

Criminal Law

Do Freegans Commit Theft?

The purpose of this journal article review is to identify the key arguments put forward by Dr. Thomas,¹ before discussing whether his critical evaluation of those arguments is persuasively presented. This will be concluded with a reasoned evaluation of his defence, while any opposition to, or agreement of his concepts, will be supported with reasoned argument. The conclusion will clarify any overall agreement if present, and confirm whether credence can be given to a theft conviction.

The key arguments used to establish a freegans defence to theft charges rely upon issues of ownership, abandonment and dishonesty. It was discussed that the right to divorce oneself from goods is subject to the rights of ownership. That right surpasses the entitlement of disposal by preventing others from interfering with the final product (e.g refuse). If the waste is environmentally unsound, there is a rational public policy justification for access restriction based upon an obligation to protect others. In argument, the freegan rationale suggests that the goods intended for their consumption are both perfectly safe and useable. Bin diving is also controvertible on privacy grounds, although this premise is difficult to defend when many supermarkets or restaurants dispose of their important data in bins separate from general foodstuff.

Because the Theft Act 1968 takes ownership as being self-evident, it is argued that freeganism is susceptible to a conviction of theft, because bin diving involves property. This point raises the question “do the goods appropriated by freegans still belong to another and if so, does it mean that freegans are dishonest?” Because the 1968 Act is concerned with ownership, possession and control, the definition of abandonment is key (voluntary surrender of property [or a right to property] without attempting to reclaim it or give it away).

In Dr. Thomas’s opinion, a freegan’s chances of avoiding a theft conviction depend more upon dishonesty than whether the goods were previously abandoned. It is still important to consider whether the goods are economically worthless yet have sentimental value, or have simply been disposed of accidentally. To explain why this scenario would not typically apply, the type of goods that bin divers look for are disposed of by shops and restaurants because they no longer have any economic value. This would counter any suggestion that the previous owner had placed sentimental attachment to the now waste product, but accidental disposal could not be ruled out without due consideration. If the goods recovered are no longer economically valuable due to technological obsolescence, they could be considered abandoned.

Determining abandonment is difficult because it requires objective and subjective reasoning. If a person takes something they believe to have been abandoned, then he is not guilty of larceny.² In contrast, *Williams v Phillips*³ demonstrated that rubbish placed outside a building is done so under an agreement with the residing Local Authority to take it away and dispose of it. This action constitutes a transfer, rather than abandonment, of goods. Unlike *R v Edwards and Stacey*⁴ and *Williams v Phillips*, freegans are not contractually bound to the bin owners, thus exempt from disciplinary actions for the appropriation of unwanted or abandoned goods.

To clarify the extension of property ownership during the transfer of unwanted foodstuffs, appropriately clear signage could be used to deter freegans by stating that the goods are not abandoned, rather waiting to be collected by an assigned refuse collection agency. However, if a freegan were to take goods out of a bin situated at the back of a building (offices, shops, restaurants or a private home) it is still a plausible argument that the goods were not abandoned. A freegan could argue that the United Kingdom’s international Treaty obligations concerning environmental protection, gives them the right to reduce the impact of waste. It could also be argued that they have a moral right to take property considered abandoned.

¹ Sean Thomas, ‘Do freegans commit theft?’ (2010) <<http://onlinelibrary.wiley.com/doi/10.1111/j.1748-121X.2009.00142.x/full>> accessed 13 April 2014.

² *R v William White* [1912] 7 Cr App R 266.

³ [1957] 41 Cr App R5.

⁴ [1877] 13 Cox CC 384.

Analysis of freeganism and jurisprudence on dishonesty suggests freegans are honest. If a freegan were to take goods in the belief that the owners would consent had they known of the appropriation and the circumstances of it, he would not be acting dishonestly. This defence could prove problematic though, if the owner had agreed to let the freegan take the goods but not through the act of bin diving. Likewise, if a freegan were to take the goods in the belief that taking reasonable steps would not reveal the owner, his actions would not be construed as dishonest.

A freegan faced with charges of theft could use the *Ghosh*⁵ direction that bin diving for food is not dishonest when he truly believes the foodstuff recovered is unwanted and free to consume. If the *Feely*⁶ direction was applied, would it be valid to believe that what was done was dishonest according to the ordinary standards of reasonable and honest people? Can it also be argued that a freegan who only goes bin diving in the middle of the night is acting honestly? This consideration challenges the criminalisation of people who commit technically theftous acts, but of a nature that ordinary people would not consider theft.

Freegan opinion argues that the notion of disgust attached to their pastime relies upon unwanted goods labelled as waste, rather than in poor or uneconomically profitable condition. There is also growing empirical evidence suggesting contemporary jury members now consider bin diving an act not carrying enough moral obloquy to be considered criminal. It is also viable to argue the validity in defining freeganism as a non-theftous action, because in contrast to 'Robin Hood'⁷ cases, freegans are taking goods that have been disposed of as waste and not money or valuables.

There is an unwillingness of the courts to resolve the interconnections between abandonment and dishonesty and while the actus reus of theft can be inferred from conduct, if the mens rea of a freegan bin diver is based upon an honest belief, a theft conviction cannot rightfully stand. Using *R v Small*⁸ it could prove a defence to dishonesty if the freegan had an honest belief the goods recovered were abandoned, irrespective of whether that belief was a reasonable one. This is supported by the fact that the goods were in the bin when they found them. It is inherently difficult to imagine goods that have been placed into a bin as rubbish or waste, are anything other than abandoned. However, the circumstantial nature of bin diving does present problems of certainty.

The absence of harm evident within the concept of freeganism, makes it harder to criminalise as an act in itself, particularly when bin diving is nothing more than disposal or consumption of property already deemed waste. Freeganism indirectly reduces the costs of landfill incineration, so it is plausible to portray it as harm reduction worthy of praise for ingenuity. When relying upon the verdict in *R v Wood*⁹, the defendant was also a freegan and seen to not be acting dishonestly, therefore this approach should be taken when dealing with future freeganism cases.

Dr. Thomas's critical evaluation rests upon principle concepts of ownership (privacy), abandonment and dishonesty. When examining the nature of ownership, *Williams v Phillips* has merit with regard to discarded property becoming free from ownership, but because it supports the argument from a contracted employee perspective, applying the same scenario to a freegan accused of theft means those rules cannot reasonably apply. For that reason, it should not be considered relevant, whereas *R v Woodman*¹⁰ discusses the seemingly innocent intention of the 'scavenger' convicted of theft, even though the material recovered had been left for a lengthy period. However, the presence of barbed wire certainly warrants a trespass¹¹ charge (this factor will be considered later on).

⁵ [1982] QB 1053.

⁶ [1973] QB 530.

⁷ *R v Ghosh* [1982] QB 1053 [1064] (Lane CJ)

⁸ [1987] Crim LR 777.

⁹ [2002] EWCA Crim 832.

¹⁰ [1974] QB 754.

¹¹ Torts (Interference with Goods) Act 1977

Parker v British Airways Board

The rather unusual *Parker v British Airways Board*¹² approaches ownership in a vein that raises questions about responsibility on the part of a landowner. Personal property in an airport is likely to be lost or mislaid, with a chance that travelling passengers could claim rights over it. Much like a freegan is essentially claiming rights over unwanted foodstuffs, this example illustrates why commercial waste areas need visible markings if bin diving is to be avoided. On that strength, this case is well used and adds weight to a hypothetical defence, placing the burden of proof on the landowner or business.

California v Greenwood

Within the concept of abandonment, *California v Greenwood*¹³ involves unwarranted police searches of refuse bags placed on the kerbside. This differs from a freegan bin dive, which would typically take place within a private section of land exempt from public access. For that distinction alone, it seems a weak argument to consider and would be best suited free of the debate.

R v Peters

When considering *R v Peters*,¹⁴ context is different because the defendant was employed by the victim and was in the immediate vicinity at the time of the jewellery's disappearance. There was also a duty on the part of the defendant to return the goods upon discovery, had they known they belonged to the victim, while in this instance, the defendant had stolen them for the purpose of reward. There is also a distinction between waste foodstuffs and missing items of considerable value, which eliminates any question that the former is abandoned, whereupon the latter has clearly been dishonestly appropriated. On that margin, the weight of this case seems weak when brought for consideration.

Bentnick Ltd v Cromwell Engineering Co.

*Bentnick Ltd v Cromwell Engineering Co.*¹⁵ tackles the abandonment issue from a judicial assumption. Despite the finance company having recorded that the hirer did not wish to terminate the hire-purchase agreement, the appeal was dismissed and abandonment cited for legal recovery of the damaged car. It must surely be understood that if the owner of the vehicle had made it clear he wished to remain bound by the contract, the concept of abandonment cannot apply. In light of this evidence, it seems fruitless to use this decision as a defence component to theft charges.

Stewart v Gustafson

Although pertinent to the concept of abandonment, *Stewart v Gustafson*¹⁶ sufficiently differs from the requirements of a freegan, because in most incidents of bin diving there is no written agreement, nor clearly defined inventory relating to what is considered abandoned, or when it is to be considered abandoned. It is also a case concerning the removal or disposal of private property, again of some worth to the owner, and not placed in a location designated to hold waste. It does go some way to define intention, so as a key case to argue the interpretation of abandonment, the core of the issue helps in distinguishing abandonment over appropriation.

R v William Rowe and R v White

In the cases of *R v William Rowe*¹⁷ and *R v William White*,¹⁸ there appears to be a conflict of opinion when examining almost identical incidents of possession of goods deemed abandoned. This is further defined when in the case of *Rowe*, the canal was undergoing a cleaning-up operation and instructions had been clear about ownership of recovered scrap iron. In *White*, the lack of evidence in relation to exactly where the pig iron was at the time of recovery, prevented a conviction because it was construed as abandoned. The facts of

¹² [1982] QB 1004.

¹³ 486 US 35 (1988).

¹⁴ [1843] 1 Car & K 245.

¹⁵ [1971] 1 QB 324.

¹⁶ [1999] 4 WWR 695.

¹⁷ [1859] Bell cc93.

¹⁸ [1912] 7 CR APP R 266.

Rowe however, lend well to a freegan defence for theft because it was a stranger that made a false (and perhaps honest) assumption. The analogy being removal of scrap metal from the bed of a canal could be compared to recovering food from a commercial bin. *R v Edwards and Stacey*¹⁹ shares a similarity with *Peters*, except the employer had knowledge of the burial of the pigs, but at no point expressed desire for his employees to profit from their demise. This could be used to argue that requesting permission from the owner of waste foodstuffs before consumption under the pretence of abandonment, bears more logic than subjective assumption as a means of justification. To include this would seem prudent, given that it bears direct relevance to an honest belief that refuse is perceived as unwanted.

R v Small

*R v Small*²⁰ relates to the alleged dumping of a vehicle on a public highway for around ten days. The vehicle may well have appeared abandoned, but the right thing to do would be to report it to the local authority or police. The defendant on this occasion attempted to steal the car, even admitting theft when arrested, only to later plead an innocent belief it had been abandoned. As with many of the previous cases relating to abandonment, the car had not been discarded in a fashion that would suggest it was free to appropriate, whereas salvaging for expired food within a bin does not suggest any immediate detriment to the proprietor of such material. A non-running car retains scrap value, therefore using this case on the principle of abandonment would be confusing and should not be given merit.

Hibbert v McKiernan

Looking at the final concept of dishonesty, the facts of *Hibbert v McKiernan*²¹ differ from a bin diving scenario because the golf balls collected belonged not to the golf club itself, but the members who had lost them while playing. This significantly alters the nature of the act, because even if the club had accepted the alleged honesty of the defendant, the lost balls were not their property, thus exempt from collection under a claim of right²². It was also apparent that prior to summary, the defendant had been retrieving lost golf balls for gratuities, which is not the intention, nor pursuit of a freegan. There was also clear evidence of an intention to permanently deprive either the club or its members of the golf balls, thereby denying any true defence to theft. With these distinguishing factors considered, it would be foolish to cite this case within a freegan theft prosecution.

R v Rostron

*R v Rostron*²³ relies upon inadequate signage and club conventions when trying to support a *Ghosh* defence against theft. The issue of trespass²⁴ is however, difficult to ignore, particularly as a burglar alarm was triggered during the defendants activities. It is useful to note that in most cases, a freegan does not attempt to enter an alarmed area while diving for waste foodstuffs, which would suggest that the bins are not perceived as 'property'. As a case example for the test of dishonesty, *Rostron* also seems a poor analogy for honest intent, as the defendants tried to lie about how the golf balls came into their possession when first questioned. Similarly, *R v Thurborn*²⁵ cannot be reasonably used to determine honest intent when the defendant was notified of the owner's identity before his disposing of the lost banknote. This case bears little similarity to an appropriation of waste product under the assumption it has been abandoned rather than mislaid.

R v Wood

What is most peculiar about *R v Wood*²⁶ is the partial defence that because nobody had challenged the defendant's actions during daylight hours, he was honest in his intent. This argument relies more upon public assumption than moral code as reasons for appealing a conviction. In addition, the goods recovered were not

¹⁹ [1877] 13 Cox CC 384.

²⁰ [1987] Crim LR 777.

²¹ [1948] 2 KB 142.

²² *Hibbert v McKiernan* [1948] 2 KB 142 [143] (Goddard CJ)

²³ [2003] EWCA Crim 2206.

²⁴ Criminal Justice and Public Order Act 1994

²⁵ [1848] 1 DEN 387.

²⁶ [2002] EWCA Crim 832.

only substantial enough to warrant several trips with a shopping trolley, but their resale value was without doubt, far greater than expired food. Regardless of a *Ghosh* direction, the events differ, in that freegans are not bin diving for financial gain, rather for exploitative, if not honest reasons. If the goods recovered by the defendant had been placed into skips or large bins outside the shop, the absence of trespass would bear more resemblance to a freegan activity and prove key to quashing a conviction of theft.

Conclusion

When concluding this journal article review, it is important to raise a couple of points that are in need of further discussion. The first is the issue of trespass, and the second is seeking communication (or obtaining permission) from the owners. At no point do freegans seem compelled to discuss their intentions with the proprietors of the waste they access. This omission does not add weight to a defence that bin diving is an honest pursuit. It also runs risk to amounting trespass charges, regardless of how or why waste is consumed or removed. Honesty requires transparency if one's actions are seen as noble, yet working in the middle of the night suggests a fear of reprisal, should the owners sense there is gain on the part of the freegan (this area deserves greater attention if one is to remove doubt from the minds of a jury).

The question of finding agreement with Dr. Thomas's conclusion has already been answered, because neither *Wood* nor *Rostron* can be applied as reasonable defences to theft. In *Wood*, the defendant entered a property in order to appropriate goods of significant resale value, assuming a right of ownership. This assumption was based upon grounds that nobody had interfered with him while he recovered property not defined as waste. In *Rostron*, the defendants had triggered a burglar alarm while appropriating large numbers of golf balls for profitable redistribution. When confronted, both denied their actions, despite evidence to the contrary. In both cases, the intention was to profit from a dishonest action, involving items of value eligible for resale. Finally, in the event that a freegan may become injured in the course of their bin diving activity, the *volenti non fit injuria*²⁷ principle should apply.

²⁷ Chris Turner, *Unlocking Torts* (4th edn, Routledge, 2013) 106

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