

70114

Criminal Law and Procedure

Semester 1 of 2014

These are a comprehensive set of notes on the entire course. They may be used as a point of reference in class, especially to clarify concepts or when you need to find that extra detail about the element of a crime quick for those class participation marks.

I have also included an 'Exam' section, which includes a far more concise version of the notes. I would suggest printing them 2 pages to a side on paper to bring into the exam.

Finally, I have included my assignment, of which was graded by the subject coordinator as a 28/30. This was worth 30% of my total mark. Each section of the marking criteria was in the HD boxes and I would suggest you read through it carefully to understand how to write well for a 'criminal law assignment'.

LARCENY

Objectives

- Identify sources of law as they apply to various property offences
- Identify the elements of larceny
- Identify and apply the applicable crime to facts
- Identify relevant law regarding the interpretation of the elements and apply it to the facts

Larceny

- S 117 Crimes Act
 - *Whosoever commits larceny [...] shall, except in cases hereinafter otherwise provided for, be liable to imprisonment for 5 years.*
- It is defined in CL in *Ilich v The Queen (1987)* 162 CLR 110

Actus Reus

- Takes and carries away (asportation)
- Property capable of being stolen
- Property belonging to another
- Without the consent of the owner

Mens Rea

- With intent to permanently deprive the owner
- Without a claim of right made in good faith
- Fraudulently

Actus Reus

Takes and carries away

- P must prove D took and carried away property
- There must be **asportation** – the **physical** removal of the property said to be stolen
- Slightest movement can satisfy ‘carrying off’ requirement
- *R v Lapiere (1784)*
 - Attempting to steal earring, entangled in hair → **satisfied asportation**
- Must be a positive act: *R v Thomas (1953)*

Property capable of being stolen

- As larceny is a crime against possession, property has to be capable of being stolen = tangible + value
 - Physical property → ‘choses in possession’
- Property must be of some value; even slightest value is sufficient: *R v Perry (1845)*
- Illegal property: *Anic (1993)*
- Property must be **moveable** (asportation); not possible to steal land: *R v Young (1947)*
- **S 134** → larceny if involving **valuable securities**, eg. bills of exchange and choses in action
- **BUT** under CL, D cannot steal intangible property: *R v White (1904)*, *Potisk (1973)*
 - Eg. right to recover a debt, known as a chose in action, cannot be stolen
 - Cannot steal patent/copyright
 - Cannot steal land, as it cannot be taken and carried away
- Property must have an owner → things which cannot have an owner/be possessed cannot be stolen eg. wild animals
 - Abandoned property cannot be stolen: *R v Macdonald R v Macdonald [1983]*
 - Abandonment occurs when owner has intentionally given up any interest in the property *Donoghue v Coombe (1987)*
 - Case emphasised distinction btwn a belief that an **owner could not be found** v. a belief that the **goods have been abandoned**

- Abandoned property cannot be stolen
- Only slightest substantiality is necessary, D could be charged with stealing gas under CL: *Low v Blease* (1975)
- Prosecution need not prove which precise objects have been stolen *Russell v Smith* [1957] 3 WLR 515
- Misc:
 - Electricity can be punished under larceny: *Electrical Supply Act 1995 (NSW) s 64*
 - At CL, a corpse is not property and cannot be stolen: *R v Sharpe* (1856)
 - Statutory provisions exist in relation to stealing of animals: ss 126-32, 505, 506, 512

Which belonged to another

- Larceny developed as offence against possession → ownership/control
- Property is not mutually exclusive: *Duyo John Anic v R* [1993] → property can be stolen from more than 1 person
- Possession = physical control + intent to control: *DPP v Brooks* [1974]
- Constructive possession applies: *Ellis v Lawson* (1987)
- **Possession**
 - One has in their possession, to their knowledge + physically in one's custody/under physical control *DPP v Brooks* [1974]
 - **Actual possession**
 - Is where the person has present physical custody of the property *Moors v Burke* (1919)
 - A person has actual possession if:
 - Person intends to possess the property
 - Person had some degree of physical control over the property at some stage
 - The fact accused cannot gain immediate custody does not mean that he is not in possession: *Williams v Douglas* (1949)
 - **No requirement** that person in **possession** is **aware of the existence** of the property → golf club possesses golf balls lost by members, even if does not know how many → club had some degree of physical control over the balls by intention to **exclude others from interfering with the land**: *Hibbert v McKiernan* [1948]
 - D argued that he was not actually taking them from people who have legal possession, because they have been abandoned by their owners
 - The person who owns the land, the property, the golf course, does not even know how many golf balls were lost in its grounds
 - **HELD**: balls existed on property of the golf course, they were still in actual possession → can be in legal possession without even being aware it is there → throw ball over to neighbour's property
 - Not larceny if they keep it, you need a claim of right if u go over the fence and get it back
 - *R v Davies* [1970] has been **reversed by statute: s 94AA** → Person may be charged if they **unaware it is stolen**
 - If at time of purchase, it was already stolen, accused can still be convicted of offence
 - At CL, you can be in possession of property even if possession is unlawful
 - Davies bought a car for \$20 from a stranger, told several days later it was stolen. D wants to keep car, changes the numberplate. An essential ingredient of larceny is the transfer of possession that amounts to trespass. (trespass' **context** is in terms of **felonious intent, fraudulent, w/o consent**)
 - D argued he did not commit trespass, even tho guy he bought it off had committed trespass

- The dishonest conversion later (mens rea to keep), did not taint the fact that his purchase was innocent

○ Constructive possession

- Constructive possession is where the person **does not have actual possession**, but **has the legal right to assume possession whenever that person wishes to do so** → eg. even tho employee has physical custody, employer has is regarded as being in possession by law
- **Ellis v Lawson (1987)**
 - Shop assistant with physical custody of radio gave to friend to sell. Held D guilty of larceny because owner had remained in constructive possession → no consent
 - merely had **custody and control, not legal possession**
- Cases of larceny by servants covered by statutes ss 155, 156

• Control

- Property can be stolen from someone who is merely in control of property, rather than having possession
 - Applies if person in control is not aware of the existence of the property *Hibbert* [1948]
- Control → has 'manual custody': **Moors v Burke (1919)**

• Ownership

- Property can be stolen from an owner who is not in possession/control: *R v Flood* (1869)
- Illegal property: **Anic (1993)**
- An owner of property can be guilty of larceny if the owner takes property from person who is lawfully in possession of it: **R v Matt [1951]**

Without the consent of the owner

- Taking of property must amount to trespass in order for larceny to be committed: **Ellis v Lawson (1987)**
 - Shop assistant allows friend to take radio from shop
- That is, property must have been taken w/o consent of owner **Croton (1967)**
- Trespass defined as **unprivileged interference with a possession of another** → occurs when property taken against the will of the person in possession: **Davies (1970)**
- Staute s 94AA, overrides requirement of a trespassory taking in relation to stolen goods
- If someone on trial for stealing, at time of purchase, it was alrly stolen, A can be convicted of offence

Croton v R (1967) 117 CLR 376

- **ISSUES**: issue of transfer was bank had possession + ownership of the money → Barwick asportation, can it be physically removed
- **FACTS**: joint bank account, each one has authority to deposit/withdraw money. They lived on man's money and used hers to save for holiday in account. He siphoned off money into own account in ANZ. She claims she did not authorise. Charge of larceny
- **HELD**: she never had **possession**, she simply had a **right to call on money**, **bank handed money over with consent, no larceny**
- **APPEAL**: insufficient elements to establish offence
- **CLASS**: chose in action → is a form of property, it is just not tangible property. Money you think you have in ur bank account is not actually ur money, all u have is the right to sue when something goes wrong.
 - Reason why it could not be larcenous, P could not **prove that D took and carried away what was owned by Ms Webstar**, the bank gave it up **voluntarily** → **suggests money in joint account cannot be stolen**
 - A chose in action cannot be stolen (fungible), she did not even have constructive possession as not her account

Facilitation and consent

- Distinction btwn facilitation/consent is question of fact
- **R v Evenett: Ex parte A-G (Qld) [1987]**
 - Held there was no consent where the customer used the card in contravention of the conditions imposed on its use
- **Kennison v Daire (1986) 64 ALR 17**
 - D closed bank account, used old card to withdraw \$200 from ATM (when it was offline), convicted of larceny → reasoned that ATM gave it to D, bank therefore consented → held, although computer permitted withdrawal, not amount to consent
 - The proper inference the court says: it would only consent to withdrawal if there was an account open/valid → 'unreal to infer that the bank consented to the withdrawal by a cardholder whose account had been closed: at 18
 - Where there is consent to the taking, even tho person giving property is mistaken as to recipient, there is no larceny: *Kennison*
 - **HELD:** no consent to person using 'offline' ATM to withdraw money from closed acct
- **R v Turvey [1946]**
 - D suggests to co-worker to steal property from employer, co-conspirator told D's boss, who advised that he hand him the property in order to entrap D. Held that D not guilty of larceny
 - Co-worker willingly gave property to Turvey, he has not rly committed trespass/no consent
 - **RATIO:** where property is delivered personally, or at the owner's direction, the owner cannot deny consent (can be given thru another person)
 - 'there was no evidence [of] asportation' → owner gave them to him
- **Martin v Puttick [1968]**
 - D in grocer, purchases some lamb chops, gave manager her bag to help pack her purchases. Manager notices chops in there, waits for her to leave thru checkout, then detains her.
 - Initial trial, she had no guilty intent at time of taking
 - Prosecution appealed, argued that the consent happened when she left the store not when she was handed the chops. It was at the point that it was just b4 leaving the shop???
 - Taking away only occurs when she walks out of the store without paying.
 - It was held that when Puttick handed her bag to the manager, she remained in physical possession. She had custody, he still had possession. The fact that he allowed her to leave, it was not consent to her giving her the chops, it was facilitating her to leave. He had not given her permission to take them unless on the basis of apprehending her
 - **CROFTS:**
 - When D had handed her shopping bag over to the manager, she did **not give up her constructive possession of the bag**. Thus his handing the loaded bag back to her did not amount to consent, but merely facilitation. Possession did not transfer to manager?
- Difference btwn **Turvey v Puttick**
 - It was less of an entrapment. Manager had to wait for detaining her, he did not encourage it, he just facilitated it. the employer encouraged it, the consent was more obvious/real
 - Him helping pack chops does not equal consent, only facilitation
- **Hayes v Fries (1988)**
 - Legal possession of video camera/items never left owner
 - X left camera and bag in taxi, subsequent passenger D got them from taxi driver, who wrongly thought they were his stuff. D guilty of larceny.
 - Nothing taxi driver said or did altered legal situation, still larceny

Threats

- Consent because of threats can be vitiated: **R v Lovell (1881)**

EXAM VERSION

Exam Response – Basic Structure

- D could be charged with ____ under ____
 - S 117 / s 192E / s 61 / s 59 / s 35 / s 35 / s 61I
 - Larceny / fraud / CA / ABH / reckless GBH / intentional GBH
 - The prosecution bears the onus of proving the elements of the offence/s beyond reasonable doubt (Woolmington)
 - The prosecution is entitled to presume voluntariness. (Falconer)
 - D may seek to rely on the defence
 - D bears the evidentiary burden to raise the 'reasonable possibility' of his defence
- Actus Reus
 - Taking and carrying away
 - How is element satisfied
 - Has element been satisfied
 - Property capable of being stolen
- Mens Rea
 - Mens rea is the fault element of a crime.
 - Is offence basic or specific.
- Temporal Coincidence
 - P must establish temporal contemporaneity of AR and MR (Fagan)
- Defences
 - Self-defence: s 418
 - Intoxication: s 428C / s 428D(b)
 - Necessity: Loughnan
 - Duress: Lawrence
- Conclusion
 - D would likely be found liable for _____
 - If there is any reasonable doubt as to any of the essential elements, the defendant will be acquitted.
- Extension of Crim Liability
 - ABTF – wasn't at scene
 - Innocent agent – innocent person commits AR/someone else has MR
 - P2 – at scene (or close enough), helped out but did not agree to anything
 - JCE – at scene (or close enough), agreed to something
 - Common purpose – agreed to something and something unexpected happened
- Conclusion
 - X is liable under the doctrine of JCE

Assault

Battery

Actus Reus	Mens Rea
<ul style="list-style-type: none"> Application of unlawful contact Without consent of victim 	<ul style="list-style-type: none"> Intentionally apply unlawful contact Recklessly apply unlawful contact

Psychic Assault

Actus Reus	Mens Rea
<ul style="list-style-type: none"> Threatened application of unlawful contact V reasonably apprehends/fears Imminent unlawful contact 	<ul style="list-style-type: none"> Intentionally causing apprehension of imminent unlawful contact Recklessly creating apprehension of imminent unlawful contact

Psychic Assault

Positive act

- An omission to act does not constitute an assault: **Fagan** at 444 per James CJ
- Courts have broad definition of 'positive act'
 - Including silent phone calls: **R v Ireland, R v Burston**
 - Use of words: **Tout v R (1987) 11 NSWLR 251, R v Knight (1988)**

State of mind of the victim

- V must **actually have been put in fear of imminent unlawful contact**: **Barton v Armstrong [1969] 2 NSWLR 451**
 - The focus is on MR to create the apprehension
 - Mostyn** (2004) → husband violently assaulted wife in farmhouse. V ran into shed and hid. D armed with rifle. D called out insulting words 'Come out...I'm hunting' → instills fear of immediate violence
- Thus, V **must be aware of threat of imminent** unlawful contact **Pemble v R (1971)**,
 - If unconscious or asleep, no psychic assault committed
- The** question revolves around **whether D had necessary mens rea** to create an apprehension of imminent unlawful contact > whether V's fear was reasonable
- In opposition to **Barton**, where D knows that V is timid, then unreasonableness of his fear may not prevent conviction: **MacPherson v Brown at 177**
 - Like if I know he's a pussy, and scare him

Does V have to 'fear' immediate unlawful contact or merely 'apprehend' → ie. Does V have to be scared

- In **Brady v Schatzel** (1911) where D was elderly woman who threatened to shoot PO if he set foot on her property, PO gave evidence not frightened of D. QLDSC held irrelevant that V was not frightened, it was sufficient **if he apprehended immediate unlawful violence**

Ability to execute threat

- D need not be able to execute D's threat → essence of **offence is the effect that is created in V's mind**
- Where D points a harmless toy pistol at V, who **believes that the pistol is real**, D can be charged with assault: **R v Everingham (1949) 66 WN (NSW) 122a**

Imminence

- At CL, V must apprehend 'imminent' or 'immediate' unlawful violence: *Zanker v Vartzokas* (1988) 34 A Crim R 11
- Threats of **future violence** should not amount to an assault: *Knight*

Threats made over the telephone

- A silent telephone call can be an act which intentionally causes a person to apprehend immediate physical violence; or causes the victim to suffer a psychological injury: *Ireland* (1997)
- *Barton v Armstrong*
 - Held that D **could be guilty of assault** provided that the threats were **sufficient to ground a fear of imminent violence in V's mind**
- *R v Knight*
 - No assault as none of the receivers of the phone call **felt there was an imminent unlawful contact**
- *Ireland and Burstow* [1997]
 - **HELD**: The making of silent telephone calls caused psychiatric injury to victim was capable of amounting to an assault occasioning ABH where the calls **caused the victim to apprehend an immediate application of force**
 - Offence of GBH could be inflicted **even though no direct body contact**

'Immediate and continuing fear'

- Immediacy can create difficulties in establishing assault
- Courts use concept of 'immediate and continuing fear' → sympathetic to plight of V
- *Zanker v Vartzokas*
 - White J allowed appeal, held that concept of continuing threat be applied: at 14
 - 'was in immediate and continuing fear so long as she was imprisoned'
 - 'defendant's threat of violence was explicit' → "his mate's house"
 - 'fear of relatively immediate imminent violence was instilled in her mind from the moment the words were uttered'
 - 'there was no escape'
 - 'no reasonable possibility of a *novus actus interveniens* to **break casual link btwn threat and expected infliction harm**'

Conditional threats

- Conditional threats are threats where D imposes some condition upon V, which if V **does not meet**, D will inflict some violence
 - Raises issue of **imminence**, as if V met D's condition, no need to apprehend assault
 - Liability is **determined by the requirement of imminent infliction**: *Rozsa v Samuels*
- 1. Looking at the **words** of the threat
- 2. Considering whether D had the **right to impose** the condition
- **Words of the threat**
 - Court looks at words to determine whether there are any grounds for D to fear imminent unlawful contact: *Tuberville v Savage*
- **Does D have a right to impose the condition?**
 - If words suggest imminent violence, courts consider whether D had a right to impose that condition
 - One ground for imposing a condition is in self-defence/robbery

Rozsa v Samuels [1969] SASR 205

- **ISSUES**: Is this an assault, conditional, if you punch me ill stab ya
- **FACTS**: appellant, taxi driver placed his car at front of queue of taxis. Drummond, got out of taxi and remonstrated/argued with the appellant who replied 'I am here and I am staying here'. Drummond replied

he would punch A in the head. A produced table knife which he held in his hand saying 'I will cut you to bits if you try it'. Appellant **made movement to get out**, Drummond slammed door of taxi. Appellant convicted of assault and appealed.

- **HELD:** D **threatened excessive force** which would have precluded reliance upon self-defence. Thus, D was guilty of assault

SAMPLE

ASSIGNMENT EXCERPT

II MENS REA

Mens rea is the fault element of a crime. There are three heads to be considered by the prosecution.¹

Intention to kill

As a subjective test, the prosecution must prove that Dan possessed intent to kill.² From the facts, there is no conclusive evidence to prove this threshold.

Intention to inflict grievous bodily harm

The prosecution must prove that Dan had the necessary intent to inflict GBH. This has been clarified as ‘really serious bodily harm’³ and is conduct which is dangerous in actuality.⁴ This common law definition is supplemented by an inclusive statutory definition.⁵

The prosecution would argue that intent for really serious harm is inferable from Dan’s actions, pointing out how he rushed at Sam and struck him in a vulnerable position at the base of the skull. Dan being a black belt could be seen as an aggravating circumstance,⁶ based on his self-awareness that his blows are more dangerous. His competence in martial arts suggests that it is likely that Dan knew a hit to Sam’s head would cause serious damage due to the concentrated point of impact. The prosecution may also contend that an intention for serious harm may be inferred from how Dan punched Sam while his back was turned; giving Sam no opportunity to react or cushion his fall from being head-first onto the concrete. Overall, these arguments present a strong case by the prosecution that Dan intended to cause ‘really serious bodily harm’.

The defence would foster doubt in the prosecution’s argument, and may dispute whether Dan truly had an intention for ‘serious harm’. They may point out the absence of a weapon and the lack of a follow-up attack to raise doubts about the level of contemplated harm.⁷ They may also choose to bring up the case of *Meyers*,⁸ distinguishing how the cranial injury in *Meyers* was caused by at least 2-3 hits on the head to satisfy ‘really serious bodily harm’, whilst Dan only struck Sam once.

Ultimately, whether Dan had intent to inflict GBH will be a question of fact for the jury.⁹ However the facts weigh towards the prosecution and it is likely that upon application of community standards, a jury would find that Dan did have intent for GBH.

¹ *Crimes Act 1900* (NSW) s 18 (NSW).

² *R v Schonewille* [1998] 2 VR 625.

³ *Crimes Act 1900* (NSW) s 4 includes ‘any permanent or serious disfiguring of the person’. Also, see *R v Perks* (1986) 20 A Crim R 201; *R v Ashman* (1858) 1 FF 88; *Pemble v The Queen* (1971) 124 CLR 107.

⁴ *R v Ashman* (1858) 1 FF 88; *R v Perks* (1986) 20 A Crim R 201.

⁵ *Crimes Act 1900* (NSW) s 4 (b)(c).

⁶ *R v Lambert* (2000) 111 A Crim R 564.

⁷ *R v Perks* (1986) 20 A Crim R 201.

⁸ *Meyers v R* (1997) 147 ALR 440.

⁹ *Rhodes v R* (1984) 14 A Crim R 124.