4.41 BAILMENT (Approved 6/72)

NOTE TO JUDGE

Recovery in bailment depends on proof of failure to exercise the requisite degree of care which proximately results in loss or damage to the bailed articles. The degree of care required depends on the relationship between the parties. In addition to the proposed charges you will probably use other general charges, such as definition of negligence, proximate cause, preponderance of the evidence, etc.

Definition of Bailment:

Under the Uniform Commercial Code "bailee" is defined as "the person who by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them." *N.J.S.A.* 12A:7-102(1)(a). Subsection (h) defines "warehouseman" as a person "engaged in the business of storing goods for hire." [As to duty of care of a warehouseman and carrier, see Cases and Commentary under Mutual Bailment, below.]

INTRODUCTORY PARAGRAPH

A contract of bailment exists when a person turns over an article of property for a particular purpose or merely for safekeeping to another person who accepts the property with the understanding that it will be returned or kept until reclaimed or otherwise disposed of in accordance with the understanding of the parties.

Parties to a bailment contract are called the bailor and bailee. The bailor is the party who surrenders the property and the bailee is the party who receives the property. For a bailment contract to exist the bailee must be given physical possession and control over the property. The bailee must know that the property has been delivered to him/her and he/she must have an intention, express or implied from the circumstances, to exercise control over the property.

The contract of bailment may be expressly agreed upon, in writing or verbally, or it may be implied from the circumstances of the transaction and the conduct of the parties.

The standard of care for the safety of the property that must be exercised by the bailee, the person who has received the property, depends upon the purpose of the bailment, namely, whether it is for the benefit of the bailee alone, or the bailor alone, or for their mutual benefit. (For example, if a car is stored in a parking garage where the garageman will receive a fee for parking, this is a bailment for the mutual benefit of the bailor and bailee since it serves the purposes of both. If, however, a neighbor borrows a lawnmower, the neighbor is a bailee for his/her own benefit of using the lawnmower on his/her lawn and the owner of the lawnmower receives no benefit from that bailment. If a person is asked to keep his/her neighbor's canary for a few days while his/her neighbor is on vacation, the

person who receives the canary is a bailee without any benefit to himself/herself but solely for the benefit of the bailor.)

A. Where Bailment is Not Disputed

In this case the parties agree that plaintiff delivered possession of (specify the article of property) to defendant for (specify the purpose) and defendant agreed to return the property (specify time or conditions). Therefore, in this case there is no dispute as to the existence of the bailment contract. The dispute concerns plaintiff's contention that the defendant, as bailee, did not exercise that degree of care for the safety of the property as was required by law and that as a proximate result of defendant's conduct the property was (damaged, destroyed or lost).

B. Where Bailment is Disputed

In this case the plaintiff contends that he/she was a bailor of property and that defendant was the bailee of his/her property. (Specify plaintiff's factual contentions.) Plaintiff contends that defendant, as bailee, failed to exercise that degree of care required by law for the safety of the property. Defendant, however, denies that a bailment contract or relationship ever existed. (Specify defendant's factual contentions.)

It is for you as jurors to determine from the evidence in this case whether a contract of bailment, as I have previously defined that term, arose out of the transaction in question. If you find from the circumstances and conduct of the parties that the property came into the possession and control of defendant with his/her knowledge, in accordance with an understanding whereby the defendant is to be considered a bailee and the plaintiff a bailor, in accordance with the definition of bailment previously given, then you must conclude that a bailment relationship or contract did arise in the transaction between the parties. If, however, an element necessary to create a bailment contract or relationship, as previously defined, has not been established in this case by the preponderance of the evidence, you must conclude that a bailment contract or relationship did not exist. (If you conclude that a bailment contract or relationship did not exist, then you must bring in a verdict for defendant of no cause for action and you need not consider the question of defendant's negligence or the question of damages.)

Cases:

> For a definition of bailment, *see State v. Carr*, 118 *N.J.L.* 233 (E. & A. 1937); *McFarland v. C.A.R. Corp.*, 58 *N.J. Super*. 449, 524 (App. Div. 1959) (possession and control of the property by the bailee required); *Moore's Trucking Co. v. Gulf Tire and Supply Co.*, 18 *N.J. Super*. 467 (App. Div. 1952) (a bailment existed where a trailer without the truck was left in a warehouse. The trailer would have been as difficult to move as a car without a key and the intentions of the parties were that the trailer should not be removed from the warehouse until it was unloaded); *Cerreta v. Kinney Corp.*, 50 *N.J.*

Super. 514 (App. Div. 1958) (where the bailee does not know that the property had been delivered to him, there cannot be a bailment of such property); *Marsh v. American Locker Co*., 7 *N.J. Super*. 81 (App. Div. 1950) (package stored in locker with key at Penn Station, Newark, where defendant exercised no control over the goods and the court held that by keeping the key plaintiff retained primary control over the package); *J.L. Querner, etc. v. Safeway Truck Lines, Inc*., 65 *N.J. Super*. 554 (App. Div. 1961), *aff'd* 35 *N.J*. 564 (1961) (physical control of the property and also intent to exercise control are essential elements); *Carter v. Allenhurst*, 100 *N.J.L*. 138 (E. & A. 1924) (jewelry checked with a swimming pool attendant); *Kittay v. Cordasco*, 103 *N.J.L*. 156 (E. & A. 1926) (diamonds delivered to a retail jeweler "on memorandum," for sale); *McBride v. DeCozen Motor Co*., 5 *N.J. Misc*. 552 (Sup. Ct. 1927) (automobile placed in shop to be washed); *Hopper's Inc. v. Red Bank Airport, Inc*., 15 *N.J. Super*. 349 (App. Div. 1951) (airplane stored in a hanger).

No bailment was found in the following cases because of lack of exclusive control: *Gilson v. Penn R.R. Co*., 86 *N.J.L*. 446 (Sup. Ct. 1914), *aff'd* 87 *N.J.L*. 690 (E. & A. 1915) (coat of restaurant customer hanging near lunch counter); *Zucker v. Kenworthy Brothers*, 130 *N.J.L*. 385 (Sup. Ct. 1943) (automobile stored in garage with the owner retaining key and right to come and go as he/she pleased). *See also* parking lot cases where the result depends upon control: *Moore's Trucking Co., supra*, 18 *N.J. Super*. at 470; 131 *A.L.R*. 1170 (1941).

C. Duty of Care Owed by Bailee

1. Mutual Bailment

A "mutual bailment" is a bailment which is beneficial to both the bailor (the person who surrenders the property) and the bailee (the person who receives the property). Where there is a bailment for mutual benefit, a bailee will be liable for damage to the property or loss of the property if that damage or loss results from

the bailee's negligence. Thus a bailee is liable to the bailor for loss or damage to the property if the bailee has failed to exercise reasonable care for the safety of the property which came into the bailee's possession. Reasonable care means such care for the safety of the property as a person of ordinary prudence would exercise in the same or similar circumstances.

Cases and Commentary:

Rogers v. Reid Oldsmobile, Inc., 58 *N.J. Super*. 375 (App. Div. 1959); *Parnell v. Rohrer Chevrolet Co*., 95 *N.J. Super*. 471 (App. Div. 1967) (automobile stripped while kept by bailee in a large cyclone fence enclosure); *Franklin v. Airport Grills, Inc*., 21 *N.J. Super*. 409 (App. Div. 1952) (mere fact of fire in a restaurant is not sufficient to establish negligence).

Warehousemen under mutual bailment:

The duty of care of a warehouseman (*N.J.S.A.* 12A:7-102(1) (h)) is defined by *N.J.S.A.* 12A:7-204(1). The duty of care of a carrier is defined by *N.J.S.A.* 12A:7-309(1). Both sections also regulate limitation of damages.

N.J.S.A. 12A:7-204(1) is as follows: A warehouseman is liable for damages for loss of or injury to the goods caused by his/her failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he/she is not liable for damages which could not have been avoided by the exercise of such care.

N.J.S.A. 12A:7-309(1) is as follows: A carrier who issues a bill of lading whether negotiable or non-negotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.

A warehouse receipt may be issued by one who has undertaken to store the goods at no profit or one who is unlawfully engaged in storing goods. New Jersey Study Comment, paragraph 1 under *N.J.S.A.* 12A:7-201. Actual possession need not be established if the warehouseman acknowledges possession. Uniform Commercial Code Comment 1, *N.J.S.A.* 12A:7-102; paragraph 1 under *N.J.S.A.* 12A:7-203.

2. Bailment for the Sole Benefit of Bailor

Where the bailment is for the sole benefit of the bailor, as where property is accepted by the bailee as a favor to the bailor without compensation or other benefit to the bailee, the bailment is known as a gratuitous bailment. Where such a bailment exists, the bailee is not responsible for loss or damage to the property unless such loss or damage is caused by the gross negligence of the bailee.

Gross negligence is defined as the failure to exercise a slight amount of care or diligence for the safety of the property. It may also be described as a great degree of negligence. For bailor to recover it is not necessary for him/her to show that the bailee wilfully or intentionally caused the injury or loss of the property, but it is necessary for you to find that the bailee did not exercise even a slight degree of care for the safety of the property.

Cases:

> *Weinstein v. Scheer*, 98 *N.J.L.* 511 (E. & A. 1922) (liability for gross neglect or bad faith); *Field v. Serpico*, 24 *N.J. Misc.* 289; 49 *A.*2d 21, (2 Jud. Dist. Ct. 1946); *Dudley v. Camden and Philadelphia Ferry Co.*, 42 *N.J.L.* 25 (Sup. Ct. 1880); *In Re National Molding Co.*, 230 *F.*2d 69, 72 (3 Cir. 1956).

3. Bailment for Sole Benefit of Bailee

Where the bailment is for the sole benefit of the bailee, that is, where the bailment is solely for the benefit of the person who receives the property, that person must exercise that degree of care and vigilance for the safety of the property which persons of extraordinary care, prudence and foresight would exercise in the same or similar circumstances. Thus, if property is received by a bailee for his/her own benefit without benefit or advantage to the bailor, then the bailee is liable for loss of or damage to the property if the bailee has failed to exercise that degree of care for the safety of the property which an extraordinarily prudent and careful person would exercise in the same or similar circumstances.

NOTE TO JUDGE

> We can find no New Jersey cases expressing the standard of care in the case of bailment for the benefit of the bailee only. Some cases in other states have used the term "slight negligence" as the test, which in turn requires definition. *See Prosser, Torts*, (4 ed.) § 34, p. 183, (1971). *See also* 8 *Am. Jur*. 2d 1091, Bailments, § 205 (1963) where it is stated that a bailee must exercise the "greatest care and attention" or "extraordinary" care or "more than ordinary care and diligence." Slight negligence is there defined as the "want of great diligence" which in turn is defined as that care which the very prudent take of their own concerns of affairs of great importance. *See also Baugh v. Rogers*, 24 *Cal*. 2d 200, 148 *P*.2d 633 (Sup. Ct. 1944).

D. Burden of Proof

Where it is shown that property has been damaged (lost or destroyed) while in the hands of a bailee, the law requires the bailee to present evidence explaining the circumstances of the occurrence so that you may determine whether the damage (or loss or destruction) was caused by the bailee's failure to exercise that degree of care imposed upon him/her by virtue of the bailment or whether the damage (or loss or destruction) was the result of some cause other than the bailee's lack of due care.

If after hearing all the evidence you conclude that the preponderance of evidence shows that the bailee failed to exercise the required degree of care and that such failure proximately caused the damage (or loss or destruction) of the bailed property, then the bailor is entitled to recover damages against the bailee. If there is evidence which tends to prove the bailee's lack of due care as well as evidence tending to prove the exercise of care by the bailee then you must determine what the preponderance of the evidence shows. If the lack of due care has been established by the preponderance of the evidence, the bailor is entitled to recover. However, if the preponderance of evidence fails to show the lack of due care on the part of the bailee, or if the preponderance of evidence shows that the bailee did exercise the degree of care required of him/her in the circumstances of

this case, then the bailor cannot recover, and you will return a verdict of no cause for action.

Cases:

Bachman Choc. Mfg. Co. v. Lehigh Warehouse, 1 *N.J.* 239, 242 (1949); *Rodgers v. Reid Oldsmobile Inc., supra*; *Parnell v. Rohrer Chevrolet Co., supra*; *Kushner v. President of Atlantic City, Inc.*, 105 *N.J. Super*. 203 (Law Div. 1969); *Moore's Trucking Co. v. Gulf Tire and Supply Company, supra*.

See also NOPCO Chemical Div. v. Blaw-Know Co., 59 *N.J.* 274, 283 (1971) (where goods were damaged while handled successively by transportation-bailees, burden is shifted to each defendant to come forward with proof of its particular part in the transaction. If any defendant fails to offer proofs, it risks a finding of liability on the evidence).

E. Defenses in General

NOTE TO JUDGE

Contributory negligence as a defense, *see*: *Kandret v. Mason*, 26 *N.J. Super*. 264 (App. Div. 1953); *Parnell v. Rohrer Chevrolet Co.*, 95 *N.J. Super*. 471, 478 (App. Div. 1967). *See also* 8 *Am. Jur*.2d, Bailment, § 177 (1963); 8 *C.J.S.*, Bailment, § 46 *et seq*. *See also Motorlease Corp. v. Mulroony*, 9 *N.J.* 82 (1952) as to the effect of the negligence of an employee of a bailee in possession of the bailed article (auto, for example). *See N.J.S.A.* 2A:53A-6.