A REASONABLE REVOLUTION: A PUSH FOR POLICY REFORM IN RETAIL SPACE

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The year was 2024. It was April, and I was in the midst of facilitating a captivating discussion regarding the "damned if you do/damned if you don't" nature of the retail litigation sphere—a presentation aptly titled "Damned If You Do/Damned If You Don't."

The focus of the discussion in the moment was on theft deterrence, and the insidious tendency of increasingly common deterrent measures to *increase* claims, like the utilization of armed third-party security contractors for instance.

There was a momentary respite, enough time for me to ask a question that seemed innocent enough: "Are any clients making changes to *their policies* to allow *employees* to do more to deter theft?"

There was an immediate-collective groan from the room—a proverbial clutching of pearls. How dare I propose such a thing! Change polices to allow employees to *do more*…? "Why, I never!"

And this was when I asked a follow-up question: "Who in the room has heard of The Shopkeeper's Privilege?"

1-to-2 hands, maybe.

"Get them up, folks, hands higher," I urged. Surely, there must be more….

"*Everyone* hasn't heard of this privilege?" I asked with genuine surprise.

"Folks, under The Shopkeeper's Privilege, *you can do some things*," I explained, "to protect your chattels."

No, this was not all empty old timey speech for humorous affect, about "shopkeepers" and "chattels." *I meant it.* You can, indeed, *do some things,* under The Shopkeeper's Privilege, and under other related or similar privileges. You can do *reasonable* things to protect your chattels, your stuff—your merchandise—like, I don't know, *touching* the person walking out of your store with a cartful of goods…or, get those pearls ready, you could maybe even grab that person, or hold that person.

"But counsel, why would you ever suggest such a thing? We could get sued!"

I got news for you: you're getting sued anyway. You're getting sued even in the instances where you're doing everything right, and you're going to keep getting sued, and in the meantime, there is an ill-intentioned person walking out of your store with globs of your stuff, *knowing*

"You can't touch me." One might even say you are "damned if you do, damned if you don't." So, what then do you do?

"REASONABLE."

That's the word.

And while I'm collecting groans, perhaps this word will prompt one from the attorney readers (wait until I start talking about how "it depends").

Companies and their employees can—and indeed I believe *they should*—employ *reasonable* means to protect merchandise, themselves, and their customers.

What is reasonable, you ask?

"It depends."

DEPENDS ON WHAT?

How much is the person taking? How is he or she acting? What are the physical characteristics of the bad actors and the employee?

"But who makes the call?" "*Who says* what's reasonable, ultimately?"

It depends.

At the furthest extent of a dispute arising out of the sort of scenario we are discussing though—a physical or otherwise forceful or assertive engagement (shouting, etc.)—a jury, or maybe a judge, is going to be the one that makes the decision: was the defendant-store's conduct reasonable under the totality of the circumstances?

Our clients act reasonably, or try to at least, *and in either case*, we the lawyers defend them. We make the argument. The trier of fact makes the call. And this brings us full circle.

If the goal is to act *reasonably*, and if ultimately that is the measure by which the trier of fact will determine liability, why are we setting higher standards for ourselves in the form of policies that demand more than reasonable conduct? And then – double whammy – why are we allowing opposing counsel to conflate those policies with law, to color them indistinguishable from the legal standards by which we are judged, such that we are allowing violations of our own policies to, well, *damn* us?

Why not write the policy *to the law*: allow "reasonable" conduct? Wouldn't *that* be reasonable?

I GET IT…

Lesser of two evils and all that; we cannot have employees going "hands on" at will or escalating every situation into a physical altercation.

I work in this space.

I see injuries to innocent customers from shoplifter pursuits; I see fights; I see shootings, and worse. I. Get. It.

But does this all mean that we blanketly prohibit employees from touching customers in any scenario, under any circumstances—and that we make this our official policy?

Does this mean that we prohibit "pursuit" *under any circumstances*?

Does it mean that we do not ask for a receipt from anyone, or not approach persons of color even where all of the criteria for an approach are met?

Can we not just be reasonable?

Or can we not at least just write that one simple word into our policies—just that word, "reasonable"—because that is the law.

THE "PRIVILEGE" YOU DON'T EVEN NEED (THE RIGHT TO ACT REASONABLY)

In my jurisdiction, Washington State, "The Shopkeeper's Privilege" is codified in RCW 4.24.220 ("Action for being detained on mercantile establishment premises for investigation— **"Reasonable grounds as defense."**). Shoot, my state's privilege-statute has "reasonable" right in the title, and then in the body the statute expressly allows for "detaining"—which Webster's Dictionary defines as "to hold or keep in or as if in custody"—"in a **reasonable** manner and for not more than a **reasonable** time," where the store "had **reasonable** grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting…." Wait, we are allowed to "detain" and hold, and it doesn't say anything about not touching? How could it be that the law allows for conduct here that would be a violation of just about every retailer policy of which I know? Why are these so starkly different?

It is your privilege as a shopkeeper—as a retailer—to act reasonably. But know that one does not even need a privilege to act reasonably. Why? Well, because negligence, that ever-present claim that forms the basis of almost every lawsuit that arises in the retail space, is itself built on a foundation of reasonableness. Don't believe me? Ask Google (you don't even need a Westlaw subscription). *Google* can tell you that negligence is the "failure to use **reasonable** care, resulting in damage or injury to another."

So, I ask again then, why are we exchanging this familiar and intuitive ideal of reasonableness for inflexible policies—the veritable legal standard for liability—for "should-not-dos" and "do-not-touches" that form the noose by which we hang ourselves? What possible global benefit could this have for retailers, because this practice certainly does not seem to be limiting claims or improving the retail experience for the customer.

YOU'RE GETTING SUED ANYWAY.

Can I tell you what's reasonable? No. But like the great Justice Potter Stewart, I'll sure know it when I see it. And I'll know unreasonable when I see it too. And in either case, I will advocate for you, referring to your defense attorney in the abstract, and will work to achieve the best result, because that's my job—that's our job. That's the service for which you pay us.

You're getting sued anyway, so why not fight? And why not take the weights off our ankles if we're going to run the race? Defending big retailers is hard enough. We don't need to set artificially high standards for ourselves in the form of policies that demand more than reason.

Are we going to win? *Could* we lose? *How much* could we lose?

All good questions.

"It depends." But let's talk. And let's also consider the alternative—the status quo—i.e., all the things we are doing except daring to make policies more permissive, if one wants to think about it that way.

You're getting sued anyway.

You're getting sued because it is *unreasonable* to have a policy that never allows for touching, or pursuit, or what is arguably "profiling," which you will be accused of anyway even in the best-intentioned cases.

You're getting sued because you're hiring third-party security contractors who do not share your company values, or even know or care about them for that matter.

You're getting sued for negligence premised on violations of *policies*, not the law, and you're paying those settlements and thereby encouraging more claims.

A RETAIL-POLICY REVOLUTION

The word revolution is a weird one, because its common meanings are almost diametrically opposed. In the more-familiar context, a revolution is a forcible overthrow of an established system with a presumptive new order in its wake. In the scientific or celestial sense on the other hand, "a revolution" denotes a return to an initial position. I guess what I'm proposing here is kind of both: a revolution *and* a revolution.

The status quo of setting unreasonable marks in the form of policies is broken. We should return to reason.

Recently selected to the Washington Rising Stars list in back-to-back years, Eddy Silverman of Williams Kastner is a creative, zealous advocate who specializes in premises liability and personal injury defense for corporate retail clients, but defends cases of all kinds—including professional liability (malpractice) matters and transportation defense cases.