A

Supreme Court

Dryden and others *v* Johnson Matthey plc

[On appeal from **Greenway and others v Johnson Matthey plc**]

[2018] UKSC 18

B

2017 Nov 27, 28;
2018 March 21

Baroness Hale of Richmond PSC, Lord Wilson, Lord Reed, Lady Black, Lord Lloyd-Jones JJSC

Negligence — Duty of care — Employee — Claimants developing sensitivity to platinum salts following employer's breach of statutory duty — Sensitivity not itself physically harmful but leading to allergic reaction on further exposure to platinum salts — Employment contracts providing for periodic testing of employees at risk of sensitisation to avoid development of platinum allergy — Further provision for redeployment of sensitised employees or termination of employment on special terms — Claimants claiming in tort for financial losses on redeployment or termination — Whether claimants suffering actionable personal injury

C

D

The claimants were employed by the defendant at chemical plants on processes involving platinum salts. In breach of statutory duty the claimants were exposed to higher levels of platinum salts than they should have been. The effect of such exposure was that the individual concerned could acquire platinum salt sensitisation which meant that he had developed an antibody to platinum salts, with the result that any further exposure to platinum salts would lead to full-blown platinum salt allergy involving physical symptoms. Platinum salt sensitisation itself, however, was asymptomatic and had no other effect on the individual's life. The claimants' contracts of employment provided for regular checks to screen employees for development of platinum salt sensitisation, and for sensitised employees to be removed from work areas subject to exposure for possible redeployment and, if redeployment were not possible, for the termination of their employment on special conditions. After such checks, the claimants were found to have developed sensitivity to platinum salts and accordingly were redeployed or dismissed, or resigned. They brought proceedings alleging, inter alia, negligence on the part of the defendant and seeking damages for loss of earnings as a result of losing relatively well paid employment in areas of the plants where it was known that there was an increased risk of exposure to platinum salts. The judge found that platinum salt sensitisation in itself was not a physical injury sufficient to give rise to a cause of action in tort. The Court of Appeal upheld his decision on the basis that platinum salt sensitisation did not give rise to detrimental physical effects in the course of ordinary life.

E

F

On the claimants' appeals—

G

Held, allowing the appeals, that actionable personal injury, for the purposes of a claim for negligence or breach of statutory duty, included a physical change which made a person appreciably worse off in respect of his health, capability or physical capacity to enjoy life; that the development of a platinum salt allergy in a person who did not, at the outset, have a sensitivity to platinum salts could be regarded as a two-stage process, involving first sensitisation and then allergy; that the claimants' ordinary life, prior to sensitisation, had involved working with platinum salts; that the effect of their sensitisation was that their bodily capacity for that work had been impaired and they were, therefore, significantly worse off; and that, accordingly, the claimants had suffered bodily damage, which was far from negligible, amounting to an actionable personal injury in both tort and breach of statutory duty (post, paras 11–12, 27, 37, 39–40, 43–44, 47–49).

H

Cartledge v E Jopling & Sons Ltd [1963] AC 758, HL(E) applied.

Rothwell v Chemical & Insulating Co Ltd [2008] AC 281, HL(E) distinguished. A
Decision of the Court of Appeal [2016] EWCA Civ 408; [2016] 1 WLR 4487; [2017] ICR 43 reversed.

The following cases are referred to in the judgment of Lady Black JSC:

Cartledge v E Jopling & Sons Ltd [1962] 1 QB 189; [1961] 3 WLR 838; [1961] 3 All ER 482, CA; [1963] AC 758; [1963] 2 WLR 210; [1963] 1 All ER 341, HL(E)
Fair v London & North-Western Railway Co (1869) 21 LT 326, DC B
Rothwell v Chemical & Insulating Co Ltd [2007] UKHL 39; [2008] AC 281; [2007] 3 WLR 876; [2007] ICR 1745; [2007] 4 All ER 1047, HL(E)

The following additional cases were cited in argument:

Bell v Peter Browne & Co [1990] 2 QB 495; [1990] 3 WLR 510; [1990] 3 All ER 124, CA C
Blue Circle Industries plc v Ministry of Defence [1999] Ch 289; [1999] 2 WLR 295; [1998] 3 All ER 385, CA
Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd [2006] EWCA Civ 50; [2006] 1 WLR 1492, CA
Brown v North British Steel Foundry Ltd 1968 SC 51, Ct of Sess
Carder v University of Exeter [2016] EWCA Civ 790; [2017] ICR 392, CA
Crossley v Faithful & Gould Holdings Ltd [2004] EWCA Civ 293; [2004] ICR 1615; D
[2004] 4 All ER 447, CA
D & F Estates Ltd v Church Comrs for England [1989] AC 177; [1988] 3 WLR 368; [1988] 2 All ER 992, HL(E)
Deyong v Shenburn [1946] KB 227; [1946] 1 All ER 226, CA
Durham v BAI (Run Off) Ltd [2008] EWHC 2692 (QB); [2009] 2 All ER 26; [2009] 1 All ER (Comm) 805; [2012] UKSC 14; [2012] 1 WLR 867; [2012] ICR 574; [2012] 3 All ER 1161; [2012] 2 All ER (Comm) 1187, SC(E) E
Geys v Société Générale, London Branch [2012] UKSC 63; [2013] 1 AC 523; [2013] 2 WLR 50; [2013] ICR 117; [2013] 1 All ER 1061, SC(E)
Gregg v Scott [2005] UKHL 2; [2005] 2 AC 176; [2005] 2 WLR 268; [2005] 4 All ER 812, HL(E)
Hunter v Canary Wharf Ltd [1997] AC 655; [1996] 2 WLR 348; [1996] 1 All ER 482, CA
Johnson v Unisys Ltd [2001] UKHL 13; [2003] 1 AC 518; [2001] 2 WLR 1076; F
[2001] ICR 480; [2001] 2 All ER 801, HL(E)
Junior Books Ltd v Veitchi Co Ltd [1983] 1 AC 520; [1982] 3 WLR 477; [1982] 3 All ER 201; 182 SC (HL) 244, HL(Sc)
Knapp v Ecclesiastical Insurance Group plc [1998] PNLR 172, CA
Law Society v Sephton & Co [2006] UKHL 22; [2006] 2 AC 543; [2006] 2 WLR 1091; [2006] 3 All ER 401; 1982 SC (HL) 244, HL(E)
Losinjska Plovidba v Transco Overseas Ltd [1995] 2 Lloyd's Rep 395 G
McFarlane v Tayside Health Board [2000] 2 AC 59; [1999] 3 WLR 1301; [1999] 4 All ER 961; 2000 SC (HL) 1, HL(Sc)
McLoughlin v Jones [2001] EWCA Civ 1743; [2002] QB 1312; [2002] 2 WLR 1279, CA
Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72; [2016] AC 742; [2015] 3 WLR 1843; [2016] 4 All ER 441, SC(E)
Miller v United States Steele Corpn (1990) 902 F 2d 573 H
Murphy v Brentwood District Council [1991] 1 AC 398; [1990] 3 WLR 414; [1990] 2 All ER 908, HL(E)
Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (formerly Edward Erdman (an unlimited company)) (No 2) [1997] 1 WLR 1627; [1998] 1 All ER 305, HL(E)

A *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1; [1983] 2 WLR 6; [1983] 1 All ER 65, HL(E)
Reid v Rush & Tompkins Group plc [1990] 1 WLR 212; [1989] 3 All ER 228, CA
Scally v Southern Health and Social Services Board [1992] 1 AC 294; [1991] 3 WLR 778; [1991] ICR 771; [1991] 4 All ER 563, HL(NI)
Smith v Eric S Bush [1990] 1 AC 831; [1989] 2 WLR 790; [1989] 2 All ER 514, HL(E)

B

APPEALS from the Court of Appeal

The claimants, Daniel Greenway, Waynsworth Dryden, Dean White, Simon York and Tony Cipullo, by claim forms issued in the City of London County Court in respect of the first three claimants and claim forms issued in the Queen's Bench Division by the fourth and fifth claimants, sought damages for personal injury sustained and pecuniary losses incurred as a
C result of the negligence and/or breach of statutory duty of the defendant, Johnson Matthey plc, whereby as a result of the claimants' employment at the defendant's chemical plants they had been exposed to platinum salts and had consequently developed sensitivity to platinum salts. Pursuant to permission given by Master McCloud on 10 September 2014 the claimants introduced claims for breach of contract. On 26 November 2014 Jay J
D dismissed the claims [2014] EWHC 3957 (QB); [2015] PIQR P10.

The claimants appealed. The Court of Appeal (Lord Dyson MR, Davis and Sales LJJ) on 28 April 2016 dismissed the appeals [2016] EWCA Civ 408; [2016] 1 WLR 4487.

With the permission of the Supreme Court (Baroness Hale of Richmond DPSC, Lord Carnwath and Lord Hodge JJSC), granted on 21 December 2016, the second, fourth and fifth claimants appealed. The
E issue was agreed to be whether the claimants had an actionable claim for damages for personal injuries.

The facts are stated in the judgment of Lady Black JSC, post, paras 2–10.

Robert Weir QC and *Patrick Kerr* (instructed by *Leigh Day & Co*) for the claimants.

F The claimants suffered actionable damage at the point in time when they first developed platinum sensitivity, that is prior to the time when they had positive blood tests and prior to the time when they were precluded from continuing to work in areas of the factory where they were exposed to platinum salts. At that time, the platinum sensitisation constituted a physical change (or injury) to their bodies: see *Cartledge v E Jopling & Sons Ltd* [1962] 1 QB 189; [1963] AC 758 and *Rothwell v Chemical & Insulating*
G *Co Ltd* [2008] AC 281. The effect of that physical change was that their bodies were likely to develop symptoms (of allergy) if they continued in their daily lives as they had done up to that time, namely by working in areas of the factory where they were exposed to platinum salts. From the moment of sensitisation, the claimants' bodies were less useful, less valuable to them. Their capability for work, a key incident of their ordinary lives, was measurably reduced. They were materially worse off even though they had
H no symptoms at that time. That suffices to constitute material damage: see *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (formerly Edward Erdman (an unlimited company)) (No 2)* [1997] 1 WLR 1627; *Carder v University of Exeter* [2017] ICR 392 and *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289. Damage was not platinum allergy but

had to do with the actual impact, at time of sensitisation, on the use which the claimants could make of their bodies; it relates to the loss of amenity or capability which they experienced on sensitisation by virtue of the real risk they now faced of going on to develop symptoms in the course of their ordinary lives.

The case law in economic loss claims shows that the courts have been astute to identify the earliest point when the claimant is "worse off" as triggering actual damage: see *McLoughlin v Jones* [2002] QB 1312; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1; *Losinjska Plovidba v Transco Overseas Ltd* [1995] 2 Lloyd's Rep 395; *Hunter v Canary Wharf Ltd* [1997] AC 655; *Bell v Peter Browne & Co* [1990] 2 QB 495; *Knapp v Ecclesiastical Insurance Group plc* [1998] PNLR 172; *Law Society v Sephton & Co* [2006] 2 AC 543 and *McFarlane v Tayside Health Board* [2000] 2 AC 59. The claimants are worse off than they would have been but for the defendant's breach of duty because they are now likely to move from the first stage of sensitisation to the second stage of allergy. Put another way, their bodies are now in a state which makes them unfit for further work in areas which expose them to platinum salts and that constitutes a real loss of amenity. The decision to move the claimants away from those areas was an act of mitigation after the actionable damage had been sustained. It was no less mitigation after the event for having been planned prior to employment commencing as a step which would be taken in the event of an employee having a positive blood test for platinum sensitisation.

In the alternative, as regards the claim for recovery for economic loss, the financial cost to the claimants of the defendant's decision to move them away from working in areas which continued to expose them to platinum salts forms part of the material damage to which the court should have regard when assessing whether the injury which is the platinum sensitisation made the claimants worse off. The duty claimed is closely defined and can be framed as a term implied into a class of contractual relationships, namely as between employer and employee, or as a free-standing claim in negligence. Since the claimants rely on the terms of the collective agreement, they recognise that the claimed duty cannot apply in tort unless it is also appropriate to imply the duty into the contract: see *Miller v United States Steele Corpn* (1990) 902 F 2d 573, 574. The relevant principles are to be derived from *Geys v Société Générale, London Branch* [2013] 1 AC 523; *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742; *Johnson v Unisys Ltd* [2003] 1 AC 518; *Scally v Southern Health and Social Services Board* [1992] 1 AC 294; *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615; *Deyong v Shenburn* [1946] KB 227; *Reid v Rush & Tompkins Group plc* [1990] 1 WLR 212; *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520; *D & F Estates Ltd v Church Comrs for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Losinjska Plovidba v Transco Overseas Ltd* [1995] 2 Lloyd's Rep 395 and *Smith v Eric S Bush* [1990] 1 AC 831.

Michael Kent QC and *Peter Houghton* (instructed by *Weightmans, Leicester*) for the defendant.

The appeals should be dismissed for the reasons given in the courts below. The claimants are seeking to climb on board a category of claim for personal injury which the courts have been careful to circumscribe: see *Cartledge v*

E Jopling & Sons Ltd [1963] AC 758. General principles and criteria can be drawn from authority and logic and then used in a given factual situation to determine whether actionable personal injury has occurred. First, not every physical bodily change will amount to actionable personal injury and a person's mere exposure to a deleterious agent and its entry into his/her body will not in itself amount to actionable personal injury: see *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281 and *Brown v North British Steel Foundry Ltd* 1968 SC 51. Secondly, initial but entirely normal and harmless bodily changes prompted by the entry of that deleterious agent are not actionable personal injury either: see *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd* [2006] 1 WLR 1492 and *Durham v BAI (Run Off) Ltd* [2012] 1 WLR 867. Thirdly, risk of something which would be actionable damage is not itself actionable personal injury: see *Gregg v Scott* [2005] 2 AC 176. Fourthly, it is not possible to aggregate things which are not in themselves actionable personal injuries so as to produce an actionable personal injury: see the *Rothwell* case [2008] AC 281. Finally, when determining whether an actionable physical personal injury has been sustained, the enquiry is about the physical, focusing on health or other bodily effects of the alleged actionable injury: see the *Rothwell* case. Short of deciding that those earlier cases should be departed from, the agreed medical evidence of platinum sensitisation (but not allergy) discloses no actionable personal injury.

Property damage cases, such as *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289, cannot be transposed wholesale into the personal injury field since an individual is not an asset. Likewise, cases such as *Bell v Peter Browne & Co* [1990] 2 QB 495, *Knapp v Ecclesiastical Insurance Group plc* [1998] PNLR 172 and *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (formerly Edward Erdman (an unlimited company)) (No 2)* [1997] 1 WLR 1627 cannot be transposed. The fact that (as it is alleged) the claimants have suffered financial losses flowing from non-actionable bodily changes cannot convert those losses into actionable physical injury: they remain claims for pure economic loss. Hence the first ground of appeal must fail.

As to the claimants' alternative ground of appeal, that they can recover pure economic losses through a term implied in law into their employment contracts (and a parallel duty of care in tort), that must fail because there is a long line of well-established authority at appellate level that an employer does not, in the absence of an express term to that effect, undertake a general duty to protect the employee from purely economic losses: see *Scally v Southern Health and Social Services Board* [1992] 1 AC 294; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615; *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742; *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 and *Smith v Eric S Bush* [1990] 1 AC 831.

Weir QC replied. [Submissions were made on the decisions in *Durham v BAI (Run Off) Ltd* [2012] 1 WLR 867 and *Brown v North British Steel Foundry Ltd* 1968 SC 51.]

The court took time for consideration.

21 March 2018. **LADY BLACK JSC** (with whom **BARONESS HALE OF RICHMOND PSC, LORD WILSON, LORD REED** and **LORD LLOYD-JONES JJSC** agreed) handed down the following judgment.

1 The central question in these appeals is whether the appellants have suffered actionable personal injury on which they can found claims for negligence/breach of statutory duty. I will refer to the appellants hereafter as "the claimants" as they were at first instance.

2 The claimants worked for the respondent company, Johnson Matthey plc (hereafter either "Johnson Matthey" or "the company"), in factories making catalytic converters. Platinum salts are used in the production process. In breach of its duty under the health and safety regulations and at common law, the company failed to ensure that the factories were properly cleaned and, as a result, the claimants were exposed to platinum salts, which led them to develop platinum salt sensitisation.

3 Platinum salt sensitisation is, in itself, an asymptomatic condition. However, further exposure to chlorinated platinum salts is likely to cause someone with platinum salt sensitisation to develop an allergic reaction involving physical symptoms such as running eyes or nose, skin irritation, and bronchial problems. When the claimants' sensitisation was detected, through routine screening by means of a skin test, they were no longer permitted by the company to work in areas where they might be further exposed to platinum salts and develop allergic symptoms. One has taken up a different role with the company but, he claims, at a significantly reduced rate of pay. The other two had their employment terminated. Each claimant therefore asserts that he has suffered financially as a result of his sensitisation to platinum salts, being unable to take work in any environment (whether with Johnson Matthey or with any other employer) where further exposure might occur. Does the platinum salt sensitisation which each of the claimants has developed qualify as an actionable personal injury, in which case the claimants have viable claims against the company for damages for personal injuries caused by the company's negligence and/or breach of statutory duty? Alternatively, if the platinum salt sensitisation is not properly categorised as an actionable personal injury, can they recover damages for economic loss under an implied contractual term and/or in negligence?

4 The claimants lost at first instance, following a trial of the question of liability, before Jay J. Jay J concluded [2015] PIQR P10 that they had sustained no actionable personal injury and that their claim was for pure economic loss, for which they were not entitled to recover in tort. He also rejected their alternative claim in contract. That had been put on the basis that there was an implied term in the claimants' contracts of employment which obliged the company to provide and maintain a safe place and system of work, and to take reasonable care for their safety, and that they were entitled to damages for pure financial loss for breach of that implied term. The judge, however, considered that the company's implied contractual duty was to protect employees from personal injury, not from economic or financial loss in the absence of personal injury.

5 The Court of Appeal dismissed the claimants' appeals: [2016] 1 WLR 4487. Sales LJ, with whom the other members of the court agreed, endorsed Jay J's view that the claimants had suffered no actionable personal injury

A and were claiming for pure economic loss. He saw the physiological change of platinum salt sensitisation as "not harmful in itself in any relevant sense", at para 30, and concluded that it was not converted into actionable injury by the resulting removal of the claimants from their jobs, with detrimental financial consequences. As for the alternative claim for damages for economic loss under an implied contractual term and/or in negligence, there is, of course, no general duty of care in tort to protect against pure economic B loss, and Sales LJ did not consider that a duty of care arose here from the particular circumstances of the case. His reasoning in relation to this was closely tied in with his reasoning in relation to the claim based on contract. That contractual claim failed because Sales LJ was in agreement with Jay J that there was no implied term in the claimants' contracts of employment to the effect that the employer would protect them from pure economic loss, C whether on the basis of this being a standard implied term in employment contracts or on the basis of features particular to the employment of the claimants. In Sales LJ's view, the claimants could not succeed in a tortious claim for pure economic loss when the employer assumed no such responsibility in the employment contract.

The medical position

D

6 It is necessary to understand the medical evidence about the claimants' condition for the purposes of the appeals. Sensitisation is a complicated process which has been explained in simplified terms for the purposes of the litigation. It involves the body's immune system. The immune system reacts to the presence of molecules which are not normally found in the body ("antigens") by producing antibodies, in the form of large E molecules called immunoglobulins. In many cases, the antibody performs a useful purpose by combining with the antigen and rendering it harmless. However, in some cases, the combination of the antigen and the antibody results in adverse consequences by provoking particular cells within the body ("mast cells") to release histamine. In this situation, asthma, rhinitis, eye symptoms or skin rashes may result.

F **7** A person who is sensitised to platinum salts will have a particular type of antibody in their immune system (IgE antibodies). Although they may not yet have developed any physical symptoms of the sensitisation, it can be demonstrated by a skin prick test in which a minute amount of a solution containing the salts is introduced into the body. A sensitised individual reacts by developing a small raised red, sometimes itchy, lump in the skin. If exposure to platinum salts continues after sensitisation has occurred, the G medical evidence is that most (but not all) people will develop physical symptoms relating to one or more of the eyes, nose, chest and skin. At this point, they are said to have developed an allergy. On the other hand, physical symptoms will not develop if there is no further exposure. A person who has been sensitised but has not yet developed symptoms is not limited in any way in their life, except that they must avoid circumstances in which H they are exposed to platinum salts. Platinum salts are not encountered in everyday life, only in certain specialised workplaces. Sensitised people cannot work in jobs which involve the potential for further exposure.

8 One of the central authorities which must be considered in determining these appeals is the House of Lords' decision in *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281, which concerned the

development of pleural plaques as a result of exposure to asbestos fibres. The doctors who provided expert medical evidence in the present case were asked to consider whether platinum salt sensitisation could be said to be akin to pleural plaques, and it is convenient to set out their response here. They were agreed that there are important distinctions between the two, namely: (i) slight further exposure to asbestos will not materially worsen pleural plaques, but slight further exposure to platinum salts is likely to increase the degree of sensitisation and may result in asymptomatic sensitisation becoming symptomatic; (ii) pleural plaques do not, themselves, turn into any other injury attributable to asbestos whereas asymptomatic sensitisation may turn into symptomatic sensitisation (allergy); and (iii) the presence of pleural plaques does not prevent a person from engaging in particular types of work that would otherwise be open to him or her, asbestos exposure being restricted by law in any event. In contrast, a person who has asymptomatic sensitisation to platinum salts *is* restricted in the work that he or she can do.

Collective agreement

9 Employees of Johnson Matthey working in factory areas in which they could be exposed to platinum salts were paid an additional shift allowance. In addition, the claimants' trade union had negotiated a collective agreement with the company to address the issue of platinum salt sensitisation and allergy. The agreement provided for regular skin prick tests to take place and for employees who became sensitised to be redeployed away from platinum salt areas if possible. If an employee could no longer continue to work in a factory because of "platinum allergy", the agreement provided for the company to dismiss him under special termination conditions, including what was termed an "ex gratia payment" of a lump sum.

10 The collective agreement expressly acknowledged that an employee dismissed with "platinum allergy" would normally file a compensation claim against the company. It provided that the termination arrangements were not meant to be an alternative to such claims, and that no waiver of claim was implied in accepting the termination payment.

Personal injury/harm

11 Negligence and breach of statutory duty are not actionable per se. It is common ground between the parties that (leaving to one side claims for pure economic loss), in order to make out their claims in tort for negligence or breach of statutory duty, it is necessary for the claimants to establish that there has been damage, in the form of actionable personal injury. The terms "physical injury" and "personal injury" tend to be used interchangeably in the authorities, and in the documentation in this case, and this is reflected in this judgment, there being no psychiatric injury to complicate the matter.

12 An exploration of the ambit of personal injury is fundamental to the appeals and depends largely on case law, in particular 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. It is worth noting from the outset that nowhere in the authorities is there a definition of actionable personal injury, although there is some guidance as to the

attributes of it. Personal injury features as a concept in various legislative provisions, again without definition, although in some of the legislation, it is expressly said to include "any disease and any impairment of a person's physical or mental condition", see for example section 38 of the Limitation Act 1980.

13 The parties are agreed that if a person were to develop a platinum salt allergy as a result of improper exposure to platinum salts at work, as opposed to mere sensitisation, he or she *would* have suffered personal injury of a type which would give rise to a cause of action in tort. What divides them is whether or not sensitisation on its own is actionable personal injury. The claimants rely upon *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 as supporting their case that it is, and Johnson Matthey rely upon *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281 as supporting their case that it is not.

14 In *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, the claims were brought by steel dressers who had contracted pneumoconiosis whilst working in the defendant's factory. The issue was whether their claims were statute-barred and the House of Lords therefore had to consider when their cause of action first accrued. This required their Lordships to determine when the steel dressers had suffered actionable personal injury. The problem was that, in pneumoconiosis, substantial injury could occur to the lungs without the sufferer being aware of the disease, as had occurred with the plaintiffs. Amongst the arguments advanced unsuccessfully on their behalf was the argument that actionable injury did not occur until the man became aware of his disease, since a man who does not feel any symptoms or have any knowledge of his disease has suffered no injury. Addressing this argument, Lord Pearce, with whom there was unanimous agreement, gave consideration to the attributes of actionable personal injury. He observed, at p 778, that no case had sought to define its borders but, in the following passage, drew what he could from the authorities to which the House had been referred:

> "There is no case that seeks to define the borders of actionable physical injury. Your Lordships have been referred to words used in various cases. In *Fair v London & North-Western Railway Co* (1869) 21 LT 326, 327 Cockburn CJ said: 'in assessing that compensation the jury should take into account two things; first, the pecuniary loss he sustains by the accident; secondly, the injury he sustains in his person, or his physical capacity of enjoying life.' Again, in *Haygarth v Grayson Rollo & Clover Docks Ltd* [1951] 1 Lloyd's Rep 49, 52 Asquith LJ said: 'General damage, while usually assessed in a single global sum, ought to include loss referable to at least three factors, where all three factors are present, namely, the respective loss of earnings, pain and suffering and loss of amenity.' Such observations naturally proceed on the normal basis that personal injury involves some pain or patent loss of amenity, but the unusual question before your Lordships is whether a hidden, painless injury or latent loss of amenity sounds in damages. And in no case is it laid down that hidden physical injury of which a man is ignorant cannot, by reason of his ignorance, constitute damage."

15 Lord Pearce went on to hold 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": p 778. In Lord Pearce's view, as will be seen from the following quotation, from p 779, the question was "whether a man has suffered material damage by any physical changes in his body", and this was a question of fact in each case:

> "It is for a judge or jury to decide whether a man has suffered any actionable harm and in borderline cases it is a question of degree . . . It is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. Evidence that those changes are not felt by him and may never be felt tells in favour of the damage coming within the principle of de minimis non curat lex. On the other hand, evidence that in unusual exertion or at the onslaught of disease he may suffer from his hidden impairment tells in favour of the damage being substantial. There is no legal principle that lack of knowledge in the plaintiff must reduce the damage to nothing or make it minimal."

16 Although symptomless, and not causing any present physical inconvenience, the physical injury to the lungs of the steel dressers was held to constitute actionable damage and, by virtue of the terms of the Limitation Act 1939, their Lordships felt compelled therefore to find that their claims were statute barred.

17 *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281 involved employees who had been exposed to asbestos dust and had developed pleural plaques as a result. They were at risk of developing asbestos-related diseases and suffered anxiety at that prospect; one of them had developed a depressive illness, brought on by the diagnosis of the plaques.

18 A convenient summary of the medical position about the plaques can be found at the start of Lord Hoffmann's speech in the *Rothwell* case. He said, in para 1:

> "These are areas of fibrous thickening of the pleural membrane which surrounds the lungs. Save in very exceptional cases, they cause no symptoms. Nor do they cause other asbestos-related diseases. But they signal the presence in the lungs and pleura of asbestos fibres which may independently cause life-threatening or fatal diseases such as asbestosis or mesothelioma. In consequence, a diagnosis of pleural plaques may cause the patient to contemplate his future with anxiety or even suffer clinical depression."

19 The unanimous view of the House of Lords was that the claimants had suffered no actionable damage. As Lord Hoffmann put it, in para 2, "compensatable physical injury" was required to establish a cause of action and the plaques did not constitute such injury. The claimant who had developed clinical depression was in a different position, since psychiatric illness can constitute damage. However, his claim also failed, essentially because it was not reasonably foreseeable that a person of reasonable fortitude would develop a psychiatric illness in his circumstances.

20 In considering the implications of the decision in the *Rothwell* case, it is important to have an appreciation of the attributes of the pleural plaques and of how they differ from the damage sustained by the steel dressers in the *Cartledge* case [1963] AC 758.

21 In the *Cartledge* case, the inhalation of silica particles had damaged the lung tissue, causing minute scars and reducing the efficiency of the lung

A tissue. As Lord Hoffmann summarised the position in the *Rothwell* case [2008] AC 281, para 8:

> "their lungs had suffered damage which would have been visible upon an x-ray examination, reduced their lung capacity in a way which would show itself in cases of unusual exertion, might advance without further inhalation, made them more vulnerable to tuberculosis or bronchitis and
B reduced their expectation of life. But in normal life the damage produced no symptoms and they were unaware of it."

22 In contrast, the pleural plaques were not in any way harmful to a sufferer's health or physical condition. They were evidence that the lungs had been penetrated by asbestos fibres but they did not, themselves, give rise to actual or prospective disability. Save in the most exceptional cases (which
C it appears did not include any of the claimants), they would not have any effect upon health at all. They were described, for example, as "symptomless bodily changes with no foreseeable consequences", at para 17, as "not harmful" and not giving rise to any symptoms or leading to "anything else which constitutes damage", at para 49, and as "asymptomatic and . . . not the first stage of any asbestos-related disease", at para 68. In so far as the
D sufferer faced a risk of deterioration in his health in future, that risk arose from the exposure to the asbestos fibres, not from the plaques, which neither posed nor contributed to any risk. Similarly, it was the exposure to asbestos which caused the anxiety felt by the claimants about their future health, following the discovery that they had pleural plaques, not the plaques themselves.

23 The speeches in the *Rothwell* case possibly shed a little further light
E on the identifying features of actionable personal injury. I will refer to the relevant passages here, and they contribute to my conclusions later.

24 First, it seems to have been accepted that the concept of personal injuries includes a disease or an impairment of a person's physical condition. The term "impairment" is to be found in certain statutes (see above) and is used by Lord Pearce in the *Cartledge* case [1963] AC 758, 779 who referred
F to the scarring to the lungs in that case as a "hidden impairment". The trial judge in the *Rothwell* case [2008] AC 281 looked for a disease or impairment of, physical condition and, considering the judge's finding that there was nothing that could be categorised in that way, Lord Hoffmann made no suggestion that the judge had been wrong to focus on impairment: para 11.

25 Secondly, it was underlined that to be actionable, the damage had to be more than negligible. This is expressed in various ways, including that it
G must be more than trivial (Lord Hoffmann, at para 8), that it must be "real damage" (Lord Hope of Craighead, at para 39), and that it must be material: Lord Rodger of Earlsferry, at para 87. Thirdly, following on from that, it was made clear that the mere fact that a particular physical condition might properly be described as an "injury" does not necessarily mean that it constitutes damage of the requisite kind. Lord Hope countenanced that the
H plaques could be called an injury (see, for example, at para 39), but the claimants still did not recover because, as he said

> "the use of these descriptions does not address the question of law, which is whether a physical change of this kind is actionable. There must be real damage, as distinct from damage which is purely minimal: Lord

Evershed, at p 774 [of the *Cartledge* case]. Where that element is lacking, as it plainly is in the case of pleural plaques, the physical change which they represent is not by itself actionable."

Returning to the subject at para 47, he said:

"It is well settled in cases where a wrongful act has caused personal injury there is no cause of action if the damage suffered was negligible. In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue. The policy does not provide clear guidance as to where the line is to be drawn between effects which are and are not negligible. But it can at least be said that an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful has no consequences that will attract an award of damages. Damages are given for injuries that cause harm, not for injuries that are harmless."

26 Lord Hoffmann had some comments to make about the nature of "damage". He said, at para 7:

"a claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability."

Putting this formulation together with the requirement that the damage be more than minimal, he saw the relevant question, on the facts of the *Rothwell* case, at para 19, as being: "is [the claimant] appreciably worse off on account of having plaques?" Although he had referred at para 7 to damage in the sense of being economically worse off, the context makes it plain that the question he was posing in para 19 was whether the claimant was physically worse off.

27 It can be seen from the passages referred to above that, as well as the usual reference to "pain, suffering and loss of amenity", 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 the *Rothwell* case) 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 the *Cartledge* case [1963] AC 758, 778), and also an "impairment". Furthermore, it has been established that it can be hidden and symptomless: the *Cartledge* case.

How Jay J and the Court of Appeal saw matters

28 Jay J saw it as key, at [2015] PIQR P10, paras 27 and 31, that the scarring to the lungs in the *Cartledge* case was "not neutral as to its health impacts" and constituted "a disease process which is real and present." He

A contrasted this with the situation in the *Rothwell* case [2008] AC 281 in that the pleural plaques would never cause symptoms or increase the susceptibility of the individual to other diseases or conditions, and did not reduce life expectancy. He agreed, at para 30, that there were factual differences between the *Rothwell* case and the instant case, including that "the progression from sensitisation to allergy can be envisaged as being along a direct causal pathway . . . [whereas] . . . the pleural plaques were a B biological cul-de-sac". But he thought it critical that the progression would not occur if an employee was removed from the source of the sensitisation and, because the claimants had all been removed from exposure to platinum salts, would not occur in their cases. The correct approach in his view, at para 32, was to analyse the sensitisation in terms of the physical or physiological harm that it may be causing. The antibodies in the claimants' C bodies were not harmful in themselves and he considered that "something more has to happen before actionable injury may be sustained". He discarded financial loss consequent upon the changes as irrelevant, and took the view that "one cannot define the actionable injury by the steps which are taken to prevent it" (by which he must have meant the steps taken to prevent the claimants developing an allergy). It seems to have been his view that, on the facts of this case, nothing short of actual symptoms could amount to D actionable injury.

29 In the Court of Appeal [2016] 1 WLR 4487, there was a close analysis of the *Cartledge* and *Rothwell* cases. Setting out his conclusions, between paras 30 and 32, Sales LJ (with whom the other members of the court agreed) concluded that the claimants have suffered "no physical injury". He considered that the platinum salt sensitisation that they have E developed is not harmful in any relevant sense. He saw it as analogous to the pleural plaques in the *Rothwell* case, and said that it was "not a 'hidden impairment' which has the potential by itself to give rise to detrimental physical effects in the course of ordinary life", and was therefore not like the lung scarring in the *Cartledge* case. He observed, at para 27, that, like the plaques, platinum salt sensitisation does not reduce life expectancy and, "provided the worker is removed from an environment in which he may be F exposed to platinum salts", will not cause symptoms, or increase the susceptibility of the individual to other diseases or conditions. In Sales LJ's view, at para 30, it did not therefore constitute actionable damage or injury.

30 Sales LJ agreed with Jay J that the steps taken to prevent the allergy developing (removing the employee from work in an environment where further exposure may occur) should not be seen as a component of the injury G and that the sensitisation had to be looked at in terms of the physical or physiological harm which *it* may be causing, which, without further exposure, was none. He acknowledged that the removal of the claimants from their jobs might be seen as an extra element, present in this case and not in the *Rothwell* case, but, whilst he accepted that this was detrimental to the claimants financially, Sales LJ did not consider that it converted the physiological change into an actionable injury, because he took the view that H the financial detriment should be viewed separately, as a form of pure economic loss. Indeed, at para 32, he was disposed to view the removal of the claimants from their jobs as a "sort of mitigation of loss in advance of injury", the restriction on their work being to protect them from suffering the physical injury which would otherwise have developed. On his

reasoning, as damages can only be claimed for the expenses of mitigation where there is a right to sue for a wrong in the first place, and there was no such right here, damages for the financial loss could not be recovered.

The arguments in this court

31 In summary, the claimants argue that platinum salt sensitisation constituted a physical change to their bodies which amounted to material damage in that they were worse off than they would have been but for their employer's breach of duty. By virtue of their sensitisation, they were likely to develop an allergy if further exposed to platinum salts. Their bodies were now in a state that made them unfit for further work in areas where they may be exposed to salts ("red zones"), and this constituted a real loss of amenity and qualified as an actionable personal injury.

32 The company supports the reasoning of Jay J and the Court of Appeal. It argues that platinum salt sensitisation is not an actionable personal injury and that the claim is in reality one for pure economic loss for which the claimants are not entitled to recover, either in tort or through the medium of a term implied into their employment contracts. The claimants cannot establish actionable personal injury, say Johnson Matthey, by adding the financial consequences of the sensitisation to the physiological changes in their bodies.

33 The company argues that the changes in the claimants' bodies do not amount to physical damage to bodily tissue or an impediment to the proper working of bodily tissues or organs, and seeks to categorise the molecular change that has occurred as entirely normal and benign in character, as a person will naturally develop antibodies in everyday life and antibodies are not themselves harmful. In the company's view, it "would seem perverse and an abuse of language to describe as 'injured' someone who merely acquired a new antibody". The company's argument seeks to align the claimants' condition with that of the claimants with pleural plaques in the *Rothwell* case [2008] AC 281, and to distance it from the situation in the *Cartledge* case [1963] AC 758, it being asserted that sensitisation is merely an indicator of past exposure to platinum salts as the plaques were an indicator of exposure to asbestos. In addition, it is emphasised that the claimants are not limited in living their lives, except that they should avoid exposure to platinum salts.

34 An important element in the company's argument is that platinum salts are not encountered in ordinary everyday life, only in certain specialist workplace environments. I interpose to observe that an employee should not be exposed to the salts even in the specialist workplace, but it is clear from the existence of the testing regime and the practice of not allowing sensitised individuals to work in the red zones, that exposure does take place, and of course it is admitted that the claimants in this case were in fact exposed to the salts by virtue of the company's breach of its duty under various health and safety regulations. The company says that these claimants almost certainly will not go on to develop platinum salts allergy, now that they are not permitted to work in the red zones, and are aware of the need to avoid contact in other working environments. Furthermore, the company observes that if the claimants *were* at any stage to develop initial allergy symptoms (which in themselves may be too minor to constitute actionable personal injury), that

A would be a warning to remove themselves from the source of exposure, thus avoiding significant injury.

35 Encapsulating these elements of their argument in their written case, the company says that the claimants have "molecular changes without symptoms" and "a theoretical but no practical risk of symptoms developing."

36 The company also argues that it is not, in fact, the sensitisation itself B that prevents the claimants from working at their old jobs, but the terms of the collective agreement which led to the employer removing them from risky areas. This is demonstrated, it is said, by the fact that the claimants must have been sensitised before the skin prick test revealed that they were, but they continued to do their jobs until the test results were known.

Discussion

C

37 I am not persuaded by the company's attempt to class the claimants' condition as just the development of another benign antibody in the body, not a true departure from the normal, and not damaging the claimants' health or physical capability. Some antibodies may do their job in the body without producing any adverse consequences. What matters, however, is the behaviour of the particular antibody which is produced in an individual D who has been sensitised to platinum salts. If such an individual is subsequently exposed again to the salts, the IgE antibody involved in platinum salt sensitisation is likely, in most people, to react in a way which produces allergic symptoms of a type which, it is common ground, would be of sufficient significance to constitute an actionable personal injury. Whilst possibly simplistic, I do not think it is inappropriate to view the development of a platinum salts allergy in a person who does not, at the outset, have a E sensitivity to platinum salts as having two stages: first comes sensitisation, next comes allergy. Before initial employment in the red zones, a medical screening procedure is undertaken so as to avoid employing people who have a genetic disposition to allergy. When commencing work in the red zones, the claimants were people who had the capacity to work there. At that point, their bodies were fitted for that task, still having a safety net to F protect them from allergy, in the form of the sensitisation stage, which would enhance the prospect of removing them from further exposure before allergy developed. When they became sensitised, through the company's negligence and/or breach of statutory duty, that change to their bodies meant that they lost this safety net and therefore their capacity to work around platinum salts.

G

38 But, on the company's argument, this bodily change which leaves the claimants worse off than they were before they became sensitised, is not actionable personal injury. From discussion in the course of argument, it became clear that Johnson Matthey's argument was not that sensitisation can *never* amount to actionable injury. Mr Kent QC acknowledged, on behalf of the company, that if the claimants had developed a sensitivity to something in everyday life, such as sunlight, as opposed to platinum salts, H they would have sustained actionable damage because they would not be able to carry on with their ordinary life and would suffer, as he put it, a "deficit" which would undoubtedly be characterised as personal injury. It follows from this acknowledgment 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.

39 However, Mr Kent contrasts the person who develops a sensitivity to sun with the situation here because, he says, the sufferer is not sensitive to something in everyday life, but only to a dangerous chemical to which people should not be exposed, given the health and safety regulations. Certain aspects of this argument ring rather hollow in this case, given that the claimants *were* exposed to the salts by the company, and the risk of further exposure is considered sufficiently significant for the collective agreement to require that they be prevented from working in red zones. However, I will set that objection to one side for present purposes and consider the simple proposition that the claimants have not become sensitised to something in everyday life, like the sun. It is a proposition to which I cannot subscribe. 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. In those circumstance, I do not see how their situation can be validly distinguished from the person who has developed a sensitivity to the sun.

40 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. The *Cartledge* case [1963] AC 758 establishes that the absence of symptoms does not prevent a condition amounting to actionable personal injury, and an acceptance of that is also implicit in the sun sensitivity example, in which the symptoms would only be felt upon exposure to sunshine, just as the symptoms here would only be felt upon exposure to platinum salts. 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.

41 It can be helpful to test an approach by applying it to slightly different facts, albeit that they are not an exact parallel with the present case. Suppose that the claimants were coffee tasters, employed because they had the ability to distinguish different flavours and qualities of coffee, by smell and taste. Suppose further that, through negligence, their sense of smell or taste became impaired in a way which would be of absolutely no consequence to anyone who was not employed in this particular role, but meant that they could no longer do their jobs and had to seek other employment. I venture to suggest that there would be little difficulty in accepting that the changes to their bodies were actionable personal injury. Another example might be of claimants working in the fragrance industry, whose highly developed sense of smell was damaged. It might be that the coffee tasters, or the expert perfumers, would be able to show something which looks more like a physical bodily injury of a conventional kind, but I can see no essential difference between their situation and the present case, where bodily changes have led to the claimants, who were formerly people who could and did work around platinum salts, no longer being able to do so.

42 I should address specifically some of the arguments which featured in the company's case. First, there is the argument that the claimants are attempting to claim for something, an allergy, that will never happen

because they will not now work around platinum salts. This goes along with what might be described as "the timing argument", namely that the deficit which the claimants rely upon (their inability to do their chosen jobs) did not exist prior to the positive skin tests, and was not the product of the negligent exposure to platinum salts and resulting sensitisation, but of the protective provisions of the collective agreement which required that they be removed from the red zones. Another strand of the argument is the assertion that the claimants are seeking to make what is, in reality, only a risk (the risk of developing an allergy) into an actionable injury.

43 These arguments could only prosper, it seems to me, if the sensitisation itself is not seen as an actionable personal injury, but only as a benign and symptom-free molecular change. For the reasons I have given at paras 37–40 above, I do not see it in that way. If the sensitisation is viewed as an injury, as in my view it should be, then it did exist before the skin test revealed it. The restrictions on the work that can be done by claimants who have tested positive are attributable to the sensitisation, to which the protective provisions of the collective agreement were a response. Those provisions reflect the fact that, because of the negligence and/or breach of statutory duty of their employer, these claimants' bodies are now in such a state that they need to avoid further exposure to platinum salts which, according to the evidence, would be likely to provoke allergy in most people. But the need for sensitised individuals to avoid exposure would apply whether or not there was a collective agreement such as that which was in force in this case, and no matter whether the employer was Johnson Matthey or another employer who imposed no comparable restrictions. As for the fact that the claimants must have worked for a period after they became sensitised, but before their positive skin prick tests demonstrated that fact, I do not see that that advances the argument in any way, given that they did so in ignorance of their condition. They were lucky enough not to have gone on to develop allergic symptoms during that period of unknown sensitisation, but that does not mean that they would be safe to continue to work in red zones (or the equivalent area in another company) if not prevented from doing so by the collective agreement.

44 Once the sensitisation is identified as an actionable injury in its own right, the company's argument that the claimants are, in reality, claiming only for their lost earnings and therefore for pure economic loss also falls away.

45 But, the company asks, what about 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? This, to my mind, does not go to the question of whether actionable personal injury has been suffered, but to the quantum of damages flowing from that, which it could be expected would be reduced by this feature of the particular case.

46 I return to the *Rothwell* case [2008] AC 281 and the *Cartledge* case [1963] AC 758. Although other authorities were cited, including some relating to claims for damage to property, I have found them of little direct, or even indirect, assistance and therefore, like Jay J and the Court of Appeal, my focus has been upon these two central cases.

47 I would distinguish this case from the *Rothwell* case. I set out earlier how the doctors saw the distinction between pleural plaques and

sensitisation to platinum salts but it is, of course, ultimately a lawyer's question whether the two conditions are distinguishable. As I see it, 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. Similarly, the sensitisation of the claimants in this case marks that they have already been exposed to platinum salts, but unlike the plaques, it constitutes a change to their physiological make-up which means that further exposure now carries with it the risk of an allergic reaction, and for that reason they must change their everyday lives so as to avoid such exposure. Putting it another way, they have lost part of their capacity to work or, as the claimants put it in argument, they have suffered a loss of bodily function by virtue of the physiological change caused by the company's negligence.

48 As Lord Pearce said in the *Cartledge* case [1963] AC 758, 779 (supra para 15), it is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. It is a question of fact that must be determined in the light of the legal principles applicable to personal injury actions, and this case has provided a useful opportunity to clarify some of those principles. The process has led me, for all the reasons I have set out, to differ from Jay J and the Court of Appeal and to conclude that the concept of actionable personal injury is sufficiently broad to include the damage suffered by these claimants, which is far from negligible.

49 In these circumstances, it is unnecessary to say anything further about the claimants' alternative argument that they should be able to recover for pure financial loss. I would allow the appeals on the claimants' first ground, having concluded that they do have a cause of action in negligence/statutory duty against the company.

Appeals allowed.

Ms B L Scully, Barrister