



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today we're walking through an Agency and Torts MEE question from the UBE. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience so you can study effectively, stay sane, and hopefully pass and move on with your life.

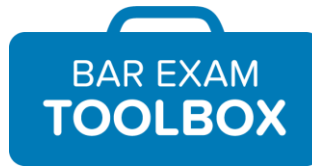
Lee Burgess: We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back. Today we are walking through a Torts and Agency question. This is also another in our series of podcasts talking about how to approach questions on the UBE. And don't forget to subscribe to our podcast so you won't miss any upcoming essay discussions. Today's essay is particularly interesting, given the current changes ongoing in the economy. The question is about agency liability for independent contractors' torts. Are the workers employees or not? Are they merely contractors? In today's gig economy – think Uber and Lyft – this is a pretty important topic.

Lee Burgess: Now, before we walk through today's question, we need to do a quick review of the law that you will want to know for this question. Since this covers both Agency and Torts, we'll need to talk about both.

Lee Burgess: First, the Agency part of the question. In general, people or companies who hire independent contractors are not liable for the torts committed by those contractors. Employers can, however, be liable for their employees' tortious conduct that occurs within the scope of employment. The test for whether a person is an employee, rather than an independent contractor, is whether the person's physical conduct in the performance of the services is subject to the employer's control or right to control. This is a question of fact and there are factors that a court might take into consideration.

Lee Burgess: Employers' liability for employees' tortious conduct is generally limited to conduct that occurs within the scope of the employment, and whether or not the conduct occurred during the scope of employment is also a question of fact. An employee's conduct is within the scope of his or her employment if, number one, it is the kind that the employee is employed to perform; number two, it



occurs substantially within the authorized time and space limits; and number three, it is motivated, at least in part, by a purpose to serve the employer.

Lee Burgess: We also need to review the Torts portion of the question. Today's question deals in part with a doctrine of negligence per se. That rule is: An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident that the actor's conduct causes, and if the accident victim is within the class of persons who the statute is designed to protect.

Lee Burgess: Finally, the question deals with indemnification. Indemnification is full reimbursement for damages, and is available to a tort defendant who has paid the plaintiff's damages award but who was not personally at fault, and where the non-paying co-defendant was at fault.

Lee Burgess: Now, let's move on to reading the bar exam question. This is a question from the [February 2015 bar exam](#). We will link to a webpage where you can find this question in the show notes.

Lee Burgess: "For many years, a furniture store employed drivers to deliver furniture to its customers in vans that it owned. Several months ago, however, the store decided to terminate the employment of all its drivers. At the same time, the store offered each driver the opportunity to enter into a contract to deliver furniture for the store as an independent contractor. The proposed contract, labeled 'Independent Contractor Agreement', provided that each driver would, number one, provide a van for making deliveries; number two, use the van only to deliver furniture for the store during normal business hours and according to the store's delivery schedule; and number three, receive a flat hourly payment based upon 40 work hours per week without employee benefits. The proposed Independent Contractor Agreement also specified that the store would not withhold income taxes or social security contributions to the driver.

Lee Burgess: The store also offered each driver the opportunity to lease a delivery van from the store at a below-market rate. The proposed lease required the driver to procure vehicle liability insurance. It also specified that the store would reimburse the driver for fuel and liability insurance, and that the lease would terminate immediately upon termination of the driver's contract to deliver furniture for the store. All the drivers who had been employed by the store agreed to continue their relationships with the store and executed both an Independent Contractor Agreement and a lease agreement for a van.



Lee Burgess: Three months ago, a driver delivered furniture to a longtime customer of the store during normal business hours. The customer asked the driver to take a television to her sister's home, located six blocks from the driver's next delivery, and offered him a \$10 tip to do so. The driver agreed, anticipating that this delivery would add no more than half an hour to his workday. In violation of a traffic ordinance, the driver double-parked the delivery van in front of the sister's house to unload the television. A few minutes later, while the driver was in the sister's house, a car swerved to avoid the delivery van and skidded into ongoing traffic. The car was struck by a garbage truck and the passenger in the car was seriously injured.

Lee Burgess: The passenger has brought a tort action against the store to recover damages for injuries resulting from the driver's conduct. Pre-trial discovery has revealed that delivery vans routinely double-park. Survey evidence suggest that in urban areas like this one, 80% of deliveries are made while the delivery van is double-parked. In this jurisdiction, there is no law that imposes liability on a vehicle owner for the tortious acts of a driver of that vehicle solely on the basis of vehicle ownership. The store argues that it is not liable for the passenger's injuries because A, the driver is an independent contractor; B, even if the driver is not an independent contractor, the driver was not making a delivery for the store when the accident occurred; and C, the driver himself could not be found liable for the passenger's injuries.

Lee Burgess: Now, number one: Evaluate each of the store's three arguments against liability. Number two: Assuming that the store is liable to the passenger for the passenger's injuries, what rights, if any, does the store have against the driver? Explain."

Lee Burgess: Wow, that's a long fact pattern. How do we approach this question in an exam setting? The first thing you should do after you read the call of the question and the question is mark up your exam paper to identify potentially significant facts and to address what is legally significant about each fact in the fact pattern. We have read the call of the question, so we have a good idea of what the question is asking and what rules are being tested.

Lee Burgess: As we start reading, we see lots of facts that relate to the nature of the relationship between the store and its drivers. First, the store terminated employment but offered the drivers work under Independent Contractor Agreements. The facts state there is an hourly wage with no tax withholding and no benefits. The drivers had to supply their own vans. The store would offer below-market leases for vans, and every driver took them up on that offer. And



those leases would terminate at the termination of the Independent Contractor Agreement. The van would be used only to deliver furniture for the store during normal business hours, according to the store's delivery schedule. The store would reimburse drivers for both gas and insurance. And every driver continued on with the company. We know that this question deals with the store's potential liability, and these facts are important in analyzing whether or not there are grounds to find liability through the laws of agency.

Lee Burgess: Now as we read on, we will see that the next section of this essay prompt contains the facts of an accident, a potential tort. So here we try to identify the specific facts that are useful in analyzing a tort. The driver delivered to a longtime customer, and then agreed to deliver a television for the customer to the customer's sister in exchange for a tip. The driver double-parked his van to make that special delivery, which was in violation of a traffic ordinance. Another driver swerved to avoid the illegally parked van, and an accident resulted. Those facts will be helpful in analyzing whether the tort occurred during the scope of the driver's employment, or indeed if the driver could be found liable for a tort at all.

Lee Burgess: Finally, the prompt throws in a few more facts for us. Vans are routinely double-parked in that area, and indeed, 80% of deliveries in that area are made from a double-parked van. Obviously, these facts speak to whether or not the driver was behaving reasonably or in line with customary practice of the area, and so might present a potential argument against finding negligence.

Lee Burgess: Okay. That is a lot of facts, but we've read through the prompt and have identified the facts that may be significant, and we've even done a bit of classification of where each fact may play into an answer. So now let's look at how to exactly answer this question. You would start any outline or answer by breaking your paper into two segments, one for each question. Note that this question implicates both Agency and Torts, so you'll need to consider both subjects as the facts indicate.

Lee Burgess: So, review the call of a question to make sure you are outlining an answer to the question actually put to you. Here the call was, "The store argues that it is not liable for the passenger's injuries because A, the driver is an independent contractor; B, even if the driver is not an independent contractor, the driver was not making a delivery for the store when the accident occurred; and C, the driver himself could not be found liable for the passenger's injuries."



Lee Burgess: So, the first one says, "Evaluate each of the store's three arguments against liability. And number two, "Assuming that the store is liable to the passenger for the passenger's injuries, what rights, if any, does the store have against the driver? Explain."

Lee Burgess: So, our outline for an answer might look something like this. Question number one, issue number one: Is the store free from liability because the driver was an independent contractor and not an employee? Issue number two: Is the store free from liability because even if the driver was an employee, the incident occurred when the driver wasn't making a delivery for the store? And issue number three: Is the store free from liability because the driver himself could not be found liable for damages? Question number two: If the store is liable to the passenger, can the store seek compensation from the driver for the damages?

Lee Burgess: Now this outline could even be shortened into an essay situation looking something like this. Issue number one: independent contractor liability. Issue number two: scope of employment. Issue number three: negligence per se. And question number two is about indemnification. Let's look separately at question one's three sub-issues, and then at question two.

Lee Burgess: Issue number one: Is the store free from liability for any of the driver's potentially tortious conduct because the driver was an independent contractor and not an employee? Now, that's the first issue. Remember, on an essay, it's important to clearly articulate what the issue is, and then proceed to complete an accurate statement of the applicable rule or rules.

Lee Burgess: The general rule is that the store will not be liable for torts committed by independent contractors. The test for whether the drivers were employees, rather than independent contractors, for the purposes of agency liability is whether or not the drivers' physical conduct in the performance of the services is subject to the employer's control or right to control. In applying this test, there are several factors that are relevant, such as how long the working relationship has gone on, whether the work in question is part of the employer's regular business operations, and how much skill is involved in the work, and who owns the tools or implements necessary to perform the work.

Lee Burgess: Now that we have stated the applicable rules, let's apply them to the facts. Whether the drivers were employees is based on a factual analysis of the employer's control, so the Independent Contractor Agreements are not dispositive on this issue. The drivers had all worked for the store for quite a while, and continued on after the employment arrangement changed, so these



were not temporary or part-time or special project workers. The drivers delivered packages on a day-to-day basis, paid hourly, rather than on a package-to-package basis that might indicate a more independent arrangement. They worked regular 40-hour weeks. Delivery is not what we commonly think of as a skilled job, and although the drivers were supposed to supply their own vans, they were in fact leased from the store for use only during the store's regular delivery hours and for no other use.

Lee Burgess: These facts all tend to support an argument that the store had sufficient control, or right to control, over these drivers so as to give rise to an employer/employee relationship. Of course, there was the Independent Contractor Agreement, but those agreements aren't always dispositive. For these reasons it's likely that the court would find that the driver was the store's employee, and accordingly the store cannot escape liability for this tort on this theory.

Lee Burgess: Okay, so for issue number one, we stated the issue, then recited the relevant rules, and then we analyzed each of the facts that are important to the legal determinations made with those rules. When doing an essay like this, it's important to first have complete and accurate rule statements memorized, and then to methodically analyze each element of the rule, each factor of any test, and to pay special attention to any specialized terms of art. Now we move on to issue number two.

Lee Burgess: If a court finds that the driver was an employee of the store, can the store escape liability by arguing that the incident occurred beyond the scope of the driver's employment? Now we know the issue, so let's move on to the rules. An employer will be liable for an employee's tortious conduct that occurs within the scope of employment. Whether an employee is acting within the scope of employment is a question of facts based on whether the act in question was of the kind that the employee is employed to perform, and whether it occurs substantially within the authorized space and time limits, and whether the act was motivated in part by a purpose to serve the employer.

Lee Burgess: Next, we analyze the facts of this issue through the legal framework that these rules provide. Just the same process as before but with different facts and different rules. Here, the act that caused the accident was double-parking in order to make a delivery, which is exactly the type of act that the store paid the driver to do. The accident happened during normal business hours, during that time that the driver was employed to make deliveries, and he had deviated only six blocks and half an hour out of the way. And he very well might have been



motivated by a purpose to serve his employer, because although he did receive a tip for the delivery, this was a longtime customer of the store and he was possibly trying to strengthen that customer/store relationship. On balance, these facts indicate that the driver likely was acting within the scope of employment when the accident occurred.

Lee Burgess: The final sub-issue of question number one is whether the store might argue that it is free from liability because the driver himself could not be found liable for damages. If there is no underlying tort, then obviously the store could not have any agency liability. This is a negligence question, and the inclusion of the double-parking traffic ordinance in the facts is a key that what we're looking at here is a negligence per se question. Having stated the issue, now state the rule: An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes and if the accident victim is within the class of persons the statute is designed to protect.

Lee Burgess: The driver violated a double-parking statute. Generally, traffic laws like these are passed to prevent traffic problems and accidents on the roadway. The accident in question, and the damages suffered, are of exactly the type of injuries that legislatures seek to prevent with those statutes. And although the facts don't tell us whether the double-parking ordinance specifies a class of persons it is designed to protect, traffic and safety ordinances in general are designed to protect the public at large.

Lee Burgess: Now, are we done with this analysis? Not quite. The negligence per se rule provides an out and potential defense that we would have to address – something like this: The negligence per se doctrine applies only when the alleged tortfeasor acts without excuse. Here, the driver and the store would likely argue that it is customary to double-park in that area, especially for delivery drivers. They would argue that a full 80% of deliveries are made this way. Indeed, courts have sometimes allowed customary exceptions to statutes. However, courts recognize such exceptions generally only when the customary behavior is actually safer, given extenuating circumstances, than it would be to conform to the statute. Here, there is likely no good argument that double-parking was actually safer than obeying the ordinance. On these facts, there is a strong argument that the driver was negligent per se when his violation of the double-parking ordinance caused the driver's injuries.

Lee Burgess: Now, finally we've made it to question number two. This is a classic example of a little bitty question tacked on after a really big question. It appears to be on



equal footing with question one, but in reality it's a much smaller question. So the question is, "Assuming that the store is liable to the passenger for the passenger's injuries, what rights, if any, does the store have against the driver? Explain." As always, we should stick to our same, trusty IRAC format. Lay out the issue, the rule, and then discuss why or why not that rule might be applicable.

Lee Burgess: Something like this: If the driver is found to be negligent and the store is liable for damages because the driver was an employee, then the store might seek indemnification from the driver. A tort defendant who pays a plaintiff damages may seek indemnification from non-paying defendants when the paying defendant was not at fault here. Here, the store was not at fault. Accordingly, to the extent that the driver was at fault for the victim's damages, the store might seek indemnification from the driver and the driver might be liable to the store for the amount of damages. Note, however, that in some states the law prevents employers from seeking indemnification from its employees.

Lee Burgess: And that's it. That's how we could approach this essay in an exam setting. And it's the same process, more or less, for most essays. I hope you enjoyed reviewing this essay with us.

Lee Burgess: And with that, we're out of time. I want to take a second to remind you to check out our blog at barexamtoolbox.com, which is full of helpful tips to help you prepare and stay sane as you study for the bar exam. You can also find information on our website about our courses, tools, and one-on-one tutoring programs to support you as you study for the UBE or California bar exam. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you are still in law school, you might also like to check out our popular [Law School Toolbox podcast](#) as well. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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