IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S141 of 2018

BETWEEN:

Paul Olaf Grajewski
Appellant

and

10 **The Director of Public Prosecutions (NSW)**
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: Issues

20 2. Did the New South Wales Court of Criminal Appeal (**CCA**)[1] err in construing "destroys or damages property" in s 195(1) of the *Crimes Act 1900* (NSW) to include physical interference with property which causes the property to be inoperable, even if only temporarily?

3. Should s 195(1) of the *Crimes Act* be construed as requiring some physical change or alteration to, or derangement of, property, even if temporary, in order for damage to be made out?

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[1] *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 (**J**).

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Part III: Notices under s 78B of the *Judiciary Act 1903* (Cth)

4. The respondent considers that no notice is required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Contested facts

5. The relevant facts are those stated by Bright DCJ for the purpose of submitting the question of law to the CCA for determination pursuant to s 5B of the *Criminal Appeal Act 1912* (NSW) (AB 26-27). The CCA was bound by, and confined to, those facts.[2] For that reason, the CCA (rightly) rejected any submissions of the parties, as to the causal connection between the appellant's conduct and the inoperability of the Ship Loader, which went beyond the facts in the stated case (J [5]-[6]). Leeming JA, with whom Johnson and Adamson JJ agreed, observed at J [64] that "the stated case establishes that [the appellant's] physical presence attached to Ship Loader 2 caused the machine to continue to be inoperable for some two hours."

Part V: Argument

6. By his written submissions, the appellant asserts that damage to property, for the purpose of s 195(1) of the *Crimes Act*, requires some physical change or alteration to, or derangement of, the property in question. The appellant proffers the expression "physical derangement", as used by Simpson J (as her Honour then was) in *Director of Public Prosecutions v Fraser & O'Donnell* [2008] NSWSC 244 (***Fraser & O'Donnell***), to mean some interference with the physicality of property that causes some change or alteration, which is not necessarily permanent or lasting but is more than an interference with functionality (AS [18]-[19], [52], [63]). By contrast, on the respondent's construction, and that preferred by the CCA, the element of damage in s 195(1) of the *Crimes Act* may relevantly be satisfied by a physical engagement or interference with property that causes it to be inoperable or impairs its functioning, even where the physical engagement or interference does not bring about an alteration to, or derangement of, the property.

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[2] *Talay v The Queen* [2010] NSWCCA 308 at [17] per Simpson J (Schmidt J agreeing at [59]); *Lavorato v The Queen* (2012) 82 NSWLR 568 at 572 [8] per Basten JA, 583 [71] per Schmidt J; *Tritton v Clarke* [2018] NSWCCA 31 at [9]-[10] per White JA (Hoeben CJ at CL and Fullerton J agreeing at [1], [48]). See also *R v Rigby* (1956) 100 CLR 146 at 151.

7. Consistently with the principles of statutory interpretation espoused by this Court,[3] it is necessary to have regard to the text, context and purpose of s 195.

Text

8. Within Part 4AD ("Criminal destruction and damage") of the *Crimes Act*, s 195(1)(a) in Division 2 ("Crimes against property generally") provides that a person "who intentionally or recklessly destroys or damages property belonging to another or to that person and another is liable" to 5 years' imprisonment.

9. Section 194(1) provides that a reference to property in Part 4AD does not include a "reference to property that is not of a tangible nature". This serves to limit the broad definition of property in s 4(1) of the *Crimes Act* for the purpose of Part 4AD.[4] Section 194(4) describes a number of ways in which property might be damaged by interference with its unique identifier. That is an "inclusive but not exhaustive definition" of damage to which Part 4AD applies.[5] It provides little assistance in understanding how damage might be caused to property other than by interference with a unique identifier.[6]

10. The natural and ordinary meaning of the term "damage" encompasses interference with property that does not involve a physical derangement of the property. The *Macquarie Dictionary* (online) defines damage, as a noun, to mean "injury or harm that *impairs value or usefulness*" and, as a verb, to mean "to cause damage to; injure or harm; *impair the usefulness of*" (emphasis added). Similarly, the *Shorter Oxford English Dictionary* (3rd ed, vol I at 485) defines damage, as a verb, to mean "[t]o do or cause damage to; to hurt, harm, injure; *now commonly to injure (a thing) so as to lessen its value*" (emphasis added). There are many ways in which property may be damaged. In common parlance, damage refers generally to

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[3] See *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at 940-941 [14] per Kiefel CJ, Nettle and Gordon JJ, 944-945 [35]-[40] per Gageler J; *Aubrey v The Queen* (2017) 260 CLR 305 at 325-326 [39] per Kiefel CJ, Keane, Nettle and Edelman JJ. See also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ.

[4] See generally *BP Australia Ltd v Bissaker* (1987) 163 CLR 106 at 114-115.

[5] *Hammond v The Queen* (2013) 85 NSWLR 313 at 316 [8] per Slattery J; Hoeben CJ at CL and Bellew J agreeing at 315 [1], 334 [80].

[6] *Ibid* at 316 [9] per Slattery J; Hoeben CJ at CL and Bellew J agreeing at 315 [1], 334 [80].

mischief done to or with respect to property.[7]

Context and purpose

11. As identified by Leeming JA at J [58], the legislative history of s 195 of the *Crimes Act* "confirms a construction whereby 'destroys or damages' includes physical interference which obstructs the working of a machine or renders it useless".

12. Section 195 was inserted by the *Crimes (Criminal Destruction and Damage) Amendment Act 1987* (NSW) (**1987 Act**). The amendments effected by the 1987 Act were designed to replace the large variety of specific offences formerly found in Chapter 2 ("Malicious injuries to property") of Part 4 ("Offences relating to property") of the *Crimes Act*, which were defined by reference to the type of property damaged.

13. The Discussion Paper of the Criminal Law Review Division in relation to those amendments described the purpose of the proposed s 195 as follows:[8]

> "The adoption of a simple offence with wide application provides clarity and virtual universal application, removes certain anomalies and obviates the need to prove that a particular type of property is involved."

14. The reforms proposed by the Criminal Law Review Division were drawn, in large part, from the "simplified classification"[9] enacted by the *Criminal Damage Act 1971* (UK).[10] The Law Commission of England and Wales described the purpose of that simplified classification as follows:[11]

> "[W]e think that the essence of offences of criminal damage should be the destruction of or damage to the property of another. Distinctions based upon the nature of the property or its situation, or upon the means used to destroy or damage it, or upon the circumstances in which it is destroyed or damaged should not affect the basic nature of the offence. ...

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[7] See *Smith v Brown* (1871) LR 6 QB 729 at 732-733 per Cockburn CJ and Hannen J.

[8] Criminal Law Review Division, *NSW Malicious Injuries to Property Provisions*, Discussion Paper (1985) at 35.

[9] The Law Commission, *Criminal Law Report on Offences of Damage to Property*, (1970) Law Com No 29 at Part II, B.

[10] Criminal Law Review Division, *NSW Malicious Injuries to Property Provisions*, Discussion Paper (1985) at 6-10, 34.

[11] The Law Commission, *Criminal Law Report on Offences of Damage to Property*, (1970) Law Com No 29 at 7 [13], [15].

> [T]he conduct to be penalised should be stated as broadly as possible, so that there should be one offence to cover the whole field of damage."

15. When introducing the 1987 Act to the Legislative Assembly, the then Attorney General said:[12]

> "The object of the bill I present today is to reform and simplify offences in the Crimes Act which involve criminal damage to property. The bill will codify this important area of the criminal law and rationalize the penalties."

16. Equally, the Explanatory Note to the 1987 Act stated:

> "The provisions relating to destruction of and damage to property are currently contained in Chapter II of Part IV of the [*Crimes Act*] and *are directed at the destruction of and damage to various specified kinds of property*. The provisions of proposed Division 2 of the substituted Chapter II adopt a *simpler approach by not discriminating between kinds of property*." (emphasis added)

17. In these circumstances, Leeming JA was, with respect, clearly correct to conclude that the 1987 Act was not intended to enact provisions that were narrower in application than the offences which preceded them (J [58], [60]). The purpose of the 1987 Act was, relevantly, to simplify the offences in Part 4, Chapter 2 of the *Crimes Act*. It is useful then to consider those predecessor provisions in more detail.

18. The provisions of Chapter 2 dealt with "act[s] of malicious injury to property" (see s 194). For example, towards the end of Chapter 2, s 247 provided:

> "Whosoever maliciously injures any real or personal property whatsoever, either of a public or private nature for which act no punishment is provided in this Chapter, shall be liable to penal servitude for five years".

On account of its generality, s 247 most closely resembles the form of s 195 presently found in the *Crimes Act*. Importantly, however, s 247 referred to injury to property, rather than damage to property.

19. An injury to property that was punishable under Chapter 2 included the obstruction of certain property. Thus, for example, in the portion of the Chapter concerned

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[12] New South Wales Parliament, Legislative Assembly, *Hansard*, 28 October 1987 at 15343.

with "[i]njuries to mines", s 224 provided:

> **"Damaging engines, staiths, wagon-ways**
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> Whosoever:
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> maliciously sets fire to, or pulls down, or destroys, or damages, with intent to destroy, or render useless any engine employed, or about to be employed in sinking, draining, ventilating, or working any mine, or any appliance or apparatus in connection therewith, or any staith, building, or erection, bridge, waggon-way, or trunk, used or intended to be used, in, or about, the business of any mine, whether such engine, staith, building, erection, bridge, waggon-way, or trunk, is completed or unfinished, or
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> *maliciously prevents, or obstructs, the working of any such engine, application, or apparatus*, or
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> maliciously cuts, breaks, unfastens, or damages, with intent to destroy, or render useless, any rope, chain, or tackle used in any mine, or in or upon any way, or work, employed in, or connected with, any mine, or the business thereof,
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> shall be liable to penal servitude for seven years." (emphasis added)

20. Similarly, in the portion of Chapter 2 concerned with "[i]njuries to railway carriages", s 232 provided:

> **"Obstructing engines or carriages on railways**
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> Whosoever, by any unlawful act, or willful omission, or neglect, *obstructs, or causes to be obstructed*, the passing, or working, of any engine, or carriage, on any railway, or aids, or assists, in any such offence, shall be liable to imprisonment for three years." (emphasis added)

21. There is no reason to read the emphasised words in the above provisions as providing "obstructs *by means of physical derangement*" (cf AS [56]-[57]). Indeed, to do so would be contrary to how the concept of obstruction was understood in relation to those provisions.

22. In *The Queen v Hadfield* (1870) LR 1 CCR 252, the Court of Crown Cases Reserved was asked to consider whether an offence of obstructing engines or carriages on railways, contrary to s 36 of the *Malicious Damage Act 1861* (UK), could be made out without physical obstruction to or derangement of a train. The accused had been convicted of the offence on the basis that he had unlawfully

altered railway signals at a railway station, causing the driver of a goods train to shut off steam and slacken the train's speed, almost to a stand-still, as it approached the station. The Court affirmed the conviction. Kelly CB remarked at 255 that:

> "there was as much an obstruction as if a log of wood had been placed across the rails".

Blackburn J commented that there was "nothing in s 36 to show that the obstruction must be a physical one". The result in *Hadfield* was followed in *The Queen v Hardy* (1871) LR 1 CCR 278. In that case, the accused stood on railways tracks and, as a train approached, held up his arms in the mode of an inspector. The driver of the train shut off steam and slowed the train, resulting in a delay of about four minutes.[13]

23. Citing the decisions in *Hadfield* and *Hardy*, Watson and Purnell recorded that "[o]bstruction is not confined to physical obstruction" in relation to a charge against s 232 of the *Crimes Act* in New South Wales (see [20] above).[14]

24. A key point to be drawn from this legislative history is that rightly made by Leeming JA at J [29]:

> "On a natural reading, 'injury' and 'injuries' in a chapter titled 'Malicious injuries to property' in the *Crimes Act* was apt to include all of the particular offences, even those which were not expressed in terms of injuring property, and including those which referred to obstructing the working of a machine or rendering it useless."

25. While the concept of "injuries to property" was replaced with "destruction and damage" by the 1987 Act, it was not intended that this change of expression would work a change to the scope or application of the relevant provisions. That is why, in the Second Reading Speech for the 1987 Act, the Attorney General said that s 195 was "similar" to the pre-existing s 247 (see [18] above), and that s 195 would

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[13] See also *R v Bradford* (1860) Cox CC 309.

[14] *Criminal Law in New South Wales* (1971), vol 1 at 266-267 [842], [845]. "Interfering with a mine" is now an offence under s 201 of Pt 4AD of the *Crimes Act*. Offences relating to railways appear in Pt 4AE, which provides specifically for "Offences relating to transport services".

be of "virtual universal application".[15] In circumstances where injury to property extended to things done to obstruct property, including where there was no physical derangement of the property, damage to property should similarly be understood as extending that far.

26. The appellant submits that, absent a clear indication of legislative intent to the contrary, s 195 of the *Crimes Act* should be construed strictly and narrowly (AS [60]). As Kiefel CJ, Bell, Keane, Nettle and Edelman JJ remarked in *Minogue v Victoria* [2018] HCA 27 at [47], that principle, relating to the proper construction of penal provisions, may variously be understood as "a general rule of construction", "a subsidiary rule of construction" or "a matter of context" to be accounted for in the usual way.[16] Applying ordinary rules of statutory construction,[17] there is no need to resort to any 'rule' that ambiguity or doubt be resolved in favour of the appellant in this case (see also J [54]-[55]).[18]

Existing authority

27. Relying on the analysis of Simpson J in *Fraser & O'Donnell*,[19] the appellant submits that the "common thread" of past cases involving criminal damage to property is that some physical derangement of the property was established before damage was made out (AS [33]). Much of this submission turns on what is meant by physical derangement. The appellant seeks to identify, in the factual circumstances of past cases, some derangement of the property in question and then to confine the more general statements of principle in those cases to circumstances in which derangement is proved. However, this involves a misunderstanding of the effect of those cases.

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[15] See New South Wales Parliament, Legislative Assembly, *Hansard*, 28 October 1987 at 15344:

> "The new offence of malicious damage to property set out in proposed section 195(a) is similar to the existing offence of malicious injury in section 247 and will carry the same penalty of five years' imprisonment. This is a simple offence of wide application which provides clarity and virtual universal application. It obviates the need to prove a particular type of property, and applies to both living and inanimate objects."

[16] See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 49 [57] per Hayne, Heydon, Crennan and Kiefel JJ.

[17] *Aubrey v The Queen* (2017) 260 CLR 305 at 325-326 [39] per Kiefel CJ, Keane, Nettle and Edelman JJ.

[18] *Beckwith v The Queen* (1976) 135 CLR 569 at 576 per Gibbs J.

[19] [2008] NSWSC 244 at [27]-[44].

28. It is convenient to begin by reference to *Samuels v Stubbs* (1972) 4 SASR 200. In that case, the respondent jumped on a police constable's hat. The hat was not recovered, but the evidence was that it had been crushed by the respondent's conduct such that it did not "spring back into its original shape".[20] The respondent was charged with willfully destroying or damaging property contrary to s 43(1) of the *Police Offences Act 1953* (SA). Walters J held, at 203-204, that in order to make out damage for the purpose of that offence:

> "it is *unnecessary to establish such definite or actual damage as renders the property useless, or prevents it from serving its normal function* – in this case, prevents the cap from being worn. In my opinion, it is sufficient proof of damage if the evidence proves a temporary functional derangement of the particular article of property". (emphasis added)

29. It may be accepted that the actions of the respondent in *Samuels v Stubbs* caused a temporary change to the physical shape of the constable's hat. But the above statement of Walters J indicates that deprivation of function need not be accompanied by proof of physical damage in order to constitute damage.[21]

30. In *"A" (a Juvenile) v The Queen* [1978] Crim LR 689, the Crown Court considered whether spitting on a raincoat could amount to damage to property. The report of the case records that the Court held:

> "[s]pitting at a garment could be an act capable of causing damage. However, one must consider the specific garment which has been allegedly damaged. If someone spat upon a satin wedding dress, for example, any attempt to remove the spittle might in itself leave a mark or stain. The court would find no difficulty in saying that an article had been rendered 'imperfect' if, after a reasonable attempt at cleaning it, a stain remained. An article might also have been rendered 'inoperative' if, as a result of what happened, it had to be taken to dry cleaners.
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> However, in the present case, no attempt had been made, even with soap and water, to clean the raincoat, which was a service raincoat designed to resist the elements. Consequently, there was no likelihood that if wiped with a damp cloth, the first obvious remedy, there would be any trace or

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[20] *Samuels v Stubbs* (1972) 4 SASR 200 at 202.

[21] See also *R v Previsic* (2008) 185 A Crim R 383, in which the Victorian Court of Appeal considered a dent to a panel in a car that could be pushed out to its normal shape at no cost: at 384-386 [3], [9]-[12] per Ashley JA; Dodds-Streeton JA and Lasry AJA agreeing at 389 [30], [31].

> mark remaining on the raincoat requiring further cleaning. Further, the raincoat was not rendered 'inoperative' at the time; if it was 'inoperative', it was solely on account of being kept as an exhibit."

31. The appellant contends that it is erroneous to understand *"A" (a Juvenile)* as suggesting that imperfection and inoperability are alternative paths by which damage to property can be made out. Property only becomes inoperable, on the appellant's submission, on account of some imperfection (AS [30]-[32], [45]).[22] It is notable, however, that, having found there was "no likelihood" of an imperfection (that is, a stain) in this case, the Crown Court went on to consider whether, and why, the property was inoperable.

32. In *R v Zischke* [1983] 1 Qd R 240, the Queensland Court of Criminal Appeal (Campbell CJ, Matthews and McPherson JJ) considered offences of willful and unlawful damage to property, contrary to s 469 of the *Criminal Code* (Qld). The relevant damage was the painting of slogans on to the surface of buildings with aerosol spray. The Court held, at 246, that the appellant had rendered imperfect the property to which the paint was applied. In reaching that conclusion, the Court referred to a number of cases "to demonstrate both the width of the expression [damage] and the variety of means available for injuring one's neighbor by acts directed against his property".[23] At the end of that discussion, the Court said:

> "Probably the formula that most nearly embraces all the attempts at definition is that a thing is damaged if it is rendered imperfect or inoperative: see *'A' (a Juvenile) v The Queen* [1978] Crim L Rev 689."

33. In *R v Heyne* (NSW Court of Criminal Appeal, unreported, 18 September 1998), the Court of Criminal Appeal was concerned with directions to a jury in a trial for manslaughter by unlawful and dangerous act. The appellant had poured petrol in the interior of a house and his wife had been killed in a subsequent fire. The source of ignition was not known. The unlawful and dangerous act put to the jury was malicious damage to property. That was said to take three alternative forms: (1) the wetting of the carpet with petrol; (2) permanent staining of the carpet caused by the petrol; and (3) "the temporary functional derangement of the house because of the

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[22] Cf *Hammond v The Queen* (2013) 85 NSWLR 313 at 326 [50], 331 [69] per Slattery J; Hoeben CJ at CL and Bellew J agreeing at 315 [1], 334 [80].
[23] *Zischke* [1983] 1 Qd R 240 at 245-246.

presence of the petrol". By reference to *Samuels v Stubbs*, Handley JA, with whom Levine and James JJ agreed, held that the appellant's conduct was capable of occasioning damage to the house by rendering it "unusable until the vapour dispersed". There was, therefore, no error in leaving that articulation of malicious damage to property to the jury.

34. With respect to *Heyne*, the appellant submits that, notwithstanding the apparent focus on damage to the house, this form of malicious damage still involved physical derangement of the carpet. It is clear, however, from Handley JA's discussion of cases relating to "permanent or temporary impairment of value or usefulness" that his Honour was speaking of inoperability, and not imperfection. Leeming JA was correct, with respect, to conclude at J [51]-[52] that "affirmation of a temporary functional derangement constituting damage was part of the *ratio* of the decision" in *Heyne*.

35. In *Director of Public Prosecutions (NSW) v Lucas* [2014] NSWSC 1441, the deflation of a car tyre was held to constitute damage to property contrary to s 195(1) of the *Crimes Act*. The evidence was that the tyre required re-inflation, but that the complainant was able to drive the car to a service station to do so. Thus, the car was not entirely inoperable. Citing *Hammond*, *Samuels v Stubbs,* and *"A" (a Juvenile)*, RA Hulme J concluded, at [18], that the evidence was capable of supporting a conclusion that there had been:

> "an interference with the functionality of the tyre and the car itself, by necessitating that the complainant take it to a service station to pump air into the tyre before normal function was restored. Put in terms of *"A" (a Juvenile)*, it was unable to be used for its ordinary functions for a period whilst its imperfections were eliminated."

36. The deflation of a car tyre involves a physical interference with the tyre, and a subsequent inoperability. It is less easy, however, to conceptualise a physical derangement of the tyre in these circumstances. The taking away or dislocation of parts of a machine, even without damage to those parts, has long been considered

damage to the machine.[24] Thus, for example, in *R v Tacey* (1821) Russ & Ry 452, the defendant unscrewed and carried away the half-jack of a frame used for knitting stockings and was convicted of having damaged the frame. In *Getty v Antrim County Council* [1950] NI 114, the dismantling of two ploughs, without injuring any of the parts, was held to constitute an offence of damaging the ploughs. In *Morphitis v Salmon* (1989) 154 JP 365, it was held that the removal of a scaffold clip and bar, which formed part of an upright barrier, could amount to damage to the barrier as a whole, because its use as a barrier was thereby impaired.

37. In point of principle, there will often be little to distinguish cases of taking something away from property and cases of adding something to property. But, as the following cases indicate, where something is added or affixed to property in such a way as to render the property useless or inoperable, it is not always correct to say that there has been a derangement of the underlying property. Further, it is submitted that such cases should nonetheless be understood as involving damage to property.

38. In *R v Fisher* (1865) LR 1 CCR 7, the defendant interfered with a steam-engine. He did so by tightening working parts of the engine; turning a plug "the wrong side up"; and placing a stick in a pipe leading to the boiler. The engine was temporarily useless and there was risk of damage to the engine if it were to be used. It was accepted, however, that once the defendant's actions were reversed, the engine was "just as good as before". The case was left to the jury on the basis that preventing the engine from working was "doing damage" to it. A question of law was reserved for the Court of Crown Cases Reserved in the form of "whether, upon the facts stated, the temporary injury to the engine was such a malicious damage to bring the prisoner under the penalties of the statute". The defendant argued that, unlike cases decided previously, "[h]ere there was no taking away of any portion; no cutting; no breaking; no absolute damage". Pollock CB stated the view of the Court:

> "We are all of opinion that the conviction is good. It is like the case of

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[24] A number of the cases discussed hereafter are cited in Watson and Purnell, *Criminal Law in New South Wales* (1971), vol 1 at 256-257 [791], in relation to the offences for injuring machines that were contained in the *Crimes Act* prior to the 1987 Act.

> spiking a gun, where there is no actual damage done to the gun, although it is rendered useless. The case falls within the expression 'damage with intent to render useless'."

39. In *R v Henderson and Battley* (Court of Appeal, unreported, 29 November 1984), the appellants were convicted of damaging property, contrary to s 1(1) of the *Criminal Damage Act 1971* (UK), by depositing loads of soil and rubble onto a site cleared for development. The appellants argued that there had been no physical damage to the land, which lay beneath the soil and rubble. The trial judge had directed the jury that damage "includes even the temporary rendering of land less usable or, indeed, not usable; adversely affecting its character for the purpose for which the owner had it". In the Court of Appeal, Justice Cantley concluded that this direction accorded with "good sense" and the principle exemplified in *Fisher*. His Honour construed s 1(1) as extending to things done to impair the value or usefulness of property.

40. In *Griffiths v Morgan* (Supreme Court of Tasmania, unreported, 13 October 1972), the appellant was charged with unlawfully injuring certain property of the Tasmanian Police Department, contrary to s 37(1) of the *Police Offences Act 1935* (Tas). The relevant property was a breath analysis machine, into which the appellant had released water (and saliva) which he had seemingly concealed in his mouth in advance of a breath test. The appellant's conduct rendered the machine inoperative, and in need of cleaning. There was no evidence that the machine was damaged. Justice Neasey concluded, at 12, that:

> "to cause the machine to become inoperative until it was cleaned and adjusted was, in my opinion, to injure it".

Referring to *Tacey* and *Fisher*, his Honour said that "you 'damage' a thing if you render it imperfect or inoperative" and, therefore, "a rendering of the breath analysis machine temporarily useless ... was unlawfully to injure it".

41. In *Hardman v Chief Constable of Avon and Somerset* [1986] Crim LR 330, the damage in question was said to arise from the painting of human silhouettes on asphalt pavement to mark the 40th anniversary of the Hiroshima bombing, in circumstances where the paint was soluble and designed to wash away with rain. The report records the Crown Court as holding:

> "Notwithstanding the fact that the markings could be washed away there had nonetheless been damage, which had caused expense and inconvenience to the Local Authority. An unduly narrow definition of damage was not appropriate. The approach of Walters J in *Samuels v Stubbs* [was approved]. ... The fact that the property was fairly easily restored to its former condition did not mean that it was not damaged."

42. In *R v Fiak* [2005] EWCA Crim 2381, the appellant was charged with doing criminal damage to a blanket and a police cell by placing the blanket in a lavatory and flushing it repeatedly with the result that the cell flooded. The blanket was "wet, but not visibly soiled". The cell floor, which was waterproof, was simply covered with water.[25] Referring to *Morphitis v Salmon* and *R v Whiteley* [1991] 93 CAR 25, the Court of Appeal said at [20]:

> "[W]hile it is true that the effect of the appellant's actions in relation to the blanket and the cell were both remediable, the simple reality is that the blanket could not be used as a blanket by any other prisoner until it had been dried out (and, we believe, also cleaned) and the flooded cells remained out of action until the water was cleared. In our judgment it is clear that both sustained damage".

43. Consistently with the view of the CCA,[26] the finding of damage in each of these cases is best explained by reference to a physical interference with property that impaired or stopped the functioning of the property. As these cases show, on a natural understanding of things, adding to property often does not affect an alteration to or derangement of the underlying property, but may still amount to damage of the property.[27] In the present case, the appellant climbed and attached himself to Ship Loader 2, thereby rendering the machine inoperable. The appellant's presence on Ship Loader 2 is equivalent to the stick thrust into the pipe in *Fisher*; the soil and rubble left on the land in *Henderson & Battley*; the water released into the breath analysis machine in *Griffiths*; and the water covering the cell floor in *Fiak*.

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[25] *Fiak* [2005] EWCA Crim 2381 at [8].

[26] See, for example, J [62].

[27] In other cases, adding something to property may cause a physical alteration to the property. See, for example, *Roper v Knott* [1898] 1 QB 868 (which involved the adding of water to milk).

Further analysis

44. The appellant contends that the concept of "physical interference" is not sustainable because, for example, there is no "material difference" between a protestor who ties herself to a bulldozer and one who lies in front of a bulldozer (AS [22]). As the above analysis demonstrates, however, the concept of physical derangement proffered by the appellant is highly problematic and inconsistent with authority. The appellant's construction can be tested further in the following way.

45. It is said by the appellant, consistently with the observations of Simpson J in *Fraser & O'Donnell* at [42], that a protester does not damage property by sitting on a bulldozer (AS [23]). Would that position be different, however, if the protestor had tied herself to the bulldozer with rope, or had locked herself on to the bulldozer with chains? In *Fraser & O'Donnell*, for example, the appellants had chained themselves to a conveyor such that there was "a significant risk of damage to the conveyor rollers had the conveyor system been re-started while the locks were still in place".[28]

46. An analogy may be drawn to graffiti with similar effect. Generally speaking, the spraying or brushing of paint on to the surface of a wall will be considered damage to the building. It does not, however, derange the underlying wall. That is especially so where the graffiti is designed to wash away without any remedial action, as in *Hardman*, or is constituted of natural materials like mud, as in *Roe v Kingerlee* [1986] Crim LR 735. Does the concept of physical derangement in such cases turn on degrees of erasibility or on the extent of "bonding" between the thing added and the property in question?[29] It is submitted that these are highly artificial and unsatisfactory distinctions. The reasoning of Leeming JA at J [62]-[64] is compelling in this respect.

47. While on either party's construction there will be cases that turn on questions of fact and degree, a construction of "destroys or damages property" in s 195(1) of the *Crimes Act* as including some physical interference with property which causes the

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[28] [2008] NSWSC 244 at [47].

[29] See *Hammond v The Queen* (2013) 85 NSWLR 313 at 331 [67] per Slattery J; Hoeben CJ at CL and Bellew J agreeing at 315 [1], 334 [80].

property to be inoperable best accords with a natural and ordinary understanding of the many ways in which property may be damaged, and with the legislative history and purpose of the provision.

48. The CCA correctly answered the first question in the stated case "Yes". The appeal to this Court should be dismissed.[30]

Part VI: Estimate

49. It is estimated that the respondent's oral argument will take approximately 1.5 hours to present.

Dated: 3 August 2018

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[30] The respondent submits that in the present case, involving an appeal in the exercise of criminal jurisdiction, there should be no order for costs whichever party succeeds. See *R v Whitworth* (1998) 164 CLR 500 at 501; *Momcilovic v The Queen* (2011) 245 CLR 1 at 123 [279] per Gummow J.