

PREMISES LIABILITY

The shopkeeper vs. the motivated criminal

By Christina L. Corl

The recent shootings of patrons at the Al Rosa Villa and the death of Columbus Police Officer Bryan Hurst at a local branch of Fifth/Third Bank place on the front page an issue addressed by shopkeepers every day in Ohio and across the United States. That is, "What duty do business owners have to protect their patrons from random and often senseless criminal acts?"

Unfortunately, there is no easy answer. Ohio courts have provided some guidance on this topic, but shopkeepers, bar owners and the like are still faced with the prospect of determining on a day-to-day basis staffing, security and other safety needs while trying to predict from where the next assault may come. Ensuring the safety and security of patrons is hardly an exact science. In the litigation context, it is not hard to find a so-called "expert" to criticize the "lack" of security in any given case. One need only look at the examples of the criminal acts listed above to realize that it is very difficult to deter a motivated criminal. Although Ohio courts have set forth standards to determine shopkeeper liability for patron injuries resulting from criminal conduct on the premises, there appears to be a loophole in cases involving the least preventable crime. That is, the case of the highly-motivated criminal.

Ohio courts have repeatedly held that a business owner is not the "insurer" of the safety of patrons on its premises.¹ In order for a shopkeeper to be held responsible for the criminal acts of third parties on its premises, such crimes must be "foreseeable." Under this standard, crimes are foreseeable either when prior similar events have occurred on the premises or when the "totality of the circumstances" put shopkeepers on notice that such crimes are likely to occur. Factors examined to determine foreseeability include the nature of the business (department store v. bar), location of the business (low v. high crime area), and the number and similarity of prior criminal acts on the premises. Additionally, the circumstances must be "somewhat overwhelming" for a business owner to be held liable because courts reason that criminal behavior is generally unpredictable.²

The shopkeeper can ask the court to make a determination as a matter of law (without sending the issue to a jury) that the crime was not foreseeable and it had no special duty to protect its patrons from the crime.

While this law does provide some guidance to business owners, it still does not provide for a case involving a highly-motivated criminal. Take for instance the example of a bank. We all know banks may be the most secure of any establishment open to the public, yet we read daily about banks being robbed. Applying the legal standard of foreseeability stated above, it could be argued that injury to patrons is foreseeable at nearly any bank. First, the nature of the banking business (storing money) could be argued to actually attract crime. Second, banks exist in every kind of neighborhood from the very safe to the very dangerous. And last, banks are robbed all the time and if a particular bank is robbed even once, it could be argued the banker is on notice of the potentiality of violence in the future. This example presents a situation where the law may imply legal liability in a case where crime is the least preventable, thus



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illustrating the case of the highly motivated criminal. Simply put, there are some people out there who, when they make up their mind to commit a crime, will not be deterred regardless of the presence of dozens of witnesses, security guards or even uniformed and armed police officers.

So, a business owner may be found to have a legal duty to protect its patrons from criminals, but how far must that duty be stretched? Unfortunately, under Ohio law, once the court finds a duty exists, issues such as breach of that duty and causation most generally must be sent to a jury to decide. This exposes shopkeepers to the expense, publicity and stress of a jury trial along with the potential of a runaway verdict, in cases where its unlikely that even a SWAT team on site could have prevented the crime. Ohio law does not yet seem to have any efficient mechanism to deal with cases involving the undeterrable criminal. Further, there are no standards shopkeepers can follow to ensure they will not be held responsible in cases involving "inadequate security." Each case is examined on a case-by-case basis, leaving the shopkeeper to wonder, "How much is enough?" In the words of a California court of appeals:

"... where do we draw the line? How many guards are enough? Ten? Twenty? Two hundred? How much light is sufficient? ... Does every shop, every store, every manufacturing plant, have to be patrolled by private guards hired by the owner? Does a landowner have to effectively close his property and prevent its use altogether? To characterize a landowner's failure to deter the wanton, mindless acts of violence of a third person as the 'cause' of the victim's injuries is ... to make the landowner the insurer of the absolute safety of everyone who enters the premises."³

The court seems to understand that in many cases it may be impossible to deter the motivated criminal, and shopkeepers can only hope that jurors in such a case agree.

¹ *Reitz v. May Company Dept Store* (1990), 66 Ohio App. 3d 188.

² *Reitz, supra*, at 194

³ *Nola M v. University of Southern California* (1993), 16 Cal App 4th 421.



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