

## CHAPTER 16

### BAILORS AND BAILEES

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## 16:1 BAILMENT — BAILOR — BAILEE — DEFINED

**A bailment is a delivery of personal property by one person to another for a specific purpose with the understanding that the property is to be returned when the purpose is accomplished.**

**A bailor is the person who delivers the property. A bailee is the person who receives it.**

### Notes on Use

A “constructive” bailment may arise when one engages another to perform some service with respect to one’s personal property and then leaves the property with the other without any instructions as to its disposition. **Montano v. Land Title Guar. Co.**, 778 P.2d 328 (Colo. App. 1989). It may also arise when there is no direct agreement between the parties, but the transaction is for their mutual benefit. **Christensen v. Hoover**, 643 P.2d 525 (Colo. 1982) (constructive bailment for hire when landlord hired moving company to move tenant’s property). When supported by sufficient evidence, this “constructive bailment” definition should be included either in addition to, or as an alternative to, the definition set out in the first paragraph, depending on the evidence in the case. Such other modifications should also be made in the second paragraph as may be necessary.

### Source and Authority

1. This instruction is supported by **Mayer v. Sampson**, 157 Colo. 278, 402 P.2d 185 (1965). *See also* **Christensen**, 643 P.2d at 528-29; **Foster v. Bd. of Governors**, 2014 COA 18, ¶¶ 16, 342 P.3d 497; **Montoya v. Connolly’s Towing, Inc.**, 216 P.3d 98 (Colo. App. 2008); **Passamano v. Travelers Indem. Co.**, 835 P.2d 514 (Colo. App. 1991), *rev’d on other grounds*, 882 P.2d 1312 (Colo. 1994).

2. In some circumstances, a bailment may exist even without specific evidence of a “special purpose.” *See In re Marriage of Amich*, 192 P.3d 422 (Colo. App. 2007) (that wife left jewelry in home occupied solely by husband was adequate evidence to support trial court finding of bailment).

## 16:2 BAILOR NOT LIABLE TO THIRD PERSONS FOR NEGLIGENCE OF BAILEE

**A bailor is not legally responsible to third persons for injuries or damages caused by any negligent use of the personal property by the bailee.**

### Notes on Use

1. This instruction is not applicable when the bailor has been personally negligent in making the bailment, for example, lending his or her car to a person who he or she knows is intoxicated or is an incompetent driver. **Baker v. Bratsovsky**, 689 P.2d 722 (Colo. App. 1984) (recognizing the doctrine of negligent entrustment, but finding it inapplicable to the facts of the case). Nor is this instruction applicable when there is some other relationship between the parties that might permit the negligence of the bailee to be imputable vicariously to the bailor. *See, e.g.*, Chapter 8 and Chapter 11, Part C.

2. A bailor may be liable to third persons for injuries proximately caused by a failure to perform properly the duties stated in Instructions 16:3 and 16:4.

### Source and Authority

This instruction is supported by **Otoupalik v. Phelps**, 73 Colo. 433, 216 P. 541 (1923). *See also* **Graham v. Shilling**, 133 Colo. 5, 291 P.2d 396 (1955); **Greenwood v. Kier**, 125 Colo. 333, 243 P.2d 417 (1952); **Montoya v. Connolly's Towing**, 216 P.3d 98 (Colo. App. 2008).

**16:3 GRATUITOUS BAILMENT — DUTY OF BAILOR TO WARN BAILEE —  
DEFINITION OF NEGLIGENCE**

**A bailor who provides an item of personal property to another without (payment) (or) (receiving anything in return) is negligent if:**

- 1. The bailor knows of a defect or condition that makes an item unsafe for its intended or reasonably expected uses, or knows other facts indicating that the defect or condition probably exists;**
- 2. A reasonably careful person under the same or similar circumstances would warn the bailee of the defect or condition; and**
- 3. The bailor fails to give such a warning to the bailee.**

**However, a bailor who provides an item of personal property to another without (payment) (or) (receiving anything in return) is not required to inspect the item to see that it is free from defects or conditions that make it unsafe.**

**Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. When otherwise appropriate, this instruction should be used for the definition of “negligence,” rather than Instruction 9:6.
3. Whenever this instruction is given, Instruction 16:1, defining “bailor” and “bailee,” should also be given.
4. This instruction should be used only in cases in which the claim for relief is based on negligence.

**Source and Authority**

There appear to be no Colorado decisions concerning the subject matter of this instruction. There is support for this instruction, however, from other jurisdictions. *See* W. PROSSER & W. KEETON, TORTS § 104 (5th ed. 1984). *See also* RESTATEMENT (SECOND) OF TORTS § 405 (1965).

**16:4 NON-GRATUITOUS BAILMENT — DUTY OF NON-COMMERCIAL BAILOR TO BAILEE — DEFINITION OF NEGLIGENCE**

**A bailor who provides an item of personal property to another (for payment) (or) (for something in return) is negligent if the bailor fails to do what a reasonably careful person would do under the same or similar circumstances to make the item reasonably safe for its intended or reasonably expected uses. This obligation to make the item reasonably safe may include:**

- 1. repairing or giving warning of any known defects or conditions; and**
- 2. inspecting the item(s) and repairing or giving warning of any defects or conditions that could be discovered by a reasonable inspection.**

**Notes on Use**

1. The Notes on Use to Instruction 16:3 are also applicable to this instruction.
2. When otherwise appropriate, this instruction should be used for the definition of “negligence” rather than Instruction 9:6.
3. This instruction applies to bailors who are not regularly engaged in leasing or renting personal property on a commercial basis. In the latter case, the bailor may be strictly liable in contract (implied warranty) or tort for physical injuries caused by a defect in the leased property. *See generally* Products liability: application of strict liability in tort doctrine to lessor of personal property, 52 ALR3d 121. In such cases, instructions similar to those in Chapter 14, Parts B and C, dealing with comparable cases involving sellers of personal property, may be more appropriate than this instruction.

**Source and Authority**

There appear to be no Colorado cases concerning the subject matter of this instruction. For authority from other jurisdictions, see W. PROSSER & W. KEETON, TORTS § 104 (5th ed. 1984). *See also* RESTATEMENT (SECOND) OF TORTS §§ 407-408 (1965).

## 16:5 DUTY OF BAILEE TO BAILOR

**A bailee must exercise reasonable care to protect the property of the bailor.**

### Notes on Use

1. Whenever this instruction is given, Instructions 16:1, defining “bailor” and “bailee,” 9:8, defining “reasonable care,” and 9:6, defining “negligence,” must also be given.

2. This instruction applies to gratuitous bailments made for the benefit of the bailor. A gratuitous bailee is liable to the owner for damage caused by simple negligence. **Christensen v. Hoover**, 643 P.2d 525 (Colo. 1982). It also applies to bailments made for the mutual benefit of the bailor and bailee, e.g., a bailment for hire. In the latter case, a bailor is also entitled to a presumption that, if the goods are not returned by the bailee, or are returned in a damaged condition, the loss or damage is presumed to have been caused by the negligence of the bailee. *Id.* at 525. For the instruction setting out this presumption, see Instruction 16:6. Where the bailment is for the sole benefit of the bailee, a higher standard of care may be required of the bailee. *See* R. BROWN, PERSONAL PROPERTY § 82 (2d ed. 1955). In such cases, this instruction must be appropriately modified.

### Source and Authority

1. This instruction is supported by **Christensen v. Hoover**, 643 P.2d 525 (Colo. 1982). *See also* **In re Marriage of Amich**, 192 P.3d 422 (Colo. App. 2007); **Motor Crane Serv. Co. v. Barker Constr. Co.**, 650 P.2d 1329 (Colo. App. 1982).

2. The negligent misdelivery of bailed property constitutes a conversion of the property for which a plaintiff may be entitled to recover purely economic damages. *See, e.g.*, **Montano v. Land Title Guar. Co.**, 778 P.2d 328 (Colo. App. 1989).

3. A bailee may be liable to third persons for injury caused by the bailed property on other than a bailment theory. **Montoya v. Connolly’s Towing**, 216 P.3d 98 (Colo. App. 2008) (tow company/bailee had duty to third person separate and distinct from duties arising out of bailment); *see also* **Foster v. Bd. of Governors**, 2014 COA 18, ¶ 20 (“Where goods have been damaged or destroyed while in the possession of a bailee, the bailor may bring a contract claim *or* may bring a tort claim (for negligence or, perhaps, for conversion).”).

**16:6 FAILURE OF BAILEE TO RETURN PROPERTY OR RETURN IT IN  
UNDAMAGED CONDITION — PRESUMPTION OF NEGLIGENCE**

*Committee’s Note: This instruction appears to be inconsistent with **Chapman v. Harner**, 2014 CO 78, 339 P.3d 519, and **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009). In those cases the Supreme Court held that a rebuttable presumption “shifts the burden of going forward to the party against whom it is raised.” **Krueger**, 250 P.3d at 1154. If the presumption applies and is not rebutted by legally sufficient evidence, then the presumed fact is established as a matter of law. *Id.* at 1156. If the presumption applies and is rebutted by legally sufficient evidence, the presumption is destroyed and leaves only a permissible inference of the presumed fact. **Chapman**, ¶ 25; **Krueger**, 205 P.3d at 1154, 1156. In neither scenario is the jury instructed about the presumption. See Instruction 3:5 and its Notes on Use.*

*However, these two cases address only: (a) the presumption of negligence arising from *res ipsa loquitur* (**Chapman**) and (b) the presumption of undue influence when a beneficiary of a will is in a fiduciary or confidential relationship with the testator (**Krueger**). The Supreme Court has not yet considered whether to apply these holdings beyond the specific presumptions at issue in those two cases.*

**When a bailee accepts delivery of property and (fails to return it) (or) (returns it in a damaged condition), the law presumes (, and you must find,) that the bailee was negligent in (losing) (or) (damaging) it.**

**Notes on Use**

1. As explained and illustrated in the Notes on Use to Instruction 3:5, this instruction, when otherwise applicable, may be used as the second paragraph of Instruction 3:5.

2. Use whichever parenthetical words and phrases are appropriate. In particular, the phrase “and you must find” must be included if this instruction is being used as the second paragraph of Version 1 of Instruction 3:5, but omitted if this instruction is otherwise appropriately being used as the second paragraph of Version 2 of Instruction 3:5. See **In re Marriage of Amich**, 192 P.3d 422 (Colo. App. 2007) (husband’s failure to return wife’s property created only a presumption, not proof, of negligence).

3. This instruction applies to bailments made for the mutual benefit of the bailor and bailee, e.g., a bailment for hire, see **Foster v. Bd. of Governors**, 2014 COA 18, ¶ 19, 342 P.3d 497, as well as to bailments made for only the benefit of the bailee. It does not apply to bailments made only for the benefit of the bailor. **Christensen v. Hoover**, 643 P.2d 525 (Colo. 1982); **Motor Crane Serv. Co. v. Barker Constr. Co.**, 650 P.2d 1329 (Colo. App. 1982).

4. This instruction should be appropriately modified when the bailee became a bailee other than by accepting delivery of the property, e.g., by assuming possession and control. *See Christensen*, 643 P.2d at 529 (discussing “constructive” bailments created by operation of law).

5. This instruction is not applicable to a claim for conversion of bailed property, but only to a claim for negligence where the conditions set forth in the instruction are established. **Underwood v. Dillon Cos.**, 936 P.2d 612 (Colo. App. 1997).

6. This instruction applies to bailments that may exist between spouses with respect to their separate property. **In re Marriage of Amich**, 192 P.3d at 426-27.

#### **Source and Authority**

This instruction is supported by **Christensen**, 643 P.2d at 528-30; **Foster**, 2014 COA 18, ¶ 19; and **Motor Crane Service Co.**, 650 P.2d at 1330-31. *See also* R. BROWN, PERSONAL PROPERTY § 87 (2d ed. 1955).