QUESTION 2

Abe wanted to cut down a tree that was growing on public property bordering his house because he did not want to rake its leaves. When Abe attempted to do so, Bill, who lived across the street, demanded that he stop. Abe refused and, holding his saw in front of him, took two steps toward Bill. Avoiding Abe, Bill climbed high into the tree, insisting he would not come down because he wanted to save the tree. Abe nevertheless sawed through the trunk of the tree, which fell into the street with Bill in it, causing Bill serious injuries.

Cindy, a passerby, rushed to help Bill. As she was assisting him, she was struck by a car and sustained serious injuries.

Debbie, a neighbor, watched the entire incident from her front porch and suffered severe emotional distress as a result.

1. Is Bill likely to prevail on any intentional tort claim against Abe? Discuss.

2. Is Cindy likely to prevail on a negligence claim against Abe? Discuss.

3. Is Debbie likely to prevail on a negligent infliction of emotional distress claim against Abe? Discuss.
Answer A to Question 2

I. Bill v. Abe

**Assault**
Assault is to intentionally cause the reasonable apprehension of an immediate harmful or offensive touching in another person. Intent is either the conscious desire to bring about the result or the substantial certainty that such a result will occur. Here, Abe, while holding his saw in front of him, took two steps towards Bill. Abe may have simply been proceeding with his plan to cut down the tree, and may not have had any intention whatsoever to cause Bill any apprehension. However, because this was a confrontational situation, a reasonable person would have had the substantial certainty that his act would cause such apprehension in Bill; therefore the intent element is satisfied. Bill took steps to avoid Abe, which shows that he likely felt apprehension because of Abe's act, and this would be reasonable under the circumstances as this was a confrontational situation. Abe is most likely liable for assault.

**Battery**
Battery is the intentional cause of harmful or offensive touching of another person. Intent is clearly satisfied here, because Abe had substantial certainty that Bill would suffer a harmful touching by Abe's voluntary act of cutting down the tree. Abe is liable for battery.

**Defenses**
Abe really doesn't have any defenses to either of these torts, but he could argue necessity. Necessity is a valid defense if the harm avoided outweighs the harm inflicted. Here, the harm avoided would be Abe's raking leaves, and the harm inflicted is Bill's serious injuries. Clearly the harm avoided does not outweigh the harm inflicted, so this defense would fail.
Conclusion--
Bill would prevail for the intentional torts of assault and battery. Damages are presumed for intentional torts.

II. Cindy v. Abe

Negligence
A person is liable for negligence if they owe a duty, the duty is breached, they are the cause of harm, and the other party suffers damages.

Duty-- Generally one owes a duty of reasonable care to all foreseeable plaintiffs under the circumstances. Here, there are no special relationships between Cindy and Abe, so Abe will be held to this reasonably prudent person standard.

Breach-- The duty is breached if the defendant fails to act as a reasonably prudent person under the circumstances. One method to determine if a duty is breached is to compare the burden to avoid the harm and the utility of the defendant's conduct against the gravity of harm combined with the likelihood of the harm. Here, Abe's burden to avoid any harm was rather low, since all he needed to do was not cut down the tree. Additionally, Abe may have been able to simply contact the local municipality and have them address his problem with the tree. The utility of Abe's conduct is also rather low, since his only benefit was the relief from having to rake leaves. The gravity of the harm suffered by Cindy was great as she suffered serious injury. The likelihood of Cindy suffering such injury was also relatively high, since Abe knew that Bill was in the tree and was likely to be injured, which would prompt a passerby to assist Bill. Based on this analysis, Abe breached his duty of reasonable care to Cindy, since the gravity of harm and the likelihood of harm greatly outweigh the burden to avoid the harm and the utility of Abe's conduct.
Causation-- In order to be liable for negligence, the defendant must be both the actual cause and proximate cause of the harm.

Actual cause-- one test used to determine actual cause is the but for test; but for Abe's cutting down the tree, would Cindy have been injured? Clearly the answer is no, so under this test Abe is an actual cause of harm. Another test used to determine actual cause is the substantial factor test; was Abe a substantial factor in Cindy's harm? Again the answer is clear; Abe was a substantial factor in Cindy's harm. Under either test, Abe is an actual cause of harm.

Proximate cause-- Were there any intervening acts which caused Cindy's harm? Abe may contend that the car which struck Cindy was an intervening act, but this act was foreseeable since the tree was caused to fall into the street. Therefore, this intervening act would not cut off liability. Next we ask, was the harm suffered by Cindy foreseeable? Since the tree had fallen in the street, and since Bill was in the tree when it was cut down, it was entirely foreseeable that a passerby would stop to render aid to Bill. It is also foreseeable that Cindy would suffer both the type of injury suffered and the extent of the injury. Therefore, Abe is a proximate cause of Cindy's harm.

Damages-- Cindy suffered serious injuries, so this element is obviously satisfied.

Defenses--
Assumption of the risk occurs when the plaintiff knows of the danger involved and voluntarily proceeds anyway. The facts do not state if Cindy knew of the car coming which caused her injury. Even if she did know of it, Cindy could argue that her act was not voluntary because Bill was in peril and required rescue.

Comparative fault/Contributory negligence-- If Cindy failed to act in a reasonable way and was a cause of her own injuries, then she could be found to be comparatively at fault or contributory negligent, depending on the jurisdiction. The majority rule is comparative fault, which states that plaintiff's damages will be reduced by the proportion of their fault in their own injury.
Contributory negligence states that plaintiff's recovery will be barred if found to be a cause of their own injury. Cindy can claim that she acted perfectly reasonable under the circumstances, because there was an emergency situation. Under emergency situations, the actor is to act reasonably under the circumstances at hand, even if in hindsight it is shown that they did not take the wisest course of action. Cindy most likely will be found to have acted reasonably under the circumstances, and her recovery will not be reduced or barred.

**Conclusion**

Cindy will prevail and she will be entitled to compensatory damages which would include medical expenses, lost time from work, and pain & suffering. If it was found that Abe acted maliciously, then punitive damages may also be awarded.

**III. Debbie v. Abe**

**Negligent Infliction of Emotional Distress (NIED)**

Debbie is a bystander; bystander NIED is established if the defendant, through negligence, causes emotional distress to a bystander who witnesses the event, the witnessing of the event is what causes the emotional distress, and if the bystander is a close relative of the one who is injured. Debbie is a neighbor, and not a close relative, so this action would fail. Abe is not liable for NIED.
**Answer B to Question 2**

**Bill v. Abe**

**Assault**

Assault is the intentional infliction of reasonable apprehension of imminent harmful or offensive contact to another without consent.

Here when Abe went to cut down the tree and Bill demanded he stop, Abe took two steps towards Bill with his saw in front of himself. We next learn that Bill, to avoid Abe, climbed high into the tree. This shoes Bill’s apprehension of possible harmful contact with Abe and his saw. Since a saw can be used as a deadly weapon, that would at least would cause serious harm, it is reasonable for Bill to feel apprehension of Abe. The only question that remains is that of intention.

Intent is the conscious desire or knowledge that a result will occur or the substantial certainty a result will occur. Since we know Abe wanted to cut the tree down because of the leaves that were left on his lawn, and also that Abe refused Bill’s attempt to stop his action, it is reasonable to ascertain Abe was substantially certain approaching Bill with the saw would make him apprehensive and leave, allowing him to continue to cut the tree down.

We also know from the facts, that nowhere does Bill consent to the assault.

Abe would be liable for assault on Bill.

**Battery**

Battery is the intentional infliction of harmful or offensive contact on another without consent.

Intent defined supra.

When Abe proceeded to cut down the tree, knowing Bill was in the tree, we can reasonably assume Abe was substantially certain Bill would fall with the tree.

Since we also know that the fall caused Bill serious injuries, the contact by Abe, made via the saw, to the tree, to the street was harmful contact.

Abe would be liable to Bill for battery.
False imprisonment

False imprisonment is the intentional confinement of another, to a defined area against their will.
Intent defined supra.

Abe will argue Bill was not confined in the tree, although this was a defined area, as he could have climbed down at any time.

Bill will argue that since Abe threatened him with the saw prior to climbing the tree, he felt continued intimidation by Abe and his saw if he did not climb down. He will argue it was unreasonable to climb down in the face of such risk.

Additionally Bill will argue that he was up in the tree against his will because of the above risks.

It is likely Abe will be liable for false imprisonment of Bill.

Cindy v. Abe

Liability for negligence requires proof of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and that the breach was the actual and proximate cause of damages suffered by the plaintiff.

General duty

Everyone owes a duty to use due care so as not to expose others to unreasonable risks of harm.

Here Abe owes a duty to Cindy so as not to expose her to unreasonable risks of harm.

Special duty

Here, the special relationship of Cindy to Bill: that of victim to rescuer extends any duty of Abe to Bill to include Cindy. This was expressed in the landmark case adjudicated by Judge Cardozo which led to the expression “danger invites rescue”. Since Abe was responsible for Bill needing rescue, Abe is also liable to any rescuer of Bill, whom he placed in danger.

Therefore, Abe owes a special duty to Cindy.

Breach

Breach is a failure to act as a reasonable person in the same or similar situation as one with a similar duty. This is often measured using the Learned Hand calculus, measuring the risks versus the utility.
Here, Abe cut the tree down, which contained Bill and knowing he would fall and likely be hurt, requiring a potential rescuer. The utility of cutting the tree down, merely so he did not have to rake up the leaves, is not worth the significant risks of serious injury or death from doing so. Abe acted in an unreasonable fashion.

Abe breached his duty to Cindy.

**Actual cause**

An actual cause is the cause which starts, ignites or makes possible the results which follow and fills the “but for” or substantial certainty test.

“But for” Abe cutting down the tree, Bill would not have fallen and gotten hurt. If Bill had not gotten hurt, Cindy would not be required to come to his aid. If Cindy did not come to his aid, she would not have been struck by a car and sustained serious injuries.

**Proximate cause**

An actual cause of harm is also the proximate cause of harm if what follows is a natural, unbroken chain of events, uninterrupted by independent, unforeseeable intervening events, and results in the harm.

Here, Abe may argue it is not foreseeable that a rescuer would be struck by an automobile, trying to help someone who fell in a tree. The argument will likely fail since the tree abutted the street and the tree fell in the street where cars are likely to be found. Since Cindy had no choice where to treat Bill, it is foreseeable she may be injured from a passing car.

Abe’s breach is the proximate cause of Cindy’s injuries.

**Damages**

Damages include special damages such as actual monetary expenditures and lost wages as well as general damages such as pain and suffering. Damages may also include punitive damages, to set an example of the defendant and possibly loss of consortium.

We are told in the scenario that Cindy sustained “serious injuries”. These will likely require hospital bills, time off of work as well as pain and suffering she sustained from the accident. It is also likely a court may find Abe’s behavior reckless and grossly negligent and may impose punitive damages.

Cindy sustained damages.

Abe will be liable to Cindy for negligence.
**Defenses**

**Contributory negligence**

In some jurisdictions, if it is found that the plaintiff contributed in some way to their damages, it may bar any recovery from the defendant. In other jurisdictions of comparative fault, if the plaintiff contributes to a portion of his damages this may be reduced from the monetary award in judgment by the percentage that the plaintiff is at fault. Further, if the plaintiff had the last opportunity to avoid harm by taking appropriate action, his recovery may be barred in the last clear chance doctrine.

The only potential argument to be raised by Abe is that Cindy contributed to her own injuries by being in the street, placing her at risk for injury. But, as discussed above, this argument will fail as she had no choice where to treat Bill.

No successful defenses will be raised.

**Debbie v. Abe**

**Negligent infliction of emotional distress**

Negligent infliction of emotional distress is the negligent conduct of extreme and outrageous nature which causes severe emotional distress of one in the zone of danger.

Negligent conduct defined and described supra.

Abe was negligent.

Abe will argue his actions were not extreme or outrageous since his use of the saw to cut a tree down is common practice and sometimes people get hurt during this process. Debbie will argue it is extreme and outrageous when one attempts to cut a tree down with someone up in the tree that is likely to sustain severe damages.

Abe’s conduct was extreme and outrageous.

We’re told in the facts that Debbie suffered severe emotional distress so this would not be an issue.

Abe will argue Debbie was not in the zone of danger. Although Debbie was a neighbor and watched the incident from her porch, Abe will argue she had no significant relationship to Bill that would cause her severe emotional distress. Most courts require some relationship between the plaintiff and the victim of the negligent action. Here no such relationship appears to exist.
Debbie will argue she is a neighbor of Bill and this should constitute a sufficient relationship.

Abe will further argue that most courts will require some form of physical manifestation of the severe emotional distress for a successful claim and the facts do not state Debbie suffered any physical ailments from her emotional distress.

It is unlikely that she will prevail in an action for negligent infliction of emotional distress against Abe.