

# APPRAISAL OF BANK'S LIABILITY ON AUTOMATED TELLER MACHINE (ATM) DEBIT-WITHOUT-DISPENSING TRANSACTION UNDER NIGERIAN LAW: *JWAN V. ECOBANK & ANOR.* IN PERSPECTIVE

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**Abstract:** *Technological advancement has been adopted in the banking sector through the use of ATM and ATM cards issued by banks to ease saving and withdrawal of money by customers. Once a customer's account is liquid, the insertion of an ATM card in an ATM and following the procedure, should lead to cash dispensation. However, there are instances where a customer's account is debited but the money is not dispensed. This is an ATM debit-without-dispensing quagmire. Recently, the Nigerian Court of Appeal in *Jwan v. Ecobank & Anor* held that an ATM card is akin to a cheque, where it is inserted into an ATM by a customer whose account is funded, a debit-without-dispensing transaction equals to a dishonoured cheque which is breach of banker's duty to the customer. This conclusion was reached based on the doctrine of *res ipsa loquitur*. This paper adopts doctrinal method in examining the propriety of making an ATM card akin to a cheque. It attenuates the nuances of the decision with particular reference to the ambit of banker's duty of care. It seeks to evaluate whether the decision took cognisance of the vagaries of technological glitches in technology driven transaction like the ATM. It discusses the impact of the decision on Nigeria's banker-customer jurisprudence. It makes vital recommendations as way-forward.*

**Keywords:** ATM, Banker, Customer, Cheque, *Res ipsa loquitur*

## 1. INTRODUCTION

One of the incursions in the 21<sup>st</sup> century, is technological revolution which has permeated all spheres of human endeavours with its concomitant effect (Okafor & Ezeani, 2021:18-33). No aspect of human life has been spared the disruptive and sometimes destructive intrusion of technology (Ahaiwe, 2011:96-107). Within the banking subsector of Nigeria's economy, it was not unusual to see a banking hall crowded by customers who have come either to deposit or withdraw money over the counter (Agboola, 2009: 6). However, this appalling scenario of the traditionally over the counter transaction of saving and withdrawal of money is being increasingly reduced through the introduction and used of ATM and ATM cards by all banks in Nigeria (Fanawopo, 2022). The banker is obligated to exercise extreme care in handling the account and transactions of the customer to avoid being liable in damages for injury suffered due to its negligence or recklessness as was held in *Balogun v. National Bank of Nigeria* (1978).

Thus, where a bank installs an ATM either within or outside its business premises, it is an invitation to the general public to use same subject to terms and conditions as was decided by the English court in *Carlill v Carbolic Smoke Ball Company* [1892]. Similarly, where a bank issues an ATM card to its customer, it undertakes that so long as the account is funded, whenever the card is

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inserted into a functioning ATM and the requisite procedure followed, an amount debited, will be dispensed. However, despite the practicability of technologically driven operations, the possibility of technical glitches which are beyond the control of the user cannot be denied. Thus, it is not uncommon to experience an ATM debiting the account of a customer and fail to dispense the amount debited as expected.

In *Jwan v. Ecobank & Anor* (2021) the Nigerian Court of Appeal dealt with the legal implications of debit-without-dispensing in banker-customer relationship and held that whenever a bank issues an ATM card to its customer, it undertakes that once the customer's account is funded, anytime the card is inserted into an ATM and the stipulated instructions are adhered to, the ATM card being in the similitude of a cheque, the amount debited by the AMT, must be dispensed. Failure to so dispense the money after the debit, amounts to a breach of the banker's to the customer. What is the propriety of placing an ATM card in the same position as a cheque book considering that the ATM is solely technologically operated while the latter is by man? Does the decision take cognizance of the operation of technological glitches which is usually without prejudice to the operator? What is the legal impact of this decision on Nigeria's banker-customer jurisprudence particularly the banker's duty of care? When will the conduct of a banker absolve liability in the event of a debit-without-dispensing transaction? These issues form the fulcrum of this paper.

The analysis and arguments in this article are framed and structured as follows: section one contains the introduction which gives a background to the work. Section two is an examination of the Banker's duty of care in banker-customer relationship. Section three exegesis the doctrine of *res ipsa loquitur* and its applicability to banker-customer relationship with particular emphasis on the case under review. Section four concentrates on the court's decision in *Jwan's case* wherein the facts of the case are graphically highlighted, the impact of the decision on Nigeria's banker-customer jurisprudence, the aptness of equating an ATM to a bank cheque, and the propriety of the decision in light of susceptibility of technological development to glitches, and whether if situation exists when a debit-without-dispensing misadventure will be legally excused. Section five contains the conclusion and recommendations which are based on the findings and as contribution to knowledge.

## **2. Explicating the Duty of Care in Banker-Customer Relationship**

In banker-customer relationship, the bank is a servant to its customer. The relationship is based and built on trust with the customer expecting the bank to be prudent and faithful in handling his/her affairs (Abugu, 2007:549). The relationship creates rights and obligations between the parties and one of the duties the bank owes the customer is duty of care as was held in *Diamond Bank Ltd. v. Partnership Investment Company Limited & Anor* (2009). This duty is expansive and almost inelastic as it permeates all spheres of the relationship and it is the bedrock upon which the relationship is laid and the lubricant that lubricates it as determined by the Supreme Court of Nigeria in *UBN Plc v. Mr. N.M. Okpara Chimaeze* (2014). The bank has the duty to exercise reasonable care and skill in handling the affairs its customer as was decided in *Afribank Nig. Plc v. A. I. Investment Ltd.* (2002). By this requirement, the bank is expected to take necessary precautionary measures, due diligence and all that is reasonable and practicable to ensure that the customer's instructions or affairs are handles in a way and manner that he/she is not exposed to preventable loss/injury *Guaranty Trust Bank v. Chief Dotun Oyewole & Anor* (2013). This duty is imposed as the bank by their characteristic nature, must be taken to have represented itself to their customers that they are professionals capable of keeping their money and other valuables safe and secured which may be kept with them thus, the law holds them in this regard not to renege from this position they have held forth as was held in *Ndoma-Egba v. A.C.B.* (2005).

The nuances of this duty entails keeping proper and updated record of their customers' transactions. In *Odulate v. First Bank Nigeria Limited* (2019) the Court of Appeal held that the law holds them to that promise (i.e. the promise of safe and secure custody of customers' money and valuables deposited with them) and also expects banks to promptly comply with lawful instructions of their customers with regards to money kept in their custody as in *UBN Plc v. Chimaeze* (2014). The Banker's duty to exercise reasonable care and skills stretches over the whole range of banking business within the ambit of the contract with the customer *Linton Industries. Trading CO. (Nig) Ltd v. C.B.N.* (2015). This duty applies to interpreting, ascertaining and acting in accordance with the instruction of the customer *N.N.B. Ltd v. Odiase* (1993); *First Bank of Nigeria Ltd v. African Petroleum Ltd* (1996). This duty requires that where the customer's account is funded, cheques issued by him/her after due diligence, will be honoured. Failure to honour such a cheques exposes the customer to ridicule as it brings his financial worthiness to question. In fact, it is a defamation of his character to the beneficiary whom the cheque was issued. Thus, the bank must take reasonable care to ensure that such unpalatable occurrence is prevented. Also, where a debit is to be carried on a customer's account, confirmation must be sought and gotten from the customer (Abe, 2017:37).

Where the bank fails in this duty and a customer suffers injury, the bank will be held to have breach its implied duty and liable to damages for negligence *Agbanelo v. UBN Ltd* (2000). Where for instance, a cheque presented for payment looks irregular on the face, the bank, pursuant to this duty, has the duty to postpone its payment until verification from the customer who issued it as in *Babalola v Union Bank of Nigeria ltd.* [1980]. Where the banks fails to take this precautionary step and the customer is exposed to injury, it has failed in this onerous duty therefore entitling the injured customer to award of damages for its negligence as was held in *Selangor United Rubber Estates Ltd. v. Cradock* [1968]. The banker is also require to ensure the privacy and confidentiality in the treatment of the customer's affairs (Oshio, 2002:57). The statement of the account of the customer are matters that must remain private and within the knowledge of both parties except where the banker is by an order of the court authorised to disclose same to third parties such as security agencies or the likes as was held in *Tournier v National provincial bank* [1924]. This is akin to the provisions of section 37 of the Constitution of the Federal Republic of Nigeria which guarantees privacy rights.

### **3. The Province of *Res Ipsa Loquitur* Determined**

This section of the paper is a synopsis on the nuances of the defence of *res ipsa loquitur*. It discusses its meaning, when it can be raised and the effect of it being successfully raised especially under the circumstance of the case being reviewed. Lunney and Oliphant (2008:204) have opined that the maxim *res ipsa loquitur* (meaning 'the thing speaks for itself' or more loosely, 'the accident tells its own story') allows the claimant to succeed in an action for negligence even where there is no evidence as to what caused the accident and, therefore, whether it was attributable to negligence on the part of the defendant. Generally, negligence is the breach of a legal duty to take care owed by the defendant, which results in damage to the claimant *Ivory Papers Mills Ltd. v. Bureau Veritas B.S.* [2002]. Thus, for a claimant to succeed in the tort of negligence, he/she must prove that the defendant owed a duty of care; that the duty of care so owed has been breach, and injury has been suffered as a result of the breach *Royal Ade Ltd. v. National Oil And Chemical Marketing Company Plc* (2004). Hence, the claimant is obligated to prove specific acts/omission (s) by the defendant that will qualify as negligent conduct that caused him/her harm *Nigeria Bottling Plc v. Mr. Jokotade A. Ibrahim* (2016). Failure of the claimant to satisfy these requirements mutually inclusive, will lead to the court dismissing a claim of damages predicated on negligence of the defendant *Strabag Construction (Nig.) Ltd. v. Ogarekpe* (1991).

The above notwithstanding, sometimes, the circumstances of a particular case may warrant the court drawing inference of negligence against the defendant without hearing detailed evidence of what

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he did or did not do. In this case, the inference connotes that the absence of explanation by the defendant, the claimant has discharged the initial burden of proof laid on him *Akintola v. Guffanti & Co. Ltd.* (1974). The foregoing alludes to the doctrine of *res ipsa loquitur*. Erle CJ in *Scott v. London and St. Katherine Docks Co.* (1865) lucidly and fluidly adumbrated the doctrine as follows;

There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by then defendants, that the accident arose from want of care.

From the above, for *res ipsa loquitur* to avail a claimant, it must be proved that the thing is under the absolute control of the defendant or his/her servants and that the accident that the occurrence that took place, in the ordinary course of business would not occurred save that there is want of care on the part of the defendant or his servants who are in control of the thing as was held in *Odebunmi & Ors. v. Abdullahi* (1997). The prerequisite are mutually inclusive as was decided in *Onwuka v. Omogu* (1991). According to Abdullahi (2022:121-138) the doctrine is pleaded or raised in one of two ways. First, it may be pleaded or raised by expressly reciting the doctrine itself. Secondly, it may alternatively be pleaded or raised to the effect that the plaintiff intends to rely upon the occurrence of the wrong or injury itself as evidence of negligence *Emirate Airline v Tochukwu Aforka & Anor* (2014).

The successful plea of the doctrine, entitles the party who has pleaded it to the judgment of the court unless the adverse party can rebut the inference and exonerate himself by showing firstly how the event complained of happened, and that its occurrence, was not due to want of care from him or his servant (s) for whom he is responsible as in the cases of *Chukwu Vertical Co. Ltd. v. Ifesinachi Industries (Nig.) Ltd. & Anor.* (2018); and *Woods v. Duncan* (1946). Unless this is done by the defendant, the requirement to prove by direct and cogent evidence the claims made by the claimant will be dispensed with once *res ipsa loquitur* is adjudged applicable. In fact, circumstances where same will be countenance is as glaring and convincing as the facts relied upon are usually matters within the exclusive knowledge and control of the person against who it is being raised. Take for instance, where a person is bitten by a dog that scaled over the defendant's fence. It is only the defendant who can explain how that occur and there is a prima facie case of negligence by the defendant or its agent without which, it is impracticable for a dog to be loose.

#### **4. Contextualising *Jwan v. Ecobank & Anor.***

This section of the paper explicates the facts of the case encapsulating the arguments of the parties, the decision of the court and the propriety of the decision. The appellant was the customer of the 1<sup>st</sup> defendant which issued him an ATM card to enable him have access to his account to make withdrawals. The appellant used his ATM card on the 2<sup>nd</sup> respondent's ATM to withdraw the sum of ₦ 10, 000 and the machine indicated that he will be charged the sum of ₦ 100 as service charge. He agreed to this, punch in his pin. The ATM directed that he should wait as the transaction was processing and the machine kept making sounds synonymous to that of money notes being counted. However, no money came out for him to retrieve despite his account having been debited of the sum of ₦ 10, 000. Sequel to this, he lodged a complaint with the respondents but the officers of the respondents dismissed the complaint and absolved themselves of any liability. The 1<sup>st</sup> respondent claimed that their record showed that the sum requested by the appellant was dispensed. The appellant argued that he could not explain how his account could be debited by the 2<sup>nd</sup> respondent ATM yet, the debited amount was not dispensed, he raised and relied on the defence of *res ipsa loquitur*. At the end of trial, the trial court

came to the conclusion that the appellant as claimant, failed to prove his case and was therefore, not entitled to judgment.

Being dissatisfied with the trial court's decision, the appellant lodged an appeal at the Court of Appeal. Several issues were raised but our focus is limited to issues 2 and 3 which are whether *res ipsa loquitur* was inapplicable and whether the respondents were negligent in handling the appellants account. On the applicability or otherwise of *res ipsa loquitur*, the appellant argued that while the law is that the person who alleges (usually the claimant), has the obligation to prove contingent on section 133(1) of the Evidence Act, 2011, however, where there is presumption in favour of the claimant as to the existence of the alleged facts based on the pleadings, the initial burden shifts to the defendant. He argued that the failure of the respondents ATM to dispense the money debited from his account is something that only they can explain aside the fact that it is not an occurrence that could have occurred in the ordinary course of business. This situation requires and justified his plea of *res ipsa loquitur*. He relied on *S.P.D.C. Ltd. v. Anaro* [2015] in arguing that the trial court was wrong to hold that his plea of *res ipsa loquitur* was inapplicable especially as his account was under the control and management of the respondents making them squarely responsible to explain what happened since it was not normal in the course of business for such to occur. Hence, it was incumbent on the respondent to prove that the failure to dispense after the debit was not due to their negligence but an accident. By this, the appellant contends that the trial court wrongly placed the initial burden of proof on it instead on the respondents and by the authority of *Adedeji v. Oloso* [2007] there was miscarriage of justice.

On the trial court's finding that the respondents were not negligent in handling the appellant's account, the appellant argued that since he was the one who alleged negatively that he was debited but was not paid, the respondents who alleged the positive that the debited amount was paid, ought to have proved what they alleged. Their failure to prove what happened, is conclusive evidence of negligence. The tendering of his account statement, only shows that the money was debited which is not in issue between the parties. Nevertheless, that does not explain why the debited sum was not dispensed especially when the two witnesses of the respondents had testified that it is possible for an ATM to debit without dispensing. He relied on the case of *Habib (Nig.) Bank Ltd. v. Gifts Unique (Nig.) Ltd* [2005] to argue that a statement of account is not a sufficient proof of a customer's debit and lodgements therein. He therefore contended that despite their failure to prove that the debited amount was dispensed, the court wrongly believed them.

The respondents jointly and severally argued that the trial court was correct in holding that the appellant failed to prove his case and as such, was not entitled to the reliefs sought. They argued that the appellant failed to prove that the debited sum was not paid to him by the ATM which proof of the non-payment, would have entitled him to the trial court's judgment. They contended that the statement of account showing that he was indeed paid as well as the journal indicating the success of transaction was conclusive proof of their defence against the appellant. Thus, on the preponderance of evidence, the appellant was not entitled to judgment as the trial court rightly held. They further argued that the defence of *res ipsa loquitur* was not available to the appellant who has failed to prove the material facts of the negligence he alleged against the respondents and assuming but not conceding that same was available to him, the evidence of their witnesses and documents tendered in evidence, had explained what transpired making the defence legally unsustainable placing reliance on the decision of *Abi v. C.B.N.* [2012] They therefore urged the Court of Appeal to dismiss the appeal and affirm the decision of the trial court which dismissed the appellant's case.

After a careful review of the facts, evidence and arguments of the parties, on the issue bothering on whether the trial court was right to have held that the doctrine of *res ipsa loquitur* raised and relied on by the appellant which the trial court held was unavailable was rightly discountenanced. The Court of Appeal found that the complaint of debit without dispensing by the appellant was one that in the ordinary course of business, would not happen and where it does, only the owner of the ATM could

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explain. The respondents having failed to explained what transpired and show that they were not negligent, *res ipsa loquitur* raised by the appellant avails him hence, the trial court who had rightly found that the appellant presented a case of negligence and pleaded *res ipsa* was wrong to have discountenance it in the circumstances of the case. The court in holding that the respondents had breach the duty of care owed the appellant held as follows:

The ATM card issued a bank being akin to a cheque, which must be honoured on request once there is enough funds in the customer's account, failure to do that will mean the banker is in breach of the duty of care owed to its customer... the issuance of the ATM Cards by the banks to its customers carry with it the duty to ensure that both the cards and the ATMs work as they care meant to and where there is failure of these services to a customer, the banks are duty bound to explain what happened. This is quiet common since the ATM and their operators are under the control and management at the banks.

By the above reasoning, the Court of Appeal has equated an ATM card to an analogue bank cheque. This reasoning raises a number of genuine concerns. An ATM is a technological enabled machine which is subjected to the vicissitudes of technological shortcomings/glitches while a bank cheque, is wholly managed by human beings. The probability of error in the operations/management of the two is not the same. Also, at what point will a bank be liable for failed ATM transactions? How can the contending interest (i.e. the interest of safeguarding the funds of customers by making seamless withdrawal via ATM and refraining damning banks for technological glitches) in this judgment be balanced? These are some of the issues arising from this decision. The preceding section focuses on these issues.

**5. Matters Arising from *Jwan v. Ecobank & Anor.***

What is the implication of the position taken by the Court in this decision under review particularly the likening of an ATM card to a cheque? When will a bank be liable for debit without dispensing transaction? Will this decision not open a floodgate of litigation against banks owing to the fact that ATM operations are digitally enabled and susceptible to technological glitches? With regards to the issue of whether this decision has not opened a floodgate of litigation against banks for every "debit but failed to dispense" ATM transaction, the answer is negative. The doctrine of *res ipsa loquitur* which the court availed the appellant is not at large. Where it is raised, it only exculpate the claimant of the duty to prove an alleged act of negligence based on the facts of the case while requiring the defendant to proffer explanation for the negligent act/omission. Thus, where a defendant, explains the reason for the alleged negligence demonstrating that neither him/her nor those under their control acted negligently which led to the complaint of the claimant, the presumption of negligence will fail. Once this is the case, *res ipsa loquitur* will become inapplicable. Thus, where a bank can satisfactorily show that a debit but failed to dispense ATM transaction occurred without their negligence, the decision reached in the case will not be inapplicable. In fact, the Court of Appeal as an impartial arbiter, is only reaffirming and directing the attention of banks to the crucial and enormous duty placed on them in relation to the money of its customers to the extent that they must like Caesar's wife, be above board in its management. A customer's fund in the custody of a bank is synonymous to the life of the customer which must be jealously guarded and released whenever requested. The decision has only placed a high standard of care on operators of ATM to ensure that the machines are functioning properly at all times and where there is any failure, it is not one which due diligence on the part of the bank would have detected and prevented.

As to the propriety of equating an ATM card to a bank cheque as held by the court, it is argued that while it is laudable to place a high standard of care on the part of banks to ensure that their ATMs are functioning properly, the court failed to take into cognisance, the peculiarity of an ATM and ATM card. An ATM does not function the same way a bank cheque does. The process of clearing a bank cheque is totally handled by humans and as such, the propensity of error is greatly limited unlike an ATM with the ATM card which is mainly technologically enabled. Thus, errors which may occur from ATM operations, may not in cheques transactions. While the court had held that where the bank satisfactorily explains the cause of a debit without dispensing transaction, and it is not negligent, the bank is absolved of liability, making an ATM card akin to a bank cheque, fails to take cognisance of the peculiarities of both. Despite the foregoing, the decision is a welcome development as it will keep banks on their toes to ensure that their ATMs are functioning properly and customers are not exposed to avoidable hardship. One way banks could avoid damages that could arise from “debit without dispensing” transactions is to take proactive steps to address complaints from customers. If the respondents had been meticulous and proactive with the appellant’s compliant, same would have resolved amicably thereby forestalling litigation.

## 6. Conclusions and Recommendations

Extrapolating from the analysis above, the introduction of ATM in Nigeria’s banking sector was meant to ease the burden of deposit and withdrawal of cash by customers and it has been embraced by all. Today, there is hardly anyone having a bank account without an ATM card. The issuance of an ATM card by a bank to its customer, comes with an implied duty that where the account is funded, whenever a withdrawal request is made by the customer on an ATM, the money debited will be dispensed. However, experience has been there several instances, the ATM, after a customer has gone through the preliminary steps, would debit without dispensing. Thus, the Court of Appeal have held that where this occurs, the bank is under an obligation to explain why and where it is unable to do so showing that it was not due to its negligence, the customer is entitled to compensation for the inconvenience occasioned to him/her by the failed transaction. Thus, banks in Nigeria operating ATMs are therefore expected to ensure that necessary precaution is taken to guarantee the seamless functioning of their machines and where same will malfunction, it is not due to their negligence. The decision is a welcomed development which has not opened a floodgate of litigation against banks but mere reaffirmed and emphasised their duty of care to their customers.

One way banks can absolve liability that may arise from debit without dispensing transactions or prevent it from escalating to litigation, is to put in place a responsive customer service reporting mechanism where such complaints are lodged and with alacrity, are resolved. Aside ensuring that if their ATM will malfunction at all, it is something that is beyond human control or ordinarily expected of them) prompt and efficient customer’s complaint resolution will forestall the option of litigation.

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