

THE DEFENSE LINE

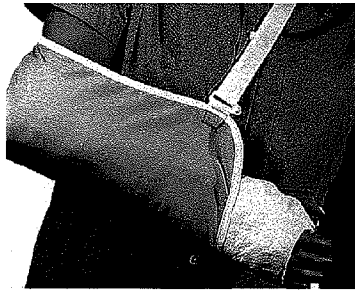
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High Crimes or Misdemeanors: Avoiding Legal Brawls From Bar Room Brawls¹

By JOSEPH W. HOVERMILL AND MATTHEW T. WAGMAN

It is a typical Friday night in Canton and your restaurant and bar is open for business. The place is crowded, every table is full and the bar is two people deep. Out of nowhere, a fight ensues and you see two men in the bar (one of whom is bleeding) struggling to gain control over a knife. Within seconds, the bouncers and bartenders have separated the two men and the paramedics are in route to care for one your patrons who has suffered multiple stab wounds as a result of the independent act of a third party. Are you civilly liable to that patron? The answer may surprise you.



According to the Federal Bureau of Investigation's Uniform Crime Report, approximately 38,778 violent crimes were reported in Maryland in 2003. In a time of heightened sensitivity to security issues, Maryland businesses should be sensitive to their potential liability for injuries to business invitees—even if that injury comes from the independent criminal act of a third party.

I. Your Instincts May be Right Absent Special (or not so special) Circumstances.

If you polled a number of Maryland business owners and asked for their opinions on the hypothetical narrated above, you would likely find that many, if not most, believe that, although in our modern liti-

gious society, their business might be sued for injuries sustained in an assault, they ultimately should not be held legally responsible. As a general rule, the law reflects those notions, but lurking exceptions to the general rule may provide businesses with unanticipated liabilities.

Absent unusual circumstances, a patron seeking to recover for injuries sustained as a result of third party criminal acts on the premises of a business would likely be limited to a negligence theory against the business. It is a fundamental principle of tort law that in order to prevail on a negligence action, a plaintiff must prove that the defendant owed a legal duty and that the plaintiff suffered actual loss factually and proximately caused by a breach of that duty. See e.g. *Peroti v. Williams*, 258 Md. 669, 669, 267 A.2d 114, 118 (1970); see also *Brown v. Dermer*, 357 Md. 344, 356, 744 A.2d 47, 54 (2000). A business owner's instincts that the business should not be liable for injuries to its patrons resulting from third party criminal acts are validated by the hurdle such a plaintiff faces in attempting to establish any legal duty to protect him from the crime. The potential existence of such a duty is the focus of this article.²

Generally speaking, what duty does a Maryland business owe to its patrons? This, like all other questions of the existence of a duty, is a question of law for the court. *Jackson v. A.M.F. Bowling Ctrs., Inc.*, 128 F. Supp. 2d 307, 311 (D. Md. 2001)

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¹Joseph W. Hovermill is a principal and Matthew T. Wagman is an associate of the law firm Miles & Stockbridge P.C. in Baltimore, Maryland. While their practice predominantly focuses on representation of the manufacturing industry, they also have extensive experience representing various companies in commercial disputes and premises liability cases on both the local and national level. The authors wish to thank Michael L. Haslop for his assistance with this article.

²Although, in addition to questions of the existence of a legal duty, third party criminal acts can raise questions regarding proximate causation, the element of proximate causation does not arise until a legal duty is established, and the analysis of proximate causation is somewhat parallel to that of legal duty in that both center on an analysis of foreseeability, therefore this article addresses only the question of the existence of a legal duty.

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(citing *Valentine v. On Target, Inc.*, 353 Md. 544, 549, 727 A.2d 947, 949 (1999)). Under Maryland law, business patrons are considered "business invitees."³ It is a well-settled principle of Maryland law that the duty of a business to a business invitee or patron is that of "exercising reasonable care to see that the premises upon which he is invited are reasonably safe." *Eyerly v. Baker*, 168 Md.599, 178 A. 691, 694 (1935); see also *Nigido v. First Nat'l Bank of Baltimore*, 264 Md. 702, 704, 288 A.2d 127, 128 (1972); and *Jackson*, 128 F. Supp. 2d at 311.

A person generally has no duty to control the actions of a third party in order to prevent injury to another in the absence of a "special relationship" between that person and the injured party or between that person and the third party. See RESTATEMENT (SECOND) OF TORTS § 315 (1965). Similarly, a person whose action is necessary to aid or protect an injured party is ordinarily, whether aware of the injury or not, under no duty to take such action regardless of the severity of the danger or injury or the trivial nature of the required action. See RESTATEMENT (SECOND) OF TORTS § 314; see also *Southland Corp. v. Griffith*, 332 Md. 704, 716, 633 A.2d 84, 90 (1993). A duty to act in either situation may only be created by statute or by a "legally cognizable special relationship."

Maryland courts have found that such a special relationship exists between a business and a patron where the business is aware that the patron is being harmed by a third party. In *Southland*, the Court of Appeals confronted the issue whether a business or its employees have an affirmative legal duty to aid a business invitee they know to have been endangered and injured on the premises. 332 Md. at 707, 633 A.2d at 85. *Southland* involved an off-duty police officer that was assaulted in the parking lot of a convenience store. The officer alleged that the store clerk was aware of the ongoing assault but initially refused to call the police. The court noted that a special duty to aid an injured business invitee could only be predicated upon a finding of a special relationship between the business and the business invitee. The court held that "an

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employee of a business has a legal duty to take affirmative action for the aid or protection of a business invitee who is in danger while on the business's premises, provided that the employee has knowledge of the injured invitee and the employee is not in the path of danger." *Southland*, 332 Md. at 717, 633 A.2d at 91.

Courts have declined to extend that special relationship and consequent legal duty, however, to situations that would require businesses "to protect their customers from unforeseen acts of third parties." *Bias v. IPC Int'l Corp.*, 1997 WL 100925, 7 (4th Cir. 1997) (unpublished slip opinion). The more difficult question is what circumstances will render crimes "foreseeable," and whether a duty exists to protect a patron from those crimes.

II. Potential Liability where Circumstances Render the Crime Foreseeable

Maryland business owners, for the most part, cannot be held liable for failure to protect patrons from third party criminal acts—at least when an unforeseeable crime is at issue. The potential for such liability does exist, however, where it can be shown that the criminal act was foreseeable.

Although it involves the duty of a landlord to a tenant rather than that of a business to a business invitee, *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976), is the seminal case on the duty of a business to secure the premises, and, therefore, the safety of the business invitee, from the danger of the criminal activity of third parties. See *Moore v. Jimel, Inc.*, 147 Md. App. 336, 344, 809 A.2d 10, 14 (2002) (reasoning that although the Court of Appeals determined the duty of a landlord in *Scott*, the same duty would apply to a shopkeeper).⁴ In *Scott*, the Court of Appeals determined whether Maryland law imposes upon the landlord a

duty to tenants to protect them from third party criminal acts committed in common areas within the landlord's control and held that "there is no special duty imposed upon a landlord to protect his tenants against crimes perpetrated by third parties on the landlord's premises." In so holding, the court relied upon its decision in *Nigido* and *Eyerly* in the context of a business's duties to business invitees.

In *Nigido*, the court upheld the dismissal of a bank customer's negligence claim against the bank for failure to protect him from injuries sustained when he was shot in the course of a bank robbery. The court found that the customer was not owed a "special duty" but rather "the same duty as a shopkeeper owes his customer, i.e., to use reasonable care for his protection." *Nigido*, 264 Md. at 704, 288 A.2d at 128. In *Eyerly*, the court held that "one who invites another upon his premises, owes to the invitee the duty of exercising reasonable care to see that the premises upon which he is invited are reasonably safe." 168 Md. 599, 178 A. at 694. The *Scott* court held, therefore, that although the general rule requiring reasonable care is typically applied to defects in the premises, "the rule encompasses within its general ambit injuries sustained by tenants as a result of criminal acts committed by others in the common areas within the landlord's control." 278 Md. at 165-66, 359 A.2d at 552. Absent additional circumstances, that duty of reasonable care would not include a duty to protect patrons against third party criminal acts.

The *Scott* court further examined whether a duty should be imposed if the landlord has knowledge of increasing criminal activity on the premises or in the immediate neighborhood and again held that the reasonable care standard applied. Reasoning that "[t]he duty of a landlord to exercise rea-

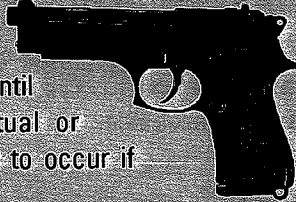
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³"A business invitee is 'one invited or permitted to enter another's property for purposes related to the landowner's business.'" *Jackson*, 128 F. Supp. 2d at 311 (quoting *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 387-88, 693 A.2d 370, 374 (1997)).

⁴Maryland courts are not alone in drawing analogies from landlord-tenant law to determine the duty of businesses to business invitees. See *Laura D. Kulwicki, A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule*, 48 OHIO ST. L. J. 247, 250 (1987).

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The comments to section 344 make clear that businesses are under no duty to protect against third party criminal acts unless and until the business has knowledge, whether actual or constructive, that the criminal acts are likely to occur if safeguards are not implemented. ■



sonable care for the safety of his tenants in common areas under his control is sufficiently flexible to be applied to cases involving criminal activity without making the landlord an insurer of his tenant's safety," the court held that "[i]f the landlord knows, or should know, of criminal activity against persons or property in the common area, he has a duty to take reasonable measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity." The court specifically limited the relevance of past criminal activity to that which occurred on the premises. Past crimes in the immediate neighborhood would not operate to impose a duty to guard against the dangers posed by such crime.

The higher duty created in *Scott* where the landlord has knowledge of past criminal activity on the premises is similar to that imposed on businesses under the section 344 of the Restatement (Second) of Torts, which states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give warning adequate to enable the visitors to avoid the harm, or otherwise protect against it.

RESTATEMENT (SECOND) OF TORTS § 344.

The comments to section 344 make clear that businesses are under no duty to protect against third party criminal acts unless and until the business has knowledge, whether actual or constructive, that the criminal acts are likely to occur if safeguards are not implemented. RESTATEMENT

(SECOND) OF TORTS § 344. cmt. f. Unlike section 344, the *Scott* decision limits the circumstances giving rise to a duty to protect from injuries resulting from third party criminal acts to the past incidents of crime on the premises.

More recent Maryland decisions in the context of the duty owed to business invitees have relied on *Scott* and have similarly limited the foreseeability inquiry to criminal acts on the premises. See *Tucker v. KFC Nat'l Mgmt. Co.* 689 F. Supp. 560 (D. Md. 1988) (holding that although the plaintiff introduced some evidence of criminal activity in the restaurant and the community, no evidence before the court indicated that the restaurant knew or should have known to "anticipate the particular incident that caused the plaintiff's injury," and, therefore, the restaurant owed no duty); *Bias v. IPC Int'l Corp.*, 1997 WL 100925, 7 (4th Cir. 1997) (unpublished slip opinion) (declining to extend the special relationship and duty to require businesses "to protect their customers from unforeseen acts of third parties"); *Jackson v. A.M.F. Bowling Ctrs., Inc.*, 128 F. Supp. 2d 307, 311 (D. Md. 2001) (holding that a bowling alley did not owe a duty to prevent the stabbing at a dance on its premises because although the plaintiff had introduced evidence of small fights during past events, the evidence did not provide the bowling alley with actual or constructive notice "that a fight, let alone one involving a dangerous weapon, would have occurred").

Most recently, in *Moore v. Jimel, Inc.*, 147 Md. App. 336, 344, 809 A.2d 10, 14 (2002), the Court of Special Appeals affirmed summary judgment against a negligence suit by a restaurant patron who was attacked and raped in the restaurant restroom. The court noted that there is no special relationship between a business and a business invitee that would give rise to a "special duty" to protect against potential criminal attacks by third parties. The court recognized, however, that such a special duty

may be created if a business knows, or should know, of past criminal activity on the premises. If the business possesses such knowledge "he then has a duty to take reasonable measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity." *Moore*, 147 Md. App. at 344, 809 A.2d at 14 (internal citations omitted). The court found no history of past crimes on the premises sufficient to create such a special duty.

Although none of the cases discussed above hold the business owner liable, each recognizes the potential for such liability where the crime and injury was foreseeable. Courts will examine the history of criminal activity on the premises in determining whether such foreseeability exists. Logically, the extent to which past crimes on the premises are similar in kind and severity to the crime that injured the patron, and how frequently and recently those crimes occurred, will be prime factors in the foreseeability determination.

It is critical from a risk management perspective, therefore, for Maryland businesses to adequately document and address all criminal activity on their premises in such a way that it can later demonstrate that it responded adequately to previous issues or be able distinguish the previous issues from current issues to defeat a foreseeability argument. Although documenting these

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issues and responding properly to the issues as they arise is paramount to protecting Maryland businesses from increased liability, taking action to address these issues subjects these businesses to another potential crisis—providing additional security in an inefficient or ineffective manner rather than no security at all may *still* subject the business to increased liability. Accordingly, under certain circumstances doing too much is still not enough.

III. Potential Pitfall: The Risk of Providing Security

As if the potential liability for failure to employ security measures to protect patrons from third party criminal acts were not burdensome enough for Maryland businesses, improper performance of security, whether required or voluntary, may render the business liable for negligence. Indeed, Maryland courts have clearly opened the door to liability where a business voluntarily undertakes to protect its patrons, but does so improperly. In *Nigido*, the Court of Appeals noted that a bank's decision not to employ armed guards "might very well reflect the exercise of sound judgment rather than negligence." *Nigido*, 264 Md. at 706, 288 A.2d at 129. Similarly, in *Scott*, the court held that even if no duty existed to employ the particular level of security measures provided by defendants, improper performance of such a voluntary act could in particular circumstances constitute a breach of duty.

IV. Conclusion: A Balancing Act

Ultimately, businesses face conflicting sources of potential liability in determining the level of security to provide. On one hand, failure to provide enough security to counter foreseeable harm as a result of criminal acts of third parties may render the business liable for those harms. On the other hand, the provision of security measures in excess of what the law requires opens the business up to liability if the measures are not properly performed. For these reasons it is essential that a business determine, as quickly as possible, the extent of its potential duty to provide security and avoid providing excess security measures that merely increase the potential for liability if performed improperly.