



- Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're talking about negligence per se, as part of our "Listen and Learn" series. 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. 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 to the Bar Exam Toolbox podcast! On this week's "Listen and Learn", we are covering negligence per se, which is a potential sub-topic that can come up within a regular negligence analysis on your outline and attack plans. It fits into duty and breach. You won't find it on every Negligence essay, but it's something you want to know how to look for. So, let's get started!
- Lee Burgess: Negligence per se establishes a statutory standard of care, which the reasonable person would have a duty to follow, and if that statutory standard of care is violated, a breach is presumed.
- Lee Burgess: So, what does this mean? It means that instead of defaulting to the basic reasonable person under the circumstances standard, the standard of care is defined by some sort of criminal or regulatory statute. The standard of care will be formulated in accordance with two things: first, a type of harm that the statute is designed to prevent or address, and second, a class of person who is meant to be protected by the statute. If a person, by virtue of violating the statute, causes the type of harm meant to be avoided, and the harm is against the class of person meant to be protected, then the doctrine of negligence per se will come in and say, "Yep, duty and breach are met."
- Lee Burgess: You can think of negligence per se almost like "automatic negligence". The statute dictates what reasonable people do in particular situations, so when someone violates the statute, meaning they weren't doing the right things, we know they weren't being reasonable, and boom! Duty and breach are checked off.
- Lee Burgess: We're going to use some fact patterns to get specific about what this looks like. But first, some bar essay tips: How do you know when negligence per se is triggered in a fact pattern? If you just said, "If there's a statute!", then you are



correct. A dead giveaway that negligence per se will be an issue is if you find a reference to a statute, or the language of a law embedded somewhere in the fact pattern. If you see a statute, discuss negligence per se in your answer no matter what. This is the most obvious clue you can look out for.

Lee Burgess: But what about a situation where there is no explicit statute written into the fact pattern, but the defendant's act is such that the existence of a statute can be presumed? What I mean here are laws like "Don't drink and drive" or "No speeding". We all know there are laws on the books about these things. In that case, you can raise the issue of negligence per se, even if you don't have a particular statute you're citing to from the fact pattern. Your common sense is citation enough.

Lee Burgess: That said, specifically on the California bar, you want to be very careful not to go too far outside the fact pattern. Remember, the facts are clues to you about what the graders want you to discuss. If there are no facts to trigger an issue, that means you shouldn't waste your time on it. If the fact pattern does not give you a statute, that might mean negligence per se is a non-issue, or at least a very small issue, in which case you may want to leave it out altogether, save it for last, or at least be very careful how you're apportioning your time so you don't get carried away writing about something that's not going to get you any points.

Lee Burgess: Now, before we get into some examples from previous bar exams, here are your basic stepping stones for negligence per se. First, is there a statute or not? Is there some kind of law in the fact pattern or in your own common sense experience that is intended to guide a person's conduct in this situation?

Lee Burgess: Second, did the defendant violate the statute? To answer this, we need to go through two sub-steps. Sub-step 1: Does that statute mention or hint at a specific type of harm that is intended to be prevented or addressed, and did the defendant cause that particular type of harm? Sub-step 2: Does the statute contemplate a particular person who is intended to be protected by the statute, and is the plaintiff in this case within that class of persons?

Lee Burgess: These steps are also how you want to set up your attack plan for a negligence per se analysis. Learn these rules so you can watch out for this issue, but just know that it will not show up on every Negligence essay.

Lee Burgess: So, let's walk through these steps using a hypo. This one is excerpted from the Torts question on the [California bar exam from July 2010](#). We've shortened the



facts in order to constrain them to negligence per se, and we've also limited the call of the question for the same reason. Okay, here we go:

Lee Burgess: "Homeowner kept a handgun on his bedside table in order to protect himself against intruders. A statute provides that 'all firearms must be stored in a secure container that is fully enclosed and locked'. Burglar broke into Homeowner's house while Homeowner was out, and stole the handgun.

Lee Burgess: Burglar subsequently used the handgun in an attack on Patron in a parking lot belonging to Cinema. Patron just exited Cinema around midnight after viewing a late movie. During the attack, Burglar approached Patron and demanded that she hand over her purse. Patron refused. Now Burglar drew the handgun, pointed it at Patron and stated, "You made me mad, so now I'm going to shoot you!" Patron fainted out of shock and suffered a concussion.

Lee Burgess: Under what theory or theories, if any, might Patron bring an action for damages against Homeowner?"

Lee Burgess: Alright, now let's move through our steps. First, is there a statute that is intended to guide or regulate Homeowner's behavior in some way? Yeah, we've been told there is a statute that requires all firearms to be stored in a secure container that is fully enclosed and locked. Did Homeowner comply with that statute? Nope, Homeowner kept his handgun on his bedside table.

Lee Burgess: Okay, so can we call it a day? Is that the end of our analysis, and do we get to declare negligence per se because Homeowner breached? No.

Lee Burgess: Let's get into the attack plan. Remember, the next step is, what is the type of harm this statute is about? When you're looking at the type of harm, take a step back and give it a common sense review. Ask yourself why this statute was made into a law in the first place. What is the harm that the lawmakers were thinking about when they wrote about it?

Lee Burgess: In this fact pattern, we have a statute about locking up guns in homes. What type of harm does that make you think of? Is someone getting mugged in a parking lot the sort of scenario that the requirement to keep a gun locked away is intended to prevent? Possibly. What else could be the more likely reasoning behind the statute requiring guns in the home to be locked away? Probably to make sure that a child in the home can't access the gun. Or maybe to keep the homeowner or someone else in the house from accidentally hurting themselves or others. Those are probably closer to the real intent of the statute.



Lee Burgess: But then again, there's an argument that having a gun laying around is dangerous no matter what, and read broadly, the statute is trying to prevent any unintended shootings by keeping all the guns in homes locked up. That could cover even the burglar scenario, where someone breaks in and takes a gun because it's not properly stored. As always on the bar exam, if you see counterarguments supported by the facts, bring them up. Always remember to look at the statutes narrowly first, and then again broadly to decide what types of harm and people the law is trying to cover. This statute is probably about people getting shot, not people getting mugged and fainting because they're scared, but you could argue it both ways.

Lee Burgess: On to the next step of the test – the class of persons meant to be protected. Who was the statute written about? What kind of person did the lawmakers have in mind? We ran through a few options for foreseeable plaintiffs – basically anyone who gets accidentally shot inside the household based on Homeowner's failure to secure the gun.

Lee Burgess: But what about the patron of a far off movie theater who gets held up in a parking lot by the very gun that was stolen from Homeowner? Did legislators have someone like Patron in mind when they drafted this rule? Again, the answer is "Maybe", and it's up to you as the bar exam taker to argue what you believe is the most reasonable answer depending on the facts you're given. Try a narrow reading and a broad reading, and figure out which one makes the most logical sense to you, but be sure to discuss both alternatives in your exam answer. Again, here, common sense is the way to go. If it feels like a stretch when you're arguing, it probably is.

Lee Burgess: So, that's one example of how you might encounter and approach negligence per se on the bar. Here's another example. This one is from the [California bar exam in July 2004](#). Again, it's edited and abridged in order to keep our attention focused on the negligence per se issue:

Lee Burgess: "As Chip was crossing the street, he was knocked down by a slow moving car driven by Wilbur. Wilbur had driven through a red light and did not see Chip, who was crossing with the light. Chip suffered a gash on his leg, which bled profusely. Though a "reasonable person" would have recovered easily, Chip had hemophilia and died as a result of the injury. Chip left a widow, Melinda. What claims, if any, may Melinda assert against Wilbur, and what damages may she recover?"

Lee Burgess: So, let's refresh on our steps. First, is there a statute governing Wilbur's behavior? Well, not in the facts. But as any person, including a little kid knows,



green means “Go”, and red means “Stop”. There’s got to be a law on the books about this. So, even though the facts don’t specify the language of the statute, knowing that running a red light would in fact violate a statute, you can go ahead and assess Wilbur’s liability. Especially if you don’t have a statute written into the fact pattern, though, it’s important to do the full negligence analysis. And of course, if you presume there is a statute governing the situation, go ahead and say that in your answer. Don’t just leave it up to the grader to guess where you came up with the idea.

Lee Burgess: So, Step 1: What is the type of harm intended to be prevented by the requirement that drivers stop at red lights? It probably looks a lot like what just happened to Chip, right? A pedestrian getting hit by a car that fails to stop. So, Step 1 is getting checked off. Wilbur ran a red light and hit the person with his car. Don’t get sidetracked to the extent of the harm. Just because a normal person wouldn’t have bled to death from such a minor injury, that doesn’t mean that this wasn’t the right type of harm. Laws about stopping cars at red lights are about the types of harm that get caused when cars don’t stop. And that’s exactly what happened here. So, we’ve got this element checked off.

Lee Burgess: Next, on to Step 2: Was Chip the right kind of person intended to be protected by the statute? If you said “Yes”, you’re right! Chip was a pedestrian crossing the street at a traffic light that Wilbur ignored. Pedestrians are no doubt intended to be protected by the whole “Red means ‘Stop’” thing. Again here, don’t get thrown off by the fact that the car was moving slowly or that Chip had hemophilia. At the end of the day, Wilbur ran the red light and hurt a pedestrian, and that’s precisely the kind of person traffic laws are designed to protect.

Lee Burgess: Starting to get the hang of it? Let’s try one more example to really cement our attack plan steps and how to walk through this analysis. So, here is a third hypo, and this one is from the [July 2006 California bar](#) – again, abridged to focus just on negligence per se. Here we go:

Lee Burgess: “Clerk suspected Paul of stealing candy from his convenience store. Clerk told Paul to follow him into the back room and wait for Mark, the store manager, and Paul complied. Clerk closed, but did not lock, the only door to the windowless back room. Clerk paged Mark, who arrived approximately 25 minutes later and found Paul unconscious in the back room as a result of carbon monoxide poisoning. Mark had been running the engine of his personal truck in the garage adjacent to the back room. When he left to run an errand, he closed the garage, forgot to shut off the engine, and highly toxic carbon monoxide from the exhaust of the running truck had leaked into the seldom used back room. A



state statute provides: “No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the ignition, setting the brake thereon and, when standing on any perceptible grade, turning the front wheels to the curb or side of the highway. Can Paul recover against Mark?”

Lee Burgess: So, what’s our first question? Is there a statute? Yes. That means negligence per se is something you should discuss in your answer. Here, the statute in question is about not leaving a vehicle before first turning off the engine and setting the brakes, and curbing the wheels if it’s on a slope.

Lee Burgess: Next question: Was the statute violated? Well, looks like it. Mark forgot to turn off the engine when he left his truck in the garage. So, let’s do the two-step analysis.

Lee Burgess: Step 1: Is this the type of harm the statute was designed to prevent? To figure that out, we look at the statute. It’s about cars being left on, and brakes, and curbing your wheels when parking on a hill. That sounds like the legislators were envisioning parked cars rolling away and hurting someone or damaging property, right? Here, Paul – the guy left in the back room by the garage – suffered something else, though. He got carbon monoxide poisoning. No amount of setting the brake or curbing the tires would have solved the problem. So, this tells us that this was not the right type of harm.

Lee Burgess: Step 2: Is Paul the right sort of person? Was he who the lawmakers had in mind when coming up with this statute? Well, if a car rolls away, it could hit people who are nearby. Paul was nearby, so he might be the person the statute was aimed at protecting. The facts tell us that the garage where the truck was parked was adjacent to the room where Paul was being held. So, a person one wall away from a truck left running could be exactly the person who would get hurt if leaving the truck running caused a problem – whether that problem was from getting run over or carbon monoxide. It’s important to note that the type of harm is not what you’re looking at under this element, just who the person was. Because Paul was close to the car, he was the correct type of person. This element is probably checked off.

Lee Burgess: Remember that the analysis requires two distinct steps: One, was it the right type of harm, and two, was it the right kind of person? So, even though we decide this was not the right type of harm, that conclusion is separate from the discussion about whether Paul is the right sort of person. And similarly, when you look at the kind of person in question, don’t start talking about the type of harm. You want to conclude on each element in your analysis separately, and



don't overlap the two discussions. Also, notice here how little details that might seem like filler words – like “adjacent” – can make a big difference. Every fact is a clue, so don't leave any out of your answer.

Lee Burgess: Bottom line for this fact pattern, the negligence per se claim would probably fail, because though Paul was the right kind of person, the kind of person the statute was meant to protect – the type of person sitting next to a dangerously parked car, the type of harm – carbon monoxide poisoning, did not match what the statute was enacted to protect against, since this statute was about vehicles rolling away.

Lee Burgess: Since both elements are not satisfied, that means that the duty and breach elements of your negligence analysis won't be established automatically. Either way though, on the bar, you want to continue the discussion, especially with negligence. Do the causation and damage analysis anyway. Remember too that you can still have a full garden-variety duty and breach analysis outside of negligence per se when there is a statute in the fact pattern, even if that statute doesn't quite match the situation at hand. In other words, there's still regular negligence at play here. Mark still breached because a reasonable person would never leave their truck parked in the garage with the door shut without turning off the engine. Paul can still recover under a regular negligence theory, so it's important to go beyond just the two-step negligence per se analysis in an exam situation. Hit all the negligence elements so you can sweep up all those points as well.

Lee Burgess: So, that's what a negligence per se analysis looks like. A couple of final notes here. How are your attack plans looking so far? Do you have negligence per se embedded somewhere under duty or breach? Do you have these steps memorized? Have you actually practiced pulling out a sub-header for this and writing it out as an IRAC? If not, try it! The very best thing you can do is practice. You can use the fact patterns we mentioned here, or you can check out the [July 2017 Torts essay from Calbar.com](#). That's another good one to practice on, even if you're studying for the UBE.

Lee Burgess: Finally, don't get too worried about spotting a negligence per se issue if you aren't given a statute in the fact pattern. Unlike law school exams, the bar will usually give you a statute. It happens more often than not, so it's a pretty safe clue to keep an eye out for.

Lee Burgess: And with that, we are out of time. 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 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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[Brainy Bar Bank – UBE \(MEE + MPT\)](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2004](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2006](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2010](#)

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