

## “More than One Arrow in the Quiver” – Sweep Logs and the Standard of Care: *Souliere v. Casino Niagara*, 2014 ONSC 1915

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### Summary

In March 2014, the Ontario Superior Court released its decision in *Souliere v. Casino Niagara*.<sup>1</sup> This decision provides a helpful outline for assessing the reasonableness of maintenance policies in the occupiers’ liability context, particularly in the context of areas of high traffic or increased hazards.

### Overview and facts

In this case, the plaintiff commenced an action against Casino Niagara for a slip-and-fall incident suffered in its restaurant. As she was leaving, the plaintiff slipped on some sauce or gravy that had spilled on the floor from a customer’s plate some moments earlier.

The trial of this matter focused solely on liability. The quantum of damages was agreed upon by counsel prior to the trial. The Statement of Claim alleged, among other things, that Casino Niagara’s policies were negligent because they failed to provide a dedicated employee for the purposes of sweeping the floor, and for failing to institute periodic sweeps while the restaurant was open.

The defendants’ evidence was that all employees on the floor (save the cashier) were trained to continuously survey and monitor the floor for hazards, and to quickly clean them up once spotted. Unfortunately, the court noted that “the checklist prepared by the supervisor that was tendered as an exhibit was vague and flawed.”

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<sup>1</sup> 2014 ONSC 1915.

## Issues

- (1) Did Casino Niagara breach the standard of care?
- (2) If the standard of care was breached, did it cause the plaintiff's injury?

## Decision and reasons

### *1. Did Casino Niagara breach the standard of care?*

The court found in this case that the restaurant had not breached the standard of care. In its analysis it referenced another recent case for the proposition that:

The liability analysis regarding any slip and fall in a public place revolves around the issues of whether the occupier had in place reasonable policies and procedures for the inspection and maintenance of the premises, and whether those policies and procedures were actually followed.<sup>2</sup>

The court added:

Further, the liability analysis is fact driven and varies from case to case. Premises in which there is a higher risk of spillage require more vigilant policies and procedures.<sup>3</sup> (emphasis added).

After weighing the oral evidence before it, the court was satisfied that the system of having each employee trained to constantly monitor for spills and quickly clean them up was reasonable in the context of a buffet restaurant where “food was everywhere.” This is especially remarkable given that courts have previously held that “reliance on the powers of observation of busy employees falls short of the standard of reasonableness in the circumstances.”<sup>4</sup>

Plaintiff's counsel attempted other attacks on the restaurant's environment. Counsel suggested that the lowered lighting contributed to the plaintiff's fall. The court dismissed

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<sup>2</sup> *Souliere v. Casino Niagara* at para. 34. The court referenced the earlier case of *Dhaliwal v. Premier Fitness Clubs Inc.*, 2012 ONSC 4711 in this regard.

<sup>3</sup> *Ibid.* at para. 35. The court also referenced the case of *Chan v. Erin Mills Town Centre Corp.*, [2006] W.D.F.L. 273 in this regard.

<sup>4</sup> *Davis v. Kin's Farm market (Lynn Valley) Ltd.*, 2010 BCSC 677 at para. 38.

this argument on the basis that the pleadings failed to allege any problems with the lighting, but noted that there was no evidence that the plaintiff had trouble seeing.

Counsel also suggested that the restaurant negligently chose not to employ non-slip mats on the floor. The court noted that this allegation was not contained in the pleadings either, and further disposed of it by noting that it would be “impractical and inappropriate for a business that relies on maintaining a certain pleasant ambiance for its customers” to cover the floor in non-slip mats.

Overall, the court noted that “the standard of care is flexible and must be applied in the context of the nature of the premises and the activities carried out therein.”<sup>5</sup> Here, the court found that the system of generalized responsibility was reasonable in the circumstances and was actually followed by the employees.

*2. If the standard of care was breached, did it cause the plaintiff’s injury?*

The court then determined that, in the alternative, the breach of the alleged standard of care did not cause the plaintiff’s injury. The evidence of the cashier, who happened to see the spill occur moments before the plaintiff’s slip, was immensely helpful in establishing the extremely short timeframe between spill and slip.

The court found that the timeframe between spill and slip would have made it impossible for Casino Niagara to prevent the plaintiff’s fall, even if it had established a system of periodic sweeps or employed a dedicated sweeper. Holding Casino Niagara responsible for the plaintiff’s slip-and-fall would therefore have been tantamount to making Casino Niagara an insurer against any slip-and-fall.

Comments

This case should provide a sense of security for occupiers, and affirms the necessity of producing witnesses and/or deponents who are articulate, credible, and knowledgeable about sweep policies and employee compliance with those policies.

Defence counsel are sometimes dismayed when presented with incomplete sweep logs whose deficiencies cannot easily be explained. Conversely, defence counsel can sometimes be made unjustifiably confident by sweep logs that are completed to

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<sup>5</sup> *Souliere v. Casino Niagara* at para. 49.

perfection. This case should serve as a reminder that sweep logs (or a lack thereof) are simply one persuasive factor in the standard of care analysis.

It seems likely that plaintiff's counsel here was emboldened by the poor quality of the sweep logs. In these situations, the courage of plaintiff counsel's convictions may overwhelm a defence that forgets that sweep logs are not dispositive of the issue of the standard of care.

Defence counsel here showed the impact of a credible, well-prepared witness with the ability to discuss existing sweep policies and other matters relating to the standard of care. Because of the quality of the defence's oral testimony, the restaurant was able to establish that a reasonable policy was in place regardless of the poor quality of the sweep logs in this case.

This case also reveals the importance of timing as it relates to the spill and the fall. If the time interval can be shown to have been short (through witness evidence or CCTV footage), then even if the occupier's system is shown to be flawed, the plaintiff's case may well fail because of causation. The court will find for the defence if it can be shown that compliance with a higher standard of care would not make a difference.

The *Souliere* case illustrates the availability and effectiveness of other lines of defence in situations where the sweep logs are deficient. In the final analysis, this case should serve as a reminder that sweep logs are just one out of several lines of defence available to defence counsel in the occupiers' liability context.