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Assessing the scope of employers liability – Chell v Tarmac

These were the opening remarks of Mr Justice Martin Spencer when handing down his Judgment in the recent case of Andrew Chell v Tarmac Cement and Lime Limited [2020] EWHC 2613, the latest in a series of appeals dealing with the scope of vicarious liability.

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'The Practical joke must be the lowest form of humour. It is seldom funny, it is often a form of bullying and it has the capacity, as in the present case, to go seriously wrong'.

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Background

The Claimant was sub-contracted to work as a site fitter for Tarmac, alongside Tarmac's own employees. According to the Claimant, tensions arose between the Tarmac employees and the sub-contracted fitters, to the extent that the Claimant raised this with his Supervisor. A few weeks later, one of Tarmac's employees brought 2 pellet targets onto site and hit them with a hammer next to the Claimant's right ear as a practical joke.

The Claimant suffered a perforated right eardrum, noise induced hearing loss and tinnitus as a result. Tarmac dismissed their employee accordingly.

First Instance Trial

HHJ Rawlings heard the Trial at first instance in October 2019.

Two key issues were to be determined; whether Tarmac were vicariously liable for the actions of their employee and whether Tarmac were in breach of their duty of care to the Claimant.

When assessing if Tarmac were vicariously liable for the actions of their employee, HHJ Rawlings applied the well-known two limb test set out in Lister v Hesley Hall Limited 2001:

1. The first limb of the test was satisfied, i.e. that there was a close relationship between Tarmac and the fitter who caused the injury, being that of employer/employee.

2. However, the second limb of the test failed, i.e. whether there was a 'sufficient connection' between the relationship of employer/employee and the act of striking the pellet targets with a hammer to make it just that Tarmac should be held responsible.

HHJ Rawlings found that there was not a 'sufficient connection' to make it just that Tarmac should be held responsible. A number of reasons were cited, with the combined effect demonstrating that there was no real connection between the nature of the work and the practical joke, rather the workplace had merely provided an opportunity to carry out the prank.

HHJ Rawlings helpfully commented that if the tensions on site had suggested the risk of physical violence and the act carried out by the Tarmac employee had been a deliberate violent act, this would have created a 'sufficient connection'. However, he found that the tensions

consisted of verbal confrontation only and the act was merely intended to be a joke. As such, this does not form a sufficiently close connection so as to make it right to hold Tarmac liable.

Turning to Breach of Duty, HHJ Rawlings found that there was not a ‘reasonably foreseeable risk of injury from a deliberate act’ on the part of any Tarmac employee to the Claimant ‘such as to give rise to the duty to take reasonable steps to avoid that risk’. Even if such a duty had been established, HHJ Rawlings considered that Tarmac had not breached that duty because it is not reasonable to expect an employer to identify the risk of ‘horseplay, ill-discipline and malice’ or take steps to avoid such risks.

The Claimant’s claim was therefore dismissed.

Appeal

The Claimant’s appeal came before Mr Justice Martin Spencer who handed down his Judgment on 5 October 2020.

Mr Justice Martin Spencer was assisted in his considerations by the Supreme Court’s recent Judgment in Morrisons v Various 2020, which HHJ Rawlings had not had the benefit of.

The Supreme Court’s Judgment re-enforced the general principle set out by Lord Nicholls in Dubai Aluminium v Salaam 2002, that ‘the wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment.’

The Supreme Court’s decision is a further reminder of the importance of drawing a distinction between "cases … where the employee was engaged, however misguidedly, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a 'frolic of his own’.”

Mr Justice Martin Spencer accordingly found that HHJ Rawlings had correctly and appropriately adopted the two-stage ‘sufficient connection’ test set out in Lister.

Mr Justice Martin Spencer also agreed with HHJ Rawlings’ conclusion that "horseplay, ill-discipline and malice are not matters that I would expect to be included within a risk assessment" and “Increased supervision to prevent horseplay, ill-discipline or malice was not a reasonable step to expect this employer to have identified and taken”.

The Claimant’s appeal was therefore dismissed.

Implications

The Judgment of Mr Justice Martin Spencer serves to re-enforce the general principle that an employer will only be vicariously liable for the actions of their employee when the wrongful conduct is closely connected with acts the employee was authorised to do.

It is difficult to envisage a scenario whereby a practical joke carried out by an employee could be found to ‘further the objectives of the employer’ and therefore fall within the scope of vicarious liability.

The Judgment also provides some helpful guidance regarding the necessary measures an employer should take to avoid any such practical jokes. Both HHJ Rawlings and Mr Justice Martin Spencer were unequivocal in their determination that an employer does not need to assess the risk posed by horseplay, ill-discipline and malice as these acts, ‘by their very nature, are acts that the employee must know are outside behaviour that they should engage in at work’. As such, it is unreasonable to expect an employer to devise and implement a policy or site rules to address practical jokes.

It should however be kept in mind that this decision was made in the context of Tarmac being found to be ‘an organisation that took health and safety matters seriously’. Had Tarmac been lapse in their other duties, the Court’s decision may not have been so favourable.

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