



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing another in our "Listen and Learn" series, talking about the reasonable person standard. 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](#) as well. 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: Hello and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast. Today, we will be discussing the reasonable person standard in Negligence. You'll probably remember some basics from Torts class, but if you need a refresher, this episode is a great place to start.

Lee Burgess: So, who is this reasonable person and what makes him tick? How does this standard fit into a Negligence analysis on the bar exam? We're going to be walking through a few examples, but first, let's take a quick look at the law and policy on this topic just to make sure we're all on the same page, since for some of you, it's probably been a couple of years since your 1L classes.

Lee Burgess: As you already know, a claim for negligence requires that the plaintiff to establish four elements: duty, breach, causation, and damages. Often, the way the court will figure out if someone breached their duty of care is by comparing them to a reasonable person under the circumstances. So, who is this person we hold everyone else's conduct up to?

Lee Burgess: Well, first of all, the reasonable person is fictitious. No one in real life could possibly be this careful. He never jaywalks or looks at his phone when he's supposed to be concentrating, he always files his taxes on time, reads the manual before using a new hair dryer, and probably doesn't go base jumping. It's not to say that the reasonable person is perfect; he's not. If you're going for perfect, you might start missing MBE questions on this topic. The thing to keep in mind is calculated risk-taking. The reasonable person will look at risks that are foreseeable from their conduct. If I start a campfire, it is foreseeably going to burn down the nearby town. The reasonable person also looks at the extent of those risks, the likelihood of causing harm as compared to the utility of the action. In other words, is it worth it? What's the trade-off?



Lee Burgess: When we apply the reasonable person “under the circumstances”, that means we are tasked with looking at the facts surrounding the situation. As we will discuss in a minute, the facts can make a big difference in whether an action is reasonable or not. If I jump out of a train while it’s still moving because my friend dares me to do so, that’s probably not very reasonable. If I jump out of the same train while moving because there is a fire and it looks like the whole place is about to explode – well, that could actually be reasonable. The bottom line here is, it’s the surrounding facts that make all the difference when deciding how reasonable the conduct was.

Lee Burgess: So, why do we have this standard anyway? Because the human experience is too vast and varied to be synthesized into statutory law. Can you imagine if there had to be a law on the books for every single action a person could take or fail to take? Plus, technology is constantly changing. For example, maybe smoking on the job or not wearing a seatbelt was reasonable at one point in time, but we know now that rules have changed. Let’s get into what the law says about how to judge reasonableness. And remember, reasonable person under the circumstances is a way to judge breach.

Lee Burgess: So, under “duty” on your attack plan, you first ask, “Is there a duty?” and then say, “Well, if so, what does that duty consist of?” Then, it’s not until you get to “breach” that you ask yourself whether the defendant lived up to whatever standard of care applied in the situation at hand. So, breach is actually the place you would really get into the nuts and bolts of discussing the reasonable person. Do you have your attack plan for Negligence written out already? If not, this is crucial, so make sure that you know the order of operations for each possible Negligence topic before jumping into practicing an essay or doing MBE questions.

Lee Burgess: Now with that, let’s look at some commonly tested standards. What if a person has a physical disability – for example, they are blind? Will they be held to the same reasonable person standard as always looking both ways before crossing the street? No. That’s because the rule is that physical disabilities will be mapped onto the reasonable person standard. The rule would change. You would look at a reasonable blind person under the circumstances, or whatever that disability in question is.

Lee Burgess: Alright, seems fair enough. What about mental disabilities? Do courts also look at the personality, emotional disturbances, mental incompetence, or deficits of a person? The answer is “No”. So, if a person of below average intelligence does something that’s not very careful, he will still be held to the usual reasonable person under the circumstances standard. How is that fair? Well, it’s not really.



But the problem is, courts have decided that we need standards that are generalized enough to apply across the board, and that's the tradeoff the law is willing to make. So, the rule is, mental disabilities are not mapped onto the reasonable person. These guys will be held to the same standard as everyone else.

Lee Burgess: There are a couple of other scenarios that are commonly tested. First, children. Children will be held to the standard of a child of the same age, intelligence, and experience. This means a couple of things. First, the analysis is a lot more subjective. And second, it can be important to look at the locale and situation of that individual child. For example, a kid operating a meat grinder or driving a tractor could be considered perfectly normal in some places. That's something you want to look at in your analysis.

Lee Burgess: Now, that brings us to the big caveat to the child standard, and that is about adult activities. The rule is that a child engaged in adult activities will normally be held to the adult standard of reasonable person under the circumstances. It's almost like the law says, "Okay, kid, that thing you were doing is not a kid thing, so we're not going to treat you like a kid." Again, though, it can make a difference to look at what is considered a "kid thing" in the jurisdiction in question.

Lee Burgess: Another common situation involves professionals. The rule is that a professional will be held to the standard of a person with the skill and knowledge of her profession. As always, the facts are what can turn the analysis one way or the other. So, instead of saying a "reasonable person", we might say a "reasonable race car driver", "reasonable librarian", or "reasonable dentist" under the circumstances. We'll do some in a minute in the examples.

Lee Burgess: There are some other topics that are outside the scope of today's discussion, and these are also ways to figure out breach, such as looking at an applicant's statute or what is called "negligence per se". This is an important bar topic and we have another [podcast](#) on this. Or, you may be faced with looking at customs in a particular trade or industry. Know these rules as well, and make sure you know where they fit in your attack plan.

Lee Burgess: Alright, on to some hypos about the reasonable person. This one is from a Torts essay from the [California bar exam, February 2011](#). As usual, we've cut some of the facts to keep this exercise limited to our scope. So, let's jump in!

Lee Burgess: "Gayle is 16 years old and attends high school in School District. One day, Gayle's teacher was relaxing in the teacher's lounge during the first 10 minutes



of class time, as he usually did, leaving the students unsupervised. School District had long been aware of the teacher's practice but had done nothing about it. Gayle drove to the home of her friend Francis, parked her car several feet from the curb, and entered the house. She came out later, carrying some paintings.

Lee Burgess: In a patrol vehicle, Paula, a police officer, spotted Gayle's car. Francis yelled to Gayle 'Quick, move your car!' And Gayle ran and jumped into her car just as Paula was walking towards it. Suddenly, without looking, Gayle swung her car toward the curb, hitting and severely injuring Paula. Who can Paula raise a negligence claim against?"

Lee Burgess: So, there's actually a lot going on here, so let's look at each actor one by one. First, our main defendant is Gayle – the student who was driving the car that hit the police officer. Was Gayle behaving reasonably? Well, let's check out the standard of care that applies. This is always the first question.

Lee Burgess: Now, what do we know about Gayle? She's 16, right? So, according to the law in most states, she is still a child. That means the standard is that of a child of the same age, knowledge, and experience. Or, is it? Do you think we hold her to the child standard? The answer is "No". Why not? No matter the jurisdiction, kids are not supposed to drive cars. If you're 16, that means that you can have a valid driver's license and will be held to the same driving standards as everyone else on the road. So, that tells us that we should use the regular old reasonable person under the circumstances standard. Got that? We have a kid, but she's doing an adult activity, so we're going to treat her as an adult instead of a child.

Lee Burgess: So, does Gayle pass the test? This is always our second question. Was she being a reasonable person under the circumstances? Well, to answer this, we need to look at what the circumstances were and then look at how she behaved. What do you think? Was there anything in these facts that made you think Gayle was not acting reasonably? Let's look at the situation. And remember, the reasonable person isn't perfect, but they are as careful as they can be.

Lee Burgess: So, Gayle parked at the home of her friend Francis. A home is probably in some kind of residential neighborhood where there are parking rules in place, right? We are told there was a curb on the street. We also know she parked several feet from that curb. Is that reasonable? Well, let's visualize the situation. For the bar exam, it can really help to imagine the scene playing out like a movie, especially if you have multiple players in the fact pattern. This can really help you keep their roles straight. Okay, so parking several feet from the curb puts Gayle's car where? Right smack in the middle of the road! Not reasonable. Why



not? Because other cars can't get around, and she might block traffic or pedestrians, which is obviously not safe.

Lee Burgess: So, what else did Gayle do? She suddenly and without looking pulled her car to the curb, and then the facts use the word "swung", which makes us think that she did this quickly without much control. None of these things are reasonable. Reasonable drivers are careful drivers, and these actions would not pass the test.

Lee Burgess: Now, let's take a look at Francis. She is the friend who yelled, "Quick, move your car!" Alright, question number 1: What standard of care do we apply? We don't know much about Francis and there's nothing to put her into any special category, so we default to the regular reasonable person standard. Next step, question number 2: Did Francis meet the standard of care? In other words, did she act as a reasonable person under the circumstances? First, let's look at those circumstances. That's your initial step. Well, there was a cop walking up to her friend's car, which was unsafely parked. The cop had already seen the car and was coming toward it. Was telling Gayle to move in this situation reasonable or not? What do you think? Here's a clue – as with every single bar essay, it depends on the facts.

Lee Burgess: On the one hand, you might see your friend about to get a ticket and think, "Sure, telling her to rectify the situation right away would be the safest thing to do. Plus, I could save her a parking fine. That's totally reasonable." On the other hand, you might be thinking, "Wait a minute, it said the cop was walking toward Gayle's car. Maybe it wasn't super safe to tell her to quickly move the car right where a person was walking, without the protection of their vehicle around them. Not reasonable." And you know what? You could actually argue this either way! The important thing on the exam is that you use the facts to justify why you're saying what you're saying. That explaining is how you get maximum points. And, as always, if you see a situation that could go either way, you need to argue it both ways. Remember, it is the facts that let you know whether there are two sides to the argument or not.

Lee Burgess: Now, this hypo is actually a goldmine for negligence arguments, which is one reason we love to use it for practice. Let's try another example and turn our attention to the teacher. You'll recall that Gayle's teacher was relaxing in the teacher's lounge during the first 10 minutes of class time, as he usually did, leaving the students unsupervised; and that the school district had long been aware of the teacher's practice but had done nothing about it.



- Lee Burgess: So, question number 1: What is the standard of care that applies? A teacher is different than the average normal person, right? They have special training as a professional, so we hold them to a slightly modified “reasonable teacher under the circumstances” standard. See how I did that? Just put their job title into the standard of care language. Easy!
- Lee Burgess: Now, question number 2: Did the teacher pass the applicable standard of care? You might be tempted to say that relaxing in the teacher’s lounge is a totally reasonable thing for a teacher to do. But upon a closer look at the facts, we see that this was during the first 10 minutes of class time, which means class was already in session. This guy was late to his own class. Instead of teaching, he was out relaxing in the lounge. And it wasn’t an accident – he pulled this stunt all the time. Not reasonable at all. A “reasonable teacher” would not do this.
- Lee Burgess: The facts also say he was leaving the students unsupervised. Now, does that make a difference? Why would the bar administrators have given you this particular fact? These kids were 16 years old, right? They’re not exactly toddlers. We can imagine situations where it would be totally reasonable to leave them unattended. Maybe the teacher needed to run to make copies or grab a book from the office. That probably would be reasonable with kids of this age. But the facts matter a lot. Was he doing these reasonable-sounding things? No. He was kicked back relaxing when he was supposed to be teaching his class. These facts are why he will not pass the reasonable person test.
- Lee Burgess: Finally, let’s look at our last actor – the school district. On the bar, you might get so caught up with the other defendants that you’re tempted to skip this one. But keep in mind: all facts are clues! And the question asked who Paula could sue, which means you want to explain all possible options. If they didn’t want you to talk about the school district, they would not have given you this fact. Or, they would have put a more limited call of the question.
- Lee Burgess: Alright, so this one is pretty easy. The school district had long been aware of what the teacher was doing, but it had done nothing about it. First question: What’s our standard of care? A reasonable school district under the circumstances. Second question: Does the school district pass the test? No. We already know the teacher was not behaving reasonably, so because they knew this, the school district should have done something about it. Instead, they did nothing. Note that not taking action when you should can be just as negligent as taking a bad action.
- Lee Burgess: Also note that the facts say the teacher “usually” did this. That means he’s even more negligent than we might have originally thought. And, by extension, the



school district knowing he didn't just do it this one time, but all the time, means they really should not have sat around doing nothing.

Lee Burgess: And there you have it – the reasonable person standard in a nutshell! Before we wrap up, just another quick reminder that attack plans are critical. We only looked at a small part of this fact pattern today, and you could already see how there were at least three full-blown Negligence analyses required. On the bar, you will need to move fast. The clearer you are on your step-by-step plan, and the better you have all of these rules memorized, the quicker you can go.

Lee Burgess: And with that, we're 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](mailto:lee@barexamtoolbox.com) or [alison@barexamtoolbox.com](mailto:alison@barexamtoolbox.com). Or you can always contact us via our website [contact form](https://www.BarExamToolbox.com/contact-form) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

## **RESOURCES:**

[Brainy Bar Bank – UBE \(MEE + MPT\)](#)

[California Bar Examination – Essay Questions and Selected Answers, February 2011](#)

[The Law of Torts: Examples and Explanations](#)

[Podcast Episode 87: Listen and Learn -- Homicide](#)

[Podcast Episode 88: Listen and Learn – Negligence Per Se](#)

[Podcast Episode 89: Listen and Learn – What Is Hearsay?](#)

[Podcast Episode 91: Listen and Learn – Logical and Legal Relevance](#)

[Podcast Episode 92: Listen and Learn – Subject Matter Jurisdiction](#)

[Podcast Episode 93: Listen and Learn – Constructive Eviction](#)

[Podcast Episode 95: Listen and Learn – Promissory Estoppel](#)