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# Plaintiffs Carry Heavy Burden in Terror Suits Against Banks

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# Plaintiffs Carry Heavy Burden in Terror Suits Against Banks

Jimmy Gurulé, New York Law Journal

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On Feb. 23, the Palestinian Authority and Palestinian Liberation Organization were found liable by a Southern District jury in Manhattan for their role in knowingly providing material support to the perpetrators of six terrorist attacks in Israel between 2002 and 2004 that left a number of Americans dead or seriously injured. The civil lawsuit was filed under the Anti-Terrorism Act (ATA), which allows American nationals who are victims of international terrorism to sue in the United States. The jury awarded \$218.5 million in damages, which was automatically tripled to \$655.5 million under the anti-terrorism law.

The Palestinian Authority case is the second successful lawsuit brought under the ATA. In September 2014, a federal jury in the Eastern District found Arab Bank, a Jordanian bank headquartered in Amman, Jordan, liable for supporting acts of international terrorism for knowingly providing financial services to Hamas, a foreign terrorist organization. The case now turns to the penalty phase of the proceedings, which has not yet been held. Considering the sheer number of plaintiffs, who include 247 people that were seriously injured or had a family member killed in Hamas-related terrorist attacks, the calculation of damages could easily exceed \$1 billion.

While the jury verdicts are important victories for the victims of international terrorism, it is unclear what impact, if any, these cases will have on pending cases against banks filed under the ATA. The evidence in the Manhattan case showed that the terrorist attacks were carried out by intelligence officers, police officials and other employees working for the Palestinian Authority, and that the authority kept some of these individuals on their payroll and promoted them after their convictions, and provided cash payments to their families.

The Arab Bank case also involves a unique and particularly aggravating set of facts. The most damning allegations involve Arab Bank's relationship with the Saudi Committee for the Support of the Al Quds Intifada. According to plaintiffs' claims which formed the basis of the jury's verdict, the Saudi Committee was established for the purpose of raising money for the families of suicide bombers participating in the Second Intifada, which claimed more than 8,000 casualties, including over 1,000 civilian deaths. The committee devised a "universal death and dismemberment plan" that provided payments of more than \$5,000 to the family members of "martyrs" killed or wounded during the commission of a terrorist attack, or imprisoned for participating in such attacks.

Arab Bank administered the plan and distributed the death benefit payments to the families of Hamas suicide bombers. Once the Saudi Committee prepared the list of eligible martyrs the names were provided to Arab Bank. In consultation with the Saudi Committee and representatives of Hamas, Arab Bank finalized the list and maintained a database of persons eligible to receive death benefits.

The committee opened an account at Arab Bank in the beneficiary's name and then deposited funds into the account. After the funds were transferred to designated accounts in Arab Bank branches in the West Bank and Gaza, the bank distributed the money to the families of the terrorists. In order to receive the remittance, the families chosen to collect the reward would present certification cards to Arab Bank personnel. According to plaintiffs, the death benefits plan "facilitated and provided an incentive for the suicide bombings and other murderous attacks in that the individual attackers knew that, if they committed an attack, their families would be supported by the funds held in their names by Arab Bank."

None of the pending cases filed against banks under the ATA involve such an egregious set of facts and heightened state of moral culpability. Generally, these complaints maintain that the banks knowingly provided routine financial services to suspected terrorists. However, clearly there was nothing "routine" about the banking and administrative services Arab Bank provided Hamas and affiliated terrorist entities.

Under the ATA, the mere provision of routine banking services to suspected terrorists does not support a cause of action. Banks are not strictly liable for the criminal acts committed by their customers. Plaintiffs must prove that the bank purposely or knowingly provided financial services to foreign terrorists. It is not sufficient that a bank was negligent and "should have known" that it was doing business with such individuals.

The ATA has never been construed to support civil liability based on a bank's negligent conduct.

Further, plaintiffs must prove that the bank's conduct was the "proximate cause" of plaintiff's death or injury. The civil proximate cause standard has two central components. First, the provision of financial services must have been a "substantial factor" in the resultant harm. Second, the terrorist attacks that caused plaintiffs' death or injury must have been "reasonably foreseeable" as a natural and probable consequence of the bank's conduct.

The courts have rejected the contention that any financial transaction knowingly made to a terrorist organization will result in civil liability without demonstrating a proximate causal relationship to the plaintiffs' injuries.

Numerous factors are probative on the causation issue. For example, the lapse of time between the provision of financial support and the injury to plaintiffs may factor into the proximate cause inquiry. Whether the transfer of funds occurred after the terrorist attack that caused plaintiff's injury is also highly relevant.

Clearly, financial services provided after the terrorist attack could not constitute the proximate cause. Further, the number and size of the financial transactions are highly relevant factors. While the transfer of substantial sums of money could satisfy the proximate cause requirement, a financial transaction involving a small amount of funds would not support a finding of causation. However, the amount of money involved in the financial transactions required to satisfy the proximate cause element is unclear.

Plaintiffs have a heavy burden to prove that the provision of routine financial services to suspected terrorists violated the ATA. While plaintiffs clearly met their burden in the Arab Bank case, that case did not involve the provision of routine banking services. Further, in the Palestinian Authority case several of the individuals who committed the terrorist attacks worked for the authority and were monetarily rewarded for their acts of terrorism.

Plaintiffs' lawyers in pending bank cases filed under the ATA therefore should be hesitant to read too much into the Arab Bank and Palestinian Authority verdicts.

**Jimmy Gurulé**

The author, a law professor at Notre Dame Law School, is a former Under Secretary for Enforcement, U.S. Treasury Department.

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