IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 141/2016
[2018] NZSC 59

BETWEEN	NEW HEALTH NEW ZEALAND INCORPORATED Appellant
AND	SOUTH TARANAKI DISTRICT COUNCIL First Respondent
	ATTORNEY-GENERAL FOR AND ON BEHALF OF THE MINISTER OF HEALTH Second Respondent

Hearing:	16 and 17 November 2017
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	M T Scholtens QC, L M Hansen and T Mijatov for Appellant D J S Laing and H P Harwood for First Respondent A M Powell and S K Jameson for Second Respondent
Judgment:	27 June 2018

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The appellant must pay the first respondent costs of $20,000 plus usual disbursements.**

C **We make no award of costs in favour of the second respondent.**

REASONS

O'REGAN AND ELLEN FRANCE JJ
(Given by O'Regan J)

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The appeals

[1] This case raises for determination a number of issues relating to the fluoridation of water in New Zealand. Fluoridation is carried out in a number of communities in New Zealand for the purpose of reducing tooth decay.[1]

[2] The appellant, New Heath New Zealand Inc (New Health) is an incorporated society that describes itself as "a consumer-focused health organisation which aims to advance and protect the best interests and health freedoms of consumers". New Health opposes fluoridation of water on the basis that fluoridation removes freedom of choice by consumers, is potentially harmful and is not effective in preventing tooth decay.

[3] In the decision under appeal, the Court of Appeal dealt with appeals by New Health against three separate judgments of the High Court relating to the legality of the fluoridation of water.[2] This Court granted leave to appeal on all aspects of the Court of Appeal's decision.[3]

[4] The first appeal to the Court of Appeal was an appeal against a decision of Rodney Hansen J dismissing New Health's application for judicial review of the decision of the first respondent, South Taranaki District Council (the Council) to add fluoride to the water supplies in Patea and Waverley.[4] The Court of Appeal referred to this aspect of the appeal before it as the Council appeal and we will do the same. The issues that arose in relation to the Council appeal were summarised by the Court of Appeal as follows:[5]

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1 The Health Committee report on the Health (Fluoridation of Drinking Water) Amendment Bill currently before the House of Representatives says about 54 per cent of the New Zealand population receives fluoridated water: Health (Fluoridation of Drinking Water) Amendment Bill 2016 (208-2) (select committee report) at 1. Counsel for New Health said 48 per cent. Fluoridation occurred for the first time in New Zealand in 1954.

2 *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13 (Randerson, Wild and French JJ) [*New Health* (CA)].

3 *New Health New Zealand Inc v South Taranaki District Council* [2017] NZSC 13.

4 *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395, [2014] 2 NZLR 834 [*New Health* (HC)].

5 *New Health* (CA), above n 2, at [9].

The issue in the Council appeal is whether the Judge was correct to find that:

(a) The Council had statutory authority to fluoridate the water supplies for Patea and Waverley.

(b) The fluoridation of water is not medical treatment for the purposes of s 11 of the [New Zealand Bill of Rights Act 1990].

(c) If the right to refuse medical treatment is engaged, fluoridation is a demonstrably justified limit prescribed by law in terms of s 5 of the [New Zealand Bill of Rights Act].

[5] In its statement of claim, New Health also sought judicial review of the Council's decision to fluoridate the water supplies in Patea and Waverley on the grounds that the Council had failed to take into account a number of considerations that it said were mandatory relevant considerations. The High Court found the considerations relied on were not mandatory relevant considerations.[6] That aspect of New Health's claim was not before us and we say no more about it.

[6] The second appeal before the Court of Appeal was against a decision of the High Court dismissing an application by New Health for declarations that two compounds added to water supplies for fluoridation purposes, namely hydrofluorosilicic acid (HFA) and sodium silicofluoride (SSF), were medicines in terms of the Medicines Act 1981 (the Medicines Act judgment).[7] We will call this the Medicines Act appeal. The sole issue arising in the Medicines Act appeal was whether the Judge had been correct to rule that HFA and SSF were not medicines in terms of the Medicines Act.

[7] The third High Court decision that was under appeal to the Court of Appeal followed on from the second. In the Medicines Act judgment Collins J said that, while he was confident his conclusion that HFA and SSF were not medicines was correct, he suggested that the Ministry of Health might wish to consider recommending a regulation exempting HFA and SSF from the definition of medicines under the Medicines Act.[8] The Ministry followed up on the suggestion and the Medicines Amendment Regulations 2015 were made with effect from 30 January 2015. The

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6 *New Health* (HC), above n 4, at [113].

7 *New Health New Zealand Inc v Attorney-General* [2014] NZHC 2487 (Collins J) [Medicines Act judgment].

8 At [51].

effect of the Regulations was that both HFA and SSF were declared not to be medicines for the purposes of the Medicines Act. New Health commenced judicial review proceedings in the High Court challenging the validity of the Medicines Amendment Regulations. New Health's application for judicial review was dismissed.[9] The issues that arise in relation to this aspect of the appeal are whether the High Court was correct to find that the Medicines Amendment Regulations were valid and, if so, whether that finding rendered the Medicines Act appeal moot. We will call this the Regulations appeal.

[8] The Medicines Act appeal and the Regulations appeal are dealt with in a separate judgment that will be issued contemporaneously with the present judgment. We say no more about them in this judgment.

Issues

[9] The issues for determination in this appeal are, therefore:

(a) Whether the Council has the statutory power to fluoridate water supplies in its territorial area.

(b) Whether fluoridating water supplies engages s 11 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) on the basis that the fluoridation of water makes those accessing the public water supply in the relevant area undergo medical treatment in breach of the right to refuse such treatment.

(c) If s 11 of the Bill of Rights Act is engaged, whether fluoridation is a limitation on the s 11 right that is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society in terms of s 5 of the Bill of Rights Act.

(d) Whether the legislative power to fluoridate can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights

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9 *New Health New Zealand Inc v Attorney-General* [2015] NZHC 2138, [2015] NZAR 1513 (Kós J) [Regulations judgment].

Act, and if so what the impact of that preferred meaning would be (s 6 of the Bill of Rights Act).

Fluoridation

[10] As already mentioned, the objective of fluoridation is the reduction of tooth decay through promoting the mineralisation of tooth enamel. It is now generally accepted that fluoride works topically, that is by direct contact with tooth surfaces.[10]

[11] Fluoridation in New Zealand is undertaken by adding HFA or SSF, both fluoride-releasing compounds, to the water supply. Fluoride (in the form of calcium fluoride) occurs naturally as a trace element in water. In New Zealand, fluoride occurs at a low level, below 0.3 parts per million (ppm). Fluoridation has the effect of increasing the level of fluoride in water to between 0.7 ppm and 1.0 ppm.

[12] Opponents of fluoridation question its effectiveness and argue that it poses risks to human health and infringes the civil liberties of consumers.

Does the Council have statutory power to fluoridate?

[13] Both the High Court and the Court of Appeal concluded that the Council had power to fluoridate water in communities within its jurisdiction.[11] In general terms their reasoning was that fluoridation was authorised under the Municipal Corporations Act 1954 as a result of the decision of the Privy Council in *Attorney-General v Lower Hutt City*.[12] In that decision, which we discuss in greater detail below, the Privy Council found that the Lower Hutt City Council was authorised under s 240(1) of the Municipal Corporations Act to fluoridate water. Section 240(1) gave the Council power to construct waterworks for the supply of pure water for the use of its inhabitants. The Privy Council found that the power to fluoridate was implicit in the terms of s 240.[13]

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10 It was previously thought that it worked systemically, that is by the swallowing of fluoridated water.

11 *New Health* (CA), above n 2, at [58]–[59]; and *New Health* (HC), above n 4, at [25].

12 *Attorney-General v Lower Hutt City* [1965] NZLR 116 (PC) [*Lower Hutt City* (PC)].

13 At 124 per Lord Upjohn.

[14] When the Municipal Corporations Act was replaced by the Local Government Act 1974 (LGA 1974) the power continued under s 379 of the LGA 1974. When the LGA 1974 was replaced by the Local Government Act 2002 (LGA 2002) the provision in the LGA 2002 which required local authorities to continue to provide water services (s 130) had to be interpreted as reflecting Parliament's knowledge that fluoridation was lawful under the earlier legislation by virtue of the *Lower Hutt City* case and thus could be seen to have authorised the continuation of the practice of fluoridating water. To the extent this was in doubt, the doubt was removed by the provisions introduced in Part 2A of the Health Act 1956, which we will discuss later. New Health argued that this line of reasoning was flawed because of an error in the reasoning of the Privy Council and because s 130 of the LGA 2002 is materially different from s 240 of the Municipal Corporations Act.

[15] The starting point for an evaluation of this submission is a consideration of the decision of the Privy Council in the *Lower Hutt City* case.

The Lower Hutt City *case*

[16] The issue in the *Lower Hutt City* case was whether the Lower Hutt City Council had legal authority to add fluoride to water. The statutory provision relied on by the Council was s 240(1) of the Municipal Corporations Act 1954, under which the Council had power to "construct waterworks for the supply of pure water for the use of the inhabitants of the district". Also relevant was s 288 of the Municipal Corporations Act, which gave the Council power to do all things necessary for the preservation of public health and convenience and for carrying into effect the provisions of the Health Act 1956.

[17] In the Supreme Court McGregor J found that s 240(1) did not give the Council power to add fluoride to the water supply but that s 288 did.[14]

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[14] *Attorney-General v Lower Hutt City* [1964] NZLR 438 (SC). The reasons of McGregor J are discussed in the reasons of William Young J below at [195] and those of the Court of Appeal are discussed at [196]–[197].

[18] The Court of Appeal dismissed an appeal against the decision of McGregor J, but decided that the authority for fluoridation was contained in s 240 of the Municipal Corporations Act rather than s 288.[15] Turner J dissented.

[19] The Privy Council dismissed an appeal against the decision of the Court of Appeal. Like the Court of Appeal, their Lordships considered that the provision authorising fluoridation was s 240 of the Municipal Corporations Act. The essence of the decision is contained in the following extract:[16]

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

Legislative history

[20] The Municipal Corporations Act was replaced by the LGA 1974. Section 379 of the LGA 1974 was to the same effect as s 240 of the Municipal Corporations Act and, as recorded in both the High Court and Court of Appeal judgments, it is not

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15 *Attorney-General v Lower Hutt City* [1964] NZLR 445 (CA).
16 *Lower Hutt City* (PC), above n 12, at 124–125.

disputed that the provisions are not materially different.[17] That being the case, the power to fluoridate under the Municipal Corporations Act continued to apply under the LGA 1974.[18]

[21] The LGA 1974 was in turn replaced by the LGA 2002, which is the legislation that now governs the operation of local authorities.

Statutory provisions: analysis of High Court and Court of Appeal

[22] Rodney Hansen J set out an extensive discussion of the LGA 2002 in his judgment.[19] The important feature of the LGA 2002 is that it took a materially different approach in the provisions providing for the powers of local authorities from that taken in the Municipal Corporations Act and the LGA 1974. The prescriptive empowering provisions in the earlier Acts were replaced by "a more broadly empowering legislative framework that focuses councils on meeting the needs of their communities".[20] There are however, specific provisions relating to the provision of drinking water.

[23] An important provision of the LGA 2002 is s 12, which gives local authorities a general power of competence. This is expressed in s 12(2)(a) as "full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction" for the purposes of performing its role. Section 12(2)(b) provides that a local authority has "full rights, powers, and privileges" for the purpose of s 12(2)(a). Section 12(3) provides that s 12(2) is subject to the LGA 2002 itself, any other enactment, and the general law.

[24] Under s 125 of the LGA 2002, local authorities are required to assess from time to time the provision within the district of water services. "Water services" is defined in s 124 as including "water supply", which in turn is defined as "the provision of drinking water to communities by network reticulation to the point of supply of each

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17 Section 379 of the Local Government Act 1974 was inserted by the Local Government Amendment Act 1979.

18 *New Health* (HC), above n 4, at [16]; and *New Health* (CA), above n 2, at [23].

19 *New Health* (HC), above n 4, at [17]–[25].

20 Local Government Bill 2001 (191-1) (explanatory note) at 1.

dwellinghouse and commercial premise to which drinking water is supplied". Section 126 provides for the purpose of assessments under s 125. The purpose is:

> … to assess, from a public health perspective, the adequacy of water and other sanitary services available to communities within a [local] authority's district, in light of—
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> (a) the health risks to communities arising from any absence of, or deficiency in, water … services;
>
> (b) the quality of services currently available to communities within the district; and
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> …
>
> (d) the extent to which drinking water provided by water supply services meets applicable regulatory standards;
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> …

[25] The Court of Appeal noted that the emphasis in this provision is on the role of local authorities in the delivery of water supplies from a health perspective, noting that there is a direct link made with applicable regulatory standards for drinking water.[21]

[26] Both the High Court and Court of Appeal attached particular significance to s 130 of the LGA 2002. Section 130(1) and (2) provide:

> **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.

[27] Rodney Hansen J noted that the LGA 2002 refers to "drinking water" rather than "pure water", the term used in both the Municipal Corporations Act and the LGA 1974. He saw this as a largely semantic difference and said it could not be understood as indicating an intention on the part of Parliament to narrow a local authority's power

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21 *New Health* (CA), above n 2, at [37].

in relation to the supply of water.[22] He considered that the use of the term "continue to provide water services" indicated that given the authorisation to fluoridate that applied under the Municipal Corporations Act and the LGA 1974, Parliament must be taken to have intended to empower local authorities to fluoridate water.[23] The Court of Appeal endorsed that reasoning.[24]

[28] Both the High Court and Court of Appeal saw the provisions of the Health Act 1956 as resolving any doubts about the interpretation of s 130.[25] The Health Act assigns particular responsibilities to local authorities in relation to public health. Under s 23, local authorities are required to "improve, promote, and protect public health" within their districts.[26]

[29] The Health Act was amended in 2008[27] to impose duties on suppliers of drinking water to, among other things, take all practicable steps to comply with drinking-water standards issued by the Minister of Health.[28] The 2008 amendment inserted a new Part (Part 2A) into the Act.[29] Section 69A(1) sets out the purpose of Part 2A, which is "to protect the health and safety of people and communities by promoting adequate supplies of safe and wholesome drinking water from all drinking-water supplies".

[30] Section 69O provides for the Minister of Health to issue or adopt standards applicable to drinking water.[30] The drinking water standard issued pursuant to s 69O specifies that the maximum acceptable value (MAV) for fluoride is 1.5 ppm.[31] The standard includes a comment in relation to fluoride that indicates that the Ministry of Health recommends that fluoride content for drinking water in New Zealand should be in the range of 0.7–1.0 mg/L.[32]

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22 *New Health* (HC), above n 4, at [24]–[25].
23 At [25].
24 *New Health* (CA), above n 2, at [58].
25 *New Health* (HC), above n 4, at [25]; and *New Health* (CA), above n 2, at [59].
26 The Health Act 1920 contained a similar obligation in s 20.
27 By the Health (Drinking Water) Amendment Act 2007.
28 Health Act, s 69V(1).
29 Health (Drinking Water) Amendment Act, s 7.
30 Health Act, s 69O(1)(a).
31 Ministry of Health *Drinking-water Standards for New Zealand 2005 (Revised 2008)* (October 2008) at 8 (Table 2.2).
32 mg/L stands for milligrams per litre, and is the same as parts per million.

[31] Water that complies with the standards is potable (as that term is defined in s 69G) which in turn means it is "drinking water" as defined in the same section.[33]

[32] Section 69O(3)(c) provides that the drinking-water standards "must not include any requirement that fluoride be added to drinking water". The reason for the inclusion of this provision in Part 2A was explained in the report of the Select Committee which considered the Health (Drinking Water) Amendment Bill 2006, which, when passed, introduced Part 2A into the Health Act.[34] The Select Committee Report said:[35]

> 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 this way. To prevent such a possibility we recommend inserting a new subclause (3)(c).

[33] The Report recorded that the Committee had made an amendment to the Bill "explicitly disallowing the mandatory fluoridation of water through the drinking water standards".[36]

[34] Both the High Court and Court of Appeal saw this provision as a strong indication that Parliament specifically authorised the inclusion of fluoride in drinking water and that the purpose of s 69O(3)(c) was to avoid any suggestion that Parliament was requiring a drinking water supplier to fluoridate.[37]

Our analysis

[35] New Health took issue with all aspects of the reasoning of the Courts below. Its counsel, Ms Scholtens QC, argued that express authorisation for fluoridation of water was required, and that none appeared in either the LGA 2002 or the Health Act.[38]

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33 Potable is defined as water "that does not contain or exhibit any determinands to any extent that exceeds the maximum acceptable values … specified in the drinking-water standards". Fluoride is a determinand for the purposes of that definition.

34 Health (Drinking Water) Amendment Bill 2006 (52-2) (select committee report).

35 At 5.

36 At 2.

37 *New Health* (CA), above n 2, at [45]; and *New Health* (HC), above n 4, at [36].

38 In her written submissions Ms Scholtens QC accepted fluoridation could be lawful if authorised by necessary implication from a statutory provision but argued no such implication was "necessary" in this case.

[36] For the Council, Mr Laing supported the reasoning of the Court of Appeal, with one addition. He argued that the starting point for the analysis of the Council's powers was s 12 of the LGA 2002, the general competence provision.[39]

[37] Mr Laing argued that s 12(2)(a) gives the Council full capacity to do any act for the purpose of performing its role, which in the present context included its role under s 23 of the Health Act to improve, promote and protect public health within its district.[40] The general power of competence in s 12(2) is subject to other provisions of the LGA 2002, other enactments and the general law.[41] Mr Laing argued that there was nothing in the LGA 2002 or the Health Act limiting the Council's power of competence in relation to fluoridation: in fact the indications in the Health Act are supportive of the power to fluoridate.

[38] From that starting point, Mr Laing adopted the analysis of the Court of Appeal, namely that s 130 provided for the continuation of the provision of water which, in the case of councils fluoridating water, contemplated the continuation of the provision of fluoridated water. Thus, he argued, when read together with s 12 (rather than as a standalone provision, as the Court of Appeal had done) s 130 indicated that Parliament's intention in enacting s 12 was that it included the power to fluoridate. That, in turn, was supported by s 23 and Part 2A of the Health Act, as the Court of Appeal found.

[39] Ms Scholtens argued that s 130 of the LGA 2002 merely provided for local authorities that were providing water in their districts prior to the coming into force of the LGA 2002 to continue to provide water. She said there was no proper basis to imply that this authorised a local authority providing water containing fluoride that had been added for a therapeutic purpose to continue to do so.

[40] We accept that s 130 is essentially a continuation power focusing on ongoing supply of water, rather than an express power to fluoridate. But we consider that s 130 must be read against the background of the general competence power in s 12 of the

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39 Section 12 is discussed above at [23].
40 See above at [28].
41 Section 12(3), discussed above at [23].

LGA 2002 and the broader public health powers and responsibilities set out in Parts 2 and 2A of the Health Act. When read in that context, s 130 can be seen as an indication of Parliament's intention not to change the law in enacting the LGA 2002 to remove from local authorities the power to fluoridate that they were recognised as having immediately prior to the LGA 2002 coming into force.

[41] Ms Scholtens said there was nothing to indicate that Parliament addressed its mind to fluoridation or that it was aware of the *Lower Hutt City* case when enacting the LGA 2002. However, as Mr Laing submitted, a lack of debate about fluoridation in the parliamentary process leading to the enactment of the LGA 2002 can equally be seen as an indicator of an intention to maintain the status quo. We think it is most unlikely that Parliament was not aware that local authorities serving almost half the population of New Zealand were fluoridating water, following a government policy in favour of fluoridation that had been consistently promulgated for almost 50 years. As noted earlier, fluoridation of drinking water supplies in New Zealand had started in 1954, so fluoridation itself had also been occurring for those 50 years. We consider that a withdrawal of the power of local authorities to fluoridate water would have been more clearly signalled if Parliament had intended that outcome.

[42] Anticipating that response, Ms Scholtens argued that, even if it had been Parliament's intention to continue the authorisation to fluoridate, it had failed to give effect to that intention when enacting the LGA 2002. As is apparent from the analysis above, we do not agree.

[43] Ms Scholtens argued that the *Lower Hutt City* case should no longer be seen as good law. She argued the Privy Council had been wrong that fluoridated water remained "pure": she said HFA and SSF are silicofluorides so are different from calcium fluoride which occurs naturally in water. Their introduction into water introduces impurities. Mr Laing questioned this given the absence of any reference to this in the *Lower Hutt City* judgments. We do not need to engage with this because the significance of the *Lower Hutt City* decision is not the detail of the reasoning but that it established that fluoridation was lawful (and had been since the 1950s) and the LGA 2002 was passed against that background.

[44] Ms Scholtens argued that a power to fluoridate would be regulatory or coercive in nature, and would therefore not come within a general power of competence. She argued that, if it were a regulatory power, one would expect to see it dealt with expressly in Part 8 of the LGA 2002, which sets out other specific regulatory powers of local authorities. In the High Court, Rodney Hansen J found that the addition of fluoride could not be classified as regulatory: to the extent there is a regulatory power in relation to fluoridation, it is the power of the Minister of Health to set drinking-water standards.[42] We agree.

[45] Nor do we consider it to be a coercive power. Ms Scholtens also argued it was a coercive power, because it coerced those living in the relevant area to consume fluoridated water. As Mr Laing pointed out, the same could be said about any measure to treat water to make it safe for drinking. The fluoridation power may be contrasted with a power to require action on the part of a person, that is, a power that has similar characteristics to a regulatory power. We do not think a power to treat drinking water to be provided to homes in a local authority area (whether with fluoride or any other substance) is a power of that kind.

[46] Ms Scholtens argued that, because powers in relation to water supply are set out in Part 7 of the LGA 2002, it was necessary to identify a specific power to fluoridate in that part of the LGA 2002. We do not consider there is any reason to read down s 12 in that way. Section 12(3) provides that s 12(2) is subject to other provisions in the LGA 2002 but we do not consider the provisions of Part 7 indicate any limitation on the general competence power in s 12(2).

[47] We see s 23 of the Health Act as an important step in the reasoning, because it defines the "role" of the Council for the purposes of s 12 of the LGA 2002. Section 23 appears in Part 2 of the Health Act, which deals with the powers and duties of local authorities. As already noted, s 23 imposes a duty on local authorities to "improve, promote, and protect public health" within their districts. Section 23(c) empowers and directs local authorities to do various things, including:

> (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

[42] *New Health* (HC), above n 4, at [43].

> taken to secure the abatement of the nuisance or the removal of the condition:

[48] Mr Laing argued that the duty to improve, promote, and protect public health arises in this case given the evidence of a high level of dental decay among the populations of Waverley and Patea.[43] He also argued that dental decay is a "nuisance" or "condition" coming within this provision. We accept that dental decay is a "condition likely to be injurious to health", but agree with Ms Scholtens that it cannot be described as a "nuisance". We agree that s 23 supports the Council's position that its public health duty under the Health Act includes a duty, with a concomitant power in s 12 of the LGA 2002, to take steps to remove the condition of dental decay.

[49] Part 2A of the Health Act is also an important aspect of the reasoning. Section 69A(1) of the Health Act says that the purpose of Part 2A is "to protect the health and safety of people and communities by promoting adequate supplies of safe and wholesome drinking water from all drinking-water supplies". The term "drinking water" is defined as water that is potable or held out as being suitable for drinking.[44] "Potable" means water "that does not contain or exhibit any determinands to any extent that exceeds the maximum acceptable values … specified in the drinking-water standards". Determinand is also defined in s 69G. It means:

> (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

[50] "Wholesome" is defined in s 69G as meaning, in relation to drinking water, water that is potable and does not contain or exhibit any determinand in an amount that exceeds the value stated in the guideline values for aesthetic determinands in the drinking-water standards as being the maximum extent to which drinking water may contain or exhibit the determinand without being likely to have an adverse aesthetic

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43 There was evidence before the High Court from Sandra Pryor, a dentist practising in Hawera and Patea, that she had undertaken a study that indicated the level of tooth decay in teenagers in Patea was very high and tooth decay in Patea was considerably worse than in Hawera, where the water is fluoridated.

44 Section 69G.

effect on the drinking water. Thus, wholesome water is not only water that is safe to drink (potable) but also is aesthetically pleasing to drink.

[51] Section 69O of the Health Act provides for the Minister of Health to issue drinking-water standards. The current standards are the *Drinking-water Standards for New Zealand 2005 (Revised 2008)*. Under s 69O(2), the standards adopted by the Minister may provide for a number of matters including the requirements for drinking water safety and composition.[45] Section 69O(2)(h) provides that the drinking-water standards may deal with "any other matters relating to … drinking water that may affect public health". Section 69O(3)(c) provides that the drinking-water standards "must not include any requirement that fluoride be added to drinking water".

[52] Thus the provision allowing for drinking-water standards to provide for matters affecting public health is clarified and qualified by the prohibition on the inclusion in drinking-water standards of any requirement that fluoride be added to drinking water. The express exclusion of the possibility that the Minister would require a local authority to fluoridate its water supply makes sense only if a local authority was permitted to fluoridate water, otherwise the provision would be redundant. This indicates that the "matters … that may affect public health" that may be provided for in the drinking-water standards include the public health concern that prompted the Council's decision to fluoridate drinking water in Patea and Waverley, namely a high level of tooth decay.

[53] We acknowledge the point made by Ms Scholtens that a provision excluding mandatory fluoridation is not the same as a provision authorising fluoridation. We do not see s 69O(3)(c) as an authorising provision. Rather, it provides support for the proposition that fluoridation is otherwise authorised because, unless that is so, s 69O(3)(c) makes no sense.

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[45] Section 69O(2)(a) and (b).

[54] It is also notable that the drinking-water standards set the maximum acceptable value for fluoride at 1.5 mg/L.[46] The reference to the maximum acceptable value for fluoride is footnoted with the following footnote:

> 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 [maximum acceptable value].

[55] Suppliers of drinking water are required under s 69V of the Health Act to take all practicable steps to ensure that the drinking water they supply complies with the drinking-water standards. Fluoridated water where the fluoride content is between 0.7 and 1.0 ppm is well within the maximum acceptable value of 1.5 ppm.

[56] We conclude that the Council (in common with other local authorities) has power to fluoridate drinking water. The LGA 2002 was enacted against a background that fluoridation was, and had been for decades, lawful. The Council's general competence power read against that background and alongside the express continuation power in s 130 includes the power to fluoridate. That this is so is confirmed by s 23 and Part 2A of the Health Act, in particular the explicit reference to fluoridation in s 69O(3)(c).

[57] As mentioned earlier, s 12(3) of the LGA 2002 says that s 12(2) is subject to the provisions of any other enactment. New Health argues that the Bill of Rights Act limits the scope of s 12(2). We will revert to that argument after considering whether s 11 of the Bill of Rights Act is engaged.

Does fluoridating water engage s 11 of the Bill of Rights Act?

[58] Section 11 of the Bill of Rights Act provides:

> **11 Right to refuse to undergo medical treatment**
>
> Everyone has the right to refuse to undergo any medical treatment.

[59] Section 11 is one of four provisions grouped under the heading "Life and security of the person". The others are s 8 (right not to be deprived of life), s 9 (right

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[46] *Drinking-water Standards for New Zealand,* above n 31, at 8 (Table 2.2). 1.5 mg/L is the same as 1.5 ppm.

not to be subjected to torture or cruel treatment) and s 10 (right not to be subjected to medical or scientific experimentation).

[60] New Health's case is that fluoridation of drinking water involving the addition of a pharmacologically active substance for the purpose of treating and preventing dental decay amounts to medical treatment for the purposes of s 11. Residents of areas where water is fluoridated have no realistic alternative source of drinking water and therefore cannot avoid ingesting the fluoridated water. This means they are unable to refuse to undergo this form of medical treatment, which breaches their right to refuse medical treatment under s 11.

The decisions of the High Court and Court of Appeal

[61] Rodney Hansen J accepted New Health's submission that the process of fluoridation had a therapeutic objective.[47]

[62] Rodney Hansen J considered that fluoridation could not be relevantly distinguished from adding chlorine or any other substance for the purpose of disinfecting drinking water, as both involved adding a chemical compound to the water, both were undertaken for the prevention of disease and it was not material that one worked by adding something to the water while the other achieved its purpose by taking unwanted organisms out of it.[48] He also equated fluoridation with the addition of iodine to salt, the addition of folic acid to bread and the pasteurisation of milk.[49] He did not consider that a person drinking fluoridated water or ingesting iodised salt would normally be described as "undergoing" medical treatment.[50] He saw the contrast between the use of the term "undergo" in s 11 and "subjected to" in ss 9 and 10 as significant.[51]

[63] Rodney Hansen J considered that the language of s 11 when read in context suggested that the right to refuse medical treatment was engaged only when treatment took place in the context of a therapeutic relationship in which medical services are

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47 *New Health* (HC), above n 4, at [58].
48 At [80].
49 At [81].
50 At [82].
51 At [83].

provided to an individual.[52] He considered that the extension of s 11 to cover public health measures intended to benefit all or a section of the populace would be a significant step, and did not consider that the language of the Bill of Rights Act supported such an extension, and nor did internationally recognised human rights norms require it.[53] He concluded:[54]

> 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.

[64] Rodney Hansen J accepted that if the supply of fluoridated water amounted to medical treatment, a consumer in the relevant area would not have the practical ability to refuse treatment.[55] However he saw the resulting intrusion on an individual's right to refuse to undergo medical treatment as minimal. He regarded this as relevant to the determination of whether the s 11 right was engaged, rather than whether the infringement was trivial or technical in nature, which would fall for consideration under s 5 of the Bill of Rights Act.[56]

[65] The Court of Appeal upheld the decision of Rodney Hansen J. It adopted the approach to interpretation of the Bill of Rights Act articulated by Dickson J in relation to the Canadian Charter of Rights and Freedoms (the Canadian Charter) in *R v Big M Drug Mart Ltd*.[57] In that case Dickson J emphasised that a purposive interpretation was required, taking into account the purpose of the right or freedom in question, the language chosen to articulate it, the historical origins of the concepts enshrined in the right and the meaning and purpose of other specific rights and freedoms with which it is associated. He said that the interpretation should be "a generous rather than a legalistic one" but qualified this by adding that "it is important not to overshoot the actual purpose of the right or freedom in question".[58]

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52 At [84].
53 At [85].
54 At [89].
55 At [94].
56 At [95].
57 *New Health* (CA), above n 2, at [76], citing *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 344.
58 At 344.

[66] The Court noted that the common law had, prior to the enactment of the Bill of Rights Act, accepted that consent of a patient was a fundamental prerequisite to medical or surgical treatment.[59] It referred to the reference in the White Paper that preceded the Bill of Rights Act to an anticipation that what is now s 11:[60]

> … would permit persons to be treated against their will only where this is necessary to protect the health and safety of other persons, and not simply where their refusal of treatment will detrimentally affect their own health.

The Court saw this reference as an indicator that the authors of the White Paper had in mind the interrelated issues of consent to medical treatment or refusal of such consent in a therapeutic setting. The Court noted there was nothing in the White Paper to suggest the idea of medical treatment was being considered in any broader context than the common law already contemplated.[61]

[67] The Court of Appeal considered that extending the scope of s 11 to public health measures would necessarily engage a conflict of rights. The Court referred to art 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognises the right to enjoy the highest attainable standard of physical and mental health.[62] New Zealand gives effect to art 12 through the New Zealand Public Health and Disability Act 2000.

[68] Taking all these factors into account, the Court of Appeal concluded that Rodney Hansen J had been correct to find that the right guaranteed by s 11 to refuse to undergo medical treatment did not extend to public health measures such as fluoridation of drinking water intended to benefit the public at large.[63]

[69] The Court of Appeal also referred to the conclusion reached by Rodney Hansen J that the addition of iodine to salt, folic acid to bread and the pasteurisation of milk were equivalent interventions to fluoridation of water in the

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59 *New Health* (CA), above n 2, at [79].

60 At [80], citing Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 [White Paper] at [10.166].

61 At [81].

62 At [83], citing the International Covenant on Economic, Social and Cultural Rights 933 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 12. New Zealand is a signatory to this Covenant.

63 At [87].

sense that they are all made to achieve public health benefits. The Court recorded its agreement with that conclusion.[64] The Court also agreed that if fluoridation is medical treatment, it is not realistic to suggest a person could avoid consumption of fluoridated water.[65]

Issues

[70] Ms Scholtens took issue with a number of aspects of the Court of Appeal's decision. She argued:

(a) the natural meaning of the terms "medical" and "treatment" were broad, and included any activity involving medical method and medical purpose which included fluoridation;

(b) if interpreted purposively, s 11 covered all medical treatment whether provided directly or indirectly;

(c) the Courts below were wrong to take into account the potential conflict between s 11 and rights to good public health, because any such conflict fell to be resolved under s 5 of the Bill of Rights Act, rather than as part of the exercise of defining the right recognised in s 11;

(d) in any event, there was, in truth, no conflict between s 11 and rights to good public health, which incorporate a respect for individual autonomy;

(e) the Court of Appeal was wrong to limit the scope of s 11 by reference to the common law that pre-dated the Bill of Rights Act; and

(f) the Court of Appeal was wrong to say that the term "undergo" denoted something different from "subjected to", the words used in ss 9 and 10 of the Bill of Rights Act.

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64 At [95]–[97].
65 At [99].

[71] Mr Powell, who led this aspect of the argument for the respondents, supported the Court of Appeal's analysis. His submissions were adopted by Mr Laing for the Council.

Natural meaning

[72] Ms Scholtens said that the natural meaning of the terms "medical" and "treatment" were broad. She noted that the White Paper referred to the term medical being used in a "comprehensive sense".[66] The *Concise Oxford English Dictionary* defines medical as "of or relating to the science or practice of medicine".[67] Similarly, the dictionary definition of "treatment" is "the process or manner of treating someone or something in a certain way", "medical care for an illness or injury" and "the use of a substance or process to preserve or give particular properties to something".

[73] Ms Scholtens also referred to *Mosby's Dictionary of Medicine*,[68] which emphasises that medical treatment had two essential features, namely a medical purpose and a medical method. She said it was clear that fluoridation had these two features, the purpose being to treat and prevent dental decay and the method being the use of a pharmacologically active substance to promote mineralisation of tooth enamel.

[74] We agree that fluoridation falls within the description of the concept of medical treatment as defined in the dictionaries referred to by Ms Scholtens, but, as she accepted, the interpretive exercise in relation to s 11 involves a purposive interpretation. That is not necessarily assisted by dictionary definitions.

Direct or indirect treatment

[75] Ms Scholtens argued that a purposive interpretation of s 11 did not support the distinction drawn by the High Court and Court of Appeal between direct and indirect means of administering medical treatment. She noted that s 11 was one of four

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66 White Paper, above n 60, at [10.167].

67 Judy Pearsall (ed) *Concise Oxford English Dictionary* (10th ed rev, Oxford University Press, Oxford, 2002), definition of "medical" at 885, and "treatment" at 1527.

68 Peter Harris, Sue Nagy and Nicholas Vardaxis *Mosby's Dictionary of Medicine, Nursing and Health Professions – Australian & New Zealand Edition* (2nd ed, Elsevier, Chatswood (NSW), 2009).

sections included in the Bill of Rights Act relating to the life and security of a person (ss 8–11, noted earlier).[69] All of these sections are directed towards securing bodily integrity. Section 11 is an example of the principle that every individual has the right to determine for themselves what they do or do not do with their own body. There is no logical reason to exclude from the scope of s 11 indirect medical treatment which can affect bodily integrity as much as direct treatment.

[76] Ms Scholtens said the purpose of fluoridating water is to treat and prevent dental decay and that has the same purpose and effect as ingestion of fluoride tablets prescribed by a doctor or purchased from a pharmacist. There is no doubt the latter would amount to medical treatment and Ms Scholtens argued that there was no justification for finding that the ingesting of fluoridated water was any different, merely because it was provided on a large scale and as part of a public health programme. She argued there was nothing in the text of s 11 to justify that distinction: indeed, the reference to "any" medical treatment in s 11 suggests the contrary.

[77] We accept that there is nothing in the text of s 11 to exclude indirect medical treatment, but we do not attach any significance to the term "any". There is in principle no difference between the provision of a pharmacologically active substance for therapeutic purpose through an individual treatment to a single patient and global treatment of the kind resulting from fluoridation. So we accept New Health's position that the wording of s 11 does not support an exclusion of public health measures. But, as Mr Powell pointed out, the more important issue is whether the scope of s 11 should be limited to exclude situations where the recognition of a right of an individual to refuse treatment through ingesting fluoridated water comes into tension with the rights of others. We will revert to that later.

Conflict of rights

[78] New Health argues that the Courts below adopted an incorrect methodology to take into account the issue of competing rights when determining the scope of the right recognised in s 11 of the Bill of Rights Act.[70] New Health argues that, to the extent

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69 See above at [59].
70 Above at [67].

there is a conflict between different rights, that was an issue that ought to be addressed in the context of s 5 of the Bill of Rights Act, rather than in the interpretation of the scope of the right itself.

[79] New Health argued that the approach taken by the Court of Appeal was inconsistent with that taken by a full Court of the Court of Appeal in *Ministry of Health v Atkinson*.[71] *Atkinson* dealt with a case concerning s 19 of the Bill of Rights Act (the right to freedom from discrimination). In that case the Court rejected an argument advanced on behalf of the Ministry of Health that matters of justification for discrimination ought to be brought to bear in the determination as to whether differential treatment of a person or group of persons amounts to discrimination, rather than left for consideration under s 5.[72] The Court noted that the reference to "discrimination" in s 19 was not qualified in any way, contrasting it with s 21, which deals with the right to be free from "unreasonable" search and seizure.[73] It is notable that s 11 is also expressed in unqualified terms. The Court determined that the correct approach was to interpret the right to be free from discrimination in light of the text and purpose of the Bill of Rights Act, and then consider matters of justification when dealing with the application of s 5 (determining whether the discrimination – or in the present case compulsory medical treatment – is justified in a free and democratic society). In *R v Hansen*, the Chief Justice said interpretation of the scope of rights under the Bill of Rights Act and the question of justification under s 5 should be kept separate: the latter was not relevant at the interpretation stage.[74]

[80] Mr Powell accepted that s 5 provides a context in which to balance this conflict. However he argued that it was proper for the Court of Appeal to have asked whether the immediate encountering of such a conflict meant that the s 11 right was not intended to be drawn in a way that engaged that conflict. He emphasised the significance of art 12 of the ICESCR, guaranteeing the right to a minimum standard of health. He said the upholding of an individual's right not to receive fluoridated

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71 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

72 At [109]–[110].

73 At [113].

74 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [18]–[22]. See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.6.1]–[6.6.10]; and Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 52–56.

water necessarily would cause the health benefits that flow to the community from fluoridation to cease.

[81] Mr Powell also argued that reliance on s 5 to resolve the conflict of rights may be inimical to the protection of human rights. He referred us to the observation of Professor Hogg about the close relationship between the scope of rights and the standard of justification required for the purpose of s 1 of the Canadian Charter of Rights and Freedoms (equivalent to s 5 of the Bill of Rights Act). Professor Hogg noted that the broader the scope of the rights, the more relaxed the standard of justification must be in order to ensure that the right does not protect that which is unworthy of a constitutional guarantee.[75] He added that restricting the scope of rights avoids concerns about "wasteful floods of litigation" and limits the occasions when judges have to review the policy choices of legislative bodies.[76]

[82] We consider that the Court of Appeal was wrong to take into account the conflict of rights at the interpretation stage in this case. It is clear that the conflict was a material factor in the Court's decision to restrict the scope of s 11 to exclude public health measures. That had the effect of potentially excluding from the protection of s 11 public health measures that could, at least hypothetically, involve the mass administration of medication. In the present context, we consider that the resolution of the conflict of rights is better done in the context of s 5. That allows the meaning of "medical treatment" to be determined on the orthodox approach based on text and purpose, taking the generous approach that is adopted in interpreting the Bill of Rights Act. The Crown is then able, if necessary, to justify the provision under challenge under s 5, which allows for a reasoned consideration of the justification and whether it is "demonstrable". We do not consider that Professor Hogg's fear of an opening of the floodgates of Bill of Rights Act litigation (in cases involving public health measures) is likely.

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75 Peter Hogg "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28 Osgoode Hall LJ 817.

76 Peter Hogg *Constitutional Law of Canada* (5th ed, Carswell, Toronto, 2007) at [36.8(b)].

Conflict with art 12

[83] New Health argues that the Court of Appeal was wrong to say that s 11 of the Bill of Rights Act would, if interpreted to incorporate public health measures, conflict with art 12 of the ICESCR. On the contrary, if correctly interpreted, art 12 supports New Health's interpretation of s 11 because it includes a right to be free from non-consensual medical treatment, and makes no provision for compulsory medical treatment. New Health points to General Comment No 14 to the Covenant, which refers to the right to health containing both freedoms and entitlements, one of which is to be free from non-consensual medical treatment and experimentation.[77]

[84] We accept this argument as far as it goes, but it seems to us to miss the point that was being made by the Court of Appeal. The underlying assumption made by the Court of Appeal was that the majority of inhabitants in areas with fluoridated water have no objection to it and derive a health benefit from it. If the invocation of s 11 by one or more inhabitants of the area brings about a cessation of fluoridation, then the consenting majority are deprived of the health benefit. If the individual seeking to challenge fluoridation relies on art 12 itself, the same point arises. The objector can claim to be exercising a right under art 12, as can a proponent of fluoridation who wishes to have access to the health benefits it brings.

Common law

[85] At the hearing of the appeal, Ms Scholtens challenged the Court of Appeal's observation that there was nothing in the White Paper to suggest that the idea of medical treatment in s 11 was being considered in any broader context than the common law already contemplated. She challenged both the basis of this observation (that the common law required a direct therapeutic relationship) and also the assumption that s 11 should do no more than enshrine the common law in the Bill of Rights Act.

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[77] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 14 to Article 12 of the International Covenant on Economic, Social and Cultural Rights* E/C.12/2000/4 (2000) at [8].

[86] The Court of Appeal referred to the decision of the House of Lords in *F v West Berkshire Health Authority*, which dealt with the lawfulness of a proposed sterilisation operation on F, who was unable to consent due to her mental incapacity. Lord Goff noted that the performance of a medical operation on a person without his or her consent is both a trespass to the person and the criminal offence of battery.[78]

[87] The White Paper acknowledged this general rule under existing law.[79] This led the Court of Appeal to conclude that the authors of the White Paper had in mind the interrelated issues of consent to medical treatment or the refusal of such consent in a therapeutic setting and then made the observation, referred to earlier, that there was nothing to suggest that any broader context than this was contemplated by the White Paper.[80]

[88] Mr Powell argued that the history behind s 11 supported the proposition that the reference to medical treatment in that section was intended to apply only to medical treatment involving the provision of treatment by a practitioner to an individual, where consent could be given or withdrawn. Thus he argued that public health measures were not within s 11. This prompts the obvious concern that this would mean that the addition to water of antibiotics or other medicines to deal with a public health situation would also not be covered by s 11. Mr Powell's answer to this was that the fact that the scope of s 11 was limited to provision of medical treatment by a practitioner to an individual does not mean that there is no legal control over the provision of, for example, antibiotics through drinking water. Rather, Parliament has chosen to constitutionalise the right to refuse medical treatment in an individual situation, but not in relation to public health measures.

[89] This is a much broader argument than that adopted by William Young J, which excludes fluoridation from the scope of s 11, given the widespread fluoridation that was occurring at the time of the enactment of the Bill of Rights Act and the understanding that this was lawful based on the *Lower Hutt City* case. The argument put forward by Mr Powell would also exclude from s 11 other inoculation programmes

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78 *New Health* (CA), above n 2, at [79], citing *F v West Berkshire Health Authority* [1989] 2 All ER 545 (HL) at 564.

79 White Paper, above n 60, at [10.166].

80 *New Health* (CA), above n 2, at [81].

as well as the hypothetical situation referred to earlier, where a medicine is added to the water supply to deal with a public health situation.

[90] We see the position advocated by Mr Powell as placing the history of the provision above the actual wording used in the provision and its underlying purpose. We do not see any basis for reading down the wording of s 11. There was no relevant comment about the content of s 11 during the parliamentary debates that would suggest that the background law was intended to influence the scope of the provision, and it is hard to see why s 11 would be limited in a way that excluded public health treatments, where issues of consent may well loom large.

[91] Mr Powell also argued that other relevant human rights instruments such as the Canadian Charter (s 7), the Constitution of the United States (the 14th Amendment), the International Covenant on Civil and Political Rights[81] (ICCPR) (art 17) and the European Convention on Human Rights[82] (ECHR) (art 8) contain provisions recognising a more generally expressed right to liberty or right to private life, under which the right to refuse to undergo medical treatment has been recognised. He argued that these provisions reflect the same underlying norms as s 11 of the Bill of Rights Act, but none had given protection for a right of the width contended for by New Health in the present case. He noted that arguments based on constitutional protection against the fluoridation of drinking water had not succeeded elsewhere.

[92] The relevant international authorities are summarised in the judgment of the High Court,[83] and as Rodney Hansen J noted in that judgment, they do not provide much assistance in the interpretation of s 11 of the Bill of Rights Act.[84] We will refer only to the ICCPR and the ECHR.

[93] Article 7 of the ICCPR recognises a right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. That general description of the right is followed by the words "[i]n particular, no one shall be subjected without his

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81 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

82 Convention for the Protection of Human Rights and Fundamental Freedoms ETS No 5 (opened for signature 4 November 1950, entered into force 3 September 1953).

83 *New Health* (HC), above n 4, at [59]–[78].

84 At [59].

free consent to medical or scientific experimentation". It is obvious that s 10 of the Bill of Rights Act is modelled on that aspect of art 7. It is generally recognised that the specific reference to medical experimentation in art 7 was in response to the medical experiments undertaken by Nazi doctors during World War II.[85] Medical treatment without consent, when not reaching the level of degrading or inhuman treatment, was not intended to be covered by art 7.[86] Sir Samuel Hoare from the United Kingdom delegation noted that there were "many instances of perfectly harmless mass experiments which it might be necessary to carry out, such as the addition of fluoride to a water supply".[87] This observation can be seen as indicating that fluoridation was not intended to be within the scope of art 7, but it can also be seen as an acknowledgment that fluoridation was "medical". While it would support an argument that fluoridation is not in breach of art 7, we do not see it as providing much assistance in determining whether fluoridation amounts to medical treatment in terms of s 11 of the Bill of Rights Act.

[94] Article 8 of the ECHR provides:

> (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.

[95] This provision was relied on in a challenge to a fluoridation scheme in Switzerland in *Jehl-Doberer v Switzerland*.[88] The European Commission accepted that even minor medical treatment amounted to an interference with a person's right to respect for private life if it was compulsory. But it did not go on to consider whether fluoridation amounted to such medical treatment, because it saw the provision of drinking water as a general service as different from compulsory medical treatment

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85 Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, NP Engel, Kehl, 2005) at 188.

86 At 190.

87 *Summary Record of the 851st Meeting* UN GAOR, 3rd Comm, 47th sess, 851st mtg, Agenda Iten 32, UN Doc A/C.3/SR.851 (13 October 1958) at [32] per Sir Samuel Hoare.

88 *Jehl-Doberer v Switzerland* (17667/91) First Chamber, EComHR 1 September 1993.

and, in any event, considered that any interference with the right to respect for private life would be justified within the meaning of art 8(2). The European Commission on Human Rights has, however, found that compulsory screening for tuberculosis, involving a chest x-ray and a tuberculin test amounted to medical treatment that was provided without consent, but also found that it was justified because it was aimed at protecting the health of the child concerned and public health generally.[89] The European Court of Human Rights has also found that compulsory vaccination against diphtheria was contrary to art 8(1) of the ECHR, but found it was justified because it was aimed at the legitimate purpose of preventing the spread of diphtheria.[90] While not directly on point, the recognition of public health measures as amounting to medical treatment without consent with the justification being dealt with at the second stage of determining whether such treatment is justified under art 8(2) supports the approach advocated by New Health in the present case.

"Undergo"

[96] The Court of Appeal saw a distinction between the term "undergo" in s 11 and the term "subjected to" in ss 9 and 10. We do not see this difference in wording as having the significance attributed to it by the Court of Appeal. If the administration of fluoride to a person means that person undergoes medical treatment, as undoubtedly does occur where fluoride tablets are provided for the person to ingest them, then there is no obvious logic in saying that the provision of the same chemical substance by a different methodology (through drinking water) does not also mean that the person undergoes medical treatment.

Conclusion

[97] We conclude that s 11 of the Bill of Rights Act applies to any compulsory medical treatment, whether provided in the course of a practitioner/patient relationship or as a public health measure. We consider that this represents a generous interpretation of s 11 but does not "overshoot" the purpose of the s 11 right.

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89 *Acmanne v Belgium* (1984) 40 DR 251.

90 *Solomakhin v Ukraine* (24429/03) Fifth Section, ECHR 24 September 2012.

[98] Reading down s 11 to exclude public health measures would leave open the possibility that compulsory mass medication as a public health measure would not be within the scope of s 11. There is nothing in the wording of s 11 or evident from the statutory purpose to justify such a reading down of the provision. We accept that this interpretation of s 11 may bring within its net some public health measures that are obviously necessary and justified, but such justification is better dealt with under s 5 than in the exercise of interpreting s 11.

[99] Applying this approach, we find that fluoridation of drinking water is the provision of medical treatment. It involves the provision of a pharmacologically active substance for the purpose of treating those who ingest it for dental decay. We agree with the Courts below that people who live or work in areas where fluoridation occurs have no practical option but to ingest the fluoride added to the water. So the treatment is compulsory. While drinking water from a tap is not an activity that would normally be classified as undergoing medical treatment, we do not consider that ingesting fluoride added to water can be said to be qualitatively different from ingesting a fluoride tablet provided by a health practitioner.

[100] We conclude that fluoridation of drinking water requires those drinking the water to undergo medical treatment in circumstances where they are unable to refuse to do so. Subject to s 5, therefore, s 11 of the Bill of Rights Act is engaged.

Is the statutory power to fluoridate a justified limitation on the s 11 right?

[101] Section 5 of the Bill of Rights Act provides:

> Subject to section 4, 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.

[102] Both the High Court and the Court of Appeal adopted the guidance given in *R v Hansen* when addressing this issue.[91]

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91 *New Health* (HC), above n 4, at [98] and [101]; *New Health* (CA), above n 2, at [109] and [112].

[103] In *R v Hansen*, Tipping J set out a summary of the approach adopted to the application of s 5 and the relationship between ss 4, 5 and 6 of the Bill of Rights Act in a number of steps. He summarised the approach as follows:[92]

> Step 1. Ascertain Parliament's intended meaning.
>
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
>
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
>
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
>
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
>
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

[104] Counsel's submissions in this Court were also directed to the approach outlined in *R v Hansen* by Tipping J, with whom Blanchard and McGrath JJ agreed in general terms.[93] Given that, we will apply the same approach.[94]

[105] We have already undertaken steps 1 and 2 in determining Parliament's intended meaning and ascertaining that the meaning is apparently inconsistent with s 11 of the Bill of Rights Act. The issue now before us is step 3 of Tipping J's formulation. The first aspect we will address is whether the limitation on s 11 is prescribed by law.

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92 *R v Hansen*, above n 74, at [92].

93 At [62] per Blanchard J and [192] per McGrath J.

94 The point was made in *Hansen* that the approach was not intended to be prescriptive: see Blanchard J at [61] ("The Bill of Rights does not mandate any one method or sequence of application …"); Tipping J at [91] ("This approach, which I regard as principled rather than prescriptive …") and at [93] ("The *Moonen* approach [referring to *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) (*Moonen No 1*)] was not intended to be mandatory"); and McGrath J at [191] ("it will usually be appropriate for a court first to consider whether under s 5 there is scope for a justified limitation …") and at [192] ("In [*Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (CA) (*Moonen No 2*) at [7]–[12]] the Court of Appeal confirmed that the approach in … *Moonen (No 1)* was not prescriptive and that other approaches were open").

Is the limit on the right guaranteed by s 11 prescribed by law?

[106] In *R v Hansen*, McGrath J wrote:[95]

> 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.

[107] In the present case both the High Court and Court of Appeal adopted that statement of the law.[96]

[108] Both the High Court and the Court of Appeal referred to the Canadian Supreme Court decision in *Slaight Communications Inc v Davidson* and adopted the approach outlined in that decision.[97]

[109] *Slaight* concerned a decision by an administrative tribunal in relation to an employee who claimed unjust dismissal. Lamer J explained how to approach an order made by the administrative tribunal when determining whether the "prescribed by law" requirement in s 1 of the Canadian Charter (the equivalent of s 5 of the Bill of Rights Act) applied. He said:[98]

> It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows.
>
> First, there are two important principles that must be borne in mind:
>
> – an administrative tribunal may not exceed the jurisdiction it has by statute; and
>
> – it must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.
>
> The application of these two principles to the exercise of a discretion leads to one of the following two situations:

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95 At [180] (footnote omitted).

96 *New Health* (HC), above n 4, at [98] ; *New Health* (CA), above n 2, at [101].

97 *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038. See *New Health* (HC), above n 4, at [99]; and *New Health* (CA), above n 2, at [105]–[108].

98 At 1079–1080 (emphasis in original). Although he was in dissent, the views of Lamer J were adopted by the majority at 1048 and by Beetz J at 1058.

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.

   – It is then necessary to subject the legislation to the test set out in s 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

   – It is then necessary to subject the order made to the test set out in s 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

   – if it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction;

   – if it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.

[110] In *Wynberg v Ontario*, this approach was applied by the Ontario Court of Appeal to a case in which a Minister had exercised a broad discretionary power in a way that was set to breach the rights of children under the Canadian Charter.[99] The Court of Appeal in the judgment under appeal concluded that this was a case coming within situation one of the two categories set out by Lamer J.[100] It concluded that the LGA 2002 and the Health Act, at least by necessary implication, clearly authorised (but did not compel) the fluoridation of drinking water. It added that the same conclusion followed from the inclusion of a maximum acceptable value for fluoride in the *Drinking-water Standards for New Zealand 2005 (Revised 2008)* which constitute subordinate legislation authorised by the Health Act.[101] It thus upheld Rodney Hansen J's conclusion that any limitation on the s 11 right by the provisions authorising fluoridation of drinking water was prescribed by law.[102]

[111] We have already set out our conclusion that the Council and other local authorities have a power to fluoridate drinking water under the LGA 2002 and the Health Act. We agree with the Court of Appeal that these legislative provisions

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99 *Wynberg v Ontario* (2006) 82 OR (3d) 561 (CA).
100 *New Health* (CA), above n 2, at [108].
101 *Drinking-water Standards for New Zealand*, above n 31.
102 *New Health* (HC), above n 4, at [100].

provide authorisation for the fluoridation of water which is sufficient to meet the requirement that a limitation be "prescribed by law" for the purposes of s 5.[103]

Is the fluoridation power a justified limit on the s 11 right?

[112] We now turn to consider whether the power to fluoridate is a reasonable limit on the s 11 right that can be demonstrably justified in a free and democratic society. In *R v Hansen*, Tipping J also set out what he called a methodology for the application of s 5.[104] This was broadly based on the decision of the Supreme Court of Canada in *R v Oakes*.[105] Having set out the approach adopted in *R v Oakes*, Tipping J added:[106]

> This approach can be said to raise the following issues:
>
> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment 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?

Approach to s 5

[113] A preliminary question is what approach the Court should take to the s 5 analysis in this case.

[114] The Court of Appeal expressed reluctance to enter the debate on the merits of fluoridation. It noted that the courts are not equipped to determine disputed issues of scientific or technical opinion.[107] It referred to the observation by Tipping J in *R v Hansen* that the court performs a review function rather than substituting its own view and noted that what it called the approach depends on a variety of circumstances,

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103 As noted above at [5], New Health's initial challenge to the Council's decision to exercise the power to fluoridate was not before us.
104 *R v Hansen*, above n 74, at [103].
105 *R v Oakes* [1986] 1 SCR 103.
106 *R v Hansen,* above n 74, at [104].
107 *New Health* (CA), above n 2, at [111].

including the subject matter.[108] Given the nature of the subject matter and the appropriate degree of latitude to be given to parliamentary decisions, the Court of Appeal decided its approach would be to outline the principal evidence before the Court, which would "amount to a broad assessment of the preponderance of the evidence sufficient to address the key issues in terms of the test laid down in *Hansen v R*".[109]

[115] New Health challenged the Court of Appeal's approach. It submitted that the Court erred in allowing latitude to parliamentary decisions because the decision to fluoridate was not debated in the House and there was no s 7 report from the Attorney-General. New Health also submitted that the Courts below erred by failing to require the Council to demonstrably justify the limit. It emphasised that the Council, as the party seeking to limit the right, bears the onus of justification.

[116] New Health also took issue with the finding that there was a sufficient evidential basis to conclude that the benefits of fluoridation outweighed any potential risks. Ms Scholtens argued that "[a] broad assessment of the preponderance of the evidence should have led the court to a much less certain conclusion". She did not however articulate what standard was required in this case.

[117] The Council submitted that the Courts below were correct not to resolve the debate about the merits of fluoridation and argued that this Court should adopt the same approach. The Council referred to Tipping J's comments in *Hansen* about the "spectrum" of review, "which extends from … major political, social or economic decisions at one end to matters which have a substantial legal content at the other".[110] The Council emphasised that the provision of a power to fluoridate is highly political.

[118] In terms of the standard of proof, the Council argued that the evidential inquiry under s 5 is limited to whether Parliament's decision to empower local Councils to fluoridate water was one that was reasonably open to it. The Council referred to the Court of Appeal decision in *Ministry of Health v Atkinson*, noting the Court's statement

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[108] At [112], citing *Hansen*, above n 74, at [116]; and at [114], citing *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 at [70] per Lord Nicholls.

[109] At [115].

[110] *Hansen,* above n 74, at [116].

that "the context will affect the type of evidence required to meet the standard of proof".[111] In *Atkinson*, the Court of Appeal discussed the debate about the evidential requirements of the *R v Oakes* test used by the Supreme Court of Canada, citing an extract from an article by Professor Choudhry which acknowledges that public policy decisions are often based on approximations and extrapolations from the available evidence.[112] The Court in *Atkinson* also referred to the Canadian Supreme Court decision in *RJR-MacDonald Inc v Canada*, citing a passage from McLachlin J's reasons where she stated that "proof to the standard required by science is not required", rather "the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view".[113]

[119] In response to New Health's points about latitude, the Council argued that there was no requirement that Parliament debate a statutory regime which it had no intention of changing. The level of latitude to be allowed to Parliament is therefore unaffected. Further, fluoridation has been considered by the Commission of Inquiry in 1957[114] and by the Human Rights Commission in 1980.[115] The Health Committee recently considered the Health (Fluoridation of Drinking Water) Amendment Bill which was introduced in 2016.[116]

[120] We consider the background to the passing of the legislative provisions authorising fluoridation is important in this context. We accept that Parliament did not debate fluoridation when the LGA 2002 was passed. But it was passed against a background that some local authorities had been fluoridating water for 40 years or more. This had been found to be lawful in the *Lower Hutt City* case and the practice had been scrutinised by the Commission of Inquiry in 1957 and been found not to give rise to human rights issues by the Human Rights Commission in 1980. There is

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111 *Ministry of Health v Atkinson,* above n 71, at [166].

112 At [165], citing Sujit Choudhry "So what is the real legacy of *Oakes*? Two decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 SCLR (2d) 501 at 524.

113 At [166], citing *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at [133] and [137].

114 WF Stilwell, NL Edson and PVE Stainton "Report of the Commission of Inquiry on the Fluoridation of Public Water Supplies" [1957] V AJHR H47. See William Young J below at [183]–[184].

115 Human Rights Commission *Report on Representations on Fluoridation of Water Supplies* (August 1980). See William Young J below at [185].

116 Health (Fluoridation of Drinking Water) Amendment Bill 2016 (208-2) (select committee report).

nothing to indicate Parliament intended any change to the pre-existing law in relation to the power to fluoridate when passing the LGA 2002 or the Health (Drinking Water) Amendment Act 2007, which inserted Part 2A into the Health Act.

[121] It is obvious that the scientific evidence relating to fluoridation is contentious, in the sense that even apparently authoritative studies as to the benefits and detriments of fluoridation are called into question in other studies, in many cases on the grounds that the writers are biased. The Court is not in a position to unpick these disputes nor is it able to determine whether particular scientific reports are scientifically robust. It can, however, note that the benefits of fluoridation are considered to be significant and the detriments insignificant by the World Health Organization and the Ministry of Health. It can also have regard to the fact that fluoridation of drinking water is sanctioned by law and actually occurs in a number of free and democratic countries with which New Zealand compares itself including Australia, Canada, the United States of America and the United Kingdom.

[122] Against that background, we consider the Court of Appeal was right not to attempt a definitive ruling on the scientific and political issues. We will undertake a broad assessment with a view to determining whether the evidence provides a proper basis for concluding that the limitation on the s 11 right resulting from fluoridation was justified.

Is the purpose sufficiently important?

[123] The purpose of fluoridation is to reduce the incidence of tooth decay in the population in the area in which fluoridation occurs. Rodney Hansen J referred to the evidence before him that the incidence of tooth decay in children living in Patea and Waverley was higher than in other areas where fluoridation occurs.[117] The High Court Judge concluded that the dental health of children was unarguably sufficiently important to justify the curtailment of the right to refuse medical treatment, if that right were engaged.[118]

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117 *New Health* (HC), above n 4, at [102].
118 At [103].

[124] The Court of Appeal said it had no difficulty agreeing with the High Court Judge's conclusion.[119]

[125] New Health argued that the Courts below did not give adequate recognition to the values of bodily integrity, dignity and autonomy underpinning the s 11 right. It argued that the types of diseases that might justify treating a citizen without consent are limited to circumstances where the failure to treat puts other citizens as risk, and argued that tooth decay does not meet that high threshold because it is not contagious, is easily prevented and easily treated and poses no risk to third parties.

[126] The evidence before the High Court indicated that dental decay in New Zealand is a significant problem,[120] and the situation in Patea and Waverley was worse than in other parts of the country.[121] This evidence cannot be reconciled with the proposition that dental decay is easily prevented and easily treated without fluoridation. We do not consider that there is any immutable rule that treatment for diseases that put others at risk is the only situation in which limiting the s 11 right is justified. The issue is one of proportionality, as we explain below.[122] We agree with the Courts below that the objective of preventing and reducing dental decay is sufficiently important to justify a limitation on the s 11 right, assuming that this can be done in a manner that is otherwise justified. Given the minor limitation of the s 11 right inherent in fluoridation, we do not consider that this conclusion gives inadequate recognition to the values of bodily integrity inherent in the s 11 right.

Rational connection

[127] Both the High Court and Court of Appeal concluded without difficulty that there was a rational connection between fluoridation and the prevention or reduction

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119 *New Health* (CA), above n 2, at [152].

120 This is evidenced by the conclusions in Ministry of Health "Our Oral Health: Key findings of the 2009 New Zealand Oral Health Survey" (2010) <www.health.govt.nz/publication/our-oral-health-key-findings-2009-new-zealand-oral-health-survey>, cited by a witness for the Council, Dr Whyman.

121 In the High Court 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.

122 Below at [135].

of dental decay.[123] The Court of Appeal accepted that there was room for debate about the extent of the reduction, but considered that the evidence produced showed it was significant.

[128] Ms Scholtens argued that the Courts below erred in this conclusion because the evidence supporting fluoridation's benefits was, she said, weak and the Courts below overstated the significance of any reduction in tooth decay attributable to fluoridation of water supply.

[129] In support of this submission, Ms Scholtens argued that the discovery that fluoride works topically rather than systemically meant that it was now not clear that the beneficial effect on the incidence of dental decay was as great as once thought. This was because the concentration of fluoride in fluoridated water was too low to have a significant topical effect and the resulting fluoride concentration in saliva was too low to have a cariostatic effect (an effect of inhibiting the formation of dental decay).

[130] Ms Scholtens cited in support of this the evidence of Dr Litras, a Wellington-based dentist who gave expert evidence on behalf of New Health. Dr Litras maintained that 2012 World Health Organization data indicated no difference in the rate of tooth decay between fluoridated and non-fluoridated communities. He also argued that New Zealand data on the decline in tooth decay in New Zealand over a 40 year period showed the level was already falling before fluoridation and that the benefit of fluoridation is, at best, insignificant. This view was contradicted by Dr Whyman, a witness for the Council, whose opinion was that fluoridation was effective in reducing both the incidence and severity of tooth decay among children and adults. As the Court of Appeal noted, the report cited by New Health in support of its position acknowledged at least some reduction in tooth decay was achieved as a result of the fluoridation of water.[124]

[131] The Court of Appeal undertook a review of the evidence before it, as well as two reports that were before the Court but had not been in evidence in the High

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123 *New Health* (HC), above n 4, at [104]–[105]; and *New Health* (CA), above n 2, at [153]–[155].
124 *New Health* (CA), above n 2, at [154].

Court.[125] We do not propose to repeat the summary set out in the Court of Appeal judgment, but, having considered the affidavits and supporting material produced before the High Court, we agree with the Court of Appeal's assessment that there is a rational connection between fluoridation of drinking water and the purpose of preventing dental decay.

No more than reasonably necessary

[132] In *R v Hansen*, Tipping J described the issue to be addressed under this heading as involving the Court considering whether Parliament might have sufficiently achieved its objective by another method involving less cost to the right at issue.[126] Both the High Court and Court of Appeal saw the question in the present case as being whether fluoridation fell within the range of reasonably available alternatives.[127] The Court of Appeal specifically adopted the observation by McLachlin J in the decision of the Supreme Court of Canada in *RJR-MacDonald Inc v Canada*:[128]

> … the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement … On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

[133] In *R v Hansen*, McGrath J described this question as an inquiry into "whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness".[129] This approach was also adopted by the Court of Appeal in *Atkinson*.[130]

[134] As the Court of Appeal acknowledged, there was evidence of alternative measures that address the problem of tooth decay, including the use of fluoridated toothpaste, good dental hygiene practices and reducing the consumption of foods and

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125 At [116]–[150]. Details of the two reports that were not in evidence follow: see below at [138].
126 *R v Hansen*, above n 74, at [126].
127 *New Health* (HC), above n 4, at [106]; and *New Heath* (CA), above n 2, at [156].
128 *RJR-MacDonald Inc v Canada*, above n 113, at [160] (citations omitted).
129 *R v Hansen*, above n 74, at [217].
130 *Ministry of Health v Atkinson*, above n 71, at [154].

drinks containing sugar.[131] Dr Litras advocated those measures as well as the possible fluoridation of salt in fast foods and of soft drinks in "at risk" areas and improved access to dental care. Some of those possibilities would have their own Bill of Rights Act implications, however. The Council's witnesses accepted the desirability of such measures, but argued that they are of limited efficacy, particularly in lower socio-economic communities, because, at least in some cases, they depend on the willingness of individuals to accept the measures and actively participate in them. Having considered the evidence and the submissions of New Health on this aspect of the case, we agree with the Courts below that the evidence establishes that fluoridation of drinking water is one of a range of reasonable alternatives to address the problem of dental decay and that the suggested alternatives, while more consistent with the Bill of Rights Act than fluoridation, are of limited efficacy. They complement rather than provide an alternative to fluoridation.

Is the limit proportionate to the objective?

[135] In considering this aspect of the case, we think it is important to put into perspective the nature of the limitation on the s 11 right constituted by the empowering of local authorities to fluoridate drinking water. As noted earlier, fluoride occurs naturally in water and in New Zealand this is typically at a level in the region of 0.3 ppm.[132] In other countries, fluoride occurs naturally at much higher levels. The addition of fluoride to water in New Zealand is, therefore, adding to the fluoride naturally occurring in water, rather than the introduction of a foreign substance.[133] The recommended level of fluoride after the addition of fluoride by councils is 0.7 ppm to 1 ppm, which is considerably lower than the maximum acceptable value of 1.5 ppm. We see this as a minimal intrusion on the s 11 right. This can be contrasted with the hypothetical situations mentioned in argument before us, such as the addition of antibiotics, tranquilisers or contraceptives to water, which would obviously amount to

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131 *New Health* (CA), above n 2, at [157].

132 See above at [11].

133 New Health argued that HFA and SSF are silicofluorides, and therefore chemically different from calcium fluoride, which occurs naturally in water, and that they may contain heavy metal impurities. However, the Gluckman/Skegg Report says that the fluoride ions released from HFA and SSF are the same as the fluoride ions found naturally in water and any impurities are well below the maximum allowable values in the *Drinking-water Standards*: Peter Gluckman and David Skegg *Health effects of water fluoridation: A review of the scientific evidence* (Office of the Prime Minister's Chief Science Advisor and the Royal Society of New Zealand, August 2014) [Gluckman/Skegg Report] at 5 and 23.

serious limitations on the s 11 right, and require commensurately greater justification (if, indeed, they could ever be justified at all).

[136] The Court of Appeal agreed with the High Court Judge that there was a sufficient evidential basis to support the conclusion that the significant advantages of fluoridation outweighed the increased risk of fluorosis, one of the negative effects of fluoridation and that there was also an evidential foundation for concluding that fluoridation did not give rise to any other significant health risk.[134]

[137] New Health argued that the claimed benefits of fluoridation were overstated and the adverse effects were understated. New Health pointed in particular to the study known as the York Review which was published in 2000, and which questioned the quality of the studies cited as demonstrating the health benefits of fluoridation.[135] The York Review said that the best available evidence suggested that fluoridation does reduce the prevalence of caries, but said that the studies suggesting this were of moderate quality and limited quantity. The Review expressed surprise at the lack of high quality research undertaken into the safety and efficacy of water fluoridation. The Review found that evidence supported the existence of fluorosis as a negative impact, but found that many of the studies indicating that fluoridation caused bone fractures or cancers (which New Health said were negative impacts of fluoridation) were of low quality and with a high risk of bias.

[138] Since the hearing of this case in the High Court, two further reports of some significance have been released, and both were considered by the Court of Appeal. These were:

(a) The Cochrane Review which was published in 2015 and was an update to the York Review.[136]

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134 *New Health* (CA), above n 2, at [164].

135 Marian McDonagh and others *A Systematic Review of Public Water Fluoridation* (NHS Centre for Reviews and Dissemination, University of York, September 2000) [York Review].

136 Z Iheozor-Ejiofor and others *Water fluoridation for the prevention of dental caries* (prepared by The Cochrane Collaboration, published by John Wiley & Sons, 2015) [Cochrane Review].

(b) The Gluckman/Skegg Report, a report of the Office of the Prime Minister's Chief Science Advisor and the Royal Society of New Zealand on the health effects of water fluoridation, published in August 2014.[137] The report was prepared by a scientist in the office of the Chief Science Advisor, reflecting the conclusions of a panel of experts appointed for the Report. It was then peer reviewed by a New Zealand reviewer and international reviewers.

[139] As just noted, neither of these reports was before the High Court and Mr Laing for the Council urged caution before attributing weight to the Cochrane Review, because the Council had not been given the opportunity to respond to it. We accept the need for caution, which we see as also applying in relation to the Gluckman/Skegg Report.

[140] The Cochrane Review was, like the York Review, critical of the standard of studies indicating the health benefits of fluoridation. It also said there was evidence that fluoridation of water to the level of 0.7 ppm caused fluorosis in 12 per cent of people that could cause concern about their appearance (although this evidence was also considered to be at risk of bias and reflected the variation in the studies considered).

[141] In contrast to this, the Gluckman/Skegg Report, having reviewed the evidence (but not the Cochrane Review, which was published after the Gluckman/Skegg Report) was clear in its conclusions:

(a) Fluoridation of water is recommended as the most effective public health measure for the prevention of dental decay by the World Health Organization and other international health authorities.

(b) A large number of studies and systematic reviews have concluded that water fluoridation is an effective preventive measure against tooth

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[137] Gluckman/Skegg Report, above n 133. Sir Peter Gluckman is the Office of the Prime Minister's Chief Science Advisor and Sir David Skegg was the President of the Royal Society of New Zealand.

decay that reaches all segments of the population and was particularly beneficial to those most in need of improved oral health.

(c) The prevalence of fluorosis of aesthetic concern is minimal in New Zealand and is not different between fluoridated and non-fluoridated communities.

(d) Extensive analyses of other potential adverse effects have not found evidence that levels of fluoride used for community water fluoridation schemes contribute *any* increased risk to public health.

(e) The current fluoridation levels appear to be appropriate.

[142] The Report reaches the following conclusion:[138]

> This analysis concludes that from a medical and public health perspective, water fluoridation at the levels used in New Zealand poses no significant health risks and is effective at reducing the prevalence and severity of tooth decay in communities where it is used.

[143] We set out the conclusions of the Gluckman/Skegg Report because it is the most recent New Zealand-based information about fluoridation. But we acknowledge that the conclusions are challenged and stand in contrast to the conclusions of the Cochrane Review, and we also reiterate the need for caution in reliance on both of those reports given that they were not in evidence before the High Court. We agree with the Court of Appeal, however, that the evidence that was before the High Court provided a proper basis for concluding that the limit on the s 11 right constituted by the empowerment of local authorities to fluoridate water is a justified limit. We refer in particular to the evidence of two of the witnesses called on behalf of the Council, Dr Whyman, the Clinical Director of Oral Health Services at the Hawkes Bay District Health Board and the Principal Dental Officer for the Whanganui District Health Board and Dr Haisman-Welsh, the Chief Dental Officer for the Ministry of Health. We acknowledge that New Health's experts strongly question the evidence of the Council's experts and point to international reports and journal articles that maintain

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138 At 10.

that the health benefits of fluoride at the levels of fluoridated water are subject to question and the insignificance of the side effects are equally subject to question.

Conclusion: justified limitation

[144] For these reasons, we conclude that the provisions authorising the fluoridation of drinking water limit the s 11 right only to an extent that is demonstrably justified in a free and democratic society for the purposes of s 5 of the Bill of Rights Act.

Result

[145] In accordance with the views of William Young, Glazebrook, O'Regan and Ellen France JJ, the appeal is dismissed. On the approach taken in this judgment and that of William Young J, the Council has the legal authority to fluoridate the water supplies in Patea and Waverley and that power is not constrained by s 11 of the Bill of Rights Act. On our approach, that is because the authorising provisions limit the s 11 right only to an extent that is demonstrably justified in a free and democratic society and on the approach of William Young J because s 11 of the Bill of Rights Act is not engaged.

Costs

[146] New Health must pay the Council costs of $20,000 plus the Council's usual disbursements.[139] Although the Attorney-General was formally a party to the appeal, his counsel accepted that his role was akin to that of an intervener and did not seek an award of costs. We therefore make no award of costs in his favour.

GLAZEBROOK J

[147] The issue in this appeal is whether local authorities have the power to fluoridate water in light of s 11 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). I propose first to consider whether there is power to fluoridate water, absent the Bill of Rights Act. Before I do this, I outline the legislative background.

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139 Supreme Court Rules 2004, r 44(5).

Legislative background

Powers, duties and functions of local authorities

[148] Before the Local Government Act 2002 (LGA 2002) was passed, a local authority had to be specifically empowered by law to carry out a particular activity, although activities incidental to specified activities were also lawful.[140] The requirement for specific authorisation led to a complex and detailed legislative framework governing local authorities, which caused increasing frustration, particularly in light of the strict application of the doctrine of ultra vires.[141]

[149] The solution chosen in the LGA 2002 was to confer a power of general competence on local authorities, to be exercised in accordance with broadly expressed purposes and also in furtherance of specific powers and functions conferred by statute. As the Hon Sandra Lee, the then Minister of Local Government, said on the introduction of the Bill:[142]

> [T]hrough its prescriptive nature [the old Local Government Act] precludes the councils from doing things that make common sense; rather, it says that unless something is prescribed it simply cannot be done. …
>
> … We want to move from a detailed, prescriptive form of law to one that is empowering and flexible. …

[150] Another aspect of the LGA 2002 related to the democratic process. As the Hon Sandra Lee said:[143]

> Above all, the bill is about … the empowerment of New Zealanders within their local communities to exercise even greater control over their elected representatives and councils, and over the environments and communities in which they live. … To be successful, the councils must in future be driven less by the need for strict compliance with a detailed statute, and more by the need to deliver the results that local communities demand.

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140 For more see Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012) at 8 and 52–58.

141 See Grant Hewison "A Power of General Competence – Should it be Granted to Local Government in New Zealand?" (2001) 9 Auckland U L Rev 498 at 499.

142 (18 December 2001) 597 NZPD 14126–14127.

143 (18 December 2001) 597 NZPD 14127.

[151] Section 3 of the LGA 2002 sets out the purpose of the Act as follows:[144]

> **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.

[152] Part 2 of the LGA 2002 contains the purposes of local government and defines the role and powers of local authorities.[145] Section 10 provides:[146]

> **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.[147]

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144 Section 4 sets out what can be seen as a further purpose of facilitating participation by Māori in local authority decision-making processes in terms of the Crown's responsibilities under the Treaty of Waitangi: see Chris Murray and John Lulich (eds) *Local Government* (looseleaf ed, LexisNexis) at [LGA4.4]. I note also that s 3(d) was amended in 2012. The previous text read: "provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach".

145 LGA 2002, s 9.

146 Section 10(2) was inserted by s 7(2) of the Local Government Act 2002 Amendment Act 2012.

147 As originally enacted, s 10(b) was broader. It provided that the purpose of local government was "to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future". Its scope was narrowed by the Local Government Act 2002 Amendment Act 2012 to concentrate on "outputs" rather than "outcomes", although terms like "public services" are still open to broad interpretation: see Murray and Lulich, above n 144, at [LGA10.4].

(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.

[153] The role of a local authority,[148] under s 11(a), is to give effect to the purposes set out in s 10 in its district or region and, under s 11(b), to "perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment". Under s 11A, local authorities must have particular regard to certain core services (not all of which are mandatory) when performing their role.[149] These core services include network infrastructure, which is defined in s 197(2) as meaning "the provision of roads and other transport, water, wastewater, and stormwater collection and management".

[154] Also relevant to this appeal is s 23 of the Health Act 1956, which provides that it is the duty of every local authority to "improve, promote, and protect public health within its district". For that purpose local authorities are "hereby empowered and directed" to do a number of things, including, under s 23(c):[150]

> 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:

[155] The general competence provision is in s 12(2) of the LGA 2002:

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

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148 Local authority is defined in s 5 of the LGA 2002 as meaning a regional council or territorial authority. Regional council is further defined as the councils named in Part 1 of Schedule 2, with territorial authorities defined as a city council or a district council named in Part 2 of Schedule 2 of the Act.

149 Section 11A was inserted with effect from 27 November 2010.

150 Examples of specific instances of nuisances for the purpose of the Act are set out in s 29. Section 29 is not relevant to this appeal.

(b) for the purposes of paragraph (a), full rights, powers, and privileges.

[156] Under s 12(4) a territorial authority must exercise its powers wholly or principally for the benefit of its district.[151] Section 12(2) "is subject to this Act, any other enactment, and the general law".[152] In addition, s 13 provides that ss 10 and 12(2) apply to a local authority performing a function under another enactment to the extent that the application of those provisions is not inconsistent with that other enactment.

Water services

[157] Part 7 of the LGA 2002 sets out specific obligations and restrictions on local authorities, including relating to water supply. The relevant part of s 123 provides:

123 Outline of Part

This Part contains provisions that set out specific obligations and restrictions on local authorities and other persons as follows:

(a) the obligation to assess water and sanitary services and the purpose of those assessments:

(b) the obligations and restrictions on local authorities and other persons in relation to the delivery of water services:

[158] Under s 125(1)(a) a territorial authority must, from time to time, assess the provision of water services (defined in s 124 as water supply and wastewater services) within its district. Water supply is in turn defined in s 124 as "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". Section 126 provides that the "purpose of an assessment under section 125 is to assess, from a public health perspective, the adequacy of water and other sanitary services available to communities within a territorial authority's district".[153]

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151 Under s 12(5) a regional council must exercise its powers wholly and principally for the benefit of all its region or a significant part of its region and not for the benefit of a single district.

152 Section 12(3).

153 The current formulation of s 126 was introduced by the Local Government Act 2002 Amendment Act 2014 to replace the specific information assessment provisions for water and sanitary services that were found in ss 126 and 127 respectively of the original Act.

[159] In regard to water services, s 130 of the LGA 2002 requires local authorities providing water services to communities within their district at the commencement of the section or any time after the commencement of the section to continue to do so.[154] Divestment to another local governmental organisation is, however, permissible.[155]

[160] The supply of drinking water is regulated by Part 2A of the Health Act 1956.[156] Under s 69G drinking water means water that is potable.[157] Under s 69G 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".

[161] The purpose of Part 2A of the Health Act, as set out in s 69A(1), is to "protect the health and safety of people and communities by promoting adequate supplies of safe and wholesome drinking water from all drinking-water supplies". Part 2A, among other things,[158] provides for a register of all drinking-water suppliers;[159] provides for the issue of drinking-water standards;[160] and imposes a range of duties on drinking-water suppliers.[161]

[162] Under s 69O(1) of the Health Act the Minister is empowered to issue, adopt, amend or revoke drinking-water standards. These can include, under s 69O(2), requirements for drinking water safety,[162] requirements for drinking water composition[163] and any other matters relating to raw water or drinking water that may

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154 In the first reading of the Local Government Bill, at (18 December 2001) 597 NZPD 14127, the Hon Sandra Lee said: "There are important provisions in this bill that say 'No' to the proposition of further privatisation of water in New Zealand society. We are not going to agree to allow the councils to sell what is not a commodity—access to clean water—but a fundamental human right."

155 For example, s 131 allows a local government organisation to close down or transfer small water services in certain circumstances. Under s 136 contracts relating to the provision of water services may be entered into.

156 Inserted on 1 July 2008. See the reasons of Elias CJ at [255] for a discussion of the regime when the LGA 2002 was first passed.

157 There are also various extensions and exclusions not relevant to this appeal. The term "wholesome" is also defined in s 69G, as is the term "determinand": see the reasons of O'Regan and Ellen France JJ at [49]–[50].

158 In terms of s 69A(2).

159 The drinking water registration provisions are contained in ss 69J–69N of the Health Act.

160 Drinking water standards are provided for in ss 69O–69R.

161 Duties of suppliers in relation to the provision of drinking water and various regulatory matters, including offences, are provided for in ss 69S–69ZZZE of the Act.

162 Section 69O(2)(a).

163 Section 69O(2)(b).

affect public health.[164] Under s 69O(3), standards may include guideline values for aesthetic determinands for avoiding adverse aesthetic effects in drinking water.[165] They must not, however, include any requirement that fluoride be added to drinking water.[166]

[163] The current standards adopted under s 69O of the Health Act are the *Drinking-water Standards for New Zealand 2005 (Revised 2008)*. Under those standards, the "[m]aximum acceptable values for inorganic determinands of health significance" are set.[167] The level for fluoride is 1.5 mg/L. There is a footnote recommending[168] that for "oral health reasons" the fluoride content for drinking water should be in the range of 0.7–1.0 mg/L.[169]

[164] Under s 69V(1) of the Health Act every drinking-water supplier must take all practicable steps to ensure that the drinking water supplied complies with the drinking-water standards.

Do local authorities have the power to fluoridate water?

[165] As indicated above, under the LGA 2002 the general competence provision in s 12(2) means that there is no longer any need to find an explicit or necessarily implicit statutory power authorising fluoridation. Local authorities are free to decide to fluoridate water, as long as fluoridation is not outside the purposes and role set out in ss 10 and 11 of the LGA 2002 or comes within any other specific powers or duties in the LGA 2002 or in any other enactment.[170]

[166] The most obvious specific provision applicable to fluoridation is s 23 of the Health Act which imposes a duty on a local authority to "improve, promote, and protect public health within its district". I accept that dental decay is a condition that

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164 Section 69O(2)(h).
165 Section 69O(3)(a).
166 Section 69O(3)(c).
167 Ministry of Health *Drinking-water Standards for New Zealand 2005 (Revised 2008)* (October 2008) at 8.
168 This cannot be a requirement because of s 69O(3)(c). I agree, however, with the comments of O'Regan and Ellen France JJ in relation to this provision: see at [52]–[53] of their reasons.
169 See at [54] of O'Regan and Ellen France JJ's reasons.
170 Section 13. Further, the decision would need to be otherwise valid, including all relevant considerations being taken into account and any consultation duties fulfilled.

a local authority would be entitled to consider injurious to public health. Thus, there would be a specific power under s 23(c) of the Health Act to "cause all proper steps to be taken to secure … the removal of the condition".[171]

[167] I also accept Mr Laing's submission[172] that there is nothing in the LGA 2002 or the Health Act limiting local authorities' general power of competence contained in s 12(2) of the LGA 2002 when fulfilling the duty under s 23 of the Health Act.[173] Local authorities would be entitled to take the view that the fluoridation of water is a measure that will improve, promote and protect public dental health in terms of s 23 of the Health Act. I agree with the conclusion reached by O'Regan and Ellen France JJ that, despite the fact that the scientific evidence related to the benefits of fluoridation may be contested, there is nevertheless a rational connection between the fluoridation of drinking water and preventing tooth decay.[174]

[168] As noted by O'Regan and Ellen France JJ, both the World Health Organization and the New Zealand Ministry of Health consider the benefits of fluoridation to be significant and the detriments insignificant.[175] Indeed, the *Drinking-water Standards* themselves recommend a certain range for the level of fluoride in the water for oral health purposes.[176] A review, published in August 2014 by the Office of the Prime Minister's Chief Science Advisor and Royal Society of New Zealand, reported positively on the health benefits and lack of detriment of water fluoridation.[177]

[169] I accept that other studies, including the Cochrane Review published in 2015,[178] came to a contrary view but it would be for the local authority to assess the

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171 It follows that I disagree with the Chief Justice's analysis on this point at [312]–[316] of her reasons.

172 Outlined by O'Regan and Ellen France JJ above at [37].

173 In particular I agree with O'Regan and Ellen France JJ that this is not a regulatory or coercive power: see at [44] and [45] of their reasons. I also agree with their comments at [46].

174 At [131] of their reasons.

175 See at [121] of their reasons.

176 See above at [163]. See also at [54]–[55] of O'Regan and Ellen France JJ's reasons.

177 See the discussion at [138](b) and [141]–[142] of O'Regan and Ellen France JJ's reasons.

178 Z Iheozor-Ejiofor and others *Water fluoridation for the prevention of dental caries* (prepared by The Cochrane Collaboration, published by John Wiley & Sons, 2015). See also at [138] of O'Regan and Ellen France JJ's reasons.

validity of the competing views.[179] The fact that there are competing views does not make the powers under s 23(c) of the Health Act or s 12(2) of the LGA 2002 inapplicable.

[170] This means that both s 12(2) of the LGA 2002 and s 23(c) of the Health Act provide the authority for a local authority to fluoridate water in fulfilment of the public health duties imposed by s 23 of the Health Act.[180]

[171] It is also likely that the power to fluoridate water arises out of the obligation under s 130 for the continuation of the provision of water services, in light of the history of fluoridation in New Zealand.[181] It may be too that fluoridation of water is not inconsistent with the general purposes relating to local infrastructure and public services contained in s 10(1)(b) of the LGA 2002 but it is not necessary to decide this point.

Effect of the Bill of Rights Act

[172] I now turn to the effect of s 11 of the Bill of Rights Act. The first issue in this regard is whether fluoridation of water is medical treatment for the purposes of s 11. I consider that it is, for the reasons given by the Chief Justice at [225]–[243] and for those given by O'Regan and Ellen France JJ at [72]–[97].[182] I also agree with the conclusion reached by the Chief Justice and O'Regan and Ellen France JJ that, as

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179 The decision-making process under the LGA 2002 is provided for in ss 76–81. Among other things s 78 provides that a local authority must give consideration to the views and preferences of persons affected, or likely to be affected, by the matter. Section 79 provides that a local authority has the discretion to make judgments concerning the matter before it.

180 See at [47]–[48] of O'Regan and Ellen France JJ's reasons. I also agree that s 69O(3)(c) supports the view that local authorities have the power to fluoridate water: see at [52] of O'Regan and Ellen France JJ's reasons. I accept that s 69O(3)(c) (and the standards) cannot be seen as authorising provisions (see the Chief Justice's discussion at [319]–[322]), but O'Regan and Ellen France JJ do not suggest they are: see at [53]. I also consider that s 69O(3)(c) is consistent with the purpose of the LGA 2002 that local authorities, with the appropriate consultation, make the decisions for their local area.

181 For the reasons set out by O'Regan and Ellen France JJ at [40]. It follows that I do not agree with the Chief Justice that the scheme of Part 2A of the Health Act precludes a power to fluoridate: see at [325] of her reasons.

182 I do not, however, consider the interpretation to be a generous interpretation of s 11 but the natural and ordinary meaning of the term "medical treatment" in light of the purpose of s 11: contrast the comment at [97] of O'Regan and Ellen France JJ's reasons.

people in the particular area where water is fluoridated have in practice no choice but to drink from the water supply, they are being medicated without their consent.[183]

[173] The next issue is the effect that fluoridation being medical treatment has on the conclusion arrived at above that, absent the Bill of Rights Act, local authorities have the power to fluoridate water.

[174] There is no specific power to fluoridate water in the LGA 2002 or the Health Act. As discussed above, such a specific power (or one arising by necessary implication) is no longer necessary under the LGA 2002. The power to fluoridate primarily arises from the duties of local authorities relating to public health and comes within s 12(2) of the LGA 2002, the general competence provision, as well as s 23(c) of the Health Act. While s 23(c) is a specific power, it relates to public health generally and not specifically to fluoridation.

[175] There is a principle of interpretation that any general power is assumed to be subject to the Bill of Rights Act.[184] Further, local authorities perform public functions and are bound by the Bill of Rights Act.[185] They must exercise their powers in accordance with the Bill of Rights Act.[186] The power to fluoridate water can therefore only be exercised if to do so would be consistent with the Bill of Rights Act.

[176] This means that local authorities can only fluoridate water if the prior consent of all possible consumers is sought and obtained[187] or if fluoridation in the particular district without consent is, in terms of s 5 of the Bill of Rights Act, demonstrably justified in a free and democratic society. Whether s 5 is satisfied may depend on local conditions. For this reason, I would prefer not to comment on the analysis of s 5 by

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183 See at [225] of the Chief Justice's reasons and [99] of O'Regan and Ellen France JJ's reasons.

184 This principle is set out in the cases discussed at [296]–[297] of the Chief Justice's reasons. I agree there is nothing to displace that presumption in this case.

185 New Zealand Bill of Rights Act 1990, s 3(b); Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [6.23].

186 The general competence provision power in s 12(2) of the LGA 2002 is in any event subject to the provision of any other enactment. This must include the Bill of Rights Act.

187 I accept this is unlikely to be practicable in most cases.

O'Regan and Ellen France JJ.[188] The validity of the Council's decisions to fluoridate are not before us in this appeal.[189]

Result

[177] For the above reasons, I agree that the appeal should be dismissed. I also agree with the costs orders.

WILLIAM YOUNG J

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My approach to the appeal

[178] As will become apparent, I am of the view that s 11 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) is not engaged by the fluoridation of drinking water. On this basis, the appeal comes down simply to a question of statutory interpretation: whether the statutory provisions discussed by O'Regan and Ellen France JJ empower the South Taranaki District Council to fluoridate the water it supplies within its territorial district. On this aspect of the case, I agree with the analysis of the statutory scheme which appears at [13]–[56] of their reasons. I would therefore dismiss the appeal.

[179] In the balance of my reasons I will explain my conclusion in respect of s 11.

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188 See at [113]–[144] of O'Regan and Ellen France JJ's reasons. Their analysis relates to the power to fluoridate. I do not consider it necessary to subject the power to fluoridate to a s 5 analysis. As that power can only be exercised in a rights consistent manner, the existence of the power is consistent with the Bill of Rights Act.

189 See at [5] of O'Regan and Ellen France JJ's reasons and [223] of the Chief Justice's reasons.

Overview of my approach

[180] Section 11 provides:

> Everyone has the right to refuse to undergo any medical treatment.

[181] The background to s 11 is discussed by O'Regan and Ellen France JJ. For my purposes the salient points are that s 11:

(a) reflects the pre-existing common law, which, via the law of torts gives individuals autonomy as to how others treat them physically and what they can and cannot be required to do;

(b) is, in a very loose sense, a development of art 7 of the International Covenant on Civil and Political Rights which was, as O'Regan and Ellen France JJ note,[190] a response to medical experimentation carried out in Nazi Germany; and

(c) falls to be considered in light of other international human rights instruments which provide protection of private and family life.

[182] The particular legislative history of s 11 is of limited assistance beyond an anticipation that the expression "medical treatment" would be construed broadly, as indeed it has been, so as for instance to include forced feeding.[191]

[183] The fluoridation of drinking water has been controversial in New Zealand for many decades. It was the subject of a Commission of Inquiry which reported in 1957. This report rejected the view that the fluoridation of water involved mass medication.[192] As well, there was significant litigation in the 1960s involving the fluoridation of water by the Lower Hutt City Council. I will discuss shortly the judgments which were delivered in that case. At this point, it is sufficient to say that

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190 Above at [93], citing Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, NP Engel, Kehl, 2005) at 188.

191 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.167]; and see the discussion, and cases cited, in Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 424–426.

192 See below at [191].

the result was the fluoridation of water was held to be within the powers of territorial authorities. Since then the addition of fluoride to drinking water and more general uses of fluoride have been subject to regulation under legislation addressed to the supply of water, the regulation of medicines and the supplementation of food. As the reasons of O'Regan and Ellen France JJ demonstrate, the legislation addressed to the supply of water authorises the addition of fluoride to drinking water. And, as I will explain later, I am of the view the regulatory regimes in relation to medicines and supplemented food proceed on the basis that neither fluoride which is added to drinking water nor fluoridated drinking water is a "medicine" for the purposes of those regimes.

[184] Against that background, the question whether the fluoridation of drinking water engages s 11 seems to me to raise a very particular question of interpretation. In resolving this question, it is necessary to have regard to the particular words used in s 11 and I will do so in these reasons. I do, however, consider that the question must be determined by reference to the statutory language construed as a whole. As with any interpretation exercise, this requires consideration of what is conveyed by the language in question in terms of ordinary English usage, both generally and in terms of the subject matter of the particular dispute, which in this case concerns the fluoridation of drinking water. For this reason, I consider that the issue whether s 11 is engaged in this case cannot be sensibly determined without reference to relevant community and legal understandings as to whether fluoridation results in compulsory medical treatment. Accordingly, I see the general background in respect of fluoridation to which I have just referred as material. This includes the 1957 Commission of Inquiry and *Lower Hutt City* litigation along with the way in which the use of fluoride, both in drinking water and more generally, has been regulated.

Are those whose drinking water is fluoridated denied a "right to refuse" to drink such water?

[185] It is possible to use filters for drinking water which eliminate added fluoride. As well, in some areas, it may be possible to arrange for alternative sources of water

supply. These considerations were seen as significant by the Human Rights Commission in its 1980 report to Parliament on the fluoridation of water:[193]

> The argument about mass medication or forced medication appears to be based on false analogy of the forced feeding that occurs in respect to people who have gone on hunger strikes. There are, however, no real similarities between the two situations as no attempt is made to force people in any direct physical way to drink water that has been fluoridated. There may be difficulties and even a considerable degree of inconvenience in obtaining unfluoridated water by those to whom this is a matter of importance, but there is no sense in which it can be alleged that they are forced to drink fluoridated water except as a matter of their own convenience.

[186] I accept that those who live in areas of New Zealand in which drinking water is fluoridated would find it difficult to avoid drinking fluoridated water. Indeed my impression is that only those who are extremely concerned about fluoridation would be prepared to put up with the inconveniences associated with drinking only unfluoridated water. I nonetheless have some reservations whether practical, but not insurmountable, difficulties of this kind mean that there is a denial of "the right to refuse" to drink fluoridated water. In particular, it seems to me that the fluoridation of drinking water results in compulsion at a level sufficiently removed from what is primarily contemplated by s 11 as to at least raise a question whether that section is truly engaged in this case.

[187] Despite what I have just said, I propose to address the appeal on the basis that if those who drink fluoridated water thereby "undergo medical treatment", the fluoridation of drinking water by a territorial authority would sufficiently detract from their practical ability to refuse such treatment as to breach s 11.

Fluoridating water/"undergo medical treatment": general considerations

[188] The argument against the view that those who drink fluoridated water thereby undergo medical treatment is as follows. Fluoride occurs naturally in drinking water at varying levels. In areas where the drinking water is fluoridated, those levels are adjusted so that the fluoride content is around one part per million. At this level, fluoride has beneficial effects on tooth enamel without significant health

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193 Human Rights Commission *Report on Representations on Fluoridation of Water Supplies* (August 1980) at 3.

disbenefits.[194] Fluoride added to water is therefore properly to be seen as a supplement, rather as iodine in salt and folic acid in bread are supplements. Further, and in any event, fluoridated water which is supplied to consumers is not in the nature of a medicine as the primary purpose of supply is to provide drinking water rather than to protect dental health. "Medical treatment" characteristically involves treatment solely for therapeutic purposes. It also characteristically involves a one-on-one relationship between a health professional and a patient. In areas of the world in which fluoride occurs naturally in water, the supply of such (naturally) fluoridated water to those without water could not sensibly be regarded as medical treatment. This being so, why should supply of water which is materially identical in chemical constitution be differently regarded?[195]

[189] These aspects of the case were developed by Dr Robin Whyman in his evidence:

> Fluoridation of water, is in my view, a supplement rather than medication:
>
> (a) Fluoride ions already exist naturally, both in the human body, primarily in bone and enamel, and in drinking water. Water fluoridation increases the quantity of these ions present in water – and therefore the body – by a small amount. The additional fluoride added to New Zealand drinking water supplies recreates naturally occurring levels in other areas of the world and is therefore in my view a supplement rather than a form of medication.
>
> (b) The situation is analogous to adding iodine to salt to prevent thyroid difficulties. Like fluoride, iodine and salt have associated nutrient reference values derived by the New Zealand Ministry of Health and the Australian National Health and Research Medical Council.
>
> Water fluoridation is not in my view "medical treatment":
>
> (a) Water fluoridation is a population health, or public health, measure that works in a prophylactic, or preventive way.

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194 Peter Gluckman and David Skegg *Health effects of water fluoridation: A review of the scientific evidence* (Office of the Prime Minister's Chief Science Advisor and the Royal Society of New Zealand, August 2014).

195 Where the natural water supply contains levels of fluoride which are inimical to health, the water supplier will reduce the fluoride content. Is the resulting supply of water medical treatment if the reduction is to an optimal therapeutic level which is beneficial but not if it is sub-optimal? And what if the water supplier has a choice of two natural supplies, one naturally fluoridated and one not? Is it medical treatment if the water supplier uses the water supply which is naturally fluoridated?

(b) Water fluoridation increases the community's environmental exposure to fluoride in a way that replicates normal environmental exposure levels in some parts of the world.

(footnotes omitted)

[190] Those who oppose fluoridation have a number of arguments in response. Thus Associate Professor David Menkes, a witness for the appellant, observed:

> … there is no physiological reaction in the human body that requires fluoride. Nor is fluoride required for any aspect of human growth, development, or reproduction.

On this basis, he asserted that "fluoride cannot be considered a nutrient or dietary supplement". And Professor Martin Ferguson made what seems to me to be the same point when he said:

> While topical or systemic fluoride has been shown to have some effect in reducing dental caries, there is no disorder recognised that is due to a deficiency of fluoride. Therefore it cannot be classified as a supplement.

The Commission of Inquiry into fluoridation

[191] Water fluoridation was the subject of a 1957 report of a Commission of Inquiry in which the Commission specifically addressed the question whether fluoridation of water was in the nature of mass medication. Its conclusions (and the associated reasons) were as follows:[196]

> 223. … Supporters of fluoridation have stated that the term "mass medication" is a misnomer. They pointed out that fluoride is *not* used to *treat* dental decay but to *reduce the incidence of the disease*. This fact was not disputed. According to them, the process consists of adding to water, which no one has disputed is itself a food, a sufficient amount of another food substance (fluoride ions) already naturally present in it to raise the total concentration to the optimum nutritional level. On this reasoning, they have argued that the process is food fortification completely analogous to examples mentioned in the evidence of Professor Gregory and Dr Muriel Bell and referred to in the following paragraph.
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> 224. Well recognised examples of food fortification are the addition of calcium carbonate to "national flour" in Great Britain, the compulsory addition of vitamins A and D to margarine in Great Britain, the compulsory nutritional enrichment of bread and flour with B-group vitamins in some parts of the United States, the addition to some salt of iodide and the addition of synthetic vitamin C to a lemon-flavoured powder used by the New Zealand

[196] WF Stilwell, NL Edson and PVE Stainton "Report of the Commission of Inquiry on the Fluoridation of Public Water Supplies" [1957] V AJHR H47.

> Navy. The addition of trace elements to the soil for the benefit of animals (e.g., the addition of cobalt to deficient pasture to combat bush sickness in sheep or cattle) or of plants (e.g., the addition of boron, manganese, molybdenum, or zinc to deficient soils) are examples of the way in which food deficiencies are supplemented in these cases for animals or for plants.
>
> 225. At the concentrations under discussion, fluoride is not a poison and is either a drug on the one hand or a food on the other. There is no doubt that it is beneficial to the human body just as the substances mentioned by Professor Gregory and Dr Bell are beneficial. It is certain, however, that it neither "counteracts the effects of disease nor reinforces the tissues in their struggle to maintain their functions when these are rendered abnormal". It does not counteract the effects of dental decay nor does it assist the teeth to maintain their functions after they are decayed.
>
> 226. We are satisfied that the process by which fluoride achieves its beneficial result is that a trace of the substance is utilised by the active tissues of the tooth germ as a foodstuff while they are forming the mineral substance of the tooth. Any effect subsequent to eruption of the tooth is an incidental ion-exchange at the surface exposed to drinking water.
>
> 227. Some authorities (see for example the evidence of Mr Needham (9J 3)) regard fluorine as an indispensable trace element in the diet, whereas others question its indispensability but do not categorically deny that it is a food. (Mitchell & Edman, 1953; McLester & Darby, 1952). None, however, questions the usefulness of dietary fluorine to civilised man in reducing susceptibility to dental decay, and the evidence has shown that the usefulness of fluoride arises from its incorporation into the organised structure of tooth enamel (para. 74). In this regard, therefore, we consider that whatever academic discussion may revolve around the question of indispensability, it is certainly no less than common sense to make use of the beneficial properties of this trace element. If the intake is insufficient the deficiency should be made up in imitation of nature by fortification of the drinking water (cf. Waldbott, 1955 a).
>
> 228. For the foregoing reasons we express our conclusion that fluoride is not a drug but a nutrient and that fluoridation is a process of food fortification. As a process it is quite analogous to the compulsory addition of fat soluble vitamins to margarine, of vitamin B1 (thiamine) to bread, or the non-compulsory addition of potassium iodide to salt. For this reason there are no valid grounds for calling the process "mass medication", a term which has acquired a certain emotional content in the course of controversy. In reaching this decision, we believe we are applying to the word medication the meaning most people attach to it.

[192] It will be observed that this discussion records the conflicting positions in similar terms to those proposed by Associate Professor Menkes and Professor Ferguson, on the one hand, and Dr Whyman on the other, with the Commission coming down on the same side as Dr Whyman.

Fluoridation in the courts

[193] Around the same time as the Commission of Inquiry was addressing fluoridation in New Zealand, the legality of such fluoridation was being challenged in Canada in *Toronto (Municipality) v Forest Hill (Village)*.[197] In this litigation both the Court of Appeal of Ontario and the Supreme Court of Canada held that a bylaw enacted to provide for the fluoridation of the metropolitan water supply was invalid. Such fluoridation was for "medicinal purposes" (as it was put in the Court of Appeal)[198] or for "a special health purpose" (as it was put by Rand J in the Supreme Court)[199] or involved the "compulsory preventive medication of the inhabitants of the area" as Cartwright J described it (also in the Supreme Court).[200]

[194] The *Forest Hill* case was considered in the litigation involving the fluoridation of water by the Lower Hutt City Council, a case which gave rise to judgments in the Supreme Court, Court of Appeal and Privy Council.[201]

[195] In the Supreme Court, McGregor J rejected the Council's argument that it was entitled to fluoridate by reason of its general power under s 240 of the Municipal Corporations Act 1954 to supply "pure water". He held that this provision did not empower the supply of what he called "medicated pure water".[202] In doing so, he relied on the judgment of the Court of Appeal of Ontario in *Forest Hill*.[203] Despite this, however, he upheld the validity of the Lower Hutt City Council's fluoridation of its water supply and, in doing so, relied on s 288 of the Municipal Corporations Act which provided:

> The Council may 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 so far as they apply to the district.

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197 *Toronto (Municipality) v Forest Hill (Village)* [1957] SCR 569 [*Forest Hill* (SC)] which affirmed the decision of the Court of Appeal of Ontario: see *Toronto (Municipality) v Forest Hill (Village)* [1956] OR 367 [*Forest Hill* (CA)].

198 *Forest Hill* (CA), above n 197, at 377.

199 *Forest Hill* (SC), above n 197, at 574.

200 At 580.

201 *Attorney-General v Lower Hutt City* [1964] NZLR 438 (SC) [*Lower Hutt City* (SC)]; *Attorney-General v Lower Hutt City* [1964] NZLR 445 (CA) [*Lower Hutt City* (CA)]; and *Attorney-General v Lower Hutt City* [1965] NZLR 116 (PC) [*Lower Hutt City* (PC)].

202 *Lower Hutt City* (SC), above n 201, at 441.

203 At 441–442.

He took the view that the adding of fluoride to water "has the effect of guarding teeth from decay or destruction … in later life"[204] and he went on to say:[205]

> This seems to me to amount to the preservation of health, and, as it may affect a considerable proportion of the public, it is a preservation of the public health. Furthermore, fluoridation treatment seems to me to be necessary or needful owing to the deficiency in the natural water, the high incidence of dental caries, the need for the prevention or reduction thereof in the interests of public health, and the absence of any other satisfactory method of administering fluoride. Although I may be adopting a liberal construction, I consider that in the interests of the general public the Legislature intended a liberal construction to be applied to an Act empowering a local authority to exercise public services for the public benefit. In my opinion, therefore, fluoridation of water supply is necessary for the preservation of the public health.

[196] The judgment of McGregor J is thus at least consistent with the view that the supply of fluoridated water is in the nature of medical treatment. And to the same general effect was the dissenting judgment of Turner J in the Court of Appeal:[206]

> In my opinion what [s 240] authorises is the collection of ground water reasonably suitable for drinking purposes, and its purification by removing from it deleterious and contaminating substances which it naturally contains. If the removal of these substances involves incidentally the addition of some other harmless or beneficial substance necessarily added in the course of the process of purification, this incidental addition will not invalidate the procedure, which is still one essentially of purification. The use of chlorine and of lime, as I have already indicated, may perhaps be justified by this reasoning. But, in my opinion, water can never be purified, using any reasonable interpretation of that word, by adding to it a substance not there before, simply by way of additive for the purpose of compulsorily improving the diet of the consumer.
>
> It can make no difference, in my opinion, that the additive is conclusively shown — as it is shown here — to be wholesome or beneficial in the proportions used. If one substance can be added on this ground, so can another; and it is impossible to see where such a construction of the section could stop, short of authorising any amount of compulsory medication which the council might reasonably consider beneficial to the inhabitants of its district.

[197] The majority in the Court of Appeal (North P and McCarthy J) took a different view. Each indicated disagreement with the majority's conclusion in *Forest Hill* including the view that fluoridation involved mass medication. Their reasons for so concluding were that fluoride is naturally found in water and that increasing its

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204 At 444.
205 At 444.
206 *Lower Hutt City* (CA), above 201, at 458–459.

concentration should not be seen as adding anything "foreign" to the water which was supplied.[207]

[198] The advice of the Privy Council was to the same general effect as that of the majority of the Court of Appeal:[208]

> 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.

The Privy Council also made it clear that it disagreed with the approach taken in the *Forest Hill* case and in particular it approved the remarks made in the Court of Appeal by North P.[209]

The regulatory position

[199] The Medicines Act 1981 defines medicine in this way:

> **3 Meaning of medicine, …**
>
> (1) In this Act, unless the context otherwise requires, **medicine**—
>
> (a) means any substance or article that—
>
> (i) is manufactured, imported, sold, or supplied wholly or principally for administering to 1 or more human beings for a therapeutic purpose; and
>
> (ii) achieves, or is likely to achieve, its principal intended action in or on the human body by pharmacological, immunological, or metabolic means; and
>
> (b) includes any substance or article—
>
> (i) that is manufactured, imported, sold, or supplied wholly or principally for use as a therapeutically active ingredient in the preparation of any substance or article that falls within paragraph (a); or
>
> (ii) of a kind or belonging to a class that is declared by regulations to be a medicine for the purposes of this Act; but

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207 See at 453–456 per North P and 465–468 per McCarthy J.
208 *Lower Hutt City* (PC), above n 201, at 124.
209 At 125.

(c) does not include—

…

(ii) any food within the meaning of section 2 of the Food Act 1981; or

…

(vi) any substance or article of a kind or belonging to a class that is declared by regulations not to be a medicine for the purposes of this Act.

[200] Section 2 of the Food Act 1981[210] defines "food" in this way:

> **Food** means anything that is used or represented for use as food or drink for human beings; and includes—
>
> (a) any ingredient or nutrient or other constituent of any food or drink, whether that ingredient or nutrient or other constituent is consumed or represented for consumption by human beings by itself or when used in the preparation of or mixed with or added to any food or drink; and
>
> (b) anything that is or is intended to be mixed with or added to any food or drink; …

[201] I think it clear that fluoridated water was never a medicine. First, it is not supplied "wholly or principally [for administration] for a therapeutic purpose". Rather, it is supplied for general household use. Secondly, I regard fluoridated water as within the s 2 definition of "food" in the Food Act 1981. Regulation of supplemented foods (including foods to which fluoride has been added) was provided for under the Dietary Supplements Regulations 1985 and has subsequently been more specifically addressed in various New Zealand Food (Supplemented Food) Standards, the most recent of which was issued in 2016.[211] I am likewise of the view that the fluoridating compounds are "food" for the purposes of the Food Act definition as being within the expression "any ingredient or nutrient or other constituent of any … drink", namely fluoridated water. In any event, the Medicines Amendment Regulations 2015

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210 This was in force at the time of the hearings and judgments in the High Court. The current definition of "food" in s 9 of the Food Act 2014 is, in material respects, the same in substance as the earlier definition as it includes "anything that is used for … human consumption" and includes "any ingredient or other constituent of any food or drink".

211 These standards were issued under s 11C of the Food Act 1981 and the continuation and status of the 2016 standards is provided for in s 421(2) of the Food Act 2014.

have put it beyond any doubt that neither fluoridating agents nor fluoridated water are medicines.

[202] At this point it may be helpful to record the main respects in which the use of fluoride is regulated:

(a) Fluorides are specified as prescription medicines in the Medicines Regulations 1984 in this way:[212]

> Fluorides; for internal use in medicines containing more than 0.5 milligrams per dose unit except in medicines containing 15 milligrams or less per litre or per kilogram; except in parenteral nutrition replacement preparations; for external use in medicines containing more than 5.5 grams per litre or per kilogram except when supplied to a dental professional registered with the Dental Council

(b) Fluorides are specified as pharmacy-only medicines in the same regulations in this way:[213]

> Fluorides; for internal use in medicines containing 0.5 milligrams or less per dose unit; except in parenteral nutrition replacement preparations; for external use in liquid form in medicines containing 1 gram or less per litre or per kilogram and when sold in packs approved by the Minister or the Director-General for distribution as pharmacy-only medicines except in medicines containing 220 milligrams or less per litre or per kilogram and in packs containing not more than 120 milligrams of total fluoride; except when supplied to any dental professional registered with the Dental Council; except in medicines containing 15 milligrams or less per litre or per kilogram

(c) The use of fluorides in dietary supplements is regulated by reg 3 of the Dietary Supplements Regulations 1985 (which refers to the current edition of *Recommended Dietary Allowances*, published by the Food and Nutrition Board of the National Academy of Science and National Research Council, Washington DC, USA). These Recommended Dietary Allowances encompass drinking water where fluoridation is performed or natural fluorides are present and, as I have noted, the

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212 Medicines Regulations 1984, Schedule 1, Part 1.
213 Schedule 1, Part 3.

Dietary Supplement Regulations 1985 as first promulgated extended to the regulation of supplemented food.

(d) Since 2010, supplemented food has been regulated by New Zealand Food (Supplemented Food) Standards made under the Food Act 1981.[214]

(e) Fluoridation of drinking water is addressed by ss 69O–69R of the Health Act 1956 in terms which make it clear that the legislature contemplated that fluoride might be added to drinking water (see s 69O(3)(c)). As well, the *Drinking-water Standards for New Zealand 2005 (Revised 2008)* also contemplate such addition of fluoride.[215]

I see this pattern of regulation as predicated on, and incorporating, the view that neither fluoridating compounds nor fluoridated water are medicines.

Drawing the threads together

[203] I see the much cited comments of Professor HLA Hart as to the "core of settled meaning" and "penumbra" as illustrative of the problem which must be addressed:[216]

> A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called "vehicles" for the purpose of the rule or not? If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use — like "vehicle" in the case I consider — must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.

[204] A patient receiving electroconvulsive therapy is well within the s 11 concept of undergoing medical treatment and is thus within the "core of settled meaning" of the expression. And it is easy enough to give other similar examples which would likewise not be susceptible to debate. Such examples will typically involve direct

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214 See the Dietary Supplements Amendment Regulations 2010 (explanatory note).

215 Ministry of Health *Drinking-water Standards for New Zealand 2005 (Revised 2008)* (October 2008).

216 HLA Hart "Positivism and the Separation of Law and Morals" (1957) 71 Harv L Rev 593 at 607.

engagement between a medical professional and a patient and the provision of services (perhaps, but not necessarily, involving medicines) for therapeutic purposes. Outside that paradigm, scope for debate emerges. Is a passer-by who provides CPR to a person who has collapsed in the street providing medical treatment? While I would see this as outside the core settled meaning of "medical treatment", I accept that it is within the penumbra and, depending on the statutory context, might be held to be "medical treatment".[217] The more routine the activity, the less it might be thought to involve medical treatment. It would be odd to regard a parent who rubs sunscreen onto a child or brushes that child's teeth as providing medical treatment. It would also not be in accordance with the ordinary understanding of the expression to say that such a child is "undergoing medical treatment". Indeed, I do not think that such categorisations are even debatable. They would be, to use Professor Hart's terms, outside the penumbra.

[205] I am of the view that an interpretation of "undergo medical treatment" which encompasses the supply of fluoridated water is well outside the core settled meaning of "undergo medical treatment". But given the number of those who have espoused the view that fluoridation does involve mass medication, I have to accept that it is a possible meaning. In other words, I accept that an interpretation of "undergo medical treatment" which encompasses drinking fluoridated water is within the penumbra, albeit that I would say, right on the outer edge. There is thus a question whether such an interpretation is appropriate in the context of s 11.

[206] As I have already indicated, the legislative history of s 11 is not particularly illuminating on this point. On the other hand, there is nothing in that history to suggest that the legislature had it in mind that those who consume fluoridated water thereby undergo medical treatment. This I see as being of some significance. If the argument of the appellant is correct, New Zealanders who live in fluoridated areas – around half the population – are being compelled to undergo medical treatment, in apparent breach of s 11. In the absence of some clear indication that this consequence was within the legislative purpose, I would be reluctant to construe s 11 so as to bring it about.

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[217] It would not be "medical treatment" for the purposes of a statute regulating the provision of medical services and licensing medical practitioners.

[207] It has never been suggested that the supply of naturally fluoridated water involves medical treatment. I do not see why the supply of fluoridated water which is materially the same in chemical composition as naturally fluoridated water should be regarded differently. Fluoridated water is not a medicine in either the ordinary understanding of the word or as it is used for regulatory purposes. Local authorities who supply water are not medical professionals. So we have something which is not a medicine supplied by parties who are not medical professionals. I see the fluoridation of water as closely analogous to the iodisation of salt. And I do not regard those who ingest iodised salt or bread made with iodised salt as undergoing medical treatment. Fluoridated water is supplied primarily for the purpose of consumption as water and the therapeutic consequences are very much ancillary to that purpose. I am not able to think of anything comparable – that is the provision of food or drink for consumption but with incidental therapeutic purposes – which could sensibly be regarded as medical treatment.

[208] I consider that the views I have just expressed are reinforced by the contextual material to which I have referred. The question whether fluoridation is in the nature of mass medication was addressed by the Commission of Inquiry in 1957. It concluded that it was not. The reasons for this conclusion do not seem to me to have been undermined by subsequent developments. The view taken by the Canadian Courts in *Forest Hill* that fluoridation involved mass medication was not accepted by a majority in the Court of Appeal and by the Privy Council in the *Lower Hutt City* litigation. And, as I have explained, the regulatory regimes around the use of fluoride, both as they were in 1990 when the Bill of Rights Act was enacted and as they are now, are premised on the understanding that neither fluoridated water nor the fluoridating compounds used in the fluoridation process are medicines.

[209] I do not see as helpful the question, sometimes raised in the context of fluoridation, whether it would be permissible to put antibiotics or other medicines into drinking water. This question is, of course, hypothetical. And, in the unlikely event that something of this sort were to be proposed, it would fall to be assessed against a historical and regulatory background which would be entirely different from the one I have been discussing.

[210] As will by now be apparent, I construe s 11 of the Bill of Rights Act as not engaged by the fluoridation of drinking water.

ELIAS CJ

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The appeal

[211] South Taranaki District Council decided in December 2012 to add fluoride to the drinking water it supplies to the towns of Patea and Waverley. The decision was taken for public health purposes to improve poor dental health in the two towns and followed public consultation. New Health New Zealand Inc challenged the decision

of the Council by way of judicial review in the High Court. It claimed that the addition of fluoride was unlawful both because it was outside the statutory powers of the Council under the Local Government Act 2002 and the Health Act 1956 and because it was in breach of the right everyone has under s 11 of the New Zealand Bill of Rights Act 1990 to refuse to undergo any medical treatment.[218] The claimed breach of s 11 of the New Zealand Bill of Rights Act was relied on as in itself rendering the decision unlawful and beyond the power of the Council because no power to limit s 11 for the purpose of preventing dental decay was "prescribed by law". New Health was unsuccessful in these contentions in the High Court[219] and its appeal to the Court of Appeal was dismissed.[220] New Health appeals from the determination of the Court of Appeal.

Approach and summary of conclusions

[212] I agree with Glazebrook, O'Regan and Ellen France JJ that the High Court and Court of Appeal were wrong in the view that the addition of fluoride is not "medical treatment" within the meaning of s 11 of the New Zealand Bill of Rights Act. My reasons for this conclusion are in general agreement with the reasons given by O'Regan J.

[213] In common with Glazebrook, O'Regan and Ellen France JJ and in agreement on this point with the Courts below, I accept that fluoride in the water supply is not something that can reasonably be avoided by those to whom the water is supplied.[221] If administration of fluoride in water is "medical treatment" (as the Judges in the majority in this Court consider it to be), it therefore removes from those to whom the water is supplied "the right to refuse to undergo any medical treatment" provided by s 11 of the New Zealand Bill of Rights Act.

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218 An additional and alternative ground of review that the Council failed to take into account a number of mandatory relevant considerations in making the decision (including s 11 of the New Zealand Bill of Rights Act 1990) was dismissed in the High Court and not maintained on appeal. It is no longer live on the appeal to this Court.

219 *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395, [2014] 2 NZLR 834 (Rodney Hansen J) [*New Health* (HC)].

220 *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13 (Randerson, Wild and French JJ) [*New Health* (CA)].

221 See the reasons given by O'Regan J above at [99]; *New Health* (HC) at [94]; and *New Health* (CA) at [99].

[214] It is common ground that there is no legislative provision expressly authorising the administration of fluoride or any other medical treatment through the supply of water. I differ from Glazebrook, O'Regan and Ellen France JJ in that I am unable to agree that authority to administer fluoride or other medical treatment for public health purposes is to be found in the general competencies of the Council conferred by s 12 of the Local Government Act, powers which mirror those provided to other non-natural persons such as those given to companies under s 16 of the Companies Act 1993. That is so even when s 12 is read alongside the requirement of continuation of water supply in s 130 of the Local Government Act and the responsibilities of local authorities for public health and water supply contained in both the Local Government Act and the Health Act.

[215] I do not accept that the meaning of the current legislation is settled by the history of fluoridation by councils in New Zealand and by the decision of the Privy Council 50 years ago in *Attorney-General v Lower Hutt City*[222] that the power to add fluoride to water is one "necessarily implicit" in s 240 of the Municipal Corporations Act 1954 (a provision which authorised councils to "construct waterworks for the supply of pure water for the use of the inhabitants of the district …"). The legislative scheme for regulation of the supply of drinking water has changed significantly since *Attorney-General v Lower Hutt City*. The basis on which that case was decided (the then statutory responsibility of local authorities to supply "pure water") is overtaken by the statutory scheme in Part 2A of the Health Act[223] which imposes on the Minister of Health the obligation to set standards to ensure that water is both safe to drink and wholesome.[224]

[216] It is notable that both North P and Turner J in the Court of Appeal in *Attorney-General v Lower Hutt City* took the view that the "very general provisions" for public health responsibilities of councils under s 288 of the Municipal Corporations Act 1954 and s 23 of the Health Act (the current version of which is relied on in support of the power contended for here) did not provide powers by implication to allow the Council to "medicate its water supply" by addition of

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222 *Attorney-General v Lower Hutt City* [1965] NZLR 116 (PC) [*Lower Hutt City* (PC)].

223 Enacted by the Health (Drinking Water) Amendment Act 2007 which came into force on 1 July 2008.

224 See below at [247]–[267].

fluoride.[225] Such provisions were considered by them not to "enlarge" the power contained in s 240 of the Municipal Corporations Act to supply "pure water".[226] (McCarthy J, in the Court of Appeal, and the Privy Council on further appeal found it unnecessary to rely on the general public health powers of councils.[227]) I do not accept that the general powers of competence provided to councils in s 12 of the Local Government Act allow the administration of medical treatment through the water supply against the statutory scheme of Part 2A of the Health Act.

[217] I am unable to agree with the view taken by O'Regan and Ellen France JJ that the prohibition under s 69O(3)(c) of the Health Act (which prevents the Minister of Health requiring addition of fluoride when setting standards for drinking water) "makes no sense" unless fluoridation of drinking water is otherwise authorised.[228] The explicit prohibition on requiring fluoridation through the standards responds to a concern the Select Committee thought a possibility "in theory", but explained was "never intended" to be permitted by s 69O or the standards.[229] Such prohibition on standards to require the addition of fluoride says nothing about the capacity of local authorities or other suppliers of drinking water to add fluoride on their own initiative using their general powers of competence and relying on their general responsibilities in relation to public health in their districts. Indeed, the fact that the Minister is prohibited from requiring the addition of fluoride (despite having wide powers and responsibilities specifically in relation to drinking water) makes it incongruous to find a power to impose fluoride without consent to be implicit in general powers of competence of local authorities which do not mention drinking water.

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225 *Attorney-General v Lower Hutt City* [1964] NZLR 445 (CA) [*Lower Hutt City* (CA)] at 456–457 per North P. See also at 460–461 per Turner J.

226 At 457 per North P and 461 per Turner J.

227 At 468 per McCarthy J; and *Lower Hutt City* (PC) at 125.

228 Compare the reasons given by O'Regan J above at [53]. See also Glazebrook J above at n 168.

229 Health (Drinking Water) Amendment Bill 2007 (52-2) (select committee report) at 5.

[218] The wider legislative context in which the provisions of the Health Act and Local Government Act fall to be interpreted now includes the New Zealand Bill of Rights Act, s 11 of which provides:

> **11 Right to refuse to undergo medical treatment**
>
> Everyone has the right to refuse to undergo any medical treatment.

[219] Applying the statutory context of Part 2A of the Health Act and s 11 of the New Zealand Bill of Rights Act, I conclude that s 12 of the Local Government Act cannot properly be interpreted as empowering local authorities to administer any medical treatment through the water supply, including fluoride. Indeed, s 12(3) of the Local Government Act provides that the capacity of a local authority under s 12(2) (the provision which identifies the capacity and powers of a local authority "[f]or the purposes of performing its role") is "subject to this Act, any other enactment, and the general law", an exclusion that imports the requirements of s 11 of the New Zealand Bill of Rights Act.

[220] Construing the general provisions of the Local Government Act and the Health Act relied on as impliedly conferring authority on local authorities to administer medical treatment without consent is also difficult to reconcile with the specific statutory provisions which have regulated compulsory treatment under the Health Act. Such treatment is now provided for in Part 3A of the Health Act which, from January 2017, replaces the former provisions previously contained in Part 3.[230] Part 3A and its precursors deal with serious incursions on freedom but also address serious public health risks. As is clear from the explanatory note to the Bill which introduced Part 3A, that reform was consciously "developed within a human rights framework".[231]

[221] The lack of any implied power to administer medical treatment in water follows from what I consider to be the proper interpretation of s 12 and s 130 of the Local Government Act and s 23 of the Health Act (the only sources of such implied power suggested), applying conventional principles of statutory interpretation. In

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230 See ss 88–92 of the Health Act 1956, repealed by the Health (Protection) Amendment Act 2016 (by which the new Part 3A was also enacted).

231 Health (Protection) Amendment Bill 2014 (234-1) (explanatory note) at 2.

addition however to the contextual significance of Part 2A of the Health Act and the New Zealand Bill of Rights Act when interpreting the sections conferring powers on local authorities, I consider the question whether the statutory powers authorise fluoridation is put beyond doubt by the rule of interpretation contained in s 6 of the New Zealand Bill of Rights Act. In this approach I differ from other members of the Court who treat s 6 as relevant only when the natural meaning of a statutory provision limiting or constituting authority to limit a right is not a justified limitation in a free and democratic society. I take the view that s 6 is a principle of interpretation of general application and that it bears directly on the immediate question whether power to provide medical treatment without the consent of those being treated is impliedly authorised by the provisions of the Local Government Act and the Health Act.

[222] Since I conclude that the statutory provisions relied on, properly construed (with or without reliance on s 6), do not provide local authorities supplying water with authority to administer medical treatment without consent, it is unnecessary for me to consider further whether any such power, if expressly conferred or conferred by necessary implication, would be a justified limitation on the right contained in s 11. I would however be reluctant to conclude that the provision of general discretionary powers is itself justifiable as a limitation of rights "prescribed by law" without more.[232] I would expect justification of such powers to address why such broad discretion without identification of purpose and the circumstances in which the discretion can be used constitutes a limit "prescribed by law" which is demonstrably justifiable in a free and democratic society.

[223] We are not called on in the present appeal to consider whether the decision of the Council to add fluoride was lawful if found to be authorised. The challenge brought by New Health to the substantive determination of the Council is not before us. The Court does not have available to it the materials which show how the Council weighed the human right in s 11 in reaching its decision, as it was obliged to do even if authorised to limit rights on a justifiable basis.[233] Rather, a summary of the process followed provided in the submissions of the Council to this Court indicates that the report on which the Council acted had considered a range of submissions received,

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232 As required by s 5 of the New Zealand Bill of Rights Act.

233 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) [*Moonen (No 1)*].

including as to the Bill of Rights Act implications, and that the Council itself considered all the submissions before making its decision.

[224] The High Court and Court of Appeal took the view that s 11 of the New Zealand Bill of Rights Act was not engaged because the addition of fluoride for public health reasons was not undertaken in the course of a "therapeutic relationship". I first explain why I disagree with that understanding of the meaning of s 11, and its further development in this Court by William Young J, before turning to the interpretation of the Local Government Act and the Health Act, on which I consider the appeal turns.

Section 11 of the New Zealand Bill of Rights Act 1990

[225] I agree with the views expressed in the Courts below that the population to which water is supplied cannot in practice avoid ingesting any substance added to it.[234] If therefore the addition of fluoride is medical treatment, individuals are denied the choice to accept or reject treatment. The critical question is whether the addition to drinking water of a pharmacologically active substance for the purpose of reducing tooth decay in the population to which the water is supplied constitutes "medical treatment" within the meaning of s 11 of the New Zealand Bill of Rights Act. The starting point in considering the meaning of s 11 of the New Zealand Bill of Rights Act must be its text and purpose, as s 5 of the Interpretation Act 1999 requires.

[226] The purpose of adding fluoride to drinking water is to reduce tooth decay. Such addition was accepted by the Privy Council in *Attorney-General v Lower Hutt City* to result in "water to which an addition is made solely for the health of the consumers".[235] In the present case, an expert dental health witness for the Council described the addition of fluoride to the water supply as a "public health measure that works in a prophylactic or preventive way".[236] Despite this, the Courts below interpreted s 11 as confined to medical treatment undergone in the course of a "therapeutic relationship".

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234 *New Health* (HC) at [94]; and *New Health* (CA) at [99].

235 *Lower Hutt City* (PC) at 124.

236 This was the evidence of Dr Robin Whyman, Clinical Director of Oral Health Services for Hawke's Bay District Health Board and Principal Dental Officer of the Whanganui District Health Board. It is now thought that fluoride acts topically by promoting the remineralisation of tooth enamel when it comes into contact with the tooth surface.

[227] The arguments that prevailed and which are repeated in this Court are that those to whom fluoridated water is reticulated are not within the scope of the section for seven principal, if overlapping, reasons:[237]

(a) the supply of water for consumption is not direct medical treatment because it does not involve "direct interference" with bodily integrity and personal autonomy;

(b) the drinking of water to which fluoride has been added does not constitute "undergoing" medical treatment, a concept properly understood to apply to treatment in the course of a "therapeutic relationship" between a professional and an individual;

(c) fluoride added to reticulated drinking water at levels that do not exceed the standards set for drinking water by the Minister of Health is comparable to supplements such as the addition of folic acid to bread or iodine to salt;

(d) the meaning of s 11 has to be understood purposively, in the context of its expression and its historical origin (which the Court of Appeal treated as derived from the pre-existing common law interests protected by the law relating to battery and trespass to the person), with care being taken not to "overshoot" the purpose of the right (in accordance with a precept adopted by Dickson J in connection with interpretation of the Canadian Charter of Rights and Freedoms[238]);

(e) there is nothing in the parliamentary materials to suggest that the legislature intended the concept of "medical treatment" to extend to public health measures like fluoridation of water;

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237 See *New Health* (HC) at [79]–[90]; and *New Health* (CA) at [60]–[98].
238 *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 344.

(f) the addition of fluoride at low levels is a minimal intrusion on the s 11 right (and a "resolute consumer" could take steps to avoid ingesting fluoride) which does not engage the right;

(g) the meaning of s 11 has to be adjusted to take account of the public health interests of others to avoid giving those opposed to fluoridation "a right of veto over public health measures which it is not only the right but often the responsibility of local authorities to deliver" which would "cut across the obligation of the state to promote the health of its citizens" under art 12 of the International Covenant on Economic, Social and Cultural Rights.[239]

[228] I do not find these arguments persuasive. They entail substantial reading-down of the language of s 11. Such restrictive meaning is inconsistent with the White Paper which preceded enactment of the New Zealand Bill of Rights Act which emphasised that the term "medical" was used in the provision which has become s 11 in a "comprehensive sense".[240] (It was explicitly envisaged that it would apply, for example, to psychological treatment.) Confining s 11 to treatment provided "in a therapeutic relationship" would exclude public health measures delivered outside such relationship. There is no textual justification for such restriction. Nor is it consistent with protection of the values of human dignity and autonomy which underlie the purpose of s 11 in allowing individual choice as to medical treatment.

[229] "Undergo[ing] medical treatment" is not a phrase that requires or suggests the refinement of provision in a "therapeutic relationship". It is not a technical term. I do not agree with the view taken in the Court of Appeal that it is "inapt" to describe treatment delivered through the water supply.[241] I consider it encompasses administration of medical treatment however delivered. Indeed, an interpretation that confined s 11 to treatment in the course of a "therapeutic relationship" would substantially restrict the effect of s 11 because the New Zealand Bill of Rights Act

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239 *New Health* (HC) at [86]–[87], referring to art 12 of the International Covenant on Economic, Social and Cultural Rights 933 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

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

241 *New Health* (CA) at [88].

applies only to those exercising public power, few of whom may be expected to be in a "therapeutic relationship" with the individuals being treated. Section 11 is directed at those in a position to impose treatment without the consent of those being treated.

[230] In *R v Oakes*, the Supreme Court of Canada held that the meaning of a right guaranteed by the Charter was to be ascertained "in the light of the interests it was meant to protect".[242] It is the "cardinal values" embodied in the right that point to its meaning.[243] I consider a similar approach is to be taken when interpreting the scope and content of the rights and freedoms contained in the New Zealand Bill of Rights Act and recognised by that Act to be "fundamental".[244]

[231] In the case of s 11, there is no direct equivalent in the International Covenant on Civil and Political Rights[245] to aid interpretation. But the concept of human dignity underlies the Universal Declaration of Human Rights[246] on which the ICCPR is founded. If dignity interests are behind s 11, as I consider they are, then there is no sufficient basis on which measures designed to achieve public health benefits could be excluded from its scope. Whether such measures are justified limitations of the right is a subsequent inquiry but does not cut down the right itself by excluding public health measures in the absence of any textual or contextual indication of restriction.

[232] Section 11 applies in its terms to all medical treatment. It seems to me irrelevant that the medium through which fluoride is delivered is water supply and that it is therefore administered "indirectly". Medical treatment which is delivered in water supply is treatment even if it is administered indirectly, in the sense that the supply of water itself is for other purposes. The fluoride supplied through the water is the relevant treatment. The water is simply the medium used to treat the population with fluoride. The issue in the case does not concern water, but fluoride administered through water without the consent of those to whom drinking water is reticulated.

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242 *R v Oakes* [1986] 1 SCR 103 at 119 per Dickson CJ (for himself and Chouinard, Lamer, Wilson and Le Dain JJ) citing *R v Big M Drug Mart Ltd* at 344.

243 At 119.

244 New Zealand Bill of Rights Act, long title.

245 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

246 *Universal Declaration of Human Rights* GA Res 217A (III), A/810 (1948).

[233] Although fluorides may be medicines (prescription, restricted, pharmacy-only or general sale) depending on their concentration and intended use, fluoridating agents and fluoridated drinking water are specifically declared not to be medicines by reg 58B of the Medicines Regulations 1984. "Medical treatment" does not, however, need to involve the supply of a medicine, as the White Paper's reference to psychological treatment makes clear. The definition of "medicine" used in the Medicines Act is for a distinct regulatory purpose which does not bear on the values protected by s 11. I consider whether or not the fluoride supplied in water would be classified as a "medicine" for the purposes of the Medicines Act does not determine the interpretation of s 11 of the New Zealand Bill of Rights Act.

[234] The scope of s 11 is not properly cut down because fluoride occurs naturally in water and, in other countries, at levels which the addition of fluoride as recommended by the Ministry of Health may replicate. In the case of naturally occurring fluoride, there may be no "treatment" imposed by a public authority. But if, as the evidence suggests, treating a population with fluoride is a "public health measure that works in a prophylactic or preventive way", that seems to me to be "treatment" which requires consent under s 11. The same conclusion might well apply to imposed addition of folic acid or iodine if there is no practical way for consumers to avoid consuming food to which these elements have been added.

[235] I consider the Courts below were wrong to place such emphasis on the historical context at the time of enactment of the New Zealand Bill of Rights Act. The passage in *R v Big M Drug Mart Ltd*[247] relied upon by the Court of Appeal makes it clear that the historical context is not elevated above the language of the right or the values it protects. It is, rather, an aid to understanding the purpose of the enactment, that is to say the end to which it is directed. It is not authority for interpreting the provisions of an enactment such as the Charter or the New Zealand Bill of Rights Act within the straitjacket of existing legal understanding.

[236] Legislation such as the New Zealand Bill of Rights Act attaches to the whole of the New Zealand legal order. It affirms values fundamental to it which may well

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[247] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 344 per Dickson J, cited in *New Health* (CA) at [76].

require reconsideration of existing understandings. That is in accordance with the way in which the Canadian Charter is seen. So McLachlin J, writing in the Supreme Court of Canada in *R v Hebert*, cautioned that "[i]t would be wrong to assume that the fundamental rights guaranteed by the *Charter* are cast forever in the straight-jacket of the law as it stood in 1982".[248] She cited in that connection the view expressed by Le Dain J in *R v Therens*:[249]

> … the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts.

[237] Similar views about the transformative effect of the New Zealand Bill of Rights Act were expressed following its enactment in *Ministry of Transport v Noort*,[250] *R v Te Kira*,[251] and *R v Goodwin*.[252] The New Zealand Bill of Rights Act "does not merely repeat the old law".[253] As the long title to the Act indicates, the obligation imposed by it includes development where necessary. Subject to inconsistent legislation, the New Zealand Bill of Rights Act is to be given "practical effect irrespective of the state of our law before [its enactment]".[254]

[238] In the New Zealand context there is additional reason to resist the straitjacket of existing law and understandings in interpreting the scope of enacted rights. In New Zealand, Parliament can always legislate to restrict rights or to continue restrictions which have previously applied. The courts must then apply the legislation according to its terms under s 4 of the New Zealand Bill of Rights Act. There is less occasion to limit rights by reading them down because Parliament can limit them expressly where it considers it appropriate to do so.

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248 *R v Hebert* [1990] 2 SCR 151 at 163 per McLachlin J (for herself and Dickson CJ, Lamer, La Forest, L'Heureux-Dubé, Gonthier, and Cory JJ).

249 *R v Therens* [1985] 1 SCR 613 at 638.

250 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 270 per Cooke P.

251 *R v Te Kira* [1993] 3 NZLR 257 (CA) at 262 per Cooke P.

252 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156 per Cooke P.

253 *R v Te Kira* at 262.

254 *Ministry of Transport v Noort* at 270. See also *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [63] per Blanchard J: in relation to interpretation of statutes, "[l]ittle guidance can now be obtained from pre-Bill of Rights cases".

[239] The rights enacted as "fundamental" to the legal order in the New Zealand Bill of Rights Act have provided insights that actions previously assumed to be lawful need to be reconsidered. While some assistance in determining the meaning and scope of a right may be obtained from decisions before enactment of the New Zealand Bill of Rights Act where the values were recognised in the common law, particular caution is necessary in relation to the right in s 11 which is a new provision, capturing values not necessarily expressed in pre-existing law. In my view the reliance in the Court of Appeal on the common law of battery and trespass to the person as indicating the proper scope of s 11 was misplaced.[255] While s 11 applies to treatment which would constitute battery or trespass (as for example in force-feeding), its terms also apply to any medical treatment without consent imposed through the exercise of public powers.

[240] As suspect is reliance on the history of fluoridation in New Zealand when interpreting the meaning of s 11.[256] Such reliance does not use previous common law understandings of the values protected by the right to assist in arriving at its meaning as expressed in the legislation. Instead it circumscribes the values by the pre-existing law, an approach that leaves no scope for the insight that these are values identified as fundamental and which fails to focus on the purpose s 11 seeks to achieve.

[241] The Council in its submissions suggested that the acceptability of the addition of fluoride in New Zealand had been addressed by a Commission of Inquiry into fluoride in 1957 and a report of the Human Rights Commission in 1980.[257] Both reports, however, preceded enactment of the New Zealand Bill of Rights Act. Indeed, in considering "personal rights in relation to fluoridation", the 1957 Commission of Inquiry proceeded on the basis that "the subject does not possess guaranteed rights".[258] These reports therefore are not concerned with the purpose of s 11, which derives from more recent insights into the values of human dignity and autonomy.

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255 See *New Health* (CA) at [78]–[81] discussing *F v West Berkshire Health Authority* [1989] 2 All ER 545 (HL).

256 Compare William Young J above at [184].

257 WF Stilwell, NL Edson and PVE Stainton "Report of the Commission of Inquiry on the Fluoridation of Public Water Supplies" [1957] V AJHR H47; and Human Rights Commission *Report on Representations on Fluoridation of Water Supplies* (August 1980).

258 At [496]–[500], citing *Halsbury's Laws of England* (3rd ed, 1954) vol 7 Constitutional Law at [416].

[242] Rodney Hansen J took the view that s 11 should be read down in the manner he proposed because it conflicted with the rights of others to the benefit of public health measures.[259] The Court of Appeal expressed agreement with that approach.[260] Whether there is such conflict would require further consideration of alternative ways in which the public health benefits might be delivered and whether the right under s 11 could properly be balanced against a value recognised in the ICESCR but not enacted in the New Zealand Bill of Rights Act. It would also require close examination of the scope of the right to health in art 12. As New Health argued, it is by no means evident that art 12 envisages the promotion of public health by non-consensual medical treatment.[261] But I consider that in any event such suggested conflict is not properly taken into account in ascertaining the meaning of s 11, which is expressed in unqualified terms. While any conflicting interests will be highly relevant to justification of a limitation prescribed by law under s 5 of the New Zealand Bill of Rights Act, I accept the arguments made by New Health that they do not bear on the meaning of the right.

[243] For these reasons I conclude that the addition of fluoride to the water supplied by the Council is medical treatment within the meaning of s 11 of the New Zealand Bill of Rights Act.

The statutory powers relied on to add fluoride to water

(a) The issues

[244] It is common ground that there is no legislative provision expressly authorising the administration of fluoride or any other medical treatment through the supply of water. The Court of Appeal however found that implied power to add fluoride was to be found in the provisions of the Local Government Act 2002 and the Health Act 1956. In this it followed the similar approach taken by the Privy Council in *Attorney-General*

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259 *New Health* (HC) at [86]–[88].

260 *New Health* (CA) at [82]–[86] and [92].

261 New Health cited the Committee on Economic, Social and Cultural Rights' *General Comment No 14 to Article 12 of the International Covenant on Economic, Social and Cultural Rights* E/C.12/2000/4 (2000) which (at [8]) provides: "The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to … be free from … non-consensual medical treatment and experimentation."

v Lower Hutt City when holding power to add fluoride to water was "necessarily implicit" in s 240 of the Municipal Corporations Act 1954.

[245] The Court of Appeal identified two principal sources for the implied power:

(a) Section 130 of the Local Government Act 2002 requires local authorities which were suppliers of water when the Act came into effect to "continue" to provide water services. The Court of Appeal considered that, since "Parliament must be taken to have been aware" that in 1964 the Privy Council had held in *Attorney-General v Lower Hutt City* that the Municipal Corporations Act 1954 permitted local authorities to add fluoride to water, it must be taken to have "authorised the continuation of the practice of fluoridating water, which by that time had been established for almost 50 years".[262]

(b) In 2008 Parliament had put the matter "beyond any doubt" by enacting s 69O(3)(c) in a new Part 2A of the Health Act dealing with "drinking water", by providing that standards for drinking water adopted under s 69O by the Minister of Health "must not include any requirement that fluoride be added to drinking water" (a prohibition that, in combination with a maximum value for fluoride set in the standards, the Court of Appeal considered showed that "Parliament clearly authorised but did not compel the fluoridation of drinking water").[263]

[246] New Health accepts that power may be conferred by necessary implication but contends that no such implication is available under the legislation, properly understood. The respondents support the reasons given by the Court of Appeal but put at the forefront of their argument in this Court the general competencies and powers conferred upon local authorities by s 12 of the Local Government Act. Such general powers enable the Council to give effect to its responsibilities under s 130 of the Local Government Act to "continue" to supply water (importing, the respondents say, a legislative history which assumes the authority to add fluoride approved in

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262 *New Health* (CA) at [58].
263 At [59].

Attorney-General v Lower Hutt City). The respondents also submit s 12 enables the Council to give effect to its responsibilities under the Health Act 1956. The responsibilities under that Act include those imposed on local authorities in respect of public health in their districts under s 23. They also include the responsibilities imposed under Part 2A on suppliers of drinking water (which the respondents say assumes in the terms of s 69O(3)(c) that each local authority supplying water is authorised to add fluoride to it, even though it may not be compelled to do so through the standards for drinking water set by the Minister).

(b) Context

[247] Before setting out the legislative provisions relied on by the Council in ss 12 and 130 of the Local Government Act and ss 23 and 69O(3)(c) of the Health Act, I describe first two matters of context relied on in the arguments addressed to us. They are the decision of the Privy Council in *Attorney-General v Lower Hutt City* and the current legislative scheme for regulation of the quality of reticulated water under Part 2A of the Health Act, enacted in 2008.

(i) Attorney-General v Lower Hutt City

[248] In issue in *Attorney-General v Lower Hutt City* was the power of Lower Hutt City to add fluoride to the water it supplied. The City relied principally on s 240 of the Municipal Corporations Act 1954 as authority for the addition of fluoride. That provision authorised local authorities to "construct waterworks for the supply of pure water for the use of the inhabitants of the district, or of the shipping in any harbour adjoining, and … keep the same in good repair, and … from time to time do all things necessary thereto, and in particular":

> (a) Subject to the provisions of this Act and to any right granted under any prior Act, take the water from any river, stream, lake, or pool:
>
> (b) Break up or dig into the surface of any street, private street, or public place within the district, or of any road or street beyond the district:
>
> (c) Alter any drain, sewer, or gas pipe on or under any such road or street so far as is necessary for that construction or repair:
>
> (d) Prospect for water by boring, whether the land to be prospected is situated within or beyond the district.

[249] Section 288 of the Municipal Corporations Act was also relied on by Lower Hutt City as a source of authority to add fluoride to reticulated water. Section 288 was in Part 20 headed "Public Health and Convenience" and empowered municipal corporations to "do all things necessary from time to time for the preservation of the public health and convenience, and for carrying into effect the provisions of the Health Act 1956, so far as they apply to the district".

[250] When *Attorney-General v Lower Hutt City* was decided, s 23 of the Health Act 1956 was in materially the same terms as the current s 23.[264] As applicable to the argument addressed to us it provided:

> **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 promote and conserve the public health within its district, and for that purpose every local authority is hereby empowered and directed—
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> …
>
> (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:
>
> …

[251] In *Attorney-General v Lower Hutt City* McGregor J at first instance had held that the power to supply pure water under s 240 could not be relied on as authority to add fluoride.[265] That was because he considered that the water without the addition of the fluoride was "pure" in the sense that all impurities had been eliminated.[266] Instead, McGregor J considered that the City had authority under s 288 to add fluoride as being "necessary from time to time for the preservation of the public health and convenience".[267]

[252] On appeal, the Court of Appeal was divided. Turner J, dissenting, would have held that the City did not have power to make the addition (although he indicated that if under a duty to supply water that was "wholesome" as well as "pure" he might have

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264 The full terms of the current version of s 23 are set out below at [269].
265 *Attorney-General v Lower Hutt City* [1964] NZLR 438 (SC) [*Lower Hutt City* (SC)].
266 At 441–442.
267 At 443–445.

come to a different conclusion[268]). The Judges in the majority held that the addition of fluoride was authorised. North P considered that a local authority was entitled to "improve" the quality of its water by "rectifying a deficiency in the water" on expert advice that it was a step "desirable in the public interest".[269] McCarthy J considered that, even though the addition of fluoride was not "literally" authorised, it was an act "reasonably and properly performed in the prosecution of the main purpose [supply of water]".[270]

[253] The Privy Council dismissed the appeal from the judgment of the Court of Appeal:[271]

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

[254] As has already been indicated, the Privy Council did not think it necessary to express an opinion as to whether s 288 of the Municipal Corporations Act (which has

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268 *Lower Hutt City* (CA) at 460.
269 At 456.
270 At 466.
271 *Lower Hutt City* (PC) at 124–125.

no direct equivalent in the Local Government Act 2002) or s 23 of the Health Act (which remains in substantially the same terms) "by themselves" empowered the City to add fluoride to the water.[272] Nor, in the Court of Appeal, had McCarthy J found it necessary to consider whether implied authority to add fluoride could be found in s 288 of the Municipal Corporations Act or s 23 of the Health Act.[273] North P and Turner J in the Court of Appeal had however expressed the views that these "very general provisions" did not enlarge the powers of the City under s 240 and could not provide authority to add fluoride to water.[274]

[255] The general power to provide waterworks for the supply of drinking water, previously contained in s 240(1) of the Municipal Corporations Act and s 267(1) of the Counties Act 1956, was continued in s 379(1) of the Local Government Act 1974. Under the Local Government Act 2002 as enacted there was no equivalent provision to s 240(1). Local authorities supplying water at the coming into effect of the Act were however required to "maintain water services" by s 130 and were obliged to "assess" water and other sanitary services from time to time in accordance with ss 125–129 of the 2002 Act. Section 126 as enacted required assessment as to the extent to which water was "potable", a term defined as meaning suitable for drinking. The responsibility to deliver "pure" water became under the new legislation a responsibility to deliver water that was "potable" and, in assessing whether water was potable, local authorities were required to report to and consult with the Medical Officer of Health appointed under the Health Act.[275] The Ministry of Health published guidelines to assist in the assessment of when water was potable.

[256] The system of supply was changed in 2008 when Part 2A of the Health Act was enacted. It set up a scheme for regulation of the quality of water through standards set by the Minister of Health which local authorities supplying drinking water were obliged to observe. It was no longer the responsibility of local authorities to provide

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272 At 125.
273 *Lower Hutt City* (CA) at 468.
274 At 456–457 per North P and 460–461 per Turner J.
275 Local Government Act 2002, s 128 (as enacted).

"pure" water[276] or "potable" water.[277] Rather, they were obliged to take all practicable steps to ensure that the water conformed to the standards set by the Minister. With the enactment of Part 2A of the Health Act, local authorities had, in addition to the obligations to take all practicable steps to comply with the standards, responsibilities to assess and report compliance.[278] Consistently with the transfer of substantive responsibility for determining the qualities that make water "potable", s 126 was repealed in 2010.[279] The Regulatory Impact Statement at the time s 126 was repealed explained that this "minor" amendment to the Act was to give greater flexibility to councils to decide for themselves how to carry out the assessments.[280]

[257] As is explained below at [325], I am of the view that following the 2008 amendments to the Health Act (which are described under the next heading) there is no room for an implied power for local authorities to add fluoride to the water they supply in the current legislation. That is even if the decision of the Privy Council on the meaning of s 240 of the Municipal Corporations Act is sound in its own terms (a matter on which I express some doubt at [327]–[329]).

[258] In the present case, the Court of Appeal accepted that some of the conclusions expressed by the Privy Council in *Attorney-General v Lower Hutt City* required "revisiting in the light of the current legislation".[281] It considered however that the principal significance of the Privy Council case was that it was the background against which the Local Government Act 2002 was enacted. It took the view that, in enacting the Local Government Act 2002, Parliament proceeded on the assumption that the addition of fluoride into drinking water "was regarded as lawfully authorised at least up to the introduction of the [Act]" and that the legislation was enacted in the "knowledge that fluoridation of drinking water was occurring in a number of

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276 As was required of suppliers by s 240(1) of the Municipal Corporations Act 1954, by s 267(1) of the Counties Act 1956 and by s 379(1) of the Local Government Act 1974 after its amendment by the Local Government Amendment Act 1979.

277 As was required by ss 125 and 126 of the Local Government Act 2002 as enacted.

278 Health Act, s 69Y.

279 By s 30 of the Local Government Act 2002 Amendment Act 2010. A new s 126 (clarifying the "[p]urpose of assessments" under s 125) was subsequently enacted by the Local Government Act 2002 Amendment Act 2014: see below at [271].

280 Department of Internal Affairs *Regulatory Impact Statement: Improving Local Government Transparency, Accountability and Financial Management* (April 2010) at [155] and [171]–[173].

281 *New Health* (CA) at [25].

districts".[282] In those circumstances it held that a power to add fluoride to water was implied in the legislation.

(ii) The current regulation of supply of drinking water under Part 2A of the Health Act 1956

[259] Supplies of drinking water in New Zealand have been regulated since 2008 under Part 2A of the Health Act 1956. The purpose of Part 2A is explained in s 69A as being "to protect the health and safety of people and communities by promoting adequate[283] supplies of safe and wholesome drinking water from all drinking-water suppliers".

[260] "Drinking water" is water that is "potable".[284] "Potable" is defined to mean water that does not exceed the maximum acceptable values for "determinands"[285] specified in the "drinking-water standards" set by the Minister under s 69O of the Health Act. Determinands may occur in the source water, or be introduced in the treatment process or the distribution system. The standards adopted may specify requirements for "drinking water safety" and "drinking water composition" (including the maximum amounts of substances that may be present in drinking water).[286] "Pollution" of water occurs when the maximum acceptable values of determinands are exceeded.[287] The standards may also include "guideline values" for aesthetic effects in drinking water.[288] Water is "wholesome" if it is both "potable" and does not exceed the values set in the drinking-water standards as guidelines for aesthetic determinands so as to have an adverse "aesthetic effect".[289] But under s 69O(3)(c) the standards "must not include any requirement that fluoride be added to drinking water".

[261] Suppliers of drinking water are obliged by s 69V to take "all practicable steps to ensure that the drinking water supplied by that supplier complies with the

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282 At [25].

283 Drinking water supplied to a property is defined as "adequate" under s 69G if it meets the minimum quantity actually required by the occupants or meets the amount specified or as is yielded by a formula set by regulations made under s 69ZZY.

284 Section 69G.

285 A "determinand" is defined as a substance or organism or characteristic able to be "determined or estimated reasonably accurately": s 69G.

286 Section 69O(2).

287 Section 69G.

288 Section 69O(3)(a).

289 Section 69G.

drinking-water standards". And every drinking-water supplier "must take reasonable steps to ensure that the drinking water supplied by that drinking-water supplier is wholesome".[290]

[262] As a supplier of drinking water, South Taranaki District Council is therefore required to comply with Part 2A of the Health Act by taking all practicable steps to ensure that the water it supplies meets the drinking-water standards set by the Minister of Health. And it must take "reasonable steps to ensure that the drinking water supplied … is wholesome" (both potable and complying with the aesthetic guidelines adopted by the Minister under Part 2A).

[263] Table 2.2 of the *Drinking-water Standards* specifies the "[m]aximum acceptable values for inorganic determinands of health significance".[291] Fluoride is one such inorganic determinand of health significance. Its maximum acceptable value is set at 1.5 mg/L of water. There is monitoring to ensure the limits are not exceeded. The Court of Appeal in the present case noted that the evidence was that the maximum value allowed for fluoride, like other determinands, is set conservatively to ensure that long-term usage does not result in dental fluorosis (mottling of teeth) or other harm.[292]

[264] The maximum acceptable value set for fluoride by the Minister, as with other standards, is based on the levels recommended by the World Health Organization, although confirmed by local expert assessment. Although there are traces of fluoride in natural water in New Zealand, the levels (at or below 0.3 mg/L) are lower than in a number of countries. Because of the benefits for dental health, a number of local authorities which supply drinking water in New Zealand have since the 1950s added fluoride to the water supply.

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290 Section 69W.

291 Ministry of Health *Drinking-water Standards for New Zealand 2005 (Revised 2008)* (October 2008) at 8.

292 See *New Health* (CA) at [54]–[57].

[265] In a footnote to the drinking-water standard set for the maximum acceptable value of fluoride, a recommendation is made as to the content of fluoride for drinking water. It is made clear that this recommendation is not itself a standard:

> 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 [maximum acceptable value].

[266] Before the enactment of Part 2A there were no standards to which a local authority supplying drinking water was obliged to adhere. Although guidelines had been provided by the World Health Organization since 1958 and by the Board of Health since 1984, they were not mandatory.[293] Instead, as has already been described, local authorities were empowered by s 240(1) of the Municipal Corporations Act 1954 and succeeding legislation to "construct waterworks for the supply of pure water for the use of the inhabitants of the district". That was the power construed by the Privy Council in *Attorney-General v Lower Hutt City* to authorise the addition of fluoride to the water supplied by necessary implication.

[267] As has been indicated, after the Local Government Act 1974 replaced the Municipal Corporations Act, s 240(1) was reproduced in s 379 of the 1974 Act. When the Local Government Act 2002 was enacted, an equivalent provision was not adopted in that Act (although local authorities are empowered by s 25 of the Health Act to provide "sanitary works" for the benefit of their districts, including facilities for the treatment of drinking-water, and s 126 of the Local Government Act 2002, until its repeal in 2010, obliged local authorities to assess the adequacy and quality of water supply by local councils). Following enactment of Part 2A of the Health Act in 2008, the local authority's former necessary determination of what constituted "pure" or "potable" water was replaced by the system of regulation by standard-setting.

(c) The statutory public health responsibilities of local authorities

[268] In addition to the responsibilities the Council has as a supplier of drinking water under Part 2A of the Health Act, it has the general powers and duties imposed

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[293] The preface to the Board of Health's *Drinking-Water Standards for New Zealand* (1984) said only: "The Board of Health recommends the study and use of the Drinking-Water Standards for New Zealand as the basis for the production and delivery of wholesome drinking-water in New Zealand."

on it by Part 2 of the Health Act as a local authority, including the powers under s 23 for the protection of public health within its district. It also has obligations under Part 7 of the Local Government Act 2002 to assess "from a public health perspective" a number of matters, including the adequacy of water supply services for drinking water within its district.[294]

[269] The powers and duties imposed on local authorities by Part 2 of the Health Act for public health ends are those described in s 23:

> **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.

[270] The respondents rely on s 23(c) as the source of functions which enable the Council to use its general powers under s 12 of the Local Government Act to add

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294 Sections 125 and 126.

fluoride to water. That is on the basis that dental decay is a condition "likely to be injurious to health". It may be noted that the two Judges who considered the authority provided by s 23 in *Attorney-General v Lower Hutt City* (North P and Turner J) did not accept that this general provision could found authority to add fluoride to water.[295]

[271] Part 7 of the Local Government Act 2002, which contains s 130, deals with the obligations of local authorities in relation to water and sanitary services. Subpart 1 imposes an obligation to "assess" water and sanitary services "from time to time".[296] The Act's amendment in 2014 made it clear that this imposes an obligation on each local authority "to assess, from a public health perspective", the adequacy of water and other sanitary services within its district. Adequacy is assessed "in light of" a number of factors, including "the health risks to communities arising from any absence of, or deficiency in, water …" and "the extent to which drinking water provided by water supply services meets applicable regulatory standards".[297]

[272] Subpart 2 of Part 7 sets out "obligations and restrictions" in relation to "the delivery of water services", including "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".[298]

[273] Where a local authority was already providing water supply at the coming into effect of Part 7 of the 2002 Act on 25 December 2002, the local authority was obliged by s 130 to "continue to provide water services and maintain its capacity to meet its obligations under [Subpart 2]". In the present case, the argument for the Council, accepted in the Courts below, was that s 130 is to be interpreted on the basis that Parliament legislated in the knowledge that the addition of fluoride had been treated as authorised under the preceding legislation and therefore is to be treated as intending

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295 See above at [216] and [254].

296 Section 125.

297 Section 126, as replaced by s 44 of the Local Government Act 2002 Amendment Act 2014. As described above at [256], the former s 126 (requiring assessment of the quality and adequacy of the supply of drinking water, including "the extent to which … the water is potable") was repealed in 2010. The 2014 replacement of s 126 is described in the relevant regulatory impact statement as a "minor legislative change to clarify the purpose of assessments of water and other sanitary services, which section 125 of the [Local Government Act] requires councils to undertake": Department of Internal Affairs *Regulatory Impact Statement: Better Local Government – Improving Infrastructure Delivery and Asset Management* (August 2013) at [18].

298 See the definition of "water services" and "water supply" in s 124.

continuing authorisation of fluoridation in the obligation to "continue" water supply. As will be apparent from the summary of conclusions given above, and as is further explained below at [311], I consider that this provision to ensure continuity of supply provides no implicit authority for the addition of fluoride on the basis of the reasoning in *Attorney-General v Lower Hutt City*. What constitutes potable water is now regulated under Part 2A of the Health Act.

(d) The general competencies and powers of councils under s 12 of the Local Government Act 2002

[274] Section 12 of the Local Government Act is concerned with the "status and powers" of a local authority. A local authority is constituted as a "body corporate with perpetual succession" with "full capacity" to carry out any activities "[f]or the purposes of performing its role". Under s 12(3) all such powers are explicitly subject to the Local Government Act and to "any other enactment, and the general law".

[275] Section 12 provides local authorities with the competencies of individuals and corporations, in the same manner in which s 16 of the Companies Act 1993 provides companies with such competencies. Such general competencies are parasitic on or ancillary to the functions of local authorities and are those necessary to enable the functions to be carried out. They do not enlarge the scope of the functions otherwise conferred on local authorities. The explanatory note to the Local Government Bill containing the clause that became s 12 made it clear that these general powers were not thought to provide "coercive or regulatory powers … over other people" and did not "override the more specific provisions of other statutes".[299]

[276] Section 11 of the Local Government Act identifies the role of a local authority as being 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.

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[299] Local Government Bill 2001 (191-1) (explanatory note) at 3.

The purpose of local government, identified in s 10,[300] and the general competencies of local authorities provided by s 12(2) apply to local authorities performing functions under other legislation "to the extent that the application [of s 10 and s 12(2)] is not inconsistent with the other enactment".[301]

[277] The general competencies recognised by s 12 do not in themselves provide a local authority with power to add fluoride to water. Such power is inconsistent with s 12(3) in circumstances where such addition would limit the right contained in s 11 of the New Zealand Bill of Rights Act, which a local authority is bound by s 3 of that Act to observe. The same conclusion also follows from the nature of such general powers, which exist to permit fulfilment of functions separately conferred by legislation.

[278] There is nothing in the Local Government Act 2002 or the amendments to the Health Act made in 2008 to suggest that local authorities are empowered to add substances to water except for the purposes of achieving conformity with the standards and guidelines set by the Minister of Health. Still less is there anything to suggest authorisation to limit the right contained in s 11 of the New Zealand Bill of Rights Act by addition of fluoride or any other medical treatment for public health purposes other than conforming with the standards and guidelines set for reasons of the safety and aesthetic qualities of drinking water. There was no consideration of s 11 of the New Zealand Bill of Rights Act in the parliamentary materials. The explanatory note to the Local Government Bill in which s 12 was introduced indicates that s 12 itself was not thought to provide "coercive or regulatory powers" over others, which is hardly

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300 Which provides:

> **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.

301 Section 13.

consistent with the imposition of treatment with fluoride through the water supply. The Select Committee explained its insertion of s 69O(3)(c) in Part 2A of the Health Act as being to avoid any doubt as to whether the Minister could make the addition of fluoride mandatory when setting standards. Construing s 12 of the Local Government Act as legislative authority to local authorities to add fluoride to water is difficult to reconcile with the statutory responsibilities of the Minister under Part 2A of the Health Act in setting the standards for water safety and taste.

Approach to interpretation

[279] Whether the functions conferred on local authorities under the Local Government Act and the Health Act authorise the addition of fluoride for public health purposes depends on the meaning of the provisions. As already indicated, it is not suggested that ss 12 and 130 of the Local Government Act and s 23 of the Health Act expressly authorise the administration of medical treatment for public health purposes in the water supplied. Rather, the Council contends that it has the power under s 12 of the Local Government Act to add fluoride to the water it supplies because of its responsibilities to continue water supply under s 130 of the Local Government Act (enacted, it says, on the understanding that the addition of fluoride was authorised) and because of its responsibilities for public health within its district under s 23 of the Health Act.

[280] The meaning of the statutory provisions relied on as constituting authority to add fluoride to water is to be ascertained principally from their text and purpose, taking into account the indications provided by the scheme of the legislation, as s 5 of the Interpretation Act 1999 directs. Importantly in the present case, where arguments are made from historical context as to the understanding current at the time of enactment, s 6 of the Interpretation Act provides that "[a]n enactment applies to circumstances as they arise".

[281] In addition to the provisions of the Interpretation Act, general principles of common law as to interpretation of statutes apply. Those of significance in the present case concern the implication of powers in legislation and the interpretation of statutory provisions which impact upon fundamental interests and rights. It is therefore

necessary to discuss the general principles of interpretation bearing on the meaning of ss 12 and 130 of the Local Government Act and s 23 of the Health Act. Those of significance in the present case are three: the approach taken to implication of power in statutes; the role of historical context in interpretation; and the role of presumptions of compliance with fundamental values both under common law principles and in application of s 6 of the New Zealand Bill of Rights Act.

(a) Implication of power

[282] The Privy Council in *Attorney-General v Lower Hutt City* applied the general approach that implication of powers not expressly conferred in statutes must be "necessary".[302] There may be room for debate about whether "necessary" implication in all cases sets the bar too high.[303] While it may be appropriate where the power to be implied would interfere with rights (such as the legal professional privilege in issue in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*[304]), in other cases implication may be available where the additional power is "reasonably and properly" incidental to functions conferred.[305]

[283] Unexpressed powers are not however treated as implicit in legislation simply because they would match reasonable assumptions or might be convenient. The power implied must be "fairly … regarded as incidental to, or consequential upon, those things which the Legislature has authorized".[306] The starting point is what Parliament has actually enacted. Any implication must reasonably be regarded as part and parcel of the authority expressly provided. The courts do not imply terms into statutes to fill in gaps in policy.[307] Implication is "in order to make the statutory power effective to achieve its purpose".[308] If the implication affects the rights of others it is not enough

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302 *Lower Hutt City* (PC) at 124.

303 Diggory Bailey and Luke Norbury *Bennion on Statutory Interpretation* (7th ed, LexisNexis, London, 2017) at 297–300.

304 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563.

305 *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 (HL) at 481 per Lord Blackburn. See also *Ward v Commissioner of Police of the Metropolis* [2005] UKHL 32, [2006] 1 AC 23 at [5] per Lord Rodger of Earlsferry.

306 *Attorney-General v Great Eastern Railway Co* at 478 per Lord Selbome LC.

307 As was made clear in *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 537 (CA) at 537–538 per Cooke P.

308 *Ward v Commissioner of Police of the Metropolis* at [24] per Baroness Hale (with whom Lord Steyn, Lord Hutton and Lord Carswell agreed).

if it is one "it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included".[309] It must be an implication that is necessary.

(b) Historical context

[284] Where statutes address and correct particular grievances, the historical context which provides the occasion for the legislation may be an important aid to its interpretation. But where statutes address contemporary issues as they arise, the principle of interpretation is that they are "always speaking".[310] Such a statute exists "independently of the historical contingencies of its promulgation, and accordingly should be interpreted in the light of its place within the system of legal norms currently in force".[311] The more modern language of the Interpretation Act retains this long-standing principle of interpretation in the requirement that statutes are to apply to "circumstances as they arise", one of the three "principles of interpretation" identified in Part 2 of the Interpretation Act 1999.[312]

[285] A statutory text that speaks to the present must, as Stephen Gageler says, be "necessarily influenced in its meaning by the contemporary statutory context in which it continues to speak":[313]

> So much is that taken for granted that it is almost never suggested that a frequently modified statute should be read other than as a coherent whole. There is not the slightest conceptual difficulty with the notion of subsequent legislative enactments expressly or by implication modifying existing statutory language. Words incorporated into a statute at a particular time are therefore not frozen at the point of incorporation but take (and can change) in meaning so as to best fit the changing statutory landscape.

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309 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* at [45] per Lord Hobhouse, applied in *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 at [58] and in *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [140] per Tipping J.

310 Acts Interpretation Act 1924, s 5(d); and Lord Thring *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (George N Morang & Co, Toronto, 1902) at 83, cited by Lord Steyn in *R v Ireland* [1998] AC 147 (HL) at 158.

311 John Bell and George Engle *Cross on Statutory Interpretation* (2nd ed, Butterworths, London, 1987) at 49–50, referred to by the Law Commission in *Legislation and its Interpretation* (NZLC PP8, 1988) at [98]. The same passage appears in the third edition: John Bell and George Engle *Cross on Statutory Interpretation* (3rd ed, LexisNexis, London, 1995) at 51–52.

312 Interpretation Act 1999, s 6. The other two principles are the requirement in s 5 to ascertain the meaning of the legislation from its text and in the light of its purpose and the presumption against retrospective effect contained in s 7.

313 Stephen Gageler "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37 Mon LR 1 at 11.

[286] Lord Steyn has pointed out that whether a court "must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions" is itself a matter of interpretation.[314] The Local Government Act and the Health Act are not legislation which seek to correct particular problems in which the historical context helps in identifying the purpose. They are statutes which address contemporary needs. They must therefore be read in the light of developing principles of interpretation and the contemporary context of the common law and statutes into which they fit, as they exist at the time of application.

[287] Statements of rights, such as those contained in the New Zealand Bill of Rights Act, are an enacted register of values which is intended to affect all domestic law, as Cooke P recognised in *R v Goodwin*.[315] The New Zealand Bill of Rights Act is enacted to "protect" and "promote" human rights and fundamental freedoms in New Zealand.[316] It inevitably affects previous understandings of the effect of existing legislation, as was its purpose. While the statutory construction in *Ghaidan v Godin-Mendoza*[317] may well have surprised the members of the United Kingdom Parliament who enacted the statute in 1988, as Lord Hoffmann pointed out in *R (Wilkinson) v Inland Revenue Commissioners* that is "not normally what one means by the intention of Parliament".[318] Instead, the court when interpreting legislation is concerned to arrive at "the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with convention rights".[319]

[288] In New Zealand following enactment of the New Zealand Bill of Rights Act there have been a number of reassessments of matters such as the content of statutory provisions concerning natural justice or the right to fair trial and the scope of statutory discretions that might similarly have surprised members of the Parliament which enacted those provisions. The meaning of enactments now reflects the human rights

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314 *R v Ireland* [1998] AC 147 (HL) at 158.

315 *R v Goodwin* at 156: "The Bill of Rights Act is intended to be woven into the fabric of New Zealand law. To think of it as something standing apart from the general body of law would be to fail to appreciate its significance; … ."

316 New Zealand Bill of Rights Act, long title.

317 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

318 *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30, [2006] 1 All ER 529 at [18].

319 At [18].

values contained in the New Zealand Bill of Rights Act. The shift in understanding has occurred despite the fact that many of the rights now enacted were earlier reflected to some extent in the common law and perhaps formerly subject to limitations, earlier thought to be reasonable, now treated as unlawful.

[289] The right contained in s 11 of the New Zealand Bill of Rights Act is not one of the traditional civil and political rights prefigured in part in the common law. Nor is it derived from the statement of rights contained in the ICCPR. It is therefore understandable that its application to legislation may produce what may seem to be relatively abrupt departure from previous understandings of the meaning of legislation bearing on the right. But unless the right recognised in s 11 is to be substantially denied, the meaning of any legislation affecting it has to be reconsidered in the light of its recognition as a fundamental right.

[290] The principal circumstance from which implication is urged in the present case is the history of fluoridation in New Zealand and the confirmation in *Attorney-General v Lower Hutt City* that a power to add fluoride to reticulated water was necessarily implied in s 240 of the Municipal Corporations Act. The Council suggested that the absence of references to a power to add fluoride to water when the Local Government Act 2002 was enacted was because Parliament had no intention of changing what was understood to be the pre-existing law.

[291] As is described further at [324]–[326], I do not think that the necessary implication by which local authorities were held by the Privy Council in *Attorney-General v Lower Hutt City* to be empowered to add fluoride to water survives the change in the regulatory regime, already described. I am of the view that following the 2008 amendments to the Health Act there is no room for an implied power for local authorities to add fluoride, even if the decision of the Privy Council on the meaning of s 240 of the Municipal Corporations Act is otherwise sound (a point on which I have in any event some doubt, as explained below at [327]–[329]).

(c) Presumption of compliance with fundamental values

[292] Encroachment on rights requires clear legislative authority. There is a common law presumption of interpretation that Parliament legislates consistently with

fundamental rights, both at common law and, more recently, under the New Zealand Bill of Rights Act. So, in *Cropp v Judicial Committee*,[320] this Court accepted that there is a presumption that "general words in legislation were intended to be subject to the basic rights of the individual"[321] and that the courts are "slow to impute to Parliament an intention to override established rights and principles where that is not clearly spelt out".[322] Blanchard J, writing for the Court, said "[t]here is nothing new in this: it is a well-established interpretative principle".[323] The Court held "[t]hat presumption naturally applies to words which authorise subordinate legislation".[324] If the presumption applies to "words which authorise subordinate legislation", it is clear that it applies equally to words which authorise the actions and decisions of public bodies.[325]

[293] Similar presumptions of interpretation to achieve compliance with fundamental values in the legal order are applied in the United Kingdom, Australia and Canada.[326] The presumption of conformity with fundamental rights was expressed by Lord Hoffmann in terms of a "principle of legality", but was a long-standing principle of interpretation before that label was attached to it.[327] It expresses the

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320 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774.

321 At [27].

322 At [26].

323 At [26] citing FAR Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 823.

324 At [27].

325 See *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 and *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745, discussed below at [296]–[297]. See also *R v Laugalis* (1993) 10 CRNZ 350 (CA) at 355–356 for an early example where the Court of Appeal held that a discretion to conduct a warrantless search under the Misuse of Drugs Act 1975 was interpreted to be restricted to circumstances of urgency in order to achieve consistency with s 21 of the New Zealand Bill of Rights Act.

326 See *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL); *Coco v The Queen* (1994) 179 CLR 427; *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1078 per Lamer J ("[The Court should] not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect."); and *Hills v Canada (Attorney General)* [1988] 1 SCR 513 at 558 per Dickson CJ, Wilson, La Forest and L'Heureux-Dubé JJ.

327 Diggory Bailey and Luke Norbury *Bennion on Statutory Interpretation* (7th ed, LexisNexis, London, 2017) at 718–719. The presumption was acted on in *R v Secretary of State for the Home Department, ex parte Simms* and *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL), and was applied to read down the wide discretion to set court fees in *R v Lord Chancellor, ex parte Witham* [1998] QB 575 (QB). It was applied by the High Court of Australia in *X7 v Australian Crime Commission* [2013] HCA 29, (2013) 248 CLR 92 and by three members of the Court of Appeal in *R v Pora* [2001] 2 NZLR 37 (CA).

approach that "[f]undamental rights cannot be overridden by general or ambiguous words":[328]

> In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[294] Where human rights recognised by the New Zealand Bill of Rights Act are affected, the presumption of conformity with fundamental values is also expressed by s 6 of the New Zealand Bill of Rights Act. Lord Reed, citing Lord Cooke, has recently pointed out that, since statements of human rights are recognition of rights "inherent and fundamental to democratic civilised society" rather than creation of them, they do not stand apart as a discrete body of domestic law.[329] The common law presumption (which attaches to important principles of the common law and to international law[330]) is in this way properly seen as reinforced by the direction contained in s 6 of the New Zealand Bill of Rights Act. That is the way in which s 6 was treated by the Court in *Cropp,* in *Zaoui v Attorney-General (No 2)*,[331] and in *Dotcom v Attorney-General.*[332]

[295] In *Cropp*, Blanchard J explained the general approach:[333]

> Subordinate legislation involving a relevant guaranteed right or freedom will be invalid when the empowering provision, read in accordance with s 6 of the Bill of Rights Act, does not authorise its making. Where the Bill of Rights Act is a relevant consideration, and obviously it will then be an important consideration, the court gives the generally expressed empowering provision a tenable meaning that is consistent with the right or freedom. "In accordance with s 6, that meaning is to be preferred to any other meaning."

[296] In *Zaoui (No 2)* a wide discretion to order deportation by Order in Council under the Immigration Act 1987 was held by the Court, in a unanimous decision written by Keith J, to require consistency with the rights and freedoms contained in the New Zealand Bill of Rights Act (in that case, the rights not to be arbitrarily deprived of life or subject to torture).[334]

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328 *R v Secretary of State for the Home Department, ex parte Simms* at 131 per Lord Hoffmann.

329 *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 at [58], citing *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [30].

330 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) at 57 per Keith J for the Court.

331 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

332 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745.

333 *Cropp* at [25] (footnote omitted) invoking *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68].

334 *Zaoui (No 2)* at [90]–[91].

[297] Similarly, in *Dotcom*, McGrath, William Young, Glazebrook and Arnold JJ proceeded on the basis that "[t]he Bill of Rights Act plays an important role in the interpretation of the scope of powers affecting protected rights that are expressed in broad or general terms".[335] Referencing *Drew v Attorney-General*, they said:[336]

> Legislative provisions conferring discretions and powers are, like all statutory provisions, to be read in accordance with s 6 of the Bill of Rights Act, … .

Applying this approach to the interpretation of s 44 of the Mutual Assistance in Criminal Matters Act 1992, they concluded that "[w]hile the terms of s 44 apparently confer broad and unfettered powers of search and seizure, to give effect to such a meaning would constitute an unreasonable and unjustifiable limit on the s 21 right to be free from unreasonable search and seizure":[337]

> In accordance with s 6 of the Bill of Rights Act, s 44 should, so far as possible, be given a meaning consistent with that right.

[298] The application of s 6 in this way is not inconsistent with the approach taken in *R v Hansen*.[338] The Judges in the majority in *Hansen* did not purport to lay down an inflexible rule as to methodology in the application of s 6.[339] Nor is such methodology inflexibly applied in the cases, as *Cropp*, *Zaoui (No 2)* and *Dotcom* all indicate.

[299] *Hansen* was a case where all members of the Court considered that there was only one possible meaning of the provision in question. Blanchard J considered that to be a point of distinction with *Moonen (No 1)*[340] which explained the different methodology there used.[341] If there had been a continuum of meaning available (as in the assessment in issue in *Moonen (No 1)* of what is "objectionable"), Tipping J considered that the same approach would have been appropriate.[342]

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335 *Dotcom* at [100].
336 At [100] citing *Drew v Attorney-General* at [68].
337 At [161].
338 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
339 See at [61] per Blanchard J, [91] per Tipping J and [192] per McGrath J.
340 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) [*Moonen (No 1)*].
341 *R v Hansen* at [61].
342 At [94]. Tipping J considered *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 to be such a "continuum" case where the methodology in *R v Hansen* was not of assistance (see *Morse* at [68]).

[300] It seems to me that the interpretation point in issue in the present case (whether implication is "necessary" or "proper") is indeed an assessment of meaning based on a "continuum", if that distinction is sound (a point on which I have considerable doubt, being of the view that interpretation in conformity with s 6 is required whenever there are different available meanings[343]). In any event, although Tipping J considered that, "logically"[344] the initial task for the court is "to identify the meaning which the statutory provision bears without reference to the preference with which s 6 is concerned" (which he thought arose only in the case of *inconsistency*), he was of the view that the "initial interpretation exercise":[345]

> … should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament.

[301] Both Blanchard and McGrath JJ took the view in *Hansen* that the s 6 preference did not arise until the "natural meaning" of the statutory provision being applied and which "appeared" to be inconsistent with a protected right had been ascertained and found to be an unreasonable limitation not able to be justified in a free and democratic society.[346] Because *Hansen* was a case where there was only one meaning of the provision which they considered reasonably available, neither Blanchard or McGrath JJ dealt with the way in which the "natural" meaning of the provision was to be ascertained in cases of doubt. They did not need to consider whether the principles of interpretation available in ascertaining the "natural meaning" of a provision included a presumption against limiting rights and freedoms as a principle of legality and a "proposition inherent in s 6", in the manner allowed by Tipping J.

[302] In *Cropp*, the Court held that the statutory rule-making power authorising rules for the purposes of safety in racing was to be interpreted to be consistent with the requirements of the New Zealand Bill of Rights Act as to freedom from unreasonable search and seizure. As Blanchard J there accepted, if a tenable meaning is consistent

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343 For the reasons I gave in *R v Hansen* at [10]–[25].

344 Since he took the view that s 6 is concerned with meanings which are *inconsistent* with the rights and freedoms contained in the Bill of Rights (a starting point I think is difficult to take from the language of s 6).

345 At [88]–[89].

346 At [57]–[60] per Blanchard J and [190]–[192] per McGrath J.

with the right or freedom, the correct approach is that taken in the earlier decision of the Court of Appeal in *Drew*. Under it, a tenable meaning consistent with the right or freedom is "to be preferred to any other meaning".

[303] In the present case, where the interpretation in issue consists of the implication of authority to act inconsistently with the rights contained in s 11, a presumption against infringement of rights could be displaced only by strong textual and contextual indications that the implication is necessary to fulfil functions unmistakeably conferred. In the absence of such necessity to augment the statute by implication, an interpretation which does not entail such enlargement is clearly one that "can" be given.

[304] This approach seems to me to be supported by the structure and content of the New Zealand Bill of Rights Act and the New Zealand constitution. In New Zealand, Parliament is not prevented from enacting limits or in authorising limitation of rights through subordinate legislation or administrative discretion if it does so clearly. (This is a position to be contrasted with that in Canada where legislation authorising limitation of rights is invalid unless the limitation authorised is justifiable under s 1 of the Charter of Rights and Freedoms.) Strong presumptions against interpretations of legislation that limit rights, including a requirement of necessity before implication of authority to affect rights, are in this way reconciled with the priority given to legislation under s 4 of the New Zealand Bill of Rights Act.

[305] The approach is also consistent with the general obligations imposed by s 3 of the New Zealand Bill of Rights Act that all exercising public power are bound by the New Zealand Bill of Rights Act (a result reached in Canada under the Charter not by direct obligation but by cascading effect of the constitutional fetter on Parliament, as Lamer J explained in *Slaight Communications Inc v Davidson*[347]). Unless the legislation under which they act clearly authorises them to limit rights, all exercising public power are bound to observe the rights and freedoms in the New Zealand Bill of Rights Act and may not limit rights to achieve ends they might otherwise lawfully seek to achieve. The concept of fundamental rights would otherwise be undermined.

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347 *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1077–1079.

[306] It is not appropriate for rights to be limited in application by administrative decision in individual cases unless those making the decisions are clearly authorised by law to limit rights. Legislation which is unmistakeable is valid even if it is inconsistent with the rights and freedoms in the New Zealand Bill of Rights Act or fundamental values of the common law, but such effect must be expressed or a matter of necessary implication.

[307] This approach is also consistent with the requirement in s 5 of the New Zealand Bill of Rights Act that any limitation of rights should be "prescribed by law" as well as being demonstrably justified in a free and democratic society. The reference to "prescribed by law" can only be sensibly understood as a reference to enacted or common law *rules*, ascertainable in advance, as the policy of prescription in the international covenants is explained.[348] Such rules may be prescribed by primary or subordinate legislation or under rule-making powers (at least where the power to make subordinate legislation or rules permits encroachment on rights explicitly or by necessary implication). They may also be derived from common law remedies such as the defamation remedies provided for protection of reputation or the rules of court which affect the rights to justice contained in s 27 of the New Zealand Bill of Rights Act.

[308] The requirement of prescription of law is necessary discipline which prevents the justification under s 5 being treated as a general dispensing power for all those exercising public powers, enabling them to limit rights ad hoc on the basis that the limit proposed in a particular case is "justified in a free and democratic society". That is inconsistent with the obligations in s 3. The scheme of the New Zealand Bill of Rights Act is that those exercising public powers must observe the rights and freedoms contained in the Bill of Rights unless they are clearly authorised by an enactment to limit rights (in which case the context provided by the authorisation will limit the discretion exercised, as will the "restraint" on wide discretion derived from s 5 of the

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348 See *Steel v United Kingdom* (1998) 28 EHRR 603 (EComHR) at 627; and *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241 (ECHR) at 256, considered in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [39]. See also *Ostrovar v Moldova* (2005) 44 EHRR 378 (Section IV, ECHR) at [98]–[101].

New Zealand Bill of Rights Act[349]). If the enactment can be given a meaning that does not entail encroachment on rights through individual decision-making, that meaning is to be preferred under s 6.

The Council had no implied statutory authority to add fluoride

[309] Given the earlier discussion about the statutory powers relied on as the source of an implied authority to add fluoride to water, the context in which they fall to be applied, and the general approach to be taken to interpretation, I can be brief in explaining my conclusion that the Council had no implied statutory authority to add fluoride to the water it supplied.

[310] The scheme of the legislation under the Health Act and the Local Government Act is that the quality of water supplied by local authorities has been controlled since 2008 by the provisions of Part 2A of the Health Act, introduced by s 7 of the Health (Drinking Water) Amendment Act 2007. Where a local authority supplied drinking water as at 25 December 2002, it has been obliged by s 130 of the Local Government Act to continue supply. But neither that Act nor the general powers in s 23 under Part 2 of the Health Act to abate nuisances and remove conditions likely to be injurious to health impose responsibility for setting the standards for potable and wholesome water on local authorities. Nor do they empower local authorities to treat the population of the district for conditions likely to be injurious to health. Standards for water quality are set nationally by the Minister by reference to measurement of identified determinands and on the basis that the standards adopted by the Minister "must not include any requirement that fluoride be added to drinking water". The public health powers of local authorities under the Health Act are limited to nuisances and conditions in land and waters which are likely to be injurious to health.

(a) Section 130 of the Local Government Act

[311] The requirement of continuity of supply of drinking water contained in s 130 of the Local Government Act does not authorise the fluoridation of the water supplied.

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[349] As acknowledged by McGrath and Arnold JJ, delivering reasons of themselves and William Young and Glazebrook JJ in *Dotcom* at [161], importing the "restraint" on wide discretion provided by s 5 of the New Zealand Bill of Rights Act when interpreting the search and seizure powers contained in s 44 of the Mutual Assistance in Criminal Matters Act 1992.

Section 130 is contained in Part 7 of the Local Government Act which, as is described above at [271], is concerned with ensuring adequacy of water supply and sanitary services as well as the provision of other public amenities (such as parks, reserves and library membership).[350] Adequacy of water services is assessed in terms of the amount of water available to households and "the extent to which drinking water provided by water supply services meets applicable regulatory standards".[351] The applicable regulatory standards are those set under s 69O of the Health Act. For the reasons given below at [319]–[322], their purpose is potable water, not wider public health interests affecting the population.

(b) Section 23 of the Health Act

[312] Section 23 of the Health Act (the text of which is set out above at [269]) provides local authorities with broad powers and duties in respect of public health. They include duties to provide reports as required by the Director-General of Health and, subject to the direction of the Director-General, to enforce regulations made under the Act and to appoint environmental health officers and other officers (including at the direction of the Director-General). Section 23 is contained in Part 2 of the Act, concerning the "powers and duties of local authorities". Section 25, within Part 2, obliges local authorities to provide "sanitary works" if requisitioned to do so by the Minister, including drainage works, sewerage works, waterworks, swimming baths and cemeteries and such other works as it is required to undertake by Order in Council, and under supervision of the Director-General.

[313] The power in s 23 relied upon as supporting an implied power to add fluoride to water supplied by the Council is that contained in s 23(c) which authorises a local authority to take "all proper steps … to secure the abatement" of any "nuisance" or any "condition likely to be injurious to health or offensive" in the district. Lack of fluoride cannot be described as a "nuisance", a term defined non-exclusively in s 29 but by reference to conditions likely to be injurious to health, such as through accumulation of rubbish or through the condition of drains or watercourses. All

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350 See s 123.

351 Section 126 (the legislative history of which is discussed above at n 297).

conditions identified as nuisances or potential nuisances are conditions found on land in the district which are or may be injurious to health.

[314] Section 23(c) itself must be read in the context provided by the powers and directions given to a local authority "to improve, promote, and protect public health within its district". The powers "to secure abatement of nuisances or conditions likely to be injurious to health or offensive" which precede para (c) are the powers in para (a) to "appoint … environmental health officers and other officers" and in para (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". Paragraph (c) follows on from para (b) and uses the same language in providing that the local authority is empowered and directed to secure abatement of any "nuisance or the removal of the condition", if "satisfied that any nuisance, or any condition likely to be injurious to health or offensive, exists in the district". In the context of para (b) it is clear that the "condition" the local authority is empowered to remove is similarly one that might be found on inspection of the district. These are not terms readily applicable to aspects of the health of the population in the district. Nor do the terms of the provision suggest that the powers of removal or abatement could include medication of the population.

[315] The remaining paragraphs, (d), (e) and (f), are concerned, respectively, with enforcement of regulations "subject to the direction of the Director-General", the making of bylaws for the protection of public health, and the furnishing of reports to the medical officer of health "as to diseases, drinking water, and sanitary conditions within its district as the Director-General or the medical officer of health may require". Again, none of these provisions suggest that the local authority could make bylaws for medical treatment of the population in its district.[352] The indications that enforcement of regulations under the Act are under the supervision of the Director-General and the reporting required to the Director-General and the medical officer of health as to diseases, drinking water and sanitary conditions within the district suggest that responsibility for public health within the district (except in the limited ways described for elimination of nuisances and conditions likely to be injurious to health or offensive)

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[352] It may be noted additionally that s 155(3) prevents the making of bylaws inconsistent with the New Zealand Bill of Rights Act "notwithstanding section 4 of that Act".

are reserved to the Director-General and medical officer of health acting under their powers.

[316] I consider that s 23(c), read in its own terms and in its immediate context, does not authorise the addition of fluoride to treat dental decay. North P and Turner J were I think right in *Attorney-General v Lower Hutt City* to take the view that s 23 did not provide the Council with authority to add fluoride.[353] Nor do I accept that s 23(c) describes a function to address health through provision of treatment of the population which justifies use of the general powers of competence contained in s 12 to add fluoride to water.

(c) Section 12 of the Local Government Act

[317] I have already described the terms and effect of s 12 above at [274]–[278]. The general competencies provided under s 12 do not enlarge the scope of the functions of local authorities. They are powers which are necessary to enable such functions to be carried out. I take the view that s 130 of the Local Government Act and s 23 of the Health Act do not implicitly confer on local authorities general responsibilities in relation to the health of the population in the district which could justify use of s 12 to add fluoride or other medical treatment to water. Such implied power would be inconsistent with s 12(3) because local authorities are bound to observe s 11 of the New Zealand Bill of Rights Act. The implication of a power to add medical treatment to water, without practical ability of the population to which the water is reticulated to avoid such treatment, is inconsistent with the presumptions of interpretation where fundamental values are affected. Such implication is not necessary in order to make the legislation work, as is required where rights are affected, as is explained above at [282]–[283].

[318] The explanatory note to the Local Government Bill referred to above at [278] indicates that s 12 was not thought to provide "coercive or regulatory powers" over others. That is not easy to square with the view that s 12 would permit treatment without consent through the water supply. An implied power in local authorities to undertake the addition of fluoride or other medical treatment is also inconsistent with

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353 See above at [216] and [254].

the overall legislative scheme in which the Minister of Health has responsibility for regulating the quality of water and local authorities have responsibility for meeting the standards set and providing assessments and reports to demonstrate compliance.

(d) The standards set under Part 2A of the Health Act

[319] The argument for the respondents entails treating the maximum acceptable value as setting a ceiling below which an implied power to add fluoride necessarily arises.[354] The provenance of the maximum level in World Health Organization guidelines applicable to countries with naturally occurring levels of fluoride is not a sound basis for an implied power to add fluoride up to the maximum level specified. The argument would treat the addition of any other determinand as available to a local authority if it promotes public health.

[320] Nor is such an implied power readily reconcilable with the statutory prohibition on requiring the addition of fluoride in setting standards. I am unable to agree with the view that the fact that the Minister is explicitly prohibited from requiring the addition of fluoride is indication of implicit conferral of such power on the local authority. The only mention of fluoride in Part 2A itself is in respect of s 69O(3)(c). The prohibition on requiring the addition of fluoride through standards would be a very backhanded way to suggest by implication that local authorities nevertheless have a discretion to add fluoride. That is not an explanation given by the Select Committee. The better view is, I think, that the maximum acceptable value simply specifies the levels of fluoride that are treated as contaminants which prevent drinking water attaining the requirements set for safety.

[321] There is in my view no logical inconsistency if a local authority cannot add a substance up to the maximum value allowed by the Minister and the Minister is prevented from requiring addition below that maximum acceptable value. The maximum value set does not carry the necessary implication of a power at the discretion of the supplier to add a determinant up to the maximum value. I do not

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354 The Council in its submissions says that the Health Act "expressly contemplates that fluoride may be added to drinking water in accordance with drinking water standards". It says that even if fluoridation limits the s 11 right to refuse medical treatment, "there is no possible alternative interpretation of the [Local Government Act], Health Act, and the drinking water standards that confer the power to fluoridate".

consider that s 69O says anything about the capacity of local authorities to add fluoride at their discretion relying on their general powers of competence and general and limited responsibilities in relation to public health in their districts.

[322] The purpose of the standards is to set the maximum values for water in order to ensure that it is safe to drink. There is nothing in Part 2A of the Act to suggest a wider public health purpose in regulating the treatment of water. The scheme of the legislation is that regulation to achieve safe drinking water is the responsibility of the Minister while the obligation to supply, maintain existing services, and set up the infrastructure to do so is the responsibility of local government.

(e) Section 11 of the New Zealand Bill of Rights Act

[323] An interpretation of the legislation which recognises an implied power to add fluoride to water is inconsistent with s 11 of the New Zealand Bill of Rights Act. In line with both the common law presumption of interpretation in accordance with fundamental values and the direction contained in s 6 of the New Zealand Bill of Rights Act, the general provisions contained in ss 12 and 130 of the Local Government Act and s 23 of the Health Act cannot properly be construed to contain an implied power to add a substance for health reasons in the absence of explicit statutory authority.

(f) The background provided by **Attorney-General v Lower Hutt City** *does not justify implied power*

[324] I am of the view that the background provided by the decision in *Attorney-General v Lower Hutt City* (even if correct when decided) does not justify an implication of authority to provide medical treatment without consent in the legislative context since enactment of s 11 of the New Zealand Bill of Rights Act. *Attorney-General v Lower Hutt City* was decided at a time when it was thought that fluoridation of municipal water supplies did not engage any protected rights. That is apparent from the report of the 1957 Commission of Inquiry and the Human Rights Commission's report of 1980 (discussed above at [241]), both of which preceded enactment of the New Zealand Bill of Rights Act and neither of which addressed the right now enacted as s 11.

[325] The provisions of the Local Government Act and the Health Act also now fall to be applied in the legislative context of the scheme of regulation of water to ensure that it is potable contained in Part 2A of the Health Act. Since 2008, Part 2A has made it clear that the obligations on local authorities supplying water are to take reasonable steps to ensure that the standards set by the Minister are met. Those standards are clearly addressed only to the safety of drinking water and not to its "improvement", as the Privy Council thought available to local authorities obliged to supply "pure" water.[355] I indicate under the next heading that I do not consider that there was a secure foundation for necessary implication of a power to "improve" water that was safe under s 240(1) of the Municipal Corporations Act. The point may perhaps have been clearer under the subsequent legislation with its substitution of an obligation to provide "potable" water instead of "pure" water. But, in any event, the scope of the obligation under Part 2A of the Health Act now makes it quite clear that the standards set by the Minister are concerned with water safety, not more general public health benefits. Still less are they consistent with the imposition of treatment without consent. Compulsory treatment would be a significant power which is inappropriate for implication, as is suggested by the care taken under Part 3A of the Act to ensure compulsion is undertaken only "within a human rights framework" (as described above at [220]).

[326] Most importantly of all, however, the provisions of the Local Government Act and the Health Act relied on as the sources of implied power now fall to be interpreted in the context of s 11 of the New Zealand Bill of Rights Act.

(g) In any event, Attorney-General v Lower Hutt City *is doubtful authority*

[327] Quite apart from the basis on which I would distinguish *Attorney-General v Lower Hutt City* in application of the contemporary provisions, I think there is reason to doubt whether the interpretation of s 240(1) of the Municipal Corporations Act that was accepted in the case could prevail today. *Attorney-General v Lower Hutt City* was decided at a time when the courts acquiesced in the unrestricted exercise of wide discretionary powers in public law. Such powers have since come to be understood to be constrained by statutory purpose, following cases such as *Padfield v Minister of*

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355 See the extract quoted above at [253].

Agriculture, Fisheries and Food[356] and *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*.[357]

[328] I do not doubt that a power to "construct waterworks for the supply of pure water for the use of the inhabitants of the district" (and for that purpose to draw on the water from rivers, lakes, etc) necessarily entailed obligations to render the water "pure" (or "potable", as the succeeding legislation had it). That does not seem to me however to do more than empower the council to render the water safe to drink. No wider public health purpose in the supply of water is suggested by the legislation, even when read in the context of s 288 of the Municipal Corporations Act 1954 and s 23 of the Health Act 1956. They describe very general responsibilities in relation to public health with no suggestion of powers to impose fluoride or other medication on the inhabitants of the district.

[329] The Privy Council in *Attorney-General v Lower Hutt City* upheld the decision of the Court of Appeal on the basis of what it acknowledged to be a "liberal" construction of the section and on the view that the addition of fluoride "adds no impurity".[358] A purposive interpretation of the section it seems to me would recognise that "pure water" in context has the meaning "potable water" (as the subsequent legislation made clear) and that the end it sought was safe water. I doubt that an implication of a power to "medicate" (and so "improve") water could be justified on the current approach to implication of powers (discussed above at [282]–[283]) on the basis that the water "remains not only water but pure water and it becomes a greatly improved and still natural water containing no foreign elements". The question was not whether "natural water containing no foreign elements" was "pure". Instead, the real question was whether the Council's discretionary powers under s 240(1) were limited to making the water potable, that is to say safe to drink.

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356 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL). See also William Wade and Christopher Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 12–13, describing the "deep gloom settled upon administrative law" from which the courts began to emerge in the 1960s.

357 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA).

358 See the extract quoted above at [253].

(*h*) *The presumption of rights-consistent interpretation is not rebutted*

[330] Construing the provisions relied on here as providing power to add fluoride or other medical treatment to water is contrary to the presumption of rights-consistent interpretation. Such presumption cannot be rebutted except by express language or necessary implication. Otherwise rights acknowledged to be fundamental would be "overridden by general or ambiguous words". Rebuttal may follow however from the purpose of the powers conferred.

[331] In *Cropp*, the issue for the Court was whether s 29 of the Racing Act 2003, in authorising rules regulating the conduct of racing through rules for "the conduct and control of race meetings, including safety requirements", authorised the rules in issue which required jockeys to supply samples for the purpose of drug testing. The Court considered that the critical question was whether the drug-testing rules were authorised by the Act "interpreted in accordance with the general law and the Bill of Rights Act".[359]

[332] Despite the presumption of rights-consistent interpretation, the Court was satisfied in *Cropp* that a power to make rules for safety in the conduct and control of race meetings, by necessary implication, "authorises the creation of a drug-testing regime intended to deter drug taking".[360] The risk to safety in use of drugs by jockeys was very great and the rule-making authority "expressly authorises rules directed to the safety of racing"[361]:

> [31] The "safety requirements" of race meetings on any sensible reading must encompass measures designed to eliminate, or at least minimise, the taking by jockeys of drugs which may induce unsafe riding practices or behaviour, both by detecting and deterring drug taking.

[333] No comparable contextual rebuttal of the presumption, such as was provided in *Cropp* by the explicit power to make rules for safety in racing, arises here. The principal source of authority to add fluoride here was a general power of competence in the context of functions which touch on public health in the physical supply of water

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359 *Cropp* at [24] per Blanchard J giving the reasons of the Court.
360 At [32].
361 At [27].

but in which the safety of the water supplied is the subject of detailed rules made under the statutory scheme contained in Part 2A of the Health Act.

(i) Conclusion

[334] For the reasons given at [323]–[326] and [330]–[333], I do not accept that the presumption of interpretation in conformity with the values contained in s 11 of the New Zealand Bill of Rights Act is displaced by the background provided by the decision in *Attorney-General v Lower Hutt City.* That decision is suspect in its own terms, as explained above at [327]–[329]. But in any event it is now inconsistent with the contemporary scheme for water treatment in Part 2A of the Health Act as well as with s 11 of the New Zealand Bill of Rights Act. I consider for the reasons given at [311]–[318] there is no basis upon which to interpret ss 12 and 130 of the Local Government Act and s 23 of the Health Act as providing authority under which local authorities may add fluoride to water. If Parliament wishes to empower local authorities to add fluoride to reticulated water for public health purposes, it can do so clearly. I would accordingly allow the appeal and make a declaration that the Council has no power to add fluoride to the water it supplies.

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