LIABILITY OF CAR-PARK OWNERS

The great increase in the number of motor vehicles on New Zealand roads over the last ten years has led to acute parking problems, especially in the central areas of our larger cities. This problem has prompted city authorities, private individuals, large stores and businesses employing substantial staffs to provide various forms of parking facilities for their citizens, customers or employees. Overseas, particularly in the U.S.A. and Canada, this trend has been even more marked with parking lots being provided for theatre-goers, patrons at restaurants and so on. The liability attaching to the provider of such facilities is a question which may very well merit the attention of our Courts more often in the future. Can the car park owner be held liable if the vehicle in his park is damaged? Is he liable if a vehicle is stolen; or if goods have been stolen from the vehicle? This article seeks to examine the problem.

It is strange that this matter has not come before the Courts more frequently. In England, Australia and New Zealand, there seems a dearth of decided cases on the subject although in Canada—probably because of the greater number of such parking facilities—this problem has frequently become the subject matter of litigation.

One point *is* clear however: before the parking lot owner can be held liable there must be shown some duty of care in respect of the vehicle flowing from the owner to the person leaving his vehicle in the park, and this will arise only if it can be shown that there was an express or implied contract of bailment between the two parties in respect of the particular vehicle.

Halsbury's Laws of England (3rd ed.) Vol.2 at p.94 defines a bailment as "a delivery of personal chattels in trust, on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on which they were bailed shall have elapsed or been performed."

In the instance of the parking of vehicles, to constitute a contract of bailment the actual or constructive possession of the vehicle must be transferred by its owner (the bailor) to the car park owner or his agent (the bailee) in order that the latter may keep the vehicle or perform some action in connection with it, for which actual or constructive possession is necessary. In order for a bailment to arise, it is necessary that the possession of the car or other vehicle be transferred, for there can be no bailment unless the car park owner has actual physical possession of the chattel.

The fundamental question therefore is this: was there an actual transfer of possession? It will immediately be obvious that this must depend on the facts of the case. It will depend on the facilities that the owner provides for the customer or employee and what action he has taken to actually claim possession of the vehicle for the time being. Upon this question will depend his liability.

The leading authority on the matter is of course, *Ashby* v. *Tolhurst* [1937] 2 All.E.R. 837. In that case, the plaintiff left his car on the defendant's parking lot for a nominal fee. He received from the

attendant on duty a ticket exempting the proprietors from any responsibility for damage caused to the vehicle. The car was removed by someone without authority and was never found. It was held by the Court of Appeal that no contract of bailment had been created; the relationship between the parties was that of licensor and licensee not bailor and bailee and consequently there was no obligation upon the defendants towards the plaintiff in relation to the car left in the park. The owner of the park had done nothing to obtain possession of the car and could not therefore, be held liable. The Court also pointed out that even if there had been delivery of possession and consequently a contract of bailment, the ticket issued exempting the defendant for loss would be wide enough to protect the defendants. The words of Romer L.J. at p.844-5 merit some attention:
"It is true that if the car had been left there for any particular purpose that required that the defendant should have possession of the car a delivery would be rightly inferred and if the car had been left at the car park for the purposes of being sold or by way of pledge or for the purpose of being driven away to some other place or indeed for the purpose of safe custody delivery of the car although not actually made would be readily inferred."

Ashby v. *Tolhurst* was followed in *Tinsley* v. *Dudley* [1951] 1 All E.R.252. In that case, the plaintiff went to a public house for refreshment and before entering, left his motor cycle in a covered yard which formed part of the premises. The gates leading to the yard, bore the words: "covered yard and garage". There was no attendant to look after vehicles left in the yard for the use of which no charge was made, nor did the plaintiff inform the publican that he had left his machine there. Subsequently, the plaintiff discovered that the motor cycle had been stolen. In an action against the defendant claiming damages for its loss, it was held that there was merely a general invitation to customers if so minded to leave their vehicles in the yard and this invitation was accepted by the plaintiff. Here again, it was held that there was no delivery of possession either actual or constructive. The defendant had not become a bailee of the motor cycle and was not therefore, liable as a bailee for its loss, Jenkins, L.J. said at p.260: "The defendant can only be fixed with liability if the inference can be properly drawn from the circumstances that there was an actual or constructive delivery of the bicycle into his safe keping. On the facts, it seems to me that clearly there was no such delivery, actual or constructive. There was no attendant in the yard to whom the motor bicycle could be handed over. The plaintiff never even told the defendant that he had left the bicycle in the yard. The yard was one to which access could readily be had from the street by anyone. There was nothing beyond the general invitation to customers, if so minded, to leave their vehicles or bicycles in the yard—an invitation accepted by the plaintiff. In my judgment, those facts fall far short of what is required to show an actual or constructive delivery of the machine into the charge of the defendant."

It is clear from both these cases that one who leaves a vehicle in a car park does not thereby necessarily deliver over the possession or custody of the vehicle to the owner or keeper of the park so as to make the latter responsible for loss. In neither case did there exist any of the special circumstances mentioned by Romer L.J. to enable the Court to infer that there had been delivery of the vehicle. The

facilities provided were merely for the purpose of parking the vehicles and not for their safe-keeping. Where there is no transfer of possession, there is no contract of bailment and the car-park owner is not liable.

In what cases then have the Courts held that there has been a transfer of possession? As mentioned above, this is a question that surprisingly has very seldom ever come before our Courts. In Canada however, there is a line of authorities holding that in particular instances there has been the transfer of possession necessary to give rise to a contract of bailment.

In the leading Canadian case of *Appleton* v. *Ritchie Taxi* [1942] 3 D.L.R.546 the plaintiff for a small fee delivered his car with the keys in it to the defendant's agent operating a parking lot. He received a ticket which contained conditions absolving the defendant from liability for damage or theft. The plaintiff did not drive the car from the entrance to be parked in the lot but with the key in place, left it in charge of the attendant. The car was taken from the lot by an unauthorised person and certain articles were removed from the vehicle. In an action for the articles stolen, it was held that the defendant received possession of the car as a bailee. Gillanders J.A. distinguished *Ashby* v. *Tolhurst* (supra) where the plaintiff had parked his own car and locked it. Here the relationship of licensor and licensee remained as possession had not been transferred to the defendant; there had been no physical delivery of the car by the plaintiff. In *Appleton* v. *Ritchie Taxi* (supra) the learned Judge was certain that possession of the car was delivered to and accepted by the defendants for safe-keeping. The defendant's agents took charge of the car at the entrance, parked it where he desired in the lot, and later another attendant for his own convenience, moved it to another place.

Furthermore, the learned Judge held that as there had been a contract of bailment created, the onus was on the defendant to prove he had taken reasonable care of the vehicle. The printed conditions were not a defence because the plaintiff did not read them and the defendants agent failed to do what was reasonably necessary to call them to his attention.

Similarly, in *Way Sagless Springs Co.* v. *Bevradio Theatres* [1942] 3 D.L.R.448, the plaintiff's car was stolen while left unattended in a theatre parking lot owned by the defendant. The car keys had been given to the defendant's servant to enable him to move the car. The servant later left the keys in what was an obvious place for a thief to look for them. It was held that there had been a delivery of possession and the defendant was a bailee and was liable for the loss of the car.

In *Brown v. Toronto Auto Parks Ltd* [1955] 2 D.L.R.525 the facts were similar and it was held that the parking lot operators were liable for the loss of the car which had been bailed in their lot. There were exculpatory signs on the lot and on the ticket but the car owner did not see or read them nor was his attention drawn to them. While the plaintiff should reasonably have seen the sign, the words "Car and contents at owners risk" did not suffice to relieve the defendants of their liability for negligence.

In New Zealand, this problem recently came before W.S. Spence, S.M. in *Johnson* v. *Shorters Parking Station Limited* (1962) 10 M.C.D. 276. In this case, the plaintiff had for some years during working days, parked his car in the defendant's premises—a three storey building

consisting of a garage, offices and parking lot. There was no express term in the agreement between the parties except that the plaintiff would pay the defendant £5 per month. One day, the plaintiff returned to find that his car had been removed unlawfully and driven away. The car was subsequently recovered in a severely damaged condition and the plaintiff claimed damages, first, on a proposition that he had deposited the car with the defendant under a contract of safe-keeping for reward, and alternatively, on a breach of an express or implied term that the defendant would exercise due care and diligence for the safe-keeping of the vehicle. He also alleged that he handed over possession of the vehicle and that there had been a failure to return possession.

The learned Magistrate felt he was able to distinguish both *Ashby* v. *Tolhurst* (supra) and *Tinsley* v. *Dudley* (supra) in these circumstances. In *Tinsley* v. *Dudley,* Sir Raymond Evershed M.R. had recognized a clear distinction between the situation of leaving a car in an open unattended park and that arising from taking a car into a garage where at least prima facie there would be a symbolic delivery of possession or custody to the proprietor. In the present case, the plaintiff had as usual, left his car inside the door of the premises with the keys left in the ignition so that the car might be moved by the attendant. The learned Magistrate was of the opinion that the defendants premises were not a public park—they had merely provided the use of a building, in the nature of a garage, for parking in charge of an attendant who had received authority to move vehicles. There was a sufficient transfer of possession to create the relationship of bailor and bailee and the defendant was therefore liable for want of care to the plaintiff's vehicle.

If there has been an actual delivery of possession and a bailment emanating therefrom, the question then arises under what liability is the bailee? There would appear to be two alternatives depending on whether it is construed as a gratuitous bailment of deposit, or a bailment of deposit for valuable consideration.

The former is defined as a bailment of a chattel without recompense and returnable upon demand. 2 Halsbury (3rd ed.) 102 sets out the obligations of a bailee under such a bailment as "that degree of diligence which men of common prudence generally exercise about their own affairs". In order therefore, to maintain an action the plaintiff must show that the defendant has been guilty of either a breach of orders, gross negligence or fraud.

Under the heading of gratuitous bailments, would probably come parking facilities provided by employers for their employees. On the other hand, it may be that facilities provided by shops and stores for their customers, restaurants and theatres for their patrons, for which no actual charge is made would come under the heading of a bailment of deposit for valuable consideration. It was held in *Timaru Borough Council* v. *Boulton* [1924] N.Z.L.R.365 that by undertaking the care of valuables belonging to bathers, the use of the bathing shed was rendered more attractive and this would constitute valuable consideration. It might be argued by analogy that by undertaking to care for customers' vehicles the theatre, shop or restaurant owner was rendering his premises more attractive and thus bringing the bailment into the class for valuable consideration. Certainly any bailment where

any sort of parking fee is charged, as in public parking lots, would come under this category.

If the bailment is one for valuable consideration, the standard of care which should be exercised by the park owner, is higher. The onus rests on the bailee to prove that reasonable care was taken of the vehicle. While not an insurer, it is the bailee's "duty to take such due and proper care as a prudent owner might take of his own goods" per Erle C.J. in *Holder* v. *Soulby* 8 C.B.N.S.254, 265, 141 E.R.1163. In particular, he is bound to take reasonable care to safeguard the property against theft. If the property is lost, stolen, damaged or destroyed, the burden lies on the bailee to prove, that the loss, theft, damage or destruction, has not been caused by any failure on his part to exercise reasonable care. Whether the bailee has exercised that reasonable care will, of course, depend on the particular facts of each individual case.

Assuming that a contract of bailment is in existence then, and the owner of a parking lot has the higher standard of care cast upon him, the question now arises whether he can exclude his liability under this contract of bailment by providing terms in the parking ticket or sign stating that he assumes no liability for the bailed vehicle, and that the car is parked at the owner's risk.

Generally speaking, in the large number of cases in which such questions have arisen, the Courts have looked on these excluding and limiting terms with some disfavour—particularly in recent years. A number of leading English cases have discussed the question thoroughly. In *Chapelton* v. *Barry Urban District Council* [1940] 1 All E.R.356 it was stated that the particular document relied upon as containing notice of the excluding and limiting terms absolving the defendants from liability, must have been intended as a contractual document and not as a mere receipt or acknowledgment of payment as in that case. In *Parker* v. *South Eastern Railway* (1877) 2 C.P.D.416, a test as to whether reasonable notice of the terms of the document had been given to the defendant was suggested and this test was applied in *Richardson* v. *Rowntree* [1894] A.C.217. Similarly in *Olley* v. *Marlborough Court Ltd* [1949] 1 All E.R.127, the problem was discussed at length. Some judges, and in particular, Lord Denning, have suggested that when faced with a wholly unreasonable term, they might even delete it from the contract; *John Lee & Son (Grantham) Ltd* v. *Railway Executive* [1949] 2 All E.R.581, 584. These cases along with others, such as *Woolmer* v. *Delmer Price Ltd* [1955] 1 All E.R.377, *Adler* v. *Dickson and Another* [1954] 3 All E.R. 397, *Bonsor* v. *Musicians' Union* [1954] 1 All E.R. 822 and *J. Spurling Ltd* v. *Bradshaw* [1956] 2 All E.R.121, seem to indicate that the Courts will construe such exculpatory terms strictly and usually in the interests of the weaker party to the agreement.

This problem, specifically in connection with the bailment of vehicles by car-park owners, has naturally enough come directly before the Canadian Courts in a number of cases. In *Spooner* v. *Starkman* [1937] 2 D.L.R.582, the defendant had been issued with a ticket limiting the liability of the owner of the premises on which his car was parked. The Court held that the defendant was responsible for the damage caused to the car upon it being stolen from the parking lot, unless he could show that the attention of the owner was called to the limitations on the ticket he was issued with. In *Appelton* v.

Ritchie Taxi (supra) the Court held that the conditions printed on the ticket were not a defence because the plaintiff did not read them and that the defendant had not drawn his attention to these terms. Gillanders J.A. referred to *Chapelton* v. *Barry Urban District Council* (supra) which he thought indicated the caution the Courts would take in following many of the earlier "railway ticket" cases. He was of the opinion that the conditions relied upon to limit liability were not enough. He said at p.552:

"I think that the plaintiff was not bound to expect that a ticket of this sort contained conditions limiting the bailee's obligations, or that it was more than a voucher to identify his car upon his return and possibly a receipt for the payment of the fee paid, and that under the circumstances, the defendants failed to do what was reasonably necessary to draw to his attention the fact that they purported in and by the ticket in question to limit their liability as bailees of the car."

In *Brown* v. *Toronto Auto Parks Ltd* (supra) too, the Court would not give effect to the excluding and limiting terms contained both on the sign erected on the lot and in the ticket issued to the plaintiff. The Court said that this was not enough. The plaintiff did not see nor read the conditions and his attention was not drawn to them. The defendants had not done enough to absolve themselves from liability.

The Full Bench of the High Court of Australia discussed excluding and limiting terms in connection with the bailment of vehicles in *Davis* v. *Pearce Parking Station Ltd* (1954) 91 C.L.R.642. Here the appellant left her car in the respondent's parking station and received a "parking check" stating that the receipt must be exchanged at the office for a delivery ticket before the motor vehicle could be obtained, and that the "check" was subject to the conditions set out on the back of it. On the back of the ticket were terms excluding the respondents from responsibility for loss or damage of any description. It was held in this case that the exemption clause should be construed as excluding liability for negligence and accordingly the respondent was not liable for the damage sustained by the appellant as a result of the theft of the car. Their Honours in their joint judgment fully discussed the case law relating to the construction and effect of clauses in contracts of bailment exonerating the bailee from liability as to damage. They said at p.649: "It has been repeatedly said that an exempting clause must be construed strictly, and that clear words are necessary to exclude liability for negligence." In spite of this however, they found the case to be one in which the bailee would not, apart from a special contract, be liable for loss or damage occurring without negligence. "It is clear that there may be in a contract of bailment special and essential terms, express or implied, breach of which will not be covered by an exempting clause in general terms . . . . but it is, in our opinion, impossible to imply in the present case, the term pleaded in the defence. The conditions relating to presentation of the parking check are obviously . . . . inserted for the protection of the bailee, and to imply the term pleaded would be to impose on the bailee an absolute liability in the event of theft—in other words, a much higher duty pro tanto than would rest upon him if the contract contained no exemption clause. Nor do we think that even the less stringent term set out in the notice of appeal—assuming it to be open on the pleadings—could be properly implied, though it is really

unnecessary to decide this, because again we agree with the learned trial judge that no breach of the term alleged was established. No person was 'permitted' to take the plaintiff's car. It was stolen without the defendant's consent or knowledge. Miss Smith saw it being taken, but she did not realize until too late that it was being stolen, and her omission to interfere physically cannot be regarded as a giving of permission."

This case illustrates the point that whether the excluding or limiting terms will be enforced on behalf of the bailee, depends on the facts and the circumstances surrounding each case. Perhaps our Courts would not go as far as those in Canada in refusing to uphold these terms, but it is submitted that it can safely be assumed that our Judges would only give effect to such exonerating conditions where the bailor ought reasonably to have been aware of them. Such cases would include those where conditions are not only printed in bold type on any parking ticket that there may be, but also are displayed on signs at the front and rear of the parking lot.

To sum up then, whether there has been the transfer of possession necessary to create a contract of bailment would appear to depend on the circumstances of the transfer. At both ends of the scale the position seems to be reasonably clear. If there is a mere leaving of a vehicle in an unattended parking lot there is no delivery and no bailment. If, on the other hand, the vehicle is left with an attendant who has authority to move the vehicle, there is a delivery and a consequent duty of care arising from the contract of bailment created thereby. But even here the Courts have shown a distinct reluctance to uphold terms inserted in a ticket or notice by the bailee, excluding or limiting his liability to the owner of the bailed vehicle. Between these two extremes will be found the majority of cases, and whether there is a delivery of possession in these cases must ultimately depend on the facts. It seems inevitable with the increasing necessity for car owners to use such parking facilities, many more such cases will come before our Courts and possibly we can look forward to the position being clarified or to a more definite dividing line being drawn.

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