FINAL EXAMINATION

TORTS

HOUSE OF RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a four-hour examination. Students may download the exam starting at 9 a.m. on May 1, 2020. All answers are due by 5 p.m. on May 2, 2020. Students must turn in their answers no later than four hours after beginning the exam and in no cases after 5 p.m. on May 2, 2020. If you pick up the exam after 1 p.m. on May 2, 2020, you will have fewer than four hours to complete your answer.

2. **EXAM NUMBER:** Please put your exam number on each page. The easiest way is to put the exam number in a header on each page. **Do not put your name or ID number anywhere in your answer.** Consider naming the file Torts-Russell-[Exam Number]. Emailing your exam answer to yourself provides evidence of when you finished the exam.

3. **TURNING IN YOUR ANSWER:** https://www.exam4.com/org/600 is the examination portal, which you will use to turn in your answer. The registrar has already sent you login instructions. If you have technical problems turning in your answer, please contact the registrar. Be sure to save a copy of your answer. **Do NOT contact Professor Russell with difficulties related to exam submission.**
   DO NOT SEND YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND YOUR ANSWER TO PROFESSOR RUSSELL.

4. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you discuss, show, or distribute this examination or your answer to anyone at all before the exam ends at 5 p.m. on Saturday, May 2, 2020. Be cautious, for example, about

posting anything on Instagram, Twitter, or Facebook that anyone might think is a request for assistance. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 5 p.m. on Saturday, May 2, 2020.

5. **LENGTH:** This examination consists of one question. You may use no more than 1,750 words to answer the question. Reducing your answers to this word limit may be one of the challenges of this examination. Do not feel that you have to write 1,750 words. **Include the word count at the end of your answer.**

6. **SPACING:** Please double-space your answer. Avoid miniature fonts, okay?

7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the most important issues. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts, relevant statutes, or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of law with the facts before you. Avoid wasting time with lengthy or abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.

8. **JURISDICTION:** The laws of the 51st state, which is called Newstate, apply to all the issues in this examination. The examination includes one Newstate statute, which you should analyze. This state has adopted the Uniform Commercial Code, which matters only in Contracts exams. The 51st state is NOT Colorado.

9. **CONCISION:** Professor Russell looks for quality not quantity. Unnecessary words and discussion weaken your answer. You have time to write and edit. Think before you begin to write. Think through your answer again after you write. You will earn a better grade by being thorough and concise. The best answers will be well-organized.

10. **EXPERTISE:** Please note that sometimes House of Russell exams deal with subject matter about which some of you may have expertise or outside knowledge. You have to accept the exam's presentation as true. For example, if there is lava in the exam, and the exam indicates that lava is 2,500 degrees Fahrenheit, but you happen to know that lava is not typically that hot, you should put aside your superior knowledge and accept the lava as being the temperature that the exam says. Typically, House of Russell exams try to simplify some issues by mashing down the science just a bit.

11. **KEEP A COPY:** You should feel free, of course, to keep a copy of the exam. Please keep your answer also.

12. **CHEATING:** If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Dean of Students immediately after this examination ends.

13. **EXAM MEMO:** After he completes the grading, Professor Russell will issue a memo for your review. Do not ask to review your exam until you have reviewed the exam memo. By faculty policy, you may never argue your way to a higher grade.

14. **GOOD LUCK:** Good luck and have a safe, healthy summer.

Sturmitis

One year ago, a Newstate man, Bill Patient, was injured when the car in which he and a woman named Minnie Driver were traveling slid off an icy highway during a late-spring storm and overturned. Ms. Driver was driving the car. Mr. Patient was sitting in the front passenger seat and NOT wearing his seat belt. Ms. Driver was driving 40 mph at the time of the accident, although the posted speed limit was 50 mph.

An ambulance rushed Mr. Patient and Ms. Driver to First Hospital. First Hospital surgeons performed emergency surgery on Mr. Patient. The surgeons and everyone who cared for Mr. Patient were employees of First Hospital. Mr. Patient remained in First Hospital for 10 days following his admission. Physicians and medical staff used numerous medical instruments during his surgery and subsequent hospitalization, including needles, clamps, and surgical tools. However, Mr. Patient did not receive a blood transfusion nor any blood products.

Three days after First Hospital discharged Mr. Patient, he developed a fever and visited his personal physician, who is not affiliated with First Hospital. The physician ordered routine blood tests. The tests revealed that Mr. Patient had Sturmitis. Sturmitis is a serious infection that kills 60 percent of those who get the disease. For those who survive, Sturmitis permanently weakens the heart and triples the survivor's chance of stroke for the remainder of his or her life. Mr. Patient's physician admitted him to Second Hospital, which is a different hospital from the

one where he had received treatment for the injuries due to the car crash. Mr. Patient required admission to the Second Hospital's Intensive Care Unit when his condition declined. The medical care that Mr. Patient received at Second Hospital was exemplary. Following discharge, he required additional physician care and also physical therapy.

In nearly all cases, infected persons contract Sturmitis through exposure to either contaminated blood products or improperly sterilized medical instruments (needles, clamps, surgical tools, etc.) that come into contact with the person's blood. There are, however, other possible sources of the infection in a hospital environment, such as a failure by the staff to follow proper handwashing techniques to avoid transmitting infection from one patient to another and staff failure to properly identify and discard certain used medical instruments that cannot safely be sterilized.

Sturmitis is possible but very rare among individuals who have not received a blood product and have not been hospitalized during the period of likely exposure. Mr. Patient's doctor told Mr. Patient that he "must have contracted this infection at First Hospital" because the period between infection and symptom development is 10 to 13 days, and Mr. Patient was a patient at First Hospital during the entire relevant period. The physician also stated that "at hospitals that have adopted medical-instrument sterilization procedures recommended by experts, cases of this infection have been almost completely eliminated." Mr. Patient has no history of intravenous drug use, and he did not receive any medical treatment for several months before his hospital stay. First Hospital employees perform all sterilization procedures. However, the particular

sterilization procedure First Hospital used while Mr. Patient was hospitalized cannot be determined because, while the hospital now uses the sterilization procedure recommended by experts, there is no record of when exactly when First Hospital started using that procedure.

The medical bills for Mr. Patient's medical care for the car crash are $100,000. His bills for the infection are $250,000.

Your job: Analyze all personal injury claims that Mr. Patient may bring against Ms. Driver and First Hospital. Include remedies and defenses.

Newstate Statute 1. Comparative Fault.

1. Scope of application. Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party, and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

2. Fault. "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort

liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished. Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

3. Personal injury or death; settlement or payment. Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf payment was made.

END OF EXAMINATION

Memorandum

To: Spring 2020 Torts Students

From: Professor Tom Russell

Re: Sturmitis Torts Final

Date: May 4, 2020

You finished the Torts final last Friday or Saturday. Congratulations!

This memo reports on the final. I have included an answer that I wrote myself as well as some other material.

1. Russell's Template

I used the following template for the two parts to the answer.

Duty:
Standard of Care:
Breach:
Cause in Fact:
Proximate Cause:
Damages:
Property:

	Past	Future
Special/Economic --Medical Bills --Wages		
General/Noneconomic		

Defenses:
Statute of Limitations:
Comparative Fault:
Assumption of Risk:
Failure to Mitigate:

2. Russell's Answer

[This answer comes in below 1,750 words.]

Patient v. Driver

Duty: Ms. Driver was active driving and therefore had a duty to Patient.

Standard of Care: Driver's duty of care was to act reasonably under the circumstances. The circumstances include the late-spring storm.

Breach: Whether Driver breached is unclear. The mere fact of the crash does not show breach of the S/C.

That she drove under the speed limit (40 in a 50 zone) is not dispositive, because that speed may have been unreasonably fast during the storm. Additional investigation is necessary.

Additional investigation may also turn up additional negligence regarding her driving or the condition of her car. For example, her tires may have been worn or outside their useful life.

Negligence per se: there is no indication—as yet—that she breached any statutes that may support a claim for negligence per se.

Cause in Fact: The cause of the accident is unknown. Again, investigation is needed. If she breached the standard of care, that breach may have caused the crash. The mere fact that the accident happened does not show cause in fact.

Proximate Cause: First, Patient's personal injuries due to the crash are foreseeable and pose no proximate cause issues.

Second, Patient's injuries due to the hospital-acquired Sturmitis infection are an intervening cause. This infection, like MRSA or C.diff is not so outside the foreseeable set of injuries to a hospitalized patient as to be a supervening intervening cause. Therefore, if Driver is liable for the crash, she can also be liable for the Sturmitis-related injuries.

Damages:

Property: Patient may have damage to his clothing or property that he had with him at the time of the crash.

	Past	Future
Special/Economic --Medical Bills	Medical bills total $100,000. These likely include ambulance, emergency treatment, care, and followup.	If Patient requires medical care in the future (after a trial)—physical therapy, counseling, etc. These bills would be included.
--Wages	Patient's lost wages to the time of the trial.	Any future wage loss due, for example, to diminished work

		capacity.
General/Noneconomic	Pain/suffering/embarrassment at the time of the crash, during treatment, and until the trial.	Any future pain, suffering, including mental health issues. Loss of Enjoyment of life or consortium society issues.

Defenses:

Statute of Limitations: The crash happened a year ago. The statute of limitations for car crashes is unknown, the passage of one year could be an issue requiring quick filing.

Comparative Fault: Newstate's comparative fault statute allows a plaintiff with 50 percent fault to prevail. The only indication of anything approximating fault by Patient is his failure to wear a seatbelt.

Newstate's statute is murky but appears to say that Patient's failure to wear his seatbelt may diminish his damages but cannot "be considered in determining the cause of an accident." Not wearing his seatbelt may therefore diminish his total recovery for crash-related damages.

If investigation uncovers fault on the part of Patient that was also a cause of the accident, this will balance against Driver's fault.

Assumption of Risk: One does not assume the risk of crashing. Merely choosing to drive during a storm is not negligence, although the choice could be unreasonable if the storm was particularly severe.

However, if there was some negligent behavior of Driver that contributed to the crash—if she'd been drinking or her car was in poor repair—then Patient's foreknowledge of this information might constitute assumption of risk.

Most likely, Newstate blends assumption of risk into comparative fault, which would be compared to Driver's fault. As she was driving, her fault is most likely to exceed 50 percent.

Failure to Mitigate: There is no indication he failed to get adequate medical treatment.

If—and it's no small if—Driver's negligence caused the crash, then she is liable for Patient's damages to be reduced because he was not wearing a seatbelt and, perhaps, by any other comparative fault that investigation reveals.

If Driver is negligent, she may also be on the hook for the damages related to the Sturmitis. Note, however, that if the crash-related damages meet or exceed her liability insurance limits, then Patient might be better to pursue these damages against First Hospital. See discussion below.

Patient v. First Hospital

Duty: First Hospital's employees were active while treating Mr. Patient. The employees therefore each had a duty to Mr. Patient.

The doctors and everyone involved in his care were employees of the hospital. Via *respondeat superior*, First Hospital will be vicariously liable for the actions of its employees, who acted in the course and scope of their employment while treating Mr. Patient.

There may be separate, direct negligence attributable directly to the hospital as well regarding such things as sanitization procedures and training of hospital employees.

Standard of Care: The duty of the non-physician employees and of the hospital itself is reasonable care under the circumstances.

The standard of care for the physicians is the professional custom.

Breach: There are two routes to proving breach of the standard of care: direct proof of breach and *res ipsa loquitur*.

Direct proof of breach will focus upon whether First Hospital had adopted medical-instrument sterilization procedures that experts recommend. The date of the adoption of this procedure is presently unknown, and Patient's lawyer will need to investigate. If First Hospital did adopt the sterilization procedure before Patient's treatment, Mr. Patient's attorneys will focus discovery on whether employees followed the procedure.

Direct proof of breach will also focus upon the handwashing techniques of the employees, and the training and support that First Hospital provided.

Direct proof will also focus upon the employee's identification and discarding of medical instruments for which safe sterilization was not possible.

The second route to proof of breach is *res ipsa loquitur*.

The first prong of *res ipsa* is that the injury is more likely than not due to negligence. Nearly all cases of Sturmitis result from either contaminated blood products or from improperly sterilization of medical equipment. Either pathway is negligent, therefore Sturmitis nearly always results from negligence. Note that because Patient did not receive blood transfusions, that avenue of infection does not apply.

The other, less likely pathways—bad handwashing and failure to discard instruments—are also negligent further supporting the first prong of *res ipsa,* namely that the injury was more likely than not due to negligence.

The second prong is that the causal be under the control of the defendant. With Mr. Patient, everyone who provided medical care was an employee of the hospital. There were not, for

example, employees working for other medical groups. This satisfies the second prong of *res ipsa.*

Third, the plaintiff must not have contributed to his own injury. There is no hint that Patient did something to give himself Sturmitis. He is not, for example, an IV drug user.

Finally, some states do not allow a plaintiff to use *res ipsa* unless there is difficulty in obtaining discovery to prove breach. Here, the hospital's inability to identify when it shifted to the preferred sanitization procedure may satisfy that *res ipsa* limit, if it exists in Newstate.

Patient thus meets the three prongs of Sturmitis. Depending on Newstate's law, *res ipsa* may be only some evidence of negligence up to presumptive evidence of negligence unless rebutted.

Cause in Fact: Plaintiff will need to show by a preponderance of evidence that the employees' direct breach of the standard of care caused him to get Sturmitis. As his treating doctor noticed, he was in the hospital during the time when he more likely than not contracted the infection. This circumstantial evidence helps.

Depending on discovery, Plaintiff will attempt to show closer links of failures in sterilization techniques or handwashing in relation to his care. These breaches, he will argue, more likely than not caused his infection.

Depending on how Newstate handles *res ipsa,* proof of *res ipsa* may establish cause-in-fact.

Proximate Cause:

The contraction of Sturmitis is a harm within the risk of not following proper sterilization technique, handwashing, or disposal of un-sterilizable instruments. Personal injury is entirely foreseeable.

As noted above, infection with Sturmitis, though an intervening cause with regard to the claim against Driver, is not a supervening cause. Driver would thus also be on the hook along with First Hospital.

Damages:

Property: If Patient suffered any damage to his personal property, that would be a part of his claim.

	Past	Future
Special/Economic --Medical Bills	Patient's bills are $250,000 for the infection. These likely are past bills.	Any future treatment—that is, after the trial—that Patient is more likely than not going to need would be included.

--Wages	Patient will make claims for wages lost during the time of hospitalization and treatment for Sturmitis. These costs will need to be separated from wages lost due to the car crash.	These costs may include monitoring of his heart and regarding stroke risk. He may need medication. Mental health counseling is another likely cost. Post-trial future wage loss due to the infection and due to the risk of heart disease or stroke.
General/Noneconomic	Pain, suffering, inconvenience, and embarrassment due to the infection and treatment for it. This will include worry.	Patient may have worries/anxiety about his past infection. He seems even more likely to have fears/anxiety about his heart and stroke risk. Included may be loss of enjoyment of life or consortium/society claims.

Defenses:

Statute of Limitations: Unknown what Newstate's SOL is for either medical treatment, whether conceived of as ordinary negligence or professional malpractice.

Comparative Fault: There's no suggestion that Patient was negligent with regard to his contraction of or treatment for Sturmitis. If with regard the original car crash, he had some comparative fault, that would not likely count against him regarding the Sturmitis, although in some jurisdictions, it may.

No suggestion that he assumed the risk—and frivolous for Defense to make such claim—nor that he failed to mitigate.

Overall, through two avenues a good case against First Hospital for negligently transmitting Sturmitis to Patient. The Hospital would be directly liable for this claim and likely has sufficient liability coverage.

If she was negligent with regard to the crash, Driver would also be liable for the Sturmitis-related damages, and winning the case against her might be easier than against the hospital and, especially, its doctors. However, choosing this route depends upon whether her policy limits are high enough.

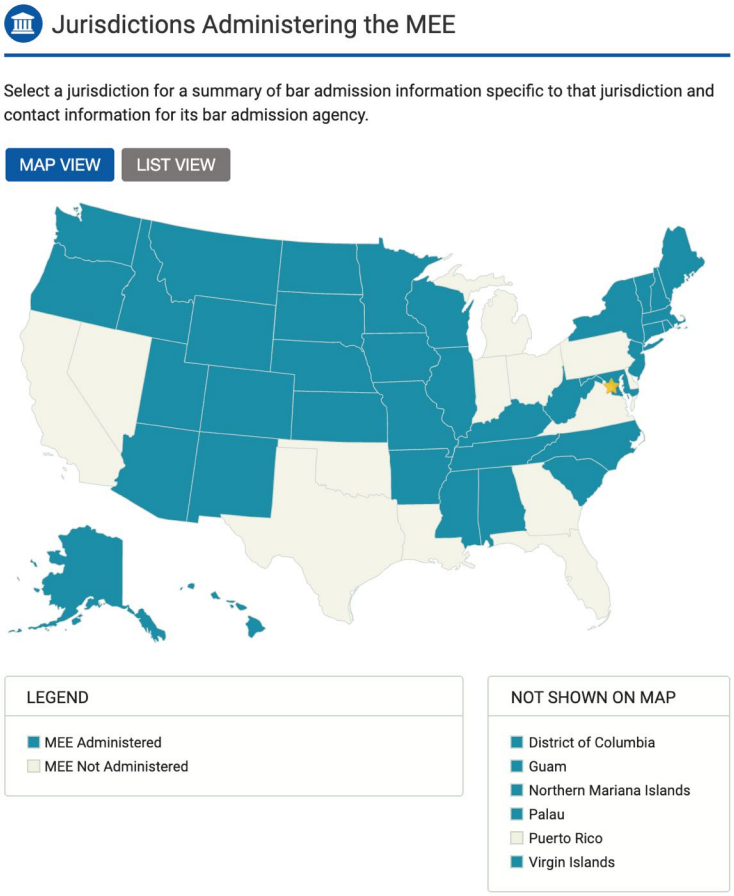
3. Origin of this question

Given the pandemic and change in grading policy, my usual 75-hour examination made no sense. Consistent with my goal of teaching you to write bar examination answers, I decided to adapt a question from a recent bar exam question. I found and adapted a question from the February 2019 Multistate Essay Examination.

You have, therefore, now seen and written an answer to a bar examination question! That should give you confidence about what lies ahead.

The original question is below. I changed the question by modifying the call of the question to call for analysis of the whole Tort problem rather than narrow segments; expanded the damages analysis by expecting you to discuss lost wages and noneconomic harm; took the Plaintiff's seatbelt off in order to give you a chance to discuss that issue; clarified that everyone who gave him medical care was an employee of the hospital; and added a statute, which I took from Minnesota. This means, in reality, that this question was harder than the bar exam question. However, you also had four hours while on the bar exam, whereas the bar examinees had just one-half hour.

Starting on the next page, you will find the original question from the New York Bar Examination. As this question was part of the *multistate* bar examination, the question appeared on most states' exams including Colorado as the map shows.



Note that the call of the bar exam question is much more focused than the Torts exam you completed.

Following the question, I have included three different answers. The first two are the answers of New York examinees. The third is from the National Conference of Bar Examiners, which puts on the exam. The final one is a more expanded NCBE analysis for which I paid $15.

Note that I am providing this memo to you before I have even seen your answers. I'm doing this because I have a hunch that reviewing this essay might be helpful with regard to the other exams for which you have to write answers. Be sure to ask me if you have any questions.

February 2019

New York State
Bar Examination

MEE & MPT Questions

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National Conference of Bar Examiners

MEE QUESTION 1

One year ago, a man was injured when the car in which he and a woman were traveling slid off an icy highway during a winter storm and overturned. At the time of the accident, the woman was driving the car. The man was sitting in the front passenger seat, wearing his seat belt. The woman was driving 40 mph at the time of the accident, although the posted speed limit was 50 mph.

The man and the woman were rushed to a local hospital in its ambulance. There, hospital surgeons performed emergency surgery on the man. The man remained in the hospital for 10 days following his admission. Numerous medical instruments were used during his surgery and subsequent hospitalization, including needles, clamps, and surgical tools. However, he did not receive a blood transfusion or any blood products.

Three days after the man was released from the hospital, he developed a fever and visited his personal physician, who is not affiliated with the hospital. The physician ordered routine blood tests. The tests revealed that the man had a serious infection that is transmitted in nearly all cases through exposure to either contaminated blood products or improperly sterilized medical instruments (needles, clamps, surgical tools, etc.) that come into contact with a patient's blood. There are, however, other possible sources of the infection in a hospital environment, such as a failure of staff to follow proper handwashing techniques to avoid transmitting infection from one patient to another and staff failure to properly identify and discard certain used medical instruments that cannot safely be sterilized.

Infections occurring in individuals who have not received a blood product and have not been hospitalized during the period of likely exposure are possible but rare. The physician told the man that he "must have contracted this infection at the hospital" because the period between infection and symptom development is 10 to 13 days and the man was a patient at the hospital during the entire relevant period. The physician also stated that "at hospitals that have adopted medical-instrument sterilization procedures recommended by experts, cases of this infection have been almost completely eliminated." The man has no history of intravenous drug use, and he did not receive any medical treatment for several months before his hospital stay. All sterilization procedures at the hospital are performed by hospital employees. However, the particular sterilization procedure used while the man was hospitalized cannot be determined because, while the hospital now uses the sterilization procedure recommended by experts, there is no record of when it started using that procedure.

The man has sued the woman and the hospital, alleging negligence. Neither defendant is judgment-proof, and this jurisdiction has no automobile-guest statute. The parties have

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stipulated that the man's damages for the injuries he suffered in the accident are $100,000 and his damages from the infection he contracted are $250,000.

1. Could a court properly find that the woman was negligent even though she was driving below the posted speed limit? Explain.

2. Could a court properly find that the woman is liable for the man's damages resulting from the infection? Explain.

3. Could a court properly find that the hospital is liable for the man's damages resulting from the infection? Explain.

4. If a court found that both the woman's negligence and the hospital's negligence caused the man's infection, could the woman's liability be limited to $100,000 for injuries the man suffered in the accident? Explain.

February 2019

New York State
Bar Examination

Sample Essay Answers

FEBRUARY 2019 NEW YORK STATE BAR EXAMINATION

SAMPLE ESSAY ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO MEE 1

1. The woman may still be liable to the man in a negligence action even if she had been driving under the speed limit. The issue here is whether the woman owed a duty to the man and breached such duty when she drove the car at the speed of 40 mph on an icy highway during a winter storm. In order to prevail on a negligence claim, the plaintiff must show that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the injury, and (4) plaintiff suffered damages as a result. In the present case, the element of damage is easily satisfied as the man suffered injuries that required emergency surgery at the hospital. As for the element of duty, a driver of a car has a duty toward her passengers and/or other drivers on the road to use the standard of care that a reasonable driver would employ in her position. While some states may impose additional duties that a driver might owe to a passenger through relevant statutes, there are no such automobile-guest statutes here, and as such, the relevant determination is whether the woman had used reasonable care when she was driving with the man in the passenger seat. Here, although the woman drove under the speed limit, the facts suggest that the woman may still have breached her duty of reasonable care that she owed to the man. That the woman drove under the speed limit by itself is not dispositive of any issue in the present negligence claim, while the fact may be relevant if this had been a strict liability case. Here, the facts state that the woman and the man were traveling on "an icy highway during a winter storm." In such a situation, it is likely that the court would find that a reasonable driver would have exercised an even higher level of care than if she had been driving under normal conditions, as driving under such harsh conditions would predictably prove to be much riskier. Not only would the roads be slippery, but the winter storm would have also hindered visibility greatly. As such, it is possible that a court could properly find that the woman had breached her duty of care that she owed to the man when she drove 40 mph in such conditions when a reasonably prudent driver would have driven much slower than 40 mph. If the above duty and breach elements are proved, than causation would be easily shown. Causation may be actual or proximate. Causation is actual when the accident would not have occurred but for the defendant's negligence. Here, the man would not have been injured but for the woman's negligent driving as the woman was driving the car, the man was wearing a seat belt, and no other cars were involved in the accident. As such, all four elements of negligence could be shown, and therefore a court could properly find that the woman was negligent.

2. The court could properly find that the woman is liable for the man's damages resulting from the infection. Causation may be actual or proximate. When determining if a defendant is a proximate cause of the plaintiff's injuries, the court may examine whether the defendant's actions have increased the risk of injuries resulting from the chain of events that involved the plaintiff and the defendant. The main issue here is foreseeability. As discussed by the Supreme Court in Palsgraf, a defendant may be liable for injuries that she did not actually cause if her actions had proximately caused the injury - that is, if the

defendant's actions had increased the likelihood of the plaintiff's injury, and that risk of receiving such injury was foreseeable. A court could properly find that it would have been foreseeable for the driver that injuring a passenger in car accident would increase the likelihood that the passenger would suffer further complications from medical malpractice in hospitals. Therefore, a court could properly find that the woman is liable for the man's infection damages.

3. A court could properly find that the hospital is liable for the man's damages resulting from the infection. The doctrine of res ipsa loquitur may apply here. This doctrine states that a defendant may be liable for plaintiff's injuries absent direct evidence of causation if the harm is of a type that would normally not exist without defendant's negligence. Here, while there is no evidence that suggest that the man's infection injuries were directly caused by the hospital's negligence, there are circumstances that suggest that the man's infection is an injury that generally would not be in existence but for some negligence of the hospital. The man was treated by only the hospital in question and no others. It is highly unlikely that the infection in question would occur for reasons other than contaminated blood products or improperly sterilized medical instruments. The hospital did not use any blood products when treating the man. The infection in question normally required 10 to 13 days for the symptoms to develop, and the man had been being treated at the hospital during that exact period. The man has no other history of drug use. All sterilization procedures at the hospital are performed by hospital employees. While any one of these facts alone would be insufficient to prove res ipsa loquitur, taken together, the court could properly find that the man's infection would not have occurred absent some negligence of the hospital. Therefore, the court could properly find that the hospital is liable for the man's damages resulting from the infection.

4. The woman's liability may not be limited to $100,000 for injuries the man suffered in the accident if a court found that both the woman's negligence and the hospital's negligence caused the man's infection. When multiple defendants are found to be liable to a plaintiff in a negligence claim, they are found to be jointly and severally liable unless there are other statutes that apply to the case. Any one of the defendants who is found to be jointly and severally liable to a plaintiff with other defendants are liable for the full amount of damages; in other words, the plaintiff may recover the full amount of damages from any one of the defendants. In the present case, if the court finds that the woman and the hospital are both liable for the man's infection, the woman and the hospital are both jointly and severally liable for the amount of $250,000. Therefore, the man could recover $250,000 from either the hospital or the woman. Should the man decide to recover from the woman for his infection damage, the woman would be liable for all or part of $250,000 in addition to the $100,000 that she owes to the man. If the man recovers the entire $250,000 from the woman, the woman may also seek contribution from the hospital for their contributory negligence.

ANSWER TO MEE 1

1. The issue is whether the woman's compliance with a statute precludes a court from finding that she breached her duty of care and was thus negligent. Ultimately, a court could properly find that the woman was negligent even though she was driving below the posted speed limit.

For a court to properly find that the woman was negligent, it must find that: (1) the defendant owed the plaintiff a duty to conform her conduct to a specified standard of care for the protection of the plaintiff against an unreasonable risk of injury; (2) the defendant breached that duty; (3) that breach was the actual and proximate cause of the plaintiff's injuries; and (4) the defendant suffered damages. When an individual engages in an activity that creates an unreasonable risk of harm to persons in the position of the plaintiff, the duty of care extends from the individual to the plaintiff. Generally, the individual must exercise the reasonable care that an ordinarily prudent person would exercise under the circumstances. Failure to exercise such care amounts to a breach of duty. Nonetheless, where a statute provides a specific standard of care and that statute is designed to (i) protect persons in the position of plaintiff (ii) from the type of harm that materialized, that standard will replace the ordinary prudent person standard of reasonable care, and an individual's failure to comply with the statute amounts to negligence per se--which is conclusive proof of the first two elements of the prima facie negligence case: duty and breach. However, by contrast, compliance with a statute is not conclusive proof of duty and breach; but, it is evidence that a jury might consider. In addition, violations of a statute may be excused where compliance with a statute would be impossible or be more dangerous than violating the statute.

Here, the woman owed the man a duty because by driving a car, on a icy highway during a winter storm, in which he was a passenger, she engaged in conduct that created a foreseeable risk of unreasonable harm to the man. As such, the general duty of care extended from the woman to the man. While the speed limit was 50 MPH and was very likely created to protect those on the road (including passengers) from drivers driving at dangerously high speeds from harms such as cars overturning, colliding, etc., the fact that the woman was driving 40 MPH, and therefore complied with the speed limit statute, does not mean that she was not negligent. A finder of fact could determine that an ordinary prudent person exercising reasonable care under the circumstances would have driven at a speed less than 40 MPH because of the icy roadway and the winter storm conditions. If the finder of fact were to find that this is the care that an ordinarily prudent person would have exercised under the circumstances, then breach would be established. Thus, even though the woman complied with the relevant statue, a court could still find that the woman breached her duty to the man.

The facts establish that the man suffered damages. Therefore, if a court also finds that the woman's breach was the actual and proximate cause, then a court could properly find that the woman was negligent, despite her compliance with the speed limit statute.

2. The issue is whether the man's damages resulting from the infection were foreseeable such that a court could properly find that the woman is liable for such damages. Because the damages resulting from the infection were foreseeable, a court find that the woman was the proximate cause of the injuries and could find her liable for the man's damages resulting from the infection.

As mentioned above, for a court to properly find that the woman was negligent, it must find that: (1) the defendant owed the plaintiff a duty to conform her conduct to a specified standard of care for the protection of the plaintiff against an unreasonable risk of injury; (2) the defendant breached that duty; (3) that breach was the actual and proximate cause of the plaintiff's injuries; and (4) the defendant suffered damages. At issue here is whether the woman was the proximate cause of the man's damages resulting from the infection. When an individual is negligent, she is liable for all results that are the natural and probable consequences of her acts--i.e., she is liable for foreseeable harms. Where an independent force combines with the individual's acts to accelerate or aggravate a plaintiff's injuries, the individual will be liable if the independent force and resulting harms were foreseeable. Generally, negligence in medical treatment and harms occurring during the course of medical treatment for the injuries caused by the individual are foreseeable because they are within the normal incidents of the individual's conduct. By contrast, where an unforeseeable superseding force after the individual's actions causes harm to the plaintiff and the result of the superseding force was not foreseeable, the individual's liability is cut off by the superseding force, and the individual's breach will not be deemed the proximate cause of the plaintiff's injuries.

Here, as a result of the accident that occurred while the woman was driving, the man (and the woman) were rushed to a local hospital in its ambulance. The man received emergency surgery and remained in the hospital for 10 days, and 3 days after he was released, he was diagnosed with a serious infection that was more than likely caused by his stay in the hospital given that the disease is "transmitted in nearly all cases" through exposure to contaminated blood products, improperly sterilized medical instruments that come into contact with a patient's blood, and other sources in a hospital environment. Although infections in persons who have not received a blood product and have not been hospitalized during the period of likely exposure are possible, they are rare. Moreover, the man's physician stated that "he must have contracted this infection at the hospital" because the man was a patient at the hospital during the infection and symptom development period, which is 10-13 days: the precise period in which the man was in the hospital, released, and then diagnosed with the infection. It is of no import that the physician was not affiliated with the hospital or was the man's personal physician. Likewise, it is of no import that most hospitals have completely eliminated cases of this

infection by adopting expert-recommended sterilization procedures. If the hospital was negligent, its negligence would be foreseeable because negligence during medical treatment is within the foreseeable incidents of a tortfeasor's risk-creating conduct.

The abovementioned facts establish that it was foreseeable that the man would develop an infection during his stay at the hospital. As such, the woman proximately caused these injuries and a court could properly find that the woman is liable for the damages resulting from the infection.

3. The issue is whether the hospital breached any duty of care it owed to the man. Because the hospital breached a duty to the man, and because the hospital is vicariously liable for the acts of its employees, it can be held liable for the man's damages resulting from the infection.

Doctors and those with superior skills are charged with a higher duty of care than the ordinarily prudent person reasonable care standard. They must exercise the care, skill, and knowledge of an average member of the profession who is in good standing. For doctors, courts generally use a national standard of care to define the standard doctors must adhere to. Under the doctrine of res ipsa loquitor, if a plaintiff can establish the requisite elements, the finder of fact is permitted, but not required, to infer the first two elements of the prima facie negligence case: duty & breach. For res ipsa loquitor to apply, the plaintiff must establish that: (1) the accident was of a kind that normally does not occur in the absence of negligence and (2) the accident was attributable to the defendant, i.e., it was of a type that would normally occur due to the negligence of someone in the position of the defendant. To prove this second element, the plaintiff can show that the defendant had exclusive control over the instrumentality that caused the accident. Additionally, the plaintiff must establish that the accident was not attributable the plaintiff.

Here, the first element can very likely be established: The serious infection is transmitted in nearly all cases through exposure to either contaminated blood products or improperly sterilized medical instruments that come into contact with a patient's blood. There are other possible sources of the infection in a hospital environment, including the failure of staff to properly follow handwashing techniques to avoid transmitting the infection between patients and the failure of staff to properly identify and discard certain used medical instruments that cannot safely be sterilized. Although infections can possibly occur in individual who have not received a blood product and have not been hospitalized during the period of likely exposure, this is rare and therefore ordinarily does not happen absent negligence.

Likewise, the second element can very likely be established for the reasons listed above, and because the hospital is vicariously liable for the acts of its employees (discussed below); unlike *Summers v. Tice*, here, the plaintiff need not identify precisely which

medical attendant or doctor was negligent to hold the hospital vicariously liable. In other words, the accident was certainly attributable to the hospital because during the period of likely exposure, the man was in the hospital, giving the hospital exclusive control over the instrumentality that caused his injuries. Moreover, even though there is no record of when the hospital starting using the sterilization procedure recommended by experts, given that cases of the infection have been almost completely eliminated in hospitals that have adopted such measures, it is highly likely that the hospital had not adopted such procedures at the time that the man was infected. (Indeed, this can be used as evidence of custom to further demonstrate that the hospital breached its duty of care. Given that doctors are held to the higher standard of care mentioned above, the failure to adhere to the expert-recommended sterilization procedure may in and of itself be considered a breach.) Further, the man can establish that the accident was not attributable to him because he had no history of intravenous drug use and did not receive any medical treatment for several months before his hospital stay. These facts further attribute the accident to the hospital.

A principal or employer is vicariously liable for the negligence of its agents or employees when the negligence occurs while the agent/employee is acting within the scope of his or her employment. Here, the facts state that all sterilization procedures at the hospital are performed by hospital employees. Moreover, as explained above, the infection was certainly the result of the negligence of an employee in some shape or form. The employee(s) were acting in the scope of their employment because it happened while the man was being treated. As such, the hospital can be held vicariously liable for its employees' negligence.

Given that the man can establish breach using the doctrine of res ipsa loquitor, and that the hospital is vicariously liable for the negligence of its employees, a court could properly find that the hospital is liable for the man's damages resulting from the infection.

4. The issue is whether the rules of joint and several liabilities allow for the woman's liability to be limited to the $100,000 for the injuries the man suffered in the accident. Ultimately, the woman's liability cannot be limited to $100,000 for the injuries the man suffered in the accident.

Under the rules of joint and several liability, where the actions of two tortfeasors combine to cause the plaintiff one indivisible injury, the individuals are jointly and severally liable. That is, the plaintiff may recover the full amount of damages from either or both of the tortfeasors. Notwithstanding this, in a pure comparative negligence jurisdiction, if a jury found each tortfeasor to be a certain proportion at fault for the injuries, the tortfeasors may seek contribution or indemnity from one another.

Here, if a court found that the woman's negligence and man's negligence combined to cause the man's infection, they would be held jointly and severally liable. Thus, the

woman's liability could not be limited to $100,000 for injuries the man suffered in the accident. The woman is jointly and severally liable for the full $350,000. If the man collects all of the judgment from her, the woman could then seek contribution for $250,000 from the hospital. However, the woman's liability could not be limited to $100,000 for the injuries the man suffered in the accident. Indeed, this would frustrate the court's finding that her negligence caused the man's infection because it would eliminate her liability for the infection.

Thus, the woman's liability cannot be limited to $100,000 for the injuries the man suffered in the accident.

NCBE Answer

The Court could properly find that the woman was negligent even though she was driving below the posted speed limit.

The issue is whether the woman may be precluded from liability on a negligence claim because she was driving under the posted speed limit.

For a claim of negligence to be viable, the following elements must be satisfied: (1) the actor owed a duty of care to the victim, (2) the actor breached that duty, (3) the actor's actions were the cause of the victim's injuries, and (4) the victim must have sustained damages. Additionally, for a successful negligence claim, the actor (defendant) must have no applicable defenses to assert.

Here, the man was a passenger in the car driven by the woman. As the driver of the vehicle, the woman owed the man the duty of care to act as a reasonable, prudent driver would in similar circumstances. In this situation, reasonable care would involve obeying traffic rules, including rules of the roadways and driving within the posted speed limit.

Moreover, as the pair was traveling in a snowstorm, reduced speeds were likely required of a reasonable, prudent person. The woman was noted as driving 40 miles per hour when the posted speed limit was 50 miles per hour. Driving at a speed 10 miles under the speed limit during a snowstorm would often be seen as compliant with the duty of care owed given the circumstances. However, without more information on the severity of the road conditions or more information regarding the woman's driving, it is possible that the woman was still negligent, despite driving under the speed limit.

As such, the court could properly find that the woman was negligent even though she was driving below the posted speed limit.

The Court could properly find that the woman is liable for the man's damages resulting from the infection.

The issue is whether the woman could be found liable for the man's damages resulting from the infection.

As stated above, one of the essential elements of a claim for negligence is that the actor be the cause of the victim's harm or injury. One aspect of the causal connection is proximate or legal cause. For an actor's actions to be the proximate cause of the victim's injuries, the

injuries must be to the extent, of the type, and occur through a manner that would be foreseeable, given the circumstances.

Here, the man was in a car accident when the vehicle the woman was driving overturned. The injury in question here is the infection that the man contracted, presumably while being treated at the hospital for his injuries from the accident. It is foreseeable that the man would need to receive medical treatment for his injuries, and as such, his receiving an infection during those services, while not expected, is certainly not unforeseeable.

As such, the court could properly find that the woman is liable for the man's damages resulting from the infection.

The Court could properly find that the hospital is liable for the man's damages resulting from the infection.

The issue is whether, absent explicit proof via record of hospital procedures, the hospital may be liable for the man's damages resulting from the infection.

The concept of res ispa loquitur applies to negligence cases when the source of the harm is not easily identifiable, but the harm incurred is of the type not typically sustained in the absence of negligence. To succeed on a res ipsa loquitur claim, one must demonstrate that (1) the actor was in control of the instrumentality which caused the harm, (2) that it is more likely than not that the victim's harm was caused by the actor's negligence, and (3) the victim himself did nothing to contribute to the harm.

Here, the doctor has stated that the type of infection the man is experiencing is typically caused through exposure to contaminated blood or unsanitized medical equipment. The man had recently been hospitalized for 10 days, the entire incubation period for infection, and had also received procedures involving numerous medical instruments, including needles and clamps. The man had no history of intravenous drug use or prior medical treatment within 6 months of his recent hospitalization. Therefore, despite the lack of concrete proof, the man's damages from the infection are not likely in the absence of negligence and therefore, res ipsa loquitur applies.

As such, the Court could property find that the hospital is liable for the man's damages resulting from the infection.

The woman's liability could not be limited to $100,000 for injuries the man suffered in the accident.

The issue is whether the woman's liability could be limited to $100,000 if both the woman and the hospital are found liable for negligence for the man's injuries.

When two or more defendants are found liable in tort to a plaintiff, they are generally found to be jointly and severally liable. Joint and several liability means that any defendant can be required to pay the entire judgment, and then seek repayment from the other tortfeasor. This is in contrast with pure several liability, wherein joint tortfeasors are only liable for their share of the harm.

In a joint and several liability jurisdiction, which is the majority, the woman cannot limit her damages to the $100,000 for the injuries he sustained in the accident. The man could seek to get the entire $350,000 from her, and she could try to seek contribution from the hospital.

February 2019
MEE Analysis 1
Torts

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FEBRUARY 2019 MEE
ANALYSIS 1—TORTS

This February 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Could a court properly find that the woman was negligent even though she was driving below the speed limit?

(2) Could a court properly find that the woman is liable for the man's damages resulting from the infection?

(3) Could a court properly find that the hospital is liable for the man's damages resulting from the infection?

(4) If a court found that both the woman's negligence and the hospital's negligence caused the man's infection, could the woman's liability be limited to $100,000 for injuries the man suffered in the accident?

DISCUSSION

Summary

A court could properly find that the woman was negligent despite the fact that she was driving at a speed lower than the posted limit if it concludes that her conduct was unreasonable under the circumstances. Given the icy road conditions, a court could find that her conduct was unreasonable.

Because exposure to either negligent or non-negligent medical treatment is a foreseeable risk of negligent driving, the woman could be found liable for the damages arising from the infection if the court concludes that the man contracted the infection through the hospital's conduct.

Although the man cannot show when or how he contracted the infection, under the doctrine of res ipsa loquitur the man could recover damages from the hospital if he can show that the harm he suffered (the infection) does not normally occur without negligence and that other responsible causes, including his own conduct and that of third persons, are sufficiently eliminated by the evidence. Here, the evidence shows that the man was in the hospital during the entire period in which he contracted the infection, that he had no other known means of exposure, and that the risk of infection can be almost eliminated through the hospital's use of recommended infection-

control procedures. A court thus could properly rely on the res ipsa loquitur doctrine to find the hospital liable.

If the court found that the negligence of both the woman and the hospital caused the infection, the woman's liability must be greater than $100,000. Because the woman's negligence alone caused the car accident, she alone would be liable for the $100,000 damages for the injuries the man suffered in the accident. In addition, in joint and several liability jurisdictions, she and the hospital together would be liable for the full amount of damages from the man's infection. Thus, her total damages for both the accident and the infection would not be limited to $100,000.

Point One (20%)

Because compliance with a statutory standard does not insulate an actor against liability for negligence, the woman could properly be found liable to the man despite the fact that she was driving below the posted speed limit.

Statutory standards typically establish the level of care necessary to avoid a finding of negligence. Thus, "an actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 14. However, an actor is negligent when he or she "does not exercise reasonable care under *all* the circumstances." *Id.* at § 3 (emphasis added). Speed limits are established for normal driving conditions, not hazardous conditions caused by poor weather. Given that the accident in which the man was injured occurred on an icy road during a winter storm, a court could find that the woman was negligent even though she was driving at a speed lower than the posted speed limit. Compliance with a statute does not establish freedom from fault. *See id.* § 16.

Point Two (20%)

Because contracting the serious infection was within the scope of the risk of negligent driving, the court could find that the woman's negligence was the proximate cause of the man's injuries sustained as a result of contracting the infection.

An actor is liable for those harms that are a foreseeable consequence of his negligence.

Courts have routinely found that subsequent medical malpractice is within the scope of the risk created by a tort defendant. "If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner." Restatement (Second) of Torts § 457. Liability typically attaches even when the medical services rendered "cause harm which is entirely different from that which the other had previously sustained . . . so long as the mistake or negligence is of the sort which is recognized as one of the risks which is inherent in the human fallibility of those who render such services." *Id.* at cmt. a.

Thus, because it is foreseeable that an injured person will require hospitalization and that hospitalization will expose the injured person to other infections, the woman could be found

liable for the man's damages associated with contracting the infection so long as the trier of fact concludes that the hospital is responsible, whether negligent or not, for the man's contracting the infection.

Point Three (40%)

Although the man cannot directly prove that he contracted the infection in the hospital or from a specific action by the hospital or its employees that was negligent, the hospital could be found liable under the doctrine of res ipsa loquitur because the man can show that (1) contracting the infection does not normally happen without negligence, and (2) other responsible causes are sufficiently eliminated by the evidence.

Typically, the tort plaintiff bears the burden of proof to establish the specific actions of the defendant or its employees (acting within the scope of their employment) that were negligent and caused his harm. Here, the plaintiff has no direct proof of the actions of the hospital or its employees that were negligent and that caused the infection from which he is suffering.

However, the doctrine of res ipsa loquitur permits the trier of fact to infer that the harm suffered by the plaintiff was caused by negligence of the defendant when

> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Restatement (Second) of Torts § 328D.

Res ipsa loquitur is commonly used in actions against medical providers when the patient suffers an unexplained injury and the evidence establishes that the risk of such an injury can be largely eliminated when reasonable care is used. If, for example, the "evidence shows that a particular adverse result of surgery is totally preventable when surgeons exercise reasonable and customary care, then res ipsa is appropriate in the patient's suit against the surgeon." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 17 cmt. e; *Kambat v. St. Francis Hospital,* 678 N.E.2d 456 (N.Y. 1997).

The man should be able to show that contracting the infection is an event that normally does not occur in the absence of negligence. A plaintiff need not show that reasonable care would completely eliminate the risk, only that it "ordinarily does not occur in the absence of negligence." Restatement (Second) of Torts § 328D.

The man should also be able to show that the very likely cause of the infection is one of three possibilities: (1) improperly sterilized instruments, (2) failure of employees to follow proper handwashing techniques, or (3) reuse of medical instruments that cannot be properly sterilized. Any of these possibilities would constitute hospital negligence. Another cause that could suggest either hospital negligence or negligence by a third-party supplier is the use of contaminated blood, but that cause is eliminated by the facts. The possible causes that do not suggest hospital

negligence are "rare possibilities" that occur outside the hospital setting. These possible causes are eliminated because the man was hospitalized during the entire period of potential exposure. Thus, even though the specific cause of the infection cannot be proven, it appears that there is a very strong inference that the hospital's negligence caused the infection.

Lastly, here the hospital clearly had a duty to the man to protect him against contracting infections while hospitalized. Thus, the indicated negligence—failing to protect the man from contracting the infection—was within the scope of the hospital's duty to the man.

Based on this evidence, the court could use the res ipsa loquitur doctrine to find that the hospital is liable for the man's infection.

[NOTE: This answer sets out the res ipsa loquitur requirements from the Restatement (Second) of Torts. Jurisdictions differ as to exactly how they express the requirements of the res ipsa loquitur doctrine. One traditional variation requires that the plaintiff show three things: "(1) the accident which produced a person's injury was one which ordinarily does not happen unless someone was negligent, (2) the instrumentality or agent which caused the accident was under the exclusive control of the defendant, and (3) the circumstances indicated that the untoward event was not caused or contributed to by any act or neglect on the part of the injured person." *See, e.g., Eaton v. Eaton*, 575 A.2d 858, 863 (N.J. 1990). The Third Restatement offers another formulation: that negligence can be inferred when the accident causing harm is of a type that "ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 17.

Answers relying on any of these variations should be given full credit as long as the examinee recognizes that courts interpret that variation, regardless of the specific way it sets out its requirements, "to limit the application of the res ipsa loquitur doctrine to those situations in which the defendant's negligence was more probably than not the cause of the plaintiff's injuries." *Giles v. City of New Haven*, 636 A.2d 1335 (Conn. 1994); *see also* Dan B. Dobbs et al., *Torts and Compensation* 190 (7th ed. 2013) ("We should expect variation in local verbalization of the rules, but always remember that a different verbalization may be intended to express substantially the same ideas.")]

[NOTE: An examinee might note that statutes in some jurisdictions restrict the use of res ipsa loquitur in medical malpractice cases. No such statute appears here, and an examinee should not receive credit for assuming such and answering accordingly. *See* Prosser, Wade, and Schwartz's *Torts Cases and Materials* 259 (13th ed. 2015).]

Point Four (20%)

A finding that the woman's negligence caused the car accident would mean that the woman is solely responsible for the $100,000 damages from the accident and is liable for that amount. She and the hospital together will be jointly and severally liable for the $250,000 in damages from the man's infection. Thus, the man can collect any portion, or all, of the $250,000 damages from the woman. Therefore, the woman's liability for both injuries cannot be limited to $100,000.

If the woman negligently caused the auto accident, she would be the sole proximate cause of the accident and would be liable for the $100,000 stipulated damages. She alone bears responsibility for those damages.

If the negligence of the woman and the hospital both caused the man's infection, the woman and the hospital would be jointly and severally liable for the $250,000 stipulated infection damages. Joint and several liability would be imposed for the infection damages because both the woman and the hospital have caused an indivisible injury, one of the bases of joint and several liability. Each of them is liable for the full amount of the man's damages from the infection.

Thus, because the woman is solely liable for the $100,000 of damages just from the accident and is jointly and severally liable for the foreseeable infection damages, her liability cannot be limited to $100,000.

[NOTE: The man has no obligation or need to ask the court to apportion the infection damages. He can approach either tortfeasor, or both tortfeasors, and seek total infection damages of $250,000 or a lesser amount. The man has the choice of how to apportion collection efforts between the two. The fourth call asks only whether the woman's liability could be limited to $100,000. Clearly the answer is "no" because she is liable for $250,000 as a joint tortfeasor in addition to liability for $100,000 damages from the accident. The examinee is not asked to specify how the plaintiff would apportion collection efforts between the two joint tortfeasors.

The MEE Subject Matter Outline notes that all torts questions occur in a jurisdiction that has joint and several liability with pure comparative negligence.]