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THE PARKING LOT CASES REVISITED: CONFUSION AT OR ABOUT THE GATE

William V. Vetter*

When entering a parking lot, have you ever had a stray thought about who will absorb the loss if your vehicle or its contents are stolen or damaged while you are off doing important things? Probably not. Or, if you did, the stray thought was casually dismissed as something not worth worrying about. Some courts believe that the average motorist understands the various legal relationships among which the lot operator and motorist might jointly choose.¹ That belief is unrealistic. As shown in the following discussion, many courts do not have a detailed understanding of parking lot-related issues.

I. INTRODUCTION

Research databases reveal a dearth of articles specifically dealing with issues of parking lot operators' liability to their patrons, and none of the articles found on this subject are recent.² Perhaps this results from apathy. After all, the

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1. In *Burcham v. Coney Island, Inc.*, 94 N.E.2d 280 (Ohio Ct. App. 1949), the court stated, without equivocation:

When the owner of a motor vehicle drives it into a parking lot, he [or she] must be aware that more than one relationship between the operator and himself [or herself] may be created. The owner may be merely interested in securing a place to leave his vehicle, or he may *also* wish to secure its safety. It is only reasonable to require the owner of the vehicle to use reasonable measures to insure the acceptance of responsibility by the operator of the parking lot if the added burden of bailment is desired by the owner.

Id. at 282. Perhaps the court's statement was accurate in 1949; one doubts its accuracy in 1999.

2. Various worded searches of the "Westlaw" database reveal no articles.

only parties concerned with parking lot liability are the companies that insure parking lot operators. Not really—lot operators are frequently held *not* liable for the losses. In addition, most insurance policies have many deductions and exclusions which may result in the vehicle³ owner⁴ or the lot operator absorbing the losses. Lack of coverage is most likely when the vehicle itself is not stolen, but is damaged or its contents are removed. Another possible explanation for the dearth of articles on this subject is that the subject seems so mundane and lacking in glamour. Although that may be true, the rules concerning parking lots potentially impact millions of persons every day, and are of immediate concern to the thousands of persons who have their vehicles stolen from a parking lot every day.

Everyone is aware of the dependence on personal motor vehicles in the United States. In many areas, private vehicles are the only mode of transportation. That is true even in parts of larger urban areas (which have no excuse for poor public transportation). Naturally, when a vehicle is driven somewhere, it must be temporarily abandoned (a.k.a. parked) while the driver does whatever it is that prompted the excursion. Every driver knows that finding an acceptable place to park her or his vehicle can be a significant problem. To satisfy this need for parking, many suburban malls devote more

Other sources produce two: John R. Feather, Recent Decisions, *Bailment—Articles Left in Automobiles*, 10 BAYLOR L. REV. 216 (1958) (focusing on one D.C. case, but citing others), and Laurence M. Jones, *The Parking Lot Cases*, 27 GEO. L.J. 162 (1938). Professor Jones was able to divide the pre-1938 cases into two categories based primarily on the degree of security provided by the lot. The article concludes that without security or control, the lots were held licensors; with security, the lots were generally held bailees. The situation has changed since 1938, particularly in the variety of parking lots.

3. The term "vehicle" is used in lieu of colloquialisms or the perhaps more accurate "personal motor vehicle." As used in this article, it is intended to include all types of transportation modes that may be temporarily stored in a parking lot, including but not limited to, motorcycles, cars, automobiles, trucks, pickups, sport utility vehicles, vans, etc. It specifically does not include aircraft, watercraft, or non-motorized items.

4. Throughout this discussion the term "vehicle owner" or "owner" is used to identify the person who drives a vehicle to, and leaves it at, a parking lot. However, the rules discussed do not depend on title to the vehicle. *Vis-à-vis* the lot operator, the person driving the vehicle has the same rights, regardless of the driver's rights to title or possession of the vehicle. Of course if some other person, or the police, can demonstrate a better right to the vehicle (e.g., it had been previously stolen), the lot operator would be obliged to recognize those rights.

land to parking than to retailing, urban buildings incorporate multiple sub-basements devoted to parking, and transportation hubs incorporate huge parking facilities.

The characteristics of parking lots vary significantly, from open, unmarked, unpaved lots to multi-story, enclosed, and closely monitored structures designed exclusively for parking. Operational aspects also vary significantly. Many lots are not regularly attended, with attendants making only infrequent visits to collect deposited fees and make sure there are no non-paying parkers. At the other end of the continuum are valet parking lots where the owner surrenders the vehicle and its keys to an attendant who parks and retrieves the vehicle. Probably the most popular parking lots (in terms of numbers of parking spaces provided) are multi-story, dedicated parking structures that have automated entry gates and attended exit gates, where the vehicle owner chooses the parking place and retains the keys (hereafter referred to as "park-and-lock structures"). Park-and-lock structures are invariably found at airports and in central business districts and are frequently found in other places, such as shopping malls and sports stadiums. Interestingly, park-and-lock structures came into general use after the previously mentioned law review articles on parking lots were published. Park-and-lock structures have created significant problems for the courts, resulting in the law becoming less uniform. The law has also become more fact-oriented, requiring considerable inquiry into the specifics of each case. This lack of uniformity in the law provides a good reason for revisiting this issue.

This article discusses the development of the law relating to the liability of parking lot operators for loss of, or damage to, patrons' vehicles and the contents of those vehicles.⁵

5. This article does not discuss the disclaimers or other attempts to limit liability that are routinely printed on parking tickets or posted at parking lots. The primary reason is that such disclaimers are routinely held ineffectual. *See, e.g., Allright, Inc. v. Schroeder*, 551 S.W.2d 745 (Tex. Civ. App. 1977, writ reff'd n.r.e); *Allright, Inc. v. Elledge*, 508 S.W.2d 864 (Tex. Civ. App. 1974, no writ). Even when bailment rules are abandoned, little direct effect is given to disclaimer clauses. *See Elish v. Airport Parking Co. of Am., Inc.*, 345 N.Y.S.2d 650 (App. Div. 1973), discussed *infra*, notes 57-69. However, in *White v. Atlanta Parking Serv. Co.*, 228 S.E.2d 156 (Ga. Ct. App. 1976), a disclaimer clause in a monthly contract with a downtown parking garage was interpreted as part of the description of the item(s) bailed under the contract, i.e., as the bailee's express refusal to accept bailment/possession of the vehicle's contents.

Part II discusses liability with respect to vehicles themselves. Part III addresses liability with respect to vehicles' contents. To the extent this article reaches a conclusion or recommendation, it is that reversion to the ancient law of bailment, or something akin thereto (with a more liberal interpretation of "control") is the most desirable course for the future.

II. PARKING LOT CASES: LIABILITY FOR DAMAGE OR LOSS OF VEHICLES

A. *Bailment*

1. *Background*

The legal rules traditionally applied to motor vehicles in parking lots have existed much longer than motor vehicles themselves. The most ancient legal predecessors are property law rules concerning possessory interests.⁶ Over the centuries these rules became commingled with contract law and, more recently, tort (negligence) law. Therefore, the current bailment rules are a combination of contract and tort rules, but with a foundation in property law that is often overlooked.

Mr. Justice Joseph Story, in his seminal *Commentaries on the Law of Bailments*, contributed to or established the strong contract leanings of modern bailment law in the United States. Justice Story defined "bailment" as "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust."⁷ Story went to considerable length to demonstrate how every bailment, "gratuitous" or compensated, includes sufficient consideration to support a cause of action for breach of contract.⁸ Story used a very flexible definition of "consideration," concluding that a bailor gives consideration merely by transferring possession in exchange for the bailee's promise (which is the bailee's consideration) to satisfy the bailor's purpose. The bailor's consideration does not exist, however, until possession is actually transferred.

6. See HUGH E. WILLIS, *CASES ON BAILMENTS AND PUBLIC CALLINGS* 1-6 (1923).

7. JOSEPH STORY, *COMMENTARIES ON THE LAW OF BAILMENTS* § 2 (Edmond H. Bennett, ed., 8th ed. 1870) (photo. reprint 1986) (1832).

8. See *id.* at 4 n.4. The footnote exceeds three pages of fine type.

Therefore, an agreement to deliver into bailment in the future is not an enforceable agreement.⁹ Thinking of bailment as just a species of contract law can be misleading because of the absolute liability for breach of contract. That is, if the bailee fails to properly redeliver the item, a breach of a contract, and absolute liability, would result. However, a bailee is protected from liability if the failure was not due to its negligence, even if the failure may not satisfy the contract law excuse of impossibility. Story admits that the bailor can elect a cause of action for negligence, misfeasance, or tort in addition to breach of contract.¹⁰

The very early common law on bailments held the bailee absolutely liable, in a cause of action for debt, for failure to return an item.¹¹ It was not until the thirteenth century that courts excused failure to redeliver when "accident, fire, water, or larceny," not caused by the bailor, made redelivery impossible.¹²

Bailment rules, as applied, seem more consistent with property, agency, or trust law than with contract law. Justice Story's treatise takes pains to demonstrate that in most bailments, the bailee does not have a property right in the item.¹³ However, Story uses the term "property" to represent the amount of legal title required to support a cause of action in trover.¹⁴ He acknowledges that every bailee has a cause of action in trespass against third parties who interfere with his possession of the bailed item.¹⁵ Since the technical niceties of common law pleading are no longer important, nor even generally known, applying Story's discussion to modern settings may result in more confusion than enlightenment.

If one person suffers injury to person or property while on another's land, the initial question is the relationship between the two persons. When personalty of one person that is present (with consent) on another's realty is damaged or

9. *See id.*

10. *See id.*

11. *See id.* at 1-2 (quoting 2 THOMAS ATKINS STREET, FOUNDATIONS OF LEGAL LIABILITY 252-57 (1906)).

12. *Id.*

13. *See* STORY, *supra* note 7, §§ 93-93i, 150, 279. However, in the special case of pawn, the pawnee does have a "special property" in the bailed item. *Id.* § 352.

14. *See id.* §§ 93-95.

15. *See id.* § 93c.

disappears, the available legal relationships are lease, license, or bailment.¹⁶ Traditionally, these three possibilities apply to a motor vehicle temporarily on another's realty, such as in a parking lot.¹⁷ In parking lot cases, many courts make virtually no distinction between lease and license, presenting parking lot problems as a choice between lease/license and bailment.¹⁸

To decide the "license versus bailment" issue, the initial question is whether the parties created a bailment. The elements of a bailment are the same for automobiles and their content as for any other forms of property. A bailment exists when: (1) possession of an item of personal property (2) is transferred by its rightful possessor to another person (3) with the transferee's agreement (a) to accept the item and (b) to return it to the original possessor or otherwise deliver the item as the transferor directs.¹⁹

16. *See, e.g., Dunegan v. Apico Inns of Green Tree, Inc.*, 514 A.2d 912 (Pa. Super. Ct. 1986). This assumes that the owner of the damaged property has no estate or tenancy rights in the underlying realty. Traditional common law property rules make significant distinctions between a landowner's duty to invitees, licensees, and trespassers. The more recent trend is to downplay those distinctions and instead apply a "reasonable under the circumstances" rule.

17. *See, e.g., Caltafano v. Higgins*, 191 A.2d 330 (Del. Super. Ct. 1963); *Aetna Cas. & Sur. Co. v. Pappagallo Restaurant Inc.*, 547 So. 2d 243 (Fla. Dist. Ct. App. 1989). Nearly every decision cited in this article could be cited as direct or indirect support for this statement. The use of traditional bailment rules as the starting point for analysis is pervasive, even by courts that have held that bailment rules should not be used.

18. Bailment problems relating to parked motor vehicles sometimes carry a hint of the special-case bailment rules applied to innkeepers. Traditional common law rules make innkeepers virtual guarantors of property entrusted to their care. An innkeeper bailment is created in the same manner as any other. However, the innkeeper's defenses in the event of non-redelivery are severely limited. The earliest cases dealing with vehicle bailments relied on earlier cases dealing with horses and carriages that were bailed at inns or livery stables. *See, e.g., Blackburn v. Depoyster*, 272 S.W. 398 (Ky. 1925). Cases involving bailment to an innkeeper are relevant when the issue relates to the creation of a bailment, but may be distinguishable when the issue relates to the bailee's defenses.

19. *See, e.g., Malone v. Santora*, 64 A.2d 51 (Conn. 1949); *Seedman v. Jaffer*, 132 A. 414 (Conn. 1926); *Wall v. Airport Parking Co.*, 244 N.E.2d 190 (Ill. 1969); *Sewell v. Fitz-Inn Auto Parks, Inc.*, 330 N.E.2d 853 (Mass. App. Ct. 1975); *Colwell v. Metropolitan Airports Comm'n, Inc.*, 386 N.W.2d 246 (Minn. Ct. App. 1986); *Allright Auto Parks, Inc. v. Moore*, 560 S.W.2d 129 (Tex. Civ. App. 1997, writ ref'd n.r.e.). The decisions cited in this discussion uniformly define bailment as requiring an express or implied contract, probably because all of them do involve situations in which contracts were created. However, gratuitous bailment is legally possible, so long as there is an agreement concerning the transfer of possession and redelivery. *See* 8A AM. JUR. 2D *Bailments* § 1 (1997).

When a vehicle containing personal property is left in a parking lot, courts have generally engaged in two separate analyses in determining liability, one concerning the vehicle, and one concerning the vehicle's contents. A conclusion that the automobile was not bailed apparently moots any question concerning bailment of its content.²⁰ The key (pun intended) to bailment of a vehicle is control, normally both accomplished and symbolized by transfer of keys from the owner (bailor) to the lot operator (bailee).²¹

2. *Keys Surrendered*

When an owner leaves a vehicle and its keys with a lot operator, there is a bailment, at least of the vehicle.²² For example, in *Insurance Co. of North America v. Solari Parking, Inc.*,²³ the Langes were on their honeymoon and moving across the country at the same time. Reaching the French Quarter in New Orleans, they searched until they found an attended, enclosed parking lot because they were apprehensive about leaving their car, which was filled with their possessions, on a city street. After a short discussion with the lot attendant, the Langes left their car and its keys. The lot attendant entered and started the vehicle, intending to move it, but was called away to wait on another customer. The attendant left the engine running. While the attendant was

20. See, e.g., *Weinberg v. Wayco Petroleum Co.*, 402 S.W.2d 597 (Mo. App. 1966); *Giles v. Meyers*, 107 N.E.2d 777 (Ohio C.P. 1952).

21. The keys transferred must be those necessary to actually operate the automobile. If it is possible to start the engine without the keys, possession can be transferred by informing the bailee of that fact. See *Dispeker v. New S. Hotel Co.*, 373 S.W.2d 904 (Tenn. 1963). The ability to unlock the door, but not to activate the ignition, would not be sufficient, nor would having the ignition key but not the key to locked doors. However, possession of the automobile can be transferred without providing access to its trunk. Modern automobiles have any number of combinations of keys and access options. For some, one key fits all. Others have a separate key for the trunk and no other access method. Others have a separate trunk key, but also have a button or lever inside the passenger compartment to open the trunk. Some with an interior trunk release allow "locking out" that release, which interestingly enough is sometimes called a "valet lock." Separate access to the vehicle's trunk may be significant in content cases.

22. This is invariably the result in "valet parking" situations where the vehicle owner's obvious, and perhaps paramount, intent is to have the attendant take exclusive possession of the vehicle and its keys, drive to an attendant-determined space, and retrieve it when the owner decides to leave.

23. *Insurance Co. of N. Am. v. Solari Parking, Inc.*, 370 So. 2d 503 (La. 1979).

away, the vehicle was stolen. The Langes recovered for their vehicle, based on bailment. The court found that giving the vehicle's keys to the lot attendant while the vehicle was in a position that requires it to be moved by the attendant obviously transferred physical control to the attendant.²⁴ Courts routinely find a bailment whenever a vehicle's keys are left with the lot operator.²⁵

3. *Keys Not Surrendered*

When the owner drives into an open-air parking lot, with or without obtaining a parking ticket, locks the vehicle, and takes the keys, most courts find no bailment. The majority of decisions finding no bailment stress the bailee's inability to physically and independently control the vehicle.

Some of the easier no-bailment cases relate to parking lots near sports stadiums. For example, in *Travelers Insurance Co. v. Pond*,²⁶ the vehicle owner drove into a parking lot near Crosley Field in Cincinnati, paid an attendant the one-dollar parking fee, received a "claim check," parked, rolled up the windows, locked the doors, kept the keys, and went to the baseball game. When he returned, the vehicle was gone. There was no evidence that the ticket was anything other than a receipt for payment. The lot was not fenced, had multiple exits, and there was no need to show the ticket to leave. The court stressed the difference between sports stadium lots and downtown business lots.²⁷ The essence was that no one wants to hang around the parking lot after the game, waiting in line as vehicles are individually and leisurely checked out. The pivotal factor for the court was, however, that nothing indicated, symbolically or otherwise, a transfer of control to

24. See *id.* at 506-07. The primary contest in *Solari* concerned the vehicle's contents, not the vehicle itself.

25. See, e.g., *Aetna Cas. & Sur. Co. v. Pappagallo Restaurant Inc.*, 547 So. 2d 243 (Fla. Dist. Ct. App. 1989); *Davidson v. Ramsby*, 210 S.E.2d 245 (Ga. Ct. App. 1974); *System Auto Parks & Garages, Inc., v. American Econ. Ins. Co.*, 411 N.E.2d 163 (Ind. Ct. App. 1980); *Garlock v. Multiple Parking Servs. Inc.*, 427 N.Y.S.2d 670 (Buffalo City Ct. 1980); *Stephens v. Katz Parking Sys., Inc.*, 348 N.Y.S.2d 492 (N.Y. City Civ. Ct. 1973); *Dispeker v. New S. Hotel Co.*, 373 S.W.2d 904 (Tenn. 1963) (gave keys to hotel doorman); *Allright, Inc. v. Schroeder*, 551 S.W.2d 745 (Tex. Civ. App. 1977, writ ref'd n.r.e.); *Allright, Inc. v. Elledge*, 508 S.W.2d 864 (Tex. Civ. App. 1974, no writ).

26. *Travelers Ins. Co. v. Pond*, 143 N.E.2d 189 (Ohio C.P. 1957).

27. See *id.* at 191 (quoting 24 AM. JUR. 493 (Cum. Supp. 1956)).

the parking lot operator.²⁸ Other cases presenting similar parking lot arrangements in venues other than sports stadiums reach similar results under the same rationale.²⁹ Park-and-lock lots that are unattended and not enclosed give even less basis for concluding a bailment was created.

However, not all "park-and-lock" cases conclude that no bailment is created. Cases involving modern, semi-automated parking structures have produced conflicting resolutions of the principal issue, i.e., control. Does a lot operator obtain control (i.e., "possession") sufficient to support a bailment when it does not have the means of starting and moving the vehicle?³⁰

The common parking structure scenario is as follows. The structure is expressly designed for parking vehicles that are driven to and from a parking space by the vehicle operator. Usually, the structure is a separate building, or a separate, distinct part of a larger building. To obtain access, a driver must retrieve a time-stamped ticket from an automated dispenser. The driver then chooses a parking place without direction or assistance from lot attendants, parks and locks the vehicle, and retains the keys. Egress from the structure is also limited. To exit, all vehicles must pass by attended fee-collection booths, with the exit physically blocked by a mechanism controlled by the attendant. Before leaving the structure, the driver must present an entry ticket to the attendant. Based on the entry time stamped on the ticket, the attendant calculates the fee. Until the fee is paid, exit is physically barred. In the typical situation, the driver contacts a lot attendant only when attempting to leave the

28. *See id.* *See also* *Giles v. Meyers*, 107 N.E.2d 777 (Ohio C.P. 1952) (different ballpark, same situation, same result).

29. *See, e.g.*, *Allright Phoenix Parking, Inc. v. Shabala*, 429 P.2d 513 (Ariz. Ct. App. 1967) (lot near movie theater); *Osborn v. Cline*, 189 N.E. 483 (N.Y. 1934) (open lot part of gas station, no exit control); *Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569 (Tenn. 1973) (pre-pay park-and-lock, no attendant).

In *Rokosa v. Hartford Jai Alai, Inc.*, 430 A.2d 1318 (Conn. App. Ct. 1981), the vehicle owner had a choice of options: "VALET PARK \$2," "SELF-PARK \$1," and "FREE PARKING AT YOUR OWN RISK." The plaintiff chose "self-park", paid the dollar fee, parked and locked his car, and retained the key. The court held there was no bailment because the plaintiff retained control of the vehicle. There was no discussion of the significance of the lot operator's distinction between self-park (for a consideration) and free parking.

30. If the lot operator uses a tow truck to take the vehicle to another location, most courts would find that the operator had taken control, even without the keys. But that usually happens without the owner's consent.

lot—or after discovering his or her vehicle missing or damaged. This type of lot is predominant in areas of high demand and high land values, such as city business districts and airports. Often they are the only place one can park, particularly at busy airports.

In *Sparrow v. Airport Parking Co. of America*,³¹ a Pennsylvania Superior Court hearing an appeal from the Court of Common Pleas dealt with a typical midtown parking structure. The plaintiff obtained a time-stamped ticket from the entry vending machine, the barrier raised to admit him, he parked where he chose, locked his car, and kept the keys, all without encountering an attendant. When he returned, his car was missing. The plaintiff contended that a bailment was created because exit from the structure was restricted. The lot arrangement required a person wishing to drive any vehicle out of the structure to present an entry ticket and pay a fee. Thus, the owner contended, the lot operator, not the vehicle driver/owner, effectively controlled the vehicle's movement.³² Relying principally on a Pennsylvania Supreme Court decision,³³ the court found that, factually, the automated parking structure is more like an unattended lot than it is like an attended lot where the attendant takes the keys, parks the car, and gives the keys back when the owner returns to leave with his or her car.³⁴ The court found that the claim check, rather than being symbolic of the lot operator's control, was merely a means of determining the parking fee, primarily because there was no way to connect a particular vehicle to a particular ticket.³⁵ Thus, the court held, a key element of bailment, possession by the bailee, was absent.³⁶ Instead, the court held that the park-and-lock patron merely contracts for a limited license to use the space and granted no

31. *Sparrow v. Airport Parking Co. of Am.*, 289 A.2d 87 (Pa. Super. Ct. 1972).

32. *See id.* at 89.

33. *See Taylor v. Philadelphia Parking Auth.*, 156 A.2d 525 (Pa. 1959).

34. *See Sparrow*, 289 A.2d 87 at 90.

35. *See id.* at 90-91.

36. *See id.* *See also* *Wall v. Airport Parking Co.*, 244 N.E.2d 190 (Ill. 1969) (airport park-and-lock); *Coleman v. Chicago Thoroughbred Enter., Inc.*, 243 N.E.2d 333 (Ill. App. Ct. 1968) (non-airport park-and-lock); *Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569 (Tenn. 1973) (non-airport park-and-lock); *All-right Auto Parks, Inc. v. Moore*, 560 S.W.2d 129 (Tex. Civ. App. 1997, writ ref'd n.r.e.) (same, citing cases with similar results).

relief to the plaintiff.³⁷

Not all courts agree. For example, Massachusetts courts have consistently held that operators of park-and-lock structures are bailees of their patron's cars.³⁸ Thus, there is no consensus on the "bailment versus license" question for park-and-lock structures.

How to characterize the bailee's control is not obvious in the park-and-lock structure situations. On one hand, the vehicle owner retains the ability to move the vehicle (under its own power) by retaining the vehicle's keys. On the other hand, the vehicle's movement is severely restricted because the lot operator bars the vehicle's exit until the owner pays the required fees. Further, the lot operator's ability to prevent the vehicle's egress clearly restricts the vehicle owner's freedom to drive wherever she wishes—hence, the owner does not have unrestricted control. Perhaps because of these difficulties, some courts employ alternate analyses.

37. The court's final conclusion was that the pleadings and affidavits raised a factual issue concerning the existence and scope of an alleged implied contract to protect the vehicle and the matter was sent back to the Court of Common Pleas. See *Sparrow*, 289 A.2d at 93.

38. See, e.g., *Richard v. Massachusetts Port Auth.*, 310 N.E.2d 146 (Mass. App. Ct. 1974); *American Auto Sales, Inc. v. Massachusetts Port Auth.*, 308 N.E.2d 781 (Mass. App. Ct. 1974); *Hale v. Massachusetts Parking Auth.*, 265 N.E.2d 494 (Mass. 1970); *Greenberg v. Shoppers' Garage Inc.*, 105 N.E.2d 839 (Mass. 1952). In these cases, the lot operator's apparent lack of concern may have influenced the results. In *American Auto Sales*, the court stated:

It was within the trial judge's discretion to admit testimony by a police officer assigned to the airport as to the number of automobiles stolen from the defendant's garage during the month of the theft and during prior months. It was relevant to show that the condition in which the garage was operated permitted thefts in substantial numbers, and there was no indication that this condition had changed.

American Auto Sales, 308 N.E.2d at 782. In New York, however, apparently the same considerations prompted the Appellate Division to decide that the lot operator's duty was limited because the lot patron could see there was little protection. See *Ellish v. Airport Parking Co. of Am., Inc.*, 345 N.Y.S.2d 650 (App. Div. 1973), discussed *infra* notes 57-66.

The Massachusetts Appeals Court held that airport parking structures are distinguishable from a park-and-lock lot that was fenced but had no limitation on exit because the vehicle operator paid in full, in advance. See *Sewell v. Fitz-Inn Auto Parks, Inc.*, 330 N.E.2d 853 (Mass. App. Ct. 1975).

B. *Alternate Theories*

1. *Bailment as an Implied Contract*

Applying solely contract law to a parking structure situation, the Supreme Court of Tennessee, in *Scruggs v. Dennis*,³⁹ held that an implied contract was created when the owner parked his car in a downtown automated parking lot.⁴⁰ The court found a breach of the contract to redeliver and therefore held the garage owner liable. "[T]o embrace the theory of the respondent garage in this case [i.e., that no contract existed] would be tantamount to nothing more or less than condonation of a reduction of [a] storage operation for hire to a subterfuge."⁴¹

*Sparrow v. Airport Parking Co.*⁴² dealt with the loss of a parked vehicle from the public parking lot at Philadelphia International Airport. After reviewing bailment rules, the Pennsylvania Superior Court held that the lot operator had not obtained sufficient control to create a bailment. However, the court went on to determine that an implied contract in which the lot operator undertook a contractual duty of due care might nevertheless exist. The case was remanded to determine if, in fact, an implied contract was created and if so, whether it included some undertaking to act with due care.⁴³

2. *Special Duty of Care*

In *Equity Mutual Insurance Co. v. Affiliated Parking, Inc.*,⁴⁴ the plaintiff submitted the contract between the parking structure operator and the City of St. Louis, which owned the structure. The contract specified how the operator was to manage the facility, including duties to inventory overnight parkers, call the police, etc. As is typical, the structure was fully enclosed and the only way to exit was past tollbooths. The court disposed of the contract-based arguments, primar-

39. *Scruggs v. Dennis*, 440 S.W.2d 20 (Tenn. 1969).

40. *See id.* at 22. The remainder of the opinion dealt with the potential defenses of a bailee who misdelivers a bailed item, holding, in essence, that there are none. *See id.* *See also* *Dispeker v. New Southern Hotel Co.*, 373 S.W.2d 904, 909 (Tenn. 1963).

41. *Scruggs*, 440 S.W.2d at 23.

42. *Sparrow*, 289 A.2d at 87.

43. *See id.*

44. *Equity Mut. Ins. Co. v. Affiliated Parking, Inc.*, 448 S.W.2d 909 (Mo. Ct. App. 1969).

ily on the ground that the vehicle operator was not a party to the contract.⁴⁵ Coming to the bailment contentions, the court stated that a bailment is a contract created when an item's owner delivers the item to another party on condition that it be restored or delivered as instructed—the common definition.⁴⁶ To be sufficient to create a bailment, the court held, the delivery must be such as to enable the bailee to exclude all others, *including the owner*, from possession for the bailment period.⁴⁷ The court found that the only factor indicating any potential for control by the lot operator was the parking ticket, which the court found was only used for determining the fee, rather than controlling possession of the vehicle. Based on that conclusion, the court held that no bailment was created.⁴⁸

Having found no contract or bailment, the court in *Equity Mutual* next considered the proper characterization of the relationship between the vehicle owner and the lot operator, i.e., whether the relationship was lessor-lessee or licensor-licensee. Based on the uncertain period of use, the court determined that a licensor-licensee relationship existed.⁴⁹ The court then held that the lot operator, *only in this special situation*, had a duty to use reasonable care under the circumstances to protect parked vehicles.⁵⁰ Thus, the court held that the structure operator had a tort-like duty with respect to the parked vehicle. This duty was similar to a bailee's duty.

In *Equity Mutual*, the Missouri court took the position that the question of whether a parking structure situation

45. *See id.* at 910-13.

46. *See id.* at 914. This fairly common definition overlooks the property-law genesis of bailment, which can create difficulty when only the vehicle's content is damaged or stolen.

47. *See id.* at 914.

48. *See id.*

49. *See id.* at 915. The court noted that a lessor-lessee relationship requires the conveyance of some interest in real estate for a fixed or definite period.

50. *See Equity Mut. Ins. Co. v. Affiliated Parking, Inc.*, 448 S.W.2d 909, 915-16. The court held: "[I]n parking lot cases regardless of the character of the legal relationship between the parties, there is a duty of ordinary care owed by the operator of the premises toward the automobile left thereon." *Id.* at 915. The court was very careful to distinguish cases involving personal injuries in non-parking lot cases resulting from the condition of the licensor's premises or acts of other individuals, where the court said the "old" rules concerning invitees still applies. The court's reasoning at this point seems based solely on the nature of the injury suffered, rather than any substantial legal theory.

involves a bailment, lease, or license is essentially academic because in each situation the "better" modern rule requires the exercise of ordinary care toward the vehicle left on the premises.⁵¹ However, the court did not fully equate parking lot situations with bailments because it concluded that *the plaintiff had not proven* how the lot operator breached its duty.⁵² If the Missouri court had adopted its "better modern rule" with bailments, it would have required the *lot operator* to prove lack of negligence.

*McGlynn v. Parking Authority of Newark*⁵³ involved a downtown parking structure. After reviewing contemporary parking lot cases, and particularly noting the lack of judicial agreement when applying bailment rules, the New Jersey Supreme Court decided it would be more useful to ignore the rigid elements of bailment and instead to define the lot operators' duty of care to patrons.⁵⁴ Apparently this duty-of-care determination is based on tort considerations. The court noted that prior decisions had imposed a duty of care on landlords to take reasonable measures to protect tenants from foreseeable criminal conduct.⁵⁵ The court then stated:

Ultimately, however, the imposition of a duty depends on policy considerations such as the effect of the imposition of the risks and burdens of an activity. In comparison with a parker, the garage owner is better situated to protect a parked car and to distribute the costs of protection through parking fees. Furthermore, at an enclosed garage, car owners expect to receive back their cars in the same condition in which they left them. The imposition of a duty to protect parked vehicles and their contents is consistent with this expectation. Thus, we hold that the operator of an enclosed garage is under a duty to exercise reasonable care to protect the parked cars and those items one would expect reasonably to find within them.⁵⁶

51. *See id.* at 915. The court was very careful to place parking lots in a category separate from other licensor-licensee situations, particularly those where the licensee is injured on the premises.

52. *See id.* at 916.

53. *McGlynn v. Parking Auth. of Newark*, 432 A.2d 99 (N.J. 1981).

54. *See id.* at 104.

55. *See id.* (citing *Trentacost v. Brussel*, 412 A.2d 436 (N.J. 1980)).

56. *Id.* (citations omitted).

3. *Sui Generis*

New York's Appellate Division has apparently abandoned traditional analysis altogether, creating a *sui generis* rule for airport parking structures (or perhaps for all park-and-lock lots). *Ellish v. Airport Parking Co. of America, Inc.*⁵⁷ (a three-two decision) involved a parking structure at JFK International Airport. The Appellate Division first characterized bailment as "merely a special kind of [implied] contract" intended to approximate the parties' expectations.⁵⁸ Therefore, the court said, traditional bailment rules were not helpful (apparently concluding that bailment rules did not approximate airport parkers' expectations). The Appellate Division then stated that the rule for determining the lot operator's liability should be based on "the realities of the transaction in which the parties engaged."⁵⁹ Because of the significant public interest in temporary parking for vehicles and the major importance of air transportation, the court said, a fair and easy-to-apply rule should be formulated. The court listed the factors on which its conclusions were based:

- (1) The service provided . . . was a space for [plaintiff's] automobile to stand while she was away on her trip. . . . The plaintiff was not treated differently from other automobile operators; nor was she led to believe that the lot would not be open to others.
- (2) The service provided was . . . impersonal. . . .
- (3) The plaintiff retained as much control as possible over the automobile. . . . She did not expect or desire the defendant to move the automobile in her absence.
- (4) The plaintiff followed the directions contained in the ticket she received [by locking her automobile].
- (5) We can draw a reasonable inference . . . [that the plaintiff] read the other warnings which [the ticket] contained that the lot was not attended and that the parking of her car was at her own risk. Thus, any expectation that

57. *Ellish v. Airport Parking Co. of Am., Inc.*, 345 N.Y.S.2d 650 (App. Div. 1973).

58. *Id.* at 653. This characterization of bailment ignores bailment's property-law foundation, substituting implied contract. The court's displaced starting point substantially facilitated the court's creation of a new standard and disregard of the long-standing policies supporting bailment rules.

59. *Id.*

the defendant would take any special precautions to protect her car . . . could not reasonably have been in her mind.⁶⁰

(6) The actual operation of an airport parking lot must have been apparent to her. . . . The plaintiff, seeing the confusion and bustle, should have realized the gigantic task which an individual check-out of each automobile would require—a task which she was aware the defendant did not undertake, since the ticket which she received did not identify her automobile.⁶¹

While it started by saying that the pivotal question was between bailment and license, the court's conclusion did not make that choice:

We are of the opinion that liability should not be determined by ancient labels and characteristics not connected with present-day practices. It is one thing for the owner of a livery stable to have to explain the disappearance of a horse from its stall to the owner, but it is not at all the same for the operator of a parking lot at a busy airport to have to explain the disappearance from the lot of one of the thousands of cars parked there daily. Unless proof of negligence is present on the part of the operator of the lot, the risk of loss must be assumed by the owner of the automobile.⁶²

The court's decision is not inconsistent with prior cases that found no bailment was created. However, instead of relying on established law, the court decided to create a new rule, which seems to be a combination of contract and negli-

60. The dissent specifically challenges these assumptions, on the reasonable grounds that modern drivers know what to do at a parking structure without reading each structure's ticket. See *id.* at 656 (Shapiro, J., dissenting). While the majority said the plaintiff was not bound by the exculpatory terms of the ticket, it in effect enforced those terms.

61. *Id.* at 653-54. The court distinguished a case arising during the 1939 World's Fair, which found a bailment existed solely on the basis that a lot employee issued the entry ticket and directed the motorist where to park. Perhaps if the JFK ticket-dispensing machine had a recording (or sign) saying: "Park where you find an empty space," a bailment would have been created.

62. *Id.* at 655. In *Linares v. Edison Parking, Inc.*, 414 N.Y.S.2d 661 (N.Y. City Civ. Ct. 1979), the court cited *Ellish* for the proposition that a parking lot operator is liable for negligence. The court found the lot operator negligent because "the removal of the tires, in the manner it was accomplished, created sufficient noise to put the defendant's cashier on notice of an occurrence requiring some action on his part." *Id.* at 661.

gence, apparently only for parking lots.⁶³ Exactly what the “fair rule, easy to apply” is, was not made obvious—unless the rule is simply that the vehicle owner assumes all risk of loss.

The *Ellish* dissent disagreed with the result, but apparently not with the decision to fashion a new rule. The dissent emphasized the captive-customer nature of the situation. The public, according to the dissent, has a “right” to drive to the airport but, after arrival, has no choice in where to park.⁶⁴ The dissent also challenged the six factors upon which the majority relied (quoted above). Instead of focusing on the apparent impersonality of the situation, the dissent focused on the factors that would be understood by a vehicle owner as preventing her or him from freely using her or his vehicle as desired. Particularly, the dissent emphasized the lot operator’s obvious efforts to secure the premises against uncontrolled egress:⁶⁵

Would not the patron have reason to believe, from the fact that the lot was fenced in and its exit gate manned throughout the day and night, that his car was safer there than on the streets or in an unmanned, un-patrolled and unfenced lot and that the lot operator was accepting supervision and control, though limited in degree, of his car?⁶⁶

In the end, the distinction between the majority and dissent in *Ellish* is based more on subjective conclusions about

63. In all the discussion, the Appellate Division never refers to any trial or empirical evidence concerning the “expectations” of the average person using a park-and-lock structure. Apparently the conclusions concerning those expectations were nothing more than the court’s idea about what a person “should” expect.

64. See *Ellish*, 345 N.Y.S.2d at 665-68 (Shapiro, J., dissenting).

65. See *id.* In *Sealey v. Meyers Parking Sys.*, 555 N.Y.S.2d 574 (N.Y. City Civ. Ct. 1990), the court’s decision sounds like it is relying on *Ellish* but comes to a distinctly contrary result. In *Sealey*, the automated four-story park-and-lock garage was enclosed and employed a security guard. (The similar structure in *Ellish* was patrolled by airport police). A parker could leave only through the cashier-attended exit. On those facts the court held that a bailment existed. There is, rather obviously, no significant factual distinction between *Sealey* and *Ellish*, with the possible exception that the *Sealey* parking garage was not at JFK airport. The court in *Sealey* appears to have found it incredible that the security guard did not hear the vandals working on the plaintiff’s car. Perhaps a finding of negligence would have been both more appropriate and consistent with *Ellish*.

66. *Ellish*, 345 N.Y.S.2d at 656 (Shapiro, J., dissenting).

patrons' "reasonable expectations" about security than on any substantive legal theory.

The *Ellish* formulation (if it can be called that) can be criticized as providing a parking lot operator with an opportunity not available to other commercial landowners. Based on either the majority's or dissent's discussion, it is possible to conclude that when a customer can observe conditions at the lot which make it appear that the lot operator is making little or no effort to deter theft and vandalism, the operator has no duty of any kind to the lot patron. Such a rule encourages lot operators to be obviously, openly, and actually unconcerned about the safety of vehicles and or persons in them. It would be difficult to find a better way to encourage auto theft.

At least one lower New York court used *Ellish's* general theory but reached the opposite result in a substantially identical case. In *Greenberg v. Kinney Systems*,⁶⁷ the New York City Civil Court, Small Claims, noted that *Ellish* recognized that liability could be based on negligence. The court found the lot operator liable for damages to the vehicle and loss of its content because the operator failed to exercise even a minimal degree of care. There was no evidence that the lot operator patrolled the lot to protect its vehicles.⁶⁸ The court rather candidly noted:

To permit an operator of a public facility not to exercise a minimal degree of care to assure the public that the facilities are indeed suitable and reasonably safe for the purposes for which it is intended, is to rent someone a space in "hell." To rule otherwise would be against public policy.⁶⁹

Further variety in New York State case law comes from

67. *Greenberg v. Kinney Systems*, 534 N.Y.S.2d 85 (N.Y. City Civ. Ct. 1988).

68. *See id.* at 86.

69. *Id.* (citations omitted). The Small Claims Court distinguished *Ellish* on the basis that in *Ellish* there was evidence that the lot operator did undertake some measures to protect the parked cars, where there was no similar evidence in the case before it. Given the theory and language in *Ellish*, that distinction is extremely weak. *See id.*

In *Sealey*, 555 N.Y.S.2d at 574, another Queens County Small Claims decision, the court purported to rely on *Ellish* but found that the lot operator had undertaken security measures, thus implying that parked vehicles were protected. The facts used to "distinguish" *Ellish* were not substantially different from the *Ellish* facts. The court rather obviously favored the *Ellish* dissent.

a Buffalo court—"Upstate" New York may be a world apart from "the City." In *Garlock v. Multiple Parking Services, Inc.*,⁷⁰ Judge McCarthy's opinion includes an extensive review of New York parking lot cases. The conclusion is not particularly flattering. With respect to *Ellish*, the decision notes, perhaps with tongue in cheek:

Ellish is an interesting case, since it inherently, though perhaps unconsciously, contains the emerging modern theory for determining liability in parking lot cases. First, bailment will be the legal key to liability; second, the amount of security will determine whether there is a bailment; third, the easier the operator makes it for the auto to be stolen or vandalized, the less likely he is going to be held liable.⁷¹

After further pointed, and reasonable, remarks about the "emerging theory," *Garlock* concludes that the public policy of the City of Buffalo, revealed in its licensing ordinance, is that parking lot owners should be responsible for the safety of the parked vehicles.⁷² While the court verbally applies a negligence rule, rather than bailment, it places the burden of producing evidence concerning the event on the parking lot owner. Without that evidence, the lot owner is liable for failing to provide reasonable protection under the circumstances.⁷³ That looks quite like bailment under a different name. Obviously lower New York courts have engaged in some rather neat intellectual games to avoid the *Ellish* result.

While Queens and Buffalo may be a milieu different from JFK International, perhaps Kentucky is in JFK country. In *Central Parking System v. Miller*,⁷⁴ the Kentucky Supreme Court distinguished the "modern" automated parking structure with hundreds of cars per day from the "parking garage of 1925." That distinction, the court found, made the "standards that were applicable to a liveryman" no longer practical.⁷⁵ The Kentucky court expressly relied on *Ellish* and

70. *Garlock v. Multiple Parking Servs., Inc.*, 427 N.Y.S.2d 670 (Buffalo City Ct. 1980).

71. *Id.* at 675. One might question the first factor, but the remainder are sound.

72. *See id.* at 677.

73. *See id.* at 678; *see also* discussion *infra* Part II.D.

74. *Central Parking Sys. v. Miller*, 586 S.W.2d 262 (Ky. 1979).

75. *Id.* at 262. The court expressly held that *Blackburn v. Depoyster*, 272

found the lot operator not liable because the plaintiff presented no evidence of negligence. The plaintiff obviously relied on the presumption of negligence in bailment rules. The dissent in *Central Parking* contends that the modern vehicle owner needs more protection than did the 1925 owner because of the large numbers of vehicles and the limited number of public parking spaces.⁷⁶ The dissent could have, but did not, mention the significantly higher rates of auto theft and the modern illegal market for stolen cars and their parts.

In most parking structure cases, the courts have focused on conclusions about the parties' hypothetical expectations under the circumstances,⁷⁷ not on any consistent legal theory. Obviously, when the rules of bailment are abandoned, there is no consensus concerning what rules should replace them.

C. *Variations on a Theme—the Burden of Coming Forward*

Under any of the legal theories discussed above, the vehicle owner has the burden of proving the lot operator's liability. When bailment rules are used, to prove a prima facie case the plaintiff-bailor need only show that the bailed item was not returned, or was returned in damaged condition.⁷⁸

S.W. 398 (Ky. 1925), which expressly refers to livery cases, "is no longer applicable." *Miller*, 586 S.W.2d at 263.

76. See *Miller*, 586 S.W.2d at 263 (Sternberg, J., dissenting).

77. Since the courts do not mention any evidence introduced to prove the parties' actual expectations, one must conclude that the relevant facts are so generally known that it was deemed appropriate to take judicial notice of them, and that reasonable persons would have the same expectations as the judges. Such a conclusion is, however, inconsistent with the diversity of opinion (within and between courts) concerning what those expectations are.

78. See, e.g., *Malone v. Santora*, 64 A.2d 51 (Conn. 1949); *Davidson v. Ramsey*, 210 S.E.2d 245 (Ga. Ct. App. 1974); *Weinberg v. Waco Petroleum Co.*, 402 S.W.2d 597 (Mo. Ct. App. 1966); *Pavesi v. Carollo*, 481 N.Y.S.2d 756 (App. Div. 1984); *J.W. Mays, Inc. v. Hertz Corp.*, 221 N.Y.S.2d 766 (App. Div. 1961); *Stephens v. Katz Parking Sys., Inc.*, 348 N.Y.S.2d 492 (N.Y. City Civ. Ct. 1973); *Scruggs v. Dennis*, 440 S.W.2d 20 (Tenn. 1969); *Allright, Inc. v. O'Neal*, 596 S.W.2d 208 (Tex. Civ. App. 1980, no writ). Based on the normal rule that a party can rely on third parties to not engage in unlawful or negligent behavior, if the bailee proves the vehicle was stolen, the general result is that he/she/it has met the burden of coming forward with exonerating evidence. That may not preclude liability, however, because the plaintiff might be able to show that the bailee-lot operator was aware of the potential for illegal activity, such as the number of cars stolen or vandalized in this particular lot or others in the area (from police records), or the actual security precautions taken by the lot operator. The finder of fact may well conclude that the lot operator contributed to the loss by failing to take reasonable precautions under the circumstances. See *Pavesi*, 481 N.Y.S.2d at 756; *Motors Ins. Corp. v. American Garages, Inc.*, 414

To avert liability, the bailee must then come forward with evidence that the loss or damage was not due to his/her/its fault.⁷⁹ If the bailee can prove the exact cause of the loss, then exercise of due care is an issue of fact, subject to the normal burden of proof rules.⁸⁰

In contrast, under either regular negligence or licensee-licensor rules, the plaintiff cannot establish a prima facie case merely by proving the item was damaged or lost while on the defendant's property. Instead, the plaintiff must present evidence showing the exact cause of the loss or damage.⁸¹

It takes little imagination to see why this distinction is important in the average parking lot case. Regardless of the type of parking lot, the vehicle owner is not present at or near the time the relevant event occurs—the whole idea of parking is leaving the vehicle while the owner is busy elsewhere. Therefore, all the owner knows is that the vehicle was missing or damaged when she or he returned for it. Similarly, in most parking lots (especially large, multi-floor structures) none of the lot operator's employees witness (or remember witnessing) the relevant event. Thus, the only evidence is that the vehicle was parked in good condition and returned in damaged condition, or not at all. The direct cause of the loss remains unknown. The choice between bailment and negligence effectively determines liability. When the exact cause of the loss is not proven: (1) under bailment rules, the lot operator would be held liable due to the presumption; or (2) under standard negligence/licensee rules, the lot operator would not be held liable.

However, some courts that have decided to apply a "negligence" standard in parking structure cases have also

N.Y.S.2d 841 (Sup. Ct. 1979). *But see* *Coleman v. Chicago Thoroughbred Enters., Inc.*, 243 N.E.2d 333 (Ill. App. Ct. 1968) (effectively holding as a matter of law that a parking lot operator has no duty to protect licensee's vehicles against unlawful acts of third parties, despite evidence that some security measures were taken).

79. *See, e.g., Malone*, 64 A.2d at 51; *Davidson*, 210 S.E.2d at 245; *Weinberg*, 402 S.W.2d at 597; *Pavesi*, 481 N.Y.S.2d at 756; *J.W. Mays*, 221 N.Y.S.2d at 766; *Stephens*, 348 N.Y.S.2d at 492; *Scruggs*, 440 S.W.2d at 20; *O'Neal*, 596 S.W.2d at 208.

80. *See, e.g., Malone*, 64 A.2d at 51; *Davidson*, 210 S.E.2d at 245; *Weinberg*, 402 S.W.2d at 597; *Pavesi*, 481 N.Y.S.2d at 756; *J.W. Mays*, 221 N.Y.S.2d at 766; *Stephens*, 348 N.Y.S.2d at 492; *Scruggs*, 440 S.W.2d at 20; *O'Neal*, 596 S.W.2d at 208.

81. *See, e.g., Coleman*, 243 N.E.2d at 333.

adopted the presumption used in bailment. In *McGlynn v. Parking Authority of Newark*,⁸² after holding that lot operators have a negligence-based duty of care to patrons, the court addressed the proof problems:

The same policy considerations that support the presumption of negligence with a bailment also support a presumption of negligence in the enclosed garage context. Those policy considerations are: (1) the operator is under a duty to exercise reasonable care to protect the parker's property; (2) the operator controls access to the premises; and (3) the parker is absent while the car is parked. We conclude that a presumption of negligence arises from damage to a car parked in an enclosed garage.⁸³

The D.C. Court of Appeals, in *Parking Management, Inc. v. Gilder*,⁸⁴ implicitly applied a presumption of negligence because it sustained a judgment for the vehicle owner when there was no evidence of the exact cause of loss.

III. CONTENTS OF VEHICLE

A. Introduction—Bailment Rules Generally Apply

The common starting point in cases concerning the alleged bailment of a vehicle's contents is the vehicle's bailment, as discussed above. If the vehicle is not bailed (or the lot operator has no duty with respect to the vehicle), the standard conclusion is that there is no bailment of, or duty with respect to, the vehicle's contents.⁸⁵ It may be theoretically possible to bail a vehicle's content without bailing the vehicle. In practice, it is very difficult to imagine how that might happen. The possessory aspect of bailment requires transferring control to the bailee. If a person does not control the vehicle, it would be very difficult for that person to con-

82. *McGlynn v. Parking Auth. of Newark*, 432 A.2d 99 (N.J. 1981).

83. *Id.* at 105. Interestingly (and unexplainably) the court cites *Ellish* in support of this ruling.

84. *Parking Management, Inc. v. Gilder*, 343 A.2d 51 (D.C. 1975). See also *Garlock v. Multiple Parking Servs., Inc.*, 427 N.Y.S.2d 670 (Buffalo City Ct. 1980).

85. See, e.g., *Allright Phoenix Parking, Inc. v. Shabala*, 429 P.2d 513 (Ariz. Ct. App. 1967); *Drybrough v. Veech*, 238 S.W.2d 996 (Ky. 1951); *Weinberg*, 402 S.W.2d at 600 ("Of course, if Wayco was not a bailee of the plaintiff's automobile, it was not a bailee of the contents.").

trol the items in it.⁸⁶

Intuitively, one might expect contents to be automatically bailed whenever the vehicle is bailed, i.e., that a vehicle's bailment includes all things in the vehicle. Unfortunately for the vehicle bailor, this intuitive conclusion is contrary to many, if not most, court decisions. This seemingly inconsistent result does not flow from some obscure exception in bailment law, but rather from a relatively mechanical application of traditional bailment rules.

As discussed earlier, a bailment does not exist without the bailee's acceptance of the bailed item.⁸⁷ In the parking lot situation, the obvious and principal item bailed is the vehicle—few people separately take household goods or briefcases to a parking lot for storage. However, if items in a bailed vehicle are not automatically included in the vehicle's bailment, then an independent acceptance is required. Courts applying the most formalistic bailment rules require proof of a separate and special bailment agreement covering any item in the vehicle that is not an integral part of the vehicle.⁸⁸ Even courts that apply a less rigid formula conclude that the vehicle's bailment includes the vehicle's content only if the facts "show notice or knowledge of the alleged bailee that the goods are in fact in his possession."⁸⁹ Even courts that expressly

86. See, e.g., *Giles v. Meyers*, 107 N.E.2d 777 (Ohio C.P. 1952).

87. See 8A AM. JUR. 2D, *Bailments* §§ 1, 28 (1997). There are, however, situations in which a person may become an involuntary bailee, i.e., where a person in possession of another's property may be required to protect that property for the other's benefit. See *id.* § 39. One example is when the owner accidentally misplaces property, e.g., leaves a briefcase in a restaurant chair.

88. See, e.g., *Drybrough*, 238 S.W.2d at 996; *Barnett v. Latonia Jockey Club*, 60 S.W.2d 622 (Ky. 1933); *J.W. Mays, Inc. v. Hertz Corp.*, 221 N.Y.S.2d 766 (App. Div. 1961); *Palotto v. Hanna Parking Garage Co.*, 68 N.E.2d 170 (Ohio Ct. App. 1946) (paying for vehicle's bailment, where lot operator had express notice of contents, makes garage owner liable as bailee for hire); *AMPCO Auto Parks, Inc. v. Williams*, 517 S.W.2d 401 (Tex. Civ. App. 1974, writ ref'd n.r.e.); *Barnette v. Casey*, 19 S.E.2d 621 (W. Va. 1942).

89. *Greenberg v. Shoppers' Garage*, 105 N.E.2d 839, 842 (Mass. 1952) (quoting *D.A. Shulte, Inc. v. North Terminal Garage*, 197 N.E. 16, 19 (Mass. 1935)). In *Greenberg*, the court held there was a content bailment because the vehicle owner expressly inquired about the safety of the valuable merchandise in the vehicle (55 fur coats) if the vehicle was parked overnight, and had received assurances of safety if the vehicle was locked. *Greenberg*, 105 N.E.2d at 840. In *GMAC v. Grafinger*, 306 N.Y.S.2d 606 (N.Y. Civ. Ct. 1969), the court held that there was no content bailment when the vehicle owner only said there were "valuables" in the parked vehicle because, the court said, that description gave no notice of the nature of the items. See also *Barnett*, 60 S.W.2d at 622;

reject bailment as an "outmoded" concept in the parking lot setting distinguish between duties with respect to vehicles and duties with respect to vehicles' content.⁹⁰

For the most part, vehicle-content issues are not treated differently from other situations in which the item expressly bailed contains, or may contain, other items, the exact nature of which may not be known by the bailee. The fact that there is no express, separate bailment of an item's contents does not automatically exclude the contents from the bailment. The more frequently applied rule is that if a person in the bailee's position could reasonably foresee that a bailed item may contain other items, those items are included in the bailment.⁹¹

If the lot operator is made expressly aware of a vehicle's content, a separate bailment agreement may result. However, in the cases that address such a situation, it appears that the lot operator's information came more in the nature of notice about the vehicle's content rather than in the negotiation of an additional agreement.⁹² In some cases, the parking operator denied liability, contending that the person informed of the content was not authorized to enter into bailment agreements for anything other than automobiles.⁹³ Almost invariably, that contention avails the operator little. Parking lot managers, and even mere attendants, have been

Campbell v. Portsmouth Hotel Co., 20 A.2d 644 (N.H. 1941); Greenberg v. Kinney Sys., 534 N.Y.S.2d 85 (N.Y. Civ. Ct. 1988); Weisman v. Holley Hotel Co., 37 S.E.2d 94 (W. Va. 1946).

90. In *McGlynn v. Parking Auth. of Newark*, 432 A.2d 99, 104 (N.J. 1981), the court held: "[T]he operator of an enclosed garage is under a duty to exercise reasonable care to protect the parked cars and those items one would expect reasonably to find within them." See also *Hallman v. Federal Parking Servs.*, 134 A.2d 382 (D.C. 1957); *R.J. White v. Atlanta Parking Serv. Co.*, 228 S.E.2d 156 (Ga. Ct. App. 1976).

91. See *Robin v. Colaizzi*, 166 N.Y.S. 978 (Sup. Ct. 1917) (woman's purse in the pocket of a man's overcoat checked at a restaurant coatroom not included in coat's bailment). See also *White v. Atlanta Parking Serv. Co.*, 228 S.E.2d 156 (Ga. Ct. App. 1976); *Davidson v. Ramsby*, 210 S.E.2d 245 (Ga. Ct. App. 1974); *Stephens v. Katz Parking Sys. Inc.*, 348 N.Y.S.2d 492 (N.Y. City Civ. Ct. 1973). Cf. 38 AM. JUR. 2D *Garages* § 31 n.18 (1968).

92. See, e.g., *Kole-Tober Shoes, Inc. v. Hoary*, 491 P.2d 589 (Colo. Ct. App. 1971) (discussing a self-park facility where a driver specifically requested attendant to lock the station wagon because it contained eleven sample cases all within view of someone outside the vehicle).

93. See, e.g., *Vallee v. Hyatt Corp.*, 433 So. 2d 1070 (La. Ct. App. 1988) (in-dash CB-AM-FM radio considered part of the vehicle); *U.S.F.&G. v. Allright Shreveport, Inc.*, 256 So. 2d 479 (La. Ct. App. 1972).

found to have implied or apparent authority to enter into such secondary bailment agreements, even if expressly informed that they could not accept anything but vehicles.⁹⁴

B. *Items Generally Considered Part of a Vehicle's Bailment*

In many, if not most, cases dealing with a vehicle's content, courts state a general rule and a decision, with little analysis. A typical statement of the general rules applied to a vehicle's content is:

Parking lot proprietors are liable for two categories of car content: (1) the usual, ordinary equipment of a car, such as articles in a trunk, which are reasonably anticipated to be there; and (2) property which is in plain view. . . . These questions, however, are for the trier of fact.⁹⁵

In one sense, there is no clear demarcation between the motor vehicle and the "content" identified under the first category in the preceding quote. Many cases deal with situations in which the vehicle is recovered, but in a damaged or vandalized condition (i.e., "stripped"). The vehicle's engine is, obviously, a major part of the vehicle; considerable effort is required to detach a motor and without that, the bailed item will not be a motor vehicle. There are other parts that are more easily separated and have a separate intrinsic value (such as tires⁹⁶) that are considered part of the vehicle, if for no reason other than a vehicle without tires is no more operable than one without a motor, though the problem is more easily remedied. Both tires and motors are essential parts of the vehicle, necessary for operation. The vehicle's bailment necessarily includes these items.

Other items frequently found in motor vehicles are not objectively essential to its operation, such as hubcaps (or "wheelcovers"), jacks, spare tires, and in-dash entertainment

94. But in *H.S. Strygler & Co. v. Hill Estates, Inc.*, 322 N.Y.S.2d 837 (App. Term. 1971), the court held that a night parking lot attendant did not have apparent authority to accept bailment of \$23,000 in jewelry which was in the vehicle, despite prior holdings that apparent authority existed for things of lesser value. The theory supporting that decision is rather obscure.

95. *Allright, Inc. v. Guy*, 696 S.W.2d 603, 605 (Tex. App. 1985, no writ). In *Guy*, the jury found for the plaintiff-vehicle owner for an amount substantially in excess of the cost of repairs but the decision does not reveal the basis for that excess. *See id.*

96. *See, e.g., Linares v. Edison Parking Inc.*, 414 N.Y.S.2d 661 (N.Y. City Civ. Ct. 1979).

equipment. Objectively, these items are distinct from the vehicle and have their own distinct function (as evidenced by the fact they are frequently stolen from a vehicle without theft of the vehicle itself). Despite that, these items are usually considered as being included in a vehicle's bailment, either as "part of" the vehicle or as something reasonably expected to be found in a vehicle.⁹⁷ Most of the items that fall within this category are things specifically designed to be used in conjunction with a motor vehicle.⁹⁸ Courts that deal with the loss of these types of items generally hold that they are so pervasive in vehicles (passenger automobiles) that it is reasonable to foresee their existence in any automobile.⁹⁹ One court found that a portable cassette player, along with cassette tapes, were reasonably foreseeable due to the common presence of audio equipment.¹⁰⁰ It is fairly safe to predict that courts will reach a similar result for factory-installed CD players, CD changers, and CDs as well. It is not that these items are actually "part of the vehicle," but that their presence is so pervasive as to make their presence foreseeable. Though the courts normally do not consider entertainment equipment as an essential component of a vehicle, the actual results reflect the general consumer attitude that a car without an adequate stereo is incomplete.¹⁰¹ Finding

97. See, e.g., *McGlynn v. Parking Auth. of Newark*, 432 A.2d 99 (N.J. 1981).

98. Audio equipment in motor vehicles operates on a different voltage than home or portable audio equipment, and many are designed to fit the unique contours of particular vehicles. Similarly, motor vehicle jacks can be used for other purposes but are generally designed for automotive use; some, like audio equipment, are designed to fit particular vehicles and are otherwise useless.

99. See, e.g., *Greenberg v. Kinney Systems*, 534 N.Y.S.2d 85, 86 (City Civ. Ct. 1988) (holding radar detector and remote garage door opener to be "items that were part of the car or items directly used in its operation" but no judgment was granted for packages containing music albums and auto parts); *Vallee v. Hyatt Corp.*, 433 So. 2d 1070, 1073 (La. Ct. App. 1983) ("[T]he radio was an in-dash model and is best viewed as a component part of the automobile as a whole."). In *McGlynn*, 432 A.2d at 104, the court treated a portable cassette player on a cradle between the seats the same as it would treat a factory-installed radio.

100. See, e.g., *Vallee*, 433 So. 2d at 1070; *McGlynn*, 432 A.2d at 99. Based on the courts' reasoning in these cases, one might include a number of things in this category, such as radar/laser detectors, garage door opener transmitters, ice-scraping tools, tire chains (at least in colder climates during the winter), CB radios, engine oil, windshieldwasher fluid, and maybe even a toolkit useful for minor repairs.

101. The cases raise an interesting question concerning factory-installed "accessories." In many decisions, the fact that an item (e.g., a stereo radio) was

this type of item part of a vehicle's bailment fits comfortably within general bailment principles. It is not theoretically different from concluding that the bailment of an overcoat includes its buttons.

C. *The Foreseeability Test*

1. *Express Notice and Items in Plain Sight*

As almost everyone can testify from personal experience, motor vehicles frequently contain items that are associated with a vehicle's operation solely because they are being transported in the vehicle—passengers, pets, pots and pans, pizza, petunias, pachyderms, etc. At some point along a continuum between absolutely essential and totally unreasonable, there is a dividing line between items that are automatically included in a vehicle's bailment and those that are not. In determining where to draw that line, courts generally employ some type of foreseeability test. If a particular item's presence does not fall on the foreseeable side of the line, the vehicle owner must show something more than the item's mere presence in the vehicle at the time of bailment.

The easiest cases of foreseeability involve express notice of lot owners. Courts normally state that if the bailee is expressly made aware of items in the vehicle and accepts the vehicle with that knowledge, the bailment includes the additional items regardless of their degree of association with the vehicle.¹⁰² However, there are few cases where such an express notice of the vehicle's content has been given.

Some courts have addressed situations in which it was at least alleged that the items in the vehicle were "in plain sight," such as lying on the front seat, back seat, or in the rear of a station wagon. The results in those cases have been inconsistent. In some cases, the in-plain-sight aspect was

factory-installed is cited as evidence of the item's intrinsic association with the vehicle. Could these cases be used to argue that all factory installed or provided items are automatically included in the vehicle's bailment? With high technology moving into automobiles (e.g., global satellite positioning computers, trip recorders, driving guides, and maybe soon automatic pilot), it seems to stretch the "reasonably foreseeable" envelope to include all factory-installed accessories, unless one takes into account the vehicle's make, model, and production year. Should the "reasonable parking lot operator" be deemed aware of the extent of factory-installed options available in all vehicles?

102. See *supra* notes 88-92 and accompanying text.

equated with actual notice.

In *Swarth v. Barney's Clothes, Inc.*,¹⁰³ the plaintiff alleged that she left her wallet on the front seat of the vehicle, which would appear to satisfy the in-plain-sight rule. The court held that the wallet was not included in the vehicle's bailment, due to lack of express notice and the "fact" that "[s]elf-evidently valuable and easily stolen articles are not left in parked automobiles."¹⁰⁴ Perhaps the court's thought was that leaving a wallet full of money in a parked car is inherently unforeseeable or incredible, even if in plain sight.

Based on the implied notice from things actually in sight in the vehicle, it seems reasonable to conclude that those items would be bailed with the vehicle.¹⁰⁵ However, an additional factor comes into play when the visible (or expressly mentioned) items themselves contain items. Those cases raise the same question as items that are not readily apparent (such as in the trunk).

In *Kole-Tober Shoes, Inc. v. Hoery*,¹⁰⁶ the plaintiff's salesman was driving a company station wagon that contained eleven sample cases that could be easily seen from outside the vehicle. The salesman specifically requested that the lot attendant lock the vehicle because of the cases. The lot operator argued that even if it was liable for the loss of the cases, it should not be liable for the cases' contents. The Colorado Court of Appeals rejected that argument because the operator was aware that the items were sample cases. Because the "defendants knew that some merchandise was in the car, the fact that the specific type and value of the samples were not made known to them is of no importance."¹⁰⁷ In other words, the awareness of the container carries with it things that might be reasonably foreseen in that type of container.

103. *Swarth v. Barney's Clothes, Inc.*, 242 N.Y.S.2d 922 (App. Term 1963).

104. *Id.* at 923.

105. *Cf. J.W. Mays, Inc. v. Hertz Corp.*, 221 N.Y.S.2d 766 (App. Div. 1961).

106. *Kole-Tober Shoes, Inc. v. Hoery*, 491 P.2d 589 (Colo. Ct. App. 1971).

107. *Id.* at 591. The court cited *Barnett v. Casey*, 19 S.E.2d 621 (W. Va. 1942), to the effect that liability for the sample cases' contents would not extend to items of extraordinary value not normally found in such cases. *Id.* See also *Greenberg v. Shoppers' Garage, Inc.*, 105 N.E.2d 839 (Mass. 1952) (55 fur coats were visible through windows of plaintiff's station wagon and attendant was told that vehicle contained valuable merchandise).

2. *Items Not in Plain Sight*

With respect to unknown, not-in-plain-sight, items, parking lot operators are in a position substantially similar to a bailee of any item that may contain other items. The question is whether the item actually inside the bailed item was reasonably foreseeable by a person in the bailee's position at the time of acceptance.¹⁰⁸ The answer to that question in any particular case frequently depends on how the question is posed, as anyone dealing with "foreseeability" questions knows. If the question is stated as: "Was it reasonably foreseeable that the vehicle's trunk contained other items?" the answer will almost universally be "yes." On the other hand, if the question is stated as: "Was it reasonably foreseeable that the vehicle parked at an airport parking lot had an original Matisse painting in the trunk?" the answer will invariably be "no." In *Campbell v. Portsmouth Hotel Co.*,¹⁰⁹ the New Hampshire Supreme Court applied a relatively broad foreseeability standard. The court held that travelers stopping for the night at a hotel might reasonably be expected to leave in their vehicle "accessories, equipment and baggage" for which they had no need while at the hotel. Thus, the hotel, as bailee of the guests' vehicle, was held to be the bailee of the items inside the vehicle, even though no express notice was given.

In addition to how the court poses the question, the answer to the foreseeability question may also vary depending on whether the question is considered one of fact or one of law.

108. See, e.g., *Davidson v. Ramsby*, 210 S.E.2d 245 (Ga. Ct. App. 1974) (whether camera equipment, binoculars, briefcases, sporting equipment, toolbox and tools could be reasonably expected to be in a car's trunk held to be a jury question). In *Davidson*, the court sounds somewhat indignant about the plaintiff's argument:

If the law is as contended by plaintiff [vehicle owner], and if the bailee is responsible for all the contents of the car whether he had any knowledge of such contents or not, suppose the car contained an expensive diamond ring of the value of \$100,000 (or \$100,000 in currency for that matter), must the bailee come up with \$100,000 when the car is stolen? What position is the bailee in to dispute the car owner's declaration that the automobile did contain such an expensive ring, or \$100,000 in currency?

Id. at 248.

109. *Campbell v. Portsmouth Hotel Co.*, 20 A.2d 644 (N.H. 1941).

In *Jack Boles Services, Inc. v. Stavely*,¹¹⁰ the owner left his luxury vehicle with the valet parking service at a private golf course. In the vehicle's trunk was a valuable painting entrusted by plaintiff Stavely to the vehicle owner's wife some days earlier. The owner gave the vehicle's keys to the valet attendant, who drove the vehicle to its parking place and put the keys on the floor under the front seat (apparently the standard practice).¹¹¹ The vehicle was stolen; the thief did not take the time to remove the painting from the trunk before driving off. Stavely alleged that Jack Boles negligently allowed the painting to be stolen. The court's first analytic step was to determine if Jack Boles owed any duty to Stavely.¹¹² The court stated: "The existence of a duty is a question of law for the court to determine from the facts surrounding the incident in question. A duty of ordinary care normally arises out of a bailor-bailee relationship."¹¹³

In *Stavely*, there was no question that the vehicle itself had been bailed. The court found that the painting was in fact delivered to the parking attendant with the vehicle. Therefore, the determinative question was whether the bailee had accepted the painting. The court noted that under Texas law, a bailee is liable for lost property of which it has actual knowledge, and any property that it could reasonably expect to be inside the expressly bailed item.¹¹⁴ After reviewing cases from Texas and other jurisdictions, the court held that:

[A] bailee accepts responsibility for unknown contents of a bailed automobile when the presence of those contents is reasonably foreseeable based on the factual circumstances surrounding the bailment of the automobile. . . . The foreseeability of the value of the contained items does not bear on the bailee's notice and acceptance of those items.¹¹⁵

The court then decided, as a matter of law, that the surrounding facts (i.e., parking an expensive vehicle at a Dallas country club) could lead a reasonable person to believe that the vehicle contained valuable things such as golf clubs, ten-

110. *Jack Boles Servs., Inc. v. Stavely*, 906 S.W.2d 185 (Tex. App. 1995, writ denied).

111. *See id.* at 187.

112. *See id.* at 188.

113. *Id.* (citation omitted).

114. *See id.*

115. *Id.* at 189 (citations omitted).

nis rackets, and sportswear, but “[i]t cannot be said . . . that a country club parking attendant should reasonably foresee the presence of valuable artwork in each member’s car trunk.”¹¹⁶ Thus, in deciding the legal question of scope of duty, the court applied a foreseeability test keyed to the type of item. The court expressly declined to pose the foreseeability question as: “Was it foreseeable that the vehicle might contain valuable items?” In reaching that conclusion, the court reviewed two prior cases concerning hotels.

In *Berlow v. Sheraton Dallas Corp.*,¹¹⁷ a hotel failed to redeliver a bailed package. When the hotel received the package, it was unaware that the package contained valuable jewelry. The hotel argued that the jury should have been instructed that the hotel was liable only if it could reasonably foresee that the package contained valuable jewelry. The court held that the jury question concerning foreseeability could be framed in terms of whether valuable items might be in the package, rather than the particular type of item.¹¹⁸ In other words, the jury was to determine if a reasonable hotel could foresee that a bailed package contained valuable contents; it was not limited to determining if the hotel could specifically foresee that the package contained expensive jewelry. When presented in that context, the answer seems to be obvious: why would a hotel guest take a package with valueless contents to the hotel management for safekeeping?¹¹⁹

In *Shamrock Hilton Hotel v. Caranas*,¹²⁰ the hotel lost a purse that had been bailed in its restaurant. The purse con-

116. *Jack Boles Servs., Inc. v. Stavely*, 906 S.W.2d 185, 190 (Tex. App. 1995, writ denied). The question concerning foreseeability of valuable items, as opposed to the foreseeability of particular types of items, was raised by two prior Texas cases dealing with hotel bailees.

117. *Berlow v. Sheraton*, 629 S.W.2d 818 (Tex. App. 1982, writ ref’d n.r.e.).

118. *See id.* at 822.

119. However, in *Waters v. Beau Site, Co.*, 186 N.Y.S. 731 (N.Y. City Ct. 1920), the court held that the Hotel Biltmore had no reason to anticipate that a patron’s stored trunks contained a \$1,000 diamond pendant. The court spent considerable time distinguishing trunks and luggage being carried by a common carrier and accompanying a traveler (can anticipate valuable jewelry) from the trunks stored at a hotel for a former guest who anticipated returning in a few days (cannot anticipate valuable jewelry). The distinction is not very convincing, particularly in light of the tour of the storage facility given to the plaintiff before storing the trunks. The tour was obviously designed to assure the plaintiff of the absolute safety of stored items.

120. *Shamrock Hilton Hotel v. Caranas*, 488 S.W.2d 151 (Tex. Civ. App. 1972, writ ref’d n.r.e.).

tained jewelry worth over \$13,000. The hotel contended that it should be liable only for the "normal" contents of a purse, such as petty cash and cosmetics. The court disagreed. The court noted that the hotel was very well known and it was general knowledge that guests often brought valuable jewelry with them to the hotel. Thus, the court held, a jury could reasonably find that it was foreseeable that a purse bailed at that hotel's restaurant might contain jewelry and the hotel was liable for failure to redeliver.¹²¹

In the hotel cases, Texas courts found that both the item and its contents were the subject of a single bailment. These cases express the proposition that a bailee effectively accepts the content of a bailed item so long as that content is reasonably foreseeable under the circumstances, even if the bailee is not in a position to determine the exact nature or value of the content. It is not necessary that the particular item's presence is foreseen, so long as it is within a category of foreseeable items. Moreover, the hotel cases (and most others) treat foreseeability as a factual question. Framing the question for jury consideration remains a question of law.¹²²

121. See *id.* at 155. Perhaps an average jury might conclude that everyone who stayed at an expensive hotel and dined at its expensive restaurant would necessarily have expensive items in their possession. Logically, a guest who brought valuable jewelry to the hotel could: (a) place it in the hotel's safe, (b) leave it in the hotel room, or (c) carry it wherever he or she went. Evidence could no doubt be produced that alternative (a) was not used frequently, leaving it foreseeable that the other alternatives were chosen. It is also likely that a jury would find it reasonably foreseeable that a guest would not choose alternative (b), given the general knowledge that hotel employees have access to guest rooms.

Without being sexist, one might surmise that the average male juror would conclude that it is foreseeable that the average female's purse could contain anything. The author firmly believes that women's purses somehow extend into a fifth or higher dimension, allowing them to contain items that, individually or collectively, substantially exceed four-dimensional limitations on mass and volume.

122. It appears that the hotel cases are contradictory with respect to the proper jury question. *Berlow*, 629 S.W.2d at 818, keys the question to value, rejecting the argument that the question should be keyed to the type of items. See *supra* notes 117-18 and accompanying text. *Caranas*, 488 S.W.2d at 151, keys the question to the type of item, rejecting the argument that it should be keyed to "normal" (less valuable) items. See *supra* notes 120-21 and accompanying text. This apparent inconsistency disappears when the type of container involved is considered. In *Berlow*, the container was a nondescript box; other than mass and volume, it gave no clue as to the character of its contents. Any foreseeability test keyed to items must logically be answered either "anything"

D. *Applying the Foreseeability Test to Parking Lot Cases*

There is at least one significant difference between the hotel cases and the parking lot situation. In the hotel cases, the sole function of items expressly bailed was to contain other objects. Most motor vehicles' principal function is transportation. Therefore, the probability that a vehicle contains unrelated items is lower than with a purse or storage box. This difference might explain the courts' difficulty in dealing with items that are not directly related to a vehicle's operation but are an object of the vehicle's function, i.e., the items transported.

If the situation is treated as two bailments, one for the vehicle and one for its contents, the bailor could theoretically recover for loss of the contents even if he or she could not recover for the vehicle. However, court decisions consistently ask first if the vehicle was bailed, treating the potential content bailment as a subsidiary question. The most common analysis is actually an extension of the analysis that supports the inclusion of spare tires and jacks in the vehicle's bailment, i.e., the item is found in vehicles so frequently that a lot operator can foresee them in every vehicle.

In *McGlynn v. Parking Authority of City of Newark*,¹²³ the New Jersey Supreme Court stated:

In a modern society, where car radios and cassette players are common, it is reasonable to expect that a car will contain a small cassette player and cassettes. Thus, in this case the duty of the [lot operator] extended to the cassettes and cassette player in the McGlynn vehicle as well as to the hubcaps and outside antenna of the Backer vehicle.¹²⁴

In effect, the court concluded that a cassette player and cassettes are as common in cars as coins are in purses.

In *Vallee v. Hyatt Corp.*,¹²⁵ the primary issue was the amount of damages to be awarded as a result of the plaintiff's vehicle being stolen and then recovered in a damaged condi-

or "nothing." The purse in *Caranas* does, however, give some clue about its content, making a foreseeability test keyed to type of content more appropriate. Where motor vehicles may fall on a continuum between women's purses and nondescript boxes could be the subject of considerable debate.

123. *McGlynn v. Parking Auth. of Newark*, 432 A.2d 99 (N.J. 1981).

124. *Id.* at 104. A similar conclusion was reached with respect to an in-dash CB-AM-FM radio/cassette player, which was considered a component part of the vehicle. *Vallee v. Hyatt Corp.*, 433 So. 2d 1070 (La. Ct. App. 1983).

125. *Vallee*, 433 So. 2d at 1070.

tion. When the vehicle was recovered, the in-dash CB-AM-FM radio/cassette player and a number of miscellaneous items were missing.¹²⁶ With respect to the radio, the court noted that it was an in-dash model and best viewed as a component part of the automobile.¹²⁷ As for the other items, the Louisiana Court of Appeals relied on the Louisiana Supreme Court's decision in *Insurance Co. of North America v. Solari Parking*¹²⁸ for the proposition that it would be unreasonable to conclude that the lot operator was unaware that people frequently leave personal items in their vehicle.¹²⁹ Therefore, the court held the defendant liable for those items, including the ones not inherently part of the vehicle.

The "notice of contents" requirement for non-accessory items places the vehicle owner in a dilemma. In *AMPCO Auto Parks, Inc. v. Williams*,¹³⁰ plaintiff Williams was visiting Dallas, driving a rented car. He parked at AMPCO's commercial lot, receiving a "stub" from an attendant. The vehicle's locked trunk contained personal clothing, "silver dollars, silver quarters, pictures, antique family heirlooms, jewelry, and a pre-Columbian bell (1000 B.C.)."¹³¹ Due to apprehension about employee theft, Williams deliberately did *not* tell the lot attendants about the trunk's content. Applying the general rule concerning actual notice or reasonable foreseeability, the jury found that AMPCO, "acting as a reasonable and prudent person" would not have foreseen that Williams' vehicle's trunk might contain "valuable articles of clothing."¹³² The Texas Appellate Court upheld the jury's verdict. The court distinguished *Caranas*¹³³ (the hotel purse case) stating that the reasonableness question is one of fact and juries

126. The personal items included several eight-track tapes, a tire gauge, miscellaneous tools, business papers, and a porcelain duck. *See id.* at 1073.

127. *See id.*

128. *Insurance Co. of N. Am. v. Solari Parking, Inc.*, 370 So. 2d 503 (La. 1979). *See supra* notes 23-24 and accompanying text. *See also* *AMPCO Auto Parks, Inc. v. Williams*, 517 S.W.2d 401 (Tex. Civ. App. 1974, writ ref'd n.r.e.).

129. *See Vallee*, 433 So. 2d at 1072.

130. *Williams*, 517 S.W.2d at 401.

131. *Id.* at 402.

132. *Id.* at 402-03. The silver dollars, silver quarters, pre-Columbian bell, etc. were apparently overlooked by the trial court in its instructions. Apparently, this represented a *sub silentio* conclusion that those items were inherently unforeseeable (or unreasonable or incredible). *See id.*

133. *Shamrock Hilton Hotel v. Caranas*, 488 S.W.2d 151 (Tex. Civ. App. 1972, writ ref'd n.r.e.). *See supra* note 122.

might reasonably conclude that valuable items are foreseeable in a woman's purse but not in an automobile's trunk.

While there is variation in results in vehicle-content cases, it is much less than in vehicle cases that do not relate to content. The courts consistently enunciate a test keyed to the foreseeability of items in the vehicle. The theory used to determine if the lot operator had a duty toward the vehicle has had little impact on vehicle-content results. Thus, even though contents are theoretically a separate bailment, they are treated as an add-on to the vehicle's bailment. In other words, if the court finds the lot operator has some duty of care with respect to the vehicle, the only additional question is whether the vehicle's contents were foreseeable. If so, the lot operator has the same duty with respect to those contents.

IV. CONCLUSIONS

On the whole, the news for the vehicle owner is bad, principally due to the nuances of bailment and negligence rules (combined, perhaps, with lack of choice). Applying those nuances produces results that are inconsistent with the degree of responsibility of commercial property owners in general. Everyone has heard of a grocery store operator being held liable in "slip and fall" incidents where the injured person could have avoided by minimal attention to what he or she was doing. The common factor in those cases is that no one knows exactly how the "foreign" substance came to be on the floor (which is similar to the lack of information in parking lot cases). Similarly, most people have heard of apartment or hotel operators being held liable because they failed to take actions to deter criminal activity.¹³⁴ Parking lot operators use their real property to make money from other people using the property—just as grocers and apartment owners—so why should the legal responsibilities be substantially different?

There is a logical explanation for the difference. In non-parking lot situations, the landowner invites others to come on the property to engage in particular activities (e.g., to buy things, to watch a movie, to live, etc.). In contrast, the park-

134. See generally, RESTATEMENT (SECOND) OF TORTS § 302B (1965). Section 302B speaks in terms of "harm to another" but comment b of that section clarifies that "harm to another" includes harm to property. In all the parking lot cases reviewed, none referred to this section.

ing lot operator invites others merely to leave their vehicles on the property while the vehicle owners are busy elsewhere. The principal threat in parking lots is property damage, not personal injury. The law generally provides a greater degree of protection from personal injury. Therefore, the social pressure to impose liability on the property owner is less in the parking lot situation.

Applying traditional bailment rules in parking lot cases produces relatively predictable results. However, there is some uncertainty when the case concerns a vehicle parked in an automated park-and-lock structure. That uncertainty results from the requirement that, to create a bailment, the vehicle owner must surrender significant control of the vehicle to the lot operator. When the vehicle's keys are given to the lot operator, the transfer of control is obvious. However, when the lot operator's only control is through preventing vehicles from leaving the structure, the result is less obvious. In one sense, the lot operator's control is significant—what good is a vehicle that can only be driven inside a single parking structure? However, preventing exit is the only way in which the lot operator exercises control. The vehicle owner retains both control of access to the vehicle's interior and the exclusive ability to move the vehicle under its own power. Applying traditional bailment rules to this situation will most likely result in a conclusion that no bailment is created because the lot operator is not given control over individual vehicles exclusive of the owner. Courts have not been satisfied with that result, more for policy reasons than difficulty in applying bailment rules. As noted by a number of courts, if no bailment exists, the lot operator has minimal, if any, responsibility to safeguard the vehicle. While vehicle owners can take measures to deter theft or vandalism (alarms are becoming standard equipment), the lot operator is in the best position to spread the losses.¹³⁵ Being liable for losses would encourage the lot operator to take measures to deter theft or vandalism, which he is in a much better position to do than the vehicle owner.¹³⁶

135. Allocating losses to the vehicle owner also spreads the cost but in a less precise manner, i.e., to all insured vehicles, not just those that frequent parking structures. This is also less precise because the risks vary depending on the structure, its location, and how it is operated.

136. One argument against finding a bailment is that machine-dispensed

In deciding particular cases, the legal theory applied may be less important than who has the burden of supplying the evidence of the exact cause of the loss. In other words, who loses if the only evidence is that the vehicle was missing when the owner returned? Here, again, the lot operator is in the best position to have the necessary evidence. By definition, the vehicle owner is not around to watch the vehicle. The lot operator is in a position to employ both human and electronic surveillance at all times.¹³⁷ Thus, placing on the lot operator the burden of producing evidence of the exact cause of loss is a necessary corollary to any conclusion that the lot operator has a duty to vehicle owners. As in bailment, the ultimate burden of proof would remain with the plaintiff.¹³⁸

Fashioning rules concerning a vehicle's content is more problematic. Most courts addressing this issue hold that the only contents included in a vehicle's bailment are: (1) things included in an express additional bailment ("notice"), and (2) things a reasonable person would anticipate being in the vehicle (the "reasonable anticipation rule").

In today's world, common sense counsels against advising lot operators or their employees that the vehicle contains valuable personal property.¹³⁹ Giving out that information would only lower the risk-return ratio for dishonest employees. Common sense (and law enforcement advice) also coun-

tickets are not associated with a particular vehicle. Modern technology could fairly easily eliminate that objection. Video cameras could be positioned to take a picture of the vehicle and its license plate (or operator, or both) when the ticket is dispensed at the entry gate. The picture can be electronically keyed to the ticket number and stored in computer memory. When the ticket is presented, the attendant would be shown a picture of the vehicle (and driver), allowing verification. Most current automated systems permit persons without vehicles to obtain tickets, putting the operator only in the position to know that more tickets were issued than cars exited, assuming that it is tracked on a regular basis, which is doubtful. Video cameras at various locations could also increase security levels. Unfortunately, cases like *Ellish*, see *supra* notes 57-61 and accompanying text, actually encourage lot operators not to take steps to guard patrons' vehicles.

137. The "exact cause of loss" in this setting requires more than merely testimony tending to show the vehicle was stolen. Testimony that neither the lot operator (if a person) or any employee stole the vehicle is, at best, self-serving. Making that sufficient evidence of non-liability would more likely promote perjury than prevention.

138. A lot operator who can prove the exact cause of loss would probably, at the same time, provide substantial evidence that reasonable precautions had been taken.

139. There is probably a reasonable exception in salesman-sample situations.

sels against leaving personal items in plain sight, which many courts hold is sufficient notice of the visible content.¹⁴⁰ Thus, while the "notice" rule is perfectly acceptable, it will rarely be applicable.

The reasonable anticipation rule is not, in itself, subject to strenuous objection. On one hand, a lot operator should not be liable for extremely valuable items (e.g., \$100,000 in cash or jewelry) left in a parked vehicle. On the other hand, some courts' interpretation of a reasonableness rule effectively eliminates the lot operator's duty of care. Given the extreme variety of lot designs, locations, manners of operation, etc., perhaps the best course is to frame the issue as one of fact: could a reasonable lot operator, in circumstances similar to the particular evidence of the case, anticipate this type of item being left in the vehicle?¹⁴¹

So where does all this leave the lot operator and the vehicle owner? Certainly not in comfortable certainty with consistent, easily applied rules. This state of affairs could be improved by consistent application of traditional bailment rules. They are relatively simple and easy to apply. The only substantive improvement needed is to apply the Massachusetts rule¹⁴² recognizing that the lot operator's ability to prevent exit is sufficient control to establish a bailment. With that interpretation, bailment rules would produce results consistent with most persons' sense of "what is right."

140. If a negligence theory is applied to parking lot cases, a reasonable argument could be made that a vehicle owner was contributorily negligent when he left things in plain sight or when he told lot attendants about valuable contents (in sight or not).

141. Whether the fact issue should be framed in terms of value or in terms of item type (addressed in *Jack Bowles Servs., Inc. v. Stavely*, *supra* notes 110-16) might be avoided by using both the type of item and its value in framing the issue statement or jury instruction. Very logical arguments can be made for keying the issue to value. For most people, leaving a costume-jewelry tennis bracelet in a vehicle trunk would not be unreasonable. Those same persons would, however, find it unreasonable to leave in the same trunk a diamond tennis bracelet worth \$1,000. Therefore value is a factor. In addition, if one might reasonably anticipate a vehicle containing \$500 in computer programs, the lot operator's obligation is not changed if the vehicle actually contains \$500 worth of something else.

On the other hand, the type of item that may be reasonably anticipated can have an impact, particularly on the degree of risk involved. Obviously, if a reasonable lot operator can anticipate a vehicle containing a particular type of item, so can a reasonable thief. Higher risks justify more vigorous security measures, regardless of the individual value of the risk-producing items.

142. See *supra* note 38.