Keoghs

Platinum Salts and the Symptomless Injury

Dryden & Ors v Johnson Matthey Plc [2018] UKSC 18

The Supreme Court has decided that mere sensitisation to an allergen is an injury for which damages can be recovered. The reasoning employed to reach that view is difficult to follow. Because of this the full implications are unclear. The one certainty is that insurers can expect to face other claims for sensitisation – and the damages may not be modest.

The claimants in *Dryden* had been exposed to platinum salts through their work and had become sensitised. This means that their immune systems had produced antibodies which would react to any further exposure. In most cases this would lead to an allergic reaction. All of the *Dryden* claimants had been moved from jobs to ensure that no further exposure would occur and none had developed an allergy.

The High Court and the Court of Appeal had decided that the sensitisation was not an injury, taking their cue from the *Rothwell v Chemical and Insulating Co. Limited [2007] UKHL 39; [2008] 1 AC 281* decision about pleural plaques, an asbestos condition which produces no symptoms. Claims for plaques had been sustained for many years until insurers successfully challenged them in *Rothwell*.

The Supreme Court disagreed with the lower courts in *Dryden*, holding that sensitisation was *"undoubtedly harmful"*. They distinguished sensitisation from plaques on two main bases. Firstly the fact that further exposure could cause symptoms and secondly that sensitisation had affected the *Dryden* claimants' capacity for work.

Both of these conclusions are highly questionable. The first is simply incorrect. In a small minority of cases pleural plaques can become so extensive that they restrict breathing. This means that further exposure to asbestos can indeed 'worsen' pleural plaques and make them symptomatic. This fundamental error is then compounded by a basic misunderstanding of the arguments and the decision in *Rothwell.*

The House of Lords in *Rothwell* were utterly dismissive of the idea that plaques could in themselves be an injury. They were not even a borderline case. Even the claimants accepted this. Their main arguments were never based on the plaques themselves - but on an aggregation of the plaques, the risks of future disease and the anxiety caused by that risk. It was this 'aggregation theory' which lay at the heart of the *Rothwell* decision. Fine points of distinction with the plaques themselves (even if they were correct) should not have led the Supreme Court to conclude that sensitisation was an injury.

The second point of distinction - the capacity for work issue - was addressed by the defendant in *Dryden* by asking the reasonable question, what if someone about to retire became sensitised? The Court answered that this would affect damages, but it would still be an injury. As with much of the rest of the judgment the reasoning behind this, and its effect on the Court's *ratio* are entirely absent. It is simply asserted.

In my view, this is just not good enough. This is a judgment which has taken over four months to write. We only have a single joint decision, with no evidence of the debate which presumably took place between the Justices. We are left with a short judgment on a crucially important point of law lacking in both logic and detailed consideration – and apparently based on error. The phrase

"*undoubtedly harmful"* drops into the judgment out of the clear blue sky like a Midwest cow in tornado season.

Where does this leave us?

Insurers can expect to face other claims for sensitisation. There are many substances to which individuals can develop a sensitisation. Unlike platinum salts, many of those substances can be encountered in daily life. Once an injury is established, a claimant can then recover for all potential consequences. A final settlement for sensitisation would include the risks of allergy and even potentially fatal anaphylactic shock. This bundling up of all the consequences ultimately drove plaques general damages claims towards the £20k mark.

The unknown effect of the *Dryden* decision is all about policy trigger. An 'injury' which occurs at the point of the body's first reaction to a toxic agent is inconsistent with the approach currently taken to 'injury occurring' policy wording. This is chiefly an issue with Public Liability policies, about which there is already a lot of debate. That debate may just have changed - but the Supreme Court's poor judgment in *Dryden* makes it very difficult to say how.

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