



Case Note: *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320

27 October 2021

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A full copy of the case can be accessed [here](#).

Background

Judge	Beech-Jones CJ at CL
Held	In the Supreme Court of New South Wales at Sydney in the Common Law Jurisdiction
Date of Hearing	30 September 2021, 1 October 2021, 5 and 6 October 2021
Date of Judgement	15 October 2021
Plaintiffs	Al-Munir Kassam, George Nohra, Alexandra Goundoulas, Jelena Zmiric (<i>Collectively referred to as the “Kassam Plaintiffs”</i>) Natasha Henry, Selina Crowe, Julie Ramos, Hohepa Waapu, Kamran Khan, and Sandi Greiner (<i>Collectively referred to as the “Henry Plaintiffs”</i>)
Defendant	Bradley Hazzard, Kerry Chant, State of NSW, and the Commonwealth of Australia
Considered	COVID-19 Public Health Orders made under <i>Public Health Act 2010</i> (NSW) s7(2) – <i>Jones v Dunkel</i> (1959) 101 CLR 298 – <i>Blatch v Archer</i> (1774) 1 Cowp 63; 98 ER 969 – <i>Constitution</i> s51(xxiiiA) – <i>Australian Immunisation Register Act 2015</i> (Cth).

Following the detection of the Delta variant of COVID-19 in the community in New South Wales (‘NSW’) in June 2021, the Minister for Health and Medical Research, the Honourable Bradley Hazzard (the ‘Minister’), made various orders under s7(2) of the *Public Health Act 2020* (NSW) (the ‘PHA’). Such orders significantly affect the freedoms of the citizens of NSW and impose greater burdens on those who are not vaccinated. This judgement deals with the aspects of the orders which prevented ‘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 vaccines¹.

One of the proceedings was brought by Mr Al-Munir Kassam and three other persons (the '**Kassam plaintiffs**'). The Kassam plaintiffs stated that they made an informed choice to refuse to be vaccinated. The Kassam plaintiffs brought proceedings against the Minister, the Chief Medical Officer (Dr Kerry Chant), the State of NSW, and the Commonwealth of Australia, and contended that the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW)* ('**Order (No 2)**'), and s7 of the PHA, were invalid². They contended that the Minister did not undertake any real exercise of power in making the order, that Order (No 2) was either outside the power conferred by s7 or represented an unreasonable exercise of the power because of its effect on fundamental rights and freedoms, and the manner in which Order (No 2) was unreasonable. Further, they contended that Order (No 2) conferred powers on police officers that were inconsistent with the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* ('**LEPRA**').

The other proceedings were brought by Ms Natasha Henry, and five other persons (the '**Henry plaintiffs**'), who like the Kassam plaintiffs, stated that they made an informed choice to refuse to be vaccinated. The Henry plaintiffs brought proceedings against the Minister only, and sought declarations that Order No 2, the *Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW)* (the "**Aged Care Order**"), and the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 (NSW)* (the "**Education Order**"; and collectively the "**impugned orders**"), were invalid. They contended that because of their effect on rights and freedoms, the impugned orders were beyond the scope of s7(2) of the PHA, that they were made for an improper purpose, that the Minister failed to have regard to various relevant considerations and asked the wrong question/s or took into account irrelevant considerations, that the Minister was obliged to but failed to afford them natural justice and acted unreasonably³.

We note that prior to the judgement, on 3 October 2021 the Minister made an order which repealed Order (No 2) from effect on 11 October 2021. Despite this, both sets of plaintiffs sought declaratory relief concerning Order (No 2) or, parts of its invalidity. At the time of the matter being heard, the impugned orders continued to have effect⁴.

The Court outlined that its only function was to determine the legal validity of the impugned orders, which included considering whether it had been shown that no Minister acting

¹ *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320, [1].

² *Ibid*, [2].

³ *Ibid*, [5].

⁴ *Ibid*, [6].

reasonably could have considered them necessary to deal with the identified risk to public health and its possible consequences⁵.

One of the main challenges in both proceedings regarded 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 contended that the broad words of s7(2) of the PHA do not authorise orders and directions that interfere with those rights, or that they were otherwise unreasonable because of their effect on those rights⁶.

Decision

The Court found that all grounds of the challenge, as provided by both the Kassam plaintiffs and the Henry plaintiffs, failed, and both proceedings were dismissed.

One of the main challenges advanced was that the impugned orders affected the rights and freedoms to the bodily integrity of those who chose not to be vaccinated, and as such the plaintiffs sought that the principle of legality was deployed⁷.

The Court found that, as the impugned orders did not authorise the involuntary vaccination of anyone, the right to bodily integrity was not violated by the impugned orders⁸. The Court proposed that the proper analysis was that the impugned orders curtailed freedom of movement, which in turn affected a person's ability to work, and socialise⁹.

The Court found that the PHA clearly authorised the type of restrictions which curtailed the free movement of persons including their movement to and from work, and thus the principal of legality did not justify the reading down of the s7(2) of the PHA to preclude limitations on that freedom¹⁰.

The Court found the following with regard to the balance of the grounds of the challenge:

- (i) "It has not been 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"¹¹;

⁵ Ibid, [7].

⁶ Ibid, [8].

⁷ Ibid, [8].

⁸ Ibid, [9].

⁹ Ibid, [9].

¹⁰ Ibid, [9].

¹¹ Ibid, [11(i)].

- (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”¹²;
- (iii) “No aspect of Order (No 2) was shown to be inconsistent with LEPR”¹³;
- (iv) “Order (No 2) does not affect any form of civil conscription as referred to in s51(xxiiiA) of the Constitution, and, even if it did, the prohibition of civil conscription does not apply to laws made by the State of NSW”¹⁴; and
- (v) “There is no inconsistency between Order (No 2) and the *Australian Immunisation Register Act 2015 (Cth)*”¹⁵.

Ratio

Whilst the Court gave consideration to a number of issues within its judgement, the following issues have been identified as particularly relevant to employers, including those in the education, and aged care industries.

Reasonableness of the orders

With regards to the consideration of the unreasonableness of orders made under s7(2) of the PHA, the Court stated that this was to be undertaken by reference to the objects of the PHA which were exclusively directed to public safety. The Court considered that the differential treatment of people based on their vaccination status, was not an arbitrary ground, and was consistent with the object of the PHA¹⁶. Further, the Court stated that orders and directions which “differentiated between individuals on arbitrary grounds unrelated to the relevant risk to public health, such as race, gender, or the mere holding of a political opinion, would be at severe risk of being held to be invalid as unreasonable”¹⁷.

Scope of the powers under the PHA

The Court considered at length the scope of the power conferred by s7(2) of the PHA. The Court stated that given the ability for the power to be exercised to deal with the risk *and its consequences*, of which both the risk and its contingencies may never eventuate and may have a low chance of materialising, that any power conferred to address ‘risk’ and its ‘possible consequences’ would appear to be very wide¹⁸.

¹² Ibid, [11(ii)].

¹³ Ibid, [11(iii)].

¹⁴ Ibid, [11(iv)].

¹⁵ Ibid, [11(v)].

¹⁶ Ibid, [10].

¹⁷ Ibid, [10].

¹⁸ Ibid, [19].

Right to bodily integrity

The plaintiffs contended that clauses 4.3(3), and 5.8(1) of Order (No 2) violated a person's right to bodily integrity¹⁹. However, the Court found that given Order (No 2) did not purport to confer authority on any person including a medical practitioner to perform a medical procedure on anyone, and that any attempt to force an injection would still be considered a battery, the right to bodily integrity had not been violated²⁰. Further, the Court found that the provisions, on their face impaired freedom of movements rather than a person's autonomy over their own body²¹.

The Court found, with regard to the argument that consent was vitiated by external factors (for example, following coercion from the government), that someone's consent to a vaccination is not vitiated, nor their right to bodily integrity violated, just because they agree to be vaccinated to avoid a general prohibition on movement or to obtain entry onto a construction site²². Further, the Court commented that the relevant clauses did not violate a person's right to bodily integrity any more than a provision requiring a person to undergo a medical examination before commencing employment would²³.

The Court found that the provisions challenged did not amount to a violation of anyone's right to bodily integrity, but instead impeded their freedom of movement which has consequential effects on their ability to work. The Court commented that whilst the freedom of movement is undoubtedly important, it is not necessarily some form of a positive right²⁴.

Privilege Against Self-incrimination

The plaintiffs also contended that clauses under Order (No 2), which in some circumstances require a person to produce evidence of their identity, residence and vaccination status, violate their privilege against self-incrimination. The Court found that the privilege is one against incrimination, and not a privilege against exoneration, meaning the privilege did not protect against production of evidence by a person that may exonerate them from a breach of the law²⁵.

The Aged Care Order and Education Order

Similarly, the Court found that the Aged Care Order, and the Education Order, operate to limit the freedom of movement, and have significant consequential effects on an unvaccinated person's ability to work, however, they do not violate an unvaccinated person's right to bodily integrity or involve a violation of their privilege against self-incrimination²⁶.

¹⁹ Ibid, [55].

²⁰ Ibid, [56].

²¹ Ibid, [58].

²² Ibid, [63].

²³ Ibid, [63].

²⁴ Ibid, [70].

²⁵ Ibid, [71].

²⁶ Ibid, [83], [94].

Additionally, with regards to the Education Order, the Court found that the relevant clause (that is, subclause (4(1)), regards education and care workers who carry out relevant work, which is **at** (emphasis added) listed places of work. As such, the clause would not apply, for example, to someone employed as a teacher but not carrying out work because they are on leave. Representation for the defendants indicated that a proper construction of the Education Order would see that it only applied to those persons **physically attending** (emphasis added) ‘at’ the places of work listed in the Education Order²⁷.

Discrimination

The Henry plaintiffs also sought to challenge that by discriminating between people based on their vaccination status, the impugned orders effected a form of discrimination on the basis of disability or required third parties, such as employers, to effect such discrimination²⁸.

The Court found that, whilst a decision to unjustifiably differentiate between classes of people could be a basis for concluding that the decision was invalid as the enabling statute, that is the antidiscrimination legislation, does not support that differentiation, in this instance, where the differentiation between persons according to their vaccination status was very much consistent with the objects of the PHA, it was seen to be a proper exercise of public powers²⁹.

Employers’ ‘collection’ of vaccination record

The Court found that a condition relating to the production of evidence concerning the person’s vaccination status against the disease which is the identified risk is clearly authorised under the PHA³⁰.

The collection of health information was considered in light of the *Health Records and Information Privacy Act 2002* (NSW) (**‘HRIP Act’**). Whilst the Court noted that Health Privacy Principle 1 precludes an organisation from ‘collecting’ health information unless “(a) the information is collected for a lawful purpose that is directly related to a function or activity of the organisation and (b) the collection of the information is reasonably necessary for that purpose.”, the Court found that merely showing vaccination evidence to an employer would not likely involve that employer “collecting” health information unless they take a record or make a note³¹. Further, if an employer or occupier has been found to have collected vaccination evidence under relevant provisions of Order (No 2), or the Aged Care or Education Orders, they would be acting consistently with Health Privacy Principle 1, in that a function or activity of their organisation is providing safe premises for their workforce, the public, students, patients or residents³².

²⁷ Ibid, [88]-[91]

²⁸ Ibid, [200].

²⁹ Ibid, [201].

³⁰ Ibid, [209].

³¹ Ibid, [213].

³² Ibid, [213].