

Criminal Law

Mini Exam Notes

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2 Basic bits

2.1 Burden of proof

The burden of proof falls to the prosecution in proving all charges beyond reasonable doubt *Woolmington v Director of Public Prosecutions* [1935].

With the defenses, the burden shifts to the defense, where they have to raise it as an issue (i.e. for provocation or insanity) or prove that it is reasonable, and the Prosecution must negative it beyond all reasonable doubt.

2.2 Doli Incapax

- If the defendant is below the age of ten, they cannot form the *mens rea* (*Children (Criminal Proceedings) Act 1987 (NSW) s5*)
- Between the ages of ten and 14, there is a rebuttable presumption of *doli incapax* (*R (a child) v Whitty (1993)*)
- Any defendant under the age of 17 may be tried in a childrens court (*Children's Court Act 1987 (NSW)*)

3 Larceny

3.1 Statute:

S117 Crimes Act 1900

Whosoever commits larceny [...] shall, except in cases hereinafter otherwise provided for, be liable to imprisonment for 5 years.

This leaves the definition of larceny to the common law, only stipulating the punishment.

3.2 Common Law

Ilich v R (1987)

At common law, larceny is committed by a person who:

Acts Reus

- Takes and carries away
- Anything capable of being stolen (property; owned by another)
- Without the consent of the owner

Mens Rea

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

With temporal coincidence

3.2.1 Takes and carries away

- Asportation → physical removal of property (even the smallest movement will suffice) (Lapier (1784))[trying to remove earring, earring became entangled; **held**: this satisfied asportation]
- Must be a positive act (Thomas (1953))

3.2.2 Property capable of being stolen

- **Property must be tangible** (Perry (1845))
- **Property must have value** (even tiny value is sufficient) (R v Morris (1840))
- **Intangible goods**, patents, copyrights and trademarks cannot be stolen
- **Land** cannot be stolen; squatters prosecuted for trespass under **Enclosed Lands Protection Act 1901 (NSW) s4**

Crimes Act 1900 (NSW), s4

"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;

and includes not only property originally in the possession or under the 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.

3.2.3 In someone else's possession

Property must be in **someone else's possession** to be able to be stolen (DPP v Brooks (1974))[one has in one's possession whatever it is, to one's **knowledge, physically in one's custody** and under one's control].

- **Actual Possession**
 - immediate and direct physical control over property, with intention (knowledge) to possess (Moors v Burke)
 - person does not have to know of property to own it (Hibbert v McKiernan (1948))[golf course with golf balls, place/number unknown; **held**: possession was satisfied]
- **Constructive Possession** (Ellis v Lawson) [Shop assistant, friend stole radio; **held**: owner still had constructive possession of the radio as he had not consented to the radio's removal]
 - having the power and intention to have and control property but without direct control or actual presence upon it (Ellis v Lawson)
- **Control** satisfies "belonging" (Harding (1929))
 - "Manual custody or exclusive right to place his hands on it [...] have manual custody whenever he wishes (Moors v Burke (1919))
- **Abandoned property** cannot be stolen (Donogue v Coombe (1987))
- If property is not in someone's possession, it can still be stolen if it is **owned** (Flood)

Property may be owned by more than one person, since control, ownership and possession are not mutually exclusive (Anic (1993)).

3.2.4 Without the consent of the person in possession

To satisfy larceny, property must have been taken w/o consent (Croton (1967))/against the will of the person in possession (Davies (1970)).

Thus, consent nullifies this offense.

3.2.4.1 Facilitation

=/ consent, question of fact to differentiate between them.

Kennison v Daire (1986) [Facilitation]

Guy took money out of an ATM by a card that was invalid.

ATM "facilitated" this transaction

Held: this did not amount to consent by the bank; the machine could not consent for the bank.

Turvey (1946) [Consent]

Guy planned on stealing

Boss found out

Boss allowed him to steal to entrap him

Held: He did not carry goods away against the will of the owner

Martin v Puttick (1968) [Facilitation]

Chick stole, put stuff in shopping bag and gave stuff to manager, who returned it to her

Held: she did not give over her constructive possession to the manager, and thus returning the bag was not consent

3.2.4.2 Threats

Consent because of threats can be nullified (Lovell (1881)).

3.2.4.3 Consent due to a mistake

Question is: Should D be **held** criminally liable for V's mistake?

- Unilateral mistake
 - D is aware of the mistake at the time
- Mutual mistake
 - D subsequently becomes aware

Potisk (1973)

Not binding, merely "cogent"

Bank teller used the wrong exchange rate, gave too much money

Bank teller knew how much money he had given

D did not realize until after he had left (unilateral mistake)

Held: Where V consented to handing over property due to a mistake, =/ larceny, because handing over was with consent

Ilich (1987) [**authority**]

Persuasive, since high court decision based on SA law which does not require absence of consent

D was overpaid by employer

D put overpaid amount aside

Consent had not been induced by fraud; mistake had not prevented property passing to D

Held: unilateral or mutual mistake only negate consent if the mistake is so fundamental so as to prevent ownership from passing; can occur three ways:

- **Mistake as to the identity of the person to whom property was given** (as per Middleton (1873) [post office, unilateral mistake, mistaken identity])
- **Mistake as to the identity of what is being handed over** (as per Ashwell (1885) [sovereign rather than shilling given, was larceny])
- **Excess quantity of goods** is delivered, ownership of excess not transferred (Russell v Smith (1958))

Ilich on **money**:

- Excluded from fundamental mistake; mistake of quantity is not a fundamental mistake

3.2.5 Intent to permanently deprive

D must have an intention to permanently deprive (Foster (1967)).

3.2.5.1 Conditional return

E.g. took, pawned, re-bought after pay; does not nullify mens rea

Crimes Act 1900 (NSW), s118 "Intent to return property no defence"

Where, on the trial of a person for larceny, It appears that the accused 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 by reason only thereof be entitled to acquittal.**

However, this is limited by Foster (1967) to cases where D appropriated property "with an **intention to take ownership** of the goods, to deal with them as his own"; **not** where D has **merely "the intention to deprive the true owner of the possession for a limited time"**.

Foster (1967)

D borrowed V's pistol to show parents

Said he was to return pistol

Did not exercise ownership (like "conversion")

Held: =/ larceny

3.2.5.2 Altered Condition

When **condition of good is altered**, there is larceny (Duru (1973)) [was going to return checks after they had been banked, was still larcenous as their value was drastically reduced]; this alteration of goods must be **drastic**, not part of normal use of the item (Bailey (1924)) [using petrol when borrowing a car held not to be larcenous].

3.2.5.3 Joyriding

Under s154A, joyriding does not require intention to permanently deprive; only requiring lack of consent to charge.

3.2.5.4 Fungibles/Commodities

Replacing with "like"/"equivalent" objects can still be larcenous (as the object, rather than the value, is the subject of the law); in cases of borrowing from a till, larceny can be charged since exact notes are not to be returned (Cockburn (1986)).

If V knows of the transaction, such as a loan, actus reus is not satisfied, since he would intend to transfer ownership.

3.2.6 Without a claim of right made in good faith

A legal claim of right negates any mens rea (Fuge (2001)); a moral right is insufficient (Harris v Harrison (1963)).

Mistake of law (i.e. D thought that he had a legal right to the good) prevents mens rea from forming (Lopatta (1983)) [was owed money, stole oil worth the same amount; **held**: prosecution had to negate beyond reasonable doubt the possibility of D honestly believing he had a claim of right, the reasonableness of this belief is irrelevant].

Claim of right must be to **full extent of the property taken** (i.e. not a defense if you took more than you were owed) (Astor v Hayes (1988)) [claim of right to handbag, not contents].

3.2.7 Fraudulently

= dishonesty; question of fact (Feely (1973))UK (Peters (1998))*as applied in NSW* "intentional creation of a situation [where D,...]knowing that he has no right to deprive [does so]".

3.2.8 Temporal Coincidence

Normal temporal coincidence (Thurdbon (1849)) extended by the Riley (1853) principle: where the original taking is innocent, and D later forms intent to permanently deprive, Larceny is a continuing trespass, and temporal coincide is satisfied. This principle is limited by the doctrine of continuing trespass, that is, the original taking must be trespassory for the Riley principle to extend this trespass to allow for extended temporal coincidence.

Butle (1960) [farmer herds in extra sheep, later kills them, originally lacked mens rea, but original act was trespassory, thus subsequent formation of mens rea satisfied temporal coincidence].

Davies (1970) [D bought car, car was stolen, D didn't know originally. D found out, kept the car. Held: would have been trespass, but D had the consent of the person in possession].

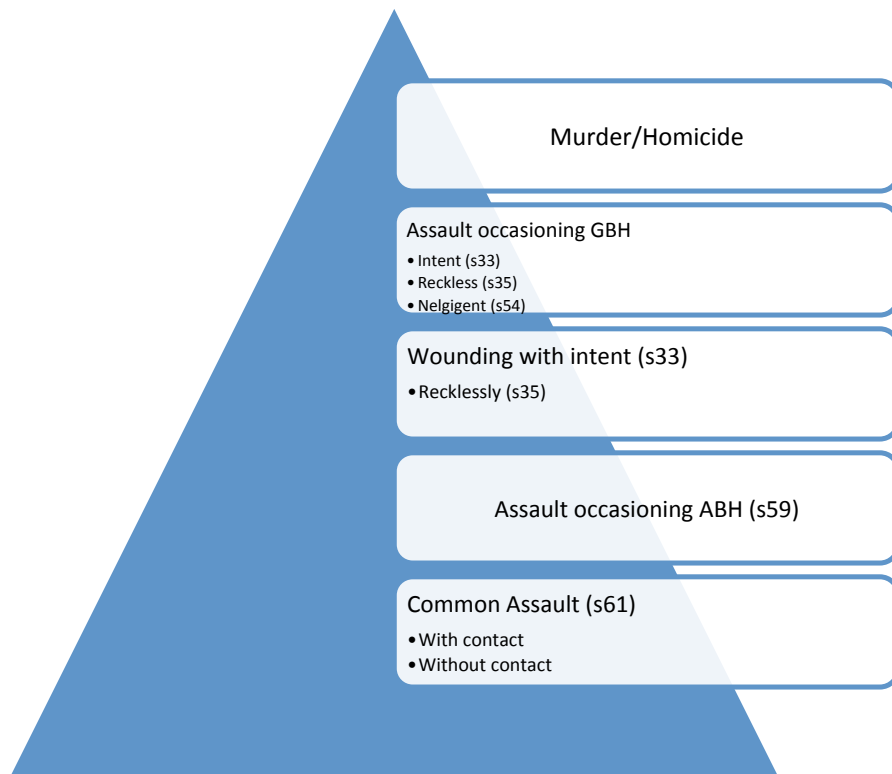
4 Larceny by finding

If D picks up property with the intent of finding the owner, the taking is not trespassory MacDonald (1983). D must make a reasonable effort to find the owner (MacDonald (1983)) [Camera, not asking enough questions] (Thurbon (1849)) [found banknote, did not know owner, later found out the owner and did not return].

D can, after trying to find V and failing, later appropriate the property (Matthews (1873)).

5 Assault

Classified by level of injury (trifling harm (s61), ABH (s59), wounding (s33, 35), GBH (s33, 35)).



5.1 Types of injury

- Actual bodily harm (R v Donovan [1934])
 - Any hurt or injury calculated to interfere with the health or comfort of the victim
 - More than transient and trifling
- Wounding (R v Devine (1982))
 - 2 layers of skin, i.e. penetrates the epidermis and reaches the dermis
- Grievous bodily harm
 - Bodily harm of a really serious kind (DPP v Smith (1961))
 - In s4 (definitions)
 - Destroying a foetus (outside of medicine)
 - Permanent or serious disfiguring
 - Any grievous bodily disease

5.2 Common Assault (s61)

5.2.1 Battery

Fagan (1969)

- Actus reus
 - Application of unlawful contact
 - w/o consent of V
- Mens rea
 - Intention to apply unlawful contact; OR,
 - Recklessly applies unlawful contact (MacPherson v Brown (1975))
 - Test for recklessness is "possibility rather than probability"
 - Test is subjective)
- Temporal Coincidence

5.2.2 Assault

Darby v DPP (2004)

- Actus reus
 - Threatened application of unlawful contact
 - Omission cannot be an assault
 - V apprehends a threat of unlawful contact
 - V apprehends that the unlawful contact is imminent (Zanker)
 - Threat of future violence is generally not assault (Knight (1988))
 - Telephone + (Ireland)
 - Conditional threats
 - Does D have a right to impose the condition (Rosza v Samuels)
 - Words of the threat (did D wish to impose apprehension) (Tuberville v Savage)
- Mens Rea
 - Intentionally creating an apprehension of imminent unlawful contact; OR,
 - Recklessly does so (as per battery)
- Temporal coincidence

Ability to execute threat is irrelevant, just V's perception of D's ability to execute threat (Everingham (1949)).

Zanker (1988)

In car

Refused sex

"my friend will fix you up"

Could not leave care

Held: immediate and continuing fear

5.3 Aggravated Assaults

NB: the precedent in Royall allows us to extend psychic assaults to these.

5.3.1 Aggravated assault with actual bodily harm (s59)

- There is no mens rea requirement to want to cause ABH, merely to assault
- Ss(1) assaults ... w ABH
- Ss(2) in company

5.3.2 Reckless GBH or wounding (s35)

- Ss(1) reckless GBH in company
- Ss(2) reckless GBH
- Ss(3) Reckless wounding in company
- Ss(4) Reckless wounding

5.3.3 Wounding or GBH with intent (s33)

Additional mens rea requirement

- Ss(1) Wound or GBH with intent to GBH is prosecuted under this section

5.3.4 Negligent GBH (s54)

Must be by unlawful or negligent act (s54); negligence is proved to the criminal standard (a high degree of negligence) (Newman (1948)).

5.3.5 Assault w intent to kill (s27)

Whosoever administers to, or causes to be taken by, any person any poison, or other destructive thing, or by any means wounds, or causes grievous bodily harm to any person, with intent in any such case to commit murder, shall be liable to imprisonment for 25 years.

5.4 Mitigating factors

5.4.1 Lack of hostility does not negate mens rea

Boughey (1986)

Doctor strangled his wife for sexual arousal

No hostility

Held: hostility is not necessary to establish mens-rea

5.4.2 Consent to assault

Consent (express or implied (Collins v Wilcock (1984))) nullifies assault (Clarence (1888)); commonplace actions (pat on the back, etc) have implied consent (Boughey (1986)).

V cannot consent to ABH or higher (Brown (1994)); unless in exception (boxing, surgery, “manly pastimes”).

- With regards to sport, the harm must be within the recognized reasonable rules of the game, and in a sporting spirit (i.e. not in anger) (Pallante v Stadiums)

5.4.3 Physical assault during consensual sex

Protected by Human Rights (Sexual Conduct) Act 1994 (s4(1)).