

GENERAL PRINCIPLES

Meaning of property

- **Property:** can either be object/thing which is capable of being owned by person (land, car) OR proprietary rights (rights of ownership) to that object/thing
 - A right enforceable against the world at large – *in rem* (as opposed to a contractual right which is only enforceable against parties to the contract – *in personam*)
 - Property rights do not arise only from title or outright ownership; also arise simply from possession
 - Property rights can arise out of a financial transaction (i.e. where property is used as security)

Real v Personal property

- **Real property (Realty):** land and fixtures (things attached to the land with an intention to remain fixed). Includes all things embedded in land or attached to it (minerals, trees, buildings).
 - Features: indestructible, immovable, unique, appreciates (good security for finance) and emotional connection
- **Personal property (Personalty):** not real property. It includes tangible things/chattels (car, books). It is moveable, impermanent, temporal, fragile and common. It consists of:
 - Choses in possession (capable of actual physical possession)
 - Choses in action → Rights in enforceable by law, intangible, enforceable against parties to the contract or individuals: Intellectual property, shares, debts, negotiable instruments

Distinction between ownership and possession

- **Ownership:** the right to exclusive enjoyment of a thing (*Austin*). May include right to use, sell, give away, put into a trust, use as security for a loan, share with co-owners, leave in will.
- **Possession:** if one has exclusive control (or dominion) over the object and intends to exclude all others from that control. Person in possession has right to retain control of the object against any other person except the owner or person who holds title. Note: possession does not necessarily concur with title Pollock & Wright
 1. **Actual possession:** person is presently in physical control of property.
 2. **Constructive possession** more abstract. It is used to describe situation where individual has actual control over chattels/real property without actually having physical control of same assets. At law a person with constructive possession stands in same legal position as a person with actual possession.

<p><u>Armory v Delamirie (1722)***</u></p>	<ul style="list-style-type: none"> ▪ Facts: chimney sweeper boy found valuable jewel; offered it to jeweller for valuation who did not return the jewel. Jeweller was liable to boy for jewel value ▪ Held by Pratt CJ: <i>By finding the jewel and taking it into his possession, the boy had acquired a proprietary interest in the jewel which is effective against the world at large, with the exception of the rightful owner of the jewel.</i>
<p><u>Button v Cooper [1947]</u></p>	<ul style="list-style-type: none"> ▪ Held: <i>Mayo J made distinction between actual and constructive possession and stated that possession in context of personal property law consists of: exercise of factual control over chattel AND concomitant intention to exclude others from exercise of control.</i>
<p><u>Costello v Chief Constable of Derbyshire Constabulary [2001]</u></p>	<ul style="list-style-type: none"> ▪ Held: <i>... possession ... is entitled to same legal protection whether or not it has been obtained lawfully or by theft or by other unlawful means. It vests in possessor possessory title which is good against the world save as against anyone setting up or claiming under better title. In case of theft title is frail, and of likely limited value ... but none the less remains a title to which law affords protection.</i>

<u>The Winfield</u>	<ul style="list-style-type: none"> ▪ Held: <i>against a wrongdoer, possession is title'. Chattel that has been converted/damaged is deemed to be chattel of possessor and no other. Its loss/deterioration is regarded as possessor's own loss</i>
<u>Russell v Wilson (1923)</u>	<ul style="list-style-type: none"> ▪ Facts: cash and cheques were seized by police from illegal bookie. Bookie was convicted, but no order was made by magistrate for forfeiture of illegally obtained assets. Bookie sues for return of cash and cheques from police ▪ Held: <i>'Possession in relevant sense, is not merely evidence of absolute title: it confers a title of its own, which is sometimes called a 'possessory title'. This 'possessory title is as good as absolute title as against, it is usually said, every person except absolute owner' at 546 per Isaacs, Rich JJ</i>
<u>Knapp v Knapp [1944]</u>	<ul style="list-style-type: none"> ▪ Facts: husband purports to give wife his car which continues to be registered in husband's name to take advantage of war time petrol allowance. Wife retains custody of vehicle. ▪ Held: <i>no animus possidendi (i.e. no intention to exercise control—mere custody and not possession). Possession would have given wife more rights over car, but mere custody did not.</i>
<u>Moors v Burke (1919)</u>	<ul style="list-style-type: none"> ▪ Held: <i>words "actual possession" while including circumstances where accused had object in his immediate possession extended to include circumstances where accused had right/power to place his hands upon object provided that such right was exercisable to exclusion of all others, except those acting in concert with him.</i>

FINDER'S RIGHTS CASES

- **Manifest intention to control:** where owner of land/ building demonstrated intention to control all things within its geographical location, it usually arises where owner of private property intends to exercise control over every chattel/ fixture on his land. It is less likely to be found in places open to the public where no particular person/s manifest an intention to control everything within its boundaries.

<p><u>Parker v British Airways Board [1982]</u></p> <p><i>(leading authority for Finder's Rights)</i></p>	<ul style="list-style-type: none"> ▪ Facts: BA had an international executive lounge at London Airport and had certain policy guidelines for employees on the handling of lost items. P, a passenger, found a gold bracelet in the lounge and gave it to employee of BAB (licensee of premises) with his contact details for the bracelet to be returned if true owner not found. BA did not find the owner and sold the bracelet without informing P. ▪ Held: <i>Parker not a trespasser because he behaved honestly; he took the bracelet into his care and control; so gained finder's rights; he was not an agent so his rights were not displaced in favour of principal. BA cannot assert rights as occupier; BA controlled entry of persons into departure lounge but did not manifest intention to assert custody or control over found items. Thus, in finding the bracelet, P acquired rights in possession against the entire world except for the true owner.</i> ▪ <u>Rights and obligations of Finder:</u> (per Donaldson LJ) <ol style="list-style-type: none"> 1. Finder acquires no rights unless item is abandoned/lost and is taken into finder's care and control 2. Finder has limited rights if took with dishonest intent or while trespassing <u>R v MacDonald [1983]</u> 3. Finder acquires rights against all but true owner (or someone with a better claim) 4. Servants/agents who find item in course of their employment take it into
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	<p>care and control on behalf of employer/principal (except where finding incidental to employment or agency – <i>Byrne v Hoare</i>).</p> <p>5. Finder has obligation to take reasonable measures to inform true owner and take care of item</p> <ul style="list-style-type: none"> ▪ Rights and liabilities of Occupier: <ol style="list-style-type: none"> 1. Occupier of land/ building has rights superior to finder where item is in or attached to land 2. Occupier of building has rights superior to finder if occupier manifested intention to exercise control over building and things on or in it 3. Occupier who manifests such intention is under obligation to take measures reasonable in circumstances to find true owner and to care for chattels in the meantime.
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Articles found in, or attached to the land

- Owner/possessor of land has better title than finder of the article

<u>Elwes v Brigg Gas Co (1886)</u>	<ul style="list-style-type: none"> ▪ Facts: Tenants under 99 year lease excavated land for particular purpose and found prehistoric boat 6 feet below surface; landlord had no knowledge of boat ▪ Held: <i>owner had the better claim as tenant had right to excavate for particular purpose; he had no right to take anything including waste for that purpose</i>
<u>Hannah v Peel (1945)</u>	<ul style="list-style-type: none"> ▪ Facts: D was owner of house he never occupied. During WWII, D's house was requisitioned to shelter soldiers. P lived in the house for a period of time and found a broach. He gave it to the police who gave it to the owner (D). D had no knowledge of the broach or its existence and sold it. P sued. ▪ Held: <i>P (soldier) had better claim to broach as owner of the house didn't know of its existence and true owner of broach was unknown and couldn't be found.</i>
<u>South Staffordshire Water v Sharman (1896)</u>	<ul style="list-style-type: none"> ▪ Facts: owner of land engaged D to clean the pool – D pool cleaner found rings in the mud in the pool. D gave rings to police who didn't find the owner and gave them back to D ▪ Held: <i>P as the owner of land containing the pool was entitled to rings</i>
<u>Waverley Borough Council v Fletcher (1996)</u>	<ul style="list-style-type: none"> ▪ Facts: medieval brooch was found with aid of metal detector, embedded in soil of public park. P (council) was entitled to retain possession as it had better title than D (finder). If D finder found lots of jewellery in park, then that would be a treasure trove, so state will have primary ownership. ▪ Held: <i>owner or lawful possessor of land owned all that was in or attached to it [including by analogy] a local authority which owned a public open space. Owner or lawful possessor of land has better title to object found in or attached to land than finder.</i>
<u>Tamworth Industries Ltd v A-G [1993]</u>	<ul style="list-style-type: none"> ▪ Facts: on land at one time leased to TI, police find concealed beneath floorboards of disused and derelict buildings, \$52,452 cash and cannabis. No charges were laid. Dodds (sole director of TI) had been convicted of drug trafficking but his conviction was overturned on appeal ▪ Held: <i>same principle was applied from Waverly v Fletcher. However, here, Occupier failed to discharge burden of proving manifest intention to exercise control over lost property.</i>

Articles found on land

- Owner/lawful possessor of land has better title than finder of article ONLY if he exercised such manifest control over the land as to indicate intention to control the land and anything that might be found on it.

- Where there is no evidence of manifest intention of owner/occupier of premises to exercise control then finder will be entitled to possession as against occupier if true owner cannot be found

<p><u>Bridges v Hawkesworth (1851)</u></p>	<ul style="list-style-type: none"> Facts: shop customer found roll of banknotes on shop floor Held: <i>customer was entitled to them</i>
<p><u>Parker v British Airways Board (1982)</u></p>	<ul style="list-style-type: none"> Facts: passenger found gold bracelet in BA executive lounge at London airport. He gave it to employee of BAB (licensee of premises). Owner was never found and BAB sold bracelet. Held: <i>since there was no evidence BAB manifested intention to exercise control over all things that might be upon or in premises (checking lounge) finder (P) had better title to possession of the bracelet</i>
<p><u>National Crime Authority v Flack (1998)</u></p> <p><i>(confirmed British Airways ratio is good law in Australia)</i></p>	<ul style="list-style-type: none"> Facts: F's son was held in remand for drug charges. House was searched for drugs and \$433,000 cash was found in a premise which was rented by F and accessible by F's son who had key. F had no knowledge of the money. No person was charged for any offence due to insufficient evidence. F sued for return of money from NCA. Held: <i>occupier of private home will ordinarily manifest necessary intention to control the premises and all chattels therein (Heerey J). Starting point for determination is premise that person with exclusive possession over private home, owner/lessee, is presumed to exercise control over each and every part of that home and everything in it (Tamberlin J)</i>

Articles found in course of employment

- General rule:** they belong to employer City of London Corp v Appleyard (1963)
- Where employment isn't cause of finding but merely incidental to it; it has been held employee is entitled to goods.

<p><u>Byrne v Hoare (1965)</u></p>	<ul style="list-style-type: none"> Facts: On duty policeman was working on 'special duties' outside his ordinary working hours under control of police force. He found gold ingot in public place while walking along the side of a privately owned driveway where he had been instructed to direct traffic. The fact these he was on duty when he found the gold ingot was merely incidental. Held: <i>P, as finder, entitled to possession of ingot against the world as employment incidental to finding (except against true owner who wasn't found).</i>
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ACQUISITION/TRANSFER OF PERSONAL PROPERTY

Acquisition of ownership

- Acquisition by purchase**
 - Contract for sale of tangible goods – Sale of Goods Act 1923 (NSW)
 - For sale of assignment/intangible personal property (debt, copyright in painting) statutory provisions may require compliance with certain formalities Copyright Act 1968 (Cth) s196(3)
- Acquisition by gift:**
 - Gratuitous transfer of title in property usually given in family context. Presumption is that all family dealings are not meant to attract legal consequences.
 - Donee is entitled to full beneficial ownership of gift provided donor was not placed under any undue influence/ unconscionable dealing when delivering gift to donee.

- **Nolan v Nolan [2003]**: *'donor must not only part with possession of property, but must relinquish all present and future dominion and control over it beyond any power on his part to reclaim it'*
- **Elements:**
 1. **Donative intention** to make unconditional transfer of rights to property to donee.
 - **Horsley v Phillips Fine Art Auctioneers**: *words of gift don't need to be contemporaneous with delivery of subject matter of the gift*
 - **Nolan v Nolan [2003]**: *Although donative intention would normally be manifested, and its extent defined, by words, unusual circumstances may be imagined where other means fulfil those functions i.e. words are not always necessary.*
 - **Dewar v Dewar (1975)**: *mother gave, intending to do so, her son sum of money to buy house. Transaction was nevertheless gift though son intended to treat it as loan and, in due course, to return money. The donor must be capable of forming proper intention.*
 2. **Acceptance by donee**
 - **Knapp v Knapp [1944]**: *wife knew car was not gift, therefore, she could not have accepted it as one, and consequently, it could not be regarded as a gift at law*
 3. **Delivery**: where goods are physically handed over to donee
 - **Symbolic delivery**: constructive conveyance of subject matter of gift/sale, when it is either inaccessible/cumbersome, through offering of some substitute article that indicates donative intent of donor/seller and is accepted as representative of original item.
 - **Re Stoneham [1919]**: *when chattels are already in possession of donee no further delivery/change of possession is necessary to complete gift. Even if delivery is made after words of gift, that may be sufficient to amount to a voluntary gift enforceable at law.*
 - **Re Cole**: *delivery doesn't need to be simultaneous with words of intention to give. Gift of chattel is not complete unless accompanied by something which constitutes act of delivery/change of possession*
 - **Nolan v Nolan [2003]**: *donor must not only part with possession of property, but must relinquish all present and future dominion and control over it beyond any power on his part to reclaim it*
 - **Flinn v White [1950]**: *where purported subject matter of gift remains in common custody it may be difficult to demonstrate delivery has perfected gift.*
 - **Rawlinson v Mort (1905)**: *where symbolic delivery is nearest to actual delivery, that may be enough to satisfy requirement of delivery.*
 - **Waserberg (1915)**: *W told his wife her present was wrapped up in a brown parcel he put in a safe – he did not physically give it to her. Held, insufficient in law to constitute a gift.*
 - **Winter v Winter (1861)**: *'on examination of evidence, it turns out there was change in possession of barge consequent upon gift... words indicating present gift and father's/son subsequent conduct indicated transfer of possession, which constituted sufficient evidence of delivery contemporaneous with or subsequent to words indicating gift.*
- **Acquisition by will or intestacy:**
 - Personal property may pass to person in accordance with the rules of intestacy where person died leaving property but without having made a will

- **Acquisition by taking possession of abandoned property**
 - Owner of property must have intended to abandon the property or relinquish ownership permanently. Intention to abandon can be inferred from the surrounding circumstances (such as a contract).
 - Moorhouse v Angus & Robertson (No 1) (1981): *P author of short stories pub by D publishers hadn't abandoned his ownership in original typewritten manuscript of stories, although he did not request return of original manuscripts for some years after their publication. D were liable for loss of manuscripts*
 - **Munday v ACT (1998)**: ACT grants exclusive scavenging rights at tip to recycling business 'Revolve'. M negotiates to take items from customers of the tip. Held: *Revolve rights conferred by ACT arise only once goods are abandoned at Tip face. It is also apparent true owner does not lose control of abandoned goods at least until they are out of his actual or constructive possession. That would usually be after owner has thrown such goods away and departed Tipping face area.*

- **Acquisition by Deed:**
 - Conveyancing Act 1919 (NSW) section 38

Co ownership of personal property

- Where this happens, property is held as joint tenants OR tenants in common
- Calabrese v Miuccio (1984): *husband and wife held savings bank account as joint tenants and on severance of joint tenancy held funds in account as tenants in common*

Personal property as security

- Personal property can be security for payment of debt. Mortgage over personal property can be given allowing mortgagee to take possession of goods and sell them in case of default by mortgagor under contract for loan of money
- Where security over personal property is given in writing it will usually constitute bill of sale and must be registered under relevant bills of sale/legislation
- Alienation of property creates incentive for lender to lend money, and for borrower to repay that money if they wish to retain ownership/possession of their property when property is:
 - Mortgaged (title passes to the lender as in OST mortgages)
 - Pledged (possession but not title is passed)
 - Charged (no title or possession but an interest in property is created as in TT mortgages)

Bailments: legal relationship arising from transfer of possession of personal property from 1 person (bailor) to another (bailee) under circumstances that when purpose for which goods were bailed has been fulfilled, bailee is under duty to return property to bailor or deliver them in accordance with the bailor's instructions

Bailment

NATURE AND CLASSIFICATION OF BAILMENTS

- A bailment comes into existence upon a delivery of goods of one person, the bailor, into the possession of another person, the bailee, upon a promise, express or implied, that they will be re-delivered to the bailor or dealt with in a stipulated way: *Hobbs v Petersham Transport (1971) per Windeyer J.*
- Relationship of bailor/bailee gives rise to certain duties/liabilities which don't apply in relationship of licensor/licensee
- Different parties include:
 - Bailor – gives possession of goods to another, no intention of transferring ownership.
 - Bailee – takes possession, but not ownership, of goods from Bailor.
 - Sub-bailee – takes possession of goods from Bailee.
- Different Categories of Bailment:
 - Bailee for reward/ consideration
 - Gratuitous bailee (no consideration)

Distinction between bailments and licenses:

- N.E. Palmer: " *law has repeatedly drawn distinction between bailments and licenses; former requiring transfer of possession and voluntary acceptance of common law duty of safekeeping, latter amounting to no more than grant of permission to user of chattel to leave it upon licensor's land on understanding that neither possession shall be transferred nor responsibility for guarding chattel accepted.*"

<p><u>Greenwood v Council of the Municipality of Waverley (1928)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts</u>: P hired locker at D bathing sheds in which to place his clothes and it was securely locked before he proceeded to bathe. Subsequently, on opening locker, it was found empty. P was not given key, but was supplied with numbered disc to identify locker. Key was kept by attendant. ▪ <u>Held</u>: council was not responsible for goods lost (£150) as there was no evidence of giving over possession of clothes to Council who merely let locker to P (no rise of duty of care in respect to locker contents). No bailment, rather a license to use locker – no attendant present. ▪ <i>there was in fact a transfer of possession</i>
<p><u>Ultzen v Nichols (1894)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts</u>: Waiter took P's coat when he came into restaurant and hung it up. It was later gone. ▪ <u>Held</u>: As waiter initiated taking of coat and selected where it should be hung for safekeeping. There was bailment and higher DOC than if it had been a mere licence
<p><u>Robertson v Stang (1997)</u></p>	<ul style="list-style-type: none"> ▪ <u>Held</u>: '...control over subject chattels is key to distinguishing between bailments and licenses. In present case, facts suggest that P surrendered control of her goods to D and a bailment relationship was created'
<p><u>Sydney City Council v West (1965)</u></p>	<ul style="list-style-type: none"> ▪ <u>Held</u>: transfer of possession re: control of vehicle esp. where some card/ticket must be presented before regaining vehicle and driving out of car park. ▪ Case also deals with Exclusion clauses
<p><u>Ashby v Tolhurst (1937)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts</u>: Owner of car left his car on another's land and paid 1 shilling. It was a bare block of land (not a car park), there was no attendant, no exchange of keys and no security. ▪ <u>Held</u>: not a bailment as no control of car, mere license
<p><u>Tinsley v Dudley (1951)</u></p>	<ul style="list-style-type: none"> ▪ <u>Held</u>: publican was not responsible for loss of a customer's motorcycle in car-park. This case signifies importance of custody and control in characterising bailment

Bailment:

- If bailee is not obliged to return goods, then no bailment has been created. No bailment where goods may be substituted – Chapman Bros v Verco Bros (1933)
- Bailee is only liable if failure to return goods could have been avoided by exercise of reasonable care
- Goods may be returned in changed form: Pangallo Estate v Killara 10 [2007] – contract to transfer grapes into wine.
- Goods may be delivered to someone other than the bailor under terms of bailment.

<p><u>Chapman Bros v Verco Bros (1933)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts:</u> wheat delivered to a silo and no obligation to return the exact same wheat – just the equivalent amount of wheat. ▪ <u>Held:</u> No bailment where goods may be substituted.
<p><u>Hobbs v Petersham Transport Co Pty Ltd (1971)</u></p>	<ul style="list-style-type: none"> ▪ <u>Held:</u> <i>bailment comes into existence upon delivery of goods of one person, bailor, into possession of another person, bailee, upon a promise, express or implied, that they will be re-delivered to bailor or dealt with in a stipulated way.'</i>
<p><u>Winkfield (1902)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts:</u> there was a fog; W collided with Mexican, and latter sank; all people and some property were rescued ▪ <u>Posture:</u> W was found negligent and people from M were trying to get damages. Amount was already fixed. Postmasters General whose mail was lost on M want to claim damages as well ▪ <u>Issue:</u> to whom should \$\$ be awarded ▪ <u>Holding:</u> PG get some money and W can't do anything about it ▪ <u>Rule:</u> D have no standing to inquire about nature or limits of rights of people whose property they destroyed ▪ <u>Reasoning:</u> if you take someone else property you are a wrong doer. Just showing that property was owned by 3rd party doesn't excuse you from liability ▪ <u>Principle:</u> <i>bailee in possession has right to recover for loss/damage to bailor goods even though he would of had good defence to action by bailor</i>

Classification of bailments: based on Lord Holt judgment in Coggs v Bernard (1703)

EXAMPLE OF BAILMENT	TYPE OF BAILMENT
deposit of goods for gratuitous safekeeping by bailee	Gratuitous bailment
delivery of goods to bailee for work to be done on goods for benefit of bailor without reward	
delivery of goods by way of gratuitous loan for use by bailee	
deposit of goods for safekeeping for reward	Bailment for reward
delivery of goods to have something done to them for reward	
delivery of goods for use by bailee for reward	
delivery of chattels to be held as security for loan	

DUTIES OF BAILEE

Bailee obligations:

- Same for all bailment relationships – though there may be a question of degree – Houghland v RR Low (Luxury Coaches)
- To take reasonable care of the goods to avoid any potential liability. This depends on:
 - goods themselves (value, nature)
 - Relationship between parties (gratuitous, commercial)
- Not to depart from the scope of the bailment as deviations entitles bailor to:
 - retake possession
 - sue for conversion for full value if goods are lost
 - may turn bailee into insurer??
- To return the goods or deal with them as directed:
 - Bailment for reward can only be terminated by scope of the bailment
 - Gratuitous bailment can be terminated at any time on demand
- To not dispute bailor's title to the goods
 - Subject to *ius tertii* – multiple people claiming title to property and 3rd party has better title than Bailor.

Uncollected Goods Act 1995 (NSW): Applies to:

- Bailed goods being chattels personal
- Object of the act is to provide bailees with a means of disposing of goods without being liable to the bailor by:
 - Obtaining a court order, or
 - Private disposal after giving notice
- If goods are ready for delivery and are uncollected, bailee gives notice, unless bailor cannot be traced
- Need to give notice of:
 - 28 days if goods worth less than \$100 in any manner
 - 3 months if goods worth \$100 - \$500 by public auction or private sale
 - 6 months if goods worth \$500-\$5000 by public auction
 - Perishable goods – can be verbal notice with reasonable time to collect and can be disposed of in any manner

Onus of proof:

- In circumstances of bailment if goods are lost/damaged P simply has to prove loss/damage and D must prove they took reasonable care Hobbs v Petersham Transport (1971)

Duties of bailee for reward

- Duty to take such care of goods as is reasonable in circumstances
- In event of loss/damage to goods during bailment, onus is on bailee to prove such loss/damage wasn't result of their failure to take reasonable care
- To pay the agreed rate for storage
- Not to interfere with the bailee's possession for the term of the bailment

<u>Pitt Son v Prouleco SA (1984)</u>	<ul style="list-style-type: none">▪ <u>Facts</u>: P purchased bales of wool from D wool broker. They were stored in D old timber building, which had fencing around it which was inadequate to keep out intruders. Intruders broke into shed and purposely lit fire to burn wool.▪ <u>Held</u>: <i>failure to adequately fence is breach of duty to take care of goods...having adequate fence is basic and D should have had one.</i>
<u>Tottenham Investments v</u>	<ul style="list-style-type: none">▪ <u>Facts</u>: P left valuable car with D for repair. Overnight thieves entered D premises through skylight in roof, started car with keys left in ignition and

<p><u>Carburettor Services [1994]</u></p>	<p>drove off with car. To break in skylight, thieves had a drop of 2m, there hadn't been break in for 15yrs and shed was near a busy bus stop. After break-in, security bars and \$3000 alarm system and signs were erected outside warning of alarms</p> <ul style="list-style-type: none"> ▪ <u>Held:</u> <i>D was liable as bailee for reward for loss of car since they failed to discharge onus of est. reasonable care. Security measures implemented subsequent to break in should have been implemented earlier; however leaving keys in ignition didn't itself constitute failure to take reasonable care.</i> ▪ <u>Kirby P</u> set out factors that were relevant to whether reasonable care was exercised: <i>Value/disposability of goods bailed; Location of place of bailment; Costs paid by bailor to bailee; Extent of bailor knowledge of circumstances of safekeeping; Extent of theft of goods in vicinity of place; Availability of simple/inexpensive/easily adopted precautions</i>
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Duties of gratuitous bailee

- Bailee to take care of goods as was reasonable in circumstances
- Breach of that duty depends on circumstances of the case. Bailee who negligently fails to return the goods within reasonable time of demand will be liable for loss to bailor Mitchell v Ealing London Borough Council (1979)
- Where goods have been damaged, onus is on bailee to show he took reasonable care of them while in his possession McComb v Martin Box Marine Holdings (1992)

<p><u>WGH Nominees v Tomblin (1985)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts:</u> P jeweller insisted D husband takes ring home to show his wife. On way home, D went to hotel where ring was stolen from his coat. ▪ <u>Held:</u> <i>gratuitous bailment. Standard of care was held to be the same as that of the ring owner. He wasn't going to a place where he could keep ring safely and had done best in circumstances, so held not liable.</i>
<p><u>Mitchell v Ealing London Borough [1979]</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts:</u> Squatter was evicted by local council. He asked to collect furniture but council official went to wrong meeting place. When met up to collect furniture, it was gone. ▪ <u>Held:</u> <i>although this was gratuitous bailment, fact that goods were stolen was enough to amount to breach of bailment obligations. <u>chattel must be returned when requested</u></i>
<p><u>Graham v Voigt (1989)</u></p>	<ul style="list-style-type: none"> ▪ <u>Held:</u> <i>landlady was liable for failing to return former boarder possessions which were left with her for 8 months as she couldn't show they had been lost without negligence/default on her part. She was bound to take reasonable care of the goods and deliver them up on equivocal demand for their return.</i>

Liability of bailee for employees and agents

- Bailee for reward is liable for their negligence and vicariously liable for their employees negligence Morris v CW Martin (1966)
- Bailee whose employee/agent sells goods entrusted to bailee is liable in damages to goods owner unless exemption clause in contract precludes liability Rick Cobby Haulage v Simsmetal (1986)

Sub bailments

- Bailee to whom goods have been entrusted will often transfer possession of goods to 3rd party creating sub-bailment of goods. Sub-bailee must be aware they are bailee.
- Sub-bailment may be expressly permitted or prohibited by head bailment
- Sub-bailee owes same bailment duties to head bailor (subject to contract)
- Rights may be varied by contract (subject to consent by head bailor)

- In action by goods owner against sub bailee for loss of goods, sub bailee can rely as against owner on contract terms between bailee and sub bailee if owner has expressly/implicitly consented to bailee making sub-bailment containing such terms

<p><u>Morris v CW Martin & Sons [1966]</u></p>	<ul style="list-style-type: none"> ▪ Facts: P (bailor) took their mink clothing to be cleaned by F. However, F did not actually do the cleaning services for mink and outsourced that to D, the actual cleaning company. The contract between F and D contained clauses that exempted D from liability in certain cases. D relied upon this exclusion clause in the contract between F and D to absolve themselves of liability. ▪ Held: <i>Sub bailee was liable to bailor for unauthorised theft of fur by their employee notwithstanding absence of contractual relationship between original bailor and sub-bailee and exclusion clause of liability between sub-bailee and bailee.</i> Ultimately, sub-bailee owes the same duties as the bailee to the bailor unless the sub-bailee can prove that the loss or damage occurred without his fault or that of his servants.
<p><u>The Pioneer Container (1994) ER</u></p> <p><i>(Case good law in Australia)</i></p>	<ul style="list-style-type: none"> ▪ Facts: owners of goods (bailors) arranged with freight carriers (bailees) for carriage of goods to foreign port and freight carriers subcontracted with shipowners (sub-bailees) for shipment of goods. Freight carrier was entitled to sub-contract the transportation, handling and storage of these goods on any terms for any part of the voyage. D, sub-bailee, acknowledged receipt of the goods and this contract said that the shipment would be governed by certain jurisdictions (i.e. Taiwan law). D lost the goods. ▪ Held: <i>owners were bound by contract terms between freight carriers and shipowners since owners were regarded as having authorised freight carriers to entrust goods to shipowners on those terms, even though owners were not party to this sub-bailment.</i> As such, P was not able to sue for loss as the dispute needed to be determined in accordance with Taiwanese law where the limitation period had expired.

Exclusion of liability

- Bailee may seek to limit/exempt their liability for negligence in contract of bailment

<p><u>Thomas National Transport v May & Baker (1966)</u></p>	<ul style="list-style-type: none"> ▪ Facts: TNT regularly employed subcontractor to pick up goods and transport them to TNT central depot where it was sorted for interstate carriage. TNT depot closed at 5.30pm. Subcontractor collected MB goods, finished at 5.40pm and took his truck home, as he had been directed by TNT on number of previous occasions when he had been late in completing his collections. Fire broke out in the morning and damaged MB goods. ▪ Held: <i>it was explicit in contract between TNT and MB that goods would be taken to and received by TNT depot at conclusion of subcontractors pick up round. Subcontractor's act in taking goods home for night constituted unauthorised deviation from contract terms. TNT was precluded from relying on liability exemption clause in contract.</i>
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Statutory obligations where services are provided to consumer: Aus Consumer Law (Sch 2 to Comp and Consumer Act 2010 (Cth))

61 Guarantees as to fitness for a particular purpose etc.

(1) If:

- (a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and
- (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

(2) If:

- (a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and
- (b) the consumer makes known, expressly or by implication, to:

- (i) the supplier; or

acquisition of the services were

conducted or made;

the result that the consumer wishes the services to achieve; there is a guarantee

that the services, and any product

resulting from the services, will be of such a nature, and quality, state or condition,

that they might reasonably be

expected to achieve that result.

- s60 Guarantee as to due care and skill: If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.
- s63 This Subdivision does not apply to...
 - a. a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored.
- 64 Guarantees not to be excluded etc. by contract.

DUTIES OF BAILOR

- If bailment for reward is for a fixed term, bailor has duty not to interfere with bailee's possession depending on the terms of bailment. Otherwise, if bailor unduly retakes possession of goods during bailment, he may be liable for trespass/conversion/breach of contract.
- Gratuitous bailment is revocable at bailor will Parastatidis v Kotaridis (1978)
- Bailor must inform bailee of dangers in the goods of which bailor is aware whether bailment is gratuitous/reward.
- Where bailee accepts possession of goods after being sufficiently warned of their dangerous qualities, bailor will not be liable for subsequent loss/damage suffered by bailee
- Bailor must comply with terms of bailment (e.g. payment of agreed fee) otherwise bailee has the right to exercise a lien over goods to secure payment.

<p><u>Coughlin v Gillison (1899)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts:</u> Ship owners contracted with P employers to ballast ship; work had to be done by hand. Workers asked if they could use owner's steam engine and owner agreed if they engaged competent operator (gratuitous bailment) During use, part of engine exploded and P was injured. Engine was used day before without any apparent defects. ▪ <u>Held:</u> <i>owner's not liable; they didn't know of defect and couldn't reasonably have been expected to know – defect appeared on day of use</i> ▪ <u>Principle:</u> <i>gratuitous bailor has duty to "communicate to borrower defects in article lent of which he is aware and if either deliberately or by gross negligence he doesn't discharge this duty, he is liable for injury resulting to borrower"</i>
<p><u>Pivovarovff v Chernabaeff (1978)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts:</u> market gardener gratuitously lent onion sorting machine to fellow gardener. While giving directions to bailee on how to use the machine, bailor warned bailee not to allow children near it. Bailee operated machine assisted by 13 yr old whose hand became caught in machine and was mutilated ▪ <u>Held:</u> <i>bailor wasn't liable since had sufficiently discharged his duty to warn of dangers that might arise from operation of machine. Bailee was liable in negligence for injuries to the boy</i>

Hire of goods for reward:

- Goods must be reasonably fit for particular purpose made known to bailor/lessor for which they are being hired
- Condition of fitness for purpose is implied at common law and can be excluded by app drafted exclusion clause

<u>Derbyshire Building v Becker (1962)</u>	<ul style="list-style-type: none">▪ Facts: P was doing fencing work for D as independent contractor. Price was agreed on basis that D (bailor) was to supply electric saw (bailment for reward). Saw was defective (faulty maintenance) and P was injured▪ Held: <i>there was implied condition that goods (saw) would be fit for purpose when user made purpose known. Duty of bailor was that goods had to be fit for purpose as far as bailor knew/ought to have known – here owner hadn't bothered to maintain saw – so he ought to have known of potential defect</i>▪ Principle: <i>goods had to be fit for the purpose</i>
<u>Cottee v Franklins Self Serve (1997)</u>	<ul style="list-style-type: none">▪ Facts: P was injured when she attempted to prevent laden shopping trolley from toppling over when 1 of its wheels collapsed. Trolley was supplied to P by employee from D supermarket▪ Held: <i>there was hire contract between P and D and an implied term that trolley would be reasonably fit for its contemplated purpose. P was awarded damages she suffered as result of breach of implied term</i>

Aus Consumer Law (hired/leased goods)

- ss52, 54-56: Guarantees of undisturbed possession and conditions of correspondence with description, acceptable quality and fitness for purpose are also applied to contracts for hire
- s3(2): terms cannot be excluded

Bailment relationship and liability can extend beyond a contractual relationship

- Modifies privity rule by conferring rights against 3rd parties (*Morris v CW Martin & Sons*)
- Bailee may sue 3rd party for damages caused to bailed goods as possession is title against the wrongdoer (*The Winkfield*)
- Bailee may sue even if bailor suffered no loss (*Goodwin v Ron Heath Tyre Service*) – bailor paid out in insurance, bailee could still sue for value of damage) – bailee must account for damages to bailor

TERMINATION OF BAILMENTS

1. **Expiry of term:** when period for which goods were bailed expires OR when purpose for which bailment was created is fulfilled
2. **Demand of gratuitous bailee (at any time):** *Parastatidis v Kotaridis (1978)*
3. **Wrongful act of bailee:** to jeopardise title of bailor to goods OR to amount to repudiation of transaction (sell goods) bailment may be terminated (not automatic; bailor has an option to continue/terminate) *Anderson Group v Tynan Motors (2006)*
4. **Destruction of subject matter:** subject matter is lost/destroyed OR some change in its nature becomes incapable of use for bailment purposes
5. **Transfer of ownership to the bailee**
6. **Re-delivery of the goods to the bailor**

Repossession of bailed goods

- Owner of bailed chattel cannot use force to repossess chattel since bailee possession wasn't wrongful from its inception
- *Toyota Finance Aus v Dennis (2002): lessor of car wasn't entitled to use force in repossessing car from lessee who wrongfully refused to return the vehicle*

Rights against 3rd parties

- If 3rd party commits wrongful act against chattel bailed (wrongful possession) bailor has right to sue 3rd party in tort for damages for conversion if bailment is at will
- Bailee can bring action against tortfeasor who negligently caused damage to bailed chattel while in bailee possession as bailee possession is good against any tortfeasor Goodwin v Ron Heath Tyre Service (SA) (1999)
- In bailment for reward, bailor rights to possession of goods is suspended and only bailee can sue 3rd party for wrongful interference with the goods. However, if interference adversely affects bailor reversionary interest (damaged goods), bailor can sue 3rd party Penfolds Wines v Elliott (1946)
- If bailee wrongfully disposes of chattel, bailor can terminate bailment (immediate rights to possession and right to sue 3rd party/bailee in conversion)

<p><u>Goodwin v Ron Heath Tyre Service (1999)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts:</u> owners delivered car to bailee for fitting tyres. Bailee did test run; another driver drove negligently and damaged vehicle. ▪ <u>Held:</u> <i>bailee could bring action for wrong done to car. If owner brought action against bailee it would have failed as it occurred without fault (bailee took due care). Bailee entitled to recover market value – but had to account to owner.</i> ▪ <u>Principle:</u> <i>A bailee is entitled to bring an action against a party who has negligently caused damage to the bailed goods subject to the contract of bailment while they were in possession of the goods as the bailee</i>
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SPECIAL TYPES OF BAILEE

Common carriers

- Common carrier of goods: whose bus it is and holds themselves out as willing to carry goods from place to place for anyone who thinks fit to employ the carrier. Principles are:
 1. person must carry on bus as carrier and must not simply be casual carrier
 2. if carrier reserves right to accept/reject transport of goods irrespective of whether their vehicles are full/not they are not a common carrier James v Cth (1939)
 3. it is always question of fact whether person is common carrier /not. Holding out of being common carrier may be express/IMPLIED by course of bus/other conduct

→ Private carriers:

- Don't hold themselves out as willing to convey goods of any person who chooses to employ them and usually consider terms/nature of every offer before deciding whether to accept it
- Not necessarily liable if goods are lost/damaged as they're not insurers of goods; onus is on them to prove damage wasn't caused by their neglect Hobbs v Petersham Transport (1971)
- Liable for damages if loss is caused through their neglect unless specifically exempted from liability

<p><u>Hobbs v Petersham Transport (1971)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts:</u> Carrier engaged 3rd party to deliver appliance. Axle in vehicle was broken, and generator was damaged. <u>Held</u> ▪ <u>Held:</u> <i>D was not bailee of goods. In action for breach of contract of carriage onus of est. breach rests on P; once D provides explanation of non-delivery which destroys inference of negligence, he is not required to est he could not have prevented occurrence causing non-delivery by any exercise of due care; and D est. precise cause of failure to deliver was fracture of axle which was not proved to have been caused by negligence of D/subcontractor</i>
<p><u>Cowper v JG Goldner (1986)</u></p>	<ul style="list-style-type: none"> ▪ <u>Facts:</u> contracted to carry P valuable mare by road from SA to NSW. On arrival mare was found seriously ill from travel sickness and died a few days

	<p>later</p> <ul style="list-style-type: none"> ▪ <u>Held</u>: <i>D was not common carrier of horses. However D had not discharged onus of proving death of mare had not resulted from failure to take reasonable care in inspecting mare during course of journey and was liable in negligence for its loss</i>
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→ **Duties of common carrier**

1. To carry class of goods they profess to handle for any person who offers to pay usual charge
2. to carry goods by usual route and not deviate unnecessarily
3. to deliver goods without unreasonable delay: carrier excused from loss resulting through delay caused by consignee
4. to carry out instructions of consignor for delivery to consignee (consignor must take reasonable precautions when sending dangerous articles and give notice of their dangerous nature to the carrier)

→ **Liability of common carrier**

- Liable for any loss/damage whether due to their negligence/not that may result to goods while in their control
- Exceptions to this is loss/damage caused through “acts of God”, acts of Queen’s enemies, inherent fault, deterioration of goods, faulty/defective packaging Gould v SE (1920)

→ **Statutory limits on liability of common carrier: Common Carriers Act 1902 (NSW)**

- s4: common carrier by land isn’t liable for loss of valuable items (gold, silver...) if value > \$20/package unless at time of delivery to carrier, value and nature of articles are declared by consignor and special rate specified in conspicuous notice on carrier premises is paid
- s7: no public notice made by carrier is deemed to limit/affect their common law liability
- s9(C): provisions don’t affect any special contract made between carrier and consignor for varying carrier common law liability provided such contract is signed by consignor

→ **Application of Aus Consumer Law**

- s60: there is a guarantee that services “will be rendered with due care and skill” (cannot be excluded where services are acquired for personal/domestic/household use)
- s63: doesn’t apply in transport of goods for bus/profession carried on by person for whom goods are transported

→ **Rights of common carrier**

1. to be paid their charges in advance before they carry goods
2. to claim lien on goods until their charges are paid
3. to refuse to carry goods in certain cases, where:
 - a. goods are not of class carrier professes to carry Cowper v JG Goldner (1986)
 - b. goods are improperly/insufficiently packed
 - c. carrier vehicles have no available space
 - d. destination is not within carrier usual route/radius