CITATION: Moffitt v. TD Canada Trust, 2021 ONSC 6133
COURT FILE NO.: CV-17-3440-00
DATE: 20210916

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Bruce Moffitt by his Litigation Guardian, Catherine Moffitt, Catherine Moffitt, Ella Bakker-Moffitt and Lucas Porter-Bakker	C. Morrison and S. Pickering for the Plaintiffs
Plaintiffs	
- and -	
TD Canada Trust, Ferdinand Pangan and Jason Green	D. Zuber and A. Presse for the Defendant TD Canada Trust
	No one appearing for the other Defendants
Defendants	
	HEARD: September 9th, 2019 March 10-12, 2020 and February 2, 2021. Written submissions completed March 5th, 2021.

REASONS FOR DECISION

LEMAY J

[1] At approximately 10:15 p.m. on May 28th, 2013, the Plaintiff, Bruce Moffitt, went to the Defendant, TD Bank's, automatic bank machine ("ATM") at

673 Warden Avenue in Toronto. This ATM was located in the vestibule of the TD Bank branch at the same address. Shortly after, Mr. Moffitt was assaulted by the Defendant, Mr. Ferdinand Pangan, who had also come to the ATM with his friend, the Defendant, Jason Green.

[2] Mr. Moffitt suffered significant injuries as a result of the assault. In this action, Mr. Moffitt alleges that TD owed him a duty of care, that TD breached its duty of care and that Mr. Moffitt suffered damages as a result of TD's alleged breaches. The other Plaintiffs are all *Family Law Act* claimants, and their claims flow from Mr. Moffitt's claims.

[3] Mr. Moffitt alleges that the breaches of TD's duty of care include approximately twenty-one (21) different concerns that have been listed in the Statement of Claim. Those breaches can be broken into three broad categories: breaches of the duty to properly analyze the risks to customers at the ATM site; breaches of the duty to provide proper security at the ATM site; and breaches of the duty to protect Mr. Moffitt from harm or to warn him of impending harm either immediately before or during the assault.

[4] TD denies that it breached its duty of care to Mr. Moffitt in any way. In the alternative, TD argues that, even if it breached its duty of care to Mr. Moffitt, causation cannot be established because of the random nature of the assault that took place, as well as the fact that Mr. Moffitt initiated the physical interaction with Mr. Pangan.

[5] TD has brought a motion for summary judgment, seeking to have Mr. Moffitt's claim against it dismissed. Mr. Moffitt opposes that motion on the basis that a full trial before a jury is required. In the alternative, if I determine that this matter is appropriate for summary judgment, Mr. Moffitt argues that summary judgment should be granted in his favour.

[6] For the reasons that follow, I have determined that it is appropriate to grant summary judgment in this matter. I have also determined that summary judgment should be granted to the Defendant TD and that Mr. Moffitt's action against TD should be dismissed. There are also *Family Law Act* claimants that are Plaintiffs in this action, being Mr. Moffitt's sister and other family members. Their claims flow from Mr. Moffitt's claims and are also dismissed.

Background Facts

a) The Assault

[7] The entirety of the assault was captured on Closed Circuit Television ("CCTV") cameras that are installed near the ATM. One is installed so that it provides a side view from the entrance to the actual bank, into part of the ATM vestibule. The other camera is installed so that it provides a view looking straight out of the ATM.

[8] I have reviewed the recordings that have been provided. There is no sound associated with these recordings. I also note that the Plaintiffs filed a number of still shots from these video recordings. I have also reviewed these still shots. The recordings themselves appear to be very closely synchronized with each other in terms of the date and time that is shown on the screen. In addition, the times on the screen fit closely with the other evidence that I have received. With the rest of the evidence I have received considered, I accept the times on the recordings as correct.

[9] In terms of the facility, it is a brightly lit ATM vestibule with a significant number of windows around it. In the recordings, it is difficult to see anything out of the windows because of the fact that it is dark outside. However, there does

appear to be traffic passing by on Warden Avenue, which is the street the branch is located on.

[10] The recordings show the following sequence of events:

a) At approximately 10:15 p.m., Mr. Moffitt enters the ATM vestibule and proceeds to use the ATM. He is at the machine for approximately ten minutes. He is dressed in a coat, a dark plaid shirt and blue jeans, and has a knapsack on his back. He appears unsteady at the ATM and drops down on his knees on a couple of occasions.

b) At 10:18 p.m., a football is seen rolling out of Mr. Moffitt's knapsack.

c) At 10:21 p.m., Mr. Pangan and Mr. Green are seen entering the ATM vestibule. Mr. Pangan is wearing a pink shirt and Mr. Green is wearing a white shirt with dark pants.

d) Mr. Pangan plays with the football and puts it on the window ledge next to him, while Mr. Green appears to be using his cell phone. Mr. Moffitt turns around twice while he is using the ATM, and appears to say something to Mr. Green and Mr. Pangan.

e) At 10:25 p.m., Mr. Moffitt completes his ATM transaction, collects his football from the window ledge and walks towards the door. Mr. Green then goes towards the ATM and appears to start using it.

f) There then appears to be an exchange of words between Mr. Moffitt and Mr. Pangan. Mr. Green and Mr. Pangan both appear to laugh and look in Mr. Moffitt's direction.

g) Immediately after this exchange, Mr. Moffitt lunges towards Mr. Pangan with his right arm outstretched and his fist clenched. Mr. Pangan tackles Mr. Moffitt, who appears to hit his head on the floor of the ATM area. Mr. Green is looking backwards towards the fight, but otherwise not participating in it.

h) Mr. Pangan then hits Mr. Moffitt, once in the head and once in the body. Mr. Pangan stands up and uses his right foot to stomp on the left side of Mr. Moffitt's head. Mr. Pangan continues his assault on Mr. Moffitt, and then removes Mr. Moffitt's sneakers. Mr. Pangan then hits Mr. Moffitt several more times, and then takes Mr. Moffitt's football and leaves.

i) This entire assault took less than a minute and a half from the moment that Mr. Moffitt lunged at Mr. Pangan to the moment that Mr. Pangan and Mr. Green left the ATM.

j) At 10:30 p.m., approximately four minutes after leaving, Mr. Pangan returns and takes Mr. Moffitt's wallet out of his knapsack. Mr. Pangan leaves the ATM, but comes back in a moment or two later (Mr. Pangan's third time back to the ATM) and takes Mr. Moffitt's knapsack.

k) At 10:32 p.m., a woman enters the ATM vestibule and looks at Mr. Moffitt before appearing to use the bank machine and leaving approximately a minute later.

l) At 10:45 p.m., a man walks into the ATM vestibule, looks at Mr. Moffitt and goes over to Mr. Moffitt to try and rouse him. This man then goes outside and uses his cell phone.

m) Very shortly after the bystander checks on Mr. Moffitt, Mr. Pangan returns to the ATM vestibule one more time (the fourth time) and kicks Mr. Moffitt's head and lower neck area twice. Mr. Pangan then leaves again.

n) Another customer comes in at 10:53 p.m. This customer goes over and appears to look at Mr. Moffitt quite closely but does not do anything else.

o) Emergency responders arrived at 10:56 p.m. and attended to Mr. Moffitt.

[11] The only witnesses to the interaction between Mr. Moffitt, Mr. Green and Mr. Pangan were the three of them. As a result of the injuries he sustained, Mr. Moffitt has no recollection of these events. This fact is confirmed by the evidence of Mr. Moffitt's litigation guardian, Catherine Moffitt.

[12] Mr. Pangan takes medication for schizophrenia and depression. During Mr. Pangan's examination for discovery, he testified that, on the day of the assault, he did not take his medications. Mr. Pangan also testified that, prior to the assault, he had been drinking with Mr. Green and had consumed a $35.00 bottle of Crown Royal. Mr. Pangan's admissions about his condition alone raise questions about the reliability of any evidence he might give about what happened at the ATM.

[13] In addition, Mr. Pangan's statements in previous proceedings have been inconsistent. The following two points are instructive:

a) In a statement to police, Mr. Pangan stated that "the guy attacked me first" and that he was just trying to defend himself.

b) However, in his testimony before Downes J. of the Ontario Court of Justice, Mr. Pangan stated that he did not recall the assault on Mr. Moffitt. On discovery, Mr. Pangan proffered the same evidence as he had before Downes J., in spite of an opportunity to watch portions of the video.

[14] Although part of the delays in this case arose in order to give the Plaintiff the opportunity to conduct an examination for discovery on Mr. Green, no transcripts or other evidence from Mr. Green was filed on this motion.

[15] Based on the foregoing, the only useful evidence about the events at the ATM on the evening of May 28th, 2013 comes from the CCTV footage. Mr. Pangan's evidence is internally inconsistent and therefore unreliable, and Mr. Green's evidence is not available on the motion. Mr. Moffitt, unfortunately, has no recollection of the events at the bank machine on the evening in question.

[16] As a result of this assault, Mr. Pangan was charged with attempted murder, as well as other offences. He pled guilty to aggravated assault, robbery and possession of stolen property, but challenged the charge of attempted murder.

[17] At a trial before Downes J. of the Ontario Court of Justice, Mr. Pangan was acquitted of attempted murder. Based on his plea, he was found guilty of the remaining charges. He was sentenced to a total of eight and a half years, less the time he had spent in pre-sentence custody.

b) The Warden Branch

[18] The expert reports focus on the design of the Warden Branch ATM vestibule and the neighbourhood in which the Warden Branch is located. It is, therefore, helpful to describe the evidence regarding both the Warden Branch and

its surroundings and location. I note at the outset that there does not appear to be any material dispute in the descriptions or the layout of the branch or its environs.

[19] The Warden Branch is on Warden Avenue in Toronto. It is on the east side of the street. Directly north of the branch is a self-storage facility. Across the street is a green space, as well as two high rise buildings that were described as "social housing". There are other social housing units in the neighbourhood.

[20] Approximately 500 meters to the north of the Warden Branch is the Toronto Transit Commission's Warden Subway Station. Approximately 200 meters south of the Warden Branch, on the other side of Warden Avenue, is a street called Firvalley, which is the street on which Mr. Pangan and Mr. Green lived.

[21] All of the witnesses agreed that the ATM vestibule was clean and well-lit, and that it was easy to see into the vestibule at night. The ATM vestibule was monitored by CCTVs, but there was no live monitoring of the feed from these CCTVs. The door to the ATM vestibule was not locked at any time and could be accessed by anyone.

[22] I also received affidavit evidence from Maryan Kavoosi, who was the branch manager for the Warden Branch from 2014 to 2016. Ms. Kavoosi testified that she was not aware of the incident involving Mr. Moffitt until she attended at discoveries in 2017. She also stated that the risk rating for the branch was low from a security perspective, and that she was not aware of any customer complaints or concerns about security, or any problems with theft or physical violence in the area where the branch was located.

[23] Ms. Kavoosi also testified that she saw police cars from time to time because there was a police station up the street from where the branch was, but that she did not notice them being called to specific properties.

[24] There was more detailed information filed by the Plaintiffs about the neighbourhood, and I will return to that evidence below. At this point, I simply note that the Plaintiffs and their experts view the neighbourhood where the Warden Branch was located as extremely dangerous, while TD and its experts take a different view.

[25] I also had an affidavit and a detailed cross-examination transcript from Ms. Viktorija Graham, who is currently Senior Manager of Physical Security Operations and Crime Prevention at TD. At the time of the assault on Mr. Moffitt, she was a Manager of Corporate Physical Security. Her evidence is more relevant to the question of TD's security systems. However, she also provided some information about specific incidents at the Warden Branch.

[26] Ms. Graham confirmed that the only customer robbery between the beginning of 2011 and 2018 was the robbery of Mr. Moffitt. I will return to the question of whether incidents (or a lack of incidents) after the assault on Mr. Moffitt took place are relevant to this case in my analysis below.

[27] Ms. Graham was not aware of the robbery that took place on May 11th, 2010, which was one of a string of robberies of approximately six bank branches in various locations in the City of Toronto. The information in the record on these robberies comes from a news article from the East York Mirror dated May 31st, 2010 as well as from an "Address History Report" from the Toronto Police Service relating to the Warden Branch. However, TD does not dispute that the Warden Branch was robbed in May of 2010.

[28] Ms. Graham also stated that she was aware of incidents of vagrancy and/or panhandling that took place outside the Warden Branch. She stated that vagrancy and panhandling were issues at "many of the TD branches." She testified that the police would sometimes be called for these types of incidents, and that sometimes staff would feel threatened by these incidents.

c) TD's Security Systems

[29] Ms. Graham was the principal source of evidence on the issue of how TD managed security at its ATMs.

[30] TD divides its branches into low, medium and high risk locations. Low and medium risk locations across Canada receive a set of standard controls for risk based upon their risk profiles. High risk branches receive an individual physical risk assessment.

[31] Dividing the branches into low, medium and high risk locations is done using a points system. The ratings are done annually using data from the previous three years. TD focuses on particular crimes such as armed robberies, unarmed robberies, assaults, thefts and breaking and entering. TD's evaluation only accounts for crimes that take place on the actual branch property or that had an immediate effect on branch customers, rather than in the neighbourhood around the branch.

[32] Ms. Graham testified that the CAP index is now being used by TD as part of their risk rating methodology for individual branches. Ms. Graham acknowledged that this index was not used at the time of the assault on Mr. Moffitt and she was not sure why TD's approach changed.

[33] Ms. Graham also acknowledged that, at the time of the assault on Mr. Moffitt, TD did not consider external threats, including the risk of crime in the

immediate neighbourhood, for low risk branches such as the Warden Branch or for medium risk branches.

[34] Ms. Graham also testified that she attended at meetings of the Canadian Bankers Association ("CBA") Security Specialists Group ("SSG"), and discussed security issues, including issues relating to ATMs. The CBA is made up of most of Canada's chartered banks. The SSG is made up of security professionals from those banks.

[35] The SSG would discuss various issues relating to bank security. Those discussions included discussion of issues relating to ATMs.

[36] Ms. Graham also confirmed that the SSG considered practices from the United States. She acknowledged that there were some differences in how American banks addressed security at ATMs. The biggest difference is the fact that, in some areas where there was a high level of vagrancy, American banks would post security guards. That approach is not followed in Canada by any of the major banks.

[37] I will discuss the security systems in more detail when I come to the question of whether TD breached its duty of care to Mr. Moffitt.

d) The Procedural History of This Litigation

[38] This litigation has been ongoing since 2015. The action was transferred to Brampton in 2017, around the time that discoveries were completed. Mr. Pangan and Mr. Green have not participated in this litigation since discoveries.

[39] After the discoveries were completed in the fall of 2017, TD brought a summary judgment motion. This motion was originally returnable in the first part

of 2018 as a regular motion. It was subsequently adjourned to a long motion date that was scheduled for October 1st, 2018.

[40] In the meantime, the Plaintiff had moved on undertakings and refusals before Seppi J. This motion was heard on June 28th, 2018 and a decision was rendered by Seppi J. on the same date. The Plaintiff appealed the decision of Seppi J. to the Divisional Court, but leave to appeal was denied.

[41] This matter originally came before me on August 23rd, 2018, when the Plaintiffs sought to adjourn the summary judgment motion that TD had scheduled for October 1st, 2018. At that point, the application for leave to appeal to the Divisional Court was still outstanding. I granted the adjournment but directed the parties to write to Daley RSJ (as he then was), and ask for the appointment of a case management judge. I was duly appointed case management judge and convened a case management conference on October 5th, 2018.

[42] At that case conference, a further summary judgment motion date was scheduled for May 13th, 2019. A timetable for the service and filing of materials was also set in consultation with the parties. As part of that timetable, the expert liability report was to be served by the Plaintiff by mid-December of 2018.

[43] In early December of 2018, further issues arose as a result of production requests that the Plaintiff made of the Defendant, TD, and as a result of difficulties in finding the Defendant, Mr. Green, and conducting discoveries with him as well as other production from the parties. Based on that information, I extended the deadline for the expert report to be served to three (3) days after the undertakings issues were dealt with and provided the parties with further directions. As of the beginning of December 2018, the date for the summary judgment motion remained in place.

[44] In addition, I had been advised by counsel for the Plaintiff that they had not received a report from their expert. As a result, I directed the filing of an Affidavit (which was sealed) outlining counsel's efforts to retain an expert and obtain an expert report. I had (and still have) concerns that the Plaintiff did not retain an expert in an expeditious manner.

[45] As a result of these requests, a further set of motions was heard before me on January 17th, 2019 to deal with issues related to documentary discovery. My decision in that regard is reported at 2019 ONSC 902. In those reasons, I also reluctantly concluded that I should permit the Plaintiff to file their expert report by no later than three (3) days after the production I had ordered was complete. Finally, I adjourned the summary judgment motion to September 9th, 2019. The issues over discovery and production consumed some considerable additional Court time over the next few months. In this regard, see 2019 ONSC 2548 and 2019 ONSC 2975.

[46] Before coming to the issue of the multiple expert reports and the events of September 9th, 2019, one other issue should be addressed. In mid-December of 2018, the Plaintiffs raised the issue of third party records production from various banks. This was not an issue that had been raised by the Plaintiffs when the timetable had been prepared in October of 2018. I therefore required submissions on whether a third party records motion should be permitted to proceed. Although I concluded (see 2019 ONSC 280) that the Plaintiffs had been moving in a dilatory manner, I also determined that the third party records motion could be brought. It was ultimately scheduled for January 30th, 2019, adjourned until March of 2019, and resolved without the need for a decision from me.

[47] Eventually, the Plaintiffs filed three (3) separate expert reports. The Plaintiff's decision to file three expert reports came as a surprise to both myself and Defendant's counsel (see 2019 ONSC 2975). I scheduled a hearing for

May 21st, 2019 to address the issue of whether three expert reports should be permitted. Ultimately, I determined that the expert reports should be permitted. I had significant concerns about the fact that the Plaintiff was seeking to tender three expert reports when both the timetable and the reasonable expectations of both TD's counsel and I were that there would only be one expert report. However, there was no prejudice to TD that could not be addressed by adjusting the timetable.

[48] The Plaintiff's experts are as follows:

a) The report of Mr. Mark Huhn, a crime analyst with the Calgary Police Service who was tendered as an expert in the area of environmental criminology.

b) The report of Mr. Lance Foster, who was tendered as an expert in security.

c) The report of Mr. Howard Wood, who was also tendered as an expert in security, as well as occupier's liability.

[49] TD filed the following responding expert reports:

a) The report of Mr. Elgin Austen, who was tendered as an expert in policing and security.

b) The report of Mr. Terry Hoffman, who was tendered as an expert in public safety, risk measurement and emergency management.

[50] However, TD challenges the admissibility of the Plaintiffs' expert reports on the basis that they do not meet the test for admissibility set out in *White Burgess Langille Inman v. Abbott and Halliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182.

In the alternative, TD argues that the Plaintiffs should only be able to rely on one expert report as the other reports are duplicative.

[51] Prior to September 9th, 2019, which was the return date for the summary judgment motion, I reviewed the materials that had been filed by the parties. Cross-examination of the experts on their Affidavits had not yet taken place prior to the September 9th, 2019 hearing date.

[52] As a result, at the hearing on September 9th, 2019, I advised the parties that cross-examinations of the experts should be conducted before me. My reasons for doing so are set out at 2019 ONSC 5208. Therefore, we conducted a *voir dire* at which all five experts testified about both their qualifications and the opinion evidence that they were providing. That *voir dire* took place on March 10th and 11th, 2020 and arguments on both the admissibility of the expert reports and the merits of the summary judgment motion were made on March 12th, 2020.

[53] In addition to this oral evidence from the five individuals tendered as experts, I also had Affidavit evidence for the Plaintiffs from Catherine Moffitt (Mr. Moffitt's litigation guardian) and Brendan Kaler (one of the Plaintiffs' lawyers). I had Affidavit evidence on behalf of TD from Allison Presse, one of TD's lawyer as well as Maryam Kavoosi, the branch manager at the Warden Branch from 2014 to 2016, Roxanne Bacchus, the Branch Manager at the Warden Branch at the time of the assault on Mr. Moffitt and Viktorija Graham, who was a Manager of Corporate Physical Security at the time of the assault on Mr. Moffitt. I also received both factums and oral submissions from both parties.

[54] After considering the submissions of the parties and reviewing the evidence from the *voir dire* and the motion records in detail, I determined that it was necessary to have counsel re-attend to address further questions. As a result of the pandemic, it was not possible to schedule that re-attendance until

December 2nd, 2020. Unfortunately, as a result of another urgent proceeding I was involved in, the December 2nd, 2020 date had to be adjourned. Although earlier dates were offered, the first date that counsel were all available was February 2nd, 2021. A further hearing was held that day.

[55] Based on the discussion on February 2nd, 2021, further written submissions were required on the issue of whether the Court should accept an expert report from Mr. Foster, given that he did not prepare his report using the method that he himself had identified as being the "best practice".

[56] Written submissions were completed on March 5th, 2021. I have now considered all of the material that has been filed by the parties as well as all of their arguments.

Issues

[57] The following issues flow from the facts that I have outlined above:

a) What evidence is admissible on this motion?

b) Is this an appropriate case for summary judgment?

c) What is the standard of care in this case?

d) Was the standard of care breached by TD?

e) Did any breach in the standard of care cause or contribute to Mr. Moffitt's injuries in any way?

[58] I will address each question in turn.

Issue #1 – What Evidence is Admissible on This Motion

[59] There are two specific disputes about the admissibility of evidence that must be resolved:

a) The admissibility of the expert reports.

b) The admissibility of Mr. Kahler's Affidavit.

a) The Admissibility of the Expert Reports

[60] In order to determine whether the expert reports are admissible, I will address the following topics: (i) the test for admitting expert evidence; (ii) the purpose of the expert evidence in this case; and (iii) an analysis of the qualifications, opinions and reports of each of the experts who have been tendered in this case.

[61] At the outset, I should set out how the expert evidence was considered for this motion. The question of whether expert evidence is admissible on **either** a summary judgment motion or at a trial is a question of law. This was an issue that was specifically raised with the parties in submissions, and both sides acknowledge that the admissibility of expert reports is a question of law. See also *R. v. R.D.,* 2014 ONCA 302, 120 O.R. (3d) 260, at paras 51 and 52.

[62] As a result, before I can consider the expert opinions in assessing any of the questions before me, including whether this action is amenable to summary judgment, I must first determine whether the expert reports are admissible for the purposes of the summary judgment motion and, if so, the extent of the evidence that is admissible.

[63] Therefore, the procedure that was adopted in this case was to have the experts cross-examined in front of me as a *voir dire*. I adopted this procedure

because it was the most efficient way of considering the expert evidence both to determine whether the proposed expert testimony was admissible and, if it was admissible, to what extent. I note that, if this matter had proceeded as a jury trial, the same procedure would have been necessary to determine whether, and to what extent, the expert evidence was admissible before the jury heard the evidence.

[64] One of the issues that counsel for Mr. Moffitt raised is whether adopting this process resulted in a merging of the two steps of the process under *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87. I am of the view that it did not. The admissibility of expert reports is a question of law that must be determined **before** the trier of fact can consider the contents of those reports. Similarly, the admissibility of expert reports must be determined before the Court considers whether summary judgment can be granted. It is only once I know what evidence is properly before me that I can determine whether I can either grant summary judgment or use the tools that are outlined by the court in *Hryniak,* in order to conduct a summary trial.

[65] I also note that the issue of whether one or more expert reports would be permitted has already been decided. I was concerned with the approach adopted to the expert reports by Plaintiffs' counsel (not Mr. Morrison). However, for reasons discussed in Court in May of 2019 I ultimately determined that the Plaintiffs could serve and seek to admit three (3) expert reports. I will briefly summarize the points I considered in reaching my May, 2019 decision:

a) Throughout 2018 and the first part of 2019, counsel for TD and I all understood that the Plaintiffs would only be filing one expert report. That understanding was reinforced by the timetable that had been agreed to by the parties and ordered by me. That timetable made reference to Plaintiff's expert in the singular.

b) Contrary to the assertions contained in an Affidavit that Mr. Kahler filed in May of 2019, neither counsel for TD or I were aware of the fact that there would be multiple experts. This issue was fully explored in Court in May of 2019.

c) However, counsel for TD could not point to any prejudice that would be suffered by TD if three expert reports were served and relied upon by the Plaintiffs.

d) On the basis of this last point, I determined that it was important to ensure that this matter was fully explored on the merits. Therefore, I permitted the Plaintiffs to serve and file three expert reports. I provided TD with the opportunity to adjourn the matter to ensure that they had proper reply experts. An adjournment was not necessary.

[66] Given that I have already heard the cross-examinations of the experts, I decline to exclude any of these expert reports on the basis of the fact that they may be duplicative on the issue of liability. The evidence on these reports has already been heard and there would be no useful purpose served by excluding the reports based on duplication or other principles relating to the efficient use of Court time at this stage.

[67] I should note that TD challenged the admissibility of the Plaintiffs' expert reports and there was much less focus from the Plaintiffs on the admissibility of TD's expert reports. However, I have a gatekeeping role over the admissibility of expert reports and will consider the admissibility of all five reports.

The Law Relating to the Admissibility of Expert Reports

[68] The test for the admissibility of an expert report is based on the Supreme Court of Canada's decision in *R. v. Mohan*, 1994 SCC 80, 2 S.C.R. 9. The

following four criteria will be considered in determining the admissibility of expert evidence:

a) Relevance;

b) Necessity in assisting the trier of fact;

c) The absence of any exclusionary rule, separate and apart from the opinion rule itself; and

d) A properly qualified expert.

[69] This test has been modified as set out in the Supreme Court's decision in *White Burgess* and *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330. The admissibility inquiry is divided into two distinct steps. First, the judge considers the four *Mohan* criteria, as set out above. Second, the judge balances the potential risks and benefits of admitting the expert report.

[70] The risks associated with expert evidence include the possibility that expert evidence will not be subject to the scrutiny that it requires, and that the expert evidence will be given more weight than it deserves (see *Abbey*, at para. 76). The test for the admissibility of expert evidence has become stricter over the past few years (see *White Burgess* at para. 16).

[71] *White Burgess* clearly acknowledges the role of the judge as the gatekeeper to ensure that expert evidence is properly scrutinized before it is admitted as evidence. The role of the trial judge as the gatekeeper for expert evidence, and the responsibility of the trial judge to carefully scrutinize expert evidence before admitting it were also discussed by our Court of Appeal in *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, 138 O.R. (3d) 584.

[72] In *Bruff-Murphy*, the Court of Appeal stated, at para. 37:

> 37 The analysis under the second component is best thought of as a specific application of the court's general residual discretion to exclude evidence whose prejudicial effect exceeds its probative value: *R. v. Bingley*, 2017 SCC 12, 407 D.L.R. (4th) 384, at para. 16. As Charron J.A. wrote in *R. v. K. (A.)* (1999), 1999 CanLII 3793 (ON CA), 45 O.R. (3d) 641 (C.A.), at para. 76, application for leave quashed, [2000] S.C.C.A. No. 16: "The balancing process which lies at the core of the determination of the admissibility of this kind of evidence is not unique to expert opinion evidence. It essentially underlies all our rules of evidence."

[73] This is a summary judgment motion, and not a trial. However, I conclude that the test for the admissibility of the expert reports is the same for the reports filed on this motion as it would be if this was a trial. I reach that conclusion for the following reasons:

a) As discussed below, *Hryniak* provides judges with expanded powers on a summary judgment motion, including the power to conduct a mini-trial and other fact finding exercises. Given these expanded powers, the test for admitting evidence (especially expert evidence) should not be different on a summary judgment motion than at a trial. Adopting a different test on summary judgment could result in different evidence being admitted depending on whether a judge is conducting a trial or a summary judgment motion, and that could produce different results depending on the procedure that is used.

b) The role of a judge as a gatekeeper to manage expert evidence is an important one and judges conducting summary judgment motions should not be applying a lower test for admitting expert evidence than judges at trials. The dangers and risks associated with the improper admission of expert evidence are the same in either setting.

c) There is no indication in the case-law of any different test being applied on summary judgment.

d) The same principles respecting the admissibility of expert evidence are applied on both trials and preliminary matters in other circumstances. For example, in class proceedings, the same principles are used to consider the admissibility of expert reports on certification motions as are applied in trials. See, *inter alia, Williams v. Canon Canada Inc.*, 2011 ONSC 6571, at paras. 65 and following.

[74] In considering whether the expert evidence is necessary, I must be satisfied that it is more than merely helpful. It must relate to a fact in issue and assist the trier of fact in proving that fact. Further, while expert witnesses can provide triers of fact with "ready-made" inferences of complicated technical subjects, it is not appropriate for the expert to make factual findings. The expert is not a substitute for the trier of fact. See *R. v. J. (J.-L.)* 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 56.

[75] Therefore, in assessing the requirement of necessity, I must also consider how close the expert opinion comes to opining on the ultimate issue before the trier of fact. As Ducharme J. noted in *Dulong v. Merrill Lynch Canada Inc.*, 2006 80 O.R. (3d) 378, at para. 14:

> 14 While an expert can provide the trier of fact with a ready-made inference, it is neither appropriate nor helpful for an expert to make factual findings. As stated by Binnie J. in R. v. J. (J.-L.), supra, at p. 628 S.C.R.:
>
> > The purpose of expert evidence is thus to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact.
> >
> > Where the expert purports to opine on the ultimate issue before the court and threatens to usurp the role of the trial judge, the requirement of necessity should be strictly enforced: R. v. Mohan, supra, at p. 25 S.C.R., p. 430 D.L.R.; R. v. J. (J.-L.), supra, at 623 S.C.R.; R. v. Pascoe

> (1997), 1997 CanLII 1413 (ON CA), 32 O.R. (3d) 37, [1997] O.J. No. 88 (C.A.), at p. 55 O.R.

[76] See also *Walker v. City of Burlington et. al.,* 2012 ONSC 2565. In this case, many of the opinions being offered focus on the question of what steps TD should (or should not) have taken in respect of the security around the ATM machine in the Warden Branch. This is the ultimate issue to be decided, so the opinions must be approached carefully even if they are ultimately found to be admissible. In other words, as a question of law, the trier of fact would have to be instructed that the opinions on the ultimate issue to be decided should be carefully considered in light of the underlying facts and assumptions.

[77] The general standard of care is a question of law, while the specific standard of care applicable in a given situation is a question of fact. The specific standard of care generally, but not always, requires opinion evidence. On occasion, where there are non-technical matters that an ordinary person would be expected to know about, explaining the standard of care may not require expert evidence. See the discussion in *Meady v. Greyhound Canada Transportation Corp.*, 2015 ONCA 6, at paras. 34 and 35, and the cases discussed therein.

[78] This brings me to the requirement for a properly qualified expert. First, all experts have a duty to provide evidence that is impartial, independent and free from bias: Rule 4.1.01(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Second, expert evidence must be given by a witness who has acquired special or peculiar knowledge through study or experience: *Mohan*, at para. 27. However, someone who has only read the literature in an area will not be sufficiently qualified to be an expert: *R. v. Mathisen*, 2008 ONCA 747, at paras. 126-127.

The Purpose of the Expert Reports in This Case

[79] In considering the purpose of the experts' evidence, I am mindful of the concerns expressed by our Court of Appeal in *Johnson v. Milton (Town),* 2008 ONCA 440, (2008) 91 O.R. (3d) 190, at paras. 41 and following. Part of the gatekeeping function of the judge, on either a trial or at a motion, is to ensure that the experts' testimony is limited to properly admissible evidence. Two general observations are appropriate at this point.

[80] First, the expert reports tendered by both parties seem to focus more on the issue of the standard of care, and whether TD breached that standard of care, rather than the question of causation. This is not surprising, as I am of the view that the issue of causation in this case is a fact-based question that is not amenable to expert evidence.

[81] Second, there was also a tendency on the part of the experts to stray and to provide opinions on the motivations of Mr. Pangan, and other issues that were either well beyond the scope of the expert's area of expertise or were speculative. Those portions of the reports were inadmissible on both sides.

[82] In particular, the question of Mr. Pangan's motivations in the assault is a question of **fact** that is not amenable to expert evidence and the testimony from experts on his motivations is inadmissible for two reasons:

a) The experts do not know what was in Mr. Pangan's mind at the time of the assault.

b) The video evidence of the assault shows Mr. Moffitt initiating the assault after a period of approximately four minutes where Mr. Moffitt, Mr. Pangan and Mr. Green were in the ATM without any physical altercation. As a result, any evidence that an expert would

> give that the assault was planned by Mr. Pangan as a result of his survey of the ATM and the area around the Warden Branch before Mr. Pangan entered the ATM is unsupported by the evidence.

[83] In addition to being speculative, these conclusions are not a "ready-made inference". Instead, they are an invitation to simply accept the expert's evidence about what Mr. Pangan's motivations were. The experts are in no better position than the trier of fact to reach these conclusions. As a result, receiving this evidence would be prejudicial and it has no probative value. It is, therefore, excluded, no matter which expert provided it.

[84] With these general thoughts in mind, I will consider the admissibility of each of the five experts that I heard from on the motion for summary judgment.

Mark Huhn

[85] Mr. Huhn is a civilian employee of the Calgary Police Service, and has been employed as a crime analyst since 2008. In that role, Mr. Huhn has worked as a criminal intelligence analyst. His educational background includes both a Bachelors and Master's degree in criminology. Mr. Huhn was also enrolled in the criminology PhD program at Simon Fraser University, but it does not appear he completed this PhD. His C.V. was part of the motion record, and I have considered it.

[86] Mr. Huhn was retained to provide an expert opinion with respect to the suitability of the location of the bank and ATM at 673 Warden Avenue. His evidence was provided from his perspective as a crime analyst. His work as a crime analyst requires him to collect, collate and analyze information on various crimes and other data.

[87] The key conclusions in Mr. Huhn's opinion are set out on pages 2, 7 and 8 of his report. They read as follows:

> To begin, after examining this aggravated assault, it is my opinion that the focus on why this crime occurred (and also where the culpability rests) lies solely on the *environment* in which the bank is situated or was built. According to environmental criminologists this built environmental impacts on the patterns of crime and has a great deal to do with when and where crimes occur. These spatial and temporal components of crime are crucial to understanding why crimes occur in certain locations over others. We as crime analysts and criminologists consistently see through crime mapping, the prevalence of crime "hot spots" or areas in which crime frequently occurs. I strongly feel there is a responsibility for corporations to fully assess the locations in which they establish their places of business. Failure to do so is negligent on their part, and makes them culpable for victimization of both employees and customers that is likely to occur.
>
> In conclusion, it is my opinion that the environment in which the TD Bank at 673 Warden Avenue is located is an aggravating factor that has contributed to past criminal offenses and will only continue to place employees and customers of this business in danger. Green spaces, empty lots, intermittent business traffic, community housing, and transit hubs are just some of the factors surrounding the bank that weaken rather than strengthen or "harden" the target.
>
> Although the bank has instituted some internal security measures to provide protection, the most difficult factors to mitigate are external or environmental. These factors are typically considered in the planning stages of any new building or expansion project, and often times are overlooked or dismissed due to lower building costs and potential profits. In my opinion, the onus or responsibility lies with TD bank to ensure that their places of business are situated in relatively safe and secure locations; this is not the case with the branch located at 673 Warden Avenue.

[88] There are a number of passages in Mr. Huhn's report that focus on the motivations of Mr. Pangan, including outlining information on Mr. Pangan's previous criminal record. As I have already noted, the "expert opinions" on Mr. Pangan's motivations are clearly inadmissible. For clarity, this includes Mr. Huhn's statement that Mr. Pangan was a "motivated offender".

[89] In support of his other opinions, Mr. Huhn referred to research that addressed two concepts. The first was that of crime generators and the second

was the concept of the “Routine Activities Theory”. The Routine Activities Theory looks at three elements that need to be present in order for a crime to occur: a motivated offender, a suitable target, and an absence of capable guardians.

[90] In essence, Mr. Huhn’s report considered the environment in which the Warden Branch was located. He concluded that the bank was a crime generator, and that the surroundings of the bank (including the green space and the self-storage lot) made for a high risk environment. In reaching that conclusion, Mr. Huhn also noted the presence of a number of low income and senior’s housing units.

[91] Mr. Huhn also concluded, based on statistics he obtained from the Toronto Police Service, that the levels of crime in the area around the Warden Branch were significantly higher than in other communities. When all of these facts were considered, Mr. Huhn concluded that the Warden Branch was a suitable target.

[92] While there are some issues that go to the weight to be given to elements of Mr. Huhn’s report, I am of the view that parts of it are admissible for the following reasons:

a) The analysis of crime statistics is something that would not be within the knowledge of the trier of fact.

b) The concepts of a “crime generator” and of the “capable guardian” are also not concepts that would be within the knowledge of the trier of fact.

c) The level of crime in the neighbourhood where the Warden Branch and ATM are located may be of some relevance to the scope of TD’s duty of care. This is a question of fact that is not amenable to expert

opinion. However, the framework with which to analyze that information will be of assistance to the trier of fact in considering the scope of TD's duty of care.

d) Given the first three points, both the relevance and the necessity of some of Mr. Huhn's evidence is established.

e) There was no challenge to Mr. Huhn's evidence on the basis of any other exclusionary rule. TD challenged Mr. Huhn's credentials on the basis that he had no familiarity with either the area or with the banking industry. These are both valid concerns, but they support placing limits on what portions of Mr. Huhn's evidence are admissible rather than excluding it completely.

f) This brings me to the balancing that is the second stage of the *White Burgess* approach. Mr. Huhn's evidence on some points has probative value. The prejudicial effect of this evidence is much more limited as it can be weighed against the other evidence that was admissible on this motion.

[93] As a result, some of Mr. Huhn's evidence is admissible on this motion. Specifically, the following points are admissible:

a) The effect that the built environment can have on the risk for crime.

b) The evidence on the Routine Activities Theory, including the evidence on Crime Generators and Capable Guardians.

c) Evidence on the general use of major crime indicators.

[94] In addition to the evidence on Mr. Pangan's motivations, Mr. Huhn's statements on corporate wrongdoing and TD's alleged profit motive in locating the Warden Branch where it is are also inadmissible for three reasons:

a) The language used by Mr. Huhn in expressing these opinions is declaratory ("I strongly feel") and the opinions come with very limited explanations as to why Mr. Huhn had these strong feelings.

b) Mr. Huhn has no information on either when TD built this branch or how TD decided to build the branch where it is located. His conclusions on why the branch was located in this location do not have an evidentiary foundation.

c) The conclusions that Mr. Huhn draws from this evidence is that TD was negligent in locating the branch where it was. This is a conclusion that is very close to the ultimate issue I have to decide and is subject to more scrutiny in the admissibility inquiry.

[95] As a final matter, I should note that there are some significant concerns about the weight that should be given to the portions of Mr. Huhn's evidence that I have admitted. Those are best addressed when I consider the merits of the motion.

Lance Foster

[96] Mr. Foster was presented as an expert in bank security. He spent eight years as a Vice-President and Corporate Security Manager for the Florida Federal Savings Bank, and had oversight of all security issues. He was previously employed as a Deputy Sherriff. Since leaving the Federal Savings Bank, Mr. Foster has worked as a security consultant.

[97] Mr. Foster is a Certified Protection Professional ("CPP") from the American Society for Industrial Security ("ASIS") and a Certified Security Consultant ("CSC") from the International Association of Professional Security Consultants ("IAPSC"). I heard evidence about these qualifications. I also heard evidence about Mr. Foster's involvement in the formulation of the forensic methodology that the IAPSC recommends for experts who are working within the field of litigation. The purpose of this framework was so that the experts did not encounter problems with their evidence being excluded from Court.

[98] Mr. Foster has an undergraduate degree in law enforcement and security. He has also taught university level courses in criminal justice related topics and has presented extensively on security-related topics. Finally, I also heard evidence from Mr. Foster that he had worked in local law enforcement in Florida before he accepted a position as the Corporate Security Manager for the third largest bank in the State.

[99] Mr. Foster offered two main opinions, as follows:

> A. Opinion: The level of risk of violent crime at the ATM of TD Canada Trust located at 673 Warden Ave., Toronto on May 28, 2013 was exceptionally high.
>
> B. Opinion: The security program established by TD Canada Trust for the above location and date was inadequate to provide reasonable protection to users of their ATM.

[100] The substance of Mr. Foster's report is less than two pages. As a result, TD has raised concerns about whether this report even complies with the requirements of Rule 53.03(2.1). In particular, TD notes that Mr. Foster has not provided the empirical evidence that he is relying on in support of his opinions and has not set out details about the standard of care for banking or financial institutions in Canada.

[101] I agree with counsel for TD that Mr. Foster's report is rudimentary, and that several of the things listed in the Rules are missing from it. For example, an issue came up during Mr. Foster's examination in chief where he wished to provide details about what he had seen in other bank litigation cases. Given that this evidence was beyond the four corners of Mr. Foster's report, I was concerned about fairness to both parties. Therefore, I provided Plaintiff's counsel with either the opportunity to have the hearing adjourned (at the Plaintiff's expense) so that this evidence could be delineated for TD, or to proceed without that evidence.

[102] The Plaintiffs elected not to pursue this evidence. In my view, this is evidence that is captured by the requirement under Rule 53.03(2.1) under the rubric of "research conducted by the expert." Its absence from Mr. Foster's report is troubling and raises concerns about the content of the report. On its own, however, it would not be sufficient to exclude Mr. Foster's report.

[103] This brings me to the basis for Mr. Foster's conclusions. Mr. Foster's "A" opinion is based on the CAP index report of the robbery rate, as well as the fact that the homicide and assault rates were similar. He also formed this opinion by considering Toronto Police Service information showing that the rate of violent crime in the vicinity of the ATM was high and there were numerous reports of police being dispatched to this location. Finally, Mr. Foster's opinion is based in part on his view that "news media reports and You Tube present information supporting the unusually high rate of violent crime in the vicinity of this property."

[104] I have set out my significant concerns about using news media reports and YouTube videos as evidence at paragraphs 258 – 259 below. Those concerns are applicable to an expert's use of those sources as well. They are not objective or tested data. These sources provide an impression that could be quite sensationalized and are not reliable.

[105] Mr. Foster's "B" opinion is based on Mr. Foster's view that TD did not apply its risk rating methodology to its ATMs specifically. It is also based on the fact that the CAP index was not applied by TD until after the incident in this case had taken place. In addition, Mr. Foster states that the vestibule for this ATM could not be locked by customers using it, and that a dead bolt lock and/or a panic alarm could be provided to better protect the customers. Finally, Mr. Foster stated that it is standard practice for banks with ATMs in dangerous locations to either provide security guards at night or shut down the ATMs.

[106] TD also argues that the principle of *ipse dixit* should prevent this report from being admitted into evidence. This principle was explained by Idington J. of our Supreme Court in *Montreal Light, Heat & Power Co v. Quebec (Attorney General),* 41 S.C.R. 116, and requoted in *Perry v. Vargas*, 2012 BCSC 1925, [2012] BCJ NO. 2693, at para. 122. Idington J. explained his concerns as follows:

> 122. The report of Dr. Tesiorowski has another important failing. It refers to a history gained from Ms. Perry and others and then simply states a conclusion. To be useful an opinion must be more than a conclusory assertion on causation. In *Montreal Light, Heat & Power Co. v. Quebec (Attorney-General)* (1908), 1908 CanLII 79 (SCC), 41 S.C.R. 116 at 132, Idington J. said "I refuse to accept unless absolutely necessary the mere *ipse dixit* of any expert when presented for my acceptance merely as an act of faith, and without the aid of such reasons as his reasoning power, or means of, and result of the use of means of, observations may have developed".

[107] In essence, TD argues that Mr. Foster has provided his two opinions (reproduced at paragraph 99 above) without any foundation to support them. This is, as I have noted above, not quite correct. While the bases for Mr. Foster's opinion are thin, they are not merely statements that must be taken on faith. There are certain factual assumptions that underpin Mr. Foster's opinion, and those factual assumptions are laid out in his report. The very thin basis for Mr. Foster's opinion is, however, a factor that should be considered in assessing whether to admit that opinion.

[108] This brings me to Mr. Foster's rebuttal report. He critiques the reports provided by both of TD's experts. In terms of Mr. Austen's qualifications, Mr. Foster states that Mr. Austen's qualifications are in law enforcement, which is a different area than security. Mr. Foster then goes on to critique the report provided by Mr. Austen by saying the following:

> Mr. Austen commented in his report that an on-site assessment was not completed at the branch by the Bank's security personnel because this was considered a low risk location. **What Mr. Austen and, apparently, the Bank's security personnel did not understand was how to perform a proper crime risk assessment**. They only considered occurrences at this branch and at other banks nearby, completely ignoring the high crime neighborhood where this branch was located. (emphasis added)

[109] In terms of Mr. Hoffman's report, Mr. Foster acknowledges that Mr. Hoffman has spent many years in the field of security. However, Mr. Foster goes on to critique Mr. Hoffman's report in the following manner:

> Terry Hoffman: Mr. Hoffman has spent many years in the field of security and appears to have concentrated his efforts in the areas of emergency management/disaster recovery and in specifying the security control measures. Nowhere in his explanation of his qualifications has he mentioned training and experience in crime risk assessment. Since security is defined as the protection of people and property from crime, **it is essential to have performed a proper crime risk assessment in order to identify the vulnerabilities and threats. Security control measures can only be applied after the assessment is performed. Mr. Hoffman has also not identified any methodology he has used to perform such assessment. As a member of ASIS he should be familiar with the General Security Risk Assessment published by ASIS**. (emphasis added)

[110] It is clear from both of these passages that Mr. Foster took the view that the expert reports advanced by TD should not be relied upon by the Court because of the fact that a "proper crime risk assessment" was not performed. Mr. Foster's concerns, however, must be remembered in light of the evidence that he provided on cross-examination:

Q. [by Mr. Zuber]. You mentioned to my friend that you're involved in this organization called the ASIS International.

A. Yes.

Q. And that organization has guidelines and methodologies as to how to calculate security risks, correct?

A. Calculate what?

Q. Security risks.

A. I'm sorry.

Q. Security risks.

A. Security risks...

THE COURT: Stay at the podium...

A. Yes.

THE COURT: ...Mr. Zuber because I think you need to...

MR. ZUBER: Sorry.

THE COURT: ...use the microphone.

MR. ZUBER: Sorry.

A. Thank you.

MR. ZUBER: Q. Security risks, Mr. Foster.

A. Yes, it does.

Q. And it's quite detailed as to how that's to be done under the ASIS guidelines, correct?

A. Yes. It's very thorough. It's unfortunate the bank didn't use it, but that's correct.

Q. Well, nowhere in your report, Mr. Foster, do you run through that approach and analysis on the ASIS guidelines, correct?

A. Correct.

[111] Based on the foregoing exchange, it appears that Mr. Foster may not have conducted a "proper crime risk assessment" in preparing his report either. It

is certainly clear that Mr. Foster did not apply the ASIS guidelines that he helped to develop and that he was criticizing TD's experts for not using.

[112] I raised this omission with the parties at the February 2nd, 2021 hearing. Given that I had not included this question in the list I had sent to counsel in advance of the hearing, counsel for the Plaintiff wanted time to consider this issue and provide written submissions on it. Both sides have provided submissions.

[113] The Plaintiffs advance the following points:

a) Mr. Foster used a methodology that was similar to the ASIS methodology and indicated as such in his reports.

b) Mr. Foster's report, when analyzed, shows that he did apply such portions of the methodology as were relevant to the case.

c) A copy of the methodology is included in Mr. Wood's report and I therefore have access to it.

[114] First, Mr. Foster's evidence and his report is clear. He criticized TD's experts, especially Mr. Hoffman who, as a member of ASIS, should have known about and used the ASIS methodology. Mr. Foster is open to the same criticism. Indeed, if Mr. Foster's criticism of TD and its experts is valid, then his report suffers from the same flaws. Mr. Foster's failure to apply the ASIS protocol that he helped to develop raises very serious issues in respect of the relevance and necessity of his report.

[115] This brings me to the Plaintiff's assertion that while Mr. Foster's report does not use the ASIS methodology, it does use "an internationally recognized methodology consistent with the ASIS guidelines". There are two problems with this statement.

[116] First, although Mr. Foster's report makes the bald statement that "I have also employed the Forensic Methodology published by the International Association of Professional Security Consultants", Mr. Foster acknowledged in cross-examination that he actually does not run through this methodology anywhere in his report. In other words, I have no evidence from Mr. Foster that I can use to evaluate whether (and how) he applied the IAPSC methodology. Therefore, it is impossible to judge whether Mr. Foster has applied the methodology correctly.

[117] Second, as counsel for TD quite rightly observes, Mr. Foster's report does not provide either a description of the IAPSC methodology he allegedly used or any detail as to how that methodology leads to his conclusions. Given these deficiencies, it is difficult for me to accept that Mr. Foster applied the IAPSC methodology. If I were to accept Mr. Foster's statement in that regard, I would be taking that statement on faith.

[118] This brings me to a further issue with Mr. Foster's report. Even if I was, somehow, persuaded that Mr. Foster's report applied the IAPSC methodology, on the evidentiary record I have, I have no evidence from Mr. Foster as to:

a) How the two methodologies are similar. All Mr. Foster's rebuttal report says is "these documents are similar and the use of one would lead a well-qualified expert to the same conclusion as the use of the other." This is a conclusory statement without explanation.

b) Which parts of the IAPSC methodology did Mr. Foster apply? He simply states that he has reached a series of conclusions by applying the IAPSC methodology without further explanation.

c) How does the application of the IAPSC methodology lead Mr. Foster to his conclusions? Again, Mr. Foster simply states the conclusions.

[119] In response to my question, the Plaintiffs' submissions provided a detailed description of both the methodology **and** how Mr. Foster's report allegedly applied the methodology in reaching his conclusions. However, I only have Plaintiffs' counsel's submissions in this respect, which include the submission that "[u]pon careful analysis, the basis for Mr. Foster's opinion clearly aligns directly with the criteria in the [IAPSC methodology]." The Plaintiff's submissions go on to provide a detailed analysis of why they take this position. The problem with the Plaintiffs submissions is that none of this "careful analysis" came directly from Mr. Foster. It comes from the Plaintiff's counsel. The careful analysis (and explanation) is something that should have been included in Mr. Foster's report.

[120] I should also address the assertion that the IAPSC methodology was attached to Mr. Wood's report. This is of no assistance to me. Regardless of whether a document outlining the methodology is in the evidentiary record somewhere, the deficiencies I have outlined at paragraph 118 remain.

[121] In short, Mr. Foster's report is based on very thin data, including some information (such as YouTube videos and newspaper reports) that are not admissible in evidence before me and cannot be used to support an expert report. More importantly, Mr. Foster's report **does not** provide me with any ability to understand how (or even whether) he applied the IAPSC methodology. Mr. Foster has said, in his rebuttal reports, that this methodology (or the ASIS methodology) should have been used by the other experts and by TD in formulating their views. If that is the case, then Mr. Foster should have explained both the methodology and how it applied in his own reports. He did not.

[122] The Court has a gatekeeper function to exercise when it comes to the admissibility of expert evidence. Mr. Foster's failure to explain either the reasons for his conclusion or how he arrived at those conclusions raises significant issues as to both the necessity and relevance of Mr. Foster's report. The report is arguably not necessary as it does not explain the reasons for the opinion and would not give the trier of fact an understanding of how the conclusions were reached. The report is also arguably not relevant for the same reasons.

[123] However, regardless of whether Mr. Foster's report would pass the first stage of the *White Burgess* test, it fails at the second stage. That stage requires me to consider the potential risks and benefits of admitting this report. The risks are clear. The trier of fact would be provided with opinion evidence from someone who has taken a firm view that TD was negligent in this case without having explained how he reached that conclusion. The benefits of this report are much less obvious because it does not explain the methodologies, the basis for the conclusion, or the analytical framework that was arrived to reach the conclusion.

[124] Counsel for the Plaintiff argues that Mr. Foster was simply providing a "ready-made" inference. I disagree. Although experts do testify about subjects that the trier of fact is not familiar with, the expert must provide the trier of fact with an understanding of how the expert reached their conclusions. Otherwise, the trier of fact is left to simply accept or reject the expert's conclusions without understanding the reasons for their conclusions. This would be a very dangerous position to put a trier of fact in.

[125] As a final matter, I should address the Plaintiff's submission that TD was aware of the factual basis for Mr. Foster's conclusions and should have cross-examined him on the inconsistencies and/or failures to apply the IAPSC methodology. I disagree. When the Plaintiff tenders an expert, it is **not** the Defendant's obligation to illustrate the deficiencies in the expert's report. Instead,

it is the Plaintiff's obligation to explain why the presumptively inadmissible opinion evidence that the expert is offering should be admitted. That explanation must come from the expert's evidence, and not from the Plaintiff's submissions. The explanation was not provided by the expert in this case.

[126] For these reasons, Mr. Foster's report is excluded in its entirety and will not be considered further.

Howard Wood

[127] Mr. Wood was tendered as an expert in occupier's liability and security, including in the area of security for banks. I note that Mr. Wood did not have any direct employment in the banking industry.

[128] Mr. Wood has a bachelor's degree in criminology. He was employed for twenty-seven years as a Secret Service agent in the United States, and was responsible for the protection of various dignitaries, which included conducting risk assessments and site analyses. Since his retirement from the Secret Service in 1997, Mr. Wood has worked as a security consultant. In that role, he conducts security surveys and risk assessments, other investigations, and other security consulting services.

[129] Mr. Wood's opinion is that TD failed to provide adequate after-hours security at the Warden Branch ATM. Mr. Wood concluded that an adequate security program would have resulted in TD either providing an unarmed guard in the vestibule after hours or closing the ATM completely after hours. Mr. Wood's opinion was based on the following:

a) The very high CAP index for the property.

b) His view that the property was vulnerable to crimes against persons because the ATM was accessible and was located next to a parking lot where people could hide. Parking lots are recognized in the security industry as a high risk area for serious crime.

[130] Mr. Wood was cross-examined about these points. First, with respect to the CAP index, it was suggested to Mr. Wood that a consideration of the crime rates at the actual property was both supported by the literature and something that was essential to consider. Mr. Wood's opinion was that you looked at the actual security at the property by conducting a site (vulnerability) assessment. Mr. Wood acknowledged that a call for the police to come to the site did not actually show that a crime had taken place. Mr. Wood also stated that the Plaintiffs had asked for the underlying police reports, and that the Toronto Police Service did not have them. Finally, Mr. Wood acknowledged that none of the calls from the Toronto Police Service records either before or after this incident involved an incident at the ATM.

[131] Mr. Wood was also asked about the low, medium, and high risk categorization that TD used. Mr. Wood stated that he did not know what a medium risk was, and that the risks associated with a particular site were either low or high.

[132] Mr. Wood also opined on the causation in this case. Mr. Wood opined that the incident involving the Plaintiff was a reasonably foreseeable incident and that the incident itself "was an opportunistic act of criminal violence and more than likely due to the opportunity provided by the lack of security which led to the incident."

[133] Mr. Wood expanded on his view about the incident in cross-examination, stating:

Q. [By Mr. Zuber] Okay. Nowhere in your report do you canvass or

mention the involvement of Mr. Pangan or Mr. Moffitt in that this was a fight that happened in a matter of seconds, do...

A. Because...

Q. ...you agree...

A. ...I don't...

Q. ...with that?

A. ...know the particulars. I – no one knows. The police don't know, we can hear from Pangan that's a criminal – the other guy, Mr. Moffitt, he can't speak for himself. So we don't know how – but we don't know if that was a fight, sir, or how it was provoked, what was said, or this was a mugging by Mr. Pangan of low hanging fruit, Mr. Moffitt.

Q. So let me – let me just sort of ask you some questions about that. So for the purposes of your opinion then would it be important to know how quickly this fight, the physical altercation took place?

A. It would depend.

Q. Well, if it's a matter of seconds I thought you'd agree that....

A. That wasn't a matter of seconds. I mean, this man was able to see the risk involved. He could assess whether he'd be apprehended or not. He came in. He waited 'til the guy completed his ATM thing and then mugged him as far as I could see. But we don't know what was said. We don't know if it was a fight or not. I don't know if it was a fight or not. You do not know if it was a fight or not.

Q. Well....

A. Alls *[sic]* we know is this guy was mugged and he was brutally beaten.

Q. Okay. And so is that the basis of your entire opinion then, Mr. Wood, that this was a planned mugging by Mr. Pangan of Mr. Moffitt?

A. Well, it has the earmarks of it. It's not – I'm not saying it's 100 percent, but more...

Q. All right.

A. ...than likely that's what it appeared to be.

[134] In addition to providing his own report, Mr. Wood provided rebuttal reports regarding the opinions of TD's experts, Mr. Elgin Austin and Mr. Terry Hoffman. In both of Mr. Wood's rebuttal reports, he challenges the conclusions of TD's experts

that this was an indiscriminate attack. Indeed, most of Mr. Wood's rebuttal reports are devoted to explaining why TD's experts are wrong in their view that this was an indiscriminate attack rather than "an opportunistic act of criminal violence".

[135] I have already set out my reasons for finding that the opinions of **all** of the experts about Mr. Pangan's motivations in the beating and robbery of Mr. Moffitt are inadmissible. I have set out Mr. Wood's testimony in some detail for two reasons. First, a substantial portion of Mr. Wood's opinions in this case flow from his conclusions about why the incident took place.

[136] Second, the vehemence of Mr. Wood's conclusions about why Mr. Pangan assaulted the Plaintiff give rise to concerns about bias on the part of Mr. Wood. This potential for bias comes to light when Mr. Wood was asked about one case, involving an assault on a cruise ship. The facts in the cruise ship case were that a passenger climbed up the stairs and was sucker punched by one of two guys who were involved in a fight. Mr. Wood testified that the cruise ship line was sued for negligent security, and that he was the expert who testified on behalf of the cruise line. There had been one previous incident on the ship involving a fight between two passengers.

[137] Mr. Wood's opinion in the cruise ship case was that where there was an unprovoked fight between two people that had taken place in a matter of seconds, no amount of reasonable security measures would have prevented the incident. That opinion has to be contrasted with the opinion offered in this case and is a factor that would certainly go to the weight to be given to Mr. Wood's opinion.

[138] TD also argues that the *ipse dixit* principle set out at paragraph 106 above applies equally to Mr. Wood. I disagree. Mr. Wood has set out the basis for his opinion and I can understand how he reached his conclusions. In addition,

Mr. Wood has attached the IAPSC guidelines to his opinion and makes reference to them in his report.

[139] Portions of Mr. Wood's opinions are both relevant in that they touch on the issues in this case, and necessary in that they will help a trier of fact understand the interaction between CAP data, a site vulnerability assessment and TD's security program. While I have concerns about Mr. Wood's impartiality, that is a question that goes more to weight than admissibility on the facts of this case. I reach that conclusion because my concerns with Mr. Wood's go to a perception of independence rather than a conclusion that Mr. Wood is incapable of giving an impartial opinion in this case. While it is difficult to square Mr. Wood's conclusions about the incident on the cruise ship case with his conclusions about Mr. Pangan's motivations in this case, that evidence is inadmissible in any event. See *White Burgess,* at para. 36 and *Mouvement laique Quebecoise v. Saguenay (City)* 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 106.

[140] There is no other exclusionary rule that would apply to the admissible portions of Mr. Wood's opinion. This brings me to the balancing that must be done at the second stage of the test. The risks of admitting Mr. Wood's opinion can be managed by excluding those portions of his opinion that deal with causation and with the reasons why Mr. Pangan assaulted Mr. Moffitt. The benefit of admitting Mr. Wood's opinion is that it provides a framework to consider the security program at the Warden Branch.

[141] To summarize, the portions of Mr. Wood's opinion that I will consider in determining the merits of this motion are:

a) The use of the CAP index in conducting security assessments.

b) The vulnerability assessment that Mr. Wood conducted based on his site visit and his consideration of the IAPSC methodology.

[142] From these two points, Mr. Wood's conclusion that TD did not have a reasonable security program and that a security guard should have been posted at the branch after hours is also admissible. However, on this point, I note that this is the ultimate issue to be determined. Therefore, when I come to consider this opinion, I am mindful of the points I have set out in paragraphs 78 and 79 above.

[143] The remaining portions of Mr. Wood's opinion are inadmissible and will not be considered further.

Elgin Austin

[144] Mr. Austin was tendered as an expert in security, and in particular the area of Crime Prevention through Environmental Design ("CPTED"). He has provided an opinion on liability and causation.

[145] Mr. Austin held various positions in the London Police Service over a more than thirty-five year career that ended in 1997. Since that time, Mr. Austin has been both a security consultant and, for a decade, the Director of Campus Community Police, Fire and Emergency Services at the University of Western Ontario ("UWO").

[146] Mr. Austin was not employed in the financial services industry and there is no indication that he has consulted extensively for the financial services industry. However, the campus at UWO had numerous ATM sites that Mr. Austin was responsible for in his time at UWO.

[147] A significant portion of Mr. Austin's opinion focuses on the issue of the motivations for this attack, and whether it was an "indiscriminate" attack. Those

conclusions are inadmissible for the reasons I have set out at, *inter alia*, paragraphs 82 and 83.

[148] Mr. Austin explains the principles of CPTED as follows:

> CPTED – Crime Prevention through Environmental Design
>
> CPTED is one of the elements that form a basis of safety and security policies, procedures, audits and actions.
>
> While many criminal activities are random and spontaneous, others are planned where the offender requires an element of motivation, opportunity, and ability to commit the crime and escape.
>
> Appropriate environmental design and good property maintenance assert visible ownership space and can also increase the perceived likelihood of detection and apprehension, known to be the biggest single deterrent to crime.
>
> Security educational measures combined with the use of correct lighting in the environment, increased visibility, the elimination of escape routes and the encouragement of people traffic reduces motivation and opportunity to commit a crime while increasing the element of detection and overwhelmingly reduces criminal activity.

[149] In addition, the entirety of Mr. Austin's opinion on this case is set out in his report as follows:

> **Opinion**
>
> An indiscriminate attack, such as this, was likely initiated by alcohol, lack of medication, and some agitation escalation, that could have happened anywhere. In this case it happened in the vestibule of the TD Canada Trust Bank Branch that has hundreds of customers every day/night and over the years no violence and no identified crime to move the level of threat from low.
>
> The Risk Management Methodology, Standard, and Risk Ratings appear to be consistent with procedures that are also used by several other large Financial Institutions. There was flexibility to apply a security guard when needed and as times and circumstances changed there was normal up-dating.
>
> It is not reasonable to think we can protect everyone from every random and spontaneous event that might happen. Using dead bolt locks and alarms have their own problems as does an excessive use of security

> guards. The relatively minor calls noted on the TPS 673 Warden Avenue report identifies an advice call, two accidents, two alarms, a medical situation, etc. These calls are over a period of four years and are people issues that are not unusual for any business in a busy district, and does not identify any crime or safety concerns for staff or Bank customers.
>
> The best basis of predictability for the future is the past and present history. Having proper oversight in place, updating policies and procedures to remain current, and dealing with the day to day safety and security events and predictabilities is reasonable and in my opinion was in place.
>
> In my opinion TD Canada Trust, or any other bank for that matter, cannot be expected to predict that one of their customers, on site, drunk, being schizophrenic, off his medications, interacting with another intoxicated person in the aggravated assault that occurred in this case. Based on my many years of experience in both Public Policing and University Policing, TD Canada Trust provided a reasonable duty of care as random crime is virtually impossible to predict or prevent.

[150] In examination in chief and cross-examination, Mr. Austen expanded on his opinion. In particular, Mr. Austen acknowledged that Mr. Huhn had a different view of the safety of the features surrounding the bank. Mr. Austen also acknowledged that customers use the ATM after hours when no one else is present. Mr. Austen was also cross-examined about the differences in the security features inside the Warden Branch itself and the security features in the ATM vestibule.

[151] The portions of Mr. Austen's evidence related to the motivations of Mr. Pangan and the causation issues are excluded for reasons set out above. When the rest of the opinions are reviewed, they appear to meet the tests of relevance and necessity. In particular, Mr. Austen's discussion of CPTED is relevant to the design decisions made by TD in respect of the Warden Branch and the ATM vestibule. Mr. Austen's evidence is also necessary because CPTED is not something that a trier of fact would be aware of or be able to consider without expert assistance. Finally, Mr. Austen's application of CPTED to this branch is not something that a trier of fact would be able to do on their own.

[152] In addition, there was no real issue raised about Mr. Austen's qualifications to provide these opinions or his impartiality and I do not see this as an issue on the record. Finally, there is no other exclusionary rule that would preclude the admission of this evidence.

[153] In terms of the balancing exercise that must be adopted at the second stage of the test, I would note that the risks associated with admitting Mr. Austen's opinions can be mitigated by limiting the opinions to the issue of CPTED and its application. I have set out at paragraph 151 why this evidence is necessary, and the same points apply to the second stage balancing that I am required to do.

[154] To summarize, the portions of Mr. Austen's opinion that are admissible are:

a) His evidence on CPTED and its uses.

b) His evidence on how CPTED would be (or would have been) applied to the Warden Branch.

c) His opinion that TD had a sufficient security program, and that the security after-hours at the Warden Branch (and the ATM) was sufficient.

[155] The remainder of Mr. Austen's opinion is inadmissible and will not be considered further.

Terry Hoffman

[156] Mr. Hoffman did not provide a traditional C.V. Instead, he provided a detailed description of his work and educational history as part of his report. Mr. Hoffman was originally employed by Panasonic in the security area in 1997.

He worked there for three years and then began working as an independent security consultant.

[157] Mr. Hoffman graduated from the Georgian College Post Graduate Diploma Studies Cybersecurity diploma program in 2002. Since that time, Mr. Hoffman has worked as a security consultant and security advisor and, more recently, he has been an instructor at ASIS seminars. As he puts it, “I have been in the Public Safety, Risk Measurement, and Emergency Management business as an advisor for twenty-two years.”

[158] Mr. Hoffman has a number of credentials from various security organizations. For instance, he is a member of ASIS and is a CPP. He is also a member of the Disaster Recovery Institute Canada and holds a certification from that organization as well. Finally, Mr. Hoffman has a certification in CPTED from the Peel Regional Police Service.

[159] Mr. Hoffman’s opinion includes a significant discussion about the incident itself and about Mr. Pangan’s motivations in attending at the site. For the reasons I have set out above, Mr. Hoffman’s opinions about these issues are inadmissible.

[160] Mr. Hoffman goes on to set out a detailed explanation of CPTED including its four pillars which are:

a) Natural Surveillance,

b) Natural Access Control,

c) Territorial Enforcement, and

d) Maintenance and Management.

[161] Mr. Hoffman went on to explain each of these concepts in his report. Based on his consideration of these concepts, Mr. Hoffman offered the opinion that the vestibule was equipped with the “appropriate and industry expected security controls." Mr. Hoffman identified those controls as follows:

> The security controls in place at TD Canada Trust Global Security & Investigations (GSI) corporate security services, and within the 673 Warden Avenue ATM vestibule at the time of the incident, consisted of the following:
>
> i. GSI overarching Corporate Security Policy
> ii. GSI defined Risk Assessment Methodology
> iii. GSI defined Risk and Branch Risk Rating Guideline
> iv. GSI defined ATM and Branch Physical Security Standards
> v. GSI demonstrable employed competence in the Security and Risk Measurement domain
> vi. Canadian Bankers Association Incident Data
> vii. 673 Warden Avenue security control measures consisting of:
>
> - Crime Prevention through Environmental Design (CPTED) strategies
> - Signage
> - Lighting
> - Video Surveillance
> - Mirrors
> - Policies and Procedures
> - Security Investigations and Intelligence
> - Security and Crisis Response

[162] Based on his review, Mr. Hoffman also offered the opinion that “the TD Canada Trust risk assessment methodology provides an acceptable means of measuring risk.”

[163] In the course of his report and evidence, Mr. Hoffman stated that he did not use the CAP index very often in an assessment because of the wide geographical area that the data covers. However, Mr. Hoffman did acknowledge that part of any security assessment process was a consideration of the crime data. However, Mr. Hoffman also testified that TD’s responsibility for assessing the risk of crime was limited to their property. If someone was robbed after leaving the ATM, then in Mr. Hoffman’s view that would not be TD’s responsibility.

[164] Mr. Hoffman also spoke about the various methodologies that were used to conduct security assessments. He acknowledged that the ASIS methodology is a general risk assessment methodology, and that various other similar methodologies exist. Finally, Mr. Hoffman opined in his written report that Mr. Wood's review of the "calls for service" from the Toronto Police Service did not identify which ones (if any) were calls for robberies or issues at the ATM.

[165] This brings me to the question of whether the remainder of Mr. Hoffman's report is admissible. I am of the view that it is. I start with relevance. The opinions that Mr. Hoffman has offered, like all of the other expert opinions that I have found to be admissible, are relevant to at least some of the issues that have to be decided. Specifically, the report provides information that would not be known to the trier of fact about the methodology of conducting security assessments as well as how that methodology could be applied to TD's approach.

[166] In addition, Mr. Hoffman's opinions are necessary in that they provide both information and analysis that might be beyond the scope of the trier of fact's knowledge. There was no real challenge to Mr. Hoffman's independence and impartiality and there was no other exclusionary rule that would preclude the admission of his report.

[167] This brings me to the balancing exercise that should be done at stage 2 of the process. In this case, the risks associated with Mr. Hoffman's opinion relate to the opinions that have been offered in areas that are not within Mr. Hoffman's expertise (such as why this assault took place), and these risks can be mitigated by excluding the opinions relating to the motivations behind the incident and to causation. The benefit to admitting the opinions is that the trier of fact will have a better understanding of the framework in which to consider whether TD conducted a proper security assessment.

[168] To summarize, I have found the following opinions offered by Mr. Hoffman to be admissible:

a) The detailed description of the CPTED methodology.

b) The opinions respecting whether TD's security methodology was reasonable.

c) The opinions about the appropriate use of CAP and crime data.

[169] The remainder of Mr. Hoffman's opinions are inadmissible and will not be considered further.

b) Mr. Kahler's Affidavit

[170] Mr. Kahler has filed an Affidavit of 219 paragraphs with more than 100 attachments. These attachments include newspaper articles, legal decisions, police notes, and a wide variety of other materials. TD alleges that Mr. Kahler's affidavit should be inadmissible because it is composed of expert opinion evidence, hearsay evidence, and completely irrelevant evidence.

[171] The Plaintiffs oppose this position on the basis that the body of Mr. Kahler's affidavit either summarizes the exhibits that are attached or provides a conclusion that is reasonably drawn from the exhibits that are attached.

[172] In support of their position, the Plaintiffs rely on the decision in *Derbyshire et al. v. Taser International Inc.*, 2019 ONSC 4969. In that decision, Leiper J. considered an affidavit from the Plaintiff's lawyer which attached numerous volumes of materials. In admitting that affidavit, Leiper J. noted, at paras 30 and 31:

> 30 The responding parties are obliged to "put their best foot forward". They have done so with an omnibus affidavit from counsel that is "evidence

> about evidence." The affidavit does not purport to speak for vague sources. It attaches records that are independently admissible. The sources of information are identified in virtually every paragraph. The alternative would be multiple affidavits from each author or foregoing a complete record. This is not required by the issues in play on this motion.
>
> 31. I agree that for these purposes, the [lawyer's] affidavit is admissible and should not be struck. Where it strays into argument, these passages can be given no weight.

[173] I generally agree with the approach outlined by Lieper J. as it pertains to the admissibility of the documentation attached to Mr. Kahler's Affidavit. I also note that hearsay is specifically admissible on a Rule 20 motion (see Rule 20.02(1)). However, the Court may draw an adverse inference from the failure of a party to provide the evidence of someone who has knowledge of contested facts.

[174] However, In *Drummond v. Cadillac Fairview Corporation Limited,* 2019 ONCA 447, Brown J.A. outlined the concerns that exist with the admission of hearsay evidence on a motion for summary judgment, especially where the evidence is contested. Citing *Kawartha-Haliburton Children's Aid Society v. M.W.* 2019 ONCA 316, 432 D.L.R (4th), Brown J.A. observed, at para. 21, that the Court should not be giving weight on a summary judgment motion to evidence that would not be admissible at trial. Similarly, M.L. Edwards J. noted in *Mitusev v. General Motors Corp.* 2014 ONSC 2342, at para. 21, that "it would seem incongruous to allow evidence in on a summary judgment motion that would not be admissible at trial."

[175] In addition, I would note that there is at least one example of what I would call double hearsay in Mr. Kahler's affidavit. Specifically, Mr. Kahler relays "evidence" about a conversation that his associate, Ms. Pickering, had with a York Region Police officer about gang activity in the area of the Warden Branch. Mr. Kahler was not, according to the record I have, present for this conversation.

As a result, I cannot give any weight to this "double hearsay" evidence. Double hearsay is not admissible on a summary judgment motion. See *OLA Staffing v. 2156775 Ontario Inc.* 2017 ONSC 7318, at para. 28, aff'd 2018 ONCA 922, para. 7.

[176] It is not an answer to argue that this "evidence" was not challenged by TD. In fact, it was challenged as inadmissible in TD's supplemental factum. TD specifically referred to this evidence as hearsay evidence. The fact that evidence to contradict the hearsay evidence was not led does not mean that the hearsay evidence was not challenged. TD is entitled to raise the issue of whether the hearsay evidence is even admissible without having to respond to it on its alleged merits.

[177] Finally, I would note that the evidence in the affidavit tendered by Mr. Kahler is not nearly as strong as the affidavit tendered in the *Derbyshire* case. However, some of the evidence (particularly the records from the Toronto Police Service and the CAP information), is clearly evidence that would be admissible at trial.

[178] Based on these principles, I am of the view that some of Mr. Kahler's affidavit is admissible. There are several areas, however, where his affidavit is not admissible, or will be given no weight, as follows:

a) As the Plaintiffs note in their factum, Mr. Kahler provided his views on "a conclusion reasonably drawn from" some of the exhibits that were attached to his affidavit. This is argument, and not fact, and I will treat it as such.

b) There are portions of Mr. Kahler's affidavit where he offers opinions about various events, including Mr. Pangan's motivations. Those are a matter for the trier of fact, as I have explained in my review of

the expert evidence. Mr. Kahler is in no better position than any of the experts to provide evidence on Mr. Pangan's motivations. Indeed, as he acknowledged on his cross-examination, Mr. Kahler's comments about the assault are based on his review of the videotape and nothing else.

c) More specifically, Mr. Kahler (at paragraph 10 of his Affidavit) states "Pangan lunged at [Mr. Moffitt]". I have reviewed the video a number of times both in and out of Court. Mr. Moffitt made the first physical move towards Mr. Pangan during the altercation. To the extent that Mr. Kahler's affidavit suggests otherwise, it does not accord with the objective evidence before the Court.

d) There are a number of legal decisions involving incidents that took place more than a decade before the incident involving Mr. Moffitt and, in some cases, more than **two decades** before this incident. Putting aside the limited efficacy of this evidence, which I will come to, the incidents that took place more than a decade prior to the events in this case are not relevant to the questions I have to decide on this motion. Put another way, events in 1999 or 2002 provide almost no useful information on how safe a neigbourhood is in 2012.

[179] However, some of the sources of Mr. Kahler's information need to be considered, and the accuracy of that information weighed. For example, documentation obtained from the police in respect of crime statistics is more reliable than information about specific incidents from news reports. Regardless, the evidence is admissible. The question of what weight to give it is a different matter that I will return to shortly.

[180] As a final comment, I note that one of the counsel for TD, Ms. Presse, provided an affidavit in which she also offered opinion and argument. I am also not admitting those portions of Ms. Presse's affidavit into evidence.

Issue #2 – Is This an Appropriate Case for Summary Judgment?

[181] Yes.

[182] I start by laying out the principles in *Hryniak.* The first question I must consider is whether there is a genuine issue requiring a trial. As noted at paragraph 49 of *Hryniak*, there is no genuine issue requiring a trial where the summary judgment process:

a) Allows me to make the necessary findings of fact;

b) Allows me to apply the law to the facts; and

c) Is a proportionate, more expeditious and less expensive means to achieve a just result.

[183] If there appears to be a genuine issue requiring a trial, the second step in the process is to consider whether a trial can be avoided by the exercise of my powers under *Rules* 20.04(2.1) and (2.2). These powers can be used at my discretion as long as their use is not against the interests of justice. The use of these powers will not be against the interests of justice where it will lead to a fair and just result.

[184] Therefore, my consideration of whether this case is appropriate for summary judgment begins with a consideration of what facts are actually in dispute. In terms of credibility and factual disputes between the witnesses, I would note the following points:

a) The facts around the assault are not in significant dispute. The best evidence of what happened in this case comes from the videotape, and a motions judge is in as good a position as a judge or jury at a trial to determine what happened during this incident. Mr. Moffitt recalls nothing of the assault, Mr. Pangan's subsequent evidence has been inconsistent and is therefore not reliable, and there was no evidence tendered from Mr. Green.

b) The facts around the crime levels at the TD branch and in the surrounding community are also not in dispute. The CAP data provided by the parties, the newspaper articles in Mr. Kahler's Affidavit, and the actual crimes that took place at 673 Warden Avenue in the years before this assault are also not in dispute.

c) There is a clear dispute between the experts over what inferences should be drawn from the facts set out in sub-paragraph (b), but the underlying facts are not in dispute.

d) The facts about what TD did in terms of risk assessments both before and after the incident involving Mr. Moffitt are not really in dispute either. The real dispute is over whether, given the existing facts, TD ought to have done more to ensure Mr. Moffitt's safety before the assault took place.

[185] When these four facts are considered, the only "fact finding" that has to be done in this case is to weigh the expert reports. Therefore, this is the sort of case that by and large there is no genuine issue requiring a trial. The only evidence where there is any dispute is with the expert evidence.

[186] I am required to consider the advisability of a staged summary judgment process in the context of the litigation as a whole. See *Mason v. Perras Mongenais* 2018 ONCA 978 and *Baywood Homes Partnership v. Haditaghi,* 2014 ONCA 450, 120 O.R. (3d) 438. I now turn to that issue.

[187] In this case, I can exercise my fact-finding powers based on the evidence that I have already heard. As part of the *voir dire* process, I have received the evidence of the experts and they have been cross-examined before me.

[188] As noted in *Hryniak*, at paras. 29-33, I must also consider what is proportional given the nature of the claim and issues in actual dispute. In this case, it would not be proportional to conduct a full jury trial in order to weigh the inferences that should be drawn from expert reports when the experts' evidence had to be given in a *voir dire* and where virtually all of the underlying facts are not in dispute. Instead, it is more proportional for me to consider the inferences to be drawn from the expert reports based on the essentially undisputed facts.

[189] In addition, there was some suggestion that additional documentation and/or witnesses could be produced for a trial. In particular, the Plaintiffs seemed to suggest that the York Region Police officer who Mr. Kahler's associate spoke to could be called at trial. I reject this possibility. As noted by Corbett J. in *Sweda Farms v. Egg Farmers of Ontario,* 2014 ONSC 1200, at para. 32, a party must put its "best foot forward" on a summary judgment motion, even under the new regime set out by *Hryniak*. Further, the Court will generally assume that the parties will lead all of the evidence that could be led at trial: *Sweda Farms,* at para. 27. If the Plaintiffs had wanted to lead evidence from this York Region Police Officer, they could have served an Affidavit from him and provided TD with the opportunity to cross-examine him.

[190] Based on these principles, if the Plaintiffs had wanted to lead evidence from the York Regional Police officer about gang violence in this neighbourhood or other direct evidence, they should have included affidavits. The parties have had approximately two years to prepare for this summary judgment motion. Nothing should have been omitted, and I will assume that the record I have is complete and includes the best evidence that the parties could find.

[191] Finally, I should address some of the other pieces of this case that might remain outstanding if summary judgment is granted on the question of TD's liability. I acknowledge the dangers that exist in granting partial summary judgment. They have been detailed in a number of the Court of Appeal's decisions, most particularly in *Butera v. Chown Cairns*, 2017 ONCA 783, 137 O.R. (3d) 561. After reviewing those concerns, Pepall J.A. stated, at para. 34:

> 34 When bringing a motion for partial summary judgment, the moving party should consider these factors in assessing whether the motion is advisable in the context of the litigation as a whole. A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner. Such an approach is consistent with the objectives described by the Supreme Court in *Hryniak* and with the direction that the Rules be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.

[192] In my view, this is one of those rare cases where the issues of TD's liability can be easily bifurcated from what would remain outstanding in this case. I reach that conclusion for three reasons.

[193] First, the question of TD's liability is separate from the other issues in this case. TD is in a different position vis a vis Mr. Moffitt than the other Defendants, and its obligations to Mr. Moffitt are necessarily different. As a result, the issues of TD's liability are easily extricable from the other questions of liability in this case.

[194] Second, one has to consider what will remain of the action if summary judgment on liability is granted either against or in favour of TD. The only issues remaining would be as follows:

a) The claims brought against Mr. Green and Mr. Pangan. As I have discussed above, Mr. Green and Mr. Pangan have not participated in this litigation at this point.

b) The issue of damages would remain. I would make two observations about this. First, TD is only liable for damages if it is found to have breached a duty of care, and if causation is established. Second, damages are often assessed by way of a bifurcated trial in any event. Therefore, it would not be unusual or unreasonable to have these issues separated.

[195] Third, as I have noted above, there are very few material facts that are actually in dispute in this case. Most of the disputes in this case are over the question of what inferences should be drawn from the underlying facts. Drawing those inferences is something that can easily be done by way of a summary judgment motion.

[196] I should also address the issue of resolving conflicting expert testimony. In *Cuming v. Toronto*, 2019 ONSC 1720, Morgan J. stated, at paras. 23 and 24:

> [23] The Court of Appeal declared in *Raes v. Rothwell*, 1990 CanLII 6610 (ON CA), [1990] OJ No 2298, at para 6 that, "It is not for this court to…reassess the relative merits of contradictory expert testimony." Accordingly, even in the wake of the Supreme Court of Canada's judgment in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87, which changed much of the landscape for summary judgment motions, two competing expert opinions on central issues such as standard of care and causation do no lend themselves to judgment in the absence of a trial.
>
> [24] While the Rules permit me to weigh credibility where necessary, the sizing up of experts with diametrically opposed positions cannot generally be done on the basis of a paper record alone. Actually hearing the experts testify in chief and in

> cross-examination is necessary for such a contest: *Maracle v. Mascarin*, 2016 ONSC 537, at para 40.

[197] Counsel for the Plaintiff argues that, in this case, we have conflicting expert testimony that can only be resolved by way of a trial. As I will explain, I disagree with this view.

[198] While I generally agree with the proposition set out by Morgan J., there are exceptions to this general proposition. This case is one of those exceptions for the following reasons:

a) The disputes over the expert reports in this case relate to the inferences that should be drawn from facts that are easily ascertainable on summary judgment.

b) The decision in *Cuming, supra*oes not deal with the admissibility of the expert reports. In that case, it appears that they were presumptively admissible. In this case, I have been required to wrestle with the question of whether these reports were admissible **before** I could determine summary judgment. These questions of admissibility would remain a question of law even if there was a full trial, including a full jury trial.

[199] In addition, I have also had the advantage of having cross-examinations of the experts. This is not a case where I simply had contradictory expert reports as part of a paper record. Instead, both sides had the opportunity to explore both the qualifications of the experts and the merits of their reports as part of the process for determining whether these reports were admissible evidence on the summary judgment motion.

[200] Finally, I should address the effect, if any, that the fact that a jury notice has been served in this case has on my jurisdiction to grant summary judgment.

At the time that this motion was argued, there was little, if any, appellate authority on the issue either way. Therefore, I asked for additional argument from both counsel on this point.

[201] The only appellate authority on the issue that either side presented to me was the decision in *Mars Canada Inc v. Bemco Cash and Carry Inc.,* 2018 ONCA 239, 140 O.R. (3d) 81. In *Mars Canada*, summary judgment was granted in the face of a jury notice. As a result, I accept that, in some cases, summary judgment may be granted even if there is a jury notice.

[202] There is also authority on this issue at the Superior Court level. This authority is mixed. The parties have referred me to a series of cases. I have considered them all. The starting point is the *Mitusev* decision of Edwards J. where he stated, at paras 85 and 91:

> [85] The relief sought by JC is a dismissal of the action. The end result would be to deny the plaintiffs the ability to present their case at trial. The plaintiffs have requested a jury to decide their case. The service of a Jury Notice signals the exercise by the plaintiffs of a fundamental substantive right. The removal of that substantive right to a jury, by way of a summary judgment motion, should occur only in the face of relevant admissible and compelling evidence that leaves the motion judge confident that he or she has the necessary facts that will allow him or her to apply the relevant legal principles so as to resolve the dispute.
>
> [91] Juries are told every day that they may draw reasonable inferences from the evidence even though there is no direct evidence on a particular point. On a motion for summary judgment, while it is clear that the motion judge is required to determine whether there is no genuine issue for trial – even in the face of a Jury Notice, where the motion judge is unable from the evidence filed to make findings of fact, and to thereafter apply the law, it seems to me that it would be the exceptional case that the motion judge would exercise the expanded fact finding allowed by Rule 20.04(2.1) and (2.2) to effectively usurp the fact finding role of a jury.

[203] However, in *Broomfield v. Doidge,* 2012 ONSC 739, Perrell J. also observed, at para. 28:

> [28] The problem, however, with this submission is that it does not address the test for a summary judgment, which is whether there is an issue requiring a trial. The test is not whether the issue could be tried by a trial judge or trial jury. The test for granting a summary judgment focuses on whether as a matter of procedural fairness and substantive justice, the action should be tried by a trial judge or jury. That an issue could be decided by a jury does not mean that it needs to be tried by a jury.

[204] In other words, there is a tension between the right to a trial and the test that a judge is required to apply on a summary judgment motion. From these decisions, and others, I have drawn the following principles:

a) Heavily fact driven cases, such as routine personal injury actions, will generally be left to a jury to determine: *Abuajina v. Haval,* 2015 ONSC 7938, at para. 46.

b) The existence of a jury notice does not preclude summary judgment, but the existence of a jury notice is a factor that must be considered in deciding whether to grant summary judgment: *Wardak v. Froom,* 2017 ONSC 1166, at para. 42, *Clarke v. Toronto Transit Commission,* 2018 ONSC 6453, at para. 41.

c) While the jury notice is a factor to be considered, the motions judge will also have to consider whether it is “in the interests of justice” to use the expanded fact-finding powers under Rule 20.04(2.1). Other relevant factors must also be considered: *McDonald v. John/Jane Doe,* 2015 ONSC 2607, 126 O.R. (3d) 211, at para. 45.

d) Cases with a complex factual matrix will generally be left to a jury: See *Clarke.*

[205] In short, a jury notice is a factor to be considered in the analysis of whether it is just and proportionate to grant summary judgment. It is not the only

factor to be considered, and it is not the primary factor to be considered. It is simply one of the factors to be considered.

[206] The Plaintiffs disagree with this view. The Plaintiffs rely on *Roy v. Ottawa Capital Area Crime Stoppers*, 2018 ONSC 4207, 142 O.R. (3d) 507, for the proposition that summary judgment should only be granted in a jury case if the evidence is such that no reasonable jury properly instructed could find for the Plaintiff: see para. 38.

[207] I disagree with this view for two reasons:

a) The view expressed in *Roy* is not in accordance with the weight of the other authorities that have been decided on this issue and that I have set out above.

b) Adopting the approach in *Roy* would mean that all a Plaintiff (or Defendant) had to do to avoid summary judgment in all but the clearest of cases was serve a jury notice. This approach is inconsistent with the Supreme Court's direction in *Hryniak* that summary judgment should be granted when it is just and proportionate to do so. The approach in *Roy* is also inconsistent with the text of Rule 20 itself which provides judges hearing summary judgment motions with enhanced powers and does not limit those powers dependent on whether there is a jury notice in the case.

[208] In this case, as I have noted, there are very few (if any) facts in dispute. All that is in dispute is the inferences that should be drawn from the experts' reports and the resolution of the different views that the experts take about what TD should have done with the known facts. This is not a complex factual dispute. There is

very little *viva voce* evidence required and what *viva voce* evidence was required has already been heard as part of the *voir dire* process. As a result, the other factors referred to by Dunphy J. in *McDonald* strongly favour the resolution of this dispute by way of summary judgment.

[209] For these reasons, I am persuaded that this matter should be resolved by way of summary judgment.

Issue #3 – What is the Standard of Care in This Case?

[210] In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, the Supreme Court set out the four things that a Plaintiff must demonstrate to succeed in an action for negligence, such as this one, at para. 3:

a) That the Defendant owed the Plaintiff a duty of care.

b) That the Defendant's behavior breached the standard of care.

c) That the Plaintiff sustained damage.

d) That the Plaintiff's damages were caused, in fact and in law, by the breach of the duty of care.

[211] In this case, there was no real dispute that TD owed Mr. Moffitt a duty of care. However, in order to understand the standard of care in this case, it is necessary to set out the law relating to the duty and standard of care, and then apply it to the facts in this case. The other three questions outlined in *Culligan* will be addressed in my analysis of subsequent issues.

a) The Law on the Duty and Standard of Care

[212] The duty of care in this case arises from the provisions of the *Occupier's Liability Act,* R.S.O. 1990 c. O.2. Section 3(1) states:

> **3** (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

[213] The *Occupier's Liability Act* is intended to be a complete code with respect to the liability of occupiers: *Nolet v. Fischer,* 2020 ONCA 155, at para. 14. In this case, TD was the occupier of the premises and Mr. Moffitt came onto those premises. Therefore, TD owed Mr. Moffitt a duty of care.

[214] This duty is expressed in general terms and will be fact specific. As the Supreme Court of Canada noted in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, at para. 33:

> 33. The mere fact that the alleged custom was not decisive of the negligence issue does not in any way support the conclusion that it was not considered. After all, the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso "such care as in all circumstances of the case is reasonable".

[215] The line between the legal and factual components of the duty of care is not a bright one. This blurring exists because a consideration of the duty of care requires consideration of principles such as reasonable foreseeability and the relationship between the parties.

b) Applying the Law to the Facts

[216] The standard of care requires TD to have taken reasonable steps to ensure Mr. Moffitt's safety. The question of whether TD has taken reasonable steps is measured against the objective standard of a reasonable person.

[217] The reasonableness test does not require perfection: *Mustapha,* at para. 16. It also does not require a party to take impractical precautions against known risks, especially when those known risks are unlikely to come to pass.

[218] Finally, reasonableness requires a consideration of the factual matrix in each case. In that respect, with these general principles in mind, we should consider the factual issues by analyzing whether there has been a breach of the standard of care.

Issue #4 – Did TD Breach the Standard of Care?

[219] As noted in *Mustapha,* at para. 7, a Defendant's conduct is negligent if it creates an unreasonable risk of harm to the Plaintiff. Therefore, answering this question requires a consideration of what TD did (and did not) do in assessing the security risks at this branch. Once this analysis is completed, the results can be used to determine whether TD breached the standard of care.

[220] As I noted above, the Plaintiffs claims of a breach of the duty of care fall into three separate categories:

a) Alleged breaches of the duty to properly analyze the risks to customers at the ATM site;

b) Alleged breaches of the duty to provide proper security at the ATM site; and

c) Alleged breaches of the duty to protect Mr. Moffitt from harm or to warn him of impending harm either immediately before or during the assault.

[221] There are a number of specific factual issues that have to be resolved in considering these three possible sources of breaches. I will address those factual issues as I address each of these categories.

a) Analyzing the Risks- Was there a Breach?

[222] Much of the focus of the evidence and arguments from both parties was on this issue. Simply put, what was the risk of harm to Mr. Moffitt at the ATM machine on the evening that he was beaten by Mr. Pangan?

[223] I start by observing that the fact that something actually happened does not mean that it was reasonably foreseeable: *Mustapha,* at para. 13**.** In order to consider whether this incident was reasonably foreseeable, there are two sets of facts that need to be analyzed. First, there is the general environment of the branch and what TD should have taken from that. Second, the fact that Mr. Moffitt was assaulted needs to be considered in light of the circumstances of the assault. I will deal with each issue in turn.

[224] In reviewing the general environment and security at the Warden Branch, there are several different facts that need to be considered: the crime rate at the branch, the CAP rates, and the neighbourhood that the Branch was located in. Once these are considered, then I will address what TD actually did about these issues, and what they should have done about them.

The Crime Rate at the Branch

[225] There was very little direct evidence on what the crime rate at the Warden Branch was. I will review the evidence that I do have.

[226] I start with the police records. One of the documents that I was provided with was a call history for the Warden Branch from the Toronto Police Service.

The report runs from January 1st, 2010 to January 16th, 2019. The events after May 28th, 2013 are not relevant to what TD knew or ought to have known about crime at the Warden Branch the day that Mr. Moffitt was assaulted.

[227] There are eleven events in the three and a half years prior to the assault where the Toronto Police Service was called to the Warden Branch. The only ones of any significance are a bank robbery on May 11th, 2010, a break and enter on April 1, 2011 and the theft of a vehicle on March 20th, 2012. The rest were suspicious events, unwanted guests, threats of an unspecified nature and one company alarm. There is very little detail about any of these incidents in the materials before me. In the absence of those details, it is difficult to infer that these were incidents of any seriousness.

[228] TD's evidence also supports the view that there were very few, if any, safety concerns at the Warden Branch. Ms. Roxanne Bacchus was the Branch Manager of the Warden Branch when this incident took place and had been the Branch Manager since August of 2011. She stated that she was not aware of any robberies or assaults that had taken place at the branch prior to May of 2013. Ms. Bacchus was not aware of the May 2013 incident when it took place. Her understanding of incidents at the Warden Branch was limited to the Branch itself, and not the ATM after hours. With these limitations in mind, Ms. Bacchus's evidence still supports the view that there was very limited interaction with the police and very limited security concerns at the Warden Branch during the day.

[229] Ms. Kavoosi was the branch manager of the Warden Branch from 2014 to 2016, after this incident took place. Ms. Kavoosi had not worked at the Warden Branch prior to becoming the Manager in 2014. Ms. Kavoosi also testified that she was not aware of any safety concerns at the Warden Branch. Ms. Kavoosi's evidence on this point is significantly less relevant than Ms. Bacchus's evidence, but it is still a factor to consider. I note that Ms. Kavoosi's evidence about security,

gang activity and the like while she was at the branch is not relevant to this motion as it was evidence about events that took place after the incident involving Mr. Moffitt.

[230] The fact that there was very little evidence of security concerns at the Warden Branch during the day is not the entire picture, as the assault on Mr. Moffitt took place at approximately 10:30 p.m. However, even the police records that have been provided by the Plaintiffs do not illustrate any other assaults on the TD premises at any time of the day or night, or many other serious incidents either during the day or at night.

The CAP Rates

[231] The CAP rates are a proprietary product of a third-party company. The purpose behind these rates is as follows:

> As the world leader in crime and risk forecasting, CAP Index provides innovative solutions for companies and government agencies looking to minimize losses including shrink, general liability, fraud, lawsuits and crimes against persons and property. CAP index is a trusted partner to 81 of the Fortune 100 Companies.
>
> CAP Index's CRIMECAST products are derived from an advanced evaluation system designed to identify the risk of personal and property crimes at any location the United States, the United Kingdom and Canada. Address-specific CRIMECAST Reports assist clients in ranking and comparing multiple locations, site selection, security resource allocation, litigation and underwriting.
>
> Going beyond CRIMECASE Scores, CAP Index's team of consultants can analyze external CAP Index Information in tandem with internal company-specific data in order to create an objective, operationally feasible, cost-effective and fully customized risk identification model.

[232] The CAP rates provide comparisons to the crime rate in Canada, the Province of Ontario, and the census subdivision. In this case, the census subdivision is the City of Toronto. They consider the address and both an inner radius and an outer radius.

[233] The inner radius represents a mile (1.6 kilometers) or a population of 25,000. The outer radius represents three miles (4.8 kilometers) or a population of 100,000. Remembering that a radius is half the width of the circle, the inner radius represents crimes within 1.6 kilometers in either direction of the Warden Branch while the outer radius represents crimes within 4.8 kilometers in either direction of the Warden Branch. The outer radius can consider communities that are nearly ten (10) kilometers apart.

[234] The CAP data expresses the comparisons in regions by a numerical score comparing it to the larger region. As described by the CAP documentation:

> Crimecast scores are based on a scale of 0 to 2000, with 0 representing the lowest risk and 2000 the highest- 100 is average. A score of 862 is 8.62 times higher than average.

[235] These numbers vary depending on whether you are comparing the location to the crime rate in Canada or Toronto. For example, in 2011, the CAP index for the Warden Branch was 862 for Canada and 410 when compared to the City of Toronto. In other words, the comparison is relative.

[236] It is also worth noting that the Crimecast maps that I was provided with show very different Crimecast numbers for different areas adjacent to the Warden Branch. The significance of these numbers was not explored in evidence by either side. However, the CrimeCast map seems to suggest that different neighborhoods have different crime numbers.

[237] The experts disagreed over the use of the CAP data. Mr. Wood suggested that this data should have been a key consideration in TD's risk assessment. Mr. Hoffman suggested that this data was less useful because of the large geographical area that it covers, but that any security assessment should consider the crime data.

[238] In this case, I am of the view that Mr. Hoffman's view is closer to the correct answer but not entirely correct. I accept his observation that the data on crimes in the neigbhourhood is less useful because of its' geographical scope. It is logical to infer that crimes 1.6 kilometers away from the Warden Branch are of limited relevance in determining the However, I am of the view that at least some consideration needs to be given to the crime in the area of the branch in conducting a security assessment. That being said, the broad geographical scope of the CAP data causes me to reject Mr. Wood's view on its paramount importance.

[239] This brings me to Mr. Huhn's evidence. Mr. Huhn talked in general terms about the effect that the built environment can have on the risk for crime, as well as major crime indicators. I have found that evidence admissible partly because it provides a good understanding of some general principles. However, I have also concluded that it is of limited assistance in this case for two reasons.

[240] First, Mr. Huhn states, in essence, that the built environment made this branch an unsuitable and unsafe location. The problem with this conclusion is that it does not acknowledge the very limited history of incidents at the Warden Branch in the three years prior to the incident involving Mr. Moffitt.

[241] Second, Mr. Huhn's conclusions appear to be based on the view that since this incident happened to Mr. Moffitt, it was reasonably foreseeable. The problem with this conclusion is that it is based on an erroneous view that this incident was a planned incident and a random incident. In addition, I have already explained why the mere fact that an incident happened and was, therefore, possible, does not make it foreseeable at law.

[242] The CAP rates were not used by TD at the time of the incident. In 2014, TD's Global Security and Investigations department began using this data as a

component in determining whether the branch was a low, medium or high risk. That is an issue I will return to below.

[243] Evidence of remedial measure taken after an accident or incident cannot, standing on its own, be used as proof of liability. Steps taken by a Defendant after an accident can, however, be relevant to the question of whether these steps could have been taken prior to the incident.

[244] Given that the CAP data is something that experts on both sides said was relevant and reliable information, I am persuaded that it assists as one tool in providing an assessment of the general crime in the area. However, given its wide geographic scope and the significant variance in crime from neighbourhood to neighbourhood. I am not persuaded that the CAP data should be an overriding consideration in assessing risk.

Other Information on The Warden Branch's Neighbourhood

[245] Mr. Kahler's affidavit provides crime rates from the Canadian Broadcasting Corporation ("CBC") for the neighbourhoods of Oakridge and Clairlea-Birchmount, which are the two neighbourhoods closest to the Warden Branch. The evidence that Mr. Kahler has provided are statistics on crime from 2004 to 2011 for the crimes of auto theft, murder, break and enter and drug charges.

[246] Unlike the CAP rates, the information from the CBC's website is of very limited use from a legal perspective for the following reasons:

a) There is no explanation of the methodology by which this data was collected.

b) There is no explanation as to the sources of this data. Indeed, the charts that are provided do not even contain the CBC's logo or any other identifying information that would associate them with the CBC.

c) There is no explanation as to the bounds of the neighbourhoods. While Mr. Kahler has told me that Warden Avenue from St. Clair to Mack Avenue is the boundary between Oakridge and Clairlea-Birchmount, I do not know where the other boundaries are.

[247] As a result of these deficiencies, I am not prepared to give any significant weight to the crime data from the CBC's website, particularly since I have the CAP data.

[248] Mr. Kahler also provides some crime rates from the Toronto Police Service. There were two groups of data attached to Mr. Kahler's Affidavit. The first group of data was Major Crime Indicators from the Toronto Police Service for the area within a two kilometer radius of the Warden Branch. This information is complete and provided by a third party. However, I view this information as being similar to the CAP index, and of limited additional assistance in resolving this matter. It also has a wide geographical scope, which makes it less useful.

[249] The second group of data was crime statistics by neighbourhood for the Clairlea-Birchmount and Oakridge neighbourhoods. The problem with this data is that it is incomplete. Mr. Kahler provides the data for robberies for Oakridge, break and enters for both Oakridge and Clairlea-Birchmount and the murder rate for Clairlea-Birchmount only. Given that the Warden Branch straddles the boundary between the two neighbourhoods, this data cannot be used to draw inferences unless it is complete for both areas. I decline to place any significant weight on this data.

[250] I had affidavits and cross-examinations of the two individuals who were branch managers from 2011 to 2016, Ms. Roxanne Bacchus and Ms. Maryan Kavoosi. Ms. Bacchus was not aware of any incidents in or around the branch prior to this lawsuit. Ms. Kavoosi testified as to one incident in which she had to deal with an irate customer. The customer was sufficiently irate that the police were called, and a restraining order was taken out against the customer. However, there are two problems with relying on this incident. First, and most importantly, it happened **after** the assault on Mr. Moffitt. Therefore, it does not assist me in determining whether TD had improperly failed to consider the risks at the Warden Branch **prior** to the assault on Mr. Moffitt.

[251] Then, there is the evidence from Mr. Kahler's Affidavit about the neighbourhood. I reject this evidence as being unreliable. It comes from three sources.

[252] First, there is the "evidence" of a Cst. Andrew Gordon, who is a member of the York Region Police Force and allegedly served in the "gang joint task force" in the City of Toronto. Based on e-mails from Cst. Gordon, Mr. Kahler alleges that there is a gang that operates in the area of the Warden Branch.

[253] The problem with Cst. Gordon's evidence, as I have noted above, is that much of it is double hearsay and therefore inadmissible for the reasons discussed at paragraphs 175 and 176. There are additional problems that render this evidence too unreliable to rely on in any circumstance. Those problems are as follows:

a) There is no indication as to when Cst. Gordon worked in this neighbourhood, whether he has any special knowledge of the gangs in this neighbourhood, or whether the situation has changed in the last fifteen years.

b) There is no indication in the records that Cst. Gordon is actually a constable. The e-mail that is provided to the Court is from a personal e-mail address and does not state anywhere in it what the sender's role with gangs in Toronto is.

c) The e-mail simply contains a link to a number of videos and other news articles. There is no official police information in the e-mail.

d) There is no ability to cross-examine Cst. Gordon on this evidence and no ability to test its reliability.

[254] The information from Cst. Gordon does not add anything of significance to the case over and above the news articles or other attachments that are provided.

[255] This brings me to the news articles that Mr. Kahler has provided. They are the second source of information about the neighbourhood that Mr. Kahler offers as evidence. One of the articles, from August of 2015, refers to the closing of the Birchcliff branch. It provides negative commentary about the neighbourhood that the Warden Branch is in, including observations about the crime rate and the presence of gangs. A second article, from 2010, offers information about a cold case respecting a body that was found in the Warden Woods (near the Warden Branch) in August of 1987. A third article provides information about a series of six bank robberies at different branches and financial institutions across Toronto, including the Warden Branch. I have discussed the robbery of the Warden Branch elsewhere in these reasons.

[256] Some of the other articles involve incidents that did not take place in the immediate area, such as a shooting on Canlish Road. I do not see Canlish Road in any of the maps that have been filed as evidence. Others involve incidents

(including shootings) that took place on Cataraqui Crescent or Firvalley Drive which appear to be closer to the Warden Branch.

[257] Finally, only seven of the articles (including the cold case from 1987) are from incidents that took place prior to the assault on Mr. Moffitt. Three others are from 2010 and three are from 2012. I should also note that two of the articles (at Tabs PP and RR of Mr. Kahler's Affidavit) are two separate descriptions of the same incident. The dates on the news articles are different, however, one article was about the incident itself and the second about an arrest.

[258] I do not intend to review all of the articles in detail. This summary of the types of articles illustrates three reasons why relying on news articles about specific crimes "in the area" are of no assistance when conducting a risk assessment:

a) There is no way to check the accuracy of the facts in these news articles.

b) News articles do not always define what "the area" is. An area can have a high rate of crime and only a short distance away, the crime can be much lower. This fact is reflected in the CAP data.

c) News articles do not have sufficient details to illustrate a pattern of crime or to indicate a problem with a specific area or a specific address. There is not enough information to know why the crime occurred or what the motivations were. For example, one shooting involved an alleged assailant and a victim who were "in an on and off relationship."

[259] On this point more generally, my conclusions about the newspaper reports is supported by the reasoning of Binnie J. in *Alberta Public School Boards*

Association v. Alberta (Attorney General), 2000 SCC 2, 182 D.L.R. (4th) 561. In that case, Binnie J. was sitting as a sole judge to determine a motion about the admissibility of fresh evidence. In terms of news articles, he made the following observations, at para. 14:

> 14 I held in the previous order that the two newspaper articles sought to be adduced by the PSBAA do not constitute "legislative fact". The two columns represent the opinion of two individuals writing in daily newspapers who may or may not have the underlying facts straight and whose opinion may or may not be valid. The authors cannot be cross-examined. The contents are apparently controversial. No basis has been made out by the applicants for admission of this material. It will therefore be rejected.

[260] The newspaper articles in Mr. Kahler's affidavit cannot be given any weight without both more information and an opportunity to test their veracity.

[261] Mr. Kahler's affidavit refers to a number of legal decisions that make at least tangential reference to the general area of the Warden subway station, or the intersection of Warden and St. Clair Avenue. These decisions are of very limited weight in assessing the risk of crime in the neighbourhood. In this regard, I would note the following:

a) Some of the decisions involve very dated incidents. For example, *R. v. H(B)*, 2000 CarswellOnt 5199, is a decision involving historical sexual assault allegations from the late 1970's and early 1980's. There are others that are also quite dated. Similarly, the domestic dispute from 2002, detailed in *Nguyen v. Canada (Minister of Public Safety and Emergency Preparedness),* 2013 CarswellNat 9256, would appear to be both quite dated and not really relevant to the question of security at the Warden Branch in 2013. The mere fact that a decision references a crime in a particular area does not support an inference that the area is more unsafe as a result.

b) These individual decisions do very little to paint a picture of the risks in the community as a whole. For example, the fact that, in *R. v. Amofa*, 2011 ONCA 368, at para. 4, the Warden subway station was "identified by the police as a high risk area for crime" in November of 2006 does not assist in any material way in understanding the risks at a bank branch approximately half a kilometer away six and a half years later.

[262] Then, Mr. Kahler's affidavit refers to some gang videos. Putting aside the evidence from Cst. Gordon about where the gang operates, which is double hearsay as I have indicated, the videos do not assist the Plaintiffs. First, all I have from the videos are screen shots of various addresses, and nothing to show any context for these videos.

[263] Second, those addresses include a number of streets, such as Leyton Avenue and Danforth Avenue, that are not completely shown. In that respect, I would note in particular that the maps at Exhibits "U" through "Z" of Mr. Kahler's Affidavit show Danforth Road, and not Danforth Avenue. Both streets are mentioned in the materials. The map at Tab "GG" is more complete. However, that map shows that the locations at 3502 Danforth Avenue are some distance away from TD's Warden Branch.

[264] It is quite possible that there is a gang operating in the area where TD's Warden Branch is located. However, the link between any gang activity and the safety of TD's customers at its Warden Branch is tenuous at best. There is no evidence before me of how gangs operate, or whether they would have any impact on the crime rates, and there is no mention in the expert reports of either side about the presence of these gangs affecting security in any way.

[265] Then, Mr. Kahler provides police call data for one of the other buildings in the area, being 682 Warden. This building is on the other side of the street from the Warden Branch, but it is not clear from the maps that were filed as to whether it is directly across the street or it is some distance away.

[266] In his Affidavit, Mr. Kahler provides information about the police records. For example, Mr. Kahler's affidavit states the following about 2012:

> 51. Toronto Police Service were required to attend at 682 Warden Avenue 279 times in 2012. In other words, Toronto Police Service attended an average of 22.3 times per month and more than three times every four days. Reasons for calls included fights, assaults, disputes stabbings, gunshots and more. Attached above at Exhibit HH is a copy of the Toronto Police Service file for 682 Warden Avenue.

[267] However, when I dig into the records for 2012, I found only approximately 250 calls to police. This may be because the data is presented in a way that is not completely chronological. In addition, of those appearances, 51 calls, or twenty percent, were described as either "see ambulance" or "medical comp." An additional 34 calls were listed as "advised", and there were nine domestic disputes. A great many of the calls appear to be non-violent and non-crime based.

[268] In addition, we do not know anything about the building that these calls relate to other than it is social housing and a high rise. For example, we do not know how many tenants are in the building or what demographics (seniors, non-seniors) those tenants fall into.

[269] Given all of these deficiencies, this data is not particularly useful in assessing the risk at either TD's Walden Branch or in the neighbourhood generally.

[270] Finally, I should note that there were a considerable number of incidents detailed in Mr. Kahler's affidavit that took place **after** the assault on Mr. Moffitt. Those incidents are not relevant to the issues I have to determine, which is whether

TD breached the standard of care on the basis of what was known **before** the assault.

TD's Risk Assessment and Precautions – The Warden Branch

[271] I have set out an outline of TD's risk assessment model in the background facts section of my reasons. I will now expand on that outline and discuss how the model was applied to the Warden Branch. As mentioned above, TD divided its branches into low, medium and high risk branches depending on their risk assessment.

[272] The data for the risk assessment came primarily from data about incidents of robberies, armed robberies, assaults and break and enters from each of the branches. That data could be provided by the police, from bank branch staff or from members of the security team becoming aware of an incident. The incidents that were tracked were limited to incidents that had an impact on TD's operations, staff and customers but would include data on robberies of customers at ATM's. This data was then inputted into a database that was used for the purpose of risk assessments.

[273] Although the information for the risk assessments came primarily from this branch-based data, some other data was also obtained from other Canadian financial institutions about branches in the same area, being approximately a kilometer or less away. There was no evidence before me of any other financial institutions having a branch within a kilometer of the Warden Branch.

[274] Prior to the incident in this case, the CAP data was not used. However, Ms. Graham confirmed that the CAP data is now being used to assess whether a branch was a low, medium or a high risk branch. Ms. Graham testified that "as the methodology evolved, we actually decided that we were going to include" the CAP

data. There was no explanation in the evidence before me as to why it was not included when the original methodology was developed.

[275] Low risk branches were given a base-line level of requirements to mitigate risk. Medium risk branches got slightly different controls. High risk branches would get both very specific controls and an on-site assessment.

[276] Determining whether a branch was a low, medium or high risk branch was done based on a weighted points system. Each type of incident was given a certain number of points. The points were calculated by looking at incidents that had taken place over the previous three years.

[277] This brings me to the risk assessment for the Warden Branch. The risk at the Warden Branch was assessed at a low level. In her evidence, Ms. Graham testified that she was not aware of the robbery that had taken place on May 11th, 2010. While this was slightly beyond the three year period from this incident, it would still have been included in a security assessment covering the three years prior to 2013. Based on Ms. Graham's evidence, I conclude that this robbery was not included in the risk assessment for the Warden Branch.

[278] However, based on the evidence I have, I am given to understand that the rating for the Warden Branch would not have changed if this incident had been included and I accept that evidence on the basis of the age of the 2010 incident and the fact that there were only two other incidents in the three year period prior to this incident as described at paragraph 227 above. Even if I accept that this extra incident would have changed the rating (which I do not), I would still be looking at a branch that was rated at the very bottom end of the medium category.

[279] This is an appropriate point to address Mr. Wood's concern that he was not familiar with "medium" risk and that risks associated with a particular site were

either low or high. The problem with a binary system of “low” and “high” risk is that there is no nuance to it. If TD adopted a low/high risk approach, one single incident could transform a branch from low risk to high risk. The TD approach of three levels better recognizes that the risks associated with a particular site lie upon a spectrum. It also recognizes the fact that there are different types of risks that should be treated differently.

[280] I now turn to the precautions that were taken by TD in the ATM Vestibule at the Warden Branch. Those precautions were as follows:

a) Signage, including signs about the fact that the ATM vestibule was being monitored by video surveillance.

b) The lighting in the vestibule was described as quite bright, and there was good visibility because of the windows.

c) There were mirrors in the vestibule to assist in security issues.

[281] TD’s experts stated that these steps, which are steps taken through CPTED, were sufficient to ensure an appropriate level of safety in the ATM vestibule. The Plaintiffs’ experts view these steps as being woefully insufficient. In the evidence I heard, I did not hear any dispute that these steps had actually been taken.

[282] In order to more fully understand whether these steps were sufficient, I now turn to the details of the assault on Mr. Moffitt.

The Specific Facts of Mr. Moffitt’s Assault

[283] I have set out my factual findings about the assault on Mr. Moffitt. It is worth repeating them as part of the risk analysis. The key points are:

a) Mr. Moffitt and Mr. Pangan had an exchange of words after Mr. Moffitt had completed his transaction at the ATM.

b) Mr. Moffitt began the physical altercation by lunging at Mr. Pangan.

c) Mr. Pangan then tackled Mr. Moffitt and ended up on the floor and appears to hit his head. Mr. Pangan then assaulted Mr. Moffitt.

d) This entire sequence of events took less than a minute and a half.

e) Mr. Pangan returned to the ATM on two occasions approximately four minutes after the assault to take Mr. Moffitt's wallet and knapsack.

[284] This was a serious assault. However, it was not a planned crime as alleged by the Plaintiffs (and their experts). It was an opportunistic crime that arose out of a verbal assault. In short, it is the type of crime that is very difficult to foresee and very difficult to stop in advance.

Conclusions on The Risks

[285] Based on the foregoing summary, I conclude as follows:

a) The neighbourhood where the Warden Branch was located had some higher crime areas and some lower crime areas around it. While there were certainly some areas in which there was a much higher level of crime than the national average, there is no basis to conclude that the Warden Branch itself was a high crime location at the time of the assault.

b) In the years prior to the assault on Mr. Moffitt, the Warden Branch itself had very few incidents of violence that had taken place either at the branch or involving customers of TD.

c) There is no direct evidence of gang activity in the area around the Warden Branch. Even if that gang activity did exist, there is no evidence to link that activity to any enhanced risk to customers using the ATM at the Warden Branch after hours.

d) TD had a risk methodology rating system that they were using to assess risks, but this methodology was still developing when the incident involving Mr. Moffitt took place.

e) The assault in this case was a random assault that was not easily foreseeable or preventable.

[286] One of the concerning factors in this case is the failure of TD, until after this incident, to utilize the CAP data. Based on the expert testimony from both sides, I conclude that this data is, and was, well-known in the security community. Further, it is objective data that will provide TD with more information about the branch and the neighbourhood that the branch is located in. In my view, it is data that is relevant to TD's analysis. I will return to the question of how relevant this information was to the analysis in the discussion of other issues relating to the standard of care.

[287] However, the CAP data would not have changed TD's classification of the Warden Branch as a low risk branch. The CAP data shows that the crime rate in the area around the Warden Branch is four times higher than it is in the whole City of Toronto. However, it is also clear that there are parts of the area covered by the CAP data that I was provided with where the crime rate is much lower.

Given the very limited history of serious incidents at the Warden Branch, the CAP data would not have had and should not have had any substantial effect on the risk rating. TD was not negligent in its' assessment of the risks at the Warden Branch

b) Alleged Breaches of Security at the ATM

[288] In the expert reports and in the materials provided by the Plaintiff, there are a number of significant breaches of security at the ATM that are alleged. The most significant of those breaches are:

a) Not having a security guard stationed in the vestibule.

b) Not having a swipe entry or an ability to lock the vestibule from the inside.

c) Not having live monitoring of the CCTV in the vestibule.

d) Not having a panic alarm for people to use in case there was an incident in the vestibule

[289] I will discuss each of these issues in turn.

No Security Guard

[290] The Warden Branch did not have an unarmed security guard posted in the vestibule after hours. Mr. Wood, in particular, was of the view that the Warden Branch needed to either have an unarmed security guard or it should have been closed during the evening and overnight hours. The context of this assertion must be considered.

[291] In his Affidavit, Mr. Kahler stated that "industry standards around the globe show numerous security options available, including but not limited to the

use of a security guard at the perimeter of the property or within the ATM vestibule." In support of this position, Mr. Kahler relies on a report prepared by Accenture, which I understand to be a consulting company.

[292] However, a closer look at that report shows that a security guard at an ATM vestibule as of 2016 was the least used security feature out of all of the ones listed, with a use rate that appears to be less than five (5) percent internationally. If they are used at less than five percent of sites internationally then it is reasonable to infer that they are only used at the highest risk branches.

[293] However, industry and community standards are not necessarily dispositive. No amount of general community compliance with a particular practice will render negligent conduct reasonable in all the circumstances. See, for example, *Waldick* As a result, I will consider whether a security guard was a reasonable precaution in this case.

[294] I am of the view that a security guard was not a reasonable precaution in these circumstances. I reach this conclusion for two reasons:

a) The Warden Branch was reasonably identified as being a low risk branch, even if the CAP data was considered in the analysis.

b) There had been no incidents in the ATM vestibule in the three years prior to this incident.

[295] As a result, the unusual step of placing an unarmed security guard in the ATM vestibule of the Warden Branch was not necessary to mitigate risks that were low.

[296] Finally, I note that a security guard was brought into the branch during the daytime hours in 2015. This was done due to concerns with vagrancy and

issues in the parking lot during the day. This evidence is, in my view, irrelevant because it does not assist me in determining whether TD had met its duty of care two years previously and in the circumstances of the ATM vestibule at night.

[297] Although it is not necessary to address the cost of the security guard, I will make a brief observation about the Plaintiffs' position in this respect. In his Affidavit, after commenting that the implementation of an after-hours security guard would not have been expensive, Mr. Kahler goes on to state that the chart they provided "shows an average employment income for a 19 year old security guard as just $7,173.00 per annum." Although it isn't directly stated by Mr. Kahler, it appears that the suggestion is that the costs of an after-hours security guard is $7,173.00.

[298] Given that the minimum wage in Ontario at the time was $10.25 per hour, the cost of a security guard for even a regular workweek is substantially higher than that: *Employment Standards Act, 2000* S.O. 2000 c. 41, and the regulation thereunder- *Exemptions, Special Rules and Establishment of Minimum Wage*, O.Reg 285/01, s. 5(1.3). Forty hours a week for fifty-two weeks at minimum wage would produce an amount of $21,320. Mr. Kahler's evidence on this point is inaccurate.

No Swipe Entry or Ability to Lock

[299] The Plaintiffs argue that TD should have provided an ability to control access to the ATM vestibule by either requiring patrons to swipe their banking cards or by permitting patrons to bolt the ATM door from inside. Ms. Graham was cross-examined about both alternatives and she explained why both alternatives were impractical. I accept her explanations.

[300] I start with the idea of swiping the banking cards to gain access to the ATM. Ms. Graham testified that requiring customers to use their banking cards created two problems. The first is that the data on the banking cards could be stolen when people swiped their cards. Second, the swipe systems could be defeated by people using any type of card with a magnetic strip, such as a library card. Therefore, these systems were not useful.

[301] Second, there is the idea of permitting patrons to bolt the ATM door. Ms. Graham testified that the problem with this idea was that, if a patron suffered a medical emergency while using the ATM, it might become more difficult to assist them. She also testified that, if a patron was attacked by someone, the fact that the door could be locked could result in a hostage like situation. I have no evidence on whether either of these events have actually taken place. However, they are both reasonably foreseeable consequences of permitting patrons (or others) to bolt the doors to the ATM.

Live Monitoring of the CCTVs

[302] The Plaintiffs' experts suggest that live monitoring of the CCTV cameras would have been a reasonable step to take in this case. I will return to the question of whether this step, if adopted, would have made a difference in this incident in my discussion of causation.

[303] I conclude that the live monitoring of CCTV cameras was not a reasonable precaution to require TD to take in this case for two reasons. First, as I have discussed throughout the decision, the risks associated with the ATM vestibule were low both generally and specifically in terms of this incident. Second, the live monitoring of CCTV cameras is not a precaution that would make any difference in dealing with sudden and random acts of violence.

Panic Alarms in the Vestibule

[304] The Plaintiffs' experts also suggested that placing panic alarms in the ATM vestibule was an appropriate security measure. I disagree for two reasons. First, Ms. Graham's testimony explained that there were a high number of false alarms from panic alarms that had been placed in various other parts of the branch. I accept this evidence. As a result, a panic alarm in the ATM vestibule would likely have resulted in a significant number of additional false alarms.

[305] Second, these panic alarms would not have resulted in immediate responses. Unless someone was standing by in the vicinity of every ATM, including those rated as low risk, it would have taken time for a security company or the police to respond to these alarms. Any incident that took place in the ATM vestibules of any branch would likely be an instantaneous event. Therefore, any response from even real-time remote monitoring would have been too late. This is not something that a reasonably prudent person would have expected TD to do.

[306] This brings me to an important observation about all the suggested security measures that the Plaintiffs' experts have proposed. All these measures **might** have prevented the assault on Mr. Moffitt. However, all these measures either have their own risks or come with significant costs. In addition, the assault on Mr. Moffitt was not a reasonably foreseeable event. Based on the foregoing, I have concluded that TD was not negligent in the manner in which they provided security at the Warden Branch.

c) Alleged Breaches of the Duty to Warn

[307] The Plaintiff lists a number of alleged breaches of TD's duty to warn Mr. Moffitt of risks. The problem with this argument is seen by posing the question: what risks should TD have warned Mr. Moffitt of? There are specific and general

risks that might exist as a result of the possibility of an incident of this type happening.

[308] I begin with the specific risks. It must be remembered that Mr. Moffitt started the physical altercation in this case. I see no basis in law for requiring TD to warn Mr. Moffitt that, if he starts a physical fight, he might be injured in it. Similarly, I see no basis for warning Mr. Moffitt that if he started a verbal argument with another customer it might become a physical altercation.

[309] This brings me to the general risks. The risks associated with this branch were low. When Mr. Moffitt was assaulted, he was the first person who had ever been assaulted in this ATM that I am aware of. While there were areas of higher crime in the neighbourhood, there were also areas of lower crime. This begs the question- what general warning should Mr. Moffitt have been given? On the facts of this case, I do not see that a reasonable person would have been required to provide him with a warning of any elevated risks.

[310] For these reasons, I conclude that TD did not breach its duty to warn Mr. Moffitt of risks that he might be exposed to by entering the ATM vestibule.

d) Conclusions on the Duty of Care

[311] Each case on the duty of care has its own factual matrix. As a result, it is difficult to find analogous cases. Indeed, I asked counsel whether they were aware of any other Canadian cases relating to an assault that had taken place in an ATM vestibule after hours. They were not. I did my own research on this point between the March 2020 and February 2021 appearances and confirmed counsel's understanding in this regard. It is, therefore, a case of first impression.

[312] The closest analogous case that any counsel was able to find for me was a decision in *Ortega v. 1005640 Ontario Inc.,* 2004 CanLII 19221, 187 O.A.C. 281.

In that case, a person was shot and killed after exiting a nightclub into the parking lot by an unknown assailant. The deceased's family sued the nightclub, claiming that they had been negligent. The trial judge dismissed the action, and the Court of Appeal agreed with this decision, stating:

> The trial judge found that this shooting was unprovoked and indiscriminate, in other words it was a random shooting and that nothing the nightclub might reasonably have done would have prevented it. This finding is amply supported by the evidence.

[313] In this case, I reach a similar conclusion for similar reasons. The assault on Mr. Moffitt was a random event. Further, it was an event that might very well not have happened if Mr. Moffitt had not lunged towards Mr. Pangan with his fist closed. I have looked at each of the suggested steps that the Plaintiffs have stated that TD should have taken and explained why each of them was not a reasonable step to require TD to have taken.

[314] In light of those conclusions, I am of the view that TD did not breach its duty of care in this case.

Issue #5 – Did Any Alleged Breach Cause the Injury?

[315] Although I have not found any breaches of the duty of care on the part of TD, I will briefly consider the question of whether Mr. Moffitt's injuries were caused, in fact and in law, by any of the alleged breaches of the duty of care.

[316] In order to recover for the negligent acts of a Defendant, the Plaintiff must demonstrate causation. As McLachlan C.J.C. (as she then was) noted in *Clements v. Clements* 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 6:

> [6] On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) caused the injury. That link is causation.

[317] The Plaintiff has the burden of proving causation. In most cases, this can be done by the trier of fact drawing common-sense inferences. See *Perry,* at paras. 98 and following. I will now consider the various allegations of negligence in this context. Specifically, I listed a series of alleged breaches at paragraph 220 that I will now consider by categories.

[318] First, there was the suggestion that an alarm be placed in the ATM machine in case a customer required assistance. That would not have assisted Mr. Moffitt for two reasons:

a) Given the way that the assault happened, it is unlikely that he would have been able to activate such an alarm even if one had been placed in the ATM vestibule. Mr. Moffitt came towards Mr. Pangan with his arm outstretched and his fist clenched. Mr. Moffitt was continually engaged with Mr. Pangan until he was on the floor unconscious.

b) The entire assault took less than a minute. Even if Mr. Moffitt had been able to activate the alarm, there is no way that anyone could have responded to the alarm in time to make a material difference.

[319] This second point about the timing of any alarm also applies to the suggestion that there should have been live video camera monitoring. It would also not have made any difference in this case. By the time someone responded to what was seen on the live video camera monitoring, the assault would have been over, and Mr. Pangan would have been long gone.

[320] The only suggested step that would have made a difference was the posting of a security guard in the ATM and/or closing the ATM vestibule at night. Although posting a security guard might have made a difference, I have already

explained why it was not a reasonable step to require TD to take in the circumstances.

Conclusions

[321] For the foregoing reasons, I conclude that TD did not breach its duty of care to Mr. Moffitt. As a result, the action brought by Mr. Moffitt against TD is dismissed. This dismissal also applies to the *Family Law Act* claimants.

[322] The parties are encouraged to agree on costs for this summary judgment motion. Failing agreement, TD shall have twenty-one (21) days from the release of these reasons to provide its costs submissions. Those submissions are to be no longer than five (5) single spaced pages, exclusive of bills of costs, offers to settle and case-law.

[323] The Plaintiffs shall have twenty-one (21) days from the receipt of TD's costs submissions to provide their responding costs submissions. Again, those submissions are to be no longer than five (5) single spaced pages, exclusive of bills of costs, offers to settle and case-law.

[324] Costs submissions are to be filed with the Court office in accordance with the current practice directions. A copy is to be provided to my judicial assistant by e-mail. Both methods are to be used for filing.

[325] There are to be no extensions to the time for costs submissions, even on consent, without my leave. If costs submissions are not received in accordance with this timetable, then there will be no costs for the motion.

[326] Finally, I believe that I have issued all necessary decisions on any other issues in respect of this matter, including all costs endorsements. However,

counsel is to advise me within twenty-one (21) days if there are any outstanding issues remaining to be resolved.

LEMAY J

Released: September 16, 2021

CITATION: Moffitt v. TD Canada Trust, 2020 ONSC 6133
COURT FILE NO.: CV-17-3440-00
DATE: 20210916

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Moffitt et. al.

Plaintiffs

- and -

TD Canada Trust

Defendant

REASONS FOR DECISION

LEMAY J

Released: September 16, 2021