



Lee Burgess: Welcome to the Law School Toolbox podcast. Today, we're talking about the categories of duty under Negligence that have to do with landlords, owners, and possessors of land, as part of our "Listen and Learn" series. 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: Hello, and welcome back to the "Listen and Learn" series from the Law School Toolbox podcast. Today, we will be discussing the duty landowners and land possessors owe to people who enter their land, and the duty landlords owe to their tenants. Both are subtopics of Negligence under Tort Law. Negligence is a topic you 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: Let's start by reviewing negligence and duty, generally. 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. In a lawsuit, we'd say the defendant owes a duty to the plaintiff. That duty differs depending upon, among other things, who the defendant is: Are they a child or an adult? Are they a person living with or without a physical disability? Duty also differs depending on the relationship between the plaintiff and defendant. Do they have a doctor-patient relationship? A parent-child relationship? Or, relevant to our discussion today, a landlord-tenant relationship?

Lee Burgess: We've already covered the reasonable person standard on an [earlier podcast](#), linked in the show notes. 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. We've also covered the duty owed by professionals and the duty owed by children in a [prior podcast](#), so be sure to give that episode a listen as you master the topic of duty. We'll link to that one in the show notes, too. Understanding the duty a defendant owed a plaintiff is super important in understanding a negligence case. You cannot analyze whether a defendant breached their duty, whether that breach caused harm, or what damages they might owe to a plaintiff, unless you understand what duty they had to that plaintiff. So, let's jump into today's topic. It's all about land!



Lee Burgess: Our first topic is the duty landlords owe to their tenants. This duty is pretty straightforward, but there are a few twists and turns you'll need to remember, so we'll go through those together. As a general rule, a landlord has no duty to maintain the leased premises, unless provided for by law or contract. The thinking here is, the renter physically possesses the property, they are living in it or utilizing it in some way, so they have to take care of it. If any damage occurs to that property, they are likely the cause of that damage.

Lee Burgess: Now, just like any bright-line rule in the law, this isn't always true! Take an apartment, for example. We all probably lived in an apartment or house, and we know that things sometimes just break. Our sink started spontaneously leaking the other day, not because we did something wrong, but because our house is over 60 years old and some part of our plumbing just wore out. Other times, Mother Nature has her way, and a hailstorm will damage a roof, or heavy rains will cause a leak. These "acts of God" or other typical wear-and-tear-type issues in a property are not addressed in this general tort theory, but they are typically covered under local law or under the rental contract signed by a landlord and tenant. So, keep that in mind as you determine what duty a landlord owed in and exam question, and practically, as you sign your next lease! Always read the contract!

Lee Burgess: But what about if there is an issue with the house or apartment before the renter moves in? Another piece of the landlord-tenant rule is that a landlord must warn the tenant of latent defects to the property. If they do not and some damage to the tenant or tenant's property occurs, landlord may be held liable. Is there a leaky gutter that creates a puddle and then a dangerous ice patch in the winter? Is there a short in the electrical circuit or a loose railing on the stairs? If the landlord knows about it, they must tell the tenant. The tenant must be given forewarning of defects so they can either watch out for those defects and avoid them, or decide they don't want to deal with that defect and therefore don't want to rent the property at all.

Lee Burgess: Finally, what duty does a landlord owe a tenant to keep them safe from the criminal acts of third persons? There are two approaches to remember here. Under common law, the landlord has no duty to provide safe premises so that tenants are safe from criminal acts of other people. The idea here was, look, there is only so much a landlord can control. They can't control acts of third-party criminals and shouldn't be held liable for criminal actions of other people. If harm occurs because of the criminal act of a third person, tenant can sue that person for damages. But this bright-line rule did not work so well in practice.

Lee Burgess: The more modern view is that a landlord has a duty to take reasonable precautions to protect the tenant against foreseeable attacks. This is not a huge change from the common law rule. The landlord isn't required to have a crystal ball or to go above and beyond to keep their tenant safe from criminal acts of



another. But we now say that if a criminal act is foreseeable – it’s happened before, it’s common in the area, etc. – the landlord must take reasonable precautions to protect the tenant.

Lee Burgess: Now, here is where you need to put on your legal argument cap. What makes something foreseeable and what are reasonable precautions? Besides showing that you know the rule, your test grader will be looking to see your ability to marshal legal argument in a question like this. If the rental property is in a high-crime neighborhood, we might argue that property crimes are foreseeable and the landlord should install security cameras on the property. This might not be true for a house in a low-crime neighborhood. Or, you could argue that functioning locks are reasonable enough precautions against property crimes, and that security cameras go above and beyond – they are not reasonable and should not be expected. Like any exam question, look at the context and make your best argument while showing you’ve considered other possible options.

Lee Burgess: Okay, so we’ve covered the rule regarding what duty landlords owe to their tenants with respect to maintenance, latent defects, and protecting tenants from criminal acts. Let’s move on to a more complex rule. What duty do landowners or possessors owe to people that enter their property? This rule is a bit more nuanced, so we’ll go through it piece-by piece and work through some examples, so you’re sure you have a good grasp of the material.

Lee Burgess: First, the operating rule depends on what state you’re in. In some states, the landowner/possessor must exercise reasonable care under the circumstances to all entrants. That’s pretty easy to remember but a little bit harder to analyze. If you own or rent and possess a property, you owe a duty of reasonable care, under the circumstances, to all entrants. “All entrants” is pretty clear, but what is “reasonable care”? And what is “reasonable under the circumstances”? Here again is where you get to flex your legal argumentation muscles. It’s your job as a lawyer to make the argument that something is or is not reasonable under the circumstances. For example, if the property is in a cold weather state, it might be reasonable to expect the landowner or possessor to keep their driveways and walkways clear of ice during winter months, so the mail carrier can safely deliver mail. If there is an ongoing blizzard, however, there is not much a landowner can do to fight a storm while it’s happening. If the mail carrier is injured due to a storm in progress – a falling limb, white-out conditions – you might argue that there was no duty under those circumstances.

Lee Burgess: If some states follow the reasonable care to all entrants rule, what do other states follow? In those other states, the duty of care owed by a landowner or possessor is determined by the type of entrant. That is, a landowner or possessor owes a different duty of care to someone invited versus uninvited, to a social guest versus someone doing work on the house or property. So, let’s break it down, starting with trespassers, or uninvited persons.



Lee Burgess: The rule for trespassers depends on whether the trespasser is expected or not. The landowner or possessor owes no duty to an undiscovered trespasser. If you live in a rural area and a random person just wanders into your backyard and gets hurt in the process, that's really not your fault. However, if the person is an anticipated trespasser – that is, if they are here without permission but their presence is expected – the landowner or possessor has two duties: one, a duty to exercise reasonable care in operations on the property; and two, a duty to warn of, or make safe, highly dangerous artificial conditions that the landowner knows about.

Lee Burgess: So, perhaps you live in an area with more foot traffic or with neighbors that are more likely to cross through or enter your yard. I do! I have a house on a corner lot in a small town and we constantly have kids and their parents playing in or crossing through our yard. So, I would have a hard time arguing that my neighbors are undiscovered trespassers. I fully expect them to be in my yard at some point, so I have a duty to exercise reasonable care in the operation of my property. I can't just let the whole yard go or let plants obscure our retaining wall, so somebody might miss it and fall off. I also have a duty to warn of, or make safe, any highly dangerous artificial condition that I know about. This might describe my retaining wall again. It might be hard to argue that my little, six-inch-high wall in my front yard is highly dangerous. But what about in the back yard where the wall gets closer to five feet high? Perhaps. So, I may have a duty to warn of or make that retaining wall safe for anyone who might pass through my yard. Perhaps a fence, or clear markings would do the trick.

Lee Burgess: Now, that covers trespassers, but what about invited guests? Again, it depends. If the invited guest is a social guest, who we call a "licensee" in lawyer speak, the landowner or possessor owes two duties: one, to take reasonable care in operations; and two, to warn of, or make safe, dangerous conditions that are known to the landowner or possessor but not apparent to the guest.

Lee Burgess: That is relatively straight forward, so I won't dive too far into it here. If you come across a question regarding licensees on an exam, remember to analyze it step-by-step. One, whether the way the landowner or possessor cared for their land was reasonable; two, whether there was a dangerous condition on the land anyway; three, whether the landowner or possessor knew about that condition; and if so, four, whether the condition was apparent to the guest; and if not, five, whether the landowner or possessor warned the guest of the danger. And that's pretty much it.

Lee Burgess: Okay, so that covers social guests, or licensees. What other type of invited guests are there? The other type is an invitee – someone who enters the property for the owner's benefit, or to shop or do business. This is less common for a residential property, but can still apply if we're discussing people on the



property to do maintenance work or some other non-social but invited reason. As you might imagine, the rule for invitees comes into play most often in commercial properties, like stores or businesses. Shoppers aren't there for a social call, but they are invited. The shop owner wants, and even needs them to come. So what duty does a landowner or possessor owe an invitee? Thankfully, the rule is the same, but with a little more. The landowner or possessor owes the same duty to a licensee (a business guest) as they owe to an invitee (a social guest), plus a duty to make reasonable inspections to find and make safe non-obvious dangerous conditions.

Lee Burgess: Okay, let's look at an example adopted 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 and said, 'Whatever you do, don't go into the room at the end of the hall.' As they were examining the puppies, the largest puppy, without warning, gave Carol a nasty bite on her hand. Dan told Bob to go to the bathroom near the end of the hall to retrieve some bandages. Forgetting Dan's earlier admonition, Bob opened the door at the end of the hall, thinking it was the bathroom, and entered a darkened room where Dan kept an enormous pet chimpanzee. The chimpanzee jumped between Bob and the door, beat its chest and made menacing hoots. Frightened, Bob stood still. In attending to Carol's bite, Dan mistakenly grabbed a bottle of heavy-duty solvent, thinking it was a bottle of antiseptic. When Dan rubbed its contents into Carol's wound, she began to scream and shout in pain. Hearing Carol's cries, Bob barged past the chimpanzee, which gave him a deep gash in his head as he passed. Shaken and sore from their injuries, Bob and Carol fled Dan's house. Bob and Carol filed a lawsuit against Dan to recover for their injuries.

Lee Burgess: What duty might Carol and Bob argue Dan owes them in a negligence suit against him?"

Lee Burgess: Alright, I know there is a lot going on in this question that goes beyond duty in a negligence case. But remember, it's important to read the question. Even if a dozen ideas pop into your head about the types of lawsuits or claims Carol and Bob might bring, pause. Read the question. What is it asking for? It's great that you know the law so well that these ideas are popping into your head, but throwing in superfluous arguments is not going to earn you any points with the test grader. Plus, you probably don't have time to discuss those arguments and answer the question well. So, focus on what's been asked. What duty might Dan owe Carol and Bob?



- Lee Burgess: First, remember that there are two different tests here, depending on what state you're in, and you should mention both unless you know in which state and under which rule you're operating.
- Lee Burgess: In some states, the landowner/possessor must exercise reasonable care under the circumstances to all entrants. In this case, do we have a landowner or possessor? Certainly. The question mentions that Dan, the dog breeder, had and was selling puppies at his house, so we know he either owns or possesses that property. Second, are Carol and Bob entrants? Yes, they are. They have entered Dan's property and he therefore owes them a reasonable duty of care under the circumstances. Whether or not Dan breached that duty by owning a wild animal on the property or by not warning about the dogs' biting, is outside the scope of this question. But I don't blame you if your mind goes there! Breach is next in the chain of a negligence claim: duty, breach, causation, and damages. So it's natural to move down that line, but let's just make sure we master duty before we move on.
- Lee Burgess: Okay, so we've covered some of the states, but we need to address the others. In the other states, we need to determine what type of entrant Carol and Bob are, to know what duty Dan owed them. We don't need to rehash that Dan is the landowner/possessor or that Carol and Dan are entrants. But what kind of entrants are Carol and Dan? Well, we can answer that by asking why they are on Dan's property. The question mentions that Carol and Bob are there to potentially purchase puppies from Dan, a dog breeder, making them invitees. Remember, invitees are people who enter the property for the owner's benefit, or to shop or do business. What does Dan owe invitees to his home/dog breeding business?
- Lee Burgess: Dan's duty is, one, to take reasonable care in operation of the property; two, to warn of, or make safe, dangerous conditions that are known but not apparent to the guest; and three, to make reasonable inspections to find and make safe non-obvious dangerous conditions. So, he has a duty to take reasonable care in the operation of his home business, to warn Carol and Dan of any dangerous conditions he knows about (for example, the chimpanzee) or to make those conditions safe, and to make reasonable inspections to make other non-obvious but dangerous conditions more safe. Again, whether he breached that duty will be left for another time.
- Lee Burgess: Now, one more thing you should keep in mind is whether Bob, in entering an off-limits room in Dan's house, changed his status from invitee to trespasser. Sure, Bob was invited to Dan's property in order to do business, but he was specifically told not to enter the room at the end of the hall. So, you could argue that, once he entered that room, Bob was no longer an invitee but was a trespasser. In that case, you'll need to address the duty Dan owes to trespassers.



Lee Burgess: I think it's safe to say that Bob is a foreseeable or anticipated trespasser. That is, Bob was in the room without permission, but his presence is expected. He was invited into the house and even instructed to go down the hall near that room. It's not like he was a random stranger that wandered into Dan's house, down the hall, and into the room with the chimpanzee. Bob's presence there is far more foreseeable.

Lee Burgess: So, taking as a given that Bob is an anticipated trespasser, Dan owes him two duties: one, a duty to exercise reasonable care in operations on the property; and two, a duty to warn of, or make safe, highly dangerous artificial conditions that the landowner knows about. Again, whether he breached that duty is outside the scope of this podcast, but I think we can safely say that Dan had a duty to exercise reasonable care and to warn of, or make safe, the highly dangerous wild animal in his home. Sure, the chimpanzee is an animal and therefore not an "artificial condition", but given that chimpanzees are not often found in residential properties or in home bedrooms, his presence in that house was created by Dan and is an artificial condition. The chimpanzee was not in his natural habitat, so Dan owes a duty to warn or make safe. Importantly, this is not a duty he would owe Bob if Bob was hurt by a wild animal that appeared in Dan's yard. The main crux is that Dan created this dangerous circumstance, and thus has a duty to make it safe or warn about its existence.

Lee Burgess: Okay, I know it's been a lot, but hang in there! We only have one more subtopic to cover. The final subtopic is one of my favorite legal terms: attractive nuisance. It just so well describes what we're talking about. What you've got there is tempting, but let's be honest, it's a pain.

Lee Burgess: So, what are we talking about? The rule for attractive nuisance is this: A landowner or possessor owes a duty to child trespassers to make the premises reasonably safe, or warn of hidden dangers on the land. Again, we have a special rule for children. Do you have any kids in your life? If you do, you know that kids wander. They wander into places they shouldn't be, especially if there is something that looks different or interesting. They're curious! And they don't have a good grasp of property lines. As adults, we know this and expect this, so we have a different rule for kids to help ensure their safety.

Lee Burgess: Here's the more detailed rule: If the property owner or possessor, one, knows or should know of a dangerous artificial condition likely to cause death or serious bodily injury (like a swimming pool, for example); and two, knows or should know that children are likely to frequent the area; and three, children are unlikely to discover the condition or appreciate the risks; and four, the risk of harm outweighs the expense of making the condition safe, then the duty comes in – the owner or possessor has a duty to make the premises reasonably safe, or to warn of hidden dangers on the land.



Lee Burgess: We most often see this rule in practical application when it comes to backyard swimming pools. Pools are highly dangerous artificial conditions. Drowning is a leading cause of death for young children in the U.S., so as fun as they can be, they are definitely considered dangerous artificial conditions.

Lee Burgess: So, when does a property owner with a pool owe a duty to make the pool reasonably safe or warn of the danger? We've already covered that the pool is a dangerous artificial condition. Quick aside: A pool is an artificial, installed body of water. The analysis would be different for an owner of a lake house. Second, we look at whether the landowner knows or should know that children likely frequent the area. Is your pool in the middle of a rural landscape, or is it in a city or suburb? If it's the latter – that is, if children live or play nearby – you've met this condition. Third, are children unlikely to discover the condition or appreciate the risk? Definitely. Pools are so much fun and are such a tempting, or attractive draw for kids. They often don't appreciate how dangerous they can be and will try and swim or play in the pool unsupervised. Fourth, does the risk of harm outweigh the expense of making the condition safe? I think it would be pretty hard to argue that it didn't. As I mentioned earlier, drowning is a leading cause of death for children one to four in the U.S. every year. At minimum, a pool owner can put an impenetrable fence around the pool, or a locked, sturdy cover, so children cannot access the pool unsupervised. That cost is likely greatly outweighed by the risk to children attracted to the pool.

Lee Burgess: One thing to keep in mind when analyzing an attractive nuisance claim is that the attractive nuisance doctrine does not apply if the child is engaged in an adult activity. So, consider the activity in determining what duty the property owner owes a child on their property.

Lee Burgess: Alright, that's a wrap for today! Glad you could join me as we continue to discuss negligence cases. If you enjoyed this episode of the Law School 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@lawschooltoolbox.com](mailto:lee@lawschooltoolbox.com) or [alison@lawschooltoolbox.com](mailto:alison@lawschooltoolbox.com). Or you can always contact us via our website [contact form](https://www.lawschooltoolbox.com/contact) at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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[California Bar Examination – Essay Questions and Selected Answers, February 2019](#)



[Podcast Episode 244: Listen and Learn – Negligence Per Se](#)

[Podcast Episode 257: Listen and Learn – The “Reasonable Person” Standard](#)

[Podcast Episode 318: Listen and Learn – Negligence: Duties of Professionals and Children](#)