

# Claim of Right Defence

*R v Fuge* (2001) 123 A Crim R 310

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A few years ago I had a client charged with Break & Enter with Intent. He had broken down the door of his girlfriend's house and had a physical confrontation with her. I raised the defence of Claim of Right and the charge was dismissed. Every criminal law advocate must understand the Claim of Right defence to properly represent criminal clients. This article is designed to assist practitioners appearing in the Local Court of NSW.

## The Leading Case – R v Fuge

Renee Julie Fuge and her friends were convicted of an armed robbery of a Hungry Jack's restaurant. Ms Fuge had been an employee at the restaurant but was sacked for tardiness. She appealed her conviction and attempted to raise a Claim of Right defence on the basis that she believed she was owed back-pay and so was entitled to the money taken. If this were so, then she and her friends did not act dishonestly and should not have been convicted.

This appeal failed spectacularly as the Court of Criminal Appeal found that the defence was not raised at trial and there was no evidential basis for it. However, the judgment became the leading case on the Claim of Right defence and provides a review of the authorities.

## Elements of the Claim of Right Defence

In summary, a Claim of Right defence involves:

1. A genuine, honest belief (regardless of whether it is well founded in fact or law),<sup>1</sup>
2. regarding a legal entitlement (not simply a moral entitlement),<sup>2</sup>
3. to property or money in the hands of another.<sup>3</sup>

Dishonesty is an element of the offence of larceny. A subjective belief in a Claim of Right would negate this required mental element and so defeat a charge of larceny. A defendant, and any co-offender, acting under this belief would believe that their actions are not dishonest, and so be entitled to an acquittal. This would be so even if they used violence or the threat of violence (ie. a robbery) to appropriate the property.

Chief Justice Woods held in *Fuge* at [24e] that:

*'The existence of such a claim may constitute an answer to a crime in which the means used to take the property involved an assault, or the use of arms. The relevant issue being whether the accused had a genuine belief in the legal right to the property rather than a belief in a legal right to employ the means in question to recover it.*

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<sup>1</sup> *Nundah* (1916) 16 SR (NSW) 482, *Bernhard* (1938) 2 QB 264; *Lopatta* (1983) 35 SASR 101 at 107; *Walden v Hensler*; and *Langham* (1984) 36 SASR 48 at 52-53

<sup>2</sup> *Bernhard and Harris v Harrison* (1963) Crim LR 497

<sup>3</sup> *Langham* (1984) 36 SASR 48

# Burden Of Proof

It is for the police to negative a claim of right where it is sufficiently raised on the evidence, to the satisfaction of the jury.<sup>4</sup>

## Application

My client referred to earlier had been living with his girlfriend and all his possessions were inside her house. She locked him out and he banged on the door and demanded his possessions. When she refused to give them, he broke down the door and took them. As a result he was charged with Break & Enter With Intent (to commit assault). Both charges were dismissed as the court accepted that he had believed he was entitled to his property and wasn't acting dishonestly.

## Limits On the Defence

### Substitute Property

The Claim of Right is not confined to the specific property or banknotes which were once held by the claimant, but can also extend to cases where what is taken is their equivalent in value. So the defendant who believes he is owed money could take property to that value.<sup>5</sup>

### Claim Must Cover ALL Property Taken

The claim of right must extend to the entirety of the property or money taken. Such a claim does not provide any answer where the property or money taken intentionally goes beyond that to which the *bona fide* claim attaches.<sup>6</sup>

### Accessories

There can be no accessorial liability unless there has in fact been a foundational offence.<sup>7</sup> So if Ms Fuge had succeeded with her Claim of Right, then any accessories would also be acquitted. What is relevant to the accessory is the existence of a *bona fide* claim in the principal offender or offenders.

The person charged as an accessory would have to know of the essential facts which made what was done a crime, and that person would have to have intentionally aided, abetted, counsel or procured those acts.<sup>8</sup>

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<sup>4</sup> Lopatta at 108, *Astor v Hayes* (1998) 38 A Crim R 219, *Lenard and Williams* at 475

<sup>5</sup> Langham; Lopatta

<sup>6</sup> *Astor v Hayes* (1988) 38 A Crim R 219 at 222.

<sup>7</sup> Gregory LR 1 CCR 77 at 79; See Lun (1932) 32 SR (NSW) 363; Richards (1974) QB 776 and Howe [1986] UKHL 4; (1987) AC 417,

<sup>8</sup> Giogianni [1985] HCA 29; (1985) 156 CLR 473; Stokes & Difford (1990) 51 A Crim R 25; and Buckett 79 A Crim R 303