

CRIMINAL LAW AND PROCEDURE

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LARCENY

Introduction

- Arguably, _____ could be charged with larceny.
- To successfully convict _____ of larceny, the prosecution must prove beyond a reasonable doubt *Woolmington v DPP (1935) AC 462* that he, **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 (AR)**, at the time of such taking, to **permanently deprive (MR)** the owner thereof (*Ilich v R (1987) 162 CLR 110* (as per *Wilson & Dawson JJ at 123*).
- When doing so, the prosecution is entitled to presume voluntariness (*Fagan*).
- Similarly, temporal coincidence must be established; that is, that the relevant MR and AR elements coincided in such a manner that _____ had a *fraudulent intent at the time of taking* (*R v Thurbon (1849) 1 Den 387*). Under the doctrine of ‘continuing trespass’/ ‘**the Riley principle**’ where an original taking is trespassory though honest, a subsequent fraudulent intention will **ground a charge of larceny**: *R v Riley (1853) 169 ER 674; Eng R*

ACTUS REUS

1. TOOK AND CARRIED AWAY (ASPORTATION)

Must be shown that ASPORTATION occurred

- There must be a **POSITIVE ACT** on the part of the defendant – *R v Thomas (1935) 47 CR App R 169*
 - I. Therefore, The mere *passive retention of property* is NOT SUFFICIENT for larceny.
- **STANDARD**: The **SLIGHTEST MOVEMENT** is enough to satisfy the ‘carrying off’ requirement, but there must be some movement - (*R v Lapier (1784) 168 ER 263* ; *Wallis v Lane* [1964] VR 239)
 - I. When attempting to do so, a very low threshold is established- with *R v Lapier* illustrating that when attempting to steal an earring, and moving it to the point where the earring became entangled in the owner’s hair is **sufficient asportation** (*R v Lapier (1784) 168 ER 263* ; *Wallis v Lane* [1964] VR 239)

2. PROPERTY CAPABLE OF BEING STOLEN

- Crime Act 1900 (NSW S4) **DEFINITION OF PROPERTY**: “Property” includes every description of real and personal property; money, valuable securities, debts, and legacies; and all deeds and instruments relating to, or evidencing the title or right to any property, or giving a right to recover or receive any money or goods”
- Must **have value**; even the **slightest** is sufficient (R v Perry 1845)
- Must be moveable – land and permanent fixtures cannot be stolen – R v Young (1947) 48 SR (NSW) 46
- Must have an owner → **Abandoned property CANNOT be stolen** – R v MacDonald [1983] 1 NWLR 729
 - Abandonment occurs when the owner has *intentionally given up any interest* in the property- Donoghue v Coombe (1987) 45 SAASE 330
 - The South Australia Supreme Court in Donoghue v Coombe (1987) 45 SASR 330 emphasised the distinction between a belief that an owner *could not be found* and a belief that *the goods have been abandoned*
- **Wild animals also can't be** (see below) - Wild animals, in their natural state (*ferae naturae*) are not in any person's possession; therefore, cannot be taken – (Swans; Blade v Higgs)
- **TANGIBLE/INTANGIBLE- S134 CA**- expanded definition to include physical money (s4), valuable securities, deeds for sale of land etc.
- However, choses in action (Croton 1967), cheques, intellectual property, data, can still NOT be stolen

3. WHICH BELONGED TO ANOTHER

I. ACTUAL POSSESSION

- Actual possession is where the person has PRESENT PHYSICAL CUSTODY of it- Moors v Burke (1919) 26 CLR 265
- May be established if:
 - a) The person **intends to possess the property**; and:
 - b) **The person has some degree of physical control** over the property at some stage
 - under Moors v Burke (1919) 26 CLR 265 at [274], ‘→ physical control’ is equated with ‘manual custody’ and is understood as the ‘*where he alone has the exclusive right or power to place his hands on it, and so have manual custody where he wishes*’

II. CONSTRUCTIVE POSSESSION

- Constructive possession is where the person does not have actual possession, **but DOES HAVE the LEGAL RIGHT** to assume possession- Ellis v Lawson (1987) 33 A Crim R 69
 - a. If property **not with anyone**, it belongs to the **last person** in possession of it (Hibbert)
 - b. If property **on enclosed land**, it is **constructively** in possession **of owner of land** (e.g. Hibbert v McKiernan)
- Is primarily applied to **employer/employee relations** - Even if an employee has physical custody over the property, the employer has a legal right- i.e. in Ellis v Lawson (1987)
 - **Facts**- a shop assistant had physical custody over a radio consented to her friend, D, taking the radio knowing that the owner did not consent to this, and in the absence of payment.
 - **Decision**- It was held that D was guilty of larceny.
 - This was because the owner remained in constructive possession of the goods and

and not consented to D's removal of the property.

4. WITHOUT CONSENT OF THE OWNER

5. To find the defendant guilty of larceny, the prosecution must prove that the property was taken *THE WILL and WITHOUT THE CONSENT* of the person in possession; rendering it **TRESPASS** *R v Davies* [1970] VR 27.

FACILITATION

- Therefore, *mere facilitation*- IS MOST conducive to forming larceny – no intent i.e. ATM, or bank teller making a *mistake*, it is larceny
- **owner facilitates, or allows, property to be taken away, that *will not necessarily amount to consent* – if there is NO CONSENT /IS JUST FACILITATION then there IS LARCENY**
- **The distinction between facilitation and consent appears to be a *QUESTION OF FACT* – and appears to have little relation to the blameworthiness of the defendant as shown in following cases**
 - **CONSENT:** *R v Turvey* [1946] 2 All ER 60
 - **FACILITATION -** *Martin v Puttick* [1968] 2 QB 82 ; *Kennison v Daire* (1986) 64 LALR 17 → **his handing the loaded bag back to her did not amount to consent, but instead, to mere facilitation**
- *Kennison v Daire* (1986) 64 LALR 17 – **ATM can be a conduit of FACILITATION, not consent**
 - I. **Facts:** the defendant had closed his bank account. He used his old card to withdraw \$200 from an automatic teller machine.
 - II. **Ratio:** ***Held that even though the computer program had permitted the withdrawal this did not amount to consent by the bank.*** ; The machine could not give the bank's consent; not guilty of larceny
- *R v Turvey* [1946] 2 All ER 60 – **CONSENT – employer consented; WAS NOT 'against his will' of intent to steal and allowed it happen; defendant guilty of larceny**
 - **Facts:** the defendant planned to steal property from his employer. His co-conspirator told the defendant's boss who advised the co-conspirator to go along with the plot and hand over the property to the defendant; entrapping him.
 - **Ruling:** it was held that the defendant had not carried the goods away against the will of the owner; **was not guilty of larceny**
- *Martin v Puttick* [1968] 2 QB 82 - **FACILITATION – she did not give up her constructive possession to the manager; handed bag over- mere facilitation**
 - **Facts:** In that in this case, the defendant stole some chops at a supermarket and put them in her shopping bag. She purchased other goods and then gave the manager her back to help her

pack her purchases. After she had gone through the checkout point, he arrested her for stealing the chops.

- **Ruling she did not give over her constructive possession to the manager, and thus returning the bag was not consent;; amounted to mere facilitation**

CONSENT BY MISTAKE

- **UNILATERAL MISTAKE**- *The accused* is aware of the mistake at the time of asportation/ time of taking – Is therefore *easy to establish fraudulent intent at time of taking/* temporal coincidence to that extent
- **MULTILATERAL MISTAKE**- *Neither party* aware of mistake. The accused becomes aware of the mistake *after* asportation
 - . This **makes establishing temporal coincidence difficult**, as the accused will lack the MR of ‘at the time of taking’
 - Under *Ashwell*, **this issue was resolved**: the court held the time of ‘taking’ to occur when the accused realises the mistake.
 - Under the *Riley Principle*, if you form a fraudulent intent after initially having a trespassory, through innocent one, then you are guilty of larceny
→ So, if you
- However, the issue of consent by mistake makes it difficult for the prosecution to prove that a crucial actus reus element of larceny; that is, that the property was taken AGAINST the victim’s WILL, so as to fully satisfy the trespassory requirement of *R v Daire*. t. This is because the original owner never realizes the mistake (be it unilateral or multilateral), and is thus consenting, or not having the property taken against their will

FUNDAMENTAL MISTAKE CATEGORIES – X 3 *ILICH*

- *** To redress this concern, in *R v Ilich* (1987) 162 CLR 110, the court outlined three categories of **FUNDAMENTAL MISTAKES**- which, when committed, negate consent; rendering the defendant guilty of larceny.
- However, if the mistake made is *not* one of the following 3 fundamental mistakes, then it will not amount to larceny. c
 - The **identity of the person** of the person to whom the property was given
 - The **identity of the things/ that which was handed over** – i.e in *Ashwell* (1985)
 - Where an **excess** quantity of goods is delivered, ownership of the excess has NOT passed on to the receiver- *Russel v Smith* [1957] 2 All ER 796
 - ***money that has entered into currency is an **EXCEPTION** to this ***
- TC AND CONSENT BY MISTAKE (FUNDAMENTAL, as per *Illich*): Additionally, the *Riley principle* may apply in mistaken consent cases if *Illich* applies.
 - If the defendant is given cloth as a result of mistaken identity by the victim, this will be an original trespassory taking because the mistake as to identity was fundamental and thus vitiated consent
- If the defendant later forms the intention to keep or to use (under s118) the property, then the *Riley principle* will apply to ground

MENS REA

5. With an intention to permanently deprive the owner

- To find the defendant guilty of larceny, the prosecution must show that the defendant **intends permanently to deprive** the owner of the property permanently – R v Foster (1967) 118 CLR 117; Lowe.
- When attempting to do so, the **MAIN TEST** under CA s118 that the prosecution must consider is whether the accused treated the property as if it were one's own (Foster; Holloway; Phillips & Strong; Lowe v Hooker).
 - Consequently, it must be shown that the defendant dealt with the property in such a way that the prior possessor's property rights were repudiated, or USURPED; demanding that a **CONVERSION** occur (Foster).

Borrowing NOT SUFFICIENT to constitute larceny -

- Traditionally, under the Crimes Act (1900) (NSW) s118- an intent to return the property is 'no defence'
 - A person who appropriates property cannot be excused of larceny simply because *he or she intends to eventually return* the property.
- However, under the case of R v Foster (1967) 118 CLR – the scope of s118 limited to contextual circumstances where the defendant has appropriated THE property with 'the intention to take ownership of the goods; to deal with them as his own';
- Therefore, if the intention to deprive for **MERELY BORROW limited time**– no larceny (Foster)
 - Exception – car 'joyriding' with max penalty of 2 years' imprisonment irrespective of value of motor vehicle (s 154A); as this does not require permanent intent to deprive in relation to the illegal use of motor vehicles, ONLY a LACK of CONSENT

CONDITIONAL RETURN

- Consequently, situations where the defendant merely has the intention to 'deprive the true owner of possession for a limited time...merely CONDITIONALLY borrowing' are not subject to this clause.
- .

****there must be some conversion for s118 to apply (Foster). Consequently, different ways to satisfy this test of what constitutes larceny/appropriating as one's own all involve a degree of CONVERSION:

- If the conduct of the accused goes *beyond* mere borrowing and is in disregard of the rights of the owner, then this may amount to an intent to permanently deprive (Foster).
 - If an intent to return is *conditional*, that will also be sufficient: Lowe.
- Return goods for money (**clear conversion**) (Lowe v Hooker) or pawn goods – satisfies test
- Return goods after it has been exhausted (Beecham)
- **ALTERED CONDITION**: Alteration of goods so they **no longer exist** – satisfies test Crimes Act 1900 (NSW), s118 "Where the defendant intends to return the property to the owner, but in a substantially altered condition, larceny can be charged – R v Duu (1973) 58 Cr App R 151

ALTERATION OF PROPERTY

- Similarly, the alteration of property presents an alternate ground upon which prosecution may establish the defendant's intent to permanently deprive

- . Crimes Act 1900 (NSW), s118 “Where the defendant intends to return the property to the owner, but in a substantially altered condition, larceny can be charged – R v Duu (1973) 58 Cr App R 151
- i.e. if its so altered that it ‘no longer exists’ - R v Duu (1973) 58 Cr App R 151

6. Without a claim of right

- ❖ A claim of right is a belief that a person is lawfully entitled to possess property in the possession of another (Walden v Hensler).

ELEMENTS OF A CLAIM OF RIGHT Wood CJ - R v Fuge [2001]NSWCCA 208,

- A claim of right must also be
 - one of **LEGAL ENTITLEMENT**, not moral (Berhard) and be *distinguished* from a moral claim of right.
 - A moral claim of right will be insufficient – Harris v Harrison [1963] Crim LR 497
 - Must be distinguished from a belief in the legal right to employ the means in question to recover it- R v Love (1989) 17 NSWLR 606 ; Langham (184) 36 SASR 48
 -
 - must be **GENUINELY/HONESTLY** held – Fuge
 - need **NOT BE reasonable** but a colourable pretence is insufficient (Lopatta)
 - must be legally recognized- **recognised under CL or Statute**, not customary law (Re DPP Ref No 1 of 1999)³⁷

7. And fraudulently

- FRAUDULENTLY’S meaning is ‘interchangeable’ with ‘dishonesty’ – R v Glenister [1980] 2 NSWLR 597
 - DISHONESTY is understood as being a word of ‘ordinary use’ – Crimes Act (1900)(NSW) s4b; R v Feely [1973] 1 All ER 341 -
 - **GOSH TEST**- Is considered using an using is a **HYBRID**
 - **Objective:** ‘conduct was contrary to the according to the standards of ordinary decent people
 - **Subjective:** ...accused **need to have known** he was acting dishonestly’ R v Gosh (1982) 1 All ER 341
 - a. Whether the accused acted dishonestly is a QUESTION OF FACT for the JURY of R v Feely [1973] 1 All ER 341
 - Unessecary for the judge to explain to the jury what it means
 - There is **NO SUBJECTIVE REQUIREMENT** that the defendant must have realized that the act was dishonest by the objective standards/ those of a reasonable person (Peters v R (1998) 192

TEMPORAL COINCIDENCE

- Generally, the accused must have had a fraudulent intent *at the time of taking*: R v Thurbon (1849) 1 Den 387.
- However, there are a **NUMBER OF EXCEPTIONS** to this requirement
 - a. A charge of larceny as a bailee requires that the defendant formed the intent subsequently to taking possession of the goods
 - b. An honest *but trespassory* taking and the development of a subsequent fraudulent intent, may amount to larceny under the Riley principle/doctrine of continuing trespass
- Similarly, under the **RILEY PRINCIPLE**, or the doctrine of 'continuing trespass', if the accused innocently acquires property and later forms the intent to permanently deprive the owner of property a charge of larceny could be grounded
 - In other words, where an original taking is trespassory *though honest*, a subsequent fraudulent intention will ground a charge of larceny: R v Riley (1853) 169 ER 674; Eng R 23.
 - If the defendant *later forms* the necessary MR for larceny, the Riley principle will apply so that the defendant may be guilty of larceny, as the original taking was trespassory
- Additionally, the Riley principle may apply in mistaken consent cases if Ilich applies.
 - If the defendant is given cloth as a result of mistaken identity by the victim, this will be an original trespassory taking because the mistake as to identity was fundamental and thus vitiated consent
 - If the defendant later forms the intention to keep or to use (under s118) the property, then the Riley principle will apply to ground a charge in larceny

ACTUS REUS

1.AR1: property must be taken AND carried away (asportation)

- For larceny to be committed, the prosecution must prove that **ASPORTATION occurred**; that is, the physical removal of the property said to be stolen