Privy Council Appeal No. 25 of 1964

Her Majesty's Attorney-General for New Zealand – – – *Appellant*

v.

The Mayor, Councillors and Citizens of the City of Lower Hutt – *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY 1964

Present at the Hearing:
VISCOUNT RADCLIFFE.
LORD MORRIS OF BORTH-Y-GEST.
LORD PEARCE.
LORD UPJOHN.
LORD DONOVAN.
[*Delivered by* LORD UPJOHN]

Since 1959 the respondent Corporation have added to the public water supply which they provide, from artesian wells, for the inhabitants of the city of Lower Hutt a minute quantity of sodium silico fluoride so as to bring the content of fluoride in the water up to one part in a million. The natural content of fluoride in this water is so small as not to be capable of demonstration, but traces of it are definitely there. The reason for this addition is not disputed. The evidence, to which their Lordships will briefly refer, established conclusively that fluoride in water plays a great part in preventing dental caries or decay in teeth and this is especially so in regard to the teeth of children up to the age of 12 or 14. As for geological reasons, the fluoride in natural water in most parts of New Zealand is very low compared with natural waters in most other parts of the world, this lack of fluoride causes an abnormally high incidence of dental decay among the inhabitants.

The respondent Corporation therefore decided to add fluoride to its water solely with a view to improving the dental health of its citizens, especially its children. It has installed a standard fluoridation plant adjacent to the pump room which (as the learned judge held) ensures that the whole water supply contains an even mixture with the proportion of fluoride to water one part per million, which medical opinion thinks is the optimum proportion for the preservation of dental health. It appears that some other public authorities in New Zealand have done the same for the same reason. The relators however challenge the power of the respondent Corporation to do this, but before examining that argument it will be convenient to set out some of the undisputed facts.

At first instance the action came before McGregor J. and he examined the evidence with meticulous care. At one stage of his judgment he said this: " I have heard considerable evidence in the matter and I must say at the outset that I have never hitherto experienced evidence more impressive and cogent than that of the defendant establishing that it is, to use a neutral expression, most desirable that fluoride should be added to the water". Later on in his judgment he said: " In the present case I was satisfied on the evidence (1) that there is a high incidence of dental caries in New Zealand generally (2) there is almost a complete absence or at least a high deficiency in the fluoride content of the natural artesian well water supply of Lower Hutt, (3) that the absorption of fluoride has a substantial effect in reducing the incidence of dental caries especially in young children (4) there are no

deleterious or toxic effects on the human body from the absorption of fluoride more emphatically in the minute proportion of one part to a million (5) that any surplus fluoride taken into the body is excreted without harmful effects, and (6) that tablets or other vehicles for the taking of fluoride are unsatisfactory in that the required regularity with children would not be achieved and that natural water is the only really satisfactory vehicle."

Notwithstanding that these findings of fact have not been challenged, the relators, as they are perfectly entitled to, challenge the powers of the respondent Corporation to make this minute addition of fluoride to the waters they supply to the public and seek an injunction restraining the respondent Corporation from doing so.

The respondent Corporation is entitled under the Municipal Corporations Act 1954 to construct waterworks and to supply pure water for the use of the inhabitants of the district and it relies on three statutory powers which, it contends, entitles it to add fluoride to the water for the purposes of improving the dental health of those who use and drink the water supplied by it.

The first section on which reliance is placed is section 240 of the Municipal Corporations Act 1954. This section is the second section in part 17 of the Act which is entitled " Waterworks ". Section 239 defines the term " waterworks " and their Lordships do not think it necessary to set that section out in detail. Then there is a sub-heading " Construction and Maintenance " and section 240 is in these terms:

> " (1) The Council may construct waterworks for supply of pure water for the use of the inhabitants of the district or of the shipping in any harbour adjoining, and may keep the same in good repair and may from time to time do all things necessary thereto, and in particular may . . . ".

Then follow a number of special powers which their Lordships do not think it necessary to set out for they do not bear on the problem they have to consider.

The second power upon which the respondent Corporation relies is to be found in section 288 of the same Act. It is the first section in Part 20 of the Act which is entitled " Public Health and Convenience " and is in these terms (as amended when the Health Act 1956 supplanted the Health Act 1920). " The Council may do all things necessary from time to time for the preservation of the public health and convenience and for the carrying into effect provisions of the Health Act 1956 so far as they apply to the district ". Finally, the respondent Corporation relies on section 23 of the Health Act 1956 which so far as relevant is in these terms:

> " 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 certain powers were expressly conferred upon the local authorities.

McGregor J. decided that section 288 of the Municipal Corporations Act entitled the respondent Corporation to make this addition of fluoride, but that section 240 of the same Act did not do so. He did not rely on section 23 of the Health Act 1956 which, indeed, he thought might be restrictive of the powers conferred by section 288 though not in this respect.

In the Court of Appeal North P. and McCarthy J. held that the respondent Corporation was empowered to make this addition but by virtue of section 240, and in these circumstances did not consider the other sections. Turner J. dissented and held that the respondent Corporation had no power to do so.

Their Lordships propose to consider first, the question whether, as the majority of the Court of Appeal held, section 240 entitles the respondent Corporation to make this addition. Ultimately it comes to a very short point of construction, whether the power to construct waterworks for the supply of " pure water " entitles the Corporation to do so. No-one has suggested that the phrase " pure water " means pure H_2O distilled of all other ingredients. It would indeed be a most unappetising and unsatisfactory liquid.

The phrase must be construed in relation to the background that " water " in the section refers to a natural liquid obtained from the earth through artesian wells (as in this case) or rivers, or streams, and as such it must have within it many substances in solution which it has collected in the course of its percolation through the earth's crust. These substances will differ greatly according to the nature of the earth through which the water passes on its way to the point where it is finally collected by the local authority, be it by artesian well, or from rivers, stream or reservoirs to form the basic supply for the distribution of water to the local inhabitants. But the authority, exercising its powers under section 240, may not be entitled to deliver that water in its natural condition for it may contain many ingredients highly deleterious and harmful to human beings who desire to use it for drinking and domestic purposes. It must supply " pure water ". For this purpose therefore it must be empowered to add to the natural water content, substances such as chlorine to counteract toxic bacilli; to take the necessary steps by the addition or extraction of constituents, to prevent cloudiness or discoloration, to make the taste more acceptable and " potable " and so on. In the case of the waters supplied by the respondent Corporation in fact it appears that the only other addition made to the water besides fluoride is lime to counteract some excess of CO_2 in the water and possibly trace elements of chlorine to combat bacilli though the evidence on this was far from clear. The learned Judge however held on the evidence that the natural water supply of the respondent Corporation from its artesian wells was " pure water " and that the water after fluoridation and with the slight percentage of other chemicals added thereto, already mentioned, was still pure water in the sense that it was wholesome water or potable water. He concluded this part of his judgment by saying " It is no more and no less pure than the natural supply ".

On these findings McGregor J. held that section 240 did not entitle the respondent Corporation to make this addition for the reasons he expressed thus:

> " As I have already said, section 240 gives power to contruct waterworks, a power already exercised prior to the installation of the fluoridation plant and from time to time all things necessary thereto. The question therefore arises whether the addition of the fluoridation plant was necessary for collecting or conveying pure water to any part of the district. I do not think any such addition was necessary. It is certainly in my opinion expedient and highly desirable, but the Council had already installed all pipes, machinery and appliances for collecting and conveying water to the district. What it has now done is not an addition to the supply or something necessary to collect or convey the water, but most worthily it has improved the health quality of the existing supply. The cholorinated plant might well be authorised for the reason that an impure or dangerous supply may be converted into a pure supply and such a plant would be necessary to give a supply of pure water. But here the inhabitants already have a supply of pure water. The fluoridation plant is for the purpose of the supply of what might be termed " medicated pure water ". This seems to be in accord with the view expressed by the Court of Appeal of Ontario in the *Village of Forest Hill v. the Municipality of Metropolitan Toronto* [1956] O.R. 367 and by the New Brunswick Supreme Court Appeal Division in *R. v. Fredericton* (1956) 2 D.L.R.(2d) 551. In the former the municipality had ' a power and obligation to provide a continued and abundant supply of pure and wholesome water '. It was held that although the word ' wholesome ' may properly be interpreted as meaning ' beneficial to health ' and although a municipality may be entitled to do something to make its water more beneficial to health as water, it enters a different field and one it is not entitled to enter when it proposes to add something for medicinal purposes to pure and wholesome water, and its real purpose is not to make the water pure and wholesome but to improve the general health of the community. "

The learned judge then went on to cite a passage from the judgment of Pickup C. J. O. in the *Forest Hill* case. He summarised his conclusion in this respect:

> " It seems to me that what is necessary for the supply of pure water is at least in part a question of fact, but it would be straining the language of the Act to hold that by implication the legislature has empowered the defendant to add fluoride to its water supply. Such an Act seems to me neither incidental nor consequential to the supply of pure water where the water is already pure.".

That really states the case on section 240 presented to their Lordships by Mr. Barton for the relators. He summarised his submission in this way that under section 240 the local authority has an implied power to ensure that all impurities in the water were neutralised or eliminated; to prevent impurities arising during distribution and to add substances to the water for that purpose but that the addition of fluoride could be justified only if it was added to remove an impurity or make it more pleasant to drink; neither of which were suggested. He contended that the powers conferred by section 240 did not entitle local authorities to add a food or medicine to its water supply.

In the Court of Appeal North P. took a different view from that of McGregor J. and he said this:

> " But if as I think the position to be the word ' pure ' in the context in which it appears in out statute, is a relative term and does not refer to the water being chemically pure, then I see no reason why a local body, so long as it acts in good faith, should not be entitled to take any reasonable steps it may think proper to improve the quality of its available water supply as water. I agree that it must not attempt to introduce a substance which is foreign to the nature of water for medicinal or other purposes for this would render the water impure ".

Later he said:

> " In taking this step [adding fluoride] the respondent was doing no more than rectifying a deficiency in the water which was available to it and was acting reasonably on expert advice which had satisfied it that this step was desirable in the public interest ".

McCarthy J. said this:

> " Therefore no doubt some people see fluoridation simply as a medication, but I think it better not to do so. Rather one should bear in mind that fluoride is normally present in New Zealand waters and that all that is done at Lower Hutt at any rate is to increase the quantity ".

Later dealing with the addition of the fluoride to the water he said:

> " Nothing which has been done to it has rendered it impure. It is not water plus some foreign substance in material quantity; it can reasonably be said to be water alone readjusted no doubt but still water. Incidentally it is better water for it then discharges in a better manner the purposes for which water is commonly used in communities such as Lower Hutt."

And later he said:

> " Taking a liberal view then I think it is possible to say that the fluoridation may not be literally authorised by the words of the section yet because it results in the water which brings to the inhabitants of the district the required element which is normally and best conveyed to humans through the water supply, it can be seen as an act reasonably and properly performed in the prosecution of the main purpose ".

Turner J. dissented for reasons which substantially agreed with McGregor J. but he said that had the words of section 240 authorised the supply of " pure and wholesome water " he might easily have come to a contrary conclusion.

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 section 5 paragraph (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 that 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 section 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 section 288, nevertheless that section makes it clear that the respondent Corporation is the Health Authority for the area and section 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.

In these circumstances their Lordships do not think it necessary to express any opinion upon the question whether section 288 of the Municipal Corporation Act or section 23 of the Health Act by themselves empower the respondent Corporation to add fluoride to the water.

Their Lordships have been referred to the Canadian cases of *Reg. v. Fredericton* (1956) 2 D.L.R.(2d) 551 and *The Village of Forest Hill v. The Municipality of Metropolitan Toronto* in the Court of Appeal [1956] O.R. 367; and in the Supreme Court (1957) 9 D.L.R.(2d) 113. While there are many points of distinction between those cases and the present case (which their Lordships do not think it necessary to enumerate) which may have influenced those decisions, yet basically those cases did decide that a local authority had no power to add fluoride to the water solely for the purpose if improving the dental health of the consumers but limited their powers to the removal of impurities. Unless these cases can be distinguished their Lordships regret that they cannot agree with them. As to the *Forest Hill* case they agree with North P. that they find the judgment of Mackay J.A. at first instance and the dissenting judgments of the Chief Justice of Canada and Locke J. in the Supreme Court the more convincing.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondents of this appeal.

(90340) Wt. 8052/97 100 8/64 Hw.

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DELIVERED BY

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