ISSUE BIFURCATION: AVOIDING CONFUSION AND IMPROVING OUTCOMES

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1938 is often wrongfully overlooked as a year of technological progress. With World War II looming on the horizon, history quickly forgets that some of the most earth-shattering discoveries of the modern age were unveiled in 1938: the first freely programmable computer was developed by Konrad Zuse, nuclear fission was discovered by Otto Hahn and Fritz Strassman, the first Superman comic made its debut from writer Jerry Siegal and artist Joe Shuster, and, only marginally less important, Rule 42(b) of the Federal Rules of Civil Procedure was first adopted into practice.

Since its adoption, federal judges have been authorized under Rule 42(b) to try issues separately through a procedure known as bifurcation. Rule 42(b) allows "for convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues,

claims, crossclaims, or third-party claims..."

One of the most useful applications of this rule, and the topic that is the primary focus of this article, is for the courts to allow for the issues of liability and damages to be tried separately in personal injury cases. In theory and when allowed to operate as intended, Rule 42(b) allows for the issue of liability to be tried first and without the complex, lengthy evidence of damages to be presented to the jury. Only if liability is found to exist against a defendant, would evidence of damages be presented. If a defense verdict is rendered by the jury on liability, then the court, jury, and all participants would avoid the unnecessary, needless presentation of evidence on damages, substantially reducing the ever-increasing litigation costs for clients.

Similarly, if a defendant's request for bifurcation is granted, defense counsel is permitted two separate opportunities to fend against a plaintiff's claim, eliminating the possibility of evidence from the injuries and damages portion of a case to improperly influence the jury and cause a finding for the plaintiff on liability because of sympathy.

The benefits of bifurcation are well-known among judges across the country, too, even though they are reluctant to grant such a request. One study of federal and state judges found that out of 94 percent of federal judges who have granted bifurcation in their career, 84 percent felt it improved the trial process. Still, the acceptance of bifurcation has been limited because the practice has been undeservingly labeled as pro-defendant.

The pro-defendant reputation initially arose out of a study conducted in 1966, where researchers claimed to have determined that plaintiffs prevailed in 66 percent of non-bifurcated trials and only 44 percent in bifurcated trials. This study and subsequent similar studies had questionable selection criteria but nevertheless managed to cement the reputation of issue bifurcation as being pro-defendant. Plaintiff lawyers now often object to bifurcation proposals, citing outdated studies from decades prior and complicating efforts to streamline civil jury trials, resulting in the underuse of Rule 42(b).

Despite having a pro-defendant reputation, case law from states around the country has varied stances on the issue. For example, New York, a left-leaning state, mandates bifurcation in most personal injury cases. In contrast, Texas, a right-leaning state, does not allow for the bifurcation of liability and damages in personal injury cases under any circumstances. These unconventional positions illustrate that the matter of issue bifurcation is not as straightforward as often believed.

Judges in the federal courts have generally been found to be in favor of bifurcating personal injury matters. However, successfully implementing such a strategy in federal court is difficult due to the near constant objections of plaintiff lawyers, who believe that having the jury hear evidence of a plaintiff's injuries and damages will generate sympathy and cause the jury to be more inclined to rule in their favor on liability. This claim itself should be an argument in favor of bifurcated trials since plaintiff lawyers are essentially advocating for the improper use of evidence, but rather than admitting to such tactics, the sterile-trial theory was brought into existence.

The sterile-trial theory is broader than admitting to reliance on sympathy to improperly influence the opinions of jurors. The theory asserts that bifurcation actually causes prejudice by creating a sterile trial environment that obscures the gravity of the underlying facts and events, stripping the trial of its human element. This argument essentially claims that to decide on liability, a jury must also have knowledge of the claimed damages and vice versa. Instead of arguing each element of the case on its merits, plaintiff lawyers often prefer to muddy the waters by relying on the jury's emotions to sway them into ruling in the plaintiff's favor.

Plaintiff lawyers seem to have overlooked that they, too, may benefit from bifurcation when the issue of liability is uncertain. If a plaintiff can bifurcate a trial and succeed in the liability phase, the defendant is at risk of paying a substantially larger damages award. This is because the information in the liability portion of a case helps to humanize a defendant by demonstrating to the jury that they took actions to prevent or minimize the plaintiff's injuries and damages. Because of this, defendants should not move to bifurcate every trial uniformly but should analyze each individual fact pattern and determine if the benefits of bifurcation outweigh the risk of an increased verdict.

To both maximize outcomes and minimize expenses, defense counsel should ask themselves the following questions before moving for bifurcation:

1. Will contesting liability be the strongest defense for the defendant during the trial?
2. Is there pro-defendant evidence in the liability phase that would cause a jury to reduce their assessment of damages?
3. Is the evidence and counterevidence of the plaintiff's claimed injuries and damages complex and lengthy enough to warrant separate trial settings to improve judicial economy?
4. Will many of the same witnesses from the liability phase also be required to testify in the injury and damages phase of the trial?

Whether or not a defendant should move for bifurcation ought to come after careful consideration of these factors. The ideal conditions for bifurcation include cases where (1) liability is the strongest defense, (2) there is little evidence in the liability phase that would lessen a verdict if a defendant were to lose the liability argument, (3) the plaintiff's claimed injuries and damages would require lengthy presentation of evidence and counterevidence, and (4) there are few witnesses that will be required to testify in both the liability and damages phases.

Issue bifurcation is an underused tool in jurisdictions around the country, including in the federal courts. Under the right circumstances, nearly all jurisdictions, aside from Illinois and Texas, at least claim to be open to the practice, and when a case arises with the right circumstances to benefit a defendant by bifurcating the liability and damages phases of a trial, defense counsel should do so but only after careful consideration of its risks. Over time, along with computers and Superman comics (I'm not so sure about nuclear fission), issue bifurcation will hopefully become more commonplace and accepted by both lawyers and judges around the country.

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