

FINLAND

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Supreme Court, KKO 2018:71, 1 November 2018: Negligence or gross negligence?

- Unauthorised use of credit/debit card
- Cardholder's responsibility when his card and PIN number are stolen
- Was cardholder's behaviour negligent or grossly negligent?

KKO 2018:71 : Negligence or gross negligence?

- Lawyer A had kept his debit and credit card in his wallet
- Card's PIN number was in a bank envelope in the desk drawer at his law firm
- A had left the office for ten minutes and left his wallet on the desk
- The office was on the second floor of a multi-storey building

KKO 2018:71: Negligence or gross negligence?

- When leaving, he had not locked the door to his office
- An unknown person had then entered the office and stolen the wallet and PIN number

Bank's claim

- After the card and PIN number had been stolen, € 4,960 was withdrawn with A's card from a nearby cash machine
- According to the bank, A had acted in a grossly negligent manner in the way he stored the credit card and PIN number
- In accordance with the Act on Payment Services, card holders' liability for the money that was withdrawn, existed if he had acted with gross negligence
- Thus, the bank demanded that A be obliged to pay the bank as compensation the unlawfully withdrawn money in full

A's response

- A admitted that he had acted negligently, but in his opinion, he had not acted grossly negligently
- Therefore, he claimed that he was only obliged to bear the loss of € 150, which was the amount of deductible according to the payment card agreement

Legislation

- According to the Finnish Act on Payment Services, card holders must use the payment instrument in accordance with the terms of the contract
- In particular, they must take reasonable steps to take care of the payment instrument and identifying information related to it

Preliminary work of the law (government bill)

- According to government bill, card holders should store the payment card and the PIN number separately, so that a third person is not able to connect them. However, unreasonable security arrangements cannot be required
- Gross negligence requires that the actions of a card holder differ clearly and essentially from what is required of careful conduct
- Gross negligence could arise if the holder of the card had stored his card and PIN number in the same wallet

Terms of contract

- PIN number shall be stored diligently, separately from the card and preferably only memorised
- Card and PIN number should not be stored in the same wallet, bag or in the memory of a cell phone in an easily recognisable format or in a locked car
- Card holder has to destroy the envelope which contained the PIN number and which was sent from bank
- Card holder must not store the PIN number in an easily recognisable form

Supreme Court (majority 3-2)

- In Finnish court practice, the threshold for gross negligence has been high
- Wallet, purse and cell phone are common storing places for payment cards because the card is usually used daily
- Because people nowadays have so many PIN numbers and codes, they cannot be expected to remember them all
- Keeping a written PIN code somewhere close has to be possible

Supreme Court (majority 3-2)

- It did not indicate gross negligence in storing the PIN number letter by itself, and without other factors increasing the risk of misuse
- A had stored the PIN number at his own law firm's office, which was on the second floor of a multi-storey building. The office was not an open public space where an outsider would have had good visual contact and access
- It was coincidental that during A's short absence an outsider had entered the office and managed to find and steal his wallet and PIN number

Supreme Court (majority 3-2)

- Since A was an attorney, he should have acknowledged the risks relating to his course of actions
- A's negligence when leaving the door unlocked and the wallet on the table had been a one-off event. The risk caused by A's actions had been temporary and not very probable
- After assessing these factors as a whole, the Supreme Court held that A's actions did not signify such reproachable disregard for security regulations and for the increased risk of misuse of the card that his negligence should be deemed gross (Vote 3-2)

Comments

- Two members of the Supreme Court would have ordered A to pay the stolen funds in full to the bank, as they regarded A's actions as grossly negligent. Many factors support this viewpoint
- The responsibility to protect card and PIN number is one of the most important responsibilities of a card holder. Despite this, A kept his PIN number in the bank envelope against explicit terms of contract. PIN number could easily have been written on a separate piece of paper, disguised as a phone number, or saved in the memory of a cell phone. However, it was quickly and easily recognised as a PIN number and found by a thief

Comments

- A had kept the PIN number in his workplace, a law firm, which outsiders regularly visited
- Due to his profession, attorney should have understood the risks of leaving the entrance door of his office unlocked and leaving his office while his wallet was left on the table and the PIN number was in the bank envelope in the top drawer of his desk

Comments

- The damage could easily have been avoided by locking the office door or keeping the PIN number in another place or in a format other than the original envelope from the bank
- Although remembering all PIN numbers today may not be a realistic requirement, the destruction of the bank envelope that contains the PIN number is a reasonable requirement

Conclusion

- This case shows how small the difference is between intent and gross negligence
- On the one hand, the requirements for storing of payment cards and their PIN numbers must be such that they prevent misuse but, on the other hand, these means have to be reasonable and practically feasible in everyday life