

Vine v. Waltham Forest London Borough Council

Court of Appeal CA (Civ Div)

Roch, Waller and May L.JJ.

ROCH L.J.

The following judgments were handed down.

This is an appeal from the judgment of Mr. Recorder Crawford, C.B.E. at the Central London County Court on 18 May 1998 dismissing the plaintiff's action against the defendant local authority with costs. The proceedings arose out of an incident which occurred on 6 March 1997 when the plaintiff's car was clamped by contractors employed by the defendants to clamp and remove cars parked incorrectly on private land in spaces reserved for persons holding licences to park in such parking spaces. The parking space concerned was one of two parking spaces on land owned by Rail Track under a railway bridge carrying railway lines over High Road, Leytonstone. Those spaces were to the left of High Road for vehicles proceeding north; access to those parking spaces being obtained by vehicles turning in to a private road owned by Rail Track leading to Leytonstone High Road railway station and then by turning right to access the parking spaces that were under the railway bridge and beyond the western pavement of High Road. It was possible for vehicles using the parking spaces to exit by continuing north crossing the western pavement of High Road and re-entering High Road by way of a section where the kerbstones have been lowered to permit vehicles to cross the kerb. The two parking spaces under the bridge with three other parking spaces, to the left of the privately owned access road to the station, had been leased by Rail Track to the East London College. That college granted licences to certain car owners enabling those persons to park their cars in the five parking spaces. The East London College availed themselves of a service provided by the defendant local authority to deter unauthorised persons parking in these parking spaces by operating a system of wheel clamping or towing unauthorised vehicles away. That work in turn was done by contractors employed by the defendants. The cost of displaying notices warning that unattended vehicles might be clamped or towed away was borne by the East London College.

The clamping of the plaintiff's car came about in this way: the plaintiff was at the relevant time 61 years of age. The plaintiff was suffering from ulceration colitis for which she was undergoing treatment at King George Hospital, Goodmayes. At the same time the plaintiff was suspected of having a serious gynaecological problem which had been investigated at Langthorne Hospital in Leytonstone.

On the morning of 6 March 1997 the plaintiff had been to that hospital and had been told that she did indeed have a serious gynaecological problem which would necessitate an urgent operation. This news, as might be expected, had upset the plaintiff. Despite this upset, the plaintiff who had travelled to the hospital in her own car, had no alternative but to return to her home in that car.

On that journey the plaintiff experienced pain, feelings of sickness and she became distressed. Thinking that in that state she represented a danger to other road users, she turned off Leytonstone High Road into the private road leading to the station, then turned to her right and parked her car under the railway bridge in the southern of the two parking bays at that point. There was ahead of her in the northern parking bay a Range Rover. On

the wall of the northern parking bay, that is the bay with the Range Rover in it, at a height of about 10 feet above the ground was a yellow notice which read: "No Parking. Any Vehicle left unattended is liable to be towed away or wheel clamped. Recoverable by the payment of a fine of £105." There was a dispute as to whether there was a second notice beside this first notice indicating that cars belonging to disabled persons would also be clamped. There was no notice on the wall of the southern parking bay. The recorder found that the first notice was in place, and would not have been hidden by the Range Rover. It would have been clearly visible to a person who was standing up over the roof of the Range Rover. It was accepted by a witness called by the defendants, a Mr. Parker, that the Range Rover would have obscured the notice for someone sitting in the driving seat of a car.

The plaintiff having parked her car and without, as the recorder found, seeing the notice, left her car, crossed the access road to a point where there was a hoarding at which point she vomited. The plaintiff was away from her car, so that her car was unattended for some three or four minutes. When she returned to her car it had been clamped. The person who had clamped it was Mr. Parker, who is employed by the contractors employed by the defendant authority. At first Mr. Parker refused to remove the clamp until the plaintiff had been to the defendant's offices and paid the sum of £105. Subsequently he accepted payment of the sum of £105 which the plaintiff paid using a credit card. As a result of the use of a credit card the plaintiff was charged a further £3.68 to cover the credit card company's charges. Of the charge of £105, the evidence was that the contractor received £60 and the defendant authority retained £45. Another witness called by the defendants, a Mr. Godfrey, gave evidence, which the judge accepted, that as far as the defendants were concerned this was not a profit making operation, the £45 merely covering the defendant's costs of operating this scheme.

The plaintiff's car was clamped for a total period of some 15 to 20 minutes.

On 3 November 1997 the plaintiff commenced proceedings against the defendants alleging that they had wrongfully immobilised her vehicle by means of a wheel clamp, the clamp being applied by servants or agents of the defendants; that when the plaintiff confronted the defendant's agent he had refused to release the plaintiff's car without payment; that the defendant's agent had wrongfully detained the plaintiff's car until the plaintiff had paid the sum of £108.68 and thus secured its release. The plaintiff further alleged that she had repeatedly attempted to obtain a refund of the sum of £108.68 without success; that that sum had been excessive and unreasonable--a reasonable fee would have been £40. The plaintiff claimed the return of the £108.68 or that sum by way of damages; alternatively £68.68, the sum paid less what would have been a reasonable fee and interest and exemplary damages. The defendants in their defence asserted that sufficient warning that unattended vehicles would be clamped had been given; denied that the plaintiff's car had been wrongly immobilised or that it had been wrongly detained. The defence asserted that the payment of £105 was a reasonable charge for them to make. The defence denied that the plaintiff was entitled to exemplary damages.

The recorder found that the defendants had been entitled to clamp the plaintiff's car. The recorder went on to find that the charge that the plaintiff had had to pay was not exorbitant. The recorder also found that the matter should either have been settled or have gone to arbitration in that the plaintiff's claim was never going to exceed the sum of £5,000, the threshold for actions in the county court as opposed to arbitration.

The material part of the recorder's judgment reads:

"It is unfortunate that something like this should have happened to Mrs. Vine on this particular day. I accept the submission from Mr. Mott that it is the type of incident for which there must be a certain degree of sympathy for the plaintiff, but I am satisfied that when Mrs. Vine entered the parking area, there was a Range Rover in front of her which was parked close to the wall. The sign prohibiting parking in the area was on the wall. It was a designated area prohibiting parking and making it clear that vehicles would be towed away. I cannot help but sympathise with Mrs. Vine for the way it happened, on the day it happened, and that the swiftness with which it happened, but there is no doubt that she was a trespasser in the area where she was parked. I am not persuaded by the argument that when she parked there the sign was not there visible for her to see. Although the Range Rover was parked close to the wall and was high sided the sign was visible. Mr. Parker, whose evidence I accept, said it was visible. It was also conceded by Mr. Godfrey that from time-to-time these signs are vandalised, but there was no suggestion that it was vandalised on the day of the incident. I was very much persuaded by Mr. Godfrey's evidence. I found him a frank and very convincing witness, and he was quite open about the fact that from time to time the signs are vandalised. It was unfortunate that Mrs. Vine had not seen it, because as a result she was clamped. She was a trespasser at the time of the clamping."

The plaintiff's case on the central issue is that the judge, having found that she had not seen the notice, should have gone on to hold that the clamping of her car was a trespass and that the maintenance of the clamp on the car until the sum of £108.68 had been paid was a wrongful detention of the plaintiff's car by the defendant's agent. The act of clamping the plaintiff's car was a clear trespass, to which the defendants had no defence unless they could establish that the plaintiff had consented to her car being clamped or alternatively had voluntarily assumed the risk of her car being clamped. If the plaintiff had not seen the notice, then she could not have consented to, or voluntarily assumed the risk, of her car being clamped.

The defendant's case is that, the recorder having found that the notice was clearly visible, it should be inferred that he concluded that the plaintiff saw the notice and consented to her car being clamped or voluntarily assumed the risk of that occurring. Alternatively, and this is the ground principally urged upon us by Mr. Mott, the question whether a person voluntarily assumes a risk or consents to trespass to his or her property is to be judge objectively and not subjectively. Once it is established that sufficient and adequate warning notices were in place, a car driver cannot be heard to say that he or she did not see the notice. Were that to be the law, it would be too easy for car drivers who trespass with their cars to evade the only method land owners have of stopping the unauthorised parking of cars in parking spaces or parking areas on their property.

We were referred to a number of cases but particularly to two cases where the facts were similar to the present case. The first in point of time is that of *Lloyd v. Director of Public Prosecutions* [1992] 1 All E.R. 982, a decision of the Divisional Court in an appeal by Mr. Lloyd against his conviction by justices of criminal damage contrary to section 1(1) of the Criminal Damage Act 1971. That section reads:

"A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence."

The facts were that Mr. Lloyd had parked his car in a private car park. There were no less than five large notices boards located at the entrance to and exit of this private car park positioned at eye-level for car drivers. All those notices warned that unauthorised vehicles would be immobilised. Mr. Lloyd's car was clamped. Mr. Lloyd returned to find that the car had been clamped. He contacted the security firm responsible for the clamping who required payment of £25 to release his car. Mr. Lloyd refused to pay. Later, in the night, Mr. Lloyd returned and cut the two padlocks securing the wheel clamps with a disc cutter. His defence when prosecuted was that he had a lawful excuse for damaging the padlocks, namely that a trespass was being committed to his car. Furthermore he argued that, once he had returned to the car park and requested the removal of the clamp, any consent by him to the clamping of his car ceased, and that even if the clamping of the car had not constituted a trespass up to that point it was a trespass thereafter.

A Divisional Court consisting of Nolan L.J. and Judge J. confined its decision to the criminal law. Nolan L.J. said [1992] 1 All E.R. 982, 992:

"In my judgment, the suggestion that there was a lawful excuse for his action is wholly untenable. At the worst what he had suffered was a civil wrong. The remedy for such wrongs is available in the civil courts. That is what they are there for. Self-help involving the use of force can only be contemplated where there is no reasonable alternative. Here, as in *Stear v. Scott* (Note--1984) [1992] R.T.R. 226, there was such an alternative. The differences between the facts of that case and those of the present case are quite insufficient to my mind to make it distinguishable"

Nolan L.J. had earlier described Mr. Lloyd's submission that once he had requested the removal of the clamp he was entitled to recover his car by force, as "a truly absurd state of affairs"

The other and more recent case is that of [Arthur v. Anker \[1997\] Q.B. 564](#), a decision of this court consisting of Sir Thomas Bingham M.R., Neill and Hirst L.JJ. This was a case of a private car park, the owners of which engaged the defendants to prevent unauthorised parking. The defendants erected notices at the entrance to the car park and placed notices around the perimeter of the car park printed in red and white under the prominent heading "Warning" which read, at p. 570:

"Wheelclamping and removal of vehicles in operation.

"Vehicles failing to comply or left without authority will be wheelclamped and a release fee of £40 charged... Vehicles causing an obstruction or damage or left for an unreasonable length of time may be towed away and held at the company's pound in Truro. A release fee of £90 plus storage costs will be charged. For release contact Armtrac Security"

The trial judge, Judge Thompson Q.C., found that Mr. Arthur parked in full knowledge that he was not entitled to park and of the possible consequences if he did. Mr. Arthur's car was clamped. He brought proceedings against the defendants for damages for tortious interference with his car. The defendants counterclaimed because Mr. Arthur, having refused to pay the £40 fee to have his car de-clamped, returned during the night and succeeded in removing his car together with the two clamps and padlocks

that the defendants had used to immobilise his car. The defendants ran two defences to Mr. Arthur's action. First that he had consented or alternatively assumed the risk of his car being clamped, so that what would otherwise have been tortious conduct by the defendants was not tortious. Second, that the defendants had seized the car damage feasant.

In a judgment with which Neill L.J. agreed and Hirst L.J. agreed on the issue of consent or volenti, Sir Thomas Bingham M.R., at p. 572, having first observed "that where intentional torts are concerned it may be more appropriate to speak of consent than of volenti, but the distinction does not appear to be crucial," adopted the following passage from *Clerk & Lindsell on Torts*, 17th ed. (1995), p. 83, para. 3-34:

"Consent if present negatives liability. What must be established is that it was a consent freely given and extended to the conduct of which the plaintiff now complains." Sir Thomas Bingham M.R. continued his judgment by saying [1997] Q.B. 564, 572-573: "The judge found that Mr. Arthur knew of and consented to the risk of clamping, and counsel for the Arthurs conceded in his written argument on appeal that this was so. But counsel argued that the demand for payment amounted to blackmail and that the commission of this crime negated the effect of Mr. Arthur's consent. I give my reasons below for concluding that Mr. Anker's requirement of payment as a condition of declamping the vehicle did not amount to blackmail. It is enough at this point to say that by voluntarily accepting the risk that his car might be clamped Mr. Arthur also, in my view, accepted the risk that the car would remain clamped until he paid the reasonable cost of clamping and declamping. He consented not only to the otherwise tortious act of clamping the car but also to the otherwise tortious action of detaining the car until payment. I would not accept that the clammer could exact any unreasonable or exorbitant charge for releasing the car, and the court would be very slow to find implied acceptance of such a charge. The same would be true if the warning were not of clamping or towing away but of conduct by or on behalf of the land owner which would cause damage to the car. Nor may the clammer justify detention of the car after the owner has indicated willingness to comply with the condition for release: the clammer cannot justify any delay in releasing the car after the owner offers to pay, and there must be means for the owner to communicate his offer. But those situations did not arise here. The judge held that the declamping fee was reasonable. The contrary has not been argued. In my view the judge was right to hold that *2390 Mr. Arthur impliedly consented to what occurred, and he cannot now complain of it. It follows that I would dismiss the Arthur's appeal against the judge's decision in so far as it rested on consent"

This last sentence is significant because Sir Thomas Bingham M.R. set out the judge's finding on consent, at pp. 571-572:

"The judge held that Mr. Arthur parked in full knowledge that he was not entitled to park and of the possible consequences if he did. In those circumstances he was consenting to the consequences and could not thereafter complain of them. The effect of his consent was to render lawful conduct which would otherwise have been tortious."

It is also of significance that Sir Thomas Bingham M.R. referred, at p. 572, to section 2(5) of the Occupiers Liability Act 1957, which spoke of "risks willingly accepted as his by the visitor..."

The act of clamping the wheel of another person's car, even when that car is trespassing, is an act of trespass to that other persons property unless it can be shown that the owner

of the car has consented to, or willingly assumed, the risk of his car being clamped. To show that the car owner consented or willingly assumed the risk of his car being clamped, it has to be established that the car owner was aware of the consequences of his parking his car so that it trespassed on the land of another. That will be done by establishing that the car owner saw and understood the significance of a warning notice or notices that cars in that place without permission were liable to be clamped. Normally the presence of notices which are posted where they are bound to be seen, for example at the entrance to a private car park, which are of a type which the car driver would be bound to have read, will lead to a finding that the car driver had knowledge of and appreciated the warning. In this case the recorder might have reached such a conclusion about the plaintiff's state of knowledge, but he did not do so. The recorder made a clear finding of fact that the plaintiff did not see the sign. That finding is not surprising in view of the absence of any notice on the wall opposite the southern parking space and the plaintiff's distressed state, the reason why the plaintiff parked and left her car hurriedly. It was the plaintiff's evidence that she did not see the sign. There was never any suggestion that the plaintiff was other than a truthful witness.

The recorder held, correctly, that the plaintiff by parking her car where she did was trespassing. Unhappily, the recorder jumped to the conclusion that the plaintiff had consented to, or willingly assumed, the risk of her car being clamped. In making that leap the recorder fell into error, in my judgment. Consequently I am of the view that the recorder's decision on the basic issue in this case must be reversed.

It follows that the plaintiff is entitled to a return of the £108.68 or alternatively that sum by way of damages. This finding renders it unnecessary for this court to consider whether the charge which the defendants were levying was or was not exorbitant.

Turning to the plaintiff's claim for exemplary damages, we were referred to the speech of Lord Devlin in *Rookes v. Barnard* [1964] A.C. 1129, 1226 that there are two categories of exemplary damages. The first is where there has been oppressive or arbitrary conduct by a defendant. Mr. Opperman conceded that this case did not fall within Lord Devlin's first category. In respect of the second category Lord Devlin said: "Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff."

In my judgment Mr. Opperman faced an impossible task in bringing the facts of this case within that second category. The compensation payable to the plaintiff will be the £108.68 and the interest of £17.64 and the sum of £5 for loss of use of the car. The defendant's conduct was not calculated by the defendants to make a profit for them which might well exceed that sum. This case is quite different from cases such as libel cases where a newspaper has published a libel of a plaintiff in the belief that the story they are publishing will increase their circulation and give them a greater financial return than any damages that might be awarded to the plaintiff. An award of exemplary damages is not the award of compensation for actual loss. It is an award designed to punish a defendant for conduct which is sufficiently outrageous to merit punishment, or to deprive a defendant of an improper profit or advantage. Such damages are rarely awarded today.

This is not a case for an award of exemplary damages. The conduct of the defendants and their contractor could not be described as insolent, malicious or cruel. On the contrary there were notices; the conduct of Mr. Parker, as the recorder found, was at all

times polite and there is no suggestion of any damage having been done to the plaintiff's car by the act of clamping it.

That disposes of the issues that arise in this appeal, with the exception of a preliminary point raised by Mr. Mott. The point arises in this way: this appeal originally came before a court consisting of two Lords Justices on the 19 July last year. At the end of the hearing the members of the court reserved their judgments. Unhappily the two Lords Justices were unable to agree, although the precise nature of the disagreement is not known.

What an examination of the court file shows is that at some time a direction was given by the Lords Justices that the case should be heard by a court of three Lords Justices and that the two Lords Justices who had disagreed should not be members of that court. A note in the file indicates that the parties were to be informed by letter of the disagreement and of that direction. Unfortunately that part of the direction of the Lords Justices was not fulfilled. Letters were sent to the parties on 3 November of last year asking that the clerks to counsel representing the parties should telephone the listing office of this court so that a date convenient to all advocates and the court can be arranged. Subsequently the parties were informed that there would be a hearing on 10 February this year which was listed for one day. That led to inquiries being made as to why the matter should be listed for a day when it was anticipated that judgments would be handed down, a matter which would take minutes only. It was at that point that the parties learnt of the disagreement between the two Lords Justices. It was not until 1 February this year that Master Venne, head of the Civil Appeals Office, wrote to the parties referring them to section 54(5) of the Supreme Court Act 1981 and, having set out that subsection, went on in the letter to the defendant's solicitors to write:

"In this case and having regard to the point in issue, it was assumed that the parties would wish to proceed to a new hearing. If, however, that is not the case I should be grateful if you or the plaintiff's solicitors Messrs. Amery-Parkes to whom I am copying this letter, would let me know as soon as practicable. I understand that on 10 November 1999 this matter was relisted, after consultation with counsel, for hearing on 10 February. I am sorry that neither you nor the plaintiff's solicitors appear to have been given formal notification of the courts decision that the matter would have to be reheard."

Again, unhappily, that letter did not make it clear that the two Lords Justices had directed that the matter be reheard by a three-judge court. The plaintiff's solicitors, Messrs. Amery-Parkes, made it clear that the plaintiff was desirous of the matter being heard by a three judge court, but made no formal application to that effect.

Mr. Mott's submissions to this court were that the parties should have been informed of the disagreement and given an opportunity to make representations as to the further conduct of the case. Mr. Mott told us that when the case was before the two Lords Justices, it was stated for the first time by the plaintiff's solicitors that this was being treated by the Automobile Association, who were backing the plaintiff, as a test case. Mr. Mott told us that one of the Lords Justices asked the plaintiff's counsel whether the plaintiff was happy, if this were a test case, to proceed with a two-judge court. Mr. Mott submitted before us, and would have submitted to the two Lords Justices had he had the opportunity, that the conduct of the plaintiff in proceeding with a two-judge court meant that it was too late for the plaintiff to request a further hearing before a three-judge court. Further, Mr. Mott submitted to us and would have submitted to the two Lords Justices,

that allowing the case to proceed further was to involve the parties in costs which were out of all proportion to the sum at issue and to the principles at issue. His submission would have been that the two Lord Justices should have delivered their judgments and that in the result the judgment below would stand: cf. *Metropolitan Water Board v. Johnson & Co.* [1913] 3 K.B. 900, 904, per Channell J. Finally, Mr. Mott submitted that there had been no proper application by the plaintiff for a three-judge court. His submission was that the appeal should not have been allowed to proceed further and should simply have been dismissed. Those submissions made by Mr. Mott were made in ignorance of the fact that the two Lords Justices had given a direction that the matter should be heard by a court of three Lords Justices. That that was the position was a matter which I established by looking through the court file during the short adjournment.

It is to be regretted, and this court apologises for the fact, that the disagreement and the direction made by the Lords Justices was not brought to the attention of the parties at a much earlier stage, certainly by 3 November 1999.

Once it became clear that the two Lords Justices had given the ruling that the matter be reheard by a three-judge court, we were bound to hear the substantive appeal and Mr. Mott appreciated that he could not take his preliminary point further. Nevertheless, this court recognises that there is an issue which requires attention. We propose to bring it to the notice of Lord Woolf M.R. so that, if it is appropriate, a practice direction can be given dealing with the situation where a two-judge court fails to agree.

WALLER L.J.

I agree that this appeal should be allowed essentially for the reasons given by Roch L.J. But, having had the advantage of reading in draft the judgment of May L.J., I would like to express in my own words why in my view the plaintiff in this case should not be held to have consented to or willingly assumed the risk of her car being clamped, and to comment shortly on the question whether it should be necessary to prove in every case that the owner of a motor vehicle who is trespassing on another's land has seen *and* read *and* understood the notice warning that such vehicles will be clamped before the clamping is excused what would otherwise be a trespass to the motor car in fitting a clamp.

Circumstances in different cases will present different problems. But I would suggest that, absent unusual circumstances, if it is established that a car driver saw a notice and if it is established that he appreciated that it contained terms in relation to the basis on which he was to come onto another's land, but did not read the notice, and thus fully understand the precise terms, he will not be able to say that he did not consent to, and willingly assume the risk of being clamped.

In this regard I suggest that some assistance is gained from cases concerned with whether terms have been incorporated into contracts, and in particular unsurprisingly cases where the question is whether particular terms have been incorporated into contracts for the parking of motor cars. In *Mendelssohn v. Normand Ltd.* [1970] 1 Q.B. 177, 182 Lord Denning M.R. dealt with the question whether a term on a notice board at a car park might have been incorporated into a contract where it was not obvious as the driver came in but was obvious when paying for parking at the end, and where the plaintiff had parked often before. He said, at p. 182:

"He may have seen the notice, but he had never read it. Such a notice is not imported into the contract unless it is brought home to the party so prominently that he must be taken to have known of it and agreed to it..."

In *Thornton v. Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163, 170 Lord Denning M.R., concerned with a condition sought to be incorporated into the contract via a ticket issued to the person parking their car seeking to exempt the car parking company from liability for personal injury, put the matter this way:

"the customer is bound by the exempting condition if he knows that the ticket is issued subject to it; or, if the company did what was reasonably sufficient to give him notice of it."

Megaw L.J. in the same case said, at pp. 172-173:

"When the conditions sought to be attached all constitute, in Lord Dunedin's words in *Hood v. Anchor Line (Henderson Brothers) Ltd.* [1918] A.C. 837, 847, 'the sort of restriction... that is usual,' it may not be necessary for a defendant to prove more than that the intention to attach some conditions has been fairly brought to the notice of the other party. But at least where the particular condition relied on involves a sort of restriction that is not shown to be usual... a defendant must show that his intention to attach an unusual condition *of that particular nature* was fairly brought to the notice of the other party. How much is required as being, in the words of Mellish L.J. in *Parker v. South Eastern Railway Co.* (1877) 2 C.P.D. 416, 424, 'reasonably sufficient to give the plaintiff notice of the condition,' depends on the nature of the restrictive condition"

He continued, in relation to the particular condition in that case, which sought to restrict liability for personal injury, at p. 173:

"In my view, however, before it can be said that a condition of that sort, restrictive of statutory rights, has been fairly brought to the notice of a party to a contract there must be some clear indication which would lead an ordinary sensible person to realise, at or before the time of making the contract, that a term of that sort, relating to personal injury, was sought to be included."

In the clamping context it should not be overlooked that things may not be so clear as in the car parking context as the circumstances of this particular case show. Furthermore the onus on the person seeking to clamp in reliance on a notice must be very high. The particular circumstances of this case had also an unusual feature in that the plaintiff was ill. Thus in this case I would say: (1) it would be less clear than in many other circumstances to a motorist that they were trespassing in pulling off the road into an area where there was both a way in and a way out; (2) it would not be fair having regard to that factor and the position of the notice to say that any ordinary and sensible person should have realised at or before the time they parked their car that they would be clamped if they did so; and (3) that the plaintiff's illness made it in any event understandable how in her case she would not see the sign, or read it.

Thus I agree that in the circumstances of this case, it would be wrong to hold that the plaintiff consented to and willingly assumed the risk of her car being clamped, and would allow the appeal to the extent indicated by Roch L.J.

MAY L.J.

I agree that this appeal should be allowed for the reasons given by Roch L.J. I would, however, place a small gloss on those reasons whose effect would be, if it were right, to

reserve for consideration in a future case, in which the question arose on the facts, the extent of evidence necessary to establish, in cases where trespassing vehicles are clamped, that the owner of the vehicle consented to, or willingly assumed, the risk of his vehicle being clamped.

As Roch L.J. has shown, this court held in *Arthur v. Anker* [1997] Q.B. 564 that a trespassing motorist, who has seen one or more notices giving sufficient warning that trespassing vehicles will be clamped and who has understood their effect, consents to the risk of clamping so that the clamping is not itself a trespass to the vehicle. In that case, the judge found as a fact that Mr. Arthur knew of and consented to the risk of clamping and this was conceded on his behalf by his counsel in this court. The court therefore did not have to decide whether consent might be established in clamping cases on any variant of the facts which had been found. It seems to me to be arguable at least that the decision is not binding authority to the effect that nothing short of actual knowledge and understanding will do. As Roch L.J. has said, a trespassing motorist who claims not to have read a very obvious warning sign will nevertheless very often be found to have done so. But I would not exclude the possibility that a motorist, who appreciates that there are warning signs obviously intended to affect the use of private property for parking vehicles but who does not read the detailed warning, might, depending on the facts, be held to have consented to, or willingly assumed, the risk of his vehicle being clamped, if the unread warning sign in fact gives sufficient warning that trespassing vehicles would be clamped. *Lloyd v. Director of Public Prosecutions* [1992] 1 All E.R. 982 is not an authority on civil law and the question of actual knowledge of the warning signs does not appear to have been in issue. But consent was in issue (see pp. 989d, 991d and Nolan L.J.'s decision at p. 991j that the alternative submission at p. 991d was well founded) and the facts appear to have been only that "the appellant did not dispute that the signs were there and that they were clearly visible" (see p. 985h-j). It is a case, therefore, where actual knowledge and full understanding of the warning signs may not have been considered necessary for a finding of consent.

The possibility to which I have referred does not arise in this case. The recorder found that Mrs. Vine did not see the sign and Mr. Mott accepts--with some reluctance, perhaps--that he cannot challenge that finding in this court. That is sufficient for her to succeed on the facts of this case. I would also find, if it were necessary to the decision, that the sign in this case was not sufficiently prominently and clearly positioned and displayed to sustain any contention that she consented to, or willingly assumed, the risk of her vehicle being clamped. In so far as this would be a finding of fact which differed from anything found by the recorder, I derive it from the photographs and the plan which show the area and the sign as clearly to this court as they were shown to the recorder. It was not intrinsically obvious, apart from signs, that the area where Mrs. Vine parked was private property. It might have been part of the highway. The sign, which Roch L.J. has described, was on the wall beside the second of two bays and was not on the occasion in question visible from the driver's seat of Mrs. Vine's car when she parked it in the first bay because a van parked in front of her blocked the view.

I agree with Roch L.J.'s judgment on the subject of exemplary damages and agree that the appeal should be allowed to the extent which he has explained.

Appeal allowed with costs.