STATES OF JERSEY

WHEEL CLAMPING: INTRODUCTION OF LEGISLATION (P.119/2009) – SECOND AMENDMENT

Lodged au Greffe on 22nd September 2009
by Deputy M. Tadier of St. Brelade

STATES GREFFE

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For the words "to make the practice of wheel clamping illegal unless specifically authorized by law" substitute the words "to make vehicle immobilization a criminal offence".

DEPUTY M. TADIER OF ST. BRELADE

REPORT

"A long habit of not thinking a thing wrong gives it a superficial appearance of being right." Common Sense, Thomas Paine (1737-1809)

Proposition P.119/2009 is welcome in that it recognises that the correct solution to the practice of "wheel clamping" is to make it illegal. This amendment seeks to give greater legal precision to P.119/2009.

Wheel clamping can best be eliminated by introducing legislation that makes vehicle immobilisation an offence, be it on private land or on a public road. Once vehicle immobilization becomes a criminal offence, wheel clamping cannot be legal.

Wheel clamping is a colloquial expression for a practice carried out on private land, that were it conducted on a public road would constitute the criminal offence of tampering under the Road Traffic (Jersey) Law 1956. Wheel clamping has two component elements. Firstly, it involves the attachment of an immobilising device to a parked or stationary vehicle without the owners consent. Secondly, once the vehicle is immobilised, the driver is presented with the demand of a release fee, in some recorded cases, up to £150. Such conduct is not parking control; it is demanding money with menaces, amounting to the criminal offence of extortion.

The previous Minister for Home Affairs indicated that the government's preferred policy was to legalise and regulate wheel clamping. This was a mistake. To do so would merely replicate the current chaotic situation in England and Wales of continuing arbitrary behaviour by licensed clampers, impotent rationalising legislation and public complaint.

Another criticism of P.119/2009 is the suggestion that wheel clamping might be specifically authorised by law. This is something of a hostage to fortune. The proposition does not explain why it is necessary to have such a qualification or caveat. If at some future date, the States saw fit to permit wheel clamping in certain circumstance, then specific amending legislation could be introduced. It is acknowledged that in the U.K. Local Authorities have powers under specific legislation to wheel clamp and tow vehicles parked on public roads and that this is justified on grounds of both parking control and as a revenue-raising mechanism.

A further ambiguity of P.119/2009 is that whilst its primary purpose is to make wheel clamping illegal, the Report suggests, as an alternative and substitute, that "*there should be the right to ticket vehicles parked illegally (sic) in Jersey, on private land*". It is not clear if this is merely a personal preference of the author or the States are being requested to approve the creation of new private property rights. If so the proposition requires further explanation, evidence and legal analysis.

History

Wheel clamping on private land with the demand of a release fee is a practice that has been conducted in Jersey for at least 30 years, without being either sanctioned in law or suppressed. A de facto toleration has developed on the basis that what is not specifically prescribed cannot be unlawful.

Over the years, Government has been indifferent to public complaints against wheel clamping, whilst the Crown Officers and the Courts have avoided a definitive ruling on its status. Not only have hundreds of motorists experienced rudeness, inconvenience and harassment from clampers, they have also parted with many thousands of pounds in "fines".

Campaigners brought the legality of wheel clamping to the fore early last year after a number of aggressive and arbitrary incidents involving clamping firms. Questions were asked in the States and in July 2008 the Minister for Home Affairs produced a Green Paper for consultation on the future of wheel clamping. The Minister rejected campaigner's abolition proposals. Government policy favoured the legalisation of wheel clamping on private land combined with regulation of clamping firms, thus following the English model.

The current Minister for Home Affairs has confirmed that the inherited policy of introducing legislation to legalise and regulate wheel clamping has very low priority for his department. Resources are not available before 2011. With Government incapable of implementing policy, the legal limbo that currently surrounds wheel clamping will be prolonged indefinitely.

Uncertainty over the direction of government policy has been added by the Minister for Home Affairs publicly stating that he considers wheel clamping to be illegal under the Law of Jersey. Indeed, during his time as Magistrate he followed a policy based on that legal assumption pending a contrary ruling from the Royal Court.

The case for the abolition of wheel clamping

It might be thought that a practice that is lawful in England and Wales is and should also be lawful in Jersey, an anglophone and anglicised island. Wheel clamping has clearly been inspired by practice in England, but it does not follow that it is lawful in an island whose law has different origins and principles. On the contrary, legal opinion suggests that the practice of wheel clamping on private land is unlawful under the Law of Jersey. However, uncertainty remains in the absence of a definitive judgement from the Royal Court. By introducing legislation to render vehicle immobilisation a criminal offence, the States will be demonstrating clear and decisive leadership, and simply agreeing with the consensus of local legal opinion that *already* considers wheel clamping to be illegal under the Law of Jersey.

It is the contention of this report that the public do not wish wheel clamping to be made lawful. Government policy has been swayed by the interests of a minority of commercial landowners who use the practice as an inexpensive way to police their car parks.

In addition, there are persuasive moral and human rights arguments why wheel clamping is undesirable.

Whilst it is accepted that landowners may take reasonable measures to control parking on their land, such as preventing vehicles entering without permission or removing those that are on that land, there are serious doubts as to the legality of a private landowner or his agents using wheel clamping to protect those rights, in particular where he takes measures to prevent cars that are parked unlawfully from leaving or to punish those who have parked on his land.

Wheel clamping is an arbitrary punishment imposed by a private organisation without due legal process or a right of appeal. **The law does not permit one person to punish another. Punishment is a right reserved to the State.**

This Report acknowledges and recommends to State Members the recent policy paper produced by the RAC Foundation in July 2009 in response to the Home Office's consultation document "Licensing of vehicle immobilisation businesses", dated 30th April 2009. The policy paper looks more broadly at some of the fundamental legal and ethical aspects of vehicle immobilization, whilst the Annex thereto is a useful summary of the relevant English and Scots law.

The RAC Foundation Report concludes:

> *"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."*

The landowner's right to protect their land

It is accepted that land owners have a legitimate right to protect their land from unlawful car parking but that this should not include the current practice of clamping unauthorised fully parked cars and demanding a punitive or deterrent release fee.

The easiest way for managers to protect commercial car parks from trespassers is through the use of barriers, chains or collapsible bollards. If a barrier is erected it should be maintained so as to function at all times.

Many managing agents, by not maintaining barriers, have allowed commercial car parks to become a "fly trap", permitting wheel clampers to prey on unwitting motorists. This is not parking control.

The Law – wheel clamping on private land

1. In Jersey

a. Penalty Notices

It has been the practice of car park security firms to issue unauthorised motorists who park on private land with a "penalty notice". The recent policy of the Petty Debts Court, put in place by the former Magistrate and current Minister for Home Affairs, has been to refuse judgement in the absence of a definitive ruling from the Royal Court as to the legality of these penalties. This policy rendered such penalty notices unenforceable.

This Report contends that landlords and their agents have no authority in law to issue "penalty notices" or so called "fines".

In English law the right to charge lies in contract law, voluntary acceptance of the terms of the notice and breach. This would not be permissible in Jersey contract law.

b. Wheel Clamping

There is no decided case in respect of wheel clamping on private land by any court in Jersey.

Wheel clampers have sought to avoid a test case in respect of the legality of wheel clamping lest it produce an unfavourable judgement. So long as the law was uncertain, their business activity could continue, since the vast majority of motorists preferred not to contest their treatment given the vagaries and expense of litigation.

Attempts by aggrieved motorists intent on bringing a test case have foundered. Wheel clampers have always settled out of court by repaying the clamp fee and court costs, thus preventing the court being seized of the matter.

Gosselin v. Attorney General [1990 JLR 102]

There is one Jersey law case, that of ***Gosselin v. Attorney General*** [1990 JLR], where the issue of wheel clamping is discussed. It is evident that the Judiciary had resolved to suppress wheel clamping by seeking to prosecute a wheel clamper.

The clamper was convicted by the Magistrate under the Road Traffic (Jersey) Law 1956 of tampering with a motor vehicle. He appealed to the Royal Court against the conviction which allowed the appeal and quashed the conviction on the ground that, although the appellant had tampered with the motor vehicle when he put a clamp on it, he had done so in a private car park – i.e. on private land, whereas the offence could only occur on a public road. Thus the prosecution failed on a strict interpretation of the statute under which he was charged. The offence could only be committed on a public highway; the clamper carried out his act on private land.

However, the Judge Francis Hamon (then Commissioner of the Royal Court) said *obiter dictum*[1];

> *"It was a penalty unilaterally demanded by the company and a prerequisite to the unclamping of the vehicle. It is a form of self-help. In our view self-help has only ever received limited application in our law, which is, after all, based on the continental system and not English common law. One only has to recall how in Jersey law one cannot, as one can in England, cut down the branches of a neighbour's tree that overhang one's property without recourse to law."*
>
> *"If Mr. Gosselin has committed the tort of detinue or of trespass, then, in our view, the commission of a tort cannot be the end result of a reasonable cause."*
>
> *"….whilst we fully sympathize with the frustrations felt by owners of parking spaces in St. Helier when these are used without permission, we do not agree with the learned magistrate when he said that "it was the accused's duty to prevent unauthorized persons from fraudulently availing themselves of this facility with no intention of paying the stipulated fee and removing their cars before payment could be enforced." Self-help can only be limited in its use, otherwise we may return to the days of mantraps to catch trespassers or poachers. These are, after all, a form of clamp in a very real sense."*

As these words did not form part of the *ratio*[2] of the judgement, they are not a statement of the Law. However, it is quite clear that the Court had no sympathy for the

[1] Note for non-lawyers: 'A judge's incidental expression of opinion, not essential to the decision and not establishing precedent.'
[2] *Ratio decidendi*: 'the rule of law on which a judicial decision is based'

practise of wheel clamping and grave doubts as to the legality of this form of self-help under the Law of Jersey.

Wheel clamping as theft under the Law of Jersey

The Jersey law of theft follows the Larceny Act 1916 and does not require an intention to permanently deprive for there to be a theft.

In the leading Scots law case on wheel clamping, ***Black v. Carmichael*** (1992 SCCR 709), the wheel clampers were held to have been guilty of theft, since an intention to deprive the owner permanently is not a necessary ingredient of the offence of theft in Scots law. This Scots law case would be persuasive authority for the Jersey Royal Court.

This is not the law in England (see sections 1(1) and 6 of the Theft Act 1968) and the English court reached a different decision in the leading case ***Arthur v. Anker*** [1997] 1 QB 564.

2. Elsewhere

a. Scotland

The illegality of clamping (and, by extension, towing and impounding) in Scotland was established by the leading case of ***Black v. Carmichael*** (1992 SCCR 709). In that case the Scottish Courts held that wheel clamping on private land amounted to the criminal offences of extortion (demanding money with menaces) and theft.

b. France

To affix a wheel clamp (know if France as a "Sabot de Denver" or Denver Boot) on to someone's car, including a trespasser, and to demand money for release, would be extortion according to French criminal law (Article 313-1 du Code pénal français – L'escroquerie). The offence carries up to 7 years imprisonment and 100,000 Euros fine.

c. Australia – State of Queensland[3]

The State of Queensland has made wheel clamping a criminal offence under specific legislation. The maximum penalty for this offence is a fine of $3,000 [£1500], or six (6) months imprisonment. Section 135 of the Transport Operations (Road Use Management) Act 1995 states:

> **"Unlawfully interfering with, or detaining, vehicles etc.**
>
> (1) A person must not, without the owners consent –
>
> (a) ….
>
> (b) wilfully interfere with –
>
> (i) any mechanism or other part of, or equipment attached to, a vehicle or tram on a road or elsewhere; or

[3] See http://www.austlii.edu.au/au/legis/qld/consol_act/touma1995434/s135.html

(ii) …..

(c) detain a vehicle parked or stopped on a road or elsewhere by –

(i) attaching an immobilising device to the vehicle; or

(ii) placing an immobilising device near the vehicle.

Example of paragraph (c)(ii) –

By locking in an upright position, a moveable steel post (commonly called a *parking sentinel*) that is secured to the ground at the entrance of a parking space where the vehicle is parked or stopped. Maximum penalty – 40 penalty units or 6 months imprisonment.

(1A) For subsection (1) (c), the owner's consent must be given expressly.

(2) ….

(3) ….

(4) …

(5) The common law remedy of distress *damage feasant*[4] in relation to trespass on land by a vehicle is abolished to the extent that it is inconsistent with subsection (1)(c).

(6) However, subsection (5) does not limit a right a person may have to remove, or cause to be removed, from land a vehicle parked or stopped on the land.

(7) Subsection (6) does not apply to a person who has detained a vehicle in contravention of subsection (1)(c).

(8) In this section –

detain includes immobilise.

immobilising device, for a vehicle, means –

(a) wheel clamps; or

(b) another device that effectively detains the vehicle.

interfere with includes damage, destroy and remove.

owner of a vehicle includes a person in lawful possession of the vehicle.…"

d. Guernsey

Guernsey has sought to deal with drivers parking unlawfully on private car parks by adapting an 18th Century Ordinance to modern needs.

Application is made to the Planning Department to designate land as **terre à l'amende**. Once approved, a notice to that effect is authorised to be displayed. The

[4] Legal term derrived from the French *dommage faisant* - and signifies the act of 'doing damage'

landowner can then issue penalties enforceable in the Petty Debts Court. The penalty is set at £50. There can be no contest on Law, only on facts.

Given that the Law in Guernsey provides a remedy, a landowner or his agent using a wheel clamp and demanding money for release, would probably be considered to be acting unlawfully.

The Guernsey Bar provides the following definition "**terre à l'amende**: *Literally "penalty land". An owner of land may apply to the Royal Court of Guernsey for permission, in effect, to declare his land penalty land. It gives him or her the right to issue what amounts to parking tickets for the sum of £50, enforceable by way of a petty debt court summons.*"

The system has been seen to fail recently in a case before the Guernsey Royal Court when land/streets are in multiple ownership and all owners do not agree to the designation.

Criticism has also been made that certain landowners use the scheme as "a nice little earner", much in the same way as wheel clampers currently do in Jersey.

e. England – Consent and the assumption of risk

The leading authority on the law of private clamping under English Law is the decision of the Court of Appeal in ***Arthur v. Anker*** [1997] 1 QB 564. Underlying the decision is the concept of consent. The Court of Appeal held that the motorist consented to the otherwise tortious act of clamping the car and also to the otherwise tortious action of detaining the car until payment.

Placing a clamp on the wheel of a vehicle is *prima facie*[5] trespass to goods, unless it is lawful or the clamper has a defence to the *Tort*[6]. Consent is a defence to the Tort of trespass. Consent takes the form of assuming the risk of a tort being committed. Thus 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

It is the '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 is deemed to have 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.

The Court of Appeal in **Arthur v. Anker** whilst expressly ruling that clamping was in principle lawful in England and Wales, made it subject to certain conditions:

> that there is notice of the operation of the clampers; and
>
> that the release fee is reasonable; and
>
> that the vehicle is released promptly; and
>
> that there is an available means of contacting the clamper.

In ***Vine v. Waltham Forest LBC*** [2000] 4 All ER 169 the Court of Appeal held that whether there was effective notice depended, not on whether objectively adequate notice was given, but whether the car owner was subjectively aware of the notice.

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[5] *'Based on first impression.'* In law: something accepted as correct until proved otherwise

[6] a wrongful act or an infringement of a right (other than under contract) leading to legal liability.

The practice of wheel clamping in England and Wales – ineffictive regulation

Whilst the Courts held wheel clamping on private land to be lawful in ***Arthur v. Anker***, the degree of public disquiet over the conduct of clampers grew to such an extent that Parliament introduced the Private Security Industry Act 2001 to deal with the cowboy or criminal end of the business, by introducing a licensing system.

In England since May 2005 all wheel clampers and vehicle immobilisers that operate on private land and charge a fee for release are required to hold a licence issued by the Security Industry Authority. Under the regulations vehicle immobilisers are required to undergo an identity and criminal records check and pass a training course to show they have reached set levels of training and professional standards. They are also obliged to follow a voluntary Code of Practice.

However, voluntary codes have not worked and the business continues to be plagued with arbitrary conduct and extortionate fees.

The British Government is currently engaged on a new round of consultation in an attempt to introduce further regulation by legislation.

In July of this year the RAC Foundation, a motorist's lobby group, issued a critical report against wheel clamping mentioned above. This was followed in August by the Automobile Association ("AA") claiming private enforcement in England and Wales was out of control with "bad and immoral" wheel-clamping commonplace. They called on the British Government to follow Scotland's lead and outlaw the clamping of cars on private land.

This Report contends that if Jersey were to make wheel clamping lawful and to introduce regulations, those regulations would be equally ineffective.

Human rights

As the RAC Foundation policy paper notes, it is not clear whether the Human Rights Act 1998 applies to clamping in England. 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 in England and it is arguable that the Act that creates the licensing regime is incompatible with the Human Rights Act 1998 because it authorizes punishment without a due legal process, in breach of Article 7, and also punishment without a fair trial, in breach of Article 6.

Similar consideration will apply in Jersey under the Human Rights (Jersey) Law 2000 and have been noted in the introduction to this report. In particular the Housing department is a public body that delegates clamping and towing on publicly owned housing estates.

Conclusion

Whilst the legality of wheel clamping remains a moot point, the Royal Court has demonstrated a clear lack of tolerance for this practice. Informed legal opinion likewise considers it to have dubious legality in Jersey law. It is worth noting that the

wheel clampers themselves have avoided bringing a test case to court which perhaps indicates that even they consider their activity to be morally dubious if not unlawful.

Deputy Le Claire is to be commended for bringing this issue to the fore, however, it is clear that if P.119/2009 goes through unamended, it will do nothing to address the confusion that already exists. In particular, the words 'unless specifically authorized by law' does not bring any certainty for the future or any satisfaction to those members of the public who have been subjected to the 'threatening and aggressive' behaviour of wheel clampers. Indeed, it leaves the door open for this practice to be legitimised.

What is needed is clear and decisive leadership from the States to pass legislation that will give certainty to the public and clear guidance to our legal profession. This amendment simply asks the States to implement in legislation what is the concensus of informed legal opinion and obtiter comments of the Royal Court, both of which are unsympathetic to the practice of wheel clamping. We have seen examples from other common law jursidictions (Australia and Scotland) that have outlawed the practice.

If ever there was a clear case of when Jersey should not slavishly follow England and copy its laws, it is here. I urge members to support the amendment, make vehicle immobilisation an offence and thereby send out a clear message that extortion and threatening behaviour will no longer be tolerated in Jersey.

Financial and manpower statement

There are no financial or manpower implications arising from this amendment.