ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320

Supreme Court of New South Wales, Beech-Jones CJ, 15 October 2021

Whether public health orders mandating Covid 19 vaccination were valid and enforceable.

Key words: Public Health Orders, New South Wales, COVID-19, Vaccination Mandates, Validity

1. This case concerned a challenge to public health orders made in New South Wales requiring mandatory vaccination against Covid 19 in certain circumstances. The orders were made by the Minister for Health, Bradley Hazzard, under s 7(2) of the Public Health Act 2010 (NSW) (the PHA). The question was whether the orders were validly made.

2. The main focus of the proceedings was those aspects of the orders which prevented so called "authorised workers" from leaving an affected "area of concern" that they resided in, and prevented some people from working in the construction, aged care and education sectors, unless they have been vaccinated with one of the approved COVID-19 vaccines.

3. The Kassam plaintiffs sued the Minister, the Chief Health Officer of NSW, the State of NSW and the Commonwealth of Australia. They contended that the Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW) (Order (No 2)) and s 7 of the PHA were invalid on various grounds, and also unconstitutional under sections 51(xxiiiA) and 109 of the Constitution of Australia.

4. The Henry plaintiffs sought declarations that Order (No 2) was invalid, along with Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW) (the Aged Care Order) and Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 (NSW) (the Education Order). They sued the Minister only.

5. Before judgement, Order (No 2) was repealed, but the other orders remain in force.

6. The plaintiffs failed on all grounds of their challenge. The Court found that:

    (i) It was not demonstrated that the making of Order (No 2) was not a genuine exercise of power by the Minister, that the making of the impugned orders by the Minister involved any failure to ask the right question, or any failure to take into account relevant considerations, much less that it was undertaken

for an improper purpose. The Minister was not obliged to afford the plaintiffs, or anyone else, procedural fairness in making the impugned orders;

(ii) It was otherwise not demonstrated that either the manner in which the impugned orders were made was unreasonable or that the operation and effect of the orders could not reasonably be considered to be necessary to deal with the identified risk to public health and its possible consequences;

(iii) No aspect of Order (No 2) in respect of powers given to the police was shown to be inconsistent with the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW);

(iv) Order (No 2) did not effect any form of civil conscription as referred to in s 51(xxiiiA) of the Constitution and, even if it did, the prohibition on civil conscription does not apply to laws made by the State of NSW; and

(v) There was no inconsistency between Order (No 2) and the *Australian Immunisation Register Act 2015* (Cth) so that there was no infringement of section 109 of the Constitution.

7. In addition, the Court noted (at [7]):

> …that it is not the Court's function to determine the merits of the exercise of the power by the Minister to make the impugned orders, much less for the Court to choose between plausible responses to the risks to the public health posed by the Delta variant. It is also not the Court's function to conclusively determine the effectiveness of some of the alleged treatments for those infected or the effectiveness of COVID-19 vaccines especially their capacity to inhibit the spread of the disease. These are all matters of merits, policy and fact for the decision maker and not the Court…Instead, the Court's only function is to determine the legal validity of the impugned orders which includes considering whether it has been shown that no Minister acting reasonably could have considered them necessary to deal with the identified risk to public health and its possible consequences.

8. In other words, the case could only be decided on the legality of the impugned orders. Judges do not pronounce on policy.

9. The plaintiffs argued the issue of "rights", particularly the right of "bodily integrity". On that issue, the Court said (at [8]):

> …one of the main grounds of challenge in both cases concerns the effect of the impugned orders on the rights and freedoms of those persons who chose not to be vaccinated especially their "freedom" or "right" to their own bodily integrity. The plaintiffs contend that, as a matter of construction, the broad words of s 7(2) of the PHA do not authorise orders and directions that interfere with those rights or that they are otherwise unreasonable because of their effect on those rights. They seek to deploy the "principle of legality" which is a rule of statutory construction to the effect that, in the absence of a clear indication to the contrary, it is presumed that statutes are not intended to modify or abrogate fundamental rights… However, this country does not have a bill of rights, and thus, important as the principle of legality is, it is only a rule of construction…At least so far as the abrogation of particular rights are concerned, the presumption is of little assistance in construing a statutory scheme when abrogation is the "very thing which the legislation sets out to achieve"…

10. Bodily integrity could not be at issue since the impugned orders did not authorise the involuntary vaccination of anyone.

11. On freedom of movement, the Court said that the degree of impairment of movement differs depending on whether a person is vaccinated or unvaccinated. Curtailing the free movement of persons, including their movement to and at work, were the very type of restrictions that the PHA clearly authorised. Hence, the principle of legality did not justify the reading down of s 7(2) of the PHA to preclude limitations on that freedom (at [9]).

12. Further, any consideration of the unreasonableness of an order made under s 7(2) had to be undertaken by reference to the objects of the PHA which were exclusively directed to public safety. Orders and directions under the PHA that interfered with freedom of movement but differentiated between individuals on arbitrary grounds unrelated to the relevant risk to public health, such as on the basis of race, gender or the mere holding of a political opinion, would be at severe risk of being held to be invalid as unreasonable.

13. However, the differential treatment of people according to their vaccination status was not arbitrary. Instead, it applied a discrimen, namely vaccination status, that on the evidence and the approach taken by the Minister was very much consistent with the objects of the PHA (at [10]).

IMPLICATIONS

The arguments raised by the plaintiffs against having a vaccination for COVID-19 included:

a) Belief in a right to choose their own medicines and medical procedures.
b) Belief that COVID-19 vaccines do not provide immunity or lessen transmission rates, and carry risks of adverse reactions.
c) Belief that good health means that a person is not at risk from the disease.
d) Belief that natural immunity is preferable.
e) Belief that there is a "basic human right in Australia" to bodily integrity.
f) Belief that there has been insufficient clinical data and years of testing.
g) Belief that prior consent was required.

Their evidence was considered, and the Court expressed the view that their opinions and beliefs were honestly held. However, their contentions concerning the use of zinc, doxycycline, ivermectin, vitamins, aspirin, nutritional medicine and allowing the body to live with COVID-19 instead of vaccination were rejected by the Court on the basis of expert evidence. No doubt these arguments will be seen in other cases in the future.

In addition, the Court criticised the dissenting judgment of Deputy President Dean of the Fair Work Commission in an unfair dismissal case that addressed whether an employee who objected to being vaccinated against influenza could be reinstated to work at an aged care centre (*Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCB 6015). The Henry plaintiffs relied on various passages in the Deputy President's judgment to the effect that "vaccine mandates" embodied in the various public health responses to COVID-19 amounted to a form of coercion that violates a person's right to bodily integrity (at [115] to [129]). The Court in this case said in relation to Deputy President Dean's judgement in Kimber (at [65]-[70]):

> Given the very different jurisdictions being exercised by the Fair Work Commission and this Court, I would not ordinarily address the reasoning in their decisions (and I doubt they would address the reasoning in mine). However, as the Henry plaintiffs sought to rely on the reasoning it is necessary to record why that judgment is of no assistance.
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> First, the relevant parts of the decision relied on by the Henry plaintiffs do not address the case law concerning consent to a medical treatment.
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> Second, the passages relied on and passages to similar effect throughout the judgment appear to contain assertions about the efficacy and safety of COVID-19 vaccines and other aspects of the public health response to COVID-19 that were not reflected in the evidence that I found persuasive in this case and as far as I can ascertain were not the subject of evidence in that case.
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> Third, elsewhere in her reasons, the Deputy President considered it necessary to opine on matters affecting either the validity or the appropriateness of making the Aged Care Order under the PHA (at [147] to [173]). The function of determining its validity is for this Court to discharge and the function of determining whether it should have been made is for the political process. The Fair Work Commission has neither function.
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> Fourth, the Deputy President's judgment concludes with a number of clarion calls imploring "all Australians" to do things such as "vigorously oppose the introduction of a system or medical apartheid and segregation" (at [182]) and "vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID" (at [183]). Political pamphlets have their place but I doubt that the Fair Work Commission is one of them. They are not authorities for legal propositions.

This stinging rebuke to the Deputy President from the Supreme Court is unusual and notable.

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC//2021/1320.html

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