Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we're doing another in our "Listen and Learn" series – this one is on vicarious liability. 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 can 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! Today we are going to be talking about vicarious liability for the acts of employees and independent contractors. Vicarious liability is a form of strict, secondary liability. In other words, a plaintiff seeking to hold a defendant vicariously liable does not need to prove that the defendant themselves committed a tort. Rather, the plaintiff only needs to prove that the defendant had a certain relationship with a third party, and the third party committed a tort. In the employment context, the vicarious liability doctrine is known as respondeat superior. Respondeat superior is a Latin phrase that means "let the master answer", and the doctrine allows a plaintiff to hold an employer liable for their employees' torts under certain circumstances. It's not always clear, however, whether a worker is an employee or an independent contractor. This is an important distinction, because there are very different rules for employees and independent contractors. We'll get into both today.

Lee Burgess: So let's start with the general rule for vicarious liability for the acts of employees: Under the doctrine of respondeat superior, an employer is vicariously liable for an employee's negligent acts if the employee was acting within the scope of employment.

Lee Burgess: This rule seems pretty straightforward, but in order to apply it properly, we need to define a couple of terms. First, we need to define "employee". Generally, if the principal has the right to control the manner and method in which the job is performed, then the person is deemed to be an employee of the principal. In contrast, a person subject to less extensive control is considered an independent contractor. Other important factors include, (1) the degree of the employer's control; (2) whether the pay was hourly or by the job; (3) whether the employer furnished the tools or other items needed for the job; (4) whether the job was for the benefit of the employer's business; and (5) the length of the working relationship.

Lee Burgess: Okay, let's come up with some quick examples to illustrate these two types of relationships. Say that Larry Landscaper works for Green Gardens, a landscaping company. Green Gardens assigns Larry to particular clients on specific days and during specific times. Green Gardens requires Larry to provide only those landscaping services offered by Green Gardens. Green Gardens pays Larry $25 per hour. Green Gardens provides Larry with a uniform with Green Gardens' logo and a van stocked with landscaping tools. Larry has worked exclusively for Green Gardens for the past 10 years. Applying these facts to our factors, it's clear that Larry is an employee of Green Gardens. In every meaningful way, Green Gardens has the right to control the manner and method in which Larry's landscaping work is performed.

Lee Burgess: Now, let's say that Green Gardens closes its doors, and Larry gets a job with City College. City College hired Larry to prune the trees and shrubs on its campus. Larry is permitted to do the pruning whenever and however he sees fit, and is required to use his own tools. When he's finished with the work, City College will pay Larry a flat fee of $2,000. Applying these facts to our factors, it's clear the Larry is not an employee of City College, but rather an independent contractor. Unlike Green Gardens, City College doesn't tell Larry when or how to perform his job or provide him with any tools. Moreover, City College will pay Larry a flat fee for the job instead of an hourly rate. Finally, the landscaping is not for the benefit of City College's business, which is education.

Lee Burgess: Now that we've defined "employee", we need to define "scope of employment", so let's do that now: An employee acts within the scope of employment when, (a) performing work assigned by the employer; or (b) engaging in a course of conduct subject to the employer's control. Factors to determine if conduct is within the scope of employment include whether, (1) it is the kind the employee is employed to perform; (2) it occurs substantially within the authorized time and space limit; and (3) it is motivated, in whole or part, by a purpose to serve the employer. Additionally, conduct is within the scope of employment if it is of the same general nature as that authorized, or incidental to the conduct authorized. Conduct is not outside the scope of employment merely because an employee disregards the employer's instructions.

Lee Burgess: An employee's act is not within the scope of employment when, (1) it occurs within an independent course of conduct; and (2) is not intended by the employee to serve any purpose of the employer.

Lee Burgess: Note that these definitions are just the black letter rules for the concepts of "frolic" and "detour" that you likely learned in law school. As you might recall, a "detour" is a minor departure from an employee's duties that is still considered

within the scope of employment. In contrast, a "frolic" is a major departure from the scope of employment undertaken for that employee's own benefit.

Lee Burgess: To illustrate, let's go back to our earlier example. Let's assume that Green Gardens assigned Larry to spray pesticides on Holly Homeowner's flower beds. Green Gardens specifically instructed Larry to use organic pesticides because Holly Homeowner grew only edible flowers. Ignoring the instructions, Larry sprayed Holly's flowers with a toxic pesticide. After he was finished, Holly's neighbor asked Larry if he could spare 15 minutes to quickly mow his small front lawn. Neighbor told Larry that if he did a good job, Neighbor would sign up as a Green Gardens client. Larry agreed. While mowing the neighbor's lawn, Larry ran over the neighbor's sprinkler head, damaging the sprinkler system and flooding the lawn. Later that evening, Holly ate some of her edible flowers and was poisoned by the pesticides. Both Holly and Neighbor sued Green Gardens.

Lee Burgess: Now, we have already established that Larry was an employee of Green Gardens, so the only question here is whether Larry's actions could be considered within the scope of his employment. With respect to Holly, Larry was likely acting within the scope of his employment. Despite the fact that Larry ignored specific instructions about how the work was to be performed, he was nevertheless performing work specifically assigned by Green Gardens and subject to its control.

Lee Burgess: With respect to Neighbor, Larry was clearly not doing work assigned by Green Gardens. If we look at our factors, however, it seems that Larry was still acting within the scope of his employment. First, Larry was mowing a lawn—which is the kind of work he was employed to perform. Second, Larry performed the work during the workday, wearing Green Gardens' uniform and using its tools, and he deviated from his schedule by only 15 minutes. Third, Larry performed the work at least in part so that Neighbor would sign up as a Green Gardens client, which clearly serves Green Gardens' interests. In other words, Larry was on a detour, not a frolic.

Lee Burgess: Now at this point, you might be wondering whether an employer can be held liable for torts other than negligence. That's a great question! Here's the rule: An employee's intentional torts are not generally within the scope of employment unless the act, (a) was specifically authorized by the employer; (b) was driven by a desire to serve the employer; or (c) was the result of naturally occurring friction from the type of employment. The first two exceptions are pretty self-explanatory and probably don't need any illustration. For the third exception, which concerns an intentional tort resulting from "naturally occurring friction", think about a battery committed by a bouncer or a bodyguard. The

employer can be held liable because the very nature of the job makes the intentional tort foreseeable if not likely.

Lee Burgess: Okay, we're almost done with our rules. We just need to understand what happens when the worker is considered an independent contractor instead of an employee. Generally, a principal is not vicariously liable for the torts of an independent contractor. However, there are several exceptions to the general rule. A principal will be liable for torts committed by an independent contractor if, (1) the independent contractor is engaged in an inherently dangerous activity; (2) the duty owed by the principal is non-delegable – for example, the duty of care owed to an invitee; or (3) through the doctrine of estoppel, where the principal holds the independent contractor out as his agent to a third party, the third party reasonably relied on the care and skill of the contractor, and the third party suffered harm as a result of the contractor's lack of care or skill.

Lee Burgess: And with that, we're done with our rules. Hopefully, the examples so far have helped illustrate how the rules apply to some basic fact patterns. Now we're ready to move on to bigger hypos, so let's get to it. This hypo was adapted from the July 2014 California bar exam:

Lee Burgess: "Owner owned and operated a small diner where Cook and Waiter worked. After closing one day, Cook called in sick for the following day. Owner knew that an acquaintance, Caterer, owned and operated a catering business. Owner asked Caterer to fill in for Cook. Owner told Caterer: 'I want you to run the kitchen for one day. I will pay you your standard catering fee. I just need somebody who knows what he's doing.' Caterer agreed, telling Owner, 'I'll bring my own knife set, but I assume the kitchen is fully equipped.'

Lee Burgess: Caterer went to Owner's diner and started to cook. Patron, a customer, ordered chicken wings from Waiter. Waiter gave the order to Caterer. Upon observing that the oven was set to 250 degrees, Waiter informed Caterer that the oven should be set at 350 degrees as required by the health code. Caterer responded: 'Just worry about waiting tables and leave the cooking to me.' Caterer did not raise the temperature of the oven, and removed the chicken wings shortly thereafter. Waiter served Patron the chicken wings. Patron ate the chicken wings and suffered food poisoning as a result.

Lee Burgess: Is Owner liable for Patron's injury?"

Lee Burgess: Okay, based on these facts, it doesn't seem like the owner did anything wrong here. We're just being asked to determine whether the owner is liable for the injury caused to Patron by Caterer and/or Waiter. That means we're in vicarious liability territory.

Lee Burgess: Before we get into our analysis, it's worth noting that an employer or principal can only be vicariously liable if the employee or agent themselves is liable. So on an actual exam, you would need to separately address the liability of Caterer and Waiter. But for our purposes, we're just going to assume that they were both negligent.

Lee Burgess: So let's analyze Owner's liability for Waiter's and Caterer's acts in turn, starting with Waiter. The first issue we need to address is whether Waiter is an employee. While we're not given any facts about the nature of Waiter's job, Waiter would probably be considered an employee, because restaurant owners typically control the manner and method in which waiters perform their jobs. Waiters are typically told when to work, what to wear, how and what to serve, and are paid by the hour plus tips.

Lee Burgess: The next issue we need to address is whether Waiter was acting within the scope of their employment. Waiter was employed to serve food at the diner, and Patron is claiming that they were injured as a result of Waiter serving food to Patron at the diner. In other words, Waiter was performing work assigned by Owner and subject to Owner's control. Therefore, Waiter was clearly acting within the scope of their employment when they served Patron. Accordingly, Owner can be held vicariously liable for Waiter's negligence.

Lee Burgess: Let's move on to Caterer. We're told that, unlike Waiter, Caterer did not regularly work for Owner. Caterer had their own catering business and was merely filling in at the diner for one day. We're also told that Owner was going to pay Caterer their standard catering fee, as opposed to an hourly wage. We're also told that Caterer was going to provide some of their own tools in the form of their own knife set. Therefore, a strong argument could be made that Caterer was not an employee, but rather an independent contractor.

Lee Burgess: As we saw earlier, the general rule is that a principal is not vicariously liable for the torts of an independent contractor unless an exception applies. So let's go through those exceptions. The first exception for inherently dangerous activities likely does not apply here. While cooking is certainly not the safest job in the world, it doesn't rise to the level of jobs that are typically considered inherently dangerous, like blasting or transporting nuclear waste.

Lee Burgess: Patron has a strong argument, however, that the second and third exceptions apply. Under the second exception, Patron would argue that he was an invitee of Owner, and as a result, Owner had a non-delegable duty to ensure that food served to Patron was cooked according to health regulations. Under the third exception, Patron would argue that by allowing Caterer to prepare food at the

diner, Owner held Caterer out as his agent. Patron reasonably relied on Caterer's care and skill in preparing food and suffered harm as a result of the caterer's lack of care or skill. Therefore, even if Caterer is held to be an independent contractor, Patron has a good chance of prevailing against Owner under one of these exceptions.

Lee Burgess: Okay, let's do one more. The first hypo focused primarily on the difference between employees and independent contractors. The second hypo will focus on the scope of employment. This one is adapted from the July 2006 California bar exam:

Lee Burgess: "After paying for his gasoline at Delta Gas, Paul decided to buy two 75-cent candy bars. The Delta Gas store clerk, Clerk, was talking on the telephone, so Paul tossed $1.50 on the counter, pocketed the candy, and headed out. Clerk saw Paul pocket the candy, but had not seen Paul toss down the money. Clerk yelled, 'Come back here, thief!' Paul said, 'I paid. Look on the counter.' Clerk replied, 'I've got your license number, and I'm going to call the cops.' Paul stopped. He did not want trouble with the police. Clerk told Paul to follow him into the back room and wait for Mark, the store manager, and Paul complied. Clerk closed the door to the windowless back room.

Lee Burgess: Clerk paged Mark, who arrived 25 minutes later and found Paul unconscious in the back room as a result of carbon monoxide poisoning. Mark had been running the engine of his personal truck in the garage adjacent to the back room. When he left to run a personal errand, he closed the garage, forgot to shut off the engine, and highly toxic carbon monoxide from the exhaust of the running truck had leaked into the back room. Paul survived but continues to suffer headaches as a result of the carbon monoxide poisoning.

Lee Burgess: Is Delta Gas liable for the acts of Clerk and Mark?"

Lee Burgess: Now, as with our first hypo, we're going to assume that Clerk and Mark are personally liable for their torts. We're also going to assume that Clerk and Mark are employees of Delta Gas because there are no facts to indicate otherwise.

Lee Burgess: With that out of the way, let's address Delta's liability for the actions of Clerk and Mark in turn, starting with Clerk. We're told that Clerk detained Paul in the back room of the store after believing he had caught Paul shoplifting. The first thing to note about Clerk's actions is that they appear to constitute false imprisonment, which is an intentional tort. We know that an employee's intentional torts are generally not within the scope of employment unless an exception applies, so our next step is to see whether any of those exceptions apply.

Lee Burgess: There is no clear indication that the false imprisonment was specifically authorized by Delta, although it's conceivable that a business would authorize its employees to detain shoplifters. There is also no indication that the false imprisonment was the result of naturally occurring friction from the type of employment. Working as a gas station clerk does not naturally result in falsely imprisoning people. There is, however, strong evidence that Clerk's false imprisonment of Paul was driven by a desire to serve Delta. Clerk detained Paul because he believed that Paul had stolen from Delta. After detaining Paul, Clerk immediately called Delta's manager, Mark. There is no reason to believe that Clerk had some other personal motive for detaining Paul. Therefore, Clerk likely acted within the scope of his employment, and as a result, Delta can be held liable for Clerk's false imprisonment of Paul.

Lee Burgess: Moving on to Mark, we're told that Mark forgot to shut off the engine to his truck, which caused a carbon monoxide leak that injured Paul. Unlike Clerk, Mark appears to have acted negligently, so our next step is to determine whether Mark committed the negligent act while acting within the scope of his employment. Delta will argue that when Mark forgot to turn off his engine, he was not performing work assigned by Delta or engaging in a course of conduct subject to Delta's control. Delta will point to the fact that the vehicle at issue was Mark's personal truck, and after forgetting to turn off the engine, he left his place of employment on a personal errand for at least 25 minutes. Applying the scope of employment factors, Mark was certainly not employed to operate his personal vehicle and run personal errands. There is also no indication that Mark was motivated by a purpose to serve Delta. In other words, Delta will argue that Mark committed the negligent act while on a frolic.

Lee Burgess: Paul will argue, however, that Mark was merely on a detour. Assuming Mark was only away from his place of employment for 25 minutes, that is a relatively short departure from the scope of employment. Moreover, even if Mark's personal errand constitutes a frolic, Mark's negligent act of leaving the engine running occurred at the Delta garage, not while he was away on the personal errand.

Lee Burgess: Absent additional facts, you could reasonably go either way on this one. You could also note any additional facts that you might need to reach a conclusion. For example, was Mark on a break when he left the engine running? Was he authorized to park his personal vehicle in the garage? Was he taking an hourlong nap in the truck on company time, or did he just pull into the garage at the start of his shift and forget to turn off the engine? As usual, your reasoning is far more important than your ultimate conclusion. The important thing is that you fully apply the facts to the rule and address both sides' arguments.

Lee Burgess: And that's all we have for you today! 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 Lee 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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