Fordham Urban Law Journal

Volume 14 | Number 1 Article 3

1986

Automatic Teller Machine Robberies: Theories of Liability

Joan Miles
Fordham University School of Law

AUTOMATED TELLER MACHINE ROBBERIES: THEORIES OF LIABILITY

I. Introduction

The emergence of the electronic banking age,[1] while bringing considerable convenience to the consumer and savings to the banking industry,[2] has created complex legal issues and problems.[3] One medium of electronic fund transfers (EFT),[4] the twenty-four hour automated teller machine (ATM), has gained nationwide acceptance[5]

---

1. *See* Schroeder, *Developments in Consumer Electronic Fund Transfers*, 69 FED. RESERVE BULL. 395, 395-97 (1983) [hereinafter cited as *Developments*]; Naar & Stein, *EFTS: The Computer Revolution in Electronic Banking*, 5 RUTGERS J. COMPUTERS AND L. 429-431 (1976).

2. A report by the Federal Reserve Board has described the savings to financial institutions which have adopted electronic banking services. *See Developments*, *supra* note 1. For example, in 1981, the average cost of processing a check deposited by mail was 59 cents, while the average cost for preauthorized electronic deposit was a mere 7 cents. *Id.* at 395.

A recent article effectively illustrated the benefits of automated teller machines [ATMs] by making the following comparison:

> A human teller can handle up to 200 transactions a day, works 30 hours a week, gets a salary anywhere from $8,900 to $20,000 a year, plus fringe benefits, gets coffee breaks, a vacation and sick time.
>
> In contrast, an automated teller machine can handle 2,000 transactions a day, works 168 hours a week, costs about $22,000 a year to run, and does not take coffee breaks or vacations. Except for occasional breakdowns, it does not get sick.

N.Y. Times, Apr. 21, 1983, at D6, col. 2. Furthermore, ATMs have proved to be considerable profit-making assets to banks which install them, attracting additional depositors and thereby increasing profits. For instance, after installing the machines, Citicorp more than doubled its share of deposits in the New York metropolitan area from 4.4% in 1977 to 9.6% in June, 1982. *Id.*

3. For an overview of the legal issues and problems raised by EFT systems, see NATIONAL COMMISSION ON ELECTRONIC FUND TRANSFERS, EFT IN THE UNITED STATES: POLICY RECOMMENDATIONS AND THE PUBLIC INTEREST 1-17 (1977) [hereinafter cited as COMMISSION REPORT].

4. An electronic fund transfer has been defined as "any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account." 15 U.S.C. § 1693a(6) (1982).

For a description of the various electronic banking services available to the public, see Horan, *Outlook for EFT Technology*, in COMPUTERS AND BANKING: ELECTRONIC FUNDS TRANSFER SYSTEMS AND PUBLIC POLICY 21 (K. Colton and K. Kraemer eds. 1980).

5. The acceptance of ATMs is apparent in light of their rapid proliferation. One of the first cash machines in the United States was installed in 1969 by

but simultaneously has generated a wave of new criminal activity.[6] The perpetration of a robbery or assault on a customer immediately following an ATM withdrawal raises an important legal question: who should be liable for the attendant loss?[7]

According to commonly accepted tort principles, an owner is often held liable for harm to patrons intentionally caused by third parties on business premises if the owner has failed to exercise reasonable care under the circumstances to protect the patrons.[8] For example, landlords have been held accountable to tenants and guests who were criminally assaulted in buildings where lack of proper security was found to be a proximate cause of the injury.[9] However, where bank customers have been shot during the course of a bank robbery,

---

Chemical Bank in New York City. *See* Louderback, *Status of EFT: An Assessment of Services and a Review of EFT in the Fifty States*, in COMPUTERS AND BANKING: ELECTRONIC FUNDS TRANSFER SYSTEMS AND PUBLIC POLICY 39-40 (K. Colton and K. Kraemer eds. 1980). At the close of 1984, there were more than 58,000 ATMs in use in the United States which handled a total of 3.91 billion transactions that year, excluding balance inquiries. Zimmer, *ATMs 1984: A Time for Opportunity*, MAG. OF BANK AD., May 1985, at 26. ATM transactions were estimated to account for $90 billion in withdrawals and $182 billion in deposits in 1984. *Id.*

6. *See* 2 J. FONSECA, HANDLING CONSUMER CREDIT CASES § 26:1 (2d ed. 1980) (impersonal nature of electronic banking transactions renders them vulnerable to crime); Lipsig, *Duty of Banks To Safeguard Customers*, N.Y.L.J., Oct. 25, 1984, at 3, col. 2 (increase in crimes at ATMs as "testimony that any owner must expect criminal attacks where money, nighttime and lack of security are present") [hereinafter cited as *Duty of Banks*]; OFFICE OF TECHNOLOGY ASSESSMENT OF THE CONGRESS OF THE UNITED STATES, SELECTED ELECTRONIC FUNDS TRANSFER ISSUES: PRIVACY, SECURITY AND EQUITY 49-50 (1982) (reporting results of bank survey which conservatively estimated that ATM customers had been robbed at 2.5 percent of all reporting institutions); Zimmer, *ATMs 1983: A Critical Assessment*, MAG. OF BANK AD., May 1984, at 32 (citing occurrences of bombings, muggings, robberies, torchings and shootings at ATMs).

While few civil cases involving thefts at ATMs have been litigated, such robberies do occur. *See, e.g.*, State v. Jordan, 39 Wash. App. 530, 694 P.2d 47 (1985); Prescott v. State, 642 S.W.2d 502 (Tex. Crim. App. 1982). Statistics on the number of ATM robberies that occur are neither kept by police departments nor disclosed by banks. The Office of Technology Assessment recently published a paper which discussed the vulnerability of EFT systems to crime, particularly computer fraud, and explained the scarcity of statistical information. OFFICE OF TECHNOLOGY ASSESSMENT OF THE CONGRESS OF THE UNITED STATES, SELECTED ELECTRONIC FUNDS TRANSFER ISSUES: PRIVACY, SECURITY AND EQUITY 45 (1982). "EFT crime is poorly reported because publicity may draw attention to ways of attacking the integrity of the EFT system, may give organizations a poor public image, or may even raise insurance premiums." *Id.* at 45.

7. Due to the scarcity of reported cases concerning ATM robberies, it will be necessary to refer in this Note to decisions and statutes which have resolved closely analogous factual and legal situations.

8. *See infra* notes 26-45 and accompanying text.

9. *See infra* notes 46-69 and accompanying text.

courts have been reluctant to assess liability against the bank for the resulting injury or death.[10] One court did permit a plaintiff to recover where the harm was economic.[11]

Congress has acted to remedy the various problems with ATMs by promulgating the Electronic Fund Transfers Act (EFTA).[12] "The Act [EFTA] establishes the basic rights, liabilities, and responsibilities of consumers who use electronic money transfer services and of financial institutions that offer these services."[13] The Federal Reserve Board subsequently enacted Regulation E,[14] which implements the EFTA. One provision limits the consumer's liability for "unauthorized transfers"[15] and places the burden of liability on the financial institutions.[16] In addition, the Federal Reserve Board has recently amended Regulation E to include within the definition of an unauthorized transfer any withdrawal made by a customer pursuant to a threat of force.[17]

This Note discusses the theories which suggest that banks should provide protection for patrons of ATMs against criminal acts of third persons as well as the factors which complicate the imposition of such a duty.[18] For example, this Note considers how the duty of care and grounds for liability should vary according to the features of the particular cash machine being used at the time of the crime.[19] Banks' defenses against liability, including consumers' contributory negligence and assumption of risk, are also examined.[20] This Note

10. *See infra* notes 70-88 and accompanying text.

11. *See infra* notes 89-94 and accompanying text.

12. Pub. L. No. 90-321 as added Pub. L. No. 95-630, 92 Stat. 3728 (codified as amended at 15 U.S.C. §§ 1693-1693r (1982)).

13. 12 C.F.R. § 205.1(b) (1985); *see also* 15 U.S.C. § 1693(b) (1982) (stating same proposition).

14. 12 C.F.R. § 205 (1985). The primary purpose of Regulation E is to protect consumers who use EFT systems by imposing certain duties and liabilities on financial institutions. *Id.* § 205.1(b).

15. 12 C.F.R. § 205.2(l) (1985). " 'Unauthorized electronic fund transfer' means an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit." *Id.*; *see infra* notes 101-06 and accompanying text.

16. *See* 15 U.S.C. § 1693g (1982); 12 C.F.R. § 205.6(b) (1985); *see also infra* note 106 and accompanying text. Courts have consistently permitted ATM customers to recover sums withdrawn from their accounts in an unauthorized manner. *See infra* notes 107-17 and accompanying text.

17. *See infra* notes 118-28 and accompanying text.

18. See *infra* notes 129-203 and accompanying text for discussions of these theories.

19. *See infra* notes 129-88 and accompanying text.

20. *See infra* notes 189-203 and accompanying text.

concludes by recommending flexible guidelines for courts to follow in determining liability in the event a consumer is robbed at an ATM terminal. These proposals consider the type of terminal involved,[21] geographical limitations within which bank liability can be imposed,[22] the scope of injury,[23] conduct of the plaintiff which may operate to shift all or part of the liability from the bank to the plaintiff,[24] and policy considerations such as consumer protection and cost.[25]

II. Landowner Liability for Criminal Acts of Third Parties

A. General Principles

An owner[26] of premises open to the public for business purposes may be held accountable for injuries caused by foreseeable, harmful acts of third persons if he fails to take reasonable measures to warn or protect against them.[27] Where a warning is insufficient to enable the public to avoid the harm, a duty to use reasonable care to

---

21. *See infra* notes 210-31 and accompanying text.
22. *See infra* notes 232-36 and accompanying text.
23. *See infra* notes 237-40 and accompanying text.
24. *See infra* notes 241-44 and accompanying text.
25. *See infra* notes 245-51 and accompanying text.
26. The terms "owner" and "landowner" will be used in this Note to mean "possessor" where the party in possession has the effective means of control over the premises. Therefore, while banks are generally lessees, they will be referred to as owners since they are the parties best able to control bank premises. *See infra* note 29 and accompanying text.
27. RESTATEMENT (SECOND) OF TORTS § 344 (1965).

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or to otherwise protect them against it.

Id. See generally Bazyler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727 (1979) (discussing theories under which landowners can be held liable for unlawful acts of third parties resulting in injury to patrons upon the land); Wilkins, *Proprietors' Liability to Patrons Injured in Robberies*, 47 TENN. L. REV. 743 (1980) (same); Annot., 10 A.L.R.3d 619 (1966) (discussing duty of private person to protect persons on their premises from criminal attack and liability for failure to provide such protection).

furnish protection is imposed.[28] This obligation springs from the owner's control of the premises, thereby making him the party best able to detect and respond to the hazard.[29] Under some circumstances the duty may require the owner to police the premises.[30]

The degree of care required of a landowner traditionally depended on whether the party entering his premises was a trespasser, licensee, or invitee.[31] However, this traditional view has been abandoned in

---

28. RESTATEMENT (SECOND) OF TORTS § 344 comment d (1965).

> There are . . . many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons . . . may conduct themselves in a manner which will endanger the safety of the visitor.

Id.; see also id. § 314A (discussing special relations giving rise to a duty to aid or protect).

29. *See* W. PROSSER & W. KEETON ON THE LAW OF TORTS § 57, at 386 (W. Keeton 5th ed. 1984) ("the person in possession of property ordinarily is in the best position to discover and control its dangers, and often is responsible for creating them in the first place") [hereinafter cited as PROSSER].

30. RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965).

> If the place or character of his [the possessor's] business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Id.

31. "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so . . . ." RESTATEMENT (SECOND) OF TORTS § 329 (1965); *see* Bovino v. Metropolitan Dade County, 378 So. 2d 50, 51 (Fla. Dist. Ct. App. 1979); Murray v. Lane, 51 Md. App. 597, 600, 444 A.2d 1069, 1072 (1982); Monterosso v. Gaudette, 8 Mass. App. Ct. 93, 99-100, 391 N.E.2d 948, 953 (1979); McVicar v. W.R. Arthur & Co., 312 S.W.2d 805, 812 (Mo. 1958); Rowland v. City of Corpus Christi, 620 S.W.2d 930, 933-34 (Tex. Civ. App. 1981); Yalowizer v. Husky Oil Co., 629 P.2d 465, 467 (Wyo. 1981). The traditional rule provides that the landowner has no duty to make the premises safe for individuals who are intruding upon his property except that he must refrain from willful, wanton or reckless conduct. *See, e.g.,* Wood v. Camp, 284 So. 2d 691, 693-94 (Fla. 1973); Huyck v. Hecla Mining Co., 101 Idaho 299, 301, 612 P.2d 142, 144 (1980); Schofield v. Merrill, 386 Mass. 244, 245-46, 435 N.E.2d 339, 340 (1982); McVicar v. W.R. Arthur & Co., 312 S.W.2d at 814; PROSSER, *supra* note 29, §§ 58-59.

A licensee enters the land for his own purposes with consent of the owner. RESTATEMENT (SECOND) OF TORTS § 330 (1965); *see* Hundt v. LaCrosse Grain Co., 425 N.E.2d 687, 697-98 (Ind. App. 1981), *vacated*, 446 N.E.2d 327 (Ind. 1983) (on grounds that plaintiff was contributorily negligent); Socha v. Passino, 105 Mich. App. 445, 448, 306 N.W.2d 316, 318 (1981); McCurry v. Young Men's Christian Ass'n, 210 Neb. 278, 280, 313 N.W.2d 689, 691 (1981); Vaughan v. Transit Dev. Co., 222 N.Y. 79, 82, 118 N.E. 219, 219 (1917); Andrews v. Taylor, 34 N.C.

a number of jurisdictions in favor of the single standard of "reasonable care under the circumstances."[32] In determining what constitutes "reasonable care," these courts weigh such factors as plaintiff's

---

App. 706, 709, 239 S.E.2d 630, 632 (1977). The older common law cases held that the landowner had no obligation to protect licensees upon his land except to prevent infliction of willful, wanton or reckless injury. *See* Rosenberger v. Consolidated Coal Co., 318 Ill. App. 8, 13, 47 N.E.2d 491, 493 (1943); Steinmeyer v. McPherson, 171 Kan. 275, 278, 232 P.2d 236, 239 (1951); Colbert v. Ricker, 314 Mass. 138, 141, 49 N.E.2d 459, 461 (1943); Vaughan v. Transit Dev. Co., 222 N.Y. at 82-83, 118 N.E. at 220; Andrews v. Taylor, 34 N.C. App. at 709, 239 S.E.2d at 632. Today it is generally held that the owner must exercise reasonable care in his activities and take steps to warn of known, hidden dangers. *See* Savignac v. Department of Transp., 406 So. 2d 1143, 1146 (Fla. Dist. Ct. App. 1981); Sideman v. Guttman, 38 A.D.2d 420, 421, 330 N.Y.S.2d 263, 265 (1972); Fitch v. Adler, 51 Or. App. 845, 848, 627 P.2d 36, 39 (1981); Rowland v. City of Corpus Christi, 620 S.W.2d 930, 934 (Tex. Civ. App. 1981); PROSSER, *supra* note 29, § 60.

Those who enter land with the consent and for the purposes of the landowner are known as invitees. RESTATEMENT (SECOND) OF TORTS § 332 (1965). Some courts require that the landowner derive some benefit from the entrant's presence. *See* Scales v. St. Louis-San Francisco Ry., 2 Kan. App. 2d 491, 496-97, 582 P.2d 300, 305 (1978) (applying standard of "economic benefit"); Madrazo v. Michaels, 1 Ill. App. 3d 583, 587, 274 N.E.2d 635, 638-39 (1971) (applying a "mutuality of benefit" theory); Socha v. Passino, 105 Mich. App. 445, 447-48, 306 N.W.2d 316, 318 (1981) (requiring any "business, commercial, monetary, or other tangible benefit"). These entrants are "business invitees." Other courts have moved away from the concept of "benefit" and have held that one who enters land open to the public for a purpose consistent with the purpose for which the premises exist are "public invitees." *See* Post v. Lunney, 261 So. 2d 146, 148-49 (Fla. 1972) (applying "invitation test"); Augsburger v. Singer, 103 Ill. App. 2d 12, 15, 242 N.E.2d 436, 438 (1968) (same). Owners must use reasonable care to protect invitees from known hazards as well as hazards of which the owners reasonably should be aware. *See* Scales v. St. Louis-San Francisco Ry., 2 Kan. App. 2d at 496, 582 P.2d at 305; Rawls v. Hochschild, Kohn & Co., 207 Md. 113, 117, 113 A.2d 405, 407 (1955); Revis v. Orr, 234 N.C. 158, 160-61, 66 S.E.2d 652, 654 (1951); PROSSER, *supra* note 29, § 61.

Bank customers are business invitees. *See, e.g.*, Nigido v. First Nat'l Bank of Baltimore, 264 Md. 702, 704, 288 A.2d 127, 128 (1972); Howlett v. Dorchester Trust Co., 256 Mass. 544, 546, 152 N.E. 895, 896 (1926); Noll v. Marian, 347 Pa. 213, 214, 32 A.2d 18, 19 (1943) (citing Sinn v. Farmers Deposit Sav. Bank, 300 Pa. 85, 89, 150 A. 163, 164 (1930)).

32. Basso v. Miller, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976) (establishing single standard of care owed to trespassers, licensees and invitees); *see* Webb v. City and Borough of Sitka, 561 P.2d 731, 733 (Alaska 1977) (same); Rowland v. Christian, 69 Cal. 2d 108, 119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (same); Mile High Fence Co. v. Radovich, 175 Colo. 537, 541, 489 P.2d 308, 311 (1971) (same); Pickard v. City and County of Honolulu, 51 Hawaii 134, 135, 452 P.2d 445, 446 (1969) (same); Cates v. Beauregard Elec. Coop., Inc., 328 So. 2d 367, 371 (La.) (same), *cert. denied*, 429 U.S. 833 (1976); Ouellette v. Blanchard, 116 N.H. 552, 557, 364 A.2d 631, 634 (1976) (same); Mariorenzi v. Joseph Diponte, Inc., 114 R.I. 294, 307, 333 A.2d 127, 133 (1975) (same); *see also* Poulin v. Colby College, 402 A.2d 846, 851 (Me. 1979) (eliminating

status on the land, the foreseeability of the injury-producing event, and the difficulty of protecting against the harm.[33]

Under either the traditional or the single standard approach, where the plaintiff is on the premises for business purposes he is an invitee, and the threshold issue in deciding whether the defendant has violated its duty is whether the criminal act was foreseeable.[34] If there has been a history of similar types of criminal activity on the premises, courts generally have held that foreseeability was established.[35] If the crime at issue was an isolated incident, some courts have held that such random criminal activity on the part of a third person was not a foreseeable event,[36] while a few have maintained that a

---

distinction between licensee and invitee only); O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977) (same); Mounsey v. Ellard, 363 Mass. 693, 707-08, 297 N.E.2d 43, 51-52 (1973) (same); Peterson v. Balach, 294 Minn. 161, 164, 199 N.W.2d 639, 642 (1972) (same); Antoniewicz v. Reszczynski, 70 Wis. 2d 836, 856-57, 236 N.W.2d 1, 11-12 (1975) (same). *See generally* PROSSER, *supra* note 29, § 62 (discussing the trend toward abolition of distinctions between trespasser, licensee and invitee when determining standard of care).

33. *See* Quinlan v. Cecchini, 41 N.Y.2d 686, 363 N.E.2d 578, 394 N.Y.S.2d 872 (1977).

> [The court] may consider whether the foreseeability of the presence of an entrant on land is too remote, given the nature of the risk and the burdens that would be imposed on a landowner to guard against it. It is also concerned with the weighing of the probability of the harm, the gravity of the harm against the burden of precaution, and other relevant and material considerations . . . .

Id. at 689, 363 N.E.2d at 581, 394 N.Y.S.2d at 875.

34. *See, e.g.,* Basso v. Miller, 40 N.Y.2d at 241, 352 N.E.2d at 872, 386 N.Y.S.2d at 568 (foreseeability used as measure of liability); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 640, 281 S.E.2d 36, 39 (1981) ("foreseeability is the test in determining the extent of a landowner's duty to safeguard his business invitees from the criminal acts of third persons").

35. *See, e.g.,* Fernandez v. Miami Jai-Alai, Inc., 386 So. 2d 4 (Fla. Dist. Ct. App. 1980) (owners of sports arena could have anticipated robbery and stabbing of patron in parking lot where prior attacks had occurred); Stalzer v. European Am. Bank, 113 Misc. 2d 77, 448 N.Y.S.2d 631 (N.Y. Civ. Ct. 1982) (bank knew or had reason to know from past experience that thefts were likely to occur at particular branch); Urbano v. Days Inn of Am., Inc., 58 N.C. App. 795, 295 S.E.2d 240 (1982) (motel owner should have been alerted to danger to guests in light of twelve previous crimes on premises).

36. *See, e.g.,* Gillot v. Washington Metropolitan Area Transit Auth., 507 F. Supp. 454 (D.D.C. 1981) (abduction of woman from parking lot and subsequent rape found to be an unforeseeable event); Herold v. Burlington Northern, Inc., 342 F. Supp. 862 (D. Minn. 1972) (assault of woman in railroad parking lot could not have been anticipated); McClendon v. Citizens & S. Nat'l Bank, 155 Ga. App. 755, 272 S.E.2d 592 (1980) (robbery of bank patron in parking lot by two female assailants was a sudden unforeseeable occurrence); Pennington v. Church's Fried Chicken, Inc., 393 So. 2d 360 (La. Ct. App. 1980) (owner of fast food restaurant

likelihood of unlawful conduct was sufficient to establish foreseeability.[37] The best view, however, determines the foreseeability of the criminal act not solely in terms of prior similar occurrences, but in light of the "totality of the circumstances."[38]

Closely related to foreseeability is the issue of proximate cause.[39] When a defendant has been negligent by breaching the duty of

---

could not have predicted that patron would be knocked to floor when her purse was snatched); Rosensteil v. Lisdas, 253 Or. 625, 456 P.2d 61 (1969) (restaurant owner could not anticipate that two fighting men would burst into restaurant).

These cases are based on a common assumption that foreseeability of the criminal act arises only when there have been prior like crimes on the premises. This view recently has been discredited in Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985). The court revealed the flawed reasoning underlying the rule requiring the plaintiff to put forth evidence of prior similar incidents:

> First, the rule . . . . has the effect of discouraging landowners from taking adequate measures to protect premises which they know are dangerous . . . . Moreover, under the rule, the first victim always loses, while subsequent victims are permitted recovery . . . . Second, a rule which limits evidence of foreseeability to prior similar criminal acts leads to arbitrary results and distinctions . . . . Third, the rule erroneously equates foreseeability of a particular act with previous occurrences of similar acts.

695 P.2d at 658-59, 211 Cal. Rptr. at 361-62.

37. *See, e.g.,* Lillie v. Thompson, 332 U.S. 459, 461-62 (1947) (foreseeable danger may be found where defendant "was aware of conditions which created a likelihood" of criminal activity); *see also* Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 145, 18 Cal. Rptr. 892, 896-97 (1962) (rape of eleven year old girl at summer camp was foreseeable in light of dangerous persons in vicinity and inadequate nighttime supervision); Neering v. Illinois Cent. R.R. Co., 383 Ill. 366, 380, 50 N.E.2d 497, 503 (1943) (presence of hoboes and tramps in railroad yard sufficient to alert owner that assaults could occur). *See generally* RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965) (speaking of foreseeability as "a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though . . . [there is] no reason to expect it on the part of any particular individual").

One court, however, held that there was no landowner liability despite a high degree of foreseeability. Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962). Reasoning that criminal conduct can be anticipated "virtually anywhere and at anytime," the court stated that the issue to be resolved was not foreseeabilty of criminal activity, but whether an affirmative duty to protect against it should be attributed to the landowner. *Id.* at 583, 186 A.2d at 293. See *infra* notes 52-62 and accompanying text for a discussion of this decision.

38. Isaacs v. Huntington Memorial Hosp., 695 P.2d at 661, 211 Cal. Rptr. at 364 ("other types of evidence may also establish foreseeability, such as the nature, condition and location of the defendant's premises").

39. Proximate cause, also referred to as to as legal cause, has been defined in the RESTATEMENT (SECOND) OF TORTS § 431: "[t]he actor's negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm . . . ." For a thorough examination of legal cause, see Green, *The*

reasonable care to another, he will be liable only if the negligent act was the proximate cause of an injury.[40] If the plaintiff's injury is inflicted by a third party on defendant's premises, the court must determine whether the defendant's failure to protect the plaintiff was a proximate cause[41] or whether the third party's criminal act constituted a superseding cause.[42] Defendants have not been held liable where the criminal acts of third persons were found to break the chain of events linking defendants' negligence to plaintiffs' harm.[43] However, if the defendant had reason to anticipate the crime,[44] the third party's acts will not be considered an intervening force and the defendant's failure to take reasonable protective measures will be considered a proximate cause of the injury.[45]

Causal Relation Issue in Negligence Law, 60 MICH. L. REV. 543 (1962); Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189 (1952); PROSSER, *supra* note 29, §§ 41-44.

40. *See, e.g.*, Tyndall v. United States, 306 F. Supp. 266, 269 (E.D.N.C. 1969), *aff'd*, 430 F.2d 1180 (4th Cir. 1970); *see also* RESTATEMENT (SECOND) OF TORTS § 430 (setting forth the requirement of an adequate causal relation between the negligence and the harm); PROSSER, *supra* note 29, §§ 41-42 (discussing the various tests for determining proximate cause).

41. The defendant's failure to protect need not be the sole cause or even the principle cause of plaintiff's injury. It need only be "a" legal cause. *See* RESTATEMENT (SECOND) OF TORTS § 430 comment d (1965).

> If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.

RESTATEMENT (SECOND) OF TORTS § 439 (1965).

42. "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." RESTATEMENT (SECOND) OF TORTS § 440 (1965). *See id.* §§ 442-453 (setting forth rules for determining when an intervening force constitutes a superseding cause); PROSSER, *supra* note 29, § 44 (examining the circumstances under which a negligent defendant will be relieved of liability due to third person's superseding actions).

43. *See, e.g.*, Gillot v. Washington Metropolitan Area Transit Auth., 507 F. Supp. at 457-58 (abduction of plaintiff from parking facility was a superseding cause despite inadequate security precautions by defendant); Herold v. Burlington Northern, Inc., 342 F. Supp. at 864 (assault of employee in parking lot was a "completely independent intervening force").

44. The elements of foreseeability and causation are closely connected. Whether the defendant's acts constitute a proximate cause of the plaintiff's injury hinges on whether the harm was foreseeable. *See, e.g.*, Tyndall v. United States, 306 F. Supp. at 269 ("requisite for the finding of proximate cause is the foreseeability of the injury"); Wallinga v. Johnson, 269 Minn. 436, 440, 131 N.W.2d 216, 219 (1964) ("criminal intervening force . . . cannot be a legally effective superseding cause unless it possesses the attribute of unforeseeability").

45. *See, e.g.*, Morse v. Homer's, Inc., 295 Mass. 606, 610, 4 N.E.2d 625, 627-

B. Landlord Liability

General landowner liability principles are clearly illustrated in cases where tenants or visitors have sued landlords for injuries inflicted by intruders in common areas of the premises.[46] Where the danger could have been anticipated and the landlord failed to maintain adequate security, courts have held that the landlord breached the duty of reasonable care and was therefore liable to the injured party.[47]

In *Kline v. Massachusetts Avenue Apartment Corp.*,[48] the court

---

28 (1936) (theft of ring from bailee by criminal could have been foreseen and therefore did not supersede bailee's negligence as the legal cause); Hines v. Garrett, 131 Va. 125, 140-41, 108 S.E. 690, 694-95 (1921) (rape could have been anticipated when conductor negligently discharged female passenger alongside tracks at night and therefore criminal acts did not supersede railroad's negligence); McLeod v. Grant County School Dist. No. 128, 42 Wash. 2d 316, 321, 255 P.2d 360, 363 (1953) (boys' acts did not supersede school's negligence because forcible rape of young girl in unsupervised gymnasium "fell within a general field of danger which should have been anticipated").

46. For a thorough discussion of landlord liability for criminal acts of third parties, see Haines, *Landlords or Tenants: Who Bears the Costs of Crime?*, 2 CARDOZO L. REV. 299 (1981); Moore, *The Landlord's Liability to His Tenants for Injuries Criminally Inflicted by Third Persons*, 17 AKRON L. REV. 395 (1984); Smith, *The Landlord's Duty to Defend His Tenants Against Crime on the Premises*, 4 WHITTIER L. REV. 587 (1982); *see also* Note, *Municipal Tort Liability for Criminal Attacks Against Passengers on Mass Transportation*, 12 FORDHAM URB. L.J. 325, 332 n.56 (1984) (citing additional articles).

47. *See, e.g.*, Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (tenant mugged in common hallway of building with history of such incidents); Flood v. Wisconsin Real Estate Inv. Trust, 503 F. Supp. 1157 (D.C. Kan. 1980) (tenant raped after landlord decreased frequency of security patrols); Spar v. Obwoya, 369 A.2d 173 (D.C. 1977) (tenant shot in common hallway of residence by assailant who entered through unlocked front door); Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 407 N.E.2d 451, 429 N.Y.S.2d 606 (1980) (guest shot in unattended lobby while signing register); Sherman v. Concourse Realty Corp., 47 A.D.2d 134, 365 N.Y.S.2d 239 (2d Dept. 1975) (tenant assaulted and robbed by intruder who gained access to building as result of broken lock); Skaria v. State, 110 Misc. 2d 711, 442 N.Y.S.2d 838 (N.Y. Ct. Cl. 1981) (tenant raped when superintendant failed to lock elevator controls which would have prevented access to basement at night); Dick v. Great South Bay Co., 106 Misc. 2d 686, 435 N.Y.S.2d 240 (N.Y. Civ. Ct. 1981) (tenant robbed and assaulted by intruders who gained access through unsecured front door), *modified and aff'd*, 109 Misc. 2d 473, 442 N.Y.S.2d 348 (N.Y. App. Term. 1981). *But see* Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962) (landlord did not breach duty of reasonable care to deliveryman beaten and robbed by assailants in elevator since duty to provide police protection is not required of private persons); Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984) (landlord generally can not be held liable for criminal acts of third persons because they constitute conduct of unpredictable independent agents).

48. 439 F.2d 477 (D.C. Cir. 1970).

permitted recovery from a landlord for injuries sustained by a tenant who was attacked and robbed in the hallway of her apartment building.[49] The court held that the landlord's duty stemmed from his control of the common areas of the building which vested him with exclusive power to guard against foreseeable dangers.[50] The landlord breached this duty by failing to post security guards or to take other protective measures despite his knowledge of previous incidents of crime in the building.[51]

A different view was taken by the New Jersey Supreme Court in *Goldberg v. Housing Authority of Newark*.[52] In *Goldberg*, the plaintiff sued the owner of a housing project to recover for injuries inflicted by two assailants who had beaten and robbed him in an elevator as he was making a delivery to a tenant.[53] The plaintiff claimed that the landlord had breached a duty to provide police protection.[54] In a sharply divided decision,[55] the court reversed the jury's finding that the landlord had been negligent in failing to take protective measures and that he should be held accountable for the plaintiff's injuries.[56] Despite a finding of foreseeability, the majority declined to impose a duty upon the landlord to provide police protection for a non-tenant.[57] The court held that this responsibility properly rested with the government.[58]

---

49. *Id.* at 478.

50. Explaining its decision, the court stated: "we place the duty of taking protective measures guarding the entire premises and the areas peculiarly under the landlord's control against the perpetration of criminal acts upon the landlord, the party to the lease contract who has the effective capacity to perform these necessary acts." *Id.* at 482.

51. *Id.* at 486-87.

52. 38 N.J. 578, 186 A.2d 291 (1962).

53. *Id.* at 579, 186 A.2d at 291.

54. *Id.* at 580, 186 A.2d at 291.

55. The justices in *Goldberg* split four to three. *Id.* at 609, 186 A.2d at 299.

56. 70 N.J. Super. 245, 175 A.2d 433 (App. Div. 1961), *rev'd*, 38 N.J. 578, 186 A.2d 291 (1962).

57. The majority stated that since crime can be anticipated everywhere at all times, the question of foreseeability was not the determining factor. The ultimate issue, the court stated, was whether it was equitable to impose a duty on the defendant to provide police protection against crime in light of the relationship between the parties, the type of risk and the interest to society in preventing the harm. *Goldberg*, 38 N.J. at 583, 186 A.2d at 293.

58. *Id.* at 588-92, 186 A.2d at 296-99 ("duty to provide police protection is and should remain the duty of government and not of the owner of a housing project"). *Id.* at 592, 186 A.2d at 298-99. *But see* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 484 (D.C. Cir. 1970) ("Municipal police cannot patrol the entryways and the hallways, the garages and the basements of private

The position of the *Goldberg* majority was countered by a strong dissent[59] which stressed that basic precepts of negligence law require that responsibility for safeguarding persons entering premises and liability for any harm resulting from failure to meet that responsibility must rest with the landlord, the party in control.[60] This position accords with the *Kline*[61] court's statement that "[n]ot only as between landlord and tenant . . . , but even as between the landlord and the police power of government, the landlord is in the best position to take the necessary protective measures."[62]

Kline and *Goldberg* are distinguishable in that the former involved a tenant's claim against his landlord while the latter involved a lawsuit by a visitor to the premises. A landlord's duty to his tenant is founded upon more than mere landowner liability in that the lease agreement is treated as a contract under which a tenant, who pays rent to the landlord each month in exchange for residential or commercial space, is entitled to various services.[63] Some courts have held that where the landlord has undertaken to install locks or take other protective measures, he has a duty to maintain the level of security that existed at the beginning of the tenant's lease term.[64] A landlord and a visitor to the premises, like the plaintiff deliveryman in *Goldberg*, do not share a contractual relationship. Nevertheless, in suits by non-tenants, courts have held landlords liable for criminal

---

multiple unit apartment dwellings. They are neither equipped, manned, nor empowered to do so.")

59. *Id.* at 593-609, 186 A.2d at 299-307 (Jacobs, J., dissenting).

60. *See id.* at 609, 186 A.2d at 307 (Jacobs, J., dissenting).

61. 439 F.2d at 477.

62. *Id.* at 484.

63. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (lease conveys not only property interest but "a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, *secure windows and doors*, proper sanitation, and proper maintenance" (emphasis added)). However, the warranty of habitability has been held not to extend to protection from injury caused by third parties. Hall v. Park Dell Terrace Partnership, 425 So. 2d 372 (La. Ct. App. 1982). *See generally* Quinn & Phillips, *The Law of Landlord Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 FORDHAM L. REV. 123 (1971).

64. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 485 (D.C. Cir. 1970); Flood v. Wisconsin Real Estate Inv. Trust, 503 F. Supp. 1157, 1160 (D.C. Kan. 1980); Sherman v. Concourse Realty Corp., 47 A.D.2d 134, 139, 365 N.Y.S.2d 239, 243 (2d Dep't. 1975).

acts of third parties on the ground that control of the premises, not contractual obligation, is the cornerstone of landlord liability.[65]

In *Nallan v. Helmsley-Spear, Inc.*,[66] the plaintiff, a visitor to a Manhattan office building who was shot as he signed the guest register in an unattended lobby, brought a cause of action for negligence against the landlord. The New York State Court of Appeals overruled a former ruling which had held that plaintiff's injuries were neither foreseeable nor a proximate result of the landlord's conduct.[67] Given the likelihood of criminal activity in the building after business hours, the court determined that the absence of a lobby attendant at the time of the shooting may have been a proximate cause of the injury.[68] The court concluded that the facts in the record tended to indicate liability on the part of the landlord.[69] *Nallan*, therefore, illustrates that the landlord's duty to protect against criminal attack does not hinge on a contractual relationship but springs from the elements of foreseeability and control.

C. Bank Liability

Banks have been held to a higher standard of care than have owners of ordinary commercial establishments.[70] Therefore, what constitutes reasonable care on the part of the average owner of business premises may not amount to reasonable care on the part

---

65. *See* Doyle v. Exxon Corp., 592 F.2d 44, 46 (2d Cir. 1979); Chrysler Corp. v. M. Present Co., 491 F.2d 320, 325 (7th Cir. 1974); Weber v. Schlemmer, 365 F.2d 323, 325-26 (6th Cir. 1966); Hanko v. United States, 583 F. Supp. 1280, 1283 (W.D. Pa.), *aff'd*, 749 F.2d 26 (3d Cir. 1984). *But see* Weaver v. Albee, 350 F.2d 638, 639 (7th Cir. 1965) (holding that landlord's only duty to tenant's guest is avoidance of intentional infliction of harm).

66. 50 N.Y.2d 507, 407 N.E.2d 451, 429 N.Y.S.2d 606 (1980).

67. *Id.* at 521, 407 N.E.2d at 456, 429 N.Y.S.2d at 614 (1980).

68. *Id.* at 521, 407 N.E.2d at 458-59, 429 N.Y.S.2d at 613-15.

69. *Id.* at 523, 407 N.E.2d at 460, 429 N.Y.S.2d at 616.

70. *See* Rothschild v. Manufacturers Trust Co., 279 N.Y. 355, 18 N.E.2d 527 (1939). "A banking corporation occupies a different relation to the public than do ordinary corporations, and its transactions frequently are subjected to a closer scrutiny and tested by a higher standard than that applied to ordinary commercial affairs." *Id.* at 359, 18 N.E.2d at 528; *see also* Stalzer v. European Am. Bank, 113 Misc. 2d 77, 81, 448 N.Y.S.2d 631, 634 (N.Y. Civ. Ct. 1982) (public's perception of bank as a secure environment in which to conduct financial business "makes a bank quite different from any other store or commercial premises"). *But see* Berdeaux v. City Nat'l Bank of Birmingham, 424 So. 2d 594, 595 (Ala. 1982) (court refused to adopt "special duty" of bank to customers); Nigido v. First Nat'l Bank, 264 Md. 702, 704, 288 A.2d 127, 128 (1972) (duty of bank to protect customers from robberies no greater than that of ordinary shopkeeper).

of a bank. Nevertheless, this principle can not be extended to require banks to become insurers of the public safety.[71]

In general, customers have been unable to recover for physical injuries sustained during bank robberies.[72] Courts have denied recovery for physical harm on several grounds which, while plausible in the holdup context, have no application to cases of ATM theft.[73] In *Nigido v. First National Bank of Baltimore*,[74] a customer who was shot in the course of a robbery sued the bank for negligence, claiming that security devices were not in proper working order, that the building was not adequately guarded, and that, in light of prior robberies, these omissions constituted a breach of the bank's duty to him.[75] The court reasoned: (a) that while bank robberies may have been foreseeable, shootings were not; (b) that there was no effective way for the bank to screen potential bank robbers from customers; and (c) that the presence of armed guards on bank premises might have prompted bloodshed, not prevented it.[76] Consequently, the plaintiff was unable to recover.[77]

In *Noll v. Marian*,[78] plaintiff was wounded when armed robbers, who entered the bank and announced, "It's a holdup. Nobody should move," began shooting when a teller grabbed something and ducked behind the counter.[79] Plaintiff alleged that the bank, through

---

71. *See* Drake v. Sun Bank and Trust, 377 So. 2d 1013, 1016 (Fla. Dist. Ct. App. 1979) (citing Burgess v. Chicopee Sav. Bank, 336 Mass. 331, 333, 145 N.E.2d 688, 690 (1957)), *rev'd*, 400 So. 2d 569 (Fla. Dist. Ct. App. 1981); *see also* RESTATEMENT (SECOND) OF TORTS § 344 comment d (1965) ("possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons . . . ").

72. *See, e.g.*, Berdeaux v. City Nat'l Bank of Birmingham, 424 So. 2d 594 (Ala. 1982); Hewett v. First Nat'l Bank, 155 Ga. App. 773, 272 S.E.2d 744 (1980); Bence v. Crawford Sav. & Loan Ass'n, 80 Ill. App. 3d 491, 400 N.E.2d 39 (1980); Altepeter v. Virgil State Bank, 345 Ill. App. 585, 104 N.E.2d 334 (1952); Nigido v. First Nat'l Bank, 264 Md. 702, 288 A.2d 127 (1972); Noll v. Marian, 347 Pa. 213, 32 A.2d 18 (1943). *But see* Drake v. Sun Bank and Trust, 400 So. 2d 569 (Fla. Dist. Ct. App. 1981) (reversing dismissal of complaint on grounds that plaintiff's amended complaint, containing allegations that bank was in high crime area, provided little protection, and should have been aware of risk in light of prior similar incidents, stated a cause of action in negligence); Sinn v. Farmers Deposit Sav. Bank, 300 Pa. 85, 150 A. 163 (1930) (recovery permitted when bank employees stalled robber carrying bomb which subsequently exploded, injuring plaintiff).

73. *See infra* notes 144-49 and accompanying text.

74. 264 Md. 702, 288 A.2d 127 (1972).

75. *Id.* at 703-04, 288 A.2d at 127.

76. *Id.* at 704-06, 288 A.2d at 128-29.

77. *Id.* at 711, 288 A.2d at 131.

78. 347 Pa. 213, 32 A.2d 18 (1943).

79. *Id.* at 214, 32 A.2d at 18-19.

its employee, had been negligent in failing to obey the robbers' demands.[80] The court determined that the bank did have a duty to use reasonable care for the protection of its patrons,[81] but that the duty had not been breached since the emergency doctrine applied. The actions of the robbers were so sudden and unforeseeable that they presented defendant's employee with an emergency situation in which negligence could not be implied.[82]

The court in *Boyd v. Racine Currency Exchange, Inc.*[83] stressed the policy reasons against imposing liability against banks for injuries inflicted by bank robbers.[84] In *Boyd*, the plaintiff's husband was shot and killed when a bank teller failed to comply with a robber's demands.[85] The plaintiff alleged that the failure of the teller to acquiesce, as well as the bank's failure to instruct tellers how to respond during bank robberies, constituted a breach of duty to customers.[86] The court, however, held that no duty to accede to criminal demands should be imposed.[87] Such an obligation actually would provide an incentive for bank robbers to threaten or commit violence so as to compel banks either to turn over their funds or to risk liability for harm to their patrons.[88]

However, in *Stalzer v. European American Bank*,[89] where a customer was robbed on bank premises immediately after cashing a check, the bank was held accountable for the *economic* loss.[90] The *Stalzer* court held that bank patrons have a right to expect a secure

---

80. *Id.*, 32 A.2d at 19.
81. *Id.*
82. *Id.* at 215-16, 32 A.2d at 19-20.
83. 56 Ill. 2d 95, 306 N.E.2d 39 (1973).
84. *Id.* at 99-100, 306 N.E.2d at 41-42.
85. *Id.* at 96, 306 N.E.2d at 40.
86. *Id.* at 96-97, 306 N.E.2d at 40.
87. *Id.* at 100, 306 N.E.2d at 42.
88.

> If a duty to comply exists, the occupier of premises would have little choice in determining whether to comply with the criminal demands and surrender the money or to refuse the demand and be held liable in a civil action for damages brought by or on behalf of the hostage. The existence of this dilemma and knowledge of it by those who are disposed to commit such crimes will only grant to them additional leverage to enforce their criminal demands. The only persons who will clearly benefit from the imposition of such a duty are the criminals.

Id.

89. 113 Misc. 2d 77, 448 N.Y.S.2d 631 (N.Y. Civ. Ct. 1982).
90. The plaintiff in *Stalzer* sued solely for loss of money. The *Stalzer* opinion explicitly distinguishes itself from prior decisions where plaintiffs were physically injured during the course of bank robberies. *Id.* at 81, 448 N.Y.S.2d at 634.

environment in which to conduct their financial transactions.[91] The nature of a bank as a holder and distributor of money, "a most convertible commodity,"[92] poses a foreseeable risk of theft to the public.[93] Particularly where there have been prior incidents of harassment or theft, the bank must take steps to adequately protect its patrons.[94]

III. Bank Liability for "Unauthorized Transfers" at ATMs

A. The Electronic Fund Transfers Act

In 1974, Congress established the National Commission on Electronic Fund Transfers (Commission) to study electronic fund transfer systems and to make recommendations concerning this new form of financial technology.[95] Based on proposals in the Commission's final report, which was issued on October 28, 1977,[96] Congress enacted the Electronic Fund Transfers Act (EFTA) on November 10, 1978.[97]

While the EFTA does not include provisions establishing rights

---

91. *Id.*

92. *Id.*

93. *Id.* at 83, 448 N.Y.S.2d at 635.

94. The *Stalzer* court held:

> [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.

Id.

95. Title II of the Act of Oct. 28, 1974, Pub. L. 93-495, 88 Stat. 1508 (codified as amended at 12 U.S.C. §§ 2401-2408 (1982)). Congress directed that "[t]he Commission shall conduct a thorough study and investigation and recommend appropriate administrative action and legislation necessary in connection with the possible development of public or private electronic fund transfer systems . . . ." 12 U.S.C. § 2403(a).

96. COMMISSION REPORT, *supra* note 3.

97. 15 U.S.C. § 1693 states:

> (a) The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions, and intermediaries in electronic fund tranfers undefined.
>
> (b) It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems . . . .

Pub. L. No. 90-321 § 902, as added Title XX of the Act of Nov. 10, 1978, Pub.

and liabilities in the event of a robbery or assault at an ATM, it clarifies these issues with respect to the analagous situation of an unauthorized transfer.[98] Typically, unauthorized transfers take the form of much publicized "scams"[99] in which ATM customers are duped into allowing strangers to use their access cards. By doing so, customers unwittingly permit thieves to withdraw funds from their accounts.[100]

To protect consumers, Congress established limits on liability in the event that funds are withdrawn from customers' accounts in an unauthorized manner.[101] Under the EFTA, if the bank fails to meet certain threshold issuance and disclosure requirements, the consumer incurs no liability whatsoever.[102] If the bank has complied with these requirements, consumer liability is limited to the lesser of fifty dollars or the amount of money actually withdrawn in an unauthorized manner, provided that the consumer notifies the bank within two business days after learning of the theft.[103] If the loss is not reported

---

L. No. 95-630, § 2001, 92 Stat. 3728 (codified as amended at 15 U.S.C. § 1693 (1982)); *see also* S. REP. No. 915, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9403.

98. *See supra* note 15.

99. The "scam" has been described as follows:

> A customer enters the automated teller machine (ATM) area for the purpose of using a machine for the transaction of business with the bank. At the time that he enters, a person is using the customer service telephone located between the two automated teller machines and appears to be telling customer service that one of the machines is malfunctioning. This person is the perpetrator of the scam and his conversation with customer service is only simulated. He observes the customer press his personal identification code into one of the two machines. Having learned the code, the perpetrator then tells the customer that customer service had advised him to ask the customer to insert his [ATM card] into the allegedly malfunctioning machine to check whether it will work with a card other than the perpetrator's. When a good samaritan customer accedes to the request, the other machine is activated. The perpetrator then presses a code into the machine, which the customer does not realize is his own code . . . [permitting] a cash withdrawal from the unwary customer's account.

Ognibene v. Citibank, N.A., 112 Misc. 2d 219, 219-20, 446 N.Y.S.2d 845, 846 (N.Y. Civ. Ct. 1981); *see also* N.Y. Times, Dec. 14, 1982, at B2, col. 5.

100. *Id.*

101. 12 C.F.R. § 205.6 (1985).

102. 12 C.F.R. § 205.6(a) (1985). Regulation E provides that a consumer will incur liability only if the bank has provided the consumer with means of identification (such as a personal identification code) and with written information disclosing potential consumer liability, the procedure to be followed in the event that an access card is lost or stolen, and the bank's business hours. *Id.*

103. 12 C.F.R. § 205.6(b)(1) (1985).

within this time, the cap on consumer liability rises to a maximum of five hundred dollars.[104] Only if the consumer fails to notify the bank within sixty days of an unauthorized transfer appearing on his bank statement will he be subject to unlimited liability, totalling the amount of such unauthorized transfer plus the amount of any subsequent unauthorized transfers which the bank can establish would not have occurred but for the consumer's failure to notify.[105] Clearly, the burden of liability for losses due to unauthorized transfers lies with the financial institutions.[106]

B. Case Law

Since the EFTA was enacted, several lawsuits have been brought by consumers against their banks to recover for losses stemming from unauthorized ATM withdrawals made by perpetrators of a criminal scheme.[107] These incidents were so widespread that one lawsuit was filed by the Attorney General of New York on behalf of two classes of Citibank customers who alleged that they either had been victims of a criminal scheme or had been debited for withdrawals which they had never personally initiated.[108] The bank initially refused to refund amounts withdrawn from the plaintiffs' accounts.[109] Subsequently, however, Citibank agreed to a settlement in which it would reimburse 485 victims for losses totalling $135,000.[110]

---

104. *Id.*

105. *Id.* § 205.6(b)(2).

106. The Commission made the following statement regarding the focus of liability in its Final Report:

> Under these recommendations, the depository institution will be liable for all thefts of its customer's funds unless it can prove that the customer ignored the specific warnings . . . and thereby substantially contributed to the loss . . . . [P]lacing all liability on depository institutions in most cases will create a strong incentive for institutions to develop and use the most secure technology possible for customer identification.

COMMISSION REPORT, *supra* note 3, at 59.

107. *See, e.g., In re* New York v. Citibank, N.A., 537 F. Supp. 1192 (S.D.N.Y. 1982); Ognibene v. Citibank, N.A., 112 Misc. 2d 219, 446 N.Y.S.2d 845 (N.Y. Civ. Ct. 1981); Feldman v. Citibank, 110 Misc. 2d 838, 443 N.Y.S.2d 43 (N.Y. Civ. Ct. 1981); Judd v. Citibank, 107 Misc. 2d 526, 435 N.Y.S.2d 210 (N.Y. Civ. Ct. 1980). At this time, the only cases litigated over customers' losses of funds due to scams have been tried in New York against Citibank.

108. *In re* New York v. Citibank, N.A., 537 F. Supp. 1192, 1194 (S.D.N.Y. 1982).

109. Wall St. J., Dec. 10, 1982, at 20, col. 2.

110. *Id.* Citibank denied any wrongdoing, basing its decision to return the funds on the preservation of good customer relations.

In *Ognibene v. Citibank*,[111] an ATM user had $400 withdrawn from his account by the perpetrator of a scam.[112] The bank argued against liability claiming that the consumer, by handing his cash card to a thief, had thereby furnished him with the means of access to his account.[113] Consequently, the bank maintained that the transaction was not unauthorized[114] and the liability provision did not apply.[115] The court disagreed, concluding that since the consumer had not supplied the perpetrator with his personal identification code as well as his card, he had not furnished him with the means of access.[116] In short, the transaction was unauthorized and the bank was subject to the liability provision of the EFTA.[117]

C. Recent Amendment of Regulation E[118]

The Official Staff Commentary to Regulation E[119] illustrates applications of the regulatory provisions to various fact situations.[120] Before the recent amendment, the commentary contained two examples of unauthorized transfers: (1) where there has been a fraud-

---

111. 112 Misc. 2d 219, 446 N.Y.S.2d 845 (N.Y. Civ. Ct. 1981).

112. *See supra* note 99.

113. *Ognibene*, 112 Misc. 2d at 222, 446 N.Y.S.2d at 847.

114. 15 U.S.C. § 1693a excepts from the definition of unauthorized transfers any transaction "initiated by a person other than the consumer who was furnished with the card, code, or other means of access to such consumer's account by such consumer, unless the consumer has notified the financial institution involved that transfers by such other person are no longer authorized. . . ." 15 U.S.C. § 1693a(11)(A) (1982).

115. *Ognibene*, 112 Misc. 2d at 222, 446 N.Y.S.2d at 847.

116. *Id.* at 222-23, 446 N.Y.S.2d at 847-48.

117. *Id.* at 223-24, 446 N.Y.S.2d at 848. The court reasoned:

> Since the bank established the electronic fund transfer service and has the ability to tighten its security characteristics, the responsibility for the fact that plaintiff's code, one of the two necessary components of the "access device" or "means of access" to his account, was observed and utilized . . . must rest with the bank.

Id. at 223, 446 N.Y.S.2d at 848; *see also* Feldman v. Citibank, 110 Misc. 2d 838, 443 N.Y.S.2d 43 (N.Y. Civ. Ct. 1981) (first plaintiff permitted to recover fully for sums withdrawn from his account in unauthorized manner, but second plaintiff limited to amount of first unauthorized transfer only since she failed to notify the bank within a reasonable time that such a withdrawal had been made from her account); Judd v. Citibank, 107 Misc. 2d 526, 435 N.Y.S.2d 210 (N.Y. Civ. Ct. 1980) (plaintiff awarded $800 judgment in lawsuit against bank for unauthorized withdrawals from her account).

118. 50 Fed. Reg. 13,181 (1985) (codified at 12 C.F.R. § 205, Supp. II, section 205.2, Q2-28).

119. *See supra* note 14 and accompanying text.

120. *See* 12 C.F.R. § 205, Supp. II (1985).

ulent taking by a financial institution's employee;[121] and (2) where the withdrawal has been accomplished by use of an access device stolen or fraudulently obtained from the consumer.[122]

The Federal Reserve Board periodically updates Regulation E and the Commentary in order to respond to new developments arising in the field of electronic fund transfers.[123] Recently, such an amendment was passed[124] which classifies an ATM withdrawal induced by force as an unauthorized transfer.[125] As a result, the favorable liability limitations applicable in cases of unauthorized transfers[126] are available to victims of forced initiation.

Forced initiation by a third party is closely analagous to an ATM robbery. The only difference is that, in the former situation, the thief uses force during the ATM transaction to compel a withdrawal, while in the latter, the thief uses force or threat of force once the withdrawal has been completed. The results, however, are identical. In the case of forced initiation, while the consumer actually performs the transaction himself, he is acting, in effect, as an instrument for another. Hence, there is a logical extension of the concept of unauthorized transfer. A theft perpetrated after the completion of an

---

121. *Id.* at section 205.2, Q2-26.

122. *Id.* at Q2-27.

123. 15 U.S.C. § 1693p provides:

> Not later than twelve months after the effective date of this subchapter and at one-year intervals thereafter, the [Federal Reserve] Board shall make reports to the Congress concerning the administration of its functions under this subchapter, including such recommendations as the Board deems necessary and appropriate. . . . In such report[s], the Board shall particularly address the effects of this subchapter on the costs and benefits to financial institutions and consumers, on competition, on the introduction of new technology, on the operations of financial institutions, and on the adequacy of consumer protection.

15 U.S.C. § 1693p (1982).

124. *See supra* note 118.

125. The text of the amendment reads as follows:

> Q2-28: *Unauthorized transfers—forced initiation.* A consumer is forced by a robber (at gunpoint, for example) to withdraw cash at an ATM. Do the liability limits for unauthorized transfers apply?
>
> A: *Yes.* The transfer is unauthorized for purposes of Regulation E. Under these circumstances, the actions of the robber are tantamount to use of a stolen access device.

12 C.F.R. § 205, Supp. II, section 205.2, Q2-28 (1985). Prior to this amendment, two banks, Texas Federal Savings and The Union Bank and Trust Co., had voluntarily instituted a policy of reimbursing customers compelled at gunpoint to make ATM withdrawals. *See* N.Y. Times, May 25, 1984, at 14, col. 5.

126. See *supra* notes 101-05 for a description of liability limitations which apply in the event of an unauthorized transfer.

ATM transaction cannot be classified as an unauthorized transaction because the withdrawal was carried out from start to finish by the consumer on his own behalf.[127] Nevertheless, the extension of the sphere of unauthorized transfers to cases of forced initiation is significant in that it evinces a tendency on the part of the Congress to enlarge the scope of bank liability in favor of consumer protection.[128]

IV. The Types of ATMs and Corresponding Theories of Liability

ATMs operate in a variety of settings. Some terminals are situated on-site, that is, directly within the bank's premises.[129] Others are situated off-site, on an outside wall of the bank or at shopping centers, airports, or other locations where there is a demand for immediate access to money.[130] Furthermore, off-site machines may be owned by the bank or owned by the possessor of the site.[131] Finally, on-site or off-site terminals may be shared by several banks under a network arrangement.[132] The factors of location and ownership bear significantly on the issues of duty and liability.

---

127. This sequence of events does not satisfy the criteria for an unauthorized transfer set forth in Regulation E. *See supra* note 15.

128. The tendency to broaden the scope of bank liability in favor of consumer rights has been demonstrated in at least two other areas. First, Congress has limited consumers' liability for losses resulting from unauthorized transfers. *See supra* notes 101-06 and accompanying text. Additionally, in the consumer credit area, consumer liability for unauthorized charges initiated with a lost or stolen credit card cannot exceed $50 and the bank must absorb the remaining loss. *See* Truth in Lending Act, 15 U.S.C. § 1643 (1982).

129. *See* Horan, *Outlook for EFT Technology*, in COMPUTERS AND BANKING: ELECTRONIC FUND TRANSFER SYSTEMS AND PUBLIC POLICY 26-27 (K. Colton and K. Kraemer eds. 1980) (describing the various placements of ATM terminals).

130. *Id.*

131. For instance, some ATMs have been purchased and installed by supermarkets. *See* Independent Bankers Ass'n of N.Y., Inc. v. Marine Midland Bank, 583 F. Supp. 1042, 1044 (W.D.N.Y. 1984), *rev'd*, 757 F.2d 453 (2d Cir.), *appeal pending*, 106 S. Ct. 52 (1985).

132. A network system is formed when two or more banks link their ATM terminals to a central computer. This permits a customer of an individual member bank to carry out transactions at any participating bank's terminal, providing widespread access to his account. *See* N.Y. Times, Mar. 7, 1985, at D1, col. 1.

> To use the system, a customer of any member bank who has a bank machine card, or a Mastercard or Visa credit card issued by one of the network's members, goes to any teller machine in the system and inserts the card and enters a personal identification number, the same as at the customer's own bank's machines. The customer can withdraw cash, make a balance inquiry or get a cash advance with the credit card. The

A. On-site ATMs Situated in an Enclosed Vestibule

The most familiar type of ATM is located at the bank branch within an enclosed vestibule.[133] After banking hours, the customer must use his access card to gain entry and the door subsequently locks behind him. This arrangement, designed to keep out everyone but ATM cardholders, is not foolproof, and once an intruder is inside, the secluded vestibule actually provides an attractive environment for the perpetration of a crime.[134]

The on-site vestibule presents the strongest case for bank liability. In general, landowners are liable for injuries caused by reasonably foreseeable acts of third persons to patrons on their premises.[135] An exception has been made by the courts with respect to banks where customers sustained injuries at the hands of bank robbers.[136] However, since the rationales advanced in cases of bank robbery do not apply to thefts at ATMs,[137] principles of general landowner liability should control. In short, since the ATM is situated on bank premises and the bank exercises exclusive control over the site, it is subject to liability to its customers for injuries caused by intentionally harmful acts of third parties if it fails to exercise reasonable care to furnish protection.[138]

In *Oppenheimer v. Chase Manhattan Bank, N.A.*,[139] the plaintiff sued his bank after he was assaulted and robbed at a vestibule facility

---

customer's card even opens the door to the secured area where many teller machines are located.

The banks' computers have been programmed to identify transactions by customers of other banks, and to route the necessary information—the customer's name, account number and, for example, the amount of cash requested—to a central computer, which routes it to the customer's bank for verification.

Id. at D13, col. 1.

133. But see *infra* note 159 and accompanying text for a discussion of the shift from on-site ATMs to other types of terminals.

134. *See Duty of Banks*, *supra* note 6, at 3, col. 1.

135. *See supra* notes 26-45 and accompanying text.

136. *See supra* notes 72-88 and accompanying text.

137. *See infra* notes 149-58 and accompanying text.

138. See *supra* notes 26-45 and accompanying text for a discussion of general landowner liability principles and notes 70-94 and accompanying text for a discussion of their application to banks in particular.

The scope of liability will be confined to the area in which the consumer is present to conduct banking business. *See* PROSSER, *supra* note 29, § 61, at 424 ("area of invitation"). Therefore, once the customer leaves this area, the bank no longer can be held responsible for theft of the customer's funds. The question of scope is not so easily defined where the terminal is situated outside the bank's premises. *See infra* notes 163-70.

139. N.Y.L.J., May 4, 1984, at 13, col. 1 (N.Y. Civ. Ct., May 3, 1984).

after completing an ATM withdrawal.[140] The court denied a motion for summary judgment by the bank, finding that there were material issues of fact as to the nature and adequacy of security.[141] Relying on the principles set forth in *Stalzer*,[142] the court focused on the expectation of bank security by customers[143] and the foreseeability of crime at financial institutions.[144] The *Oppenheimer* court, however, emphasized more clearly than the *Stalzer* court that the risks inherent in banking transactions are sufficient to support a finding of foreseeability when it stated: "The robbery of a person using the services of a bank, including an automatic money machine in a bank, is clearly foreseeable *even if there were no prior robberies or robberies of a particular type at that branch.*"[145]

The unique characteristics of ATMs render them especially amenable to incidents of this kind.[146] If thefts occur at crowded banks during daytime hours, the potential for criminal activity seems greater at unattended facilities at night.[147] Where danger is more clearly anticipated, the duty to guard against it should be more stringently enforced.[148]

Moreover, *Oppenheimer* did not limit recovery solely to financial loss.[149] Where customers have sued banks for injuries incurred during bank robberies, recovery for physical harm has been denied consistently.[150] However, where a plaintiff sued for financial loss, recovery was permitted.[151] The *Oppenheimer* opinion, however, draws

---

140. *Id.*

141. *Id.* The case was never tried on the merits. However, the court did discuss the substantive issues of duty and liability in its opinion denying the bank's summary judgment motion. *Id.*

142. *See supra* notes 89-94 and accompanying text.

143. "The issuance of the card and the operation of the bank's premises constitute an invitation to the public to enter into the bank and expect certain protection." *Oppenheimer*, N.Y.L.J., May 4, 1984, at 13, col. 1.

144. *Id.*

145. *Id.* (emphasis added); *accord* Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985) (evidence of prior similar criminal activity not necessary to establish foreseeability of the harm to the plaintiff).

146. *See supra* note 6.

147. *See Duty of Banks*, *supra* note 6, at 3, col. 1.

148. *See* PROSSER, *supra* note 29, § 34, at 208. "The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it." *Id.*

149. *See Oppenheimer*, N.Y.L.J., May 4, 1984, at 13, col. 1.

150. *See supra* notes 72-88 and accompanying text.

151. *See supra* notes 89-94 and accompanying text.

no distinction between physical and economic harm, but rather speaks generally of the "extent" of plaintiff's injuries.[152]

When an ATM user is simultaneously robbed and assaulted, he should be permitted to recover for all injuries, both financial and physical. The rationales advanced in cases denying recovery for physical injury incurred during armed robberies[153] do not apply in the context of an ATM robbery. With respect to foreseeability of the violent act,[154] assaults can be expected to accompany thefts at ATMs which are unattended, operate at night, and where the risk of identification and apprehension of the perpetrator are slight. Furthermore, the emergency doctrine[155] is not relevant since no bank teller or other bank employee is present in the ATM setting. Finally, the deterrence policy advanced in *Boyd v. Racine Currency Exchange*[156] is likewise inapplicable. The ATM customer carries out his transaction with an electronic device and, therefore, no bank employee is presented with a choice between compliance or possible harm to the customer.[157] Imposition of liability on the bank for physical injury to victims of ATM robberies will not provide an incentive to the perpetrators because it will not provide them with leverage in achieving their criminal ends.[158]

B. Off-site ATMs

Banks increasingly are installing off-site terminals in order to make ATM services more easily accessible to their customers.[159] When the ATM is not situated on bank premises, principles of landowner

---

152. *Oppenheimer*, N.Y.L.J., May 4, 1984, at 13, col. 1.

153. See *supra* notes 74-88 and accompanying text for a discussion of these policies.

154. *See supra* notes 74-77 and accompanying text.

155. *See supra* notes 78-82 and accompanying text.

156. *See supra* notes 83-88 and accompanying text.

157. *Id.*

158. *Id.*

159. A recent article described this shift as follows:

> In Florida, for example, the rush by financial institutions, retailers and independent third parties to place off-premises ATMs . . . has resulted in oversaturation. In some urban areas one literally may find an ATM on each corner of an intersection. Depending on where they bank, cardholders may participate in shared networks such as Max, Publix Teller, ADP Exchange, Honor, Plus, Cirrus, etc. Depending on their financial institution's affiliations, cardholders have access to some portion of the latticework of shared networks through off-premises bank machines deployed in Winn Dixie, Kash 'n Karry, Family Mart, and 7-Eleven stores; and through third-party ATMs in Publix supermarkets and in a variety of other locations, including free-standing kiosks deployed by the

liability[160] may not apply. Since off-site terminals are installed in a variety of settings,[161] theories of liability should be tailored to the specific features of the terminal involved.[162]

1. ATMs Situated in Exterior Walls of Bank Premises

Terminals installed in exterior walls of bank branches can be viewed as hybrids between on-site and off-site machines. While the machine itself is part of the physical premises, the user executes his transaction from the public sidewalk. Consequently, it would appear that there is no landowner liability for third party criminal assaults.[163] The court in *Schwartz v. Helms Bakery Ltd.*,[164] however, took an extended view of the term premises when it held the bakery liable for injury to a customer on a public street. In *Schwartz*, the driver of a bakery truck told a child that he would wait while the child went home to get money to make a purchase.[165] When returning, the child darted into the street and was struck by a car.[166] The court found that the child was a business invitee to whom the bakery owed a duty to exercise reasonable care for his safety "upon all premises of the business over which [it] exercises control . . . ."[167] In order to arrive at this conclusion, the court redefined the concept of premises in the following manner:

> [T]he physical area encompassed by the term "the premises" does not . . . coincide with the area to which the invitor possesses a title or a lease. The "premises" may be less or greater than the invitor's property. The premises may include such means of ingress

---

neighborhood banking centers.
DeCotiis and Ora, *Fulfilling the Promise of Direct Debit Point of Sale*, 167 THE BANKERS MAGAZINE, May-June 1984, at 50.

160. *See supra* notes 26-94 and accompanying text.

161. *See supra* note 159.

162. Some ATMs are situated in enclosed areas equipped with security devices. *See supra* notes 133-48 and accompanying text. Others are installed in open areas easily accessible to criminals. *See infra* notes 163-88 and accompanying text. The degree of care to be exercised by the bank should be proportionate to the risks posed by the terminal at issue. See *supra* notes 32-33 and accompanying text and note 148 for discussions of reasonable care under the circumstances.

163. *See* RESTATEMENT (SECOND) OF TORTS § 344 (1965) ("A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public *while they are upon the land* for such a purpose . . . .") (emphasis added).

164. 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967).

165. *Id.* at 235, 430 P.2d at 70, 60 Cal. Rptr. at 512.

166. *Id.* at 236, 430 P.2d at 70, 60 Cal. Rptr. at 512.

167. *Id.* at 238, 430 P.2d at 72, 60 Cal. Rptr. at 514.

> and egress as a customer may reasonably be expected to use. The crucial element is control.[168]

The *Schwartz* court stretched the concept of extended premises to include a public highway far from the bakery's premises. It is questionable whether a bakery truck driver can control all parts of the public street where he stops to conduct business. However, the concept of extended premises is decidedly applicable in cases involving crimes at ATMs situated in exterior walls of banks. The area at issue directly adjoins bank premises where it would not be unreasonable to expect the bank to exercise some measure of control.[169] Furthermore, it is well established that a landowner who puts the adjacent sidewalk to a "special use" for his own benefit has a duty to maintain the sidewalk in a reasonably safe condition.[170]

Liability for acts of third persons, however, need not be premised

---

168. *Id.* at 239, 430 P.2d at 73, 60 Cal. Rptr. at 515 (footnotes omitted). Similarly, an argument can be made that since customers must stand outside to conduct banking business at this type of ATM terminal, a certain proximate area constructively becomes part of the premises.

169. However, the difficulty of defining the precise extent of such "premises" in the ATM context would raise new and troublesome legal questions. For instance, would the bank be liable for thefts occurring only when the customer is in physical contact with the terminal, or as he is in the act of transferring the money from the terminal to his wallet, or as he steps away and slips his wallet into his pocket? The boundary will be difficult to establish.

170. *See, e.g.,* Merriam v. Anacostia Nat'l Bank, 247 F.2d 596 (D.C. Cir. 1957) (pedestrian injured when she fell on sidewalk damaged by defendant's construction of new building); Barker v. Kroger Grocery & Baking Co., 107 F.2d 530 (7th Cir. 1939) (plaintiff stumbled where portion of sidewalk removed for construction of driveway by defendant); District of Columbia v. Texaco, Inc., 324 A.2d 690 (D.C. App. 1974) (pedestrian hurt by fall on sidewalk cracked by wear and tear of defendant's use as driveway). In *Texaco*, the court held:

> [T]he abutter derives private commercial benefit from the "special use" and is in the best position to be aware of and to guard against any dangerous condition caused by this use. Thus, although the District as the municipality is under a duty to exercise reasonable care in maintaining its sidewalks, this duty becomes secondary to the abutter's when he makes such "special use" of the sidewalk.

324 A.2d at 692.

For cases holding landowners liable for special uses outside the business premises that create a risk to others of criminal attack, see Butler v. Acme Markets, Inc., 89 N.J. 270, 275, 445 A.2d 1141, 1143 (1982) (store parking lot within the "scope of the invitation"); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981) (shopping mall parking lot considered part of the premises to which the landowner's duty to protect extended). *But see* McClendon v. Citizens & Southern Nat'l Bank, 155 Ga. App. 755, 756, 272 S.E.2d 592, 593 (1980) (bank not liable when patron held up in parking lot).

on the defendant's status as landowner.[171] Any party is negligent if he creates a situation which poses an unreasonable risk of intentional harm to another by a third party.[172] A service which dispenses money to customers on the street is particularly apt to attract criminal activity since it is highly visible, unattended and unprotected. Where a defendant creates a "stimulus"[173] or an incentive to commit crimes, an obligation to take security measures arises.[174]

2. *Teller Machines Installed at Remote Locations*

Terminals located at shopping malls, airports, and other such locations are situated in unprotected, highly-trafficked areas. These machines, like exterior wall terminals, expose customers to a high risk of robbery.[175]

Off-site teller machines present the most difficult scenario for imposing a duty on the bank to protect its patrons from criminal attack. The element of control over the premises is eliminated,[176] yet the risk of theft at such a facility is considerable.[177] There are two types of off-site ATMs. The bank may own the terminal itself and deploy it on commercial premises,[178] or the terminal may belong to the premises owner himself for which the bank agrees to pay a stipulated fee for access by its customers.[179] The issue raised is

---

171. *See* RESTATEMENT (SECOND) OF TORTS §§ 302B, 303 (1965).

172. RESTATEMENT (SECOND) OF TORTS § 302B (1965) ("An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of . . . a third person which is intended to cause harm, even though such conduct is criminal."); *see also id.* § 303 ("act is negligent if the actor . . . realizes or should realize that it is likely to affect the conduct of . . . a third person . . . in such a manner as to create an unreasonable risk of harm to the other").

173. *See* RESTATEMENT (SECOND) OF TORTS § 303 comment d (1965).

174. *See* RESTATEMENT (SECOND) OF TORTS § 302B comment e (1965). "[T]he actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others . . . where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account." *Id.*

175. *See supra* notes 6, 172-74 and accompanying text.

176. See *supra* note 29 and accompanying text for a discussion of the element of control.

177. *See supra* notes 6, 172-74 and accompanying text. The degree of risk, of course, will vary with respect to each individual facility according to the nature of the site, its location in the community, and the existence of prior incidents of crime.

178. *See supra* notes 130-31 and accompanying text.

179. *See supra* note 131 and accompanying text.

whether the bank or the owner of the site where the ATM is installed should have the duty to protect users from criminal attack and bear liability for loss should such an attack occur.

Clearly the owner of the premises has a duty to take reasonable measures to insure the safety of invitees upon his premises.[180] Nevertheless, by arranging for access for its customers, the bank has participated in exposing them to some risk of criminal attack.[181] Where the bank has created a foreseeable risk of harm to its patrons, it should bear some responsibility in protecting against the risk, as well as some measure of liability, should the customer be harmed.[182] Furthermore, if banks were held liable for thefts at on-site ATMs but not for those at terminals located off the premises, courts would be creating an incentive for banks to install their terminals at the off-site, more dangerous locations. Since it is unfeasible for banks to supervise activities on others' premises, it is suggested that banks provide in their contracts with the site owners that the owners take appropriate security measures.[183] In this way, if a bank is found liable for failing to provide reasonable protection for its patrons at an ATM, it can recover from the site owner for breach of its contractual duty.

C. ATMs Shared Under a Network Arrangement

Banks increasingly are entering into agreements with other banks whereby they link their ATM terminals to a central computer, thereby enabling customers of any member bank to initiate transactions at any other participant's terminal.[184] If a customer is robbed while

---

180. See *supra* notes 26-45 and accompanying text for a discussion of the duty of a landowner to exercise reasonable care to protect persons on the premises.

181. *See supra* notes 6, 172-74 and accompanying text.

182. Under the doctrine of joint and several liability, where two or more parties have acted in concert to commit a tort, they are deemed joint tortfeasors and each is liable to the plaintiff in damages. *See, e.g.*, McLeod v. American Motors Corp., 723 F.2d 830, *reh'g denied*, 729 F.2d 1468 (11th Cir. 1984); Foshee v. Lloyds, New York, 643 F.2d 1162 (5th Cir. 1981); Zapico v. Bucyrus-Erie Co., 579 F.2d 714 (2d Cir. 1978); Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

183. *See, e.g.*, Independent Bankers Ass'n of N.Y. State, Inc. v. Marine Midland Bank, 757 F.2d 453, 455 (2d Cir.), *appeal pending*, 106 S. Ct. 52 (1985) (supermarket which owned terminal was obligated under agreement with bank to provide security and take out insurance).

184. *See supra* note 132 and accompanying text. By August 1984, approximately 45% of all ATMs in the United States were affiliated with one of about 175 regional networks. Zimmer, *ATMs 1984: A Time for Opportunity*, MAG. OF BANK AD., May 1985, at 26; *see also* Ingram & Boomstein, *Shared ATM Networks:*

withdrawing funds from his bank account at another network participant's terminal, the question of which bank should be accountable arises. Liability for loss due to theft or assault at a network facility situated on a member bank's premises could be attributed both to that member in which the plaintiff is a depositor[185] and to the bank on whose premises the crime occurred.[186] If the network terminal is located on commercial premises,[187] the member banks should contract with the landowner to insure that some means of protection for their patrons is provided.[188]

V. The Bank's Defenses: Contributory or Comparative Negligence and Assumption of Risk

When a plaintiff encounters a risk created by the defendant's negligence and fails to respond in a reasonable manner so as to avoid the harm, the plaintiff will be said to have contributed to his own injury.[189] Traditionally, if the plaintiff had been found guilty of contributory negligence, he would have been barred from recovery.[190] Since this yielded a harsh result, most states replaced contributory negligence with comparative negligence,[191] which gen-

---

Legal and Operational Aspects, THE BANKERS MAGAZINE, Sept.-Oct. 1983, at 58-59.

185. Such liability could be based on a combination of factors. For instance, a depositor has a right to expect that his bank will provide him with a secure environment in which to conduct his banking business. *See supra* note 91 and accompanying text. In addition, the bank should be aware of the foreseeability of such incidents occurring at ATM facilities. *See supra* note 6.

186. See *supra* notes 26-45 for a discussion of general landowner liability principles.

187. *See, e.g.*, Independent Bankers Ass'n of N.Y. State, Inc. v. Marine Midland Bank, 757 F.2d at 455-56.

188. *See supra* note 183 and accompanying text.

189. RESTATEMENT (SECOND) OF TORTS § 463 (1965). *See generally* James, *Contributory Negligence*, 62 YALE L.J. 691 (1953) (explaining the development and basic elements of the contributory negligence defense); PROSSER, *supra* note 29, § 65 (same).

190. *See* Haeg v. Sprague, Warner & Co., 202 Minn. 425, 429, 281 N.W. 261, 263 (1938) (discussing hardships to plaintiff under traditional contributory negligence rule); RESTATEMENT (SECOND) OF TORTS § 467 (1965).

191. Forty-one states had shifted from a contributory to a comparative negligence theory by July 1985. Nine states adopted comparative negligence judicially. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Gustafson v. Benda, 661 S.W.2d 11 (Mo.

erally apportions damages between the plaintiff and the defendant according to their respective degrees of fault.[192]

Banks are likely to argue that if dangers posed by ATMs are so foreseeable, consumers must recognize them as well. Consequently, banks would maintain that when a consumer carries out an ATM transaction, particularly at night or in a high-crime neighborhood, his conduct itself is negligent and fails to conform to the standard which a reasonable person would observe for his own safety. However, "[i]f the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he exposes himself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless he acts unreasonably."[193] Whether the customer has acted in an unreasonable manner depends on the circumstances of each individual case.

In addition, banks may raise the defense of assumption of risk. In order to assume the risk, a person must know of the danger

---

1983); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). *But see* Golden v. McCurry, 392 So. 2d 815 (Ala. 1980) (Alabama Supreme Court declined judicial adoption of comparative negligence, holding that such a change was responsibility of legislature); Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 456 A.2d 894 (1983) (Maryland Court of Appeals refused to adopt comparative negligence judicially).

Thirty-two states have enacted comparative negligence statutes. *See* ARIZ. REV. STAT. § 12-2505 (West Supp. 1985-86); ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); COLO. REV. STAT. § 13-21-111 (Supp. 1984); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1985); GA. CODE ANN. § 51-11-7 (1982); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE §§ 6-801, 6-806 (1979); IND. CODE ANN. §§ 34-4-33-1 to -13 (Burns Supp. 1984); KAN. STAT. ANN. § 60-258a (1983); LA. CIV. CODE ANN. art. 2323 (West Supp. 1985); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MASS. ANN. LAWS ch. 231, § 85 (Michie/Law. Coop. Supp. 1985); MINN. STAT. ANN. § 604.01 (West Supp. 1985); MISS. CODE ANN. § 11-7-15 (1972); MONT. CODE ANN. § 27-1-702 (1985); NEB. REV. STAT. § 25-1151 (1979); NEV. REV. STAT. § 41.141 (1979); N.H. REV. STAT. ANN. § 507:7-a (1983); N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West Supp. 1985); N.Y. CIV. PRAC. LAW §§ 1411-1413 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, §§ 13, 14 (West Supp. 1985-86); OR. REV. STAT. § 18.470 (1983); PA. STAT. ANN. tit. 42, § 7102a (Purdon 1982); R.I. GEN. LAWS § 9-20-4 (Supp. 1984); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979); UTAH CODE ANN. §§ 78-27-37, 78-27-41 (1977); VT. STAT. ANN. tit. 12, § 1036 (1973); WASH. REV. CODE ANN. § 4.22.005 (Supp. 1986); WIS. STAT. ANN. § 895.045 (West 1983); WYO. STAT. § 1-1-109 (1977).

The states retaining contributory negligence are Alabama, Delaware, Kentucky, Maryland, North Carolina, South Carolina, Tennessee, Texas and Virginia.

For a description of the development of the comparative negligence doctrine in the United States, see generally WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT (1978 & Cum. Supp. July 1984); PROSSER, *supra* note 29, § 67.

192. *See* PROSSER, *supra* note 29, § 67.

193. RESTATEMENT (SECOND) OF TORTS § 473 (1965).

and appreciate its gravity[194] yet voluntarily decide to proceed with the course of action and take his chances.[195] Assumption of risk may be expressly stated[196] or implied from the plaintiff's conduct.[197] The essence of assumption of risk is that the plaintiff chooses voluntarily, by words or actions, to encounter the known danger, thereby releasing the defendant from responsibility.[198] Implied assumption of risk, which is usually a complete bar to recovery,[199] has been abolished or merged with contributory negligence in a number of jurisdictions.[200]

---

194. RESTATEMENT (SECOND) OF TORTS § 496D (1965); *see* Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Thompson, 236 F. 1, 9 (6th Cir. 1916) ("[k]nowledge of the risk is the watchword of the defense of assumption of risk"); Garcia v. City of South Tucson, 131 Ariz. 315, 319, 640 P.2d 1117, 1121 (Ariz. Ct. App. 1981), *rev'd on other grounds*, 135 Ariz. 604, 663 P.2d 596 (1983) ("plaintiff must have actual knowledge of the specific risk which injured him and appreciate its magnitude").

195. RESTATEMENT (SECOND) OF TORTS § 496E (1965); *see Garcia*, 131 Ariz. at 319, 640 P.2d at 1121 ("[a]ssumption of risk . . . is fundamentally based on consent"); Parker v. Roszell, 617 S.W.2d 597, 600 (Mo. Ct. App. 1981) ("[The defense] does not mean a hunter assumes the risk of being shot merely because he participates in that activity. Assumption of risk is based upon a voluntary consent . . . ."); *see also* PROSSER, *supra* note 29, § 68, at 489 (implied assumption of risk focuses more on plaintiff's consent than his knowledge).

196. RESTATEMENT (SECOND) OF TORTS § 496B (1965).

197. *Id.* § 496C.

198. *See* PROSSER, *supra* note 29, § 68, at 490-92. There may be circumstances in which the victim of an ATM robbery knew of the danger, comprehended its magnitude, and chose to proceed in spite of it. For instance, a customer who freely elects to enter an ATM vestibule and make a withdrawal, despite his awareness that a suspicious person, who is clearly not conducting banking business, is lurking inside, could be said to have assumed the risk.

199. RESTATEMENT (SECOND) OF TORTS § 496A (1965) ("A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.").

200. Five states have abolished or merged implied assumption of risk statutorily. *See* CONN. GEN. STAT. § 52-572h(c) (1983); MASS. ANN. LAWS ch. 231, § 85 (Michie/Law. Coop. 1985); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); OR. REV. STAT. § 18.475(2) (1983); UTAH CODE ANN. § 78-27-37 (1977).

Many state courts have held that implied assumption of risk no longer operates as a complete bar to recovery. *See* Leavitt v. Gillaspie, 443 P.2d 61 (Alaska 1968); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Frelick v. Homeopathic Hosp. Ass'n, 51 Del. 568, 150 A.2d 17 (1959); Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977); Burrows v. Hawaiian Trust Co., 49 Hawaii 351, 417 P.2d 816 (1966); Smith v. Blakey, 213 Kan. 91, 515 P.2d 1062 (1973); Parker v. Redden, 421 S.W.2d 586 (Ky. 1967); Felgner v. Anderson, 375 Mich. 23, 133 N.W.2d 136 (1965); Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971); Abernathy v. Eline Oil Field Services, Inc., 650 P.2d 772 (Mont. 1982); Bolduc v. Crain, 104 N.H. 163, 181 A.2d 641 (1962); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959); Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971); McWilliams v. Parham, 269 N.C. 162, 152 S.E.2d 117

Since a bank provides its customers with a service which it promotes, which it knows to present foreseeable risks, and which is highly profitable,[201] the defense of assumption of risk should be permitted only in situations of clear-cut disregard of danger by the consumer.[202] Such a position would be in keeping with the current provisions of the EFTA, in which the heavier burden of liability for unauthorized transfers, despite the public's awareness of scams, was imposed on financial institutions.[203]

VI. Recommendations

This Note suggests that banks do have a duty to use reasonable care to protect their customers from criminal attack at ATM facilities. As between the customer and the bank, the latter is in a better position to anticipate the risks and guard against them.[204] The proposal of a set of fixed measures for banks to implement so as to satisfy the duty of reasonable care is untenable since there are so many variables present in the area of ATM robberies. In general, courts should look to the likelihood of such incidents, the role of the bank in creating the risk, and the ability of the bank to control the premises as well as to provide for security either directly or by contract.

The type of ATM at which the crime occurs is central to the

(1967); Hirschbach v. Cincinnati Gas & Elec. Co., 6 Ohio St. 3d 206, 452 N.E.2d 326 (1983); Ritter v. Beals, 225 Or. 504, 358 P.2d 1080 (1961); Rutter v. Northeastern Beaver County School Dist., 496 Pa. 590, 437 A.2d 1198 (1981); Farley v. M M Cattle Co., 529 S.W.2d 751 (Tex. 1975); Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 515 P.2d 821 (1973); Gilson v. Drees Bros., 19 Wis. 2d 252, 120 N.W.2d 63 (1963); Ford Motor Co., Inc. v. Arguello, 382 P.2d 886 (Wyo. 1963). *See generally* PROSSER, *supra* note 29, § 68, at 493-98 (describing the trend toward merger or abolition of assumption of risk in the United States).

201. See *supra* note 2 for illustrations of the considerable profitability of ATMs to banks who install them.

202. *See* RESTATEMENT (SECOND) OF TORTS § 496C comment j (1965).

> [C]onsiderations of public policy, for the protection of particular classes of persons against unfair or unreasonable advantage which may be taken of them, . . . may lead to a decision that as between particular plaintiffs and defendants, or in particular situations, implied assumption of risk is not to be recognized as a defense.

Id.

203. *See supra* notes 101-06 and accompanying text.

204. *See supra* note 29 and accompanying text. For a thorough analysis of the rationale supporting the imposition of a duty to protect customers on the commercial landowner, see Bazyler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727 (1979).

issues of foreseeability and control.[205] In addition, courts must define the area of invitation when the terminal is situated outside bank premises in order to determine whether the bank's duty to protect extends over the scene of the crime.[206] Moreover, the courts should extend the bank's liability to physical as well as financial harm.[207] Finally, if the bank raises the defense of contributory or comparative negligence, or assumption of risk, the courts must determine whether the plaintiff increased or voluntarily disregarded the risk.[208] This Note proposes the following guidelines[209] with respect to these variables.

A. Type of Terminal

1. On-site Vestibule Terminals[210]

When a robbery occurs at an ATM situated in an internal vestibule, principles of landowner liability apply.[211] The customer is a business invitee to whom the bank owes a duty to take reasonable measures for his protection.[212] Since banks install the facilities, encourage customers to use them,[213] are, or should be, aware of the risks of criminal activity associated with them and have exclusive control over the premises,[214] plaintiffs should be permitted to recover for any harm resulting from the perpetration of criminal acts upon them at ATMs.

2. Terminals Installed in Exterior Walls of Banks[215]

At this type of terminal, the customer usually initiates his transaction from the public street, not the bank premises. However, the bank

---

205. *See supra* notes 129-88 and accompanying text.
206. *See supra* notes 163-70 and accompanying text.
207. *See supra* notes 149-58 and accompanying text.
208. *See supra* notes 189-203 and accompanying text.
209. *See infra* notes 210-51 and accompanying text. All of the following proposals are subject to the defenses of contributory or comparative negligence and assumption of risk, where applicable.
210. *See supra* notes 133-48 and accompanying text.
211. See *supra* notes 26-45 and accompanying text for a discussion of general landowner liability principles.
212. See *supra* note 31 and accompanying text for a discussion of business invitees.
213. See *supra* notes 34-38 and accompanying text for a discussion of foreseeability.
214. See *supra* note 29 and accompanying text for a discussion of the landowner's control of his premises.
215. *See supra* notes 163-70 and accompanying text.

has created an extremely dangerous situation by electing to place the ATM at such a vulnerable location and should be found to have assumed the duty to reasonably protect its patrons despite the decreased control it exercises over the area.[216] Additionally, courts should consider the concept extending "premises" beyond the four walls of the business site to encompass all areas in which the plaintiff is present to accomplish his business purpose,[217] as well as those cases which discuss landowners' special uses of areas adjacent to their premises.[218] If the bank has failed to provide reasonable protection, a victim of a robbery at an ATM installed in an exterior wall of a bank should be permitted to recover in so far as it occurred within an area reasonably within the bank's control.[219]

3. *Terminals Situated at Locations Removed from Bank Branches*[220]

Some ATMs situated at remote locations are self-contained units placed at street corners and other highly-trafficked public areas; others are situated on business premises such as grocery stores and shopping centers.[221] Some terminals are owned by the banks; others belong to the owners of the premises on which they are installed.[222] At all such terminals, the element of direct control by the bank is virtually eliminated, but the risk of criminal activity is generally high. Although it often would be burdensome to require banks to protect their customers at these sites, it would be inequitable to free banks from responsibility, since they created the risks[223] and profit from the use of these terminals.[224]

When the ATM is located in a public place, this Note recommends that liability for loss due to theft be attributed to the bank, despite its inability to supervise the site and to prevent such incidents. Such strict liability may be premised on the fact that the bank has created an environment which it knows poses an unreasonable risk of criminal attack to its customers by providing access to money at exposed, unsupervised locations.[225]

---

216. *See supra* notes 171-74 and accompanying text.
217. *See supra* notes 164-69 and accompanying text.
218. *See supra* note 170 and accompanying text.
219. *See supra* note 29 and accompanying text.
220. *See supra* notes 175-83 and accompanying text.
221. *See supra* note 159.
222. *See supra* notes 130-31 and accompanying text.
223. *See supra* notes 171-74 and accompanying text.
224. *See supra* note 2.
225. The RESTATEMENT (SECOND) OF TORTS provides that "[o]ne who carries on

At ATMs situated on other business premises, the site owner is the party responsible for exercising reasonable care to protect its business visitors from criminal acts of third persons.[226] Nevertheless, the bank, by contracting to install its own terminal on the premises or to gain access to the landowner's terminal, exposes its patrons to a risk of robbery. In short, this Note proposes that under these circumstances, the bank may be liable if it failed to use reasonable care to protect its patrons.[227] To protect itself from liability, the bank may contract with the owner of the premises, thereby obtaining indemnity in the event that it is found liable.

4. Terminals Shared by a Network of Banks[228]

Any of the aforementioned types of terminals may also be involved in a network arrangement whereby the funds of all member banks can be accessed through each individual participant's terminal.[229] Unless otherwise provided for by the network participants, this Note proposes the following methods for determining the duty to protect and the liability for loss in the event of theft.

If a customer of X Bank is robbed after making a withdrawal at a terminal located on Y Bank's premises, since X Bank is responsible for exposing its depositor to this dangerous situation and Y Bank is responsible for the lack of security on its premises, both

---

an abnormally dangerous activity is subject to liability for harm to the person . . . of another resulting from the activity, although he has exercised the utmost care to prevent the harm." RESTATEMENT (SECOND) OF TORTS § 519(1) (1965). In determining that the defendant has engaged in an abnormally dangerous activity, some of the following factors must be present:

> (a) existence of a high degree of risk of some harm to the person . . . of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1965).

With respect to the operation of ATMs in public areas, factors (a), (c), (e) and (f) are particularly applicable.

226. See *supra* notes 26-45 and accompanying text for a discussion of general landowner liability principles.

227. *See supra* notes 27-28 and accompanying text.

228. *See supra* notes 184-88 and accompanying text.

229. For a description of the manner in which an ATM network operates, see *supra* note 132.

should be held accountable for the loss.[230] If the ATM is not located on any member bank's premises, but on other business premises, the network participants should contract with the landowner for security. If they fail to do so, the owner of the premises and the bank in which the victim is a depositor should be jointly liable.[231] Finally, where a network facility is situated in a public place, liability should be attributed to the bank at which the victim is a depositor since there is no business relationship, and hence no duty, between the other member banks and the victim.

B. Area of Invitation[232]

To determine the boundaries within which the bank will be held to the duty of reasonable care, the area of invitation must be defined.[233] At on-site terminals,[234] the area should encompass the entire vestibule since the customer has a right to expect that bank premises afford him a secure environment in which to conduct his financial business. At exterior and off-site ATMs,[235] the boundaries should extend only around the area in which the customer must be present to complete his banking transaction. At the point of completion, control shifts from the bank to the customer and the bank can no longer be expected to protect him.[236]

Defining the scope of invitation will always be a question of fact. The factfinder should apply a flexible standard which takes into account certain variables including, but not limited to:

> (1) the distance between the terminal and the plaintiff at the time of the theft. If he still had been in contact with the terminal, he clearly had not completed his transaction. If he had stepped away from the terminal when accosted, a finding that the customer had accomplished his business might be appropriate.
>
> (2) the time that had elapsed between the moment the patron

---

230. The liability of X Bank would be premised on the principles enunciated in the discussion of bank liability for injuries sustained by customers at remotely situated terminals. *See supra* notes 175-83 and accompanying text. The accountability of Y Bank, on the other hand, is rooted in general landowner liability principles as stated under the section discussing liability at on-site ATMs. *See supra* notes 133-58 and accompanying text.

231. *See supra* note 182 and accompanying text.

232. *See supra* notes 163-70 and accompanying text.

233. *Id.*

234. *See supra* note 129 and accompanying text.

235. *See supra* notes 130-31 and accompanying text.

236. *See supra* note 29 and accompanying text.

removed the money and the moment he was robbed. The shorter the time lapse, the more likely the transaction was still in progress.

(3) the degree of control that the plaintiff had exercised over the money. If he had been in the process of removing it from the machine, the transaction was incomplete. Once the money had been placed in the plaintiff's pocket or wallet, the transaction was terminated. The act of counting the money withdrawn, so long as it is not extended, should be included within the transaction.

C. Scope of Injury[237]

This Note proposes that plaintiffs be permitted to recover for all injuries which are reasonably foreseeable consequences of ATM use. Where there is easy access to cash, with minimal risk of apprehension, thefts and acts of violence which are employed to perpetrate thefts are likely to occur.[238] A customer may be severely beaten by a thief who steals only twenty dollars but had sought to obtain more. It would be unfair to limit the plaintiff's recovery to the amount of his financial loss when it was the expectation of greater profit which lured the thief to the ATM and led to the plaintiff's injury. The policy reasons underlying the courts' denial of recovery for physical injury in bank robbery cases[239] are inapplicable in cases of ATM theft,[240] and therefore, recovery for both physical and financial harm should be permitted.

D. Contributory and Comparative Negligence and Assumption of Risk[241]

There may be instances where the bank was unquestionably negligent, but the plaintiff acted in such a manner that he either increased the risk or proceeded to encounter an identified danger. Depending on the circumstances, such a finding will result in a reduction, or perhaps a preclusion, of the plaintiff's recovery.[242]

---

237. *See supra* notes 149-58 and accompanying text.

238. *See supra* note 6.

239. *See supra* notes 72-88 and accompanying text.

240. See *supra* notes 153-58 and accompanying text for discussion of the inapplicability of these rationales to cases involving criminal activity at ATMs.

241. *See supra* notes 189-203 and accompanying text.

242. In most cases, contributory or comparative negligence will not be a defense to strict liability. *See* RESTATEMENT (SECOND) OF TORTS § 524 (1965). Therefore,

To determine whether the plaintiff was either contributorily or comparatively negligent or had assumed the risk, courts should consider: (1) the character of the neighborhood; (2) the time of day at which the transaction was made; (3) the presence or absence of any suspicious persons in the vicinity when the plaintiff approached the terminal; (4) the amount of money withdrawn; (5) whether the plaintiff acted in an ostentatious manner; and (6) whether publicized incidents had previously occurred at the terminal or at nearby facilities. For assumption of risk, courts must find more than a general awareness on the plaintiff's part sufficient for a finding of contributory or comparative negligence.[243] The defendant must establish that the plaintiff comprehended that he was taking a risk with respect to one or more of the factors listed above and willingly proceeded to initiate the transaction.[244]

E. Consumer Protection and Cost Considerations

Finally, this Note proposes that courts approach cases involving robberies at ATMs in the spirit of consumer protection manifested by the liability provisions in the EFTA and the Truth in Lending Act.[245] In particular, the limitations on consumer liability which apply to cases of unauthorized transfers[246] demonstrate that the bulk of liability for losses associated with electronic fund transfer systems should remain with the bank, the party who created the risks and is in the best position to remedy them.[247] Furthermore, the recent amendment to Regulation E[248] to include forced initiation within the definition of an unauthorized transfer evinces a willingness to extend protection to consumers who are victims of crime at ATM terminals. It seems logical to extend this favorable posture one step further to include recovery by victims of ATM theft.

It must be noted, however, that imposing liability on banks would have negative repercussions as well. The expense of installing and maintaining additional security devices or hiring security guards would

---

since this Note recommends strict liability in cases where the terminal is operated in a public area, the guidelines with respect to contributory and comparative negligence will not apply where such a terminal is involved. Assumption of risk, however, remains a viable defense in strict liability claims. *See* RESTATEMENT (SECOND) OF TORTS § 523 (1965).

243. *See supra* note 194 and accompanying text.
244. *See supra* note 195 and accompanying text.
245. *See supra* note 128.
246. *See supra* notes 101-06 and accompanying text.
247. *See supra* note 117 and accompanying text.
248. *See supra* notes 118-28 and accompanying text.

surely be passed on to the public.[249] Bank liability could result in a cutback in services, banks choosing to cut costs by operating fewer terminals at reduced hours.[250] The cost of procuring liability insurance would be passed on to consumers as well. These increased costs would no doubt result in ATM user fees, which certain banks have already implemented for some types of ATM service.[251] Nevertheless, some increased cost would be acceptable if accompanied by greater consumer security and enhanced integrity of ATM systems as a whole.

VII. Conclusion

As society moves further into the banking age, electronic banking facilities will continue to proliferate. Financial services will proceed to shift from the confines of the "brick and mortar" branch to the bustle of every street corner. The trade-off for increased banking convenience should not be decreased security. Courts should stress the goals of consumer protection and integrity of electronic fund transfer systems by imposing a duty upon the banks to provide reasonable protection for their customers against criminal attack at ATM facilities.

Joan Miles

---

249. For example, the costs banks have incurred in complying with the regulatory provisions under the Truth in Lending Act have been passed on to consumers in the form of annual credit card user fees. *See* Humes, *EFT and the Consumer: An Agenda for Research*, in COMPUTERS AND BANKING: ELECTRONIC FUND TRANSFER SYSTEMS AND PUBLIC POLICY 61 (K. Colton and K. Kraemer eds. 1980).

250. *Id.*

251. *See* N.Y. Times, Aug. 10, 1985, at 32, col. 1.