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HEADLINE: Jury Awards Soar As Lawsuits Decline OnDefective Goods

BYLINE: By GREG WINTER

BODY:

After years of little change, jury awards to consumers suing over defective products are rising sharply in many industries, from cars and tools to toys and appliances. But at the same time, far fewer such cases are being brought, and many lawyers are turning away clients because their injuries are not debilitating enough to bring in big awards.

The median award -- not including punitive damages -- has more than tripled since 1993, from $500,300 to over $1.8 million in 1999, according to a study of 2,751 product-liability verdicts to be released today by LRP Publications, one of the only nonpartisan groups to track cases in several states each year. Much of that rise has come the last three years, and awards are now growing at the fastest rate in two decades.

In the mid-1980's, when corporations and politicians warned that a litigation explosion threatened economic growth, the size of defective-product awards actually dropped as often as it climbed. But in recent years, they have increased four times as fast as the sums doled out in medical malpractice lawsuits, even though tort reform has been in full swing and juries have begun giving less to the casualties of fender benders and slips and falls.

There is no way of knowing if American manufacturers are paying more

"I've had plenty of defective products, clearly defective, where I won't even talk to the people because their injuries aren't severe enough," said Craig E. Hilborn, president of Hilborn & Hilborn, a small law firm in Birmingham, Mich. "If they're not a quadriplegic, a paraplegic or losing some part of their body, there's no way I'm going to take that case."

In fact, the number of product-liability cases filed in federal court has dropped by more than half the last four years, from 32,856 in 1997 to 14,428 in 2000, according to the Administrative Office of the United States Courts -- a reflection, some legal scholars say, of how selective many lawyers have become.

It is not that the lawyers are unsympathetic, legal experts argue, but rather a matter of economics. With the greater emphasis on expert witnesses, product-liability suits are increasingly expensive to bring, often costing well above $100,000.

paid only if they win, picking more seriously injured clients is the surest way to meet expenses and make the substantial risk of losing worthwhile.

"I can't take cases on any more unless I am absolutely positive that I have one worth at least $2 million," said James L. Gilbert, president of the Attorney Information Exchange Group, an organization of about 500 plaintiffs' lawyers nationwide. "I can no longer afford to spend $300,000 trying a case that is only worth $500,000, and that's ridiculous."

For some injured consumers, juries will award more money than their lawyers ask for. In 1997, when a washing machine made by Pellerin Milnor kept spinning, even with the lid open, a curious 4-year-old named Malik Singletary reached inside. After 13 hours of surgery, his arm was

their hometown of Jacksonville, Fla. The boy was strapped in a car seat behind his mother, but in the impact her seat collapsed backward, smashing his eye socket and fracturing his skull.

With surgery, he escaped any permanent damages other than a large scar. Still, his parents became enraged when they learned that the minivan's seats had also bent backward in several similar accidents, causing other drivers to lose control and ram nearby cars. DaimlerChrysler, which now makes Plymouth, said that collapsing seats are a common cause of lawsuits for all auto manufacturers, but knew of no design flaws specific to the minivan.

For two years, the Corrigans tried to mount a case, hoping to force Chrysler to fix the problem. But because Connor fully recovered and their economic losses came to about $30,000, paid mostly by insurance, they eventually stopped trying.

"Everyone seems interested until you tell them the details, and then they give you the same story: they can't take it because it's not worth it," said Michael L. Corrigan Jr., Connor's father. "It was very frustrating because every time I see another child sitting in their seat, I still think to this day, 'Oh my God, I know what can happen to them.' "

One big reason defective-product cases have become so expensive to bring, legal experts argue, is that lawyers are bulking up on expensive expert witnesses as never before.

In the past, a case may have rested on a few doctors or engineers who testified that a person's injuries stemmed from a dangerous product, not personal negligence.

But the recent Supreme Court decisions, applying to federal courts but also adopted by a majority of states, have led to a 36-fold increase in the number of courtroom battles over whether testimony by expert witnesses should be allowed in civil cases, according to a recent study by Prof. D. Michael Risinger of the Seton Hall University law school.

In response, plaintiffs' lawyers have begun building fortresses of expert testimony that they hope will withstand any challenges. To prove a car is unsafe, for example, lawyers now routinely hire separate experts to analyze the crash site, the road conditions, the body's response to an impact and the vehicle's design -- then pay other experts in the field to verify the findings.

"These days you need to have experts on experts," said Ned Miltenberg, associate director of legal affairs for the Association of Trial Lawyers of America. "And sometimes that doesn't help either."

The wave of experts has helped plaintiffs' lawyers improve their batting average in court. While most injured consumers lose defective product suits, their success rate rose from 39 percent in 1993 to 46 percent in 1999, according to the study by LRP, based in Horsham, Pa.

"It debunks the notion of the frivolous lawsuit," Stephen Daniels, senior research fellow at the American Bar Foundation, a nonpartisan research group. "The plaintiffs' attorneys believe that the tort reform movement has poisoned the jury box, so they're extra prepared."

What juries actually think is a matter of debate, fueled by the widespread attention paid to large awards. Some argue that recent notable cases involving executive cover-ups have led jurors to believe that corporate malfeasance is common.

In the early 1990's, for example, jurors quipped about the grandmother who spilled coffee in her lap and won a $2.9 million award against McDonald's. But now, some jury experts say, jurors mostly think of the lawsuits brought by states against tobacco companies, and the truckloads of secret documents they uncovered. Increasingly distrustful

of corporations in general, jurors are awarding more money, experts say.

"That's the contamination that I'm beginning to see," said Joseph A. Rice, president of the Jury Research Group, which analyzes jurors -- mostly for defendants. "They're drawing from a news item that they've read or heard about and bringing it into the process."

But many academics believe jurors are surprisingly impartial. Valerie P. Hans, a sociology professor at the University of Delaware who has studied juries the last decade, said juries hold corporations to a higher standard than they do individuals but are equally skeptical of plaintiffs, hesitant to side with them simply to bond with the underdog.

Nor are demographic factors like race, sex or income likely to influence a juror's mind, she said, even though lawyers often view them as predictors of how a jury will decide.

"It's a myth," said Professor Hans, who interviewed hundreds of jurors in the Northeast. "In fact, people you might expect to have a sense of being oppressed by big business often seem to have less sympathy for those who are suing corporations. But if they believed in a

THE LAWYERS KNOW TOO MUCH p 257

The lawyers, Bob, know too much.
They are chums of the books of old John Marshall.
They know it all, what a dead hand wrote

The bones of the fingers a thin white ash.
The lawyers know
A dead man's thoughts too well.

In the heels of the higgling lawyers, Bob,
Too many slippery ifs and buts and howevers,
Too many hereinbefore provided whereas,
Too many doors to go in and out of.

When the lawyers are through

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5 The Legal Dimensions of Everyday Life

Daniel Jutras

This past summer, I entered the world of *Harry Potter*, putting my large shoes in the footsteps of my nine-year old daughter. Harry Potter is, of course, the main character in J.K. Rowlings' immensely popular books about a little boy, orphaned at a very young age, who discovers at eleven that his mother and father were

moments of brief interaction with strangers, and of moments of intimacy with one's close family and friends. Those encounters have a logic of their own, constructed outside of the concepts and representations of law. They appear to be largely determined by habit, internalized roles, instinct or emotion, and invoking the language of law and rules to describe them produces the kind of awkward feeling one gets when very small children dress and behave like adults : amusing, but wrong, and definitely not meant to last. Everyday life and law, in this latter sense, seem to be hermetically sealed from one another.

Or are they ? In a recently published monograph, Michael Reisman explores paradigmatic everyday occurrences to uncover their normative dimensions.[1] In his account, brief encounters are evidence of the existence of true legal systems on a very small scale : micro-normative systems display characteristics that are fundamental to any form of legal ordering. Similarly, in a series of essays published on the website of the Law Commission of

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Everyday Life as a Normative Site

When scholars of legal pluralism set sail to discover new territory, unexplored legal orders within and across state boundaries, they usually plan to find and map out relatively stable orders : geographically confined groups, ethnic or religious communities, business, political, criminal or educational organizations, or even the family. While some of those exist

and staring in public places), but they may also take place between parties who know one another. And conversations may be highly formalized in some circumstances, subject to explicit norms (as in deliberative assemblies), though most instances are informal, and the norms governing them, implicit.

Finally, the third setting is that of queues, which is the easiest to observe because of its spatial dimensions and its pervasiveness. Standing in line is, of course, both a bilateral and multilateral activity, connecting one to the person ahead and to the person behind, but also to the rest of the group. It is often subject to external direction, but may also be spontaneously managed by the participants themselves.

In each of those settings, the behaviour of participants can be understood in systematic terms. Whether they are standing in line, catching one another's glance in a public place, or talking to a clerk at the bank, people have a strong sense of what is appropriate and inappropriate behaviour within that setting, and well-anchored expectations that others will conform to those standards. They may have a hard time articulating the norms governing those activities, but a violation of the norms will easily bring a shared sense of wrongdoing, and a shared acknowledgment of the appropriateness of a punitive response. The norms provide reasons for acting, as well as justifications for restorative action. For Reisman, this collective recognition of the governing norms, and the willingness to sustain them over time by protesting their violation, are sufficient to establish a normative order.[6]

It should not be surprising that a normative order of this type could exist without formal processes for the creation, interpretation, and amendment of its norms. Reisman's research into three microlegal systems brings to light decentralized and implicit processes for the continued monitoring and transformation of the norms. Hence the norms on looking and staring are organized in a complex pattern of principles and exceptions, determining when it is appropriate to stare (at famous people, public speakers, or small children accompanied by a parent, for instance) and under what conditions.[7] Actors in novel social situations interact tentatively, and establish norms for their visual encounter through trial and error, reasoning by analogy from the norms they know to norms appropriate for the circumstances.

This endogenous process of norm creation and transformation is even more obvious in the microlegal system of queues. There, the principle of sequential priority is routinely qualified by a number of exceptions that are adjudicated on the spot by other people in the line, when they are recognized as consistent with the justice and distributive purposes for which the line was formed in the first place.[8] In a coarchical queue, that is, a line that is not subject to the direction of a person in authority, the participants collectively monitor compliance with the norms. They will allow new people to join

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6 *Ibid.* at 39.
7 *Ibid.* at 45-48.
8 *Ibid.* at 76-84.

someone in the queue if a convincing case can be made that they came together, but refuse access to those who abuse this privilege and try to insert themselves in the queue in large numbers. Participants will generally respect and enforce bilateral arrangements made within the queue ("hold my place, please"), and take account of hardship in generating exceptions to sequential priority. Each person in the line is, simultaneously, adjudicating and subject to collective adjudication.

The richest insight drawn by Reisman, however, relates to the process and function of enforcement of the norms within microlegal systems. Indeed, for Reisman, without a response to the transgression of the norm, there is no law — just hopeful statements of what ought to be. The study of microlegal systems underlines the coordination of sanctions embedded in the interaction with sanctions external to it.[9] In circumstances of cooperation, where actors have an incentive to sustain the relationship, corrective responses that reaffirm the norm without disrupting the interaction are generally preferred. When these fail to restore compliance, or when the relationship is not sufficiently cooperative, parties will often resort to sanctions external to the interaction. This interplay of different restorative mechanisms can be witnessed, for instance, in the microsystem of looking, when the victim of inappropriate staring escalates from non-verbal to verbal protest, raising the level of discomfort of the offender and provoking the possible intervention of third parties.

That said, the norms of microlegal systems are most often sustained over time through low intensity restorative actions. The authority for initiating sanctions is typically distributed among the participants, and not in the hands of a centralized agency. Protests for the violation of queue norms

order, the vitality of the norm is measured not by its ability to direct behaviour in such a way as to prevent all transgressions, but by the extent to which the commitment of the actors, their belief in the norm, is manifested in their unwavering refusal to let transgressions go unanswered.[11]

Now, the idea that the coordination of behaviour in most social settings rests on interlocking systems of norms is not a novel one, even if it is explored by Reisman in an unusual context. What is more novel, on the other hand, is the claim that the norms governing microscopic social interaction are *legal* norms, and not just social norms. It is of course a matter of debate whether these are distinct categories, and if so, what criterion determines the boundaries of law as an object of study.[12] Reisman's criterion, resting on the shared recognition of norms and on the shared acknowledgment and implementation of proper responses to norm violation, is admittedly minimalist, and probably leads to the conflation of legal and social norms.

In some measure, what is truly at stake in this debate is the rhetorical advantage that a scholar may gain through the application of the label *law* to diverse normative social phenomena. For many, the description of small scale normative orders as legal systems serves to shift attention from state law, and to underline the latter's relative insignificance in our lives in comparison to non-state rule systems. For others, it may serve to justify a preoccupation with the conformity of small-scale normative orders with the underlying values and principles of state law, leading either to conclusions about the limited efficacy or state law, or to the necessity of corrective intervention of the state in some arenas of injustice. There are traces of both of those dimensions of legal pluralism in Reisman's analysis.

Indeed, the significance of small-scale normativity is a dominant theme of his monograph. In quantitative terms, those normative orders are more present in our lives than state law, given the frequency and variety of human interaction functioning through rule-systems of this sort. In qualitative terms, although one often thinks of the stakes as not very high in microlegal

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function of underwriting the conventions and can be useful for at least three related reasons. (i) They make coordination easier and more efficient, because it is no longer necessary to go through the process of mutual replications of patterns of practical reasoning each time coordination is called for. (ii) They reduce the risk that in any particular instance in a recurring situation requiring coordination, some party may fail to exhibit the requisite presence of mind or motivation to achieve proper coordination. (iii) They make it possible immediately to introduce newcomers to the community governed by the conventions; compliance can be counted on, if not because the newcomer shares the appropriate desire for coordination, at least because he will probably wish to avoid the sanction."

[11] *Brief Encounters*, *supra* note 1 at 89 : "In every type of legal system, the primary or principal function of the formal application of a norm is not — as the language of judgments and verdicts frequently suggest and most of the community may believe — to punish or to otherwise do justice or to give the gods their due by penalizing or securing penance from the violator of the law or some surrogate, if blood penance is deemed necessary. The most urgent objective of a legal application is to maintain the credibility of the system of which it is a part by reaffirming the norm that has been violated and

s ability to direct

settings, negative outcomes resulting from transgression or sanction may be

subjectively experienced as fairly serious. In light of this, one who is

read and educated professional, legal scholars sometimes overestimate their ability to absorb the complexity of extralegal human activities. But that would be missing the point. Indeed, it turns out that many of the enduring puzzles of large-scale legal ordering manifest themselves in other fields as well, so that, beyond the pleasant aesthetic dimensions of a clever analogy, those other fields can be thought of as quiet places to sit down and think about law. The thinking lawyer knows something about problems of interpretation, adjudication, fact-finding and representations of reality, or rules and their transcription in linguistic and other symbolic forms, wherever they might occur. But it is also the case that musicians, art critics and baseball players know more about law than they realize, by virtue of their experience of these problems in their own fields.

This, of course, is also true of everyday life. Everyone is a lawyer, in a sense, because ordinary human interaction is saturated with norms, and with normative processes, institutions, structures and cultures. Hence it is possible to find in small-scale relationships and mundane occurrences enough images to explicate complex dimensions of the state legal order. This, in part, is what Roderick Macdonald set out to do in his periodic columns on the website of the Law Commission of Canada.

Take the role of rules, for instance. Lawyers are well aware of the advantages and disadvantages of explicit norms, when compared with unstated, informal arrangements. Specific and detailed clauses in a contract clarify the basis of interaction of the parties, and the process through which they are negotiated may be helpful in itself, deepening or transforming the relationship. But it is sometimes better not to say too much, for the decision to have a rule for everything might uncover trivial disagreements that would not otherwise derail a functioning interaction. For Macdonald, most of those without legal training can recognize this dilemma, and learn to address it with subtlety whenever the structure or foundation of their relationship with family members, friends, or partners in a project is in question.[18]

Once a rule is in place, lawyers also struggle with the constraints it may

overestimate their

abandoned, others are transformed through legal fictions, others still are [illegible] with [illegible] an effort to prolong their life. House renovation projects[20]

learned from the normative practices inherent in daily life, and highlight the individual's ethical responsibility in coordinating his allegiances to multiple normative orders.[26]

Hence, law reform can proceed on two parallel planes. On the one hand, the state can find, in those practices, inspiration for reforms that might bring its law and legal processes closer to the normative sensibilities of its citizens.[27] On the other hand, the state can find, in the existence of those practices, opportunities to step aside and recognize the potency and legitimacy of informal law.

That said, here again, the normative patterns of everyday law may be revealing even outside of the law reform agenda. Macdonald's images are much more than helpful heuristic devices to understand or reform state law — they are also accounts of practices *internal* to the normative order(s) of everyday life. In that sense, from the point of view of comparative legal

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comparative work which highlights similarity runs the risk of being either superficial or reductionist. But while the excessive or inappropriate merger of distant realities has plagued comparative law for some time, it can hardly be said that legal pluralism scholars have, until now, dwelled on the shared characteristics of mundane encounters and large-scale formal legal orders. Thus my aim here is only to suggest that normative orders in different spheres of social life are comparable, not that they are identical. I want to do this, not by positing universal or essential architectural features present at each level, but by formulating "the presuppositions, preoccupations, and the frames of action characteristic of one sort of legal sensibility in terms of those characteristic of another"[29].

Everyday Life as Comparative Law

One of Reisman's assumptions is that microsituations display "complex and significant normative components that are characteristic of law in its conventional usage".[30] In essence, those components consist of "strands of intertwined expectations" : a shared conception of what is proper and

In this area, valuable insight can be drawn from one of the most recent contributions to sociolegal scholarship, in which Jean-Guy Belley brings together his conclusions about the contractual structure of supply acquisitions at Alcan, a multinational corporation established in Quebec.[33] His extended interviews with participants at all levels in the corporation and among suppliers reveal, not surprisingly, that the juridical logic of the formal contract is only partly determinative of the normative practices of the parties, who must also respond to complex economic and social imperatives. But his research adds layers to this now classical insight in two notable ways.

First, Belley tells the story of a transformation of the economic culture of corporations, from the traditional culture of relationships of trust, confidence and interdependence, highlighted by Macaulay, among others, to a modern, technocratic culture of quality control and coordination, driven by fixed objectives of growth.[34] While previous scholarship had emphasized the importance of implicit norms and personal bonds of trust in long-term commercial contracts, Belley underlines the unresolved tension created in those contracts by the introduction of the depersonalized logic of expert systems and explicit parameters of production. Second, taking explicit and formal norms seriously, Belley shows that in this commercial context, the full content of contracts cannot be grasped without reference to the constraints dictated by the organisational structure of the corporation, both in terms of its internal bureaucratic framework, and in terms of its external commitments as a corporate citizen.[35]

The representation of the contract that emerges from Belley's work builds on the idea of semi-autonomous social fields. Indeed, a contract rests on a combination of autonomous rule making in the pursuit of a joint project, on the one hand, with external constraints resulting from its insertion in a particular social context, on the other hand. As a result, the contract is a

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cooperative microsituations, like coarchical queues or conversations, also
can be characterized as semi-autonomous fields for the

which can be highlighted in large-scale relationships and in mundane encounters.

In the context of supply acquisitions at Alcan, the content of formal contracts is, of course, largely dictated by Alcan. Routine transactions are governed by standard-form contracts drawn by Alcan to fit its overall

Observation suggests that those norms do not operate in the same manner in a hierarchical talk session. The "boss", that is, the person "who has more power with regard to the substantive and procedural norms of the microsituation"[39], may fail to comply consistently with those basic norms

antithetical), and that they sometimes find a solution in the emergence of interactional expectancies (or implicit norms that make each party's behaviour predictable for the other). Because those expectancies direct the

characterized by interlocking explicit and implicit dimensions, each one affecting the other.

The same could be said, of course, of large-scale contracts, so that the difference between the two layers of interaction, in the roles played by explicit and implicit norms, might just be a matter of degree. Supply contracts at Alcan are very much explicit, but Belley's research shows that the behaviour of parties in circumstances of uncertainty is guided by unspoken shared assumptions that make up underlying cultures of the contract.[46] There is, indeed, a plurality of such cultures, which together provide structure and depth to the terms of interaction between Alcan and its

point, the tacit assumptions that arise from their previous experiences. And the physical proximity which characterizes those encounters may be sufficient to infuse them with the emotional charge that triggers reciprocal immunity. Whatever the reason, there is a form of reciprocal immunity within each of the microsituations that Reisman describes. Whether the norm that is violated is one that governs looking and staring, or talk sessions, or queues, the same pattern takes shape : the most frequent corrective response, as I indicated earlier, is of low intensity. Victims will typically try to resolve the conflict bilaterally, in a manner that promotes the continuation of the interaction, before invoking the authority of an external normative order or putting an end to the encounter. Justice, here as in relational contracts, is initially internal to the interaction and inseparable from the social relation of

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comes a point where the primary culture of the parties is no longer a source of protection for the victim of deviance, and there is nothing to lose in seeking assistance from external norms and

each layer, from the brief encounter to the formal, institutionalized, and large-scale human interaction. Within those forms of human association, there are, to name but a few, unresolved tensions between the explicit and the implicit[53]; between autonomy and relational solidarity; between domination and reciprocity; between freedom and tradition; and between the endogenous and the exogenous. I don't think there is any neutral ground from which one gains access to those recurring features. They are not universal nor essential. The tensions are manifested concretely and in divergent ways in the practices characteristic of each order. "Cultural translation" enables us to transpose those presuppositions and frames of action from one normative order to another, to reveal some continuity in our representations of the relationships that make up our social lives.[54] But surely, that does not mean that microlegal and macrolegal orders are the same in all respects — no more than my daughter's life can be described as identical to that of her favourite sorcerer. Indeed, diversity is the norm here, and this is compounded by the inherent cultural heterogeneity of large scale social interaction and microsituations alike.

In short, what I am proposing is that comparative law bring the mundane and the very small within its gaze. There is often enough kinship between normative orders at various levels of social life to make them comparable. This kinship is not surprising, because social life is not discontinuous : from the individual's point of view, there are no sharp frontiers between one's multiple social roles at different levels of interaction. Basic representations of one's relationships with others, and ways of using norms to make sense of these relationships, often travel between the different spheres of one's life. Cultural translation is a feature of each person's everyday life.

Résumé

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Belley, laquelle révèle une parenté de structure dans l