
Negligence

1. If, at the end of the plaintiff's case, the defendant moves for directed verdict, the trial judge should

The jurisdiction has adopted a rule of pure comparative negligence. In an action brought against a defendant by a pedestrian's legal representative, the only proof that the legal representative offered on liability were that: (1) the pedestrian was killed instantly while walking on the shoulder of the highway; (2) the defendant was driving the car that struck the pedestrian; and (3) there were no living witnesses to the accident other than the defendant, who denied negligence.

- Grant the motion, because the legal representative has offered no specific evidence from which reasonable jurors may conclude that the defendant was negligent
- Grant the motion, because it is just as likely that the pedestrian was negligent as that the defendant was negligent
- Deny the motion, because the pedestrian was in violation of the state highway code
- **Deny the motion, because, in the circumstances, negligence on the part of the defendant may be inferred**

Note:
When a defendant's conduct falls short of the applicable standard of care owed to the plaintiff, he has breached his duty. Whether the duty of care is breached is a question for the trier of fact. The circumstantial evidence doctrine of res ipsa loquitur ("the thing speaks for itself") deals with situations where the mere fact that an injury occurred can establish or tend to establish a breach of duty. Where the facts strongly indicate that the plaintiff's injuries resulted from the defendant's negligence, the trier of fact may be permitted to infer that the defendant was probably negligent. Res ipsa requires the plaintiff to show: (i) an inference of negligence (i.e., that the accident causing the injury is the type that would not normally occur unless someone in the defendant's position was negligent); (ii) negligence attributable to the defendant (i.e., evidence that this type of accident normally happens because of negligence, such as that the instrumentality that caused the injury was in the defendant's exclusive control); and (iii) that the plaintiff is free from negligence, meaning the injury was not attributable to him.

Res ipsa loquitur does not change the burden of proof or create a presumption of negligence. A successful res ipsa showing by the plaintiff amounts to a prima facie case, which will preclude the defendant from being awarded a directed verdict. However, if the defendant rebuts the res ipsa showing with evidence that he did exercise due care, it has the same effect as in all other cases. In that scenario, the jury may either find that the defendant's evidence overcomes the plaintiff's res ipsa showing and decline to infer liability, or it may reject the defendant's evidence and draw the permissible inference of negligence, finding for the plaintiff. Even if the defendant rests without offering evidence, the jury may still elect not to infer negligence.

A directed verdict allows judgment for the moving party if the evidence, when viewed in the light most favorable to the non-moving party, is such that a reasonable person/jury could not disagree.

Comparative negligence is a system that divides liability between the plaintiff and the defendant in proportion to their relative degrees of fault. The plaintiff will not be barred entirely from recovery where he is also negligent, but his recovery will be reduced by a proportion equal to the ratio between his own negligence and the total negligence contributing to the accident. "Pure" comparative negligence is a system where the plaintiff may recover (but at a reduced level) even if his fault is greater than the defendant.

D is correct. The pedestrian's legal representative is seeking to make a res ipsa loquitur claim, which allows a jury to infer the defendant's negligence. The representative offered evidence that the defendant was in exclusive control of the car that struck and instantly killed the pedestrian while walking on the highway shoulder, and no witnesses were present except the defendant, who denied negligence. A reasonable inference is that the defendant was driving negligently and somehow veered off the road, onto the shoulder, and hit the pedestrian. This is enough for the jury to infer the defendant's negligence. The next step after a res ipsa showing is for the jury to determine whether it will infer that the defendant was negligent, or that the defendant's denial of negligence is enough to defeat the plaintiff's res ipsa claim. Either way, the directed verdict should be denied and the case should go to the jury.

A is incorrect. This is a misstatement of the facts. The legal representative produced evidence sufficient to make a res ipsa claim, as explained above. The facts show that the plaintiff was injured by a car in the exclusive control by the defendant, in a scenario where this type of accident would normally be the result of the driver's negligence because the plaintiff was on the side of the road. The motion should therefore be denied because a jury could reasonably infer that the defendant was negligent.

B is incorrect. A directed verdict is improper where a plaintiff satisfies the requirements of res ipsa loquitur, after which the jury may choose to draw a reasonable inference of the defendant's guilt or decline to do so, as previously explained. Regardless of the jury's determination, a res ipsa showing does not change the burden of proof or create any presumptions regarding negligence.

C is incorrect. This answer reaches the correct answer with the wrong reasoning. The directed verdict should be denied, but not based on whether the pedestrian violated the state highway code. The motion should be denied because, as explained above, a directed verdict is inappropriate where a res ipsa claim gives rise to a potential inference of negligence when it is for the jury to decide the issue. Moreover, this is a pure comparative negligence jurisdiction, which means that if the pedestrian had been negligent by violating the highway code, the representative may still recover on behalf of the pedestrian, even if by a reduced amount. Thus, the pedestrian's negligence would necessitate determinations regarding the applicability of pure comparative negligence and allocated responsibility, none of which may be done via a directed verdict.

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2. If the pedestrian proves the foregoing facts and offers no other evidence explaining the accident, will his claim survive a motion for directed verdict offered by the defense?

A landlord owns and operates a 12-story apartment building containing 72 apartments, 70 of which are rented. A pedestrian has brought an action against the landlord alleging that while he was walking along a public sidewalk adjacent to the landlord's apartment building a flower pot fell from above and struck him on the shoulder, causing extensive injuries. The action was to recover damages for those injuries.

- Yes, because the pedestrian was injured by an artificial condition of the premises while using an adjacent public way
- Yes, because such an accident does not ordinarily happen in the absence of negligence
- No, because the landlord is in no better position than the pedestrian to explain the accident
- **No, because there is no basis for a reasonable inference that the landlord was negligent**

Note:
Res ipsa loquitur is a doctrine that permits the factfinder to infer negligence when there is no direct evidence that the defendant acted negligently. To establish res ipsa loquitur, the plaintiff must show (i) the event that happened is one that usually does not occur absent the negligence of a party; (ii) evidence connecting the defendant with the negligence (often satisfied by showing that the harm was caused by something in the defendant's exclusive control); and (iii) the plaintiff is not the one who caused the event to occur. Courts generally apply the "exclusive control" element liberally. If the above elements are met, res ipsa loquitur creates an inference of negligence.

D is correct. Here, the elements of res ipsa loquitur are not met. Even applying the exclusive control element liberally, this element is not met for the landlord because there were 70 units rented and no evidence the landlord had any knowledge of, for example, issues of falling flowerpots that he failed to address (which would be evidence of direct negligence in any event). Thus, res ipsa loquitur does not apply, and the plaintiff has not made a showing of the landlord's negligence.

A is incorrect. This answer choice misstates the law. Although a land possessor and landowner owe a duty to protect others from dangerous, non-obvious, artificial conditions on the land that extend off the land, that liability is not strict liability. Instead, the land possessor and owner must act reasonably as to any such artificial conditions. This rule can also apply for natural conditions like trees in urban settings. Here, there is no indication the landlord failed to act reasonably as to the artificial condition. Note that a falling plant is not automatically a natural condition, and a plant in a flowerpot is normally an artificial condition.

B is incorrect. This answer choice states the general concept of res ipsa loquitur - that it imposes liability where the act normally would not have occurred absent the defendant's negligence - but the answer choice fails to establish this. Res ipsa loquitur requires a showing that the defendant had control of the instrumentality. That element is not met here, and thus this answer oversimplifies the doctrine's requirements and is incorrect.

C is incorrect. This answer choice is not necessarily factually correct since a pedestrian walking outside a building likely is in a weaker position than the building's landlord to explain matters that arose from a condition related to the building's tenants. More importantly, however, a defendant is not normally required to prove the plaintiff's lack of a case.

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3. If the customer brings an action, based on negligence, against the grocery store, the store's best defense will be that

An eight-year-old child went to the grocery store with her mother. The child pushed the grocery cart while her mother put items into it. The child's mother remained near the child at all times. Another customer in the store noticed the child pushing the cart in a manner that caused the customer no concern. A short time later, the cart the child was pushing struck the customer in the knee, inflicting serious injury.

- A store owes no duty to its customers to control the use of its shopping carts
- A store owes no duty to its customers to control the conduct of other customers
- Any negligence of the store was not the proximate cause of the customer's injury
- **A supervised child pushing a cart does not pose an unreasonable risk to other customers**

Note:
Normally, there is no affirmative duty to act to protect others from harm or to control the behavior of third parties. There are several exceptions to those rules, however, and one of them is in the relationship between a business and its customers. Businesses owe their customers a limited duty to protect them from harm, including harm caused by other customers.

D is correct. However, in the facts of this question, the grocery store did not breach that duty. The child was supervised "at all times" by her mother. Even the injured customer did not have any concern about the manner in which the child was behaving. Thus, the store did not act unreasonably - assuming the store even knew the child was pushing the cart - in permitting the child to push the cart under her mother's direct and continuous supervision.

A is incorrect. This answer misstates the law. Customers who enter the business are invitees, and the business owes them a duty of care. That duty would certainly include the business exercising reasonable care as to how its customers used the instruments the store provided (the carts). Thus, this answer choice misstates the law by rejecting, in an overly broad manner, the grocery store's duty as to its invitee-customers.

B is incorrect. As described above, normally there is no affirmative duty to act to control the behavior of third parties. There are several exceptions to this rule, however, and one of them is in the relationship between a business and its customers. Businesses owe their customers a limited duty to protect them from harm, including harm caused by other customers. However, on the facts of this question, the grocery store did not breach that duty because the child posed no unreasonable risk of harm to other customers. The mere fact that harm did result does not establish otherwise.

C is incorrect. This answer does not provide a strong defense. The question is premised on there being some negligence by the store in its opening words ("any negligence of the store"), and it then offers that this negligence was not actionable because it was not the proximate cause of the customer's knee injury. That is likely incorrect. Proximate cause turns largely on foreseeability, and it was very foreseeable that the grocery store not stopping even a supervised child from pushing a grocery cart could lead to the child causing harm to someone. It might not be very likely, but it was possible and foreseeable.

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4. Assume that the child was negligent and the child's mother did not adequately supervise the child. If the customer brings an action, based on negligence, against the child's mother, will the customer prevail?

An eight-year-old child went to the grocery store with her mother. The child pushed the grocery cart while her mother put items into it. The child's mother remained near the child at all times. Another customer in the store noticed the child pushing the cart in a manner that caused the customer no concern. A short time later, the cart the child was pushing struck the customer in the knee, inflicting serious injury.

- Yes, because the child was negligent
- Yes, because the child's mother is responsible for any harm caused by the child
- Yes, because the child's mother assumed the risk of her child's actions
- **Yes, because the child's mother did not adequately supervise the child's actions**

Note:
D is correct. Parents have a number of affirmative duties based on their special relationship to their minor children. This includes the duty to exercise reasonable care in the control of the parent's minor children. A parent who is physically present and fails to exercise control of her child is generally not vicariously liable for the child's tortious behavior; rather, the parent may be liable for her own negligence in failing to control the child. Because the child's mother was not adequately supervising her daughter, and it was foreseeable that the child could potentially injure someone, the customer is likely to prevail.

A is incorrect. The action is against the child's mother, who had an affirmative duty to control her child. It is the mother's negligence, not the tortious behavior of the child , that renders the mother liable.

B is incorrect. The correct standard of care here is negligence, not strict liability. The mother was liable because the harm caused by the child's actions was reasonably foreseeable, not because she is responsible for any harm, which would be incorrectly applying strict liability.

C is incorrect. Assumption of risk must be knowing and expressed or implied. More importantly, it is used as a defense by the defendant against a claim of negligence by the plaintiff. The mother cannot "assume the risk" of the child's behavior unless the mother was the plaintiff herself in an action. This choice implies vicarious liability, which is not at issue here.

5. If the customer brings an action, based on negligence, against the child, the child's best argument in defense would be that

An eight-year-old child went to the grocery store with her mother. The child pushed the grocery cart while her mother put items into it. The child's mother remained near the child at all times. Another customer in the store noticed the child pushing the cart in a manner that caused the customer no concern. A short time later, the cart the child was pushing struck the customer in the knee, inflicting serious injury.

- **The child exercised care commensurate with her age, intelligence, and experience**
- The child is not subject to tort liability
- The child was subject to parental supervision
- The customer assumed the risk that the child might hit the customer with the cart

Note:
A is correct. This choice gives a child-appropriate negligence standard of care. The customer's claim for negligence will be allowed, but the child will only be held to the standard of care expected of "a reasonable child" of the same age, training, maturity, experience, and intelligence.

B is incorrect. This choice is both overly broad and not a defense. The child is not too young to be held liable in tort. Children as young as four have been found capable of forming a tortious intent.

C is incorrect. The child's mother can assert supervision of her child as a defense against a claim for negligence in the control of her daughter, but it is not available to the child herself.

D is incorrect. The customer did not expressly or impliedly and knowingly assume the risk that the child would push a cart into her. Entering the grocery store was not an assumption of the risk that she might be injured by a store cart.

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6. How much, if anything, can the plaintiff collect from the truck driver, and how much, if anything, can the truck driver then collect from the bus driver in contribution?

The jury has found that the plaintiff sustained damages in the amount of $100,000, and apportioned the causal negligence of the parties as follows: The plaintiff 40%, the truck driver 30%, and the bus driver 30%. While driving his car, the plaintiff sustained injuries in a three-vehicle collision. The plaintiff sued the drivers of the other two vehicles, a truck and a bus, and each defendant crossclaimed against the other for contribution. The jurisdiction has adopted a rule of pure comparative negligence and allows contribution based upon proportionate fault. The rule of joint and several liability has been retained.

- Nothing, and then the truck driver can collect nothing from the bus driver
- $30,000, and then the truck driver can collect nothing from the bus driver
- $40,000, and then the truck driver can collect $10,000 from the bus driver
- **$60,000, and then the truck driver can collect $30,000 from the bus driver**

Note:
D is correct. Pure comparative negligence allows the plaintiff to recover all damages not attributed to his own negligence. The plaintiff is therefore entitled to $60,000, which is the $100,000 in damages he suffered minus his 40% of the fault. Since this is a joint and several liability jurisdiction, the defendants are each liable for the entire award. The plaintiff can collect the full amount of his award from either defendant or both, as long as the total only equals the $60,000 he is entitled to. The jurisdiction allows contribution based on proportionate fault. The question asks how much (what is the most) the plaintiff can collect from the truck driver. Under joint and several liability, the plaintiff can collect up to his full award, $60,000, from the truck driver. The truck driver can then collect the bus driver's proportionate amount of the award in contribution, which is 30% of $100,000, or $30,000.

A is incorrect. As explained above, the plaintiff is entitled to $60,000 in damages from either the truck driver or the bus driver, and whichever defendant pays those damages may collect from the other defendant their proportionate amount of the award in contribution.

B is incorrect. Because joint and several liability applies, the plaintiff may collect the full amount of his award ($60,000) from either defendant. And because contribution based on proportionate fault also applies, the truck driver may collect $30,000 from the bus driver.

C is incorrect. The amount of $40,000 (40%) is what the plaintiff is responsible for, not the amount he may recover in damages, which is $60,000, $30,000 of which the truck driver may collect from the bus driver as a proportionate amount of the award in contribution.

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7. Will the plaintiff prevail in his action against the hiker's estate?

The plaintiff brought an action against the hiker's estate for compensation for his injuries. In this jurisdiction, the traditional common-law rules relating to contributory negligence and assumption of risk remain in effect. A hiker, although acting with reasonable care, fell while attempting to climb a mountain and lay unconscious and critically injured on a ledge that was difficult to reach. The plaintiff, an experienced mountain climber, was himself seriously injured while trying to rescue the hiker. The plaintiff's rescue attempt failed, and the hiker died of his injuries before he could be reached.

- Yes, because his rescue attempt was reasonable
- Yes, because the law should not discourage attempts to assist persons in helpless peril
- **No, because the hiker's peril did not arise from his own failure to exercise reasonable care**
- No, because the plaintiff's rescue attempt failed and therefore did not benefit the hiker

Note:
The issue in this question is the negligence doctrine for rescuers. A rescuer is a foreseeable plaintiff as long as the rescue is not done recklessly. Therefore, a defendant (the "rescuee") is liable if he negligently puts himself or a third party in peril and the plaintiff (the "rescuer") is injured attempting a rescue. The rescuee, therefore, owes a duty of care to the rescuer because danger invites being rescued. If the defendant breached that duty by tortiously creating his own or another's peril, a negligence claim is possible so long as the other elements (causation and damages) are met and no other limitations apply (for example, if the rescuer caused his own injuries by attempting the rescue in a grossly negligent manner it will negatively affect the rescuer's recovery).

C is correct. The hiker is stated to have been "acting with reasonable care." He breached no duty to the mountain climber who attempted a rescue. When the mountain climber was subsequently injured, the hiker's estate was under no legal obligation to pay, and the hiker's estate will prevail.

A is incorrect. This answer does not provide a basis for recovery against the hiker's estate. The mere fact that the plaintiff acted reasonably in attempting to rescue the hiker does not alter that the hiker did not breach any duty to the mountain climber. No other torts apply for these facts and answer choices.

B is incorrect. This answer is not relevant to whether the plaintiff can prevail against the hiker's estate. As a policy matter, it might be true that the law should not discourage attempts to assist persons in helpless peril. But that principle alone does not create a basis for the hiker's estate's liability. No such basis is presented on these facts with these answer choices.

D is incorrect. This answer choice is not relevant to whether the plaintiff can prevail against the hiker's estate. As explained above, there is no legal basis presented here that would sustain a cause of action by the plaintiff against the hiker's estate. That is true even if the plaintiff had succeeded in the rescue attempt - even if the plaintiff successfully rescued the hiker and was then suing the hiker instead of hiker's estate, there would still be no basis for recovery in law because hiker breached no duty to the plaintiff.

Similarly, the fact that the plaintiff failed does not change the outcome. For example, suppose the facts in the question were different and the hiker had created his peril by acting negligently, and the mountain climber then reasonably attempted a rescue but failed and the hiker died. Even though the rescue attempt failed, because the hiker in this example created his own peril, the hiker's estate would still be liable for the injuries the mountain climber sustained in the attempted rescue.

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8. The plaintiff's best argument in opposition to the defendants' motions would be that the defendants are jointly and severally liable for the plaintiff's entire harm, because

The plaintiff brought an action for damages against the student and the doctor. At the close of the plaintiff's evidence, as outlined above, each of the defendants moved for a directed verdict in his favor on the ground that the plaintiff had failed to produce evidence on which the jury could determine how much damage each defendant had caused. The jurisdiction adheres to the common law rules regarding joint and several liability. Six months after the first accident, the plaintiff was a passenger in a car that was struck in the rear by a car driven by a doctor. The collision resulted from the doctor's negligence in failing to keep a proper lookout. The plaintiff's physician found that the second collision had caused a general worsening of the plaintiff's condition, marked by a significant restriction of movement and muscle spasms in her back and neck. The physician believes the plaintiff's worsened condition is permanent, and he can find no basis for apportioning responsibility for her present worsened condition between the two automobile collisions. The plaintiff was a passenger in a car that was struck in the rear by a car driven by a student. The collision resulted from the student's negligence in failing to keep a proper lookout. The plaintiff's physician found that the collision had aggravated a mild osteoarthritic condition in her lower back and had brought on similar, but new, symptoms in her neck and upper back.

- **The wrongdoers, rather than their victim, should bear the burden of the impossibility of apportionment**
- The defendants breached a common duty that each of them owed to the plaintiff
- Each of the defendants was the proximate cause in fact of all of the plaintiff's damages
- The defendants are joint tortfeasors who aggravated the plaintiff's preexisting condition

Note:
A is correct. The issue in this question is the proper application of joint and several liability. This choice may seem tricky because it is a policy argument, not a rule. The issue is cause-in-fact, which requires proof of actual cause of harm, and is impossible for the plaintiff to prove under the facts of this question. Without cause-in-fact, the plaintiff will not recover, despite clear injury and evidence of negligence (breach of duty of ordinary care in driving) by the defendants. Here, the facts indicate that the two defendants both contributed to worsening the plaintiff's back condition. When two or more defendants cause a single, indivisible harm such that liability cannot be apportioned between them, both defendants are liable for the whole harm.

Note that, though the question references motions "for a directed verdict," they are more commonly called "motions for judgment as a matter of law" in modern rules.

B is incorrect. This answer choice correctly states an element of negligence (breach of a duty), but it does not assist the plaintiff as to her inability to prove how each defendant contributed to the plaintiff's injury.

C is incorrect. This answer choice does not respond to the problem the plaintiff faces: countering the defendants' argument that the plaintiff did not produce evidence as to how much damage each defendant had caused.

D is incorrect. The mere fact that the defendants are joint tortfeasors - meaning that two or more individuals contributed to the harm the plaintiff suffered - does not make them jointly and severally liable. If the harm could be apportioned between them, joint and several liability likely would not apply. There are situations in which joint and several liability could still apply despite the availability of apportionment, but the facts do not raise any such circumstance. Additionally, although this answer choice correctly identifies the issue as joint and several liability for the collective negligence of multiple tortfeasors, it essentially only restates the premise of the call of the question (that the defendants are joint and severally liable as joint tortfeasors): "The plaintiff's best argument in opposition to the defendants' motions would be that the defendants are jointly and severally liable for the plaintiff's entire harm, because the defendants are joint tortfeasors who aggravated the plaintiff's preexisting condition." Thus, this answer choice adds virtually nothing new to the call of the question's foundation.

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9. In this action, the plaintiff should recover

The plaintiff has brought an action against the defendant to recover damages for his loss resulting from the accident. The jury determined that both parties were negligent, but that the defendant was less negligent than the plaintiff. The jurisdiction follows a pure comparative negligence rule. A defendant operates a bank courier service that uses armored trucks to transport money and securities. One of the defendant's armored trucks was parked illegally, too close to a street intersection. The plaintiff, driving his car at an excessive speed, skidded into the armored truck while trying to make a turn. The truck was not damaged, but the plaintiff was injured.

- Nothing, because the defendant was not an active or efficient cause of the plaintiff's loss
- Nothing, because the defendant was less negligent
- **His entire loss, reduced by a percentage that reflects the negligence attributed to the plaintiff**
- His entire loss, because the defendant's truck suffered no damage

Note:
C is correct. In a pure comparative rule jurisdiction, the plaintiff may recover his full amount of damages, less the portion attributed to his own negligence. The plaintiff is not barred from recovery by his own negligence, but he will have his award reduced, according to the court's determination of the plaintiff's percentage of responsibility for his own injuries due to his excessive speed in driving.

A is incorrect. This answer misstates the applicable standard, which is that when the plaintiff and defendant each have a proportion of the fault, in a pure comparative rule jurisdiction, the plaintiff may recover the full damages less the amount for which he is responsible.

B is incorrect. This answer also misstates the standard. Even when a plaintiff is more liable than the defendant, in a pure comparative jurisdiction, the plaintiff is entitled to damages that are proportionate to the defendant's fault.

D is incorrect. As explained above, the plaintiff is only entitled to the full damages minus the amount attributed to his own negligence.

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10. Assume that the homeowner exercised reasonable care in hiring the repairman, that the repairman was an independent contractor, and that public policy made a homeowner's duty to keep the sidewalk safe for pedestrian a nondelegable duty. If the pedestrian brings an action against the homeowner to recover damages for the injury caused to him by the repairman's negligence, will the pedestrian prevail?

While walking on a public sidewalk, a pedestrian was struck by a piece of lumber that fell from the roof of a homeowner's house. The homeowner had hired a repairman to make repairs to his roof, and the lumber fell through due to negligence on the repairman's part.

- Yes, under the res ipsa loquitur doctrine
- **Yes, because the repairman's act was a breach of a nondelegable duty owed by the homeowner to the pedestrian**
- No, because the repairman was an independent contractor rather than the homeowner's servant
- No, because the homeowner exercised reasonable care in hiring the repairman to do the repair

Note:
The doctrine of vicarious liability provides that in some situations, the tortious act of one person may be imputed to another because of some special relationship between the two. The latter will be held liable even though his conduct may have been blameless. A person who hires an independent contractor is generally not liable for the torts of that person. However, there are exceptions to this rule, including: (i) when the independent contractor is engaged in inherently dangerous activities, such as doing dangerous work near a public sidewalk; and (ii) when the duty is considered non-delegable for public policy reasons, such as the duty of a business to keep the premises safe for customers.

The circumstantial evidence doctrine of res ipsa loquitur ("the thing speaks for itself") deals with situations where the mere fact that an injury occurred can establish or tend to establish a breach of duty. Where the facts strongly indicate that the plaintiff's injuries resulted from the defendant's negligence, the trier of fact may be permitted to infer that the defendant was probably negligent. Res ipsa loquitur requires the plaintiff to show: (i) an inference of negligence (i.e., that the accident causing the injury is the type that would not normally occur unless someone in the defendant's position was negligent); (ii) negligence attributable to the defendant (i.e., evidence that this type of accident normally happens because of negligence, such as that the instrumentality that caused the injury was in the defendant's exclusive control); and (iii) that the plaintiff is free from negligence, meaning the injury was not attributable to him.

B is correct. Although the general rule would protect the homeowner from being liable for the repairman's negligence because he was an independent contractor, there is an exception to this rule involving non-delegable duties. Where there is a non-delegable duty, such as the policy to keep the sidewalks safe in this case, the delegator/homeowner is liable for the negligence of even an independent contractor. The pedestrian will, therefore, prevail in an action against the homeowner because, even though the homeowner was not negligent, liability for the repairman remains for the non-delegable duty of protecting passerbys on the sidewalk.

A is incorrect. This answer reaches the correct answer with the wrong reasoning. The pedestrian will prevail, but not because of the doctrine of res ipsa loquitur. The facts of this case state that the repairman and not the homeowner/defendant was negligent, and that the repairman's actions caused the lumber to fall. Res ipsa is thus inapplicable because the homeowner was conclusively not negligent, so no inference as to the defendant's negligence can be drawn. Vicarious liability will be the basis for holding the homeowner liable, as explained above.

C is incorrect. Even though the repairman was an independent contractor, and the general rule severs liability between this actor and the employer, here an exception applies. The homeowner is vicariously liable for the repairment's negligence because the duty to protect the public from dangers on the sidewalk was non-delegable. Note: "Servant" historically is a term of art used to describe an employee for purposes of vicarious liability, which does not apply here, where the repairman was an independent contractor.

D is incorrect. This answer correctly states that the homeowner was not negligent, however, the homeowner is still liable for the negligence of the repairman, an independent contractor, under the exception for non-delegable duties, as explained above.
