

70114- Criminal Law & Procedure Exam Notes

Contents

Common Law Larceny:	2
Fraud:	9
Assault:	12
Sexual Assault:	18
Extending Criminal Liability:	21
Defences:	29
Mental Illness:	29
Automatism:	31
Intoxication:	31
Self Defence:	32
Necessity:	33
Duress:	34

Criminal Law and Procedure Exam Notes:

Common Law Larceny:

- s 117 Crimes Act 1900
- *Ilich v R* (1987) 162 CLR 110 – Wilson and Dawson JJ:
- 'At common law, larceny is committed by a person who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.'

<i>Actus Reus</i>	<i>Mens Rea</i>
1. Taking and carrying away	1. Intention to permanently deprive at the time of taking
1. Property capable of being stolen	2. Without a belief in a claim of right
2. Belonging to another	3. Fraud/dishonesty
3. Without consent	
<i>Actus Reus and Mens Rea coinciding – temporal coincidence</i>	

Actus Reus:

1. Taking and carrying away (asportation)

- Must be physical movement of the property
- The slightest movement will satisfy – *R v Lapier* (1784)
- *Wallis v Lane* (1964) – 'it would appear that any movement of goods with an intent to steal them is sufficient to constitute asportation ... it is sufficient asportation if there is a removal of the property from the spot where it was originally placed with an intent to steal' Herring CJ
- There must be a positive act on the part of D – *R v Thomas* (1953)

2. Property capable of being stolen

- Property (s 4 Crimes Act 1900 NSW) – 'includes every description of real and personal property ... and includes not only property originally in the possession or under control of any person, but also any property into or for which the same may have been converted or exchanged, and everything acquired by such conversion or exchange, whether immediately or otherwise.'
- Committed against real and tangible property
- Slightest value will be sufficient (*R v Perry* 1845)
- Piece of paper is of sufficient value (*R v Daley* 1879)
- Property must be moveable; it is not possible to steal land (*R v Young* 1947)
- Tangible property does not include information (*R v Lloyd* 1985)

- Does include gas (*R v White* 1853)
- Choses in action cannot be stolen – e.g. removing money from a bank account (*Croton v R* 1967) (*R v Potisk* 1973)
- Statute has altered this position – now possible to be punished for larceny of valuable securities e.g. bills of exchange and choses in action s 134
- Fungibles – objects that are interchangeable, focus is on specific object rather than an objective equivalence
- Electricity is punishable larceny – Electricity Supply Act 1995 (NSW) s 64
- Possible to charge D with stealing a portion of a larger whole (*Russell v Smith* 1957)
- Property must have an owner

3. In possession of another

- Property may belong to more than one person (*Duyo John Anic v R* 1993)
- Ownership, possession and control are not mutually exclusive (*Anic v R* 1993)
- Possession (ordinary meaning) – ‘one has in one’s possession whatever it is, to one’s knowledge, physically in one’s custody or under one’s physical control’ (*DPP v Brooks* 1974)
- **Actual possession** – where one person has physical custody of the property or has it in such a place that he or she has the right or power to place his or her hands upon it and take custody of it (*R v Dib* 1991)
- No requirement that the person in possession is aware of the property (*Hibbert v McKiernan* 1948)
- ‘...Every householder or occupier of land means or intends to exclude thieves and wrongdoers from the property occupied by him, and this confers on him a special property in goods found on his land sufficient to support an indictment if the goods are taken therefrom, not under a claim of right, but with a felonious intent’ (*Hibbert v McKiernan* 1948)
- Person may be in possession notwithstanding that their possession is unlawful (*R v Davies* 1970) – reversed by statute s94AA
- s93J Crimes Act 1900 (NSW) ‘ where on the trial of a person for any offence which includes the stealing of any property it appears that the property was, at the time when it was taken by the accused, already out of the possession of the owner by reason of its having been previously stolen, the accused may be convicted of the offence charged notwithstanding that it is not proved that the taking by him or her amounted to an interference with the right of possession of, or a trespass against, the owner’
- **Constructive possession** – where the person does not have actual possession but has the legal right to assume possession whenever that person wishes to do so (*Ellis v Lawson* 1987)

Ellis v Lawson 1987

Facts: A shop assistant with physical custody over a radio consented to her friend D taking the radio knowing the owner did not consent to this, and in the absence of payment.

HELD: D guilty of larceny because the owner had remained in constructive possession of the goods and had not consented to D's removal of the property

- **Control** – property can be stolen from someone who is merely in control of the property, rather than having possession
- 'A person is in control of property where he or she has 'manual custody' of it, or has it 'where he alone has the exclusive right or power to place his hands on it, and so have manual custody when he wishes' (*Moors v Burke* 1919)
- Control not amounting to possession may be sufficient
- *Anic, Stylianaou and Suleyman v R* 1993 – 'larceny was always conceived as an offence against possession... it follows therefore that a man can be guilty of larceny by stealing a thing from another who had himself stolen that thing from someone else, for a their holds possession of what he has stolen' – Bollen J
- Property can be stolen from an owner who is not in possession or control of property – e.g. larceny by finding (*R v Flood* 1869)
- Property can also be stolen from owners unaware they are in possession (*Hibbert v McKiernan* 1948)
- A person lawfully in possession cannot commit larceny (*Ilich v R* 1986)
- An owner of property can be guilty of larceny if he or she takes property from the person in lawful possession of it (*Rose v Matt* 1951) (*R v Cameron* 1924)
- Abandonment – cannot be the subject of larceny
- Defined as the intentional giving up of ownership and possession (*Hibbert v McKeirnan* 1948)
- Will not be lightly inferred (*Donaghue v Coombe* 1987)

Croton v R (1967) – High Court of Australia

Facts: The accused, a married man, and a divorced woman formed an association. By arrangement, they lived on his wages and banked her wages into an account in their joint names upon which either could operate. The accused withdrew certain moneys from this account without the authority of knowledge of the woman and deposited these into two accounts in his own name. Convicted of larceny, on appeal to the High Court
Barwick CJ:

4. Without the consent of the person in possession

- Must be a trespassory taking (*Ellis v Lawson* 1987)
- Trespass – unprivileged interference with a possession of another
- Must be taken without the consent of the person in possession (*R v Croton* 1967)
- Where the property is taken against the will of the person in possession (*Davies v R* 1970)

- Consent due to threats or intimidation may be vitiated (*R v Lovell* 1881)
- Facilitation and consent – where an owner facilitates or allows property to be taken away will not necessarily amount to consent - question of fact

Kennison v Daire (1986) – High Court of Australia

Facts: The accused opened an Easybank account and obtained a card to operate the ATM together with a PIN. The accused subsequently close the account but retained the card. He then used the card to operate an ATM, which paid out \$200. Convicted of larceny of that sum, on appeal to the High Court

HELD: Even though the computer program had permitted the withdrawal, it did not amount to consent by the bank. The machine was not authorized to give the banks consent.

R v Turvey (1946)

Facts: D planned to steal property from his employer. D's co-conspirator told D's boss, who advised the co-conspirator to go along with the plot and hand the property over to D to entrap him

HELD: D not guilty of larceny. 'He did not carry away the goods against the will of the owner but because the owner was willing that he should have the goods and gave them to him'. Where the property is delivered personally, or at the owner's discretion, the owner cannot deny consent.

Martin v Puttick (1968)

Facts: D stole some chops at the supermarket and put them in her shopping bag. She purchased other goods and then gave the manager her bag to help pack the purchases. After she had gone through the checkout point he arrested her for stealing the chops.

HELD: D had stolen the chops. When D 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

❖ NOTE: The difference between mere facilitation and consent will be a matter of degree

- Threats – consent due to threats may be vitiated (*R v Lovell* 1881)
- **Consent due to mistake**
 1. Unilateral – D obtains property due to a mistake, and D is aware of the mistake at the time
 2. Mutual – D obtains property due to a mistake and only subsequently becomes aware of the mistake (D will lack mens rea at the time of taking)
- Historical Approach – D was found guilty of larceny on the basis that consent was vitiated due to mistake

R v Middleton (1873)

Facts: D was given extra money at the post office by mistake, D was aware of the mistake

HELD: D was guilty of larceny as the mistake vitiated consent

R v Ashwell (1885)

Facts: D asked his friend to lend him a shilling. His friend mistakenly handed over a sovereign. D only discovered the mistake sometime later.

HELD: D was found guilty on the basis that mistake vitiated consent. To circumvent the lack of mens rea at the time of taking, the Court held that D was not in possession of the coin until he knew what it was.

- Contemporary approach:

R v Potisk (1973) – persuasive

Facts: A bank teller applied the wrong exchange rate to D's traveller's cheques. D took the extra money but explained that he had not realised the mistake until he had left the bank

HELD: D not guilty of larceny. Where V consented to handing over property due to a mistake, this will not amount to larceny because the handing over was with consent. D should not be guilty upon formation of a subsequent guilty intention

Ilich v R (1987) – binding

Facts: D was overpaid by an employer for work. He had not returned the excess but had put it aside while deciding what to do with it.

HELD: Conviction quashed. The mistaken payment had not prevented the property passing to D. D cannot be charged with subsequent fraudulent conversion, as D cannot take or convert what is already his. Where D obtains property due to a mistake, and D is aware of the mistake at the time (unilateral), or subsequently becomes aware of the mistake (mutual) and then converts the property, D can be charged with larceny only where the mistake is so fundamental as to prevent ownership from passing.

- Types of fundamental mistakes (*Ilich v R 1987*)
 1. Mistake as to the identity of the person whom the property is given (*Middleton 1873*)
 2. Mistake as to the identity of that which is handed over (*Ashwell 1885*)
 3. Where an excess quantity of goods is delivered, ownership of the excess has not passed to the receiver (*Russell v Smith 1957*)
- **Summary:**
 - Where V has consented to the handing over of property due to a mistake, there is not trespassory taking – *actus reus* for larceny is missing
 - Where there has been a mutual mistake there will be no *mens rea* at the time of taking
- Potisk

- Mistaken consent is still consent – *actus reus* missing
- D will not be found guilty of larceny where the property was handed over with consent due to mistake
- llich
- Where property received due to mistaken consent, will not amount to larceny unless V has made a fundamental mistake as to:
 - Identity of the person
 - Identity of the things
 - Excess quantity of goods
- Where fundamental mistake has been made and D only subsequently aware of the error and decides to keep the property apply Riley Principle
- Riley Principle (*R v Riley* 1853) – Once a fundamental error has been established, so that the consent is vitiated the original taking will be trespassory. The original trespassory taking will extend unless and until D forms the necessary *mens rea*

Mens Rea:

1. Intention to permanently deprive:

- *R v Foster* (1967)
- Conditional return – s 118 'where, on trial of a person for larceny, it appears that the accused has appropriated the property in question to the accused's own use, or for the accused's own benefit, or that of another, but intended eventually to restore the same, or in the case of money to return an equivalent amount, such person shall not be reason only thereof entitled to an acquittal.
- Where D takes the property, an intention to return the property is not a defence to the charge of larceny if D has appropriated the property for D's own use or benefit, or for another's use or benefit
- The focus is on exercising ownership, rather than the reasonableness of the intention to return.

R v Foster 1967

Facts: D borrowed V's pistol to show to his parents. V complained to the police, and D was questioned on the same day. He claimed that he had intended to return the property that same evening

HELD: D's actions did not amount to larceny under common law and under s118.

- Pawning of another's property would amount to exercising ownership thus satisfying s118.
- Barwick CJ – 'if the intention of the taker is to exercise ownership of the goods, to deal with them as his own, an intention to later restore the property in the goods will not prevent the original taking from being larcenous' (*Foster* at 121)
- Altered Condition – where D intends to return the property to the owner, but in a substantially altered condition or with reduced value, larceny can be charged (*R v Duru* 1973)

- Joyriding is the unauthorized 'borrowing' of a car with the intention of returning or abandoning it.
- Section 154A does not require permanent intent to deprive in relation

R v Bailey 1924

Facts: D had taken a car and used all the petrol

HELD: the change in the property must be substantial, and not that which would occur by normal use of the property. D could not be convicted of stealing the car, but only the petrol (likely to be covered by s118) as driving a car could be regarded as exercising ownership

to the illegal use of motor vehicle, only lack of consent.

- Fungibles – objects that are interchangeable e.g. money, eggs, sugar
- The focus is on the specific object, rather than any object or equivalence
- Where D takes money from the till, and intends to return the at money the next day with a reasonable expectation of doing so, D can be charged with larceny (*R v Cockburn 1968*)
- D intends to permanently deprive the owner of those particular notes, intending only to return money of equal value
- If D had taken an antique chair, with the intention of returning the chair the next day, then the focus would be on whether or not D 'appropriated' the chair (*R v Foster 1967* applying s118)

2. Without a claim of right made in good faith

- Must be a legal claim of right
- A claim of moral right to the property will be insufficient to negative a charge of larceny (*Harris v Harrison 1963*)
- Mistake may negative charges of larceny if the mistake prevented D from forming the necessary *mens rea* for the offence (*R v Lopatta 1983*)
- Belief does not have to be reasonable (*R v Lopatta 1983, R v Nundah 1916*)
- D cannot argue a legal claim of right if D took more than he or she believed him or herself entitled to (*Astor v Hayes 1988*)
- D need only have a belief in a legal right to the property, rather than a belief in the legal right to employ the means in question to recover it (*R v Langham 1984, R v Love 1989*)

3. Fraudulently

- Where D acts with the intention to deprive permanently and without a bona fide claim of right, D will act fraudulently
- Dishonesty a question of fact for the jury
- Ordinary meaning of dishonesty
- Apply an ordinary person test
- (*R v Feely 1973*)
- Dishonesty defined s4B as 'dishonest according to the standards of ordinary people and known by the defendant to be dishonest to the standards of ordinary people'

Temporal Coincidence

- Generally, for D to be guilty of larceny, D must have had a fraudulent intention at the time of taking (*R v Thurbon* 1849)
- Exceptions: an honest but trespassory taking, and the development of a subsequent fraudulent intent, may amount to larceny – Riley Principle
- Riley Principle (continuing trespass) – where D innocently acquires property and later forms the intention to permanently deprive the owner of the property

R v Buttle (1960) – applied Riley Principle

Facts: D was driving a flock of sheep along a road when some lambs joined the flock. D knew that the lambs were not his own, but drove them to his house anyway, later killing and skinning the lambs

HELD: D lacked the necessary *mens rea* at the time of taking. However, the original taking was trespassory (without the consent of the owner). Thus, the subsequent formation of fraudulent intent allowed a charge of larceny to be laid.

R v Davies (1970) – did not apply Riley Principle

Facts: D purchased a car, not realizing it was stolen. When he discovered it was stolen, he decided to keep the car anyway.

HELD: if D's original taking had been trespassory (without the consent of the person in possession) then the Riley Principle would apply and D would be guilty of larceny.

As D had the consent of the person in possession, he had not committed a trespass and the doctrine of continuing trespass could not apply, D would not be guilty of larceny

- Riley Principle important in larceny by finding cases
- If D later forms the necessary *mens rea* for larceny, Riley Principle will apply so that D may be guilty of larceny as the original taking was trespassory
- Mistaken consent (if *Ilich* applies)
- If D is given property as a result of mistaken identity by V, this will be an original trespassory taking because the mistake as to identity was fundamental and thus vitiated consent.
- If D forms the intention to keep or use (under s118) the property, then the Riley Principle will apply.