



- Lee Burgess: Welcome to the Law School Toolbox podcast. Today, we are talking about negligence per se, as part of our series called “Listen and Learn”. 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.
- Lee Burgess: 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 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 Law School Toolbox podcast! On this week’s “Listen and Learn”, we are covering negligence per se, which will generally appear as you’re moving through the Big Four of Negligence: duty, breach, causation, and damages. Negligence per se lives in the world of duty and breach. It establishes a statutory duty of care, which the reasonable person would have a duty to follow, and if that statutory standard of care is violated, a breach is presumed.
- Lee Burgess: Okay, but what does that mean? It means that instead of defaulting to the basic reasonable person standard, the standard of care is defined by some sort of regulatory or criminal statute. The standard of care will be formulated in accordance with two things: First, the type of harm that the statute is designed to prevent or address; and second, a class of person who is meant to be protected by the statute. If a person, by virtue of violating the statute, causes the type of harm meant to be avoided against the class of persons meant to be protected, then negligence per se has occurred, and there has been a breach of the duty to abide by this statutory standard of care.
- Lee Burgess: So, we’re going to use some fact patterns to get specific about what this looks like. But first, some test taking tips. How will you know when negligence per se appears on a Torts exam? If you just yelled, “If there’s a statute!” into your AirPods or headphones or whatever you’re listening to this on, then you are correct. A dead giveaway that negligence per se will be an issue on your exam is if you find reference to a statute, or the language of law embedded somewhere in your exam.
- Lee Burgess: If your professor really wants to have fun with you, they may create a fact pattern where the facts don’t necessarily fit neatly into the class of harm/class of persons example, and you’ll want to analyze under negligence per se as well as under traditional negligence, moving through the Big Four without presuming a breach has occurred.



Lee Burgess: Finally, there may be a fact pattern where the statute is not specifically cited, but the act is such that the existence of a statute can be presumed, such as the breaking of a traffic law. In that case, you can raise the issue of negligence per se, even though you don't have a particular statute you're citing to. Your common sense is citation enough.

Lee Burgess: So, we'll move through a couple of quick examples of these approaches. To remind you of the stepping stones for a negligence per se analysis, you first want to identify, is there some kind of statute or regulation that is intended to somehow guide the conduct in which the defendant engaged? Two, did the defendant act in violation of the statute? This question is asked by a two-step test. Step 1: Does the statute articulate or allude to a specific type of harm that is intended to be prevented or addressed, and did the defendant cause that particular type of harm? Step 2: Does the statute contemplate a particular person who is intended to be protected by the statute, and is the plaintiff in this case within that class of person?

Lee Burgess: Let's walk through these steps using a hypo. This is an excerpt from the Torts question on the [July 2010 California bar exam](#). The facts have been shortened in order to constrain them to negligence per se, and we've also limited the call of the question for the same reason. Here we go:

Lee Burgess: "Homeowner kept a handgun on his bedside table in order to protect himself against intruders. A statute provides that 'all firearms must be stored in a secure container that is fully enclosed and locked'. Burglar broke into Homeowner's house while Homeowner was out and stole the handgun.

Lee Burgess: Burglar subsequently used the handgun in an attack on Patron in a parking lot belonging to Cinema. Patron just exited Cinema around midnight after viewing a late movie. During the attack, Burglar approached Patron and demanded that she hand over her purse. Patron refused, and Burglar drew the handgun, pointed it at Patron and stated, 'You made me mad! Now I'm going to shoot you.' Patron fainted out of shock and suffered a concussion.

Lee Burgess: So, under what theory or theories, if any, might Patron bring an action for damages against Homeowner?"

Lee Burgess: So, let's move through our steps. First, is there a statute that is intended to guide or regulate Homeowner's behavior in some way? Yes, we've been told there is a statute that requires all firearms to be stored in a secure container that is fully enclosed and locked. Did Homeowner comply with that statute? No way. Homeowner kept a handgun on his bedside table in order to protect himself from intruders.



- Lee Burgess: Alright, can we just call it a day? Is that the end of our analysis, and we get to declare negligence per se because Homeowner breached? No, this is where we get into our two-step class of harm/class of person analysis. Because even if Homeowner violated the statute, if the harm or plaintiff was somehow unforeseeable or too attenuated from the purpose of the statute, then negligence per se won't apply. This doesn't mean that Homeowner won't be found to be negligent; just that the breach won't be presumed under a negligence per se theory.
- Lee Burgess: So, let's go back to our facts. Keeping the handgun on the table was obviously ineffective against intruders, because Burglar broke into Homeowner's house when Homeowner was out and stole the gun, and then used it to hold up Patron in a movie theater parking lot, leading to Patron fainting and getting a concussion.
- Lee Burgess: Is this the sort of scenario that the requirement to keep a handgun locked away is intended to prevent? Maybe. What else could be the reasoning behind the statute? To make sure that a child in the home can't access the gun? To keep the homeowner or someone else in the house from accidentally hurting themselves or others? To prevent suicide? Those may be the more likely scenarios contemplated by the statute, and could give a jury pause as to whether a person breaking into the house and stealing the gun in order to use it on someone else is really the type of harm that this statute was meant to prevent.
- Lee Burgess: But then again, you could argue that an enclosed gun is an enclosed gun and read broadly – the statute is trying to prevent any unintended contact with the gun, which is a pretty dangerous thing to leave around. For the purpose of testability, this is where the two-part analysis is meant to be dynamic and give you room for argumentation. What you conclude is never as important as how you get there.
- Lee Burgess: Now on to the second part of the test – the class of person meant to be protected. We ran through a few options for foreseeable plaintiffs – basically anyone who gets accidentally shot inside the household based on Homeowner's failure to secure a gun. But what about a Patron of a far-off movie theater who gets held up in a parking lot by the very gun that was stolen from Homeowner? Did legislators have someone like Patron in mind when they drafted this rule? Again, the answer is "Maybe", and it's up to you as an exam taker to argue what you believe is the most reasonable answer. Try a narrow reading and a broad reading, and figure out which one makes the most logical sense to you. But be sure to discuss both alternatives in your exam answer.
- Lee Burgess: So, that's one example of how you might encounter and approach negligence per se in an exam. But what if the statute isn't as obvious? Can you leap to



negligence per se as a possible theory of liability? Yes, but remember, you won't want to stop with negligence per se; you'll want to continue moving through your elements, from duty all the way through damages, even if negligence per se is a possible theory.

Lee Burgess: Here's another example, this one from the [July 2004 California bar exam](#). Again, it is abridged in order to keep our attention focused on the negligence per se issue:

Lee Burgess: "As Chip was crossing the street, he was knocked down by a slow moving car driven by Wilbur. Wilbur had driven through a red light and did not see Chip, who was crossing with the light. Chip suffered a gash on his leg, which bled profusely. Though an 'ordinary person' would have recovered easily, Chip had hemophilia and died as a result of the injury. Chip left a widow, Melinda.

Lee Burgess: Now what claims, if any, may Melinda assert against Wilbur, and what damages, if any, may she recover?"

Lee Burgess: Let's remember our steps. First, is there a statute that is governing Wilbur's behavior? Well, not in the facts. But as a person in the world, who has perhaps been in a car, or seen cars, or seen movies about cars in which those cars stop when the light is red, and go when the light is green, or even read some of the children's books that I have in my library, that talk about green lights and red lights, you know that this behavior is guided by more than the honor system. Somewhere out there is a traffic code that requires drivers to stop at red lights.

Lee Burgess: So, even though the facts don't specify the language of the statute, knowing that running a red light would in fact violate a statute, you can go ahead and assess Wilbur's liability under a statutory standard of care, as well as the general standard of care – that of a reasonably prudent driver. However, under a negligence per se theory, you will assess his actions as someone who is required to stop at a red light in order to prevent against a certain type of harm against a certain type of person.

Lee Burgess: So, what is the harm intended to be prevented by the requirement that drivers stop at red lights? It probably looks a lot like what just happened to Chip – a pedestrian getting hit by a car that fails to stop. Any counterarguments that you see? Wilbur may try and argue that he was moving really slowly through the red light, and a mere gash in the leg that just so happened to be fatal is a sort of unforeseen event that goes beyond what was considered when these statutes will put in place. Will this argument work for Wilbur? I doubt it.

Lee Burgess: He ran a red light and hit a person with his car. Just because the extent of the harm – killing someone by inflicting an ordinarily non-fatal leg wound – may have been unusual under these circumstances, the type of harm – hitting and



injuring someone with your car – is very much aligned with the reasoning behind traffic laws. Therefore, Wilbur hitting Chip with his car is quite likely the type of harm that was meant to be prevented by the statute that requires Wilbur to stop at a red light.

Lee Burgess: Secondly, was Chip the type of person intended to be protected by the statute? Well, the short answer is “Of course”. Chip was a pedestrian crossing the street at a traffic light that Wilbur ignored. Pedestrians are no doubt intended to be protected by the whole “Red means stop, green means go” thing. But Wilbur may try to give us a long answer. He’s going to engage in an absurdly narrow reading of traffic laws, and argue that such a statute could not have intended that a person with hemophilia specifically would have been contemplated by these laws to the extent that a breach may be presumed.

Lee Burgess: Now, Wilbur will likely be wrong, because at the end of the day, Chip was a pedestrian who was hit by a car, and it doesn’t matter that Chip’s particular condition resulted in an usual outcome. What matters is Wilbur caused the type of harm – hitting someone with his car, against the type of person – a pedestrian, that is intended by the statutes that require us to stop at red lights.

Lee Burgess: So, that’s what a negligence per se analysis looks like. Because negligence per se collapses your standard of care and breach analyses into one theory, you’re typically going to want to engage in a basic negligence analysis as well, just to cover all your bases and show your professor that you know what it would look like as well. But if you see a statute or a conduct that would ordinarily be guided by a statute, give that negligence per se analysis a try.

Lee Burgess: And with that, we are out of time. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review or 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@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website [contact form](#) at LawSchoolToolbox.com. Thanks for listening, and we’ll talk soon!

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[California Bar Examination – Essay Questions and Selected Answers, July 2004](#)

[Podcast Episode 215: Listen and Learn – The Commerce Clause](#)

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