



# Bailees' Liability

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## Introduction

- When does bailees' liability exposure arise?
- What is the meaning of 'care, custody or control'.
- When is a bailee liable? Is the liability strict?
- The cross-over between:
  - insurance covering **liability** for damage to the customers' goods, and
  - insurance covering **damage** to the customers' goods.

## Creation of bailment

Where person A (the bailee) knowingly and willingly accepts possession of goods that belong to person B (the bailor).

Often created by a contract (e.g. a contract of hire or storage), but not always.

Key requirement = **transfer of possession** of the goods from bailor to bailee.

Once possession is transferred, the bailee's obligations at law commence.

## Bailees' obligations

Return the goods to the bailor at the conclusion of the bailment in the same condition in which they were originally delivered, or

Where the bailment forms part of a contract to do work on the goods, in the condition that complies with that contract.

It is possible to contract out completely of obligations of a bailee at common-law, but must use clear words to do so – expressly refer to excluding own negligence.

## Meaning of 'care, custody or control'

The word 'bailment' rarely appears in an insurance policy. The words 'care, custody or control' are usually used instead.

Those words have been considered in a number of cases:

1. *Gray Brothers Engineering Ltd v NZI* - NZ High Court 1992
  - Insured using oxy-acetylene torch on boom of excavator
  - Excavator on owner's land and owner nearby
  - Insured set fire to whole excavator
  - Policy excluded property 'in the charge of or under the control of the insured'.
  - Court held only boom under insured's control – rest of damage to excavator covered

## Meaning of 'care, custody or control'

2 *Indemnity Insurance Co v Excel Cleaning Service* – Canadian Supreme Court 1954

- Insured cleaning rug in customer's house and ruins it.
- Customer was present in the house.
- Insured's liability policy excluded property in the insured's 'care, custody or control'
- Court held that the exclusion did not apply.
- Insured's obligation to do work on rug did not mean the rug was no longer in the care, custody or control of the customer.
- Position would probably be different if rug taken to insured's premises for cleaning.

## Meaning of 'care, custody or control'

- 3 *Botany Fork & Crane v NZI* – Federal Court of Australia 1993
- Insured damaged a customer's gondola while moving it in its premises where it was being stored.
  - Insured's liability policy excluded property in the insured's 'care, custody or control'
  - Court held that the exclusion **did** apply.
  - 'Custody' and 'control' don't have to be exclusive to the insured for exclusion to apply. Not limited to legal custody and control – de facto custody or control enough
  - It doesn't matter that control is only for a brief moment.

## Meaning of 'care, custody or control'

Cases difficult to reconcile

- In *Gray Brothers and Indemnity Insurance*, insured was working on customer's premises/land – one found part of excavator being worked on (but not rest of excavator) was in insured's control, the other found a rug being worked on was not in the insured's control.
  - In *Botany* insured was working at own premises and gondola was in its control.
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- If at own premises → likely to be under your control
  - If at customer's premises → only part worked on in your control or may not be in your control at all.

## When is a bailee liable? Strict liability?

- A bailee is liable when it fails to take reasonable care of the bailed goods, i.e. the bailee is negligent.
- Bailee is not strictly liable for damage to the goods. The NZ Court of Appeal said in *Faesenkloft v Coutts & Co Ltd*:

‘A bailee is not an insurer [and] ... [the bailee] is not obliged to turn its premises into a fortress.’

- Where there is a bailment, the onus of proof is reversed.
  - Normally → plaintiff (owner) must prove defendant negligent.
  - Bailment → defendant (bailee) must prove was not negligent.

## Overlap between bailees' liability policy and material damage policy

Material damage policy usually covers goods held by the insured

‘in trust or on commission [for which the insured is responsible]’

This covers customers goods held by the insured against property damage. If words in brackets are added, this cover only applies when the insured is liable to the customer for the damage (but policy still pays based on MD cover).

If the insured has both MD and Broadform (common) insured can potentially claim under both policies

## Overlap between bailees' liability policy and material damage policy

If the insured has both MD and Broadform (common), and insured is liable as bailee, insured can potentially claim under either (but not both) policies:

MD → damage to goods held in trust (bailment).

Broadform → liable for damage to goods in care, custody or control.

No double insurance as two policies are covering different perils: damage vs. liability.

Effectively, the insured can choose – but cannot claim on both. The proceeds of MD claim are held in trust for owner of goods.

## Summary

- Bailment = transfer of possession of the goods from bailor to bailee.
- Bailee must return the goods to the bailor at the conclusion of the bailment in the same condition in which they were originally delivered
- Meaning of 'care, custody or control' uncertain. Most likely applies when goods are at bailee's premises. If working at owner's premises may only apply to part being worked on at best.
- Bailee is not strictly liable but must prove was not negligent.
- Overlap between bailees' liability cover and material damage cover.