

EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV 92/2008

ANDREW FAHIE

PETRA BENJAMIN

Claimant

AND

NATIONAL BANK OF THE VIRGIN ISLANDS

Defendant

Appearances:

Mr Terrance Neale of Mc W Todman and Co. for the Claimants
Mr Paul Webster QC of O'Neal Webster for the Defendant

2012: October 8th

2013: February 5th

JUDGMENT

[1] ELLIS J: By Amended Claim Form filed on 10th December 2008, the Claimants claims against the Defendant damages for personal injuries resulting from an armed robbery which took place at the Defendant's business premises on 15th August 2007 in which both Claimants were shot in the leg by the robbers and sustained injuries, loss and damage. The Claimants also seek interest on the award of damages and costs.

[2] In their Amended Statement of Claim, the Claimants relate that at the material times they were customers of the Defendant conducting banking business when three masked men wielding guns entered the premises and began demanding money from the bank staff. The Claimants claim that their injuries, loss and damage were occasioned by the negligence of the Defendant's their servants or agents. The particulars of negligence are pleaded as follows:

- i. Failing to take any or any reasonable care to ensure that the Claimants would be reasonably safe in visiting its premises to transact business.
- ii. Failing to provide adequate security personnel on the premises

- iii. Failing to provide adequately trained security personnel on the premises
- iv. Failing to provide armed security personnel on the premises capable of dealing with a robbery and other criminal activity at the bank particularly given the spate of robberies in the Territory.

- [3] In its Defence filed on 2nd February 2009, the Defendant denies the Claimant's particulars of negligence. It states rather that it took all reasonable precautions to ensure that there was adequate security at the bank. It also states that it was not a lack of adequate security which resulted in the Claimant's injuries but rather the unforeseeable interventions of a third party which broke the chain of causation in this matter.
- [4] At the trial, the Claimants gave evidence on their own behalf. The Defendants called two other witnesses in addition to the Second Defendant.

ISSUES AND LAW

- [5] The parties' pre-trial memorandum generally disclosed the following issues for determination:
1. Whether the Defendant owed the Claimants and all customers of the bank a duty of care to ensure that the premises were reasonably safe to conduct business at its premises
 2. Whether the defendant fulfilled that duty of care and took all reasonable steps in the circumstances to prevent injury to the Claimants.
 3. Whether the Claimants injuries were the result of inadequate or lack of proper security on the premises or rather the result of an unforeseeable intervention of a third party.
 4. Whether the Defendant ought to have been aware of the possibility of a robbery on its premises.
 5. Whether the Claimants are entitled to any of the relief claimed.
- [6] In order to succeed in their claims the Claimants must satisfy the Court on a balance of probabilities of the merits of their case. In applying the standard of balance of probability the Court is guided by the dicta of Baroness Hale in the House of Lords decision *Re B (Minors)* 2008 EWCA Civ.282 and by Lord Nicholls in *Re H (Minors)* (Sexual Abuse: standard of proof) 1996 AC 563 at 586 D-H.

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

- [7] In the case at bar the Claimants have grounded their claim in negligence. In order to have a viable negligence action, a Claimant must therefore satisfy the elements of the tort, namely, the existence of a duty on the part of the defendant, a breach of that duty, causation of the alleged injury, and damages resulting from the alleged breach of the duty. The Court must therefore now examine the evidence before it to verify whether the elements have been made out to the degree or standard of proof required.

THE CLAIMANT'S CASE

- [8] In his witness statement, Andrew Fahie, the First Claimant stated when he entered the Bank's premises, he noted that there was one unarmed security guard at the door who appeared to be employed more for the purpose of opening the door for customers than providing effective security to the Bank. He stated that three masked men armed with guns entered the Bank and began demanding money from the Bank tellers. He stated that upon the gunmen entering the bank and brandishing their weapons, the security guard fled the bank and was not seen again.
- [9] He stated further that as far as he was aware no attempt was made by the security guard or any other employee of the Bank to intervene or protect the customers of the bank during the course of the robbery.
- [10] He stated that during the robbery one of the gunmen discharged his firearm and shot him in his left ankle. He was transported to Peebles Hospital and treated by a consultant orthopaedic surgeon who advised that the bullet had caused a fracture of the lateral malleolus. He had to wear a cast below the knee for a couple of months and was in great pain and discomfort throughout the entire period. He claimed to have incurred medical expenses amounting to \$5,086.00.
- [11] The First Claimant states that as a result of painful flashbacks and insomnia he consulted a consultant psychiatrist who has diagnosed that he suffers from post-traumatic stress disorder secondary to being exposed to the traumatic incident.
- [12] Following the grant of leave to amplifying his witness statement, the First Claimant testified that contrary to what is indicated in his statement, he did not in fact witness the guard fleeing the bank. Rather he stated that when he turned around over his left shoulder he saw the guard running, going upstairs the Bank. He clarified therefore that when he said the guard left the Bank, he meant that he saw him leave the downstairs floor of the Bank. He further testified that after this, is when he saw one masked man enter the Bank together with another taller one. He stated that he did not see a gun at the time, but that he later saw a taller man pull out a gun.
- [13] The First Claimant also gave evidence that in the first half of 2007 he was aware of several robberies including at the Riteway Supermarket, Sports Club and the Popeye Service Station all in Pasea. He stated that in his view there were numerous robberies in the area of Nexus Cafe Restaurant of gunmen robbing persons there.

- [14] During cross examination, the First Claimant conceded that the Defendant Bank was in terms of physical dimension the smallest of the five commercial banks in Tortola. He also agreed that as far as he could see none of the security guards at these banks were armed. He went to say that as far as he could recall he had never seen a security guard bearing a firearm in Tortola.
- [15] The First Claimant also testified that when he entered the Bank he encountered the uniformed security guard at the front entrance of the Bank. He had joined the line of customers when he heard someone behind him saying "move" in an aggressive way. He turned around to see the guard in front of a tall man. He stated that the tall man told the guard to move but he could not say if he had pushed the guard to the ground.
- [16] Later, the First Claimant testified that he was unclear as to which of the robbers entered the Bank's premises first. He stated that he saw the tall man take out the firearm after the security guard had already gone upstairs. He stated that he saw the second robber also carrying a firearm after he got up on top of the counter. He testified that he understood there was a third robber but that he did not get a good glimpse of him.
- [17] Petra Benjamin, the Second Claimant's account of the incident repeats almost verbatim the statement of the First Claimant. She also stated that she sustained injuries when one of the gunmen discharged his firearm resulting in her being shot in her left foot. She was also examined by the consultant orthopaedic surgeon and advised her that the bullet had caused a fracture of one of the phalanx of her fourth toe. Her wound had to be bandaged. She states her mobility was restricted for a period of approximately 3 months and that she suffered great pain and discomfort throughout. She stated that she continues to suffer nightmares about the incident which has affected her ability to sleep and at times made her irritable. She claims to have incurred medical expenses amounting to approximately \$962.16 as well as the costs of employing a housekeeper/babysitter (\$700.00).
- [18] In amplifying her statement during the trial, the Second Claimant testified that contrary to what was indicated in paragraph 5 of her witness statement, she only saw one person robber rather than three gunmen.
- [19] Under cross examination, the Second Claimant testified that when she arrived at the Bank on the day in question she encountered the uniformed security guard at the door. She stated that when the robbery occurred she was standing in the right hand corner of the Bank in the area in front of the staircase leading upstairs about 10 – 15 feet from the entrance door.
- [20] She testified that she saw the robber at the entrance of the door when she heard him ask everyone to go down/ lie down on the floor. She stated that at that time he had a gun in his hand. She did not see in which direction the robber went following this. When re-examined however she stated that when she saw the guard speaking to the robber at the door she did not see him with a gun.

- [21] She testified that she did not see the robber push the security guard to the floor but that she saw the robber stooping down pointing the firearm at the floor. At one point however she did see the security guard with the door open, standing in front of the robber talking to him but then she did not see the guard again and could not say where he went. This was clearly at variance with her witness statement in which she stated that she saw the guard fleeing the Bank.
- [22] When examined by the Court the Second Claimant confirmed that she saw only one robber and that when he asked everyone to go down on the floor she complied and did not look around again.
- [23] The Claimants' case was supported by the medical evidence of Dr Nagy Darwish, an experienced orthopaedic surgeon who in his witness summary indicated that he treated both Claimants. He confirms his treatment and respective diagnoses related by the Claimants.
- [24] Psychiatrist, Dr. June Samuels also provided a witness summary in which she details her treatment of the First Claimant. She confirms that he diagnosed him as suffering from post-traumatic stress disorder. She noted that while there has been some improvement in the intensity and frequency of the symptoms, the First Claimant continues to experience acute anxiety.
- [25] Neither of these physicians gave oral evidence during the trial.

THE DEFENDANT'S CASE

- [26] Mr Brian Penn, Managing Director of VANguard Security Services and Supplies Ltd (VANguard) gave evidence on behalf of the Defendant Company. In his witness statement, Mr Penn stated that his company was retained by the Defendant Company in May 2003. At the material time, VANguard was contracted by the Defendant Company to provide static guard duties at the bank utilizing one security officer. This officer would cover the entrance door from within, dealing with disruptive persons, managing the flow of person in and out of the bank and reporting anti-social behaviour. He also stated that he was aware that the bank has surveillance cameras, a hold up system and access control which would enable them to lock the doors in an emergency.
- [27] According to him, the officer on duty at the material time was Anthony Yearwood. He stated that Mr. Yearwood had previously been employed at one of the large security firms in Guyana prior to taking up employment with Vanguard in 2007. He stated that Mr Yearwood was also trained locally in Introduction to Security, Patrol Procedures and Basic Risk Analysis and more.
- [28] He further stated that Mr. Yearwood was not in possession of a firearm because the general practice in the Territory does not allow for security service providers to issue the same to their personnel. He was however in possession of the only weapon which is not restricted in the Territory, an extendable baton.
- [29] Finally, he stated that the security measures implemented by the Defendant were sufficient based on the level of risk which was assessed at the time. This risk assessment takes into account the type of society and the security measures appropriate in the circumstances. His witness statement

concludes with his opinion that the Defendant acted reasonably and that the incident was not caused by a lack of security.

- [30] Cross examination of Mr Penn began with his professional background. He indicated that he has been a police constable of the Royal Virgin Islands Police Force since 1990. He testified that he is a trained police officer and has also attended a number of security related courses. He is a member of the professional body called the American Society of Industrial Security – ASIS, membership of which entails attending seminars and trade shows.
- [31] He stated that he started his company in 2002 and in 2003 the services contracted by the Defendant Bank included overall protection of the assets and its customers. He testified that the Bank's decision to retain one security guard was taken after consulting with his company. From his evidence, the Bank appeared to rely on his experience and the general practice in the Territory.
- [32] When questioned as to his Company's experience prior to being retained by the Defendant in 2003, he indicated that he had been a law enforcement officer from 1998 and that he had done a number of courses with the Police Department and was exposed to entities such as the FBI and the DEA. When questioned about his experience in providing security services for similar institutions, he admitted that his company had no experience in providing security services to financial institutions prior to 2003 when he was retained by the Bank. He stated further that his recommendations to the Bank were therefore based on his association with ASIS.
- [33] Mr Penn then explained the functioning of the electronic security systems in the Bank including the hold-up system and what he termed access control. He explained that the hold-up system was essentially a silent panic alarm which when activated would send a signal to the security company or the police department, while the access control would lock down the internal doors of the Bank. He acknowledged that the access control system would provide no protection to the Bank's customers.
- [34] He also testified that he had carried out background checks on Mr. Yearwood and that he considered the training seminars conducted by him to be adequate training for him. He confirmed that he had applied for a firearms licence in 2004 or 2005 but that this application had been refused. He stated that he did so because he felt that there was a need which still maintains today. He indicated that he was aware that there were a number of robberies in the Territory in 2007.
- [35] While he agreed that it a potential robber would think twice about attempting a robbery where the security guard at the Bank was armed, he stated that given that it would not be possible to arm guards in Tortola he did not believe that hiring two unarmed guards would have made much of a difference in the robbery. He stated his opinion that the position would perhaps be different if both the robbers and the guards were unarmed.
- [36] The Defendant's final witness was Mr Lesmore Smith who produced an expert report on the adequacy of the security at the Defendant Bank on August 17th 2007. Mr Smith indicated that he

was been in the security industry for 10 years and was employed in the Criminal Investigative Division of the Royal Virgin Islands Police Force.

[37] He stated that he is aware that at the time in question the following security provisions operated at the Defendant bank.

- i. A single unarmed security guard.
- ii. A surveillance camera system which monitored the premises.
- iii. An alarm system with a hold up button at each teller.
- iv. A lock down system which allowed individuals inside the bank to lock the internal doors if necessary.

[38] Mr Smith's evidence is that at the material time, no security company offers and has offered armed security guards. He stated that as a former police officer he is aware that it is practically impossible for a security guard to have a firearm because the relevant authorities have not in the past approved applications for a private security guards because this has not been deemed inappropriate. He noted that the primary reason for this position is that the Royal Virgin Islands Police Force which is charged with protecting the residents in the Territory is considered an unarmed force. His evidence is that no private security guard has been able to obtain firearm licences for its guards because they simply have not been approved.

[39] Having regard to the risk involved at the material time and the challenges in the Territory, he opined the Defendant Bank had reasonable security measures in place at the time of the incident. He stated that he was unable to conclude that the Defendant breached its duty at the time of the incident because a reasonable risk analysis would not have warranted posting more than one guard. In his view, the combination of the cameras and other systems in place were reasonable and in keeping with the risks associated in the Territory.

[40] He stated that he had reviewed the Claimants' witness statements and concluded that that given their account, there was not much more that the bank's security could have done to prevent the Claimant's injuries. In his opinion the Defendant acted reasonably under the circumstances and complied with its responsibility to its customers and employees.

[41] Under cross examination, the Mr Smith testified as to his qualifications and expertise. He indicated that his primary experience as a member of the Royal Virgin islands Police Force between 1984-1989. He testified that during that time he undertook a number of training courses ranging from 1- 6 months including a 3 month course with the FBI in the US Virgin Islands. He left the Police Force in 1989 at the rank of Sergeant in order start his security company, Top Priority because he saw a need for this service.

[42] He agreed that by its very nature a bank with its liquid assets would attract criminals and would require different levels of security but he also went on to say that the BVI is often classed as a crime free zone. He agreed however that to some extent there had been an increase in crime in

Tortola between 1998 and the present time and that it would be accurate to say that between 2007 and the present time there would also have been an increase in crime.

[43] Although Mr Smith recalled that sometime in 2007 there was an upsurge in crime, he later testified that at the time of the robbery, the Territory was peaceful and tranquil. Based on this he thought the Bank operated based on the information that was laid before it.

[44] Mr Smith confirmed his statement that the security systems and procedures in place at the time of the robbery were adequate. He could not say whether there had been failure in the functioning of the bank employees or the security provider. Mr Smith also conceded that of the security systems operating at the Bank at the time, the surveillance camera system and the lock down system would not apprehend a robber but rather provide a reference if some incident should occur. And when re-examined about the use of the hold-up button, Mr Smith stated that he had been advised that both the police and the security company eventually came to Bank.

[45] Mr Smith gave an brief explanation of the process to be followed in securing the firearm licence in Tortola but stated that he personally did not go so far to complete this process because in his words:

“....at the time we weren't even allowed to go that far. Because of the constraints they tell you straight, the United Kingdom Officers some of them are unarmed and they call it an unarmed force in the BVI.”

[46] In fact he stated that he was told by the then Commissioner of Police that based on the situation it would have been impossible to issue a firearm. He clarified that he was presently in discussion with a view to obtaining a licence for his guards based on the fact that they provide cash- in -transit services which is high risk. While this is under consideration he indicated that he did not think at this point that a similar consideration or privilege would be given to guards at other locations

ANALYSIS OF THE EVIDENCE/FINDINGS

[47] Existence and Extent of the duty of care

In a negligence action, the legal duty is the obligation to conform to a standard of conduct under the law for the protection of others against unreasonable risks of harm. This duty can arise either from a valid legislative enactment or be imposed by a common law principle recognized in case law.

[48] The Claimants' evidence is that at the material time they were at the Defendant Bank conducting business. Counsel for the Claimant contends that as such there can be no doubt that they would be regarded in law as invitees or guests of the Defendant Bank which would owe them a duty of care at common law.

- [49] The Defendants do not dispute that the Claimants were in fact lawfully in their premises as customers of the Bank. In written submissions, Counsel for the Defendant contends that while an argument could be made that a special relationship existed between the Bank and its customers to ensure that the Bank's premises were safe, such liability would operate as an exception to the general rule that a person is not responsible for loss or damage caused by the deliberate and wrongful act of a third party.
- [50] It is now settled law that the mere ownership of real property does not render such owner liable for injuries sustained by persons who have entered thereon by invitation of the owner. An owner of property is not an insurer against injuries occurring on the premises of the owner; rather an owner's liability to an invitee for injuries not intentionally inflicted must be predicated upon proof of negligence. The general rule therefore is that an owner of premises owes to an invitee a duty (1) to use ordinary care to have the premises in a reasonably safe condition for the use in a manner consistent with the purpose of the invitation, (2) not to lead such person into a deliberately or negligently created danger and (3) to give such person adequate and timely notice and warning of latent or concealed perils which are known to the owner and not the invitee. The basis of the owner/inviter's liability therefore rests on the owner's superior knowledge of the danger and a failure to take reasonable precautionary steps to alleviate the same.
- [51] The Claimants have submitted and the Court concurs, that in considering the degree of care to be taken by a Defendant, it is necessary to take into account the likelihood of injury or damage being caused. An owner of premises is only required to guard against reasonable rather than fantastic probabilities. If the chance of injury is minimal then little care or precaution may be necessary. However, if the chance of injury is great or increased then reasonable precautions should be taken to prevent or avoid it.

The Defendant's Knowledge – Risk or Danger

- [52] What then does the evidence disclose about the Defendant's knowledge of the risk or danger? The Claimant's argue that by virtue of a bank's very nature and purpose that it is reasonably foreseeable that unless adequate security is provided to deal with the potential unlawful activity which a bank may attract, that some level of injury, loss and damage may occur.
- [53] The Defendant appears to have taken this into account in prescribing the security measures which it implemented. These measures include retaining a security company and the services of an unarmed security guard, installing a surveillance camera system to monitor the premises as well as a hold-up or alarm button by each teller, and an access or lock down system.
- [54] The Claimants allege that given the circumstances, the Defendant was obliged, to do more. At paragraph 7 (d) of the Claimant's Amended Statement of Claim, they allege that the Defendant was negligent in that it failed to provide armed security personnel on the premises capable of dealing with a robbery and other criminal activity at the Bank particularly given the recent spate

of robberies in the Territory. The general contention appears to be that these incidents warranted immediate precautionary steps by the Defendant to improve and/or increase security at its premises.

- [55] No details of these incidents were provided in the claim, neither were they set out in the Claimants' witness statements. It is also clear that neither the Claimants' pleadings nor their witness statements specifically allege any prior knowledge of the potential risk or danger on the part of the Defendant or its officers. Indeed it was only during the trial that the First Claimant gave evidence of his knowledge of armed robberies in the Road Town area during 2007. It was also during the cross examination of Brian Penn and Lesmore Smith that the Claimants' attorney sought to lead any evidence in regards to the increase in crime in the Territory. Both witnesses agreed with Counsel for the Claimant that there were a number of incidents of armed robbery within the Territory in early 2007.
- [56] However, can this knowledge be *without more* imputed to the Defendant? Although there is no case made out by the Claimants to that effect, this seems to be the general contention of their submissions. Counsel for the Claimants submits that there is clear evidence in the matter that although there was a great increase in crime between 2003 and 2007 the level of security at the Bank remained the same and no risk assessment was done.
- [57] Even if a general trend were acknowledged, no specific statistical data was provided detailing the nature of the incidents which would have contributed to the increase in crime. In the Court's view, this would have been pertinent in determining what would have been a reasonable response from the Bank because it is certainly arguable that an increase in sexual or drug related offences would not have warranted any concern on the part of the Defendant Bank.
- [58] In any event, the Claimants have not demonstrated that at the material time the Defendant, its principals or officers had any knowledge superior or otherwise of these incidents and the potentially increased risk or danger which would have warranted redress and it is clear that the Defendant has made no admission in that regard.
- [59] It is precisely this key element which distinguishes the Court of Appeal's decision in *Grenada Breweries Limited v Goodwin Griffith*¹. In that case, the Court had evidence of a spate of criminal activities involving breaking and entering and stealing at the defendant's factory and that the defendant had knowledge of these happenings and yet took no reasonable steps to protect its employees from injury. The Court's conclusion in that case is therefore not surprising. Unless the court assumes that the mere presence of the Bank in the Territory would lead to the requisite

¹ Civil Appeal No. 2 of 2002 (Grenada): see also *Smith and Others v Littlewoods Organization Ltd.* 1987 1 All. E.R. 710 in which the House of Lords held that given that the respondents had not known of the vandalism in the area or of the previous attempts to start fires, the events which occurred were not reasonably foreseeable by the respondents. They accordingly owed no specific duty to the appellants.

knowledge of these incidents, the Court cannot reflect the findings of the Court of Appeal in Grenada Breweries Limited.

Breach

- [60] If the Claimants are to succeed they must also establish that the Defendant breached its duty of care towards them. They must demonstrate through the evidence on a balance of probability that the Defendant failed to measure up to the standard and scope of care expected by law. As indicated, what is expected will be predicated upon the potential danger or the magnitude of risk.
- [61] The Claimants allege that Defendant have failed to take any reasonable care to ensure that the Claimants would be reasonably safe in visiting its premises to transact business. In particular they alleged that the Defendant failed to provide adequate security personnel on the premises; failed to provide adequately trained security personnel on the premises and failed to provide armed security personnel on the premises capable of dealing with a robbery and other criminal activity at the bank particularly given the spate of robberies.
- [62] The Claimants do not dispute that the Defendant employed security measures which included an electronic surveillance system, an alarm system with a hold up button at each teller and a lock - down system which allowed the Bank to lock internal doors. They contend however that these measures were largely geared at protecting the Bank's property rather than potential customers. In so far as the access control system is concerned, the evidence of the Defendant's witnesses corroborates this. No similar admission is made in respect to the other security measures implemented and the court has no doubt that at the very least, an hold-up or alarm system would (all things being equal) facilitate employees in alerting the relevant law enforcement authorities who are obliged to attend the scene of a robbery in order protect innocent patrons.
- [63] It is also not disputed that there was one unarmed security guard on duty stationed at the entrance of the Bank. The Claimant contends that this was unsatisfactory in several respects. First, the Claimants allege that security officer on duty at the time was not properly trained. However, Mr Brian Penn's testimony about the professional background and experience of the security officer revealed that he had over 15 years' experience with a security company in Guyana prior to joining VANguard in 2007. Mr Penn gave evidence that this has been personally verified through background checks. In addition, he testified that guard had undergone in-house training in a number of security related courses.
- [64] The Claimants also allege that there was no adequate security because that guard on duty made little or no attempt to protect customers or to apprehend the robbers, but instead fled the scene. However during oral examination, the Claimant's evidence as to the guard's actions on that day vacillated significantly. Although in their witness statements they both stated that the security guard fled the Bank, they did not maintain this position during the trial. The First Claimant testified that he saw the guard run upstairs the Bank during the robbery while the Second Claimant could

not say what happened to the guard after she initially saw him standing in front of the robber. This is despite her vantage point and despite the fact that she was clearly looking in the direction of the robber at the front door. Also, given the Second Claimant's purported location in the Bank at the time of the robbery the Court is puzzled that she could not corroborate the evidence of the First Claimant as to the actions of the guard.

- [65] Given the chaotic and rather traumatic events of that day, it is perhaps not surprising that the Claimant's recollections were not particularly logical, precise or consistent. The Court is therefore not satisfied that either Claimant was able to reliably testify about the actions or inactions of the security guard on that day.
- [66] The Claimants also submit that given the increase in crime in the Territory and the number of armed robberies in early 2007 that the security guard posted at the Bank should have been armed. It is clear that within the Territory persons can only lawfully carry a firearm if they are in possession of a license to do so. Both of the defence witnesses, testified that firearm licences are not as a matter of policy issued to private security firms by the relevant licensing authority. They both acknowledge that this is a long standing policy and that to their knowledge no exceptions have been applied.
- [67] In both his witness statement and under cross examination Mr Penn, owner of the company contracted by the Defendant to provide security services testified that in 2005 he applied for a firearm licence but was unsuccessful. Although Mr Penn (who employed the guard) conceded that he had not applied for a licence since 2005 when he was rejected, it is clear from his evidence that given this apparent policy, it would not have been possible for the guard in question to be armed.
- [68] This evidence was corroborated by the Defendant's expert, Lesmore Smith who testified that in his experience firearms licences are not issued to private security guards. This evidence was not significantly traversed during the trial despite vigorous cross examination by Counsel for the Claimants, and the Claimants certainly provided no evidence to the contrary. In fact the First Claimant confirmed that he has never seen an armed security guard in the Territory. The sum of the evidence therefore is that at the material time, it would not have been practically possible for the Bank to have retained the services of armed guards.
- [69] Bearing in mind that the guard was unarmed, the Claimant then contends that the Defendant failed to provide an adequate number of guards at its premises. No evidence, expert or otherwise as to what would have been adequate or reasonable provision in the circumstances. They simply contend that more than one guard was necessary since that one unarmed guard could easily be overpowered even by one individual and certainly by three armed guards.
- [70] The Claimants evidence is that there are banks within the Territory who employ two guards. This is corroborated by the Defendant's expert. They submit that in the circumstances, the Defendant cannot contend that that they have conformed to the norm in the Territory. However, the

Defendant's expert evidence is that these Banks have their own internal advisers and are subject to international standards and may therefore employ security over and above the amount suggested by a reasonable risk assessment.

- [71] During cross examination, Mr Smith also agreed that the presence of an additional guard may have made a difference at the time of the robbery given that the lone security guard was not armed because in his words "...if there were two security officers, the issue of overpowering the one person would have been more effective." Similar evidence was at first proffered by the Defendant's second witness, Mr Penn. He testified that two guards would have made a difference in the event that the robbers were unarmed. He later added that if one of the guards were stationed at some other location in the Bank then it is unlikely that it would have made difference.
- [72] In light of this and given the evidence that there were in fact three armed gunmen involved in this robbery, the Court sees much force in the argument that the presence of two unarmed security guards would have not significantly reduced the likelihood of the incident.
- [73] The evidence discloses that the Defendant had a reasonable security system in place at the time of the robbery which was consistent with the known risk operating at that time. This is confirmed by the expert testimony of Mr Smith.
- [74] The Court accepts that it is reasonable to expect that the Defendant will implement security measures following an appropriate risk assessment. In this case it is apparent that the Defendant's appreciation of the level of risk was based on advice received from a relatively novice security company. However, in the Court's view this would not *without more* constitute a breach the duty of care.
- [75] It is apparent that the Defendant Bank employed a number of electronic security measures which were largely common to other financial institutions in the Territory. Both of the witnesses for the Defendant testified that the security measures implemented by the Defendant were reasonable and sufficient based on the level of risk which was assessed at the time. Certainly the Claimant has not proffered any additional electronic measures which could have been utilised.
- [76] The Defendant also contracted with a security company to provide a suitably trained security officer to protect its customers, employees and property. From the evidence of Mr Penn, this guard was experienced and trained. For the reasons already indicated, the Court is unable to draw any adverse conclusions as to the guard's actions on that day. He was in any event clearly outnumbered and outgunned on that day and facing a desperate criminal element.
- [77] The Court is also persuaded that stationing an armed guard at the Defendant's premises would not have been possible. Even if the Court accepts that it would have been prudent for the Defendant to employ two unarmed guards at its premises, the Court is not satisfied on a balance of

probabilities that this would have made any real difference against three armed criminals intent on their chosen illegal enterprise.

- [78] Finally, the Claimants were unable to demonstrate that the Defendant had superior knowledge concerning any increased danger or risk which would have affected the degree of care which was necessary in the circumstances.
- [79] In the Court's view, the evidence in this case does not disclose that the Defendant was in breach of the legal duty of care which it owed to the Claimants.
- [80] Having failed to demonstrate the requisite knowledge of an increased risk or danger and having failed to demonstrate a breach of duty on the part of the Defendant there is no need for the Court to consider to the third element of the tort of negligence – causation. However, even assuming that a breach of the Defendant's duty of care could be made out, the Court is not satisfied that the Claimants were able to demonstrate that this purported breach was the proximate cause of their injuries.

Causation

- [81] Generally, an independent, intervening criminal act of a third party, without which the injury would not have occurred, will be treated as the proximate cause of the injury superseding any negligence of the defendant unless the intervening criminal act is a reasonably foreseeable consequence of the defendant's negligent act.²
- [82] In this case there can be no doubt that the proximate cause of the injuries sustained by the Claimants was the criminal act of three armed perpetrators. The Court would therefore need to consider, whether, on a balance of probabilities, the Defendant's alleged failure to take appropriate steps in respect of security, superseded the criminal actions of these robbers so as to render it liable for the injuries suffered by the Claimant. In other words "but for" the purported negligence of the Defendant, would the Claimant have suffered the injuries, loss and damage claimed.
- [83] The Court accepts that where banking businesses cater to the public, they have a duty to protect invitees when they know or have reason to know that criminal acts have occurred or are likely to occur. In assessing the Defendant Bank's culpability, the Court must therefore consider the evidence of its knowledge of prior criminal incidents.
- [84] On the facts presented in this case and for the reasons already indicated, the Court cannot conclude as a matter of law that the intervening criminals act in this case—the robbery of the Bank by three masked gunmen—was a foreseeable consequence of the alleged breach of its duty to protect the Claimants.

² Lamb v Camden London [1981] 1 QB 625

[85] The Claimants have also not satisfied the Court that had the Defendant's taken the purported precautionary measures that this would have averted their injuries and loss.

Conclusion

[86] In the end the decisive factor in the determination of this claim is the burden and the standard of proof. The legal and evidential burden rests on the Claimants who must satisfy this Court on a balance of probabilities of the merits of their case.

[87] While there can be no doubt that the Claimants sustained injuries during the course of this robbery they failed to prove on a balance of probabilities that a negligent breach of the Defendant in fact resulted in the injuries.

[88] Counsel for the Claimant submitted that a disturbing element of this case is that there was no evidence from the Defendant or its employees and no attempt was made by them to obtain evidence from the security guard. In the circumstances, he contends that the Court is left to speculate and draw inferences in the matter. There is however, no basis upon which it can be concluded that the legal or evidential burden shifted to the Defendant in this case. The Claimants have simply not done enough to discharge their burden and certainly not to the requisite standard. The Court is therefore obliged to enter judgement for the Defendant.

[89] It is hereby ordered as follows:

- i. Judgment is therefore entered for the Defendant.
- ii. The Claimant shall pay the Defendant's costs in the sum of \$7,500.00.

Vicki Ann Ellis
High Court Judge