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Chell v Tarmac

The Common Law Unmoved on Vicarious Liability and Direct Duty

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On 12th January 2022, judgment was handed down in *Andrew Chell v Tarmac Cement and Lime Limited* [2022] EWCA Civ 7. This was the second appeal from the decision of HHJ Rawlings ("the judge") sitting at Stoke-on-Trent County Court on 14 October 2019. He had dismissed the claim by Mr Chell ("the appellant") for personal injury and damage, which occurred during the course of his employment on 4 September 2014.

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

Anthony Heath, a fitter employed by Tarmac entered the workshop where the appellant was working. As 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 next to the appellant's right ear. In consequence, the appellant suffered injury, a noise induced hearing loss in his right ear and tinnitus.

The Judge's findings of fact and determination as to the law were upheld by Martin Spencer J in a judgment dated 5 October 2020 ("the first appeal"). In giving permission to appeal, Males LJ limited such permissions to grounds (a) direct duty, (b) breach, (f) vicarious liability and (h) causation only.

The Factual Foundations

It is as well to rehearse what findings were unchallenged on appeal:

i. Mr Heath caused an explosion by striking 2 pellet gun targets with a hammer: whereas the hammer was work equipment, the targets had no connection with either the appellant's or Mr Heath's work and had been brought into the workplace;

ii. Neither Mr Heath nor Mr Starr (his alleged accomplice) were in a supervisory role as to the appellant;

iii. Although Mr Heath had access to the workshop as part of his role, Mr Heath was not working in the workshop at the time of the incident and had made his way to the workshop in order to carry out this prank on the appellant;

iv. Whilst the incident was an ill-judged joke at the appellant's expense connected with tensions at work between Tarmac's employees and Roltec employees – such tensions had eased in the time shortly before the incident;

v. Whilst the appellant and his brother stated they had complained about tensions between Tarmac employees and Roltec employees more than once it was found that the reporting of tensions had only occurred only once;

vi. In regard to any friction, there were no express or implied threats of violence made by Tarmac employees to Roltec employees;

vii. No request was made by the appellant to be taken off site;

viii. In relation to tensions, there was no complaint that made mention of Mr Heath (or indeed any other named individual);

ix. Mr Heath had not been suspended for threatening anyone, he was suspended as regards his clocking off for which he was properly disciplined.

Significantly, these findings made by the Judge were in the main contrary to the case which the appellant advanced at trial. That there were so many, and such detailed, findings of fact reflects two matters. First, how careful and considered was the Judge's consideration of the key factual matters at trial. Secondly, and by way of practitioner's point, it reflected the understanding of Counsel at trial that, as regards vicarious liability in particular, the test(s) to be applied are multi-factorial whereby the old truth that - in the winning of losing of cases - the closest attention to what findings of fact are required (or to be rebuffed) carries special force - and reward. It is of note that the appellant could not sensibly challenge the factual findings of the Judge since these findings were soundly based on the evidence which he heard.

Direct Duty and Breach

As Mr Justice Martin Spencer said at paragraph 38 of his judgment on the first appeal - the subject of commentary by Andrew Lyons here.

> *"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."*

No case-law authority was placed before the trial judge – nor indeed before Mr Justice Martin Spencer - supporting the contention that intentional, indeed criminal wrongdoing ought to be covered in any workplace risk assessment. At trial, no evidence was adduced on behalf of the appellant of any standard or specimen risk assessment which directly addressed horseplay.

Given on appeal the Judge's unchallenged findings that:

i. Any bad feelings between the outside contractors from Roltec and Tarmac's fitters had eased in the period prior to incident;

ii. The appellant did not ask to be taken off site;

iii. There were no express or implied threats of violent conduct, let alone any complaint about named individuals.

There was, in short, nothing to put Tarmac on notice of the need for a risk assessment. As it is, the existing site health and safety procedures included a section on general conduct stating *"no one shall intentionally or recklessly misuse any equipment"*. That was more than suitable and sufficient under common law. As Nicola Davies LJ stated, in giving the leading judgment on the second appeal:

> *"there was no reasonably foreseeable risk of injury to the appellant arising from the practical joke played by Mr Heath which could begin to provide a basis for a breach of a duty of care owed by Tarmac to the appellant"*.

In further disposing of the issue of breach, Her Ladyship stated, in a passage that will surely carry weight in other like cases, as follows:

> *"If it is seriously suggested that there should have been a specific instruction not to engage in horseplay, I regard the same as unrealistic. Common sense decreed that horseplay was not appropriate at a working site. The fitters were employed to carry out their respective tasks using reasonable skill and care, and by implication to refrain*

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" [para 36]

As to any need to investigate, once the appellant made the complaint, the bad feeling was reducing, no threats of violence were made, and the appellant did not ask to be taken off site. In short, there was no factual basis upon which it could properly be said that an investigation should have been commenced [para 37].

If horseplay was to have been included in risk assessments, such would have provided the answer that has eluded all those acting in such cases of vicarious liability before now[1], straining to consider matters through the prism of vicarious liability. Standing back, the pendulum has swung further away from attempts to elevate the lack of a risk assessment into a cause of action in itself.

Vicarious Liability

As regards vicarious liability, the trial judge had demonstrably understood that determining whether to impose vicarious liability required him to apply a 'two-limb' test: (i) whether the relationship between the defendant and the primary wrongdoer was so close that it was *capable* of giving rise to vicarious liability (the first limb); and (ii) whether the connection between that relationship and the primary wrongdoing was close enough to impose liability on the defendant (the second limb).

The first limb was straightforward: given that Mr Heath was an employee of Tarmac, he was in a close relationship with it. The real dispute here centred on the *"close connection'* test under the second-limb. Again, as the Judge correctly identified, that itself required a two-stage analysis, considering:

1) first, *"the field of activities entrusted to Mr Heath by Tarmac'*; and

[1] Notably in *Graham v Commercial Bodyworks Limited* [2015] ICR 665, another Court of Appeal case considering vicarious liability for misjudged horseplay, no arguments were put forward as to direct duty and breach.

2) secondly, *"whether there was a sufficient connection between that field of activities and the position in which Mr Heath was employed; and Mr Heath's act of striking the two targets with a hammer close to Mr Chell's ear, to hold that Tarmac should be liable having regard to the principles of social justice"*

In applying the second limb, the Judge and the Court of Appeal also called to mind the five factors derived from McLachlin J's judgment in *Bazley v Curry* [1999] 2 RCS 534[2] and approved by Longmore LJ in *Graham v Commercial Bodyworks Limited* [2015] ICR 665 (another authority on vicarious engaging Ropewalk counsel) the opportunity that the enterprise afforded the employee to abuse his or her power;

i. the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

ii. the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

iii. the extent of power conferred on the employee in relation to the victim; and

iv. the vulnerability of potential victims to wrongful exercise of the employee's power.

That approach was endorsed again in the Court of Appeal.

Placing *Chell* in context as regards the abundant modern authority on vicarious liability, whereas the judgment at trial had pre-dated *Morrisons v Various Claimants* [2020] AC 989, that authority had been handed down by time of the first appeal. Whilst the Supreme Court in *Morrisons* approved the same two-stage analysis of the *"close connection'* test under the second limb – by implication at least - *Morrison*, if anything, made matters yet more difficult for the appellant in *Chell* because Lord Reed made clear that *"the temporal connection is less significant in itself, with more weight to be attached to the capacity and purported basis on which the perpetrator acts"*.

[2] A decision of the Supreme Court of Canada.

The fact-sensitive, evaluative judgement required in resolving such cases - and amply shown here by the Judge – was rightly underscored by Martin Spencer J in the first appeal; and in turn by the Court of Appeal in this second appeal.

There remains one question going forwards, not necessary to be resolved on the appeal in *Chell,* where alternative views have been posited. In deciding cases as to vicarious liability, should the Court focus on a *'field of activities'* test – which would focus on the employee's express functions, duties, and responsibilities, as the most concrete reference points. For example, in the context of violence and/or horseplay, Longmore LJ in *Graham* identified a category of cases involving findings of vicarious liability where the use of reasonable force or the existence of friction is inherent in the nature of the employment e.g. bouncer. Indeed, *Mohamud v Morrisons* [2016] AC 677 is explicable on the basis that ordering the claimant to leave the petrol station kiosk fell within the employee's field of activities and he was purporting to act on his employer's behalf in reinforcing that order with violence.

In the alternative, does one focus on the 'enterprise risk', that is as per the summation by McLachlin J in *Bazley*:

> *"… 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 the harm by putting the employee in his or her position and requiring him to perform the assigned tasks."*

It was hardly necessary for the Court of Appeal here to resolve that debate, in so far as it arose at all, because on the basis of the Judge's careful judgment, it was *'heads the Claimant loses'* or *'tails the Defendant wins'*.

On the one hand, this is not a case where Mr Heath had any function, duty, or responsibility directly related to his intentional wrongdoing. The Judge found that Mr Heath had no supervisory/managerial role over the appellant. One could not characterise Mr Heath's role as having, but misusing, institutional authority with managerial status or plenary powers, duties, and responsibilities. On the other hand, application of *Bazley* factors did not carry the appellant's case over the winning line either.

In summary, calling to mind the much-quoted statement of Lord Phillips in *Various Claimants v Catholic Child Welfare Society* [2012], namely of vicarious liability being on the move, *Chell* marks a good example of the common law now pausing for breath as to both vicarious liability and perhaps more significantly direct breach of duty.

The full judgment is found here: https://www.bailii.org/ew/cases/EWCA/Civ/2022/7.html

Patrick Limb QC and Andrew Lyons were instructed as Counsel for the Respondent by Chris Wilson of CMS Cameron McKenna Nabarro Olswang LLP – Mr Lyons being Counsel at trial and for the first appeal.

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