



TRADING STANDARDS:

Wheel Clamping: Regulation and the Criminal Law

The following is an abstract of a Podcast recorded by Paul Raudnitz and Tom Broomfield of QEB Hollis Whiteman Chambers on "Wheel Clamping: Regulation and the Criminal Law". The Podcast was recorded in conjunction with Simon Martin, Assistant Head of Trading Standards for the London Boroughs of Brent and Harrow."

INTRODUCTION

1. Frank Marugg, a violinist with the Denver Symphony Orchestra, patented the wheel clamp in 1958. The device (which Marugg called an 'auto immobilizer', and which has also been called the 'Denver boot' after the city where it was first employed) is essentially a clamp which surrounds a vehicle wheel and is designed to prevent removal of both itself and the wheel.
2. As is universally known, the wheel clamp is primarily used as a means of cracking down on unauthorised or illegal parking. Clampers apply the clamp to an illegally parked car and charge a release fee to remove it, the objective being to deter drivers from parking in unauthorised zones.

3. This article deals with some of the practical legal questions associated with the regulation of wheel clamping operations. It is intended to be of assistance primarily to those involved in the day to day policing of the activities of car clampers.

JURISDICTIONS WHERE CLAMPING IS ILLEGAL – AN OVERVIEW

4. Wheel clamping is illegal in many jurisdictions. In Scotland, for example, clamping on private land has been held to amount to extortion and theft [Black v Carmichael (1992 SCCR 709)].
5. In France, to attach a wheel clamp to a car and to demand money for its release, even if the car is trespassing, is deemed to be extortion. The offence carries up to seven years' imprisonment and a 100,000 Euro fine [Article 313-1 du Code penale francais - l'escroquerie].
6. Wheel clamping is also a criminal offence in the Australian state of Queensland.

ENGLAND AND WALES

7. In England and Wales, the wheel clamp is regarded to be an essentially lawful means of enforcing parking restrictions - as long as certain regulations and strictures are observed.
8. The practice of wheel clamping was first introduced in England and Wales in the late 1980s. Initially it was only used on public roads in certain London

Boroughs and could only be fixed by, or under the direction of, a police constable. From 1993, local authority parking attendants were given the general power to clamp, or to authorise the clamping of, illegally parked vehicles. Thereafter, the practice of wheel clamping on public roads spread throughout London and eventually throughout the rest of the country.

CLAMPING BY PUBLIC AUTHORITIES: STATUTORY GUIDANCE

9. The use of the wheel clamp by public authorities is now fairly limited. In February 2008, The Department of Transport published 'Statutory Guidance to Local Authorities on Civil Enforcement of Parking Contraventions' to accompany the Traffic Management Act 2004. The 'Guidance' sets out the policy framework for civil parking enforcement and all local authorities are statutorily obliged to have regard to it when exercising their functions. It includes the following observations:

'Very few authorities now use immobilization. The Secretary of State is of the view that it should only be used in limited circumstances such as where the same vehicle repeatedly breaks parking restrictions and it has not been possible to collect payment for penalties, primarily because the keeper is not registered, or it is not properly registered, with the DVLA. Where a vehicle is causing a hazard or obstruction the enforcement authority should remove rather than immobilize. Immobilization/removal activity should only take place where it gives clear traffic management benefits.'

10. The 'Guidance' places fairly tight controls on local authorities that engage in wheel clamping. For example, among other things:

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- a. The decision to immobilize can only be taken following specific authorization by an appropriately trained officer;
 - b. A vehicle must not be clamped in the first 30 minutes once a Penalty Charge Notice is issued (except in the case of persistent offenders where the time limit is reduced to 15 minutes);
 - c. If a driver returns to his/her vehicle whilst the clamping is taking place, then, unless he/she is a persistent offender, the operation should be terminated. This does not apply if the clamp has already been secured;
 - d. Vehicles displaying a disabled blue badge should not be clamped;
 - e. When a vehicle has been clamped and is subsequently towed and moved to the pound, the driver does not have to pay the clamp release fee as well.
11. The 'Guidance' provides for a three-stage appeals mechanism, starting with informal representations, graduating to formal representations and ultimately to a full adjudication. In the worst case, an aggrieved motorist might be able to challenge a decision to apply a wheel clamp to a vehicle by issuing proceedings in the civil courts for trespass to goods, and damages.

CLAMPING ON PRIVATE LAND: THE LEGAL FRAMEWORK

12. The question of the legality of *private* car clamping has come before the civil courts of England and Wales on a number of occasions. The following principles have emerged from the guideline cases:
- a. Private landowners *do* have the right to wheel-clamp those who park on their land without permission;
 - b. The right to clamp an illegally parked car arises out of the legal concept of consent – that, by parking where he/she knows that

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- clamping may be used, the car owner consents to, or willingly assumes the risk of, what would otherwise amount to a trespass against his car;
- c. An unreasonable or exorbitant fee cannot be imposed for releasing the car;
 - d. There must be a visible warning of clamping and/or towing away;
 - e. Any delay in releasing the car after the owner tenders the fee cannot be justified;
 - f. There must be means for the owner to communicate his offer to pay.
13. Where all the above conditions are satisfied, the civil courts have regarded the car clamping activity to be essentially lawful. Incidentally, where a motorist damages a clamp or padlock that has been lawfully applied to his/her car, this has been held to amount to the commission of the offence of 'criminal damage', contrary to The Criminal Damage Act 1971.
14. The scrutiny of the civil courts notwithstanding, private wheel clamping remains controversial – and this is largely as a result of the wide scope for its abuse. A minority of private clampers continues to engage in improper practices, including the use of unclear signage, making demands for excessive fees and employing threatening and coercive behaviour.

CLAMPING ON PRIVATE LAND: THE REGULATORY FRAMEWORK

15. The Regulatory landscape governing the conduct of private clampers embraces the following three elements:
- a. A licensing scheme run by the Security Industry Authority;
 - b. A voluntary Code of Practice issued by the British Parking Association;
- and

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- c. The wider criminal law.

THE SECURITY INDUSTRY AUTHORITY LICENSING SCHEME

16. The Security Industry Authority ('SIA') is a public body that regulates the whole of the private security industry. From May 2005, the SIA introduced a compulsory licensing scheme regulating private wheel clampers who impose a charge for the release of the vehicle.
17. It is illegal to operate anywhere in England and Wales as a private vehicle immobilizer without an SIA licence. The scheme applies only to the private clamping industry; operatives who work solely for the police and/or a local authority do not require a licence.
18. To be eligible for an SIA licence, potential operatives must:
- a. Possess a relevant qualification;
 - b. Undergo a criminal records check; and
 - c. Prove their identity and the bona fides of their immigration status.
19. There are two types of SIA licence: a 'front line licence', held by those actually undertaking the clamping activity; and a 'non-front line licence', held by those who manage, supervise or employ those who engage in front line activity. The latter would, by way of example, cover company directors and partners.
20. Licence holders have the following obligations:
- a. When taking payment for the release of any vehicle, a receipt (containing the date, location and the clamer's licence number, name and signature) must be issued; and

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- b. Licence holders must not clamp a marked emergency vehicle or any vehicle displaying a valid disabled badge.

21. Under the provisions of the Private Security Industry Act 2001, it is an offence to:

- a. Clamp a vehicle parked on private land without an SIA licence;
- b. Employ an unlicensed person to clamp a vehicle;
- c. Contravene SIA licence conditions;
- d. Claim approved status where no such status exists; and
- e. Make false statements to the authority.

22. For those working in a licensable role without an SIA licence, or where a licensee breaches a condition of an SIA licence, the maximum penalty is six months' imprisonment and/or a fine of up to £5,000. For those supplying unlicensed staff, the maximum is five years' imprisonment and an unlimited fine. The SIA has power to revoke or suspend a licence; it can also issue verbal and written warnings and improvement notices.

23. At present, approximately 6,000 individuals hold a vehicle immobilization qualification and approximately 2,200 have valid licences. The SIA estimates that there are between 100 and 200 clamping businesses, which are mostly one or two person operations, or small businesses with no more than ten operatives.

24. The main limitation of the scheme is that it does not regulate those aspects of the clamping operation that are most prone to abuse. For example, the scheme does not regulate:

- a. The amount of the release fee;

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- b. The time taken to release the vehicle after payment of the fee; or
 - c. The adequacy of signage around the site warning that vehicles may be immobilized.
25. Further, the scheme only provides for the licensing of individual operatives - there is no provision for the licensing of business or corporate entities. This can create real problems: often, if an individual licence holder engages in conduct that is reported, the SIA is unable to issue sanctions against the company that employs him. The individual is simply reprimanded and the company can continue to support questionable practices without fear of recourse.

THE BRITISH PARKING ASSOCIATION VOLUNTARY CODE OF PRACTICE

26. In 2007, the British Parking Association issued an 'Approved Operator Scheme Code of Practice'. The Code provides a model of best practice for individuals and organisations undertaking the clamping or removal of vehicles on private land. Those operatives who can establish that they substantially comply with the Code are eligible to join the 'Approved Operator Scheme'.
27. The main objectives of the project are to help raise standards in the parking sector and to ensure that wheel clamping and removal are undertaken in a responsible, effective and efficient manner.
28. The Code includes recommended charges and also guidance on signage. For example, it advises:

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- a. A maximum release fee for removal of a wheel clamp of £125 for a private car;
 - b. A maximum fee of £250 for removal and return of a vehicle;
 - c. A maximum daily storage charge of £35 for removed vehicles;
 - d. Cash payment should only be accepted as a last resort; and
 - e. There should be clear and sufficient signs.

29. The Scheme has its limitations however - the principal one being that membership of it is entirely voluntary. The guidelines are recommendations *only* – they have no legal force. There is accordingly no requirement for a wheel clamping company to join the organization, or to be bound by the guidelines that it provides. The only available sanction for a breach is removal from the membership scheme.

THE WIDER CRIMINAL LAW

'BLACKMAIL'

30. At the extremes of rogue clamping, a range of different criminal offences might be committed. Serious offenders, for example, have been successfully prosecuted for blackmail, which is defined as follows [see section 21 of the Theft Act 1968]:

‘A person is guilty of blackmail if, with a view to gain for himself or another, or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief-

- a. That he has reasonable grounds for making the demand; and
- b. That the use of the menaces is a proper means of reinforcing the demand’.

31. The maximum sentence for blackmail is 14 years.

32. In R v Havell and Miller [2006] EWCA Crim 735, the Court of Appeal approved sentences of two and three years' respectively for offences of blackmail committed by two wheel clampers. The defendants had effectively used their business to extort large sums of money from motorists. A succession of complainants had been stopped on land for short periods and, often while they were sitting in their cars with their engines running, they would be prevented from pulling away. They would then be clamped and, effectively, trapped.

'FRAUD ACT' OFFENCES

33. Additionally, certain rogue behaviour might engage offences under the Fraud Act 2006. For example, the offences of 'fraud by false representation' (s.2 of the Fraud Act); 'fraud by failing to disclose information' (s.3); and 'possession of an article to commit fraud' (s.6) might all, in certain circumstances, apply.

34. 'Fraud by false representation' and 'fraud by failing to disclose information' carry maximum sentences of ten years' imprisonment. 'Possession of an article to commit fraud' carries a maximum of five years.

35. The offences are cast very broadly so that, for example:

- a. 'Fraud by false representation' could cover:
 - i. Dishonestly false or misleading signage; and
 - ii. Dishonestly false claims regarding approved status.

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- b. 'Fraud by failing to disclose information' might embrace:
 - i. Dishonestly false, misleading or inadequate signage; and
 - ii. Dishonest failure to disclose the fact that the clammer does not possess a valid clamping licence.

 - c. 'Possession of an article to commit fraud' could be charged where:
 - i. The wheel clammer has an intention to commit any of the other offences of fraud and is in possession of any items – for example the wheel clamp itself – used to commit those offences.

THE 'CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS'

36. The 'Consumer Protection from Unfair Trading Regulations' ('CPRs') came into force on 28 May 2008. The Regulations prohibit unfair commercial practices. There are 31 specific commercial practices that will *always* be regarded to be unfair, including:-

- a. Claiming to be a signatory to a code of conduct when the trader is not; and
- b. Claiming that a trader has been approved, endorsed or authorised by a public or private body, when he has not.

37. In addition, both *misleading* practices and *aggressive* practices will be deemed unfair if they cause consumers to take a different commercial decision from one they would have taken in the absence of the practice. The Regulations are drawn sufficiently widely to catch a broad range of car clamping misconduct when committed in connection with, for example, private car-parking businesses.

38. The maximum sentence for the CPR offences is two years' imprisonment and/or an unlimited fine. The penalties are lower than those for blackmail and the Fraud Act offences, but the CPR offences are much easier to prove. This is essentially because in great part they are so-called "strict liability" offences (ie it need only be shown that there has been a prohibited act or omission; no further mental element such as dishonesty, intention or recklessness needs to be established for the vast majority of the offences).

THE CRIME AND SECURITY ACT 2010

39. There are a number of provisions in the new Crime and Security Act 2010 (which received Royal Assent on 8 April 2010) that affect car clamping. The relevant provisions of the Act are to come into force on a day appointed by the Secretary of State (at the time of writing, the commencement date is not known). Importantly, section 42 of the Act requires all wheel clamping businesses to be SIA licensed. As mentioned above, currently, the law only requires individual operatives to be licensed, not the companies for whom they work. This change is designed to bring to account companies that engage in questionable practices.

40. It will be an offence for businesses to operate without a licence and an offence to operate otherwise than in accordance with the conditions of a licence [see the new section 4A to be inserted into the Private Security Industry Act 2001]. The Act imposes a maximum sentence of 6 months' imprisonment and/or a £5,000 fine in the Magistrates' Court, and 5 years' imprisonment and/or an unlimited fine in the Crown Court. The Act also

provides an independent avenue of appeal for motorists in respect of release fees.

41. At consultation stage, the Government envisaged sector-specific conditions to be included in a business licence, which would set minimum standards with regards to matters such as signage and penalties. The Act states that one of the conditions that may be included is required membership of a nominated body or scheme [see the new section 4B to be inserted into the Private Security Industry Act 2001]. The Act is silent, however, in relation to the inclusion of industry-specific conditions. It remains to be seen therefore exactly what standards, if any, the Government (through the SIA) will require wheel clamping businesses to meet.

42. The AA has identified a number of shortcomings with the Act. First, it has found that many rogue clamping businesses frequently change their names to avoid investigation and potential litigation. It is therefore concerned that companies will infringe licence conditions only to set up again as new companies. Second, the AA fears that companies which wish to avoid the expense of acquiring a licence will turn their attention to ticketing of vehicles on private land, as has happened with some current individual clampers unable to get SIA licences.

CONCLUSION

43. The regulation and prosecution of rogue car clampers is a complex and often difficult task. There are however, a number of weapons in the armoury of those fixed with this duty. The above provides some guidance for prosecuting authorities intent on curbing the damaging practices of rogue clamping operatives.

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