



Products Liability

Discovering Connections

ACTIVITY (PAGE 132)

Since this exercise involves MORAL decisions and not legal ones, there are no correct answers. Rather, the students should be encouraged to develop the “why” or the reasoning that led them to their answers.

Legal Listening

Putting the Terms to Use (page 134)

Listening Script

Perhaps one of the most widely reported injury cases is *Lieback v. McDonald's Corp.* We've all heard of the seventy-nine-year-old New Mexico woman who suffered third-degree burns as a result of spilling a cup of coffee she had bought at a McDonald's® drive-thru. Many people, and even legal scholars around the world, have made fun of this case and, by extension, the American legal system. Most assume Ms. Lieback received millions of dollars simply because she spilled a cup of coffee on herself while driving. On closer examination, however, the facts show that this case was actually an example of how the American

products liability system works to change corporate behavior and protect consumers.

In pretrial discovery, the attorney for Ms. Lieback learned from McDonald's that the corporation had already been sued more than seven hundred other times for burns and injuries caused by the temperature of the coffee. In each case, the injured party had settled with McDonald's. As part of the settlement, the injured party was required to sign a confidentiality agreement that would bar the plaintiff from talking about the nature of the settlement.

During the trial it was established that in the U.S. coffee is routinely served at 135–45 degrees Fahrenheit (57–68 degrees Celsius) at home and in restaurants. In contrast, McDonald's served its coffee in its American stores at 180–90 degrees (82–87 degrees Celsius). When liquids that hot touch human skin, they can be very dangerous.

On the day of her injury, her grandson, the driver of the car in which Ms. Lieback was a passenger, came to a complete stop so that Ms. Lieback could add cream and sugar to the coffee she had just received from the drive-thru clerk. Ms. Lieback placed the cup between her knees and attempted to remove the plastic lid from the cup. As she removed the lid, the entire cup of coffee spilled into her lap. Because of the high temperature of the coffee, the burns were immediate, painful, and serious. Consequently, Ms. Lieback incurred medical bills more than \$10,000 for skin grafts and several weeks of hospitalization. During later negotiations for reimbursement for the medical bills paid, McDonald's attempted to settle for \$800. Unable to reach a settlement, the family filed a lawsuit.

At the trial, a McDonald's spokesperson held that although customers were going to be injured, it was appropriate to continue to serve the coffee at that temperature since the number of burned people would be "statistically insignificant." Although it seemed as though the jury initially found the case ridiculous, the members were so angered by McDonald's attitude that they found for Ms. Lieback. She was awarded \$200,000 in compensatory damages, which was reduced to \$160,000 when the jury determined that she was 20 percent responsible for the accident.

As punitive damages, they awarded an amount equal to McDonald's U.S. earnings from two days of coffee sales: \$2.7 million. Even though the judge later reduced the amount to

\$480,000 and the parties actually settled for even less money, the news media erroneously reported that Ms. Lieback was awarded “millions.”

In response to this case, McDonald’s began serving coffee at a lower temperature. This case serves as a good example of how the system actually does work to protect the consumer by changing corporate behavior.

1. The others settled out of court and signed a confidentiality agreement (nondisclosure).
2. New Mexico. You may wish to point out this state on a map.
3. As she removed the lid, the entire cup of coffee spilled into her lap, causing immediate serious burning.
4. She suffered third-degree burns that required skin grafts.

Degrees of Burns

First-Degree Burns:

Not serious but painful, superficial: mild sunburn or simple burn

Second-Degree Burns:

Deeper burns, cause blistering: severe sunburn or scalding with boiling water. Usually little if any scarring, which often fades with time.

Third-Degree Burns:

All layers of the skin are destroyed, and damage extends into deeper tissue. Since the nerves are destroyed, these types of burns are often painless. Usually result in much scarring and infection. A doctor must be consulted immediately. In many cases skin grafts are required.

5. 20 percent
6. \$160,000 (\$200,000 minus 20 percent.) No.

[*Note:* This is a good entry into the high cost of health care in the United States and the fact that there is no universal health care system. In fact, many who work full time have no health insurance.]

[*Note:* Notice that in the United States, we use a comma to separate the thousands from the hundreds. A period is used only to represent decimal fractions. Thus, \$2.75 equals two dollars and seventy-five cents. You may wish to review the names for large numbers with the students.]

thousand	1,000
million	1,000,000
billion	1,000,000,000 (also called a <i>thousand million</i> in international circles to avoid confusion since it is sometimes called <i>milliard</i> by the British)
trillion	1,000,000,000,000 (sometimes <i>billion</i> by the British)
quadrillion	1,000,000,000,000,000 (British: <i>septillion</i>)

7. It was a statistically insignificant problem.
8. The actions and the attitude of the company
9. No, we can't tell from the text.
10. The company lowered the temperature of the coffee, which made it safer for its customers.

[*Legal note:* In a tobacco case being decided as this book is being written, the plaintiff's attorney has asked for punitive damages against the cigarette company equal to a day's profit. This use of a day's earnings makes the award look very reasonable in comparison to the profits the large corporations make. You may wish to follow the progress of this products liability case, discussed below, which is likely to be important.]

Widdick v. Brown and Williamson. A jury in Jacksonville, Florida, found cigarette manufacturers Brown & Williamson guilty of negligence and of manufacturing a defective product in Lucky Strike cigarettes, the brand Mr. Maddox (the father of the main plaintiff, Ms. Widdick) smoked for almost 50 years before his death from cancer.

The jury awarded about \$52,000 to the Maddox family for medical expenses, \$500,000 in compensatory damages to the widow for her loss of companionship and her husband's earnings, and \$450,000 in punitive damages. On appeal, that verdict was overturned because the trial had been held in the wrong county in Florida.

Legal Thumbnail

Exercise A. Case Hypotheticals and Discussion

(page 135)

Student opinion. The quality of argumentation is more important than the actual answer. We've also provided the legal answer to a *similar* (but not identical) case in the United States. Remember, however, that since products liability laws differ in each jurisdiction, there may be different legally correct answers.

1. The drunk man and the clerk. Although you have the right to sell most things to a drunk man, there is public policy against the combination of guns and alcohol—and, of course, alcohol and driving. As a result of that clear public policy, the gun dealer can be held responsible. *K-Mart v. Kitchen*, 22 Fla. L. Wkly. S435 (Fla. July 17, 1997).
2. The rental agent in Florida can't rent "unseaworthy" vessels. *Meyers v. Scoot-a-way Corp.*, 20 Fla. L. Wkly. D2492 (Fla. 3d DCA 1995). This case shows the importance of local laws in assigning legal responsibility.
3. The murderer was able to sue Upjohn (the pharmaceutical company), but Upjohn was not charged with any criminal misdoing in the murder. *Jones v. The Upjohn Co.*, 20 Fla. L. Wkly. D2271 (Fla. 2d DCA 1995).
4. There might be comparative fault even in a strict liability case. The jury would be able to consider the dead man's role in causing the accident, so both may be responsible in some jurisdictions. *Kidron, Inc., v. Carmona*, 20 Fla. L. Wkly. D2666 (Fla. 3d DCA 1995).
5. Based on but different from *Publix Super Market, Inc., v. Sanchez*, 22 Fla. L. Wkly. D2173 (Fla. 3d DCA 1997). The customer is responsible since leaving cake out is not inherently dangerous and the customer couldn't prove that the store knew that the cake was on the floor and just ignored it.

Exercise B. Reading for Details

(page 137)

1. §402A (2)(b)
2. Yes. §402A (1)(a)
3.
 - a. Product is unreasonably dangerous.
 - b. No change in condition before it reaches the consumer.
 - c. The seller is a professional seller (merchant).
 - d. The product is defective.
4. Student resource. Have them explain what is necessary for liability.
5. Someone must pay for the damages, and that someone is usually the party or parties with the most money. Again, you can bring up the high cost of health care. Perhaps if health care were “free,” strict liability would not be as attractive.

Exercise C. Writing and Pair Work

(page 139)

1. Student opinion. Do check that, regardless of the method used, the students include the key terms such as
 - a warranty is implied
 - seller is a merchant
 - pass without objection
 - fair average quality
 - fit for the ordinary purposes
 - of even kind, quality, and quantity
 - adequately contained, packaged, and labeled
 - promise made on the container
2. Elements
 - a. Is the defendant a merchant?
 - b. Is there a disclaimer?
 - c. Are the goods merchantable?
 - (1) trade accepted
 - (2) fair average quality
 - (3) fit for ordinary use
 - (4) of similar kind, quantity, and quality
 - (5) adequately packaged and labeled
 - (6) match promises on the label.

Here is a sample letter using the elements listed.

Said & Lithgow, LLC
1020 Main Street
Memphis TN 38104
April 15, 2008

Mr. Scott Healey
48 N Larchdale Ave.
Memphis TN 38111

Dear Mr. Healy:

Thank you for your phone call. Since you asked, we would like to review the essential elements that are required to prove a breach of warranty of merchantability (the product is fit for general purposes) that is the basis of your case against the defendant. This should help you understand the situation and prospects for your case. We'll list them for you one by one.

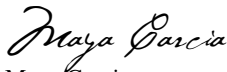
1. The defendant must be a merchant.
2. Next, was there any type of disclaimer, such as noting that it should not be used outdoors or in wet conditions?
3. The product had to be merchantable. This issue has several parts.
 - a. It must be accepted by the trade without objection.
 - b. It must be of at least fair average quality.
 - c. It must be fit for ordinary use.
 - d. All the pieces must be of the same quality and quantity as specified within the contract.
 - e. It must be adequately packaged and labeled.
 - f. It must match the promises on the label.
4. Finally, there is the issue of foreseeability, which simply means that we could assume that everyone in your house, including guests, would use the product.

We hope this list helps you understand the points and issues we must prove in order for your case to be successful.

Before our meeting with the defendant's attorney, we would like to meet with you once again to go over the legal issues and discuss the options we have in your case. We know this will be difficult for you, but we hope that you will be able to meet with us one day next week. I will call you on Monday to schedule a time that is best for you.

I hope that this answers your question about your case. If you have further questions, please call or we can discuss them in detail at our meeting.

Sincerely,



Maya Garcia
Attorney-at-Law

Exercise D. Case Hypotheticals and Pair Work

(page 140)

- 1 and 2. a. Yes—merchantability, not fit for ordinary purpose: eating! [U.C.C. §2-314 (1) included serving of food or drink as a sale.] You might wish to ask why moldy bread is “bad” while moldy cheese (brie, bleu cheese) is “good” to get to the heart of the idea of “ordinary purpose.”
- b. Most likely—merchantability, since you are using it for its ordinary purpose
- c. Yes—fitness for a particular purpose discussed with the clerk. U.C.C. §2-315.
- d. Probably. In this case, however, you have an express warranty. You will also have to show that you used the product as directed.
- e. Perhaps. Certainly a good argument could be made that using a knife as a screwdriver is a common use that should be foreseeable by the manufacturer. See the kitchen chair example.

Exercise E. Writing and Pair Work

(page 141)

1. Student opinion; however, we have underlined many of the terms that could be left out.

Disclaimer of Liability

Neither Dragonflyer, Inc., nor any of its employees make any warranty, express or implied, including the warranties of merchantability or fitness for a particular purpose, or assume any legal liability or responsibility for the accuracy or completeness of any information contained in this manual or represent that its use would not infringe privately owned rights. Information provided in this manual by Dragonflyer, Inc., is provided “AS IS,” and any express or implied warranties of merchantability and fitness for a particular purpose are disclaimed. In no event shall Dragonflyer, Inc., or its employees be liable for any direct, indirect, incidental, special, exemplary, or consequential damages (including but not limited to, procurement of substitute goods or services; loss of use, data, or profits; or business interruption) however caused and on any theory of liability, whether in contract, strict liability, or tort (including negligence or otherwise) arising in the use of this information.

2. *Example:* Dragonflyer, Inc., makes no warranty, express or implied, nor assumes any legal liability or responsibility. Information provided in this manual by Dragonflyer, Inc., is provided “AS IS.” In no event is Dragonflyer, Inc., liable for any damages arising in the use of this information.

[*Grammar note:* Point out to the students that after the strong negative (*in no event*), an inversion occurs (*is Dragonflyer, Inc.*); if the main verb were anything but *to be*, you would need to add *do* (e.g., “In no event does Dragonflyer owe the client . . .”). This inversion only occurs after strong negatives such as *rarely*, *barely*, or *under no circumstances*.]

Exercise F. Reading Comprehension

(page 143)

1. Negligence
2. No. It is only one of four central requirements.
3. a. Is the defendant a merchant?
b. Is there a disclaimer?
c. Is the use ordinary?
d. Has the warranty been breached, and does the warranty flow from the defendant to the plaintiff (foreseeable plaintiff)?
4. Advise consumers of possible dangers
5. Claimant (plaintiff)

Exercise G. Analysis

(page 144)

1. Use the three issues in *BMW v. Gore* to make the determination.
 - a. Was the conduct reprehensible? Is filling a bottle with iced tea that perhaps contains a living mouse reprehensible? Did the company try to hide its action?
 - b. Is the ratio between compensatory and punitive damages acceptable? 1 to 100. Compare to *BMW* 1 to 500. Your call. In the *McDonald's* case, the punitive damages determination was based on total coffee sales in the United States by McDonald's®.
 - c. Is there a difference in civil and criminal penalties? No criminal charges were brought against the bottling company.
2. Student resource

Exercise H. Analysis

(page 146)

1. Student opinion. However, the requested award of \$100 million would most likely have been seen as excessive under *BMW v. Gore*; thus, the company might have risked the trial.
2. Student opinion. Possible answers would include different attitudes toward publicity, trust in the system, or willingness to gamble.

Exercise I. Reading for Details

(page 146)

1. No privity of contract is necessary anymore.
2. Not exclusive
3. Other duties, such as duty to warn or the issue of foreseeability, and the implied warranties
4. Not really. However, strict liability as it now exists in tort law is a 20th-century development. Negligence has been part of the system for a long time.
5. No. Compensatory damages are designed for that purpose.
6. Must be causally related
7. Just the opposite
8. Not that simple. You must prove all the elements of your claim.
9. A plaintiff can recover if the use is foreseeable (common): for example, standing on a chair to put a book on a high shelf. Using a computer mouse to drive a nail into a wall would not be a foreseeable use for a computer mouse.
10. Also cost of litigation and bad publicity