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.]