***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 chlorinated platinum salts by their employer in breach of statutory and common law duty. They developed platinum salt sensitivity, in itself an asymptomatic condition. However, further exposure to platinum salts is likely to result in the asymptomatic sensitivity becoming a symptomatic allergy. Consequent upon their development of this sensitivity and its detection through routine skin-prick testing, the Claimants were moved into different, less well-paid jobs or left the company. Having been unsuccessful in the High Court and Court of Appeal, they appealed to the Supreme Court on two alternative bases:

(1) that they have suffered an actionable injury, namely platinum salt sensitisation, which causes them a real loss of amenity, or

(2) that they should be able to directly recover their economic losses in negligence.

<u>The Judgment</u>

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.

Rothwell concerned the development of pleural plaques as a result of exposure to asbestos fibres. In that case, pleural plaques were found not, of themselves, to be actionable personal injury. The plaques caused no symptoms and did not increase susceptibility to other asbestos-related diseases or shorten life expectancy. The Defendant (Respondent), Johnson Matthey, had attempted to draw an analogy between the plaques in *Rothwell* and the sensitisation in the instant case.

Cartledge concerned steel dressers who had contracted pneumoconiosis. In pneumoconiosis substantial injury can occur to the lungs without the sufferer being aware of the disease. In that case it was held by

Lord Pearce that actionable harm can be suffered despite the fact that a man has "*no knowledge of the secret onset of pneumoconiosis and suffers no present inconvenience from it*" (at page 778).

Lady Black 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' (Lord Hoffmann at para 7 of* Rothwell*) and as including an injury sustained to a person's 'physical capacity of enjoying life' (*Fair v London & North-Western Railway Co *(1869) 21 LT 326, 327, quoted by Lord Pearce in* Cartledge*), and also an 'impairment'. Furthermore, it has been established that it can be hidden and symptomless (*Cartledge*).*"

Applying this to the instant facts, Lady Black went on to hold that, "*there is no dispute that the physiological changes involved in sensitivity <u>can</u> constitute sufficient personal injury, sufficient damage, to found an action for negligence or breach of statutory duty*" (at [38], original emphasis). She then rejected the Defendant's argument that the Claimants had not developed a sensitivity to something in everyday life, stating at [40] that,

> "*The physiological changes to the claimants' bodies may not be as obviously harmful as, say, the loss of a limb, or asthma or dermatitis, but harmful they undoubtedly are.* Cartledge *establishes that the absence of symptoms does not prevent a condition amounting to actionable personal injury… What has happened to the claimants is that their bodily capacity for work has been impaired and they are therefore significantly worse off. They have, in my view, suffered actionable bodily damage, or personal injury, which, given its impact on their lives, is certainly more than negligible*."

Lady Black provided an example of how this might be seen in a more everyday setting. At [41] she gave the example of coffee tasters, employed for their heightened ability to distinguish different flavours and qualities of coffee by smell and taste. Supposing that their ability to smell and taste was impaired through negligence and, although this would have no impact on anyone who was not employed in that particular role, they became unable to continue doing their jobs and were forced to seek other employment. Lady Black gave the opinion that "*there would be little difficulty in accepting that the changes to their bodies were actionable personal injury*".

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.

Addressing a question raised by the Defendant regarding a claimant upon whom the sensitisation would have no impact because, for example, he or she was about to retire when the sensitisation occurred, Lady Black dispensed with this by describing it as merely a question of quantum, not a question of whether personal injury had been suffered at all (at [45]).

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])

This is a welcome and common-sense judgment in the field of personal injury law, providing much needed clarity on the scope of actionable injury. However, since the court did not consider it necessary to precisely delimit or define the legal concept of personal injury, this is unlikely to be the last word on the matter. How long it will take before another case on the conceptual boundaries of injury reaches the higher courts remains to be seen.