IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2013-443-107
[2014] NZHC 395

	BETWEEN	NEW HEALTH NEW ZEALAND INC Plaintiff
	AND	SOUTH TARANAKI DISTRICT COUNCIL Defendant

Hearing: 25-26 November 2013

Council: LM Hansen for Plaintiff
DJS Laing and HP Harwood for Defendant
AM Powell for Attorney-General as intervenor

Judgment: 7 March 2014

JUDGMENT OF RODNEY HANSEN J

This judgment was delivered by me on 7 March 2014 at 11.30 a.m., pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors: Wynn Williams Lawyers, Christchurch
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Introduction

[1] In 1945 in Grand Rapids, Michigan, fluoride was added to public drinking water supplies for the first time. Its purpose was to promote dental health by reducing the incidence of tooth decay. The use of fluoride by this means spread rapidly, including to New Zealand. Water fluoridation occurred for the first time in Hastings in 1954. Currently 48 per cent of the New Zealand population live in communities with water fluoridation programmes.

[2] On 10 December 2012, the South Taranaki District Council (the Council) decided by a vote of 10 to 3 to add fluoride to the water supplies of Patea and Waverley, both small towns in South Taranaki. The plaintiff (New Health), an organisation with the stated aim of advancing and protecting the best interests and health freedom of consumers, challenges the decision. It does so on the grounds that:

(a) The Council does not have the legal power to add fluoride to its water supply for therapeutic purposes;

(b) Adding fluoride for therapeutic purposes constitutes a breach of the right to refuse to undergo medical treatment contained in s 11 of the New Zealand Bill of Rights Act 1990 (NZBORA) and the breach:

(i) Has not been prescribed by law; and

(ii) Is an unjustified and disproportionate limitation on the right in s 11.

(c) In deciding to add fluoride to the water supplies, the Council failed to take into account a number of mandatory relevant considerations.

[3] New Health seeks declarations that the decision to add fluoride to the Patea and Waverley water supplies is *ultra vires* and in breach of the NZBORA and an order quashing the decision.

[4] The Council maintains its actions were lawful and did not involve any breach of the NZBORA. The Attorney-General was granted leave to intervene and to be heard on the questions of whether fluoridation of a public water supply is medical treatment for the purpose of s 11 of NZBORA and, if so, whether it limits the right of any person under s 11 of NZBORA.

[5] It is important to make it clear at the outset that this judgment is not required to pronounce on the merits of fluoridation. The issues I am required to address concern the power of a local body to fluoridate drinking water supply. That is a legal question which does not require me to canvass or express a view on the arguments for and against fluoridation.

The process of fluoridation

[6] Fluoride in the form of calcium fluoride occurs naturally as a trace element in water throughout the world but at widely varying levels. In New Zealand fluoride occurs at relatively low levels (below 0.3 ppm). Fluoridation is the process of increasing the level of fluoride in the water supply to between 0.7 ppm and 1.0 ppm by the addition of a fluoride-releasing compound, either sodium silico fluoride (SFS) or hydrofluorosilicic acid (HFA).

[7] Proponents of fluoridation believe it improves public health by reducing the incidence of dental caries or tooth decay by promoting the mineralisation of tooth enamel. It is argued that it helps to overcome social inequality by ensuring that children are not disadvantaged by poor dental hygiene in their homes. For many years it was believed that it worked systemically. It is now generally accepted that it works topically.

[8] There is ongoing debate as to the effectiveness of fluoridation and whether it poses any risks to human health. The view of many public health authorities and medical science bodies, among them the Ministry of Health and the New Zealand

Dental Association, is that fluoridation is beneficial and safe. On the other hand, there are a number of organisations and individuals who oppose fluoridation on a range of grounds, among them that it is ineffective, unsafe and an infringement of civil liberties.

The legal power to fluoridate

[9] The power to fluoridate relied on by the Council is derived from the Local Government Act 2002 (LGA 2002) and the Health Act 1956. The Council says that the power to fluoridate comes under the general power of competence in the LGA 2002 and is consistent with its obligation to promote public health under s 23 of the Health Act.

[10] The LGA 2002 replaced the Local Government Act 1974 (LGA 1974). It constituted a comprehensive reform of local government legislation. The LGA 1974 and its predecessor, the Municipal Corporations Act 1954, were highly prescriptive. The powers and obligations of local authorities' functions, including water supply, were spelt out in detail. The approach in the LGA 2002 was described in the explanatory note to the Local Government Bill 2001 as a: [1]

> ... shift from a detailed and prescriptive style of statute (that focuses councils on compliance with detailed legislative rules) to a more broadly empowering legislative framework that focuses councils on meeting the needs of their communities.

[11] The power of a local authority to fluoridate water supplies under the 1954 Act was challenged by two ratepayers in *Attorney-General v Lower Hutt City.*[2] Section 240(1) of the 1954 Act provided:

> (1) The council may construct waterworks for the supply of pure water for the use of the inhabitants of the district, ...

[12] McGregor J at first instance held it would be straining the language of the Act to hold that by implication the legislature had empowered the city to add fluoride to its water supply. He said such an act seems to be neither incidental nor

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1 Local Government Bill 2001 (191-1) (Explanatory Note).

2 *Attorney-General v Lower Hutt City* [1964] NZLR 438 (HC) and (CA).

consequential to the supply of pure water, where the water is already pure.[3] However, he found that fluoridation was within the powers of the Council under s 288 of the 1954 Act which conferred separate powers on councils to do all things necessary from time to time for the preservation of public health and convenience and for carrying into effect the provisions of the Health Act 1956.

[13] By a majority the Court of Appeal upheld the judgment of McGregor J holding, however, that s 240 empowered the local authority to fluoridate the water. North P said[4]

> ... the word "pure" in the context in which it appears in our statute is a relative term, and does not refer to the water being chemically pure, then I see no reason why a local body, so long as it acts in good faith, should not be entitled to take any reasonable step it may think proper to improve the quality of its available water supply *as water*. I agree that it must not attempt to introduce a substance which is foreign to the nature of water, for medical or other purposes. For this would render the water "impure". But short of anything like that, in my opinion a local body is entitled to change the concentration of the various elements which are in solution in the water available to it if it is advised that that course is desirable. Local authorities are public bodies entrusted with the powers and duties for public purposes and the election of their members is in the hands of the inhabitants of the district. This being the position, in my opinion the power contained in s 240 should not be narrowly construed.

[14] After referring to evidence that New Zealand soils are deficient in fluoride, North P continued:[5]

> In these circumstances, in my opinion the respondent was lawfully entitled to install a treatment plant for the purpose of adding in controlled proportions fluoride to its water supply. In taking this step the respondent was doing no more than rectifying a deficiency in the water which was available to it and was acting reasonably on expert advice which had satisfied it that this step was desirable in the public interest.

[15] The Privy Council upheld the decision of the Court of Appeal, agreeing that the power to fluoridate was conferred by s 240 of the 1951 Act. Their Lordships said:[6]

> Their Lordships are of opinion that an act empowering local authorities to supply "pure water" should receive a "fair large and liberal" construction as

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3 At 442.
4 At 456.
5 At 456.
6 *Attorney-General v Lower Hutt City* [1965] NZLR 116 (PC) at 124-125

> provided by s 5(j) of the Acts Interpretation Act 1924. They are of opinion that as a matter of common sense there is but little difference for the relative purpose between the adjectives "pure" and "wholesome". Their Lordships think it is an unnecessarily restrictive construction to hold (as did McGregor J) that, because the supply of water was already pure there is no power to add to its constituents merely to provide medicated pure water, i.e. water to which an addition is made solely for the health of the consumers. The water of Lower Hutt is no doubt pure in its natural state but it is very deficient in one of the natural constituents normally to be found in water in most parts of the world. The addition of fluoride adds no impurity and the water remains not only water but pure water and it becomes a greatly improved and still natural water containing no foreign elements. Their Lordships can feel no doubt that power to do this is necessarily implicit in the terms of s 240 and that the respondent corporation is thereby empowered to make this addition and they agree with the observations of North P and McCarthy J already quoted. They think too that it is material to note that, while their Lordships do not rely on s 288, nevertheless that section makes it clear that the respondent corporation is the health authority for the area and s 240 must be construed in the light of that fact; that is an additional reason for giving a liberal construction to the section.
>
> Their Lordships think it right to add that had the natural water of Lower Hutt been found to be impure it would of course have been the duty of the respondent corporation to add such substances as were necessary to remove or neutralise those impurities; but that water having been made pure they can see no reason why fluoride should not be added to the water so purified in order to improve the dental health of the inhabitants.

The Privy Council added that, having found that s 240 provided the authority to fluoridate, it was unnecessary to decide whether s 288 or s 23 of the Health Act by themselves empowered the corporation to fluoridate the water.

[16] Section 240 of the 1954 Act was superseded by s 379 of the Local Government Act 1974 (the 1974 Act). Although not identically worded, it is accepted that the two provisions are not materially different and it may be inferred that the power to fluoridate was carried over into the 1974 Act. However, as noted earlier, the empowering provisions of the LGA 2002 are materially different. New Health says the *Lower Hutt City* case no longer applies. Ms Hansen also relies on the intervening passage of NZBORA and scientific evidence which, it is said, no longer supports the factual conclusion of the Privy Council that the addition of fluoride adds no impurity to the water.

Local Government Act 2002

[17] It is necessary to set out the provisions of the LGA 2002 which bear on the responsibilities and powers of local authorities. The purpose of the act is set out in s 3 which reads as follows:

> **3 Purpose**
>
> The purpose of this Act is to provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act—
>
> (a) states the purpose of local government; and
>
> (b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and
>
> (c) promotes the accountability of local authorities to their communities; and
>
> (d) provides for local authorities to play a broad role in meeting the current and future needs of their communities for good-quality local infrastructure, local public services, and performance of regulatory functions.

[18] Section 10 amplifies s 3(a) by setting out the purpose of local government:

> **10 Purpose of local government**
>
> (1) The purpose of local government is—
>
> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
>
> (b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.
>
> (2) In this Act, good-quality, in relation to local infrastructure, local public services, and performance of regulatory functions, means infrastructure, services, and performance that are—
>
> (a) efficient; and
>
> (b) effective; and
>
> (c) appropriate to present and anticipated future circumstances.

[19] The role of a local authority and the core services to be considered in performing that role are to be found in ss 11 and 11A which provide as follows:

> **11 Role of local authority**
>
> The role of a local authority is to—
>
> (a) give effect, in relation to its district or region, to the purpose of local government stated in section 10; and
>
> (b) perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment.
>
> **11A Core services to be considered in performing role**
>
> In performing its role, a local authority must have particular regard to the contribution that the following core services make to its communities:
>
> (a) network infrastructure:
>
> (b) public transport services:
>
> (c) solid waste collection and disposal:
>
> (d) the avoidance or mitigation of natural hazards:
>
> (e) libraries, museums, reserves, recreational facilities, and other community infrastructure.]

Network infrastructure is defined in s 197(2) to include the provision of water.

[20] The status and powers of a local authority are set out in s 12 which relevantly provides:

> **12 Status and powers**
>
> (1) A local authority is a body corporate with perpetual succession.
>
> (2) For the purposes of performing its role, a local authority has—
>
> (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and
>
> (b) for the purposes of paragraph (a), full rights, powers, and privileges.
>
> (3) Subsection (2) is subject to this Act, any other enactment, and the general law.

(4) A territorial authority must exercise its powers under this section wholly or principally for the benefit of its district.

...

[21] Local authorities are required to act in accordance with the principles set out in s 14 which relevantly provides:

14 Principles relating to local authorities

(1) In performing its role, a local authority must act in accordance with the following principles:

...

(b) a local authority should make itself aware of, and should have regard to, the views of all of its communities; and

(c) when making a decision, a local authority should take account of –

(i) the diversity of the community, and the community's interests, within its district or region; and

(ii) the interests of future as well as current communities; and

(iii) the likely impact of any decision on the interests referred to in subparagraphs (i) and (ii):

(d) a local authority should provide opportunities for Maori to contribute to its decision-making processes:

...

(e) in taking a sustainable development approach, a local authority should take into account –

(i) the social, economic, and cultural interests of people and communities; and

(ii) the need to maintain and enhance the quality of the environment; and

(iii) the reasonably foreseeable needs of future generations.

[22] Part 7 of LGA 2002 sets out specific obligations and restrictions on local authorities. The delivery of water services is specifically referred to in subpara (b)

of s 123. "Water services" is defined in s 124 as "water supply and waste water services". "Water supply" is:

> The provision of drinking water to communities by network reticulation to the point of supply of each dwellinghouse and commercial premise to which drinking water is supplied.

[23] Subpart 2 of Part 7 then sets out the obligations and restrictions on local authorities in relation to the provision of water services. Section 130 relevantly provides:

> **130 Obligation to maintain water services.**
>
> (1) This subpart applies to a local government organisation that provides water services to communities within its district or region –
>
> (a) at the commencement of this section:
>
> (b) at any time after the commencement of this section.
>
> (2) A local government organisation to which this section applies must continue to provide water services and maintain its capacity to meet its obligations under this subpart.
>
> ...

[24] It is of note that what was described as "pure water" in the 1974 Act is referred to as "drinking water" in the 2002 Act. I agree with Mr Laing that the change would appear to be largely semantic though arguably "drinking water" is more accurate than "pure water". As the Privy Council recognised in *Attorney-General v Lower Hutt City*, water could never be literally pure in the sense of being H^2O distilled of all other ingredients.[7] That would, said their Lordships, "indeed be a most unappetising and unsatisfactory liquid".[8]

[25] The change in terminology could not be understood as indicating an intention on the part of Parliament to narrow a local authority's power in relation to the supply of water. There is no obvious reason why the implied power to fluoridate found to exist in the 1956 and 1974 Acts should not also be implied in the 2002 Act. On the contrary, by requiring local bodies who had been supplying (in some cases) fluoridated water to maintain water services, Parliament must be taken to have

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7 *Attorney-General v Lower Hutt City,* above n 6.

8 At 122.

intended to empower them accordingly.[9] This is confirmed by the Health Act which makes detailed provision for the supply of drinking water and explicitly recognises that fluoride may be added.

Health Act 1956

[26] The supply of water services is expressly subject to the Health Act 1956 which confers powers and imposes duties on local authorities in respect of public health including the provision of drinking water. Section 23 provides:

> **23 General powers and duties of local authorities in respect of public health**
>
> Subject to the provisions of this Act, it shall be the duty of every local authority to improve, promote, and protect public health within its district, and for that purpose every local authority is hereby empowered and directed—
>
> (a) To appoint all such Environmental Health Officers and other officers and servants as in its opinion are necessary for the proper discharge of its duties under this Act:
>
> (b) To cause inspection of its district to be regularly made for the purpose of ascertaining if any nuisances, or any conditions likely to be injurious to health or offensive, exist in the district:
>
> (c) If satisfied that any nuisance, or any condition likely to be injurious to health or offensive, exists in the district, to cause all proper steps to be taken to secure the abatement of the nuisance or the removal of the condition:
>
> (d) Subject to the direction … of the Director-General, to enforce within its district the provisions of all regulations under this Act for the time being in force in that district:
>
> (e) To make bylaws under and for the purposes of this Act or any other Act authorising the making of bylaws for the protection of [public health]:
>
> (f) To furnish from time to time to the Medical Officer of Health such reports as to diseases, drinking water, and sanitary conditions within its district as the Director-General or the Medical Officer of Health may require.

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[9] Antecedent legislation, the way in which it has been interpreted by the courts and the social context in which legislation is passed are legitimate indicators of Parliament's intention – see Burrows and Carter, *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) pp 252 – 258.

[27] Part 2A of the Health Act, introduced in 2007, contains detailed provisions directed to promoting the supply of safe and wholesome drinking water.[10] They include duties imposed on the supplier of drinking water to take all practicable steps to comply with drinking water standards.

[28] Section 69V of the Health Act relevantly provides:

> **69V Duty to take all practicable steps to comply with drinking-water standards**
>
> (1) Every drinking-water supplier must take all practicable steps to ensure that the drinking water supplied by that supplier complies with the drinking-water standards.
>
> (2) A drinking-water supplier complies with subsection (1) if the supplier implements those provisions of the supplier's approved water safety plan relating to the drinking-water standards.
>
> ...

[29] Section 69G defines "drinking water" as:

> **drinking water—**
>
> (a) means—
>
> (i) water that is potable; or
>
> (ii) in the case of water available for supply, water that is—
>
> (A) held out by its supplier as being suitable for drinking and other forms of domestic and food preparation use, whether in New Zealand or overseas; or
>
> (B) supplied to people known by its supplier to have no reasonably available and affordable source of water suitable for drinking and other forms of domestic and food preparation use other than the supplier and to be likely to use some of it for drinking and other forms of domestic and food preparation use; but
>
> (b) while standards applying to bottled water are in force under the Food Act 1981, does not include—
>
> (i) any bottled water that is covered by those standards; or
>
> (ii) any bottled water that is exported; and

[10] Health Act 1956, s 69A(1).

(c) to avoid doubt, does not include any water used by animals or for irrigation purposes that does not enter a dwellinghouse or other building in which water is drunk by people or in which other domestic and food preparation use occurs.

[30] Potable is defined as:

> **Potable**, in relation to drinking water, means water that does not contain or exhibit any determinands to any extent that exceeds the maximum acceptable values (other than aesthetic guideline values) specified in the drinking-water standards.

[31] Determinand is defined as:

> (a) a substance or organism in water in circumstances where the extent to which any water contains that substance or organism may be determined or estimated reasonably accurately; or
>
> (b) a characteristic or possible characteristic of water in circumstances where the extent to which any water exhibits that characteristic may be determined or estimated reasonably accurately

[32] Fluoride is a determinand; the extent to which it is contained in water can be accurately determined. The definition of "potable" permits drinking water to contain a determinand to the "maximum acceptable value" which is defined in s 69G as:

> In relation to a determinand, means a value stated in the drinking-water standards as the maximum extent to which drinking water may contain or exhibit that determinand without being likely to present a significant risk to an average person consuming that water over a lifetime.

[33] Drinking water standards are issued pursuant to s 69O which provides:

> **69O Minister may issue, adopt, amend, or revoke drinking-water standards**
>
> (1) The Minister may, by written notice,—
>
> (a) issue or adopt standards applicable to drinking water; and
>
> (b) revoke or amend any existing standards.
>
> (2) Standards issued or adopted under this section may, without limitation, specify or provide for all or any of the following:
>
> (a) requirements for drinking water safety (including requirements relating to the transportation of raw water or drinking water):
>
> (b) requirements for drinking water composition, including—

(i) maximum amounts of substances or organisms or contaminants or residues that may be present in drinking water; and

(ii) maximum amounts of substances that may be present in drinking water; and

(iii) maximum acceptable values for chemical, radiological, microbiological, and other characteristics of drinking water:

...

(3) Standards issued or adopted under this section—

(a) may include guideline values for aesthetic determinands for avoiding adverse aesthetic effects in drinking water; and

(b) may contain different provisions for different categories of bulk supplier, networked supplier, designated port or airport, or water carrier, or different provisions for each class of drinking-water supplier; but

(c) must not include any requirement that fluoride be added to drinking water.

...

[34] By s 69P the Minister is required to carry out a process of consultation for three years before issuing or adopting drinking water standards unless there is urgency or otherwise as provided in s 69P(2).

[35] The drinking water standard issued pursuant to s 69O specifies the maximum acceptable value for fluoride is 1.5 ppm.[11] I was told this is significantly higher than the naturally occurring fluoride level in New Zealand water supplies which is usually between 0.1 and 0.3 ppm. The standard includes the following comment in relation to fluoride:

> For oral health reasons, the Ministry of Health recommends that the fluoride content for drinking-water in New Zealand be in the range of 0.7 - 1.0 mg/L; this is *not* a MAV.

It follows that water containing fluoride at a level less than the maximum acceptable

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[11] Drinking-water Standard for New Zealand 2005 (revised 2008), at Table 2.2; Drinking-water Standards for New Zealand 2000, Table 14.2. (Under s 14(3) of the Health (Drinking Water) Amendment Act 2007, drinking water suppliers can elect to comply with the 2000 standards until 31 December 2014).

value will be potable and come within the definition of "drinking water".

[36] The Health Act does not expressly authorise the addition of fluoride to drinking water but it plainly contemplates that it may be. The stipulation in s 69O(3)(c) that standards must not include any requirement that fluoride be added to drinking water is consistent only with a legislative intention that fluoride may be added. If the intention was that fluoride could not be added, the provision would be redundant. This is confirmed by the report of the Select Committee which considered the Bill which contained the following passage:[12]

> **Issue, adoption, amendment and revocation of drinking-water standards – new clause 69O**
>
> New clause 69O sets out the process by which the Minister may issue, adopt, amend, or revoke drinking-water standards. Although new clause 69O or the standards were never intended to enable the mandatory fluoridation of water, in theory it is possible that they might be applied in this way. To prevent such a possibility we recommend insertion of a new subclause (3)(c).

Subparagraph (3)(c) has the purpose of countering any suggestion that the inclusion of fluoride as a contaminant in drinking water standards may be interpreted as requiring a drinking-water supplier to fluoridate. This is consistent with the expectation that such decisions are quintessentially a function of local government.[13]

Fluoridation is *ultra vires*

[37] The LGA 2002 and the Health Act, separately and in combination, appear to establish a clear legislative mandate for local authorities to add fluoride to drinking water supplies. Ms Hansen, however, challenged that interpretation, arguing that:

(a) The power of "full capacity" is limited to what an individual or corporate can lawfully do which does not extend to adding a compound to the water supply for therapeutic purposes.

(b) Fluoridation is akin to a regulatory function and requires express authorisation.

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12 Health (Drinking Water) Amendment Bill 2006 (52-2) (Select Committee Report) at 5.

13 See, for example, s 10 at [18] above.

Additionally, Ms Hansen argued that fluoridated water could not be supplied without the consent of the Minister of Health under the Medicines Act 1981.

Capacity

[38] The submission that the power of local authorities is delimited by what an individual or corporation can do draws on the report of the Select Committee in relation to the Local Government Bill 2002. The extract relied on by Ms Hansen reads as follows:[14]

> The intended effect of the general power contained in [section 12] is ... that in undertaking these activities, local authorities should, as the starting point, have the same rights and obligations under general law *as individuals and corporations.*

[39] Ms Hansen also referred to the following passage from Brookers, Local Government Act Commendary:[15]

> By this section, local authorities are authorised to do anything that *any person or body corporate may do*, subject to any other law and an obligation to act wholly or principally for the benefit of its district (in the case of territorial authorities) or all or a significant part of its region (in the case of a regional council).

[40] The words of qualification in both passages relied on signal, however, that the powers of individuals and corporations are no more than a starting point. The limits on the general power of competence are to be found in the 2002 Act itself, other legislation and the general law – see s 12(3).[16] As the authors of the Local Government chapter in the *Laws of New Zealand* say:[17]

> The significance of the power of general competence should, however, not be overstated. The power of general competence is subject to the provisions of the 2002 Act, any other enactment, and the general law. This has a number of consequences. First the power of general competence is limited to the corporate powers of local authorities. It does not extend the regulatory or coercive powers of local authorities, not possessed by ordinary citizens. The Rule of Law continues to require that state powers of such a nature be expressly conferred by legislation or the common law. Secondly, there remain some specific restrictions on the general (corporate) powers of local authorities in the 2002 Act. For example, local authorities are prohibited

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14 Local Government Bill 2002 (191-2) (Select Committee Report) at 3 (emphasis added).
15 *Local Government Key Legislation* (online ed, Brookers) at LG12.01 (emphasis added).
16 Set out in [20] above.
17 Laws NZ, *Local Government* at 33.

from borrowing in foreign currency or divesting of water services (except in certain limited circumstances): paragraph [33].

Regulatory power

[41] It is the case, as noted in the foregoing passage from *Laws of New Zealand*, that the power of general competence does not extend to regulatory or coercive powers not possessed by ordinary citizens. Such powers must be expressly conferred and are to be found, together with powers of enforcement, in Part 8 of the 2008 Act. They include the power to make by-laws (Subpart 1), enforcement powers (Subpart 2), powers in relation to private land (Subpart 3) and, relevantly, powers in relation to water services and trade wastes (Subpart 4) which include the power to restrict water supply in response to lawful activities by the person.

[42] Ms Hansen's argument requires that a territorial authority could fluoridate only if the power was among those conferred in Part 8. She says that because it is a population-based measure which involves adding a chemical compound to the water supply which must be ingested by all residents, it is regulatory in nature. She refers also to the need for the chemical to be regularly monitored and maintained within specified limits. It is also characterised as coercive since residents are practically unable to opt out of the scheme and are effectively required to consume fluoridated water.[18]

[43] The argument cannot be sustained. The addition of fluoride to water quite simply cannot be characterised as a regulatory function. The *Concise Oxford English Dictionary* defines "regulate" as "control or supervised by means of rules and regulations" and "regulatory" is listed as a derivative of "regulate".[19] In *Strachan v Marriott*, Blanchard J referred to "regulate" as defined in the *Oxford English Dictionary* as "to control, govern or direct by rule or regulation".[20] The fluoridation of water is a physical act that takes place in the course of a local authority providing one of its core services. It does not involve the exercise of a

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[18] Special measures to avoid ingestion such as the instillation of rainwater tanks, are said to be only partially effective as fluoridated water is typically found in food and beverages purchased in a supermarket or restaurant.

[19] *Concise Oxford English Dictionary* (11th ed (revised), Oxford University Press, Oxford, 2008) at 1212.

[20] *Strachan v Marriott* [1995] 3 NZLR 272 (CA) at 291.

regulatory power. To the extent that a regulatory power exists in relation to the fluoridation of water, it is conferred on the Ministry of Health under the Health Act to set drinking water standards.[21]

Water as medicine

[44] The argument that fluoridated water requires the consent of the Minister of Health relies on water coming within the definition of food for the purposes of the Medicines Act 1981. The argument proceeds that under the Medicines Act a food for which therapeutic claims are made must be consented to by the Minister as a "new medicine".

[45] The argument fails at the first hurdle as, for the purpose of the Medicines Act, "food" does not include a drink. This was authoritatively determined in *Diet Tea Company Limited v Attorney-General.*[22] In that case it was accepted that in its natural and ordinary meaning "food" did not include a beverage such as tea. The plaintiff relied on extended definitions of food in the repealed Food and Drug Act 1969 and the Medicines Act 1981 to advance an argument that the definition in the Medicines Act should be similarly extended. That was rejected by Henry J who observed that if that were the intention of the legislature, it would have been simple to do so either by using general terms or by referring expressly to drink.[23]

[46] Water is not food for the purpose of the Medicines Act. This part of Ms Hansen's argument cannot succeed.

New Zealand Bill of Rights

Genesis of s 11

[47] The NZBORA undoubtedly applies to the Council's responsibilities as a supplier of water pursuant to s 3(b) which provides that:

> This Bill of Rights applies only to acts done –

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21 See [33] above.
22 *Diet Tea Co Ltd v Attorney-General* [1986] 2 NZLR 693 (HC).
23 At 697.

...

(b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[48] The plaintiff's case is that s 11 of NZBORA applies by reason of the fact that the addition of fluoride to the water supply is medical treatment. Section 11 is one of four sections in Part 2, Civil and Political Rights, grouped under the heading Life and Security of the Person. They are:

8 Right not to be deprived of life

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9 Right not to be subjected to torture or cruel treatment

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10 Right not to be subjected to medical or scientific experimentation

Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11 Right to refuse to undergo medical treatment

Everyone has the right to refuse to undergo medical treatment.

[49] In his helpful submissions, Mr Powell traced the development of this part of NZBORA to show that the right to refuse medical treatment is a subset of the general human right of privacy; comprising identity, integrity, autonomy and intimacy. It is to be contrasted with the rights in ss 9 and 10 of NZBORA which directly correlate with Article 7 of the International Covenant on Civil and Political Rights (ICCPR) which provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular no one shall be subjected without his free consent to medical or scientific experimentation.

[50] Professor Manfred Nowak, in his commentary on Article 7 states that the inclusion in that article of the right not to be subject to medical or scientific experimentation without consent was a specific response to the atrocities of the Nazi

concentration camps.[24] Professor Nowak explains that the provision was drafted so as to exclude legitimate medical treatment or experimentation undertaken in the interests of patient health. He confirmed that medical treatment without consent or against the will of the patient is to be deemed interference with privacy.[25]

[51] In the draft Bill attached to the White Paper, the right to refuse to undergo medical treatment was initially grouped with the rights now found in ss 9 and 10 under the heading "No Torture or Cruel Treatment". The Interim Report of the Justice and Electoral Law Subcommittee recommended including those rights with the separate right to life under s 8 under the broader heading "Life and Security of the Person". The relevant passage of this report reads: [26]

> The effect of including the right not to be subjected to medical or scientific experiments without consent in article 7 [of the ICCPR] was to require that any infringement reached the threshold of degrading or inhuman treatment. If the three rights proposed in article 20 of the Draft Bill of Rights attached to the White paper had remained in that form, it would have suggested a similar alignment of the right to refuse medical treatment to the torture threshold.

[52] In following the recommendation in the Report, Parliament made clear that s 11 stands on its own. It does so as an element of the general right to privacy and, in particular, the right to bodily integrity which the common law has always recognised as a fundamental right.[27] In *R v B* which did not directly concern s 11, Cooke P referred to the complainant's right to have her privacy, dignity and bodily integrity protected from non-consensual medical procedure as a right which may be wider than those assured by ss 10 and 11 of NZBORA. [28]

[53] In order for fluoridation of drinking-water supplies to breach the s 11 right, the consumption of the flouridated water must amount to medical treatment and delivery must take place in circumstances which effectively deny a consumer the ability to refuse such treatment. The critical issues arising for consideration are the

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[24] Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (2nd revised N.P. Engel, 2005) at 188.

[25] At 387.

[26] Interim Report of the Justice and electoral Law Select Committee – Inquiry into the White Paper – A Bill of Rights for New Zealand (1987) 1 AJHR 8A.

[27] *Nowak*, above n 24, at 387.

[28] *R v B* [1995] 2 NZLR 172 (CA) at 177. See also at 182 per Richardson J and 185 per Hardie-Boys J.

meaning or scope of "medical treatment" and the nature of the obligation on the state not to interfere with the right to refuse.

Medical treatment

[54] The White Paper made it clear that medical treatment would not be confined to interventions which interfered with physical bodily integrity. It said:[29]

> The word "medical" is used in a comprehensive sense. It would certainly include surgical, psychiatric, dental, psychological and similar forms of treatment.

That expectation has been borne out in court decisions. The New Zealand authorities to which I was referred have held medical treatment for the purpose of s 11 to include confinement in an abortion clinic;[30] an assessment of children undertaken by a doctor for the purposes of an investigation into their safety;[31] and the psychological assessment of a prisoner.[32]

[55] The purpose of the intervention is relevant. Medical treatment requires a therapeutic purpose. Those of combating, ameliorating or preventing a disease are recognised in the comprehensive definition of medical treatment in *Mosby's Dictionary of Medicine, Nursing and Health Professions*:[33]

> A method of combating, ameliorating or preventing a disease, disorder or injury. Active or curative treatment is designed to care; palliative treatment is directed to relieve pain and distress; prophylactic treatment is for the prevention of a disease or disorder; causal treatment focuses on the cause of a disorder; conservative treatment avoids radical measures and procedures; empirical treatment uses methods shown to be beneficial by experience; rational treatment is based on a knowledge of a disease process and the action of the measures used. Treatment may be pharmacological, using drugs; surgical, involving operative procedures; or supportive, building the patient's strength. It may be specific to the disorder; or symptomatic, to relieve symptoms without effecting a cure.

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29 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984 – 1985] I AJHR A6 at 10.167.

30 *Re a case stated by the Abortion Supervisory Committee* [2003] 3 NZLR 87 (HC).

31 *M v Attorney-General* [2006] NZFLR 181; (2005) 25 FRNZ 137 (HC).

32 *Smith v Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008, Miller J.

33 Peter Harris, Sue Nagy and Nicholas Vavdaxic (eds) *Mosby's Dictionary of Medicine, Nursing and Health Professions*: *2nd Australian and New Zealand Edition* (Elsevier, Australia, 2009).

[56] It may be doubted whether an intervention for the purpose of diagnosis only is treatment. In *A v Counsel of the Auckland District Law Society* Randerson J had "some difficulty" with the proposition that a medical examination for diagnostic rather than treatment purposes came within the scope of s 11[34]. Randerson J accepted, however, that the examination, which would include a urine test, blood test, liver function test and hair follicle test, would be contrary to the fundamental right to freedom from invasion of physical privacy and bodily integrity. In *Smith v Attorney-General* Miller J, while accepting that psychological treatment is "medical treatment" for the purpose of s 11, observed that it would not necessarily be so if the tests were done for risk assessment purposes. [35]

[57] In *Cairns v James* Temm J suggested that the taking of a blood sample for the purpose of determining paternity may be "medical treatment" for the purposes of s 11[36] and Professor Rishworth & ors suggest that the taking of blood samples for paternity or alcohol testing may be medical treatment whose object is the obtaining of a sample or information. [37] However, I prefer the view of Butler and Butler that the determinative factor should be the purpose of the medical intervention.[38] In blood alcohol and paternity testing cases the intention is to collect evidence, not to treat a patient. As the learned authors say, the fact that this must be done by a medical practitioner according to certain protocols is not decisive.

[58] Although the Council resisted the suggestion that fluoridation has a medical purpose, it cannot be disputed that the process has a therapeutic objective. While there are differences of opinion as to whether the compounds used for fluoridation are to be characterised as a medicine, a dietary supplement, a nutrient (all of which terms were favoured by various experts) or, as Dr Robin Whyman[39] said, recreate fluoride levels naturally occurring in other parts of the world, fluoridation has a therapeutic medical purpose, preventing tooth decay, and a known pharmacological effect, namely the mineralisation of tooth enamel. It is the means by which the

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34 *A v Counsel of the Auckland District Law Society* [2005] 3 NZLR 552 (HC) at [62].
35 *Smith v Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008.
36 *Cairns v James* [1992] NZFLR 353 (HC).
37 Rishworth et al *The New Zealand Bill of Rights* (OUP, Melbourne, 2003) at 257.
38 Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington 2005) at 11.8.5.
39 Clinical Director of Oral Health Services at Hawkes Bay District Health Board and Principal Dental Officer, Whanganui District Health Board.

therapeutic purpose is achieved that is at the heart of the controversy as to whether fluoridation qualifies as medical treatment for the purpose of s 11. The Attorney-General, supported by the Council, argues that public health measures such as fluoridation do not constitute medical treatment notwithstanding its therapeutic purpose. Ms Hansen, for the plaintiff, is adamant that a procedure that involves both a medical purpose and a medical method qualifies as medical treatment.

International case law

[59] Overseas authorities are of limited assistance. There have been numerous challenges to fluoridation in foreign jurisdictions but none which directly engage the question of whether fluoridation is medical treatment. The United Kingdom cases are directed to the legality of the decision to fluoridate.[40] The courts were not required to consider whether fluoridation infringed the plaintiff's rights. *McColl v Strathclyde* may be noted, however, for distinguishing *Attorney-General v Lower Hutt City Corporation* in deciding that fluoridation was outside the powers of the respondent council.

[60] Although fluoridation is widespread in Australia, there has been no significant constitutional challenge to the practise. As suggested by Mr Powell, this may reflect the fact that in six of the seven states, authority to fluoridate is confirmed in legislation which also includes provision for either a State Minister or Secretary to direct that fluoridation occur.[41]

[61] It is helpful, however, to examine in more detail decisions of the Irish, Swiss, Canadian and American courts which adjudicated on challenges to decisions to fluoridate as involving a breach of individual rights, of which the right to bodily integrity was in each case an element.

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[40] *McColl v Strathclyde* ([1983] SC 225; *Milner v South Central* SHA [2011] EWHC 218 (Admin).

[41] Fluoridation of Public Water Supplies Act 1966 (WA); Fluoridation Act 1968 (Tas.); Water Fluoridation Act 2008 (Qld); Fluoridation of Public Water Supplies Act 1957 (NSW); Health (Fluoridation) Act 1973 (Vic); Electricity and Water Act 1988 (ACT). In *Oshlack v Rous Water* [2013] NSWCA 169 there was a challenge based upon an assertion that the local authority had misinterpreted authority to fluoridate as a direction to do so, but no constitutional challenge to the practice itself.

Ireland

[62] One of the earliest challenges to fluoridation was *Ryan v Attorney-General.*[42] Legislation authorising the introduction of fluoride into the water supply was challenged as contrary to the Irish Constitution which included a general state guarantee of personal rights. These were held to include the right to bodily integrity. In the High Court the claim was dismissed on the ground that there was no interference with the right as there was no obligation to consume the fluoridated water supply; no right to an unfluoridated supply; and because the fluoride could be easily filtered out by an end-user.

[63] On appeal the Supreme Court declined to resolve the case on that narrow basis, particularly without sufficient evidence as to the practicality of removing the fluoride. The Court held that, as fluoridation had no effect on the "wholeness or the soundness" of the body of a consumer, the ingestion of fluoridated water could not constitute an infringement of or a failure to respect the bodily integrity of the individual.[43] The Court also rejected the contention that fluoridation involved mass medication or mass administration of "drugs" through water. The Court said that fluoridation is a process by which an element which naturally occurs in water is raised to a concentration at which it is found in wholesome water with an outcome that did not differ from what occurred in nature. The Court quoted from the conclusion of the New Zealand Commission of Inquiry 1957[44] that fluoride is not a drug but a nutrient and fluoridation is a process of food fortification.[45]

Switzerland

[64] In *Jehl-Doberer v Switzerland*[46] the complainant contended that a fluoridation scheme was contrary to Article 8 of the European Convention on Human Rights and Fundamental freedoms which provides:

> **Article 8: right to respect for private and family life**

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42 *Ryan v Attorney-General* [1965] IR 294 (HC and SC) at 308.
43 At 349.
44 Commission of Inquiry 1957 *Fluoridation of Public Water Supplies* (Government Printer, Wellington, 1962) at 142 – 143.
45 *Ryan v Attorney*-General, above n 42, at 349.
46 *Jehl-Doberer v Switzerland* (1993) E Comm HR No. 17667/91.

> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[65] The Commission noted that its case-law was that even minor medical treatment, as long as it is compulsory, constitutes an interference with a person's right to respect for private life. However, the Commission held that:[47]

> ... this situation differs from that of compulsory medical treatment. Thus in the Canton of Basel-Stadt drinking water is provided as a general service to the population.

[66] The Commission went on to say that it was unnecessary to examine the issue since any interference with the applicant's right would, in any event, be justified within the meaning of Art 8(2).

Canada

[67] In *Locke v Calgary*[48] the plaintiff challenged a bylaw allowing for fluoridation of the water supply as a breach of the right to security enshrined in s 7 of the Canadian Charter of Rights and Freedoms which reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[68] Montgomery J found as a fact that fluoridation is the most cost-effective available public health measure for reducing tooth decay and the introduction of fluoride to the water supply of the city of Calgary presented no risks to the lives or health of the populace. He found that Mr Locke had not established that his security or any person's security was affected by communal water fluoridation.[49] He went on to say that the intrusion by the judiciary into value judgments of the legislature and the electors must be restrained unless there is a clear breach of the *Charter*

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47 At 6.

48 *Locke v Calgary* (1993) 147 AR 367 (AQB).

49 At [34].

established on at least the balance of probabilities.[50] Based on the evidence before him and the findings of fact made, he found that no violation of the plaintiff's right to security of the person had been made out.

[69] In *Millership v British Columbia* one of the grounds of challenge to provincial legislation that permitted the fluoridation of public water was a breach of s 7 of the *Charter*.[51] The "liberty" interest includes the right to make fundamental personal choices free from state interference[52] and the right not to be subject to medical treatment without informed consent is an aspect of the liberty interest.[53] The Court rejected a submission that the addition of fluoride should not be considered medical treatment as fluoride is better considered as a nutrient rather than a drug or medicine. Powers J held that it is more appropriate to deal with the issue on the basis that fluoride is being used as a drug or medicine, at least for the purposes of promoting health when it is added to the public water system.[54] However, the Court went on to find that the plaintiff's s 7 rights had not been infringed because fluoridation within the range of the optimal levels recommended by the relevant health authority is a minimum intrusion into the plaintiff rights to liberty or security of the person and did not amount to a prima facie breach of those rights.[55] The Court also found that even if the plaintiff's right under s 7 was infringed, the infringement occurred in accordance with the principles of fundamental justice,[56] was minimally impairing of the right[57] and was proportional to the importance of the right and goals of fluoridation.[58]

United States of America

[70] Challenges to fluoridation decisions in the United States have relied on inconsistency with the 14th Amendment to the United States Constitution or

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50 At [51].
51 *Millership v British Columbia* [2003] BCSC 82 (BCSC) affirmed by *Millership v British Columbia* 2004 23 BCLR (4th) 198 (BCCA).
52 *Blencoe v British Columbia (Human Rights Commission)* 2000 SCC 44 at [49].
53 *Fleming v Reid (Litigation Guardian)* (1991), 82 D.L.R. (4th) 298.
54 *Millership v British Columbia*, above n 51, at [105],.
55 At [112].
56 At [117].
57 At [129].
58 At [130].

equivalent provisions in state constitutions. The 14th Amendment relevantly provides:

> Section 1 ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws.

An infringement of that right through compulsory medical treatment was acknowledged by the Supreme Court in *Jacobson v Commonwealth of Massachusetts.*[59]

[71] In *Dowel v City of Tulsa* the plaintiffs challenged the validity of an ordinance authorising fluoridation of Tulsa's water supply as, among other things, involving a violation of the 14th Amendment of the US Constitution. [60] The Court rejected the argument that fluoridation should be distinguished from the addition of chlorides, both of which achieved demonstrable public health benefits, the one by killing germs in the water, the other by reducing the incidence of tooth decay. The Court said at:[61]

> To us it seems ridiculous and of no consequence in considering the public health phase of the case that the substance to be added to the water may be classed as a mineral rather than a drug, antiseptic or germ killer; just as it is of little, if any, consequence whether fluoridation accomplishes its beneficial result to the public health by killing germs in the water, or by hardening the teeth or building up immunity in them to the bacteria that causes caries or tooth decay. If the latter, there can be no distinction on principle between it and compulsory vaccination or inoculation, which, for many years, has been well-established as a valid exercise of police power.

[72] The Court also rejected the argument that fluoridation could not be justified as a public health measure because it was only of direct benefit to those under the age of 16 year. The Court endorsed the principle that the protection of liberty requires the absence of arbitrary restraint but not immunity from reasonable regulations imposed in the interests of the community.[62] In *Kraus v City of*

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59 *Jacobson v Commonwealth of Massachusetts*, 197 U.S. 11 (1905).
60 *Dowel v City of Tulsa* 273 P.2d 859. (Okl, 1954).
61 At 863.
62 At 863.

Cleveland the City of Ohio Supreme Court reached similar conclusions on the same questions raised in *Dowel v City of Tulsa*.[63]

[73] In *Minnesota State Board of Health v City of Brainerd* the Supreme Court of Minnesota held that upon balancing the substantial public health benefit of fluoridation against its innocuous effect on the individual, fluoridation is a justified intrusion into an individuals' bodily integrity.[64] In considering whether the means of achieving the state's purpose is proper and reasonable, the Court concluded that the means adopted are not particularly offensive or unusual. The Court said that although the actual consumption of water is, in a sense, a private and personal act, the preparation and treatment of water is a common and accepted public function. The Court said:[65]

> While forced fluoridation does, to a limited extent, infringe upon an individual's freedom to decide whether he will or will not ingest fluoride, such an infringement, absent any significant adverse consequences to the individual, cannot be accorded substantial weight.

[74] The Court quoted with approval the following passage from the decision of the Illinois Supreme Court in *Schuringa v City of Chicago*:[66]

> [F]luoridation programs, even if considered to be medication in the true sense of the word, are so necessarily and reasonably related to the common good that the rights of the individual must give way.

[75] In *Quiles v City of Boynton Beach*[67] the applicant contended that the city's fluoridation of water amounted to medical treatment in breach of a right to freedom from compulsory medication that was a subset of the right to privacy guaranteed in Art 1, s 23 of the Florida Constitution which reads as follows:

> Right of privacy – Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right to access to public records and meetings as provided by law.

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63 *Kraus v City of Cleveland* 127 N.E.2d 609 (Ohio, 1955).
64 *Minnesota State Board of Health v City of Brainerd* 241 N.W.2d 624 (Minn, 1976) at [12].
65 At [11].
66 *Schuringa v City of Chicago* 198 N.E.2d 326 (Ill, 1964).
67 *Quiles v City of Boynton Beach* (2001) 802 So 2d 397 (Fla. App 4 Dist 2001).

[76] The Florida District Court of Appeal (4th Circuit) held that the introduction of fluoride is not a medical procedure. The Court rejected the contention that fluoridation amounted to "compulsory medication", pointing out that the city's fluoridation of its water stops at the water faucet:[68]

> The city is not compelling [the plaintiff] to drink it. He is free to filter it, boil it, distil it, mix it with purifying spirits, or purchase bottled drinking water. His freedom to choose not to ingest fluoride remains intact.

[77] The Court concluded by adopting the following statement in *Alternhoff*:[69]

> [T]here is, in logic, a valid factual distinction between *preserving* health on one hand and *improving* it on the other .... We do feel, however, that it is a distinction which the courts should not be made to suffer in arriving at a determination as to whether a particular public health measure is or is not a reasonable or legitimate exercise of power to legislate to the public interest on the state or local level.

[78] The divergent grounds on which the courts have held that fluoridation did not breach the right to bodily integrity, privacy or liberty, have found their way into the arguments advanced in this case. As earlier mentioned, it was contended for the Council, as was accepted in *Ryan*, that fluoridation does not have a medical purpose. Analogies were drawn with the use of chlorine, as in *Dowel*, which is an accepted public health measure for treatment of drinking-water. It was argued that any breach was *de minimis* and outweighed by the substantial health benefits of fluoridation as found in *Minnesota State Board of Health v City of Brainerd*. I pass now to consider how these and other points made in argument apply to the somewhat narrower right to refuse medical treatment found in the NZBORA.

Section 11 and fluoridation - discussion

Medical treatment

[79] I do not think it is helpful to attempt to adjudicate on the range of views expressed as to precisely how the process of fluoridation should be characterised. As indicated earlier, I consider it preferable to confront squarely that, although the addition of fluoride does no more than to elevate it to levels which often occur

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68 At 399.

69 *City Comm'n of Fort Pierce v State ex rel Altenhoff* 143 So.2d 879 (Fla 2d DCA 1962) at 888

naturally, it is nevertheless a process undertaken for the purpose of preventing or arresting a disease. The descriptor should not be a decisive consideration. It is sufficient that the process of fluoridation is undertaken for a therapeutic purpose.

[80] In my view, fluoridation cannot be relevantly distinguished from the addition of chlorine or any other substance for the purpose of disinfecting drinking water, a process which itself may lead to the addition of contaminants as the water standards themselves assume.[70] Both processes involve adding a chemical compound to the water. Both are undertaken for the prevention of disease. It is not material that one works by adding something to the water while the other achieves its purpose by taking unwanted organisms out.[71]

[81] The addition of iodine to salt, folic acid to bread and the pasteurisation of milk are, in my view, equivalent interventions made to achieve public health benefits by means which could not be achieved nearly as effectively by medicating the populace individually. The fact that iodine is an essential nutrient, necessary for the function of the thyroid gland as Professor David Menkes[72] pointed out, does not alter the fact that it is added to salt in order to prevent thyroid disease. All such measures have a therapeutic purpose. All are intended to improve the health of the populace. But they do not, in my view, constitute medical treatment for the purpose of s 11.

[82] The terms of s 11 themselves indicate that medical treatment is of more limited scope. One would not naturally describe a person drinking fluoridated water or ingesting iodised salt as "undergoing" treatment. That is a description that more readily lends itself to something that is "done" to a patient, a point made by Professor John McMillan.[73]

[83] The terminology of s 11 contrasts with the wording of s 10. First, s 10, like s 9, creates a right "not to be subjected to" the proscribed activity. The right "not to be subjected to medical and scientific experimentation without ... consent" plainly extends to all and any circumstances in which a person may be, knowingly or

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70 See, for example, ss 4.3.2, 4.3.3 and 4.3.4 of Drinking-Water Standards.

71 This is consistent with the decision in *Dowel v City of Tulsa*, above n 60.

72 Associate Professor at the Waikato Clinical School of the University of Auckland and Consultant Psychiatrist.

73 Professor of Bioethics at Otago University.

unknowingly, the subject of scientific or medical experiment. Both s 9 and s 10 must be understood as encompassing any form of activity which results in the specified outcome. In contrast, an experience that is undergone suggests something of narrower compass. Clearly one undergoes surgery, a medical procedure or a psychiatric examination. But it seems to me to be inapt to speak of "undergoing" the process of drinking fluoridated water. On the other hand, it is entirely appropriate to undergo a course of treatment which could include taking fluoride.

[84] The language of s 11 in the context in which it appears strongly suggests that the right to refuse medical treatment is only engaged when the treatment takes place in the context of a therapeutic relationship in which medical services are provided to an individual. That is the only context in which the right has been invoked in New Zealand and, as an element of the broader rights relied on in the overseas authorities to which I was referred. That is not, of course, decisive. It does, however, serve to underline that to extend the right to refuse medical treatment to public health measures intended to benefit all or a section of the populace is a significant step.

[85] The language of NZBORA does not support such an extension and internationally recognised human rights norms do not require it.[74] The reasons why this should be so were helpfully identified and articulated by Mr Powell.

[86] The right to refuse medical treatment is to be confined to direct interference with the body or state of mind of an individual – what Mr Powell called "the intimate sphere of human identity" – because within that sphere there are no competing interests that need to be moderated or resolved. Provided it does not have consequences for public health[75] a person has the right to make even the poorest decisions in respect of their own health. But where the state, either directly or through local government, employs public health interventions, the right is not engaged. Were it otherwise, the individual's right to refuse would become the individual's right to decide outcomes for others.[76] It would give any person a right

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74 Nowak, above n 24. at 387.

75 As may arise, for example, with infectious diseases.

76 This is in line with the point made in *Dowel v City of Tulsa,* above n 60, that the protection of liberty did not extend to immunity from reasonable regulations.

of veto over public health measures which it is not only the right but often the responsibility of local authorities to deliver.

[87] Were medical treatment for the purpose of s 11 to extend to public health initiatives, an individual right to refuse could cut across the obligation of the state to promote the health of its citizens. That is itself a right. Mr Powell drew my attention to Art 12 of the International Covenant on Economic, Cultural and Social Rights, to which New Zealand is a signatory. Article 12 provides:

> 1 The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2 The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
>
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
>
> (b) the improvement of all aspects of environmental and industrial hygiene;
>
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
>
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[88] New Zealand gives effect to Art 12 through the Public Health and Disability Act 2000, s 3. Public health measures may be required in order for the State to give effect to its responsibilities. It will not be constrained from doing so by s 11 provided the measures taken do not lead to medical treatment which involves direct interference with the right to bodily integrity and autonomy to which s 11 gives effect.

[89] Section 11 ensures that within the context of a therapeutic relationship there is a right to refuse medical treatment. To the extent that public health measures may lead to therapeutic outcomes and constitute medical treatment in the broad sense, an individual has no right to refuse, at least not so as to produce outcomes that will deny others the benefit of such measures. In the case of fluoridation that does not

necessarily lead to unwanted outcomes. As I will shortly discuss in more detail, and as has been acknowledged in the overseas jurisprudence, a resolute consumer who does not want to ingest additional fluoride can employ a range of measures to avoid doing so.

[90] Ms Hansen drew my attention to the discussion on s 11 and fluoride treatment in Butler and Butler and to the authors view that fluoridation falls under medical treatment for the purpose of s 11.[77] They explain their conclusion on the basis that fluoridation of water supply is intended to cure dental problems in the community. They assume that all that is required to bring fluoridation within s 11 is a medical purpose. For the reasons I have given, I am satisfied that something more is required before a therapeutic intervention qualifies as medical treatment for the purpose of s 11.

Refusal

[91] Because of the view I have taken that fluoridation does not come within the purview of medical treatment, it is unnecessary for me to reach a concluded view on the alternative submission made on behalf of the Attorney-General that the right in s 11 would not be engaged because an individual has the ability not to consume fluoridated water. It is submitted that the right to refuse to undergo treatment is not lost because no one is compelled to consume the water that is supplied to their home. A citizen has the choice of supplying their own drinking water or filtering out the fluoride. Mr Powell argued that a person who does not wish to receive fluoride in their tap water is really complaining about the failure of the local authority to supply water that is not fluoridated rather than being deprived of the right to refuse to ingest fluoride.

[92] That was the view taken by the Florida Supreme Court in *Quiles* and in *Millership* it was held that any intrusion on the plaintiff's bodily integrity as a result of fluoridation had such a trivial impact that it did not amount to a prima facie breach of the plaintiff's right.

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[77] Butler and Butler, above n 38, at 11.8.10.

[93] Ms Hansen responded that while it is theoretically possible to avoid consuming fluoridated water delivered to the home, the measures necessary to do so give rise to expense and inconvenience and would not be available to those without the resources to take the necessary steps. She relied on evidence to indicate that it is practically impossible to avoid the consumption of fluoridated water as a result, for example, of the consumption of food or beverages made with fluoridated water or its consumption at cafes and restaurants or at friends' homes.

[94] On the basis that the rights in NZBORA need to be applied with commonsense and to be given practical effect,[78] I tend to the view that if the supply of fluoridated water were to be regarded as medical treatment, a consumer would not have the practical ability to refuse treatment. I accept, however, as did the Court in *Millership*, that the intrusion into an individual's rights would be minimal. Relying on *Police v Smith and Herewini*[79] and *Ministry of Health v Atkinson*[80] Mr Powell submitted that in such circumstances the s 11 right would not be engaged.

[95] On my reading of the authorities relied on, the enquiry into materiality is for the purpose of determining whether the right is engaged in the first place rather than whether the infringement is trivial or technical in nature. That is an issue that is more appropriately addressed in considering the consequences of infringement and the enquiry which would take place under s 5 as to whether any reasonable limits prescribed by law can be demonstrably justified.

Section 5 – justified limitation

[96] In case I am wrong in my conclusion that s 11 of NZBORA does not engage the power to fluoridate, I will briefly consider whether s 5 would apply. Section 5 provides:

> **5 Justified limitations**
>
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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78 *Minister of Transport v Noort* [1992] 3 NZLR 260 (CA) at 271 per Cooke P.
79 *Police v Smith and Herewini* [1994] 2 NZLR 306 (CA).
80 *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA).

[97] Two questions arise:

(a) Whether the power to fluoridate is prescribed by law; and

(b) Whether what is prescribed by law is demonstrably justified in a free and democratic society.

Prescribed by law

[98] In *R v Hansen* McGrath J said:[81]

> To be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty.

The reference to subordinate legislation indicates that orders in council bylaws and tertiary legislation may be considered.[82]

[99] Ms Hansen argued that what is prescribed by law must be expressly stated, relying on what was said in *Gravatt v Coroners Court at Auckland.*[83] The comment in *Gravatt* was not made as part of a consideration of the application of s 5. It is the case that the courts should be slow to impute to Parliament an intention to override established rights and principles.[84] But that intention may arise by necessary implication, as was recognised in *Slaight Communications Inc v Davidson.*[85] Lamer J identified two situations when the equivalent provision to s 5 of the NZBORA may apply. These were helpfully summarised in *Attorney-General v IDEA Services* as follows:[86]

(a) One situation was where the legislation under which the decision was made confers, either expressly or by implication, the power to infringe a right protected by the Canadian Charter. In that situation, it was the legislation that was subject to the test of whether it was a

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81 *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1 (SC) at [180].
82 See also Butler and Butler, above n 38, at 6.13.2.
83 *Gravatt v Coroners Court at Auckland* [2013] NZHC 390; [2013] NZAR 345 at [39].
84 *Cropp v A Judicial Committee* [2008] NZSC 46; [2008] 3 NZLR 774 at [26].
85 *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038.
86 *Attorney-General v IDEA Services* [2012] NZHC 3229, [2013] 2 NZLR 512 at [183].

reasonable limit that could be justified in a free and democratic society;

(b) The second situation was where the legislation pursuant to which the decision was made confers an imprecise discretion, and does not confer, either expressly or by implication, the power to limit the rights guaranteed by the Canadian Charter. In that situation it is the decision, and not the legislation, which is subject to the test of whether it is a reasonable limit that can be demonstrably justified in a free and democratic society.

[100] Ms Hansen argued that at best the legislation conferred an imprecise discretion and it was therefore the decision itself that should be subjected to scrutiny. However, as the earlier discussion shows, there is clear statutory authority to fluoridate deriving from the broad power to supply water in the LGA 2002 and the express recognition in the Health Act that such water may contain added fluoride. The question I am required to consider then is whether the power to fluoridate is demonstrably justified in a free and democratic society.

Test

[101] The approach to be taken to a s 5 analysis is well established. As articulated by Tipping J in *R v Hansen.*[87] The questions are:

(a) Does the limiting measure serve a purpose sufficiently important to justify curtailing of the right or freedom?

(b)

(i) Is the limiting measure rationally connected with its purpose?

(ii) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

(iii) Is the limit in due proportion to the importance of the objective?

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87 *R v Hansen*, above n 81, at [104].

Importance of the purpose

[102] The objective of fluoridating water is to reduce the severity and incidence of tooth decay. An incidental benefit is to reduce oral health inequalities particularly in children. The poor dental health of children in Waverley and Patea was the subject of detailed submissions to the Council and evidence before me.[88]

[103] In my opinion, the objective of improving the dental health of New Zealanders, particularly children, is unarguably sufficiently important to justify curtailment of the right to refuse (if it is engaged). The end is unquestionably justified. Any debate must focus on the means adopted to achieve it.

Rational connection

[104] Ms Hansen valiantly sought to show that there is no rational connection between fluoridation and the objective of preventing dental caries. She argued that the link between the problem and the perceived solution is weak as dental caries is not caused by a lack of fluoride but by excess sugar in the diet and poor oral hygiene habits.

[105] Whatever the causes of tooth decay, I accept Mr Laing's submission that there is a clear rational connection between fluoridation and its objective. Fluoridation increases the amout of fluoride available for consumption which in turn decreases the incidence and severity of dental decay across the population who receive fluoridated water.

No more than reasonably necessary

[106] The key question is whether or not fluoridation falls within the range of reasonable alternatives available. The issue was framed by Tipping J in *R v Hansen* in the following way:[89]

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88 Dr Gregory Simmons, a public health physician for the Taranaki District Health Board, referred in evidence to data that showed children residing in the South Taranaki District suffer significantly worse oral health than those in the rest of Taranaki and levels of tooth decay in Patea and Waverley are some of the worst in South Taranaki.

89 *R v Hansen*, above n 81, at [126].

> The court must be satisfied that the limit imposed ... is no greater than is reasonably necessary to achieve Parliament's objective ... In practical terms this inquiry involves the court considering whether Parliament might have sufficiently achieved its objective by another method involving less cost to the presumption of innocence.

[107] For the plaintiff it is submitted that fluoridated water is not needed to prevent tooth decay. All that is needed is a healthy diet, good dental hygiene and regular dental checkups. Ms Hansen relied on the evidence of Dr Stamoulis Litras[90] that targeted preventive policies would be more effective. These would include banning soft drinks and sugary snacks in schools, fluoridating salt in fast foods and soft drinks at high-risk areas, improved diet and oral hygiene education for low socio-economic families and improved access to dental care.

[108] For the Council, Mr Laing acknowledged that there are a range of complementary steps which could also help to reduce dental decay, among them those suggested by Dr Litras. Some of those suggested – fluoridation of milk or salt among them – would potentially give rise to the same kind of intrusion into any right to refuse medical treatment as the additional fluoride to water. Further, the evidence of Dr Whyman is that there is less good quality scientific evidence that milk and salt fluoridation are effective. On the present state of knowledge, it cannot be seen as an equally effective alternative to fluoridation of water.[91] Improved dental hygiene and ready access to a dentist are an established element of public health policy but have been shown to be of limited efficacy.[92]

[109] The evidence satisfies me that fluoridation is within the range of reasonable alternatives available to Parliament to address the problem of dental decay, particularly in low socio-economic areas.

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90 A dentist practising in Wellington.

91 In *Locke v Calgary*, above n 48, fluoridation of water was said to be the most cost effective public health measure for reducing tooth decay.

92 Dr Whyman referred to evidence that only about 45 per cent of children aged 2 – 17 years and 65 per cent of adults aged 18 years and over brush their teeth twice daily with a fluoridated toothpaste.

Whether the limit is proportionate to the objective

[110] The plaintiff questions the benefits of water fluoridation and criticises the quality of the evidence relied on to support its efficacy. Assuming, however, that fluoridation results in a small reduction of decay, it is submitted that the outcome is completely disproportionate to the harm done. The harms identified are the risk of dental fluorosis, a condition which affects the tooth enamel, the risk of ingesting excessive quantities of fluoride and of fluoridation increasing the content of mercury, arsenic and lead in drinking water. The disadvantages of fluoridating drinking water are argued to be disproportionate to the advantages. In response, it is submitted on behalf of the Council that fluoridation is proportionate response. It addresses an important and widespread health issue by the most effective and efficient means. While it is acknowledged to bring about an increase in the prevalence of fluorosis, the evidence relied on by the Council is that any fluorosis resulting ranges from very mild to mild which has negligible effect on the appearance of teeth. The Council's witnesses dispute evidence of higher levels of heavy metals resulting from fluoridation and dismiss as fanciful the risk that excessive quantities of fluoride may be consumed.

[111] Accepting, as I must, that there is respectable scientific and medical support for the Council's position, I am driven to the conclusion that the significant advantages of fluoridation clearly outweigh the only acknowledged drawback, the increased incidence of fluorosis. I am satisfied that the power conferred on local authorities to fluoridate is a proportionate response to the scourge of dental decay, particularly in socially disadvantaged areas.[93]

Failing to take into account relevant considerations

[112] The plaintiff claims that in making its decision to add fluoride to the drinking water of Patea and Waverley the Council failed to take into account nine relevant considerations. Six of these relate to the claimed breach of s 11 of NZBORA. As I have found the NZBORA to be inapplicable, it is necessary only to consider the remaining three considerations. They are:

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[93] This is consistent with the decisions in *Millership v British Columbia*, above n 51; *Schuringa v City of Chicago*, above n 66.

(a) That the fluoride added to water supplies is sourced from industrial by-products and contains contaminants that are potentially harmful to health.

(b) That there is a body of credible scientific evidence that shows that adding fluoride to water supplies to achieve a level of 0.7 to 1 ppm fluoride is potentially harmful to health.

(c) That there is no credible scientific research to show how drinking fluoridated water at between 0.7 and 1 ppm fluoride can reduce tooth decay.

[113] Neither the 2002 Act nor the Health Act require the Council to consider the three matters listed. If they are required to be considered before a decision to fluoridate can be made, the requirement to do so must arise by implication from the scheme and purpose of the legislation.[94] Ms Hansen did not advance any submissions to support the claim that the three factual issues referred to are implied mandatory relevant considerations. Each is a controversial factual assertion which could not possibly be implied from the general terms of the empowering legislation which is the source of the Council's power.

[114] It is clear, in any event, that the three claims which it is alleged the Council failed to consider were the subject of detailed submissions and of similarly extensive submissions in response. There is no reason to think that the matters raised were not considered. The minutes of the special meeting of the Council at which submitters were able to make oral presentations record that all councillors had read the written submissions in advance of the meeting. The record of the oral submissions shows that the issue of contamination, the concern that the addition of fluoride may be otherwise harmful to health and whether or not fluoridation is effective in reducing tooth decay were fully ventilated. In the press release which accompanied the announcement of the Council's decision to fluoridate, the arguments for and against were acknowledged and the council's reliance on the advice of experts to the effect that fluoridation of the water supply is a safe and effective measure for improving public oral health. There is nothing to show that the competing arguments and evidence were not fully and fairly considered by the Council.

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[94] *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA); *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA). See also Phillip A Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 895.

[115] This cause of action cannot succeed.

Summary and conclusions

[116] New Health has challenged the Council's decision to fluoridate the drinking water of Patea and Waverley on the grounds that:

(a) There was no legal power to do so.

(b) If there was power, its exercise by the Council was a breach of the right to refuse medical treatment in s 11 of NZBORA.

(c) In making the decision, the Council failed to take into account relevant considerations.

[117] I have rejected all grounds of challenge. I have concluded that there is implied power to fluoridate in the LGA 2002, as there had been in the antecedent legislation, the Municipal Corporations Act 1954 and the LGA 1974. The Health Act confirms that fluoride may be added to drinking water in accordance with drinking water standards issued under that Act. The power to fluoridate drinking water is not a regulatory function; it does not require express authority. Nor does a decision to fluoridate require the consent of the Minister of Health under the Medicines Act as water is not a food for the purpose of that Act.

[118] I have concluded that the fluoridation of water is not medical treatment for the purpose of s 11 of NZBORA. While I accept that fluoridation has a therapeutic purpose, I conclude that the means by which the purpose is effected does not constitute medical treatment. I am of the view that medical treatment is confined to direct interference with the body or state of mind of an individual and does not extend to public health interventions delivered to the inhabitants of a particular locality or the population at large. I see no material distinction between fluoridation and other established public health measures such as chlorination of water or the addition of iodine to salt.

[119] In the event that, contrary to my view, fluoridation does engage the right to refuse medical treatment, I discuss whether in terms of s 5 of NZBORA the power to fluoridate is a justified curtailment of the right to refuse medical treatment. I conclude that it is. The evidence relied on by the Council shows that the advantages of fluoridation significantly outweigh the mild fluorosis which is an accepted outcome of fluoridation.

[120] Finally, I examine whether the Council failed to take into account relevant considerations in reaching its decision. I am of the view that the Council was not required to take into account the controversial factual issues relied on by New Health. There is, nevertheless, a plenitude of evidence to show that the Council carefully considered the detailed submissions presented and reached its decision after anxious consideration of the evidence and careful deliberation.

Result

[121] New Health's application to review the Council's decision fails.