

The mere fact that a victim has committed a *faute simple* (i.e. mere negligence) reduces his right to compensation

In a decision handed down on March 16, 2022^[1], the *Cour de Cassation* (French Supreme court) has made an important clarification to its case law regarding the reduction of the victim's right to compensation. Indeed, it is now established that even the victim's *faute simple* (mere negligence) can lead to a reduction of his right to compensation.

In the case at hand, an account manager of the bank *Caisse d'Epargne* embezzled sums in the accounts of some of his clients, selected from among the oldest ones, and falsified bank documents in order to carry out transactions on behalf - but without the knowledge - of his clients.

The account manager fully admitted that he was the author of these embezzlements and explained that they had been carried out under pressure and threats from a third party he had met during his professional activities.

This third party acknowledged having used false names in order to open bank accounts of which he was the only beneficiary, with help of the account manager who transferred the funds to him or through the intermediary of another person.

The three individuals were convicted by the trial judges. The same judges considered that the bank *Caisse d'Epargne*, who had joined the criminal proceeding as a civil party^[2], had contributed to the occurrence of its own damage to the extent of 70% of the material loss suffered, and ordered the three individuals to compensate the remainder of this loss.

Two of the three individuals, including the account manager, lodged an appeal against the part of this judgment that concerned the civil damages that had been awarded.

In a decision dated November 9, 2020, the Montpellier Court of Appeals held that the indicted were fully liable for the loss suffered by the bank and ordered them to pay the full amount of the damages awarded in

compensation for such loss. The Court considered that the compensation due by the indictees could not be reduced due to the mere negligence of the victim and required, for such reduction to be ordered, the demonstration of the existence of a *faute caractérisée* (a qualified fault or gross negligence) with a certain degree of seriousness having a causal role in the occurrence of the damage.

The indictees appealed against this decision.

Is the victim's *faute simple* (mere negligence) sufficient to reduce his right to compensation?

In a decision dated March 16, 2022, the *Court de Cassation* (French supreme Court) ruled that the victim's *faute simple* is sufficient to order an apportionment of responsibility and that by seeking only if there had been a fault with a certain degree of seriousness to order such an apportionment of responsibility, the Court of Appeals misunderstood Articles 2 of the French Code of Criminal Procedure and Article 1240 of the French Civil Code.

The difference between *faute simple* and *faute caractérisée*

Article 121-3 of the French Criminal Code describes *faute simple* as “*imprudence, negligence or failure to comply with a duty of care or safety provided for by law or regulations*”. In other words, it is a careless mistake. On the other hand, a *faute caractérisée* appears to be much more serious than carelessness or negligence. It is a serious fault, often constitutive of serious breaches of safety, which has exposed others to a risk of a particular seriousness that the wrongdoer could not ignore.

In principle, this difference is used in matters of unintentional fault in order to assess whether the wrongdoer can, depending on the causality of the fault in the occurrence of the damage, be held liable.

In the matter at hand, the *Cour de cassation* has rectified the use of these concepts by the Court of Appeals in order to determine the possible reduction of the scope of the victim's right to compensation.

The possible reduction of the scope of compensation of the negligent victim: An established case-law

Since a decision rendered in the famous “Kerviel” case^[3], it is settled case law that in matters of intentional offences against property, the victim's negligence which contributed to his/her/its damage reduces the scope of his/her/its right to compensation. The scope of the possible reduction is left to the discretion of the judge ruling on the merits. The Kerviel ruling put an end to inconsistent decisions of the Criminal Chamber of the *Cour de Cassation* which required that a distinction be made between personal injury and damage to property. Indeed, in matters of damage to property, and until the Kerviel ruling, the *Cour de Cassation* refused to reduce the compensation of the negligent victim in order to prevent the perpetrator of an intentional offence against property from making any profit from his crime.

In the decision commented herein, the *Cour de Cassation*, re-asserted the findings of the Kerviel case, which allows for the reduction of the compensation of a negligent victim in matters of offences against property.

The useless search for a *faute caractérisée*

However, the *Cour de Cassation* overturned the decision of the Montpellier Court of Appeals which held that only the existence of a serious *faute caractérisée* allows to reduce the compensation due by the wrongdoer. Indeed, it affirmed in its findings that a “*simple faute was sufficient to order an apportionment of responsibility*” and thus to reduce the compensation of the negligent victim.

This decision provides an extremely important clarification in line with the Kerviel ruling: After having noted that the fact that the victim has committed a fault could be relied upon in order to reduce his/her/its right to compensation, the *Cour de Cassation* specified that the fault in question can be a *faute simple*, and should not necessarily be a *faute caractérisée*.

This decision should encourage companies to implement more drastic monitoring and control systems in the context of compliance, in order to ensure that such a *faute simple* does not prevent them from obtaining compensation in the event of unlawful conduct by one of their employees.

[1] Criminal Chamber of the *Cour de Cassation*, March 16, 2022, No. 20-86.502

[2] Under French law, a natural or legal person who joins criminal proceedings to obtain compensation for the damage he/she/it deems to have suffered as a result of the offense(s) committed by the indictee(s).

[3] Criminal Chamber of the *Cour de Cassation*, March 19, 2014, No. 12-87.416

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