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SAMPLE "A" grade

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Course / Session F13 Torts -Carey

Section All Page 1 of 25

Institution University of New Mexico School of Law
Course F13 Torts -Carey

Exam Mode Closed

Exam ID

Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	2226	10868	13080
Section 2	2282	11019	13283
Section 3	1756	8946	10684
Total	6264	30833	37047

Answer-to-Question- 1

Lucia has a premises liability claim against Paula.

Owners and occupiers of land owe a duty to intrants onto the land that varies in many jurisdictions according to the status of the entrant under the status trichotomy. Other jurisdictions have done away with the status trichotomoy, opting instead to use general duty principles. Rowland v. Christian.

In status trichotomy jurisdictions, entrants may be invitees, licensees, or trespassers. Since it is given that Lucia was a trespasser on the land, Paula owed a duty to Lucia not to injure her wilfully, wantonly or through gross negligence, and a duty to warn Lucia of hidden artificial conditions if they posed a risk of serious bodily harm or death.

Under the general duty principle Paula had a duty to foreseeable plaintiffs to exercise reaonable care with regard to foreseeable risks of harm arising from her conduct. MacPherson v. Buick. There need not be a special relationship between the parties for a duty to arise between them. Rudolph v. Arizona BASS Federation.

Breach of duty can be established according to a reasonable person test, which asks whether a reasonable person would have exercised greater care than the defendant did under the same or similar circumstances. Here, it seems clear that Paula breached her duty because a reasonable person would not install automated traps and guns on her property to shoot people indiscriminately. Such installment posed considerable foreseeable risks of harm, specifically the risk that someone would be shot and suffer

serious bodily harm or death. By setting the guns and traps to go off on their own, Paula acted with less care regarding those risks than a reasonable person would have done under the circumstances. Thus, the reasonable person test indicates that there was a breach of duty.

Under the status trichotomy, too, Paula's conduct consttuted a breach of duty. The guns and traps were hidden artificial conditions that posed risks of serious bodily harm or death. Paula did not (at least according to the fact pattern) post any warnings that those conditions existed, and that is also supported by the fact that Lucia wandered unknowingly onto Paula's property. Thus, Paula breached her duty under the status trichotomy as well.

Also, allowing Tony to hunt on her land may also have consttited a breach in much the same way. She could have posted signs warnign of hunters. There also may be statutes prohibiting hunting on the property, so a negligence per se claim might also be available.

But for the guns and traps, the injury to Lucia's leg would probably not have happened (but see the discussion of joint and several libility below, addressing the fact that which gun injured Lucia is not known.) Thus, the causation element is satisfied (at least provisionally).

Scope of liability does not pose a problem for Lucia here because she was a foreseeable plaintiff (indeed, Paula placed the traps precisely because she did foresee Plaintiffs like Paula), the injury of a gunshot wound is not an unforeseeable consequence of setting up

gun-based boobytraps, and there were apparently no intervening causes. Something set off the trap, and we're not sure what, but the trap being set off when that was what it was designed to do is not attenuated, remote or surprising. Thus the causal nexus between the tortious conduct and the resulting harm is strong enough to make a viable claim.

The damages Paula suffered were fortunately lower than might have been expected. Compensatory damages are awarded in order to make the plaintiff whole, or return her to her pre-injury condition. Lucia could have recovered lost wages and the value of her diminished earning capacity if she had incurred any, but it appears she did not. She is entitled, however, to her past and any future medical expenses, including transport in the ambulance, treatment, drugs, equipment, etc. She is also entitled to damages for the physical pain she experienced, any emotional anguish that might have resulted from being hunted like a wild animal, etc. The damages would be awarded in a lump sum, with any damages for future losses reduced to present value (i.e. increased to account for inflation and decreased to account for the time value of the money, i.e. the value of the return the lump payment of the future damages would earn if invested in the best and safest investments.) However, it is not clear that there are much in the way of future medical or other damages.

Lucia has a negligence claim against Tony and Archie.

Both Tony and Archie owed a duty to Lucia under the general duty principle, which holds that people have a duty to foreseeable plaintiffs to exercise reasonable care with regard to foreseeable risks of harm arising from her conduct. *MacPherson v. Buick*. There

need not be a special relationship between the parties for a duty to arise between them.
Rudolph v. Arizona BASS Federation.

Archie might argue that he has a lesser duty because he is only a six year old child. The standard of care for children is what a child of like age, intelligence, experience and maturity would have done under the circumstances. He could argue that any 6-year-old similar in those ways to Archie would have acted in the same way, so that there is no breach of duty and no liability. However, that standard of care is not applicable when the child is engaging in inherently dangerous activity, or adult activities, and hunting falls into both categories. (As a side note, Archie's father Duncan may also be liable because giving a 6-year old child a gun for his birthday is probably not reasonable conduct in light of the foreseeable risks of doing so.)

The duty in this case arose from the conduct of hunting in the woods, which posed a foreseeable risk of harm to other human beings in the woods. It appears that both Archie and Tony shot immediately upon detecting movement, without waiting to see whether what they were shooting at was actually a human or an animal. That conduct posed the foreseeable risk of shooting a human, and by failing to determine the nature of the target they probably did not act with as much care in light of the foreseeable risks as an ordinary reasonable person would have done. Thus, they breached their duty to Lucia when they shot at her.

But for their shooting at her, would Lucia have suffered her injuries? It is not certain, because only one bullet hit her and we don't know whose it was. This is addressed under

joint and several liability below.

Scope of liability does not pose a problem for much the same reasons as above. It is not unforeseeable that there would be other humans in the woods, so Lucia was a foreseeable plaintiff; the injury suffered is a foreseeable consequence of a negligently fired gunshot; and there were no intervening forces at work, let alone superseding ones.

The damages are the same as discussed above in regards to the claim against Paula. Compensatory damages are awarded in order to make the plaintiff whole, or return her to her pre-injury condition. Lucia could have recovered lost wages and the value of her diminished earning capacity if she had incurred any, but it appears she did not. She is entitled, however, to her past and any future medical expenses, including transport in the ambulance, treatment, drugs, equipment, etc. She is also entitled to damages for the physical pain she experienced, any emotional anguish that might have resulted from being hunted like a wild animal, etc.

Lucia has a (likely unviable) negligence claim against Archie for failure to assist or rescue.

Generally there is no duty to act, assist or rescue in cases of non-feasance, i.e. where the prospective defendant did nothing to cause the harm from which s/he might have rescued the plaintiff. However, in cases of misfeasance, i.e. where the plaintiff suffered injury from a risk of harm that arose out of the defendant's conduct, the defendant does have a duty to assist or rescue the plaintiff. Thus, when Archie shot Lucia, then saw her lying

there hurt, and ran away instead of helping her, he breached his duty to assist her.

While this claim seems ok at first, it fails for multiple reasons. First, Archie's failure to assist did not cause any damages because Tony did act to assist at virtually the same instant. In other words, there are no injuries that Lucia suffered but would not have suffered but for Archie's failing to assist her. Second, it is not clear that Archie's shot is the one that injured her, so it is not clear that he had the duty to assist her in the first place; it could be argued that he did have the duty under the alternative liability rule, but there would still remain the causation/damages problem.

Lucia could try to mount a negligence claim against the city for denying a building permit to Paula.

Lucia could try to argue that the city was negligent in denying Paula's application for a permit to build a fence that would have kept Lucia out of harm's way. However, there are numerous problems with this claim. Perhaps not first, but most importantly, the claim would not pass the discretionary function test. The government had discretion as to whether to award the permit. But that discretion is probably of the type the legislature intended to fall within the realm of governmental immunity. (This is not like government employees choosing to fight a fire in a stupid way. The decision whether or not to award a permit involves the social, economic, and political factors that the legislature seeks to keep immunized.) Further, while there might be but-for causation (Lucia would not have gone on the property and not been shot if there had been a fence) there would be a scope of liability problem because a shooting victim is not a foreseeable plaintiff in the context

of the putatively tortious act of denying a building permit. Thus, the injuries are too attenuated, remote or surprising for the attendant damages to be awarded in connection with the act.

Lucia could attempt to file a negligent or intentional infliction of emotional distress claim, but it would probably fail.

One of the essential elements of both IIED and NIED is that the plaintiff has to have suffered extreme emotional distress. Lucia does not seem to have suffered distress such as a person cannot reasonably be expected to endure. To the contrary, she suffered "nothing more than minor inconveniences." Thus, her NIED and IIED claims would fail.

Lucia could try to sue for punitive damages, but would probably fail. If she prevailed on a punitive damages claim against anyone though, it would probably be against Paula.

Punitive damages are rarely awarded. Their purpose is to punish especially egregious tortious conduct and to deter others from the same conduct. They are generally only available when there is a bad state of mind on the part of the tortfeasor similar to malice, though sometimes they are recoverable when there not intent to harm but there is recklessness or serious risk-taking or wanton conduct.

Archie and Tony would not probably be liable for punitive damages because they did not know that they were shooting at a human and they did not even expect there to be other hunters in the area. Their conduct was bad, but not heinous.

However, Paula's act of placing the traps on the land was arguably malicious. She was fed up with trespassers and wanted to stop them. She didn't just want to deter them from coming on the property, either, or she would have posted warning signs. She wanted them to be shot, or at least scared to death. This is at least reckless if not malicious, and it is conduct that would be eminently worthy of deterrence. Therefore, Lucia should probably seek punitive damages from Paula.

Archie, Tony, and Paula are jointly and severally liable for Lucia's damages.

Under the alternative liability rule, if two or more defendants are engaged in simultaneous wrongful conduct but the harm is caused by only one of the defendants the identity of which is not known to the plaintiff and all the defendants are present in court the burden of proof shifts to the defendants to prove which one of their actions was the cause in fact (but-for cause) of the plaintiff's injuries. If the defendants fail to meet this burden then each defendant is jointly and severally liable for all of the plaintiff's damages. That means that the plaintiff can recover the entire amount from whichever defendant she can most easily recover from, and then that defendant can sue the others for contribution (reimbursement of the appropriate share).

Here, the shooting of Archie, Tony, and Paula's trap was simultaneous wrongful conduct. Ballistics evidence has failed to determine which gun shot the offending bullet. Therefore it seems unlikely that the defendants will be able to prove who was the actual tortfeasor, and they will thus be jointly and severally liable. However, it is important to note that in

order to proceed under this theory it is crucial to join all of them as defendants, since all of them must be present in court for the rule to apply. Compare Barron v. Martin.

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Answer-to-Question- 2

Bobby has a negligence claim against Roger.

Under the general duty principle Roger had a duty to foreseeable plaintiffs to exercise reasonable care with regard to foreseeable risks of harm arising from his conduct. MacPherson v. Buick. There need not be a special relationship between the parties for a duty to arise between them. Rudolph v. Arizona BASS Federation. Here, the act of parking the car on a hill is the conduct; a foreseeable risk of doing so is that the car might roll down the hill. Anyone downhill from the car would be a foreseeable plaintiff. Thus, the duty owed would be to make sure the car did not roll down the hill.

Breach of duty can be established according to a reasonable person test, which asks whether a reasonable person would have exercised greater care than the defendant did under the same or similar circumstances. Here, it seems clear that Roger breached his duty because a reasonable person would not park his car in such a way that it might roll

down the hill. It is not clear why the car rolled down the hill: did Roger fail to set the parking brake? Was the parking break non-functional? Either way, a reasonable person would set the brake and, if it was non-functional, would not park the car on a hill. Thus, it appears that Roger breached his duty of reasonable care.

Another method of determining whether conduct constituted a breach of duty is to apply Learned Hand's formula from *U.S. v. Carroll towing*. The formula states that there is a breach of duty if $B < PL$, where B is the cost and burden of a feasible safer alternative course of conduct (but not one which would unduly impair the utility of the defendant's conduct), P is the probability that harm will result the conduct, and L is the gravity of the harm risked by the conduct (but measured by what is reasonably foreseeable, not by a worst case scenario nor by what actually happened.)

Here, the burden of setting the parking brake is so trivial as to be evanescent; it is free and takes almost no time or energy. If it was a failure to have a non-functioning parking brake fixed that caused the car to roll, then the cost of fixing it may not be negligible but still only on the order of a hundred or hundreds of dollars; and, actually, the burden in that case could be seen instead as the cost and burden of parking on level ground, which is actually free and also takes little effort or time. The probability of a car rolling down a hill it is parked on when the parking brake is either not set or not functioning is high; cars are heavier than air, and thus will roll downhill if they are allowed to; everyone knows this. The gravity of the harm risked by parking a car on a hill without securing it is enormous. Cars are terribly heavy and have great inertia when they get up to speed. They can smash whole houses, and of course people too. Thus the harm risked times the

probability of it occurring dwarfs the burden of alternative conduct, indicating that there was a breach.

Since the precise reason why the car rolled down the hill is not entirely clear, Bobby may want to proceed under a Res Ipsa Loquitur claim.

That the injury to Bobby would not have occurred if the car had not rolled down the hill goes without saying. His injuries were caused by the impact of the thing that rolled down the hill because it so rolled.

Scope of liability is similarly non-problematic. Anyone downhill from the car is a foreseeable plaintiff; any injury (including death) resulting from the impact of the rolling car (unless there is some sort of rube-goldberg scenario, which we don't have here) is a foreseeable consequence, and there were no intervening forces at work (unless something ran into the car and caused it to roll, which the fact pattern does not state.)

Bobby's damages are huge. Assuming he was conscious until he died, his damages for physical pain would be high even though they lasted only a short while. Assuming he was mature enough to realize that he was going to die at such a tender age, his emotional suffering (here mental anguish at an unfair young age) would also be considerable. His medical expenses may be considerable, depending on the treatment he received.

But probably the hugest part of his damages would be future lost earnings (including fringe benefits). (These can be recovered in a survival action for negligence, i.e. one

which outlives the decedent and is prosecuted by the estate.) These damages will have to be proved by substantial evidence and not mere conjecture. *Calva-Cerqueira v. U.S.*. Thus, the expert will use actuarial tables and Bureau of Labor statistics. Race should not be taken into account, though gender may be. *Id.* His estate will have to hire an expert to determine how long Bobby would have lived, how long he would have worked, and how much he would have earned over that work life (and how much in the way of pensions or other benefits he would have received even after he stopped working). Then the expert will have to total all that up and discount it to present value, perhaps using the Market Interest Rate approach, Real Interest Rate Approach, or Total Offset approach. Generally speaking, whatever approach is used will have to take into account the projected rate of inflation and also the (usually but not always countervailing) time-value of the lump sum payment (i.e. the return the investment would earn if placed in the best and safest investments at the time the judgment is rendered.) There may be a battle of the experts here because different economists will use different approaches and come to very very different final figures.

His estate may also be able to recover the loss of enjoyment of life, i.e. the pleasure he would have derived from living to a ripe old age; but not all jurisdictions would allow this.

Mary and Scott have a wrongful death claim against Roger.

Roger's negligence caused the death of Bobby. As a result Mary and Scott lost the society and companionship of their son for the rest of their lives. Wrongful death actions allow the immediate family members of a decedent who died as a result of negligence to

recover for such losses through wrongful death actions. Other damages allowable under such claims are the value of services and economic support the decedent would have provided to the family-member plaintiffs, but where the decedent is a child such damages would not likely be provable because they could really only be based on speculation as to their existence and amount. But damages need to be proved by a preponderance of the evidence based on substantial evidence and not mere speculation. *Calva-Cerqueira*. It is hard to put a figure

Mary and Scott may have a Negligent Infliction of Emotional Distress claim, though without more facts it would probably fail.

The fact pattern does not state that Mary and Scott suffered severe emotional distress as a result of their contemporaneous sensory perception of Bobby's injury or their immediate arrival on the scene prior to any significant change in his condition or the other circumstances. However, it also does not state that they did not. This will have to be investigated. Time does not permit an extensive discussion of the Impact Rule, Foreseeability Test, and Zone of Danger Rule since it is not clear that the requisite extreme emotional distress is present.

Bobby's estate may have a products liability claim and a wrongful death claim against the manufacturer of the car.

It is highly unlikely, but maybe Roger did nothing negligent and the parking brake, which had been working fine, spontaneously failed. In that case, though it would be very hard to prove and would require many expensive forensic tests and expert analysis, Bobby's

parents could recover all the damages discussed above from the car manufacturer. If they can prove that the cause of Bobby's injuries and death was the spontaneous failure of the brake mechanism, strict liability would apply and the pockets of the defendant would be deep. The downsides to this approach are that the claim is improbable, it would be costly to investigate, and it would introduce confusion if it was maintained alongside any of the other claims discussed above.

Frank has a negligence claim against George.

Under the general duty principle George had a duty to foreseeable plaintiffs to exercise reasonable care with regard to foreseeable risks of harm arising from her conduct. *MacPherson v. Buick*. There need not be a special relationship between the parties for a duty to arise between them. *Rudolph v. Arizona BASS Federation*. The conduct in question is George's transporting of his belongings into the pod (specifically by throwing them out the window instead of carrying them by foot and hand.) The duty would be to exercise reasonable care in doing so.

Breach of duty can be established according to a reasonable person test, which asks whether a reasonable person would have exercised greater care than the defendant did under the same or similar circumstances. Here, it seems clear that George breached his duty because a reasonable person would carry the belongings to the pod by hand, on foot; alternatively, a reasonable person would buy beer and pizza and ask friends to do it; alternatively, a reasonable person would pay movers to do it. Thus, the reasonable person test indicates that there was a breach of duty.

Another method of determining whether conduct constituted a breach of duty is to apply Learned Hand's formula from *U.S. v. Carroll Towing*. The formula states that there is a breach of duty if $B < PL$, where B is the cost and burden of a feasible safer alternative course of conduct (but not one which would unduly impair the utility of the defendant's conduct), P is the probability that harm will result from the conduct, and L is the gravity of the harm risked by the conduct (but measured by what is reasonably foreseeable, not by a worst case scenario nor by what actually happened.) The burden of carrying the belongings in person to the pod is "a lot more time." But really it's not "a lot" of time at all, if compared to the length of time that a reasonably foreseeable plaintiff will have to live with a reasonably foreseeable injury (as in this case Frank will have to live in a wheelchair for the rest of his life.) Or the burden is the cost of pizza and beer, or of professional moving services. Again, these are small compared to the costs of paraplegia. The probability of harm resulting from throwing the furniture out the window depends on facts not developed in the pattern. We don't know whether Frank was trespassing on the property or walking on the sidewalk off the property or walking up to the door to offer a magazine subscription. Was it a densely populated streetcorner or a rural neighborhood? It may not matter, inasmuch as George should have been looking where he was throwing the stuff; had he been looking, and he saw Frank, then the riskiness of throwing the chair before Frank continued past was too high; if he was not looking, then throwing heavy furniture out the window without looking was too high. The gravity of the harm risked is also very large: any person or thing that was inadvertently hit with a chair thrown from a window (and note this is not a first story window, being "above the pod, and pods being rather tall) can be expected to suffer considerable damage. Thus, Hand's formula indicates breach because the burden is small and the risk and harm risked

are both large.

But for the throwing furniture out the window, Frank would not have been hit with the furniture. Enough said.

Scope of liability does not pose a problem (unless there are facts we don't know.) The connection between throwing heavy objects out a second-or-higher-story window and the spinal injury suffered by someone walking below and being struck with said objects is not attenuated, remote or surprising.

Damages are potentially huge here. Frank is entitled to collect past and future medical expenses (including equipment, of which paraplegics may require a lot) (provided the medical expenses are reasonable, necessary and caused by the tortious conduct). Since it was a spinal injury, there was probably spinal surgery, which isn't cheap. Frank is also entitled to loss of enjoyment of life damages (if the jurisdiction allows them) which could be considerable, considering the vast range of things one cannot continue to do after becoming a paraplegic; one such thing would be to care for the children, whom Frank had to stop raising and return to their mother due to his injury. He would also be entitled to damages for pain and emotional suffering, which would also be considerable considering the anguish becoming a paraplegic would probably involve. Unless we believe Cass Sunstein, who says people generally get over it and return to a normal happiness level after some relatively short period of anguish.

Frank may have a Loss of Consortium claim against George, but it would likely fail

because most jurisdictions don't allow LOC claims to parents for the loss of their non-dependent children's consortium.

These damages could probably recovered under the LOEL damages discussed in th preceding subsection, so it's pretty moot but potentially looking into if this jurisdiction allows loss oc child consortium but not LOEL.

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Answer-to-Question- 3

Patricia has claims against Charles for Assault and Battery.

Words can constitute assault if together with other acts or circumstances they put the plaintiff in reasonable apprehension of an imminent battery. Restatement Third of Torts, section 31.

Before beating Patricia, Charles stated that he was going to make her pay, while his face was red and his fists were balled and he was storming around the room like a professional boxer around the ring. This would create in any reasonable person the apprehension of an imminent battery. Then he rushed over towards her, which would make the apprehension reasonable even if the storming about wasn't enough.

Battery is intentional conduct, intended to cause a harmful or offensive contact with a person. Some jurisdictions require a plaintiff to prove only that the defendant intended the contact, and that the contact was harmful or offensive, but not that the defendant intended the conduct to be harmful or offensive. This is called single intent. Other jurisdictions do also require the plaintiff to prove that the defendant intended the conduct to be harmful or offensive; this is called dual intent. It doesn't matter which jurisdiction this happened in, though, because Charles actions meet all the elements of either test.

Charles beat Patricia, which is harmful and offensive contact. He intended to beat her, and intended that it be harmful and offensive, as evidenced by his statement that he would "make her pay."

But for the beating, Patricia would not have suffered the physical injuries Charles inflicted on her with that beating. The injuries are likely (though it is not stated in the fact pattern) precisely the sort of injuries one would expect from such a beating. However, it would not pose a scope of liability even if the injuries were unexpected, so long as they were physical injuries, because of the eggshell plaintiff rule: a negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable person should have foreseen as a probable result of his conduct. Nor were there (as far as we know) intervening forces. Thus, the connection between the battery and the injuries is not attenuated, remote or surprising; thus, there is no scope of liability problem for Patricia.

The damages available to Patricia under the assault and battery claims is whatever amount of money is equivalent to the tort themselves, in addition to the ordinarily available ompensable damages. Those ordinary compensable damages include past and future medical bills (so long as they are reasonable, necessary and caused by the tortious conduct)(and which would probably include the therapy she requires as a result, though this may be better sought under the IIED claim discussed in a following section), which are already equal to or greater than \$35,000. She is also entitled to damages for her physical pain and emotional suffering, which (given her mental state) are of considerable magnitude and duration. If her mental anguish will permanently scar her (as by giving her PTSD) then she may even be able to recover loss of enjoyment of life damages, even if the physcial injuries eventually heal. All the future damages will have to be calculated and added up by experts, then dicounted to present value (by taking into account the time value of the lump sum award as well as the projected rate of inflation).

Further, Patricia could pursue punitive damages as well, even though they are rarely awarded and even though Charles probably is judgmnt proof. (By stretching a theory of vcarious liability or joint and several liability, she may be able to recover punitives assessed against Charles from Dr. Wilson due to his failure to warn her of Charles' intentions.) Their purpose is to punish especially egregious tortious condut and to deter others from the same conduct. They are generally only available when there is a bad state of mind on the part of the tortfeasor similar to malice, though sometimes they are recoverable when there not intent to harm but there is recklessness or serious risk-taking or wanton conduct.

Here, Charles' conduct (assault and battery, which are intentional torts) evinced malice as well as a heinous disregard for the rights and safety of Patricia. One of the Gore guideposts gives indications that punitive damages would be warranted here because the degree of reprehensibility of the conduct is high.

Noteworthy, however, is that the Statute of Limitations for intentional torts is generally very short, so she should bring her claim timely.

Patricia has a claim of intentional infliction of emotional distress against Charles.

A claim for IIED requires a plaintiff to prove that the defendant engaged in (1) extreme and outrageous conduct (2) that was intended to cause and did cause (3) severe emotional distress to the plaintiff, or that the defendant evinced a reckless indifference to the possibility that his actions would cause severe emotional distress. The beating was extreme and outrageous, as evidenced by the five-figure medical bills, the physical manifestations of the emotional trauma, the ongoing need for therapy, etc.; and the same things also evidence that the beating did cause severe emotional distress. It was intended to cause that distress, as can be seen from Charles stated intent of "making her pay."

Thus, the IIED claim is viable. The damages available are the same as those discussed under assault and battery, above, plus punitives.

Patricia has a claim of negligence against Dr. Wilson.

The tarasoff rule states that a mental health professional owes a duty to exercise reasonable care to protect a third party when he or she knows or should have known (using

that reasonable degree of skill, care and knowledge ordinarily possessed and exercised by other mental health professionals acting under similar circumstances) of a patient's intent to commit serious violence against a foreseeable third party. The Dunkle rule tightens that rule somewhat: A mental health professional owes a duty to exercise reasonable care to protect an identifiable (as opposed to a foreseeable) third party when he or she knows or should have known of a patient's intent to commit serious violence against that third party. (This is a duty to use reasonable care, not really to warn.) Under either rule, Dr. Wilson owed Patricia a duty to exercise reasonable care to protect her because Charles told Dr. Wilson on several occasions that he intended to kill her (serious violence) and even identified her by name. Dr. Wilson did nothing to protect Patricia, thus breaching his duty. It seems reasonable to assume that, had Patricia been warned or had Dr. Wilson taken any real steps to uphold his duty, the beating could have been avoided. In other words, but-for causation, while not a slam dunk, is probably a reasonable inference away (which is good enough.) There is no scope of liability problem, for the reasons discussed in the A&B section above. The damages are the same as those described in that section as well.

Amelia has a claim of negligence against Dr. Wilson, though it could fail for scope of liability.

This claim is the same as Patricia's in every respect except that Amelia was not a foreseeable victim, nor an identifiable victim, of Charles' intended violence. Thus, her claim would probably fail under either Tarasoff or Dunkle.

Amelia has a claim of negligent infliction of emotional distress against Charles.

There are a number of tests for NIED, used in different jurisdictions. The different tests fall into two families: bystander liability (fear for the well-being of another) and direct physical risk (fear for one's own well-being.) It is not clear who Amelia was afraid for--perhaps both herself and Patricia--so I will get through as many of all of the tests as I can in the short time remaining. I will say now that the claim would likely be viable under ANY of the tests, even the impact rule, and even in a jurisdiction that requires physical manifestation of the distress.

Under any of these theories, the emotional distress has to be extreme. Amelia can prove that easily, since she is having nightmares, losing sleep, is on constant alert, and is losing hair. Still, an expert would be handy to establish causation and scope of liability, if not also damages (especially as regards prognosis and resulting future medical and LOEL damages).

fear for own wellbeing:

Impact rule:

The impact rule allows recovery for emotional distress only if the defendant's negligent conduct caused physical impact with the plaintiff (and the slightest touching is ok.) Since Amelia was under the covers in the same bed with Patricia when the beating began, it is reasonably inferable that Charles' beating Patricia also caused some contact (even if only through the medium of the covers being moved and brushing Amelia) with Amelia.

Zone of danger

The zone of danger test requires that the plaintiff must have been at risk of [physical impact in the foreseeable zone of danger when distress arose from fear of one's own physical safety. Amelia could have been crushed by Charles because she was in the same bed. She also could have become the object of his attention, since she was right there and he was out of control. She would thus meet this burden.

Foreseeability test:

Recovery for emotional distress is allowed when severe emotional distress is the reasonably foreseeable consequence of the defendant's negligence. Charles could argue that he did not know she was there; but he continues after she ran away, screaming, so that argument would not probably work.

fear for another's wellbeing:

Impact rule:

The impact rule allows recovery for emotional distress only if the defendant's negligent conduct caused physical impact with the plaintiff (and the slightest touching is ok.) Since Amelia was under the covers in the same bed with Patricia when the beating began, it is reasonably inferable that Charles' beating Patricia also caused some contact (even if only through the medium of the covers being moved and brushing Amelia) with Amelia.

Zone of danger

The zone of danger test allows one who is himself or herself threatened with bodily harm

in consequence of the defnendant's negligence to recover for emotional distress resulting from the death or serious physical injury

Foreseeability test:

The damages available here would be past and future medical treatment (therapy and drugs), emotional suffering, LOEL if available and provable (perhaps by expert testimony as to long term effects of the distress)