IN THE COURT OF APPEAL OF NEW ZEALAND CA21/01

BETWEEN EDWIN ARTHUR MITCHELL

Appellant

AND THOMAS JAMES SPROTT

Respondent

Hearing: 8 October 2001

Coram: Richardson P
Blanchard J
McGrath J

Appearances: J G Miles QC and D H McLellan for Appellant
T J G Allan for Respondent

Judgment: 15 November 2001

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

Introduction

[1] This is an appeal from a decision of Master Kennedy-Grant in the High Court at Auckland dismissing an application for summary judgment by the appellant, Dr Mitchell, the defendant in a defamation proceeding brought by the respondent, Dr Sprott. The proceeding relates to a statement about Dr Sprott attributed to Dr Mitchell (and admittedly made by him) in an article in the New Zealand Herald on 4 December 1999. We understand that no proceeding has been brought against the author of the article, Jan Corbett, or the publisher of the New Zealand Herald.

[2] In issue on this appeal is whether the words complained of in the article were a statement of fact or an expression of opinion and whether, in either event, it has been shown on the balance of probabilities that Dr Sprott cannot succeed. The Master held that it was arguable that the facts pleaded in Dr Mitchell's statement of defence did not establish the truth of the meaning alleged by Dr Sprott; and that it was also arguable that the facts did not provide support for Dr Mitchell's defence that the opinion in question was genuinely held by him.

Facts

[3] Dr Mitchell is a specialist in paediatrics and an associate professor at the medical school at the University of Auckland. Dr Sprott is a consulting chemist and forensic scientist. Both men have long taken a strong interest in the causes and prevention of cot death or Sudden Infant Death Syndrome (SIDS). At the time of the publication of which Dr Sprott complains, Dr Mitchell was the chair of the New Zealand Cot Death Association (the Association) and was prominent in the organisation of an international conference on SIDS due to take place in Auckland in February 2000.

[4] The association had for several years until 1999 raised funds from the public by what were known as Red Nose Day appeals. Those appeals were discontinued as a result of actions taken by Dr Sprott.

[5] Dr Sprott holds the view, as a result of studies and research since the mid 1980s, that cot death is caused by toxic gases (phosphines, arsines and stibines) which can be generated in a baby's cot by microbiological activity in the mattress. This has become known as the "toxic gas theory". He has since 1994 publicly advocated (both in this country and internationally) the preventive measure of enclosing the mattress on which a baby sleeps in a gas-impermeable diaphragm which is incapable of generating the toxic gases. In 1996 he invented the BabeSafe cot mattress cover (a slip-on polythene cover which encloses a baby's mattress) with which he says his name is now associated in the public mind. He says there has been no reported cot death on any mattress wrapped to his specifications.

[6] The Association and its supporters, including of course Dr Mitchell, are not persuaded by the merits of the toxic gas theory and, consequently, of mattress-wrapping as a preventative. The Association instead tells parents that, in order to avoid or reduce the risk of cot death, they should place a baby to sleep on its back. They recommend also that the mother should not smoke during pregnancy or around the infant in its first year and should breastfeed if possible. If the mother is a smoker, she should not have the baby sleeping with her in the same bed.

[7] The New Zealand Herald article was entitled "Deadlock in the nursery". It opened:

> When a major international conference on cot death runs in Auckland in February, one leading cot death campaigner will be absent from the stage. But the presence of Dr Jim Sprott – the man who helped to free Arthur Allan Thomas – will undoubtedly be felt.
>
> For five years Sprott has been at war with the cot death research establishment over his conviction that cot death can be prevented by wrapping baby mattresses to his specifications.
>
> The "establishment" considers his theory unproven, even potentially dangerous if the wrapping does not conform to his precise instructions.
>
> But Sprott doesn't seem to be interested in arguing his theory before the Sudden Infant Death Syndrome (SIDS) 2000 conference.
>
> Twice declining invitations to address the conference, he has cited the lack of time devoted to the toxic gas theory, the lack of right of reply and the inadequate qualifications of the opposing speaker.
>
> In a letter to Cot Death Association chairman Dr Ed Mitchell, he goes further, promising that if mattress wrapping is not endorsed he will "proceed with a public campaign to discredit the conference."
>
> He reminded Mitchell of how successfully he had undermined the Red Nose Day appeal and the financial implications of that to the Cot Death Association.

[8] Later in the article it is stated that the most recent analysis of the problem – in the 1998 Limerick Report, produced after four years' investigation by British scientists – concluded that "the toxic gas hypothesis is unsubstantiated". The article goes on:

> Sprott takes issue with that conclusion and warns he will sue people who attack the theory in a manner he believes defames him. As a result, several doctors, researchers, educators and journalists have been threatened with defamation.
>
> Sprott accuses those in the cot death establishment who refuse to endorse mattress-wrapping – the Cot Death Association, Plunket and the Ministry of Health – of wanting cot death to continue because they make their living from it.
>
> Does he think that might be a defamatory statement?
>
> "I haven't named anybody," he replies.
>
> None of his warnings of legal action has yet ended in court, although he has put one British doctor on notice that the next stop will be the courtroom.
>
> So far, under threat of legal proceedings, he has secured what he calls retractions from *Consumer* magazine, *Little Treasures,* the *New Zealand Medical Journal* and *MedALERT*. He also says he was granted an extensive live interview by TVNZ "for the purpose of avoiding defamation proceedings."

[9] The article also contains the following passage:

> Common among the statements that rile Sprott are those suggesting babies have died on wrapped mattresses. They have. But he has successfully argued they did not die on mattresses wrapped to his specifications – and to suggest otherwise is to impugn his reputation. Clarifications usually follow.
>
> For similar reasons, Sprott has taken exception to a soon-to-be-published Canterbury study on infant sleep practices, including mattress-wrapping.
>
> *Little Treasures* magazine referred to an earlier version of that paper this year and later printed a clarification pointing out that the study did not state whether the mattresses were wrapped to Sprott's precise specifications. He also argued it was misleading to compare the cot death rate since 1990 because his theory was not widely publicised until 1994.
>
> Sprott is now threatening to injunct the *Medical Journal* over its plans to publish a revised version of that paper, and has issued press releases denouncing it.
>
> He took an earlier swipe at the authors of that paper last year when they declared 14.6 per cent of Christchurch parents wrapped their mattresses to prevent cot death.

> The warning was clear: "…any future publication of your incorrect figure for mattress-wrapping, which carries with it the implication that BabeSafe products are not selling well, will be treated by the manufacturer as product defamation and legal remedy [will be] pursued accordingly."
>
> As Sprott points out, citing defamation laws is perfectly legitimate. But it is unusual among scientists who disagree. They normally thrash out their differences in scientific journals.
>
> Sprott says he does not react to people who disagree with him scientifically, only those who defame him.
>
> Nor does he accept that his actions invite animosity against him. "I don't start it," he says. "I react. Don't ever dare publish that I start these fights, because I don't."
>
> Nevertheless, the legal warnings put considerable psychological pressure on cot death researchers, according to the Cot Death Association's Dr Mitchell, the recipient of three threats. He says some people are now questioning whether it is worth remaining in the field.
>
> *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."*

[10] In the balance of the article Dr Sprott's reaction to the effect his actions are having on the cot death research community is quoted: "There should be fear. The sooner they get out of the field the better". The author reports that Stephanie Cowan, co-author of the Canterbury study, is so worried about her individual liability that she refused to answer questions. The article concludes:

> Ask Sprott for his view on suggestions that his tactics are stifling debate, he replies: "If they say that I as a professional scientist of 50 years standing, honoured by the Queen with the OBE, accepted as a scientist by the public of this country, do anything to stifle free debate in science, that is a defamatory statement and they will have to face that."
>
> Where does Sprott see all this ending? "The problem will be solved when finally these people come to their senses, when finally they realise I'm not going to go away."

The pleadings

[11] It is the words which we have italicised in para [9], and particularly those shown as a quotation, which are alleged to have defamed Dr Sprott. His statement of claim pleads that in their natural and ordinary meaning Dr Mitchell's words "and his tactics are aimed at preventing that debate" meant and were intended to mean that Dr Sprott:

(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.

[12] In his statement of defence, after admitting speaking the words complained of, Dr Mitchell pleads that they were not capable of bearing any of the meanings alleged or that, if they were, such meanings, with the exception of "is a bigot" (which has now being withdrawn by Dr Sprott as an alleged meaning) and "unlawfully" in para (c), were expressions of honest opinion based on the following facts:

<u>Particulars</u>

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 R P K 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.

[13] As a further alternative defence, it is pleaded that if the words complained of meant or were understood to have any of the said meanings, such meanings – with the same exceptions – were true. Particulars given of this defence include the matters set out in relation to the honest opinion defence.

[14] The Master recorded the acceptance by Mr Miles QC, for Dr Mitchell, that the words complained of were capable of having the alleged meanings, as still pursued, except for the word “unlawfully” (see para [11] (c) above). The Master found that the words complained of were not capable of meaning that Dr Sprott unlawfully threatens legal action against those who criticise his cot death theory. That finding, unsurprisingly, has not been further contested.

[15] Section 39 of the Defamation Act 1992 requires a plaintiff faced with a defence of honest opinion and intending to allege that it was not the genuine opinion of the defendant to serve a notice on the defendant to that effect and, if intending to rely on particular facts or circumstances to support that allegation, to supply particulars. Dr Sprott gave a s39 notice specifying 10 particulars. In summary, he alleged that Dr Mitchell was aware of reasons why Dr Sprott had taken the various actions mentioned in the statement of defence and was also aware that Dr Sprott had threatened defamation proceedings in respect of, or was trying to prevent, only statements impugning his reputation or that of BabeSafe products, but was not trying to prevent scientific debate about toxic gas theory, and indeed had participated in or encouraged such debate.

Legal principles

[16] A defence of honest opinion can succeed only where the defamatory matter includes or consists of an expression of opinion and the defendant (the author of the opinion) proves that it was his or her genuine opinion (s10(1)).

[17] Thus the defendant must first show that the words complained of, or the part of them said to be an opinion, were an expression of opinion, not an imputation of fact. Sometimes it is not easy to distinguish fact from comment on fact. If that cannot be done, the words are not protected by the honest opinion defence.

Sometimes words may in isolation appear to be stating a fact, but when read in context are properly understood to be drawing a conclusion from facts which have also been stated or indicated by the author or which would have been known to the person to whom the words were addressed. They can then be seen to be in the nature of a comment or expression of opinion based on those facts. The person who hears or reads the words can recognise them as an opinion which he or she can evaluate on the basis of the stated or known facts. As *Gatley on Libel and Slander* (9ed, 1998) says (at para 12.7), "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".

[18] Presentation is crucial to whether a statement is or is not an expression of opinion. In *O'Brien v Marquis of Salisbury* (1889) 54 JP 215, 216, Field J said that

> …comment may sometimes consist in the statement of a fact, and may be held to be comment if the facts as stated appear to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed, and from which his conclusion may be reasonably inferred.

[19] The defence applies when the words appear to a reasonable reader to be conclusionary. The ultimate question, says Gatley (at 12.8), is how the words would strike the ordinary, reasonable reader. Whether they were fact or opinion is, in the first instance, for the Judge to decide. But if reasonable people could take either view the determination must be left to the jury.

[20] It is no longer the law in this country that words attributing a dishonourable, corrupt or base motive to the plaintiff must be taken to be making an allegation of fact which the defendant is required to justify (for example, *Greville v Wiseman* [1967] NZLR 795, 800). Section 12, adopting a recommendation of the Report of the Committee on Defamation (1977) (paras 156-160), provides:

> **12. Honest opinion where corrupt motive attributed to plaintiff**
>
> In any proceedings for defamation in which the defendant relies on a defence of honest opinion, the fact that the matter that is the subject of the proceedings attributes a dishonourable, corrupt, or base motive to the plaintiff does not require the defendant to prove anything that the

> defendant would not be required to prove if the matter did not attribute any such motive.

[21] Hence the fact that Dr Mitchell may, as alleged, have been imputing impropriety on the part of Dr Sprott does not require him to show that any such imputation ought to be drawn from those facts. To this extent the passage from the judgment of Fletcher Moulton LJ in *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309, 320-321, which was applied by this Court in *News Media Ownership v Finlay* [1970] NZLR 1089, 1098, does not now represent the law of New Zealand.

[22] If the words complained of are found to be an opinion, the defendant must next be able to point to the existence of facts upon which the opinion is based. It must be shown to be an opinion based on facts alleged or referred to in the publication which are proved to be true or not materially different from the truth, or it must be based on other facts which were generally known at the time of the publication and are proved to be true; but the defendant does not need to prove the truth of all the facts which are asserted in support of the opinion (s11). In *Kemsley v Foot* [1952] AC 345, 358, in delivering a judgment with which the other members of the House concurred, Lord Porter said:

> …any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact was sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea.

His Lordship realistically went on to say that the failure to substantiate a number of the facts might cause the jury to be unlikely to believe that the comment was made upon the one fact or was honestly founded on it and accordingly the jury would find it unfair.

[23] To state or indicate only part of the facts, omitting something which is highly relevant and which would change the complexion of what has been stated, may be misleading and may lead to the conclusion that the opinion is not based upon true facts. Gatley (para 12.17) gives the example of a statement that someone was

convicted of a serious crime, omitting that the conviction was quashed on appeal. Such a statement could not be the basis for an honest opinion.

[24] Thirdly, the defendant must show that the opinion was genuinely held. It is not necessary, however, to show that the opinion was sound or even one which a reasonable person would hold. The test is the honesty of the opinion, not its reasonableness. A fair-minded person has been said to include even someone whose (honestly held) view may be prejudiced or obstinate (*Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743). The Defamation Act now provides that the defence of honest opinion does not fail because the defendant was motivated by malice (s10(3)).

Defendant's summary judgment

[25] The Master guided himself by reference to this Court's decision in *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298, saying that r136(2) of the High Court Rules permits summary judgment only where a defendant satisfies the court that the plaintiff cannot succeed on any of its causes of action. The rule 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 defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed.

[26] By way of comparison, we note the new procedure for summary disposal of defamation claims in ss8, 9 and 10 of the Defamation Act 1996 in England, Wales and Northern Ireland, which permits a court to dismiss a claim if it has "no realistic prospect of success" and there is no other reason why it should be tried.

Opinion or fact?

[27] The Master recorded that counsel for Dr Mitchell had contended that the proper question was whether the words themselves, not the meanings alleged by Dr Sprott, were statements of opinion or statements of fact. The Master, however, considered the issue in relation to the meanings. He concluded, without any express

analysis, that in most of their alleged meanings the words complained of were arguably a statement of fact or a statement of opinion, or arguably partly one and partly the other. But, in case he was wrong about the correct formulation of the question and the correct focus should instead be on the published words themselves, he held, for the purpose of summary judgment only, that the words complained of were a statement of opinion.

[28] In argument in this Court, Mr Miles put forward the view that the question of fact or opinion must be determined in relation to the words themselves, not their alleged meanings. He cited in support of this view passages in the decision of the New South Wales Court of Appeal in *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448, 466-468. But neither counsel addressed the point in oral argument and, although Mr Allan took the position in his written submissions that the words complained of were a statement of fact, he appeared to accept during argument that the Court would be bound to regard both the words themselves and any of their alleged meanings as an expression of opinion. Mr Allan correctly appraised the position. The words appeared in a lengthy article about Dr Sprott's role in the cot death debate containing many factual statements about actions which Dr Sprott has taken and things which he has said, according to the author. In that context a reasonable reader would undoubtedly conclude that the words "and his tactics are aimed at preventing that debate" were an expression of Dr Mitchell's opinion concerning the narrated actions and utterances of Dr Sprott. The words, as they stand and in all their alleged meanings, are an expression of a conclusion reached or observation made by Dr Mitchell based upon the facts appearing in the article.

Facts a proper foundation for the opinion?

[29] The next portion of the Master's judgment concerned whether the facts alleged by Dr Mitchell in his statement of defence (para [11] above) were true, and thus able to provide a proper foundation for the opinion. The Master found that most of them were true, although he said that there were reasons which would arguably justify or explain Dr Sprott's conduct. For example, Dr Sprott had admitted, in his affidavit in opposition to the summary judgment application, threatening to discredit the SIDS conference. There was ample evidence that he had made and acted on that

threat. But Dr Sprott had explained that, because of the stance taken by Dr Mitchell, he had anticipated that there would be no debate on toxic gas theory at the conference. He considered there should be and that delegates should be informed about the theory and the 100% success of the New Zealand mattress-wrapping campaign. By publishing his reasons for opposing the conference and sending material to potential delegates, Dr Sprott hoped to attract useful scientific debate. As a result of his publicity some delegates, including scheduled speakers, approached him and on the opening day of the conference he was offered a 30 minute time slot on the fourth day. The Master said that it was at least arguable that the threat to discredit the conference publicly should not be considered in isolation in determining whether the meanings alleged by Dr Sprott were an honest opinion.

[30] This example highlights the position taken by Dr Sprott concerning Dr Mitchell's particulars of fact supporting his expression of opinion. He accepts that the things stated in the particulars did occur but says they cannot be taken in isolation. As another example, there were the (admitted) threats made to various persons or publications to sue them for defamation. Dr Sprott says that he was justified in threatening to sue because he had been defamed. The Master found that it was arguable in some instances that in the respects referred to by Dr Sprott, material emanating from a third party, as listed in Dr Mitchell's particulars, had been arguably defamatory of Dr Sprott. But of course these materials are not directly the subject of Dr Sprott's present proceeding nor attributable to Dr Mitchell. It can be seen that a major part of the case, if it were allowed to proceed, would be about whether various third parties have on other occasions defamed Dr Sprott or have been intending to publish material which would have been defamatory of him. The complication of litigation potentially involving multiple defamations on differing occasions by differing persons can well be imagined.

[31] The Master also found that Dr Sprott had threatened Dr Mitchell with legal proceedings relating to his work on SIDS issues (Dr Mitchell's particular 7.6) and that these related to material which arguably was defamatory of Dr Sprott. In one case a letter from Dr Sprott was characterised by the Master as arguably containing a warning rather than a threat.

[32] In the light of his findings in relation to the facts alleged by Dr Mitchell's statement of defence and/or other relevant facts relied on by Dr Mitchell, the Master found that it was arguable that the facts did not provide support for the argument that the opinions in question were genuinely held by Dr Mitchell.

[33] On the findings made by the Master, there were facts – mostly admitted by Dr Sprott – on which the opinion (in its various alleged meanings) could be based. It is, as noted earlier, unnecessary for a defendant pleading honest opinion to prove all of the facts which the defendant alleges in support of that opinion (*Kemsley v Foot*). Any reader of the article as a whole was made well aware that Dr Sprott was contending that he had been defamed. The article actually stated that Dr Sprott had said that he does not react to people who disagree with him scientifically, only those who defame him. Dr Mitchell's comment was being expressed in that context.

[34] But it was Mr Allan's submission, for Dr Sprott, that what appeared in the article was not a full statement of the facts. As a consequence, they did not present a true picture. They were "not what they seem". What was missing, making them not "true facts", was Dr Sprott's reasons for the actions he had taken. Mr Allan submitted that Dr Mitchell was well aware of Dr Sprott's true motivation – attempting to prevent publications which were damaging to his reputation. He also knew that Dr Sprott had been proved correct when he objected to the methodology of certain research or studies. Dr Sprott had not been requiring Dr Mitchell to endorse mattress-wrapping "on any scientific ground". Nor had he asked him to accept the toxic gas theory. Dr Mitchell knew this and also knew that what Dr Sprott was asking was that the Society should add mattress-wrapping to its publicised list of recommended preventive measures. Dr Mitchell also knew that Dr Sprott's objection was to publication of the idea that mattress-wrapping could cause infant suffocation. Mr Allan said that the threats were made on that confined basis only. Dr Mitchell was deliberately misconstruing Dr Sprott's objections.

[35] It is difficult to see how there could really be any sensible severance of the scientific debate between cause and remedy so as to avoid direct or indirect criticism of mattress-wrapping. If a scientist contends that cot death is not caused by toxic gas, implicitly he or she is saying that mattress-wrapping is useless as a preventative. Therefore to threaten defamation proceedings against anyone who says that mattress-

wrapping is of no benefit (that Dr Sprott is associated with a product which does not protect babies) may well appear to signal proceedings against someone who tries to present scientific proof of a different cause of SIDS or that toxic gas theory is not the cause.

[36] In some of his correspondence Dr Sprott does not restrict his threats to those who may say that mattress-wrapping positively causes harm. He also threatens those who say that it is not beneficial. For example, on 12 August 1999 he wrote to Dr Lambie, Director-General of Health, about the forthcoming SIDS conference and sent a copy of the letter to Dr Mitchell. He referred to a paper by Dr Tuohy and a co-author which "canvassed the issues of cot death prevention and suffocation in relation to mattresses wrapped in an impermeable diaphragm" and which Dr Sprott had reviewed for the New Zealand Medical Journal. He raised with Dr Lambie the possibility that Dr Tuohy or his co-author might seek to publish research contained in the paper at the SIDS conference. He noted the conclusion in the paper that mattress-wrapping did not prevent cot death and that it posed a risk of suffocation to babies. He went on to point out that there had been no reported cot death on any mattress wrapped to his specifications and that during the period when mattress-wrapping has been promoted in New Zealand, the cot death rate in this country has fallen markedly (mattress-wrapping being the only new item of cot death prevention advice publicised in New Zealand during that period). He also pointed out that there had been no reported suffocation on any mattress wrapped to his specifications. His final point was that there was no published literature supporting a claim that mattresses so wrapped posed a risk of suffocation.

[37] The points being made are not confined to combating suggestions that mattress-wrapping to Dr Sprott's specifications may actually cause suffocation.

[38] The letter to Dr Lambie continued:

> Please be advised that any publication of the paper "Impermeable mattress covers and the prevention of sudden infant death syndrome (SIDS)" or the research on which that paper was based will be treated as:

1 Defamatory of *BabeSafe* products, since:

(a) The research clearly implies that those products, which are marketed for cot death prevention, do not prevent cot death; and

(b) The research clearly implies that those products pose a risk of suffocation to babies;

2 Defamatory of myself, since:

(a) I designed *BabeSafe* products, and they carry my name and are sold with reference to my scientific reputation; and

(b) The research clearly implies that I, as a well-known public figure, publicly advocate to parents a babycare practice which could result in the suffocation of babies.

[39] This threat of defamation proceedings, which is confirmed later in the letter, though it is in 1(b) and 2(b) concerned only with criticisms of the BabeSafe products as a positive danger, is equally directed in 1(a) and 2(a) against statements that the products are not effective to prevent cot death. The recipient of such a letter would reasonably interpret the threat as covering a statement that because cot death was not caused by toxic gas theory, no form of mattress-wrapping was an effective preventative. The recipient would also reasonably consider that the threat would cover an exposition of a different theory of the cause of cot death since it would be implicit that the person putting forward that view was saying that it was not caused by toxic gas theory and that a preventative against toxic gas was not effective.

[40] Another example of one of Dr Sprott's threats is a letter to Ms Cropp on 10 August 1999 about an article she had written in *Little Treasures*. Dr Spott complains that the article implies that BabeSafe products do not prevent cot death. He says in the letter that it is "totally defamatory" to imply that he is promoting a product which does not achieve the purpose for which it is marketed. As we have just demonstrated in relation to the letter to Dr Tuohy, it would, in Dr Sprott's eyes, be defamatory for Ms Cropp to write in positive terms about a theory of cot death which does not involve toxic gas and which suggests a cause not preventable by mattress-wrapping. Dr Sprott sought a retraction from Ms Cropp in the next issue of

Little Treasures and threatened defamation proceedings against her. That matter was mentioned in the Herald article.

[41] A similar letter was sent to Mrs Stephanie Cowan of Bounty Services on 20 October 1999 concerning material in the Bounty Baby Guide Care. Mrs Cowan's concern is also referred to in the Herald article.

[42] A further example is in a letter to Dr Ford of Canterbury Health on 16 August 1999 in which Dr Sprott threatened defamation proceedings if there was any publication of a paper which, he said, contained statements to the effect that mattress-wrapping in accordance with his published specifications was not effective in preventing cot death. That letter was copied by Dr Sprott to Dr Mitchell.

[43] It therefore seems to us that, so far as the facts stated in the article relate to these threats, they cannot be said to present an incomplete picture so as not to have been truly stated and that, whichever of the alleged meanings it may bear, the opinion expressed by Dr Mitchell is based upon facts appearing in the article which have been truly stated.

Honesty of the opinion?

[44] It was Mr Miles' submission that the difference between the parties on the question of the honesty of Dr Mitchell's opinion emerging from Dr Sprott's s39 notice is simply that, whilst Dr Sprott justifies his actions on the basis that he has been defamed by various persons, Dr Mitchell considers that there has been no defamation. Dr Mitchell's view is that scientific debate should be about both the cause of cot death and the remedy for it. Consequently, he believes that Dr Sprott is making an unscientific division in objecting to any discussion on remedy which is critical of his recommendations for mattress-wrapping. Mr Miles submitted that the mere fact that, when making the comment complained of, Dr Mitchell did not accept that Dr Sprott had any proper motivation for his threatening conduct, could not mean that Dr Mitchell's opinion was not genuine.

[45] Even if the various publications had been defamatory or potentially defamatory of Dr Sprott, counsel said, that gave no strength to the argument that

Dr Mitchell's opinion was somehow not honestly held. Even if Dr Sprott was justified in making his threats because the articles or papers were arguably defamatory of him, this did not make Dr Mitchell's opinion dishonest. That opinion was based on his own interpretation of the threats, not Dr Sprott's view of whether they were justified.

[46] Mr Miles referred to the guarantee in s14 of the New Zealand Bill of Rights Act 1990 of the freedom to impart "opinions of any kind in any form", saying that this right would be in serious jeopardy if the appellant's comment cannot be his honest comment merely because he disagrees with the respondent. He asked why Dr Mitchell should have to accept Dr Sprott's views.

[47] Mr Miles' submissions were persuasively put, but we must bear in mind that we are concerned at this point with what was going on in the mind of Dr Mitchell when he was speaking to the journalist. It is also of some moment that Dr Mitchell's opinion was itself directed to the purpose or motive for Dr Sprott's conduct (i.e. what Dr Sprott's tactics were aimed at), not merely to the effects of his conduct. Dr Mitchell was not just commenting on the results which Dr Sprott's tactics were achieving – something which might be able to be assessed from material in affidavits.

[48] At the summary judgment stage of a defamation proceeding it is likely to prove difficult to satisfy a Court that it can safely conclude that at trial, after cross-examination (or comment on failure to give evidence), a defendant will succeed in establishing the honesty of his or her opinion. Unless the Court is persuaded that the evidence in the affidavits reveals conduct by the plaintiff of such a nature as would produce a comment from any dispassionate observer similar to that from the defendant, the Court will hesitate to determine the question of the honesty of the opinion in advance of a trial.

[49] In this case, although Dr Sprott's sincerity does not appear to be in doubt (and indeed Dr Mitchell himself said so in the article), aspects of Dr Sprott's conduct towards various participants in the cot death debate, including Dr Mitchell, do appear questionable. But, on balance, we think that his proceeding must be allowed to proceed further, despite the obvious hurdles which it seems he will encounter. There

is a logical difficulty in making a final determination on the issue of honesty of opinion at the present time when the exact meaning of Dr Mitchell's words remains in dispute. We were not asked to say which, if any, of the five remaining alleged meanings was the true meaning. Dr Mitchell himself has pleaded that his words were not capable of bearing any of those meanings. And although there is some overlap between the meanings, they are not so close that they can be taken to be merely variations of one idea. The sting in some may be greater than in others. The Court cannot very well say that Dr Mitchell's opinion must have been honestly held no matter which of the meanings, or what other meaning, is or may be attributed.

Result

[50] The appeal is dismissed, but as all but one of the appellant's contentions have succeeded, there will be no order for costs.

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