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A Critique of the Onerous Burden/Onus of Proof Placed on a Bank Customer in Proof of Negligence on the Part of the Bank in Cases of Unauthorised Withdrawals of Customer's Funds Via Automated Teller Machines (ATM).

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Abstract

In this day and age, the attraction towards automated teller machines (ATM) has been on the increase even in rural areas and this may be attributed to the ease and swiftness of carrying out a financial transaction at the convenience of a bank customer. With the help of these automated teller machines (ATM) and other online banking services, a bank customer is enabled to handle account management and perform financial transactions without the participation of a bank staff. To carry out these transactions, a customer is normally provided with a debit card and a personal Identification number (PIN) which is supposedly known to the customer alone. Despite the supposed confidentiality of the PIN, there have been of complaints by bank customers of withdrawals from their accounts without their knowledge, consent or authorisation. Under common law and statute, these customers who most times allege that the banks were negligent in handling their domiciled funds are expected to prove by cogent evidence particulars of the alleged negligent act. This paper examines the onerous burden of proof placed on these customers trying to prove negligence on the part of the bank. The paper will also carry out a fair critique of the arduous task faced by these customers in discharging the evidential obligation placed on them by common law and statute.

Keywords: Unauthorised Withdrawal, Negligence, Proof, Onus, Burden, Bank, Bank-Customer, Automated Teller Machines. Personal Identification Number.

1.0 Introduction

The automated teller machine (ATM) is an electronic device that is provided by banks for its customers to process account/financial transactions. These bank customers access their accounts through a special type of plastic cards that is encoded with user information on a magnetic strip. The strip contains an identification code that is transmitted to the bank's central computer by modem.[1] The holder of the plastic card is expected to insert the card into the ATM to access the account and process their account transactions. Generally, there are two types of automated teller machine (ATM); the basic one which permits the user to only withdraw cash and receive an optional report of account balance and a more complex machine that accepts cash deposit, provides

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[1] See <https://www.elprocus.com/automated-teller-machine-types-working-advantages/> Accessed on 7th May 2021 at 8:43 am.

credit card payment facilities and reports account information.[2] ATM was the first well-known machine which provided electronic access to customers that brought less hassle and easier transaction for the bank customer and the bank.[3] ATMs have been adopted by banks because of the special facilities and the benefits it offers to both the customers and the bank. The most exciting experience for both the bankers and the customers is that the ATM is replacing all the difficulties associated with bank transactions such as personal attendance of customer and paper based verifications.[4] Notwithstanding these numerous benefits of ATM systems, security of customer information has been a huge challenge and source of worry not only on the part of the banking industry but also for the customers.[5] Unscrupulous elements in the society sometimes tamper with the ATM and steal user's credit card particulars and passwords via illegal means.[6] These frauds perpetrated via ATMs is not the sole problem of banks alone rather it is a big threat that requires a co-ordinated and corporative action on the part of the bank, its customers and law enforcement agencies.[7] These ATM frauds not only cause financial loss to customers but they also undermine customer`s confidence in the use of ATMs.[8]

Under Common Law and the Evidence Act[9], the bank`s customer who has a shallow insight as to the mechanics of an ATM, is placed in a gruelling and challenging situation when he is expected to show by cogent evidence how the alleged unauthorised withdrawal took place. The germane question this paper intends to tackle in its critique of this onerous evidential burden placed on the bank`s customer is; can a bank`s customer, whose knowledge about the ATM, ends at the use of the ATM card to access his funds and who has no acquaintance as to the mechanics of an ATM, be able to hit the mark required of him by the provisions of the Evidence Act,[10] which provides that a person that asserts must prove and the principles of common law which dictates that for a successful action to lie in negligence, the plaintiff must not make a blanket allegation rather he is expected to prove the particulars of the negligent act. The first step in tackling this question is to make an outline of various security breaches associated with ATM cards which the banks have in most cases failed to bring to the knowledge of the card users, the existence of these instances of breaches.

2.0 Security Breaches Associated with ATM Cards.

There are different classifications of ATM breaches which ranges from physical insecurity, insecurity through the ATM card and insecurities in the existing ATM network protocols. For the purposes of this discourse, emphasis will be on security breaches through ATM cards. The decision

[2] *Supra* (n.1).
[3] See M.B, Calayag M.B (Nalt guidelines), *et al* 'A Comparative Study of Different Automated Teller Machines and its Effectiveness Based on Customers Satisfaction' *Journal of Industrial Engineering and Management Science* (2019) 1 p. 49.
[4] See M.O, Onyesolu, A.C Okpala, 'Improving Security Using a Three-Tier Authentication for Automated Teller Machine' *International Journal of Computer Network and Information Security* (2017) 10 p. 50.
[5] Onyeolu M.O, *Ibid*.
[6] Okapala A.C, (Nalt guidelines) *Ibid*.
[7] See A.S, Adepoju, (Nalt guidelines)'Challenges of Automated Teller Machine (ATM) Usage and Fraud Occurrences in Nigeria: A Case Study of Selected Banks in Minna' *Journal of Internet Banking and Commerce* (2014) 10 p. 50.
[8] *Ibid*.
[9] 2011, Section 131,132 and 133.
[10] *Ibid*.

of this paper to place emphasis on security breaches associated with ATM cards is informed by the customary defence put up by banks, whenever issues pertaining to unauthorised withdrawals are made subjects of litigation. This habitual defence suggest that once an ATM card is issued to a bank`s customer, who subsequently changes the default PIN to one known to him alone, any unauthorised withdrawal is attributed to the customer's careless or negligent act towards the safety of the ATM card or PIN. The rationale behind this customary defence put up by the bank is anchored on the general and erroneous belief that the only person that can access an account via an ATM is the owner of the card or a person whom he has given the card and divulged the PIN to. This erroneous belief then suggests, that a customer who asserts that an unauthorised withdrawal was as a result of a breach of duty on the part of the bank, must show particulars of the alleged breach of duty. Thus, the onus is on the customer who is alleging unauthorised withdrawal as a result of the banks' negligence to show by cogent evidence particulars of the alleged negligent act. The succeeding sub-paragraphs, which houses certain categories of security breaches associated with ATM cards, will reveal that even a prudent and discreet bank customer, who is in custody of his ATM card and who has not divulged his PIN to anyone, can also be a victim of ATM card fraud.

2.1 Thin Plastic Sleeve

This scam involves the culprits putting a thin, clear, rigid plastic 'sleeve' into the ATM card slot. When the victim inserts his card, the ATM cannot read the strip, so it repeatedly asks him to enter his PIN number; the victim leaves, thinking the ATM has snatched the card. These unscrupulous elements then remove both the plastic sleeve and the card to withdraw from the victim's account.[11]

2.2 Card Skimming

Skimmers are devices used by some devious persons to capture data from the magnetic stripe on the back of an ATM card. These devices, smaller than a deck of cards and resembling a hand-held credit card scanner are often fastened in close proximity to or over top of an ATM's factory installed card reader. When removed from the ATM, a skimmer allows the download of personal data belonging to everyone who used it to swipe an ATM card.[12]

2.3 Fake PIN Pad Overlays and Other Fake Equipment

This criminal technique involves the placement of a fake PIN pad directly on top of ATMs original PIN pad. This overlay captures and stores PIN data with each transaction. The fake PIN pad is later removed, recorded PINs are downloaded, and the information is combined with counterfeit ATM cards to obtain funds illegally from legitimate customer accounts. Fake PIN pads are often identical in appearance and size to original equipment.[13]

[11] See Fagbolu O.O, (Nalt guidelines) 'Security Issues in Information and Communication Technology Environment: A Focus on Automated Teller Machine' *International Journal of Physical Sciences* (2011) 7(2) p. 50.
[12] See <https://www.ublocal.com/atm-fraud/> Accessed on 9th May 2021 at 5:53pm.
[13] *Ibid*.

2.4 PIN interception/Card fraud

This is a high-tech approach to stealing PIN information from the capture of data through an electronic data recorder which is possible through the ATM terminal or as PIN data is transmitted for online verification. Either approach requires access to the inside of an ATM which can be perpetrated by "professionals" at off-premises ATM locations. Given the intense focus manufacturers are placing on security-related engineering of ATM, it is not surprising that the most vulnerable component of any ATM system cannot be found on an ATM rather it can be found in the pockets, purses, and wallets of ATM customers. It is the ATM card. Once it is compromised, the data it contains can lead to many of the most common types of ATM fraud armed with a customer's personal identification Number (PIN) which is often obtained through casual observation - a thief with data from a magnetic stripe can reproduce or clone ATM card using inexpensive, commercially available equipment.[14]

2.5 Digital Fraud

The migration from proprietary operating systems, to Microsoft Windows technology has led to greater connectivity and interconnectivity of ATMs. Vast networks-including ATMs, branch systems, phone systems, ticketing systems, and other infrastructure connected via the World Wide Web–are susceptible to a new kind of threat, a threat to digital security. Digital attackers include vandals who author viruses or worms intended to exploit an ATM's operating system and criminal hackers attempting to violate the confidentiality, integrity, or authenticity of transaction- related data.[15]

A cursory observation of these instances of security breaches via ATM cards shows that a customer who is careful and diligent can also be a victim of these breaches and this position taken by this paper is anchored on the singular fact that the customer, who is not informed in details about other possible ways his account can be infiltrated, is made to believe that the only way a person can access his account via ATM is when he gives out his ATM card and pin to the person. These banks who are aware of these other instances of security breaches that can occur despite the customer's meticulousness, in a bid to avoid liability insists that the breach that resulted to the unauthorised withdrawal was a result of the customer's failure to apply due diligence in handling his ATM card or PIN.

For instance, in *UBA v Yahuza*,[16]the Appellant's sole witness in his evidence-in-chief insisted that the unauthorised withdrawal was as a result of the Respondent's sloppiness and negligence and thus, the withdrawals were either made by the customer or someone the customer gave his ATM card and PIN. However, under the heat of cross-examination, this witness admitted that the bank had received several complaints from other customers of the bank, apart from the Respondent, of unauthorised withdrawals from their account and that such withdrawals were fraudulent and usually occurred via the ATM machine. The witness further admitted under cross-examination;

[14] See J.E Constantino, "Five Common Types of ATM Frauds and Tips on How to Deal with Them"; <https://www.google.com/amp/s/joanneconstantino.wordpress.com/2011/08/11/5-common-types-of-atm-frauds-and-tips-on-how-to-deal-with-them/amp/>. Accessed on 9th May, 2021 at 6:06 pm.

[15] *Ibid*.

[16] (2014) LPELR-2397C (CA).

that upon the complaint of the Respondent about the unauthorised withdrawals, he (the Respondent) was told by one Farouq Lawal (Appellant's Regional Manager) that there was a possibility that a fraud was committed on his account. In other words, while the sole witness of the Appellant maintained in his evidence in chief, that only the Respondent could have made the withdrawals from the account via the ATM machine as he was the person in possession of the ATM card and only he knew the PIN, he admitted under cross-examination that the bank is aware that fraudulent and unauthorised withdrawals were being made from the accounts of its customers through the ATM machine without the knowledge, consent or authorisation of the customers. Finding the bank liable for negligence and commenting on the inconsistent and oscillatory evidence of the Appellant's sole witness, the appellate court *Per Abiru JCA* penned thus:

> *The evidence of the witness under cross-examination took the "wind out of the sail" of the assumption in the case of the appellant that the respondent could have made the alleged withdrawals and thus further evidence was required from the appellant to ground its case that, in this particular instance, it was the Respondent that indeed made the alleged withdrawals complained about. The Appellant led no such evidence and the lower court was thus correct when it stated that the testimony of the defence witness under cross-examination strengthened the case of the Respondent. The Appellant did not also give details of the security safeguards that it put in place to forestall fraudulent withdrawals from the account of its customers after the many complaints it admitted receiving and/ or of how it exercised diligence in managing the monies of the respondent in its possession.*

The Court of Appeal, instead of placing the burden of proving the alleged unauthorised withdrawals on the Respondent (customer), the Court of Appeal held that all the customer need to lead evidence to show is that he had funds in his account with the bank, that he did not withdraw the funds and did not authorise any person to withdraw the funds nor did he expose his ATM Card to anyone. And after which the onus must necessarily shift to the bank to show that the withdrawals were made either by the customer or by someone authorised by the customer or by someone to whom the Respondent carelessly or willfully exposed his ATM card and PIN to.

3.0 Discharging the Onerous Evidential Burden under Common Law

Under Common Law, a person who is alleging that another is liable for being negligent is expected to prove by cogent evidence the particulars of the alleged negligent act. Negligence is the omission to do something, which a reasonable man guided upon those considerations that ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do.[17] It means lack of proper care and attention; careless behavior or conduct; a state of mind which is opposed to intention and the breach of a duty of care imposed by common law and statute resulting in damage to the complainant.[18] Negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. It is also any conduct that falls below the legal standard established to protect others against unreasonable risk

[17] See *Friday v Nigerian Army* (2016) LPELR-41604 (CA).
[18] See *MTN v Chinedu* (2018) LPELR-44621 (CA).

of harm.[19] Thus, a person is said to be negligent, if he omits or fails to do something which a reasonable man under similar circumstances would do or the doing of something which a reasonable and prudent man would not do. In an action for negligence on the part of a bank for failure to apply due care over a customer's fund in its custody, the bank customer must prove the following three co-existing elements:

(a) That the bank owed the customer a duty to exercise due care.

(b) That the bank failed to exercise due care.

(c) That the bank's failure to exercise due care was the cause of the injury/damage sustained by the customer.[20]

A customer, alleging unauthorised withdrawals from his account via ATM, may not find it difficult to satisfy the first and third requirement which is to prove the existence of a duty of care and to prove damages suffered as a result of the breach. However, the uphill task faced by the customer, which forms the kernel of this work is the ability to show how the said duty was breached (how the unauthorised withdrawal occurred as a result of the bank's negligence). In determining whether a duty of care has arisen the vital and crucial question to ask is whether as between the wrong doer and the party who suffered damage, there is sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former's carelessness on his part, it may have caused damage to the latter. If that is the case, then a duty of care arises.[21] For instance, a bank has a duty of care to exercise reasonable care and skill and which extends over the whole range of banking business with the contract entered with the customer. A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operation within its contract with its customers. Thus, the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.[22] It appears that proving this first element may not be hard after all as the only thing the customer is expected to show is that he is a customer and that he deposited his funds with the bank on the understanding that the said funds will be made available to him upon request. Also, the third ingredient, which entails showing that damages were suffered as a result of the breach may also not be difficult as a successful proof of the breach of the duty lays the foundation for a successful proof of damage suffered because there can be no damage if there is no breach of duty. However, the problem lies in the ability to prove that the bank breached the duty of care owed the customer and this forms the core of the arguments contained in this paper. Since the customer is alleging that it was due to the negligence of the bank that certain amount of money left his account without his consent, such customer is expected to show how the unauthorised withdrawals took place.

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[19] See *Nigeria Dynamic Engineering Construction Ltd v Dasso & Ors* (2017) LPELR-43206 (CA) P.25-26 @ Paras F-B *Per Abiru JCA.* See also *Adesina v People of Lagos State* (2019) LPELR-46403 (SC). *HI-tech Construction Ltd v. Onomuaborigho* (2018) LPELR-45193 (CA). *Chuwkuma v Awoh* (2018) LPELR-44830 (CA).

[20] See *Diamond Bank v MocokOnu (Nig) Ltd* (2019) LPELR-46440 (CA).

[21] See Ani C.C, (Nalt guidelines), "*Understanding Legal Concepts in Nigeria*' Volume II (Enugu: CIDJAP,2020) P.123.

[22] See *Agbanelo v UBN Ltd* (2000) LPELR-234 (SC); (2000) 4 SC (Pt. 1) 233; (2000) 7 NWLR (Pt. 666) 534; (2000) FWLR (Pt. 13) 2177. *Diamond Bank Ltd v Partnership Investment Co. Ltd & Anor.* (2009) LPELR-939 (SC); (2009) 12 SC (Pt. II) 159; (2009) 18 NWLR (Pt. 1172) 67. *UBA v Osok* (2016) LPELR-40110 (CA).

Experience has shown that what Legal Practitioners representing these customers do in the preparation of the Writ of Summons and its accompanying Statement of Claim and Witness Statement on Oath, is to make a blanket allegation of negligence on the part of the bank without stating specifically those acts carried out by the bank that resulted in negligence. This is the main reason why these cases of fraudulent unauthorised withdrawals through ATM has failed and will continue to fail due to the failure to discharge the high evidential hurdle placed in the path of Legal Practitioners and their clients. Both the client and the Legal Practitioner who lacks an in-depth knowledge of the mechanics of the ATM cannot be blamed and even in a situation where the Legal Practitioner is familiar with the mechanics of an ATM the fact that the bulk of information he needs in the preparation of his brief is emanating from an ill-informed customer may also hamper the chances of ascertaining the specific negligent acts of the bank. Unlike an unauthorised withdrawal perpetuated via a human teller, an uninformed customer alleging unauthorised withdrawal via an ATM may find it quite impossible to pinpoint at what point the breach occurred or what was the cause of the breach and this inability is chiefly sponsored by his shallow knowledge as to the mechanics of an ATM.

In *Agi v Access Bank Plc*,[23] the Appellant; a Markurdi based Businessman dealing in wears operated a current account number with the Respondent at its Markurdi branch, Benue State. The Respondent issued the Appellant with an Automated Teller Machine (ATM) debit card which the Appellant activated and changed the default PIN to his own personal PIN (Personal Identification Number). On 03/11/2009, when he travelled to Onitsha to purchase wears for sale, he could not make a withdrawal as he was told that he had insufficient funds. Back at Markurdi, the Appellant was issued with a print-out of his statement of account which revealed fifteen sequential withdrawals vide the ATM located at the Respondent's Fontana station at Enugu. The Appellant was unsuccessful at both the Trial Court and Court of Appeal. The action failed because of the inability of the Appellant's Counsel to plead specific particulars of the alleged negligence. The Court of Appeal was of the view that since the password was only known to the Appellant and the ATM Card was also with him, the money was withdrawn either by the Appellant or an unknown third party whom he divulged the PIN to and consequently the appellate court came to a conclusion that the Respondent was not negligent in protecting the Appellant's money. It appears that the line of decision of the Court of Appeal was influenced by the widely held and erroneous belief that withdrawals via ATM can only be done by the owner or a person he willfully or carelessly divulged his pin to and this is shown in the statement of the court *Per Ogbuinya JCA* when the eminent Jurist intoned thus:

> *Flowing from these critical pieces of evidence, I am impelled to draw the inference that it was either the appellant that did the withdrawal or an unknown third party to whom he divulged the PIN. I have the unbridled licence of the law to make the inference, see Okoye v Kpajie (1992) 2 SCNJ 290; Akpan v Bob (2010) NWLR (pt.1223) 421. I am fortified in the inferences because, without the secret PIN, which is usually personal to the card holder as testified by the appellant, it is impossible to withdraw money through the ATM debit card.*

[23] (2013) LPELR-22827 (CA); (2014) 9 NWLR (Pt. 141) 121.

The writer had argued in a previous publication [24] that in view of the fact that the technology that controls this transaction was introduced by the bank to the ill-informed customer, the bank being the owner or originator of this technology should be in a better position to give evidence on how, who and when these unauthorised withdrawals were made. This paper adopting the foregoing view further submits that placing the burden on an unwitting customer who lacks the knowledge as to the mechanics of an ATM and who only agreed to use the same technology based on the assurance given to him that the platform is secured is grossly onerous and unfair.

4.0 Discharging the Onerous Evidential Burden Under Statute. (Evidence Act, 2011)

Under statute,[25] it is rudimentary that whoever assert the affirmative must prove by credible evidence and this is termed; discharging the burden/onus of proof. The Latin maxim in this regard is *Incums Probatioqui Dicit, Non Qui Negat* which means that the burden of proving a fact rest on the party who asserts the affirmative of the issue and not upon the party who denies it for a negative is usually incapable of proof.[26] This statutory position of law is provided for under Section 131, 132 and 133 of the Evidence Act.[27] Burden of proof in civil cases has two distinct and frequently confused meanings. This comprises, firstly, of the burden of proof as a matter of law and the pleadings, usually referred to as the legal burden or the burden of establishing a case and, secondly, the burden of proof in the sense of adducing evidence, usually described as the evidential burden. While the burden of proof in the first sense is always stable, the burden of proof in the second sense may shift constantly, according as one scale of evidence or the other preponderates.[28] It is settled that in a civil case, the party that asserts in its pleadings the existence of a particular fact is required to prove such facts by adducing credible evidence. If the party fails to do so its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact, it is said to have discharged the burden of proof that rests on him. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the court giving judgment in favour of the party.[29]

Thus, the burden is therefore on the customer to first adduce prima facie evidence in support of his case. Where a prima facie case is made out, the burden then shifts to the bank to adduce counter evidence to sustain their defence. Since negligence is a question of fact and not law, each case must be decided in the light of the facts pleaded and proved. Thus, the customer in an action in negligence is required to state or give particulars of negligence alleged and it is not sufficient for such customer to make a blanket allegation of negligence against the bank in a claim of negligence without giving

[24] Ani C.C *Supra* (n.21), p.162-163.
[25] *Supra* (n.9).
[26] See *Ayala v Daniel &Ors* (2019) LPELR-47188 (CA); *Dasuki v FRN* (2018) LPELR-43897 (SC); (2018) 10 NWLR (Pt. 1627) 320.
[27] *Supra* (n.9).
[28] See *Ndul v Wayo&Ors* (2018) LPELR- 45151 (SC); *Union Bank v Ravih Abdul & Co Ltd* (2018) LPELR -46333 (SC).
[29] See *Registered Trustees of International Islamic Relief Organisation, kaduna v Keystone Bank Plc*. ;*Ughelli South Local Government Council v Edojakwa* (2018) LPELR-43927 (CA); *Osawaru v Ezeiruka* (1978) LPELR-2791 (SC).

full particulars of the items of negligence relied on.[30] Reiterating this rudimentary principle of law the Court of Appeal in *PW (Nig) Ltd v Mansel Motors Ltd & Anor*[31] penned thus:

> *To succeed in an action for negligence, the law is settled as to the standard of pleading and proof required. As a matter of law therefore; a plaintiff who intends to be victorious in negligence action must plead the particulars of negligence alleged and give cogent and credible evidence at the trial in line with the detailed pleadings. It is not sufficient pleading for a plaintiff to make a blanket allegation of negligence against the defendant without giving detailed particulars of the items of negligence relied on as well as the duty of care the defendant owes him. See: DIAMOND BANK LTD v PARTNERSHIP INVESTMENT CO. LTD. & ANOR (2009) v 18 NWLR (PT. 1172) 67; UNIVERSAL TRUST BANK OF NIGERIA FIDELIA OZOEMENA (2007) 3 NWLR (PT. 1022) 448; 1-2 SC (PT. 11) 211 KOYA v UNITED BANK FOR AFRICA LTD (1997) LPELR 1711; (1997) 1 NWLR (PT. 481) 251; MTN NIGERIA COMMUNICATIONS LTD v MR. GANIYU SADIKU (2013) LPELR 27705 CA. Certainly the law does not permit the trial Judge to fill in the gaps for the plaintiff where the pleading lacks the necessary particulars. See: UNION BANK OF NIGERIA PLC v E. D. EMOLE (2001) 12 SC (PT. 1) 106. This position of the law is inevitable because what amounts to negligence is not law but a question of fact which must be decided according to the facts and circumstances of a particular case. See: KALLZA v JAMAKANI TRANSPORT LTD. (1961) ALL NLR 747; NGILARI v MOTHERCAT LIMITED (1999) LPELR SC; (1999) 13 NWLR (PT. 636) 626.*

This inclination of the Courts towards the belief that the exclusive possession of the PIN by a customer suggests that any unauthorised withdrawal from an account is orchestrated by the customer played out in *Odulate v First Bank*,[32] wherein the Appellant's claim against the Respondent for being negligent in the management of his account particularly with regards to unauthorised withdrawals failed at the High Court and Court of Appeal respectively. Dismissing the appeal, the Court opined thus:

> *The fact that the duty generally exists however does not mean that it was breached in this instance. The online banking platform which the Appellant is alleging to be the means by which authorized withdrawals were made is not under the sole control of the bank. As a matter of fact, as established at trial, it is the Appellant who has the password that can access his account through the online platform. It therefore behooves on the Appellant to clearly show how the bank was negligently responsible for the withdrawal of certain sums from his account through the said online platform. The Appellant failed to do this.*[33]

[30] See *Mobil Oil v Barbedos Cars Ltd* (2016) LPELR-41603 (CA); *NDIC v Mohammed &Ors* (2018) LPELR-44744 (CA).
[31] (2017) LPELR-43390 (A).
[32] (2019) LPELR-47353 (CA).
[33] *Ibid.* at p. 25, paras. C-E, *Per Tukur, JCA.*

However, in *UBA Plc v Yahuza*,[34] a different decision was reached. The Respondent's case was that several monies were withdrawn from his account which he held with the Appellant bank and which was discovered at the point of his wanting to withdraw money from his account. The Appellant once again put up their accustomed and customary defence which is that the various withdrawals made from the Respondent's account was done by him or by someone whom he (Respondent) authorised to carry out cash withdrawals for him from the account. The Appellant also submitted that in a case where the withdrawals were made by an unauthorised person, the Respondent must have willfully, carelessly or negligently exposed his ATM Card and PIN to that person and thus it behooves on him (Respondent) to show by cogent evidence that the unauthorised withdrawals was a result of the failure of the bank to exercise diligent care. Rejecting the contention, the Court of Appeal opined thus:

> *Looking at the respective obligations of the parties under the contractual relationship of banker/customer, the onus on the Respondent before the lower Court was to lead evidence showing that he had funds in his account with the Respondent and that he did not withdraw the funds and did not authorize any person to withdraw the funds nor did he expose his ATM card to anyone. And after which the onus must necessarily shift to the Appellant to show that the withdrawals were made either by the Respondent or by someone authorized by the Respondent or someone to whom the Respondent carelessly or willfully exposed his ATM card and pin number to and that it exercised reasonable diligence and skill in its handling of the funds of the Respondent in its care and control.*

Relying on the provisions of section 140[35] which provides that when a fact is especially within the knowledge of any person, the burden of proving that fact is upon him, this paper submits, that without prejudice to the supposed fact that the customer is the only one in exclusive possession of the password and the provisions of section 131, 132 and 133, the bank being the owner, sponsor or the originator of the technology is the one who is in a better position to prove how these unauthorised withdrawals occurred. This is so because the facts surrounding the mechanics of an ATM requires special knowledge which the bank as a participant in the network protocol is deemed to have an insight as to the mechanics of the ATM and thus will definitely be in a better position than the ignorant customer. In furtherance to the foregoing submission, this paper adopts the position of the writer in a preceding publication[36] to the extent that whenever this ugly situation comes up and a customer lodges a complaint, the bank as a participant in the network protocol always provides information as to the exact time and the exact place where these withdrawals were done. So the germane question is, having provided the exact time and exact location of these unauthorised withdrawals, what precludes the bank from completing the puzzle by providing the identity of the person who withdrew these funds.[37]

[34] *Supra* (n.16).
[35] *Supra* (n.9).
[36] *Supra* (n.21).
[37] Ani C.C *Ibid*.

5.0 Conclusion and Recommendations

This work has revealed that fraud can be perpetrated on a prudent and discreet customer despite the erroneous belief that the only person that can access an account via ATM is the owner of the debit card and any other person he has given the card to or divulged the PIN to. This work in its critique of the onerous evidential burden placed on a bank-customer advocated for an alleviation of this arduous evidential burden by shifting the onus/burden to prove to the bank once the customer has satisfactorily shown by cogent evidence that at the time those withdrawals were carried out, he was at all time with his card, he was not at the scene of the withdrawals and he did not divulge his pin to any other person. Thus, a departure from the traditional view of the customer being the person to prove all the three conjunctive ingredients of negligence (particularly the breach of duty of care) will definitely put the bank at the position to ensure that ATMs they intend to introduce to a customer is 100% tamperproof and same has been subjected to adequate security test before its introduction instead of using customer funds as the security test element.[38] It will also put the bank in a position to ensure that all ATM machines are installed functional cameras which will be the only way to capture the identity of the withdrawer and that at every point in time the said camera is functional.[39] Finally, this paper in its recommendations also adopts the view of *Onyesolu* and *Okpala*[40] as to the reinforcement of the security features of ATMs to the effect that instead of a one-tier security feature which involves the use of PIN, ATMs should have at least three layers of authentication; the use of personal identification number (PIN), fingerprint and a one-time password (OTP).

[38] See also C.C Ani *Supra* (n.21) p.163.
[39] *Ibid.*
[40] *Supra* (n.4). See also O.K, Afiriye, v Arkorful (Nalt guidelines) 'Enhancing Security of Automated Teller Machine Using Biometric Authentication' *Journal of Knowledge and Information Management* (2019) 10 (7) p. 8.