Success for Patrick Kerr in the Supreme Court in Dryden and ors v Johnson Matthey [2018] UKSC 18

On 21st March 2018 the Supreme Court handed down judgment in the case of *Dryden and ors v Johnson Matthey*. The case confirms that actionable personal injury includes an asymptomatic physiological change that causes the claimant a real loss of amenity. The three successful Appellants were represented by Robert Weir QC and Patrick Kerr, instructed by Harminder Bains, a partner at Leigh Day.

The Claimants (Appellants) were negligently exposed to platinum salts by their employer in breach of statutory and common law duty. They developed platinum salt sensitivity and consequently were moved into different, less well-paid jobs or left the company. They appealed to the Supreme Court on the basis that they have suffered an actionable injury, namely platinum salt sensitisation, or, alternatively, that they should be able to directly recover their economic losses in negligence.

The Judgment

Lady Black gave a succinct judgment, with which the rest of the Court agreed, setting out the primary dichotomy in the presented case as being that between the two House of Lords cases of *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 and *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281. Her Ladyship noted that there is no definition of actionable personal injury in the authorities and went on to consider the concept in the particular light of *Rothwell* and *Cartledge*. She concluded at [27] that,

"*personal injury has been seen as a physical change which makes the claimant appreciably worse off in respect of his 'health or capability' … and as including an injury sustained to a person's 'physical capacity of enjoying life' …, and also an 'impairment'. Furthermore, it has been established that it can be hidden and symptomless.*"

Applying this to the instant facts, Lady Black went on to hold that, "*there is no dispute that the physiological changes involved in sensitivity can constitute sufficient personal injury, sufficient damage, to found an action for negligence or breach of statutory duty*" (at [38], original emphasis).

The key argument put forward by the Claimants in the Supreme Court was that, if platinum salt sensitisation were to be considered an actionable personal injury, then it arose as soon as the Claimants became sensitised, i.e. before the routine skin-prick test detected that sensitisation and, therefore, before the Claimants were aware of it. Lady Black accepted this, holding that the restrictions on work that were imposed on the Claimants were merely responses to the sensitisation, subsequent and consequent to the injury itself (see [43]).

Having identified sensitisation as constituting actionable personal injury, Lady Black held that the pure economic loss arguments put forward fell away (at [44]), and considered it unnecessary to say anything further about that alternative argument.

Finally, her Ladyship made it clear that she distinguished the case from *Rothwell*, holding,

"*it is material that the pleural plaques were nothing more than a marker of exposure to asbestos dust, being symptomless in themselves and not leading to or contributing to any condition which would produce symptoms, even if the sufferer were to be exposed to further asbestos dust. … [U]nlike the plaques, [platinum salt sensitisation] constitutes a change to their physiological make-up which means that further exposure now carries with it the risk of an allergic reaction… [T]hey have lost part of their capacity to work or, …, they have suffered a loss of bodily function by virtue of the physiological change caused by the company's negligence.*" (at [47])

Harry Steinberg QC and Ed Ramsay represented the appellants in the Court of Appeal.

For a more in-depth look at the judgment, please see here. The full judgment can be found on the SCUK website here, as well as the press summary.