independent contractor who is not in a situation comparable to those in atypical working relationships considered in recent case law, but operating a recognisably independent business on traditional tests.

The Singapore Court of Appeal in *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58 recently observed at [63]-[64] that Lord Phillips' criteria were not intended to effect such a radical change in the law of vicarious liability, but merely represent a recognition that vicarious liability may be imposed outside the class of traditional employment relationships in certain circumstances. *Barclays Bank* demonstrates the urgent need for clarification on this fundamental question.

ALLISON SILINK AND DESMOND RYAN

Address for Correspondence: Faculty of Law, University of Technology Sydney, PO Box 123 Broadway, NSW 2007, Australia. Email: allison.silink@uts.edu.au; School of Law, Trinity College Dublin, House 39, Trinity College, Dublin 2, Ireland. Email: desmond.ryan@tcd.ie

THE OUTER LIMITS OF "PERSONAL INJURY"

EARTHA Kitt really needed "the deed to a platinum mine" in her smash hit of Christmas 1953, *Santa Baby*. But platinum can be dangerous. Those who work with its salts are tested regularly for platinum sensitisation. Should they develop it, they can no longer work with platinum salts for fear of allergic reactions. Workers at Johnson Matthey's factory developed platinum sensitisation (as a result, they alleged, of the company's negligence and breach of statutory duty). Unable to continue in their jobs they were either dismissed or moved to other (less well paid) posts within the company. The workers sued for damages. But is platinum sensitisation "personal injury" (in which case the claims would be legally straightforward)? Jay J. and a unanimous Court of Appeal had all held that sensitisation was *not* "personal injury"; that the claims therefore concerned pure economic loss; but that the employer had no duty to protect against such loss (whether in tort or contract). The Supreme Court unanimously allowed the claimants' appeal, classifying platinum sensitisation as "personal injury": *Dryden v Johnson Matthey plc* [2018] UKSC 18, [2018] 2 W.L.R. 1109.

Whether something counts as "personal injury" is usually clear beyond argument, but at the margins proves troublesome. As with so many legal categories the core is indubitable but the penumbra hazy. Ultimately the question turns on the facts of the case (at [48]). Yet two House of Lords decisions were directly on point: *Cartledge v E. Jopling & Sons Ltd.* [1963] A.C. 758 and *Rothwell v Chemical & Insulating Co. Ltd.* [2007] UKHL 39, [2008] A.C. 281. These cases were the twin stars by which Lady Black navigated, delivering the judgment of the Supreme Court; other decisions concerning the boundaries of physical damage *to property*

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were thought unhelpful (at [46]: cf. *The Orjula* [1995] 2 Lloyd's Rep. 395, *Blue Circle Industries plc v Ministry of Defence* [1999] Ch. 289 and (not cited to the court) *Pride & Partners v Institute for Animal Health* [2009] EWHC 685 (QB)).

In *Cartledge v Jopling* miniscule scarring to the lungs (through inhalation of particles) was held to be "personal injury" because it affected lung function and so reduced life expectancy – even though sufferers were unaware of the invisible changes in their everyday lives (indeed, by the time the plaintiff became aware of it in *Cartledge*, the limitation period had expired). But *Rothwell* shows that not every bodily change amounts to "damage". The claimants developed plaques on their pleura (lung membranes) from asbestos inhalation. These plaques were entirely benign (asbestos-related diseases including cancer do not develop from the plaques). They were entirely asymptomatic. They were held non-actionable in *Rothwell*. The plaques could not be viewed as a *damaging* bodily change (Lord Hoffmann, at [7]). Since the policy of the law is to ignore negligible harm, such "harmless injuries" are not actionable (Lord Hope, at [47]) – *de minimis non curat lex*.

In *Dryden v Johnson Matthey* the claimants succeeded in distinguishing *Rothwell*. Platinum sensitisation is, in itself, asymptomatic – like the *Rothwell* plaques. But it is not benign: sensitisation brings a significant risk that further exposure to platinum will result in allergic reactions (it being common ground that allergies, with their unpleasant symptoms, surely are "personal injury": at [37]). Since further exposure to platinum salts had to be avoided to prevent allergic reaction, the *Johnson Matthey* claimants' "bodily capacity to work ha[d] been impaired and they [were] therefore significantly worse off" (at [40]). Unlike the *Rothwell* pleural plaques, sensitisation was held to be a bodily change *with significant negative effects*.

The defendants submitted that aggravation of the claimants' sensitisation into bodily injury (i.e. platinum allergy) was an entirely theoretical risk. Any chance of this actually happening had been removed when the claimants' work with platinum salts was terminated. In ordinary daily life there was no prospect of encountering such salts and developing the allergy. (The defendants accepted in argument that sensitisation to everyday things such as sunlight would have been actionable: at [38].) On this Lady Black observed at [39]: "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." Her Ladyship suggested that had a specialist coffee-tester or perfumist lost their sense of smell (and their job), there would be little difficulty in accepting that this was actionable personal injury (at [41]). Indeed not – but since impaired smell has an obvious effect on anybody's ability to enjoy the ordinary amenities of life (e.g. food and drink), the analogy with a

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recherché inability to handle platinum salts seems, with respect, distant. Still, the core point was that the bodily changes were not "harmless" ones when they obliged the claimants to avoid contact with platinum.

Would this amount to bodily injury for someone like a lecturer in law, whose life does not routinely involve contact with precious metals (and upon whose freedom the restriction would be purely theoretical)? Or does the rationale apply only to workers with platinum salts, whose livelihoods would be impaired thereby? If the latter, what of Sales L.J.'s point [2016] EWCA Civ 408, [2016] 1 W.L.R. 4487, at [31]: "The presence of such economic loss does not convert a physiological change which does not in itself qualify as an actionable injury into such an injury"? Lady Black addressed a variant: what about platinum workers about to retire when they became sensitised? In the Supreme Court's opinion, imminent retirement might reduce the quantum of damages but would not mean that personal injury had not been suffered (at [45]). Yet not everyone will be convinced that the hypothetical lecturer, in his base-metal career, would suffer greater-than-negligible negative effects from platinum sensitisation.

Sales L.J.'s argument was therefore not directly considered. Is it persuasive? There is authority that costs incurred to avert physical harm should not be viewed as pure economic loss. For example the (dissenting) judgment of Laskin J. in *Rivtow Marine Ltd. v Washington Iron Works* [1974] S.C.R. 1189, adopted by Lord Wilberforce in *Anns v Merton L.B.C.* [1978] A.C. 728, 759–60, before its rejection in *D&F Estates Ltd. v Church Commissioners* [1989] A.C. 177. Notwithstanding its chequered career in England, Laskin J.'s approach ultimately prevailed in Canada: *Winnipeg Condominium Corpn. v Bird Construction Co.* [1995] 1 S.C.R. 85. These were all cases involving expenditure to repair defective buildings, but the argument seems applicable to personal injury situations. Sales L.J. disposed of the point summarily, saying "A right to claim damages covering the expenses of mitigation only arises where there is a right to sue for a wrong in the first place", which was not the case in his view since sensitisation was essentially benign ([2016] EWCA Civ 408 at [32]). Is this further restriction well founded? Donal Nolan has recently explored the previously neglected question of "preventive damages": (2016) 132 L.Q.R. 68. It is regrettable that it received no consideration in the Supreme Court, despite its potential to buttress the main decision.

Given that sensitisation was classified as "personal injury", the court declined to consider whether a claim for pure economic loss would have succeeded. This was entirely proper, although again a pity for eager students of the law. Considerably more attention had been paid to economic loss by the Court of Appeal. Accepting that there is no general overarching duty for employers to secure their employees' financial well-being (e.g. *Crossley v Faithful & Gould Holdings Ltd.* [2004] EWCA Civ 293, [2004] I.C.R. 1615), should that preclude a specific duty (e.g. implied

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contract term) not to positively *incapacitate* workers (whether physically or otherwise)? Must the court's conclusion about implied terms always and necessarily determine the "voluntary assumption of responsibility" question too (*qua* foundation of a tortious duty)? A careful distinction must be made between "terms implied by law" (i.e. imposed as a matter of legal policy) and those "implied in fact" (i.e. present, even though unspoken, in a particular employment contract). The precise juridical nature of the "voluntary assumption" doctrine is also now in doubt. The rich policy reasoning running through *Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28, [2007] 1 A.C. 181, was conspicuously absent in *NRAM Ltd. v Steel* [2018] UKSC 13, [2018] 1 W.L.R. 1190 – but then *NRAM* was a more straightforward case. The criteria for recovering pure economic loss in tort, and the relationship between "voluntary assumption" and the implication of contract terms, will continue to be difficult issues.

Dryden v Johnson Matthey indicates that any bodily change which affects freedom of action has a negative effect and thereby amounts to "personal injury". That the effect on the freedom of these particular claimants was significant (i.e. affected their employability) meant it was no "harmless injury". It was irrelevant that others might not have been significantly affected by platinum sensitisation. Irrelevant also that the negative effects were essentially financial not physical ones. It is a decision at the very limit of "personal injury".

JONATHAN MORGAN

Address for Correspondence: Corpus Christi College, Cambridge, CB2 1RH, UK. Email: jem44@cam.ac.uk

VARYING CONTRACTS IN THE SUPREME COURT

ROCK Advertising Ltd. v MWB Business Exchange Centres Ltd. [2018] UKSC 24 raised two fundamental issues in the law of contract. First, can an oral variation be effective in the face of a no-oral modification (NOM) clause? Secondly, is part payment of a debt good consideration for satisfaction of the debt? The majority of the Supreme Court answered "No" to the first question, overturning the Court of Appeal (noted [2016] C.L.J. 455). None of the Justices felt it necessary or appropriate to answer the second question. It is suggested that both questions should have been dealt with differently.

Rock occupied as licensee premises managed by MWB. Rock decided to expand, and entered into a written agreement with MWB for larger premises for 12 months beginning 1 November 2011. The agreed licence fee was £3,500 per month for the first three months, and £4,433.34 subsequently. Rock's business was not successful, and by February 2012 it had incurred

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