support of the summary judgment application.

[c] Arguably, those reasons would justify or explain Dr Sprott's decision not to attend the Conference

[43] I make the following findings as to the truth of the allegation that before the said conference Dr Sprott had threatened to discredit the Conference publicly (paragraph 7.2 of Professor Mitchell's statement of defence)

[a] Dr Sprott has admitted threatening to discredit the SIDS conference publicly (see paragraph 46 of his affidavit in opposition).

[b] There is also ample evidence, independent of his admission, that he made and acted on such a threat: see exhibits "B", "E" and "H" to Professor Mitchell's affidavit.

[c] However, in paragraphs 46-50 of his affidavit in opposition, Dr Sprott gives an explanation for his conduct. I quote passages from these paragraphs:

> 46 ... The reason why I stated this intention was that since Dr Mitchell had not changed his stance, I anticipated that there would be no debate on the toxic gas theory at the Conference. I considered that such debate should take place.
>
> 47 ... I was keen to ensure that delegates attending the Conference (many of whom would be coming from overseas countries) would nevertheless be informed about the toxic gas theory and the 100% success of the New Zealand mattress-wrapping campaign.
>
> ...
>
> 49 By publicising my reasons for opposing the Conference and sending material to potential delegates in advance, I hoped to attract useful scientific debate with delegates – an outcome which occurred.

[d] He explains (in paragraph 49 of his affidavit) that, as a result of his publicity:

> ... I was contacted by paediatricians, cot death researchers and other cot death workers in Australia, the United States and South Africa. Three of these people were scheduled to be speakers at the Conference. I engaged in a lengthy exchange of correspondence with Dr Peter Fleming. Two delegates, one of whom was a scheduled Conference speaker, approached me with a view to having the opportunity of meeting me when in Auckland.

[e] In addition, as a result of the publicity – particularly, no doubt, of the extensive television coverage of Dr Sprott's criticism of the conference on TV One - on the opening day of the conference (8 February 2000) he was offered a 30 minute time slot on 11 February 2000) (20 minutes speaking time and 10 minutes of questions).

[f] It is at least arguable that the fact of the threat to discredit the conference publicly should not be considered in isolation in determining either the truth of the fact alleged by Professor Mitchell or whether the meanings alleged by Dr Sprott were true or were honest opinion.

[44] I make the following findings as to the truth of the allegation that Dr Sprott had campaigned to undermine Red Nose Day appeals (paragraph 7.3 of Professor Mitchell's statement of defence)

[a] Dr Sprott admits that he engaged in public campaigns against the annual Red Nose Day appeals run by the New Zealand Cot Death Association. The methods which he adopted are evident from exhibits "J", "K", "L" and "O" to Professor Mitchell's affidavit in support of the summary judgment application and exhibits 9-13 to his own affidavit.

[b] His reasons for conducting this campaign are set out in the correspondence, advertisements and articles which constitute these

exhibits. Whatever view one might take of the validity of his reasons – and Mr Miles was very critical of them – it could not be said, in my view, that they were not in fact Dr Sprott's reasons for what he did nor that they are irrelevant to the determination of whether the fact that he campaigned to undermine Red Nose Day appeals justifies (in the sense of proving the truth) of the meanings alleged by the plaintiff or (if they are statements of opinion and not statements of fact) establishes a basis for holding them honestly.

[45] I make the following findings as to the truth of the allegation that Dr Sprott had threatened to sue doctors, educators, journalists, and various publications for defamation for publishing or intending to publish statements which the plaintiff considered attacked his theory, findings , or recommended preventative measures, relating to sudden infant death syndrome .. (paragraph 7.4 of Professor Mitchell's statement of defence)

[a] The evidence establishes that Dr Sprott has threatened each of the persons named in paragraph 7.4 of the statement of defence with defamation proceedings.

[b] The threats are contained in the following documents:

[i] The organisers of the SIDS 2000 Conference – exhibits "S"-"DD" and "TTT" to Professor Mitchell's affidavit

[ii] Professor Fleming – exhibit "FF" to Professor Mitchell's affidavit

[iii] Dr RPK Ford – exhibit "Q" to Professor Mitchell's affidavit

[iv] Dr Pat Tuohy – exhibits "GG" and "HH" to Professor Mitchell's affidavit

[v] Amanda Cropp – exhibits "GG", "II" and "EE" to Professor Mitchell's affidavit

[vi] Professor Nicholls – exhibits "JJ" and "OO" to Professor Mitchell's affidavit and 18 and 25 to Dr Sprott's affidavit

[vii] Mrs Stephanie Cowan – exhibits "JJ" and "ZZZ" to Professor Mitchell's affidavit

[viii] *Consumer Magazine* – exhibits "KK" and "LL" to Professor Mitchell's affidavit and exhibits 20.1 and 21 to Dr Sprott's affidavit

[ix] *Little Treasures* – see [v] above

[x] *Bounty Babycare Guide* – see [vii] above

[xi] *New Zealand Medical Journal* – see [vi] above

[c] Dr Sprott's justification for making these threats is that he was defamed by the statements to which he took exception and the publication of which, where appropriate, he sought to prevent.

[d] Mr Miles' response to this is to:

[i] Accept that, if Dr Sprott was arguably defamed in the statements of which he complained, he would arguably have been entitled to make the threats that he did; but

[ii] To contend that Dr Sprott could not conceivably have been defamed by the statements in question.

[e] The crucial issue in relation to this allegation of fact is, therefore, whether Dr Sprott arguably was or would have been defamed by the various statements in respect of which he made threats to sue. I set out my findings on this issue in paragraphs [46]-[53] of this judgment.

[46] I make the following findings as to the arguability of Dr Sprott's contention that he had been defamed by *Consumer Magazine* (see paragraph 7.4(7) of Professor Mitchell's statement of defence and paragraphs [8] and [45][b][vii] of this judgment):

[a] The passage of which Dr Sprott complained is the underlined portion of the following quotation from an article entitled "While they were sleeping" published in Consumer Magazine in October 1997 (see exhibit 20 to Dr Sprott's affidavit):

> Do Dr Sprott's views have substance? In our view, no one has been able to produce enough evidence to be fully confident of the answer – either way.
>
> But we have three major concerns about his campaign to introduce polythene covers.
>
> ...
>
> ♦ The third is his ability to misrepresent the situation

[b] These words are, in my view, arguably defamatory.

[47] I make the following findings as to the arguability of Dr Sprott's contention that he had been defamed by the statement in Professor Fleming's e-mail to him and would be further defamed if that statement were published to others (see paragraph 7.4(2) of Professor Mitchell's statement of defence and paragraph [45][b][ii] of this judgment):

[a] The threat to sue Professor Fleming for defamation was made in an e-mail from Dr Sprott to Professor Fleming dated 10 September 1999 (exhibit "FF" to Professor Mitchell's affidavit). In that e-mail Dr Sprott quoted the following statement from Professor Fleming's earlier e-mail to him:

> [T]here were in the third year of the CESDI study, two deaths on mattresses wrapped according to your instructions, as well as a single death in the second year of the study. Thus to state that no [deaths] have

> occurred on [correctly wrapped mattresses] is clearly not true.

[b] Dr Sprott pointed out that the deaths to which Professor Fleming had referred occurred between February 1993 and March 1996 and that his [Dr Sprott's] mattress-wrapping instructions were not published in Britain prior to 1997. He continued:

> I do not propose to take any steps to obtain legal redress from you on this occasion. However, I would most strongly warn you, your colleagues, FSID and other recipients of this e-mail not to publish any claim that babies have died of cot death on mattresses wrapped to my specifications. Such a claim is clearly defamatory and BabeSafe products (which are sold in New Zealand, Britain, Australia and the USA) ....

Dr Sprott went on to warn against repetition of the statement as the SIDS 2000 Conference or otherwise in the future. He copied the e-mail to the persons to whom Professor Fleming had copied his earlier e-mail.

[c] On the assumption that Dr Sprott had correctly repeated Professor Fleming's statement in his e-mail and had correctly stated the relevant dates (and as far as I am aware, the contrary is not argued), he would, in my view, arguably have been defamed and therefore arguably justified in threatening to sue if there was a further publication of the statement.

[48] I make the following findings as to the arguability of Dr Sprott's contention that he had been defamed by Dr Pat Tuohy (paragraph 7.4(4) of Professor Mitchell's statement of defence and paragraph [45][b][iv] of this judgment):

[a] Dr Tuohy was the subject of two (indirect) threats of action, the first in a letter of 27 May 1999 to the editor of *Little Treasures* (exhibit "GG" to Professor Mitchell's affidavit) and the second in a letter of 12 August 1999 to the Deputy Director General of the Ministry of Health (exhibit "HH" to Professor Mitchell's affidavit).

[b] The first letter complained of advice which had been given to Ms Cropp, who was preparing an article on cot death prevention (which was subsequently published – see exhibit 16 to Dr Sprott's affidavit), as to the accuracy of Dr Sprott's statement in the April 1999 issue of Cot Life 2000 that:

> There has not been one reported cot death on a BabeSafe mattress cover or BabeSafe mattress, or on a mattress correctly wrapped in polythene sheeting.

[c] The second complaint was in respect of statements in the paper "Impermeable mattress covers and the prevention of sudden infant death syndrome (SIDS)" of which Dr Tuohy was the lead author (see exhibit 65 to Dr Sprott's affidavit).

[d] So far as the first statement (ie the advice given by Dr Tuohy to Ms Cropp) is concerned, there is no evidence as to what the statement was precisely and the question of whether it was defamatory or not therefore cannot be determined.

[e] So far as the statements in the paper are concerned, their effect is sufficiently indicated by quoting the "Conclusions" section of the paper:

> The weight of currently available evidence is that the use of impermeable mattress covers made of PVC, polythene and rubber, neither increases nor decreases the risk of SIDS. Reports in the scientific literature have implicated plastic sheeting used as mattress covers, and garment bags in a baby's sleeping environment in the death of babies through suffocation, although the number of reported deaths from this cause is currently very low.
>
> In conclusion, currently available evidence does not support mattress wrapping with gas impermeable materials as a preventive strategy for SIDS.

[f] In his letter of 12 August 1999 to Dr Lambie (exhibit "HH" to Professor Mitchell's affidavit) Dr Sprott claimed that publication of

the paper would be defamatory of BabeSafe products, because it implied that they did not prevent cot death and that they posed a risk of suffocation to babies, and defamatory of himself, since he designed the BabeSafe products and "the research clearly implies that I, as a well-known public figure, publicly advocate to parents a baby care practice which could result in the suffocation of babies"

[g] There are references in the paper to Dr Sprott's 1995 paper "Poisonous gas hypothesis as a prime cause of cot death (SIDS). A chronology of events to February 1995" and his book "The Cot Death Cover-up".

[h] Given the references to Dr Sprott in the paper, the fact that he has been a high-profile campaigner for mattress wrapping as a preventative measure and the reference to plastic sheeting as well as plastic bags being involved in the death by suffocation of babies, I do not consider that it can be said to be totally unarguable that he was defamed by the paper

[49] I make the following findings as to the arguability of Dr Sprott's contention that he had been defamed by Dr RPK Ford (paragraph 7.4(3) of Professor Mitchell's affidavit and paragraph [45][b][iii] of this judgment):

[a] Dr Ford's paper (exhibit 16.1 to Dr Sprott's affidavit):

[i] clearly identified Dr Sprott with the promotion of mattress wrapping as a SIDS prevention method in New Zealand;

[ii] stated:

> The implausibility of the mattress-wrapping theory is better understood when data from the 1980s and 1990s were (sic) examined.

[iii] concluded:

> No evidence was found to suggest that SIDS numbers had been substantially reduced in Canterbury since the mattress wrapping campaign commenced. Moreover a large decrease in SIDS rate occurred in the absence of a correspondingly large increase in mattress-wrapping rates.

[b] Dr Sprott complained of this paper in his letter of 16 August 1999 to Dr Ford (exhibit "Q" to Professor Mitchell's affidavit), which was copied to a large number of people, including Professor Mitchell. He alleged that the research was flawed and alleged that it was defamatory of him because:

> (a) I am named in the research in connection with mattress-wrapping for cot death prevention; and
>
> (b) The research clearly implies that mattress-wrapping (being a babycare practice relating to disciplines in which I practice as a consultant) does not achieve the purpose for which I publicly promote it; and
>
> (c) I designed BabeSafe products, and they carry my name and are sold with refernce to my scientific reputation; and
>
> (d) the research clearly implies that I, as a public figure, publicly promote products which do not achieve the purpose for which they are expressly sold.

[c] It is at least arguable, in my view, that the paper was defamatory of Dr Sprott.

[50] I make the following findings as to the threats by Dr Sprott against Amanda Cropp and *Little Treasures* (paragraphs 7.4(5) and (9) of Professor Mitchell's affidavit and paragraphs [45][b][v] and [ix] of this judgment):

[a] The first threat, that made in the letter of 27 May 1999 to the editor of *Little Treasures* (exhibit "GG" to Professor Mitchell's affidavit), is so closely related to the first complaint against Dr Tuohy (see paragraph

[48][a], [b] and [d] of this judgment) that, in my view, it must be treated on the same basis.

[b] The second threat, that contained in Dr Sprott's letter to Ms Cropp of 10 August 1999 (exhibit "II" to Professor Mitchell's affidavit), is so closely related to Dr Sprott's complaint against Dr Ford (see paragraph [49] of this judgment) that it should, in my view, be treated similarly.

[c] The third threat, to *Little Treasures* (exhibit "EE" to Professor Mitchell's affidavit) is so closely related to Dr Sprott's complaint against Professor Fleming (see paragraph [47] of this judgment) that it should, in my view, be treated similarly.

[51] I make the following findings as to the arguability of Dr Sprott's contention that he had been defamed by Mrs Stephanie Cowan and *Bounty Baby Care Guide* (paragraph 7.4(7) and (10) of Professor Mitchell's statement of defence and paragraph [45][b][vii] and [x] of this judgment)

[a] The passage in the *Bounty Baby Care Guide* of which Dr Sprott complained reads:

> The [cot death] risks that tend to attract the most attention in the media are those with the weakest evidence; that is, those that are either controversial, are new findings, are based on assumptions or opinions or are down right (sic) wrong.

[b] In his letter of 20 October 1999 to Bounty Services Ltd (exhibit "ZZZ" to Professor Mitchell's affidavit), copied to Mrs Cowan, Dr Sprott alleged that the passage would be understood by people reading the guide to refer to him and to his views of the efficacy of mattress-wrapping. He alleged that the passage was:

> 1 Defamatory of myself, since it implies that I, as a well known public figure, am promoting mattress-wrapping to the public on the basis of insufficient evidence of risk on unwrapped

mattresses (and certain other items of bedding); and

2 Defamatory of my professional reputation, since it implies that:

(a) I am or may be mistaken in matters of chemistry relating to the generation of toxic hydride and/or alkyl gases from compounds of phosphorus, arsenic and antimony; or that

(b) I have reached a professional conclusion on the basis of information which comprises "assumptions and opinions".

[c] In the absence of further evidence leading to the conclusion that the article criticised mattress wrapping and/or was identifiably referring to Dr Sprott, I doubt whether any judge or jury would find that Dr Sprott had been defamed.

[52] I make the following findings as to the threats to Professor Nicholls and New Zealand Medical Journal (paragraph 7.4(6) and (11) of Professor Mitchell's statement of defence and paragraph [45][b][vi] and [xi] of this judgment):

[a] Dr Sprott's threats to these parties are related to the Ford paper, both in its original version (the subject of the threats dealt with in paragraph [49] of this judgment) and in its revised version (see exhibit 23 to Dr Sprott's affidavit) and to the Fleming claim (see paragraph [47] of this judgment).

[b] Dr Sprott sent the following letters to Professor Nicholls or to the Journal on the subject of the Ford paper:

[i] A copy to Professor Nicholls of his letter of 10 August 1999 to Ms Cropp (exhibit "II" to Professor Mitchell's affidavit) ;

[ii] A letter to Professor Nicholls on 8 September 1999 (exhibit 18 to Dr Sprott's affidavit), which referred back to the earlier

letter and advised that if the Ford paper was published in the New Zealand Medical Journal defamation proceedings might ensue;

[iii] A letter to Professor Nicholls of 26 October 1999 (exhibit "JJ" to Professor Mitchell's affidavit) advising of the agreement for a retraction to be published in *Little Treasures* and reiterating the warning given in the letter of 8 September 1999;

[iv] A letter of 16 November 1999 to Dr Evan Begg (exhibit "OO" to Professor Mitchell's affidavit) referring to the revised version of the Ford paper, commenting on various matters in an enclosed critique and claiming that he would be defamed if the following paragraph was retained in the revised version of the paper when it was published:

> By introducing plastic into their infants' sleeping environment, parents are introducing a potentially life-threatening hazard. The chances of asphyxiation increase if the plastic is thin and not appropriately fixed to the mattress. While the mattress-wrapping campaign clearly states that mattress- coverings should be secured firmly to the mattress, 31.0% of respondents simply used a sheet or blanket to hold the mattress cover in place. In one case, a respondent used the plastic packaging off a new mattress and held it in place around the mattress by using only a sheet.

[c] Separately from this series of letters, on 15 February 2000 Dr Sprott wrote to Professor Nicholls warning of proceedings if Professor Fleming's claim that three babies in Britain had died of cot death on mattresses wrapped to Dr Sprott's specifications was published (see exhibit 25 to Dr Sprott's affidavit).

[d] In my view, the series of letters regarding the Ford paper and the single letter regarding the Fleming claim are both so closely related to

their respective subject matter that they should be treated similarly (as to which see paragraphs [49] and [47] of this judgment).

[53] I make the following findings as to the threats to the organisers of the SIDS 2000 Conference (paragraph 7.4(1) of Professor Mitchell's statement of defence and paragraph [45][b][i] of this judgment):

[a] The threats to the organisers of the SIDS 2000 Conference relate to the publication of the Tuohy and Ford papers or research contained in them at the Conference.

[b] They are so closely related to those papers, that they should, in my view, be treated similarly (as to which see paragraphs [48] and [49] of this judgment).

[54] I make the following findings as to the allegation that the plaintiff had threatened to seek an injunction against the New Zealand Medical Journal enjoining it from publishing statements which the plaintiff considered attacked his theory, findings, or recommended preventative measures relating to SIDS (paragraph 7.5 of Professor Mitchell's statement of defence):

[a] The threat was made in Dr Sprott's letter of 16 November 1999 to Dr Evan Begg of the New Zealand Medical Journal referred to in paragraph [52][b][iv] of this judgment.

[b] It was a threat to seek an injunction to prevent publication of the paper; but it was clear on the face of the letter that the ground on which the injunction would be sought would be the inclusion in the Ford paper of the new paragraph regarding suffocation.

[c] The threat therefore falls to be considered as part of the whole Ford episode (as to which see paragraph [49] of this judgment).

[55] I make the following findings as to the allegation that the plaintiff had threatened the defendant with legal proceedings relating to his work on SIDS issues (paragraph 7.6 of Professor Mitchell's statement of defence).

[a] Three documents are relied on by Professor Mitchell:

[i] Dr Sprott's letter to him of 16 August 1999 (exhibit "P" to Professor Mitchell's affidavit), threatening defamation proceedings if the Ford and Tuohy papers or the research contained in them was published at the SIDS conference;

[ii] A letter of 15 July 1998 (exhibit 27 to Dr Sprott's affidavit) written to Professor Mitchell following the publication of a paper (exhibit 26 to Dr Sprott's affidavit) written by him jointly with Drs Fitzpatrick and Waters;

[iii] A letter written by Dr Sprott to a student of Professor Mitchell's, Ms Subramaniam (exhibit "R" to Professor Mitchell's affidavit).

[b] I consider each of these letters separately in paragraphs [56]-[58] of this judgment

[56] Dr Sprott's letter of 16 August 1999 to Professor Mitchell (see paragraph [55][a][i] of this judgment) forms part of the Ford and Tuohy episodes and should be dealt with as such (as to which see paragraphs [49] and [48] of this judgment).

[57] I make the following findings in relation to Dr Sprott's letter of 15 July 1998 (see paragraph [55][a][ii] of this judgment):

[a] The Mitchell, Fitzpatrick and Waters paper reviewed the chemistry, epidemiology, pathology and toxicology of the toxic gas theory and identified what the authors believed to be weaknesses in the theory. It then considered the "Dangers of polythene covering of mattresses", identifying Dr Sprott as a proponent of the toxic gas theory and of the

recommendation of polythene covering of mattresses. The paper reached the following conclusion on this subject:

> Plastic wrapping of cot mattresses has recently been reviewed. The balance of evidence is that it neither increases nor decreases the risk of SIDS. However, there is definite evidence that plastic sheeting, including plastic bags, in a baby's sleeping environment, has caused the death of babies through suffocation, although the number of reported deaths from this cause is currently very low. ...

The article concludes by saying that the toxic gas theory had been investigated and:

> Found not to be supported by the evidence.

and that:

> It is time to concentrate on reducing the prevalence of risk factors which are known to be associated with SIDS.

[b] Given the identification of Dr Sprott as a proponent of the toxic gas theory and a recommender of the wrapping of mattresses with polythene, the conclusion in the section "Dangers of polythene coverings of mattresses" that there was definite evidence that plastic sheeting had caused the death of babies through suffocation, and the further statements in the "Conclusion" section of the paper just quoted, it is at least arguable that persons reading the paper would take it to mean that Dr Sprott was recommending a practice which was dangerous.

[c] Such a meaning would arguably be defamatory.

[d] At the same time as he wrote to Professor Mitchell, Dr Sprott sent an e-mail to Dr Fitzpatrick (exhibit 27.1 to Dr Sprott's affidavit) in which he expanded on his objection to the passage and said he would welcome any letter that Dr Fitzpatrick might have published in the

New Zealand Medical Journal about the chemistry but pointed out that that would not "retract the defamatory statement or take away your liability for that statement".

[e] A letter from Dr Fitzpatrick and a statement by the Editors of the New Zealand Medical Journal were duly published. Both stated that there had been no intention to imply that there had been deaths on BabeSafe mattresses. The statement by the Editors stated that the comment complained of cited the findings of a survey of causes of death for infants and children in California and that the comment

> should be read as referring solely to the study and should not be taken to imply that there have been deaths of infants due to suffocation on the BabeSafe plastic mattress or on plastic of the type specified by Dr TJ Sprott as mattress wrapping. We do not know of any such deaths:

[f] Given my findings in sub-paragraphs [b] and [c] of this paragraph and the letter by Dr Fitzpatrick and the statement by the Editors referred to in sub-paragraph [e], I consider that it is arguable that Dr Sprott had been defamed in the paper.

[58] I make the following findings in relation to Dr Sprott's letter to Ms Subramaniam (exhibit "R" to Professor Mitchell's affidavit):

[a] It took her to task, first, for puncturing a BabeSafe cover and inserting a needle to extract material from the mattress and cutting a hole in the mattress cover and removing a sample of plastic for testing and, secondly, for her statements to the mother in question that the mattress cover might cause the baby to "overheat".

[b] It warned Ms Subramaniam that the first action might expose her and the University of Auckland, among others, to an action in negligence and that the manufacturer of the BabeSafe cover was considering legal action against her for product defamation.

[c] In my view, to say that a person may be sued by a third party because of what he or she has done is, at least arguably, not a threat but a warning.

[59] I make the following findings in relation to the allegation that Dr Sprott had refused to attend a Ministry of Health meeting of experts in the SIDS field to discuss whether mattress wrapping should be publicly endorsed as a SIDS preventative measure (paragraph 7.7 of Professor Mitchell's statement of defence):

[a] It is clear on the evidence that Dr Sprott refused to attend this meeting.

[b] The circumstances in which he refused to attend this meeting and his reasons for refusing to attend it are relevant when it comes to enquire whether the fact of his refusal establishes the truth of the meanings alleged by the plaintiff, or to the extent that those meanings are statements of opinion, provides a basis for those opinions to be genuinely held.

[c] That enquiry involves the consideration not only of exhibits "CCC" – "HHH" to Professor Mitchell's affidavit but also of exhibits 46-64 to Dr Sprott's affidavit.

[d] If the enquiry is extended to cover all these documents, there are a number of matters on which Dr Sprott could base an argument that his refusal to attend the meeting was justifiable or, at the very least, understandable. I refer, for example, to:

[i] The fact that shortly before the second proposed date of the meeting the New Zealand Cot Death Association, supported by the National Child Heath Research Foundation, the Health Research Council and the Royal New Zealand Plunket Society issued a media release (exhibit 58 to Dr Sprott's affidavit), headed "Health organisations call for end to cot death

confusion", in which they stated that they "cannot endorse the toxic gas theory that has been widely promoted in the media by Dr James Sprott as the cause of cot death" and questioned the validity of the theory and the efficacy of mattress covers. (In making this observation, I am not overlooking Dr Sprott's frequent and effective use of the media.)

[ii] The omission from the briefing papers for the meeting of papers which Dr Sprott considered relevant and the inclusion of papers which, in his view, were either irrelevant or of questionable value (see exhibit 64 to Dr Sprott's affidavit). (I appreciate that this document was prepared after he had refused to attend the meeting and, it may be, that the briefing papers were not received by him until after that date; but I consider that the content and quality of the briefing papers issued for the meeting are matters which are potentially relevant to the question of whether Dr Sprott's refusal to attend the meeting was justifiable or, alternatively, understandable.)

[60] I make the following findings in relation to the allegation that Dr Sprott had tried to prevent funding of a pilot study supervised by Professor Mitchell into, among other things, the prevalence of mattress-wrapping in Auckland (paragraph 7.8 of Professor Mitchell's statement of defence):

[a] It is clear that Dr Sprott did try to prevent funding of the pilot study in question or, more accurately of a proposed pre-pilot study connected with the pilot study. This appears from exhibits "KKK'-"MMM" to Professor Mitchell's affidavit.

[b] However, having regard to the reasons for Dr Sprott's attempt to prevent funding for the pre-pilot study apparent from exhibits "KKK'-"MMM" to Professor Mitchell's affidavit, together with

exhibits "MNN-OOO" to that affidavit and exhibits 66-68 of Dr Sprott's affidavit, it is arguable that he was justified in doing so.

[61] I make the following findings in relation to the allegation that Dr Sprott undertook a letter-writing campaign against a study carried out by Professor Bruce Taylor in 1997 examining the effect of increased carbon dioxide on babies (paragraph 7.9 of Professor Mitchell's statement of defence):

[a] The evidence establishes that Dr Sprott wrote to the parents of babies who might be included in the study (exhibits "PPP" to Professor Mitchell's affidavit and 71 to Dr Sprott's affidavit) and to the Manager, Biomedical Research, of the Health Research Council of New Zealand (exhibit 70 to Dr Sprott's affidavit).

[b] However, once again, it is necessary to consider his reasons for doing so, as expressed in the letters and in related press releases (as to the latter see exhibits "QQQ" and "RRR" to Professor Mitchell's affidavit and exhibit 72 to Dr Sprott's affidavit).

[c] If those reasons are taken into consideration, it may be arguable that his actions were justified or excusable.

[62] I make the following findings in relation to the allegation that Dr Sprott circulated his critiques of two draft papers submitted to him to review by the New Zealand Medical Journal to various people (paragraph 7.10 to Professor Mitchell's statement of defence):

[a] The evidence on this point establishes that Dr Sprott copied the following reviews to the following persons:

[i] His review of Dr Ford's paper to Professor Mitchell (see exhibit "P" to the latter's affidavit)

[ii] His review of Dr Tuohy's paper to the Minister of Health in January 1999 (see exhibit 74 to Dr Sprott's affidavit) and in

August 1999 to Dr Lambie, Dr Tuohy's superior in the Ministry of Health (see exhibit "HH" to Professor Mitchell's affidavit)

[iii] Reviews of both papers to Mr L Schoushkoff, Chief Executive of the New Zealand Cot Death Association, and Mr R Austin, a Board member of the Association, in March 1999.

[b] Dr Sprott explains the first and second of these copyings as due to the desire to prevent the publication of material which he regarded as defamatory of himself.

[c] He explains that the third copying was made, in support of his submission to the New Zealand Cot Death Association of a proposal for an endorsement of mattress-wrapping for cot death prevention, to counter any reliance that might be placed by researchers on the research contained in the two papers.

[d] These explanations arguably justify or excuse his conduct.

Are there other facts which are relevant to the determination of the truth, or genuineness as opinion, of the meanings alleged by Dr Sprott?

[63] Professor Mitchell's affidavit contains a section headed "Additional matters proving truth of facts in article and of the meanings attributed to those facts" (see paragraphs 38-52 of that affidavit). Many of the matters to which he refers have already been dealt with. The only relevant additional matters contained in this section, in my view, are those contained in paragraphs 41, 45.1, and 46-47:

[a] The former paragraph alleges that in May 1999 Dr Sprott threatened to run a media and letter campaign against the Cot Death Association as the Association had refused to endorse his mattress wrapping recommendation as a cot death preventative measure;

[b] In paragraph 45.1 Professor Mitchell refers to a letter from Dr Sprott to Ms Felicity Price, the Conference Chairperson for the SIDS 2000 Conference, written on 27 January 2000;

[c] In paragraphs 46 and 47, Professor Mitchell alleges that none of the material released by Dr Sprott that he has seen meets the requirements for scientific debate.

[64] On the evidence before the Court (see exhibits III and JJJ to Professor Mitchell's affidavit), Dr Sprott did threaten to write to potential sponsors and to the media if the Cot Death Association did not endorse mattress wrapping as a SIDS prevention measure. On that evidence, he appears to have done so because he considered it "unconscionable for the ... Cot Death Association ... to seek public funding while at the same time declining to endorse mattress wrapping for cot death prevention." He proposed to include with his letters what he regarded as "relevant research".

[65] Dr Sprott's letter to Ms Price is exhibit TTT to Professor Mitchell's affidavit. Its contents are such that, in my view, it is properly to be considered in the same light as the alleged threats to the organisers of the SID's 2000 Conference (as to which see paragraph [53] above)

[66] With regard to Professor Mitchell's allegation that none of Dr Sprott's applications meet the criteria for scientific debate (see paragraph [63][c] of this judgment), I am not in a position, on the evidence before me and without the benefit of much more detailed consideration of the material than was engaged in before me, to form a view as to the validity of this particular allegation. I note, however:

[a] What Dr Sprott says (in paragraph 6 of his affidavit) as to the publication of papers by Dr Richargson and others on the toxic gas theory in peer-reviewed journals and on other occasions which one would have thought would qualify as serious scientific debates;

[b] That Dr Sprott has published a book "The Cot Death Cover-up?", in which, according to him (paragraph 229 of his affidavit), "[r]esearch methodology relating to the toxic gas theory is described in extensive detail".

Do the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts establish the truth of the meanings alleged by Dr Sprott or, in the case of those meanings or parts of meanings which are statements of opinion, provide support for the argument that the opinions in question were genuinely held by Professor Mitchell?

[67] I consider this question in relation to each of the meanings alleged by Dr Sprott in paragraph 6 of his statement of claim (see paragraph [6] of this judgment) in paragraphs [69]-[74] of this judgment.

[68] The findings in those paragraphs are made for the purpose of this summary judgment application only.

[69] The first meaning alleged by Dr Sprott in paragraph 6 of his statement of claim (see paragraph [6][a] of this judgment) is that he "[d]eliberately and improperly engages in practices which are designed to prevent scientific debate about cot death". I make the following findings regarding the truth, and the genuineness as opinion, of this meaning:

[a] In the light of my findings in paragraphs [43]-[66] of this judgment in relation to the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts relied on by Professor Mitchell, I find that it is arguable that the facts do not establish the truth of the meaning alleged by Dr Sprott;

[b] In the light of my findings in paragraphs [43]-66] of this judgment in relation to the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts relied on by Professor Mitchell, I find that it is arguable that the facts do not provide support for the argument that the opinions in question were genuinely held by Professor Mitchell;

[c] In making these findings, I have not overlooked the fact that in paragraphs [48][d] and [51][c] of this judgment I have made findings that there is no evidence or insufficient evidence that Dr Sprott was defamed by whatever it was that Dr Tuohy said to Ms Cropp or by the passage in the *Bounty Baby Care Guide* of which he complained.

[70] The second meaning alleged by Dr Sprott in paragraph 6 of his statement of claim (see paragraph [6][b] of this judgment) is that he "[i]s unwilling to have his in cot death theory scientifically debated". I make the following findings regarding the truth, and the genuineness as opinion, of this meaning:

[a] In the light of my findings in paragraphs [43-[66] of this judgment in relation to the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts relied on by Professor Mitchell, I find that it is arguable that the facts do not establish the truth of the meaning alleged by Dr Sprott;

[b] In the light of my findings in paragraphs [43]-[66] in relation to the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts relied on by Professor Mitchell, I find that it is arguable that the facts do not provide support for the argument that the opinions in question were genuinely held by Professor Mitchell;

[c] In making these findings, I have not overlooked the fact that in paragraphs [48][d] and [51][c] of this judgment I have made findings that there is no evidence or insufficient evidence that Dr Sprott was defamed by whatever it was that Dr Tuohy said to Ms Cropp or by the passage in the *Bounty Baby Care Guide* of which he complained.

[71] The third meaning alleged by Dr Sprott in paragraph 6 of his statement of claim (see paragraph [6][c] of this judgment) is that he "[u]nlawfully or improperly threatens action against those who criticise his cot death theory". I make the

following findings regarding the truth, and the genuineness as opinion, of this meaning:

[a] As already noted in paragraphs [22]-[25] of this judgment, I find that the words complained of are not capable of bearing the meaning that Dr Sprott acted "unlawfully". The truth or genuineness as opinion of such a meaning, therefore, does not require consideration.

[b] In the light of my findings in paragraphs [43]-[66] of this judgment in relation to the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts relied on by Professor Mitchell, I find that it is arguable that the facts do not establish the truth of the meaning alleged by Dr Sprott;

[c] In the light of my findings in paragraphs [43]-[66] of this judgment in relation to the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts relied on by Professor Mitchell, I find that it is arguable that the facts do not provide support for the argument that the opinions in question were genuinely held by Professor Mitchell;

[d] In making these findings, I have not overlooked the fact that in paragraphs [48][d] and [51][c] of this judgment I have made findings that there is no evidence or insufficient evidence that Dr Sprott was defamed by whatever it was that Dr Tuohy said to Ms Cropp or by the passage in the *Bounty Baby Care Guide* of which he complained.

[72] The fourth meaning alleged by Dr Sprott in paragraph 6 of his statement of claim (see paragraph [6][d] of this judgment) is no longer relied on.

[73] The fifth meaning alleged by Dr Sprott in paragraph 6 of his statement of claim (see paragraph [6][e] of this judgment) is that he "[i]s an unprofessional scientist in that he tries to prevent or stifle scientific debate". I make the following findings regarding the truth, and the genuineness as opinion, of this meaning:

[a] In the light of my findings in paragraphs [43]-[66] of this judgment in relation to the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts relied on by Professor Mitchell, I find that it is arguable that the facts do not establish the truth of the meaning alleged by Dr Sprott;

[b] In the light of my findings in paragraphs [43]-[66] of this judgment in relation to the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts relied on by Professor Mitchell, I find that it is arguable that the facts do not provide support for the argument that the opinions in question were genuinely held by Professor Mitchell;

[c] In making these findings, I have not overlooked the fact that in paragraphs [48][d] and [51][c] of this judgment I have made findings that there is no evidence or insufficient evidence that Dr Sprott was defamed by whatever it was that Dr Tuohy said to Ms Cropp or by the passage in the *Bounty Baby Care Guide* of which he complained.

[74] The sixth meaning alleged by Dr Sprott in paragraph 6 of his statement of claim (see paragraph [6][f] of this judgment) is that he "[i]n having recourse to legal remedies he acts in a manner which is unbefitting of a professional scientist". I make the following findings regarding the truth, and the genuineness as opinion, of this meaning:

[a] In the light of my findings in paragraphs [43]-[66] of this judgment in relation to the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts relied on by Professor Mitchell, I find that it is arguable that the facts do not establish the truth of the meaning alleged by Dr Sprott;

[b] In the light of my findings in paragraphs [43]-[66] of this judgment in relation to the facts alleged in paragraph 7 of Professor Mitchell's statement of defence and/or the other relevant facts relied on by Professor Mitchell, I find that it is arguable that the facts do not provide support for the argument that the opinions in question were genuinely held by Professor Mitchell;

[c] In making these findings, I have not overlooked the fact that in paragraphs [48][d] and [51][c] of this judgment I have made findings that there is no evidence or insufficient evidence that Dr Sprott was defamed by whatever it was that Dr Tuohy said to Ms Cropp or by the passage in the *Bounty Baby Care Guide* of which he complained.

The consequences of the above findings

[75] The consequence of the above findings is that I find that the defendant's application for summary judgment against the plaintiff cannot succeed

Orders

[76] I therefore make the following orders:

[a] The defendant's application for summary judgment against the plaintiff is dismissed;

[b] The question of the costs of the summary judgment application is reserved on the basis that, if the plaintiff does not apply for costs within 14 days, the costs of the summary judgment application will be determined by the trial judge but, if the plaintiff does apply for costs, that application is to be referred to me for directions as to the manner of presentation of argument in relation to costs;

[c] The proceeding is transferred to the standard track and the Registrar is to schedule a Directions Conference before me outside normal Court

hours on the first available date after 31 January 2001 (not being a Conference Day);

[d] The costs of the substantive proceeding are reserved.

[77] This judgment is signed at 10.10 am on 12 December, 2000.

T Kennedy Grant.

MASTER T KENNEDY-GRANT