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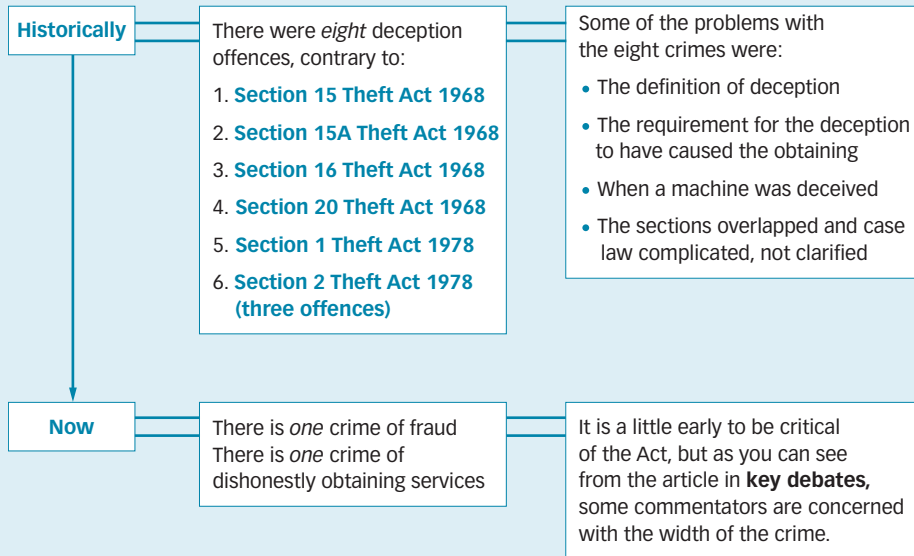
Fraud

Key facts

- There were eight offences under the **Theft Acts 1968** and **1978** which were based on deception.
- All eight deception offences have been abolished.
- The **Fraud Act 2006** replaced the eight crimes with one new offence of fraud and one new offence of dishonestly obtaining services.
- The common law offence of conspiracy to defraud has not been abolished, but there have been sustained calls for it to be.

Chapter overview

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Introduction

The **Fraud Act 2006** has turned this topic on its head recently and it means you will do well if you master the issues involved. You need to have a good understanding of the pre-**Fraud Act 2006** crimes, be able to analyse what was wrong with them, and why the Law Commission (among others) called for their abolition. You also need to know what has replaced the old crimes, and for high marks, provide a criticism of the new offences. There is no case law yet on the new law, so you will have to learn some of the old cases if you wish to illustrate your answer with examples.

The abolished deception offences

Before the enactment of the **Fraud Act 2006**, there were eight offences that were broadly categorized as fraud, but were defined in terms of deception. The eight offences all involved dishonestly obtaining:

- property belonging to another by deception with intention permanently to deprive the other of it, contrary to **s 15 Theft Act 1968 (TA 1968)**;
- a money transfer by deception, **s 15A TA 1968**;
- a pecuniary advantage by deception, **s 16 TA 1968**;
- a valuable security by deception, **s 20(2) TA 1968**;
- services by deception, contrary to **s 1 Theft Act 1978 (TA 1978)**;
- the evasion of a liability by deception(three offences), **s 2 TA 1978**.

The Law Commission Report (LC276) 2002 criticized the deception offences for the following main reasons:

Deception

For each of the eight crimes, the prosecution had to prove there had been a deception, the deception actively ‘conned’ the victim, and the deception caused the obtaining of the relevant thing (property, etc). In addition, the provisions were poorly drafted, there was overlap between the offences, and between the offences and theft, and the case law did not always clarify the law.

The meaning of deception

Section 15(4) Theft Act 1968 provided a very weak definition of ‘deception’ partly because it defined deception by using the word deception. A number of cases then held that a deception consisted of a deliberate or reckless false representation, either expressly (eg by spoken words or letter) or impliedly (ie through conduct or even silence).

The abolished deception offences

A conduct deception has been found on the following facts, for example:

- D booked a hotel room. D impliedly represented that he intended to pay for the room later (*Harris (1975)*) and if he did not have such an intention, it was a false representation, or a deception.
- D ordered a meal in a restaurant (*DPP v Ray [1974]*). If he intended not to pay, or formed such an intent during the meal, the representation by conduct became a deceit.
- D paid by cheque. D represented that the cheque would clear when presented (*Gilmartin [1983]*).
- D paid using a cheque guarantee card (*MPC v Charles [1977]* which is in key cases below).
- D paid using a credit card.

A deception could possibly be made by silence, such as in *Firth (1990)* which is examined in key cases below.

Revision tip

Many of the examples above would amount to fraud under the **Fraud Act 2006**. After you have examined the new offence, come back to this list and practise applying the law by explaining which section(s) might be breached under the new law for each example listed.

Conning a machine was not a deception

The deception had to be effective against another human being because V had to be 'conned' or actively taken in by the falsity. However, this became a problem because many modern deceptions are practised online and not in person. So, if property was obtained online, D might have committed theft contrary to **s 1 Theft Act 1968**, but where services were obtained, or a liability was evaded, D escaped liability as there was no active deception.

The causation issue

In addition, the prosecution had to establish a causal connection between the obtaining and the deception. In many cases of deceit, say a typical case of where D lied on a loan application form about his income, the deceit would clearly have caused the lender to advance the loan because of the lie, but if the 'victim' did not in fact believe D's false statement, then there was no deception. Further, secure payment schemes such as cheque guarantee cards, credit cards, and automated payment methods caused considerable difficulties to the courts. They were introduced to guarantee payment to the seller of goods or provider of services and the trader does not have to think about the buyer's credit-worthiness if the payment is made using a guaranteed scheme.

Because the deception had to be active in causing V to be conned, if D paid using a guaranteed payment scheme, V would not necessarily think about whether he was being conned. He knows he will receive payment anyway. To get around this lack of an 'active' deception,

The abolished deception offences

the judiciary invented the *deception fiction*. In *MPC v Charles* [1977] in key cases below, V admitted he did not consider D's credit-worthiness because D had used a guarantee card. However, the House of Lords decided that the manager would not have gone ahead, had he known the truth. The same outcome was reached in *Lambie* [1982].

Lambie [1982] AC 449

D had exceeded the limit on her credit card and agreed to return the card to the bank. However, she used it to make another purchase in a shop. The shop manager, V, testified that she might have gone through with the transaction even if she had known of D's falsity (because the credit card system meant payment was guaranteed) but the view of the House of Lords was that this was irrelevant to D's liability.

The terms in the deception provisions

The terms used in the **Theft Acts 1968 and 1978** were technical and caused much confusion. It is no longer necessary for you to spend time and energy dissecting the problems (you will be relieved to know) but you might cite, for example, the meaning of 'pecuniary advantage' in **s 16 TA 1968** was so poorly drafted it had to be repealed (**s 16(1)**).

The difficulties in case law

An example of the technical nature of the Theft Act offences can be found in the case of *Preddy* (1996).

Preddy [1996] AC 815

The defendants had lied on mortgage applications and received loan advances from lenders into their bank accounts. They were charged with obtaining property belonging to another by deception, contrary to **s 15 Theft Act 1968**. The House of Lords had to consider whether the debiting of the lenders' bank accounts and the corresponding crediting of the defendants' accounts amounted to 'obtaining of property belonging to another'. The House of Lords unanimously held that it did *not*. A transfer of funds between accounts in credit actually extinguished the property in the lender's bank and created new property in the recipient's bank. So, the defendants had not obtained property *belonging to another*, which was an essential ingredient of an offence under **s 15 Theft Act 1968**.

Almost immediately, Parliament passed legislation to insert a new **s 15A** into the Theft Act 1968 to reverse the effect of the decision. **Section 15A** provided it was an offence dishonestly to obtain a money transfer by any deception, and a money transfer occurred when one account was credited with a sum of money and another debited with a sum of money and either the credit resulted from the debit or the debit resulted from the credit.

Fraud

✓ Looking for extra marks?

We discussed in chapter 11 that Gomez (who was charged with theft under **s 1**) might have been better charged with obtaining property by deception under **s 15**. There is no doubt that he *obtained* by deception, but because he was charged with theft, his conviction could be upheld only if he could be said to have *appropriated* it. One of the consequences of the House of Lords' decision was that every **s 15** offence would also amount to an offence under **s 1 Theft Act 1968**. Can you explain how? This is a useful way of showing the overlap between theft and the old deception crimes and you might include this in an essay question on deception and theft or on deception and fraud.

Fraud

The deception offences under the **Theft Acts 1968 and 1978** have been abolished.

The offence of fraud is governed by the **Fraud Act 2006**. There is only *one* offence of fraud (**s 1 Fraud Act 2006**) with three ways of committing it, under **ss 2–4**. These are:

- by false representation,
- by failing to disclose information, and
- by abuse of position.

Fraud is a conduct crime (D lies) unlike the old deception offences which were result crimes (ie where D caused V to give him something by a deception). This means the prosecution does not have to prove causation. The new offence is potentially very wide indeed, a view made by David Ormerod (among others), see key debates below.

Section 2, false representation

It is an offence if D dishonestly makes a false representation, and intends, by making the representation to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss. Under **s 2(3)** a representation is any representation as to fact or law, including a representation as to the state of mind of the maker or another person and it may be express or implied. The representation is false if it is either untrue or is merely misleading. What amounts to 'misleading' is undefined. However, a fraud can be committed against a machine, unlike under the old law, because **s 2(5)** provides that

a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

The *mens rea* requirements are that the representation must be made dishonestly (**Ghosh [1982]**, **Section 2 Theft Act 1968** does not apply to the fraud crimes), knowing it is or it might be untrue or misleading, and it must be made with a view to produce a gain to D or another or loss or the risk of loss to the victim. The prosecution does not need to prove an actual gain or loss. Gain includes a gain by keeping what one has, as well as a gain by getting what one

Conspiracy to defraud

does not have, and loss includes a loss by not getting what one might get, as well as a loss by parting with what one has.

Section 3, failing to disclose

This is essentially a crime of lying by omission. The offence is committed where a person dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and intends, by failing to disclose the information, to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss (s 3). The nature and extent of the legal duty is not defined in the Act.

Section 4, abuse of position

This method of committing fraud is worryingly broad. It covers any defendant who occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, and where he dishonestly abuses that position, and intends, by means of the abuse of that position, to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss. The term 'abuse' is not defined. Nor is the concept of 'expectation' in terms of the interests of the other person, for example, whose expectation matters?

Dishonestly obtaining services

Section 1 Theft Act 1978 has been abolished. There is a new offence of dishonestly obtaining services under **s 11 Fraud Act 2006**, which parallels the offence of theft (see chapter 11) but it is phrased in terms of *obtaining services* rather than *appropriating property*. It is an offence to obtain services (neither 'obtain' nor 'services' is defined in the Act) for which a payment has been, is being, or will be expected, where D intends to avoid part payment or payment in full. There is an overlap with the fraud offence of making a false representation and the CPS might prefer to bring a fraud charge because it is easier to prove (fraud is a conduct crime, and there is no need to prove that a specific thing (or a service) was obtained which is needed under s 11).

Note that under **s 11**, the prosecution does not have to prove any deception or false representation.

Conspiracy to defraud

Conspiracy to defraud is a common law offence. It was described by the Law Commission in its 2002 report as 'an anomalous crime' because although it is a 'fraud' offence, D does not have to commit a deception, he does not have to cause economic loss through the carrying out of the agreement (*Wai Yu-tsang v R* [1992]), and it is not even necessary to prove that the

Key cases

conspirators' purpose was to defraud (provided they are aware that their agreement might result in a defraud (*AG's Ref (No 1 of 1982)* [1983]). The crime consists of an agreement:

- to deprive a person of something which is his, or
- to which he is or would be or might be entitled, or
- to injure some proprietary right of his.

In fact, this crime is so wide that it covers an agreement concerning conduct which, if carried out, does not consist in itself of a crime or even a tort.

Scott v MPC (1974) 3 All ER 1032

This is the leading case, where D entered into an agreement with employees of a cinema to lend him the films so that he could copy them and sell the pirate copies. He would then return the films, with the cinema owners none the wiser. The House of Lords acknowledged that a conspiracy to defraud does not have to involve the commission of a substantive offence and on the facts, it could not be theft because D had no intention permanently to deprive (he always meant to give the property back). There was no deception because the owners were completely unaware of what was happening. However, there was an agreement, and it was to deprive the owners of the potential profits they would have made had people gone to the cinema to watch the films they would purchase instead from D. That is all that was needed for a conviction for conspiracy to defraud.

There have been numerous calls for the abolition of this crime, but the Government refused to do so when the **Fraud Act 2006** was enacted. The reason given was that if abolished, it could leave an unforeseen lacuna in the law.

Key cases

Cases	Facts	Principle
<i>Firth</i> (1990) 91 Cr App R 217	D was a consultant gynaecologist, and used a National Health Service hospital to treat a number of his private patients. He failed to tell the hospital that the patients were in fact private and the hospital did not charge either D or the patients for the use of the facilities.	The offence of dishonesty by deception, obtaining exemption or abatement of liability contrary to s 2(1)(c) Theft Act 1978, could be committed by an act of commission or one of omission.
<i>Lambie</i> [1982] AC 449	D had exceeded the limit on her credit card and agreed to return the card to the bank. However, she used it to make another purchase	The House of Lords held that the presentation of the credit card had been a representation of D's authority to make a contract on the bank's behalf

Key debates

Cases	Facts	Principle
	in a shop. The shop manager, V, testified that she might have gone through with the transaction even if she had known of D's falsity (because the credit card system meant payment was guaranteed).	and it was open to the jury to find that the manager had been induced by D's representation.
<i>MPC v Charles</i> [1977] AC 177	D wrote a cheque and used his cheque card to buy gaming chips at a casino. The manager did not consciously think about D's credit-worthiness.	Where the holder of a cheque card presents a cheque with the card which is accepted, he represents that he has the authority to use the card in order to oblige the bank to honour the cheque. If that representation is false and the payee accepts the cheque, then the holder of the cheque card thereby obtains a pecuniary advantage by deception and is guilty of an offence.
<i>Scott v MPC</i> [1974] 3 All ER 1032	The defendant had an agreement with employees of a cinema to lend him the films so that he could copy them and sell the pirate copies. He would then return the films, with the cinema owners none the wiser.	The offence of conspiracy to defraud is complete where the intention is to cause the victim economic loss by dishonest means. Deceit is not an essential ingredient of the offence.

» Key debates

Topic	'The Fraud Act 2006 – criminalising lying'
Author / Academic	David Ormerod
Viewpoint	The Fraud Act 2006 is welcome, but too broad, undefined, and possibly unworkable.
Source	[2007] Crim LR 193
Topic	'The Fraud Act 2006 – some early observations and comparisons with the former law'
Author / Academic	Carol Withey
Viewpoint	Assesses the extent to which the new offences address the problems in connection with the former deception offences.
Source	(2007) J Crim L 71(3) 220

Exam questions

? Exam questions

Problem question

Stacey was a plastic surgeon who did operations for both National Health Service patients (who do not have to pay) and for private (paying) patients. She did all of the operations at the local National Health Service hospital on the understanding that she would always declare which patients were private, and they would be invoiced by the hospital separately.

Stacey carried out eight private operations. She did not declare to the hospital that these patients were private. She sent the patients invoices for their operations, which they all paid directly to her. Stacey did not pass on their payments to the hospital. The hospital administrators listed the patients as National Health Service patients because they had not been told to the contrary. The payments came to a total of over £10,000.

Stacey was also authorized to place orders over the internet for medical supplies using the hospital's credit card. Stacey placed a number of orders online for personal items, and paid using the hospital's credit card.

Consider Stacey's criminal liability, if any, for offences under the **Fraud Act 2006**.

An outline answer is included at the end of the book

Essay question

The effect of the **Fraud Act 2006** is to criminalize lying.

Discuss the truth of the statement above.

An outline answer is available online at www.oxfordtextbooks.co.uk/orc/concentrate/