**21.01 NEGLIGENT BAILMENT – WHEN PLAINTIFF ENTITLED TO RECOVER**

The plaintiff claims that [he] [she] was harmed because [bailed property] plaintiff left in the possession of the defendant was damaged or lost.

In order to find that the plaintiff is entitled to recover, you must decide it is more likely true than not true that:

(1) the plaintiff left [bailed property] in the possession of defendant for a [state specific purpose] and with the mutual understanding that the [bailed property] would be returned; and

(2) the [bailed property] was [damaged] [lost][not returned][.] [; and

(3) the defendant was negligent; and

(4) the defendant’s negligence was a substantial factor in causing the damage or loss of the [bailed property].]

**Use Note**

Instruction 21.1 should be given in every case regarding a claim of negligent bailment. Paragraphs 3 and 4 should be given only when the defendant has offered evidence that the damage or loss was beyond the defendant’s control, and the defendant used an appropriate level of care to protect the bailed property. In that situation, Instruction 21.02 (Negligent Bailment – Negligence Defined – Adult) and Instruction 21.03 (Negligent Bailment – Substantial Factor) must be given in addition to this instruction.

For damages, see Instructions 20.14 through 20.17.

**Comment**

This instruction is based on Negligence Instruction 3.01 (Negligence – When Plaintiff Entitled to Recover) and Alaska case law.

“A relationship of bailor-bailee arises when the owner, while retaining general title, delivers personal property to another for some particular purpose upon an express or implied contract to redeliver the goods when the purpose has been fulfilled.” *Harris v. Keys*, 948 P.2d 460, 464 n. 7 (Alaska1997). E.g., *Alaska Const. Equipment, Inc. v. Star Trucking, Inc.*, 128 P.3d 164, 168 n.13 (Alaska 2006). The bailee has a duty to exercise the degree of care of a reasonably careful owner. E.g., *Madonna v. Tamarack Air, Ltd.*, 298 P.3d 875, 880 (Alaska 2013); *Coster v. Piekarski*, 3 P.3d 333, 335 (Alaska 2000).

The plaintiff makes out a prima facie case of negligent bailment by putting on evidence of the existence of the bailment and the damage, destruction, or loss of the property involved. E.g., *Coster,* 3 P.3dat 334; *Burgess Const. Co. v. Hancock*, 514 P.2d 236, 239 (Alaska 1973). To avoid liability, if the defendant is not contesting the prima facie case, the bailee must then show the damage or loss was beyond the bailee’s control and offer evidence permitting an inference of due care on his or her part for the protection of the property. E.g., *Coster,* 3 P.3d at 335; *Burgess,* 514 P.2d at 238 n.8.

In *Burgess*, the court approved an instruction shifting the burden to the defendant of showing that the damage was beyond his control and that he or she exercised due care. *Id.* Subsequent cases affirm this shift. E.g., *Silvers v. Silvers*, 999 P.2d 786, 794 (Alaska 2000)(“Proof of loss of or injury to the goods while in the custody of the bailee establishes a prima facie case against the bailee to put him upon his defense”); *Coster,* 3 P.3d at 334.

If the defendant puts on evidence that the damage or loss was beyond his or her control and that he or she used due care, the plaintiff must then offer specific facts showing negligence. *Id*. The plaintiff’s proof would need to include the elements of a standard negligence cause of action: (1) a duty of care; (2) breach of the duty; (3) causation; and (4) harm. *Silvers*, 999 P.2d at 793; *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 667 (Alaska 2000)(setting forth the same elements in a non-bailment negligence case).

The measure of damages in a bailment case will vary according to the nature of the action. A bailment creates a contractual relationship, which can give rise to an action for contract damages. *See Green v. Koslosky*, 384 P.2d 951, 952 (Alaska 1963). In such a case, the judge can adapt the damages instructions provided in Article 24 (Contracts). Bailments can also give rise to an action in tort. In most such cases, principles of tort damages apply, and the tort damages instructions (Article 20) can be adapted to the case.

"The general rule underlying tort damages is that the injured party is entitled to be placed as nearly as possible in the position he would have occupied had it not been for the tortious conduct." *Era Helicopters, Inc. v. Digicon Alaska, Inc.*, 518 P.2d 1057, 1059-60 (Alaska 1974) (negligence of bailee).