NATIONAL UNIVERSITY OF LESOTHO

THE LIABILITY OF A BANK FOR ROBBERY OF A CUSTOMER IN ITS PREMISES IN SOUTH AFRICA

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Declaration

I 'Makokoli Alice Moshesha, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook or other media. The contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

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CHAPTER ONE

1. INTRODUCTION

1.1 General Introduction

Banks play a significant role in the economy by providing essential financial services to individuals and businesses. Because of the nature of their banking business, which entails the handling of money, banks have had to put up some security measures in their premises. These security measures are not only meant to safekeep the money held or stored in the bank, but also to protect the employees of the bank and the customers from criminal attacks. The protection of customers in the bank premises is very important because customers are usually not allowed to bring or carry weapons into the bank. It is primarily for this reason that banks are usually perceived by members of the public as some of the safest place for customers, such that it is believed that customers cannot be robbed while in the bank premises.

The foregoing notwithstanding, however, customers do often get robbed in the bank premises in South Africa and many other parts of the world, including the United States of America. Whenever this happens, the customers who have been robbed of their monies believe that the bank should be held liable or responsible to compensate them for their loss; wherefore legal scholars, lawyers and courts of law have frequently had to examine the potential liability of the bank for robbery of the customer's money in the bank premises. This is by no means an easy question.

1.2 Problem Statement

The real difficulty with the issue concerned arises where money is stolen by robbers from the person of customer in the bank premises, *i.e.*, before it has been deposited or after it has been withdrawn. In such cases, the bank is understandably not liable or responsible for the customer's loss because possession and ownership of the money remained with the customer at the time of the robbery. Consequently, the next best alternative for the customer who wishes to recoup their loss from the bank is to seek a remedy in delict. This, in turn, raises the issue whether a customer who has been robbed in the bank premises has a right of action in delict against the bank. It has been

held in the case of *Lillicrap Wessenaar and Partners v Pilkington Brothers*[1], that a person cannot claim delictual damages where their cause of action arises purely from contract or from a contractual relationship with the defendant. As mentioned above, the bank-customer relationship is uniquely contractual in nature.

There is a handful of authorities in South African law to the effect that, despite the contractual nature of their relationship, the bank can be held liable to the customer in delict. This is only possible if the customer can demonstrate that the action of the bank complained of constitutes both a breach of contract and a breach of a duty of care. Put simply, the customer needs to demonstrate to the satisfaction of the court that the bank owed him or her a legal duty of care to prevent their loss, and that the bank failed to take reasonable steps or measures to prevent that loss.

There is present not a single judicial authority in South African law that recognizes the existence of a legal duty of care on a bank to protect its customers from loss of money to robbers in the bank premises. This gives rise to a question whether a bank is under a legal duty in South African law to make its premises safe and secure for customers. This issue necessarily requires a detailed research into the meaning or definition of the concept of a "legal duty of care," and into what factors South African courts usually consider in determining whether one person owes another a legal duty of care.

If it is established that banks owe their customers a legal duty to make their premises safe and secure for the conduct of financial activities, the next important question concerns the standard or nature of security measures that a bank is required or expected to implement in order to avert the customer's loss. This is also a question on which South African law provides no ready solution or guidance. As it has been observed by the South African Ombudsman for Banking Services, the provision of robust security at the bank premises may carry along a number of disadvantages. Some of these disadvantages are that, the provision of day-to-day banking services may become practically difficult or impossible, also that robust security may encourage larger gangs who are prepared to shoot first. It is clear, therefore, that the courts need to develop guidelines, first concerning security measures that a bank can

[1] 1985(1) SA 475 (W).

put in place, and the circumstances or conditions under which those security measures need to be heightened.

1.3 Hypothesis

This research proceeds on the presumption that banks have a legal duty to make their premises safe for their customers, and breach of this duty renders a bank liable to the customer where the customer is robbed while in the bank premises.

1.4 Aims and Objectives

The aims and objectives of this research are to:

a) Discuss the concept of duty of care;
b) Establish whether a bank owes a duty of care to protect its customers against robbery in the bank premises;
c) Determine the circumstances under which a bank may be held liable for robbery of a customer in its premises, and
d) Make recommendations for the development of the law on the concerned issue.

1.5 Research Methodology

This study is mainly based on literature review of relevant primary and secondary legal sources including case law, legal text books, law journal articles and internet material sourced from reliable websites. These sources will be subjected to a critical analysis with a view of addressing the research question of this dissertation, namely the extent to which a bank may be held liable for the robbery of the customer's money in its (bank's premises).

The research will also employ a brief comparative analysis of South African law (RSA) and the law of United States of America (USA) in relation to the liability of the bank for the customer's robbery.The USA is specifically chosen as a comparator for this research because it is one of the leading countries in banking services and financial markets. Banks in the USA have been targets of criminal activities (including robberies, theft and larcenies) from as early as the 1800s, and remain to be so to date. With one of the most effective law enforcement and judicial machineries in

the world, the USA boasts a rich jurisprudence, in both criminal and civil law, on aspects of bank robberies. Additionally, the USA has also enacted comprehensive legislation dealing with security at banking institutions. These legislation includes the Bank Protection Act of 1968, which deals with minimum security standards and procedures for Federal Reserve Banks and state member banks. Valuable lessons may be drawn from this jurisprudence for the development of South African law, which to date lacks a clear direction on the question of this research.

1.6 Chapter Outline

Chapter two

The second chapter will discuss the bank's liability for robbery of a customer in its premises in South Africa. The first part will discuss in detail the crime of robbery under the South African law. The second part will look into the liability of the bank for the robbery of the customer focusing on liability for deposited and undeposited money. With regard to liability for undeposited money, the chapter will consider a legal duty of banks to protect its customers against robbery.

Chapter three

The third chapter will deal with USA law on the liability of banks for customer robbery, and will also involve a brief comparative analysis of RSA law and USA law. The first part of the chapter will discuss the liability of banks for deposited money in the USA and the second part will deal with general principles of tort liability in the USA. The third part will discuss the liability of banks for customer robbery (undeposited money) under the USA law, while the fourth part will make a comparative analysis between these two jurisdictions.

Chapter four

The last chapter will entail final conclusions derived from the discussions and analysis made in the foregoing chapters. The chapter will be concluded with recommendations and suggestions for the development of the law and for further research on the topic.

CHAPTER TWO

2 THE BANK'S LIABILITY FOR ROBBERY OF THE CUSTOMER IN ITS PREMISES IN SOUTH AFRICA

2.1 Introduction

Banks range high in the list of targets for armed robbers. This is not surprising because as the deposit taking institutions, banks are always in possession of large sums of money. This in turn lures robbers and thieves. Bank robberies usually occur in two forms; first being cash in transit heists and second being robbery at the bank premises(often referred to simply as "bank robbery"). These robberies often involve a high degree of violence intended to coerce security guards and bank officials, sometimes even bank customers, into handing over the money to the robbers.

In banking law, ownership of the monies held in the accounts of the customers belong to the bank. Consequently, it is usually the banker and not the customers, who suffer losses from a successful robbery. In other words, despite the fact that it has been robbed, the bank is ultimately liable in law to repay that money to the customers on demand. That notwithstanding, however, there are instances where robbery within the premises of the bank may cause a direct loss to the customer. For instance, robbers can take away money by force from a customer before he or she can deposit it with the bank, or after he or she has withdrawn it from the bank. In such instances, the customer may seek to recover the stolen money from the bank, primarily on the basis that the bank failed to provide adequate protection or security to ward off the robbers.

The objective of this chapter is to discuss the liability of the bank for the money stolen from the customer, by robbers within the premises of the bank. The first part of the chapter will discuss in detail the crime of robbery in the law of South Africa. The second part of the chapter will discuss the liability of the bank for the stolen money, first for the money stolen after it has been deposited into the bank and second before it has been deposited or after it has been withdrawn from the bank. Conclusions will follow.

2.2 The Crime of Robbery Under the Law of South Africa

Robbery is a criminal offense in South Africa that is defined as theft of property by unlawfully and intentionally using violence to take property from someone else; or threats of violence to induce the possessor of the property to submit to the taking of the property.[2] It is classified as a schedule 1 offence,[3] which means it is one of the most serious crimes in South Africa. The penalty for robbery varies depending on the circumstances and the offender's history. For instance, a first offender may be sentenced to 15 years' imprisonment, while the second offender may face 20 years and the third offender 25 years.[4]

Customarily, the crime of robbery is described as theft by violence.[5] The crime of robbery is distinct from other forms of theft such as shoplifting and pick-pocketing by its inherently violent nature. The violence is aimed at threatening the person who is being robbed to give up the property.[6] For one to be convicted of the crime of robbery, the prosecution must prove all the elements of that offense. The essential elements of the crime of robbery are; (1) theft, (2) violence or threats of violence, (3) causal link between the violence and the taking of property and (4) intention to steal and to use force to overcome the victim's resistance to the stealing of the property.[7] These elements are discussed separately and in detailed below.

2.2.1 Elements of the crime of robbery

2.2.1.1 Theft

A completed crime of theft is an essential element of the crime of robbery.[8] It can be defined as the taking of property belonging to someone else with the intention of permanently depriving that person of that property.[9] In relation to theft as an element of robbery,the *actus* must take the form of appropriation, in that there must be the taking of property with the aim of depriving the lawful owner or possessor thereof

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[2] CR Snyman,*Criminal Law,*(5th edn, 2002) 517.
[3] *Criminal Procedure Act, 1977 Schedule 1.*
[4] *Criminal Law Amendment Act 105 of 1997,Section 51(2) (a).*
[5] S v Benjamin 1980(1) SA 950(A) p 958(H).
[6] S v Sithole 1981(1) SA 1186(N).
[7] Sv Makeleni (CC 74/2015) para 6.
[8] Jonothan Burchell, *Principles of Criminal Law* (fourth edn, 2013) 708.
[9] PMA Hunt,*South African Criminal Law and Procedure* vol. II Common Law Crimes revised(3 nd ed (1990)681.

control over such property. [10] This was said to be so in the case of *S v Dlamini*[11] wherein the accused who was in a self-service shop, took a shirt and hid it under his jacket, securing it with his arm. Before he could reach the pay point, he was apprehended by the security guard, and charged with theft.

The issue before court was whether the accused was correctly charged with theft or whether he should have been charged with attempted theft only. In addressing this issue, the court explained that the essential elements of theft do not change or differ where the crime is committed in a self service shop; the same legal principles govern the situation and simply have to be applied to the particular facts and circumstances. The court stated further that in dealing with the crime of theft, accused's intention is to be inferred from the manner in which he deals with the property and the intention must be to permanently deprive the complainant of the benefits of his ownership.

It then came to the conclusion that in *casu*, it could be inferred from the facts that the accused hid the shirt under his jacket and gripped it under his arm and that he had no money on his person, thus having no intention of paying for it at the pay point, that he had control over it and had already formed the final intent to deprive the owner of his ownership. It was therefore held that the accused was correctly convicted with theft. Additionally, the owner must not have consented to the taking of such property and the accused must have been aware of the lacking of consent. That is, where the accused used violence to take the property belonging to another with the bonafide belief that it is his own property, then he cannot be taken to have committed the crime of robbery.[12]

2.2.1.2 Violence

The use of violence or threat of violence is an essential element of the crime of robbery. It can be deduced from the definition of robbery above, that this crime can be committed in two ways namely, first being by means of violence or second by threats of violence. The real use of violence must be directed at the person of the victim,*i.e*, against his bodily integrity.[13] The purpose of this violence should be to induce the

[10]Burchell (n 5) 676.
[11] 1984(3)SA 196(N).
[12] Snyman (n 1) 517.
[13] Ibid.

victim to submit to the taking of the property or to overcome resistance on the part of the victim to the taking of the property.[14] This element was considered in detail in the case of *S v Pachai*[15].The accused in that case had telephoned the victim, being a shopkeeper demanding the money and the cigarettes. During the telephone conversation, he told the shopkeeper that he would come in the evening to collect the items. The shopkeeper reported the matter to the police, who then came to the store and hid in wait for the accused. In the evening the accused arrived and pointed a pistol at the shopkeeper, who in turn handed some money and the cigarettes.

The accused was arrested by the police; subsequently being charged and convicted of robbery. On appeal, the court came to the conclusion that the prosecution had failed to prove beyond a reasonable doubt that the shopkeeper was induced by fear or threats to hand over the articles. The finding of the court was that the items were handed over pursuant to an arrangement between the shopkeeper and the police, not out of fear of violence or threats of violence.[16] The court further stated that it is an essential part of the crime of robbery that the violence should have caused the obtaining of possession of the articles by the perpetrator.[17] The accused was, however, found guilty of attempted theft.

The crime of robbery can also be committed even where there is no real violence to the victim. A mere threat of physical harm directed to the victim with the aim of inducing him to hand over the property is also sufficient to constitute the crime of robbery.[18] The courts have not yet pronounced themselves as to what nature of threat would lead to conviction of robbery. It has merely been stated that only threat in that regard that it is only threat which would lead to a conviction of assault that qualifies as a threat for the robbery.

2.2.1.3 Causal link between the violence and the taking of property.

For the conviction of the crime of robbery, there must be a causal link between the violence or threat of violence and the taking of property. The proposition is that the

[14] Hunt (n4) 644.
[15]1962 (4) SA 246 9(T).
[16] Ibid 249 para E.
[17] Para F.
[18] S v Moloto 1982(1) 844(A) 850B-C.

violence must precede the taking of the property.[19]However, this is not absolute as there may be instances where the crime of robbery would be regarded to have been committed even-though the violence follows the completion of theft as it was decided by the Appellate Division in *S v Yolelo.*[20] wherein the court held that;

> Robbery can also be committed if violence follows on the completion of the theft in a judicial sense. In each case an investigation will have to be made into whether, in light of all the circumstances, and especially the time and place of the (accused's) acts, there is such a close link between the theft and the commission of violence that they can be regarded as connecting components of substantially one action. This is also applicable to a threat of violence so far as it can be an element of robbery. [21]

2.2.1.4 Intention

As in all other offenses, intention is an essential element of robbery. The burden is on the prosecution to prove beyond a reasonable doubt that the accused had the intention to commit robbery in that; the accused had intended to steal the property and that he had intended to use violence or threats to overcome the victim's resistance and to induce submission to the taking of property.[22]

Failure to do so will result in the accused not being found guilty on the charge of robbery as it was explained in *S v Makeleni*[23]where the court was faced with a task of considering the questions of law, which one of them was whether the trial court erred in applying the test regarding inferences to be drawn from circumstantial evidence, in reaching a conclusion that the circumstantial evidence does not demonstrate the intention to rob.
The brief facts upon which this question of law was to be considered are that the respondent, who knew that the money was kept in the deceased's apartment was seen leaving the deceased's apartment, returning and thereafter leaving it again. Despite absence of witnesses to the commission of offenses that the respondent was charged with, the trial court found that the only reasonable inference to be drawn from the proved facts was that it was the respondent. The factors that contributed to the finding of the trial court were that, the respondent was seen inside the deceased's apartment

[19] Burchell (n 5) 713.
[20] 1981(1) SA 1002 (A).
[21] Ibid 1009.
[22] S v Benjamin en 'n Ander 1990 (1) SA 590, p 958H.
[23] [2016] ZAECGHC 66 (18 August 2016).

on the CCTV footage and that upon his arrest, the items from the deceased's apartment were in his possession.

In its consideration, the court held that:

> In this case, the factual ingredients for mens rea element for the crime of robbery (i.e the intention to cause the victim to submit to the taking of the property) are absent. whether or not those ingredients are present is a question of fact. A question of law is not raised simply by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, especially when there is no doubt or dispute as to what those ingredients are.[24]

2.3 The Liability of a Bank for Robbery of a Customer

2.3.1 Liability for deposited money

The relationship between the bank and the customer is contractual in nature[25] and is customarily classified as that of a debtor and creditor, where the bank is a debtor and the customer a creditor as defined in *Kearney NO v Standard Bank of South Africa*[26]. Wherein Hill J stated that;

> Ordinarily the relationship of a customer and bank is that the customer is the creditor and the bank the debtor who is obliged to pay the customer's cheques when the account is in credit. Any amount deposited to the credit of the customer immediately upon receipt becomes a loan to the bank and and is not held in trust for the customer. The relationship is different when the customer's account is overdrawn. In that case the customer is the debtor and any deposit to his account is in effect pro tanto payment of the customer's indebtedness to the bank.

It is clear from the definition in the case above that debtor-creditor relationship between the bank and the customer is created when the customer deposits money into his bank account thus creating a credit balance[27] and that the money in the credit balance is considered in law as a loan to the bank, which is repayable to the customer on demand or under agreed circumstances.[28]

As it has already been stated that when a customer deposits money into a bank account it becomes that of the bank, if the customer's money is stolen after it has

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[24] Ibid para 17.

[25] Chris Nagel & Joseph Thomas Pretorius 'Mandate and the bank and customer relationship' [2016] Vol 79 Journal.
of Contemporary Roman-Dutch Law p 514 Da Ungaro & Sons (Pty) v Absa bank Ltd [2015] 4 All SA 783.

[26] 1961(2) SA 647 (T) p 650.

[27] Standard Bank of SA Ltd v OAneanate Investments (Pty) Ltd 1995(4) SA 510 (C) at 530 G-H.

[28] Joachimson v Swiss Bank Corp [1921] 3 KB 110.

already been deposited, the bank is liable in contract to refund the customer that money on demand. This is illustrated in the case of *Transitional Local Council of Randfontein v Absa Bank Ltd.*[29] In that case, the plaintiff and the defendant bank had an arrangement in terms of which the latter would send one of its employees to the council's premises to count and verify cheques and cash intended to be deposited by the council into its account held with the bank. Pursuant to that arrangement, the defendant bank had sent one of its tellers to the plaintiff's premises whereupon she counted money which was intended to be deposited into the plaintiff's account in the form of cash and cheques. Upon completion, the teller issued out the signed and stamped deposit slip and left with the cheques. She left the cash in a metal box at the premises of the plaintiff for collection by the bank's security company. The money was then stolen from the safe by an unknown person before it could be collected by the company.

The plaintiff sought an order directing the bank to credit its accounts with the stolen money. The bank in turn made a counter-claim against the plaintiff seeking an order directing the plaintiff to refund it with the stolen money. The court had to consider whether the bank was liable to the plaintiff for the stolen money.The court held that by issuing a deposit slip, the bank teller acknowledged that the bank had received ownership of the money from the customer. As a result, the bank bore the risk in the stolen money as it was by then the money of the bank. The court held that the bank was liable to credit the account of the customer with the money.

2.3.2 Liability for undeposited money

On the other hand, if the money is stolen before it can be deposited, the bank is generally not liable in a contract to refund the customer. This was illustrated in the case of *Balmoral Supermarket Ltd v Bank of New Zealand*[30] wherein an employee of the plaintiff went to the defendant bank to deposit money in the form of cheques and cash. The employee placed some money on the counter in front of the cashier who started counting it. While in the process of counting the money, the robbers entered the premises, pushed away an employee and took the money that had not yet been counted by the cashier.

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[29]2000(2) SA 1040(W).
[30] (1974) 2 LIoy's Rep 164.

The plaintiff instituted an action against the defendant, claiming recovery of the money that was taken by the robbers on the basis that ownership of property in money had already been passed to the bank from the time when an employee placed the money on the cashier's counter to be deposited, thus placing liability on the defendant. In deciding the matter, the court explained that the property in the money, or legal ownership of the money had not passed to the bank at the time when it was taken by the robbers. The defendant was not found liable.

It has been shown above that the bank is only liable to refund the customer for money that has been deposited. As illustrated in the case *of Balmoral Supermarket Ltd v Bank of New Zealand* above, the bank cannot be held liable to the customer for money stolen by robbers prior to it being deposited, or after it has been withdrawn from the account, notwithstanding that robbery occurs in the premises of the bank. It is important to note that the above conclusion is based exclusively in contract, *i.e*. on the contractual relationship existing between the bank and the customer. That contract does not generally obligate the bank to refund the customer for funds stolen by third parties from his (the customer) possession. Seeing that the customer has no recourse on contract to recover funds stolen by robbers within the premises of the bank, it is not difficult to appreciate that he may be steered by that fact to opt for delict as the next best alternative. This raises a question whether the bank can be made liable in delict to the customer for money stolen by robbers from the customer in the premises of the bank.

Although the banker-customer relationship is contractual in nature, it is not peculiar for customers to seek delictual remedies against the bank. South African courts have generally allowed such actions, even if the customer has a remedy in contract.[31] This issue was held to be so, amongst others, in the case of *Holtzhausen v Absa Bank Ltd*.[32] In that case, the plaintiff desired to sell some diamonds, for a sum of R500 000, to a person whom he had met casually. This person purported to be an agent of an undisclosed principal, and was to be paid a commission of R20 000 by the plaintiff. In due course the purported agent advised the plaintiff that R500 000 had been paid into a Johannesburg bank for the credit of the plaintiff's account. He provided the plaintiff with three telephone numbers to verify the information.

[31] Pilkington Brothers S.A (Pty) Ltd v Lillicrap, Wessenaar and Partners 1983 (2) SA 157(W) p 169.
[32] 2008 (5) SA 630 (SCA).

The plaintiff obtained a copy of his bank statement, which showed that such an amount had indeed been credited to his account. He assumed (correctly, as it transpired) that the deposit in the Johannesburg bank had been by cheque. He then approached the manager of the defendant bank, where he kept his account, to ascertain whether he could safely proceed with the transaction and hand over the diamonds. The manager was apprised of the reasons for the enquiry, and was furnished with the three telephone numbers given by the agent to the plaintiff. After making several telephone calls, the bank manager gave the plaintiff an assurance that the money was safe and that he could proceed with the transaction. The manager also personally authorized the withdrawal by the plaintiff of the R20 000 commission payable to the agent.

It transpired subsequently that a fraud had been perpetrated and the credit to the plaintiff's bank account had been reversed. The plaintiff instituted an action, in delict, for pure economic loss, against the bank. The basis of the claim was that the bank manager had been negligent in advising the plaintiff to deliver the diamonds without first verifying that payment had been made into his account. One of the issues to be decided was whether the plaintiff had a cause of action against the bank in delict. In defending the matter, it was argued for the bank that, instead of delict, the plaintiff should have based his claim in contract. This argument, which was accepted by the court a quo, was predominantly based on the case *of Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd*,[33] wherein the Appellate Division ruled that it would be unjustified to grant a delictual remedy "[w]here the subject-matter of a claim is entirely contractual … [and] contractual remedies are entirely adequate to protect the plaintiff …."[34]

On appeal, the Supreme Court held in favour of the plaintiff. With specific reference to the issue at hand, namely whether the plaintiff's action should have been based on contract, instead of delict; the court reasoned that the plaintiff was not prohibited from recovering delictual damages by the simple fact that the manager's conduct also constituted a breach of contract. After a careful review of leading authorities on the matter, Cloete JA explained that:

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[33] 1985 (1)SA 475 A.
[34] Ibid p 499.

> *Lillicrap* is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent. On the contrary, Grosskopff JA was at pains to emphasize (at 496D-I) that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to pursue."[35]

It is important to note that the customer can only seek delictual damages from the bank for breach of the legal duty of care.[36] In other words, the banker's conduct, which occasioned loss to the customer, must constitute a breach of the legal duty of care. The "legal duty of care" referred to here should not be confused with the "banker's duty of care," which imposes an obligation on the bank to exercise reasonable care in performing the mandate of the customer.[37]

The banker's duty of care is fundamentally contractual in nature because it is implied by law into the contract formed between the bank and the customer.[38] Aside from that, the application of the banker's duty of care is mostly restricted to the performance of ordinary banking duties such as the making and receiving of payments, and the giving of financial advice.[39] The legal duty of care, on the other hand, is a duty imposed by law on a person to prevent reasonably foreseeable harm or loss to another.[40] In other words, a person is said to owe another a duty of care if it is reasonably foreseeable that their conduct will cause harm or loss to another.[41] Failure to take reasonable steps to prevent such loss or harm amounts to a breach of the duty of care.

It is important to note that South African law does not automatically impose delictual liability on a person for failure to prevent loss or harm to another. As put by Mamosebo J in the case of *Sampson v Legal Aid South Africa*,[42] the "[n]egligent causation of pure economic loss is not regarded as *prima facie* wrongful. Its wrongfulness depends on the existence of a legal duty."[43] In other words, a person can only be made liable for loss or harm that has befallen another if he had a legal duty to prevent it. As explained by the court in the above mentioned case, whether or not a

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[35] Holtzhausen (n 24) 564 para 7.
[36] Minister of Safety and Security v Hamilton 2004(2) SA 216 (SCA) para 16.
[37] First National Bank v Kgethile [2021] ZANWHC 63 para 36.
[38] Ibid.
[39] Ibid para 42.
[40] Minister of safety and Security v Duivenboden [2002] ZASCA 79 para14.
[41] Ibid.
[42] [2022] ZANCHC 49.
[43] Ibid para 18.

person had a legal duty to prevent the occurrence of loss or harm to another "… is a matter for judicial determination involving criteria of public or legal policy [considerations] consistent with constitutional norms."[44] Putting aside predetermined cases where judicial authority has already determined that certain categories of people have a legal duty to prevent loss or harm to another clearly defined group,[45] South African courts judge on a case-by-case basis whether the defendant must be settled with a legal duty.[46]

There is no universal rule as to what factors a court needs to take into consideration when determining whether a legal duty of care must be imposed on the defendant towards the plaintiff. This does not mean, however, that the creation of a legal duty depends exclusively on the idiosyncratic views of an individual judge.[47] As explained by the Supreme Court of Appeal in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*,[48] such an approach would create further uncertainty as the outcome of each case. The Court in that case identified at least two policy considerations that South African courts usually consider in deciding whether to impose a legal duty of care. These considerations are:

a) ***Multiplicity of actions***: The court explained that delictual liability for pure economic loss will readily be imposed "for a single loss of a single identifiable plaintiff occurring but once and which is unlikely to bring in its train a multiplicity of actions."[49] What this means is that a court will not create, recognize or impose a legal duty of care if doing so would open floodgates of litigation. As explained by the Constitutional Court in the case of *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*,[50] cases of pure economic loss are distinguished from cases of physical harm or damage to property (caused by the negligent conduct of the defendant) by the fact that pure economic loss can spread widely and unpredictably. The court illustrated this observation with two examples,

[44] Fourway Haulage (Pty) Ltd v SA National Roads Agency Ltd 2009(2) SA 150 (SCA) 156 para 12.
[45] See Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd [2008] ZASCA 134, para 25.
[46] See Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd, para 20, citing Canadian Supreme Court in Canadian National Railway Co v Norsk Pacific Steamship Co Ltd (1992) 91 DLR (4th) 289 at 366.
[47] Para 24.
[48] (653/07) [2008] ZASCA 134 (26 November 2008).
[49] Para 24.
[50] [2014] ZACC 28.

namely where people react to incorrect information published in a newspaper and where businesses incur expenses or lose profits as a result of power outages. The recognition of a legal duty of care in such cases would result in the risk of "liability in an indeterminate amount for an indeterminate time to an indeterminate class of people."[51].

b) ***Undue burden and unjustified limitation on defendant's activities***: The court explained in that regard that a court may refuse to recognize a duty of care where doing so would unwarrantedly create an additional burden for the defendant or constitute an unjustified limitation of the defendant's commercial activities.[52] The same view was expressed by the Constitutional Court in the case of *Steenkamp NO v Provincial Tender Board, Eastern Cape*.[53] That case concerned an action for delictual damages, instituted by the liquidator (plaintiff) of a tenderer, against the Provincial Tender Board of the Eastern Cape. The defendant had initially awarded a tender to the tenderer in issue, but the tender was later on set aside upon application for review by one of the unsuccessful tenderers. The liquidator claimed from the defendant out-of-pocket expenses, in the form of director's and consultants' remuneration, incurred by the tenderer after it was awarded the tender. The court ruled that "to afford an unsuccessful tenderer such a claim in our society would unduly burden the public purse that is already beset with more legitimate claims than it can possibly meet."[54]

   The recognition of a legal duty should also not limit or interfere with the commercial activities of the defendant in an unjustifiable manner. For instance, in the case of *Road Accident Fund v Shabangu*,[55] the Supreme Court of Appeal refused to hold an attorney liable for failure to investigate the true facts of a claim that he had made to the Road accident fund. The claim was made as a result of fraud by a person who claimed to be the widow of the deceased, who had died as a result of a car accident. It transpired later on, after the Road Accident Fund had already paid compensation to the fraudster, that

[51] Para 24.
[52] Para 26.
[53] [2006] 1 All SA 478 (SCA).
[54] Para81.
[55] 2005(1) SACR 349 (SCA).

she was not the widow of the deceased. In reaching it's decision, the court explained that holding the attorney liable would;

> "... undermine the attorney-client relationship which, as a matter of policy, is regarded as so intimate that in the law of evidence it is even protected by a special privilege of confidentiality."[56]

c) ***Boni mores and legal convictions of the community***: another important factor considered by courts in deciding whether to create or recognize a legal duty of care are the moral (boni mores) and legal convictions of society. Courts will impose delictual liability for pure economic loss if conduct of the defendant is both morally and legally reprehensible. As explained by the court in *Ministerof Law and Order v Kadir*,[57] a legal duty of care to prevent harm or loss to another arises:

> "when the circumstances are such, not only that the omission evokes moral indignation, but also that the legal convictions of the community demand that it be regarded as wrongful and that the loss should be compensated by the person who failed to act positively."

In other words, the defendant will ordinarily not be held liable if, from the perspective of societal attitudes and public and legal policy, it is not fair or justified to saddle him with a legal duty to prevent economic loss or harm to another.

2.3.3 Does the bank have a legal duty to protect customers from robbery in their premises?

There is no judicial authority in South African on whether banks are liable delictually to their customers for the theft of the customers' money by robbers in the premises of the bank, before the money is deposited or after it has been withdrawn. This question has also been largely ignored by legal scholars. For purposes of this research, the pressing issue is whether it is possible in South African law to impose on banks a legal duty of care to protect their customer's from robbers in their premises. The emphasis in this question is on the fact that the robbery of the customer occurs within the premises of the bank. There is, however, a need for clear understanding as to what

[56] Para 18.
[57] 1995(1) SA 303 (A).

constitutes bank premises as this may also create some issues concerning imposition of duty on banks to protect customers. For example, if the customer is robbed just few steps after withdrawing cash from the ATMs in a mall, this may raise issues as to who has a duty to protect the customer against criminal attacks, is it the bank or the mall? This, therefore, calls for the determination of what constitutes bank premises in South African law.

In South Africa,in accordance with the Banks Act, NO.94 of 1990 "bank premises" include land or buildings owed by the reporting bank and used or intended to be used mainly for the purposes of conducting its business as a bank, including any relevant amount in respect of an official residence or capital cost of a leasehold premise.[58]In other words, bank premises refer to the physical locations and properties that a bank owns or leases to operate its banking business in South Africa.This includes banking houses,drive in banking facilities and teller facilities (staffed or automated) together with adjacent parking, storage and service facilities.[59] Therefore, it is clear that if banks are imposed with the legal duty of care to protect the customers against robbery, customers will enjoy protection only when they are within these areas that are determined to be premises of the bank.

Banks are generally considered to be safe, which explains why members of the public prefer to keep their money there, instead of keeping it at home. Modern banks have access to different security options including the hiring of specialized security personnel/companies, door barriers, metal detectors panic buttons among others. The use of some of these tools can help prevent the robbery of customer's money in the bank. It is submitted that public morals demand that banks should in fact employ some form of security to protect its customers. This submission is based on the well-known fact that a majority of people who go to the bank are there to either deposit or withdraw money, which makes bank premises a prime target for robbers. Society would no doubt frown upon a bank that does not provide any form of security and protection to customers in its premises.

The legal convictions of the community, on the other hand, will not hold the bank responsible for every act of robbery that befalls the customer in its premises. As

[58] *Banks Act, NO.94 of 1990 (Regulations),*section 90, schedule 1.
[59] Law Insider, https://www.lawinsider.com/dictionary /bank-premises.

explained by the South African Ombudsman for Banking Services, it is for the court to determine on a case-by-case basis whether a bank must be held liable to the customer for failure to provide adequate security.[60] The determination of this issue may depend on a number of factors including the location, size and nature of the bank, past robbery experiences and the category of customers served. For example, it is not unreasonable to expect a bank that operates business accounts only, or is located in a notoriously unsafe place, or has been a target for robbers before, to increase its security as the risk of robbery is foreseeable in some of these cases. When evaluating legal convictions on this matter, it is also important to keep in mind that increasing security will not necessarily ward of robbers. As noted by the Ombudsman for Banking Services:

> "More security guards in a bank might deter criminals but might also simply encourage larger and better-armed gangs to rob the bank. More security measures might hinder day-to-day banking to such a degree that it becomes impractical. Armed security guards may encourage armed robbers to rather shoot first, which could endanger customers."[61]

This does not mean, however, that a bank should not provide security and protection to its customers. At any rate, public morals and legal conviction of the community require the bank to take security measures, and deem as blameworthy any failure by the bank to provide adequate security and protection.

Moving further, it is submitted that the imposition of liability on a bank for the robbery of the customer would not create multiple actions. This is so because, in South African law, a bank customer is clearly an identifiable person; being the holder of a current account.[62] When robbers enter a bank and steal from one or more people, those people can easily be identified, and it would not be difficult to determine whether they are customers or mere invitees. Secondly provided the customer is able to prove their loss, the amount of damages for which the bank is made liable would also be determinable. Thirdly, the robbery of a customer is a once of event for which the bank would be made liable that one time when it has occurred. It is on this basis

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[60] Ombudsman for Banking Services, Bank Robberies/ Safety Deposit Box Theft, Consumer Note 9,(January 2018).
[61] Ibid.
[62] Standard Bank of SA v Minister of Bantu Education 1966 (1) SA 229.

that this research takes the view that holding the bank liable would not result in the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class.

It is a difficult question whether the imposition of liability on a bank for the robbery of a customer creates unwarranted burden or limits the activities of the bank. The Ombudsman for Banking Services warns in that regard that "[m]ore security measures might hinder day-to-day banking to such a degree that it becomes impractical." It is submitted that imposing a duty of care on the bank by requiring it to provide a safe and secure environment for its customers does not create an unwarranted burden.

Banking services are by their very nature susceptible to interference by criminal activities such as theft, robbery and fraud among others As between the bank and the customer, the bank is clearly in the best position to take security measures to protect its employees and patrons. It cannot be expected that bank customers should provide their own security while in the premises of the bank, e.g. by bringing guns and other weapons to ward of robbers. In fact, almost all banks in South Africa prohibit customers from carrying guns in their premises. For this reason, it may be argued that banks do have a legal duty to ensure the security and safety of their customers within the bank premises.

2.4 Conclusions

In conclusion on this matter, this research takes the view that failure by the bank to put in place adequate security measures in its premises creates a real risk of robbery, not only for the bank, but for the customers also. The creation of this risk amounts to negligence in that it results in foreseeable loss or harm occasioned by robbers on customers. At the end, it is submitted that South African courts should not hesitate to hold a bank liable where it is evident that the bank failed to provide its customers with security and protection.

CHAPTER THREE

3 LIABILITY OF BANKS FOR CUSTOMER ROBBERY IN UNITED STATES OF AMERICA

3.1 Introduction

Bank customers in the United States of America have also become victims of criminal acts that take place in the bank premises, such as fraud, robbery and other violent crimes when they have visited the bank premises to perform their business transactions. Banks are entrusted with the responsibility of keeping safe the customers' money.Therefore it is generally believed that when a customer is in the bank premises, he or she is safe and cannot fall victim of any criminal attacks since banks are known to have tight security. Consequently, customers who have been robbed of their monies while on the bank premises usually proceed against the bank for compensation of their stolen money.

The claims are often on the basis of the bank's negligent failure to keep its premises safe in order to scare away criminals or staff actions which caused security breach and exposed the customer to the robbery. American courts have been faced with a difficult situation of determining whether banks are liable for the robbery of the customer while in their premises.

This chapter will discuss the issue of liability of banks for the customer's stolen money in the event of robbery in the USA. This will be achieved by firstly discussing liability of banks for deposited money on the basis of contract, secondly the general principles of tort liability, thirdly the liability of the bank for robbery of the customer, and lastly a brief comparative analysis of RSA law and USA law. USA law will be used a comparator because USA is one of those countries with vibrant banking systems in the world and also have a large number legal precedents on robbery which countries such as South Africa may use to resolve its own issues relating to robbery incidents. Conclusions will follow.

3.2 Liability for deposited money

In the United States of America, the relationship between the bank and the customer is defined as that of a debtor and creditor, whereby the bank is the debtor and the customer the creditor.This relationship is founded on contract.[63] The relationship arises when a customer deposits money into the bank and such a deposit is taken to be a loan to the bank.[64]Ownership of the money deposited by the customer passes immediately to the bank and the bank may use it for its own purposes.[65] However, the bank is under an obligation to pay that money to the customer on demand. This was said to be so, in the case of *Morse v Croker National Bank*[66] wherein the court stated that:

> It is axiomatic that the relationship between a bank and its depositor arising out of a general deposit is that of a debtor and creditor. Such a deposit is in effect a loan to the bank. Title to the deposited funds passes immediately to the bank which may use the funds for its business purposes. The bank does not thereby act as a trustee and cannot be charged with converting the deposit for its own use. It is, however, obligated to pay the debt reflected by the balance of the deposited funds upon its depositor's demand.

It is clear from the above mentioned that ownership of the money immediately passes to the bank upon being deposited by the customer, meaning it ceases to be the money of the customer but becomes that of the bank. Therefore, where the money is stolen by robbers after being deposited, the bank will be liable under contract to pay the money to the customer on demand. It is also clear that if the money is stolen before it is deposited or after it has been withdrawn, the bank will not be held liable in contract to refund that money because ownership of the money will still be that of the customer.

3.3 General principles of Tort Liability in USA

It has already been shown above that, where the customer's money is stolen before being deposited or after it has been withdrawn, the bank will not be held liable. As a result, the customer will usually institute a claim in tort to recover the stolen money on the basis of the bank's negligence. It is, therefore, important to determine whether the bank may be held liable under tort for the customer's stolen money.

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[63]Allen v Bank of America 58 Cal App 2d 124, p 127.
[64] Smiths' Cash Store v First National Bank (1906) 149 Cal 32, p34.
[65] Ibid.
[66] 142 Cal App 3d.

Tort liability in USA law is classified using two basic standards: strict liability and negligence liability. Under strict liability, the defendant is held fully liable for committing an action, regardless of whether he or she was actually negligent or intended to harm the plaintiff.[67] Negligence liability, on the other hand, arises where the defendant failed to behave with the level of care that a reasonable person would have exercised under the same circumstances.[68]

It is generally agreed that the banker's liability for the robbery of the customer belongs to the second category, *i.e.* negligence. To succeed in a claim based on negligence liability, the claimant must prove the following elements; (a) the existence of a legal duty that the defendant owed the plaintiff, (b) defendant's breach of that duty, (c) that defendant's actions are the cause-in-fact of harm to the plaintiff, (d) that defendant's actions are the proximate cause of harm to the plaintiff and (e) harm to the plaintiff.[69] These elements are discussed in detail below.

3.3.1 Legal duty

In USA, the duty of care is a fundamental element of negligence liability. It is defined as a duty imposed on a person to protect another from unnecessary danger.[70] Negligence liability will arise if the defendant breaches such a duty. This was explained in the case of *Palsgraf v Long Island Railroad Company*[71], where Cardozo stated that "proof of negligence in the air, so to speak, will not do". Meaning, negligence is not actionable unless it involves the invasion of a legally protected interest or the violation of a right.[72] The duty of care may arise from statute or common law principles. Courts of law in the USA take into consideration various factors in order to determine the existence and scope of the defendant's duty of care. As demonstrated below, these factors may include, but are not limited to, special relationships, foreseeability and public policy considerations.

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[67]Bryan A Garner, *Black's Law Dictionary* , 7th ed (St Paul, Minn: West Group, 1999) p 926.
[68] Restatement (Second) of torts(1965) section 282, 283, 284.
[69]W. Page Keeton Et Al,*' Prosser And Keeton On The Law Of Torts*, 5th ed. (1984) 30.
[70]All Answers ltd, 'Tort Law- Neligence'(LawTeacher.net, May 2024) <https://www.lawteacher.net/lectures/tort-law/negligence/?vref=> accessed 12 May 2024.
[71]28 NY 339.
[72]Ibid 341.

3.3.1.1 Special Relationships

It is trite law that a special relationship between the parties gives rise to a legal duty of care.[73] The special relationship doctrine is an exception to the general rule that there is no duty to act for the protection of a third party, and it recognizes that some "socially recognized relations", may constitute the basis of a legal duty.[74] These relationships include; parent and child, employer and employee and in-keeper and guest among others.[75]

The court explained in *Biscan v Brown*[76],as to how a legal duty of care based on a special relationship is established. In this case, a sixteen year old plaintiff (Biscan) was severely injured in a single automobile accident after leaving a party hosted by the defendant, Paul Worley, at his house. She filed a negligence action against Worley alleging that he negligently permitted, condoned and encouraged the unlawful consumption of alcohol by minors, that he undertook a special duty to protect the minors at the party and that he (Worley) negligently exercised control or negligently failed to exercise control over Brown, who was the driver of the car that caused an accident. Brown was of the same age as Biscan, and had also consumed alcohol at the party.

In determining whether the defendant owed a plaintiff a duty of care to the plaintiff, the court had to inquire into whether Worley stood in some special relationship to his minor guests including Biscan, such that he owed her a duty of care. The court evaluated several factors including the public policy, foreseeability and means and ability to control a third party. The court came to the conclusion that the factors supported the finding of a special relationship and therefore held that since Worley "knowingly permitted and facilitated the consumption of alcohol by minors(the illegal act), he had a duty to exercise reasonable care to prevent his guests from harming the third person or from befalling harm themselves."[77]

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[73]*Restatement (Second) of torts(1965) 315-320.*
[74]Fowler V & Posey M. Kime, The Duty to Control the Conduct of Another,43 Yale L.J 886, 887 (1934).
[75]*Restatement, section 314-5.*
[76]160 S.W 3d 462 (Tenn. 2005).
[77]Ibid p 482.

3.3.1.2 Foresseability

Foreseeability is one of the primary factors in establishing duty of care and courts of law in the USA have developed various tests to assess the role of foreseeability in determining duty of care. For the duty of care to arise, harm caused to the plaintiff must have been foreseeable to the defendant. The harm caused to the plaintiff will be regarded as foreseeable if the defendant was aware of the imminent probability of harm to the plaintiff or where there had been prior incidents similar to the harm or where there are circumstances that render the nature of the harm foreseeable.[78]

a) Knowledge of harm

Here the duty of care is imposed on the defendant if he was aware of any imminent harm to the plaintiff. This was illustrated in *Shipes v Piggy Wiggly St Andrews*[79] wherein the plaintiff was assaulted at night by a third party in the parking lot of the grocery shop. The plaintiff alleged that there was breach of duty to exercise reasonable care for his protection because the parking lot lights were either not shining brightly or were not turned on, and therefore, the grocery store failed to adequately light its parking lot. The evidence indicated that the neighbourhood of the grocery store included several bars, a liquor store, awning company and a real estate company and no violent crimes had ever been committed in the neighbourhood.

The only known crimes by the store manager to have occurred at the store were theft of the employee's cassette tape deck in the parking lot, shoplifting in the store and one arrest for unspecified offence that was made in the parking lot between 10 pm and 11pm. On the basis of that evidence the court came to the conclusion that the store owner did not know or have a reason to know of the criminal attacks such as the one on the plaintiff, and held that the defendant did not know or have reason to know that the specific assault at issue would occur, so the defendant had no legal duty to protect the plaintiff from the third party criminal act.

b) Prior Incidents

Prior incidents similar to the one that caused harm to the plaintiff render harm to the plaintiff foreseeable, thus requiring the defendant to take additional precautions to protect the plaintiff against such harm. Factors such as the nature and extent of

[78] Bass v Gopal Inc 135,726 SE 2d 913, 135-38.
[79] Inc 269 SC 479, 238 SE 2d 167 (1977).

previous incidents, and frequency or similarity to the incidents, are taken into consideration in determining whether prior incidents render the harm foreseeable; thus establishing legal duty of care. The court in *Matt v Days Inn of America*[80] emphasized that for legal duty to arise, prior incidents do not need to be identical to the current incident, but must be sufficient to put a reasonable person on notice of the dangerous condition.

In that case the Matt family sued Days Inn for damages sustained after Richard was shot in a robbery attempt at the Atlanta Airport Days Inn. The Matts contended that the Days Inns' negligence was the proximate cause of Richard Matt's injuries because it failed to provide adequate security and failed to take reasonable precautions to protect him from reasonably foreseeable criminal acts of third persons.The Days Inn subsequently moved for summary judgement contending that it was not liable as Richard Matt's injuries were caused by the unforeseeable criminal act of a third person. It went on to assert that although there had been crimes in their parking lot, and two robberies by force sometime earlier, there had been no substantially similar armed robbery on its premises which would give notice of the possible occurrence of the kind of event that resulted in Richard Matt's injuries.

The underlying evidence brought before court was that there had been eighty two crimes committed at the Days Inn in the three years before the attack on Matt. Police records showed that one robbery occurred in a guestroom and that the other eighty one crimes were committed in the parking lot, including a purse snatching and robbery by force. There was also evidence from three other hotels located within a quarter mile radius of the Days Inn. This evidence showed that at one hotel alone, there had been one hundred and eighty four parking lot crimes, including five armed robberies, two rapes, ten assaults and one kidnapping. Another hotel had experienced two hundred and fifty seven parking lot crimes, including four armed robberies, one strong arm robbery, one rape and twenty six assaults. A third hotel had witnessed two assaults and one kidnapping. In addition, the security guard in Days Inn testified that he did not feel safe patrolling the premises and that sometime prior to the shooting of Matt, he had requested permission to carry a weapon, wear a bullet vest and carry a portable telephone.

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[80]265 Ga.235 (Ga. 1995).

The issue before court was whether the prior robberies by force in the Days Inn parking lot were substantially similar to the armed robbery in which Richard Matt was shot.In addressing this issue, the Georgia Court of Appeals explained that;

> Substantially similar does not mean identical and it is not the question whether a weapon was used but whether the prior crimes should have put an ordinarily prudent person on notice that the hotel's guests were facing the increased risk. All that is required is that the prior incident be sufficient to attract the hotel's attention in the dangerous condition which resulted in the litigated incident.'

The court held that since there were no prior "substantially similar" attacks on the premises, there was no knowledge of a dangerous condition giving rise to the shooting. Additionally that there was no evidence that any security efforts undertaken by Days Inn were otherwise below the reasonable standard of care.Therefore the court awarded a summary judgement in favour of Days Inn.

c) Totality of circumstances

Harm or loss to the plaintiff can also be taken to have been foreseeable where all relevant factual circumstances including the nature, condition and location of a place where the harm occurred, as well as prior similar incidents, render it foreseeable. The case of *Issacs v Huntington Memorial Hospital*[81] outlines other factors that the court may consider in establishing foreseeability thus giving rise to a legal duty of care.

In that case, the plaintiff was shot during a robbery attempt in the defendant's hospital parking lot, and sued the defendant hospital for negligence for failing to provide adequate security. Evidence submitted before court showed that the hospital was located in a high crime area and that prior assaults had occurred in the emergency room adjacent to the parking lot. In addition, evidence showed that the defendant monitored its other parking lots with security cameras and guards but did not provide similar security for the lot where the incident of robbery attempt occurred.

The trial court entered judgement in favour of the hospital on the ground that there was insufficient evidence to find the hospital liable. It concluded that plaintiffs failed to introduce evidence essential to prove the following elements of their case: notice of prior crimes of the same or similar nature in the same or similar portion of the

[81] 38 Cal.3d 112.

defendant's premises; the reasonable foreseeability of the subject crime occurring; the minimum standards of security for premises similar to those of the defendant for the period of the time and locality involved and any prove of causation.

The plaintiffs appealed against the trial's judgment and the issue on appeal was whether foreseeability for the purposes of establishing a landowner's liability for criminal acts by third parties on the landowner's property may be established without evidence of prior similar incidents on those premises. In addressing the issue, the court explained that foreseeability is determined in light of all the circumstances and not by strict application of mechanical prior similar incidents rule, and that all the evidence submitted on behalf of the plaintiff, which was known or should have be known to the hospital, was sufficient to provide notice of the risk of an assault in the parking lot. Therefore the court held that the trial court erred in concluding as a matter of law that the Issac's assault was not foreseeable.

3.3.1.3 Public policy considerations

Another important element of the legal duty of care is fairness, justice and reasonableness. Here the legal duty of care is imposed where public policy recognizes and agree that it exists. American courts of law recognize public policy considerations as crucial in determining the existence of a duty of care. This was emphasized in *Burroughs v Magee*[82]wherein the plaintiff instituted an action for damages for injury and wrongful death resulting from a automobile accident in which the plaintiff was injured and her husband died.

The plaintiff asserted her claim against the physician of the other driver that caused the accident on the basis that on the day before the accident the physician negligently prescribed two medications to his patient. These medications had the prospects of impairing a person's ability to drive, but the physician failed to warn his patient of the risks of driving while under the influence of the two drugs. The plaintiff's argument was that the defendant had a duty of care to his patient and to the motoring public (which the plaintiff and her husband formed part of) to warn the patient of the risks of driving under the influence of the two prescribed drugs, but failed to do so, thereby breaching the duty of care he owed to the plaintiff and her husband. Secondly, the

[82] 118 S.W. 3d 323.

plaintiff argued that the defendant had a duty to the motoring public to use reasonable care in deciding whether or not to prescribe medication that can affect the patient's ability to safely operate a motor vehicle, but he violated that duty by inappropriately prescribing the two drugs to the patient.

In response, the defendant argued that the plaintiff failed to advance any evidence that at the time of the accident, the prescribed medication was still in the patient's system, thus failing to establish causation as an essential element of her negligence claim.He further submitted that he did not owe any duty to the plaintiff and her husband under either of the theories advanced by the plaintiff. In addressing these arguments the court explained that considerations of public policy are crucial in determining whether the duty of care existed in a particular case. It further stated with reference to *Bradshaw v Daniel*[83] that;

> The imposition of a legal duty reflects society's contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another's act or conduct.Indeed, it has been stated that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.

In determining whether the defendant owed a legal duty of care to the plaintiff and her husband, the court emphasized that it had to give considerable weight to the significant "importance and social value" of medical services and the effect that a finding of a legal duty might have on the delivery of those services. After doing so, the court held that the defendant owed a duty of care to the plaintiff and her husband to warn his patient of the risks of driving while under the influence of the two prescribed drugs. It, however, held that the defendant did not owe duty to the plaintiff and her husband in deciding whether or not to prescribe the medications to his patient.

3.3.2 Breach of duty of care

Existence of legal duty of care is not enough to impose negligence tort liability. The plaintiff needs to prove further that there was breach of the duty of care. This was pointed out in the case of *McEvoy v American Pool Corp*[84] where the court explained

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[83] 854 S.W 2d 865.
[84] 32 Cal 2d 295, p 298.

out that "[t]he conclusion that a certain conduct is negligent involves the finding of both of a legal duty to use due care and a breach of such duty by the creation of an unreasonable risk of harm". This means that where the defendant unreasonably created a risk of harm by failing to conform to the duty of care expected of him, that amounts to a breach, and he may be held liable for negligence. This was illustrated in the case of *Richards v Stanley*[85] whereat the plaintiff instituted an action against defendants for recovery of damages for personal injuries sustained when his motorcycle collided with an automobile owned by defendants.

It transpired that Mrs Stanley parked her car unattended and unlocked, with the key still on the ignition. As a result, Rawlings (thief), entered the car and drove it from the parking lot into the streets, where he collided with the plaintiff's motorcycle, thus causing him injuries.Plaintiff contended that by leaving the car unlocked and with the key inside, Mrs Stanley created an unreasonable risk to persons on the streets and was therefore negligent towards him.

In addressing this issue, the court concluded that Mrs Stanley was not negligent to the plaintiff because by leaving the keys in the car, she increased the risk of it being stolen and she had no reason to believe that it will be stolen by an incompetent driver. Since she owed no duty to the plaintiff to protect him from harm resulting from activities of third parties, her duty to exercise reasonable care in the management of her automobile did not encompass a duty to protect the plaintiff from negligent driving of a thief.[86] It was, therefore, held that "defendant was not bound to anticipate that any person would steal her car or commit any other crime in respect to it, and, accordingly, defendant owed no duty to anyone growing out of the unlawful taking and operation of the vehicle."[87]

3.3.3 Cause in Fact of the Injury

Negligence claim also requires proof of "causation in fact" to succeed. Here the injured party needs to prove that the defendant's conduct is " in fact the cause" of his injury, thus it directly contributed to it.[88] The test that is applied here is the "but for"

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[85] 43 Cal 2d 60 (1953).
[86] Ibid p 66.
[87] P 69.
[88] Hale v Ostrow 166 S W 3d 713.

test which provides that the injury or harm would not have occurred "but for" the defendant's negligent conduct.[89] The application for this test was well illustrated in the case of *Wood v Newman, Hayes & Dixon Ins. Agency.*[90]The plaintiff Sarah Wood and her husband Jack Wood, operated Creekwood Marina, which had docks and slips for approximately one hundred boats.

The defendant Gregory Slusher was the plaintiff's insurance agent who procured "all risk" insurance, which included coverage for damage form ice and snow, for the marina from 1979 to 1985. In November 1985 the insurance carrier notified the plaintiff and Slusher that the policy would not be renewed after its expiration.Slusher contacted several companies in attempt to secure a like replacement policy but he did not succeed. However, he managed to secure a comparable policy which covered certain named perils and ice and snow were excluded.

In October, Slusher notified the plaintiff that the new policy would cover "fire, extended coverage and vandalism" and exclude theft, but he failed to mention that ice and snow would also not be covered. However, he advised the plaintiffs to contact him if they had any questions about the scope of the policy's coverage. Two weeks later he forwarded the new policy to the plaintiff accompanied with the letter, but the letter also did not address the issue of ice and snow coverage.

On February 1986, an ice and snow storm caused eighteen covered wooden docks at the Marina to collapse. Subsequently Ms Wood filed a claim with Slusher, who forwarded it to the insurance carrier.The carrier denied the claim on the basis that ice and snow did not form part of the perils covered by the policy. Ms Wood then sued the defendants alleging that Slusher was negligent in failing to procure a policy covering ice and snow damage and that he was negligent in failing to inform the plaintiffs that the replacement policy did not cover the ice and snow damage. The defendants however denied their negligence by alleging that if their actions in fact constituted negligence, that negligence was not the proximate cause of the plaintiff's injuries.

The plaintiffs' testified amongst other things that they believed that the new policy covered the ice and snow damage; and further that had they known that the ice and

[89] Cardwell v Ford motor Co 619 S W 2d 534, p543.
[90] 905 S W 2d 559.

snow damage was not covered, they would have tried to find it somewhere else because the ice and snow presented a great risk to the marinas. On the other hand, Slusher testified amongst other things that he informed Ms Wood about the tight market in 1985 , but admitted that he did not tell her that there would be a problem in obtaining the ice and snow coverage, and he also admitted that he did not tell the plaintiffs that the replacement policy did not cover ice and snow damage.

The trial court entered judgement in favour of the plaintiff on the basis that Slusher was negligent and the negligence caused the plaintiff to suffer loss. However Ms Wood was also found to be at 15% fault for failing to read the new policy. The defendants appealed and the Court of Appeal reversed the judgement of the trial court. The court agreed that Slusher owed Ms Wood duty to inform her of any material changes in coverage and that he breached that duty. However the court concluded that Slusher's actions were not the cause in fact of Wood's damages. The court reached its conclusion on the reasoning that;

> A seminal question in the case at the bar is whether the defendant's negligence was the cause in fact of plaintiff's injury; that is, whether plaintiff's losses would not have occurred "but for" for the negligence of the defendant. At trial, both Gregory Slusher and Paul Smith testified that all risk insurance was simply unavailable during the fall of 1985, and for the time thereafter, given market conditions. Even if Slusher had made Ms Wood fully aware of the lack of snow and ice coverage in the new policy,she would not have been able to do anything to thwart her losses, apart from shutting down the marina, which she was unwilling to do. The snow and ice storm occurred in February of 1986, a time when the insurance market happened to be 'tight' in the area of coverage for marinas. Although Slusher negligently breached his duty to inform, he cannot be held responsible for Mrs Wood's losses because his negligence was not the cause in fact of the damage sustained. [91]

3.3.4 Proximate Cause

Once the cause of fact is established, the injured party also need to prove the proximate cause for the negligence liability to arise. Here the plaintiff needs to prove that harm to the plaintiff is closely connected to the defendant's negligent act such that the policy of the law requires imposition of liability.[92] The courts of law use the proximate cause to limit liability of the defendant for

[91] Ibid p 562.
[92]Kilpatrick v Bryant 868 S W 2d 594, p598.

the consequences of his or her own conduct.[93] This simply means that the defendant will be held liable for negligence if it is proved that his or her conduct was closely connected to the harm sustained by the plaintiff such that the law requires liability to be imposed.

The issue of legal causation was clearly dealt with in the case of *Wallace v Jones.*[94] In this case, Mrs Jones(plaintiff) instituted an action to recover damages for personal injuries that she sustained from two separate automobile collisions. It was submitted that on the night of January 6, 1935, the car driven by Wallace(defendant) negligently collided with the one which the plaintiff was the passenger and pushed it to the left side of the road where it came to rest. While the plaintiff and other passengers were standing besides their car after it was involved into an accident, another car driven by one Woodard struck on the car of one Todd who had been helping in the accident that had just occurred.Todd's car then struck the plaintiff causing her injuries.

The issue before court was whether negligence of Wallace, the defendant, which caused the first collision was the proximate cause of the injuries sustained by the plaintiff resulting from the second collision. The defendant's argued that the damages for the injuries suffered by the plaintiff as a result of the second collision are, as a matter of law, not recoverable against him because the wrongful conduct which was responsible for that collision was entirely disconnected from and bore no proximate relation to the negligence of the defendant that brought about the first collision.

In determining the issue, the court submitted that; to constitute actionable negligence, there must be a causal connection by natural and unbroken sequence between the negligence complained of and the injury suffered. There must be an absence of intervening effect and causes and in applying the law to the facts, the court submitted that;

> A reference to the evidence discloses that the following events transpired after the first collision and before the second collision: Mr Todd drove his car to the a point opposite the Sykes car and partially obstructed the vision of Woodard who was approaching. No lights were burning on the Sykes car. The occupants of

[93] Ibid.
[94] 168 Va 38 (1937).

> this car had gotten out and the plaintiff being assisted by her daughter and son in -law was standing or walking with them in the road, in the intervening space between the Todd and Sykes cars. Woodard, who did not see the Sykes car until he was very close to it on account of the glare from the headlights of the Todd car, tried "to slip between the cars" and in doing so, struck Todd car and the plaintiff [95]

The court therefore held that there could be no causal connection between the negligence of Wallace and the injuries sustained by the plaintiff from the second collision because of the intervening efficient causes shown by evidence. It concluded further that Wallace's negligence and the injuries of the plaintiff were entirely separated and the chain of causation was interrupted by several intervening events which constituted new, efficient and independent causes superseding the original act of negligence of the defendant.[96]The trial decision was reversed and remanded.

3.3.5 Damages/ Harm

Lastly, the party to the negligence claim must prove that he or she suffered actual harm or damages as a result of the defendant's negligence.Damages may be in the form of physical injuries, property damage or financial losses.The compensation awarded in negligence claims may vary significantly due to the factors such as the severity of injuries, impact on life and income and the specific type of negligence involved.[97] For instance, in the case of *Pinsonneault v Merchants Farmers Bank Trust Company*[98], where one Jesse Pinsonneault was shot and killed in the defendant's premises where he went to deposit the evening receipts and operating cash into the bank's deposit box, the court had to determine whether, his family was entitled to be awarded wrongful death and survival damages. The court stated that, "the award for damages in a wrongful death action is determined by the degree of affection which existed between the deceased and various different plaintiffs."[99]

It further stated that in awarding damages for loss of society and companionship, the closeness of the family relationship is taken into consideration. After considering the

[95] Ibid 43-44.
[96] Ibid 44.
[97] Owen, David G. (2007) 'The Five Elements of Negligence,'(2007) Volume 35 (4), Article 1.Hofstra Law Review Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol35/iss4/1 Accessed May 2, 2024.
[98]738 So. 2d 172 (La. Ct. App. 1999).
[99] Ibid 191.

relationship between the deceased and his family, the court came to the conclusion the family was particularly close to the deceased especially because they lived together and the family was therefore awarded damages.

3.4 Banks liability for customer robbery in USA Law

It has long been recognized in USA law that a bank has a duty of care to make its premises safe for the public. As explained by the New York Court of Appeals in *Rothschild v Manufacturers Trust Co*,[100] the basis of this duty is that "[a] banking corporation occupies a different relation to the public than do ordinary corporations," wherefore banking transactions are frequently "… subjected to a closer scrutiny and tested by a higher standard than that applied to ordinary commercial affairs."[101] Banks are distinguished by the fact that they serve as institutions for storing money. Consequently, a bank must strengthen its security measures in order to ensure a safe environment for its customers and employees. This point was explained as follows by the Queens Civil Court, Small Claims Part, in the case of *Stalzer v. European American Bank*;[102]

> This court believes that the general public assumes that when one is present in the bank premises to transact business that he or she is present in a safe and secure place; that the public reaches this conclusion of confidence by reason of the very special character and purpose of a bank, namely, that it receives, keeps and distributes money, money being a most convertible commodity. This special characteristic in public perception makes a bank quite different from any other store or commercial premises. The public would become quite uneasy or rudely shocked and thereby more "under the mattress" oriented if it were told, as the bank here contends, that they (whether as business invitees or visitors of some lesser status) are on their own in their trips to and from the bank door to the teller's station, and on their own while they are engaged in banking activity at the convenience counters or while they are present in and around other parts of the bank's interior.

The above mentioned statement does not, however, imply that a bank is liable for all third party actions that result in loss or harm to the customer while on its premises. The liability of the bank in this regard is restricted by the rule of landowner liability.[103]In USA law, the landowner or possessor has a duty at common law to ensure that the public areas of his property are reasonably safe for individuals who

[100] 279 N. Y. 355, 18 N. E. (2d) 527 (1939).
[101] Rothschild v Manufacturers Trust Co 153.
[102] 113 Misc.2d 77, 448 N.Y.S.2d 631 (N.Y. City Ct. 1982).
[103] Moskal v. Fleet Bank.

utilize it.[104] This duty means that the land owner must maintain minimal security measures to protect users of the property against injury caused by the reasonably foreseeable criminal acts of third persons.[105]What this means for present purposes is that a bank has a duty to protect customers from reasonably foreseeable loss or harm arising from third-party conduct,[106] and that the duty is fulfilled when the bank provides some form of security at its premises. Whether security measures are adequate will depend on a number of factors including:

> [C]urrent specific and general crime statistics, geographic location of the bank, physical arrangements of the bank in relation to traffic and transportation, predictable customer use and the perceptive deterrent effect of bank guards and other various anti crime paraphernalia. [107]

It is therefore clear that under the American law, it is crucial to know as to what constitutes 'bank premises' because this is essential in determining the liability of the bank as the landowner for protection of customers while in its premises. For instance,banks sometimes have ATMs located outside the bank halls; that is, in shopping malls or fillings stations and this may raise a question as to whether these machines are within bank premises or whether it is shopping mall or filling station at which an ATM is situated which has a duty to protect the customers against any criminal attacks while performing their banking transactions at such places. This may raise an issue as it may be argued that principles of landowner liability do not apply to banks in such circumstances because the landowner will in that regard be a shopping mall or a filling station.

In United States, "bank premises" include premises that are owned and occupied by a national bank or Federal savings association, its respective branches, or its consolidated subsidiaries.[108] The bank premises may include parking facilities that are used by the bank's customers or employees, capitalized leases and leasehold improvements, vaults fixed machinery, and equipment such as furniture,computers, automated teller machines,security devices and any other equipment necessary for

[104] Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 519-520, 429 N.Y.S.2d 606, 407 N.E.2d 451 (1980).
[105] Miller v. State of New York, 62 N.Y.2d 506, 478 N.Y.S.2d 829, 467 N.E.2d 493 (1984).
[106] See Stalzer v. European American Bank, stating that " It is now well established that the duty owed is one of "reasonable care under the circumstances whereby foreseeability shall be a measure of liability" (Basso v Miller, 40 N.Y.2d 233, 241)."
[107] Stalzer v. European American Bank 84.
[108] 12 CFR 5.37 (C)(1)(i).

conducting business transactions. [109] It is within these areas that a bank may be held liable for any foreseeable harm that occurred to the customer.For instance, if a customer is robbed while within the areas stated above, the bank may be held liable since the crime would have occurred within the space controlled by the bank and therefore has the duty to provide adequate security for protection of the customer.However, this may vary according to the circumstances of each case as the American courts have redefined the concept of premises in the case of *Schwartz v Helms Bakery Ltd* [110] as follows:

> [T]he physical area encompassed by the term 'the premises' does not … coincide with the area to which the invitor possesses the title or a lease. The 'premises' may be less or greater than the invitor's property. The premises may include such means of ingress or egress as a customer may be reasonably expected to use. The crucial element is control.

The purpose of this discussion is to determine the circumstances under which banks have been held liable for customer robbery in their (banks) premises. These circumstances, which are discussed in detail below, may be divided into three categories, namely; future robberies, failure to provide security measures and breach of bank's security policies.

3.4.1 Past robbery experiences

In USA law, it is established that a bank is obliged to implement safety measures to protect its premises if it is aware or has a valid reason to believe, based on the past robbery experiences, "that there is a likelihood of conduct on the part of third persons which is likely to endanger the safety" of its customers.[111] In such instances, the bank that fails to implement adequate security measures is held liable to the customer because harm or loss is foreseeable. It is not clear how many times a bank must be robbed before it can be said that the risk of future robberies is foreseeable.

In the case of *Vaughan v. Bank of New York*,[112] it was held that the bank was not liable to a customer, who had been assaulted and robbed at the bank's night depository, where there was only one instance of a prior robbery at the bank's night depository in the two-year period before the incident. The risk of robbery at that night depository was held to be unforeseeable. Similarly, in the case of *Golombek v. Marine*

[109] Comptroller's Handbook, 'Bank Premises and Equipment' (Version 1.1, December 28, 2018).
[110] 60 Cal Rptr 510 (1967).
[111] Dyer v. Norstar Bank, N.A., 186 A.D.2d 1083, 588 N.Y.S.2d 499 (4th Dept.1992).
[112] 230 A.D.2d 731, 646 N.Y.S.2d 49 (2d Dept.1996).

Midland Bank, N.A.,[113] it was held that two prior robberies at the bank's night depository did not give rise to a duty on the bank's part to anticipate a risk of harm from criminal activity at the night depository box.[114]

Despite the aforementioned, a bank was held liable to the customer based on prior robberies in the case of *Stalzer v. European American Bank*[115]. The facts of that case were as follows; the claimant, Marian Stalzer, went to a branch of defendant's bank to cash her payroll check. After cashing the check at the teller's window, the claimant stepped away to a nearby table, provided by the bank for its customers' use, to count her money. A man came from behind the claimant, and quickly snatched away her money, wherefore Claimant screamed "I was robbed." The Claimant's case against the defendant bank was first that the bank had failed to provide adequate security,[116] and second that the bank ought reasonably to have anticipated the possibility or probability of harm to its business invitees. In support of the second ground, the Claimant explained that:

> (a) The bank branch had been robbed on prior occasions;
> (b) The bank was in a superior position to know about bank robberies in general and about any specific aborted or unsuccessful robbery attempts at the bank branch;
> (c) The bank branch was in a vulnerable location being in the basement of a building providing easy access to the bank from the subway;
> (d)The bank knew or should have known that Thursday, the day of claimant's robbery, was a Gulf Western payday when unusually heavy cashing of checks by Gulf Western employees occurred.[117]

Holding for the Claimant, the court explained per William D. Friedmann, J. that:

> [W]here, as here, the bank either knows or has reason to know from past experience that there is a likelihood of conduct on the part of third persons which is likely to endanger the safety of a bank visitor, the bank is obliged to take all necessary protective measures and to provide a reasonably sufficient number of servants to afford reasonable protection. Given the very nature of a bank and the business it does and considering the many recent media-documented robbery attempts and completions, it seems reasonable to conclude that banking invites certain very real risks to the public at large. Whether the crime be one of random

[113] 193 A.D.2d 1113, 598 N.Y.S.2d 891 (4th Dept.1993).
[114] See also Williams v. Citibank, 247 A.D.2d 49, 677 N.Y.S.2d 318 (1st Dept.1998).
[115] Stalzer (n101).
[116]Stalzer v. European American Bank, 79 " claimant maintained that the bank branch did not have a security guard at the time of the occurrence and that the bank-installed glass bandit barriers separating the tellers from the rest of the bank premises (and other security or anticrime equipment) are for the primary protection of the bank employees not the customers."
[117] Stalzer v. European American Bank, 79.

> violence or a deliberate, planned attack, bank robberies seem to be a fact of everyday life, committed by persons of all ages and by amateurs and professionals alike.[118]

This case goes on to show that a bank will be held accountable to the customer for robbery, where the bank neglects to implement adequate security measures in light of previous robberies in its premises. The court explained in that same case that presence of a security officer at the premises of the defendant bank would have appreciably diminished the likelihood the Claimant's robbery, consequently that lack of adequate security was the proximate cause of the Claimant's loss.[119]

3.4.2 Lack of security measures at the bank premises

As previously mentioned, it is the responsibility of the banker to ensure safety and security of its premises for customers. This necessitates the implementation of adequate security measures by the bank. In this manner, the absence of security measures on its own amounts to a breach of that duty, even in the absence of previous robberies. This was held to be so in the case of *Pincus v Citibank.*[120] Briefly stated, the facts of that case were as follows; Plaintiff, who was a senior citizen, went to the defendant bank and placed his money ($600) on the teller's counter, and was in the process of transacting his business when a man ran up to the counter, grabbed plaintiff's money and fled from the bank. It transpired that, although the concerned bank branch was assigned a security guard at one time, Citibank, by way of policy determination, discontinued the use of security guards at that branch. The court held in that case that:

> [W] here a bank unilaterally eliminates an element of its security, reasonably relied upon by its customers, it should bear responsibility for a loss proximately resulting from its actions. In the view of this court, the crime perpetrated against Mr. Pincus was encouraged and made possible by the absence of security guards. Judgment for plaintiff for $600."[121]

3.4.3 Breach of bank security policies

The bank may also be held liable to the customer for robbery where it fails to comply or follow its own security policy. This was held to be so in the case of *Moskal v. Fleet*

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[118] Stalzer v. European American Bank, 83.
[119] Stalzer v. European American Bank, 84.
[120] (NYLJ, June 8, 1989, at 27, col 4 [Civ Ct, Small Claims Part, Bronx County].
[121] Pincus v Citibank, supra, at 27.

Bank. In that case, Mr Moskal, who was a jewellery dealer, rented a safe deposit box in the bank's vault. The vault was located in the basement and was frequented by jewellers to deposit or retrieve jewellery and cash. To access the vault, the jewellers were required, as a security measure, to use the elevator and not the stairway. The stairway was considered steep and and narrow, thus posing physical danger to the customers, and was meant to be used by employees only. There was a notice of a hazard to using the stairwell and it was a known policy that the bank instructed that there be security in the premises to prohibit the use of stairs.

It transpired that on April 18, 1996, the plaintiff visited the vault twice in the morning and in the afternoon. As he approached the street floor elevators which took customers down into the basement vault area that afternoon, he found that the renovation work was in progress and was blocking the elevator entrance and he was told by a security guard to use the stairway to the vault and he did so. While he was halfway down the corridor, he was confronted by a person who slapped him, held a knife on his neck, and robbed him his valuables. As a result, he instituted a claim for serious physical injuries, emotional stress and loss of property against the defendants.

One of the plaintiff's contentions was that, by wholly disregarding and violating the known policy, which is that of prohibiting customers to use the stairway to the vault; the defendants thereby created a risk of danger and that the robbery could have been prevented if the security guard had directed him to take the elevator. In addressing the matter the court held that :

> The nature of harm that befell Moskal is ultimately immaterial. Harm of some sort was foreseeable, which Fleet recognized. It created a specific policy so as to keep people away from the lobby stairwell. However the bank failed to ensure that its own was carried out or, as is usual in most banks, to permit entrance to the vault by means of its own stairwell. Indeed, as Moskal suggests, it may have been the accessibility of the lobby door to the basement that permitted the mugger to gain entry to that area. While defendants counter that the attacker accessed the basement from another floor in the building, taking the elevator down to the basement, certainly, had Moskal been permitted the use of the bank's internal stairwell directly into the vault, this could not have occurred.

3.4.4 Bank Insurance policies on liability of banks for robbery

Banks as institutions dealing with money usually have insurance policies to cover specific risks such as theft, fraud or cyber attacks. For this reason, bank

customers generally believe that when their money is robbed while in the bank premises, they are entitled to compensation from the insurance for their loss. However, this is not always the case as banks usually purchase insurance policies to mitigate their own risk exposures rather than to cover customer losses.

Banks usually have Bankers professional liability insurance policy in place to protect its employees and officers. This insurance policy is one of the common policies in the financial industry and it protects banking professionals against claims of wrongdoing, negligence, and errors or omissions in their services. It covers the costs associated with lawsuits or judgments resulting from customer claims including allegations of financial misconduct, such as providing inaccurate advice and making errors in transactions, bank's breach of duty, misleading or incorrect statements, and mistakes relating to other banking services.[122]

However, this insurance does not cover criminal acts, deliberate violations of the law, fraudulent activities, or claims pending at the time of policy underwriting. Additionally, it excludes coverage for libel, slander, or defamation.[123] Therefore, it clear that with respect to this insurance policy, the customer's claim will only be covered where there was negligence on the part of the bank.

In the USA depositors are primarily protected by the Federal Deposit Insurance Corporation (FDIC) which insures depositors for up to $250 000 per depositor, per insured bank, for each account ownership category. This insurance covers for losses if the bank fails or shuts down, it does not protect against theft or fraud by third parties.[124]

Banks may, however, purchase additional insurance policies to cover specific risks such are robbery, theft, fraud or cyber attacks. For instance, banks may

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[122] Brian Beers, 'Banker's Professional Liability (BPL): What it is, How It Works (Investopedia, May 10, 2021).

[123] Sandra Habiger, CPA,Banker's Professional Liability (BPL) Insurance Definition & Meaning ,https://www.freshbooks.com/glossary/accounting/bpl-insurance (Accessed 13 September 2024).

[124] Damian Davila, 'Does the FDIC Cover Identity Theft?'(Investopedia, July 24, 2023).

purchase insurance policies such as Crime Insurance which covers losses resulting from theft,disappearance or destruction of money and securities within the bank premises. It includes coverage for robbery and safe burglary, as well as damage caused during theft attempts. This policy does not cover direct losses of the customer unless explicitly stated.[125]

Therefore, it is clear that banks put up insurance coverage limitations for direct loss to the customer. Ultimately, customers usually bear the risk of theft or fraud on bank premises where the insurance coverage excludes them unless there is clear negligence on the part of the bank. Customers are usually advised to know the insurance policies as well as coverage limitations before instituting claims for compensation.

3.5 Comparative Analysis of RSA and USA Law

In both South Africa and the United States of America, where the money of the customer is stolen after it has been deposited, the bank is *prima facie* liable in contract to refund the money to the customer on demand. This is so because, when the customer deposits the money into the bank, it ceases to be the money of the customer and its ownership passes to the bank, with an added obligation on the bank to refund or pay back the money to the customer on demand.

However, in both jurisdictions, a bank is not liable in contract for the customer's money that was stolen before it is deposited or after it has been withdrawn from the bank. The reason being that, at this stage, ownership of money is not that of the bank, but still that of the customer. Therefore it would be unreasonable to hold the bank responsible in contract for the money that does not belong to it.

Because of the difficulty of recovering the stolen money in contract, the customer's remedy seems to be in delict or in tort, and in both jurisdictions, the delictual or tort liability is governed by common law. The bank's liability is based on the legal duty of care, whereby the bank will only be held accountable for the customer's stolen money if it is demonstrated that the bank had a legal duty of care to prevent the customer's money from being stolen.

[125] Nebraska Bank Association,www.nebankers.org.

In RSA, there is no general rule as to what needs to be taken into consideration in order to establish a legal duty of care. However, the South African courts take into consideration factors such as multiplicity of actions, undue burden and unjustified limitation on the defendant's business or commercial activities, and the boni mores and legal convictions of the community to determine whether to impose a legal duty of care on the defendant. Because of these limited factors, the approach used by the South African courts in establishing a duty of care can be taken to be more restrictive or cautious. These limited factors make it difficult to establish the duty of care, especially where one has not be recognized by courts before. For instance, in South Africa there is no judicial authority that creates and recognizes the bank's legal duty of care to protect its customers against robbery while in its premises. Therefore, in light of these limited factors, it would be very difficult to establish one.

In the USA, courts of law acknowledge a handful factors in establishing a legal duty of care. These include, but are not limited to, foreseeability, special relationships, public policy legal considerations, similar prior incidents and totality of circumstances. Because of these many factors, it is relatively very easy to impose a legal duty of care on the defendant in the USA. Hence, under the USA law, banks have a legal duty of care to protect their customers from robbery while in their premises especially where there is breach of security policies. The use of these factors also helps banks to consider the issue of security of their customers seriously, thus ensuring that they put up security measures aimed at protecting the customers and their money. It can, therefore, be concluded that, the approach used by American courts is mainly focused on protecting the interests of the bank customer.

It would therefore be reasonable to recommend that, RSA courts should broaden their scope in the consideration of whether to impose a legal duty of care on the defendant. This does not mean, however, that they should abandon, their own approach, but rather that they should adopt the approach used by American courts when establishing a duty of care, and merge it with their own approach. Since the South African approach is focused on protecting the interests of the bank, while the American approach is focused on protecting

the interests of the customer, when these two approaches are merged, they will create a balanced approach in establishing legal duty of care, which is required by law.

As it has already been mentioned, public morals and legal convictions of the community demand that banks should implement adequate security measures in their premises in order to ward off criminal activities. In RSA, there is no judicial or industry guidance as to what constitutes "adequate security". This may make it difficult for banks to have a clear understanding of their obligations, thus leading to inconsistencies in the level of security measures that need to be provided by the banks.

However, in the USA, there are both judicial and legislative guidelines as to what constitutes "reasonable security". For instance, the Bank Protection Act[126] makes it a requirement for banks to adopt appropriate security measures, such as lighting system, temper-resistant locks on exterior door and windows, and alarm system among others,for purposes of discouraging robberies,burglaries and larcenies.[127] Moreover, the landowner principles in USA require landowners to provide reasonable security to their invitees and the courts use the objective test in judging as to what constitutes reasonable security, whereby they observe the totality of circumstances in determining as to what is reasonable security. They consider factors such as past robbery experiences, lack of security measures in the bank premises, and breach of security policies among others.

In future when the issue of adequate security arises in RSA, it is recommended that the courts should follow the USA approach in determining as to what constitutes reasonable security because it is viewed objectively. Thus,forcing the bank to make analysis for the need of security and implementation of excess security measures to ensure safety of customers. However, RSA does not necessarily need to adopt the USA landowner principle as it is solely an element of tort. The courts should use this principle in line with the Ombudsman's recommendation that, the security measures

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[126]*Bank Protection Act 1968* (12 U.S.C. 1882).
[127]Ibid section 3.

implemented should not interfere with the daily running of the banking business.

3.6 Conclusions

This chapter discussed liability of banks for customer robberies in United States of America. The first part of it dealt with liability of the bank for deposited money. With regard to this issue, it was found that banks are *prima facie* liable in contract to the customer, for the money stolen after it has been deposited. It was further discovered that where the money is stolen before it is deposited or after it has been withdrawn, there is no recourse for the customer in contract, to recover such money.

The second part, examined the general principles of tort liability.It demonstrated that USA courts take into consideration factors such as foreseeability, special relationships and public policy considerations in establishing the legal duty of care. The third part addressed the liability of banks for undeposited money. It was stated in this instance that liability of banks for robbery of a customer while in the bank premises should be imposed in instances where there have been past robbery experiences, lack of security measures in the bank premises and breach of security policies. It also highlighted the role of insurance on liability of banks for robbery of a customer in its premises. It was stated that insurance policies purchased by banks are usually meant to meant to cover for losses by the banks not a customer. However the customer needs to be aware of the terms of the insurance policy and its coverage limitations before instituting a compensation claim.

The last part of the chapter made a brief comparative analysis of the RSA law and USA law on liability of banks for the robbery of the customer while in the bank premises. It was found that in RSA, the courts take into consideration limited factors in establishing duty of care as opposed to USA. It also transpired that in RSA, there are no guidelines as to what constitute "adequate security". Therefore, it was recommended that RSA should adopt the approach used by the USA in determining the legal duty of care and also the guidelines

on what constitutes reasonable security, to develop its own common law position.

CHAPTER FOUR

4 CONCLUSIONS AND RECOMMENDATIONS

4.1 Introduction

In South Africa, robbery of customers while in the bank premises do occur. This happens despite the fact that banks are perceived by members of the public to be the safest and secure places. It has been established in this research that when the customer's money is stolen in the bank premises as a result of robbery he or she will usually institute a claim of damages in delict or tort to recover the stolen money. Therefore, the aim of this research was to determine whether a bank can be held liable for delictual damages for the robbery of the customer while in the bank premises. The focus of the research was particularly whether the bank has a legal duty of care, both in South Africa and United States of America, to protect the customer against robbery while in its premises.

This chapter will outline the summary of key findings of the research, plus recommendations and final conclusions.

4.2 Summary of Key Findings

4.2.1 Key findings in South Africa

The key findings of this research on the question of the liability of banks for the robbery of the customer's money while in the bank premises in RSA are as follows:

a) The bank customer cannot recover money stolen by robbers while in the bank premises before it is deposited or after it has been withdrawn on the basis of contract.

b) Despite the decision of *Lillicrap Wessenaar and Partners v Pilkington Brothers*,[128] South African courts allow a bank customer a remedy in delict regardless of the contractual nature of the bank-customer relationship.

c) In order to succeed in a delictual claim, a legal duty of care on the bank must be established by the customer. In determining whether the defendant owes a duty of

[128] Lillicrap n(1).

care, RSA courts take into consideration a number of factors such as the possible multiplicity of actions, undue burden and unjustified limitation of defendant's commercial activities , and the morals and legal convictions of the community.

d) There is no legislative or judicial authority which specifically creates a legal duty of care for banks to protect their customers against robbery in their premises. However, it is possible, at least on the basis of this research to hold the bank liable on the basis of factors taken into consideration in establishing the duty of care for robbery of a customer while in its premises in RSA.

4.2.2 Key findings in United States of America

With regard to the USA, the key findings of this research on the liability of banks for robbery of the customer while in the bank premises are as follows:

a) It is impossible for the customer to recover the money that was stolen by robbers before it is deposited or after it has been withdrawn, on the basis of contract.

b) USA courts recognize a bank's legal duty of care to provide a safe and secure banking environment based on a number of factors including, special relationships, foreseeability and public policy considerations.

c) Banks may be held liable for robbery of their customers while in their premises *i.e.,* breach of the duty to provide a safe and secure banking environment to customer's based on a number of factors such as past robbery experiences, lack of security measures in the premises and breach of the bank's own security

4.3 Conclusions and Recommendations

The findings of this research show that South African courts take into consideration a limited number of factors in establishing the legal duty of care. Consequently, it is difficult to impose the duty of care on a defendant, especially where it has never been judicially imposed on that defendant or other's in his category or class before. In the USA, on the hand, courts of law consider several factors in establishing duty of care, thus making it easy to impose the legal duty on the defendant. It is, therefore, recommended that, South African courts should adopt the USA approach in establishing and recognizing the duty of care; and merge the USA approach with its

own approach. This will help the courts to balance the interests of the parties when imposing the duty of care, such that where the court is faced with the issue of determining whether a bank is liable for the robbery of the customer in its premises, it will be able to reach the decision by balancing the interests of both the customer and the bank.

The research also found that in RSA, there are no guidelines as to what "adequate security" constitutes, and this makes it difficult for banks to have a clear understanding of their obligations, thus leading to inconsistencies in the level of security measures provided by banks. It is, therefore, recommended that in the future, when the issue of adequate security arises in RSA, the courts should follow the USA guidelines in considering as to what constitutes "reasonable security". This is because the USA courts use the objective test in considering as to what constitutes "reasonable security" and this enjoins banks to be careful or cautious when implementing security measures in their premises for protection of customers.

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