IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY CIV-2013-443-107

BETWEEN	NEW HEALTH NEW ZEALAND INCORPORATED **Plaintiff**
AND	THE SOUTH TARANAKI DISTRICT COUNCIL **Defendant**

COUNSEL FOR THE ATTORNEY GENERAL'S SUBMISSIONS ON INTERVENTION

11 November 2013

Judicial Officer: Hansen J
Next Event Date: Hearing 25 November 2013

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May it please the Court,

1. By a Minute dated 3 July 2013, the Court made a provisional order, later confirmed on 22 July 2013, for the Attorney General to intervene in this proceeding and be heard on two questions:

   1.1 Is fluoridation of a public water supply "medical treatment" for the purpose of s 11 of the New Zealand Bill of Rights Act 1990?

   1.2 If fluoridation is medical treatment for that purpose, does the inclusion in the water supply of fluoride up to one part per million limit the right of any person under s 11?

2. These submissions on behalf of the Attorney General as intervener in the proceedings are in two sections.

3. In the first section, I will address the sources of law that the Court is likely to have regard to for the purpose of interpreting and applying s 11 of the New Zealand Bill of Rights Act 1990 and answering the two questions. This comprises:

   3.1 The legislative history of the section.

   3.2 The underlying human rights values that the section is intended to protect.

   3.3 The limited domestic case law on s 11.

   3.4 Developments in cognate jurisdictions, and in particular whether the international analogues of s 11 are engaged by public health initiatives, with an emphasis on those involving the fluoridation of municipal water supplies.

4. In the second section, I will advance the submissions for the Attorney General on the two questions for which the Court granted leave to intervene.

SOURCES OF LAW FOR THE INTERPRETATION OF SECTION 11

Legislative History of s11

5. The right to refuse medical treatment is seen internationally, and in the limited case law in New Zealand as a sub-species of the rights to bodily integrity or privacy. Given that medical treatment generally penetrates the most intimate sphere of human existence, it seems entirely appropriate to see it in that context.

6. In recognising the right to refuse medical treatment as a specific right however, the New Zealand Bill of Rights Act 1990 has no direct equivalent in any of the human rights instruments around the world. Its appearance begs a question. When the more general right to privacy and security of the person (recognised as a fundamental right in the common law and in the International Covenant on Civil and Political Rights (ICCPR) was not included in the Bill, why was specific protection given against the one form of intrusion into it that is generally therapeutic? Both the Court of Appeal[1] and High Court[2] have acknowledged that Parliament was selective in the choice of rights that were to be guaranteed by the New Zealand Bill of Rights Act 1990, and it must be taken that this was a response to New Zealand conditions.

7. The position of the right to refuse medical treatment adjacent to ss 9 and 10 reflects the fact that it was originally coupled with the torture provision and the right not to be subjected to medical or scientific experimentation.

8. In the draft Bill attached to the White Paper, the rights were combined in article 20 under the heading of Torture and Cruel Treatment:

> **20.** *No Torture or Cruel Treatment*
>
> (1) Everyone has the right not to be subjected to torture, or to cruel, degrading, or disproportionately severe treatment or punishment
>
> (2) Every person has the right not to be subjected to medical or scientific experimentation.
>
> (3) Everyone has the right to refuse to undergo any medical treatment

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1 *R v Barlow* (1995) 2 HRNZ 635 (CA) Richardson J at 655.

2 *BHP NZ Steel Ltd v O'Shea* (1997) 4 HRNZ 456 (HC) at 470

9. The first two sub-paragraphs, which became ss 9 and 10 of the Bill of Rights Act, directly correlate with Article 7 of the International Covenant on Civil and Political Rights.

10. Professor Nowak in his commentary on article 7 records that the inclusion in that article of the right not to be subject to medical or scientific experimentation without consent alongside the torture right was a specific response to the atrocities of the Nazi concentration camps.[3] The provision was carefully drafted, according to the *traveaux préparatoires*, so as to exclude legitimate medical treatment or experimentation undertaken in the interests of patient health. Nowak confirms that the relevant right engaged by compulsory medical treatment is Article 17 which protects the right of privacy.

11. The effect of including the right not to be subjected to medical or scientific experiments without consent in article 7 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.

12. The comment in the White Paper at 10.166 suggests that the drafters did not have article 7 of the ICCPR in mind when including the right to refuse to undergo medical treatment, notwithstanding its placement.

13. In any event, as finally drafted, the right not to be subject to medical and scientific experiments (s 10) and the right to refuse medical treatment (s 11) are separate rights under a broader heading *Life and Security of the Person,* which encompasses the right to life (s 8) as well as the right to be free from torture or cruel, degrading or disproportionately severe treatment or punishment (s 9). This structural alteration was recommended in the Interim Report of the Justice and Electoral Law Select Committee.[4]

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3 Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* ( )188

4 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, page 75.

What the right protects

14. Seen as a variant of the right to bodily integrity or security of the person, the right to refuse medical treatment is placed within the general human right of privacy; comprising identity, integrity, autonomy and intimacy, all of which are at the core of the liberal notion of individual existence and freedom. The notion of integrity requires recognition of the inviolability of a person's own body. The notion of autonomy reflects the right to self-fulfilment through actions that do not affect the rights of others and at the most fundamental level that must include the right for an individual to decide what they do with their own body.[5]

15. While s11 is a manifestation of this broader human right and its purpose is explained in part by reference to those underlying values, it is confined by the words of the statute. In order to determine how far s 11 goes to protects those fundamental values there are two concepts that require interpretation:

    15.1 First the negative obligation it imposes on the state is to refrain from interfering with the right to refuse to undergo medical treatment, rather than an obligation to refrain from undertaking the medical treatment itself. On its face that suggests a narrower protection for integrity and autonomy than is found in the adjacent s 10, which requires the state to refrain from undertaking medical or scientific experimentation without consent.

    15.2 Second, it does not define medical treatment.

New Zealand case law considering s 11.

16. There have been few cases referring to s 11, and none in which the right has been directly engaged, as against being used in the interpretation of other legislation under s 6 of the Bill of Rights Act.

17. From the limited body of case law two propositions can be advanced:

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5 See the commentary on Article 17 in Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (2nd edition N.P.Engel, Kehl)386-388

17.1 Section 11 has been consistently interpreted as a stand-alone protection of a right to refuse medical treatment coinciding with a wider universal fundamental right to bodily integrity at common law that predated the New Zealand Bill of Rights Act 1990 and survives it.

17.2 While there is support for a comprehensive approach to what is "medical treatment", in line with the expectation of the authors of the White Paper, an orthodox approach to "treatment" aligning it with the conventional purposes of medical intervention is still required.

Confirmation of section 11 as a variant of the right to bodily integrity

18. In *R v B*[6] the accused sought a pre-trial order that the complainant submit to a medical examination. The request was made with reference to the rights of persons charged and minimum standards of procedure affirmed by ss 24 and 25 of the Bill of Rights Act.

19. The Court of Appeal was not directly concerned with s 11 of the Bill of Rights Act because an examination for forensic purposes did not appear to come within the orthodox notion of treatment, but the Court identified that s 11 was only one strand of the right to bodily integrity and privacy, which the common law had always recognised as a fundamental right and continued to do so by reason of s28 of the Bill of Rights Act.[7]

20. The High Court has followed the same line in cases where the right could not be directly engaged because it concerned a person without the capacity to consent,[8] or because the compulsory intervention was for evidential rather than treatment purposes.[9]

The scope of 'medical treatment'

21. While s 11 is considered to reflect a broader right to bodily integrity, the *White Paper* indicates that the s 11 right was intended to cover forms of treatment

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6 [1995] 2 NZLR 172 (CA)

7 At 177 line 30 (Cooke P); 182 line 33 (Richardson J); 185 line 4 (Hardie Boys J)

8 *KR v MR* Alt. cit. *X v Y [Mental Health: Sterilisation]* [2004] 2 NZLR 847 (HC) at [74]

9 *A v Council of the Auckland District Law Society* [2005] 3 NZLR 552 (HC) at [62] – [63]

that may not directly interfere with physical bodily integrity. 'Medical treatment' was thought to include 'surgical, psychiatric, dental, psychological and similar' treatments.[10]

22. In *Re a case stated by the Abortion Supervisory Committee*[11] Durie J was required to interpret s 18 of the Contraception Sterilisation and Abortion Act 1977 which required any abortion authorised by the Act to be carried out on licensed premises. The practice for medical abortions was that the drugs to induce a miscarriage were administered on licensed premises but the subsequent miscarriage would occur some days later and the patient would be sent home in the meantime. The Abortion Supervisory Committee referred to the High Court the question of whether 'performing' an abortion required the complete expulsion of the fetus, or if it was limited to the medical intervention of administering drugs.

23. His Honour found that the answer could be found in the natural and ordinary meaning of the words in the section. An abortion referred to the medical or surgical procedure whereby a miscarriage was induced and not to the subsequent miscarriage. Since that event occurred on licensed premises there was no breach of the CSAA if the expulsion of the fetus occurred somewhere else.[12]

24. The Court turned to s 11 to reinforce that conclusion, accepting a submission from *amicus curiae* that the alternative interpretation would require the patient to remain at the medical centre for a period of days and would therefore limit her right to refuse medical treatment.

25. It was necessary for the purpose of entertaining that argument to find that the act of detaining a patient following an abortion for the purpose of awaiting the expulsion of the fetus was medical treatment. The Court was prepared to accept that, finding:[13]

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10 "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6 at 109.

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

12 At [37]

13 At [51]

> Rights must be given a full and proper meaning, not a technical meaning. In this case I find that, if a patient was required to stay at an abortion institution until her fetus was expelled, this would be "medical treatment" for the purposes of the right expressed in s 11. Section 11 is the natural corollary of the need for persons to give consent to treatment and expresses the respect for an individual's autonomy. However, the literal meaning of "abortion" in the CSA Act is consistent with the Bill of Rights Act.

26. The need for a non-technical interpretation of rights is beyond argument, but the finding that a requirement to remain at the clinic constituted medical treatment doesn't follow from that recognition. The abortion itself is plainly medical treatment, and if that treatment were to involve the administration of drugs and remaining on licensed premises for a period afterwards, it is unnecessary to treat the latter aspect as a separate treatment for the purpose of assessing the right to refuse.

27. Durie J's comment was adopted by Potter J in *M v Attorney-General* [14] where a number of issues arose from the removal of two children by the Children Young Persons and their Families Service. While in CYFS care one of the children was subjected to an examination by a doctor. The stated purpose of the examination was diagnostic but it seemed to form part of an investigation as to the manner in which the girl had been treated while in the care of her parents. Issues were raised as to whether consent had been obtained for the full extent of the examination.

28. Potter J held:

> [107] I prefer the wider interpretation of the words "medical treatment" in s 11. A right to determine what shall be done with one's own body can be as important in relation to a medical examination or assessment as in respect of an anaesthetic, a surgical operation or the administration of medicine. All and any such treatments can be invasive of one's own person. I consider therefore, that all require informed consent in terms of s 11.

29. By using the degree of interference with intimate privacy as the yardstick, Potter J's approach offers the greatest degree of alignment with the underlying values of integrity and autonomy but the words of the section cannot be ignored. For example a personal search undertaken for the purpose of finding

concealed drugs can also be as invasive as many medical interventions but it is outside the scope of s 11 because it does not constitute any form of medical treatment. [15]

30. In *A v Council of the Auckland District Law Society* the defendant law society had required its member A, who was facing disciplinary charges, to undergo a psychiatric assessment for the purpose of assessing complaints that in part related to alcohol or substance abuse by him. The High Court declined to determine whether the rights relating to bodily integrity were engaged in that case but in passing expressed doubt that the taking of a sample would amount to medical treatment, where the sample was not taken for the purpose of treatment, but for diagnosis only.[16]

31. In *Smith v Attorney General*[17] a corrections psychologist undertook a psychopathy assessment of the plaintiff, a prisoner serving a sentence for murder and sexual offending. The assessment did not involve an examination of the plaintiff, and indeed one of his complaints was that he was not aware that it had been done and the Court noted that it was clinically acceptable for the test to be applied without interview of the subject.[18] The High Court was prepared to assume that to the extent that the assessment was associated with assessment of appropriate therapeutic intervention, it could constitute medical treatment, but noted that this would not necessarily be so if it was done for the purpose of assessing risk.[19]

32. Whether or not a particular intrusion constitutes medical treatment must be dependent on it involving an intervention into the health or well-being of a patient for preventative, therapeutic or palliative purposes. The two leading texts on the Bill of Rights Act are in substantial agreement that an inclusive approach should be taken so as to bring in not only the orthodox branches of

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

15 The need for a medical purpose to the intervention also features in the decision of the Court of Appeal in *R v B.*

16 [2005] 3 NZLR 552, at [62]. The Court concluded that s 21 NZBORA did apply to diagnostic sampling.

17 *Smith v Attorney General* (HC Wellington CIV 2005-485-1785 Miller J, 9 July 2008)

18 At [21]. This could have raised a question about whether a patient could be said to undergo a treatment that entirely consisted of an external assessment of which he was unaware. The point was not taken.

medical science[20], but the core elements of medical intervention must be present. The High Court was right in *A v Auckland District Law Society* and *Smith v Attorney General* to exclude examination undertaken for purely diagnostic, forensic or other purposes. To the extent that *Cairns v James*[21] suggests otherwise it should not be followed.

Refusal

33. Both *Butler and Butler* and *Rishworth et al.* do not accord much significance to the difference between the right to refuse in s 11 and the requirement for consent in s 10.[22] *Butler* suggests that the ultimate purpose is to secure the individual against the non-consensual activities of another person.

34. Where a distinction is apparent is in the way information relevant to the exercise of the right to refuse is treated. If the right protected against non-consensual activity it might have been necessary to demonstrate that any consent given was an informed consent. As *Butler and Butler* acknowledge:

> In light of its purpose – namely, to protect people from becoming the non-consensual object of another's actions – s 11 is not concerned to protect the patient from the negligent misinformation that has been *honestly* provided since autonomy is not offended by such misinformation. Rather s 11 protects a patient from misinformation that tricks him or her into agreeing to the treatment.[23]

35. There is support for this view in *Smith v Attorney General.*[24]

> [Section 11] is not framed as a right to full information about proposed medical treatment. It does not focus on the concept or quality of consent. Its purpose of protecting people from becoming the non-consensual object of another's treatment suggests that it was intended to cover broadly similar ground to that covered by the tort of battery. ... The right to refuse to undergo medical treatment is honoured where the patient has a broad understanding of the nature of the proposed treatment, the health professional does not go beyond the treatment proposed, and the consent is not vitiated by fraud or misrepresentation.

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19 At [100].

20 Rishworth et al *The New Zealand Bill of Rights* (OUP, Melbourne 2003) at 256; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [11.8.5]

21 *Cairns v James* [1992] NZFLR 353 (HC) at 356

22 Rishworth op cit. 255; Andrew Butler and Petra Butler (op cit.)at [11.9.1]

23 Andrew Butler and Petra Butler (op cit.) at [11.9.24]

24 *Smith v Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008, at [119].

International case law

Ireland

36. In *Ryan v Attorney General* [25] the plaintiff challenged the consistency of water fluoridation with, among other provisions, article 40(3) of the Irish Constitution which provided the general state guarantee of personal rights. Although not specifically provided for in that article, the High Court concluded that the general guarantee in subsection 1 extended to rights not specified in article 40. The Court recognised that included among the rights protected but not specified was the right to bodily integrity.[26]

37. The claim was dismissed on the narrow basis that there was no interference with the right to bodily integrity in her case, 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 by the end user of any fluoridated water supply.[27] In the Supreme Court on appeal the Court was not prepared to resolve the case on that narrow basis, particularly without sufficient evidence as to the practicality of removing the fluoride. Instead the Court determined that the right to bodily integrity was not infringed because on the evidence before the High Court the interference caused by the presence of fluoride was insignificant.[28] The Court also declined to accept that the addition of fluoride constituted medication preferring the view that it was the addition of a nutrient.[29]

Europe

38. In *Jehl-Doberer v Switzerland*[30] the European Commission of Human Rights (First Chamber) considered whether a complaint submitted by a resident of Basel against a fluoridation scheme in that canton was admissible. The Commission had the role of screening applications before they were submitted to the European Court. Among other reasons, the Commission could find the

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25 *Ryan v Attorney General* [1965] IR 294 (HC and SC), at 308.

26 Ibid, at 313-314.

27 Ibid, at 314-315.

28 Ibid, at 348 O'Dálaigh CJ.

29 At 349, O'Dálaigh CJ

30 *Jehl-Doberer v Switzerland* (1993) E Comm HR No. 17667/91

complaint inadmissible if, under article 28 of the Convention, it was manifestly ill-founded. Mr Jehl-Doberer's complaint was that the fluoridation scheme was contrary to article 8 of the European Convention on Human Rights and Fundamental Freedoms, which affirms a right to privacy, in a similar manner to Article 17 of the ICCPR:

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

39. Previous cases before the Commission had found that compulsory medical treatment interfered with article 8. The Commission doubted whether fluoridation could properly be characterised as compulsory medical treatment finding:

> However, in the Commission's opinion, 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.

40. In any event, the Commission found that allowing a due margin of appreciation for the Contracting State, the measure was necessary for the purposes of Article 8(2). The complaint was found to be inadmissible.

41. In *X v Austria*[31] the applicant complained of a compulsory order to submit to a blood test for the purpose of establishing affiliation and asserted a breach of article 8. The Commission accepted that:

> A compulsory medical intervention, even if it is of minor importance, must be considered an interference with this right.[32]

42. The interference was, however, manifestly justified under article 8.2 because the establishment of affiliation was necessary for various purposes in the public interest.

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31 *X v Austria* (1979) E Comm HR 8278/78

32 At [3]

43. The critical element for the engagement of article 8.1 in these cases is the physical interference with a person's body. Whether that occurs in the course of medical treatment is not significant for the purpose of article 8.1. The Commission had earlier found that compulsory blood alcohol testing also crossed the threshold of article 8.1 although complaints of a breach were found to be manifestly ill-founded because of the clear application of article 8.2.[33]

The United Kingdom

44. The European Convention, subject to reservations given by the United Kingdom on signing it, is incorporated into United Kingdom law by way of the Human Rights Act 1998, ss 1 and 2. That includes article 8, and should a right be engaged a United Kingdom Court is obliged to have regard to the jurisprudence of the European Court and the European Human Rights Commission.

45. There have been two significant challenges to water fluoridation decisions in the United Kingdom, neither of which has drawn the Court into consideration of the human rights issue that has been raised in the present case.

46. In *McColl v Strathclyde Regional Council*[34] the petitioner challenged the decision to undertake fluoridation of a Scottish public water supply, but the challenge rested entirely on the interpretation of the empowering legislation, in a manner similar to *Attorney General v Lower Hutt City Corporation (ex rel. Lewis)*[35]. The decision finding that fluoridation was not authorised by the statute was not generally couched in a discussion of competing rights or interests, and it predated the Human Rights Act 1998 so there was no consideration of the European Convention. One of the reasons contributing to the decision was

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33 *X v The Netherlands* (1978) E Comm HR 8239/78. The same result (prima facie engagement of article 8.1 but no breach due to necessity under article 8.2) was found in the case of compulsory vaccination (*Boffa v San Marino* (1998) E Comm HR 26536/95) and compulsory x-ray screening of children for tuberculosis (*Acmanne v Belgium* (1984) E Comm HR 10435/83)

34 *McColl v Strathclyde Regional Council* [1983] SC 225 (Outer House)

35 *Attorney General v Lower Hutt City Corporation (ex rel. Lewis)* [1964] AC 1469 (PC)

the preference for statutory constructions that minimally encroach on individual rights:[36]

> ...I consider there is some force in the petitioner's argument that if two possible constructions of the statute are available that construction should be preferred which encroaches to the minimum on the personal rights of individual. To put the matter in another way the individual's right to choose how to care for his own body should only be encroached upon by statutory provisions in clear and unambiguous language.

47. More recently the High Court considered an administrative law challenge to a Strategic Health Authority's process for creating a fluoridation scheme in Southampton in *R (Milner) v South Central Strategic Health Authority.*[37] The issue there was whether the authority could have regard to a policy announced by the Government that fluoridation would not be introduced in any area unless the local population supported it, when the legislation was particular as to the criteria that the Authority were to have regard to in exercising the discretion given to it by Parliament. Again there was no consideration of the human rights issue.

Canada

48. Section 7 of the Canadian Charter of Rights and Freedoms covers similar ground to Article 17 of the ICCPR but in more generic terms:

> 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.

49. The leading case on s 7 of the charter, concerning security of the person is *R v Morgantaler*[38] a case concerning the constitutionality of a criminal code provision that criminalised abortion where it had not been approved as a therapeutic abortion. In holding the provision to be inconsistent with the Charter the Supreme Court (McIntyre and La Forest JJ dissenting) held that interference with bodily integrity and state-induced psychological trauma, both of which would occur where a woman was denied access to a safe medical procedure by reference to criteria that did not consider her personal

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36 *McColl v Strathclyde Regional Council* [1983] SC 225, at 241.

37 *Milner v South Central SHA* [2011] EWHC 218 (Admin)

38 *R v Morgantaler* [1988] 1 S.C.R. 30

aspirations, would constitute a limitation on the s 7 right to security of the person. That limitation would only be permissible if it accorded with fundamental justice.[39]

50. The Court noted that the position at common law was that the least form of non-consensual physical interference with the body of another was *prima facie* a a tort (battery), even if the intention of that interference was therapeutic. Medical personnel and others acting in emergencies were protected by available defences. The Charter should, in the majority's view, offer no less protection.[40]

51. In *Locke v Calgary*[41] the city of Calgary passed a bylaw allowing for fluoridation of the water supply. Mr Locke, a resident of Calgary, challenged the bylaw as a breach of the right to security of the person guaranteed by s 7 of the Canadian Charter. His claim for a breach of s 7 was dismissed for a failure to discharge the burden of proving a Charter breach. The Court held:

> 51 In my judgment 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 established on at least a balance of probabilities by the proponent of such breach.
>
> 52 Based on the evidence before me and the findings of fact which I have made I do not find that [the bylaw] violates the Plaintiff's right to security of the person.

52. It is not clear where the failure of proof arose since the evidence put forward by the plaintiff and that filed in response to it ranged across the full breadth of fluoridation issues.

53. More clarity came in *Millership v British Columbia*[42]. Mr Millership challenged the validity of provincial legislation allowing local authorities in British Colombia to regulate fluoride levels in water supplies by bylaw. He claimed that the bylaw power granted to local authorities by the British Colombia provincial government was incompatible with his s 7 Charter right.

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39 At 56

40 At 53

41 *Locke v Calgary* (1993) 147 AR 367 (AQB)

42 *Millership v British Colombia* [2003] BCSC 82

54. Although 'medical treatment' is not a statutory or constitutional measure in Canada as it is here, the Court preferred to regard fluoridation as a drug (rather than a nutrient) that was being used for medical purposes.[43] The Court also distinguished fluoridation as an adjustment rather than an unnatural addition to the water.[44]

55. The plaintiff's claim for a breach of s 7 ultimately failed because the Court accepted that any interference with his bodily integrity by fluoridation was *de minimis*, and that a *prima facie* breach of a right had not therefore been established.[45]

56. The Court also found that even if Mr Millership's right under s 7 was infringed, the infringement occurred in accordance with principles of fundamental justice,[46] was minimally impairing of the right[47] and proportional to the importance of the right and the goals of fluoridation.[48]

United States of America

57. The closest analogue for article 17 of the ICCPR in the United States Constitution is the 14th Amendment which 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 of law; nor deny to any person within its jurisdiction the equal protection of the laws.

58. The potential for abridgment of that right through compulsory medical treatment was acknowledged by the Supreme Court in *Jacobson v Commonwealth of Massachusetts*[49] although in that case the Court found that the implementation by states of measures designed to protect public health and well-being such as,

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43 At [104]

44 At [118]

45 At [112]

46 At [117].

47 At [129].

48 At [130]. Other Canadian cases concerning challenges to fluoridation decisions (*Toronto v Forest Hill* [1957] SCR 569 (SCC); *R v Fredericton* (1956) 2 DLR (2d) 551 (NBCA); *Fraser v New Glasgow* (1977) 76 DLR (3d) 79 (NSSC)) tend to turn on the construction of a particular empowering section rather than application of the Charter.

49 *Jacobson v Commonwealth of Massachusetts*, 197 U.S. 11 (1905)

in that case, compulsory immunisation against smallpox, did not violate the Fourteenth Amendment.

59. Challenges to fluoridation decisions have been made in various state jurisdictions alleging inconsistency with the Fourteenth Amendment or equivalent provisions in State constitutions.

60. In *Dowell v City of Tulsa*[50] the Oklahoma Supreme Court rejected the contention that fluoridation was a form of mass medication, drawing an analogy between public health measures to protect tooth enamel by fluoridation and parental insistence on a balanced diet:[51] The Court also drew an analogy with chlorination as an equally valid public health measure that addresses part of the same problem (that is, the bacteria in water that can contribute to dental caries).[52] The constitutional right to protection of liberty made it secure against arbitrary restraint but not against reasonable regulation, and steps taken to improve general public health were a reasonable exercise of state power.[53]

61. A different approach, closer in its analysis to *Millership v British Columbia* but leading to the same result, is apparent from *Minnesota State Board of Health v City of Brainerd*[54] where the Minnesota Supreme Court held:

> 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.

62. The applicant in *Quiles v City of Boynton Beach*[55] 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 Article 1, s 23 of the Florida Constitution:

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50 *Dowell v City of Tulsa* (1954) 273 P.2d 859

51 At 864.

52 At 863.

53 At 863. Similar reasoning, leading to the same result was applied by the Ohio Supreme Court in *Kraus v City of Cleveland* (1955) 127 N.E.2d 609.

54 *Minnesota State Board of Health v City of Brainerd* (1976) 241 N.W.2d 624, 632. In a similar vein is *Schuringa v City of Chicago* (1964) 198 N.E.2d 326. The Illinois Supreme Court, in a challenge to Chicago's addition of fluoride to the public water supply, held that 'fluoridation programs, even if considered to be medication in the true sense of

> 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 of access to public records and meetings as provided by law.

This provision, which includes a right to 'bodily integrity', was considered to include a right to refuse medical treatment in Florida.

63. The Florida District Court of Appeal (4th Circuit) held that the introduction of fluoride is not a medical procedure as contemplated in previous judicial descriptions of a right to refuse medical treatment. Compulsory medical treatment in the usual sense is highly invasive; the city's fluoridation of water was considered a 'far cry' from such behaviour.[56] The Court found a distinction between fluoridation and medical treatment in the choice residents had of how to use the city's water supply:[57]

> Importantly, the city proposes to fluoridate the water before it enters each household in the city; it is not seeking to introduce the mineral directly into Quiles's bloodstream. Therefore, the city's fluoridation of its water stops with Quiles's water faucet. The city is not compelling him to drink it. He is free to filter it, boil it, distill it, mix it with purifying spirits, or purchase bottled drinking water. His freedom to choose not to ingest fluoride remains intact.

Australia

64. Although Australia is one of the most consistently fluoridated countries in the world, there has been no significant constitutional challenge to the practice. That 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.[58]

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the word, are so necessarily and reasonably related to the common good that the rights of the individual must give way.' (p 334)

55 *Quiles v City of Boynton Beach* (2001) 802 So 2d 397 (Fla Dist App 4th)

56 at 399.

57 Ibid. In *Coshow v City of Escondido* (2005) 132 Cal.App.4th 687 the California Court of Appeal followed similar reasoning.

58 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.

65. In *Ferguson v ACT Electricity & Water*[59] the challenge to the fluoridation of water in the Australian Capital Territory came after the Electricity and Water Authority had sought to recover outstanding water rates from Ms Ferguson. She denied liability to pay in part relying on an argument that fluoridation of the water amounted to civil conscription for the purposes of Section 51 of the Constitution.

Medical treatment requires direct intervention

66. There is a common theme running through the limited New Zealand case law, and the international cases cited above. The right to bodily integrity in general and the particular right to refuse medical treatment have been confined in their application to direct non-consensual interference with the body or mental state of an individual.

67. Compulsory sterilisation, inoculation against disease using a syringe, depriving access to an abortion or requiring submission to a medical examination involve direct intrusion into the intimate sphere of human identity.

68. The confinement of the liberty rights in this manner accords with fundamental human rights norms. As Nowak describes them, the classic civil rights, including the right to privacy and all of its component rights, guarantee liberal freedom from intrusion by the State but the sovereignty they give to the individual reaches a natural boundary where the individual engages with the society around them.

69. The State can guarantee the inviolability of the human body because within the intimate sphere there are no competing interests that need to be moderated or resolved. If a person chooses to make even the poorest decisions in respect of their own health, they may cause an indirect burden on the community that provides care for them but their decision infringes the rights of no other person. That is not to say that the state cannot intervene, but that it must be justified in doing so, with the threshold for doing so set high – in our case demonstrable justification in a free and democratic society.

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59 *Ferguson v ACT Electricity & Water* [1995] ACTSC 156

70. Although there is no requirement that human rights instruments and the common law be the same, they are in this respect. The tort that occupies the same place as article 17 of the ICCPR, or s 11, is battery. As Blackstone wrote:

> The law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.[60]

71. Where the individual encounters others, or the State, rights still exist at common law but the legal standard is no longer absolute. In its most common manifestation, the law of negligence, the law protects the individual from harm caused by the actions of others not absolutely, but through an objective standard of reasonableness.

72. The right to refuse medical treatment, which is properly seen as a variant of the right to bodily integrity and autonomy, has to operate within similar boundaries. All forms of conventional medical or scientific intervention between a health professional and an individual patient can readily be accommodated. If a dentist prescribes a topical fluoride treatment for a patient's teeth, or prescribes a course of fluoride tablets he or she is plainly engaged in medical treatment, which the patient has the right to refuse. Any attempt by the State to render it compulsory would cause a *prima facie* limitation of the right.

73. Public health measures, such as the fluoridation of a water supply, or the requirement that milk be pasteurised, or that bread contains folic acid are immediately in a different category. The purpose may resemble that of medicine but the aspect of treatment is lacking. As the Florida Court of Appeal put it in *Quiles*, fluoridation occurs at source, the intervention is complete well before the individual turns on the tap. It is not put directly into the body.

74. For these purposes, there is no practical distinction between chlorination of water to remove bacteria, and fluoridation. In each case, the purpose is the

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60 *Blackstone Commentaries on the Laws of England* (17th ed, T Cadell and J Butterworth, London, 1830) vol 3 at 320

improvement or maintenance of public health, and it occurs by means of introducing a chemical into the water that inevitably finds its way into the bodies of persons who drink it and in the minutest degree alters the composition of that body.

75. It is not correct to characterise the issue raised in this case as a contest between a legal right (under the Local Government Act) to adulterate water and a human right to refuse medical treatment.

76. As Professor Nowak says in his introduction:[61]

> In principle, States parties to international human rights treaties have an obligation to respect, fulfil and protect all human rights. The *obligation to respect human rights* refers to the duty to refrain from State intervention and applies equally to the rights to life, personal integrity and privacy as well as the rights to work, food, health and education. The same holds true for the *obligation of the State to protect human beings* against human rights abuses by private persons, and the *obligation to fulfil human rights* by means of positive legislation, administrative, judicial and practical measures necessary to ensure that the rights in question are implemented to the greatest extent possible.

77. The right to a minimum standard of health is a human right, guaranteed by article 12 of the International Covenant on Economic, Cultural and Social Rights, to which New Zealand is also 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.

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61 Nowak op cit. XX – XXI – Content and Current Significance of the Covenant on Civil and Political Rights.

78. New Zealand gives effect to that human rights obligation through the New Zealand Public Health and Disability Act 2000, s 3.

79. In order to give effect to its responsibilities, the State may from time to time wish to employ public health interventions. In the present case, the public power is being exercised by local rather than central government but the principle is the same.

80. It is only when those measures involve direct interference with bodily integrity and autonomy that the human rights of the individual are engaged. Regardless of how that manifests itself in particular human rights instruments, as the case law cited demonstrates, the same principle is observed. Were the law to be otherwise, it would allow the individual an unwarranted veto power in decision-making that affects the whole community, and constitute an interference with the rights of others.

81. Although the United States Constitution is constructed differently so that the justification for interference with individual freedom is not separately articulated, the comments of the United States Supreme Court in *Jacobson* are apposite:

> On any other basis organized society could not exist with safety to its members. Society based on a rule that each one is a law unto himself would soon be confronted with anarchy and disorder.

82. The point at which the individual right is engaged is most clearly illustrated by inoculation. If inoculation against contagious disease could be achieved by addition to the water supply, that would not engage s 11. If it must be administered with a syringe or a tablet, it will involve an interference with bodily integrity and that interference must be justified.

83. It must therefore be that public health initiatives that do not involve direct interference with the body or mind of the individual, and fluoridation is one of them, are not medical treatment for the purpose of s 11.

Fluoridation does not engage s 11 even if it were considered to be medical treatment

84. If the Court were satisfied that the addition of fluoride to a public water supply constituted medical treatment, it does not follow that the right is engaged. It is not the administration of treatment which the right protects against, but the ability of the individual to refuse that treatment.

85. The provision of unwanted medical advice and the delivery of unwanted medication does not interfere with the right in s 11. The patient's right to decline to take the medication is preserved because they need not take it. However forcefully a surgeon presents the case for surgical intervention, the patient retains the ability to decline it. Their right to refuse is engaged if their refusal is ignored or their capacity to exercise it is defeated by trickery.

86. The observation of the Florida Supreme Court in *Quiles* is stark but unavoidable. The right to refuse any treatment that fluoridation constitutes is preserved intact because the local authority in piping the water to a person's house does not compel them to drink it. The right in s 11 does not oblige the state to ensure that the decision to receive the treatment or to decline it are equally supported.

87. The 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.

88. In *Millership* the Court said:[62]

> [111] The security of the person referred to in s. 7 includes control over one's bodily integrity free from state interference and freedom from the serious state-psychological and emotional stresses. However, the fact that Mr. Millership may disagree with fluoridation and that it may cause him psychological stress is not sufficient to support a s. 7 challenge. The province argues that any intrusion on Mr. Millership's bodily integrity as a result of the fluoridation of water is very minimal, and is really a trivial impact and should not support a s. 7 challenge. The province argues that minimal intrusions into constitutionally protected interests are not

62 *Millership v British Colombia* (2003) BCSC 82 at [111]

> even prima face breaches of constitutional rights. (R. v. Jones (1986),31 D.L.R. (4th) 569 (S.C.C.).)
>
> [112] I find that Mr. Millership's s. 7 rights have not been infringed by the fluoridation of public water pursuant to s. 523 of the Local Government Act and any by-law passed pursuant to that Act, provided that fluoridation is maintained within the range of the optimal levels recommended by the Federal/ Provincial/Territorial Subcommittee (.8 mg/L to 1 mg/L). This is a minimal intrusion into Mr. Millership's rights to liberty or security of the person, and did not amount to a prima facie breach of those rights.

89. There is support in New Zealand for the principle that the intrusion into rights must be more than transient or trivial in order to amount to a limitation of rights. It is not necessary to consign every limitation however slight to the s 5 analysis. In *Police v Smith and Herewini* Richardson J said of the right protected by s 22:[63]

> A commonsense and practical approach is called for. Thus it will be important to consider the nature, purpose, extent and duration of the constraint. For example the assumption of control over a citizen's movements is very different from a pause while particulars are provided. As in many areas of the Bill of Rights the answer may involve considerations of fact and degree. At the very least something more than a temporary check, hindrance or intrusion on the citizen's liberty is required.

90. Similarly, in *Ministry of Health v Atkinson* the Court of Appeal confirmed that the test for a prima facie infringement of s 19 requires that the alleged discriminatory impact must be material before the s 5 enquiry is triggered.[64]

91. Section 11 also invites the application of a *de minimis* threshold that will be of particular significance with public health measures. If the addition of a therapeutic or preventative compound to water were to constitute medical treatment, the effect on the individual must be more than trivial or transient before it could give rise in any meaningful sense to a right to refuse it.

92. Whether the Court should find on the evidence, as Powers J plainly did in *Millership* and the Supreme Court of Ireland held in *Ryan v Attorney General*[65] that the impact of fluoridation at the proposed level of 1 ppm on an individual

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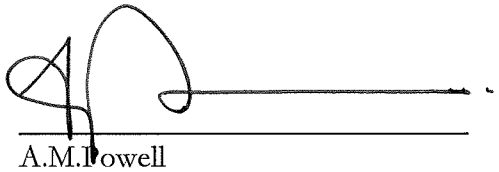
63 *Police v Smith and Herewini* [1994] 2 NZLR 306 (CA) page 316

64 *Ministry of Health v Atkinson* [2012]

65 *Ryan v Ireland* [1965] IR 294 (HC and SC), at 348

may properly be categorised as trivial is a matter going beyond the scope of the leave given to the Attorney General to intervene, but it is appropriate to measure the impact against that minimum threshold before concluding that there is a limitation of the right that requires justification.

93. Should the Court find, in all of the circumstances that a limitation exists, the enquiry must turn to whether that limitation is demonstrably justified. The application of that test is well established in New Zealand law and I will leave it in the competent hands of counsel for the parties.



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