HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND GORDON JJ

PAUL OLAF GRAJEWSKI APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS (NSW) RESPONDENT

Grajewski v Director of Public Prosecutions (NSW)
[2019] HCA 8
13 March 2019
S141/2018

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of New South Wales dated 24 October 2017 and in lieu thereof order that the questions submitted to the Court of Criminal Appeal by Judge Bright be answered as follows:*

   Can these facts support a finding of guilt for an offence contrary to section 195(1)(a), Crimes Act, *1900?*

   No.

   In particular, was the evidence capable of proving beyond reasonable doubt that Ship Loader 2 had been damaged by the conduct of Paul Olaf GRAJEWSKI?

   Unnecessary to answer.

3. *Quash the conviction and sentence of the District Court at Newcastle on 29 May 2017 on the appeal to the District Court.*

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with A T S Dawson SC and N D Funnell for the appellant (instructed by O'Brien Criminal & Civil Solicitors)

D T Kell SC with E Jones for the respondent (instructed by Office of the Director of Public Prosecutions (NSW))

CATCHWORDS

Grajewski v Director of Public Prosecutions (NSW)

Criminal law – Appeal against conviction – Question of law referred to Court of Criminal Appeal – Case stated – Destroying or damaging property – Physical element of offence – Where appellant harnessed himself to ship loader – Where ship loader shut down due to safety concerns – Where ship loader inoperable until appellant removed – Where no alteration to physical integrity of ship loader – Whether property damaged.

Words and phrases – "destroys or damages", "impairment of value", "physical derangement", "temporary functional derangement".

Crimes Act 1900 (NSW), s 195(1).

1 KIEFEL CJ, BELL, KEANE AND GORDON JJ. A person who intentionally or recklessly destroys or damages property belonging to another (or to that person and another) commits an offence contrary to s 195(1) of the *Crimes Act 1900* (NSW). This appeal is concerned with the physical element of the offence. In issue is whether a person can be said to destroy or damage a thing if the person's conduct does not occasion any alteration to the physical integrity of the thing.

2 Mr Grajewski, a protestor, harnessed himself to a ship loader at a coal terminal. Mr Grajewski was at risk of serious harm while he remained in this position. The ship loader was shut down as Mr Grajewski commenced to climb the machine and remained shut down until he was removed. Mr Grajewski was charged with an offence against s 195(1)(a), particularised as doing "damage [to] property causing the temporary impairment of the working machinery" of Ship Loader 2. He was convicted of this offence in the Newcastle Local Court, and fined a sum of $1,000.

3 Mr Grajewski appealed against his conviction to the District Court of New South Wales (Judge Bright)[1]. Her Honour dismissed the appeal and confirmed the conviction.

4 Under s 5B(2) of the *Criminal Appeal Act 1912* (NSW) a party to appeal proceedings in the District Court may request that a question of law be submitted to the Court of Criminal Appeal for determination even though the proceedings during which the question arose have been determined. The Court of Criminal Appeal may, in connection with the determination of the question of law in such a case, quash any acquittal, conviction or sentence of the District Court on the appeal to the District Court[2].

5 At the request of Mr Grajewski, Judge Bright stated a case to the Court of Criminal Appeal setting out the facts and asking (i) can these facts support a finding of guilt for an offence contrary to s 195(1)(a); and (ii) was the evidence capable of proving beyond reasonable doubt that Ship Loader 2 had been damaged by the conduct of Mr Grajewski.

6 The Court of Criminal Appeal (Leeming JA, Johnson and Adamson JJ) considered the stated case principally by reference to three Australian authorities. In *Director of Public Prosecutions v Fraser & O'Donnell*, Simpson J in the

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1 *Crimes (Appeal and Review) Act 2001* (NSW), s 11.

2 *Criminal Appeal Act 1912* (NSW), s 5B(3).

Supreme Court of New South Wales[3] dismissed the Director of Public Prosecutions' appeal against the dismissal of charges under s 195(1)(a) arising out of Ms Fraser's and Mr O'Donnell's conduct in chaining themselves to a conveyor belt at the site of a coal loader. Her Honour reviewed the authorities in the United Kingdom and Australia on the meaning of "damage" in cognate legislation ("criminal damage") and concluded that, with the possible exception of the decision of the Court of Appeal (Criminal Division) in *R v Henderson and Battley*, common to all is the requirement that there be "some physical change or alteration to the property", even if temporary[4].

7 The Court of Criminal Appeal acknowledged the force of Simpson J's conclusion that the words "destroys or damages" require that there be some physical interference with or alteration to the property. The Court of Criminal Appeal considered, however, that it should not depart from two decisions which were against acceptance of this "narrow" construction. In the first, *R v Heyne*[5], an unreported decision to which it appeared Simpson J had not been referred, it was held that the "temporary functional derangement" of property suffices as criminal damage. In the second, *Hammond v The Queen*[6], it was held that interference with functionality alone without any "derangement" of the property may constitute criminal damage. The Court of Criminal Appeal also considered that the purpose of s 195(1), understood in light of the legislative history, provides a further reason for rejecting the "narrow construction".

8 The Court of Criminal Appeal determined that "physical interference causing property to be inoperable", whether temporarily or otherwise, satisfies the "destroys or damages" element of the offence[7]. In the Court of Criminal Appeal's analysis, Mr Grajewski's attachment to Ship Loader 2 amounted to an act of physical interference which caused it to be inoperable for some two hours.

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3 [2008] NSWSC 244.

4 *Director of Public Prosecutions v Fraser & O'Donnell* [2008] NSWSC 244 at [36], citing *R v Henderson and Battley* (unreported, Court of Appeal (Criminal Division), 29 November 1984).

5 Unreported, Court of Criminal Appeal of New South Wales, 18 September 1998, incorrectly named *R v Hayne* in Butterworths Unreported Cases – BC9807961.

6 (2013) 85 NSWLR 313.

7 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [62]-[63].

The Court of Criminal Appeal answered question (i) "yes" and declined to answer question (ii) because it asked the Court to determine the question on the *evidence* as distinct from the facts stated by Judge Bright[8].

9 On 18 May 2018, Kiefel CJ and Bell J granted Mr Grajewski special leave to appeal from the judgment of the Court of Criminal Appeal. For the reasons to be given, damage to property within the meaning of s 195(1) of the *Crimes Act* requires proof that the defendant's act or omission has occasioned some alteration to the physical integrity of the property, even if only temporarily. It follows that the first question submitted by Judge Bright to the Court of Criminal Appeal should be answered "no" and in consequence that Mr Grajewski's conviction should be quashed.

Section 195(1)(a)

10 Part 4AD of the *Crimes Act*, headed "Criminal destruction and damage", comprises a number of Divisions concerning crimes against property generally; crimes relating to particular kinds of property; sabotage; and bushfires. Part 4AE concerns offences relating to transport services, including to aircraft and to railways. Parts 4AD and 4AE were inserted into the *Crimes Act* by the *Crimes (Criminal Destruction and Damage) Amendment Act 1987* (NSW) ("the Amending Act").

11 Section 195(1) is in Pt 4AD. It provides:

"**195 Destroying or damaging property**

(1) A person who intentionally or recklessly destroys or damages property belonging to another or to that person and another is liable:

(a) to imprisonment for five years, or

…"

12 "Property" is broadly defined in s 4(1) of the *Crimes Act* to include every description of real and personal property. Section 194(1) provides that in Pt 4AD, "a reference to property does not include a reference to property that is

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8 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [3]-[4], [66], citing *R v Rigby* (1956) 100 CLR 146 at 151-152; [1956] HCA 38 and *Sasterawan v Morris* (2007) 69 NSWLR 547.

not of a tangible nature". Apart from providing that for the purposes of Pt 4AD, "damaging property includes removing, obliterating, defacing or altering the unique identifier of the property"[9], the *Crimes Act* does not define "damage". The unique identifier is any numbers, letters or symbols that are marked on, or attached to, the property to enable it to be distinguished from similar property.

13 As a matter of ordinary English, to damage a thing means to injure or harm the thing in some way that, commonly, lessens the value of the thing[10]; a thing is not damaged if the physical integrity of the thing is not altered in any respect. Contrary to the Court of Criminal Appeal's analysis, the legislative history does not support a construction of the offence in s 195(1) that extends its reach to any "interference" with property that results in the property being inoperable.

The legislative history

14 Chapter II of Pt IV of the *Crimes Act*, as enacted, contained a plethora of offences of criminal damage to property. Its provisions can be traced to the *Malicious Damage Act 1861* (UK) ("the 1861 UK Act")[11], which amended and consolidated the *Malicious Injuries to Property Act 1827* (UK)[12]. The latter was the first consolidation of many provisions largely enacted in the eighteenth and nineteenth centuries which made criminal damage to particular types of property an offence ("property-specific offences")[13].

15 The 1861 UK Act, like its predecessor, contained a range of property-specific offences: some criminalised "damaging" the thing and some criminalised "injuring" the thing. There is no reason to consider that the former was intended to have any wider meaning than the latter. The difference in wording merely reflects that the 1861 UK Act, like its predecessor, was a consolidation Act. Section 51 of the 1861 UK Act was novel. It made it an

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9 *Crimes Act*, s 194(4).

10 *Macquarie Dictionary*, 7th ed (2017) at 387, defining "damage" as a transitive verb; *Oxford English Dictionary*, 2nd ed (1989), vol 4 at 225, defining "damage" as a transitive verb.

11 24 & 25 Vict c 97.

12 7 & 8 Geo 4 c 30.

13 Greaves, *The Criminal Law Consolidation and Amendment Acts* (1861) at ix, x.

offence for a person to "maliciously commit any Damage, Injury, or Spoil to or upon any Real or Personal Property whatsoever, either of a public or private Nature, for which no Punishment is herein-before provided". This general offence was said by its draftsman to recognise the "many very valuable instruments and machines daily invented" and the impracticality of making specific provision for each[14].

16 Section 247 in Ch II of Pt IV of the *Crimes Act*, as enacted, was framed in terms reminiscent of s 51 of the 1861 UK Act and provided that "[w]hosoever maliciously injures … any real or personal property whatsoever, either of a public or private nature for which act no punishment is hereinbefore provided, shall be liable to imprisonment". Chapter II of Pt IV was repealed by the Amending Act, which inserted Pt 4AD. On the second reading of the Bill for the Amending Act, the Attorney-General stated its object as the reformation and simplification of the law. The Attorney-General observed that Ch II of Pt IV contained "a large number of archaic and anomalous offences … based on damage to different types of property"[15], and he described the s 195(1) offence as being "similar to the existing offence of malicious injury in section 247"[16].

17 The simplification of offences involving criminal damage under the Amending Act, in common with reforms introduced in Victoria[17] and the Australian Capital Territory[18], was based on the *Criminal Damage Act 1971* (UK) ("the 1971 UK Act"), which replaced many antique property-specific offences with a general offence of intentionally or recklessly destroying or damaging any property belonging to another[19].

18 The Court of Criminal Appeal considered that s 195(1) is to be understood as having a broad meaning that is apt to capture all of the offences formerly

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14 Greaves, *The Criminal Law Consolidation and Amendment Acts* (1861) at 199.

15 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 October 1987 at 15344.

16 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 October 1987 at 15344.

17 *Crimes (Criminal Damage) Act 1978* (Vic).

18 *Crimes (Amendment) Ordinance (No 4) 1985* (ACT).

19 *Criminal Damage Act 1971* (UK), s 1(1).

contained in Ch II of Pt IV[20]. Their Honours noted that Ch II of Pt IV was headed "Malicious injuries to property", and they concluded there is no reason to find that the legislature intended "damage" to have a narrower meaning in Pt 4AD than "injury" in Ch II of Pt IV. Among the conduct proscribed in the repealed Chapter were offences of obstructing machinery and rendering machinery useless. The Court of Criminal Appeal identified a number of provisions in this respect. Sections 209 and 210 contained offences that were most apt to cover the conduct with which Mr Grajewski was charged[21]. These sections were expressed in terms "[w]hosoever maliciously cuts, breaks, or destroys, or damages, with intent to destroy or render useless, any … machine, engine …". Sections 223 and 224 were offences involving injuries to mines[22]. The former made it an offence to obstruct or damage "with intent to destroy, obstruct, or render useless, any airway, waterway, drain, pit, level, or shaft" and the latter made it an offence to destroy or damage "with intent to destroy, or render useless, any engine". Section 232 made it an offence to obstruct, or cause "to be obstructed, the passing, or working, of any engine, or carriage, on any railway"[23]. Against this background, the Court of Criminal Appeal concluded that physical interference which obstructs machinery, or which renders machinery useless, whether permanently or temporarily, should be understood as within the meaning of the expression "destroys or damages" in s 195(1)[24].

19 The legislative history cannot overcome the plain words of the provision. In any event, it is not apparent that the history supports the Court of Criminal Appeal's interpretation of the intended broad reach of s 195(1). The view that the offences formerly provided in ss 209 and 210 were most apt to capture the *conduct* with which Mr Grajewski was charged conflates the physical and mental elements of the repealed offences. The physical element of each offence was "cutting, breaking, destroying or damaging". It was the mental element that required that the conduct be accompanied by the intent, among others, to "render useless".

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20 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [29], [58].

21 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [23].

22 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [24].

23 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [25].

24 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [58].

20 While the evident intention of enacting s 195(1) was to provide a general offence of criminal damage to property[25] applying to conduct which in many instances had been criminalised in the repealed property-specific offences, it is overstating its object as to apply to all of the conduct proscribed in the repealed Ch II of Pt IV[26]. The conduct proscribed by ss 223 and 224, obstructing or rendering useless machinery or structures involved in mining activity[27], is proscribed under s 201 in Pt 4AD. The conduct proscribed by s 232, obstructing any engine or carriage on any railway, is proscribed under s 213 in Div 2 of Pt 4AE, which is headed "Offences relating to railways etc".

21 The physical element of the offence created by s 195(1) is conduct which "destroys or damages". It strains the language of the provision to interpret the words "destroys or damages" as including conduct which obstructs or renders useless without in any way altering the physical integrity of the property. If the legislature intended to criminalise the obstruction of property or the rendering of it useless in s 195(1), it is to be expected that it would have so provided.

22 While the Court of Criminal Appeal was correct to take from the legislative history that the word "damages" in s 195(1) does not have a narrower meaning than the word "injures" as the latter is used in the context of criminal damage to property, it remains that the legislative history does not warrant interpreting either word as applying to conduct which does not occasion any alteration to the physical integrity of the thing said to be damaged or injured.

The authorities

23 Mr Grajewski adopts Simpson J's analysis of the authorities and her Honour's conclusion in *Fraser & O'Donnell* that proof of criminal damage requires that there be some "physical derangement" of the property damaged. The respondent submits that it is not possible to explain a number of decisions

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25 As enacted by the Amending Act, s 195 provided: "A person who maliciously destroys or damages property ...". The word "maliciously" was omitted and replaced by the words "intentionally or recklessly" by the *Crimes Amendment Act 2007* (NSW), Sch 1 [2]-[3] and [21].

26 cf *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [29].

27 The reference to "structure" in s 201(c) was inserted by the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW), Sch 2 [1].

which have considered the meaning of criminal damage by reference to this criterion: *R v Fisher*[28]; *Henderson and Battley*[29]; *Griffiths v Morgan*[30]; *Hardman v Chief Constable of Avon & Somerset Constabulary*[31]; *R v Fiak*[32] and *Heyne*[33]. Implicit in the submission is the further submission that in following the model of s 1(1) of the 1971 UK Act the legislature is presumed to have intended the words "destroys or damages" to have an extended meaning consistent with a settled line of authority.

24 A difficulty with acceptance of the respondent's submission is, as Auld J observed in *Morphitis v Salmon*, the authorities show that what constitutes "damage" in this context is not always clear[34]. In *Morphitis*, the Queen's Bench set aside Mr Morphitis' conviction for an offence of criminal damage, particularised as damaging a scaffold clip and scaffold bar. These two items together with an upright had formed a barrier across an access road. Mr Morphitis dismantled the barrier and carried off the scaffold clip and scaffold bar, leaving the upright in position. The question on the appeal was whether the scaffold clip and scaffold bar, although not physically damaged as individual objects, were nevertheless damaged within the meaning of s 1(1) of the 1971 UK Act by their separation from the upright.

Impairment of value or usefulness as a test

25 In *Morphitis*, Auld J said the authorities show that "damage" is to be widely interpreted so as to include not only permanent or temporary physical harm but also permanent or temporary impairment of value or usefulness[35]. Mr Morphitis' appeal was allowed because the charge as framed did not allege

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28 (1865) LR 1 CCR 7.

29 Unreported, Court of Appeal (Criminal Division), 29 November 1984.

30 Unreported, Supreme Court of Tasmania, 13 October 1972.

31 [1986] Crim LR 330.

32 [2005] EWCA Crim 2381.

33 Unreported, Court of Criminal Appeal of New South Wales, 18 September 1998.

34 (1989) 154 JP 365.

35 (1989) 154 JP 365 at 368.

damage to the barrier. Had the allegation been of damage to the barrier, Auld J considered it was clear on the authorities that the offence could have been proved[36]. The analysis took into account decisions holding that dismantling a thing and removing a part from it amounts to criminal damage even where no other physical damage is done to the thing or the part removed[37].

26 In the earliest of these decisions, *R v Tacey*, the prisoner in company with others forcibly broke into a shop, where he and others dismantled two frames used for making knitted stockings and carried away an essential component of each known as the half-jack. The question of whether this amounted to damage to the stocking frames within the meaning of an eighteenth century statute[38] was reserved for the consideration of the common law judges. Their Lordships were unanimously of the view that the taking out and carrying away of the half-jack was "damaging" as it made the frame "imperfect and inoperative"[39].

27 The conclusion that the dismantling and carrying away of the half-jack *damaged* the frame may be thought to accord with the ordinary meaning of the word. Nothing in the brief report of the reasoning in *Tacey* suggests that, in stating that the frame had been made "imperfect and inoperative", the common law judges were articulating a disjunctive test[40].

28 Auld J's analysis also took into account *Fisher*, in which the Court for Crown Cases Reserved, in an ex tempore judgment, held that stopping-up the feed pipe of a boiler by thrusting a stick into it, thereby preventing water passing into the boiler, amounted to damage to the boiler within the meaning of s 15 of the 1861 UK Act[41].

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36 *Morphitis v Salmon* (1989) 154 JP 365 at 369.

37 *R v Tacey* (1821) Russ & Ry 452 [168 ER 893]; *Getty v Antrim County Council* [1950] NI 114.

38 *Protection of Stocking Frames Act 1788* (28 Geo 3 c 55), s 4, which relevantly made it an offence to "wilfully and maliciously break, destroy, or damage any frame ... used in and for the working and making of any such framework-knitted pieces …".

39 *R v Tacey* (1821) Russ & Ry 452 at 454 [168 ER 893 at 894].

40 (1821) Russ & Ry 452 at 454 [168 ER 893 at 894].

41 *R v Fisher* (1865) LR 1 CCR 7.

29 The removal of the half-jack in *Tacey* and the introduction of the stick in *Fisher* were acts which undoubtedly involved impairment of the function or usefulness of the property. Equally undoubtedly the impairment of function or usefulness in each case was the result of a physical alteration to the integrity of the property albeit that in each instance the alteration was remediable.

30 The English Court of Appeal in *Whiteley* approved Auld J's statement that damage is to be "widely interpreted so as to include not only permanent or temporary physical harm, but also permanent or temporary impairment of value or usefulness"[42]. Mr Whiteley, a computer hacker, appealed against his conviction for the malicious damage to discs in a computer system. Mr Whiteley had gained unauthorised access to the system and he had issued commands, impulses magnetising or de-magnetising particles, so as to alter data that had been written to the discs. Mr Whiteley contended that his activity had affected only intangible information contained on the discs. Lord Lane CJ rejected the argument, stating[43]:

> "What the Act requires to be proved is that tangible property has been damaged, not necessarily that the damage itself should be tangible. There can be no doubt that the magnetic particles upon the metal discs were a part of the discs and if [Mr Whiteley] was proved to have intentionally and without lawful excuse altered the particles in such a way as to cause an impairment of the value or usefulness of the disc to the owner, there would be damage within the meaning of section 1".

31 The impairment of the value or usefulness of the discs was brought about by a physical, albeit unseen, alteration to the magnetic particles on the discs.

32 The Court of Appeal of England and Wales returned to the scope of the concept of "damage" in *Fiak*[44]. Mr Fiak appealed against his conviction for malicious damage contrary to s 1(1) of the 1971 UK Act. While he was held in a police cell Mr Fiak stuffed a blanket into the toilet and repeatedly flushed the toilet causing his cell and the adjoining cells to be flooded. The charge was particularised as damage to the blanket and the cells. The Court of Appeal referred to Auld J's statements in *Morphitis* and to the analysis in *Whiteley* and held that, while the effect on the property was remediable, the blanket could not

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42 (1991) 93 Cr App R 25 at 29.

43 *Whiteley* (1991) 93 Cr App R 25 at 28.

44 [2005] EWCA Crim 2381.

be used until it was dried out (and cleaned) and the flooded cells were "out of action" until the water cleared[45]. Mr Fiak's appeal was dismissed.

33 It will be recalled that Simpson J identified *Henderson and Battley* as a possible exception to the requirement for "physical derangement" of the property damaged. In that case, the Court of Appeal (Criminal Division) confirmed the defendants' convictions for criminal damage occasioned by the deposit of some 30 lorry-loads of soil, rubble and mud on a building site[46]. Their Lordships rejected an argument that there had been no damage because the condition of the land beneath the rubble had not been altered. Whether damage was done was said to be a question of fact and degree for the jury's assessment.

34 Lord Lane CJ explained *Henderson and Battley* in *Whiteley*, observing[47]:

> "The trial judge['s] … decision was upheld on appeal, on the grounds that damage can be of various kinds and that the definition found in the *Concise Oxford Dictionary* … namely '*injury* impairing value or usefulness,' was appropriate to cover the facts of the case." (emphasis added)

35 The deposit of 30 lorry-loads of rubble on a site may be thought to have occasioned a temporary alteration to land beneath, which had been "cleared flat" in readiness for construction work[48]. So understood, in none of the decisions which have used, or been explained by, Auld J's formulation has the impairment of function or usefulness not been occasioned by some *injury* in the sense of some alteration to the physical integrity of the property, even if relatively slight as in *Fiak*.

Has the property been rendered inoperative?

36 There was no dispute that there must be some form of physical connection to the property. However, the decision in *Hammond*, where the Court stated that

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45 *R v Fiak* [2005] EWCA Crim 2381 at [20].

46 *R v Henderson and Battley* (unreported, Court of Appeal (Criminal Division), 29 November 1984).

47 *Whiteley* (1991) 93 Cr App R 25 at 28.

48 *R v Henderson and Battley* (unreported, Court of Appeal (Criminal Division), 29 November 1984) at 2.

inoperability of the property alone could be considered "damage" under s 195(1), was influential in the reasoning of the Court of Criminal Appeal below. It is therefore necessary to address inoperability or "temporary functional derangement" as a possible test under s 195(1). *Hammond* was a case stated to the New South Wales Court of Criminal Appeal which asked whether the facts stated were capable of supporting Mr Hammond's conviction for a s 195(1)(a) offence[49]. Those facts were that Mr Hammond spat on a stainless steel seat located in the dock of a police station. As the Court of Criminal Appeal noted[50], the facts bore similarity to those in *"A" (a Juvenile) v The Queen*, in which the defendant was charged with criminal damage for spitting on the back of a police officer's raincoat[51]. "A" appealed against his conviction in the Juvenile Court to the Kent Crown Court. The Kent Crown Court acknowledged that spitting on a garment may damage the garment and instanced spitting on a satin wedding dress which leaves a mark or stain. In "A"'s case the spittle landed on a garment that was designed to resist the elements and there was no likelihood that if wiped with a damp cloth any trace of it would remain. The Kent Crown Court contemplated that criminal damage to a garment may be sustained if the garment is rendered "inoperative" until it is dry-cleaned. "A"'s conduct had not rendered the raincoat imperfect or inoperative and his appeal was allowed and his conviction quashed.

37 In *Hammond*, the Court of Criminal Appeal said that a "new judicial approach" to the determination of criminal damage had been identified in *"A" (a Juvenile)*: applying this approach, the court considers (i) whether the physical appearance of the property has changed as a result of the defendant's act so that it may be described as "imperfect"; or (ii) whether as a result of the defendant's act the property was rendered "inoperative"[52]. The stainless steel seat was not rendered imperfect or inoperative as the result of Mr Hammond's act and the Court of Criminal Appeal answered the question reserved in the stated case "no". Although not strictly necessary to the decision, their Honours said that interference with the functionality alone, even without physical harm to, or

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49 *Hammond v The Queen* (2013) 85 NSWLR 313.

50 *Hammond v The Queen* (2013) 85 NSWLR 313 at 325 [49] per Slattery J.

51 [1978] Crim LR 689.

52 *Hammond v The Queen* (2013) 85 NSWLR 313 at 326 [50], citing *"A" (a Juvenile) v The Queen* [1978] Crim LR 689.

"derangement" of, property may suffice to establish damage within the meaning of s 195(1)[53].

38 As the Court of Criminal Appeal observed in Mr Grajewski's case, the decision in *"A" (a Juvenile)* has proved to be influential despite its limited precedential authority[54]. Important to acceptance of the "new judicial approach" was its approval by the Court of Criminal Appeal of Queensland in *R v Zischke*[55].

39 In *Zischke*[56] the issue for the Queensland Court of Criminal Appeal was whether slogans spray painted on buildings, walls and footpaths at the Townsville Mall constituted criminal damage under the *Criminal Code* (Qld). Mr Zischke argued that an adhesive substance applied to a structure does not, without more, damage the structure. The Court of Criminal Appeal rejected the argument, observing that the authorities show that an article may be damaged even though the damage is remediable. Their Honours cited *"A" (a Juvenile)* with approval and concluded that the formula which "most nearly embraces all the attempts at definition [of criminal damage] is that a thing is damaged if it is rendered imperfect or inoperative"[57]. Their Honours considered that this formula accommodated the test which had been applied by the Supreme Court of South Australia in *Samuels v Stubbs*, which equates the "temporary functional derangement" of property with damage to the property[58]. The graffiti was held to have rendered the surfaces on which it was sprayed "imperfect"[59].

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53 *Hammond v The Queen* (2013) 85 NSWLR 313 at 331 [69].

54 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [38], citing "The Binding Effect of Crown Court Decisions" [1980] Crim LR 402.

55 *Hammond v The Queen* (2013) 85 NSWLR 313 at 326 [51], citing *R v Zischke* [1983] 1 Qd R 240.

56 [1983] 1 Qd R 240.

57 *R v Zischke* [1983] 1 Qd R 240 at 246.

58 *R v Zischke* [1983] 1 Qd R 240 at 246, citing *Samuels v Stubbs* (1972) 4 SASR 200.

59 *R v Zischke* [1983] 1 Qd R 240 at 246.

"Temporary functional derangement"

40 *Samuels v Stubbs* was an appeal from the dismissal of a complaint that charged the respondent with criminal damage to a police constable's cap[60]. The Special Magistrate found that the cap had fallen to the ground as the constable was attempting to arrest a demonstrator and that the respondent kicked the cap and jumped on it with both feet. The Special Magistrate recorded "it was crushed under his weight, it didn't spring back into its original shape; [and] it remained in a semi-crushed condition"[61]. The Special Magistrate dismissed the complaint, holding that the evidence did not establish "actual damage" to the cap. Walters J observed that it is difficult to lay down a "precise and absolute rule" as to what amounts to "damage" and that it is necessary to be guided by the circumstances of each case[62]. His Honour concluded that it suffices for the prosecution to establish "a temporary functional derangement" of the property. The cap was damaged in that it was "injured or harmed in such a way to cause temporary derangement of its function and of the purpose which it was normally to serve"[63].

41 Applying the ordinary meaning of the language of the provision[64], the conclusion that the cap was damaged might be thought inevitable; it was crushed out of shape. The foundation for the test of "temporary functional derangement" as a criterion of criminal damage to property is less clear. Immediately before articulating the test, Walters J commented that "damage" in the context of property offences may not necessarily be employed interchangeably with "injury" in the context of offences against the person[65]. It may be that his Honour took the test from the rejection of counsel's argument in *Fisher*. Counsel is reported to have submitted unsuccessfully, by analogy with a decision of the Court for Crown Cases Reserved dealing with proof of the offence of occasioning bodily injury dangerous to life, that a "temporary functional

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60 *Police Offences Act 1953* (SA), s 43.

61 *Samuels v Stubbs* (1972) 4 SASR 200 at 202.

62 *Samuels v Stubbs* (1972) 4 SASR 200 at 203.

63 *Samuels v Stubbs* (1972) 4 SASR 200 at 204.

64 Section 43(1) of the *Police Offences Act 1953* (SA) provided: "Any person who wilfully and without lawful authority destroys or damages any property shall be guilty of an offence."

65 *Samuels v Stubbs* (1972) 4 SASR 200 at 203.

derangement" of the boiler did not suffice to constitute criminal damage to property[66].

42 In *Heyne* the test of "temporary functional derangement" was approved as a criterion of criminal damage. The question arose in somewhat unlikely circumstances and the Court of Criminal Appeal's consideration of the criterion was brief. Mr Heyne was convicted of the manslaughter of his wife, who had died in consequence of being trapped inside their burning home. Mr Heyne had poured petrol on the carpet inside the house but the cause of its ignition was unknown. The prosecution contended that Mr Heyne was guilty of manslaughter by unlawful and dangerous act or criminal negligence. On the former case, the unlawful act was the malicious damage occasioned by pouring the petrol onto the carpet. The jury was directed that it was open to find that this act amounted to criminal damage in any of a number of ways, including by (i) wetting the carpet with petrol, which was temporary, (ii) any permanent staining of the carpet by the petrol, and (iii) the "temporary functional derangement" of the house occasioned by the presence of the petrol.

43 On appeal against his conviction, Mr Heyne argued the trial judge erred in law in leaving the third basis for the jury's consideration since it could not support a finding that the act amounted to criminal damage. Handley JA, giving the leading judgment, saw no reason to doubt that the "temporary functional derangement" of property may suffice for liability for the s 195(1) offence. His Honour said the formulation is consistent with *Hardman* and *Morphitis*[67].

44 There could be no serious question that the pouring of the petrol on the carpet in *Heyne* occasioned damage to the carpet and, as Mr Grajewski argues, the three ways in which the trial judge invited the jury to consider that the foundational offence was made out might be thought to be cumulative. In any event, viewing the third way in isolation, the presence of the petrol vapour in the house occasioned a temporary physical alteration to the house.

45 Neither *Hardman* nor *Morphitis* requires recourse to the concept of "temporary functional derangement" to explain the decision. As earlier noted, the analysis in *Morphitis* is that the dismantling and removal of a part of a thing damages the thing. In *Hardman* painting graffiti on a pavement with water

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66 *R v Fisher* (1865) LR 1 CCR 7 at 8, citing *R v Gray* (1857) Dears & Bell 303 [169 ER 1017].

67 *R v Heyne* (unreported, Court of Criminal Appeal of New South Wales, 18 September 1998) at 3.

soluble whitewash was held to damage the pavement notwithstanding that the whitewash would eventually have been eradicated by rainwater and pedestrian traffic. It is not apparent that there was any functional derangement of the pavement; however, the surface of the pavement was undoubtedly altered by the graffiti even though the damage thereby occasioned was not permanent.

46 Whatever its origin, the concept of "temporary functional derangement" is not a useful criterion for the determination of criminal damage to property. It is an effect or product of damage. Interference with functionality alone can hardly be said to amount to damaging the thing; and, as indicated, this was not the contention of either party. If it were otherwise, as Simpson J has pointed out, removal of the ignition key of a motor vehicle might be within the reach of the s 195(1) offence[68].

47 The only other decision on which the respondent's submission, that there is no requirement that there be any "physical derangement" to property, is based is Neasey J's decision in *Griffiths v Morgan*[69]. Mr Griffiths filled his mouth with water before taking a breathalyser test and when asked to blow into the breathalyser machine he released the water or saliva or both into the tube thereby rendering the machine inoperative. It was sent to Hobart where it was dismantled, cleaned and adjusted before it became operational again. Neasey J held that the machine was injured within the meaning of s 37(1) of the *Police Offences Act 1935* (Tas). Contrary to the respondent's submission, the introduction of the fluid into the machine brought about a physical albeit temporary alteration to the machine. As Neasey J reasoned, the case was analogous to *Fisher*.

The Court of Criminal Appeal's test in Mr Grajewski's case

48 In Mr Grajewski's case, the Court of Criminal Appeal was not prepared to embrace *Hammond*'s conclusion that interference with functionality alone suffices to establish damage. The Court of Criminal Appeal said that there must be "some physical interference with the property" before liability under s 195(1) can be engaged. In this respect the Court of Criminal Appeal discerned a material distinction between the protestor who ties herself to the wheel or blade of a bulldozer and the protestor who lies down in front of the bulldozer. In each case the result may be the stopping of the bulldozer but it is only in the former case that there is a combination of "physical interference and temporary

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68 *Director of Public Prosecutions v Fraser & O'Donnell* [2008] NSWSC 244 at [38].

69 Unreported, Supreme Court of Tasmania, 13 October 1972.

inoperability" which suffices to satisfy the "destroys or damages" physical element of the offence[70].

49 Inoperability may be the product of damage done to property but it does not, of itself, constitute damage to property. Nothing in the authorities justifies an interpretation of the expression "destroys or damages" as extending to conduct which does not in any respect alter the physical integrity of the thing said to be damaged. The attempt to overcome the evident difficulty in the conclusion in *Hammond*, that interference with functionality alone suffices to establish the offence, by the addition of a requirement of "physical interference" does not solve the difficulty. The protestor who ties herself to the blade of the bulldozer does not damage the bulldozer just as the protestor who lies in front of the bulldozer does not damage the bulldozer. It may be that in each case the bulldozer is stopped while the protestor remains in position but that is not because of anything done by the protestor to affect the functioning of the bulldozer. It is because of the desire of the operator not to injure the protestor.

Application to Mr Grajewski

50 At this point the facts and the questions of law for determination stated by Judge Bright should be set out in full:

> "In determining the appeal against conviction by Paul Olaf GRAJEWSKI on 29 May 2017 I was satisfied of the following beyond reasonable doubt:
>
> 1. Paul Olaf GRAJEWSKI was a protestor who attended the Carrington Coal Terminal on 8 May 2016.
>
> 2. At 7:50am a machine known as Ship Loader 2 was being used to load a vessel on Dyke 5.
>
> 3. Paul Olaf GRAJEWSKI climbed the stairs to the top of Ship Loader 2.
>
> 4. As Paul Olaf GRAJEWSKI commenced to climb Ship Loader 2 the machine was shut down due to safety concerns.
>
> 5. He then used a harness and roping device to lock himself to Ship Loader 2.

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70 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [62].

6. He then lowered himself down to about 10 metres above the platform.

7. The actions of Paul Olaf GRAJEWSKI and his position posed a potential risk of serious harm to himself.

8. The machine was inoperable whilst he remained in that position.

9. NSW Police Rescue successfully removed Paul Olaf Grajewski from Ship Loader 2 at approximately 9:40am.

10. Carrington Coal Terminal Ship Loading Operations recommenced at 10:15am.

QUESTION OF LAW FOR DETERMINATION

The question I now submit is:

Can these facts support a finding of guilt for an offence contrary to section 195(1)(a), *Crimes Act*, 1900.

In particular, was the evidence capable of proving beyond reasonable doubt that Ship Loader 2 had been damaged by the conduct of Paul Olaf GRAJEWSKI."

51 The Court of Criminal Appeal said that fact 4 established that Ship Loader 2 ceased operations because of a decision in the control room; fact 5 established that, thereafter, Mr Grajewski locked himself to the machine; fact 6 established that he lowered himself so that he was ten metres above the platform; and fact 8 established that Ship Loader 2 was inoperative while Mr Grajewski remained in that position. Notably, the Court did not refer to fact 7, that Mr Grajewski's actions and his position posed a potential risk of serious harm to him. The Court of Criminal Appeal's determination that the first question submitted by Judge Bright should be answered "yes" reflected their Honours' conclusion that Mr Grajewski caused Ship Loader 2 to cease operating by physically attaching himself to it and that this conduct sufficed to satisfy the physical element of the offence in s 195(1)(a) of the *Crimes Act*[71].

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71 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [6].

52 The Court of Criminal Appeal considered that once the conclusion is reached that physical interference causing property to be inoperable is within s 195(1), "there is no occasion to imply fine distinctions based on precisely how that is achieved"[72]. The Court said that it would seem absurd to hold that letting out the air in a vehicle's tyre amounts to damage for the purposes of s 195(1) but that attaching a wheel clamp does not[73]. Equally, it may be thought absurd to hold that the protestor who ties herself to the wheel or to the blade of a bulldozer commits an offence contrary to s 195(1) while the same protestor who lies in front of the bulldozer does not.

53 The physical element of the offence created by s 195(1) is conduct that "destroys or damages" some article of tangible property. A person does not damage a thing by conduct which does not bring about any alteration to the physical integrity of the thing. The alteration may be relatively minor and temporary as in letting the air out of a tyre, which physically alters the tyre and renders it imperfect[74]. By contrast, unless the attachment of a wheel clamp to the tyre causes some physical alteration to the tyre it has not *damaged* the tyre even though the vehicle may be inoperable while the clamp remains in place.

54 The Court of Criminal Appeal's conclusion that Mr Grajewski's physical presence attached to Ship Loader 2 caused it to continue to be inoperable for some two hours does not establish that Mr Grajewski damaged Ship Loader 2. On the facts stated, nothing done by Mr Grajewski brought about any alteration to the physical integrity of Ship Loader 2. The decision to shut down Ship Loader 2 was taken due to safety concerns for Mr Grajewski (fact 4) and those same concerns led to Ship Loader 2 remaining shut down until Mr Grajewski was removed from it (facts 7 and 8).

55 For these reasons the appeal must be allowed. As noted, the Court of Criminal Appeal has power to quash the conviction or sentence of the District Court on the appeal to the District Court. Section 37 of the *Judiciary Act 1903* (Cth) permits this Court to give such judgment as ought to have been given in the first instance. The facts stated by Judge Bright cannot support Mr Grajewski's conviction. The conviction and the sentence of the District Court on the appeal to the District Court must be quashed.

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72 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [63].

73 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [63].

74 See *Director of Public Prosecutions (NSW) v Lucas* [2014] NSWSC 1441 at [18].

56 Mr Grajewski seeks an order for costs. The proceeding is not relevantly to be distinguished from an appeal and there is no reason to depart from the usual practice of making no order as to costs in criminal proceedings.

Orders

57 For these reasons, there should be the following orders:

1. Appeal allowed.

2. Set aside the order of the Court of Criminal Appeal of the Supreme Court of New South Wales dated 24 October 2017 and in lieu thereof order that the questions submitted to the Court of Criminal Appeal by Judge Bright be answered as follows:

> Can these facts support a finding of guilt for an offence contrary to section 195(1)(a), *Crimes Act*, 1900?
>
> No.
>
> In particular, was the evidence capable of proving beyond reasonable doubt that Ship Loader 2 had been damaged by the conduct of Paul Olaf GRAJEWSKI?
>
> Unnecessary to answer.

3. Quash the conviction and sentence of the District Court at Newcastle on 29 May 2017 on the appeal to the District Court.

58 NETTLE J. On 8 May 2016, the appellant, Mr Grajewski, participated in a protest at the Carrington Coal Terminal in Newcastle, New South Wales. At that time, a machine known as Ship Loader 2 was being used to load a vessel with coal. Despite the fact that the machine was in operation, the appellant climbed the stairs of the machine, thereby causing the operator to shut it down for safety reasons. The appellant then tied himself to the machine's structure, using a rope and harness, thereby causing the machine to continue to be inoperable for approximately two hours.

59 The appellant was charged inter alia with an offence contrary to s 195(1)(a) of the *Crimes Act 1900* (NSW) of intentionally or recklessly damaging property belonging to another and fined therefor $1,000. He appealed against conviction to the District Court of New South Wales but his appeal was dismissed. Upon the appellant's application, the District Court judge (Judge Bright) submitted the following facts and questions of law to the Court of Criminal Appeal of the Supreme Court of New South Wales[75] with a view to determining whether the appellant's conduct in locking himself to the coal loading machine so that it was inoperable was conduct capable of constituting damage to property within s 195(1)(a) of the *Crimes Act*:

> "FACTS
>
> In determining the appeal against conviction by Paul Olaf GRAJEWSKI on 29 May 2017 I was satisfied of the following beyond reasonable doubt:
>
> 1. Paul Olaf GRAJEWSKI was a protestor who attended the Carrington Coal Terminal on 8 May 2016.
>
> 2. At 7:50am a machine known as Ship Loader 2 was being used to load a vessel on Dyke 5.
>
> 3. Paul Olaf GRAJEWSKI climbed the stairs to the top of Ship Loader 2.
>
> 4. As Paul Olaf GRAJEWSKI commenced to climb Ship Loader 2 the machine was shut down due to safety concerns.
>
> 5. He then used a harness and roping device to lock himself to Ship Loader 2.
>
> 6. He then lowered himself down to about 10 metres above the platform.

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75 Pursuant to s 5B(2) of the *Criminal Appeal Act 1912* (NSW).

7. The actions of Paul Olaf GRAJEWSKI and his position posed a potential risk of serious harm to himself.

8. The machine was inoperable whilst he remained in that position.

9. NSW Police Rescue successfully removed Paul Olaf Grajewski from Ship Loader 2 at approximately 9:40am.

10. Carrington Coal Terminal Ship Loading Operations recommenced at 10:15am.

QUESTION OF LAW FOR DETERMINATION

The question I now submit is:

Can these facts support a finding of guilt for an offence contrary to section 195(1)(a), *Crimes Act*, 1900.

In particular, was the evidence capable of proving beyond reasonable doubt that Ship Loader 2 had been damaged by the conduct of Paul Olaf GRAJEWSKI."

60 The Court of Criminal Appeal (Leeming JA, Johnson and Adamson JJ agreeing) answered[76] the first question affirmatively and the second as inappropriate to decide. By grant of special leave, the appellant now appeals to this Court against their Honours' construction of s 195(1)(a). For the reasons which follow, I consider that the appeal should be dismissed.

Relevant statutory provisions

61 Division 2 of Pt 4AD of the *Crimes Act*, which is entitled "Crimes against property generally", comprises six sections: s 195, "Destroying or damaging property"; s 196, "Destroying or damaging property with intent to injure a person"; s 197, "Dishonestly destroying or damaging property"; s 198, "Destroying or damaging property with intention of endangering life"; s 199, "Threatening to destroy or damage property"; and s 200, "Possession etc of explosive or other article with intent to destroy or damage property".

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76 *Grajewski v Director of Public Prosecutions (NSW)* [2017] NSWCCA 251 at [66], [68], [69].

62 Section 194(1) states that "property" for the purposes of Pt 4AD does not include intangible property and s 194(4) states that "damaging property" includes "removing, obliterating, defacing or altering the unique identifier of the property". "Damage" is not otherwise defined.

63 Section 195(1) provides that:

> "A person who intentionally or recklessly destroys or damages property belonging to another or to that person and another is liable:
>
> (a) to imprisonment for 5 years, or
>
> (b) if the destruction or damage is caused by means of fire or explosives, to imprisonment for 10 years."

The history of s 195(1)(a)

64 As Leeming JA observed[77], s 195 and the other provisions that are now in Pt 4AD were inserted into the *Crimes Act* by the *Crimes (Criminal Destruction and Damage) Amendment Act 1987* (NSW) ("the 1987 amendments") to replace provisions of the *Crimes Act* that, as originally enacted, were drawn from the *Malicious Damage Act 1861* (24 & 25 Vict c 97). The 1987 amendments gave effect to recommendations of the Criminal Law Review Division of the Attorney-General's Department in a Discussion Paper titled "NSW Malicious Injuries to Property Provisions" consequent on an extensive review of criminal damage to property offences at common law, in England and in other Australian States and Territories. Consistently with developments in England, Victoria and the Australian Capital Territory, the Criminal Law Review Division recommended[78] replacing the miscellany of damage to property offences drawn from the *Malicious Damage Act*, which were principally defined by reference to the type of property damaged, with a simpler legislative scheme of damage to property offences principally defined by reference to the mental state of the offender regardless of the nature of the property, with aggravating factors of dishonesty, use of fire or explosives, and malicious endangerment of life.

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77 *Grajewski* [2017] NSWCCA 251 at [13]-[16]. See also Criminal Law Review Division, "Discussion Paper: NSW Malicious Injuries to Property Provisions" at 3, 34-38; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 October 1987 at 15343-15344.

78 Criminal Law Review Division, "Discussion Paper: NSW Malicious Injuries to Property Provisions" at 34-38.

Significantly, as Leeming JA observed[79], the Discussion Paper proposed[80] the following provision, the substance of which was enacted as s 195:

> "Offence One: Maliciously[81] destroying or damaging any property (maximum penalty: 5 years' imprisonment)."

65 The commentary on the proposed provision was as follows[82]:

> "Whereas the current s 247 applies only in respect of property which is not the subject of another offence in Part IV Chapter II, the proposed offence would apply generally. A similar offence is found under the UK, Victorian and ACT legislation. 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. The proposed penalty is in accordance with the current penalty in respect of s 247."

66 As his Honour further observed[83], it is also significant that, prior to the 1987 amendments, s 194(1) – being the first section of Ch II of the *Crimes Act* – made reference to "[e]very act of malicious *injury* to property punishable under this Act" (emphasis added). That was followed by s 196 to s 247, which proscribed various injuries to various types of property. Some of those provisions were expressed in terms of conduct which "destroys or damages" property of a particular kind[84]. And others were expressed in terms of conduct which "injures" or "does injury to" property of a particular kind[85]. Section 247, which was the catch-all provision, proscribed conduct that "injures" *any* property. As originally enacted, it provided that:

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79 *Grajewski* [2017] NSWCCA 251 at [16].

80 Criminal Law Review Division, "Discussion Paper: NSW Malicious Injuries to Property Provisions" at 35.

81 "Maliciously" was replaced by "intentionally or recklessly" in 2008: see *Crimes Amendment Act 2007* (NSW), Sch 1 [2]-[3].

82 Criminal Law Review Division, "Discussion Paper: NSW Malicious Injuries to Property Provisions" at 35.

83 *Grajewski* [2017] NSWCCA 251 at [22].

84 See, eg, *Crimes Act*, ss 209, 210, 215, 224, 225, 244.

85 See, eg, *Crimes Act*, ss 207, 226, 228, 241.

"*Injuries over five pounds not otherwise provided for.*

Whosoever maliciously injures, to an amount exceeding five pounds, any real or personal property whatsoever, either of a public or private nature for which act no punishment is hereinbefore provided, shall be liable to imprisonment for two years, and where such offence is committed in the night, shall be liable to penal servitude for five years."

67 After some amendments and immediately before the 1987 amendments, s 247 stood as follows:

"**Other injuries**

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."

68 As has been seen, the 1987 amendments relocated the catch-all provision within the relevant part of the Act from the position of last to first and reconstituted it as s 195 expressed in terms of conduct which "destroys or damages" property. Evidently, it was intended that "damages" should be taken to include "injures" according to the natural and ordinary meanings of those words[86]. In *Samuels v Stubbs*, Walters J noted[87] that where the word "damage" is used in legislation its meaning will be controlled by its context and, depending on the context, may not always be employed interchangeably with "injure". In this context, however, it is apparent that it was intended that the two terms should be interchangeable. Under legislation analogous to the *Crimes Act* as it previously stood, "injures" was taken to include "damages"[88] and, as has been noticed, s 195 was proposed by the Criminal Law Review Division as in effect an expansion of the previous reach of s 247.

The concept of "damage"

69 In view of the cases canvassed in the Court of Criminal Appeal's reasons for judgment and in the arguments advanced before this Court, conceptually there arise five broad categories of conduct which arguably could amount to damage to property within the meaning of s 195(1). They are:

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86 *Concise Oxford English Dictionary*, 11th ed (2004) at 361 meaning 1, 732 meaning 1.

87 (1972) 4 SASR 200 at 203.

88 See *Getty v Antrim County Council* [1950] NI 114 at 118 per Black LJ; *Griffiths v Morgan* (unreported, Supreme Court of Tasmania, 13 October 1972) at 12.

(1) conduct which involves physical interference with the property and which causes some alteration to the physical or chemical structure, or integrity, of the property, or, as otherwise termed, "physical derangement"[89], whether permanent or temporary;

(2) conduct which changes the physical appearance of the property, so that it may be described as "imperfect"[90];

(3) conduct which involves physical interference with the property and which has a direct impact on the ability of the property physically to operate or fulfil its function;

(4) conduct which involves physical interference with the property and which has some impact on the functionality of the property but which does not involve a direct impact on the ability of the property physically to operate or fulfil its function; and

(5) conduct which involves no physical interference with the property but has some impact on the functionality of the property.

70 These categories are not intended to be rigid or prescriptive. It is not always possible to draw bright lines between them; for example, as is suggested by the majority in this case[91], the second category could be conceived of as a subset of the first. Nor are the categories intended to undercut the proposition that whether damage is done in any particular case is a question of fact and degree[92]. Nonetheless, in my view the categories assist in understanding the extant cases and in determining the breadth of s 195(1)(a).

71 In this case, the majority concludes[93] that, for conduct to cause damage to property within the meaning of s 195(1)(a), it is necessary that it cause some alteration to the physical integrity of the property, which may include a change to the appearance of the property where that involves a change to the physical or

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89 *Director of Public Prosecutions v Fraser & O'Donnell* [2008] NSWSC 244 at [38].

90 *"A" (a Juvenile) v The Queen* [1978] Crim LR 689; *R v Zischke* [1983] 1 Qd R 240 at 246; *Hammond v The Queen* (2013) 85 NSWLR 313 at 326 [50] per Slattery J (Hoeben CJ at CL and Bellew J agreeing at 315 [1], 334 [80]).

91 See reasons of Kiefel CJ, Bell, Keane and Gordon JJ at [39].

92 *R v Henderson and Battley* (unreported, Court of Appeal of England and Wales, 29 November 1984) at 3; *Fraser & O'Donnell* [2008] NSWSC 244 at [27].

93 See reasons of Kiefel CJ, Bell, Keane and Gordon JJ at [53].

chemical structure of the property. I do not accept that conclusion. As I see it, the better view of the meaning of s 195(1)(a) is that it is enough to constitute damage to property if there be some physical interference with the property which affects the functionality of the property or the ability of the property physically to operate. In other words, whereas the majority accepts only the first category (and, to the extent that it falls within the first category, the second) as sufficient to constitute damage, in my view s 195(1)(a) can also encompass the third and fourth categories. As I explain in what follows, the decided cases extend to the third category and there is no reason in principle to suppose that the legislature intended to draw a line between the third and fourth.

The need for "physical derangement"

72 The appellant argued before this Court, as he did before the courts below, that the "common thread" of previous authority regarding offences of criminal damage to property was that the element of "damage" is not established without proof of some degree of physical derangement or alteration of the physical integrity of the relevant property. Up to a point that is so; but it is not entirely so.

73 Clearly enough, there are cases which speak in terms of physical derangement or interference with the physical integrity of the property. For example, in *R v Previsic*, where the accused was charged with criminal damage caused by kicking a car, it was held[94] that the jury were correctly directed that: "a dint such as was observable on the photographs put in evidence *can* amount to damage" (emphasis in original).

74 There are also a number of cases in which the conduct has had an effect on the physical appearance of the property. In *"A" (a Juvenile) v The Queen*, the Kent Crown Court gave[95] the example of a person spitting on a satin wedding dress so as to leave a mark or stain that could not be removed: this could amount to damage since it could render the dress "imperfect". And it has consistently been held[96] that the painting of graffiti or slogans on the surface of property can amount to damage. In *R v Zischke*, this was explained[97] on the basis that slogans painted on the surface of a building with aerosol spray had rendered the building

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94 (2008) 185 A Crim R 383 at 388 [27] per Ashley JA (Dodds-Streeton JA and Lasry A-JA agreeing at 389 [30], [31]).

95 [1978] Crim LR 689 at 689.

96 See, eg, *Zischke* [1983] 1 Qd R 240; *Hardman v Chief Constable of Avon & Somerset Constabulary* [1986] Crim LR 330; *Roe v Kingerlee* [1986] Crim LR 735.

97 [1983] 1 Qd R 240 at 246.

"imperfect" until the slogans were removed. In *Hardman v Chief Constable of Avon & Somerset Constabulary*, the painting of silhouettes on an asphalt pavement with a soluble water paint designed to wash away in the rain was held[98] to be damage to property on the basis that, although it caused no lasting effect, the paintings were productive of "mischief done to property". And in *Roe v Kingerlee*, the smearing of mud graffiti on a wall was held[99] to be capable of amounting to criminal damage. While *Zischke* can be explained on the basis that the painting of the graffiti altered the physical or chemical structure of the surface of the property, it is more difficult to describe *Hardman* and *Roe* in that manner.

75 By contrast, there are many cases which speak in terms of effect on function. For example, in *R v Fisher*, the Court for Crown Cases Reserved held[100] that an accused who had interfered with the operation of a steam engine by over-tightening screws, shutting off a valve and blocking the flow of water to the boiler by placing a stick in a boiler feed pipe, was rightly convicted of an offence of "unlawfully and maliciously cut, break, or destroy, or damage with Intent to destroy or to render useless, any Machine or Engine" used for agriculture operation, contrary to s 15 of the *Malicious Damage Act*. Despite the fact that once the screws were loosened, the valve was opened and the stick was removed from the feed pipe, the steam engine was able to function just as well as before the interference, the Court held that there was damage to the engine because for a time it was rendered dysfunctional. Pollock CB equated[101] what had been done to spiking a gun, where no physical damage is done to the weapon but it is rendered dysfunctional until the spike is removed:

> "there is no actual damage done to the gun, although it is rendered useless. ... Can it be said that the machine was not damaged, when it was placed in such a position that, if the water had gone on boiling, the boiler would have burst? Moreover, great injury may be done to a machine by the displacement of its parts; and in this case, until the parts were replaced, the machine was useless."

76 In more recent times, there has been a succession of cases in which the basis of decision has been that it is enough to constitute damage to property in the relevant sense that there be some physical interference with the property that

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98 [1986] Crim LR 330 at 330-331.

99 [1986] Crim LR 735.

100 (1865) LR 1 CCR 7 at 7. See also *R v Tacey* (1821) Russ & Ry 452 [168 ER 893]; *Getty* [1950] NI 114.

101 *Fisher* (1865) LR 1 CCR 7 at 8.

temporarily affects its functionality. For example, in *Samuels*, the act of jumping on a policeman's cap and so putting the cap temporarily out of shape was held[102] to amount to an offence of wilfully destroying or damaging property contrary to s 43(1) of the *Police Offences Act 1953* (SA): on the basis that it prevented the cap serving its normal function of being worn as a policeman's cap until put back into shape. In overturning the decision of the Special Magistrate to dismiss the complaint against the accused, Walters J implicitly rejected the Special Magistrate's view[103] that "the word 'damage' … denotes an actual physical interference to the structure or components of the hat, however small". In *Griffiths v Morgan*, an accused who rendered a breath analysis machine temporarily dysfunctional by blowing water or saliva into the mouthpiece was held[104] to have been rightly convicted of unlawfully injuring property contrary to s 37(1) of the *Police Offences Act 1935* (Tas) because "to cause the machine to become inoperative until it was cleaned and adjusted was ... to injure it". Significantly, there was no evidence that the parts of the machine were harmed. In *R v Henderson and Battley*, the accused were held[105] to have been rightly convicted of damaging property contrary to s 1(1) of the *Criminal Damage Act 1971* (UK) by dumping soil and rubble onto a parcel of land that had been cleared for development. The jury had been directed that damage "includes even the temporary rendering of the 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, Cantley J, delivering the judgment of the court, held[106] that the direction accorded with "good sense" and with *Fisher*. In *Morphitis v Salmon*, while the accused's conduct in removing a scaffold clip and scaffold bar forming part of a barrier did not amount to damage to the clip and bar, the Queen's Bench Division considered[107] that it could have amounted to damage to the barrier, noting[108] that "[t]he authorities show that the term 'damage' for the purpose of [s 1(1) of the *Criminal Damage Act 1971* (UK)], should be widely interpreted so as to include not only permanent or temporary physical harm, but also permanent or temporary impairment of value or usefulness". In *R v Heyne*, the Court of

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102 (1972) 4 SASR 200 at 203-204.

103 *Samuels* (1972) 4 SASR 200 at 203.

104 Unreported, Supreme Court of Tasmania, 13 October 1972 at 12-13.

105 Unreported, Court of Appeal of England and Wales, 29 November 1984 at 4.

106 *Henderson and Battley* (unreported, Court of Appeal of England and Wales, 29 November 1984) at 4.

107 (1989) 154 JP 365 at 369.

108 (1989) 154 JP 365 at 368.

Criminal Appeal of the Supreme Court of New South Wales upheld[109] a trial judge's direction to the jury that tipping petrol onto a carpet constituted an offence of malicious damage to property: on the basis, among other considerations, that the temporary *functional* derangement of the house made the house unusable until the petrol vapour dispersed. In *R v Fiak*, the accused was held[110] to have been rightly convicted of doing criminal damage to a blanket and a police cell by placing the blanket in the cell lavatory and flushing it repeatedly with clean water until the cell flooded: on the basis that the blanket could not be used until it had been dried out and the flooded cell remained out of action until the water was cleared. In *Director of Public Prosecutions (NSW) v Lucas*, the deflation of a motorcar tyre was held[111] to be capable of constituting damage to property contrary to s 195(1) of the *Crimes Act*: on the basis that it was a physical interference with the tyre that rendered it unable to be used for its ordinary function until proper pressure was restored.

77 Counsel for the appellant contended that, although the impugned conduct in each of those cases was held to be damage because it affected the functionality of the property in question, it was equally important to the result in each case that the impugned conduct caused a physical change to or derangement of the property even if only slight. Counsel prayed in aid the decision of Simpson J in *Director of Public Prosecutions v Fraser & O'Donnell*, where, after reviewing a number of the decisions just cited, her Honour held[112] that the actions of protesters in activating a safety switch on a machine rendering it inoperable and then locking themselves to that machine did not amount to a sufficient degree of physical interference with the machinery to amount to damage to the machinery. Likewise, in counsel's submission, none of the appellant's actions on 8 May 2016 amounted to a sufficient degree of physical interference with the coal loader to amount to damage to the coal loader.

78 The Crown responded by invoking the subsequent decision of the Court of Criminal Appeal of the Supreme Court of New South Wales in *Hammond v The Queen*, in which Slattery J, with whom Hoeben CJ at CL[113] and Bellew J[114]

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109 Unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 18 September 1998 at 5 per Handley JA (Levine J and James J agreeing).

110 [2005] EWCA Crim 2381 at [20].

111 [2014] NSWSC 1441 at [18].

112 [2008] NSWSC 244 at [49].

113 (2013) 85 NSWLR 313 at 315 [1].

114 (2013) 85 NSWLR 313 at 334 [80].

agreed, expressed[115] disagreement with Simpson J's conclusions and, in obiter dicta, posited that the course of authority in England and Australia now supports the conclusion that interference with functionality of the property in question, even without physical harm or derangement of the property, is sufficient to establish damage within the meaning of s 195(1) of the *Crimes Act*.

The sufficiency of effect on functionality

79 As counsel for the appellant contended, in many of the cited cases in which it has been held that damage to property consisted in the effects of the accused's actions on the functionality of property there was also some degree of physical change or alteration to the property. But contrary to the appellant's submissions, not all of those cases involved an appreciable degree of physical derangement. What emerges from the totality of them is that although, in some circumstances, damage to property in the relevant sense may consist of interference with property resulting in physical derangement of the property, in other circumstances it is sufficient that there be some physical interference with the property – even without any appreciable physical derangement – if it affects the functionality of the property in a manner that renders it inoperative in the context in which it existed. Of the cases mentioned, the dumping of soil and rubble on a development site in *Henderson and Battley*, and the act of blowing water or saliva into the mouthpiece of a breath analysis machine in *Griffiths*, are perhaps the clearest exemplars. In each case, the impugned conduct went no further than the attachment of something extraneous to property by no more than the force of gravity, and so in a manner that meant that what had been so attached could readily be removed without alteration to the underlying physical or chemical structure of the property.

80 There is good sense in these cases. If an offender physically attaches something to property (even if only by the force of gravity) and the attachment renders the property dysfunctional (even if only until the attachment is removed) it accords with the natural and ordinary sense of language to speak of the offender's actions as physical interference with property which affects the functionality of the property; and thus it accords with the apparent objectives of s 195(1), as construed against the background of its historical context, to conceive of the offender's action as damage to property within the meaning of the section. The question is whether the conduct of the appellant in this case can properly be conceived of as physical interference with property which rendered the property dysfunctional.

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115 (2013) 85 NSWLR 313 at 331 [69].

When does conduct interfere with functionality?

81 As Simpson J recognised[116] in *Fraser & O'Donnell* and Leeming JA concluded[117] in the Court of Criminal Appeal, it is not enough to constitute damage to property in the relevant sense for a protester to lie down in front of a bulldozer with the object of influencing the driver to stop the machine. Such conduct may be expected to affect the driver's operation of the machine, and may in fact cause him or her to change or cease its operation, but it does not physically interfere with the machine in a manner that affects the functionality of the machine. Is it any different, as in this case, where a protester climbs on or ties himself to a machine?

82 To some extent, a protester climbing on a machine is analogous to a dump truck driver tipping soil and rubble on a development site. The two situations are alike in that, while no more than the force of gravity binds the intruded element to the property, the property cannot be used for the function for which it is intended until the intruded element has been removed. But whether the analogy is appropriate ultimately depends on the view properly to be taken of functionality. In a case where soil and rubble are dumped on a development site, the presence of the soil and rubble physically prevents the site being used for development until the soil and rubble are removed. In the case of a protester climbing on a machine, the position is more problematic.

83 If functionality of the machine is to be conceived of as limited to the ability of its mechanism physically to operate, it could hardly be said that the protester climbing on or tying him or herself to the machine affected its functionality. At least in the case of a machine like a bulldozer or the coal loading machine in issue, it is improbable that the presence of a protester on the machine would have any effect on its mechanism unless and until the protester came into contact with some of the moving parts. And even then, the size and strength of the machine are such that the protester's contact with the mechanism would more probably result in the death or serious injury of the protester than any hindrance to the operation of the moving parts. Thus, at least in the majority of cases, the only thing about the protester climbing on or tying him or herself to the machine that would cause the machine to stop would be the entirely understandable disposition of the operator to shut down the machine for fear of harming the protester. And, in one sense, that is not relevantly different from what occurs where a protester lies in front of a machine, without physically coming into contact with the machine, causing the operator to stop the machine

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116 [2008] NSWSC 244 at [42].

117 *Grajewski* [2017] NSWCCA 251 at [62].

for fear of running over the protester. It may be obstruction of the machine but it is not damage to property.

84 The alternative view is that the functionality of the machine includes its capacity to operate safely as it was designed to do. On that view of the matter, if a protester climbs onto or ties him or herself to a machine with the inevitable, consequent risk of falling off or coming into contact with part of the mechanism[118], the protester thereby physically interferes with the machine in a manner which puts it into a condition unsafe to be operated as it was designed to do, and so affects its functionality. Presumably, the machine would have the capacity to keep pushing dirt or loading coal or carrying out some other intended operation until the protester came into contact with its mechanism. But even so, it could only do so in a manner that would be manifestly unsafe and hence contrary to the manufacturer's operating instructions and statutory occupational health and safety requirements[119].

85 Counsel for the appellant argued against that view that for a protester to climb on a machine in order to induce the driver to stop its operation is no different in point of principle from a protester standing in front of a machine in order to induce the driver to stop its operation. But there are two answers to that. The first is that, according to ordinary acceptation, to attach an object to property, even if only by force of gravity, is to interfere with the property. Dumping a load of soil and rubble on a property is a graphic example. So is standing on the roof of a motorcar. So, too, in the case of a protester climbing or tying him or herself to a machine, it is an act of interference with the machine which causes the machine to cease to be capable of safe operation and thereby affects its functionality. By contrast, standing in front of a machine in order to block its path, but without making contact, is not ordinarily perceived of or described as interfering with the machine, as opposed to obstructing its path, or as affecting the safety of the machine and therefore its functionality, as opposed to prejudicing the safety of the environment in which the machine is proposed to be operated. Therein lies the distinction.

86 The second answer is that, given that damage in the relevant sense includes physical interference with property which, by bearing on its mechanism, prevents it being operated as it was designed to do, there is no apparent reason in principle to suppose a legislative intention to exclude physical interference with property which, although it does not bear on the mechanism, does by its physical attachment to the machine render the property incapable of operating as it was designed to do. Given that it is not infrequently difficult to draw a clear line

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118 See and compare *Fraser & O'Donnell* [2008] NSWSC 244 at [47].

119 See, eg, *Work Health and Safety Act 2011* (NSW), ss 31-33.

between such cases, there is no sound reason in principle for the Parliament to have intended to exclude the latter category of case. In my view, it is more likely that the object of the legislation was to criminalise physical interference with property that affects its functionality whether or not the effect on functionality is the result of physical impact.

Conclusion

87 By his actions in this case, the appellant interfered with Ship Loader 2 by physically attaching himself to it in a manner which rendered it incapable of being operated safely in the way it was designed to operate. For the reasons I have given, I would hold that the appellant was, therefore, rightly convicted of intentionally or recklessly damaging property contrary to s 195(1)(a) of the *Crimes Act*. Upon that basis, I would order that the appeal be dismissed.