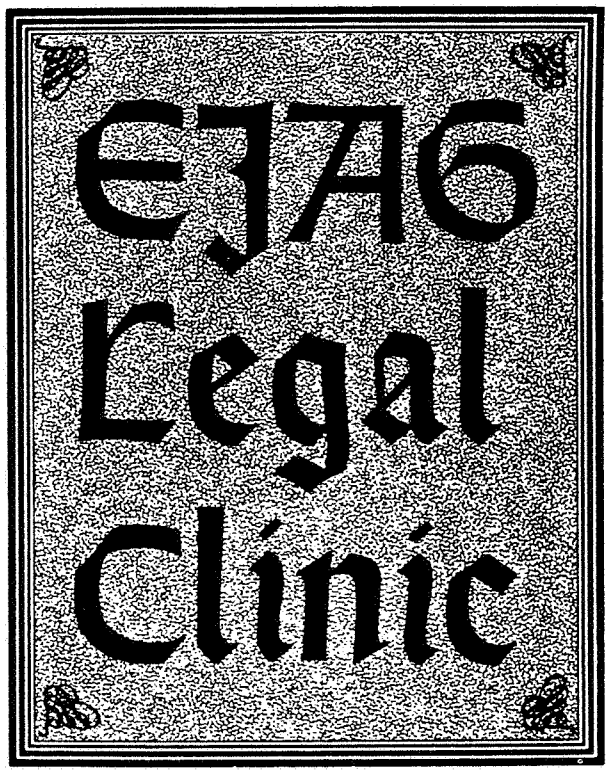

A LOT TO LOSE: RECOVERING FOR LOSS OR DAMAGE AT A PARKING LOT OR GARAGE

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We've all had the same nightmare. We've left our beloved Jag at a parking lot, only to return later to find it damaged or, worse, gone. Unfortunately, and with increased frequency, this nightmare may become a reality. The question arises whether, in such a situation, you could obtain reimbursement from the operator of the lot for your loss. The answer, as the answer to a legal question often is, is "it depends." Two recent cases have shed some light on the issue.

On July 5, 1983, David Colwell drove his camper into a long-term parking lot at the Minneapolis/St. Paul International Airport. Upon entering he received a ticket from a dispensing machine. He parked his camper, locked it, and walked away. He left the garage ticket hidden in the camper.

On July 17, 1983, the camper was removed from the parking lot by "a person or persons unknown." Mr. Colwell sued the Metropolitan Airport Commission, which operated the lot. His suit was based on three points. First, he asserted that the Commission was negligent in the way it operated the lot. Second, he alleged that the Commission breached the terms of the agreement it had made with him. Finally, Mr. Colwell argued that the Commission had violated its responsibilities under the law of "bailment." A bailment is the handing over or "delivery" of property by one person (the "bailor") to another (the "bailee") based upon the bailee's promise to return the item(s) to the bailor. An easy way to remember these terms is to think of Boston Red Sox Designated Hitter Don Baylor (the "bailor") leaving his Jaguar (assuming he has one) at a lot run by Miss Pearl Bailey (the "bailee").

The court rejected Mr. Colwell's arguments, ruling that the Commission neither had an obligation nor had agreed to safeguard the camper. According to the court, the transaction was solely a lease of space.

Mr. Colwell appealed, and on April 22, 1986, the Court of Appeals of Minnesota, in Colwell v. Metropolitan Airports Commission, Inc., upheld the earlier ruling.

The appeals court noted that when a motor vehicle is left in a garage or parking lot, the relationship between the operator of the facility and the owner of the vehicle may be one of bailment, lease, or "license," depending upon the circumstances of each case. (In this sense, a "license" means permission to go on property for a certain purpose.) Generally, where the operator of the garage or lot has knowingly and voluntarily taken control, possession, or custody of the vehicle, a bailment has been created. On the other hand, if the operator has not done so, he may merely have granted only a license to park or a lease of parking space.

The court listed the three elements generally required to create a bailment relationship. First, there must be delivery of the vehicle by the bailor, the owner-driver, without any actual transfer of the ownership of the item (as there would be if the vehicle were sold). Second, there must be acceptance or receipt of the item by the bailee, the parking lot or garage operator. Finally, there must be an agreement between the parties that the item will be returned or accounted for. If the bailment is "for hire" (i.e., for money, a fee is charged), then the bailee must use at least "reasonable care" in safeguarding the vehicle.

The court noted that the principles applied to decide these cases differ depending upon which state's law applies. Some states continue to apply traditional bailment principles to cases where damage or loss is suffered in a garage or parking lot. For example, in 1984, the Tennessee Supreme Court ruled that a commercial parking garage was liable for the theft of a car from a facility which used machines to dispense tickets. In that case, the Tennessee court concluded that the operator of the facility had assumed control and custody of the vehicles parked, limiting access to them and requiring the presentation of a ticket upon exit.

On the other hand, courts of other states have questioned whether traditional bailment principles are appropriate to the modern parking lot situation. In a 1979 decision, the Kentucky Supreme Court ruled that the use of a modern parking

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lot did not create a bailment and thus did not find the operator liable. According to the Kentucky court, standards and rules that were developed for and applicable to a stable keeper in years past should not be applicable to a parking garage where hundreds of cars are parked daily. The court emphasized the large number of automobiles in existence today, the increasing number and size of parking facilities, and the easier access to these facilities made possible by automatic ticket machines and other technological advances. The Kentucky court concluded that entry into a lot or garage and the parking of a car no longer depends upon the presence of the owner or an attendant or an expressed agreement between the garage and car owner.

The Colwell court noted that courts in Illinois, Texas, and New York (and presumably other states) specifically dealing with airport parking lots had refused to find the airports liable under a bailment theory. In the New York case, the court found no bailment to exist in the case of a driver who entered a self-service lot at John F. Kennedy International Airport after receiving a ticket from a machine. The New York court listed a number of factors that led to its ruling in favor of the lot operator, including the fact that: (1) the only service provided by the lot was a space for the vehicle, (2) The service was impersonal, (3) the owner retained control, as reflected by the fact that he locked the car and kept the keys, (4) the owner followed instructions on the ticket, (5) the manner of operation of the parking lot was obvious to the driver, and (6) there was no proof of neglect by the lot operator.

The Colwell court concluded that it would follow the generally accepted test of asking whether there has been a full transfer of the property, amounting to the driver's giving up the exclusive possession and control of the vehicle for as long as it is parked. In a prior Minnesota case, a bailment had been found where the plaintiff, a regular customer at a parking garage, left his car with the keys in it. There was an attendant present who not only watched the cars as they came and left, but also greased them, flushed their radiators, changed their oil, and did other minor maintenance. By contrast, Mr. Colwell had kept his keys. His mere assumption that the vehicle would be safe in the long-term lot was not sufficient to create a bailment or a contract. In the absence of such a bailment or contract, Mr. Colwell was left with the often difficult task of showing specific acts of negligence by the garage operator or his employees - - which he was unable to do.

The same month as the Colwell decision, the Court of Appeal of Louisiana, Fourth Circuit, addressed a similar issue in Sovereign Marine and General Insurance Co. v. APCOA Parking Services, Inc. In the Sovereign case, an insurance company sued the operator of a parking lot to recover the payment the insurer made on the claim of an automobile owner whose car was stolen while parked on the lot. The Court of Appeal, agreeing with the trial court, ruled that the parking lot operator was not responsible for the loss of the automobile.

On September 25, 1983, Ludmil Maslarski had parked his 1967 Mercedes-Benz 250SL (which the court noted was "considered to be a collector's item") in a short-term parking lot operated by APCOA at Moisant International Airport. Like Mr.Colwell's experience, Mr. Maslarski's entry onto the lot was controlled by an automatic device, commonly known as a "ticket splitter," which dispensed a parking ticket had been taken. At the entrance was a sign posted by APCOA:

"Attention. We provide parking space for your vehicle only. We are not responsible for damage to, or loss of, the vehicle, its contents, or accessories from any cause whatsoever. No employee may change this policy. If you do not agree to these conditions, you may immediately exit this facility at no charge. APCOA, Inc."

Mr. Maslarski parked his vehicle, retaining his keys. He had free access to his car and unrestricted movement once in the lot. APCOA parking attendants were only present at the lot's exit area, with their sole function being to collect the amount due and control exit once payment was made.

The trial court, focusing on the sign, found that the relationship between Mr. Maslarski and APCOA was one of lease and not of bailment.

The court of appeal began its analysis of the case by noting that the key question was whether the legal relationship between the parties was one of lease or bailment. If the relationship was one of bailment, the lot operator was bound to use the same care in preserving the owner's vehicle as the operator uses in preserving his own property. The determination whether it is a lease or a bailment that exists affects who has the "burden of proof" regarding the care that was or was not used. Once it is established that there has been bailment and that the vehicle has been lost or damaged, the law presumes that the loss resulted from a lack of care by the operator. The operator can defeat this presumption by showing he is not at fault. If, on the other hand, the relationship is one of lease, then the vehicle's owner has the burden of establishing that the lot owner did not maintain suitable facilities or that the lot was operated in a negligent manner.

The Sovereign court noted that the Louisiana legislature had enacted a statute dealing with this situation, which stated that when a person leaves or parks a vehicle at a privately owned unattended parking lot, when such parking lot has signs prominently displayed informing customers that the lot is not a contract of bailment but only one of hiring or letting out space. Thus, the parking lot owner shall not automatically have the obligations or the responsibilities of a bailee for losses as a result of theft, vandalism, or property damage.

The appellate court first addressed the question whether the

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lot was "unattended." The court considered factors such as the fact that the patron had complete control over his vehicle, that he retained his keys, and that he had unrestricted movement while on the lot and free access to his vehicle once parked as, in sum, weighing in favor of the lot being considered "unattended."

Given this finding, the court then asked whether the sign met the requirements of the statute. It concluded that the sign did not because it failed to communicate to the patron that the lot was unattended in such exact words or their equivalent. Thus, the statute did not apply to protect the lot operator from liability.

The court then considered whether the lot operator could change his relationship to one of lease by communicating such an intention to patrons through a sign not meeting the statutory requirements. The court noted that the statute was not intended to prohibit an operator from establishing his relationship through other alternatives. According to the court, the intentions of the parties can be inferred from the circumstances, taking into account the type of parking arrangement and whatever notification was given to the patron by the operator purporting to limit the operator's liability.

Thus, the final question before the court was whether the notification given by the sign was adequate. Although Mr. Maslarski alleged that he had not seen the sign, such an allegation was not an automatic defense - - it was only a factor to be considered in determining whether the size and location of the sign was adequate to give notice to a prudent man exercising a reasonable degree of attention. The appellate court accepted the trial court's ruling that the sign was of sufficient size and in a proper location to give notice that APCOA was only leasing space and that Mr. Maslarski was bearing the risk of any loss.

The court also agreed with the lower court that the facilities were adequate and that no evidence had been offered that the operation was conducted in a less than reasonable fashion.

As noted above, where a bailment relationship is found, the bailee, the parking lot or garage owner, must exercise reasonable care to safeguard the vehicle. Among the factors that courts in other cases have focused on in assessing such care are; (1) the general nature of the parking operation, (2) the presence or absence of attendants, (3) the number of attendants, (4) the care taken in the selection of competent attendants, (5) the ability of the attendants to observe the cars and persons on the lot or in the garage, (6) the presence or absence of fences or barriers to enclose the facility, (7) whether or not the operator devised a proper method for checking out vehicles, and (8) whether the operator complied with laws requiring recordkeeping and the like.

The Bailee's liability to the vehicle owner may extend to cover damage to or loss of the contents or equipment of the vehicle, depending on the presence or absence of knowledge of the contents by the lot or garage operator. Even where there is no actual knowledge, an operator may be held liable for loss of or damage to contents which an ordinarily prudent driver would assume to be carried (for example, a battery, spare tire, etc.).

Lessons From The Cases

As the two cases discussed here point out, and as is true on most matters, the laws of the various states vary on this issue and a careful care owner should make himself aware of local laws regarding recovering for loss or damage in a parking lot or garage. Nevertheless, both cases clearly suggest that such a careful person should also keep in mind that the common assumption that the lot or garage operator will be liable for such losses may well prove to be unfounded. A driver looking for parking should act no differently than any other educated consumer shopping around for the best value, including the best protection. Perhaps such critical selection can overcome the frustration the Roman poet Horace observed two thousand years ago, when he said, "no man living is content with the lot that either his choice has given him, or chance has thrown in his way."