Answers to Exam questions

Chapter 9

Question 1

Richard's aunt gives him a cheque for £10,000 which she tells him is to help him get a start in life. She tells him to "sort out his finances" and put the money towards a deposit on a house. Richard, who is heavily in debt, banks the cheque and then uses £6,000 of the money to pay off his credit cards.

While Richard's flatmate is on holiday, Richard borrows his car to go on a weekend driving break around the English countryside. In the past, his flatmate had allowed Richard to take the car out when he wanted to, but Richard had not asked his flatmate on this occasion. He also takes his flatmate's "pay as you go" mobile phone. Over the weekend he uses the phone, spending £10 worth of credit. At the end of the weekend, Richard fills up the car with petrol and leaves £10 in his flatmate's room to replace the phone credit he had used.

Discuss Richard's liability for theft.

Bullets

- This question requires discussion and application of the offence of theft. Theft is defined under s.1(1) of the Theft Act 1968 as the dishonest appropriation of property belonging to another with the intention to permanently deprive the other of it. You might identify the specific *actus reus* and *mens rea* elements of the offence.

- **£6,000**: Appropriation is defined under s.3 as an assumption of the rights of the owner. According to *Morris* (1983) only one single right of the owner needs to be assumed. Richard has assumed the right of possession of the cheque for £10,000 by banking it. Consent is not relevant to appropriation: *Lawrence* and *Gomez*. You should also consider the fact that this may have been a gift from his aunt and a gift may be appropriated according to *Hinks*. So, although his aunt has consented to Richard banking the cheque and may have given it to him as a gift, Richard has still appropriated it. However, this is not a dishonest action (yet), so is unlikely to amount to theft.

- There is a later appropriation of £6,000 of the money given to him by his aunt. Under s.3(1) there may be a later appropriation of property which a person has come by innocently. The later appropriation occurs when Richard uses the £6,000 to pay off credit card bills.

- The £6,000 is property as it is a thing in action: s.4.

- Much will depend upon the purpose for which the money was given to Richard. S.5(3) could be applied in respect of the element of belonging to another. The cheque for £10,000 was given to Richard for a particular purpose. If there was a legal obligation on Richard to deal with the property in a particular way, such as to use the money as a deposit on a house, then it will still belong to the aunt. However, as the aunt told Richard to use the money to "sort out his finances", it could be argued that this is exactly what he has done with the £6,000.

- Dishonesty is not defined in the Theft Act 1968, but s.2(1) does provide a partial definition of the negative aspect. S.2(1) may apply if Richard honestly believed that he had a right in law to use the £6,000 in that way (s.2(1)(a)) or if he honestly believed that his aunt would have consented to him using the money to pay his credit card bills (s.2(1)(b)). He could legitimately argue the latter in light of the fact that she gave him the money to "sort out his finances". If s.2(1) applies, Richard is not dishonest and not guilty of theft.

- If s.2(1) does not apply, the test for dishonesty under *Ivey* should be applied (as confirmed in *Barton*): would ordinary decent people find D's conduct dishonest? This should be considered in the context of D's knowledge and honest belief. You should accurately state this test and apply it.

- If the £6,000 belongs to the aunt, does Richard intend to permanently deprive the aunt of the money?

- **Car**: Richard has assumed a single right of the owner of the car by borrowing it and so has appropriated it: s.3 and *Morris*. Consent is irrelevant to appropriation (although it may be relevant to dishonesty below): *Lawrence* and *Gomez*. The car is property under s.4 and it belongs to the flatmate: s.5.

- S.2(1)(b) may apply here if Richard honestly believed that his flatmate would have consented to him borrowing the car. If s.2(1) does not apply, the *Ivey* test would be applied. You are expected to apply this test.

- Richard is unlikely to have intended to permanently deprive the flatmate of the car by borrowing it. Under s.6, borrowing or lending property may amount to an intention to permanently deprive. In *Fernandes* (1996), the Court of Appeal held that the important question in s.6(1) is whether the defendant treated the property as his own to dispose of, regardless of the other's rights. Applying *Lloyd*, Richard would need to intend to return the thing in such as changed state that all its goodness or virtue has gone (per Lord Lane CJ). This is not the case here.

- However, a wider approach was taken in *DPP v Lavender* in which it was stated that merely dealing with property amounted to a disposal of it. On this interpretation, there could be a theft. It is unlikely that theft would be charged here as there is a specific offence which deals with "joyriding" under s.12(1), Theft Act 1968 (taking a vehicle without owner's consent).

- **Petrol**: Richard has assumed a single right of the owner of the petrol by using it and so has appropriated it: s.3 and *Morris*. The petrol is property under s.4 and it belongs to his flatmate under s.5. The same reasoning will apply in respect of the car in determining whether Richard was dishonest. Richard has intended to permanently deprive his flatmate of the petrol. Refilling the tank does not negate this as he has put different petrol (different property) into the tank: apply *Velumyl*.

- **Mobile**: Richard assumes a single right of the owner by borrowing the mobile phone: s.3 and *Morris*. The phone is property belonging to another. It is unlikely that s.2(1) applies here. You should apply the test for dishonesty under *Ivey*. The same reasoning applies to the issue of intention to permanently deprive as applied to the car.

- **£10 credit**: Richard appropriates the £10 credit by spending it: s.3 and *Morris*. It is property (albeit a thing in action) which belongs to another. S.2(1) probably does not apply. Apply *Ivey*. He does intend to permanently deprive and leaving £10 in his flatmate's room does not negate this: apply *Velumyl*.

Question 2

The scope of the *actus reus* of theft is currently so wide that it renders the *mens rea* elements pivotal in assessing the liability of a defendant for theft.

To what extent do you agree with the statement above? Support your answer with case law.

Bullets

- You should recognise that this is a question relating to the relationship between the *actus reus* and the *mens rea* of theft. Theft is defined under the Theft Act 1968, s.1(1) – dishonest appropriation of property belonging to another with the intention to permanently deprive the other of it. The *AR* is appropriating property belonging to another. The *MR* is dishonesty and intention to permanently deprive.

- *Morris* and Gomez are cases relating to the *actus reus*, and more particularly, appropriation. You should explain the definition of appropriation under s.3 and that

the ratio from *Morris* (that consent is relevant to appropriation) is now no longer good law. You should recognise that the quote requires discussion of the *obiter* statement in *Morris* (that only one single right needs to be appropriated), which is still good law and explain that the case of *Gomez* clarified the law, bringing it back into line with *Lawrence* (i.e., that consent is irrelevant).

- A good answer would also refer to the cases relating to gifts, most notably, *Hinks* (and *Mazo* – as long as you recognise that this no longer reflects the law). Despite the decision in Gomez, in the cases of Gallasso (1993) and Mazo (1996), it was held that it was not possible to steal a valid gift, even where D had deceived or taken advantage of the victim. However, in *Hopkins and Kendrick* (1997), the CA upheld a conviction for theft of a gift, causing another conflict in the law. The position was clarified in according to the HL in *Hinks* (2000), it is possible to be guilty of stealing a gift as consent is irrelevant to appropriation. A good answer would recognise that the *AR* of theft is now very widely defined, and as such, liability is heavily dependent on the *MR* of D.

- The effect of these decisions is that the *actus reus* of theft is less important, as appropriation can occur by simply touching property irrespective of whether or not one has consent to touch it. For example, when you pick up an item in the supermarket and put it into your trolley, you have appropriated it. You have assumed a single right of the owner (the right to touch the property and possess it), and even though you have implied consent to touch the goods, you have appropriated them. The goods are property and they still belong to the supermarket, as you have not yet paid for them. Consequently, the *actus reus* of theft is satisfied. It would be completely ridiculous if such a situation could amount to theft, and so it is that the *mens rea* of theft becomes far more important.

- Property is also widely defined under s.4 as including money, real or personal property, things in action and other intangible property. Confidential information does not amount to property and cannot be stolen: *Oxford v Moss* (1978). Electricity does not amount to property: *Low v Blease* (1975). The common law has long held that there is no property in a corpse: *Kelly* (1998). You might also explain the meaning of "things in action" and other intangible property and give examples, such as a debt, shares, copyright, etc.

- Belonging to another is another wide concept. It is defined under s.5 and involves possession and control, not just ownership. It is possible to steal your own property: *Turner (No.2)* (1971). It is very difficult to abandon property, but property which has been abandoned cannot be stolen. An act excluding others from property is sufficient to ensure that property is not abandoned and it belongs to the person in control of it: *Woodman* (1974). Leaving rubbish out for collection is not an act of abandonment: *Williams v Phillips*. Belonging to another includes having a proprietary

right or interest over the property and equitable rights. You might also consider s.5(3) which deals with property received for a particular purpose, or s.5(4) which deals with property obtained by mistake.

- You should explore the *mens rea* elements of theft, focusing on dishonesty and the problems surrounding this element. You should consider the Supreme Court decision in *Ivey v Genting Casinos* and the fact that this obiter decision is preferred over *Ghosh* now (as per the Court of Appeal's decision in *Barton*). You should also comment on whether or not it is good that the offence of theft is now so heavily reliant on the element of dishonesty.

- Dishonesty is not defined in the TA, but s.2(1) does provide a partial definition of the negative aspect. It provides that D is not dishonest if he honestly believes he has a right in law to the property (s.2(1)(a)), or he honestly believes he would have had the consent of the owner (s.2(1)(b)), or he honestly believed that the owner could not be found if all reasonable steps were taken (s.2(1)(c)). You should recognise that D does not actually need to take those reasonable steps.

- The test for dishonesty is found in *Ivey* (2017) and is objectively assessed. The test asks whether ordinary decent people would find the defendant's conduct dishonest. The defendant's conduct must be considered objectively, but in the context of the defendant's knowledge or honest belief as to the facts affecting his conduct. A good answer might discuss the *Ghosh* test and the pitfalls of a purely objective or purely subjective test and might recognise the inconsistency which might result from the application of the *Ghosh* test.

- Intention to permanently deprive is not defined under the TA and is given its ordinary meaning. S.6 deals with temporary deprivation where D treats the thing as his own to dispose of regardless of the owner's rights. A borrowing or lending may amount to such an intention where it is equivalent to an outright taking or disposal. According to *Lavender*, "to dispose of" means "to deal with", thus dealing with property could be sufficient. This is a wide approach. By contrast, in *Lloyd* (1985), Lord Lane CJ gave this element a very narrow interpretation, stating that what was required was an intention to return the thing in such a changed state that it can be said that all its goodness or virtue has gone. Consequently, authorities conflict in this respect.

- You should conclude by addressing the question again. The *actus reus* elements are so widely defined that liability for theft with hinge on the *mens rea* elements. Thus, the definition and application of the law on dishonesty is crucial.