Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we have another episode as part of our "Listen and Learn" series. This one covers assumption of risk. 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: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast. Have you ever had to sign a waiver for something that seemed a little outlandish, or seen a dangerous situation and thought to yourself, "Oh man, someone is going to get hurt"? These are the kinds of situations we're going to be discussing today because, that's right – we're talking about the dangerous world of Torts, and we're looking at assumption of risk.

Lee Burgess: As always, let's get right into the rule first. You can write this one down: Assumption of risk is a defense to negligence. It applies if the plaintiff, one, voluntarily assumed; a, two, known risk. That's your basic rule. A short caveat to that is a sub-rule that you should also include on any essay where this issue is triggered. The sub-rule to write down is this: The assumption can be either (a) express, by agreement; or (b) implied, where an average person would appreciate the risks involved.

Lee Burgess: So, first things first – let's talk about what kinds of situations trigger application of these rules. As the name implies, "assumption of risk" means that there is some risk and you're assuming it. So, what does that mean? Well, you see a risky situation and you decide to go ahead anyway. I also said that this is a defense to negligence. So, what does that mean? You already know that negligence is when the defendant is not acting carefully enough and hurts the plaintiff. So, if the plaintiff establishes that the elements of negligence are met against the defendant, the defendant can then turn around and raise this defense. In other words, the defendant can say, "Hey, I know you severed your spine in my bumper cars, but sorry! You walked into that situation with your eyes wide open, and that was just a risk you were willing to take. Not my problem."

Lee Burgess: So, what does this mean for attack plans? Well, since assumption of risk is a defense to negligence, it means that it should go under its own header on an essay, and that header and IRAC should come after you discuss negligence. Makes sense, right?

Lee Burgess: To understand how this rule works, let's take the easiest example first: express assumption of risk. Have you ever been scuba diving, or indoor rock climbing, or racked up charges on your cell phone plan while traveling out of the country? These are all situations in which you probably signed something in advance saying, "Hey, if bad stuff happens to me, I'm not going to sue you." This is the kind of scenario that triggers express assumption of risk. There was a risk, but you expressly agreed to it.

Lee Burgess: I decided to go scuba diving. That was voluntary. I knew I might smash my face on some coral, or run out of oxygen, or break my femur, but I proceeded anyway. Those were known risks. I was assuming those risks. I signed a waiver when I rented my equipment, so I expressly agreed I was responsible for my own injuries.

Lee Burgess: Remember, again, that we're talking about this as a defense. That means this only comes up as a clap-back the defendant can raise once the plaintiff has already tried to establish an action for negligence. So, if my oxygen tank was empty when they gave it to me, that is negligence on the part of whoever rented my equipment to me. I can claim they were negligent. They can try to defend themselves with assumption of risk. If I signed a waiver, that's probably on me.

Lee Burgess: But what about if I'm just a terrible swimmer, or I managed to hurt myself because scuba diving is a hazardous sport? Can I sue the equipment rental company for negligence? Probably not. They didn't really do anything wrong. Some situations are just dangerous by their very nature, and there's no one to blame. We'll get into this a bit more later.

Lee Burgess: Now, what about the implied assumption of risk? Let's look back at the bumper car example. The first part of our rule involves checking off the element of "voluntarily assuming" some kind of risk. If you are at a carnival and you jump into a bumper car, you're doing so voluntarily. No one blindfolded you, picked you up, or sat you in the car. You did that yourself. There's no duress going on that puts you in a lose-lose situation. This element is met.

Lee Burgess: The next element is about a “known risk”. Is a bumper car risky? Yeah. Do you know it’s risky before harnessing yourself in? Sure. This element is easily met too.

Lee Burgess: But what about the sub-rule for express vs. implied? Did you expressly agree that you might sever your spine and that was okay with you? No. Carnivals don’t normally involve any waiver signing before you jump into whatever rickety monstrosity you decide to spend your tickets on. Something like base jumping might, but probably not a carnival ride.

Lee Burgess: How about an implied agreement? What you’re looking for under this prong is whether an average, normal, reasonable person would see the situation and understand that there were risks. Do they need to anticipate the exact harm that ends up happening? Well, no. But if you see people crashing their bumper cars into each other and whipping their necks back and forth, you’d probably think to yourself, “Hey, that could hurt someone.” That’s all you need to check off for this element.

Lee Burgess: Now finally, that brings me to the firemen…. What’s that? You didn’t know we’d be discussing firemen today? Well, yes, actually. There’s even a special rule for them! Your law school class may have called this the Fireman’s Rule, as it’s commonly known. But let’s go ahead and call them “firefighters”, because hey, ladies can run into a building too. The Firefighter’s Rule, also called the Professional Rescuer Rule is about people whose job it is to get into dangerous situations, usually to protect others. Here’s the text of the rule you should write down: Under the firefighter rule, a professional rescuer cannot bring a cause of action against someone whose negligence caused injuries to the rescuer. The professional rescuer assumes the risk of injury that is related to the job.

Lee Burgess: So, what does this mean? Can a firefighter brave the flames to save you and then turn around and sue you for smoke inhalation damage to her lungs? No. Why not? Because unfortunately, that’s exactly what she signed up for when taking the job as a firefighter.

Lee Burgess: Now, what about if you’re a bouncer at a bar and you see a drunk guy trying to order more drinks and decide to kick him out, whereupon he hauls off and punches you in the face? Can you sue him or the club for your broken nose? Nope. Sorry, you literally signed up for a “punching-in-the-face” kind of job. Thank you! We love you for keeping drunk dudes in check, but you can’t sue. Maybe sue the guy for battery, but that’s another story.

Lee Burgess: Now, what if a firefighter is rescuing a little kitten out of a tree and the tipsy guy from the bar walks up and punches him in the face? Does this situation fit the rule? Well, being a firefighter is dangerous and injury can be expected, but getting punched in the face is not the kind of harm our firefighter signed up for. Remember, the injury has to be related to his job.

Lee Burgess: You can see now the specific facts could make a big difference here. What if the firefighter's punch in the face was from a person whose house was burning down and they were angry at the firefighter for not going back in to save their cat? Same firefighter, same kitten, same "getting punched" idea. But, is this injury related to the job? Arguably, yes. That might actually work. And by "work" here, I mean this situation would fit the rule.

Lee Burgess: So, let's get into some hypos so we can experiment further with these rules. The first one is based on the 2011 Torts exam in California:

Lee Burgess: "Gayle, a sixteen-year-old driver, carelessly parked her car several feet from the curb and entered the house of her friend Frances. In a patrol vehicle, Paula, a police officer, spotted Gayle's car. Gayle saw Paula approaching and worried about getting a ticket. She 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. Paula sues Gayle for negligence. Can Gayle assert assumption of risk as a defense against Paula's claim?"

Lee Burgess: Okay, so who is suing whom? Gayle, the driver, hurt Paula, and Paula sued her for injuries. The question is asking whether Gayle can defend the negligence suit by claiming that Paula assumed the risk of the situation. What do you think?

Lee Burgess: Let's look at our rule. Did Paula voluntarily assume a known risk? Well, walking towards a car that is in the process of moving is pretty dangerous. The car could hit her. Paula also did this on purpose, by her own volition, so it was voluntary. Was there any kind of express agreement that Paula and Gayle had about Paula potentially getting hurt? No. So, on an essay, you should skip discussing express assumption of risk.

Lee Burgess: But what about implied? This kind of goes back into the idea of the risk being known. Would a reasonable person in Paula's shoes know that heading towards a car that is moving or is in the process of parking could be dangerous? And remember, Paula is out of her vehicle at this point, because the facts say she was walking. Sure, this element for implied assumption of risk is met.

Lee Burgess: But what else is going on here? There's another important fact that we need to consider. Who is Paula? She is a police officer, right? And she is driving a patrol car. Why do these things matter? Being a police officer is sort of like being a firefighter or a bouncer. It's one of those "you-signed-up-for-danger" sort of professions. So, that means Paula can't go around suing people every time she gets hurt in the line of duty. The Professional Rescuer Rule would apply and bar Paula from suing Gayle. If you were writing an essay about this, that's a sub-issue to assumption of risk that would get its own IRAC with a header.

Lee Burgess: Okay, let's change the facts a bit. What if Paula is still a police officer, but she happens to be off the clock, coming home from work in her own car, or it's Saturday and she's using her mini-van to drive her kids to soccer practice? She's still a cop, she's still getting hurt, but does the Professional Rescuer Rule still bar her from suing? No. Why not? The reason is because even though Paula signed up for a dangerous job, if she's not on the job in the moment she gets hurt, then the rule doesn't apply. The specific facts make a difference.

Lee Burgess: So, what you need to do on an essay is look for facts that tell you the person is the right kind of worker, and facts that show they were engaged in the job when the incident occurs. And, if you see a job you think might fit the exception but the facts aren't quite right – like an off-duty police officer – you should quickly raise the issue but then dispose of it.

Lee Burgess: Remember, a claim or a defense working out in real life is not the same as an issue being triggered by the facts on the bar exam. What do I mean by that? Sometimes the bar graders want you to mention something that ultimately won't work, just so you can point out that the facts don't quite fit. The key here is you have at least one triggering fact – like police officer. Don't worry, the more writing practice you do, the more you will get the hang of this.

Lee Burgess: Finally, let's take one last look back at Gayle. She parked carelessly, she's swinging her car towards the curb without looking right as someone is walking up. So, the question is, does it matter here that what Gayle is doing is pretty negligent? Is the reason the assumption of risk defense applies because it's Gayle's fault that the situation is dangerous? Not really. When you're considering the harm that occurred, it's less important whether someone else was engaging in risky behavior. It's a defense to negligence, so you're going to have that negligence claim in play. But on an essay, the negligence claim might ultimately fail and you still might need to discuss assumption of risk as a possibility anyway.

Lee Burgess: So, this defense is about seeing a situation that seems dangerous and proceeding anyway. So, even if the bumper cars were in perfect working order and the court ends up deciding no one did anything wrong, this defense could still be triggered because bumper cars are dangerous and the carnival goer knew that and tried them out anyway.

Lee Burgess: Let's try a new scenario. Imagine I loan you my lawn mower so you can cut your grass. I have no idea, but there's actually a mechanical failure just waiting to happen the next time the lawn mower is switched on. I've kept my lawn mower in perfect working order, but this is some kind of latent glitch in the motor. If you bring the lawn mower to your front yard and set it up, and it explodes and hurts you, you might sue me for negligence. The problem is, I didn't really do anything wrong. Could I bring an assumption of risk defense against you? No, that won't work either, because you had no way of knowing that the lawn mower was broken either. Both of us are innocent.

Lee Burgess: So, let's change it a bit. What if I knew my lawn mower was having problems and didn't warn you? Could you bring a negligence claim against me when it explodes and burns your leg? Sure. Could I bring an assumption of risk defense back at you? Possibly. It really depends on the facts.

Lee Burgess: Now, how dangerous is the situation according to a reasonable person? Lawn mowers can cause injuries – everyone knows that. But they usually don't, so this one is debatable. On an essay, you'll need to take the specific facts you're given and argue about whether they meet the elements of your rule or not. Another detail to look at is just how much you knew about the danger before deciding to proceed anyway. Again, the individual facts matter a lot here.

Lee Burgess: What if you started the mower and heard a weird clicking sound and noticed the blades starting to get really hot and smoking, but you thought to yourself, "Hm, that's weird, but who cares"? If you noticed something seemed dangerous and went ahead anyway, it's much more likely that the assumption of risk defense will work against you. If you sue me for negligence, I could serve it right back to you by saying that you saw those smoking blades and went ahead anyway, so it's your fault you got hurt. Make sense?

Lee Burgess: Why don't we try another situation? Imagine you are prescribed medication for your allergies. There's a tiny label printed inside the box that says the allergy medicine could have some side effects, including drowsiness, and very rarely, loss of vision. You take the medication and start operating a forklift for work, which you crash when you fall asleep behind the wheel. Two days later, you go

blind. You sue the pharmaceutical company for negligence and they say you assumed the risk. How do you think this will play out?

Lee Burgess: Did you act voluntarily? Yes, you took the drugs. Did you assume a known risk? A reasonable person knows that you shouldn't take some types of medication before driving. It's commonly understood that allergy meds can cause drowsiness. You could argue the facts, but ultimately, you probably did assume some of the risk of falling asleep when you chose to drive the forklift while on medication. Does it matter that you didn't see or read the label in the box? Probably not, because a reasonable person would have known better.

Lee Burgess: But what about the blindness? Is that a common side effect that a reasonable person would think about when taking allergy medicine? No. Did you assume the risk? This hinges on whether you knew of the risk and proceeded anyway. Here's where the facts get particularly important. If you did read the label and thought to yourself, "Yeah, right, that will never happen to me", and took the medicine anyway, you may have assumed that risk. If you didn't read the label and this freak incident occurred, could the court really say you knew the risk and proceeded anyway? No. In fact, some courts are pretty hesitant to enforce written warnings and waivers in situations where most people don't actually read them. This is why there's often a mandatory consult with your pharmacist when you're prescribed medicine that could endanger your health.

Lee Burgess: Some of these fact scenarios have arguments on both sides. On bar essays, your ultimate conclusion often doesn't matter as much as your analysis and how you explain your thought process. When writing your bar essays, the important thing is that you look at the precise facts that you're given and argue for why the rule elements are met or not.

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 Lee 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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