Evaluating the Outcome of Litigation for Negligence at Bank Automated Teller Machines (ATMs)

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Automated teller machines (ATMs) have increasingly become welcome features of consumer convenience over the past 15 years. In recent years, however, crime associated with these locations appears to have increased, precipitating plaintiffs' actions for negligence against ATM operators. This article reviews developments and suggests possible issues for plaintiff and defense counsels. Implication for security practitioners concerned with ATM security are apparent.

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Defending Assaults at Automatic Teller Machines

With its development, most of us have all come to appreciate and use automated teller machines (ATMs). These devices have proliferated (Miles, 1986:171, note 5; 172, note 6). They are now available at most banks and many of their branches. We see them, conventionally, in supermarkets and retail stores, as free-standing units, and, unconventionally, even at the City of New York police pound, which retains vehicles towed away for parking infractions until their fines are paid in cash.

The benefits of ATMs are obvious. The machines process deposits and withdrawals faster, cheaper, and, possibly, more accurately than people do (Developments, 1983). They also encourage customers to bank round the clock because they are not limited by normal banking hours. Machines are increasingly versatile, are not limited in available work hours, and, of course, they do not call in sick. Their biggest benefit to customers is convenience.

Deposits and withdrawals are the most common and frequent banking transactions: withdrawal of cash and the deposit of endorsed checks. Although many of us as customers, while waiting to use an ATM, may feel frustrated at the length of the prior customer's transaction, it is probably

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the result of the user's lack of understanding of how to operate the machine than the complexity of the transaction itself. Individuals do not and cannot complete complex business transactions at the ATM. Commercial establishments do not make cash deposits at ATMs requiring counting large sums of money. Money orders are not sold, checks are not approved, and sundry other banking business does not take place at the automated teller machines—just money in and money out. Capitalizing on this cost-saving technology, most banks have installed ATMs wherever feasible. Assaults against bank customers, like certain other types of bank crime, are on the rise.

Because these machines are open after business hours, the likelihood of an assault increases over assaults during business hours (Lipsig, 1984). More people congregate within and near a bank during regular business hours than they do in the evenings. The risk of assault at an ATM at night in proportion to the total number of transactions per day appears to be greater. The ATMs are usually unattended at night and operate where the risk of apprehension and identification is slight (Miles, 1986:171).

Documentation of a greater frequency of assaults occurring after business hours is virtually a certainty if your own records record these data. A plaintiff's attorney will compare the timing of assaults against customers with the bank's opening and closing hours. This point assumes the defendant bank maintains such records. Of course, if such records are not maintained, one might argue that the lack of them is evidence of failure to have taken reasonable measures to determine if greater security standards than currently applied are required for the protection of ATM customers.

Many of the institutions that have enjoyed all of the benefits of the ATMs have done so without investing in and providing for truly adequate security to protect their customers. These ATM users are encouraged to make off-hours transactions, in most cases at their own risk. Now is the time to address this matter before legislation does it for the entire banking community. One might look to the recent example in New York City where an ordinance passed the City Council and is now law in the five boroughs of New York. (See *Legislative Horizons*, section below.)

What Is the Plaintiff's Cause of Action?

The plaintiff's usual cause of action is nothing new and is known in premises liability circles as "inadequate security." Following common law theories of negligence, the plaintiff must prove that he or she suffered injuries that are the foreseeable acts of third persons while on the defendant's premises and where the defendant failed to take reasonable measures to warn or protect against them.[1]

Banks like any other property owner have a duty to protect their invitees (customers, vendors). That duty includes providing a safe place for their invitees when on bank premises and property.[1] The bank patrons have a right to expect a secure environment in which to conduct their business. The nature of a bank, holding and distributing money, creates a foreseeable risk.

Recognizing that a warning of potential harm is not going to be enough in many situations for the public to avoid harm, the Restatement (Second) of Torts finds that the landowner is under a **duty to exercise reasonable care** to provide such means as are available, or to provide such means in advance because of the likelihood that third persons . . . may conduct themselves in a manner that will endanger the safety of the visitor.[2] A New York court noted that, with prior incidents of harassment or theft, the bank must take steps to adequately protect its patrons (Stalzer, 1982; Miles, 1986: supra note 3, at 185). There must be a breach of the duty to provide a safe protected place. The breach of duty causes injury to the invitees, and the breach of duty is proximate to the injuries caused.

Foreseeability

The measure of what constitutes reasonable care is closely connected to the foreseeability of the assault that caused the injury complained of as well as the burden on the property owner to protect against it (Basso, 1976; Quinlan, 1977; Foster, 1981; Miles, 1986:171, 177). Jurisdictions differ on what constitutes a foreseeable event. The existence of a duty of the landowner to protect invitees from the reasonably foreseeable acts of third parties is well accepted. There is less general agreement concerning the extent of the duty and the foreseeability of the event when it in-

[1] Restatement (Second) of Torts § 344 (1965). 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 likely to be done, or

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

[2] Restatement (Second) of Torts § 344 comment d (1965).

volves crimes against a bank customer by a third party.[3] In *Oppenheimer* v. *Chase Manhattan Bank, N.A.* (Oppenheimer, 1984), the court recognized the risks in banking transactions and found foreseeability even if there were no prior robberies . . . at that branch.

The difficulty other jurisdictions have had finding foreseeability of assaults by third parties may be relieved in those cases where the ATMs and any assault occurs within an enclosed vestibule. This may present the strongest case for the bank liability (Miles, 1986: 171, 192).

Yet other jurisdictions have addressed the issue of assaults that occur away from the ATM. In the matter of *Salvamoser* v. *Pratt Institute,* the plaintiff was assaulted near her home, then forced to go to the ATM to withdraw cash.[4] In light of a limited number of civil cases involving ATMs and given the uncertainty of some jurisdictions to impose liability on banks for third-party assaults, even on their premises, off-premises assaults are sure to be an even more difficult area to litigate.

Duty

The plaintiff must allege a duty. In addition to the Restatement (Second) supra, there is authority in every jurisdiction defining the duty of the landowner for the criminal acts of third persons (Miles, 1986:171; Bazyler, 1979; Wilkins, 1980). Although the nature of the pleading is fundamental, the existence of a duty to guard against third-party actions is not so clear, nor unanimously supported in every jurisdiction. In an Alabama case, the Supreme Court of Alabama addressed the issue of whether the defendant bank owed a duty to the plaintiff to guard against criminal acts of a third party. The Court, while not overturning an earlier decision in *Henley* v. *Pizitz Realty Co.,* 456 So.2 272, 277 (Ala. 1984), holding that "a duty may be imposed on a store owner to take reasonable precautions to protect invitees from criminal attack in the exceptional case (emphasis added) where the store owner possessed actual or constructive knowledge that criminal activity which could endanger an invitees was a probability" (Williams, 1989) did say that we have not yet found the exceptional case that warranted the imposition of such a duty" (Williams, 1989:at 27). The knowledge of two prior incidents, alone, is insufficient to impose a duty on the bank otherwise absent (Williams, 1989:at 27).

[3] See *Basso* v. *Miller, Quinlan* v. *Cecchini, Foster* v. *Winston-Salem Joint Venture,* and Miles in references.

[4] *Salvamoser* v. *Pratt Institute,* 150 A.D.2d 666, 541 N.Y.S.2d 540 (N.Y. App. Div. 1989).

The Tennessee Court of Appeals addressed an appeal by the defendants who were found liable for the injuries received by a plaintiff during a robbery at an ATM. A comprehensive complaint averred various theories of liability and a jury returned a favorable verdict. The Court held that a private person has no duty to protect others from the criminal acts of third persons (Page, 1991).

The court in Page, supra at page 4, criticized the vagueness of the duty alleged by the plaintiff and the facts that presumably give rise to notice the bank had of other acts of violence. But in Page, the prior histories of crimes were five over a period of 4 years. Two occurred in 1984, one in 1986, one in 1987, and one in 1988. Three of the five occurred during the day. Thus, this pleading in the same jurisdiction, in a case where the prior history was more extensive and documented and known to the bank, may yield a different result.

A Florida jury held the Barnett Bank liable in the amount of $1 million to a college student who was shot in the head while attempting to make a deposit at a night depository; the location was on the outside of the bank's wall in St. Petersburg. Plaintiff's lawyers alleged that there had been other robberies, the facility was isolated and in a high-crime area, and surrounded by overgrown shrubbery (Verran, 1988).

Breach of the Duty

The nature of the breach of the duty will be plead by the plaintiff with specificity. If the breach of the duty was the failure to exercise a reasonable degree of care, the complaint will allege the manner in which reasonable care was not exercised. For example, this could include failure to maintain adequate security in providing operational door locks, the inoperability of video surveillance cameras, and inadequate or nonfunctioning lighting.

Typical allegations that should present themselves for consideration as a breach of the duty are

(a) inadequate lighting to deter crime
(b) inoperable lighting
(c) inadequate access control
(d) inoperable access control
(e) inoperable lock mechanism
(f) inadequate lock mechanism
(g) inadequate service and maintenance
(h) failure to service or maintain otherwise adequate mechanisms
(i) inoperable video surveillance cameras
(j) lack of video surveillance cameras