



Arresting for Trespass

A harsh lesson for loss prevention officers having to deal with trespassers

By Elliott Goldstein

Q What authority does a loss prevention officer have to arrest a trespasser?

A A loss prevention officer's authority to arrest a person trespassing in a retail store arises from a combination of the common law of trespass, a citizen's authority to arrest, and a citizen's right to defend real property. In Canada, "a tortious trespass to land occurs if a person enters upon land lawfully, as a 'visitor,' and then refuses to leave the property once the occupier of that land, or its agent, requests the person to leave."¹ Thus, any person who is present with the permission and licence of the occupier may, as a general rule, when the licence has been properly terminated, be sued or ejected as a trespasser, if he or she fails to leave the premises after a request and after the lapse of a reasonable time.²

This right to terminate a licence to enter private property extends to a right of a shopping centre or retail store to remove the right of entry granted to the general public. So if a loss prevention officer can show that he or she properly revoked a person's licence to enter the retail store and after a reasonable time that person remained or refused to leave the retail store, then the officer has made out the store's claim for trespass.

If the person attempts to leave within a reasonable time but is arrested and detained by loss prevention officers, from that point forward he or she is no longer considered to be voluntarily on the property and cannot be considered a trespasser. For example, in the 1999 Alberta case of *Chopra v. Eaton Co.*,³ although Chopra "initially may have voiced his reluctance to exit the store, as soon as the loss prevention officer put his hand on Chopra's arm to guide him out of the store, Chopra did not resist. He voluntarily began walking towards the door within a reasonable time after the request

to leave, and he was not a trespasser at that point in time.

Near the door, Chopra pushed the loss prevention officer to free himself from his grasp. This push did not constitute resistance from exiting the store. At best it was resistance against being physically escorted through the door, rather than resistance against leaving the property."⁴ The Alberta Court of Queen's Bench held that Mr. Chopra was never a trespasser upon Eaton's property.

A citizen's statutory power of arrest is found in section 494 of the Canadian *Criminal Code*.⁵ Section 494(2) reads as follows:

"Any one who is

- (a) the owner or a person in lawful possession of property, or
- (b) a person authorized by the owner or by a person in lawful possession of property may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property."⁶

This section extends the authority of a property owner or a person authorized by the owner (such as a loss prevention officer) to arrest anyone they find committing any criminal offences, including theft. It is not limited to indictable offences in the same way as section 494(1)(a), which requires the private citizen to show that the person he or she has arrested is in fact the person who committed the offence in relation to or on that property.

A private person must prove that the offence has actually been committed in order to fall under the protection of sec-

tion 494(1) or (2). That is, a loss prevention officer is not justified in arresting a fellow citizen simply on the basis that he had reasonable and probable grounds to believe an offence had been committed. Rather, such an arrest can only be justified if, in fact, an offence has been committed.⁷

It is also worth taking note of section 41 of the Canadian *Criminal Code*, which states the following:

- (1) Everyone who is in peaceable possession of ... real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the ... real property, or to remove a trespasser there from, if he uses no more force than is necessary.
- (2) A trespasser who resists an attempt by a person who is in peaceable possession of ... real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation."

Chopra did commit an assault on the loss prevention officer as described under section 266 of the *Criminal Code*

Section 41(2) was argued by the defendant Eaton's in the Chopra case. For it to apply required Chopra, as a trespasser, to resist his removal from Eaton's premises. However, section 41(2) does not convert mere "passive resistance" into an assault; it simply provides that force used by a trespasser to resist removal is an assault.⁸

The Alberta Court of Queen's Bench

found that the only resistance Chopra gave was verbal in nature (that is, a "passive resistance"), indicating that he did not want to leave. When he disengaged himself from the loss prevention officer's grasp, Chopra was not "resisting" his removal but rather was attempting to exit the premises on his own. As the Court had already found that Chopra was not a "trespasser," section 41(2) did not apply and was of no help to Eaton's or its security officers.

On the issue of whether Chopra pushed the loss prevention officer or

The loss prevention officer ... grossly overreacted [and] ... used excessive force without lawful justification

merely withdrew his arm from the loss prevention officer's grasp, the Court found that Chopra applied some sort of force on the officer in order to remove himself from officer's grasp. He did not push the loss prevention officer in the manner suggested by the defendants, but the Court was satisfied that he applied force intentionally and directly to the loss prevention officer without that officer's consent.

Therefore, Chopra did commit an assault on the loss prevention officer as described under section 266 of the *Criminal Code*. This assault was a nominal one at best. However, an assault is an assault; therefore, the loss prevention officer was authorized to arrest Chopra under the authority provided under section 494(2).

Although the arrest itself was legal, however, the force used to carry out the arrest of Chopra and the actual imprisonment imposed on Chopra could still give rise to liability for the defendants: Eaton Co. and its loss prevention officers. In fact, it did.

The Alberta Court of Queen's Bench held that "lawful authority to arrest does not mean that the persons arresting may do so in any manner they choose. There are limits to the degree of force, if any, that may be authorized. If these limits are exceeded, then a defence based on lawful authority to commit battery will fail. ... In the case of a private person utilizing force to carry out an otherwise lawful arrest, there are public policy arguments in favour of limiting the amount of force that is authorized. The use of force is not something that should be encouraged. ... Whether the force used

was reasonably necessary in carrying out the arrest in the circumstances will be a question of fact to be decided by the trial judge on a perusal of a number of factors. For example, ..., the seriousness of the offence for which the person was arrested, the heat of the moment, the conduct of the offender, the physical characteristics of the parties involved, the presence of weapons, the availability of other methods of arrest, and many other factors will be relevant in assessing whether or not the person arresting used only as much force as was reasonably necessary in the circumstances."

In the Chopra case, the Court held that Eaton's was vicariously liable for the force employed by its loss prevention officers beyond that which was reasonably necessary in the circumstances. The Court found that the loss prevention officer who detained and arrested Chopra grossly overreacted to Chopra's push and, in arresting him, used excessive force without lawful justification, thereby committing battery. Specifically, the Court pointed out the following circumstances:

- Chopra was about to leave the prem-

ises, and he clearly would have done so had the loss prevention officer done nothing;

- Chopra's assault was nominal, and the heat of the moment was minimal as well;
- the officer was a larger, younger, stronger and more fit man than Chopra;
- the officer had two fit young men present as backup;
- Chopra had no weapons and, while excitable, posed no realistic potential harm to anyone; and
- the officer employed force that he acknowledged could injure someone and did not release that force until much later than was deemed necessary.

Furthermore, during the arrest, Chopra was put in a headlock, knocking off his glasses and cutting his lip. Chopra also suffered a throat injury, which subsequently caused him to have voice problems.

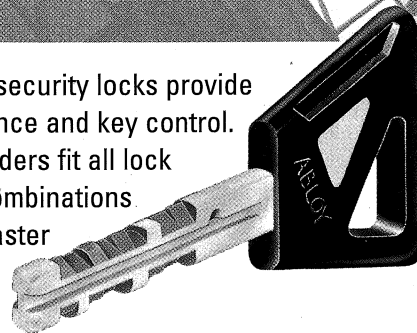
The Court heard evidence and found that Chopra sat handcuffed in the security office for approximately four hours. The loss prevention officer who arrested him did not call police for almost two-and-one-half hours. That same officer refused to allow Chopra to

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use the telephone to call his wife and initially refused Chopra's request for water. He also took Chopra's wallet and removed his driver's licence. And he photographed him without his consent.

With regard to the imprisonment, the loss prevention officer failed to remove the handcuffs for a considerable period of time. The handcuffs may have been necessary in the early stages of the arrest, but it was clear once the officer and Chopra arrived at the security office that Chopra posed no harm. By not removing the handcuffs, the officer was indirectly imposing force that the trial judge found to be excessive.

In the end, the Court held the loss prevention officer, and Eaton's by virtue of vicarious liability, liable in trespass for the unjustified battery committed upon Chopra's person. The Alberta Court of Queen's Bench allowed Chopra's action for battery and false imprisonment and awarded him \$23,000 aggravated general damages plus half of his legal costs.

The moral of the story is this: Loss prevention officers must not overreact or use excessive or unreasonable force. If they do, they may find both themselves and their employers being sued and ultimately found "liable in trespass for the unjustified battery" of an alleged trespasser. ★

Elliott Goldstein, BA, LL.B., is a barrister and solicitor in private practice. He is also the author of Visual Evidence: A Practitioner's Manual and a member of the Canadian Security Editorial Advisory Board.

Author's Notes

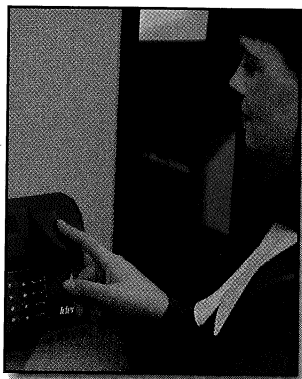
- 1 *Chopra v. Eaton Co.* (1999), 240 A.R. 201 (QB).
- 2 *R. v. Peters* (1970), 2 C.C.C.(2d) 336 (Ont. C.A.), affd. (1971), 2 C.C.C.(2d) 339 (S.C.C.).
- 3 *Chopra v. Eaton Co.* (1999), 240 A.R. 201 (QB).
- 4 *Ibid.*
- 5 At common law, a private citizen has authority to arrest in two situations: first, to prevent a breach of the peace; second, if a felony has been committed.
- 6 *Chopra v. Eaton Co.* (1999), 240 A.R. 201 (QB).
- 7 *Ibid.*
- 8 See *R. v. Baxter* (1975), 27 C.C.C.(2d) 96 (Ont. C.A.).
- 9 *Chopra v. Eaton Co.* (1999), 240 A.R. 201 (QB).

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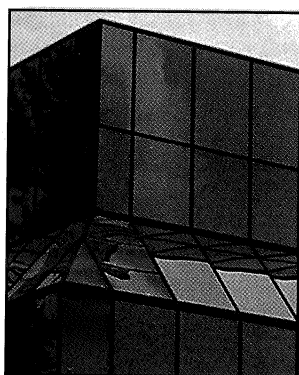
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