

In Search of a Fair Shake

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When you and your client believe that bifurcation would prove useful, consider a motion at the start of a case and use discovery to develop arguments to support it.

Bifurcation of Civil Trials in Trucking Cases

You are defending a trucking company and a driver sued as the result of a traffic accident. Settlement negotiations have broken down. High-low agreements have been rejected. Your case is heading to trial. As is often

the case when defending trucking companies, the accident was severe, and the plaintiff suffered serious injuries. While there is no significant dispute about causation or damages, liability is very questionable. Without a doubt, the plaintiff's injuries and the way that they changed the plaintiff's life will elicit tremendous sympathy from a jury, and his or her attorney will seek significant compensatory damages.

Since a traditional negligence jury trial consists of one trial in which a jury considers both negligence and damages, a judge may well allow the plaintiff's attorney to discuss the plaintiff's catastrophic injuries in great detail during voir dire and opening statements and while presenting evidence, leading to the coda—his or her closing argument. Your client is concerned that the damages evidence will evoke enough sympathy that the issue of liability will not receive a fair hearing.

In fact, the courts have recognized this concern, articulated, for instance, by the United States District Court for the Dis-

trict of New Jersey, which wrote that "sympathetic jurors might be inclined to award Plaintiff some money... regardless of fault, if they were aware of the magnitude of the injuries incurred and the damages sought." *Miller v. New Jersey Transit Authority Rail Operations*, 160 F.R.D. 37, 41 (D.N.J. 1995).

So what can you do to prevent sympathy for the plaintiff from overwhelming strong arguments on negligence and to make sure that your client gets a fair trial? How can you help your client reduce its exposure and best predict the outcome of a very dangerous case? The Federal Rules of Civil Procedure and their state counterparts, as well as courts across the country, have provided a possible solution—bifurcation.

Splitting the liability and damages issues into two phases, determining liability first, and then, if necessary, determining damages separately, can give defendants a fair chance to present liability defenses without facing a jury that is not mostly focused on a badly injured plaintiff. Bifurcation may offer your best chance to reduce or



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even eliminate jury prejudice when a plaintiff suffers a catastrophic injury or death, which will likely improperly influence a jury if the jury considers liability and damages together.

You must determine whether to seek bifurcation on a case-by-case basis. In an appropriate case, bifurcation has many positives, but it certainly also offers risks

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that you must assess fully and discuss with your client. For example, if a jury finds for a plaintiff on liability in the first phase of a trial and then moves on to damages, that jury may be less inclined to reduce an award for questionable liability because it has already decided and forgotten that issue.

This article will examine some telling case law on bifurcation to provide you with an understanding of what courts consider in deciding whether to bifurcate a case and help you decide whether bifurcation is a desirable option for you and your clients. Some of the cases discussed below dealt with lawsuits against trucking companies; others did not. They are heavily weighted toward personal injury lawsuits involving catastrophic injuries or death. These cases generally, though not universally, have allowed bifurcation. Further, when courts have permitted bifurcation, these courts' opinions often have set out some of the most common objections made by the plaintiffs' bar, which will give you an idea of the objections that you will likely face.

The Basis for Bifurcation: Fed. R. Civ. P. 42(b)

Rule 42(b) of the Federal Rules of Civil Procedure gives judges discretion to order separate trials of issues or claims: (1) for

reasons of convenience; (2) when conducive to expediting a case or to promote judicial economy; or (3) to avoid prejudice. Since bifurcation is discretionary, a court of appeals will overrule a decision to bifurcate only if the trial judge abused that discretion. See *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974). Some courts have required that "[o]nly one of these criteria need be met to justify bifurcation." *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553, 556 (6th Cir. 1996). Others seem to require that the party seeking bifurcation demonstrate that it will suffer prejudice if a court does not grant separate trials. See *Marshall v. Overhead Door Corp.*, 131 F.R.D. 94 (E.D. Pa. 1990). Any party can move for bifurcation, or the court may order it sua sponte. See *Saxion*, 86 F.3d at 556.

Federal courts have universally recognized that a trial judge has the right within his or her discretion to apply Rule 42(b) to bifurcate personal injury actions into separate phases to determine liability and damage issues. *Moss v. Associated Transport, Inc.*, 344 F.2d 23 (6th Cir. 1965). The party "seeking bifurcation has the burden of showing that bifurcation is proper in light of the general principle that a single trial tends to lessen the delay, expense, and inconvenience to all parties." *Lowe v. Philadelphia Newspapers, Inc.*, 594 F. Supp. 123, 125 (E.D. Pa. 1984).

The Severity of a Plaintiff's Injuries as a Factor in Bifurcation

The case *Moss v. Associated Transport, Inc.*, involved four consolidated actions for conflicting claims of death and injury and an unusual twist on bifurcation. 344 F.2d 23 (6th Cir. 1965). Moss was permanently injured when he was riding as a passenger in a tractor-trailer truck that collided with another tractor-trailer truck owned by the defendant, Associated Transport, and operated by its employee. The driver of the Associated Transport truck and his passenger were both killed.

The widows of the driver and passenger in the Associated Transport truck sued the driver and the owner of the truck in which Moss was riding at the time of the accident for wrongful death. Moss sued the driver and owner of the Associated Transport truck. The lawsuits were consolidated and, over the objection of Moss, the trial court

directed that the jury should first determine the issue of liability and then, second, damages, if necessary. The jury found in the liability phase of the trial that Moss' driver was negligent and exonerated the driver of the Associated Transport vehicle. As such, Moss' claims were dismissed, and the widows prevailed at trial.

On appeal, Moss argued, among other things, that separating the issues had prejudiced him, because he could not show the severity of his injuries and "was denied a weapon with which to combat the natural sympathy that a jury would feel for the two plaintiff widows who had, in effect, been made Moss' opponents by the consolidation." *Id.* at 26. Moss argued that the jury knew what the widows had lost during the liability phase of the bifurcated trial, but had no idea of the extent and severity of his injuries, since he could not introduce that evidence.

In affirming the trial court's decision to consolidate and bifurcate, the Sixth Circuit stated:

There are not a few who question the wisdom of employing Rule 42(b) to divide personal injury damage actions into separate trials of the liability and damages issues, whether submitted seriatim to the same jury or to different juries. Some look upon the practice as but another procedural 'gimmick' designed to assist current judicial efforts to mass produce dispositions of pending cases, but which merely multiplies the burden of litigation. They feel that the occasional good it produces is greatly outweighed by the danger of unfairness being visited upon litigants who from right motives prefer to try their suits in traditional fashion. However, whatever academic disagreement there may be on that point, it seems now to be established that under Rule 42(b) a trial judge had right within his discretion to do what was done here.

Id. at 25 (internal citations omitted).

Another Sixth Circuit case, *Helminski v. Ayerst Laboratories*, held that bifurcation was appropriate when evidence pertinent to the issues of liability and damages was wholly unrelated and evidence relevant to damages could have a prejudicial impact on a jury's liability determination. 766 F.2d 208 (6th Cir. 1985). The plaintiff in *Helminski* was a severely disabled child whose parents sued, claiming that his in utero

exposure to a medication manufactured by the defendant caused those disabilities. The case is notable for another reason, however. In it, the Sixth Circuit discussed whether a trial court could exclude the litigant from attending the liability phase of a bifurcated trial if it determined that the plaintiff's presence would substantially prevent or impair a jury from performing its duties. While the Sixth Circuit found that the trial court should not have barred the plaintiff from the liability phase of the trial, it also determined that this was a harmless error, since his condition rendered him unable to assist meaningfully with the prosecution of the case, and the circuit court affirmed the defense verdict.

In *Zofcin v. Dean*, the plaintiff was injured and his wife and two children were killed in an auto accident. 144 F.R.D. 203 (S.D.N.Y. 1992). The defendant stipulated to causation and moved to bifurcate. The trial court granted the defendant's motion to split the liability and damages phases of the trial. Over the plaintiff's objections, the court found bifurcation proper, since the plaintiff intended to "offer detailed evidence of extreme pain and suffering, including burning flesh and screams of pain." *Id.* at 205. This posed a "substantial risk of impairing the jury's objectivity on the liability issue." *Id.* The *Zofcin* facts were horrific—a father and husband who suffered injuries himself and, more importantly, who witnessed the deaths of his family in the same accident. It presents a classic example of a situation in which a jury would likely become overwhelmed by damages evidence without bifurcation.

Other Considerations in Deciding Whether to Bifurcate

In *McKellar v. Clark Equipment Company v. Lime Products Corporation*, the plaintiff was left quadriplegic and incurred significant economic damages as the result of an accident. 101 F.R.D. 93 (D. Me. 1984). The severity of the damages was not in question, but liability was hotly contested. The defendant sought to separately try the issue of liability from the damages issues on the bases of avoiding prejudice and judicial economy. The plaintiff opposed the motion, arguing that bifurcation was unnecessary to avoid prejudice and unlikely to result in time savings.

In granting the defendant's motion to bifurcate, the court considered several factors, including:

Whether a separation of the issues for trial will serve to expedite the disposition of the action and to conserve trial time and other judicial resources, whether such separation will be likely to avoid prejudice to any party at trial that may occur in the absence of separation of the issues, and whether the issues to be separated are essentially independent of each other for evidentiary purposes so that there will be no need to duplicate the presentation of significant areas of the evidence in the separated proceedings.

Id. at 94.

The court determined that bifurcating the trial would "obviate likely prejudice to the defendant on the determination of the liability issues, will conserve judicial resources, and will occasion no prejudice to Plaintiff in the orderly and effective presentation of his case." *Id.* at 94. The court further stated that the plaintiff's physical injuries and lengthy treatment could "adversely and improperly affect a jury's fair, impartial and objective consideration of the liability issues." *Id.* at 95. Regarding judicial economy, the court noted that since the main dispute was liability, a plaintiff's victory on that issue against one or both of the defendants was likely to "greatly facilitate" a voluntary settlement by the losing party. *Id.* at 95.

While not recognized as a circumstance permitting bifurcation under Rule 42(b), the *McKellar* court's comment about the likelihood of settlement if the defense lost the liability phase of the case probably reflects reality. When a defendant pins its hopes on a liability defense that proves unsuccessful, it often chooses to settle a case rather than go forward with a trial on damages that will almost certainly end badly.

New York's federal courts have consistently recognized several additional factors that a court should consider when determining whether bifurcation is proper, including "(1) whether the issues are significantly different from one another; (2) whether the issues are to be tried before a jury or to the court; (3) whether the posture of discovery on the issues favors a single

trial or bifurcation; (4) whether the documentary and testimonial evidence on the issues overlap; and (5) whether the party opposing bifurcation will be prejudiced if it is granted." *Dallas v. Goldberg*, 143 F. Supp. 2d 312, 315 (S.D.N.Y. 2001). The *Dallas* court noted that "bifurcation remains the exception rather than the rule," however, and denied the defendants' request. *Id.*

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Promoting Judicial Economy: A Strong Argument for the Defense

Betts v. General Motors Corp., is a wrongful death and personal injury case resulting from a motor vehicle accident. 689 P.2d 795 (1984). The case involved a high-speed, head-on collision between a 1974 Ford pickup truck and a 1973 Chevrolet Monte Carlo that was towing a 1972 Chevrolet Vega with a rented U-Haul trailer hitch and tow bar. The accident was caused by the Ford pickup driver's negligence. He lost control of his vehicle when he apparently fell asleep. Five members of the plaintiffs' family were passengers in the Monte Carlo. A fire broke out after the collision, and, except one five-year-old child, the plaintiffs' family died. The driver of the Ford pick-up was also killed.

The plaintiffs sued General Motors for faulty product design and manufacturing and for negligence in installing the fuel tank in a place where the plaintiffs claimed that it would likely rupture in a collision and cause a gasoline fire. General Motors moved to bifurcate the liability and damages issues so that a jury first could determine liability, if any, of General Motors, U-Haul and the Kansas Turnpike Authority. The trial court allowed a bifurcated

trial, and the jury decided that General Motors was not liable.

The plaintiffs argued on appeal that the trial court had abused its discretion in ordering bifurcation. The Kansas Supreme Court found no error, noting that the trial court pointed out the advantages of a bifurcated trial—that it would help the jury comprehend the issues, economize the

Although discretionary, a trial judge must consider the merits of each individual case when granting or denying bifurcation.

court's time, and reduce the parties' trial expenses. The supreme court affirmed the trial court's bifurcation order, which found that "the additional expenses of time and resources might be unnecessary if determination of the fault issues made the damages issues moot or enhanced the prospects of settlement." *Id.* at 802.

In *Marshall v. Williams*, the North Carolina Court of Appeals approved an order initiated by the trial judge to bifurcate a personal injury action. 574 S.E.2d 1 (2002). The case involved a collision between a truck and a boy on his bicycle. The trial was bifurcated to consider all issues related to negligence before proceeding with a trial on the damages.

Arguing against bifurcation, the plaintiff's attorney took the position that the jury needed to see the "entire picture of the accident" and that to prove negligence the plaintiff would have to prove that the boy's damages were proximately caused by the negligence of defendant. In response, the defendant stipulated that the boy's injuries were the direct result of the accident.

The court bifurcated the trial "for the purpose of judicial economy, for the ease of understandability and presentation to the jury, and... after lengthy consideration of the best presentation of this matter." *Id.* at 4. At trial, the court granted a directed verdict in favor of defendant on the issue of negli-

gence. The North Carolina Court of Appeals upheld the trial court's decision to bifurcate, noting that a trial judge's discretion in separating trials is extremely broad.

Even "Simple" Cases Can Be Bifurcated

Sometimes plaintiffs oppose bifurcation, as in *Hunter v. McDaniel Construction Company*, by arguing that their case is the result of a "simple vehicular collision," and, as such, does not meet bifurcation criteria. 623 S.W.2d. 196, 198 (1981). The Arkansas Supreme Court has disagreed. It held that bifurcation of liability and damages in a personal injury action was "common" in federal and state courts and did not infringe on the constitutional right to a jury trial. *Id.* The court also noted that "the primary concern is efficient judicial administration, rather than the wishes of the parties, as long as no party suffers prejudice by bifurcation." *Id.* at 198.

Trucking cases may seem "simple" to courts, and plaintiffs' attorneys may try to depict them that way. The truth is often different, however. For example, trucking cases often involve the Federal Motor Carrier Safety Regulations, for instance, whether a carrier violated them and, if so, whether that violation was a proximate cause of an accident. Expecting jurors to parse evidence of regulatory violations when determining liability and then asking those same jurors to ignore that evidence when deciding compensatory damages is optimistic at best. Educating a court about the complexity of your case can be crucial when trying to win a bifurcated trial.

Stipulating to Other Issues to Win Bifurcation

Sometimes, you might need to stipulate some issues to win bifurcation. One case that illustrates this strategy is *Fisher v. Northland Insurance Company*, which involved a fatal trucking accident and in which the Court of Civil Appeals of Oklahoma upheld bifurcation of liability and damages. 23 P.3d 296 (2000). The plaintiff, the personal representative of her granddaughter's estate, sued a trucking company and its insurance carrier. Granting a motion by the defense, the trial court bifurcated the issues of liability and damages and further bifurcated the plaintiff's claims against the

insurer until the jury decided the liability question. The jury found in favor of the trucking company. The plaintiff argued that evidence of her relationship with her granddaughter was necessary to prove that she was an appropriate personal representative. The defendants stipulated that the plaintiff had the legal ability to bring the suit, dispensing with the plaintiff's arguments. The plaintiff could not show that bifurcation was prejudicial to her, and the appeals court affirmed the trial court's decision.

Fisher is also a classic example of a trucking case bifurcation. It involved the death of a child, questionable liability, and coverage issues. The court wisely chose to try liability first, and second, have the jury decide damages and coverage, if needed. After hearing the negligence case, the jury found for the defense, and the jury did not need to sort through coverage and damages evidence to conclude the case.

Bifurcation as Court Practice Requires Informed Discretion

Courts must generally adhere to particular principles when granting bifurcation, as illustrated in *Lis v. Robert Packer Hospital*, in which a four-month-old child was taken to the emergency room with breathing difficulties after possibly aspirating food. 579 F. 2d 819 (3d Cir. 1978). On arrival at the hospital, a doctor's examination revealed extremely high blood sugar levels, and the baby was diagnosed with diabetes. Next, the baby received 15 insulin injections. Shortly after receiving the injections, the baby experienced serious seizures, which led to severe brain damage and mental retardation. At the time, the emergency room examining doctor thought that the child would also experience blindness. The doctor's diagnosis and treatment was later proven erroneous, and the family sued the hospital and the physician.

The case was tried in the Middle District of Pennsylvania. The trial court, as was its "usual practice," ordered the case to go to the jury first on the issue of negligence. *Id.* at 823. Over the plaintiffs' objection, the trial court stated: "I bifurcated it because we bifurcate all negligence cases, and I think everybody is more fairly treated that way." *Id.*

During the bifurcated trial, the defense argued that the baby's seizures were not the result of the insulin injections, but of a pre-

existing congenital brain disorder. The jury found the treating physician negligent, but found no proximate cause. The plaintiffs appealed, and the Third Circuit held that it was improper for the lower court to adopt a general practice of bifurcating all negligence trials. The court stated that:

A general policy of a district judge bifurcating all negligence cases offends the philosophy that a decision must be made by a trial judge only as a result of an informed exercise of discretion on the merits of each case.

Id. at 824.

The Third Circuit upheld the trial court's decision to allow bifurcation in this case, however, noting that the plaintiffs did not show that bifurcation prejudiced them. The Third Circuit noted, however, that it would not necessarily require a showing of prejudice in future cases to overrule a trial court's decision to bifurcate if the trial court failed to demonstrate that it had exercised *informed* discretion. *Id.* at 825. This opinion illustrates that although discretionary, a trial judge must consider the merits of each individual case when granting or denying bifurcation.

Courts Can Initiate Bifurcation

A court can initiate bifurcation. Further, even if both parties oppose bifurcation, a court can find that it is appropriate given the circumstances of a particular case. For example, in *Hosie v. Chicago & N.W. Ry. Co.*, the trial court initiated and ordered bifurcation on the issues of liability and damages one day before the trial, over the objection of *both* the plaintiff and the defendant. 282 F.2d 639 (7th Cir. 1960). The defendant prevailed on the issue of liability at trial, and the plaintiff appealed, arguing that bifurcation deprived him of his constitutional right to a trial by jury.

In affirming the trial court's decision to bifurcate and rejecting the plaintiff's constitutional argument, the Seventh Circuit held that the procedural rules in place when the Bill of Rights was adopted were not set in stone and, just as with rules on the form of pleadings, they could be changed. In support of bifurcation, the court stated:

Many of the federal district courts of this country are laboring under the heavy burden of crowded trial dockets. The Northern District of Illinois is no excep-

tion. The judges of that court should be commended for their search for methods and means to expedite the disposition of cases upon their calendars. There is no doubt that in numerous cases, the severing of the issue of liability from the issue of damages will result in the shortening of the time of trial. The instant case is a good example. Without such severance, hours or even a day or two might have been consumed on the issue of damages.

Id. at 643.

Bifurcation initiated by a court, however, is the exception, rather than the rule, and the best practice is to request bifurcation rather than hope that a court will decide to split a trial.

Damages as an Essential Liability Element

With all this said, achieving bifurcation creates challenges when damages are an essential element of a liability claim, as exemplified by *Miller v. Fairchild Industries, Inc.*, in which two employees sued their employer, alleging that they were discharged from their jobs in retaliation for filing discrimination charges with the Equal Employment Opportunity Commission. 885 F.2d. 498 (9th Cir. 1989). Among other claims, the plaintiffs sought redress for intentional infliction of emotional distress. The Ninth Circuit held that the facts supporting the intentional infliction of emotional distress claim were "so intertwined with liability" that bifurcation was improper. *Id.* at 511. Specifically, the Ninth Circuit noted that a finding of liability for intentional infliction of emotional distress required that the fact finder determine that a plaintiff in fact had suffered emotional distress. As such, the court determined that separating the issues would create confusion and uncertainty for the jury, rendering separation inappropriate.

Beware the Demand for a Jury Trial

At least one court has relied, in part, on a defendant's demand for a jury trial in denying a motion to bifurcate in a trucking accident case. *Fetz v. E&L Truck Rental*, 670 F. Supp. 261 (S.D. Ind. 1987). In this case, as a result of the accident the plaintiff sustained brain damage that left her in a permanent vegetative state. Noting that bifurcation typically only shortened trials if the defense

won on liability, the trial court found that the trucking company had "not demonstrated that its probability of prevailing in a separate trial of liability is sufficiently substantial to warrant ordering a bifurcated trial in this case based on 'judicial economy'" *Id.* at 266.

The court next discussed the defendant's concern about prejudice, should a jury hear the full case. After writing that "the defendant's sudden lack of faith in the jury system must be viewed with skepticism given that the defendants themselves demanded a jury trial in this case," the court denied the request to bifurcate.

While an uncommon basis for denying a motion to bifurcate, the *Fetz* court's logic would require the defense to decide whether prejudice is likely when you file an initial pleading and when you decide whether to request a jury trial.

Conclusion

Lest you believe after reading the cases discussed above that courts frequently grant bifurcation, remember that there is essentially a presumption against it. While not dealing specifically with bifurcation under Rule 42(b), the United States Supreme Court in *Miller v. Am. Bonding Co.*, wrote that "the general practice is to try all the issues in a case at one time; and it is only in exceptional instances where there are special and persuasive reasons for departing from this practice that distinct causes of action asserted in the same case may be made the subject of separate trials." 257 U.S. 304, 308 (1921).

In defending your client, a motion to bifurcate a trial can offer an important tool. Separating consideration of issues at trials may give your client some predictability and save time and money in certain circumstances. While you should decide to move to bifurcate on a case-by-case basis, generally serious personal injury lawsuits resulting from trucking accidents lend themselves to bifurcation as much as any other. When you and your client believe that bifurcation would prove useful, consider a bifurcation motion from the start of a case and use discovery to develop arguments to support it. Bifurcation may be an uncommon remedy, but it could help alleviate your clients' concerns about facing a jury in a catastrophic trucking accident case. 