

IN THE SUPREME COURT OF NEW ZEALAND

**SC 141/2016
[2017] NZSC 162**

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

Court: Elias CJ, William Young, Glazebrook, O'Regan and
Ellen France JJ

Counsel: M T Scholtens QC and L M Hansen for Appellant
D J S Laing and H P Harwood for First Respondent
A M Powell for Second Respondent

Judgment: 30 October 2017

JUDGMENT OF THE COURT

**The application for leave to admit the TDB report annexed to the
affidavit of Philip Barry is dismissed.**

REASONS

Introduction

[1] The appellant, New Health New Zealand Inc, seeks leave to adduce new evidence in relation to the appeal on this matter set down for hearing on 16 and 17 November 2017. The evidence comprises an affidavit from Philip Barry exhibiting two reports, namely:

- (a) a report dated 11 December 2016 prepared by TDB Advisory Ltd (described as financial and economic advisors) of which Mr Barry is a principal, entitled “The Costs and Benefits of a National Tooth Brushing Education Programme for Children” (the TDB report); and
- (b) a report prepared in September 2015 by the Sapere Research Group (described as a consulting firm providing inter alia, economic and public policy services) entitled “Review of the benefits and costs of water fluoridation in New Zealand” and made public by the Ministry of Health in May 2016 (the Sapere report).

[2] The TDB report states that it sets out to address two questions, namely, the cost of a national tooth-brushing education programme for children aged 12 and under and the dental health effects and treatment savings for those under 18 years of age resulting from such a programme. The report considers these questions against the background of similar programmes in Scotland and in Denmark.

[3] The Sapere report is a cost benefit analysis of water fluoridation in New Zealand.

The application for leave

[4] To put the application for leave in context, one issue raised by the appellant’s written submissions on the appeal is whether fluoridation of drinking water by the first respondent, the South Taranaki District Council (the Council), engages the right under s 11 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) to refuse to undergo any medical treatment and, if it does, whether fluoridation is a limit on that right demonstrably justified under s 5 of the Bill of Rights.

[5] The application for leave is advanced primarily on the basis that the proposed evidence will substantially assist the Court in making any assessment under s 5. The appellant says that the analysis of the costs and benefits of a national tooth-brushing and education programme undertaken in the TDB report will be relevant in deciding, as part of the s 5 analysis, whether fluoridation impairs the s 11 right as little as possible. The appellant also submits the report could not have been obtained earlier

because it followed publication of the Sapere report which post-dated the hearing in the High Court of this matter and so it is fresh evidence. Finally, the appellant says the TDB report responds to the Sapere report. If both reports are admitted, there will be no prejudice to the Council.

[6] The application is opposed by the Council on the basis that the TDB report is not fresh as it could have been commissioned prior to the High Court hearing. The Council also submits the report lacks credibility because it is based on a hypothetical tooth-brushing programme. The Council argues the report is not cogent because it is not directed to the key issue under any s 5 inquiry which will focus on water fluoridation (but rather, on other hypothetical measures which might also be beneficial for oral health) especially where there is sufficient evidence already to enable the Court to address the s 5 issues. Finally, the Council says that it will be prejudiced by admission of this evidence given further evidence would be necessary to respond and no response could be prepared prior to the filing of the Council's submissions which are due on 30 October 2017.

[7] The second respondent, the Attorney-General, abides the decision of the Court.

Discussion

[8] We decline leave to adduce the TDB report on the basis it does not meet the established guidelines for admission.¹

[9] The report is not fresh. The application of s 5 of the Bill of Rights was in issue in the High Court and the report could, with reasonable diligence, have been commissioned prior to the hearing on 25–26 November 2013 in that Court.²

[10] Further, it is difficult to see how the TDB report would assist the Court in any s 5 analysis given its untested and hypothetical nature.

¹ *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 1, [2007] 2 NZLR 124 at [16] citing r 40, Supreme Court Rules 2004 and *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA) at 649.

² See, for example, the discussion in *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395, [2014] 2 NZLR 834 (Rodney Hansen J) at [107]–[109].

[11] Finally, we accept the Council's submission that introduction of the report at this very late stage would prejudice the Council.

Result

[12] The application for leave to adduce the TDB report is accordingly dismissed. It is unclear to us whether the appellant or the Council would nonetheless still seek admission of the Sapere report. We can leave the question of admission of that report for argument at the hearing, if necessary.

[13] Any questions of costs can be addressed in the judgment on the appeal.

Solicitors:
Wynn Williams Lawyers, Christchurch for Appellant
Simpson Grierson, Wellington for First Respondent
Crown Law Office, Wellington for Second Respondent