



Special Rules for Land Conditions and Bailments

Torts
Eric E. Johnson
ericejohnson.com



Konemark
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Duties for bailments

General observations (1/2)

- A “bailment” is when one person, called the “bailee,” is holding on to the chattel owned by another person, who’s called the “bailor.”
- Common words used to describe what’s going on in a bailment situation include ***renting, lending, borrowing, and holding on to [something for someone].***
- The law differs by jurisdiction, but what’s presented here are classic, traditional rules that are widely recognized and followed.
- These things can often be altered by contract.

General observations (2/2)

- There’s two sets of standards:
- One set is for when the “bailor” is the plaintiff—there we’re generally talking about damage done by the bailee to the bailor’s chattel.
- The other set is for when the “bailee” is the plaintiff—there we’re generally talking about damage the chattel does to the bailee’s physical person or the bailee’s property.

Bailement Standards *Owed by Bailee to Bailor*

I/o/w: Π bailor v. Δ bailee

These are the classic, traditional rules:

For whose benefit?	What's owed?	So what's a breach?
solely for the bailee's benefit	a high degree of care	slight negligence
mutual benefit of the bailor and bailee	ordinary care	ordinary negligence
solely for the bailor's benefit	only slight care	gross negligence

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Example: I lend my neighbor my lawn mower, and they damage it.

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mutual benefit bailor and bailee		
solely for the bailor's benefit		

Many authorities would say that these rules don't replace the reasonable person standard, but rather specify and uphold it in the circumstances of a bailment—because, for instance, the reasonable person would only exercise slight care when holding on to a chattel for the bailor's exclusive benefit. But for practical purposes, these are a replacement, because they form the basis for the jury instructions.

Bailement Standards *Owed by Bailor to Bailee*

I/o/w: Π bailee v. Δ bailor

These are the classic, traditional rules:

Is the bailor making money?	What's owed?	In other words ...
gratuitous bailment	to warn of or fix known hazardous defects	The bailor has <u>no duty to inspect</u> the chattel beforehand.
bailment for hire	to warn of or fix known <u>and reasonably knowable</u> hazardous defects	The bailor has a <u>duty to inspect</u> the chattel and find reasonably discoverable defects.

Bailement Standards *Owed by Bailor to Bailee*

I/o/w: Π bailee v. Δ bailor

These are the classic, traditional rules:

Example: I borrow or rent a truck, and I get injured when the brakes fail.

Is the bailor making money?		In other words ...
gratuitous bailment	to warn of or fix known hazardous defects	The bailor has no duty to inspect the chattel beforehand.
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Problems

Eleanor lent her lawn mower to Tracy so that Tracy could mow Eleanor's lawn, which Tracy's doing for free.

1

Tracy takes ordinary care of the lawn mower but damages it nonetheless by going over a metal sprinklerhead. Is Tracy on the hook for the damage to the mower?

- A. Yes
- B. No

Eleanor lent her lawn mower to Tracy so that Tracy could mow Eleanor's lawn, which Tracy's doing for free.

1

Tracy takes ordinary care of the lawn mower but damages it nonetheless by going over a metal sprinklerhead. Is Tracy on the hook for the damage to the mower?

A. Yes

B. No

The answer is no because Tracy only owed slight care, since this bailment was for Eleanor's sole benefit. And apparently even ordinary care wasn't enough to prevent the damage.

Eleanor lent her lawn mower to Tracy so that Tracy could mow Eleanor's lawn, which Tracy's doing for free.

2

Tracy is burned when the lawn mower catches on fire because of a defect that Eleanor didn't know about, but which could have been found through a simple, reasonable inspection. Is Eleanor on the hook for the damage?

A. Yes

B. No

Eleanor lent her lawn mower to Tracy so that Tracy could mow Eleanor's lawn, which Tracy's doing for free.

2

Tracy is burned when the lawn mower catches on fire because of a defect that Eleanor didn't know about, but which could have been found through a simple, reasonable inspection. Is Eleanor on the hook for the damage?

A. Yes

B. No

The answer is no because since this bailment was a gratuitous bailment, Eleanor didn't know about this defect, and she only had a duty to disclose known defects. She had no duty to inspect.

Land owner/occupier
duties for conditions
of the land

General observations (1/5)

- What follows is a *simplified* view of the law on the duties of care owed by landowners and land occupiers.
- In reality, there is a great deal of variation among courts on what rules to apply for land owner/occupier defendants – not just in how these are worded, but in the substance.
- “[T]here has been little uniformity among the states in determining the measure of the duty owed to certain persons coming onto the land.”
– Understanding Torts (5th ed.) Diamond et al.

General observations (2/5)

- I personally would say there’s too much variation to make this a subject for the bar exam.
- Yet the multistate bar includes within the scope of coverage for the exam: “special rules of liability” for “[c]laims against owners and occupiers of land[.]” (2020 MBE Subject Matter Outline p. 8; 2020 MEE Subject Matter Outline, p. 11).
- Thus, I’m giving you a **simplified approximation** of the law – it’s a view that doesn’t really represent the general state of the law or even what you’d call a “majority approach.” But it provides what I would consider to be a useful approximation of the general state of the law.

General observations (3/5)

- I've looked at various secondary sources to see how commentators and scholars approximate the law in this area – but they differ considerably!
- The approximation I'm giving you is my approximate synthesis of various treatise writers' approximate syntheses. ☺
- For what it's worth, what I'm giving you is a view that is somewhere between the Second Restatement of Torts and the Third Restatement of Torts.
- That strikes me as a good place to be, because the Second Restatement is arguably outdated at this point, but the Third Restatement is controversial and might be said to be "ahead of its time."

General observations (4/5)

- In the real world, you'll have to look this stuff up! That's not only because it varies so much by jurisdiction, but also because precedent can be applied in an extremely fact-specific way.
 - For instance, if you've got a case of a trespasser being hit by a front loader operated by the land owner, then it would be good to look for construction-equipment-vs-trespasser precedent in your jurisdiction. According to the law I present here, that situation is just regular reasonable-person standard, with no special standards. But I can't say some court might not apply a special land-owner standard.

General observations (5/5)

- So, what I'm giving you in the following grid is what you should assume the law to be for the purposes of my class, including my exam.
- It should also be useful for the bar exam!
- *But* if your bar prep company tells you something different, then you should probably go with what they say in terms of the bar exam.

Land owner/occupier duties of care

	Conditions on the land	Activities on the land
Unanticipated / undiscovered trespassers	No duty	Reasonable person
Anticipated / discovered trespassers	Warn of or fix seriously dangerous, known, artificial, concealed hazards	Reasonable person
Anticipated / discovered child trespassers	Fix seriously dangerous, known, artificial hazards, so long as cost-benefit justified	Reasonable person
Licensees	Warn of or fix known, concealed hazards	Reasonable person
Invitees	Warn of or fix known and reasonably knowable, concealed hazards	Reasonable person

Note: "Seriously dangerous" means capable of causing death or serious bodily harm.

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Unanticipated / undiscovered	No duty	Reasonable person
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		Reasonable person
Invitees	Warn of or fix known and reasonably knowable, concealed hazards	Reasonable person

Note that for activities on the land, the standard's just normal old reasonable person. (But that's not to say you couldn't also use negligence per se where appropriate.)

Note: "Seriously dangerous" means capable of causing death or serious bodily harm.

Land owner/occupier duties of care

These standards actually *replace* the reasonable person standard. If they don't work to prove breach, the plaintiff can't fall back on reasonable person to prove breach.

But can a plaintiff use negligence per se with regard to conditions of the land? **Yes, this will work in many courts.**

	Conditions on the land	Activities on the land
	No duty	Reasonable person
	Warn of or fix seriously dangerous, known, artificial, concealed hazards	Reasonable person
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	Warn of or fix known, concealed hazards	Reasonable person
	Warn of or fix known and reasonably knowable, concealed hazards	Reasonable person

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Anticipated/Discovered vs. Unanticipated/Undiscovered Trespassers

- The default category of trespasser is undiscovered/unanticipated. This category applies if there's nothing suggesting the trespasser is anticipated or discovered.
- Whether a trespasser counts as discovered/anticipated is ultimately a factual issue. But here are some examples:
 - The landowner/occupier sees a beaten path, evidencing trespassers.
 - The landowner/occupier has seen school kids cutting across the yard on their way to school.
 - The landowner/occupier has seen trespassers previously walking over the land to access a public beach.
 - Some trespassers are actually observed in real-time.

Anticipated/Discovered Child Trespassers

- This category adds a duty to fix (as opposed to a duty to *warn of or fix* for adult anticipated/discovered trespassers) and embraces non-concealed hazards (as opposed to just concealed hazards for adults).
- The doctrine is sometimes called "attractive nuisance," although that's a confusing name, because there's no requirement that the artificial hazard be attractive or that it counts as a nuisance.
- The doctrine sprang from and is associated with the "turntable cases," where railroads were sued for injuries and deaths sustained by children playing on and with railroad turntables.



Turntable photos by Bernard Spragg

Licenseses and Invitees

- **Licensee** means a person who has permission ("license") to be on the land who doesn't qualify as an invitee.
 - Licensee is the default category for nontrespassers.
 - The licensee category includes social guests.
- **Invitee** is an elevated category of nontrespasser where the land owner/occupier's broad invitation to others to enter implies an obligation to undertake more care. While definitions vary, many courts recite that an invitee is someone who is:
 - a member of the public on land open to the public for the purposes for which the person is there (like a park goer in a public park) **OR**
 - a person on land in connection with the landowner's business (like a shopper in a store).

Realothetical ...

Lisa went to a "kegger" after high school graduation. It was held on farm land owned by the parents of graduating senior Dean. Partygoers, including Lisa, purchased a \$20 ticket, proceeds of which were used purchase beer, food, and music. By 11 p.m., there were 100 to 400 partying youths. Lisa arrived at 11:30 p.m. **Is she an invitee?**

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No. "We are not persuaded by Lisa's argument that payment of a \$4.00 admission price [in 1977, worth ~\$18 now] made her an invitee. Analysis in cases where an admission was paid and the plaintiff was characterized as an invitee did not focus on the money as indicative of the plaintiff's status as an invitee. ... The trial court correctly identified Lisa as a licensee." *Younce v. Ferguson*, 106 Wash. 2d 658, 669 (1986).

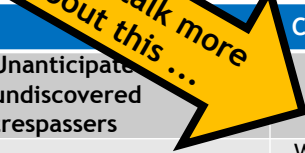
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It really would not have been surprising if this case came out the other way. It's a borderline situation.

Land owner/occupier duties of care




	Conditions on the land	Activities on the land
Unanticipated undiscovered trespassers	No duty	Reasonable person
Anticipated / discovered trespassers	Warn of or fix seriously dangerous, known , artificial, concealed hazards	Reasonable person
	Fix seriously dangerous	

Note the word “known” in here. Some courts might not, in fact, require such knowledge. But the best approximation of the law I can give you is that this duty applies only when the seriously dangerous, artificial, concealed condition is known to the land owner/occupier.

Note: “Seriously dangerous” means capable of causing death or serious bodily harm.

LACK:
Lethal
Artificial
Concealed
Known

Land owner/occupier duties of care



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A possible memory aid ...

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Problems

A mazuku (from the Swahili for “evil wind”) is a pocket of heavier-than-air oxygen-poor gas that accumulates in a depression. They result from natural geologic processes. Mazukus, which are odorless and invisible, can cause asphyxiation of people and animals that wander into them.

1
Linda is a landowner that knows about a mazuku on her land. Is she liable for a trespassing child that falls in and dies?

- A. Yes
- B. No

1

Linda is a landowner that knows about a mazuku on her land. Is she liable for a trespassing child that falls in and dies?

A. Yes

B. No

The answer is no because it's a natural hazard. The duties to trespassers, including child trespassers, apply only to artificial conditions.

2

Geologist George, walking nearby, happens to see the child fall into the mazuku. George has a breathing mask and could safely go and rescue the child. Is George liable for not walking down to pull the kid out?

A. Yes

B. No

2

Geologist George, walking nearby, happens to see the child fall into the mazuku. George has a breathing mask and could safely go and rescue the child. Is George liable for not walking down to pull the kid out?

A. Yes

B. No

(This is a review question.) The answer is no because there's no affirmative duty to rescue.

3

A different mazuku is on a golf course owned and operated by Funstar Resorts, and they know mazukus tend to form on the land. Is Funstar Resorts liable if a golfer falls in and is injured?

A. Yes

B. No

3

A different mazuku is on a golf course owned and operated by Funstar Resorts, and they know mazukus tend to form on the land. Is Funstar Resorts liable if a golfer falls in and is injured?

A. Yes

B. No

Yes. The golfer is an invitee, so there is a duty to warn of known and reasonably knowable natural hazards.

4

Does it make a difference if Funstar Resorts doesn't actually *own* the property, instead they just lease it?

A. Yes

B. No

4

Does it make a difference if Funstar Resorts doesn't actually *own* the property, instead they just lease it?

A. Yes

B. No

No. They're still the land "occupier," so the special rules apply the same as if they were the owner.

5

Linda knows people are sometimes on her land without permission. She sets off a huge fireworks display where it's foreseeable that a trespasser might be walking. Must she use reasonable care to avoid injury to them?

A. Yes

B. No

5

Linda knows people are sometimes on her land without permission. She sets off a huge fireworks display where it's foreseeable that a trespasser might be walking. Must she use reasonable care to avoid injury to them?

A. Yes

B. No

Yes. When it's an activity, as opposed to a condition, don't use the special rules for land owner/occupiers.