

A policy on vehicle immobilisation



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The Royal Automobile Club Foundation has commissioned a number of external experts to write a series of think pieces and occasional papers throughout the course of 2009/10. This paper is about wheel clamping on private property and is report number 09/125.

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Executive summary

We recognise and respect the right of land owners to protect their land from unlawful car parking but we are concerned that the current practice of clamping illegally parked cars and demanding a punitive or deterrent release fee is illegal and damaging to society. The Home Office is seeking consultations on a new regime to license those who clamp cars but is doing so without:

- addressing the fundamental legality of clamping
- ensuring that there is an adequate and enforced code of practice
- creating a robust, credible and accessible mechanism for appeal.

We are very concerned that the fees charged to release a clamp bear no relation to the damage suffered by the land owner and are in effect a punishment imposed by one individual on another, an action that seems contrary to proper rule of law. If society is to grant that power, it should be restricted to people who have a high level of competence and integrity and who are not incentivised to maximise the number of punishments that they impose.

We invite the Home Office to address the fundamental legal and policy issues of clamping before creating a new licensing regime.

Context and scope

This policy paper has been prompted by the Home Office's consultation document "Licensing of vehicle immobilisation businesses", dated 30 April 2009. This paper looks more broadly at some of the fundamental legal and ethical aspects of vehicle immobilisation (referred to here as clamping for brevity) that need to be addressed before any further developments of the regime that licenses people to do it. The Annex to this paper is a summary of the relevant law; the paper examines its policy implications.

The foreword to the consultation paper states:

The vehicle immobilisation sector is a small but visible part of the wider private security industry which gives land owners the means to control parking on their land. This is entirely legitimate and we have no wish to prevent landowners from continuing to protect their property.

We can see no objection to landowners taking reasonable measures to "protect their property" or to "control parking on their land". They may prevent cars entering their land without permission or may remove cars that are on that land. Unauthorised parking is an unacceptable infringement of the land owner's rights and can lead to inconvenience, loss of trade or even a risk to safety if emergency access is blocked. More generally, it

damages good relations within a community and the sense of fair play on which society depends. There are however serious doubts as to the legality of a private land owner or his agents using clamping to protect his rights, in particular where he takes measures to:

- prevent cars that are parked illegally from leaving
- deter those who might park on his land
- punish those who have parked on his land.

This policy paper is concerned with parking on private land, not car parks operated by public authorities and not with the enforcement of on-road parking restrictions. It starts by considering the case where parking is permitted but a car is clamped because the payment was inadequate for the time that the car was there. This is simpler to analyse and provides a valuable basis for the more legally complex case of a car that is clamped when parked on private land where parking is not permitted.

Car clamped when left beyond the permitted duration of parking

By parking in a designated car park, the car owner is entering into a contract with the land owner for a temporary licence to park, an activity that without the licence would constitute trespass. Once the licence period has expired, the car owner is in breach of contract. Provided that the threat of clamping is known to the car owner at the time that he enters into the contract (usually at the point that he enters the car park), it is a term of the contract.

However, this is subject to two important conditions.

- contract terms must not be unfair, especially when a consumer deals with a company
- contract terms must not be punitive; in the event of a breach of contract the innocent party can only recover in damages what he has lost as a result of the breach. The contract may include an estimate of the damage that would be caused by a breach but the law will not uphold a "penalty clause".

The Annex describes the legal principles in more detail; the practical consequence is that it is unlikely that, except under exceptional circumstances, the courts would uphold a contract term that imposed a fee to remove a clamp that was so large as to constitute a punishment. The rights in trespass set out in the next section might apply but a court might be reluctant to infer into a contract a common law right that would be excluded under contract law.

Car clamped on private land where parking is not permitted

Concept of consent

The judgement in the leading case, Arthur v Anker in the Court of Appeal, provides a thorough and learned analysis of the legal basis of the right to clamp an illegally parked car. The majority of their Lordships conclude that the right arises from the legal concept of consent; that, by parking where he knows that clamping may be imposed, the car owner consents to what would otherwise be a trespass against his car.

We argue respectfully that such reasoning provides an unsound basis to create a right to interfere with property, since it depends critically on the exact circumstances of the notice that was given and evidence that the car owner was aware of the risk that he was taking. The concept of consent is now mainly applied to sports, such as boxing or rugby, where every player consents to the harm that naturally arises as a result of the game. Treating illegal parking as some kind of sport between the land owner's agent and the car owner seems a most unsatisfactory basis on which to licence clamping.

The impression given from the case law is that the Courts have striven to find a legal basis to achieve the result that seems right in natural justice; compare Arthur with that of Vine where natural justice demanded and received the opposite outcome.

Punishment, not restoration

The normal aim of the law of trespass is to restore the innocent party to the position that he was in before the trespass occurred. We are concerned that the underlying rationale for clamping is punitive. We have already pointed out that this would not be upheld in contract law.

The purpose of clamping is to prevent the car from being removed from the land. The Private Security Industry Act 2001, in section 3 of Schedule 2, explicitly states that the purpose is "*preventing or inhibiting the removal of a vehicle by a person otherwise entitled to remove it*". On its face, this is perverse since it causes the harm to the land owner to persist. In Arthur, the Master of the Rolls referred to this as a "self-inflicted wound".

Given that the consequence of clamping is to cause greater harm to the land owner, the tactic only makes sense either to deter future parkers or to punish the present one. The Annex to this paper makes clear that English law does not permit a person to punish another. Punishment is a right reserved to the State; even the so-called "penalty clauses" in contracts will not be upheld by the Courts unless they are genuine attempt to estimate the actual loss.

Clamping

We understand that it is common for the clamper to keep the entire fee charged to remove the clamp. As well as creating an inappropriate incentive for the clamper, which we examine more later, this makes a mockery of any link between the fee charged and the damage suffered by the land owner. Where the land owner receives none of the fee, the fee can only be interpreted as a punishment.

The scale of the fee is clearly important. This was not an issue in the leading case of Arthur, where the fee of £40 could probably be justified as a realistic estimate of damage. The judge found that reasonable and it was not challenged on appeal. However, we understand that fees of several hundred pounds are being charged and we question whether any court would find this reasonable or justified, other than as a deliberate punishment.

It is not clear whether Human Rights Act 1998 applies to clamping. The Act forbids public bodies to act in a way incompatible with the Act but does not apply to private bodies exercising private functions. However, clampers are licensed by the State and it is arguable that the Act that creates the licensing regime is incompatible with HRA 98 because it authorises punishment without a due legal process, in breach of Article 7, and also punishment without a fair trial, in breach of Article 6. Although the Courts would be reluctant to over-rule the will of Parliament, we believe that Government should not proceed to further licensing of clamping while uncertainty exists in this complex area of law.

Recommendation 1: Before creating any more licensing procedures or bodies, Parliament should enact (probably primary) legislation to create and define a legal right to clamp cars parked on private land without the permission of the land owner.

Licensing of clampers

Assuming that a satisfactory legal basis for clamping is established, we turn now to the practicalities of who should carry out the clamping and how. We are concerned about four issues:

- competence of the regulatory bodies
- code of conduct
- reward and motivation
- mechanism for appeal

Competence

The Consultation paper proposes a two-tier structure. The upper tier is the Security Industry Authority, which currently issues licences to individuals and would license companies. The lower tier is an accrediting body that sets standards for the industry and accredits companies that conform.

Clamping

It is important that the accrediting body has:

- the resources and expertise to establish and maintain an accrediting regime. It must have sufficient time and staff to assess applicants and to monitor and audit their behaviour.
- an awareness of the harm that inappropriate clamping causes. Society operates by consent; licensed "cowboys" undermine more than those who are directly affected, they threaten that consent.
- the independence to be, and be seen to be, impartial and objective. Where licensed clampers misbehave, the body must not be afraid to withdraw their licences. If not, the body might be seen as the fox in charge of the hen coop.

Recommendation 2: The SIA should create a specification for the accrediting body and invite potential suppliers to bid for the role. SIA should monitor and audit the performance of the accrediting body.

Code of conduct

When dealing with a delicate balance of conflicting rights, it is essential that the highest standards of conduct are maintained. "Conduct" is about much more than the behaviour of the people involved. It includes the rules for placing signs and the wording of those signs, the procedures for determining that clamping is appropriate, the promptness with which the clamp is removed on payment and the mechanisms for appeal against wrongful clamping. The code of conduct should set out all of these.

Most importantly, the code of conduct should also set out the basis on which the fee paid to remove the clamp is calculated. In the absence of legislation to the contrary, that fee should be a reasonable estimate of the cost to the land owner of the trespass by the car, including the cost of paying the clumper to attach and remove the clamp. It should not include an element of punishment or deterrence.

The code of conduct should be approved by the SIA before the accrediting body is allowed to operate. The accrediting body needs to show how it will ensure that licensed clampers comply with the code of conduct and how it will verify that they are doing so.

Recommendation 3: The accrediting body should draw up a robust, credible and enforceable code of conduct. The SIA should approve the code of conduct and verify that the accrediting body ensures that accredited clampers comply with it.

Reward and motivation

We have already drawn attention to the legal weakness of the clumper retaining the entire fee to release the vehicle; legally weak because there is then no linkage to the damage suffered by the land owner. We are

Clamping

concerned also by the incentive created for the clamper by retaining some or all of the fee. This inevitably will encourage the clamper to err on the side of excessive vigilance. Given that the legal basis of clamping is that the car owner consented to the car being clamped, it is essential that the land owner and his agents should err on the side of making the car owner aware and giving him every opportunity to avoid suffering clamping. It is hard to believe that the person best positioned to make the car owner aware, the clamper, will do so with enthusiasm when he has an interest in the car owner failing to comply.

The ideal solution would be for the land owner to retain the release fees and to pay the clamper a fee for acting on his behalf that is independent of the number of vehicles clamped. However, we recognise that this could be unfair on land owners who are already suffering from trespass and would have to engage the clamper at their own risk. A compromise would be for the clamper to retain the release fees up to a cap, the level of the cap to be determined in the code of conduct.

Recommendation 4: Clampers should not be incentivised to clamp cars; their rewards should be fixed or capped.

Appeal

The accrediting body should establish an effective appeal mechanism or ombudsman. It should be impartial and efficient, with the power to award compensation to the car driver or the clamper in the event of a breach of the code or of inappropriate conduct. The disputes resolution procedures offered by other professional and trade groups, such as the Law Society, the Construction Industry Council and local authorities can provide helpful models.

We recommend that the appeal mechanism should be robust, credible and readily accessible and should include:

- a legally-qualified Chairman, perhaps a practising barrister sitting part time
- lay members to provide balance, appointed from outside the industry
- published rules of procedure and evidence
- an easy application mechanism, available on paper, email and the web
- flexible procedures for hearings, including written submissions, oral hearings and telephone hearings
- a secretariat to organise hearings and keep records of all decisions and the reasoning behind them.

Recommendation 5: The accrediting body should establish an effective appeal mechanism or ombudsman.

Conclusion

The consultation paper says at paragraph 25:

Landowners (who include a wide range of individuals and public and private bodies) have the right to enjoy the use of their land and to restrict access to it. They are entitled to prevent unwanted parking, including the use of any parking facilities they provide for visitors or customers by other vehicle drivers, to charge for use of their land and put in place such charging schemes as the law allows. In many cases the driver is at fault in knowing, or not taking reasonable steps to ascertain, that they should not have parked on private land.

We do not challenge this statement itself but we have considerable reservations about the leap from "prevent" and "charge" to impose punitive sanctions". We are concerned that it is far from clear that the law allows punitive schemes, notwithstanding the apparent acceptance by a somewhat contrived mechanism of "consent" in the case of Arthur. And we are deeply concerned by the potential for injustice that lies behind the words "In many cases .."; they imply that there are other cases where the car driver is innocent but is held to ransom by an arbitrary punishment imposed by a private company without a due legal process or a right of appeal.

We strongly recommend that Government introduces legislation to set private clamping on a more robust, explicit and defensible footing before creating a new and more complex licensing regime.

Annex: The law of private clamping

Annabel Graham-Paul, barrister

Introduction

1. This annex sets out an overview of the law concerning private clamping. It is divided into the following sections:

- A) The common law of private clamping
- B) Background to the common law:
 - i. Trespass to Land
 - ii. Trespass to Goods
 - iii. Consent and Assumption of Risk
 - iv. Distress damage feasant
 - v. Contract
 - vi. Criminal Damage
 - vii. Nuisance
 - viii. The Release Fee and Punishment
- C) Scots law
- D) Licensing of Clamping
- E) Human Rights

A) The common law of private clamping

2. The leading authority on the law of private clamping is the decision of the Court of Appeal in Arthur and Another v. Anker and Another [1997] 1 QB 564.

3. A summary of the factual background is as follows:

The leasehold owners of a small car park behind their premises in Truro used the car park for commercial vehicles making deliveries and for private parking by their employees. Customers of the leaseholders were given permission to park their cars there when visiting the leaseholders' premises. The leaseholders engaged Armtrac Security Services to prevent unauthorised parking. Armtrac displayed notices at the entrance to and on the site warning that vehicles parked without authority would be clamped, that a specified release fee would be charged, and that obstructing vehicles might be towed to Armtrac's pound. The notices indicated a local telephone number by which Armtrac could be contacted.

Mr Arthur parked his car in the car park without authorisation and, in accordance with the warning notices Mr Anker, an employee of Armtrac, clamped the car. Mr Arthur refused to pay the release fee and Mr Anker refused

to remove the clamp without payment. Eventually, Mr Arthur's wife arrived in a pick-up truck, which she also parked in the car park. Mr Anker made to clamp that vehicle as well, and Mrs Arthur assaulted and abused him. In due course Mr and Mrs Arthur left in the pick-up truck but, during the night, he returned and succeeded in removing his car (he was unwilling to say how). When Mr Anker returned to the car park the next morning there was no sign of Mr Arthur's car, or the clamps, or the padlocks which had been securing the clamps.

Mr and Mrs Arthur issued proceedings claiming compensation and exemplary and aggravated damages for malicious falsehood and tortious interference with their car. Mr Anker counterclaimed for the value of the clamps and padlocks and also for damages for the assault by Mrs Arthur.

At trial, the judge found that Mr Arthur was a trespasser on entering the site, that he had seen the notices and appreciated their effect. The judge concluded that Mr Anker had been entitled to exercise the remedy of distress damage feasant, that the fee charged was reasonable and that Mr Arthur had impliedly consented to the consequences of his trespass. He accordingly dismissed Mr and Mrs Arthur's claim and entered judgment for Mr Anker on the counterclaim.

4. The Court of Appeal held the following:
 - (1) Mr Arthur consented to the otherwise tortious act of clamping the car and also to the otherwise tortious action of detaining the car until payment;
 - (2) The clamper cannot exact any unreasonable or exorbitant charge for releasing the car;
 - (3) There must be a visible warning of clamping and / or towing away;
 - (4) The clamper cannot justify any delay in releasing the car after the owner offers to pay;
 - (5) There must be means for the owner to communicate his offer (per Sir Thomas Bingham MR at 573; the other members of the Court of Appeal were in agreement);
 - (6) Damaging a clamp or padlock is an offence under section 1(1) of the Criminal Damage Act 1971 of causing damage without lawful excuse (per Sir Thomas Bingham MR at 576).
5. Accordingly, the appeal was dismissed as Mr Arthur had consented to the clamping and judgment on the counterclaim upheld.
6. Although unnecessary to decide the appeal, the Court also considered the application of the remedy of distress damage feasant (see section B iv) below).
7. Sir Thomas Bingham considered the remedy did not apply to the facts because:
 - (1) The result of the clamping was not to stop or prevent the car from causing whatever damage it was causing to the leaseholders but to ensure that the car would continue to cause the very damage (unauthorised occupation of parking space) of which the leaseholders complained: it is anomalous that a self-help remedy should amount in effect to a 'self-inflicted wound' (at 574).
 - (2) There must be proof of actual damage before the remedy can be invoked: damage need not be physical damage to the land; it can be apprehended damage; but it must be more than a

mere technical trespass (e.g. if the party entitled to use of the land were denied, or obstructed in, the use of it) – there was no evidence of such damage on the facts (at 574 – 575).

- (3) A flat charge for a release of the vehicle has no compensatory element at all (at 575 – 576).
8. Neill LJ agreed that there was insufficient damage proved to justify the use of the self-help remedy. He went further, however, and said he: “would deplore the widespread use of the ancient remedy of distress damage feasant to control the unauthorised parking of vehicles on private land” (at 580) because, *inter alia*, the matter can be satisfactorily dealt with by means of clearly worded notices and by the application of the doctrine of volenti (consent).
9. Hirst LJ (dissenting on the application of distress damage feasant) cited a number of authorities that suggest there need be no proof of actual damage in order to invoke the remedy of distress damage feasant. He concluded: “I find it difficult to see why in a tort actionable per se the presumed damage should not also apply to this particular remedy” (at 582). In any event, he considered the cost of towing away or of clamping could constitute the required damage (at 584 – 585).
10. The ratio of Arthur v. Anker was upheld by the Court of Appeal in Vine v. Waltham Forest London Borough Council [2004] 4 All ER 169.
11. A summary of the factual background is as follows:
- Ms Vine, upon feeling unwell and distressed following a hospital visit whilst driving home, parked her car in one of two parking bays on privately-owned land. A Range Rover was parked in the other bay. On the wall by that vehicle, about ten feet above the ground, was a yellow notice which prohibited parking, and warned that any vehicle left unattended would be liable to be towed away or clamped and would be recoverable by payment of a fine.
- That notice would have been clearly visible to a person standing up, but the Range Rover would have obscured the view of a person sitting in the driving seat of a car. There was no such notice on the wall by Ms Vine’s car. Ms Vine’s car was clamped while she was away from it for a period of a few minutes, vomiting on the other side of the road. At trial, the recorder accepted that Ms Vine had not seen the sign, but dismissed her action on the basis that the sign had been visible and she had been a trespasser at the time of the clamping.
12. The Court of Appeal confirmed that the act of clamping the wheel of another person’s car, even when that car was trespassing, was an act of trespass to that other person’s property but it was a defence to show that the owner of the car had consented to, or willingly assumed the risk of, his car being clamped (at 175).

13. However, the Court of Appeal considered that in order to show that the car owner consented or willingly assumed the risk of his car being clamped, the following had to be established:
- (1) That the car owner was aware of the consequences of his parking his car so that it trespassed on the land of another;
 - (2) That the car owner saw and understood the significance of a warning notice or notices that cars in that place without permission were liable to be clamped (Roch LJ at 175).
14. Waller LJ added that it is not necessary to prove in every case that the owner of a car who is trespassing on another's land has seen, *and* read *and* understood a warning notice. He considered that: "absent unusual circumstances, if it is established that a car driver saw a notice and if it is established that he appreciated that it contained terms in relation to the basis on which he was to come onto another's land, but did not read the notice, and thus fully understand the precise terms, he will not be able to say that he did not consent to, and willingly assume the risk of being clamped" (at 178).

B) Background to the Common Law

i. Trespass to Land

15. Trespass to land can be committed in three ways:
- (i) by entering on the land of another
 - (ii) by remaining on that land or
 - (iii) by placing or projecting any object upon it, in each case without justification.
16. The intention required for the tort of trespass to land is the intention to commit the act that constitutes the trespass, so an entry onto land in the reasonable belief that it is yours is a trespass if the land in fact belongs to another (*Basely v. Clarkson* (1681) 3 Lev 37, 83 ER 565). Therefore, the unauthorised parker is a trespasser even if he does not know that he is not permitted to park on the land.
17. Trespass is actionable *per se* without proof of special damage (*Ashby v. White* (1703) 2 Ld.Raym 938; 92 ER 126). The remedy would normally be damages, but it is unlikely that unauthorised parking would cause sufficient damage to warrant court proceedings. The other

remedy would be an injunction, but again this is unsatisfactory because individual trespassers are unlikely to park for long enough for it to be effective.

ii. *Trespass to Goods*

18. An action of trespass to goods has always been concerned with the direct, immediate interference with the claimant's possession of a chattel. It includes any unpermitted contact with or impact upon another's chattel (Clerk & Lindsell on Torts 19th edn., at 17-123).

19. Therefore, the seizing of a car by placing a clamp on its wheel is *prima facie* trespass to goods, unless it is lawful or the clamer has a defence to the tort.

20. It should be noted that clamping is a trespass and not a conversion: an act of conversion is the wrongful conversion of a personal chattel to the defendant's use or to the use of some third person.

iii. *Consent and Assumption of Risk*

21. The principle of consent is that: "One who has invited or assented to an act being done to him cannot, when he suffers it, complain of it as a wrong" (*Smith v. Baker* [1891] AC 325 at 360 per Lord Herschell).

22. Consent, on the part of the claimant, is a defence to trespass (as well as almost all other torts) and may take two forms:

(1) The claimant may authorise the doing of the act which would otherwise constitute an invasion of his interest (e.g. a patient consents to surgery);

(2) The claimant may consent to assume the risk of a tort being committed (see Clerk & Lindsell at 3-74).

23. It is the latter 'assumption of risk' that constitutes the form of consent in the case of private clamping. So, where a motorist parks his vehicle on clearly marked private land in defiance of a notice indicating that unauthorised vehicles will be clamped, he has voluntarily accepted both the risk that his vehicle will be clamped and the risk that it will not be released unless he pays a reasonable charge (note that the implied consent does not extend to an exorbitant charge or delay in releasing the vehicle after payment is offered).

24. It should be noted that the doctrine of consent is preserved in relation to trespassers by section 1(6) of the Occupiers Liability Act 1984.

iv. Distress damage feasant

25. The alternative justification for the trespass to goods that results from private clamping is that the clamping is the exercise of the self-help remedy of distress damage feasant. This argument was rejected by the majority of the Court of Appeal in Arthur v. Anker.

26. Distress damage feasant is an old, medieval self-help remedy. As stated in Arthur v. Anker: 'Put in simple English, if a landowner found property of another causing damage on his land he could seize the offending property and withhold it from its owner until adequate compensation had been tendered for the damage done (at 571 per Sir Thomas Bingham MR). It was common ground in Arthur v. Anker that the remedy survives and is in principle capable of applying to inanimate objects (in spite of the fact that the application of the remedy to animals was abrogated by section 7(1) of the Animals Act 1971 which substituted a new procedure for detaining trespassing livestock).

27. Sorrell v. Paget [1950] 1 KB 252 is modern authority that apprehended damage is sufficient to invoke the remedy. In that case, the plaintiff's heifer had strayed onto the defendant's land where he kept a T.T. herd. The defendant impounded the heifer in his barn and, though no damage was proved, the Court of Appeal held that the defendant's action had been justified. It seems that the right to impound flowed from the threat which the heifer presented to the herd.

28. It appears that distress damage feasant cannot be levied on things in actual use: for example, shaking a ladder while it was being used was held to be an unlawful distress (Collins v. Rennison (1754) Sayer 138; 96 ER 830). Applying this principle, the remedy should not be invoked if the driver is sitting in the car that is unlawfully parked.

29. The question of who may impound also creates difficulties. There is Canadian authority that only a landowner may distrain: the employee of a towing company, authorised by the superintendent of a car park, was not entitled to invoke the remedy (Reg v. Howson (1966) 55 DLR (2d) 528).

30. However, it was because the majority of the Court of Appeal in Arthur v. Anker considered there was no actual damage against which to distrain that they held that the remedy did not apply to private clamping (Hirst LJ dissenting).
31. This is contrary to the New Zealand authority of *Jamieson's Tow & Salvage Ltd. v. Murray* [1984] 2 NZLR 144 which held that the cost of removing an illegally parked vehicle could be regarded as actual damage justifying the retention of the vehicle by clamping and several earlier cases (e.g. *Ambergate, etc. Rly. v. Midland Rly. Co.* (1853) 2 E & B 793; 118 ER 964). The *Jamieson's* decision was doubted by Sir Thomas Bingham MR and Neill LJ in Arthur v. Anker (at 575 and 580).

v. *The Law of Contract*

32. There is no contract between a landowner and the trespasser who parks without authorisation as there is no contractual *animus* and no exchange of consideration.
33. Nevertheless, in Vine, Waller LJ commented that, in relation to the level of knowledge and understanding required of a notice warning of clamping, some assistance is to be gained from cases concerned with whether terms have been incorporated into contracts (at 178).
34. He drew guidance from *Mendelsohn v. Normand Ltd* [1969] where Lord Denning MR held that a notice at the exit of a car park is not incorporated into a contract unless it is brought home to the party so prominently that he must be taken to have known of it and agreed to it, and *Thornton v. Shoe Lane Parking* [1971] 1 All ER 686 which held that in the case of an unusual condition (restricting liability for personal injury), the defendant must bring it fairly to the notice of the other party.
35. Waller LJ concluded in Vine that: "In the clamping context it should not be overlooked that things may not be so clear as in the car parking context as the circumstances of this particular case show. Furthermore the onus on the person seeking to clamp in reliance on a notice must be very high."
36. Therefore, the notice requirements for onerous terms in contract law are a useful guide in considering the special requirements for implied consent in the law of private clamping.

37. In addition, there may be circumstances when private clamping is carried out in a paying car park, where there is a clear contract to park (e.g. if the driver pays an inadequate fee or if the car is parked for too long or in the wrong place). In those circumstances, the contract cases such as *Thornton* will apply to determine whether a notice or term warning of clamping is validly incorporated into the contract.
38. However, there are difficulties fitting private clamping into the law of contract, even in the case of clamping in contractual car parks. A large part of the deterrence will come from a penalty charged for abuse of the proper parking procedure. If the agreement is to pay a certain sum for parking, but in default of payment a larger sum is payable, it is clear that the larger sum is not a pre-estimate of loss, but is a security for the performance of the contract (*Dunlop Pneumatic Tyre Co. v. New Garage* [1915] AC 79, at 86). Such a penalty is most likely to be unlawful (Chitty on Contract, Vol I General Principles, 13th edn., at 26-125: when damages fixed by contracting parties are regarded as a penalty (as opposed to liquidated damages) the clause is unenforceable). In any event, in the car parking situation, the contract is likely to come within the ambit of the Unfair Terms in Consumer Contract Regulations 1999 as a contract between a business and a consumer. The Regulations give illustrations of terms which will, *prima facie*, be regarded as unfair: relevant to this context is “(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation”.
39. Nevertheless, even though private clamping does not sit well in the law of contract, there may be circumstances when the principles in *Arthur v. Anker* could apply with the consequence that, once a vehicle overstays beyond what has been paid for, it becomes a trespasser and the principle of consent by way of notice takes effect.

vi. *Criminal Damage*

40. The offence of criminal damage (contrary to section 1(1) of the Criminal Damage Act 1971) will not apply to the act of clamping unless that act destroys or damages the vehicle without lawful excuse where the clammer has intended to destroy or damage it or has been reckless as to whether it would be destroyed or damaged.
41. More commonly, the criminal law arises in clamping cases where the owner of the vehicle has subsequently sought to release his car from the clamp and in the process has destroyed or damaged the clamp and / or the padlocks and chain.

42. The Divisional Court of the Queen's Bench Division held in *Lloyd v. Director of Public Prosecutions* [1992] 1 All ER 982 that there was no lawful excuse for such acts because, even if the clamping of a car would otherwise have been a trespass, the car-owner had consented to the risk of it happening and so was not in a position to complain when it in fact occurred (at 992). Self-help involving the use of force could only be contemplated where there was no reasonable alternative, which there was, as if the car-owner considered he had suffered a civil wrong, his recourse was to pay the fine and then take civil action (at 992). Damaging or destroying the clamp and / or padlocks and chain is therefore a criminal offence.

43. It should be noted the Courts do not appear to have considered the situation where someone is unable to pay the release fee and therefore unable to avail themselves of the option of paying the fine and then taking civil action, such that there may be no reasonable alternative but to invoke self-help.

vii. Nuisance

44. The authorities consider an unauthorised parked car to be a trespass rather than a nuisance. In certain circumstances, however, it may be that the presence of the car could also amount to a nuisance (e.g. if it were blocking an access). There are *dicta* in a Canadian car parking case that suggest that parking may be a nuisance and there is a right to abate that nuisance (*Controlled Parking Systems Ltd. v. Sedgewick* [1980] 4 WWR 425, 435, 439 per Walker DCJ); however, on the existing English authorities, it seems that the landowner's remedies lie in trespass rather than nuisance. In any event, there would be little to be gained for either clamper / landowner or clampee in arguing a case in nuisance rather than trespass.

viii. The Release Fee and Punishment

45. The authorities tend to describe the amount of the release fee as a deterrent rather than a punishment (see e.g. *Arthur v. Anker* at 574 per Sir Thomas Bingham MR). A deterrent would not be a deterrent, however, if it were not also to a degree a punishment. In contract law, punitive damage clauses are unenforceable and such a clause would most likely be unfair within the meaning of the UTCCR 1999 (see paragraph 38 above). There is an argument therefore that the situation should not be different where there is no contract in existence, i.e. that the clamper may not punish the trespasser. It is certainly the case that private individuals

may not impose criminal sanctions on other private individuals (that being solely the role of the State), and non-criminal punishment between individuals is frowned on by the law (see e.g. the limits on the exercise of self-help remedies such as distress damage feasant and abatement in nuisance, as well as punitive contract clauses).

C) The Position in Scots Law

46. The position as regards private clamping is different in Scotland. In Scotland, clamping without statutory authority is an offence of theft. This is because an intention to deprive the owner permanently of his goods is not a necessary ingredient of the offence of theft in Scots law (*Black v. Carmichael* 1992 SCCR 709). However, this is not the law in England and Wales (see sections 1(1) and 6 of the Theft Act 1968) and an English court would reach a different decision (see *Arthur v. Anker* at 577 per Sir Thomas Bingham MR).

47. In *Black v. Carmichael* it was also considered that it was illegitimate to use threats which are not related to the use of legal process or the unauthorised detention of the debtor's person or his property in order to obtain payment of a debt (at 717 per Lord Justice-General, Lord Hope). This was endorsed by the Court of Appeal in *Arthur v. Anker*, Sir Thomas Bingham MR stating, "It appears from this passage ... that everything depends on whether the demand made is one which the law recognises as legitimate" (at 577). As, on the current state of the authorities, private clamping is legal (provided conditions such as warning, reasonable release fee etc. are met), there can be no argument that the clamper in those circumstances is guilty of blackmail. However, if the clamper goes beyond the bounds of the law, he cannot believe that he has reasonable grounds to act in such a way, and allegations of blackmail are more likely to succeed (note that the common law offence of extortion was abolished by the Theft Act 1968 (s 32(1)(a)).

D) Licensing of Clamping

48. The Private Security Industry Act 2001 made it an offence to engage in any licensable conduct, which includes wheel-clamping in circumstances in which it is proposed to impose a charge for the release of immobilised vehicles on land which is not a road, except under and in accordance with a license (s 3(1) & (2) and Schedule 2 paragraph 3).

49. Applicants must now apply to the Security Industry Authority for a license, who carry out identity, criminal record, requisite training and other checks (such as mental health, the right to work) before granting a license, in order to clamp on private land.

E) Human Rights

50. On 2 October 2000 the Human Rights Act 1998 came fully into force and, for the first time, made human rights issues justiciable in the English courts. In this context, a number of Convention rights could be engaged:

- (1) Article 6: The right to a fair trial
- (2) Article 7: No punishment without law
- (3) Article 1 of the First Protocol: The protection of property

51. The HRA contains a strong rule of construction requiring legislation to be interpreted so far as possible to comply with Convention rights (s 3); and it is also unlawful for public authorities (which includes the courts) to act in a way which is incompatible with Convention rights (s 6(1)).

52. There are therefore two ways in which the HRA could impact on the law of private clamping:

- a) if the act of clamping is carried out by a public authority;
- b) in any ensuing litigation between either public and private individuals or private individuals.

53. Section 3 of HRA places a strong interpretative obligation on the courts to read and give effect to legislation in a way which is compatible with Convention rights, *so far as it is possible to do so*. The interpretative obligation under section 3(1) applies to legislation in disputes between private parties where Convention rights are engaged, and so could apply to the Private Security Industry Act 2001. Interpretation is not limited to situations where there is an ambiguity in the statutory language, but the courts have been concerned that section 3 deals only with interpretation and not legislation, and are wary of preserving Parliamentary sovereignty (see *Re S (care Order: Implementation of Care Plan)* [2002] 2 AC 291).

54. A court is therefore highly unlikely to 're-write' a statute to say that something is unlawful that is expressly authorised by the statute. However, if a Court were to consider that clamping in

appropriate circumstances and with the necessary safeguards were compatible with HRA, it would be open to a Court to interpret the licensing scheme under the Private Security Industry Act 2001 as authorising only activity that is HRA compatible. On the other hand, if a court were to consider that private clamping is incompatible with the ECHR per se, it could make a declaration of incompatibility under section 4(1) of HRA in relation to the 2001 Act. Such a declaration is not binding on the parties to the proceedings in which it is made (s 4(6)), but can prompt Parliament to re-legislate.

55. In the context of the obligation under section 6 not to act in a way that is incompatible with Convention rights, there are three different types of public authorities envisaged by the HRA:

- (1) public bodies which are obviously public authorities e.g. central government, local government, the police, immigration officers and prisons (which can be described as core public authorities);
- (2) public authorities defined as such under the HRA s 6(3)(b) by virtue of carrying out some public functions (which can be described as hybrid public authorities); the Government has expressed the view that hybrid authorities would include Railtrack, private security firms managing contracted out prisons, doctors in general practice (The Lord Chancellor, Lord Irvine, *Hansard*, HL cols 796, 811 (24 Nov 1997); and
- (3) courts and tribunals.

56. All acts of a core public authority will be subject to the HRA, so human rights may arise if, for example, a Council employed a private firm to carry out wheel clamping in its staff car park.

57. However, in the case of hybrid authorities, a person is not a public authority if the nature of the act is private (s 6(5)). At the Committee stage of the Bill, Lord Irvine gave examples of three situations where public authorities are performing private acts: Railtrack plc exercises public functions in its role as a safety regulator but is acting privately in its role as a property developer; a private security firm would be exercising public functions when managing a contracted out prison but not when acting privately by guarding commercial premises; and doctors in general practice would be public authorities in relation to their National Health Service functions but not in relation to their private patients (*Hansard*, HL col 811 (24 Nov 1997)). There are therefore arguments that a private security firm that clamps vehicles parked on the premises of a hybrid authority in order to protect the commercial nature of those premises (i.e. to deter authorised parking) is acting privately, rather than exercising public acts

(it should be observed that the land in Vine was owned by Railtrack, a case decided post the coming into force of HRA, though no human rights arguments were raised).

58. Furthermore, it should be noted that the Private Security Industry Act 2001 provides statutory underpinning for the act in question (by way of the license). The primary obligation on a public authority to comply with Convention rights in section 6(1) may be displaced by section 6(2) which provides that in the case of acts carried out under legislation which cannot be read or given effect to in a way which is compatible with Convention rights, the authority is acting so as to give effect to or enforce those provisions. It may well be that a Court would interpret the licensing scheme as only authorising that which is HRA compatible. Were a core public authority to exceed those bounds, it would be subject to HRA. However, if private clamping were incompatible per se, and the clamping is carried out by a public authority, that authority would have an exclusion of liability by reliance on the statutory scheme that authorises clamping on private land with the appropriate license. Section 6(2) applies to both core and hybrid authorities, and courts and tribunals.

59. Therefore the scope of the applicability of the HRA to the law of private clamping may be limited by Parliament's decision to authorise the activity by the granting of licenses. One therefore has to examine whether that authorisation in itself is incompatible with Convention rights.

Conclusion

60. The current justification for private clamping is based on the doctrine of consent to what would otherwise be trespass to goods. However, private clamping does not sit easily within the common law framework, particularly accounting for the imposition of a release fee that amounts to a sum far in excess of any damage actually sustained and is, in reality, intended not as compensation but as a punishment and deterrent.

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