



Lee Burgess: Welcome back to the Law School Toolbox podcast. Today we have Part 1 of our two-part series on strict liability – specifically as it relates to animals (both wild and domestic), as well as certain super dangerous activities. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the law school and early legal career experience, so you’ll be the best law student and lawyer you can be. 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 if you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Welcome back to the “Listen and Learn” series, where we are talking about strict liability as it relates to animals (both wild and domestic), as well as certain super dangerous activities. This is Part 1 of our two-part series on this topic.

Lee Burgess: First off, why don’t we talk about some background on the law at issue for today. As you probably already remember from Torts class, some torts are intentional – like battery or assault, and one required element the plaintiff needs to prove is, of course, intent. Then there’s negligence – a theory under which a defendant can be held liable not because they intended harm, but because they were somehow just not careful enough and harm ended up happening. There’s also a third type of liability, which is what we are talking about today – strict liability, and this arises when it doesn’t even matter what the defendant intended, and we don’t even care how careful they tried to be. Strict liability means there are situations in which the defendant is on the hook for damages simply for undertaking the activity in the first place. In other words, there are certain activities that courts have decided are so dangerous that nothing else matters. If someone gets hurt and you’re doing one of these super dangerous things, you are liable.

Lee Burgess: So, you might be wondering what types of activities fall into this category. And by the way, as far as terminology goes, sometimes these are called “ultra hazardous activities”, like in the First Restatement of Torts, or sometimes they’re called “abnormally dangerous activities”, like in the Second Restatement of Torts. But for our purposes, these mean the same thing. There are some classic examples of strict liability activities – one of them is blasting with dynamite; the other is keeping a tiger as a pet. Both of these are so dangerous that the law does not consider how careful you try to be. If you’re blowing



things up with dynamite or housing a tiger and someone gets hurt, you are held liable.

Lee Burgess: The basic rule for strict liability in these situations for abnormally dangerous activity is: A defendant is strictly liable for damages caused to a plaintiff when engaging in an abnormally dangerous activity. An abnormally dangerous activity is defined as an activity that, (1) creates a foreseeable and highly significant risk of physical harm, even when reasonable care is exercised by all actors, which is; (2) not an activity of common usage in the community. So that's the rule to memorize. We need a dangerous activity that is also not common in the community, and based on that activity alone, we can pretty much foresee someone is at risk of getting significantly hurt.

Lee Burgess: So, what do those two rule elements mean, though? Let's break them down. The first element of our rule is that the activity must create a foreseeable and highly significant risk of physical harm, even when reasonable care is exercised. Here's where it gets sort of fun. Can you imagine situations in which it really doesn't matter how careful you are, the risk of physical harm is just too high? Well, according to the case law, courts have already found quite a few activities to be this abnormally dangerous, and those relate to dynamite, explosives, rockets, experimental aircraft, radioactive materials, storage of large quantities of highly flammable, combustible, or poisonous substances, and even fumigating and crop dusting.

Lee Burgess: In this category of abnormally dangerous activities, we also have the idea of keeping certain types of animals as pets. I said before that a tiger is going to be too dangerous. What about a very big dog? What if this dog has attacked someone in the past? On the one hand, other people's dogs are just a part of life and very common in most communities. That means when you see a dog bite case, you are probably going to be dealing with a negligence framework rather than strict liability.

Lee Burgess: And with animals, we have a couple more nuances to add to our rules. The first is about wild versus domestic animals. When it comes to domestic animals, the rule is that the owner will not be strictly liable for harm caused, unless the owner has knowledge of the animal's vicious propensities. Domestic animals includes pets like dogs and cats (although not all pets), as well as farm animals.

Lee Burgess: However, an owner of a wild animal, even if it is a pet, is subject to strict liability for harm caused by the animal regardless of safety precautions taken by the



owner. Animal owners are also strictly liable for trespass and resulting property damage if animals get out and the damage caused is reasonably foreseeable. And in general, when it comes to all strict liability cases, the harm caused does need to be somewhat foreseeable. For example, this might mean that the type of harm caused is the same type of harm one would normally expect to result from a particular activity.

Lee Burgess: Does anyone else remember that bizarre case from law school about the mink babies? No need to look this up, but it's called [*Foster v. Preston Mill Co.*](#) Essentially what happened is a mink farm operator tried to recover for harm caused by nearby dynamite blasting of a mill company. The problem was that the harm that happened was truly weird, because the farmer alleged that the noise and vibrations from the blasting caused the mink to freak out and kill their young, which evidently mink do in the wild when their lives are in danger. Who knew? So yeah, as you can imagine, the court said "no". The kind of harm that is foreseeable from dynamite blasting are things like rocks flying and hitting something, loud noises damaging someone's hearing, or something else we think about with dynamite. "You caused my farm animal to commit infanticide" is not really a foreseeable risk of dynamite. So, the mill company was not strictly liable. Would it matter if the mill company had actual knowledge that this was happening and continued blasting anyway? Well, this is a trickier question and it hinges on what really is foreseeable in these situations. The bottom line here, though, is that typically the harm has to be the right type. And by that I mean the type of harm we would expect from the activity being done.

Lee Burgess: The second element of our rule is common usage. To be considered abnormally dangerous, the activity has to be one that is not of common usage, and this is based on the particular surrounding community. So what is considered super dangerous out on a rural farm or in the middle of an empty desert might be very different from what is considered super dangerous in the middle of a city block in downtown San Francisco.

Lee Burgess: We need to look at where the activity happened, what was around the defendant at the time, what are people in this community up to on a regular basis? You also want to be thinking of activities that are super dangerous but that need to happen regardless of that fact. So for example, maybe electrical wires are super dangerous, but since every city needs electricity, that means some activities relating to electrical wires are of common usage in most communities, and therefore will not give rise to strict liability. Would it matter if the person touching electrical wires was a trained professional versus a random lay person? Probably, but that is something you should look for in the fact



pattern. If you see a dangerous activity, ask yourself if it is commonly done or not in that place at that time.

- Lee Burgess: Another really classic example is driving a car. Driving is super dangerous. The risk for accidents is very high, and a car accident can be catastrophic. However, most of us drive. That means it is an activity of common usage, and therefore will not get strict liability treatment. Interestingly though, some jurisdictions have imposed strict liability for certain driving behavior, such as driving at very high speed or with broken headlights at night. And one more thing – driving isn't just common; it's very useful. That's important. Courts will also look to the utility of an activity, not just how prevalent it is. If you have an activity that is both very common and highly useful, it is less likely to be a strict liability situation.
- Lee Burgess: Now that we're clear on the rules, let's get into some examples. This first fact pattern is from a [California bar question on torts from February 2008](#). We've modified this a bit, so it's not so long. Here it is:
- Lee Burgess: "Peter, a 12-year-old, was playing with his pet pigeon in a field near his home, which is adjacent to a high voltage electricity power substation. The substation is surrounded by a six-foot tall chain link fence topped with barbed wire. Attached to the fence are 12 10-inch by 14-inch warning signs, which read 'Danger! High voltage!' Peter's pigeon flew into the substation and landed on a piece of equipment. In an attempt to retrieve his pet, Peter climbed the surrounding fence, then scaled a steel support to a height of approximately 10 feet from where the bird was stranded. When Peter grasped the bird, it fluttered from his hand, struck Peter in the face, causing Peter to come into contact with a high voltage wire, which caused him severe burns.
- Lee Burgess: Peter's father is contemplating filing a lawsuit on Peter's behalf against the owner and operator of the substation – Power and Light Company, or PLC, to recover damages arising from the accident. Can Peter's father reasonably pursue a strict liability claim against PLC?"
- Lee Burgess: Well, what do you think? First things first, we do have an animal here that is a pet – the pigeon – but the animal causing damage isn't really the problem this hypo centers on. Instead, what we're really looking at is those high voltage electrical wires that Peter touched and burned himself on. So, let's go through our list of steps.



- Lee Burgess: First step to figuring out whether an activity is abnormally dangerous or not, is whether it creates a foreseeable and highly significant risk of physical harm, even when all reasonable care is exercised. What do you think here? We have high voltage electricity. This is an electricity power substation, which presumably means that this power is what's keeping the lights on in the place where Peter lives. So that tells us this electricity is probably on all the time. We already know electricity can shock and even kill people, so we know it's dangerous in the abstract, and we can always bring that kind of common sense knowledge into answering an exam question. We also know it was dangerous here since it severely burned Peter. So far, this is sounding like it fits the "abnormally dangerous" element of a strict liability activity.
- Lee Burgess: Next, we have our second element, which is about common usage in the community. What do we think about this one? What do the facts say? Peter was playing in a field near his home, and the power substation is adjacent to that field. So this is a place where people live, it's not out completely in the middle of nowhere. A 12-year-old kid got to this by himself, so it must be close to some kind of town or city. Again, we can also be thinking about common sense evaluations of the situation at hand. We know everyone needs electricity to power their homes. That tells us electricity is not only of common usage, but it seems to be common usage in this particular locale as well, which is important. So according to this element, it's looking less likely that the strict liability claim will work, because conduction of electrical wires is common to the area.
- Lee Burgess: A general note on your attack plan or step-by-step framework when writing an essay: On a strict liability discussion like this one, in real life, you would next discuss causation. Did the dangerous activity of the power plant cause the harm? This is where the idea of whether the type of harm is foreseeable or not would come in. Here, we can say "yes", that's easily met. Burns from electrical wires is one of the things we would expect. Then finally, damage. Did Peter get hurt? Yes, he suffered severe burns, so that is also easy to check off as well. We can conclude that the strict liability claim fails, because even though it is a dangerous activity that cannot possibly be made totally safe, even with fences and warnings, and even though we have causation and damage, the activity is just too common to the community, so it will fail that second abnormally dangerous rule element.
- Lee Burgess: Interestingly, when this essay was tested on the California bar, it was possible to come to a different conclusion on this "common usage" element. For example, maybe having a power substation right next to people's homes is not common. You can see how the way you frame the activity can make a big difference in



what you can argue. So as we always say, use the facts given and argue both sides if there are arguments to make.

Lee Burgess:

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