TRESPASSING VEHICLES

The problems posed by cars parked illegally on both public roadways and private property have grown appreciably in recent years, as the increase in the number of cars coming to the centre of our cities has run parallel with the decrease in the available land for parking. Consequently the operations of towing companies have increasingly affected the daily lives of the urban inhabitants of New Zealand, especially, it seems, the citizens of Wellington. These operations raise several quite separate legal issues perhaps unified only by the involvement of towing companies, the dearth of legal material concerning these issues and the ignorance of the legal situation on the part of most persons. The last two circumstances are probably due to the comparative newness of the problem, at least in this country.

Towing operations in relation to trespassing vehicles seem to raise three main legal issues:

1. The right to remove a person's vehicle without his permission.
2. The right to retain a vehicle until towing and/or storage charges have been paid.
3. The right to recover expenses of towing and/or storage by other means.

The first major distinction which arises when discussing these problems is that between cars parked illegally on public roadways and cars parked illegally on private property. The first situation is regulated by statute, the second by the principles of the common law.

PUBLIC ROADWAYS

The rights of a person other than the owner of a vehicle to have the vehicle removed from a public road are now contained in the Transport Act 1962 as amended. Section 68 B(1) of that Act provides that a constable or traffic officer is authorised to enforce the provisions of the Act and any regulations or by-laws made under it and in particular may

> ". . . (c) At the expense of the owner, move or cause to be moved to any place of safety any vehicle on any road, if the constable or traffic officer believes on reasonable grounds that it causes an obstruction in the road or to any vehicle entrance to any property or its removal is desirable in the interests of road safety or in the interests of the public."

This provision replaced reg. 5(1)(d) of the Traffic Regulations 1956 which in many respects was considerably wider than its successor. The requirement that the vehicle be on a road was omitted and there was no requirement that the opinion of the officer be reasonable, although it was probably implied. Furthermore the reasons necessary to justify a removal were that the vehicle caused an obstruction in the

road "or its removal is desirable for any other reason." It is not clear why a more restrictive provision was substituted though perhaps it was thought that a provision interfering with property rights ought to be spelt out more clearly, especially if contained in an Act rather than a regulation.

A further right of removal is given by s. 76 of the Act. Under subs. (1) any person duly authorised by a local authority may take possession of and remove any motor vehicle which is on any road if it appears to that person that the motor vehicle has been abandoned by the owner and either it is unregistered or no licence to use the vehicle has been issued for the current year. Then follow certain provisions for claiming the removed vehicle upon payment of the removal and storage expenses, and if not claimed, for the sale of the vehicle. Section 76(3A) gives the local authority similar powers where it believes on reasonable grounds that a vehicle has been abandoned (without the necessity for the existence of the other condition in s. 76(1)), but before the powers given by s. 76(3A) can be exercised, the Magistrate's Court must be satisfied that the vehicle has been abandoned.

A further legal justification for removing vehicles may be found in local by-laws. The validity of such by-laws is however doubtful. Neither s. 77(k) of the Transport Act nor s. 386(12) of the Municipal Corporations Act 1954 (both of which relate to the power to make by-laws regulating the use of streets) appear to be wide enough to give power to remove vehicles. It is doubtful whether valid by-laws can be made prohibiting even the leaving of vehicles on the road for any appreciable length of time. In *Transport Department* v. *Kendall*[1] McLean S.M. held that a by-law providing that "no person shall store or keep any vehicle when not in use in any street or public place" was unreasonable and uncertain. Wicks S.M. in *Singh* v. *Wellington City Corporation*[2] doubted whether a by-law prohibiting the leaving of undrivable vehicles on the road for more than seven days was *intra vires*. *A fortiori*, a by-law authorising the removal of such vehicles would be *ultra vires*.

The foregoing is a short outline of the statutory powers of local authorities, traffic officers and police constables to remove vehicles from the road. It is clear that these powers must be exercised strictly in accordance with the empowering statute or regulation:

> "Certain rights are given to traffic officers to remove motor vehicles. Any such removal is of course, an interference with the right of possession of the owner of the vehicle and it must therefore be clearly established that the right of removal given by statute or regulation is exercised in full compliance

1. (1971) 13 M.C.D. 97.
2. Unreported (1970). Appeal reported as *W.C.C.* v. *Singh* [1971] N.Z.L.R. 1025.

with that authority, and goes no further than the statute or regulation permits."[3]

The case from which the above dictum is taken, is itself an example of the dangers to which failure strictly to comply with the relevant provision can lead. The Wellington City Corporation was held guilty of conversion after the plaintiffs' vehicle had been removed by it, impounded and then stolen from the pound by some third party. Quilliam J. held that the removal was unlawful since the predecessor to s. 68B(1) under which the Corporation purportedly acted was not strictly complied with. The provision was construed so that the traffic officer who directly caused the removal was himself required to form an opinion that the car was an obstruction. This was not proved on the evidence.

Accordingly the two provisions of the Transport Act set out above, if complied with, give the right to remove vehicles from the public roadway. This leaves the two further questions of whether a vehicle can be retained until payment of charges and, if not, how charges are to be recovered. Immediately a distinction must be drawn between removal of abandoned vehicles under s. 76 and removal of vehicles causing an obstruction under s. 68B(1). Under the former provision a right of impoundment until payment of charges is clearly given. The latter provision is not so clear and is the one affecting the more normal situation of a vehicle merely wrongfully parked, the situation with which this paper is primarily concerned.

This section provides that a vehicle may be removed "at the expense of the owner". Normally the vehicle is removed by a towing company to its premises at the direction of a traffic officer. When the owner comes to reclaim his vehicle, the towing company vigorously attempts to retain the vehicle until payment of charges. The question of whether this is permissible does not appear to have been directly considered though it was alluded to in *W.C.C.* v. *Singh* both in the Magistrate's Court and the Supreme Court. In the Magistrate's Court, Wicks S.M. stated that the predecessor of s. 68B(1) (which is indistinguishable for the present purposes) gave no power to impound the vehicle and that anyway only removal and not storage charges could be claimed. Quilliam J. in the Supreme Court was not nearly so forthright. He held that the fact that Corporation had no intention of restoring the plaintiff's car to him until towing and storage charges had been paid amounted to an assumption of possession adverse to the plaintiff's and that this constituted the second necessary element of the tort of conversion. However it is unclear whether the learned Judge considered this temporary assumption of possession as wrongful in itself or only because he had earlier held that the original removal was unlawful. A reading of the relevant part of his judgment leads to the conclusion that it was his view that possession was wrongful for the latter reason. Furthermore he was inclined to the view that

3. *W.C.C.* v. *Singh* [1971] N.Z.L.R. 1025, per Quilliam J. at p. 1027.

storage as well as towage charges could be made. It is submitted that there is no warrant for this in the section and that Wicks S.M. was correct on this point. The words of the section are: "At the expense of the owner, move or cause to be moved to any place of safety." There is no reference to storage, only to removal.

As to the question of impoundment of the vehicle until payment of removal expenses, it is submitted that there is no such power under s. 68 B(1). Firstly, a clearer legislative intention is necessary to endow the police, traffic officers or their agents with what amounts to a lien over another's property. Secondly, the maxim *expressio unius exclusio alterius* would appear to militate against a right of impoundment. Such a right is given by s. 76 in clear words and it may safely be inferred that a similarly clear statement of intention would have been made by the legislature had it wished to give a similar right of impoundment under s. 68 B(1).

This submission is supported to some extent by a recent United Kingdom decision, *R.* v. *Meredith.*[4] The defendant's car was removed to a police station yard from a road pursuant to the Removal and Disposal of Vehicles Regulations 1968 (U.K.). He later went to the yard and removed the car without the consent or authority of the police and without having paid any sum to them and was charged with theft of his own car. It was held by the Manchester County Court that the reality of the situation was that the police were removing the car to another situation for the owner to collect it subsequenly. An owner was liable to pay the statutory charge for removal only if the car originally caused an obstruction, and he had three choices on going to the police station: to pay the charge, admitting that the car caused an obstruction; to refuse to pay, whereupon he would face a prosecution for having caused an obstruction; or to agree to pay, and then no doubt, receive a bill. In all three eventualities he would be allowed to take the car away, for the police had no right as against the owner to retain it. Consequently the defendant could not be guilty of theft.

Likewise in New Zealand, the expenses of removal of a vehicle are payable by the owner only if a traffic or police officer has reasonable grounds for his belief that the vehicle is an obstruction and similar choices would be open to the owner as to the defendant in *Meredith.* However the authority here of this case is weakened by the fact that in England the way in which expenses are to be recovered is clearly set out in the legislation,[5] viz. as a simple contract debt or by order of the Court at the time of conviction on the original obstruction.

It is submitted however that a towing company has no right to retain a vehicle removed from a road until charges have been paid. Its only remedy is to charge the authority which employed it. But

4. [1973] Crim. L.R. 253.
5. Road Traffic Regulation Act 1967 (U.K.), s. 52(2).

a vehicle owner should think twice before reclaiming his vehicle without paying charges. Such an action will lead to the issue of an offence notice for the original obstruction with an order for payment of the expenses if the offence is proved *plus* a fine.

PRIVATE PROPERTY

Whereas the law relating to vehicles trespassing on roads is primarily statute law, that relating to vehicular trespass on private property is composed completely of common law principles, many of them of the most ancient lineage. The antiquity of the law relating to the factual situations discussed in this paper is betrayed by the prevalence of remedies of self-help which have tended to fade in more modern times as the law's powers of enforcement have strengthened.

It is clear that the law gives an occupier of land a right to remove any chattel which is unlawfully upon his land and that a removal pursuant to this right is a good defence to an action for trespass to the chattel.[6] Halsbury states:[7]

> "If a chattel is unlawfully on someone else's land, the person in possession of the land may remove the chattel to some place within a reasonable distance."

It would seem to follow that the occupier of the land may invite or employ a third party, such as a towing company to remove the offending chattel for him. Whether the place to which a vehicle is taken pursuant to this right is "within a reasonable distance" would, of course, depend on the facts of the case, but it would be unlikely that in normal circumstances, a Court would find that a local towing company's premises are not a reasonable place to which to take a trespassing vehicle.

Thus far the legal position is reasonably clear. The main difficulties arise when the owner of the vehicle attempts to reclaim it and the towing company attempts to recover its charges for towing and sometimes for storage also. It is intended to deal first with the question of whether a towing company has a right to retain a vehicle until payment of its charges.

Cases where the relevant principles of law have been applied to the particular fact situations under scrutiny here are scarce, but there are two Commonwealth decisions in point, decided in Canada.

The fullest and most authoritative of these is the decision of the Ontario Court of Appeal in *R.* v. *Howson*.[8] The informant parked his car in a private car park without the owners' permission; the superintendent of the park 'phoned a towing company and an employee

6. See e.g. *Slater* v. *Swann* (1730) Stra. 872, *Aglionby* v. *Cohen* [1955] 1 Q.B. 558.
7. 38 Halsbury's Laws of England (3rd ed.), para. 1249, note (q).
8. (1966) 55 D.L.R. 2d. 582.

of this company duly towed the car away to his company's premises. The informant located it there and demanded its return to him. The tow truck driver refused to deliver it up until paid a towing and storage charge. The informant paid up under protest, reclaimed his car and laid an information charging the tow truck driver with theft of the car. The driver was convicted by a Magistrate. This conviction was quashed by the Court of Appeal, Porter C.J.O., Evans and Laskin JJ.A. on the ground that the prosecution had failed to show that the accused acted without colour of right. Counsel for the accused also submitted that the accused had a right to retain possession of the car. These submissions were dealt with only by Laskin J.A., the other members of the Court being content to quash the conviction on the colour of right ground. It is proposed to discuss the question of the right of a towing company to retain either under lien or distress damage feasant a trespassing vehicle pending payment of charges on the basis of these submissions, since, it is submitted, they raise all possible grounds upon which a right could be based.

A. Lien

There is no statutory lien available to a car park owner in New Zealand (just as there is none in Canada) by which he can retain possession of a vehicle until payment of expenses.[9] In *Howson*, Laskin J.A. held that there was also no common law lien in favour of one who "merely preserves another's goods" unless he is a warehouseman, citing *Hatton* v. *Car Maintenance*[10] in support. This finding is undoubtedly correct. The case cited confirmed the principle earlier laid down[11] that to obtain a lien where money, skill or labour is expended on property, some additional value must be conferred on it. In the case of a vehicle being towed away, it cannot be said that any additional value is conferred upon it.

A further reason, if one is necessary, why no common law lien arises in this situation is that the work done is not done at the request or with the authority of the owner. It is well-established that an unauthorised expenditure of work will not give rise to a lien.[12]

It was also decided in *Howson* that a towing company could have no lien as a common carrier. This is self-evident as a common carrier is one who holds himself out to carry goods of all persons who apply for hire. A towing company which removes persons' vehicles at the behest of a third person certainly does not come within this category.

9. As was pointed out by Wicks S.M. in *Singh* v. *W.C.C.* (supra N.Z.L.R.) the Impounding Act 1955 applies only to "stock" and this term is so defined that not even the most generous judicial interpretation could bring a vehicle within it.
10. [1915] 1 Ch. 621.
11. E.g. *Jackson* v. *Cummins*, 5 M. & W. 342, 151 E.R. 145; *Chapman* v. *Allen*, Cro. Car. 271, 79 E.R. 836.
12. *Hiscox* v. *Greenwood*, 4 Esp. 174, 170 E.R. 681; *Binstead* v. *Buck*, 2 Bla. W. 1117, 96 E.R. 660; *Stone v. Lingwood*, 1 Str. 657, 93 E.R. 759.

B. Distress Damage Feasant

The ancient right of distress damage feasant is the most interesting and most viable basis upon which towing companies could base their widespread practice of retaining trespassing vehicles until towing costs have been paid. The right is described in Salmond[13] as the only survival in modern law of "thing liability". The principle as stated therein is: "It is lawful for any occupier of land to seize any cattle or other chattels which are unlawfully upon his land and have done or are doing damage there, and to detain them until payment of compensation for the damage done."

The right was originally available to an occupier whose land had been trespassed upon by cattle but is now available for the trespass of any chattel.[14] It is very much arguable that such a right is open to a car park owner in relation to a trespassing vehicle and to a towing company if it can be shown that the company is an agent of the park owner. The major problem, however, is the question whether legal damage rather than mere trespass *per se* is enough to give rise to the right, and whether an illegally parked car has caused actual damage. In both the Canadian cases concerning this fact situation it was held that actual damage must be shown, i.e. mere legal *injuria* such as all trespasses involve is not enough. In *Howson* it was argued that this requirement was satisfied because a regular patron had been deprived of the space for which he had paid and the towing charge was therefore lawfully incurred and was an element of "actual damage". Laskin J.A. held that this was not damage for which distress could be maintained because the distrainor was bound to keep a pound at his own cost. The learned Appeal Judge was obviously considering the costs of removal as the source of actual damage. He did not really consider the question of whether the mere presence of a car on a lawful patron's space could amount to actual damage.

The Vancouver County Court has held[15] that "actual damage" is necessary to support distress damage feasant. A towing company which refused to hand over a trespassing vehicle until payment of charges was held liable for conversion. The learned Judge appeared to consider that if the vehicle was blocking ingress or egress to the parking lot, or was depriving a patron of his park or the owner of his parking fee, then there would be sufficient evidence of actual damage.

It is submitted that despite earlier doubts,[16] it is now firmly established that some element of actual damage is necessary to support the right of distress damage feasant. In this respect, the authority of

13. Salmond on Torts, (15th ed.), p. 818.
14. See e.g. *Ambergate Rly* v. *Midland Rly* (1853) 2 E. & B. 793, 118 E.R. 964; *Pfeifer* v. *Sheldhelm* (1921) 59 D.L.R. 631.
15. *Forhan & Read Estates Ltd* v. *Hallett, and Vancouver Auto Towing Service* (1959), 19 D.L.R. (2d) 756.
16. See e.g. Glanville Williams, *Liability for Animals* 1939, p. 70 et seq.

the two Canadian cases above is bolstered by the United Kingdom cases of *Watkinson* v. *Hollington*[17] and *Sorrell v. Paget*.[18] In the former, Scott L.J. at p. 19 stated: ". . . the old law (as to trespassing cattle) was that, if they are doing damage, they may be seized . . ."

And the decision in the latter case which established that a defendant is entitled to keep possession of chattels distrained damage feasant until a tender for the damage caused had been made, implied that if no such damage were done there would be no right to keep the chattel. This accords with the view expressed in Salmond that "there must be actual damage done by the thing distrained; for it is rightly taken and detained only as a security for the payment of compensation, and when there is no damage done there can be no compensation due."[19] This is supported also by Fleming[20] although both Glanville Williams[21] and Pollock[22] take the logical point that trespass is *per se* considered by the law to amount to legal damage and therefore the right should always coexist with trespassing chattels.

Assuming that the right is dependent on actual damage does a vehicle trespassing on private property cause actual damage if, for example, it blocks ingress or egress or deprives a rightful parker of his space? *Forhan & Read Estate* v. *Hallett*[23] implies that it does. Laskin J.A. in *Howson* did not directly consider the point, since the damage there claimed was the cost of removal and storage which is not chargeable to the trespasser. The *Ambergate Railway*[24] case is authority for the view that there is damage. In that case, a railway engine was trespassing on another company's line and was held to have been rightfully distrained damage feasant. It had caused no physical damage to the line. There is no discussion in the judgments of the question whether a mere blocking of the line was sufficient damage to give the right to distrain. However the decision of the Court implied that it was. Glanville Williams[25] suggests that "the damage was in fact the obstruction to traffic and the loss of time spent in removing the encumbrance." He submits that *whenever* the thing *has* to be removed there is sufficient damage to support the right.

As long as the word "has" is emphasised, there seems to be no reason to disagree with this proposition. There seems no reason why the necessary damage need be to the land itself and not merely to the property of the occupier.[26] Surely loss of parking fees or of the goodwill of customers is damage to a car park owner? Accordingly,

17. [1944] 1 K.B. 16.
18. [1950] 1 K.B. 252.
19. Note 13, supra, p. 819.
20. *Law of Torts* (4th ed.), p. 85.
21. Note 16, supra.
22. *The Law of Torts*, (13th ed. 1929), p. 407.
23. Supra, n. 15.
24. Supra, n. 14.
25. Note 16, supra, p. 75.
26. *Boden* v. *Ruscoe* [1894] 1 Q.B. 608.

it is submitted that distress damage feasant is available to the owner of a commercial car park. However, it would be extremely difficult for an ordinary landowner to rely on the right. Mere inconvenience would not seem to be enough.

Two caveats must be entered against the above conclusion. First, the right of distress damage feasant is open to an occupier of land only. It could be taken advantage of by a towing company only if it could show itself to be the occupier's agent. If that were the case, the towing company could rely on the general doctrine that whatever a person can do himself he can do by his agent. In *Howson* a main reason for the failure of defendant's submissions was that he had failed to show he was an agent of the car park operator. It is clear that in the usual situation, a towing company, being engaged to do a particular job by its own methods, would be an independent contractor.[27] But it would also seem quite possible for a towing company and a car park owner to so order their affairs as to produce an agency situation. For example, an owner could authorise a towing company in writing to act as his agent in removing any trespassing vehicles from his park and to recover the costs of doing so in any way the towing company might think appropriate.

The second matter is that the damage that can be claimed to support the detention of a vehicle is not the towing and storage costs but the actual damage which the trespassing vehicle has caused to the land or property of the land occupier. (Although Glanville Williams[28] suggests that damages reasonably and necessarily sustained in the course of removal to a place of impoundment may be demanded, there is no authority for such a view). Again, however, it would not be difficult for a towing company and a commercial car park owner to arrange matters so that in substance the towing company receives its costs.

It is submitted, therefore, that it is possible for a towing company to legally justify the retention of a trespassing vehicle until its costs are paid by the vehicle's owner. On the other hand, it is quite certain that at present the requisite legal conditions for this widespread practice are not present.

THE RIGHT TO RECOVER DAMAGES BY AN ACTION

If the right of distress damage feasant is either not available or not exercised, can the costs of towing and/or storage of a trespassing vehicle be recovered from the vehicle's owner by court action? Once more it is clear that the towing company can only recover if at all, as an agent of the car park owner. Any available rights would be vested in the owner of the land which is trespassed upon.

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27. See e.g. *Wilson* v. *Darling Island Stevedoring & Lighterage Co. Ltd* (1956) 95 C.L.R. 43 per Fullagar J. at p. 70.
28. Note 16, supra, p. 86.

In *Howson*, Laskin J.A. thought that a car park owner would be entitled to recover his costs of removal in an action based on quasi-contract. (This question is dealt with later.) Peculiarly, he did not even consider the obvious method which jumps to mind, namely, as damages in an action for trespass by the vehicle. Can a land-owner exercise his legal right of removal of a trespassing chattel and then recover his costs of such removal in an action for the trespass? The writer has been able to discover no case directly in point, so the general principles on which damages are awarded in a trespass action must be applied. The plaintiff in a trespass action can of course always recover nominal damages without proof of actual loss. Furthermore if any damage has been caused to the land, he is entitled to any diminution in its value and to any loss consequential upon the trespass which is not too remote. But this would not seem to cover costs of exercising his remedy of removal.

It is submitted, however, that a car park owner could recover from a trespassing vehicle owner a reasonable parking fee under the principle in *Whitwham* v. *Westminster Brymbo Coal and Coke Co.*[29] That case established that where a trespasser has made use of the plaintiff's land, the plaintiff is entitled to recover a reasonable sum for such use. (However this would not seem to be available to a land owner who does not normally rent out his land.)

Apart from this, it is impossible to discover under what principle any further damages are recoverable. The case of *Rose* v. *Miles*[30] is superficially similar. In that case a plaintiff was able to recover the expense incurred by him in moving his goods by land necessitated by the defendant's wrongful obstruction of a canal. But in the present situation it is the cost of removing the obstruction which is being claimed, not the costs incurred as a consequence of the obstruction. Accordingly it is submitted that there is no way in which a car park owner can recover his costs of removing a trespassing vehicle in an action for trespass.

QUASI-CONTRACT

In *Howson*, Laskin J.A. said that "if a car park owner is not content to let the car remain where it is until the owner appears or if he is not content simply to remove it to the nearest street curb but decides to remove it to an accessible place of safe-keeping, he would hold that he should be entitled to recover the reasonable expenses incurred in doing so." Such a view may not be quite consonant with the attitude of the common law that a person cannot ordinarily be made a debtor without his consent.[31] But I pray in aid the expansion

29. [1896] 2 Ch. 538; see also *Penarth Dock Engineering Co. Ltd* v. *Pounds* [1963], 1 Lloyds List L.R. 359.
30. (1815) 4 M. & S. 101, 106 E.R. 773.
31. *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234, per Bowen L.J. at p. 248.

of the law of quasi-contract or restitution to support recognition of a legal obligation to reimburse a person who has thus taken care of another's goods which have been thrust upon him.[32]

No doubt the law of quasi-contract has expanded in recent years but it is extremely doubtful that it supports the recovery of expenses in the situation which Laskin J.A. was dealing with. The two cases he cites certainly do not support the proposition although they do perhaps show the expansion of quasi-contract. The *Fibrosa* case concerned the repayment of moneys paid under a contract the performance of which had been completely frustrated. In *Degelman* the concept of unjust enrichment or quasi-contract was used to enable the success of an action which in New Zealand would have fallen squarely within the Law Reform (Testamentary Promises) Act 1949. The situations present in these cases have no real relevance to that in *Howson.*

First, it must be pointed out that the situation discussed here and in *Howson* is not a case where a stranger or a bailee (either voluntary or involuntary) is taking steps on his own initiative to protect another's property. In reality, an involuntary bailee is removing a chattel from his land and it would be over-charitable to say that he was doing a necessary service for the owner of the chattel. Secondly this is a case where unsolicited work has been done. As pointed out by Stoljar[33] quasi-contract in this field is still based on a real implied contract (as opposed to other forms of quasi-contract such as money had and received which really have no contractual basis). Here no contract can possibly be implied between the parties. The unsolicited services are probably the last thing the trespasser wants. Also there is no question of him acceding to them as he has absolutely no opportunity of stopping them.[34] It is submitted that there is no basis in the law of quasi-contract for a land owner to obtain his removal costs.

LIABILITY FOR DAMAGE TO TOWED VEHICLE

An important practical matter is the question of liability for damage occurring to a vehicle which is being or has been towed away without its owner's consent. The position of the occupier of land on which a vehicle has been wrongfully left is that of an involuntary bailee.[35] Although authority is scarce there are two possible standards of care which could be applied to an involuntary bailee in relation to the property in his possession.

32. E.g. *Fibrosa* v. *Fairbairn,* [1943] A.C. 32 per Lord Wright at p. 61; *Degelman* v. *Guaranty Trust* [1954] 3 D.L.R. 785.
33. *Law of Quasi-Contract* (1st ed. (1964), Law Book Co. of Australasia Pty. Ltd.
34. See e.g. *Taylor* v. *Laird* (1856) 25 L.J. Ex. 329, 332 per Pollock C.B. cited by Stoljar, n. 35 at p. 168.
35. This is the normal categorization in such circumstances, although not strictly apt, as a bailment implies a contract — it implies the knowledge and consent of the bailee.

The first is that applied in cases such as *Howard* v. *Harris*[36] where it was held that an involuntary bailee owes no duty to the owner of the property in his possession. There the manuscript of a play was sent to the defendant without any invitation on his part, and was later lost by him. He was held to be under no duty in regard to the safekeeping or protection of the manuscript. *Lethbridge* v. *Phillips*[37] is a somewhat similar decision. The defendant was held not liable for damage caused to a miniature picture which had been sent to him without any request by him. Lord Abbott C.J. observed that there could be no contract of bailment without the knowledge and consent of the defendant and accordingly there was no duty in respect of the property. This was a stronger case than *Howard* v. *Harris* in that the defendant was probably negligent in placing the picture near a stove.

The second possible standard is a duty to exercise reasonable care in relation to the property. Support for this view is found in a case[38] in which Hawke J. stated that there is "an obligation on the part of an involuntary bailee to do what is right and reasonable", and if he discharges that obligation, he cannot be liable for damage or loss of the property. This view, that an involuntary bailee must act without negligence, has been taken in other cases.[39] There are, therefore, two competing principles neither of which is firmly established by authority. On the one hand, there is the traditional reluctance of the common law to thrust obligations on persons who in no way invite them. On the other hand, there is the pervasive tendency of the law to require conduct conforming with the golden standard of reasonableness.

It is submitted on two grounds that the second standard should be imposed on occupiers of land on which vehicles are trespassing. First, an occupier who chooses to remove or in some other way interfere with a trespassing vehicle is making an affirmative and voluntary decision to assume some control over the vehicle. He is not required to remove it. If he elects to, he should surely be required to shoulder some burden of care for the vehicle. Secondly, the imposition of a duty to act reasonably is in line with the development of the law in modern times, when there has been an increasing tendency by the courts to impose wider duties in regard to the persons and property of others. It would be repugnant to allow an occupier of land to treat a vehicle in a grossly negligent manner solely because it is not authorised to park where it is found.

The foregoing discussion concerns the liability of an occupier of land for damage caused by him to a trespassing vehicle. Once again

36. (1884) 1 Cab. & El. 253.
37. (1819) 2 Starke 554, 171 E.R. 731.
38. *Elvin and Powell Ltd* v. *Plummer Roddis Ltd* (1933) 50 T.L.R. 158.
39. E.g. *Heugh* v. *London & North Western Rly Co.* (1870) L.R. 5, Ex. 51; dicta in *Helson* v. *McKenzies Ltd* [1950] N.Z.L.R. 878.

however, the position of the tow truck operator is somewhat different. A case which throws some light on the legal relationships and duties involved, although one involving vastly different facts, is *Helson* v. *McKenzies Limited*[40] where a woman left a handbag containing a large sum of money in a department store. It was found by another shopper who handed it to an employee of the store. The bag was later handed over without due care to a person who was not the owner. It was held that the store was liable in conversion to the true owner.[41] If the principle in *Helson* is applied under discussion here, the following propositions, it is submitted, emerge:

1. The land occupier is not liable to the vehicle owner merely by handing over the vehicle to a tow truck operator.
2. The tow truck operator is not an involuntary bailee for the vehicle owner but is a bailee for the land occupier with a duty to keep the vehicle safely and hand it to the true owner.
3. The tow truck operator is liable for conversion if he misdelivers the vehicle to anyone other than the true owner even if he acts in good faith and without negligence. In this respect he is in a worse position than the car park owner who, as an involuntary bailee is not liable for non-negligent misdelivery.

Unfortunately the case sheds little light on the question of a tow truck operator's liability for damage not amounting to conversion of the vehicle. There is no bailment between the parties and any liability must be tortious. In these circumstances, it must arise if at all from the neighbour principle enunciated in *Donoghue* v. *Stevenson*. In the absence of authority, there seems no reason to refuse to apply that principle merely because the vehicle owner is a wrongdoer in regard to the land occupier. There may however be some room for the application of the *volenti non fit injuria* principle especially if the customary "keep off" notices are erected on the land trespassed upon.

SUMMARY

The main conclusions drawn in this paper are:

1. Trespassing vehicles on public roads and on private property can be lawfully removed to a towing company's property.
2. A towing company has no right to retain a vehicle until towing charges have been paid, at least under the present system of operation in Wellington. However this may be possible under distress damage feasant if certain conditions are fulfilled.
3. It is doubtful if a land owner, let alone a towing company, can recover removal costs by court action.

40. [1950] N.Z.L.R. 878.
41. Her damages were reduced by three-quarters by reason of her contributory negligence.

Certainly the last proposition does not seem particularly just. It is suggested that a right for a towing company to recover its charges directly from the owner of a trespassing vehicle should be given by statute subject to proper conditions. This could quite easily be done by an amendment to the Trespass Act 1968. However no right of impoundment or lien should be given since normally the value of a vehicle is many times greater than the towing charge. It would be inappropriate to enable the impoundment of a chattel worth perhaps thousands of dollars in order to obtain payment of $10.00.

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