

## Outline for Torts

### Intentional Torts

- I. Intent
  - a. Intent can be achieved two ways:
    - 1) The purpose was to cause the harm.
    - 2) Knowledge to a sufficient certainty.
  - b. Mistaken intent is still intent. Mistake does not vitiate the intent.
  - c. Insanity is not a tort defense. It does not vitiate the intent.
  - d. Transferred intent
    - 1) Intent to commit a tort against a third party, but tort occurred against plaintiff.
    - 2) Intent to commit another tort, but a different one occurs. Assault to battery.
  - e. Recklessness is not enough to satisfy intent.
- II. Battery
  - a. Requirements
    - 1) Intend to cause a harmful or offensive touching.
    - 2) The act does cause a harmful or offensive touching to plaintiff.
  - b. Mere words never suffice, but provide context.
- III. Assault
  - a. Intent to cause a reasonable apprehension of an imminent battery.
  - b. Causes a reasonable apprehension of imminent battery.
    - 1) If she reasonably apprehended, it does not matter whether the tort-feasor could commit the battery.
    - 2) Imminence-an instant away from happening.
- IV. False Imprisonment
  - a. Elements
    - 1) Defendant acts with intent to confine plaintiff in a bounded area.
    - 2) Plaintiff is knowingly confined in a bounded area without an adequate legal justification and not of his or her own volition.
      - A. In a minority of jurisdictions, actual harm will substitute for knowledge.
  - b. If you can reasonably escape, then you are not falsely imprisoned.
  - c. A means of escape is not reasonable if you do not know of it and it is not apparent.
- V. Intentional Infliction of Emotional Distress
  - a. Elements:
    - 1) Intent to cause emotional distress.
    - 2) Defendant's acts were extreme and outrageous.
    - 3) Plaintiff suffers severe emotional distress.
  - b. Want people to get over it.
  - c. Does not transfer from trespass torts:
    - 1) Trespass to land.
    - 2) Trespass to chattel.
    - 3) Assault
    - 4) Battery

- 5) False Imprisonment
- VI. Trespass to land
  - a. Elements
    - 1) Intent to go on to the land of another.
    - 2) Unauthorized entry.
    - 3) Entered land of another
  - b. Prior rule: property up to heaven and down to the center of the earth.
    - 1) New rule: whether it is close enough and affects the enjoyment of the use.
- VII. Trespass to chattel
  - a. Element:
    - 1) Intent to intermeddle with or use the chattel (property) of another.
    - 2) Chattel is the plaintiff's to have.
    - 3) Causes:
      - A. An impairment in condition, quality, or value.
      - B. Possessor is deprived of use for substantial time.
      - C. Harm is caused to the possession or other legally protected interest.
- VIII. Conversion
  - a. Elements
    - 1) Intent to exercise dominion over chattel.
    - 2) So seriously interferes with plaintiff's right of control that the remedy is justified.
  - b. Remedy is a forced sale-has to pay full value of chattel but defendant keeps chattel.
  - c. Good Faith Purchaser-Can use this as a defense unless chattel was stolen. Plaintiff can only win if third party stole it, unless the defendant bought it from business in the business of selling that item.

Privileges (defenses to intentional torts)

- I. Consent
  - a. Silence does not mean consent. Fact specific.
  - b. The issue is not whether there was actual consent, but whether a reasonable person would have reasonably consented.
  - c. Consent given by a mistake is still valid, unless defendant induced the mistake (misrepresentation, fraud, or duress) or should have known the plaintiff's consent was based on a false pretense.
  - d. In most states, consent to a criminal act is not valid.
- II. Self-defense:
  - a. defendant (who has the burden of proof) is not liable for tort if:
    - 1) It was performed under a reasonable belief by the defendant that he is or was about to be attacked; and,
    - 2) Constituted reasonable force. Meaning:
      - A. That it was reasonable to use force.
      - B. Amount of force used was reasonable.
  - b. Some states require a retreat when it is reasonably safe to do so (except in the home).
- III. Defense of others.

- a. If a third party would have been privileged to use self-defense, defendant is privileged to use reasonable force on the third party's behalf.
- IV. Defense of Property
  - a. Defendant is privileged to use a reasonable amount of force to prevent a tort against his property.
  - b. Less than the amount for self-defense and almost never deadly force.
- V. Recovery of property
  - a. Defendant may be privileged to use reasonable force to recover wrongfully obtained chattel:
    - 1) Defendant must be in uninterrupted fresh pursuit.
    - 2) A mistake vitiates the privilege.
      - A. Except for shopkeepers who reasonably suspect a person of shoplifting.
- VI. Necessity
  - a. A defendant may commit an intentional tort if it is reasonably necessary to prevent a further injury.
  - b. The threat must be:
    - 1) Natural/external
    - 2) Substantially more serious than the interference.
    - 3) Sudden, unexpected, and temporary.
  - c. If acting to protect the public at large, the privilege is an absolute one and defendant need not pay for damages. If the act is to protect a private interest, he must compensate the plaintiff for damage, but is allowed to act.
- VII. Common law certain people, i.e. parents, teachers, and wardens are allowed to use reasonable force to maintain discipline.

## Negligence

- I. Elements
  - a. Defendant had a duty to plaintiff
  - b. That duty was breached
  - c. That breach caused
    - 1) Causation in fact.
    - 2) Proximate cause.
  - d. Damages
- II. The Learned Hand Test
  - a.  $B < PL$ 
    - 1) Burden of taking steps to avoid harm.
    - 2) Magnitude if harm occurs (L).
    - 3) Probability of it occurring (P).
      - A. Actual quantities not needed.
- III. Customary practices can be used as evidence that a standard of care was breached, but it is not the standard itself.
- IV. Standards of care:
  - a. The reasonable prudent person, an objective standard.

- 1) Ordinary intelligence, perception, and memory with the physical characteristics of the defendant.
  - 2) In general, a defendant's general mental characteristics or deficiencies are not taken into account.
  - 3) The context must be considered as well.
  - 4) Special knowledge raises the standard.
- b. Children are held to a subjective standard, and children under a certain age cannot be held negligent at all. Age, maturity, intelligence, training, and experience.
- 1) Children engaged in adult activities (driving or snowmobiling) are held to the adult standard.
- c. Insanity is not a defense.
- d. Professionals are held to an objective standard of an ordinary member of the profession.
- 1) If there is a specialty, they are raised to that standard.
  - 2) Custom of profession/specialty is the standard generally.
  - 3) Liability cannot be based on a disagreement or failure of tactics.
- e. Medical Malpractice allows, sometimes, for the standard to be set locally (minority rule) or by similar areas (majority rule). Other use a national standard (minority rule).
- f. Informed Consent
- 1) Baseline Rule
    - A. Custom is that doctor has to disclose X (Duty)
    - B. Doctor did not disclose X (breach).
    - C. With that knowledge the plaintiff would not have had the surgery.
    - D. Damages were caused.
  - 2) Canterbury Rule:
    - A. A doctor must disclose what a reasonable person would want to know. (Material Risks). (Minority Rule)
    - B. Doctor did not disclose
    - C. Patient needs to show (Majority Rule)
      1. That a reasonable patient, upon learning of the risk, would not have consented; and,
      2. That the patient would not have consent.
- g. Doctors have a duty to disclose any profit or research interests of the treatment.
- V. Negligence Per se.
- a. Duty and breach are set by a statute or administrative regulation.
    - 1) An alternative method of establishing negligence, not an exclusive one.
  - b. The statute is designed to prevent this sort of injury from this sort of victim-zone of protection.
  - c. The court must also decide if the statute is appropriate to be a civil duty by considering:
    - 1) Difficulty in proving causation
    - 2) Creates a new civil duty.
    - 3) Is the liability too strict (too detached from defendant's level of care)?
    - 4) Disproportionate liability compared to criminal law.
    - 5) Too vague of a duty.

- d. Majority rule for excuses, which the defendant has the duty to prove:
    - 1) Incapacity or reasonable inability to comply.
    - 2) No knowledge of violation (ignorance of facts, not law).
    - 3) Unable after reasonable diligence to comply.
    - 4) Emergency not of the defendants making.
    - 5) Greater risk of harm to comply.
  - e. Minority rule is that NPS is only evidence of unreasonableness which the defendant must rebut by an excuse.
- VI. Proof of Negligence
- a. Circumstantial evidence, which allows a fact finder to draw inferences, is okay.
  - b. Res ipsa loquitur-when a plaintiff cannot show exactly what was done, it may suffice to show that defendant was negligent through inference.
    - 1) The accident was not the type which would have occurred unless someone was negligent. And,
    - 2) Defendant exercised substantial control over the injury causing instrument. Therefore,
    - 3) The accident was caused by defendant's negligence.
      - A. Used to help survive a pre-trial motion with little evidence.

## Causation

- I. Causation-in-fact
- a. 2 separate elements which must be met
    - 1) Causation-in-fact (but for)
    - 2) Proximate cause (legal cause)
  - b. Causation in fact: but for defendant's negligence the injury and damages would not have occurred.
    - 1) Can be more than one.
    - 2) There must be a causal link, in that the negligence must be something that makes the result more likely.
  - c. Plaintiff must produce evidence that defendant more than likely caused the injury.
    - 1) Must show that the harm was more than twice as likely with the defendant's negligence then without it. Otherwise, the evidence suggests the injury would have occurred anyway.
  - d. If there are two causes, both of which are sufficient to have caused the injury, they cancel each other out as "but for" causes. In these cases, causation can be determined based on whether the negligence was a "substantial factor" in causing harm and allows a defendant to be held liable, who otherwise would not be liable for his negligence.
  - e. If there are multiple possible negligent causes and the plaintiff cannot know which was the cause, the court will shift the burden to the defendants to prove who caused.
  - f. Sindell uses a market share to apportion liability. Uncommon.
- II. Proximate cause is less a matter of fact and logic, but how broadly the courts wish to allow a defendant to be held liable for the damages he causes-in-fact.
- a. Was the injury within the scope of risk that the defendant created with by the defendant's negligence? (Foreseeability)

- A. The type of accident is what needs to be foreseeable, not the exact sequence of events.
    - b. Intervening causes-Causes-in-fact of an injury that arises subsequent in time to defendant's negligence.
      - 1) Foreseeable-is the intervening cause in scope of the risk. More foreseeable, less superseding.
      - 2) Independent-More independent, more superseding. An Act of God type thing, which would have occurred without defendant's negligence.
        - A. Superseding cause is an intervening cause that is so powerful that defendant is not a proximate cause.
        - B. Intentional torts are very likely to be a superseding cause, though not necessarily.
        - C. Subsequent injury or malpractice is not a superseding cause.
    - c. Rescue doctrine-Precludes a case from getting dismissed for lack of foreseeability. Plaintiff must still establish other elements.
      - 1) If attempt to rescue is foolish, might be superseding.
      - 2) Firefighter's rule-precluded from claim if the injury was within the scope of the job.
- III. Public Policy
  - a. Social hosts cannot be liable for their drunk driving guest, unless the guest is a minor.
  - b. Plaintiffs not conceived or exposed at the time the injury was inflicted.
- IV. Comparative Negligence.
  - a. Contributory negligence-the minority rule which states that if plaintiff is negligent at all there can be no recovery.
    - 1) Exceptions:
      - A. When defendant had the last clear chance to prevent the injury.
      - B. Treating plaintiff more forgivingly when defendant was proximate cause.
  - b. Comparative Negligence-The majority rule where plaintiff can recover if negligent, but the award will be reduced by percentage of plaintiff's fault.
    - 1) Pure-minority rule where plaintiff can recover no matter how much was their fault.
    - 2) Modified-majority rule, where plaintiff has to be less than 50% (49% in some states) to recover.
- V. Assumption of Risk
  - a. Express assumption of the risk (all states still do this).
    - 1) Conflict between tort common law and contracts, contracts win.
    - 2) Enforced unless:
      - A. It contravenes public policy (such as for essential services where the plaintiff had no choice).
      - B. Defendant's tort was intentional or wanton-and-willful;
      - C. The injury was medical malpractice.
      - D. Contract waived application of a safety statute.
  - b. Implied assumption of the risk (most states do not use).
    - 1) Actual knowledge of the risk.

- 2) Actual knowledge of the risks magnitude.
- 3) Plaintiff voluntarily encounters risk.
  - A. All risks, not just unreasonable risks.
  - B. Does not apply when there is no other alternative.
  - C. Constructive knowledge not good enough.
- c. Implied assumption of risk is replaced with comparative negligence.
- VI. Statute of Limitation
  - a. Certain amount of time to file a lawsuit.
  - b. Discovery rule-time begins when plaintiff knows or should have known of the injury.
  - c. Cannot wait until the injury gets worse.
  - d. Procedural defense which the defendant must make it within a reasonable time.
  - e. Tolling
    - 1) Minor does not start until she is 18.
    - 2) Fraudulent concealment.
- VII. Statute of Repose
  - a. Substantive.
  - b. Begins at the time of injury and runs for the time set by statute. Afterwards, it cannot be brought.
    - 1) Not subject to tolling.
    - 2) Usually long, 10-20 years, and for things like buildings.

## Immunity

- I. Spousal immunity
  - a. Most states have gotten rid of it mostly
  - b. It was based on:
    - 1) Unity of husband and wife as 1 person.
    - 2) Ruins peace and tranquility of marriage union.
    - 3) Other ways, i.e., criminal laws and divorce
    - 4) Do not want these kinds of lawsuits.
      - A. Marriage ended in the meantime.
      - B. Tort occurred before marriage.
      - C. Intentional torts.
      - D. Car insurance.
    - 5) Fraud or collusion.
- II. Parent-child
  - a. Most states have gotten rid of it mostly.
  - b. Majority rule was to keep part of it when it is within the parental capacity.
  - c. Not allowed for:
    - 1) Relation was only incidental to the case.
    - 2) Willful and wanton
    - 3) Intentional torts
- III. State and Local Government Immunity
  - a. Every state has different laws for when they are immune
  - b. Cities have some immunity due to hardship in paying.

- c. Majority rule: Immunity waived for certain core governmental activities.
  - d. Police:
    - 1) There is no duty to protect an individual.
    - 2) They determine how to allocate their resources.
    - 3) If they voluntarily assumed the duty (911 operator) then there is a duty.
- IV. Federal Immunity
- a. FTCA waives sovereign immunity, employees are immune.
    - 1) Not waived for negligence for discretionary function for social, economic, or political goals.
    - 2) Military
    - 3) Strict liability
    - 4) Punitive damages
    - 5) Construes waivers narrowly,
    - 6) Cannot sue for intentional torts
  - b. If the government is immune, the employee may be able to be sued. If the government waives immunity, the employee is immune.
  - c. Public officers cannot be sued if acting within their official capacity. Tend not to be immune for ministerial acts. If it is a discretionary, was it done in good-faith?

#### Joint and severally liability

- I. Some states have gotten rid of it, no majority rule.
- II. If joint and several liability is possible, look for three things.
  - a. Action in concert
  - b. Vicarious liability (employee-employer)
  - c. Indivisible harm (if they have gotten rid of J and S, this is what they do)
- III. Some jurisdictions keep it with comparative negligence and some get rid of it when they bring in comparative.
- IV. Reason to keep
  - a. Allocability does not mean divisibility.
  - b. Plaintiff can get a full recovery.
  - c. Would hurt the plaintiff
- V. Reasons to lose:
  - a. Can divide the harm
  - b. Plaintiff keeps the risk.
- VI. Recovery
  - a. If plaintiff collects the full amount of the judgment from one tortfeasor, then he has had “full satisfaction” and cannot proceed against the other.
    - 1) Contribution: The settlor may recover against the other tortfeasor. Can seek if he paid more than his fair share. Does not require that plaintiff sued the other party.
      - A. Intentional tortfeasors cannot seek contribution.
  - b. Majority Rule: If the plaintiff settles with and releases a tortfeasor, this does not preclude suit against others, unless the settlement is a “full satisfaction.”
  - c. Partial satisfaction is subtracted from the amount recovered by another tortfeasor.

- 1) Pro tanto-reduced by the dollar amount received. Puts the risk on the non-settling defendant.
- 2) Pro rata-reduced by the percentage of fault of settling defendant. Puts the risk on the plaintiff.
- d. A good faith settlement renders the settlor immune from contribution from other joint tortfeasors.
- e. Indemnity: A joint tortfeasor who bears no fault (e.g., employer held vicariously liable) can recover full amount from party at fault.
- VII. A defendant will not be held jointly and severally liable for separate, subsequent injuries merely because it is difficult to separate the damages.
- VIII. The burden shifts to the defendant to establish that the injury is divisible to avoid J&S Liability.
- IX. To apportion damages, 1) reduce the damages into individual, indivisible injuries, 2) apportion liability separately for each one, and then 3) apply J&S liability to defendants and applicable indivisible injuries.

### Duty of Care

- I. Privity of contract:
  - a. Nonfeasance (failure to perform a contract) gives a right to sue only in contract.
  - b. Misfeasance (improper performance, lying, fraud, partial performance) can be sued under both contract and tort.
    - i. Lawyers only owe a duty to their clients.
- II. There is no general duty to rescue, except:
  - a. When plaintiff is a business invitor.
  - b. Bosses and their helpless employees on the job.
  - c. Person created the harm, even if not negligent.
  - d. Plaintiff controls the instrumentality of harm.
  - e. Person has induced reliance on a rescue and caused a harm as a result of not rescuing.
- III. There may be a duty to protect from a third party if:
  - a. There is a special relationship between defendant and plaintiff.
  - b. A special relationship of control between defendant and the third party.
- IV. Negligent infliction of Emotional Distress.
  - a. Used to require a contemporaneous physical harm.
  - b. If no physical harm, there must be:
    - i. A manifestation of the emotional reaction with definite and objective physical manifestations.
    - ii. A normal person's normal and natural reaction is unusually affected.
  - c. Many states require that the plaintiff have been in the zone of danger or a close family member to the victim.

### Unborn Children

- I. A viable fetus can recover from injuries suffered in utero if born alive.
- II. Majority Rule: It can recover, through a wrongful death action, if it not born alive.
- III. A "wrongful birth" suit can come about when the child is born but if not for the defendant's negligence, it would have been aborted. Damages include:

- a. Emotional injury
  - b. Extra cost of child care caused by the defect.
- IV. “Wrongful life,” a minority rule, is limited to medical expenses presented by the defect. However, emotional damages are not allowed, as non-existence is considered worse.
- V. Wrongful pregnancy may be brought for violations of informed consent or medical malpractice.

### Landowners

- I. No duty to protect off the premises from natural occurrences. Things coming from human acts, though, require reasonable care. Trees require reasonable care if he knows or should know of the danger.
- II. No duty owed to known or anticipated trespassers (majority rule). Some jurisdictions vary with no wanton injures caused to reasonable care.
- III. A licensee is on defendant’s property for his own purposes. They include social guests, solicitors, and anyone not an invitee.
  - a. Duty owed to a licensee includes:
    - i. Not to be willful and wanton.
    - ii. To warn of hidden dangers that are unknown to the licensee but are actually known to landowner.
- IV. Invitees are business visitors including customers, employees, delivery people, and repairman.
  - a. Owed a duty of reasonable care.
  - b. A social guest does not become an invitee because of an incidental occurrence.
- V. Active operations: a duty of reasonable care to licensees, invitees, and known trespassers. Verb injuries.
- VI. Invitees who go past the area of invitee state, may become a licensee or trespasser.
- VII. Attractive Nuisance doctrine of child trespasser:
  - a. Plaintiff is injured by an artificial condition.
  - b. Defendant knows or has reason to know that children are likely to trespass.
  - c. Defendant knows or has reason to know the condition presents an unreasonable risk of severe harm.
  - d. The child does not fully realize the risk.
- VIII. Many states have abolished the licensee and invitees and now apply reasonable care.
- IX. Landlords do not usually owe a duty to guests of tenants, except when the tenant does not know about the danger or lacks control over it.
- X. Coase Theorem: Assuming no transaction costs, the same result will occur regardless of the initial allocation of duties. But as there are transaction costs, liability should be imposed on the side with the lowest cost.

### Damages

- I. Types:
  - a. Nominal/symbolic
  - b. Compensatory-return plaintiff to where he would be had tort not occurred.
  - c. Punitive-punish the defendant and deter others. Requires wanton and willful conduct by the defendant and is established by clear and convincing evidence.
- II. When excessive damages are awarded, defendant can ask for:

- a. A new trial
- b. Remittur-giving the plaintiff the option to accept a lower award or a new trial.
  - i. Excessiveness is 1) whether a reasonable jury would have awarded this amount, 2) if the award shocks judicial conscience, or 3) was the result of jury passion or prejudice.
- III. Future damages require expert testimony and there is a discount rate applied by some court.
- IV. Personal injury damages are not taxable, but others are and punitive are.
- V. If plaintiff fails to mitigate, he cannot recover that increment.
- VI. Damages for property are based on fair market value at time and place of injury.

### Wrongful Death and survival

- I. Wrongful death suits are a procedural rule which require an underlying tort.
  - a. Plaintiff's next of kin (spouse, kids, parents, estate).
    - i. Loss of consortium and services.
    - ii. Loss of financial support.
    - iii. Funeral expenses.
  - b. Plaintiff is decedent's estate
    - i. Lost wages
    - ii. Funeral expenses
- II. Survival statutes allow another party to take over as the plaintiff

### Vicarious Liability

- I. Respondeat superior: an employer is liable for a tort committed by the employee committed within the scope of employment. Employee can also be sued.
  - a. Frolic-during work hours but too far outside the scope.
  - b. Detour is still within scope of employment.
- II. Intentional tort only allow vicarious liability when it is directly within the scope of employment (Bouncer-assault).
- III. Independent contractors: no vicarious liability because of arm's length and lack of control
- IV. Non-delegable duties do create vicarious liability, even with an independent contractor.
  - a. Car safety, property maintenance, building design, inherently dangerous activities, and crimes.
- V. Joint enterprises creates vicarious liability among participants if the tortious act is within the scope of the enterprise and defendant had some control over negligent party's acts.
- VI. The owner of a car is vicariously liable for negligence committed with his car.
- VII. Vicarious liability may impute comparative negligence when there is control between the parties.

### Strict liability

- I. Wild animals: owners are strictly liable for the harm they cause as wild animals.
- II. Domesticated animals: if the owner knows or should know the animal is vicious then he is liable
- III. Abnormally dangerous activities
  - a. The existence of a high degree of risk.
  - b. Likelihood that harm will be great.
  - c. **Inability to eliminate that risk by reasonable care.**

- d. Not a matter of common usage.
  - e. Inappropriate location.
  - f. Extent to which community values the activity.
- IV. Limitations
- a. Things which are in the scope of the hazard.
  - b. Easier to establish proximate cause for negligence than SL, and easier to establish PC for intentional torts than negligence.

### Products Liability

- I. Negligence is always present.
- II. Manufacturers owe a duty of care to foreseeable users of a product which they no is defective.
- III. Express warranty is always a possibility if the facts support it.
- IV. Implied warranty (minority rule)
  - a. Contracts and tort hybrid.
    - i. Contracts-the manufacture guarantees that the product will work in a certain way.
    - ii. Tort-Manufactures owe a duty to users and bystanders.
  - b. Merchantability-reasonably fit for the usual purpose.
- V. If manufacturer makes something which is defective, he is strictly liable to injured plaintiff.
- VI. Majority Rule: Restatement (Third) of Torts: Products Liability
  - a. One engaged in the business of selling or distributing a product is subject to liability for harm caused if the product is defective.
    - i. Manufacturing defect (strict liability and negligence)
    - ii. Design defect (negligence)
    - iii. Warning Defect (negligence)
  - b. Manufacturing defect is when that instrument causing injury was defective because it in a way it was not supposed to and was dangerous.
  - c. Design defect occur when a product is designed according to the manufacturer's specifications but the design itself is dangerous.
    - i. Majority Rule: (negligence)
      - 1. Risk-benefit (utility) test (similar to the LHT); and,
      - 2. Feasible alternate design.
    - ii. The defect must be reasonably foreseeably.
    - iii. If it is widely used with well-known risks, then it is not designed unreasonably.
    - iv. One minority rule is the consumer expectation test.
  - d. Defective Warnings:
    - i. Inadequate warnings of a foreseeable risk which could have been avoided or reduced by a reasonable warning.
    - ii. Effective Warnings:
      - 1. Tell what the danger is.
      - 2. How to avoid the risk.
      - 3. And obtains the user's attention.
    - iii. Requires actual or constructive knowledge of the risk. Lack of knowledge is a defense.

- iv. If the danger is obvious, no warning are necessary.
  - v. Hypersensitive plaintiffs may still be entitled to a warning, based on how widespread the hypersensitivity is, and how serious it is.
  - vi. A person who does not follow warning may not be able to establish causation.
- e. Proof
- i. Circumstantial evidence is okay.
  - ii. Evidence can be that harm could have only occurred because of a product defect.
- f. Defenses
- i. Comparative fault us a defense, though not if the plaintiff's negligence was in not discovering the defect.
  - ii. Misuse: the manufacturer not liable for abnormal or not reasonably foreseeable misuse.
    - 1. Abnormal means no constructive knowledge.
    - 2. 3 places misuse matters:
      - a. There was no defect (misuse was not reasonably foreseeable).
      - b. There is an issue with proximate cause (superseding).
      - c. Comparative fault.
    - 3. Misuse can be general, for it to be reasonably foreseeable does not require that the particular circumstances were foreseeable.
- g. Defendant's other than manufacturers
- i. Wholesalers and retailers are usually strict liable, as are the manufacturers.
  - ii. Sellers of used goods are generally not strictly liable either because the supply chain has been broken or because there is no defect, the product just wore down.
  - iii. Strict liability does not apply to service providers, if the sale of the product was incidental to the service.