

Increase in Crime Forces Local Businesses Into a Catch-22

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By Andrew Goldstein and Robert Stanko

It's no secret that crime in many areas across the country is rising, and Philadelphia is no exception. Each day brings with it new reports of violence and many retail businesses are finding themselves at the center of this increased lawlessness.

Back in February, a 49-year-old local musician/bartender was found stabbed to death in his car in the parking lot of a Wawa in Southwest Philadelphia. More recently, a Wawa in Northeast Philadelphia was overrun by a group of roughly 100 unruly teens ("Philly kids ransacking Wawa was 'a scene from the apocalypse,'" Philadelphia Inquirer, 9/27/2022); a store clerk at a 7-Eleven in Southwest Philadelphia was shot after asking for ID from a customer ("7-Eleven employee shot after asking for ID during cigarette purchase: Police," 6abc.com, 9/12/2022); and, a man getting gas at a Sunoco in Germantown was ambushed and carjacked at gunpoint by four masked men ("Germantown carjacking: Group seen on video jumping from van, stealing car at gunpoint," 6abc.com, 10/3/22).

The increase in crime has prompted some businesses to significantly decrease their hours of operation or shut down all together. For instance, within the last year, Walgreens decided to close its flagship store at Broad and Chestnut Streets, citing an increase in "organized retail crime." ("Walgreens 'superstore' on Philly's Broad Street will shutter in February," Philadelphia Inquirer, 1/29/22). Wawa has closed at least three locations in Center City and stopped offering 24-hour service at others. ("Another Center City Wawa ends 24-hour service," Philadelphia Inquirer, 8/9/2022). According to recent reports, Wawa is also considering halting any further expansion in Philadelphia due to the rise in crime. ("Wawa 'seriously considering' halting expansion plans in Philadelphia due to crime, councilmember says," Philadelphia Business Journal, 10/12/22).

Of course, many retail establishments remain open for business, and those that have are undoubtedly contemplating how best to combat this rise in crime against persons and property. After all, customers

want to feel safe, and if store owners do not satisfy that desired sense of security, the business itself is sure to suffer.

This leaves business owners with the decision of whether to implement a security program or bolster whatever program they have in place. This is not a decision that should be taken lightly. There are a lot of factors to consider, including the risk of future litigation and the impact that such a decision could have when evaluating potential liability.

Indeed, the increase in violence has already led to at least one significant lawsuit. The family of the man stabbed to death outside the Wawa in Southwest Philadelphia sued the company, the owner of the strip mall where the store is located, and the security firm that was hired to monitor the area. (“Wawa sued over stabbing death of man outside store in South Philadelphia,” Philadelphia Inquirer, 8/2/22). The plaintiffs contend that the defendants negligently operated the premises and failed to provide sufficient security.

The general structure of negligent security lawsuits is generally the same: the plaintiff was harmed by a criminal act of a third party, the defendant premises owner or occupier is either located in a purported high crime area or otherwise knew or should have known that the harm was likely to occur, and but for the defendant’s failure to prevent the harm vis-à-vis adequate security, the harm would not have occurred.

Pennsylvania courts have cautioned that the duties a proprietor owes to business invitees must be determined on a case-by-case basis. Take, for instance, the case of

Pearson v. Philadelphia Eagles, 220 A.3d 1154 (Pa. Super. Ct. 2019), which arose from a fight in the bathroom at Lincoln Financial Field during a game between the Philadelphia Eagles and Dallas Cowboys. The plaintiff, who was wearing a Cowboys jersey, was assaulted in the bathroom and sustained injury as a result. He filed suit against the stadium operators and the security company that had guards stationed in various areas of the stadium but not in the bathroom. The case went to trial and a jury returned a verdict in favor of the plaintiff in the amount of \$700,000.

The defendants appealed, claiming, among other things, that the plaintiff failed to set forth a prima facie case of negligence against them. The Superior Court agreed, vacated the jury verdict and entered judgment for the defendants as a matter of law. The court’s opinion is instructive as to the duties owed to business invitees. As a threshold matter, a possessor of land is not an insurer of a visitor’s safety; to the contrary, “the duty to protect business invitees against third party conduct arises only if the owner has reason to anticipate such conduct.”

The court explained that the relevant inquiry was specific and tailored: did the defendants have notice of prior incidents in stadium restrooms? The court carefully examined the trial record and determined that, while fights had happened there in the past, they “were a rare occurrence.” The court concluded that because there was no evidence that the defendants knew or had reason to anticipate that violent assaults would occur in the restrooms, they did not act unreasonably by electing not to station security guards in or around the stadium restrooms.

Pearson is an important decision in that it demonstrates the fact-intensive nature of determining the specifics of a proprietor's duty to invitees. Indeed, the duty owed to invitees can change once the proprietor voluntarily offers a program of security. Relied upon by *Pearson*, the seminal case in this arena is *Feld v. Merriam*, 485 A.2d 742, 747 (Pa. 1984). *Feld* stands for the proposition that, while a proprietor is not an insurer of safety, if the proprietor voluntarily implements a certain security program, that program must be discharged reasonably.

Feld also provides that invitees are entitled to rely upon only the level of security in place. In other words, whether a proprietor was negligent in its operation of a security program considers only the parameters of the security services actually offered. As the court in *Feld* explained:

“A tenant may not expect more than is offered. If, for instance, one guard is offered, he cannot expect the same quality and type of protection that two guards would have provided, nor may he expect the benefits that a different program might have provided. He can only expect the benefits reasonably expected of the program as offered and that that program will be conducted with reasonable care.”

The law as it stands states that invitees are entitled to rely upon only the program of security offered; and no specific level of security is required. On the other hand, should a business elect to implement a certain security program, the law requires that it must be pursued reasonably. Indeed, what *Pearson* shows us is that the issue is not whether more security would have prevented the harm; rather, the

question of liability turns on whether the security program actually in place was reasonable.

Herein lies the challenge for businesses in areas experiencing a significant rise in crime. In essence, the recent rise in violent crime has created a Catch-22 for local store owners choosing to remain in Philadelphia—maintain the status quo and risk losing business because customers don't feel safe; or, take on the operational costs of implementing a security program, and with that the non-delegable duty of operating it in a non-negligent manner.

Take, for example, a business that elects not to employ security guards. Because there is no general duty to do so, a customer who is harmed by the unforeseen acts of a third person cannot argue that the business was negligent for failure to employ security guards. But, if the same harm is suffered by that individual with a security guard on duty, the failure of the guard to protect the individual will undoubtedly be viewed as a failure of the security program to protect against the harms it was presumably designed to prevent.

And while the occurrence of a crime on a premises is not determinative of the reasonableness of the security measures in place, it could potentially give rise to an additional duty to aid on the part of the proprietor. This was the case in *Reason v. Kathryn's Korner Thrift Shop*, 169 A.3d 96 (Pa. Super. Ct. 2017), wherein the plaintiff alleged that the defendants were under a duty to intervene to stop an assault on her as it was occurring. The court explained that a business satisfies its duty to aid a business invitee by calling 911 or another

source of professional medical or police assistance.

No matter the approach that businesses take with regard to security, it is imperative that they be deliberate and consistent in their execution. This helps to establish expectations not only for the general public but also for those charged with the operation of the program, regardless of whether that is an outside security contractor or a businesses' own employees. Taking care in implementing a specific policy or program will not only improve

customer safety but also minimize exposure in the event of litigation.



Robert Stanko is a shareholder at Marshall Dennehey Warner Coleman & Goggin where he focuses his practice on civil litigation.

Andrew Goldstein is an associate in the casualty department of the firm where he defends insured and self-insured entities in all types of matters involving personal injury claims.