Public drinking-water fluoridation and the right to refuse medical treatment — the Supreme Court wades in

*05 October 2018 - By Holly Hedley*

* [LAWTALK 922](https://www.lawsociety.org.nz/search/_nocache?meta_C_and=922)

The fluoridation of public drinking-water supply has long been a topic of debate in Aotearoa. Although there is broad support for fluoridation from the Ministry of Health and the New Zealand Dental Association, the practice has remained controversial, particularly in the context of our express recognition of the “right to refuse to undergo any medical treatment” in section 11 of the New Zealand Bill of Rights Act (NZBORA).

In recent years our courts have heard various challenges to the lawfulness of public drinking-water fluoridation brought by New Health New Zealand Inc (NHNZ). In June this year the Supreme Court had the final word on these challenges, releasing two decisions dismissing NHNZ’s appeals: *New Health New Zealand Inc v South Taranaki District Council*[2018] NZSC 59 and *New Health New Zealand Inc v South Taranaki District Council*[2018] NZSC 60.

The issues brought before the courts by NHNZ were complex, and covered much more than just the section 11 right to refuse to undergo medical treatment. However, it is the court’s analysis of section 11 that this article will focus upon.

**A bit of history**

The right to bodily integrity has long been recognised in common law (Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd Ed, LexisNexis, Wellington, 2015) at 424, and see also the High Court decision of *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395 at [52]). However, Aotearoa is fairly unique in having an express constitutional protection of the right to *refuse* to undergo medical treatment. Indeed, only three other jurisdictions (Fiji, South Africa and Turkey) have similar constitutional protections (Butler and Butler, at 424) and there is no direct comparison in any international human rights instrument (see *New Health New Zealand Inc v South Taranaki District Council*[2016] NZCA 462 at [71]).

Up until the challenges to public drinking-water fluoridation brought by NHNZ there had been relatively limited discussion of the scope of section 11 by the New Zealand courts and no analysis of the right in the public health (rather than individual treatment) context. Rodney Hansen J’s analysis in the High Court iteration of the NHNZ cases was therefore ground-breaking (*New Health New Zealand Inc v South Taranaki District Council*[2014] NZHC 395).

**The High Court decision**

Although Rodney Hansen J accepted that public drinking water-fluoridation had a therapeutic purpose (see at [58] and [79]) he ultimately took a narrow view of section 11, concluding that it did not apply to more general public health measures intended to improve the health of the populace. In reaching this conclusion, the Judge compared water fluoridation to “the addition of iodine to salt, folic acid to bread and the pasteurisation of milk” (at [81]) and commented that “[t]he terms of s 11 themselves indicate that medical treatment is of more limited scope. One would not naturally describe a person drinking fluoridated water or ingesting iodised salt as 'undergoing' treatment…”(at [82]).

Rodney Hansen J also accepted that a broad interpretation of section 11 to include the right to refuse public health measures intended to benefit the population could cut across the international right to the “enjoyment of the highest attainable standard of health” (as guaranteed by article 12 of the International Covenant on Economic, Social and Cultural Rights).

He concluded (at [89]) that: “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.”

For completeness, Rodney Hansen J also considered whether, in the event that he was wrong about the narrower scope of section 11, the fluoridation of public drinking-water was a justified limitation in terms of section 5 of the NZBORA. After briefly considering the evidence for and against (and noting that there were ways that a “resolute consumer” could avoid ingesting fluoride – at [89]) the Judge reached the view that public drinking-water fluoridation was a “proportionate response to the scourge of dental decay” and that the power to fluoridate did amount to a justified limitation under section 5 (at [111] and [119]).

**The Court of Appeal**

On appeal in 2016, the Court of Appeal agreed with Rodney Hansen J’s analysis of section 11, finding that: “the right guaranteed by s 11 to refuse to undergo medical treatment does not extend to public health measures such as the fluoridation of drinking water intended to benefit the public at large” ([2016] NZCA 462 at [87]). The court also considered section 5 of the NZBORA and, after a much more detailed analysis of expert evidence, concluded that even if fluoridation did infringe upon section 11: “there is a respectable and sufficient body of evidence to support the conclusion that any such infringement is a justified and reasonable limit in terms of s 5 of the NZBORA,” (at [165]).

**The Supreme Court’s views**

NHNZ’s appeals came before the Supreme Court in November 2017 and the court’s judgments were issued in June this year, in *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59.

On the section 11 point, the Justices’ reasoning was varied and complex. The upshot however is that all of the Justices except William Young J disagreed with the lower courts’ narrower interpretation of ‘medical treatment’ section 11, with O’Regan and Ellen France JJ (with whom Elias CJ and Glazebrook J both agreed) commenting that: “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,” (at [90]).

The majority and binding view of the Supreme Court when it comes to the proper interpretation of section 11 was therefore that the right to refuse (at [97]): “… applies to any compulsory medical treatment, whether provided in the course of a practitioner/patient relationship or as a public health measure. …”

And that: “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.” (at [98]).

As far as the application of section 5 of the NZBORA, the justices’ reasoning was again complex. Without diving too far into the detail, O’Regan and Ellen France JJ concluded that, despite engaging section 11, a power to fluoridate drinking-water supplies was nonetheless justified under section 5 (at [144]).

Glazebrook J agreed that section 11 was engaged but declined to comment on section 5 in this particular case (at [176]).

Elias CJ’s approach differed again, as (contrary to the other Justices) she declined to imply a power to fluoridate public water supplies from the existing legislation (see, for example at [214] – [217]). She concluded that “an interpretation of the legislation which recognises an implied power to add fluoride to water is inconsistent with s 11 of the [BORA]” (at [323]).

Although not central to her conclusions, the Chief Justice also noted her reluctance to accept that section 5 of the NZBORA could apply in circumstances where there were only general discretionary powers, noting that section 5 required any limitation to be “prescribed by law” (at [222]).

**What might the Supreme Court’s decision mean for the future?**

Although the Supreme Court’s analysis was complex (particularly when it came to the application of section 5), what is clear from the NHNZ cases is that section 11 of the NZBORA must be given a generous interpretation and that the protection will be engaged in the public health context, even though there may be no direct or individual therapeutic relationship. The key focus for cases in the future will not therefore usually be on whether fluoridation (or other public health measures) amount to medical treatment, but rather, whether those public health measures can be demonstrably justified under section 5 of the NZBORA.

*Holly Hedley**holly.hedley@buddlefindlay.com**is a Senior Associate at Buddle Findlay. She specialises in health and employment law and is a member of the New
Zealand Law Society’s Health Law Committee.*