

NOBODY'S PERFECT – RECENT TRENDS IN THE LAW OF OCCUPIERS' LIABILITY

Insurers can finally rely upon recent decisions regarding the liability of occupiers for injuries suffered by patrons while present on the occupier's premises - to its credit, the Ontario courts have adopted what can be referred to as a "common sense approach" to applying the provisions of the *Occupier's Liability Act*. So long as an occupier or its agents implement reasonable policies and procedures to ensure the safety of patrons while on the premises, which take into consideration the nature and circumstances of the specific premises, and provided those policies and procedures are followed by the occupier's employees or agents, the case law indicates that the courts will be willing to find that the occupier has met the appropriate standard of care. Although the law on occupier's liability has not really changed, this recent case law seems to suggest that the courts are more inclined to take a more critical look at these cases.

The applicable standard of care that an occupier must meet will vary depending upon the nature of the premises and the activities that are carried out upon it. The courts have emphasized that the standard of care owed by an occupier to a patron on its premises is one of reasonableness – not perfection. From the perspective of an insurer defending a claim on behalf of an occupier, if the occupier has implemented reasonable policies and procedures to address safety concerns or hazards on the premises, which the evidence suggests

were being adhered to by the occupier's employees or agents on the date of the incident, there is a strong defence to put forward that the standard of care was met, and that the occupier is not liable for any injuries that may have been sustained by the patron while on the premises.

In the Ontario Superior Court of Justice decision of *Souliere v. Casino Niagara* (2014 ONSC 1915 (CanLII)), the Plaintiff slipped and fell in a buffet-style restaurant owned and operated by Casino Niagara. A staff member of the restaurant saw another patron spill a brown liquid substance on the floor followed by the Plaintiff falling seconds later in the approximate area of where the spill had occurred. There was no policy of regular cleaning of the floors while the restaurant was open, however the floors were cleaned in the evening following the closure of the restaurant. Moreover, there was no specific employee responsible for inspecting or cleaning the floors of the restaurant, but rather the Casino's policy was that all employees on duty were responsible for monitoring the restaurant for food spillage and cleaning any spillage that may be observed.

Justice Henderson found that the Casino had met its duty of care in the circumstances. He noted that liability in occupiers' cases is a fact driven exercise that varies from case to case. For example,

a premises in which there is a higher degree of spillage will require more vigilant policies and procedures to be in place. Occupiers are required to tailor their policies and procedures to the particular circumstances of their premises. What is required to meet the standard of care will depend upon the circumstances of the particular case, and what meets the reasonableness standard in one situation may fall short in another. Justice Henderson advised that the applicable standard of care is a flexible one that must take into account the context and nature of the premises, as well as the activities that are carried out on the premises. The analysis will revolve around considerations of whether the occupier had reasonable policies and procedures in place for the inspection and maintenance of the premises, and whether those policies and procedures were actually followed.

In this particular case, the court concluded that the Casino was not required to ensure that there was no food spillage in the restaurant, but rather to take reasonable care to ensure customers of the restaurant were reasonably safe while on the premises. Although there was no evidence that the policy was in fact followed in this particular case, the evidence at trial was that the floor of the restaurant was clean, and so the judge concluded that the Casino's policy for inspecting and cleaning the floors of the restaurant was working reasonably well. The only spill that was observed by anyone at the relevant time was the one in which the Plaintiff had slipped. Consequently, the court found that the Casino had met the standard of care required and was not liable for the Plaintiff's slip and fall. In the past, a case similar to this one would possibly have attracted some liability but fortunately, the Court was not swayed by the Plaintiff and took a reasonable approach in its analysis.

Similarly, in the decision of *Nandlal v. Toronto Transit Commission* (2014 ONSC 4760 (CanLII)), the Plaintiff claimed that she fell on debris that was on the stairs of

a Toronto subway station. The Defendant, the Toronto Transit Commission (TTC), brought a motion for summary judgment following the completion of examinations for discovery seeking to dismiss the Plaintiff's action.

At her examination for discovery, the Plaintiff testified that she slipped on floor tiles, however in response to the summary judgment motion, she stated that she believed she had slipped on debris at the top of stairs in the station. She was not able to describe the debris on which she allegedly fell, and there were no witnesses to her fall.

The available evidence indicated that the floor tiles where the Plaintiff had fallen were non-slip tiles and were not defective or in any state of disrepair. Additionally, a janitor was exclusively assigned to the subway station and followed a schedule of regular cleaning and maintenance within the station.

The summary judgment motion judge, Justice Perell, noted in his reasons for decision that the *Occupiers' Liability Act* does not impose strict liability on the occupier of a premises. The presence of a hazard on a premises does not in itself lead inevitably to the conclusion that the occupier has breached its duty to take reasonable care to ensure that persons are reasonably safe while on the premises. In order to succeed in an occupier's liability claim, the claimant must be able to specifically point to some act or failure on the part of the occupier that caused the injury suffered.

The motion judge indicated that the success of the Plaintiff's case depended upon her providing evidence that the steps where she had slipped were slippery or debris strewn. However, even if she did establish that this hazard in fact existed, her claim may not be successful in the end. If the TTC showed that it took reasonable care to ensure that the Plaintiff and others

were reasonably safe from the hazard, the claim would not succeed.

Justice Perell advised that it is important for a court to use common sense when applying the provisions of the *Occupier's Liability Act*. Falls at locations such as subway stations can occur without someone being responsible or with responsibility resting with someone other than the occupier of the property. Falls occur on stairs found everywhere without anyone being responsible for what can simply be considered to be an accident. It is not reasonable or practical to impose an obligation on an occupier to be in a position to continuously and immediately clean up after patrons who may litter or spill on the premises. The duty of care imposed upon the occupier does not extend to the removal of every possible danger, rather the standard of care is one of reasonableness.

In granting the TTC's motion for summary judgment and dismissing the action, Justice Perell found there was no objective evidence that there was debris on the stairs or that the stairs were a slippery hazard. In fact, the evidence was that the TTC took

steps to make its premises as safe as was reasonable in the circumstances.

This recent case law will hopefully dissuade overzealous plaintiffs of initiating frivolous claims against occupier. The occupier of a premises will not be held to a standard of care that requires perfection in terms of ensuring that its premises is free from hazards. Ultimately, an occupier is not an insurer against all injuries to its patrons while they are present on the premises. Provided the occupier has in place reasonable policies and procedures which take into account the nature and circumstances of the premises, and there is evidence indicating that these policies and procedures were followed, the courts have expressed a willingness to find that such an occupier will meet the appropriate standard of care that is owed to its patrons. Insurers defending these claims are encouraged to continue maintaining denials of liability by applying the common sense approach. That said, it is cautioned that insurers should carefully choose the cases that should be fought at trial – we wish to continue the trend that the court seems to have adopted. There is light at the end of this tunnel – the day will come where negligence needs to be proven to be awarded damages.

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