Dryden v Johnson Matthey Plc
[2018] UKSC 18

Summary

The claimants worked for the defendants handling platinum, as part of the production process in manufacturing catalytic converters. There was a standing danger that employees working with platinum might become sensitised to platinum, which condition meant that they would develop an allergic reaction if they continued to handle platinum. As a result, there were procedures in place that aimed to ensure that the defendants' employees did not become sensitised to platinum, and employees who handled platinum were regularly checked to see whether sensitisation had set in despite the safeguards against that happening. Due to the defendants' carelessness the procedures for safeguarding against sensitisation were not followed, and the claimants each became sensitised to platinum and had to stop working with platinum. One of the claimants was reassigned to another job within the defendants' company, at a significantly lower rate of pay. The other two claimants lost their jobs.

The claimants sued the defendants in negligence. At first instance, and in the Court of Appeal, their claims were dismissed on the ground that while the claimants' had undergone a physiological change in becoming sensitised to platinum, that change had not had any adverse effect on their physical functioning – with the result that the claimants could not argue that they had suffered a physical injury (following the House of Lords' decision in *Rothwell* v *Chemical & Insulating Co Ltd* [2008] AC 281). The claimants were therefore suing the defendants in negligence for pure economic loss, and the defendants had not owed the claimants a duty of care to protect them from suffering that kind of loss.

The UK Supreme Court allowed the claimants' appeals. Lady Black gave the only judgment. She distinguished *Rothwell* on the basis that the pleural plaques suffered by the claimants in that case did not have any effect on the physical functioning or health of the claimants. By contrast, the sensitisation suffered by the claimants here prevented them from handling platinum. There was therefore no distinction between the claimants' case and that of someone who, due to a defendant's negligence, undergoes a physiological change which meant they could not engage in an ordinary everyday activity such as going out into the sun: 'Ordinary everyday life is infinitely variable. For these claimants, their ordinary everyday life involved doing jobs of a type which, by virtue of their sensitisation, they can no longer do... I do not see how their sensitisation can be validly distinguished from the person who has developed a sensitivity to the sun' (at [39]). The claimants were not therefore suing for a hard to recover pure economic loss, but for a physical injury that may or may not result in the claimants suffering an easily compensable economic loss. So, for example, 'a claimant who was about to retire when he or she became sensitised, or no longer wanted to work in the same type of employment, and upon whom the sensitisation would therefore have no impact' (at [45]) could still claim to have suffered a physical injury – but their circumstances would mean that they could not claim to have suffered much, if any, economic loss as a result of suffering that physical injury.

Comments

Lady Black may not have been able to distinguish between two claimants who both suffer a physiological change as a result of a defendant's negligence, where in the case of the first

claimant (C1), they can no longer do their job and in the case of the second claimant (C2), they can no longer go out into the sun – but clearly there is a distinction. C1 can no longer do *one* thing as a result of their physiological change. C2 can no longer do *lots* of things as a result of their physiological change. C2's physiological change means they are disabled from engaging in normal life; C1's physiological change means that they are disabled from performing one, very specialised, function. The question is whether that distinction should make a difference. Clearly, Lady Black thinks that it should not – and gives as supporting examples a coffee taster whose sense of smell or taste is 'impaired in a way which would be of absolutely no consequence to anyone who was not employed in this particular role' or someone 'working in the fragrance industry, whose highly developed sense of smell was damaged' (at [41]). The result of adopting Lady Black's position is twofold:

(1) An employer will owe his employees a duty of care not to expose them to working conditions that could foreseeably result in them experiencing a physiological change that will make them unfitted to continue with whatever work they are currently doing;

(2) As between two strangers, A and B, A will usually owe B a duty of care not to do something that will foreseeably result in B's undergoing a physiological change that will make B unable to perform one specific physical function (whether or not B wants to perform that function, and whether or not the performance of that function counts as a normal part of daily life).

Whether we are happy to follow Lord Black down the road which she has driven English law depends on whether we are happy to find that a duty of care exists in (1) or (2), or whether we think that the existence of the duties of care in (1) or (2) should depend not on foreseeability alone, but on some kind of special relationship or special circumstances existing between the parties involved.

One way of testing whether we are so happy is to ask whether the law's adopting positions (1) and (2) will result in an appreciable increase in people's duties of care and therefore radically limit people's liberties. This seems doubtful: it is hard to think of situations where you would owe me a duty of care not to do *x* under (1) or (2), where *x* is not something you already owe me a duty of care not to do because of the foreseeable effect that your doing *x* will have on my general physical functioning. So, for example, the employers in *Dryden did* owe their employees a duty of care to see that they did not handle excessive quantities of platinum because it was foreseeable that handling such excessive quantities would result in an allergic reaction – which everyone acknowledged in *Dryden* did amount to a physical injury (at [13]). The real issue in *Dryden* was what we call in McBride & Bagshaw, a 'wrong kind of loss' issue – did the claimants suffer the kind of loss that the duty of care that the employers in *Dryden* owed the claimants was imposed on those employers in order to avoid? So the law's adopting positions (1) and (2) is far more likely to result in an expansion of people's liabilities (which can be insured against) than a restriction on their liberties (which cannot).

Another way of testing whether we are happy for English law to adopt positions (1) and (2) is whether doing so results in an arbitrary results. For example, suppose that in *Rothwell*, one of the claimants reacted to the presence of pleural plaques in their lungs – which is an indicator that they might develop the always fatal cancer mesothelioma in future – by quitting their job, reasoning that they might as well enjoy whatever time they have left rather than waste it slaving away. This is not an unreasonable response to the news that you have pleural plaques in your lungs. But the reasoning in *Dryden* does nothing to help our imagined *Rothwell* claimant recover for the loss of income consequent on his quitting his job. This is because the physiological change undergone by our imagined claimant has not made him unfit to continue in his line of work – it is his reaction to that physiological change that has taken him out of his line of work. But are we happy to award compensation to the

claimants in *Dryden* and deny any compensation to our imagined *Rothwell* claimant, where in each case the claimant's being diagnosed as having undergone a physiological change *has* caused the claimant to lose their current job? Perhaps we are: maybe the fact that the claimants in *Dryden* had no choice but to give up their jobs, whereas our imagined *Rothwell* claimant had a chance about giving up his, makes all the difference to how we think of the respective merits of these claimants' claims.

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