

# Hold up! Put up and shutter up

*Roberts v Westpac Banking Corporation* [2015] ACTSC 397

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## Summary

The duty of care owed by a business to its customers attending its premises is well established in relation to the safety of the premises. A more contentious area concerns the involvement of entrants creating a risk of injury to others on the premises, and in particular through their criminal acts.

The December 2015 ACT Supreme Court case of *Roberts v Westpac Banking Corporation* [2015] ACTSC 397 involved examination of the duty of care owed by an occupier to prevent harm to entrants to commercial premises by a stranger engaging in criminal activity. The case is likely to be of particular interest to all businesses (and their insurers) in which robbery is a risk associated with normal trading.

## The Evidence & Arguments

On 1 February 2010, the Fyshwick branch of Westpac Banking Corporation was held up by an armed offender. The plaintiff was being served at the counter when he heard a male behind him yelling “Put the money in the bag! Put the money in the bag!” The plaintiff turned his head to see a man wearing a black balaclava with a gun aimed directly at him. The offender threatened to kill the plaintiff if the teller activated the security screen. The plaintiff pleaded with the teller to give the offender the money stating that he had two children. Money was handed over by the teller.

The other teller in the branch was working her first day as a graduate local business banker. She nodded to the teller serving the plaintiff to indicate to give the offender what he wanted, having received training on what to do in the event of a robbery four months before. While training she learned that staff could activate the security screen when

it was safe to do so. She did activate it after the other teller handed over money. This caused the offender to yell at the teller that he had warned her. He then fired his gun into the ceiling and fled.

The plaintiff thought he had been killed but pursued the offender to the street and then began questioning the bank staff about why they had activated the security screen.

As a result of the armed robbery the plaintiff suffered psychological injury. He sued Westpac for damages, alleging negligence. His primary allegation was that Westpac was vicariously liable for the teller’s activation of the screen and that this was negligent because it was in defiance of the offender’s threats and that it served to provoke him to discharge the firearm, which in turn caused the psychological injury by making the plaintiff think he had been killed.

The plaintiff also alleged that in breach of its duty of care as occupier, Westpac had not undertaken proper training or instruction of its staff in relation to strategic response to armed offenders. The plaintiff also submitted that the teller activated the security screen out of concern for her own safety, rather than the wellbeing of the plaintiff and other customers.

Westpac submitted that it had no duty of care because it had no control over the offender or his actions.

The graduate teller could not recall anything being said in training about response to threats made against customers. She testified that she could not recall any express threats being voiced by the offender (as opposed to the obvious implied threat that he would if necessary discharge the firearm) and, importantly, both tellers gave evidence in particular that they did not hear the offender voice threats against the plaintiff in connection with the shutter being activated.

Westpac submitted that the teller was properly trained and the fact that she could not remember being told about the safety of customers did not mean it did not

occur. It also submitted that what was important was whether staff acted in accordance with good practice.

The plaintiff's expert witness testified that a common and recommended practice was to activate the screens as soon as the offender entered the bank in the expectation that the offender would flee. The plaintiff's expert also testified that because that did not occur, the staff should have complied with all of the offender's demands. The expert concluded that in the context of the offender's express threats, the teller's activation of the security screen constituted a failure to follow common industry practice and exposed the plaintiff to a real and foreseeable risk of injury.

Westpac's expert did not agree with the proposition that once an offender engaged with a teller the security screen should not be activated. He also did not agree that it was unsafe to activate a security screen if an armed offender was waving his gun in the vicinity of customers. He reasoned that the activation of the screen should encourage the offender to leave, which is what happened.

## Findings

The court acknowledged the High Court case of *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] 205 CLR 254 in which it was found that the land owner's duty as an occupier of the land did not extend to taking reasonable care to prevent physical injury to an employee resulting from the criminal behaviour of third parties on that land. The court held that Westpac could not have predicted the actions of the offender or controlled his actions and that Westpac owed no duty to prevent harm to the plaintiff from criminal activity in such circumstances.

The court held that Westpac owed a duty to all lawful entrants to take reasonable care that they were not exposed to a reasonably foreseeable risk of harm. The court identified the relevant risk of harm as that associated with the robbery by the armed offender and addressed the risk and breach of duty considerations in section 43 of the *Civil Law (Wrongs) Act 2002 (ACT)*.

The court's key factual finding was that the graduate teller did not hear the offender voicing threats to shoot the plaintiff in conjunction with his direction not to activate the screen. Her Honour reasoned that this was either due to noise levels or the graduate teller's focus on and

concern for the other teller, believing that the gun had been mainly pointed at her.

The court also observed that while risks are generally minimised if certain procedures, including handing over money when ordered to, are followed, there must be some discretion vested in staff in such a tense situation.

## Implications

The approach taken by the court in this case was consistent with that taken in cases involving violent patrons on licensed premises, where having regard to considerations of reasonable foreseeability and reasonable response to risk, occupiers can be held liable in connection with the injuries caused by the criminal acts of third parties, depending on the extent of their knowledge and control.

This case demonstrates the importance of an occupier having established systems and procedures. Relevantly, the systems and procedures of the bank involved having security shutters and associated training of staff and these systems and procedures were shown not to be wanting in circumstances where it was ultimately the discretionary action of the teller that became the focal point of the determination of whether there was negligence. In following established procedure, while unaware of a direct threat against a customer, the teller was held not to have acted negligently.

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