***Dryden and ors v Johnson Matthey* UKSC 2016/0140**

On 27th and 28th November 2017 the Supreme Court heard the case of *Dryden and ors v Johnson Matthey Plc*. The case raised important questions of the nature of actionable injury and the recoverability of economic loss in negligence in the context of platinum salt sensitisation in the workplace. The three Claimants were represented by Robert Weir QC and Patrick Kerr, instructed by Harminder Bains, a partner at Leigh Day. Michael Kent QC and Peter Houghton were for the Defendant, instructed by Paul Debney of Weightmans LLP.

Summary

The Appellants submitted that an actionable injury arises at the point that a physical change occurs in the Claimant's body, as a result of which the Claimant suffers material damage. In this context, this was manifested by the development of antibodies in response to exposure to platinum salts rendering them less able to work in their jobs. This caused them an immediate loss of amenity and, subsequently, loss of earnings.

On an alternative basis, the Appellants contended that they should be able to recover economic loss where the employer breaches its duty to protect employees from personal injury; that breach has caused a physical change, which is a potential source of injury to the employee; and the change is discovered, following which the employee is precluded to work in his chosen job so as to prevent him from developing personal injury. In these circumstances, the Appellants submitted that the liability is extended to cover foreseeable financial harm arising as a result of the enforced job loss.

The Respondent argued that the development of antibodies is a mere molecular change, insufficient to qualify as actionable injury. Therefore, the claim is one for pure economic loss. This, it argued, is not within the scope of the duty to protect employees from personal injury and thus is irrecoverable. Nor, it was submitted, is there a general duty imposed upon employers as a result of the employment relationship to take reasonable care to protect the employee from purely economic losses, except in limited and specified circumstances.

Background

The Claimants were all chemical process operators who worked with platinum salts in the course of their employment with Johnson Matthey. Repeated exposure to platinum salts may give rise to sensitisation, which may in turn become a symptomatic allergy. Sensitisation is signified by the production of IgE antibodies and can be identified by skin prick testing. All the Claimants were found to have developed sensitivity and, as a consequence, were taken off work in the "red zones" where they might be further exposed to platinum salts.

This exposure to platinum salts was in breach of the employer's common law and statutory duties (Regulation 5 of the Workplace (Health, Safety and Welfare) Regulations 1992 and Regulations 7 and 12 of the Control of Substances Hazardous to Health Regulations 1994).

Having been removed from work in the red zones, the Claimants were redeployed to other, less well-paid jobs or dismissed if no other job could be provided. As a result, they suffered a loss of earnings.

Aware of the risks to employees working in the red zones, Johnson Matthey and the employees' trade union had negotiated a collective agreement ("the Collective Agreement") to cater for this. The Collective Agreement mandated three-monthly skin prick testing and the immediate removal from the red zones of anyone found to have become sensitised. It also provided that those employees would receive a pay-out of a number of weeks' salary regardless of the circumstances of their exposure. Importantly, the Collect Agreement contained a non-waiver clause, preserving the right of employees to pursue a civil law claim.

The Claimants brought proceedings in negligence, breach of employment contract and breach of statutory duty on the basis that their wrongful exposure to platinum salts had resulted in personal injury (the sensitisation) and, in any event, consequential loss of earnings or loss of earning capacity – changing jobs had reduced their income dramatically.

High Court

At first instance in the High Court ([2014] EWHC 3957 (QB)), the issues were, firstly, whether there was an actionable injury in tort, and, secondly, whether the Claimants could recover more than nominal damages for breach of contract.

On the first issue, Jay J held that the correct approach is to analyse the sensitisation in terms of the physical (or physiological) harm it may be causing, not any financial loss which may be consequent upon that harm. His view was that actionable injury cannot be defined by the steps which are taken to prevent it. He held that sensitisation is "*no more, and no less, than the presence of antibodies which in themselves are not harmful*" (at [32]). Consequently, it was Jay J's view that this was a claim for pure economic loss and could not succeed in tort.

The implied term in contract was submitted to be exactly co-extensive with the Defendant's obligation under the general law of tort to provide and maintain a safe place and system of work, and to take care for the Claimants' safety. It was held that the critical question was whether the relevant losses are within the scope of the Defendant's contractual duty (at [44]). Jay J concluded that they were not, that the Claimants' pure economic loss fell outside the parameters of the Defendant's duty, and the contract claim had to fail.

The case for the Claimants was brought by Harry Steinberg QC and Edward Ramsey, instructed by Slater & Gordon. The Defendant was represented by Michael Kent QC, instructed by Weightmans LLP.

Court of Appeal

The Claimants appealed the decision of Jay J to the Court of Appeal, where the case was heard by Lord Dyson MR, as he then was, and Sales and Davis LJJ ([2016] EWCA Civ 408). Harry

Steinberg QC and Edward Ramsey continued to represent the Appellants, joined by Frank Burton QC. Michael Kent QC remained for the Respondent. In the Court of Appeal, the Appellants reignited their personal injury argument, but amended their economic loss point. Aikens LJ, in advance of the hearing, gave permission to argue a case not put in the High court, namely that if their losses were properly to be regarded as pure economic loss, the Respondent owed each of them a duty of care in tort to hold them harmless from that sort of loss.

Sales LJ, giving the judgment of the court, dismissed the personal injury argument on the same grounds as Jay J below, stating that the Appellants had not suffered actionable personal injury and thus were claiming damages for pure economic loss (at [11]). In reaching this conclusion, Sales LJ considered in particular the cases of *Cartledge v Jopling* [1962] 1 QB 189 and *Rothwell v Chemical Insulating Co Ltd* [2007] UKHL 39.

Sales LJ distinguished *Cartledge*, a pneumoconiosis case. He stated that the scarring on the lungs suffered by the individuals in that case was actionable personal injury as it was part of a disease which could have significant impact upon the individuals' ordinary lives (at [18]). On the basis that actionable injury necessitated "*some form of physical injury which involves 'material damage' or is 'beyond what can be regarded as negligible*'" (at [21], considering Lord Pearce in *Cartledge*), he held that the presence of antibodies that signify platinum salt sensitisation was insufficient to be actionable and that they were no "*hidden impairment*" unlike the scarring (at [30]).

This was bolstered by Sales LJ's reading of *Rothwell*, in particular Lord Hoffmann's emphasis on the pleural plaques in that case never causing symptoms, not increasing the susceptibility of the individual to other diseases or conditions, and not reducing life expectancy. In the Court's view, this was analogous to platinum salt sensitisation, "*provided the worker is removed from an environment in which he may be exposed to platinum salts*" (at [27]). Ultimately it was concluded that the presence of an economic loss "*does not convert a physiological change which does not in itself qualify as an actionable injury into an injury*" (at [31]).

Regarding recovery for pure economic loss in contract, the Court held that in the circumstances of the case there was no such right of action and that protecting employees from pure economic losses was not within the scope of the employment contract. Sales LJ considered it relevant that the Collective Agreement made provision for the employee's economic interests in relation to possible sensitisation to platinum salts. He thought it not to be "*fair, just or reasonable in these circumstances to hold Johnson Matthey liable in relation to such financial consequences*" (at [40]). In this regard, Sales LJ found support from *Reid v Rush & Tompkins Plc* [1990] 1 WLR 212 and *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293.

Sales LJ dealt with the tortious claim for pure economic loss relatively swiftly, finding that, "*[s]ince there is no implied contractual term according to which Johnson Matthey is obligated to protect the appellants in relation to their financial losses arising in the circumstances of this case, so equally there can be no duty in tort to protect them in relation to the pure economic loss they have suffered by reason of those financial losses*" (at [51]).

Supreme Court – Submissions – Actionable Injury

The Appellants' submissions in the Supreme Court on the actionable injury issue were, in essence, that platinum salt sensitisation constituted a physical change and, at that point in time, the die was cast. The damage occurred at the point of sensitisation. Either (a) the Appellants would continue working in their jobs (for example if they had a false negative on the skin prick test) and likely develop symptoms of allergy; or (b) they would test positive and to mitigate or prevent the asymptomatic sensitisation becoming symptomatic, they would be removed from work in the red zones that risks further exposure to platinum salts. Either way, the Appellants lost out. At the moment of sensitisation, their bodies were less useful and less valuable to them. Their capability to work was measurably reduced and they were materially worse off.

In the Appellants' submission, the damage concerns the actual impact at the time of sensitisation and the use that the Appellants could make of their bodies. It relates to their loss of amenity (or capability) that they experienced at that point. At the time of sensitisation, the Appellants were bound to face the economic impact of termination of their employment in the red zones. This, it was submitted, can be factored into what constitutes material damage for the purpose of completing the cause of action in negligence.

In this regard, the Appellants contended that the definition of actionable injury given in the authorities is a two-stage test:

1. Has there been a physical change in or to the Claimant's body?
2. As a result of such change, has the Claimant suffered material damage?

The distinction between physical change or injury and the impact on the Claimant was key to the Appellants' argument and supported by Lord Rodger in *Rothwell* at paragraph 87. *Cartledge* shows that damage can occur without the individual suffering from any symptoms or having any knowledge of the physical change. The Appellants drew on the case law, both in personal injury and property, to submit that "material damage" is synonymous with "materially or measurably worse off". The material damage was submitted to be the loss of amenity or capability of being unable to work in the red zones. This was submitted to materialise upon sensitisation as the Appellant's "couldn't do tomorrow what they could today".

It was submitted that the Collective Agreement cannot change that analysis: all the Agreement does is confirm what happens after sensitisation and as a result of sensitisation.

The Respondent countered these submissions by asserting that there was no loss of amenity at the point of sensitisation. The reason was that prior to the skin prick test the Appellants continued to work in the red zones without incident. As there was no loss of amenity, this was a claim for pure economic loss.

In this vein, the Respondent argued that the Appellants were not prevented from continuing to work with platinum salts as long as they had adequate protection. It was only because Johnson Matthey was a careful employer, concerned with the Appellants' welfare, that it

prevented such work by implementing the "*precautionary principle*" of the Collective Agreement.

It was argued that platinum salt sensitisation is akin to pleural plaques (c.f. *Rothwell*). This is because (i) everyone should avoid exposure to platinum salts or, indeed, asbestos; and (ii) being sensitised means that the Appellants are at greater risk of injury, but they are not injured – just like those people with pleural plaques.

The Respondent then sought to draw on *Bolton MBC v Municipal Mutual Insurance Ltd and Anor* [2006] EWCA Civ 50 and the series of cases cited therein. It was argued that *Bolton* showed that initial bodily changes – analogous to the development of antibodies in response to platinum salt exposure – are insufficient to be actionable injury and complete the cause of action. This was bolstered by the submission that the court in *Rothwell* had had the opportunity to correct this, but hadn't.

Continuing with *Rothwell*, the Respondent suggested that the arguments put forward by the Appellants were simply a variant of the (rejected) aggregation theory, to combine physical change with the loss of earnings suffered by the termination of employment in the red zones.

<u>Supreme Court – Submissions – Economic Loss</u>

In the alternative, the Appellants argued that, if sensitisation is not considered to be actionable injury, they should be able to recover economic loss where:

1. the employer breaches its duty to protect its employees from personal injury, that breach causes a physical change in the employee (here, platinum salt sensitivity), which is a potential source of injury to the employee; and
2. the physical change is discovered, following which the employee is precluded to work in his chosen job so as to prevent him from developing the personal injury.

In these circumstances, the Appellants submitted that the scope of the duty to protect the employee against personal injury is then extended to cover foreseeable financial harm arising directly as a result of the enforced loss of the employee's chosen job. It was made clear that this was not a case for a new general duty on employers.

On the Appellants' case, the relevant test to impose such a term was that of it being fair, just, and reasonable. The Appellants highlighted that their submission did not involve creating a new liability with respect to different conduct. Rather it would be an extension of the scope of liability for conduct in respect of which there already exists a duty. This extension would allow a party who had taken – or been obliged to take – preventive measures to minimise or avoid harm to recover for the associated losses: here, loss of earnings.

In response, the Respondent argued that the economic losses suffered by the Appellants were not recoverable because they did not fall within the scope of the duty (*South Australia Asset Management Corporation v York Montage Ltd* [1997] AC 191 relied upon), that duty being to protect employees from personal injury. Instead, the Respondent submitted that the

Collective Agreement addresses the very situation that has arisen in these cases and, therefore, the negotiated and express terms to that effect should govern.

Moreover, it was submitted that there is no general duty imposed upon employers as a result of the employment relationship to take reasonable care to protect the employee from purely economic losses, except in limited and specified circumstances. The Respondent submitted that the relevant test for imposing a term is that of necessity, a higher bar than "fair, just and reasonable", and that this test was not satisfied.

The parties await the Court's judgment.