Neutral Citation Number: [2022] EWCA Civ 7

Case No: CA-2020-000582 (Formerly B3/2020/2079)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE MARTIN SPENCER
[2020] EWHC 2613 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 January 2022

Before :

LADY JUSTICE NICOLA DAVIES
LADY JUSTICE SIMLER
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

ANDREW CHELL	**Claimant/ Appellant**
- and -	
TARMAC CEMENT AND LIME LIMITED	**Defendant/ Respondent**

- -
- -

Theo Huckle QC and Philip De Berry (instructed by **Imperium Law Solicitors Ltd**) for the **Appellant**
Patrick Limb QC and Andrew Lyons (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Respondent**

Hearing date : 24 November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII The date and time for hand-down is deemed to be 10am on Wednesday 12 January 2022.

Lady Justice Nicola Davies :

1. This is a second appeal in respect of the decision of HHJ Rawlings ("the judge") sitting at Stoke-on-Trent County Court on 14 October 2019 dismissing the appellant's claim for personal injury and damage which occurred during the course of his employment on 4 September 2014. The appellant was employed by a company, 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 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 next to the appellant's right ear. As a result the appellant suffered injury, a noise induced hearing loss in his right ear and tinnitus.

2. The original causes of action were that:

   i) Tarmac is vicariously liable for the actions of Mr Heath; and

   ii) Tarmac is liable to the appellant in negligence for breaching its duty to take steps to prevent a foreseeable risk of injury resulting in the appellant's injury.

3. The judge dismissed both claims. His findings of fact and determination as to the law were upheld by Martin Spencer J in a judgment dated 5 October 2020.

4. By an order dated 16 April 2021 Males LJ granted permission to appeal on four grounds: (a) direct duty; (b) breach; (c) vicarious liability; and (d) causation.

The County Court trial

5. In a considered and careful judgment, the judge set out the history of the matter and made findings of fact which are critical to this appeal. At [2] the judge noted that the appellant and his brother, Gavin, also employed by Roltec and providing fitting services to Tarmac, were working at the Site alongside fitters who were employed directly by Tarmac. In the summer of 2014 two fitters employed by Tarmac, Anthony Heath and Jason Starr, were suspended but subsequently returned to the Site. It was the appellant's evidence that following their return there were tensions between the Tarmac fitters and the Roltec fitters as it appeared that the Tarmac fitters were concerned that they would be replaced by the Roltec fitters [3]. The appellant maintained that he raised the issue of rising tensions with his supervisor, Mr Gain, in around mid-August 2013. Subsequently the appellant and his brother had a meeting with Mr Gain and Mr Grimley of Tarmac about this issue. It was the appellant's evidence that at the meeting he asked to be taken off the Site but was asked to "stick it out" for a few more weeks. The incident occurred at around 11:30am when the appellant was working in the workshop. Mr Heath was dismissed as a result of the incident following an investigation conducted by Tarmac [4].

6. It was agreed that Mr Heath's actions resulted in injury to the appellant, which manifested itself as noise-induced hearing loss and tinnitus. The nature and extent of the injury was agreed between the medical experts instructed by both parties.

7. The appellant gave evidence and called his brother and Mr Gain. Tarmac called no witnesses but placed before the court, by the appellant's counsel, were statements from Fiona King, a HR manager employed by Tarmac who was not so employed at the time of the index incident and John Jones, a relief supervisor who was on sick leave at the time of the incident.

The findings of fact

8. The following findings of fact were agreed between the parties: Mr Heath struck two pellet targets with a hammer close to the appellant's ear; the pellet targets were brought to the Site from outside; the hammer was work equipment provided in the workshop where the appellant was working at the time.

9. The judge's findings of fact:

   i) Immediately before the index incident the appellant and Mr Heath were not working in the same part of the premises, namely the workshop.

   ii) Neither Mr Heath nor Mr Starr had any supervisory or other role in relation to the work which the appellant was carrying out in the workshop at the index time.

   iii) Mr Heath and Mr Starr had access to the workshop as part of their role as fitters.

   iv) Mr Heath's actions represented a joke at the appellant's expense which was connected with the tensions between Tarmac and Roltec fitters, in that those tensions gave rise to a desire on the part of Mr Heath and Mr Starr to play a practical joke on the appellant. Mr Starr watched Mr Heath doing what he did and laughed about it afterwards.

   v) The bad feelings of the Tarmac fitters directed at the Roltec fitters eased in the time shortly before the index accident occurred. (This was accepted by the appellant and his brother in cross-examination.)

   vi) The appellant and his brother, Gavin, told Mr Gain, their supervisor, about the tensions on the Site between the Roltec fitters and the Tarmac fitters. The tensions related to a fear on the part of the Tarmac fitters, or some of them, that they might be replaced by Roltec fitters and that the Roltec fitters were making the Tarmac fitters look bad by appearing to work harder and to be doing a better job.

   vii) The friction between the Tarmac fitters and the Roltec fitters did not include express or implied threats of violence.

   viii) The issue of tension between Roltec fitters and Tarmac fitters was only raised with Mr Grimley, the manager employed by Tarmac, on one occasion. The judge accepted the evidence of Mr Gain that it was raised only once and that

was not independently of any involvement by Mr Gain in informing Mr Grimley of the situation.

ix) The judge described Mr Gain as an "impressive and honest witness", he accepted his evidence that neither the appellant nor his brother had asked to be taken off the Site. He also found that the appellant and his brother did not tell Mr Grimley that they wanted to be taken off the Site.

x) In reporting friction with Tarmac employees to Tarmac, the appellant and his brother did not specifically refer to Mr Heath.

xi) Mr Heath was previously suspended for misrepresenting the amount of time he had spent at work by cheating Tarmac's clocking-in and clocking-out system. The judge was not satisfied that Mr Heath was disciplined by Tarmac for threatening someone on Site prior to the index incident.

The first cause of action – Vicarious liability

10. It was the appellant's case that there was a close enough connection between the actions of Mr Heath and the work which he undertook for Tarmac to make it fair, just and reasonable that Tarmac should be held liable for the results of his actions. It was Tarmac's contention that it is not vicariously liable for Mr Heath's actions because he was not acting in the course of his employment in doing what he did. The judge considered a number of authorities which included: *Cox v Ministry of Justice* [2016] UKSC 10, *Muhamud v WM Morrisons Supermarkets plc* [2016] UKSC 11, *Lister v Hesley Hall Limited* [2001] UKHL 22 and *Graham v Commercial Bodyworks Limited* [2015] EWCA Civ 47.

11. Having considered the authorities, at [52], the judge identified the following principles which he derived from them:

> "(a) the first limb of the *Lister* two-limb being a close relationship between Tarmac and Mr Heath is satisfied, because Mr Heath was Tarmac's employee at the relevant time;
>
> (b) the second limb of the *Lister* test remains undisturbed by the Supreme court decision in *Mohamud*. The test is - whether there is a sufficient connection between the relationship between Tatmac and Mr Heath as employer/employee and Mr Heath's act of striking two pellet targets with a hammer close to Mr Chell' s ear - to make it just that Tarmac should be held responsible for that act;
>
> (c) in considering that question, I should consider first the field of activities entrusted to Mr Heath by Tarmac and secondly, whether there is 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; and

> (d) in considering whether there is a sufficient connection between the wrongful act and the employer/employee relationship, I should consider the five factors identified by Lord Justice Longmore in *Graham*, but other factors may also be taken into account."

12. Applying those principles, the judge asked the question "… was the striking of the pellet target within the field of activities entrusted to Mr Heath by Tarmac?" The judge observed that "If Mr Heath was engaged in horseplay not connected to the field of activities for which he was employed by Tarmac, then it will not be liable in accordance with *Lister* criteria, as explained and applied in *Mohamud*" [55].

13. At [59] the judge found that the following factors did not support a finding that Mr Heath's actions in hitting the two pellet targets with a hammer were within the field of activities assigned to him by Tarmac, namely:

> "(a) the pellet target was brought on to the Site, either by Mr Heath or one of his colleagues - it was not work equipment;
>
> (b) it formed no part of Mr Heath's work to use let alone hit pellet targets with a hammer at work;
>
> (c) what Mr Heath did was unconnected to any instruction given to him in connection with his work;
>
> (d) Mr Heath had no supervisory role in relation to Mr Chell's work and at the index time he was meant to be working on another job in another part of the Site;
>
> (e) the striking of the pellet targets with a hammer did not in any way advance the purposes of Tarmac; and
>
> (f) in all those circumstances, work merely provided an opportunity for him to carry out the prank that he played, rather than the prank in any sense being within the field of activities that Tarmac had assigned to Mr Heath."

14. At [62] the judge considered whether, by bringing onto the Site Roltec's fitters to replace Tarmac's fitters, Tarmac created friction or confrontation at the Site. At [63] the judge found that the tensions which were created by Tarmac employing Roltec fitters to work on the same Site as directly employed Tarmac fitters and the fact that Mr Grimley was made aware of those tensions did not create a sufficiently close connection between the relationship of employer/employee between Tarmac and Mr Heath and the latter's wrongful act of hitting the two pellet targets with a hammer. His reasoning was as follows:

> "(a) it is only one of the five factors identified by Lord Justice Longmore in *Graham v Commercial Bodyworks*. I accept, nonetheless, that it is possible for that one factor, to create a sufficiently close connection if, by itself it creates a strong enough connection;

> (b) I have accepted that there was, in turn, a connection between the friction between the Tarmac fitters and Roltec fitters and what Mr Heath did, because Mr Heath's desire to play a joke on Mr Chell and Mr Starr's desire to see that joke being played were connected to the ill feeling of Mr Heath and Mr Starr as Tarmac fitters towards Mr Chell; but
>
> (c) there is a spectrum of friction and confrontation. If the tensions created by Tarmac in putting Roltec fitters on site with Tarmac fitters had been so serious as to suggest the possibility of violence, or at least physical confrontation, I would have been more inclined to find that there was a close enough connection between the tension which Tarmac were made aware of, and Mr Heath's act, but the tension only consisted of Tarmac fitters making it clear that they did not welcome the presence of Roltec fitters on site, and were worried about being replaced by Roltec fitters which Mr Chell said made him feel 'uncomfortable' (he did not say that he felt threatened);
>
> (d) I have found that Mr Heath did not intend to cause injury to Mr Chell. Rather as Mr Chell accepted it was a joke gone wrong, done for the amusement of Mr Chell and Mr Starr. It was Mr Heath's miscalculation of his actions, intended, no doubt, to make Mr Chell at least jump – if I put it that way – and instead damaging Mr Chell's hearing, which was the cause of the injury. I do not consider that that, by itself creates a sufficient connection between the employer/employee relationship of Tarmac and Mr Heath and Mr Heath's actions; and
>
> (e) in short tension that was serious enough to suggest a risk of physical confrontation of which Tarmac were aware, where the wrongful act consisted of a deliberate violent act, would in my judgement have created a sufficient connection between the risk posed by the tension and the wrongful act. Tension however which consisted only of verbal confrontation not suggesting the risk of violence which made Mr Chell feel 'uncomfortable' where the wrongful act consisted of a joke not intended to cause physical injury (but which resulted in physical injury because of the recklessness of the wrongdoer) does not, in my judgement form a sufficiently close connection between the risk posed by the tensions on site and the wrongful act, such as to make it right to hold Tarmac liable under the principles of social justice."

The second cause of action – Breach of the duty of care owed by Tarmac to the appellant

15. At [66] the judge identified the duty of care as being to take reasonable steps to avoid the appellant being injured as a result of a reasonably foreseeable risk of injury. He accepted that "horseplay, ill-discipline and malice could be the mechanism for causing such a reasonably foreseeable risk of injury." At [68] the judge stated that he

was not satisfied that such a foreseeable risk of injury from a deliberate act on the part of Mr Heath, or any Tarmac employee, to the appellant, such as to give rise to a duty to take reasonable steps to avoid that risk, was made out for the following reasons:

> "(a) there was no threat of violence or any suggestion that violence by a Tarmac fitter against a Roltec fitter, including Mr Chell, was at all likely. Mr Gain made it clear that any suggestion of tensions that might give rise to violence would have led to the Roltec fitters being taken offsite immediately;
>
> (b) Mr Heath had just returned from suspension, but I have found that that suspension related to cheating his time records not threatening anyone. I have not accepted Mr Chell's evidence that Mr Heath had threatened someone on the Site;
>
> (c) Mr Jones in his witness statements describes Mr Heath as 'not the easiest person to work with', and as having to put him in his place, regarding his behaviour towards Mr Jones. He does not, however describe Mr Heath as volatile in any sense; and
>
> (d) the availability of heavy and dangerous tools does not of itself create a foreseeable risk of injury."

16. For the sake of completeness, the judge considered whether, if he had found that Tarmac had owed a duty to Mr Heath to take steps to protect him from a deliberate act causing him injury, Tarmac would have breached that duty. At [70] to [72] the judge considered the issue of a risk assessment but for the reasons given at [71] and [72] did not accept the appellant's case as follows:

> "71. Horseplay, ill-discipline and malice are not matters that I would expect to be included within a risk assessment. Those acts, by their very nature are acts that the employee must know our (sic) outside behaviour that they should engage in at work. I do not therefore accept that there was a failure by Tarmac to prepare a suitable and sufficient risk assessment because of its failure to identify in the risk assessments it has prepared, the risk posed by horseplay, ill-discipline and malice.
>
> 72. If a risk assessment had identified horseplay, ill-discipline and malice as risks and had identified training and supervision as appropriate to reduce those risks then:
>
> (a) the site health and safety procedures do include a section on general conduct which says, at item 13.3, 'No one shall intentionally or recklessly misuse any equipment.' Given the multifarious ways in which employees could engage in horseplay, ill-discipline or malice, general instructions of the sort contained within the health and safety procedure. booklet are the only information or warnings that could reasonably be given to employees in relation to horseplay, ill-discipline and

> malice. Nothing more specific than that could reasonably be expected;
>
> (b) I do not consider that increased supervision to prevent horseplay, ill-discipline or malice would be a reasonable step to expect an employer to identify and take. By the nature of horseplay, ill-discipline and malice, it is behaviour that an employee would try to ensure does not take place in front of the eyes of a supervisor and an employer cannot reasonably be expected to be supervise its employees 24 hours a day to ensure that they do not engage in such activity; and
>
> (c) education might have been proposed as a means of reducing the risk. But if it was, I do not consider that education in this case would have prevented Mr Heath from engaging in the index incident. From what can be seen of Mr Heath's behaviour, he did not respect rules if he thought he could get away with flouting them- he cheated his time records."

17. Finally, the judge did not accept that Tarmac ought to have taken steps because it was aware of tensions between the Tarmac and Roltec employees, this was based upon his findings of fact as to the alleged tensions and frictions between the two sets of fitters.

The decision of Martin Spencer J

18. In dismissing the appeal, Martin Spencer J at [34] discerned no error of law or misapplication of the relevant authorities in the judgment of HHJ Rawlings. At [36] Martin Spencer J concluded that had the judge had available to him the later decision of *Morrisons v Various Claimants* [2020] UKSC 12 "he would only have been fortified in the conclusions to which he had come and in his approach to this issue which, he would have found, and I find, was endorsed by the Supreme Court's judgment."

19. In respect of breach of duty, at [37] Martin Spencer J observed that the judge was correct to state that "horseplay ill-discipline and malice are not matters that I would expect to be included within a risk assessment." As to the specific risk arising from the tensions between the two sets of employees, Martin Spencer J regarded the finding of the judge that the claimant did not ask to be taken off the Site as an important one, in that it revealed the true level of concern on the part of the appellant and thus being imparted to Mr Gain through him to Tarmac. It was significantly lower than that being portrayed retrospectively by the appellant at trial. At [38] Martin Spencer J observed that 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."

Vicarious liability – The law

20. The judge based his analysis of the law on the decision of *Lister* which followed the Canadian authorities of *Bazley v Curry* [1999] 2 RCS 534 and *Jacobi v Griffiths* (1999) 174 DLR(4th) 71. At [27] of *Lister* Lord Steyn observed in respect of these authorities that: "Wherever such problems are considered in future in the common law world these judgments will be the starting point." *Bazley*, *Jacobi* and *Lister* concerned sexual abuse of children but no point is taken on that. At [41] and [42] of *Bazley* McLachlin J considered the principles of vicarious liability as follows:

> "41. Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:
>
> 1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'.
>
> 2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. …
>
> 3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. When related to intentional torts, the relevant facts may include, but are not limited to the following:
>
> a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> b) 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);
>
> c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> d) the extent of power conferred on the employee in relation to the victim;

> e) the vulnerability of potential victims to wrongful exercise of the employee's power.
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> 42. Applying these general considerations to sexual abuse by employees, 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. … an incidental or random attack by an employee that merely happens to take place on the employer's premises during the working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the employer is conducting or what the employee was asked to do and, hence, to any risk that was created. Nor is the imposition of liability likely to have a significant deterrent effect; short of closing the premises or discharging all employees, little can be done to avoid the random wrong. Nor is foreseeability of harm used in negligence law the test. What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability."

21. In all three authorities reference is made to *Salmond and Heuston on Torts* which states:

> "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master."

As regards (2), the text continues:

> "But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them."

At [37] of *Lister* Lord Clyde stated in respect of the latter observation that:

> "… recognition should be given to the critical element in the observation, namely the necessary connection between the act and the employment. … What has essentially to be considered is the connection, if any, between the act in question and the employment. If there is a connection, then the closeness of that connection has to be considered. The sufficiency of the connection may be gauged by asking whether the wrongful

> actings can be seen as ways of carrying out the work which the employer had authorised."

At [45] Lord Clyde stated that:

> "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: *Heasmans v Clarity Cleaning Co Ltd* [1987] ICR 949."

22. In *Graham*, Longmore LJ considered the issue of vicarious liability in respect of a practical joke which occurred during the working day. The claimant and W were friends and employees in the defendant's bodywork repair shop. During a working day when both men were in the repair shop W, in what appeared to be intended as a prank, used a cigarette lighter in the vicinity of the claimant whose overalls he had sprinkled with a highly inflammable thinning agent, which was used at the premises for legitimate purposes. The claimant's overalls caught fire and considerable injury was caused. Smoking was not permitted in the workshop. In dismissing the appeal, Longmore LJ at [14] stated:

> "… although the defendant employers did create a risk by requiring their employees to work with thinning agents, it is difficult to say that the creation of that risk was sufficiently closely connected with Mr [W]'s highly reckless act of splashing the thinner onto Mr Graham's overalls and then using a cigarette lighter in his vicinity. It is only the first of McLachlin J's five factors that is present in this case. The other factors tell against the imposition of liability. The wrongful act did not further the employer's aims; there was no friction or confrontation inherent in the employer's enterprise and such intimacy as there was likewise had no connection with that enterprise; it is inappropriate to talk either of power conferred on Mr [W] in relation to Mr Graham or any particular vulnerability of Mr Graham to the wrongful exercise of such power."

23. In *Morrisons v Various Claimants*, which involved a malicious data breach by one of Morrisons' former employees, Lord Reed PSC reviewed the authorities on vicarious liability. At [22] he referred to the judgment of Lord Nicholls of Birkenhead in *Dubai Aluminium* and at [23] stated that Lord Nicholls identified the general principle applicable to vicarious liability arising out of a relationship of employment as being that:

> "23. … 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. …

> 24. The general principle set out by Lord Nicholls in *Dubai Aluminium*, like many other principles of the law of tort, has to be applied with regard to the circumstances of the case before the court and the assistance provided by previous court decisions. The words 'fairly and properly' are not, therefore, intended as an invitation to judges to decide cases according to their personal sense of justice, but require them to consider how the guidance derived from decided cases furnishes a solution to the case before the court. …"

24. Lord Reed reviewed other authorities in considering such facts as give rise to a claim in vicarious liability and concluded at [47]:

> "All these examples illustrate the distinction drawn by Lord Nicholls at para 32 of *Dubai Aluminium* [2003] 2 AC 366 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", in the language of the time-honoured catch phrase.' In the present case, it is abundantly clear that Skelton was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta, seeking vengeance for the disciplinary proceedings some months earlier. In those circumstances, applying the test laid down by Lord Nicholls in *Dubai Aluminium* in the light of the circumstances of the case and the relevant precedents, Skelton's wrongful conduct was not so closely connected with acts which he was authorised to do that, for the purposes of Morrisons' liability to third parties, it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment."

Discussion and conclusion – Vicarious liability

25. The issue is whether Mr Heath's wrongful act was done in the course of his employment. Was it a wrongful act authorised by his employer, Tarmac, or a wrongful and unauthorised mode of doing some act authorised by Tarmac? It is only if the unauthorised act is so connected with what Mr Heath had been authorised to do that it may rightly be regarded as the mode of doing what was authorised.

26. The appellant takes no issue with the judge's identification of the relevant law and legal principles but contends that he erred in his application of the law to the facts as found. I do not agree. In my view, the careful and detailed findings of fact made by the judge, unchallenged by the appellant, are fatal to this appeal. What they demonstrate is that 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.

27. In my view, the following are relevant to the absence of such a connection:

i) The real cause of the appellant's injuries was the explosive pellet target – it was not the employer's equipment. In *Graham*, the real cause of the claimant's injuries was not the thinners provided by the employer but the application of the cigarette lighter which was no part of the employer's equipment or materials.

ii) It was no part of Mr Heath's work to use pellet targets.

iii) There was no abuse of power. Mr Heath did not have a supervisory role in respect of the work which the appellant was carrying out and was not working on the task on which the appellant was engaged at the time of the incident.

iv) As to friction, the findings of fact made by the judge are:

a) Any bad feelings between the Tarmac and Roltec fitters eased in the run-up prior to the incident;

b) There were no threats of violence and the issue of tension was only raised once with a manager employed by Tarmac;

c) The appellant had not asked to be taken off the Site;

d) The appellant did not refer specifically to Mr Heath as the source of any tension.

v) 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 of itself is insufficient to create the close connection, particularly in the absence of other factors.

28. 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 target was 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.

29. Applying the law to the facts as found by the judge, my findings are the same or consistent with the judge's findings. They lead to the same conclusion, namely that Tarmac are not vicariously liable for the actions of its employee, Mr Heath, when he chose to strike a pellet target with a hammer in the proximity of the ear of Mr Chell.

Tarmac's breach of its duty of care to the appellant

30. It is the appellant's case that what is described as "employers' liability" provides the basis in fact for the closeness of the relationship test for the purposes of vicarious liability, it provides the context for consideration of whether vicarious liability should be imposed and the judge fell into error by not considering the issues as being interrelated. The evidence of Ms King was that had a complaint or concern been raised it would have been investigated. Given there was a dispute or tensions between two groups of employees, that was a matter which probably should have been investigated and was not. Where an employee, in particular a fitter on a quarry site, feels the need to draw the issue of tension to the attention of management, that should

give rise to a foreseeable risk of escalation including potentially the risk of injury and should have been further investigated.

31. The general Site rules issued for the quarry area include under "General Conduct" at 13.3: "No one should intentionally or recklessly misuse any equipment". There were no further documents addressing Site discipline or risk assessing these matters.

32. The appellant also relies on alleged breaches of statutory regulations which include the Management of Health and Safety at Work Regulations 1999, in particular the failure to carry out an adequate and sufficient risk assessment (regulation 3) and a failure to implement preventative and protective measures which were identified in that risk assessment (regulation 4). Regulation 4 states that where an employer implements any preventive and protective measures he shall do so on the basis of the principles identified in Schedule 1 of the regulations. Schedule 1 sets out the general principles of prevention which at (g) includes "developing a coherent overall prevention policy which covers … working conditions, social relationships and the influence of factors relating to the working environment".

Discussion and conclusion – Breach of duty

33. In order to succeed on the alleged breach of the employer's duty of care, it must be shown that there was a reasonably foreseeable risk of injury to the appellant by reason of the actions of Mr Heath. It is accepted that horseplay, ill-discipline and malice could provide a mechanism for causing such a reasonably foreseeable risk but, in my view, it is not made out on the facts of this case.

34. The judge found that the tensions reported to Tarmac did not support any suggestion of threats of violence still less actual violence. Mr Gain stated that had the suggestion been made, the Roltec fitters would have been taken off-site. Although Mr Heath had recently returned from suspension this was for a clocking offence which provided no indication for the potential for Mr Heath to engage in dangerous horseplay, including by banging a hammer onto a pellet target as a practical joke. There was no other indication that Mr Heath might behave in this way. The judge said that the mere fact that heavy and dangerous tools were available does not of itself create a reasonably foreseeable risk of injury due to misuse of a tool. I agree.

35. In my view, 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. It follows from this finding that it would not have "assisted" the judge in his consideration of the issue of vicarious liability as submitted by the appellant.

36. 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. 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. Further, the general Site rules include a

section that "No one shall intentionally or recklessly misuse any equipment". This was a warning against exactly what Mr Heath did.

37. As to the need to investigate, when 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 the Site. In my view this does not provide a factual basis upon which it could properly be said that an investigation should have been commenced.

38. I accept the respondent's contention that only on a very generous interpretation of the regulations can it be argued that work/social relationships encompass horseplay of the type demonstrated in this case. There were no express or implied threats of violent conduct, there were no complaints about named individuals. It follows that, even if any duty of care arose, there was no breach of duty on the part of Tarmac.

39. Accordingly, and subject to the views of Simler LJ and William Davis LJ, I would dismiss this appeal.

Lady Justice Simler :

40. I agree.

Lord Justice William Davis :

41. I also agree.