



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're talking about two categories of duty under Negligence, as part of our "Listen and Learn" series – the duty children have and the duty professionals have. 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. Today, we will be discussing the duty for professionals and the duty for children under Negligence, a sub-topic of tort law. Negligence is a topic you'll need to know whether you're prepping for a law school Torts exam or getting ready for the bar exam. So, hopefully this podcast will be a good resource for you!

Lee Burgess: So, let's set the stage by brushing up on negligence and duty, generally. As you may remember, for a plaintiff to prevail on a claim for negligence, they must prove four elements: duty, breach, causation, and damages. Duty deals with what one person owes to another, and that duty differs depending upon, among other things, those individuals' relationship to each other. That makes sense, right? I'll use myself as an example here. I am both a lawyer and a mother, and with those two titles come different duties.

Lee Burgess: I owe a different duty – a different level of care – to my daughter than I do another child I encounter in the grocery store. Why? Because of our relationship to each other. I am her mom – it's my responsibility to care for her. Now, as a lawyer, I owe a different duty of care to my client than his friends do. Why? Because I am trained and specialize in the legal profession, and therefore have a greater responsibility to use my skills and knowledge in representing my client than someone with no legal training.

Lee Burgess: Different characteristics individuals possess may also impact their duty. For example, children are held to a different standard of care than adults, and their standards change depending on how old they are. A toddler is not held to the same standard of care or duty as a 15-year-old. As children grow older, more developed, more intelligent, they are held to different standards. Let's take a



deeper look at both of those topics today: duties of children and duties of professionals.

Lee Burgess: So, we've already covered [the reasonable person standard on an earlier podcast](#). If you haven't listened to that one yet, I'd go back and do so now. It's essentially the baseline when we think about duty, and understanding it will help contextualize the other categories.

Lee Burgess: With that covered, let's jump into the standard of care or duty to which children are held. The operating rule here is that children must act in the same way a as hypothetical child of similar age, experience, and intelligence, acting under similar circumstances would act. Keep in mind, though, that there's an exception to this rule. If the child is engaged in an adult activity, the child has a duty to act as a reasonable adult. That is, if the child is operating as an adult, they have to act like one. I know, it's all a little squishy, but that just means if you get a question on an exam about the duty a child owes, you have a chance to show off your skills of argumentation and analysis! See, there's always a silver lining.

Lee Burgess: So, let's flex those muscles a bit. Kaitlyn, Monty, and Christa are 10-year-old kids who love playing outside. They live in a small town where kids often play outside freely in their neighborhoods – in their yards, in each other's yards, and even in the street, since there are few cars driving by. One summer day, Kaitlyn is scootering with Monty. They're pretty excited about their new scooters and want to show off all the skills they've learned over the summer. The two friends scooter up and down the street, weaving in and out of their neighbors' driveways. All of a sudden, Christa comes barreling down her driveway on her new bike. Without looking for traffic, she rides it straight into the street where she hits Kaitlyn, who is doing a trick off the curb. They both crash to the ground, and while Christa is scraped up, Kaitlyn suffers a broken elbow. Kaitlyn's parents sue Christa for negligence. What duty do you think Christa owes Kaitlyn in this situation?

Lee Burgess: Well, since she's only 10, Christa is clearly a child and will therefore be held to the standard of a hypothetical child of similar age (10), experience, and intelligence, acting under similar circumstances. What does that mean? Here we've got to get creative. How would a hypothetical 10-year-old with similar experience and intelligence act? As we know from the reasonable person standard, community customs can be instructive here. In Christa's town, kids often play outside freely. They bike and scooter on the sidewalks, in the street, and on their neighbors' properties. The question also mentions that cars don't often drive by. So, we could argue that Christa, in biking down her driveway and into the street, is acting similarly to a hypothetical 10-year-old in her situation.



We could even argue that the hypothetical child might not look both ways before riding into the road, since there is little traffic.

Lee Burgess: On the other hand, we could argue that Christa had a duty to look for traffic – be it other cars, bikes, scooters, or pedestrians – even if there typically isn’t a lot of traffic in her neighborhood. It’s just always prudent to check for cars, and Christa lives in a neighborhood where kids are often playing in the road, so their presence should be expected. As you can see, you can use your lawyering skills to argue different options for the duty Christa owes to Kaitlyn.

Lee Burgess: Now, let’s say Christa wasn’t riding her bike, but instead she grabs her mom’s keys, starts the engine, and backs up her car out of the garage and down the driveway. Like last time, she hits Kaitlyn, who is doing a scooter trick in the street. Does that change the analysis regarding what duty Christa owes to Kaitlyn? Definitely. Remember the exception? If a child is engaged in an adult activity, that child has the duty to act as a reasonable adult. And driving is certainly an adult activity. So, if you’re faced with this question, you should apply the reasonable person standard to Christa, regardless of her age.

Lee Burgess: Now that we’ve covered the duty owed by children, let’s swing the pendulum to the completely opposite end of the spectrum and discuss the duty owed by professionals. First, who is a professional? Thankfully, the tort gods are not pulling a fast one on us here. A professional is essentially someone with specialized training and knowledge in a particular field, such as doctors, psychologists, lawyers, accountants, engineers, architects, and nurses. So what duty do these professionals owe? The rule is this: Professionals must act with the same knowledge and skill as an average member of that profession participating in a similar community.

Lee Burgess: Let’s take a look at medical doctors for a minute, because, for better or worse, this is a common real-life issue. There is an entire field of law called medical malpractice, where patients sue doctors for negligence after something allegedly goes wrong with their medical care. You’ve probably seen TV ads and billboards for attorneys who practice in this field. So, what are those patients suing about? What duty of care are they alleging their doctors breached? Under tort law, medical doctors are held to the degree of care and skill of an average qualified practitioner under a national standard. Do you notice the difference? Professionals are typically held to the same standard as those in a similar community, while medical doctors must comply with a national standard.

Lee Burgess: Let’s dive into an example. A bus driver has been experiencing migraines. He visits his doctor to try and sort it out, and his doctor prescribes him medication.



That medication has the side effect of drowsiness, but the doctor doesn't mention that to the bus driver. The bus driver takes the medication as prescribed and goes to work. That day, the bus driver dozes off and gets into an accident. One of the passengers is injured and sues the doctor. Let's not worry in this scenario about whether the suit is proper. Let's assume it is and jump into the question of the duty the doctor owes.

Lee Burgess: We know that the doctor owes a duty to act with the same knowledge and skill as an average qualified practitioner under a national standard. Because Bus Driver is Doctor's patient, Doctor owes a duty to bus driver to act as an average qualified practitioner with respect to the bus driver. This includes a duty to diagnose, a duty to warn of side effects, etc. So, without a doubt, the doctor had a duty to warn Bus Driver of the side effects of his medication.

Lee Burgess: But, what about Passenger? That brings us back to another piece of the negligence analysis – to whom does a defendant owe a duty? Remember, the question here is whether the plaintiff was foreseeable. I think we can safely argue that Passenger was a foreseeable plaintiff. While the doctor may or may not know that his patient is a bus driver, the side effect of drowsiness is a danger to both the patient and anyone who may be in his vicinity when he suddenly falls asleep. If Patient knew he might become drowsy, he should not drive or operate heavy machinery, or really do anything that would put himself or others at risk if he fell asleep. Since the chance of Patient driving is high, regardless of his profession, a passenger in the vehicle Patient is driving is certainly a foreseeable plaintiff. Ultimately, it seems Doctor did owe a duty to Passenger, even though the passenger isn't his patient.

Lee Burgess: Now let's take a look at another example – this one adapted from the [2002 California bar exam](#):

Lee Burgess: "Manufacturer advertised prescription allergy pills produced by it as the 'modern, safe means of controlling allergy symptoms'. Although Manufacturer knew there was a remote risk of permanent loss of eyesight associated with use of the pills, Manufacturer did not issue any warnings. Sally saw the advertisement and asked her doctor to prescribe the pills for her, which he did. As a result of taking the pills, Sally completely lost eyesight in both of her eyes. Sally had not been warned of these risks and would not have taken the pills if she had been so warned. Doctor says he knew of the risk of eyesight loss from taking the pills, but prescribed them anyway because 'this pill is the best-known method of controlling allergy symptoms'. Sally filed a suit for damages against Doc for negligence in prescribing the pills."



Lee Burgess: Okay, again, we're only discussing duty today, so let's discuss what duty of care, if any, the doctor owed to Sally. Remember, doctors are held to the degree of care and skill of an average qualified practitioner under a national standard. So, does the doctor owe a duty to Sally regarding her medical care? The answer is always going to be "Yes". The doctor, at minimum, owes the duty of a reasonably prudent professional – an average doctor. Again, this a duty to warn of side effects of medications.

Lee Burgess: But what if the doctor isn't just Sally's general practitioner? What if he's an allergy specialist she's visited to help get her symptoms under control? Here, it's important to note that not all professionals are treated the same. Professionals with additional training who hold themselves out as a specialist must act as an average member of that profession practicing that specialty. So, for example, a podiatrist isn't just supposed to act with the same knowledge or skill as any doctor; they are to act with the same knowledge and skill as other podiatrists – other doctors with a specialty in, well, feet.

Lee Burgess: Let's not forget about poor Sally! In Sally's case, if the doctor is an allergy specialist, he will be held to an even higher standard – that of an average member of that profession acting in that specialty. I don't think that greatly impacts the analysis here, since information regarding the side effects of medication is easily accessible to all doctors, so any doctor should be able to look up drug side effects and warn their patients of them. Regardless, it's a good supplemental rule to keep in mind as you analyze medical negligence questions.

Lee Burgess: I also want to highlight the special rule for psychologists and psychotherapists. The operating rule for us is this: Psychologists and psychotherapists have a duty to warn victims when their patient makes a credible threat if four things are true: one, the therapist believes the patient posed a real risk; two, of serious physical violence; three, to a readily identifiable victim; and four, failed to take steps to warn the victim.

Lee Burgess: You may remember this from the famous case on the topic, [Tarasoff v. Regents of the University of California](#). In that case, the family of a murdered woman sued the University of California because school therapists had failed to warn their daughter that death threats had been made towards her by a patient. In that case, the court found that the psychologist not only owed a duty to the patient, but also to the individuals being specifically targeted by their patient. In doing so, the court had to weigh the patient's right to confidentiality against the public's right to safety. Though confidentiality is important, that right succumbed to public safety when credible threats were made.



Lee Burgess: I hope you have a better grasp on the special duties owed by professionals, given their training and expertise that they hold themselves out to be qualified in a particular field. If you ever see a Negligence question on an exam where the defendant is arguably a professional, be sure to analyze their duty as a professional, not just as a reasonable person. And keep in mind that the reasonable person analysis changes with age! If the defendant is a child, they're held to the standard of a similarly-situated hypothetical child. Before you jump into the duty analysis, pause and think about who the defendant is, and whether any special rules apply.

Lee Burgess: Okay, that's it for today. Thanks for joining me! 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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[Tarasoff v. Regents of the University of California](#)

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