

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN



No S141 of 2018

Paul Olaf Grajewski
Appellant

AND

The Director of Public Prosecutions (NSW)
Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

PART I: PUBLICATION

1. This outline is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED

2. One of the various ways in which a person may damage property, for the purposes of s 195(1) of the *Crimes Act 1900* (NSW), is by physical interference with property that causes the property to be inoperable or that impairs the property's functioning: CCA at [62]-[63] (AB 54-55).
3. Where both physical interference and inoperability or impairment (including of a temporary kind) of function caused by that interference are made out, the question of whether damage has been occasioned to the property in question is one of fact and degree for the tribunal of fact.

Concept of physical interference

4. As applied by the CCA, the concept of physical interference requires something to be done to the subject property by physical means or some physical engagement with the property: see, for example, CCA at [62] (AB 54).

5. It is the combination of physical interference with a resulting inoperability or impairment of the property's function that is capable of supporting a finding that the property has been damaged.

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Physical interference and impairment of function in this case

6. The appellant's actions in climbing and locking on to Ship Loader 2 and his position once attached to the Ship Loader caused the machine to become inoperable and to continue to be inoperable for some two hours until the appellant was detached and removed from the Ship Loader: Stated Case Facts 7 and 8 (AB 27); CCA at [64] (AB 55).
7. Consistent with the Court Attendance Notice (AB 5), the appellant damaged property by causing the temporary impairment of the working of the Ship Loader during that period.

10 Concept of physical derangement

8. Existing authority does not support or utilise a concept of "physical derangement" as a guiding criterion for a determination of whether a person does or does not damage property: cf AS [33]-[34].
9. Key examples of cases which cannot be adequately explained on the basis of some 'physical derangement' caused to the relevant property include:
 - i. *R v Fisher* (1865) LR 1 CCR 7
 - ii. *R v Heyne* (NSW Court of Criminal Appeal, unreported, 18 September 1998)
 - iii. *R v Henderson and Battley* (Court of Appeal, unreported, 29 November 1984)
 - iv. *Griffiths v Morgan* (Supreme Court of Tasmania, unreported, 13 October 1972)
 - 20 v. *Hardman v Chief Constable of Avon & Somerset* [1986] Crim LR 330
 - vi. *R v Fiak* [2005] EWCA Crim 2381

Appropriateness of respondent's construction

10. At least for the purposes of the present case, it is necessary to draw a line when determining the content of the word "damages" in s 195(1) of the *Crimes Act*.
11. A requirement that there be some physical interference with property is consistent with the text and purpose of the provision and with existing authority: CCA at 62 (AB 54). Further, by comparison, the concept of 'physical derangement' involves unsatisfactory and fine distinctions: see CCA at [63] (AB 54).

Context and purpose of s 195(1)

12. The context and purpose of s 195(1) of the *Crimes Act*, informed by its legislative history, supports the respondent's position that the notion of injury or damage to property is a broad one. Injury or damage to property has not required – and in the respondent's submission does not require – proof of some physical derangement of the property in question: see RS [12]-[25].
13. The penal nature of the provision is a relevant consideration, but is not determinative of the question of statutory construction in this case.

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David Kell SC

12 October 2018



Eleanor Jones