Cambridge Law Review (2019) Vol IV, Issue ii, 185–194

Personal Injury, Autonomy, and Johnson Matthey

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I. Introduction

In *Dryden v Johnson Matthey plc*[1] (hereafter, *Johnson*), the Supreme Court pushed the concept of personal injury to the limits. Commentators believe that this was a pragmatic, policy-oriented response to compensate the Claimants for their financial loss by bringing such loss under a conception of personal injury. For this reason, they take issue with an obiter comment that is inconsistent with their reading of the case. However, this author believes that said comments are far from heretical. They reveal a different reading of the case, one that puts the Claimants' autonomy front and centre in a conception of personal injury. Though novel, this reading is one that can be supported and defended on the existing law.

II. Facts of the case

The Claimants were employed by the Defendants in positions that exposed them to platinum salts. Having been exposed to higher levels of platinum salts than that permitted by law, the Claimants developed a condition called sensitisation. Antibodies to the platinum salts were now present in their bloodstream. While asymptomatic, any further exposure to platinum salts would cause the Claimants to develop allergies with physical symptoms. But before the manifestation of any physical symptoms, the Claimants' sensitisation was detected through a routine skin prick test. In response, the Defendants either dismissed the Claimants entirely or redeployed them to other jobs that paid less. The Claimants brought proceedings

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[1] *Dryden v Johnson Matthey plc* [2018] UKSC 18; [2018] 2 WLR 1109.

against the Defendants, alleging negligence on the part of the Defendants. They sought damages for loss of earnings resulting from their redeployment or termination.[2]

At first instance, Jay J held that platinum salt sensitisation was not itself a physical injury.[3] The Claimants thus had no cause of action. This was upheld in the Court of Appeal.[4] Sales LJ, giving the sole substantive judgment, treated the sensitisation as prior to and separate from any future allergy. His Lordship noted that there was a distinction between platinum salt sensitisation and the pneumoconiosis suffered by the Claimants in *Cartledge v E Jopling & Sons*.[5] Unlike pneumoconiosis, platinum sensitisation had no detrimental physical effects in the course of ordinary life.[6] It would only lead to future allergy (and so personal injury) if the Claimants continued to be exposed to platinum salts. As the Claimants were removed from such an environment, the sensitisation was now harmless, much akin to the symptomless and harmless pleural plaques in *Rothwell v Chemical & Insulating Co*.[7] For these reasons, his Lordship dismissed the Claimants' appeal.[8]

On appeal to the Supreme Court, the Claimants argued that platinum salt sensitisation, albeit asymptomatic, amounted to physical injury. The lost earnings resulting from the redeployment and dismissal were consequential economic losses that could be recovered by the plaintiff. The Claimants argued in the alternative that the Defendants had assumed responsibility to the Claimants in respect of their lost earnings.

On the other hand, the Defendants claimed that the negligent breach had merely increased the risk of physical injury, *i.e.*, the physical allergies, to the Claimants. The sensitisation was not in and of itself physical injury. Further, redeploying and dismissing the employees were steps taken to avoid the physical injury and so could not form the basis of any claim.

III. The judgment

Lady Black JSC, giving the only substantive judgment, rejected the Defendants' arguments. Lady Black held that platinum salt sensitisation could not be distinguished from platinum salt allergy, such that the sensitisation itself amounted to damage.[9] Although platinum salt sensitisation was asymptomatic,

2 *ibid* [2]–[3].
3 *Greenway v Johnson Matthey plc* [2014] EWHC 3957 (QB); [2015] PQIR P10.
4 *Greenway v Johnson Matthey plc* [2016] EWCA Civ 408; [2016] 1 WLR 4487.
5 *Cartledge v E Jopling & Sons* [1963] AC 758 (HL).
6 *Greenway* (CA) (n 4) [21].
7 *Rothwell v Chemical & Insulating Co* [2007] UKHL 39; [2008] 1 AC 281.
8 *Greenway* (CA) (n 4) [30]–[33].
9 *Johnson* (n 1) [37].

the presence of symptoms is not a prerequisite for personal injury. In *Cartledge*, the Claimants contracted pneumoconiosis in the course of their work. This condition caused scarring of the lung tissue. Although asymptomatic, the Claimants suffered a reduction in their lung capacity and were more susceptible to diseases.[10] The House of Lords held that the Claimants had suffered actionable physical injury, on the basis that in "unusual exertion or at the onslaught of disease he [*sic*] may suffer from his [*sic*] hidden impairment".[11]

Having put to bed any contention over the asymptomatic point, Lady Black proceeded to apply the decision of the House of Lords in *Rothwell*.[12] That case concerned workers who were exposed to asbestos fibres as a result of their employer's negligence. These workers later developed pleural plaques in their lungs and brought a claim against their employer for personal injury. The House of Lords dismissed their claim on the basis that they had not suffered any such physical injury. Damage, Lord Hoffmann said, was "an abstract conception of being worse off, physically or economically, so that compensation is an appropriate remedy".[13] The pleural plaques were simply a marker of exposure to asbestos dust. They did not cause any problems themselves and would not lead to anything harmful.[14] The present case was different, noted Lady Black. The Claimants started out with the bodily capacity to work around platinum salts. As a result of the Defendants' breach of duty, the Claimants lost this safety net and "therefore their capacity to work around platinum salts".[15]

This was a point of contention during the course of argument. Counsel for the Defendants argued that the Claimants had not been sensitised to something present in everyday life, but merely to a restricted and dangerous chemical only present in that particular employment context. As such, the risk of allergy could be averted simply by preventing them from working in situations involving platinum salts.[16] Recall that this too, was the view adopted by the Court of Appeal. But Lady Black disagreed, rejecting any such suggestion out of hand. In her words, "ordinary life is infinitely variable".[17] Indeed, there is nothing 'ordinary' in ordinary life – what is ordinary must be judged according to the particular individual. Lady Black gave the example of coffee tasters whose sense of taste was impaired, or expert perfumers who lost their sense of smell, such that they were no longer able to

[10] *Cartledge* (n 5) 760–2.
[11] *ibid* 779.
[12] *Rothwell* (n 7).
[13] *ibid* [7].
[14] *Johnson* (n 1) [22].
[15] *ibid* [37].
[16] *ibid* [39].
[17] *ibid* [39].

continue in that line of work.[18] Surely, they could be said to have suffered personal injury. Similarly, the sensitisation prevented the Claimants from working in a field of their choice. As a result, they earned less than they could have, which left them worse off. This was sufficient to amount to personal injury. For this reason, some commentators have alluded to this concept of "damage to the person" as opposed to mere "damage to the body".[19]

If Lady Black had stopped here, there would be relatively little controversy. However, Her Ladyship made some *obiter* comments that have troubled commentators.[20] Responding to questions by counsel, Her Ladyship held that the hypothetical worker who was about to retire or change occupation would nonetheless have suffered actionable personal injury.[21]

IV. Conceptions of loss and injury

A. Loss of future profits

At first glance, the approach adopted by the court in *Johnson* appears to be consistent with that adopted in professional negligence cases. These are commonly classified as 'loss of a chance' cases, but this terminology is misleading for they are not claims for a mere increase in risk. Green distinguishes the former from the latter in the following way. She says that in these cases "the chance exists independently of the breach of the duty, such that the breach affects the claimant's ability to avail herself of that chance, but not the substance of the chance itself".[22] In other words, the gist of the action is the lost opportunity to earn profits. There are three essential elements to such a claim:

1. The Claimant had the opportunity to make a choice about X.
2. But for the Defendants' breach, the Claimant would have acted differently in relation to X.
3. In acting differently, the Claimant could have availed themselves of a potential profit from X.

In order to prove that they had a shot at that potential profit, the Claimant has to show that they would have acted differently but for the Defendants'

[18] *ibid* [41].

[19] Robert Weir QC, 'What is a Personal Injury Anyway?' (2018) 4 Journal of Personal Injury Law 263, 269.

[20] Jonathan Morgan, "The Outer Limits of "Personal Injury"" (2018) 77 CLJ 461; Jarret J Huang, "*Dryden v Johnson Matthey*: The Boundaries of Actionable Damage" (2019) 82 MLR 737.

[21] *Johnson* (n 1) [45].

[22] Sarah Green, *Causation in Negligence* (Hart 2015) 154.

negligent action, to avail themselves of that chance.[23] Although Lady Black made no reference to this line of cases, her reasoning bears striking resemblance to that adopted in said cases. In *Johnson*, the Claimants had lost the capacity to work around platinum salts as a result of the Defendants' breach of duty. As a result, the Claimants were prevented from working in an occupation of their choice. Had they continued in their line of work they would have earned a higher salary. For this reason, Morgan considers that the "negative effects were essentially financial not physical ones".[24]

Understanding *Johnson* in these terms, we can see how Lady Black's obiter comments are problematic. Recall Lady Black said that the hypothetical Claimant who was about to retire or change jobs would nonetheless suffer personal injury. Such a Claimant would satisfy element 1 above. But he fails to satisfy element 2 or 3. The recent case of *Perry v Raleys Solicitors*[25] reminds us what we are to make of such a Claimant. The Claimant in *Perry* was afflicted with a particular condition as a result of his employer's negligence. He retained the Defendants as his solicitors to make a claim under a compensation scheme established by the Department for Trade and Industry. The Claimant alleged that the Defendants' negligence caused him to lose the chance to gain additional compensation. At trial, it transpired that the Claimant was unable to prove he met the criteria for additional compensation. The Supreme Court allowed the Defendants' appeal on this basis. It held that unless the Claimant could prove that but for the Defendants' breach he would have acted differently, the Claimant would not have lost any 'chance' at all. Accordingly, Lady Black's hypothetical Claimant would not have suffered personal injury. Commentators have seized on this reasoning to criticise this part of Lady Black's judgment. Huang argues that Lady Black conflates the issue of damage with that of quantification.[26] Any Claimant who was about to retire could only be said to have suffered negligible injury, for which he could not recover. Morgan too seems troubled by this. He raises the example of the hypothetical university lecturer who was negligently exposed to platinum salts.[27] It would be problematic, says Morgan, for such an individual to recover. Yet this would be precisely the result should Lady Black be correct.

The validity of these criticisms, however, depends on the above reading of *Johnson* being correct. Yet the court did not reason in quite those terms. At paragraph 44 of her judgment Lady Black says: "Once the sensitisation is

[23] *Perry v Raleys Solicitors* [2019] UKSC 5; [2019] 2 WLR 636 [19]–[23]; *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 (CA); Green (n 22) 154.

[24] Morgan (n 20) 464.

[25] *Perry* (n 23).

[26] Huang (n 20) 742–3.

[27] Morgan (n 20) 463.

identified as an actionable injury in its own right, the company's arguments that the Claimants are, in reality, claiming only for their lost earnings and therefore for pure economic loss also falls away."

Lady Black juxtaposes actionable injury with lost earnings in rejecting the Defendants' arguments on pure economic loss. This contrast suggests that the court did not regard the lost earnings as *constitutive of*, but rather *consequential on* the Claimants suffering personal injury.[28] If this is correct, then personal injury must be established independently from and prior to the claim for lost earnings. Consider the hypothetical situation of a Claimant that has developed sensitisation to alcohol, such that the consumption of a single drop will cause him to break out in hives. Our Claimant's work does not involve alcohol of any kind, nor does he intend to work around it. In his personal life, he is a teetotal. Nevertheless, we would still say that he has suffered personal injury, even if he cannot be said to have lost any future earnings.[29] If so, then any explanation for why the sensitisation amounted to personal injury must lie elsewhere.

B. Rights to autonomy

Such an explanation might, counter-intuitively, be found in Lady Black's obiter comments. The Claimants in *Johnson* did not lose the opportunity to make a gain, but rather suffered an infringement of some limited right to make a decision about themselves. It is the infringement of this right that constitutes damage. Such a conception would involve:

1. A breach of the posterior duty (the Defendants' duty to ensure safe working conditions), the breach of which causes;
2. The infringement of an anterior right (the right to make future decisions about one's occupation)

This view of rights protecting rights is given support by the recent case of *Morris-Garner v One Step (Support) Ltd.*[30] That case dealt with the issue of when a claimant can recover 'negotiation damages' for breach of contract. Before this case, the courts were of the view that negotiation damages were a discretionary remedy for breach of contract.[31] But Lord Reed, with whom the majority agreed, rejected this line of thought. Negotiation damages were awarded for breach of contracts that created or protected ancillary rights valued as assets. One such example is a contractual license to use intellectual property. In such cases, the

[28] *Johnson* (n 1) [44].
[29] My thanks to Birke Håcker for this example.
[30] *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20; [2018] 2 WLR 1353.
[31] *ibid* [81], see also *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EMLR 25 (CA) [34]–[35] (Mance LJ).

breach of contract would cause the loss of a valuable asset, to be measured by the economic value of the protected right.[32]

In the realm of 'loss of a chance', Green argues convincingly that the claimant in *Chester v Afshar*[33] recovered because she lost a chance to decide whether to undergo the surgery.[34] Dr Afshar was a surgeon who advised Ms Chester to undergo a spinal surgery. He failed to inform Ms Chester that the procedure carried a small risk that the patient would develop cauda equina syndrome. Ms Chester agreed to the surgery, and subsequently developed the syndrome. She sued the Defendants in negligence. On appeal to the House of Lords, their Lordships dismissed the Defendants' appeal and held Dr Afshar liable in negligence.[35] Yet Ms Chester did not lose the opportunity of gaining a better outcome. The risk of injury was inherent within the operation. At trial, she even conceded that had she been told about the risk of injury, she might still have agreed to the surgery at some other time.[36] What she suffered was an infringement of her right to make informed decisions concerning bodily integrity,[37] which in itself amounted to damage.

Steel astutely observes the difference between this category of cases and that of 'lost opportunity to make a profit' cases in his analysis of *Chaplin v Hicks*.[38] The Claimant was a beauty contestant who was shortlisted for an interview. On the basis of the interview, a select few were to be awarded actress engagements. The Defendants failed to inform the Claimant of her interview time, thereby breaching his contract.[39] On appeal, the Court of Appeal allowed the Claimant's appeal for substantial damages. Yet their Lordships did not do so on the basis that she had lost a chance of winning. Rather, the Claimant was entitled to recover because she had lost the right to participate in the contest. As this was a right of value, the Claimant was able to recover damages amounting to the pecuniary value of that right.[40]

The courts have adopted a similar approach in cases involving wrongful conception. In *Rees v Darlington Memorial NHS Trust*,[41] the Claimant was a disabled mother who went for a sterilisation procedure at the Defendants' hospital. The procedure was negligently performed by the Defendants. The Claimant later successfully conceived a healthy child and brought a claim against the Defendants

[32] *One Step* (n 30) [92]–[95].
[33] *Chester v Afshar* [2005] 1 AC 134 (HL).
[34] Green (n 22) 158-160.
[35] *Chester* (n 33) [11].
[36] *ibid* [31]–[32].
[37] *ibid* [16]–[18], [24]. This right was recognised in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] 1 AC 1430 albeit not in this context of rights protecting rights.
[38] Sandy Steel, *Proof of Causation in Tort Law* (CUP 2015) 296.
[39] *Chaplin v Hicks* [1911] 2 KB 786 (CA), 786–8.
[40] *ibid* 793, 796.
[41] *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309 (HL).

for damages. The House of Lords rejected the claim, on the basis that the birth of a child is not a wrong. But their Lordships nevertheless allowed the Claimant to recover for the lost autonomy to order her family life.[42]

This is consistent with the approach adopted by the court in *Johnson*. The Defendants breached their duty of care to provide a safe working environment for the Claimants. As a result, the Claimants were exposed—and developed sensitisation—to platinum salts. This sensitisation amounted to an infringement of the Claimants' limited right to choose their occupation, the economic value of which was measured by the possibility of continuing in the same line of work.

V. When such rights might exist

If this is correct, the question that follows is: 'when might such rights exist?'. It is clear that we have no general free-standing right to autonomy. Almost every action has the potential to affect the autonomy of others. If the law treats a mere reduction in valuable choices as actionable damage, it would open the door to large and indeterminate liability in tort.[43] As Steel notes, this parallel is reflected in the approach the law takes in dealing with pure economic loss.[44] Losing wealth entails losing valuable options that could be pursued with that wealth. But no one seriously suggests that we have a freestanding right to economic gain.[45]

That is not to say, however, that we should not recognise a limited duty in some circumstances. As Cane notes, whether A is said to have caused something to happen to B depends in part on B's obligations to A.[46] A plausible explanation is that in exceptional relationships of trust and confidence, the law deems B to have assumed responsibility to A not to negligently impinge on his autonomy.[47] Such relationships would include employer and employee (*Johnson*) or doctor and patient (*Chester*, *Rees*). Already there is some support for this in the law. The courts have recognised an implied obligation of mutual trust and confidence in employment contracts, as a response to the disparity of power between the employer and

[42] Craig Purshouse, "Judicial Reasoning and the Concept of Damage: Rethinking Medical Negligence Cases" (2015) 15 Medical Law International 155, 166–7; Donal Nolan, "New Forms of Damage in Negligence" (2007) 70 MLR 59, 79.

[43] Jane Stapleton, "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 LQR 249, 254–8; Leonard Hoffmann, "Causation" (2005) 121 LQR 592, 600.

[44] Steel (n 38) 349.

[45] Robert Stevens, *Torts and Rights* (OUP 2007) 26.

[46] Peter Cane, *Responsibility in Law and Morality* (Hart 2002) 132; see also HLA Hart and Tony Honore, *Causation in the Law* (2nd Ed, Clarendon Press 1985) 33; Clarke, *et al*, "Causation, Norms, and Omissions: A Study of Causal Judgments" (2015) 28 Philosophical Psychology 279.

[47] Steel (n 38) 349; Morgan (n 20) raises the point about assumption of responsibility, but in relation to pure economic loss.

employee.[48] If the employee suffered from reduced employment prospects as a result of the breach, then the employer will be made liable for any continuing financial loss.[49] In Lord Nicholls' words, "employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term".[50]

Understanding damage as the infringement of an ancillary right helps to address Morgan's concerns. Whether his hypothetical university lecturer has suffered damage depends on the scope of his employer's duty to him.[51] It is at least arguable that a university's duty does not extend to protecting a lecturer's choice to work around platinum salts. We can rest easy at night knowing *Johnson* will not lead to large, indeterminate liability.

This conception is supported by a close reading of Lady Black's speech in *Johnson*:

> The restrictions on the work that can be done by Claimants… are attributable to the sensitisation, to which the protective provisions of the collective agreement *were a response*. These provisions reflect the fact that, because of the negligence… these Claimants' bodies are now in such a state that they need to avoid further exposure to platinum salts… But the *need for sensitised individuals to avoid exposure would apply whether or not there was a collective agreement*… whether the employer was Johnson Matthey or another employer who imposed no comparable restrictions.[52] [Emphasis added]

Huang notes that, strictly speaking, the Claimants could still work around platinum salts.[53] They did in fact do so. At trial, it was found that the Claimants were in fact sensitised before such sensitisation was detected. Yet they remained employed in positions that exposed them to platinum salts.[54] Any right that was infringed has its contents prescribed as a matter of law - the court deems the employer to have assumed responsibility to the Claimant, such that the employer came under a duty to avoid impinging on the Claimant's career opportunities.

[48] *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 (HL).
[49] *ibid*; see also *Abbey National plc v Chagger* [2009] EWCA Civ 1202; [2010] ICR 397.
[50] *ibid* 38.
[51] *C.f.* the approach adopted in *Palsgraf v Long Island Railway Co* (1928) 248 NY 339, and *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL).
[52] *Johnson* (n 1) [43].
[53] Huang (n 20).
[54] *Johnson* (n 1) [43].

Future courts will have to address questions such as when this anterior right will exist, and what will amount to an infringement of this right.

VI. Conclusion

Dryden v Johnson Matthey presents an opportunity for us to reconsider our conception of what amounts to personal injury. While some believe that the case is authority for pecuniary loss as personal injury, the better reading of the case is that it recognises people can be made worse off by the loss of valuable choices.