Lee Burgess: Welcome back to the Bar Exam Toolbox podcast. Today, we have another episode of our "Listen and Learn" series – this one discussing Factual Cause. 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 or rating 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: This is Lee from the Law School Toolbox. Hello, and welcome back to the "Listen and Learn" series. Today, we will be discussing Factual Cause – a subtopic of Negligence. Whether you're preparing for a law school Torts exam or studying for the bar exam, you will find factual cause on every Negligence essay. Since Negligence is one of the most highly-tested topics on both the bar exam and Torts exams in law school, this episode should be extremely useful for you.

Lee Burgess: Let's get started by reviewing negligence. Negligence is when a defendant fails to take proper care when doing something and it causes injury to another person. To prove that a defendant acted negligently, a plaintiff must prove four elements: duty, breach, causation, and damages. As you might have guessed, today's topic of factual causation falls within the "causation" element of negligence. The "causation" element is all about showing a connection between the defendant's breach and the plaintiff's harm. To satisfy the "causation" element, a plaintiff must prove both factual and proximate causation. Proximate causation was already discussed on an earlier podcast episode. If you have any questions on proximate causation, be sure to check out Episode 186 of our Bar Exam Toolbox podcast, and we will link to that episode in the show notes.

Lee Burgess: Since this episode is focused solely on factual causation, we will ignore all other elements for today. But remember, whenever you are analyzing negligence, you should analyze duty, breach, causation (which includes both factual and proximate), and damages.

Lee Burgess: So let's start by talking about what factual causation even is. Factual causation is all about showing what actually caused the plaintiff's injuries. In other words, the plaintiff's injuries need to, in some way, be traced back to the defendant's conduct. This is why factual causation is sometimes called "actual causation".

There are five ways you can prove factual causation. You do not need to prove all five for the defendant to be the factual cause of the plaintiff's injuries. In fact, you would never be able to satisfy all five tests for one issue. Rather, you only need to satisfy one of these tests to prove factual causation. I am going to walk you through each one, explaining what it is, and when to use one approach over another.

Lee Burgess: The first way, and most common way, to prove that a defendant was the factual cause of a plaintiff's injuries is through the "but for" test. This test asks a simple question: But for the defendant's conduct, would the plaintiff have been injured? In other words, more likely than not, if the defendant had not acted that way, would the plaintiff have been injured? If the answer is "No", factual cause is established. If the answer is "Yes", factual cause is not established. The "but for" test is used when there is only one possible cause of a plaintiff's injuries.

Lee Burgess: For example, let's imagine I am looking at my phone while driving down the street. Because I am too busy texting, I run a stop light and crash into your car. To see if I was the factual cause of your injuries, we can use the "but for" test, because there is only one possible cause of your injuries – me texting while driving. The question would be: But for me texting while driving, would you have been injured? The answer is "No". Had I not been texting, you would not be injured, because I would not have run the red light.

Lee Burgess: So let's look at a hypo to flesh out this test out further. This one is adapted from a question on the February 2019 California bar exam:

Lee Burgess: "Dan, a dog breeder, had some eight-week-old puppies to sell. Bob and Carol went to his house to look at them. Dan invited them into the living room where the puppies were located. As they were examining the puppies, the largest puppy, without warning, gave Carol a nasty bite on her hand.

Lee Burgess: Carol filed a lawsuit against Dan to recover for her injuries. With regards to the dog bite, can Carol establish negligence?"

Lee Burgess: First, keep in mind that your answer on a Negligence essay needs to address the elements in this order: duty, breach, causation, and damages. Since this podcast is solely focused on factual causation, we will ignore the other elements and assume they are satisfied.

Lee Burgess: Clearly, this is a situation where we would use the "but for" test to establish factual causation, because there is only one possible cause to Carol's injury –

Dan not warning her about the dangerous propensities of that puppy. So we need to ask ourselves: But for Dan not warning Carol of the puppy's dangerous propensities, would Carol have been bitten? "But for" is satisfied, because if Carol knew that puppy was dangerous, she would not have put her hands near the biting puppy. This means factual causation is established because the "but for" test is satisfied.

Lee Burgess: The "but for" test is met pretty easily in most cases. This is because you can have a long string of events between the defendant's actions and the plaintiff's injuries and still satisfy the test. You can think of the "but for" test like the domino effect. Imagine a long line of dominos, maybe 50 dominos long. The first domino in line is the defendant's conduct, and the fiftieth domino in line is the plaintiff's injuries. Once that first domino falls, it does not matter how many dominos are in between – eventually that fiftieth domino will fall as a result of the first one.

Lee Burgess: So let's try one more hypo, this time one that illustrates the domino effect a little better. This one is adapted from the July 2017 California bar exam:

Lee Burgess: "Doug was driving down a busy street while texting on his cell phone. Doug lost control of his car, slipped off the road, and hit Electric Company's utility pole. The pole crashed to the ground, and the fallen wires sent sparks flying everywhere. One spark landed in a piece of newspaper, setting the paper on fire. The burning paper blew down the street, landing on the roof of Harry's house. The house caught on fire and burned down.

Lee Burgess: What claims may Harry reasonably raise against Doug?"

Lee Burgess: Here, Harry would want to bring a Negligence claim against Doug. Again, we will just focus on factual causation, but if you were fully analyzing this question, you would want to discuss all elements of negligence.

Lee Burgess: There is a lot going on here. The chain between Doug texting while driving and Harry's house burning down is fairly long, with a lot of strange events in between. But don't let that trick you. The amount of events in between a defendant's conduct and the plaintiff's injury, as well as the types of those events, is an issue with proximate cause. We are just focused on factual cause here, and remember, all we need for factual causation is a line of dominos where that last domino falls because the first domino fell.

Lee Burgess: So, let's ask the question: But for Doug texting while driving, would Harry's house have been burnt down? The answer is "No", and "but for" causation is

satisfied. This is because had Doug not been texting while driving, he would have not lost control of his car and slipped off the road. If he did not lose control of his car and slip off the road, he would not have hit a utility pole. If he did not hit a utility pole, sparks would not have flown everywhere. If sparks had not flown everywhere, one would not have landed on a piece of newspaper, setting it on fire. If that piece of newspaper did not blow down the street, it would not have landed on the roof of Harry's house. And finally, if the piece of newspaper did not land on the roof of Harry's house, the house would not have caught on fire and burned down.

Lee Burgess: Again, don't let the chain of events in between trick you when it comes to factual cause. If you can establish a chain or causation, much like I just did with Doug and Harry, you satisfied the "but for" test. To recap: The "but for" test is one way to prove factual causation and is used when there is only one single cause to the plaintiff's injuries. This can be distinguished from the next way to prove factual causation – the substantial factor test.

Lee Burgess: The substantial factor test is used when the defendant's conduct was a substantial factor in causing the plaintiff's harm. You want to use this test instead of the "but for" test when you have multiple tortfeasors, or multiple causes to the plaintiff's single injury. If the defendant was a substantial factor in causing the plaintiff's injury, then factual causation is established.

Lee Burgess: So let's think back to that first example about me running the red light and change the facts slightly. This time, I am still looking at my phone while driving down the street. At the same time, the driver of the car coming from the opposite direction is also looking at their phone while driving. Because both of us are too busy texting, we both run the stop light and crash into your car at the same time.

Lee Burgess: So let's first try the "but for" test on these facts and ask ourselves: But for me looking at my phone while driving, would you have been injured? This is true – you would have been injured had I not been looking at my phone. Whether I was looking at my phone, driving extremely safely, or not even on the road that day, you likely still would have been injured; the other driver coming from the opposite direction still would have hit you. This means, under the "but for" test, you will not be able to satisfy factual causation against me or the other driver. Not holding us liable, though, does not align with the principles of tort law, so there must be some way that we can still be liable. This is where the substantial factor test comes into play. Even though I was not the "but for" cause, I was a substantial factor in causing your injures. So was the other driver. This means

that factual causation in this set of facts would be established through the substantial factor test, not the "but for" test.

Lee Burgess: A third way to satisfy factual causation is through alternative liability. Alternative liability is used when there is a small group of negligent defendants, and the plaintiff is uncertain which one actually caused their injury. If the plaintiff does not know which one negligent defendant caused their injury, the plaintiff can shift the burden to the defendants to prove that they were not the factual cause. This means instead of the plaintiff having to prove the defendant was the factual cause, the defendants now have to prove that they were not the factual cause.

Lee Burgess: The most famous example of alternative liability is in the case *Summers v. Tice (1948)*, the case that established the test. In this case, Summers went quail hunting with the two defendants, Tice and Simonson. Tice and Simonson both shot at a quail in the direction of Summers. Summers was hit with two pellets, one in his eye and the other in his lip. Summers sued both Tice and Simonson for negligence, but the issue was that it was unknown which pellet was shot by which defendant. The court held that because both defendants had been negligent, justice required that the burden of proving factual causation should be shifted to the defendants. If, for example, Tice were able to prove it was not his pellet, he would not be liable. If Tice could not prove it was not his pellet, he would be liable.

Lee Burgess: Alternative liability can be distinguished from the next way to prove factual causation – market share liability. Market share liability is also used when it is uncertain which defendant caused the plaintiff's injury. In this case, the court will hold each defendant liable for its proportional share of the overall market. This sounds extremely similar to alternative liability, so let's talk about it. Clearly, the two are similar in that both are used when the plaintiff does not know which defendant caused their injury. However, the similarities stop there.

Lee Burgess: Market share liability is used when the facts scenario deals with injuries caused by products, like paint or medicine. As you can imagine, the Summers court would not be able to hold Tice and Simonson liable under market share liability, because there is no share in the market for a product the two could have even owned in this situation. They were not manufacturing a product; they were rather hunting for quail and mis-shot. It would, however, be possible to hold companies liable under market share liability, not individual people. An example of this is in the case *Sindell v. Abbott Laboratories (1980)*, the case that established market share liability. In this, the plaintiff's mother took prescribed drugs while pregnant with the plaintiff, and years later the plaintiff developed

cancer as a result of the drug. It was impossible to know which drug company to sue, because around 200 companies manufactured the drug at the time. The court held that it was not fair for the defendants to escape liability, merely because it was impossible to prove which specific company caused the harm. The court held that the companies should pay damages in the amount of their respective shares of the market.

Lee Burgess: As you can see, market share liability has a pretty narrow scope. If you see facts dealing with companies who market a product, accompanied by percentage shares of that market, then you should consider using market share liability to prove factual causation.

Lee Burgess: The final way a plaintiff can prove that a defendant factually caused their injuries is through the loss of chance doctrine. This doctrine is only used in medical malpractice situations, so its scope is also very narrow. This doctrine states that a plaintiff will be able to show actual causation where, (1) the likelihood of survival would have been greater than 50% had their ailment been diagnosed correctly; and (2) the likelihood of survival is now lower due to the misdiagnosis.

Lee Burgess: Let's break this test down with an example. Imagine Mary goes to the doctor complaining of constant headaches. The doctor runs some tests and determines she has chronic migraines. The doctor gives Mary some medication and sends her home. A year later, Mary is still suffering with headaches and goes back to the doctor. This time, a different doctor diagnoses her with a late-stage brain tumor. The new doctor tells Mary she has had this brain tumor for quite some time, and had this been diagnosed earlier, she would have had more of a chance of survival.

Lee Burgess: Now, let's work through the loss of chance test. If Mary could prove evidence that at the time she went to the first doctor, her chance of survival was more than 50% if diagnosed correctly, then the first element would be satisfied. The second element is satisfied because the new doctor told Mary her chance of survival is now lower due to the initial misdiagnosis.

Lee Burgess: As you can see, "loss of chance" is an extremely narrow doctrine. If you encounter facts indicating medical malpractice, likely accompanied by percentages of survival, then you should consider using "loss of chance" to establish factual causation.

Lee Burgess: We are running out of time, so let's recap what we've learned. Negligence is a tort that has four elements: duty, breach, causation, and damages. Causation –

the third element of negligence – requires both factual causation and proximate causation. Factual causation is established when you can show the defendant actually caused the plaintiff's injuries. To do this, five tests can be used:

Lee Burgess: The first is the "but for" test. This is the most common one, so it should be the one that you are most familiar with. The "but for" test requires you to ask the question: But for the defendant's negligence, would the plaintiff have been injured? You should use this test when you have one potential cause for the plaintiff's injuries.

Lee Burgess: The second test is the substantial factor test. This one asks whether the defendant was a substantial factor in the plaintiff's injuries. You should use this test when you have multiple tortfeasors, or multiple causes to the plaintiff's injury.

Lee Burgess: The third test is the alternative liability test. This is used when the plaintiff cannot determine which tortfeasor is liable for their injuries. The burden would then shift to the negligent defendants to prove they were not the factual cause.

Lee Burgess: The fourth test is the market share liability test. You want to use this test when you have a plaintiff injured by a product, and it is impossible for them to prove which defendant produced the exact product that injured them.

Lee Burgess: The final test used to establish factual causation is the loss of chance doctrine. Like I said, this one is extremely narrow in scope and should only be used in medical malpractice situations. Factual cause is established under "loss of chance" where, (1) the likelihood of survival would have been greater than 50% had their ailment been diagnosed correctly; and (2) the likelihood of survival is now lower due to the misdiagnosis.

Lee Burgess: Alright, that's a wrap for today. Glad you could join me as we discussed factual cause! 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!

RESOURCES:

"Listen and Learn" series
California Bar Examination – Essay Questions and Selected Answers, February 2019
California Bar Examination – Essay Questions and Selected Answers, July 2017
Summers v. Tice
Sindell v. Abbott Laboratories
Podcast Episode 186: Listen and Learn – Negligence: Proximate Cause