

Questions & Answers

Torts

CAROLINA ACADEMIC PRESS
QUESTIONS & ANSWERS SERIES

- Questions & Answers: Sales & Leases
Aviva Abramovsky
- Questions & Answers: Administrative Law,
Third Edition
Linda D. Jellum, Karen A. Jordan
- Questions & Answers: Antitrust
Shubha Ghosh
- Questions & Answers: Bankruptcy, Second Edition
Mary Jo Wiggins
- Questions & Answers: Business Associations,
Second Edition
Douglas M. Branson
- Questions & Answers: Civil Procedure,
Fourth Edition
William V. Dorsaneo, III, Elizabeth Thornburg
- Questions & Answers: Constitutional Law,
Third Edition
Paul E. McGreal, Linda S. Eads, Charles W. Rhodes
- Questions & Answers: Contracts, Second Edition
Scott J. Burnham
- Questions & Answers: Copyright Law
Second Edition
Dave Fagundes, Robert C. Lind
- Questions & Answers: Criminal Law,
Third Edition
Emily Levine, Paul Marcus
- Questions & Answers: Criminal Procedure—
Police Investigation, Third Edition
Neil P. Cohen, Michael J. Benza, Wayne A. Logan
- Questions & Answers: Criminal Procedure—
Prosecution and Adjudication, Third Edition
Neil P. Cohen, Michael J. Benza, Wayne A. Logan
- Questions & Answers: Environmental Law
Dru Stevenson
- Questions & Answers: Evidence, Fourth Edition
David P. Leonard, Paul Giannelli
- Questions & Answers: Family Law, Second Edition
Mark Strasser
- Questions & Answers: Federal Estate & Gift
Taxation, Second Edition
Elaine Gagliardi
- Questions & Answers: Federal Income Tax
David L. Cameron
- Questions & Answers: Intellectual Property,
Second Edition
Gary Myers, Lee Ann W. Lockridge
- Questions & Answers: International Law
Rebecca Bratspies
- Questions & Answers: Patent Law
Cynthia Ho
- Questions & Answers: Payment Systems,
Second Edition
Timothy R. Zinnecker
- Questions & Answers: Professional Responsibility,
Fourth Edition
Patrick Longan
- Questions & Answers: Property, Second Edition
John Nagle
- Questions & Answers: Remedies
Rachel Janutis, Tracy Thomas
- Questions & Answers: Secured Transactions,
Third Edition
Bruce A. Markell, Timothy R. Zinnecker
- Questions & Answers: Taxation of Business Entities
Kristofer Neslund, Nancy Neslund
- Questions & Answers: The First Amendment,
Third Edition
Russell L. Weaver, William D. Araiza
- Questions & Answers: Torts, Fourth Edition
Anita Bernstein
- Questions & Answers: Trademark and
Unfair Competition
Vince Chiappetta
- Questions & Answers: Wills, Trusts, and Estates,
Third Edition
Thomas Featherston

Questions & Answers **Torts**

FOURTH EDITION

*Multiple Choice, Short Answers, Essay Issue-Spotters, and
90-Minute Practice Final Exam*

Anita Bernstein

ANITA AND STUART SUBOTNICK PROFESSOR OF LAW
BROOKLYN LAW SCHOOL



CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2018
Anita Bernstein
All Rights Reserved

ISBN 978-1-5310-0500-9
e-ISBN 978-1-53100-501-6

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

In memory of David P. Leonard 1952–2010

Contents

Preface: How to Use This Book	ix
About the Author	xi
Zoom Out	xiii
Multiple-Choice Problems That Use the Same Fact Pattern	xv
Questions	1
Topic 1: Intentional Torts: Battery and Assault	3
Topic 2: Intentional Torts: Invasions into Land, Harm to Property, and False Imprisonment	9
Topic 3: Defenses to Intentional Torts	15
Topic 4: Negligence: The Duty of Care	19
Topic 5: Negligence: Breach of Duty	25
Topic 6: Negligence: Causation — Actual and Proximate	33
Topic 7: Defenses to Negligence	39
Topic 8: Strict Liability and Nuisance	45
Topic 9: Products Liability	51
Topic 10: Defamation	57
Topic 11: Invasion of Privacy	61
Topic 12: Emotional Distress	65
Topic 13: Harm to Economic Interests	71
Topic 14: Damages	77
Topic 15: Multiple Defendants and Vicarious Liability	81
Practice Final Exam	85
Essay Issue-Spotter Questions	103
Answers	111
Topic 1: Intentional Torts: Battery and Assault	113
Topic 2: Intentional Torts: Invasions into Land, Harm to Property, and False Imprisonment	117
Topic 3: Defenses to Intentional Torts	123
Topic 4: Negligence: The Duty of Care	127
Topic 5: Negligence: Breach of Duty	133
Topic 6: Negligence: Causation — Actual and Proximate	139
Topic 7: Defenses to Negligence	143

Topic 8: Strict Liability and Nuisance	149
Topic 9: Products Liability	155
Topic 10: Defamation	161
Topic 11: Invasion of Privacy	165
Topic 12: Emotional Distress	169
Topic 13: Harm to Economic Interests	175
Topic 14: Damages	179
Topic 15: Multiple Defendants and Vicarious Liability	183
Practice Final Exam Answers	187
Essay Issue-Spotter Answers	201
Index	225

Preface: How to Use This Book

The law of torts deals with a broad range of human conduct. From punches in the nose to automobile accidents; from affronts to dignity to environmental pollution; from defective products to infliction of emotional distress. Not only must rules of tort law regulate vastly different types of potentially harmful behavior, but they must also be flexible enough to account for the almost limitless variety of fact patterns within each type. No two punches in the nose are exactly alike. At the same time, the rules ought to make the law at least reasonably predictable and the results of the cases both fair to individuals and conducive to social prosperity.

With these far-reaching goals in mind, modern rules of tort law are written in broad strokes. They seldom seek to prescribe or proscribe specific behavior in specific circumstances (always stop, look, and listen before crossing a railroad track). Rather, they set forth general principles to guide behavior in a variety of circumstances (always exercise reasonable care). Instead of purporting to tell us exactly what to do, they provide us with standards against which our conduct may be measured.

The generality of tort rules is what makes the study of tort law difficult. But tort is not unstructured. Every claim for relief and every affirmative defense has a set of required *elements*. These elements tell lawyers what they must allege and prove in order to demonstrate their clients' entitlement to relief or why their clients should not be held responsible. It is your task to learn what these elements are and how to apply them to real and hypothetical fact patterns.

How can *Questions and Answers: Torts* help you in this task? Recognizing that torts coverage varies somewhat from school to school, instructor to instructor, and even day to day in the same course, this book follows a comparably varied path to give you what you need.

You will find a range of difficulty. Some questions are tough while others are pretty easy. In the subject-specific chapters, most of the time the questions start relatively easy and get harder. The difficulty order on the Practice Final Exam is (purposely) random.

Multiple-choice questions, which predominate in this book, always offer four alternatives and only rarely resort to something like "none of the above." They might ask you to pick the best of a list, the worst of a list, the correct one of two contrary outcomes accompanied by the best rationale, or the story that illustrates a point of doctrine most effectively, as well as other routes to mastery of the material. Short-answer questions ask you to analyze scenarios or communicate discrete points. A little (simple) arithmetic comes up now and then—just as it does for practicing lawyers. The Practice Final Exam simulates tort litigation in the real world by not announcing up front, the way the chapter headings do, which topics are at issue. Whether you're in your beginning or ending stage of pulling torts material together, then, you'll find coverage at a level suited to that need.

This edition adds two new features to the book. First, “Zoom Out” is designed for when you’ve examined more than one topic in depth and want to confirm your understanding about how the two (or more) relate to each other. You’ll need that skill on your final exam, because exam questions do not point you to a particular chapter or passage in your syllabus. Second, multiple-choice questions that unite around the same fact pattern are identified and characterized. You’ll know what to expect from these joined questions.

Like most torts classes, the book emphasizes black-letter law but also goes beyond it. While most of its questions use the familiar issue-spotter approach to doctrine—an approach you can probably expect to see on your final—a number of questions will help you review social policy, economic theory, fairness, and the insights of famed common law judges. Most torts teachers expect you to think about torts at this more conceptual level while also mastering rules and elements. Questions that fall in this “policy” category are identified at the end of the Index.

Despite its wide swath, this book is neither a casebook nor a treatise. Its purpose is to help you test your comprehension of the elements of the most important tort claims and defenses. It does not purport to teach you the law in the first instance: that is the purpose of your torts class. Therefore, you should not attempt to answer the questions in any particular part of this book until you have studied the applicable law.

Once you have completed an area of study, you can work your way through the problems in that part of the book to test your understanding of the subject matter. Take your time. Try to answer each question before reviewing the answers and the explanations they provide. If the question calls for a response in your words, write something before reviewing the answer—at least an outline. Don’t just suppose what you would say. It’s too easy to think you have the perfect response in your mind. Your instructor will grade what you produce, not what you intend.

When you reach the end of the semester, consider taking the Practice Final Exam. Give yourself 90 minutes to answer it and do so under conditions of the kind your instructor imposes—for example, closed book or open book depending on what you’ll face. If the question tests on something you didn’t cover, you’ll know and can skip it. Try to avoid the temptation to peek at the answers until after you’ve finished. This exercise can give you a better idea of how to allocate your study time before your actual final.

Many people helped me and my much-missed co-author of the first and second editions, David P. Leonard, to reach the point where we could put these questions before you with confidence that you will benefit from them. First to be thanked are the Torts students who over many years challenged me, and David too, to dig deeper into the whys and wherefores of this fascinating subject. Some multiple-choice questions in this book originated in their ideas. Robin Deis, Maria Raneri, and Joanne Tapia worked on the manuscript. Jennifer Fried, Jack Berry, and Veronica Mishkind provided research assistance. Keith Rowley and Heather Dean got the book started. Carolina Academic Press, publisher of the Q&A series since 2016, offered a welcoming and supportive new environment.

ANITA BERNSTEIN
Brooklyn, New York

About the Author

Anita Bernstein, Anita and Stuart Subotnick Professor of Law at Brooklyn Law School, has also taught at Chicago-Kent, Cornell, Emory, Fordham, Iowa, Michigan, New York, and Seton Hall law schools. She served as chair of the Torts & Compensation Systems section of the Association of American Law Schools, and has published extensively on the relation between torts and other subjects including feminist theory, legal history, comparative law, and the sociology of products liability. Her torts books include *Understanding Torts* (with John L. Diamond and Lawrence C. Levine) and *A Products Liability Anthology*.

Zoom Out

When you've finished studying a unit and want to relate it to something else you've reviewed, consider the multiple-choice questions below, which cover intersections between two or more topics.

Q 1: **Battery** without assault

Q 2: **Intentional torts** and **defenses to intentional torts**

Q 58: Breach: **Negligence per se** or **res ipsa loquitur**?

Q 65: Breach: Choose **res ipsa loquitur**, the **locality rule**, the **Hand formula**, or **custom**.

Q 71: Breach: What **circumstantial evidence** means

Q 98: Which **plaintiff's conduct defense** applies?

Q 104: Which fits better, **strict liability** or **negligence**?

Q 110: Choose **nuisance**, **negligence**, **strict liability**, or **trespass to land**.

Q 117 and 118: Contrast *Rylands v. Fletcher* with the Second Restatement treatment of **strict liability**

Q 122: Choose **negligence**, **express warranty**, **strict products liability**, or **absolute liability**.

Q 162: Connect **assault** and **battery** with **intentional infliction of emotional distress**.

Q 170: Which **negligent infliction of emotional distress** topic is not like the others?

Q 172: Does this scenario raise **intentional misrepresentation** or **negligent misrepresentation**?

Q 186: Which issue related to **discounting to present value** is not like the others?

Q 194: Which of the following is not **vicarious liability**?

Q 212: A **medical** operation goes badly. Which claim fits best?

Q 216: Another **medical** operation goes badly. Which claim fits best?

Q 223: Which fits better, **battery** or **negligence**?

Q 224: Which "**advanced torts**" rubric fits best?

Q 228: Distinguish **intentional** from **negligent defamation**.

Q 234: Is the problem with this claim **duty**, **breach**, **causation**, or a **plaintiff's conduct defense**?

Multiple-Choice Problems That Use the Same Fact Pattern

Topic	Questions
Duty to rescue	41 and 42
Duty of an architect	46 and 47
Office visit to a doctor gone wrong	65 and 66
Negligently contaminated oysters: two breach questions	68 and 69
Res ipsa loquitur , with variations	72, 73, and 74
Combine comparative negligence with assumption of risk	89 and 90
Combine comparative negligence with assumption of risk in a very different setting	91 and 92
Contrast <i>Rylands v. Fletcher</i> with the Second Restatement treatment of strict liability	117 and 118
Products liability , two issues	125 and 126
Products liability that tests engagement with a factual variation	132 and 133
Factual variations in bystander negligent infliction of emotional distress	167, 168, and 169
Workers compensation and respondeat superior	204 and 205
LSAT-style reasoning by analogy; asks you to ascertain relevance	208 and 209
Contrast outcomes when a jurisdiction observes the categories of trespasser, licensee, and invitee , and when it merges these categories	213 and 214
Scenario that starts with duty , then moves to breach , then onto assumption of risk	218, 219, and 220
Assault followed by self-defense	221 and 222
Land visitor duty along with custom as a breach topic	229 and 230
Duty, breach , and two tests for proximate cause: directness and the risk rule	234, 235, and 236
Variations on informed consent	240, 241, and 242

