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Mental Impairment and the Objective Approach in Negligence: *Spearman v Royal United Bath Hospitals*

In *Spearman v Royal United Bath Hospitals NHS Foundation Trust*[1] the claimant sustained serious injuries when he fell from a flat roof at the defendant's hospital. The claimant, a diabetic since childhood, suffered a hypoglycaemic attack while at home one evening. An ambulance was called and the attending paramedics were able to stabilise the claimant's glucose levels. Concerned, however, by signs of continuing confusion on the claimant's part, the paramedics decided that he should be taken to hospital for further observation and treatment. The claimant was very reluctant to go: a serious road accident years before had left him with an intense dislike of hospitals. A further consequence of that earlier accident was a brain injury which left the claimant with substantially impaired appreciation of the risk of personal harm. Shortly after arrival at hospital, the claimant was left unattended in a cubicle for a minute or so. He promptly got up, walked out of the cubicle and passed through various sets of doors before leaving the emergency department via an unlocked door. This door led to an internal fire escape serving the floors above. The claimant climbed the stairs onto the third floor. There he went through another door emerging onto a flat roof. At the edge of the roof was a 1.4 metre safety fence. Fixated upon the need to get out of hospital, and failing to recognise the danger because of his confused state of mind and his existing brain injury, the claimant placed a bench and some plastic chairs alongside the fence. He then used these to help him to climb over the fence before falling to a courtyard below. Spencer J held that the defendant was liable to the claimant in negligence, both under the Occupiers' Liability Act 1957[2] and at common law. The judge further held that the claimant had not been contributorily negligent. Two points in the judgment, in particular, merit brief comment.

Visitor or trespasser?

The first is the test adopted to determine that the claimant was, at the relevant time, a visitor under the 1957 Act rather than a trespasser, to whom the less generous provisions of the Occupiers' Liability Act 1984[3] would have applied. Spencer J said that generally a patient

[1] [2017] EWHC 3027 (QB).
[2] *Occupiers' Liability Act 1957* (UK) c 31.
[3] *Occupiers' Liability Act 1984* (UK) c 3.

leaving hospital after treatment remains a visitor until they leave the hospital premises. He continued:

> The position may be different if they deliberately enter an area marked "no entry", or "private" or know that they are entering a part of the hospital where they have no right to be. But if the patient simply makes a mistake and goes the wrong way, it could not possibly be suggested that such a person was now a trespasser. So here . . . [the claimant] in his confused state of mind, thought (wrongly but honestly) that he needed to go upstairs to get out and, indeed, go over the barrier to get out. His belief meant that he remained a lawful visitor . . .[4]

This looks very much like a wholly subjective approach to the question of whether the claimant had permission to be where he was. But in *Gould v McAuliffe*,[5] on which Spencer J relied, Goddard LJ's terse judgment indicates the objective aspect of the inquiry: '[t]here was nothing to show that an invitee to this garden ought not to go through the gate in question.'[6] As the same judge made clear in a later case, the primary focus is on the occupier's conduct rather than the entrant's state of mind: 'to find a licence there must be evidence either of express permission or that the landowner has so conducted himself that he cannot be heard to say that he did not give it'.[7] This is both logical and reasonable: logical, because permission can only come from, or through, the occupier; reasonable, because by giving permission the occupier assumes a more onerous obligation to the entrant than would otherwise arise. Returning to the facts of *Spearman*, it seems clear that, as Spencer J held, the claimant did not become a trespasser when he passed through the door out of the emergency department. There was nothing to show that a patient ought not to leave that way: the door was not locked and there was no 'no exit' sign. But an objective approach to the climbing of the safety fence yields a contrary conclusion to that reached by the judge. It is suggested that in the circumstances a patient could not reasonably have believed that the 1.4 metre barrier provided an appropriate route for leaving the premises. Even where the purpose of a fence is not to control access (for example, where it is intended to screen the occupier from an eyesore on neighbouring land), it will frequently not be reasonable to think that climbing the fence is permitted because of the risk of injury or damage. In *Spearman* it is suggested that the height of the fence and the fact that the top half was bent inwards clearly indicated that its purpose was to deter and prevent

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[4] Ibid [56].
[5] [1941] 2 All ER 527.
[6] Ibid 528.
[7] *Edwards v Railway Executive* [1952] AC 737, 747 (Lord Goddard).

people from going any further. This purpose should have been even clearer given the apparent need to make use of the chairs and table to scale the fence. In the absence of some emergency, such as a fire, it could not be said to have been reasonable to treat the barrier as a permitted exit route whether what lay beyond was visible or not. Furthermore, while the likely presence of confused patients may have been relevant as to whether the premises were dangerous, it did not affect the claimant's status: as Carnwath LJ observed in *Harvey v Plymouth City Council*, the relevant question when deciding whether an entrant was a visitor is 'not whether his activity or similar activities might have been foreseen, but whether they had been impliedly assented to by the [occupier]'.[8]

Adopting an objective approach and assuming that the claimant was not a visitor, it would then ordinarily fall to consider whether the claimant was owed a duty of care under the Occupiers' Liability Act 1984. For such a duty to arise, the claimant would have to show, pursuant to s 1(3)(b), that the defendant knew or had reasonable grounds to believe that the claimant was or might be in the vicinity of the danger. On the facts it may be doubted whether the defendant had any reason in fact to think that it 'a real possibility'[9] that the claimant might go on to the roof when leaving the premises. An alternative and more radical approach would be to recognise that a claim under the 1957 Act remained available to the claimant notwithstanding that he ceased to be a visitor when he climbed the fence. As the claimant was a visitor when he first went on to the roof, it might be argued that the defendant owed a duty at that stage to take reasonable care to keep him reasonably safe from dangers, including the risk of falling from the edge of the roof. In other words, it might be argued that the defendant's duty was in effect to take reasonable steps to stop the claimant from entering the area at the edge of the roof.[10] While this approach has its supporters,[11] its adoption in *Spearman* seems to have been foreclosed by the decision of the majority of the House of Lords in *Tomlinson v Congleton Borough Council*.[12]

In short, it is submitted that the claimant in *Spearman* was not a visitor under the 1957 Act and was probably not owed a duty of care under the 1984 Act either. It would seem to

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[8] *Harvey v Plymouth City Council* [2010] EWCA Civ 860 [27].
[9] *Hatcher v ASW Ltd* [2010] EWCA Civ 1325 [6] (Rix LJ).
[10] See Nicholas J McBride and Roderick Bagshaw, *Tort Law* (Pearson, 5th ed, 2015) 381-2.
[11] See *Tomlinson v Congleton Borough Council* [2002] EWCA Civ 309; [2004] 1 AC 46 [52] (Longmore LJ), *Donoghue v Folkestone Properties Ltd* [2003] EWCA Civ 23 [45] (Lord Dyson MR) and McBride and Bagshaw, above n 10.
[12] [2003] UKHL 47; [2004] 1 AC 46. So too, it seems, Carnwath LJ's suggestion in *Harvey v Plymouth City Council* [2010] EWCA Civ 860 [22] that a claimant in this situation might remain a visitor for the purposes of the 1957 Act albeit one to whom the occupier did not owe the common duty of care.

follow that unless the defendant owed a duty in some other capacity,[13] its liability as the occupier of dangerous premises, onto which a clearly vulnerable patient initially came as a visitor, extended only to wilful injury.[14] The better response to this predicament, it is suggested, is not to extend the scope of the 1957 Act by modifying the visitor test so as to include those who honestly but unreasonably believed themselves to have had the occupier's permission to be where they were. Rather, the better response is to question the adequacy of the existing legislative scheme and to consider whether English law might by improved by adopting the approach taken in Scotland,[15] Western Australia,[16] Victoria[17] and elsewhere.[18] The effect of the relevant legislation in these jurisdictions is that the claimant's status is treated as one of various factors in determining the standard of care owed.

Contributory negligence

The other point, which can be taken more shortly, concerns contributory negligence. Spencer J held that the claimant's confused state of mind negatived the argument that the damages should be reduced to take account of his negligence in climbing over the safety fence. With respect, it is hard to reconcile this approach with the authorities, to none of which Spencer J made reference. If the claimant, without regard for the safety of others, had jumped from the roof and injured a bystander in the courtyard below, when he fell from the roof it is clear, following *Dunnage v Randall*,[19] that his mental impairment would not of itself have absolved him of any liability to the bystander: 'a defendant, who is merely impaired by medical problems, whether physical or mental, cannot escape liability if he causes injury by failing to exercise reasonable care'.[20] It is only where 'the defendant himself did nothing to cause the injury' that he will be absolved of responsibility.[21] 'It does not therefore matter whether the person . . . had some disability.'[22] *Dunnage* provides emphatic confirmation that it will be in only the most extreme cases that a court will take account of a defendant's mental impairment in assessing negligence. As the Court of Appeal in that case noted, the same seems to apply to

[13] See, eg, *Westwood v Post Office* [1974] AC 1 where a trespassing employee was owed a duty by his employer under the Offices, Shops and Railways Act 1963.
[14] See, eg, *Bird v Holbrook* (1828) 4 Bing 628, 130 ER 911.
[15] See *Occupiers' Liability (Scotland) Act 1960* (UK) c 30 s 2.
[16] See *Occupiers' Liability Act 1985* (WA) s 5.
[17] See *Wrongs Act 1958* (Vic) s 14(B).
[18] See, eg, *Occupiers' Liability Act*, RSO 1990, c O-2, s 2.
[19] [2015] EWCA Civ 673; [2016] QB 639.
[20] Ibid [131] (Vos LJ).
[21] Ibid [132].
[22] Ibid [149] (Arden LJ).

contributory negligence. Hence in *Corr v IBC Vehicles Ltd*[23] the view of the majority of the House of Lords appears to have been that in principle a deduction for contributory negligence on the part of a claimant with a mental impairment would be appropriate unless the evidence showed that the claimant was an 'automaton [lacking] the power of choice',[24] someone whose personal autonomy had been 'wholly overborne'.[25] Furthermore, this appears to be consistent with the deduction for contributory negligence made by the House of Lords in *Reeves v Commissioner of Police of the Metropolis*.[26] In *Spearman* there was no finding that the claimant was an automaton or that his will had been wholly overborne. With respect, it could hardly be said that he had done nothing to cause himself injury.

The adoption in *Spearman* of a subjective standard on the contributory negligence issue reflected Spencer J's view that the law does not 'penalise a person for being ill or of unsound mind'.[27] That view is hard to reconcile with Arden LJ's statement in *Dunnage v Randall* that the liability imposed there on a paranoid schizophrenic 'is no doubt treated in law as the price [payable by the defendant] for being able to move freely within society despite his schizophrenia'.[28] While the latter may carry the greater weight, it is respectfully suggested that the former represents the better aspiration.

[23] [2008] UKHL 13; [2008] AC 884.
[24] Ibid [31] (Lord Scott of Foscote).
[25] Ibid [69] (Lord Neuberger of Abbotsbury).
[26] [2000] 1 AC 360.
[27] [2017] EWHC 3027 (QB) [74].
[28] [2015] EWCA Civ 673 [153].