Thinking Point 10.1

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| Consider whether or when an appropriation occurs in these supermarket scenarios:  1. If consent is irrelevant, when does the customer appropriate: when they remove an item from a shelf, when they place it in their basket or when they leave without paying?  2. Does the shop assistant or shelf-filler appropriate?  3. D carelessly knocks an article off the shelf and then replaces it.  4. D removes an item intending not to pay for it but changes her mind and replaces it.  5. D lifts an item off the shelf to read the label and puts it back. |

* The answer to all of the above scenarios is that whilst for the majority an appropriation occurs as soon as the customer assumes a right of ownership over property (i.e.: possession or control) for Lord Lowry in *Gomez* an appropriation would not occur until the assumption is accompanied by MR.
* Unfortunately, his view did not prevail, and so appropriation now occurs in all of the above scenarios at a very early stage. This has no legal consequence unless it is accompanied by MR when it then becomes theft, even before any adverse result to the shop.

Thinking Point 10.2

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| 1. V lends D his bicycle for two weeks. D fails to return it. When does D appropriate?  2. Right now, you are presumably sitting on some sort of a chair whether at home/in the university or on the bus/tube. According to whose view in Gomez are you appropriating it and why?  3. V advertises his Rolex watch for sale. D, a rogue, agrees to buy it and one week later gives V a forged building society cheque for the price. V hands the watch to D. The cheque bounces. Has D stolen the watch? |

1. As soon as he assumes possession. Under s3(1) it would not have been until s/he had MR, i.e.: when the decision was made not to return the bicycle.
2. The majority – consent is irrelevant to appropriation which is now a neutral term.
3. These are essentially the facts of *Dobson v General Accident Fire and Life Assurance Comp. PLC.* [1989] which followed *Lawrence*: D appropriated despite the consent of the owner as soon as he assumed rights of ownership.

Thinking Point 10.3

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| Look at these questions:   1. D befriends an elderly, wealthy man (V). V makes all sorts of valuable gifts to D in the genuine wish to give her tokens of his friendship. The gifts are not the result of any deception, pressure, undue influence or coercion on V’s part. She does, however, take knowing advantage of V’s loneliness in the hope that he will give her some of his wealth. Has she appropriated V’s gifts? 2. Have you sold a car/house knowing there were defects which the purchaser did not discover? The contract would be valid under the civil law. Would this now be theft? 3. V buys a painting from D under the impression that it is an old master when it is not. D knows of V’s mistake but says nothing. Is this theft?   Does it make any difference whether the contract is valid or not?   * Most people would consider this to be a far cry from conventional ideas of criminality. Immoral yes. But *Gomez* and *Hinks* say that despite D’s acceptance of gifts giving her the right to an indefeasible title to the property under the civil law, her dishonesty converts her acceptance into an appropriation and theft. * 1 and 3. Theoretically, yes to both |

Thinking Point 10.4

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| Does D steal the following items?  1. X takes his bicycle to a shop for repair. The repairer, R, does the work but X fails to collect it as arranged. After three weeks, R puts the bicycle outside the shop because he needs the space. It remains there for a further week when D, a passer-by, sees the bike and takes it.  2. D, a workman dredging a pool on local authority open space, finds two antique gold rings. He decides to keep them. |

1. This would not constitute abandonment (*R (Ricketts) v Basildon Magistrates Court* [2010] EWHC 000 (Admin)) and presumably R would have to go to reasonable lengths to ascertain from X that he no longer wanted his bicycle. Presumably, also, R might want to retain possessory title over it until he was paid.
2. The owner of the pool has a better right to property than D: *South Staffordshire Water Co v Sharman* [1896] 2 QB 44.

Thinking Point 10.5

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| If the facts of *Kaur* occurred today, would Ms. Kaur have appropriated and stolen the shoes?  (Consider how *Gomez* might have affected the outcome.) |

* If the issue was appropriation, then under *Gomez* she would have appropriated the shoes as soon as she did anything with them, the consent of the shop being irrelevant. If her mind was dishonest at that point she would have committed theft, even before doing anything wrong!
* Even if her dishonest intention arose after picking the shoes up and taking them to the cashier, it would probably be the same, appropriation here equating to selecting and presenting the shoes for payment (*Atakpu*).

Thinking Point 10.6

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| V gives D £1800 to buy a particular type of car on V’s behalf. D spends the money on himself. Has D committed theft? |

* This is the case of *Dunbar* [1988] Crim LR 693.
* The money was received by D under an obligation to account for it in a particular way under s5(3).

Thinking Point 10.7

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| V owes D £50 and has been avoiding D for several weeks. D badly needs the money. D bumps into V one day who has a bundle of notes in his pocket. As V takes his mobile phone from his pocket a £50 note falls out and D takes it in the belief that it is his.  Does D commit theft? |

* If D honestly believes that he has the right to take the money, then s2(1)(a) provides a defence.
* Note that for the new Ivey test of dishonesty, D’s subjective belief will no longer be relevant, provided, objectively he is found to be dishonest.

Thinking Point 10.8

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| Are the following Ds dishonest under s2(1)(c)?  1. V is a legal clerk working for a firm of solicitors. She is engaged on a large conveyancing case. On her way to a meeting where the purchase will be completed, she leaves the office file containing a bankers’ draft for £1 million on the seat of the underground train (a draft is as good as cash on presentation to a bank). She gets off the train without it. D finds the draft and keeps it, taking no steps to trace the firm on whose account it has been drawn.  2. D finds a copy of the latest best-selling detective novel on the seat of a bus. There are only one or two people sitting at the back of the bus and they do not appear interested in it. She decides to keep it. |

* In 1, D would be unable to assert a genuine belief under s2(1)(c) that the owner could not be found.
* It would be easier to assert an honest belief in 2, for the item has far less value and the owner has probably left the bus.
* Dishonesty will be a question of fact in every case and must be left to the jury to decide. This is so whether D asserts a belief under s2(1), or the *Ivey* test, though this will now be an objective test only, as the judge will direct the jury that it is irrelevant whether D appreciated that her actions were objectively dishonest once that objective dishonesty has been established.

Thinking Point 10.9

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| Do you consider D to be dishonest in the following situations:  (a) D spends half an hour at work each day using the firm’s computer for her personal emails?  (b) D takes home from work pens, staplers and paper for her personal use?  (c) D buys a cheap CD player from a friend knowing that it has ‘come off the back of a lorry’ (i.e. that it is stolen)?  (d) D inflates her expenses claims at work so as to receive more than she has spent?  (e) D conceals certain episodes of self-employment in her tax returns so as to avoid paying  as much income tax as she should.   * You may think that in each case D’s conduct was probably dishonest but that as it is something that most people might do from time to time, and since D might not regard herself as being dishonest according to ordinary standards, it is not necessarily criminal. This will now be irrelevant under Ivey as the second part of the previous test does not apply (see discussion in the answer to the next thinking point) |

Thinking Point 10.10

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| Can you identify any problems with either the subjective or the objective part of the test? |

* The *Ghosh* test has now been replaced with the *Ivey* test which as you have seen emphasises the objective nature of the test. It is likely to be irrelevant that the D does not appreciate that by objective standards his behaviour was dishonest.
* The problems with the previous test were well recognised: namely that it was difficult to obtain a unanimous verdict as everyone has their own standards of dishonesty. The recent case of *Barton* confirms this approach. See Lord Hughes in Ivey.

Thinking Point 10.11

D has been accused of theft and puts forward the *Ghosh* defence. The jury is not representative of society being entirely white and predominantly male. Suppose D is black and a single mother or mentally disabled and inarticulate or a scruffy and ill-educated young man. What are the risks of leaving the definition of dishonesty up to the jury?

* This shows how circular the *Ghosh* test was: the jury had to decide if D was so unaware of ordinary standards that she believed society would agree with her conduct. If so, she was not to be regarded as dishonest.
* This is not what Lord Lane in *Ghosh* intended. Clearly, on a common-sense basis, most people would say her conduct was dishonest and that, even if she believed herself to be right, her conduct was still criminal. This approach is the *Ivey*/*Barton* one.

Thinking Point 10.12

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| Does D have an intention to permanently deprive in the following situations?  1. D uses V’s mobile phone without permission intending to replace it. He makes so many calls that the batteries run flat. He then returns the phone.  2. D takes V’s Arsenal season ticket without permission intending to return it later. He uses it for nine months before returning it to X.  3. D takes a booklet of supermarket loyalty coupons from an empty check-out. When she does the next week’s shopping she hands vouchers to the cashier and receives a substantial discount on the bill. |

1. Borrowing: All the goodness/value of the batteries has been used up. S6(1) applies.
2. Borrowing: Some of the goodness/value remains although comparatively little compared to the cost. Strictly *Lloyd* should apply but query whether this would be fair to X.
3. Buy-back principle: S6(1) applies

Thinking Point 10.13

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| Has D committed robbery?  1. D enters a museum just before closing time with the intention of stealing ancient antiquities from the third floor. As he descends the stairs with the property he is confronted by a museum attendant. D hits him over the head and knocks him unconscious.  2. D approaches a blind person (V) from behind and shouts ‘Give me your bag or you’ll get this.’ He waves a knife at V’s back. Unknown to D, V is also deaf and does not hear. D grabs V’s bag from her hand. |

* In the first scenario, as D descended the stairs with the property, followed by attacking the attendant, this was theft accompanied by the use of force and hence a robbery.
* The Court of Appeal held that section 8 required any amount of force to be used against a person in order to steal and not only sufficient to overpower or prevent resistance from the victim as under the former law. In most cases, especially ‘mugging’, force against the property will also be force against the person.
* A mere threat of force is sufficient. The threat does not need to result in actual fear or the actual infliction of force. Section 8 requires that D puts or seeks to put any person *in fear of being then and there* subject to force. Therefore, a futile threat against a deaf, blind or sleeping person will suffice. A threat of future force is probably not sufficient unless it can be said that D will still be on the job of stealing at that point.

Thinking Point 10.14

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| Has D entered a building as a trespasser?   1. D inserts a long hook on the end of a pole through the window of a warehouse to drag out some expensive oriental carpets. 2. D points a gun through a window to shoot someone inside. 3. D puts a child through the window of a building so that she may unlock a door and admit D into the building. |
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1. 1. Yes, this would amount to entry and burglary.
2. 2. This example would also amount to entry and burglary.
3. 3. Probably not burglary but it would be an attempt; the child is being used to gain entry and not to commit an ulterior offence.

Thinking Point 10.15

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| Is there a trespass in the following cases? |

1. D is carried against her will into X’s house and left there. She steals a necklace and escapes via an open window.

* No – trespass must be voluntary.
* Therefore, D does not commit burglary.

2. D mistakenly enters a neighbour’s house through an open door one night after a furious row with his girlfriend. On turning to leave, he sees a huge box of chocolates by the front door. He takes it and leaves, intending to give it to his girlfriend the next time he sees her.

* The AR of burglary requires: entry/as a trespasser/of a building or part.

Whether he has trespassed depends on there being voluntary action and either knowledge or recklessness as to belief in the right to enter.

* A mistake would negate the necessary MR for the purposes of trespass and potential s9(1)(a) burglary, for he would lack MR either for trespass or the intention for the ulterior offence at the time of entry.
* Query whether he has liability under s9(1)(b): he must later realize his mistake and know he is in the wrong house.
* The MR of trespass will be satisfied. By stealing the chocolates, he commits s9(1)(b) burglary.
* If he was unaware of the fact that he had no right to be there, he will lack MR for the offence.)

3. D gains entry into an 85-year old person’s home by fraudulently representing himself as a gas-meter reader. He then steals her purse and seriously assaults her.

* Entry may have been with consent but as it was obtained by a deception D has intentionally trespassed and commits burglary by virtue of his intention to commit the ulterior offences of theft and GBH.

4. An 18 year-old daughter living in her parents’ home invites her boyfriend to her room for sex. On his way out, he steals her father’s mobile phone.

* Boyfriend would realize that his permission to enter does not extend to theft.
* He has exceeded his permission to enter (*Jones & Smith*).
* This would be either s9(1)(a) burglary if he intended to steal when entering or s9(1)(b) if the intention arises later at which point he becomes a trespasser.)

Thinking Point 10.16

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| Has D entered any building or part?  1. D breaks into a derelict house and takes away a fire-place.  2. D goes to the local swimming pool and walks down a corridor passing a notice stating that access to the public is denied. He steals an employee’s leather coat from a rack on the wall.  3. D enters a supermarket and hides behind a pallet of vegetables. When the supermarket closes, he emerges, steals £100 from a petty cash box and leaves through an open window. |

1. If the house is genuinely derelict and abandoned then it is not in occupation. (If awaiting development, that would be different.)

2. Probably the notice would be sufficient to denote that there was entry as a trespasser to a part of a building. The theft in that part amounts to burglary.

3. Unless the principle of *Jones & Smith* applies (above) D did not initially enter the shop as a trespasser. Could he be trespassing by being on the premises when he was not supposed to be? On a common sense basis the answer is probably yes. Thus he commits burglary.

Thinking Point 10.17

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| In which of the following does D have the MR for s9(1)(a) burglary?  D breaks into a dwelling house:  • to seek shelter for the night.  • to find food to eat.  • to rape any woman he finds there.  • with a view to stealing any credit card he might find and finds none.  • to make many long-distance telephone calls without paying.  • to spray paint the hallway.  • to take as much money as possible and to beat up the occupier if necessary. |

* The only exclusions from burglary would be intending to seek shelter, rape and making telephone calls. Note that it is an offence to enter as a trespasser with intent to commit a sexual offence (s63 SOA 2003).