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1. LARCENY

DEFINE

COMMON LAW

Illich v R (1987), Wilson & Dawson JJ at 123

'Larceny is committed...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...permanently to deprive the owner thereof'

STATUTE

Crimes Act 1900 NSW pt IV div 5

SECTION	PROVISION	DETAILS
116	All larcenies to be of SAME NATURE	Every larceny, WHATEVER THE VALUE of the property stolen, shall be deemed to be of the SAME NATURE
117	PUNISHMENT for larceny	Whosoever commits larceny, or any indictable offence by this act made punishable like larceny, shall...be liable for IMPRISONMENT FOR FIVE YEARS
118	INTENT to RETURN property	Where...it appears that the accused ... INTENDED EVENTUALLY TO RESTORE the SAME, or...to return an equivalent amount (of money)...shall NOT... be entitled to acquittal

ELEMENTS OF THE OFFENCE

PROSECUTION MUST PROVE BEYOND REASONABLE DOUBT

ACTUS REUS	MENS REA
<ol style="list-style-type: none">1. Taking and CARRYING AWAY (asportation)2. Property CAPABLE of being stole3. BELONGING to another4. WITHOUT consent OR claim of right	<ol style="list-style-type: none">1. Intention to PERMANENTLY DEPRIVE at the time of taking2. WITHOUT a belief in a claim of right3. Fraudulently/dishonestly
TEMPORAL COINCIDENCE: AR & MR COINCIDING	

(A) ACTUS REUS

TAKING AND CARRYING AWAY

ASPORTATION: P must prove that D's movement of object constituted ASPORTATION *Potisk (1973)*

POSTITIVE ACT: Cannot be an omission *Thomas 1953*

MINIMAL MOVEMENT: slightest movement will be sufficient *Potisk (1973)*

PROPERTY CAPABLE OF BEING STOLEN

PROPERTY MUST BE:

- TANGIBLE (physical)
'Larceny can only be committed of property which is capable of physical possession and removal'
Croton (1967); Potisk (1973)
- OF VALUE
Perry (1845); R v Morris (1849)

LOOPHOLES

PREVIOUSLY STOLEN PROPERTY

Crimes Act s 94AA

IF ALREADY stolen when A stole it, A may be convicted of larceny despite being proved that second larceny by A amounted to an interference with the right to possession of, or a trespass against the owner (paraphrased)

I.e. A must have KNOWLEDGE that goods were stolen *R v Davies [1970]*

UNIQUE BUT CAPABLE OF BEING STOLEN

- Valuable securities e.g. bills of exchange (*Crimes Act 1900 s 134*)
- Electricity (*Electricity Supply Act 1995 s 64*)
- Documents of land titled (*Crimes Act 1900 s 134*)
- Portions of a larger whole rather than merely precise objects (*Russel v Smith [1957] All ER*)
- Fixtures e.g. soil, things forming out of land (*Billing v Pill [1954]*)

INCAPABLE OF BEING STOLEN

- Choice in action (intangible property e.g. debt, patents, copyrights, trademarks)
- Land *Young (1947)*
- Corpse *R v Sharpe (1856) ER*
- Wild animals *Case of Swans (1591)*
- Intentionally abandoned property *Donaghue v Coombe (1987)*

BELONGING TO ANOTHER

Extends to POSSESSION, OWNERSHIP AND CONTROL

POSSESSION

Define: Custody/control recognised and protected by law

- May legally possess even if NOT true OWNER
- May legally possess even if NOT IN PHYSICAL CONTROL
Anic, Stylianou and Suleyman (1993)

ACTUAL POSSESSION

Define: Person has present physical custody

- Intention to possess
- Has degree of physical control over property
Moors v Burke (1919)

CONSTRUCTIVE POSSESSION

Define: Doesn't have physical custody, but has legal right to assume possession

- E.g. money in bank account

OWNERSHIP AND CONTROL

Larceny when property stolen from someone who is in mere control of property, rather than possession
Moors v Burke (1919)

WITHOUT CONSENT

D must have taken V's property WITHOUT CONSENT

- Evidence of non-consent is not necessary *Middleton (1873)*; *Kennison v Daire (1986)*

FACILITATION

When an owner facilitates/allows property to be taken away, this does not amount to consent

Facilitation is dealt with: QUESTION OF FACT

- o Facilitation and consent *Kennison v Daire*
- o Consent due to a mistake = VOID *Illich v R (1987)*

CONSENT DUE TO MISTAKE

Whether D should be liable for doing nothing more than taking advantage of V's mistake

(1) Unilateral mistake

Define: D IMMEDIATELY realises a mistake and FORMED dishonest intention to take advantage of it

- *Middleton 1873*
- Proof Issue: property being handed over WITHOUT CONSENT

(2) Mutual mistake

Define: Both make a mistake and defendant realises LATER and FORMS dishonest intention to take advantage of it

- *Ashwell (1885)*; *Potisk (1973)*
- Proof Issue: Mistake has resulted in property being handed over with consent + temporal coincidence issue (overcome by principle of continuing trespass – original trespassory taking will extend unless and until D forms the necessary MR to establish temporal coincidence)

Fundamental mistake: *Illich v R (1987)*

1. Mistaken IDENTITY of person *Middleton 1873*
2. Mistaken as to EXCESSIVE QUANTITY of property *Russel v Smith (1958)*
3. IDENTITY of PROPERTY – mistakes the actual NATURE of property *Ashwell (1885)*

(B) MENS REA

INTENTION TO PERMANENTLY DEPRIVE

Larceny NOT committed UNLESS at TIME of TAKING, D INTENDED to deprive owner PERMANENTLY

Includes: from *Holloway (1848)*

- Intention to permanently deprive, Intention to return conditionally, Intention to return but in a substantially altered condition or reduced value, Intention to return the equivalent amount/value (fungibles)

CONDITIONAL RETURN

S 118 *Crimes Act 1900*

Intention to return the property is not a defence to the charge of larceny if the defendant has appropriated the property for [his/her] own use or benefit, or for another's use or benefit.

ALTERED CONDITION

Where D intends to return property, but in a substantially altered or condition with reduced value = larceny
Use property for their own benefit/benefit of another

FUNGIBLES

Fungible = interchangeable in everyday life e.g. money

D will be guilty of larceny when they do not return the exact object, only that of equivalent value
Cockburn (1968)

WITHOUT BELIEF IN A CLAIM OF RIGHT

Mens rea NOT present if D GENUINELY believes they were asserting a LAWFUL CLAIM OF RIGHT

Can arise from:

- (1) Mistake of fact: D mistakenly believes that object belonged to them
- (2) Mistake of law: D believed that under rules of civil law, the title had passed to them – may negate charge of larceny if mistake prevented D from forming MR

CLAIM OF RIGHT

Define: Whether D honestly held the belief

- Only needed to have belief in LEGAL RIGHT, rather than legal right to employ the means in question to recover it *Langham (1984)*
- Must be GENUINE
- Does not have to be REASONABLE
- Claim of MORAL RIGHT is INSUFFICIENT *Harris v Harrison (1963)*
- Must extend to entirety of property that should be claimed
- MUST be BONA FIDE *Lopatta (1963)*

BURDEN OF PROOF

Evidentiary burden: Rests of defendant

- REASONABLE POSSIBILITY
- If this is proved, LEGAL BURDEN shifts back to PROSECUTION to DISPROVE the defence BRD

THEFT AS AN ACCESSORY

Define: Claim of right IS NOT YOURS but that of P1

- Can belong to the PRINCIPLE in the offence OR extend to ACCESSORY
- *Fuge (2001)*

FRAUDULENTLY OR DISHONESTLY

Determined by JURY

- What D did to be considered dishonesty based on ORDINARY COMMUNITY STANDARDS *Feely (1973)*
- D did not have to SUBJECTIVELY realise that their taking was dishonesty by this standard *Peters (1998)*
- Dishonesty is given its ordinary meaning

TEST FOR FRAUDULENCE/DISHONESTY

Per R v Ghosh (1982)

- (1) OBJECTIVE: Jury considers if D's conduct was dishonest according to the 'ordinary standards of reasonable and decent people'
- (2) SUBJECTIVE: D subjectively realised that their conduct was dishonest by those standards

(C) TEMPORAL COINCIDENCE

Accused MUST have had a fraudulent intent at time of taking *R v Thurbon (1849)*

HOWEVER, under doctrine of 'continuing trespass', where an original taking is trespassory through honest, a subsequent fraudulent interaction will ground a charge of larceny *R v Riley (1853)*

CASES

LARCENY: ACTUS REUS

R v Croton (1967) – PHYSICAL, TANGIBLE PROPERTY IN POSSESSION OF ANOTHER

Facts

- Croton (A) married, became engaged to Webster (divorcee)
- Joint bank account with authority for each to operate account individually
- Croton withdrew all money from joint acc and deposited into his own account

First instance

- Charged + convicted of larceny

Appeal

- Acquitted
 - o Because joint acc, Webster was not in EXCLUSIVE POSSESSION of money
-

Anic, Stylianou and Suleyman (1993) – PHYSICAL, TANGIBLE PROPERTY IN POSSESSION OF ANOTHER

Facts

- Ds break into house in mistaken belief that it contained cannabis
- Burglary with intent to steal + assault

First instance

- Convicted of burglary

Appeal

- Basis for appeal: not possible to steal property from a person who had it unlawfully in their possession
 - Held
 - o Drugs were TANGIBLE, PHYSICAL property having SOME value
 - o Possession was sufficient to found charges
-

R v Davies [1970] – PREVIOUSLY STOLEN PROPERTY

Facts

- Stolen car bought + kept by Davies

Legal decision + reasoning

- Acquitted
 - o The legislature ended up reversing this under s 154 A *Crimes Act* where property previously stolen may allow A to be convicted to larceny
-

Kennison v Daire (1986) – FACILITATION AND CONSENT

Facts

- Closed bank account, withdrew money, later used card to withdraw \$200 + argued that bank was meant to give it to him, this was not found as the ATM was programed to do this

Legal decision

- Charged + convicted larceny
 - o ATM was merely facilitating, NOT CONSENTING
 - o Inference:
 - Machine cannot give consent
 - Machine programming CANNOT amount to consent
 - Bank can only consent to withdrawal if he had an account with the bank
-

Illich v R (1987) – FACILITATION AND CONSENT – FUNDAMENTAL MISTAKE

Facts

- A overpaid by employer (was aware) and A saved excess cash

Legal decision + reasoning

- Acquittal
 - o Mistake had not prevented the property – possession shifted when employee gave salary/wages
 - o Whilst act fell into fundamental mistake category (mistake of quantity handed over), it wasn't fundamental enough to constitute possession
-

Potisk (1973) – FACILITATION AND CONSENT – FUNDAMENTAL MISTAKE

Facts

- D retained money originally obtained by mistake

Legal decision + reasoning

- Acquitted
 - o Intention without asportation was not considered sufficient
 - o Mistaken consent is still consent thus an essential part of AR not made out
-

LARCENY: MENS REA

Holloway (1848) – INTENTION TO RETURN

Facts

- Holloway (A) employed at tannery, paid according to skills dressed
- A took co-workers skins to get more money
- Returned the skins eventually

Legal decision + reasoning

- Acquitted
 - o Did not have intention to PERMANENTLY deprive, but intention to RETURN it
 - o Temporary asportation
 - o S 118: intention to return is still not a defence
-

Foster (1967) – INTENTION TO RETURN + BORROWING

Facts

- Foster (A) Living in Goulburn with a man called Baker
- When Baker goes to Canberra, A takes Baker's gun to "show parents"
- No consent

Appeal

- Basis for appeal: going to return it
- Held + acquitted
 - o If deprivation is only for a limited time, then larceny isn't made out
 - o Depends on the intention
 - If it is to exercise ownership over goods, then it is larceny

Legacy

- Legal distinction between BORROWING and INTENTION TO APPROPRIATE
 - S 118
 - o Foster LIMITS application of s 118
-

Cockburn (1968) – FUNGIBLES

Legal decision + reasoning

- Held that D committed larceny as he intended to permanently deprive V of particular notes, only intending to return money of equal value