Insight 215

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

In this week's edition of Insight, we report on the recent Court of Appeal ruling in the case of *Chell v Tarmac Cement and Lime Ltd*. The Court of Appeal considered an appeal of the decision of His Honour Judge Rawlings sitting at Stoke-on-Trent County Court and appeal of the decision of Mr Justice Martin Spencer.

The decision considers whether an employer can be held to be vicariously liable or in breach of duty for injury resulting from horseplay at work.

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Chell v Tarmac Cement and Lime Ltd

Background

The appellant was employed by Roltec Engineering Limited ("Roltec") as a site fitter. From December 2013 he worked at a site in Brayston Hill ("the Site") which was operated and controlled by the respondent, Tarmac Cement and Lime Limited ("Tarmac"). The appellant was providing services for the purposes of Tarmac's business.

On 4 September 2014, Anthony Heath, a fitter employed by Tarmac, entered the workshop on the Site where the appellant was working. The appellant bent down to pick up a length of cut steel. Mr Heath put two pellet targets on the bench close to the appellant's right ear and hit them with a hammer causing a loud explosion. As a result, the appellant suffered injury, a noise-induced hearing loss in his right ear and tinnitus.

The Judgment of His Honour Judge Rawlings

The judge noted that the appellant and his brother, Gavin were working at the Site alongside fitters employed directly by Tarmac. In the summer of 2014, two fitters employed by Tarmac, Anthony Heath and Jason Star, were suspended but subsequently returned to the Site.

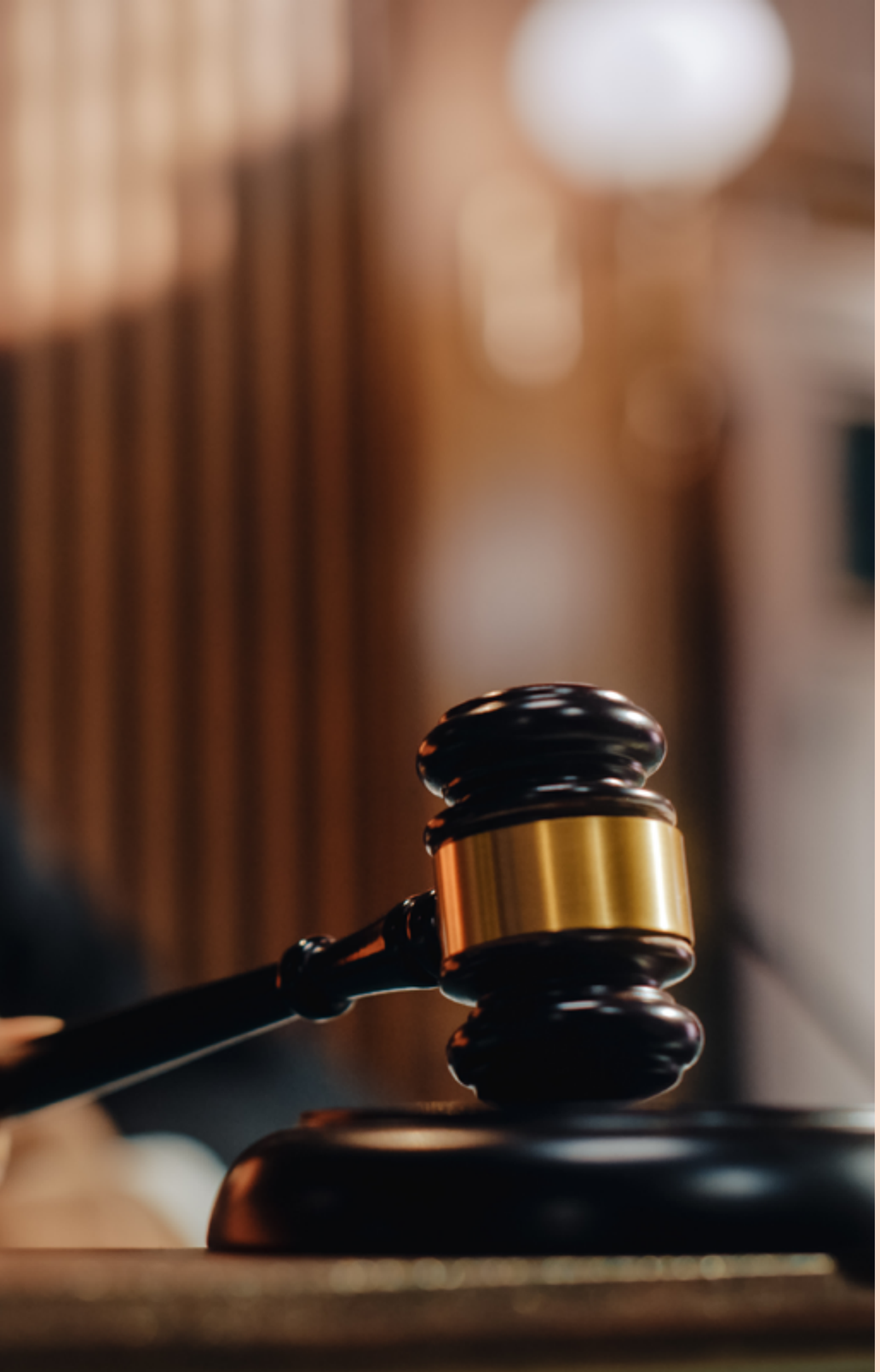
It was the appellant's evidence that following their return to the Site there were tensions between the fitters employed by Tarmac and Roltec, as it appeared the Tarmac fitters considered they would be replaced by Roltec fitters. The tensions had been reported to Tarmac management. Following the incident Mr Heath was dismissed.

The judge's findings of fact

- The appellant and Mr Heath were working in different parts of the Site.
- Mr Heath had access to the workshop as part of his role as a fitter.
- Mr Heath's actions represented a practical joke at the appellant's expense which was connected with the tensions between Tarmac and Roltec fitters.
- The friction between the Tarmac and Roltec fitters did not include any express or implied threats of violence.
- Mr Heath's suspension was unrelated to the tensions between the fitters.

Vicarious liability

The appellant contended that there was a close enough connection between the actions of Mr Heath and the work he undertook to result in Tarmac being held liable for Mr Heath's actions.



Tarmac contended it was not vicariously liable as Mr Heath was not acting in the course of his employment with Tarmac.

The judge considered various authorities including *Lister v Hesley Hall [2001] UKHL 22* and *Graham v Commercial Bodyworks Limited [2015] EWCA Civ 47.*

The judge concluded the first limb of the *Lister* test being a close relationship between Mr Heath and Tarmac was satisfied. The second limb was whether there was sufficient connection between the relationship between Tarmac and Mr Heath and Mr Heath's striking two pellet targets to make it just that Tarmac should be held responsible for the act. The question was whether the striking of the pellet targets was within the field of activities entrusted to Mr Heath by Tarmac.

The judge found the following factors did not support a finding that striking the pellet targets were within the field of activities assigned to him by Tarmac:

- The pellet targets were brought on to the Site by Mr Heath and were not work equipment.
- It formed no part of Mr Heath's work to use pellet targets at work.
- What Mr Heath did was unconnected to any instruction given to him in connection with his work.
- Mr Heath had no supervisory role in relation to Mr Chell's work and at the time of the incident he was supposed to be working on another job in another part of the Site.
- The striking of the pellet targets did not in any way advance the purposes of Tarmac.
- Work merely provided an opportunity for Mr Heath to carry out the prank and was not within the field of activities assigned to Mr Heath by Tarmac.

Breach of the duty of care owed by Tarmac to the appellant

The judge held that Tarmac had not been in breach of duty for the following reasons:

- There was no evidence of threats of violence by Tarmac fitters against any Roltec fitter.
- There was no failure by Tarmac to risk assess horseplay, ill-discipline and malice.
- Increased supervision would not have prevented the incident.

The First Appeal

The claimant's appeal was heard by Mr Justice Martin Spencer.

The judge found:

- There was no error of law or misapplication of the relevant authorities in the judgment of His Honour Judge Rawlings.

He observed;

"The judge was entitled to find that the situation as presented to Tarmac did not merit specific action in relation to Mr Heath where there was no foreseeable risk of injury to the claimant at the hands of Mr Heath. Furthermore, the learned judge's findings in relation to vicarious liability impinge on this aspect too. If Mr Heath was acting in a way wholly unconnected with his

employment, but for his own purposes and "on a frolic of his own" then it is more difficult to argue that the employer should have taken steps to avoid such behaviour"

The judge cited with approval the judgment of Lord Clyde in *Lister*;

"In order to establish a vicarious liability, there must be some greater connection between the tortious act of the employee and the circumstances of his employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment has afforded"

The appeal was dismissed.

The Court of Appeal Decision

Vicarious liability

There was not a sufficiently close connection between the act which caused the injury and the work of Mr Heath so as to make it fair, just and reasonable to impose vicarious liability on Tarmac.

The following were said to be relevant to the absence of such a connection:

- The cause of the injury was the explosive pellet target - it was not work equipment.
- It was no part of Mr Heath's work to use pellet targets.
- The risk created by this employee was not inherent in the business. The employer's business provided the background and context for the risk and created the ground for it but that was insufficient to create the close connection required.

Lady Justice Nicola Davies concluded;

"On no basis could it be said that Mr Heath was authorised to do what he did by Tarmac. Nor was his act an unlawful mode of doing something authorised by Tarmac. The pellet targets were not work equipment, hitting pellet targets was no part of Mr Heath's work, such an activity in no way advanced the purposes of Tarmac and that activity was in no sense within the field of activities authorised by Tarmac"

Tarmac were not vicariously liable for Mr Heath's actions.

Breach of Duty

"There was no reasonably foreseeable risk of injury to the appellant arising from the practical joke played by Nr Heath which could begin to provide a basis for a breach of duty of care owed by Tarmac to the appellant. Even if a foreseeable risk of injury could be established, on the facts of this case, the only relevant risk which could have been included in an assessment was a general one of risk of injury from horseplay. It would be unreasonable and unrealistic to expect an employer to have in place a system to ensure that their employees did not engage in horseplay"

There was no breach of duty.

The appeal was dismissed.

Commentary

In view of the detailed and carefully constructed judgments of the trial judge and Mr Justice Martin Spencer the outcome of the appeal to the Court of Appeal is no surprise.

Vicarious Liability

The trial judge had correctly applied the "two-limb" test. The dispute centred on the second limb., the "close connection test". This required a two-stage analysis considering the field of activities entrusted to Mr Heath by Tarmac and whether there was sufficient connection between the field of activities and the position in which Mr Heath was employed and the striking of the pellets.

In applying the second limb the judges below and the Court of Appeal referred to the factors set out in *Graham v Commercial Bodyworks Limited [2015] ICR 665*:

1. the extent to which the wrongful act may have furthered the employer's aims
2. the extent to which the wrongful act was related to friction, confrontation, or intimacy inherent in the employer's enterprise.
3. the extent of power conferred on the employee in relation to the victim and
4. the vulnerability of potential victims to wrongful exercise of the employee's power.

There does remain one issue which was not necessary for the Court of Appeal to determine in *Chell*. Should the court when deciding cases on vicarious liability focus on the "field of activities" test which looks at the employee's express functions or should the court focus on the "enterprise risk" as described in *Bazley v Curry [1999] 2RCS 534* which stated;

"There must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of harm by putting the employee in his or her position and requiring him to perform the assigned tasks"

This was not a case where Mr Heath had any function, duty or responsibility directly related to his wrongdoing and even applying the *Bazley* test the appeal would still have failed.

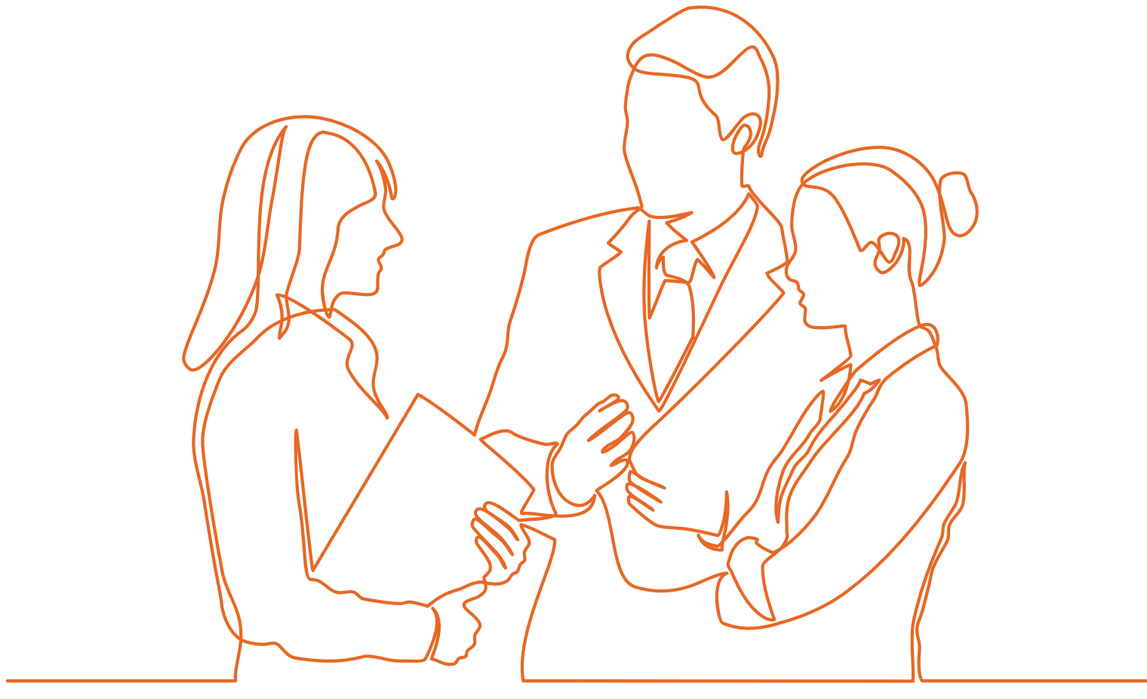
Breach of Duty

It should be noted that no case-law authority was placed before the trial judge, Mr Justice Martin Spencer or the Court of Appeal supporting the contention that intentional wrongdoing should be covered in any workplace risk assessment. Further at no stage did the claimant adduce evidence of any risk assessment which addressed the issue of horseplay.

Had horseplay been included in a risk assessment, different considerations may have applied but as Lady Justice Nicola Davies stated any such risk assessment would only have covered a general risk of horseplay.

As it stands the case shows the lack of a risk assessment does not provide the claimant with a separate cause of action.

There is little prospect of the decision being appealed.



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