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# Legal Briefing

## Ted Lowery considers the implications of a practical joke on site that backfired

*Chell v Tarmac Cement and Lime Ltd [2020] EWHC 2613 (QB)*

Before Mr Justice Martin Spencer

Queen's Bench Division

Judgment delivered 5 October 2020

### The facts

Tarmac operated an aggregates quarry at Bayston Hill in Shropshire. Mr Chell was employed by Roltech Engineering Limited and from 2013 worked at the quarry as a sub-contracted site fitter alongside Tarmac's own staff. Tarmac's detailed health and safety rules for the quarry included a prohibition against the intentional or reckless misuse of equipment but did not specifically forbid practical jokes.

During 2014 tensions arose at the quarry between the Tarmac employees and the Roltech workers over fears of job losses. Mr Chell raised concerns with his supervisor and then with Tarmac's representative during August 2014 but he continued working at the quarry.

On 4 September 2014 one of the Tarmac employees, Mr Heath, brought two pellet targets to the quarry. Pellet targets are used in shooting and are designed to explode if hit. Mr Heath took the pellet targets to the workshop at the quarry where Mr Chell was working. As Mr Chell bent down to pick up a length of steel Mr Heath placed the two pellet targets on a bench close to Mr Chell's right ear and struck them with a hammer causing a loud explosion. Mr Heath was dismissed by Tarmac but the explosion left Mr Chell with a perforated right eardrum, noise-induced hearing loss and tinnitus.

During 2017 Mr Chell commenced County Court proceedings alleging that Tarmac had failed to provide appropriate supervision and training to prevent horseplay and had failed to take action to address the tensions between the Tarmac employees and the Roltech workers. In its defence, Tarmac denied any responsibility for the incident on grounds that Mr Heath's actions were not reasonably foreseeable, were outside the scope of any risk assessment, HSE guidelines and his terms of employment and did not have a sufficient connection with Mr Heath's work duties to make Tarmac liable.

Following a trial in October 2019 the County Court judge dismissed Mr Chell's claim finding that Tarmac was not vicariously liable where: the actions of Mr Heath were not within the field of activities assigned to him by Tarmac and were unconnected with any work instructions he had received; the pellet target was not work equipment; and, Mr Heath had no supervisory role as regards Mr Chell's work. Furthermore, Tarmac was not under a duty to take preventative steps because there was no reasonably foreseeable risk of injury from a deliberate act on the part of Mr Heath or any Tarmac employee and horseplay, ill-discipline and malice were not matters ordinarily included within work based risk assessments. Mr Chell appealed to the High Court.

### The issue

Had Tarmac been negligent or was Tarmac vicariously liable for the actions of Mr Heath?

### The decision

The judge agreed with the lower court that one of the key requirements of vicarious liability, that the wrongful conduct had to be closely connected with the activities that the employee was authorised to do by the employer, was not satisfied: Mr Heath's conduct was not part of the ordinary course of his employment and he was clearly acting on a 'frolic of his own'.

Turning to the question of negligence and any alleged duty arising out of tensions on site, the judge considered that the criticisms of Tarmac were made with the benefit of hindsight. Although Tarmac had been made aware of these tensions, given the lower court's finding on the facts that Mr Chell had not asked to be moved, the circumstances presented to Tarmac in August 2014 did not merit specific action and at the time there was no foreseeable risk of injury to Mr Chell at the hands of Mr Heath. The judge noted that Tarmac had in place extensive site rules which evidenced its commitment to health

and safety matters. The site rules prohibited the intentional and reckless misuse of equipment and this was sufficient given the wide range of opportunities for such misuse in a quarry and nothing more specific could reasonably be expected.

The judge also observed that where the misconduct was wholly unconnected with the employment, it would be more difficult to argue that the employer should have taken steps to discourage such behaviour.

## Commentary

This case reflects the current law on vicarious liability but it is unusual to see judicial comment upon the extent to which site safety policies need to specifically address the risks of irresponsible practical jokes. Here the judge endorsed the lower court's conclusion that horseplay, ill-discipline and malice were not the sort of the matters that ordinarily ought to be included within construction site risk assessments.

Ted Lowery
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