New Zealand's approach to dishonesty

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Alex Steel, the University of New South Wales gives an international view abridged from his article (2009) 38 Common Law World Review 103

While dishonesty is often used as a basic fault element for a range of offences, the role of fraud in larceny and its meaning is historically contentious and different meanings exist across common law jurisdictions. In particular, there is fundamental disagreement over whether dishonesty is a morally based concept.

As larceny was one of the oldest common law offences, it developed prior to the modern emphasis on a separation between physical and mental elements. While an element of fraudulence came to be considered a fundamental part of larceny, there was still disagreement over its meaning when the (E&W) Theft Act 1968 was enacted. In essence, the debate was whether “fraudulently” was merely a synonym for a lack of a claim of right, or whether it had a broader role that ranged beyond a mere claim of right basis. One key commentator was James Fitzjames Stephen, who argued:

Theft in English law has always meant taking a thing with intent to deprive its owner of it permanently and without claim of right (A General View of the Criminal Law of England (2nd ed, Macmillan, London, 1890) at 146).

On the other hand, one of three reports of R v Holloway (1 Den 370; 169 ER 285 at 375, 287) had the court holding:

... the taking should be not only wrongful and fraudulent but should also be without any colour of right.

What was involved in fraudulence was unclear. In the 1950s Lord Goddard LJ in R v Williams [1953] 1 QB 660 at 666, 668 held:

The court thinks that the word “fraudulently” does add, and is intended to add, something to the words “without a claim of right”, and that it means ... that the taking must, be intentional and deliberate, that is to say, without mistake.

The (E&W) Theft Act 1968 replaced the element of “fraudulently” with “dishonestly” in an attempt to overcome the confusion. Ironically, this was the catalyst for a number of English decisions on the meaning of the new term, culminating in R v Feely [1973] QB 530 and R v Ghosh [1982] QB 1053. In Feely at 541 the Court of Appeal held that dishonesty was a morally based term that was to be left to juries to determine, applying ordinary standards:

We find it impossible to accept that a conviction for stealing, whether it be called larceny or theft, can reveal no moral obloquy. A man so convicted would have difficulty in persuading his friends and neighbours that his reputation had not been gravely damaged. He would be bound to be lowered in the estimation of right thinking people. Further, no reference was made by Winn LJ to the factor of fraud which Lord Goddard CJ in Reg v Williams [1953] 1 QB 660 had said had to be considered. It is this factor, whether it is labelled “fraudulently” or “dishonestly”, which distinguishes a taking without consent from stealing.

Consequently, they considered that dishonesty was an element of theft based on moral considerations and at 537-538 held:

Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people.

Ghosh at 1064 held that before criminal liability could result from that finding, a jury would also need to be satisfied that the defendant was aware of those community standards:

In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.

In Ghosh, the English Court of Appeal thus accepted that dishonesty was a state of mind. However, feeling bound by the decision in Feely that dishonesty meant something that was morally wrong, the Court could not or did not wish to consider whether such a basis for liability was appropriate. Instead, it ensured that dishonesty was a subjective state of mind by grafting onto the Feely test the second step of requiring that the accused was subjectively aware of the breach of community morals.

England thus now has a strongly morality-based concept of dishonesty.

CANADA

In Canada, the offence of theft is based on the Draft Criminal Code of the 1878 Criminal Code Commissioners. It requires the accused to have acted “fraudulently and without colour of right”: s 322, Canadian Criminal Code RSC 1985, c C-46.
Again, what acting fraudulently amounted to was a subject that did not elicit much judicial comment. Judicial statements did, however, appear to see fraudulence as having a minimal role. Williams was thus adopted in Canadian courts: see R v Srynkowycz [1954] SCR 606, (1954) 19 CR 401, 110 CCC 97; R v Houson [1966] 3 CC 348.

In Canadian cases decided after Feely there was some judicial endorsement of a broader, morally-based notion of fraudulence (R v DeMarco (1973) 22 CRNS 528, 13 CCC (2d) 369). However, in LaFrance v R [1975] 2 SCR 201 the Canadian Supreme Court affirmed Williams as the correct understanding of fraudulence. This was reasserted in R v Skalabina [1997] 3 SCR 995 when the Supreme Court unanimously stated:

an intentional misappropriation, without mistake, suffices to establish mens rea under s 32(1) [see LaFrance v The Queen [1975] 2 SCR 201; R v Williams [1953] 1 QB 660; [1953] 1 All ER 1068 (CA)]. The word “fraudulently”, as used in this section, connotes no more than this. The dishonesty inherent in the offence lies in the intentional and unmistaken application of funds to an improper purpose.

These two decisions amount to a decisive rejection of the broader, morally-based approach in Feely and Ghoosh. It is unclear, however, what Williams practically adds to the elements of theft, and consequently in Canada much more attention has been focused on the scope of crime of theft (see, for example, Holland The Law of Theft and Related Offences (Carswell, Toronto, 1998) at 150ff.).

It is also important to note that in Canadian law dishonesty also plays a significant role in fraud offences and is differently defined. Under s 380 of the Canadian Criminal Code, fraud can be committed by a person who by “fraudulent means, defrauds the public or any person”. It was held in R v Olm [1978] 2 SCR 1175, 1182 that in this context, “fraudulent means” refers to a dishonest act and that dishonesty is a common cause of the actus reus of the offence other than the mens rea: R v Theroux [1993] 2 SCR 5, 16-7. This recognition of different roles and meanings for dishonesty is significant and is in stark contrast to the English approach of harmonising the terms across offences.

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NEW ZEALAND

Section 219 of the Crimes Act 1961 had, until 2003, also used the wording “fraudulently and without colour of right”. Again, there was little judicial exegesis until recent times. In R v Coombridge [1976] 2 NZLR 381 the Court of Appeal was asked to determine the meaning of “fraudulently” in an offence of fraudulent conversion. The Court expressed itself on Feely and noted that this overruled Williams and R v Cockburn [1968] 1 WLR 281; [1968] 1 All ER 466. It defined “fraudulently” at 387 in the following terms:

We think that in order to act fraudulently an accused person must certainly, as the Judge pointed out in the present case, act deliberately and with knowledge that he is acting in breach of his legal obligation. But we are of opinion that if an accused person sets up a claim that in all the circumstances he honestly believed that he was justified in departing from his strict obligations, albeit for some purpose of his own, then his defence should be left to the jury for consideration provided at least that there is evidence on which it would be open to a jury to conclude that in all the circumstances his conduct, although legally wrong, might nevertheless be regarded as honest.

This is a strongly moral and highly subjective test. Importantly, it allows a person to be exculpated even though the jury is aware that the defendant’s moral code is different from that of the rest of society, a defence not permitted under Ghoosh. In R v Williams [1985] 1 NZLR 294 the Court of Appeal considered Coombridge and Ghoosh. It held that the approach in Coombridge is how the test has been applied in this country for many years, and it is the test which must be applied here unless and until a Full Court decides otherwise.

In so doing the Court rejected the approach in Ghoosh and referred to the alternative approaches in Australia. However, in a major revision of the theft offences, “fraudulence” was replaced with “dishonesty” by the Crimes Amendment Act 2003 (NZ) and “dishonesty” was defined as follows in s 217 of the Crimes Act 1961:

In this Part, unless the context otherwise requires, — dishonesty, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority

There appears to be no clear Parliamentary statement as to why this particular change was needed, but it was clearly a reaction against Coombridge. The committee appointed to review the draft Bill reported:

The term “dishonestly” remains but is confined by our proposed definition to conduct which is known or believed to be without proper authority. While the Committee does not support the use of an objective standard to assess the defendant’s belief that the act in question was authorised, at the same time the bill should remove any doubt that an idiosyncratic moral view about what actually constitutes dishonest behaviour will excuse the defendant from liability (Crimes Consultative Committee “Crimes Bill 1989” (1991) at 65).

Proof of a lack of claim of right remains as a separate element of the offence in s 219. When compared to the partial definition of dishonesty in the English Theft Act, the New Zealand definition appears to要求 that the accused believe that consent has previously been given — and so neither a belief that the owner would consent if informed or that the owner of lost property cannot reasonably be found would be exculpatory.

The new approach is thus significant in being the only jurisdiction to specify that dishonesty is restricted to a belief in consent which need not be reasonable: Hayes v R [2008] 2 NZLR 321 at 334 [34]. Simister and Brookbanks have commented;
What the new law threatens to do is to convert most deliberate usurpations of property rights into theft. But remedying interferences with property rights is the job of the civil law. Criminal law requires something more: a moral wrong, sufficient to mark that interference out as deserving the attention of the criminal law, that is, as more than a mere tort or breach of trust. It is submitted that someone who is not morally dishonest lacks the guilty mind that makes the actions criminal rather than a civil wrong. Abolishing this element is an error (Principles of Criminal Law (3rd ed, Brookes, Wellington, 2007) at 688).

Again, it is not entirely clear what this definition of dishonesty adds to the offence. A belief that the victim consented to the appropriation, if misplaced but reasonable, would appear to amount to a mistake of fact. Consequently, this section only serves to additionally protect those with unreasonable beliefs as to consent, which would seem to be the sort of idiosyncratic beliefs the Committee was concerned to remove from the Crimes Act 1961.

The amendment is also another example of a rejection of a morally based approach to the offence in favour of a return to Stephen's restrictive understanding of fault elements.

ALTERNATIVE APPROACHES IN AUSTRALIA

Australia has nine different criminal jurisdictions and there is a range of increasingly divergent approaches to the meaning of dishonesty in theft.

The Griffith Code

Queensland and Western Australia have offences based on Sir Samuel Griffith's 1897 Criminal Code which in turn was influenced by Stephen's writings. Under the Griffith Code formulation there is no reference to dishonesty and fraudulence is defined as an intention to permanently deprive. The law is to similar effect in the Northern Territory.

It therefore seems that in all three jurisdictions what is known as dishonesty in other jurisdictions has no separate role and is considered to be merely an alternative way of expressing the bona fide nature of a claim of right. In a passage approved in R v Mill [2007] QCA 150 [81], the Queensland Supreme and District Courts Benchbook suggests that:

"To defraud" in this context means to do [or omit to do] something dishonestly, so the requirement that the claim of right be honest and the requirement of the absence of an intention to defraud are really two ways of saying that the defendant must have honestly believed himself to be entitled to do what he did [or omitted to do].

Given that Griffith was heavily influenced by Stephen's codification, it is not surprising that the Code states do not have any explicit role for a morally based fault element. Unlike Stephen, Griffith attempted exhaustively to define all the common law defences, and thus claim of right received a statutory formulation (see Griffith Explanatory Letter to Draft of a Code of Criminal Law (Government of Queensland, Brisbane, 1897)).

Victoria

The English Theft Act wording has been adopted in Victoria, though that State interprets the meaning of dishonesty differently from the English approach. In R v Salvo [1980] VR 401, Fullagar J held at [432] that dishonesty meant nothing more than a need to prove that the accused took the property "without any belief that he himself has any right to deprive the other of it".

This decision resists the implications of the development of theft as an offence that placed greater reliance on subjective wrongdoing, although it appears to overlook the implications of the partial definition of dishonesty in s 73(2) of the Crimes Act 1958 (Vic). It insists that the approach proposed by Fullagar continues to apply in the new offence.

Salvo represents a comprehensive rejection of Feely and Ghosh. Fullagar J's reason for rejecting the broader understanding of dishonesty was explicitly based on a fear of permitting morally based notions of criminality to determine liability. In particular, at [430] Fullagar J expressed concerns that despite dishonesty being in theory an issue for the jury, in many cases magistrates would make the determination summarily and this would bring the judiciary into disrepute.

Accepting that dishonesty was a mental element of the offence, but refusing to allow belief in moral right and wrong to exculpate, Fullagar J was thus forced to state dishonesty as being merely lack of a belief in a claim of right, there being no other historically available mental element. Murphy J came to similar conclusions at [420]. Despite reservations by other judges in Salvo and following cases (see R v Brow [1981] VR 783 and R v Bonollo [1981] VR 633), Fullagar J's interpretation is now universally applied to all instances of dishonesty in Victoria.

Australian common law and Tasmania

In 1998, the Australian High Court in Peters v R [1998] 192 CLR 493 at [504] rejected the Ghosh test, which it felt was artificial and confusing. Because of these concerns the Court reinstated the Feely test as the general common law test for dishonesty. This was inconsistent with Salvo. However, rather than overrule Salvo, their Honours saw that test as an example of where dishonesty was used in a "special" way. To date no Australian courts have found other instances of such special meanings.

Peters represents a significantly different approach to dishonesty. The judgment describes Salvo as a "subjective" test for dishonesty, a test it then restricts to "special" cases. However, in adopting Feely, the judgment does not at any point explain why Salvo or the subjective approach is inappropriate for dishonesty generally. Furthermore, the judgment, in rejecting the Ghosh test as unworkable in practice, does not at any point explain why the Feely test is appropriate. Thus Peters presents an unfortunate vacuum of policy or reasoning as to what dishonesty means and its role in criminal law.

What is also puzzling is the lack of consideration of Fullagar J's concerns over the judiciary being asked to decide moral concepts. McHugh and Gummow JJ were happy for the entire question of dishonesty to be a legal one determined by the judiciary, and the entire Court found no difficulty with a morally based community standards approach. This suggests that there is now strong endorsement of the moral basis for dishonesty as a concept. How it is determined by finders of fact was the only point in issue.

In Tasmania the theft offence requires proof of "dishonesty" but does not define the term. The Tasmanian Supreme Court has endorsed Feely of seeing dishonesty as a moral concept and also accepted that the Peters test is to be applied: see R v Fitzgerald [1980] Tas R 257 and Jovanovitch v R [2007] TASSC 56 respectively.
The Model Code

The Commonwealth, South Australia and the Australian Capital Territory have adopted the wording of the Australian Model Criminal Code, and that Code provides a legislative definition of dishonesty that mirrors the approach in Ghosh.

The Explanatory Memorandum to the Commonwealth legislation states:

The approach in Peters is not favoured because it is necessary for offences like theft to retain a broad concept of dishonesty to reflect the characteristic of moral wrongdoing ...

Paragraph (b) of the definition requires knowledge on the part of the defendant that he or she is being dishonest according to the standards of ordinary people. This is crucial if the Criminal Code is to be true to the principle that for serious offences a person should not be convicted without a guilty mind (Explanatory Memorandum “Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000” (Cth) at [62]-[65]).

There is clear legislative acceptance of a morally based test, but rejection of the adequacy of the Feely test in a number of Australian jurisdictions. One reason for this is the use of dishonesty as a mental element in a range of offences. From this perspective dishonesty emerges as a new general core element of criminal offences. If so, different meanings of the term in larceny or theft cannot be sustained.

NSW

Since the beginning of 2010 New South Wales has been in a peculiar position. All fraud offences now require a statutory form of the Ghosh test in line with the Model Code jurisdictions. However, its theft offence remains the uncodified common law offence of larceny and thus the centuries old uncertainty of definition remains.

Although Feely was not directly applicable, the Court of Criminal Appeal in R v Weatherstone (1987) 8 Petty Sessions Review 3729 accepted Feely as encapsulating the element of fraudulence in larceny. In so doing, it saw the terms as synonymous and considered that fraudulence had a broad, morally based role to play in larceny. This decision predated Ghosh.

After referring to Feely and the earlier NSW case of R v Small (1957) WN (NSW) 150, the Court held at 3731:

... [i]n Regina v Small it was recognised that an element of the offence of larceny was that the taking was wrongful. That this concept underlies the offence of larceny has long been recognised at common law. The element of dishonesty might be met by proving in a particular case that the intention was one to advantage the taker in a personal sense. At the same time it must be recognised that the element of personal advancement is not in itself an essential ingredient in larceny. It may, I repeat, be a factor or indeed the only factor which in a given case establishes the wrongfulness, the moral obloquy, the dishonesty or the relevant guilty intent, however it be expressed, which is the ingredient of larceny.

Thus in NSW larceny requires more than merely a lack of claim of right, or intention to permanently deprive. It also requires dishonesty, described as “wrongfulness” or “moral obloquy”. What is important in Weatherstone is that while the reasons in Feely are quoted, the test of “ordinary people” is not. It remains unclear whether this decision is to be interpreted in light of Ghosh or Peters.

FURTHER COMPLICATIONS

One argument that is given for applying Peters to larceny is that dishonesty and fraudulence are synonymous, and there are repeated statements by courts in a number of jurisdictions that assert this. However, dishonesty and fraudulence occur in a range of different offences, and in differing contexts. As we have already seen, across time and in different jurisdictions the terms have been given different meanings, and in Canada fraudulence/dishonesty is used both as a form of mens rea in theft and as actus reus in fraud.

One key difference, recognised by the New Zealand courts, is between dishonesty as a descriptor of a physical element of an offence, such as “dishonest means”, and “dishonesty” as a stand-alone element which supplies a fault element for an offence and is separate from any physical elements. In Hayes the Court of Appeal noted at 336:

It is important ... to distinguish between two concepts. The first is whether conduct of the kind in question should be characterised as dishonest. The second is whether the mind of the particular accused was dishonest. It is seldom that any issue arises at trial in respect of the first concept. But where it has arisen, the correct approach to its resolution has proved controversial. What is normally in issue at trial is whether the mind of the particular accused was dishonest. That is conventionally assessed subjectively by reference to what the accused knew or believed the circumstances to be. The principal focus of the cases cited has been on the first issue. Little, if any, difficulty has been encountered with the second ...

The decision of the Australian High Court in Peters and the Canadian approach to “fraudulent means” in their fraud offence can be seen as examples of dishonesty as an external standard of conduct, and the approaches in Ghosh, Sahv and Weatherstone as examples of the second category of defining the mental state of the accused. Elsewhere I discuss this difference in detail (see Steel “Describing Dishonest Means: The Implications of Seeing Dishonesty as a Course of Conduct or Mental Element” (2010) Adel LR forthcoming).

For present purposes the distinction is important in highlighting that with such structurally different uses of the concept, there are likely to be different emphases in definition.

However, in the subsequent decision of Macleod v R (2003) 214 CLR 230, the Australian High Court did not advert to the key difference between dishonesty and dishonest means. The offence in Macleod required proof that a corporate officer “fraudulently takes ... the property of ... such company” (s 173 of the Crimes Act 1900 (NSW)). In this context it might have been possible to see “fraudulently” as either describing the means, or as the mental state of the accused.

In describing the offence at [240], their Honours clearly saw fraudulence as a separate element, rather than as an aspect of a fraudulent taking. They considered this dishonest according to ordinary notions and thus applied the test in Peters. They went on to apply the approach to determining dishonesty set out in Peters, but did so in terms of dishonesty amounting to an element of mens rea. Thus at [252] they held that the evaluation of the constituent mental attitude of the accused in establishing the mens rea of dishonesty was such that there was no need to separately direct the jury on a claim
of right argument, as the claim of right was to be taken into account by the jury in assessing whether the accused knew he had no entitlement to apply the funds for his own purposes, and was thus acting dishonestly.

However, the joint judgment by Gleeson CJ, Gummow and Hayne JJ failed to provide any clear indication of why the reasoning in Peters should apply to this offence. They stated only that “dishonestly” was synonymous with “fraudulently” and, at [242], that the methodology of determining whether an act was dishonest in Peters was “the preferred approach to the meaning of the term ‘fraudulently’ in s 173”. Despite this lack of clarity, the decision in Macleod is considered by the High Court to have established the Peters test as the “general principle” of fraudulence (see Polyaire Pty Ltd v K-Aire Pty Ltd [2005] 221 CLR 287 at [295]-[296]).

The result is that the methodology that had been employed in Peters to characterise a course of conduct has now been applied to determining a mental state, and it has been endorsed as applicable to dishonesty in theft in Tasmania. This is in stark contrast to the approach taken in Canada where fraudulence in theft, as a mental element, is read down to a minimum, and a morally based approach is only applicable to defining physical elements.

Dishonesty and claim of right

In holding that in the trial the Judge had not been in error in refusing to allow an argument of claim of right to be put to the jury in addition to a denial of dishonesty, the majority judgment in Macleod referred to Stephen:

> fraud being inconsistent with a claim of right made in good faith to do the act complained of, that act has, as a necessary element of criminal liability, the quality of dishonesty according to ordinary notions (A General View of the Criminal Law of England at 124).

This appears to misquote Stephen, in that Stephen was suggesting that no one who genuinely asserted a claim of right could be considered to be fraudulent, and the High Court was instead holding that a finding of dishonesty precluded a claim of right. But more fundamentally, the reference overlooks Stephen’s belief that fraudulence had no role in the criminal law beyond lack of claim of right. Thus although the High Court had accepted that dishonesty had a moral basis, Stephen’s writings still influenced the Court’s understanding of the concept. Perversely, the result is to diminish the claim of right defence that Stephen considered fundamental.

The position in Australia is thus somewhat confused. Dishonesty is seen to be a moral concept, but one that the High Court considers is ultimately objectively defined. An accused’s genuinely subjective claim of right is to be taken into account in characterising behaviour as dishonest, but a jury can still not the less find an accused to be dishonest. To allow claim of right to be put separately to a jury “would limit the flexibility inherent in [the Peters] direction” (Macleod at 245).

In all other jurisdictions a claim of right trumps the prosecution case in a theft trial. Whether the High Court was unconsciously establishing another special form of dishonesty for claim of right in defrauding offences is unclear.

CONCLUSION

This survey and analysis of the interpretation of dishonesty and fraudulence in a number of common law jurisdictions makes clear that there are fundamental differences over the meaning of the terms. In many ways the difficulties are based on the historical development of larceny. Currently, the following alternative definitions of fraudulence/dishonesty exist:

1. The term has no real meaning. Stephen's influence remains strong in a large number of jurisdictions where fraudulence/dishonesty is defined away to be merely an alternative expression of lack of claim of right. This is the case in Queensland, Western Australia, the Northern Territory, and Victoria.

2. The term has a residual meaning, but one of no general importance in limiting the scope of the offence. In Canada this is seen as some sort of deliberateness, in New Zealand as an unreasonable belief in consent.

3. The term is a morally based standard of behaviour, and liability is dependant on the accused’s awareness of that standard. This is the test developed in England and applied both there and also in South Australia, the Australian Capital Territory and the Australian Commonwealth.

4. The term is a morally based standard of behaviour, but there is no requirement that the accused be aware of its breach. The objective nature of this test is such that it removes the basis for a claim of right defence. This approach has been adopted by the Australian High Court in relation to common law defrauding and applied to theft in Tasmania. It is may also apply to New South Wales.

An entirely subjective approach to dishonesty has been rejected by all courts that have considered it, other than the New Zealand courts. There, the subjective approach was statutorily rejected.

A further complication involves situations where fraudulence/dishonesty is used in a way that might amount to a description of the physical elements of the offence. Although this is arguably required in some statutory offences, it is suggested that it is best to avoid such approaches and to see dishonesty as solely a fault element. In so doing, a morally based approach to the concept appears to be the most logical.

In light of these perspectives, New Zealand appears to have lurched from having the broadest moral basis to the narrowest non-moral basis, but without any clear justification for this switch.

It is beyond this article to engage in the debate over whether such morally based approaches are appropriate in the criminal law. The aim of this article is instead to make clear the unacceptable confusion between jurisdictions and emphasise the need for a considered debate over use of the terms.

To see dishonesty as not involving a moral basis requires recourse to debates from the end of the 19th century. Since then there has been recognition of a much greater role played by mental elements in offences, and if dishonesty is to be used in offences this should be fully acknowledged. This may require the use of alternative words, or definitional subsections to express the mental state required in an offence, but this is to be preferred over the deeming approach adopted in Salter and in the New Zealand definition.