

# Occupiers' Liability and Mental State: Trespassers Who Change Their Minds

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The High Court recently considered the meaning of 'trespassers' and the relevance of a person's state of mind and intention for the purposes of the Occupiers' Liability Act 1984 in the case of *Ovu v London Underground Ltd* [2021] EWHC 2733 (QB). Judgment was handed down on 13 October 2021.

## Factual Background

On a freezing cold night on 22 January 2017, Mr Ovu tragically died after falling from a staircase in the emergency exit footbridge area at Canning Town London Underground Station. The staircase was a standard one with no particular defects.

The accident occurred in a non-public area of the station in the early hours of the morning. Mr Ovu was intoxicated at the time. He had passed through some clearly marked emergency barriers linked to a silent alarm which alerted the station control centre.

Beyond the emergency barriers was a wire gate which led onto a staircase-and-gantry exit structure in the open air. Mr Ovu went through the wire gate. While Mr Ovu was wandering within the exit structure, the sole member of staff working that night, who had been alerted to Mr Ovu's presence by the silent alarm, went down and closed the wire gate which prevented Mr Ovu from coming back through it; the only option left for him was to proceed towards a further push-bar gate which opened out onto the street.

Mr Ovu was seen on CCTV reaching the final street exit gate at about 2:27 am but then, instead of pushing the gate to leave the station, he turned around and went back up to the gantry. Mr Ovu then tried, unsuccessfully, to regain access to the station platform via the now closed wire gate.

At an inquest into Mr Ovu's death, the Senior Coroner for East London issued a [Regulation 28 Report \(a report on action to prevent future deaths\)](#) under the Coroners (Investigations) Regulations 2013 ('the Report') which made recommendations to London Underground. The Report noted that the system of work in place, to investigate situations where a member of the public had gone through the emergency exit barriers, had not been followed. As an aside, the High Court in *Ovu* found that the fact that such recommendations were made did not impact upon the existence of a duty of care or its scope: [85].

An action was brought by Mr Ovu's estate for breach of the occupier's statutory duty of care and for negligence at common law.

The issues for the High Court were:

1. Was Mr Ovu a trespasser at the time of his death?
2. Was a duty of care owed by the Defendant to Mr Ovu at the time of his death?
3. If yes, what was the extent of that duty of care?

Master McCloud found that Mr Ovu was a trespasser (or, strictly speaking, a 'person other than the occupier's visitor') at the time of his death. The Claimant argued that Mr Ovu had ceased to be a trespasser at the time of his death as he had evinced his intention to return to the platform by remaining beside the locked wire gates for 11 minutes. The Claimant sought to rely on *Spearman v Royal United Bath Hospitals NHS Foundation Trust* [2017] EWHC 3027 (QB) in which Martin Spencer J considered the relevance of a person's state of mind and intention for the purposes of someone's status as visitor or trespasser.

In *Spearman*, the claimant, a patient at the Defendant's A&E Department, jumped or fell from the hospital's roof. The Court in *Spearman* held that the claimant patient had been mentally disturbed and had entered the off-limits area as a genuine mistake; the Court held that he was owed a duty as a lawful visitor under the Occupiers' Liability Act 1957. At [56] in *Spearman*:

*"... in my judgment whether a person is a trespasser or not is not solely determined by whether the place where they are is or is not an 'authorised' place. A person's state of mind and intention is an important additional factor. If a patient, who is a lawful visitor to a hospital ... has finished his or her treatment and is leaving, he or she does not cease to be a visitor in general until they leave the hospital premises. 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 a trespasser."*

Master McCloud in *Ovu* considered *Spearman* and *British Railways Board v Herrington* [1972] AC 877 and drew a distinction between 'a person who is already a visitor and who has no way to know, in the circumstances and with his characteristics, what the limit of the licence actually is' (as in *Spearman*) and 'a person who at no stage has any permission to enter at all' (which is why, on Master McCloud's reasoning, a child was properly considered a trespasser in *Herrington* even though the child was unaware that he was entering an area without permission: [64]-[65] of *Ovu*).

*'The mental element in Spearman seems to me to be best described as asking whether in the circumstances of a lawful visitor, that class of person with those characteristics could reasonably have been aware of the limits of the licence he had. Mr Spearman simply did not know he was off limits, and that was a function of the lack of signage and his own vulnerabilities which were commonplace in the hospital environment and actually known to the staff.'*

The High Court in *Ovu* distinguished *Spearman* on two grounds (at [66]). First, Mr *Ovu* had entered the off-limits area having passed very clear barriers and signage. Mr *Ovu* could not and did not pray in aid his own intoxication for mistakenly passing through the gates. Second, 'merely' changing one's mind and wishing to re-enter the platform was not comparable to the case of a person who was unaware that they had exceeded their licence to enter or unaware that they were entering a dangerous area, as in *Spearman*.

It was therefore the Occupiers' Liability Act 1984, concerning persons other than visitors, that applied.

Master McCloud found that no duty under the 1984 Act arose as the staircase had no particular defects and did not pose a danger; there was no danger due to the state of the premises. There were no measures that the Defendant could sensibly be expected to have taken to prevent Mr *Ovu*'s fall given the obviousness of the risk of a fall on any stairs and the enormous implications if it were to be necessary to somehow protect transport users from that normal everyday risk.

## When might a duty at common law arise in parallel with a duty under the Occupiers' Liability Acts?

Master McCloud also considered the circumstances in which a duty at common law might arise in parallel with a duty under the Occupiers' Liability Acts. Master McCloud considered at [75] that whilst the legislation replaces the common law in respect of 'occupancy duties' (danger due to the state of the premises and the effect on the state of the premises by activities or lack thereof), 'activity duties' which are independent of the state of the premises, such as (say) holding a dangerous event such as a fireworks event, fall to be determined outside of the Occupiers' Liability Acts.

On the facts of this case, the Defendant's duty of care stemmed from the 1984 Act alone; no parallel common law duty arose. Master McCloud suggested that if hypothetically, on that evening, the Defendant's staff had been making use of the stairs for their own purposes such as an impromptu social event and had in the process negligently harmed the Claimant, for example by tripping or pushing him, then they may have owed a duty at common law in parallel with the 'occupation' duty under the 1984 Act.

## Practice Points

This case has some unusual facts. It is relatively rare that a trespasser will change their mind, try to return to the permitted area of the premises, not succeed and then suffer injury. It is relatively rare that a person will be trapped in a non-permitted area (and, for the avoidance of any doubt, Mr Ovu was not trapped).

This case at first glance may appear to produce a harsh result. After all, Mr Ovu had tried to return to the public area of the station. However, the Defendant in this case rightly raised the difficulty which would be caused by a subjective approach to trespass, taking into account the mind of the trespasser: almost every trespasser could say that they were not trespassers because they had some intention to return to the platform at some point. Parties would end up arguing over the precise point at which a person formed the relevant mental intention to return to the permitted area of the premises.

The High Court in *Ovu* has sought to confine the potentially wide-reaching notion from *Spearman*, that mental state is relevant to visitor or trespasser status, to the peculiar facts of *Spearman*.

Where a person's appreciation of their licence to be on the premises is uncertain, it appears the questions to consider are:

- Were there clear barriers or signage to inform that person that they were entering a non-permitted area? If so, that is a factor that points to the person being deemed a trespasser regardless of their state of mind. If not, and a person merely makes a mistake and goes the wrong way, that person will probably be a visitor even to a non-permitted area of the premises: at [56] of *Spearman*.
- If there were no such clear barriers or signage, and the person was not aware that they were entering an area without permission, then did that person at any stage have permission to enter? Where a person entered the premises as a visitor and then strayed into a non-permitted area (*Spearman*), their state of mind and appreciation of the limits of their licence is relevant. Where a person at no stage had permission to enter the premises, then the person's mental state or intention will not change the person's status from trespasser to visitor or licensee (at [65]-[67] of *Ovu*).

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