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# Bifurcation in Personal Injury Cases: Should Judges Be Allowed to Use the "B" Word

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## I. INTRODUCTION

The bifurcation of personal injury cases is becoming more prevalent since the article by Judge David L. Tobin, *To B . . . or Not to B . . . "B . . . "*

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*Means Bifurcation*.[1] The debate regarding the bifurcation of personal injury cases has drawn both supporters and critics. Retired Judge Tobin appears to support the bifurcation of personal injury cases on the issues of liability and damages in automobile, slip and fall, products liability, and general negligence cases.[2] The purpose of this article is to provide an opposing viewpoint regarding whether bifurcation is appropriate in these types of cases, and to consider the impact that bifurcation has upon a plaintiff's success at trial. Unlike other law review articles on the issue of bifurcation, this article delineates, in part, the positive and negative impact of bifurcation by type of personal injury case.[3]

The legal term bifurcation is sometimes used interchangeably with the term severance in case law.[4] However, the difference is that bifurcation ultimately results in one enforceable judgment, whereas severance "divides the lawsuit into two or more independent causes."[5] Instead of one judgment, severance results in separate and enforceable judgments.[6] Rule 1.270 of the *Florida Rules of Civil Procedure* states in relevant part: "(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross claim, counter claim, or third-party claim, or of any separate issue or of any number of claims, cross claims, counter-claims, third-party claims, or issues."[7] Importantly, the comment to the rule contains language not present in its federal counterpart: "Generally, justice requires that an action not be handled piecemeal when it reasonably can be avoided . . . ."[8]

In the following sections, some of the concerns that support this comment will be discussed. Part II provides a brief overview of Florida case law and decisions of other states. Part III discusses the potential impact of bifurcation on different types of negligence cases. Part IV considers the potential bias and prejudice to the plaintiff. Part V refutes some of the assertions Judge Tobin made in his article and Part VI provides a statistical analysis of the success rate of plaintiffs in bifurcated versus non-bifurcated

1. David L. Tobin, *To B . . . or Not to B . . . "B . . . " Means Bifurcation*, FLA. B.J., Nov. 2000, at 14.

2. *See id.*

3. *See, e.g.*, Miering de Villiers, *A Legal and Policy Analysis of Bifurcated Litigation*, 2000 COLUM. BUS. L. REV. 153 (2000); Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705 (2000).

4. *See, e.g.*, Hardee Mfg. Co. v. Josey, 535 So. 2d 655 (Fla. 3d Dist. Ct. App. 1988).

5. BLACK'S LAW DICTIONARY 148 (5th ed. 1979).

6. *Id.*

7. FLA. R. CIV. P. 1.270(b).

8. Author's Comments, FLA. R. CIV. P. 1.270 (1967).

trials. Finally, this article concludes that bifurcation of liability and damages in personal injury cases should be the exception rather than the rule, and should be permitted only when the benefit of bifurcation clearly outweighs the detriment and prejudice to any party opposing the bifurcation of a case.[9]

## II. REVIEW OF CASE LAW

### A. *Florida Case Law*

There have not been many Florida appellate decisions that address bifurcation of the liability and damage issues in personal injury cases. Before the adoption of rule 1.270 of the *Florida Rules of Civil Procedure*, the first Florida case that squarely discussed the issue stated that the bifurcation of personal injury cases on the issues of liability and damages was ordinarily not permitted.[10] The court held that the bifurcation of issues in a cause "should be the exception rather than the usual procedure."[11]

*Vander Car v. Pitts*,[12] pointed out that the authority for the trial court to bifurcate was then-existing rule 1.20(b) of the *Florida Rules of Civil Procedure*, effective July 1, 1962, which essentially mimicked 42(b) of the *Federal Rules of Civil Procedure.* Although the bifurcation of liability and damages was upheld, the appellate court noted: "a single trial generally tends to lessen the delay, expense and inconvenience to all concerned, and the courts have emphasized that separate trials should not be ordered unless such disposition is clearly necessary, and then only in the furtherance of justice."[13]

In *Watts v. Mantooth*,[14] the appellate court held, upon plaintiff's motion, that it was not an abuse of discretion to bifurcate the trial on liability and damages for determination by separate juries where the judge's trial docket ended on Monday, the trial was beginning on Friday, and unless the case was bifurcated, the jury would have had to sit through the trial on Saturday and possibly Sunday.[15] In addition, both of the plaintiff's medical

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9. This article is not intended to discuss the bifurcation of the determination of the amount of punitive damages from the main portion of the trial, which procedure was approved by the Supreme Court of Florida in *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994).

10. Bowen v. Manuel, 144 So. 2d 341, 343 (Fla. 2d Dist. Ct. App. 1962).

11. *Id.* at 343.

12. 166 So. 2d 837 (Fla. 2d Dist. Ct. App. 1964).

13. *Id.* at 839.

14. 196 So. 2d 230 (Fla. 2d Dist. Ct. App. 1967).

15. *Id.* at 232.

doctors resided in Tennessee, and they would have had to come to Florida to testify.[16] The trial court granted plaintiff's request to determine liability first so that the jurors, the court, and the parties would not have to try the case over the weekend, and so that the plaintiff could potentially avoid the cost of bringing these two medical doctors to Florida from Tennessee.[17]

In *Marley v. Saunders*,[18] the Supreme Court of Florida, in dicta, discussed the issue of bifurcation in a case where bifurcation had apparently been agreed to by both parties.[19] The court never addressed the issue of prejudice or the application of bifurcation to different types of personal injury lawsuits. The issue in the case was whether the Third District Court of Appeal erred in dismissing the plaintiff's appeal after the trial court ordered a new trial for the defendant on the issue of liability alone.[20] The court held that the trial court did not err in granting a new trial for the defendant on the issue of liability only.[21]

There does not appear to be another Florida appellate decision pertaining to the issue of bifurcation of liability and damages in personal injury trials for the next seventeen years. Then, in 1988, the court in *Hardee Manufacturing Co. v. Josey*[22] held that the trial judge did not abuse his discretion in denying a motion to bifurcate the issues of liability and damages in a rear-end collision where the injuries were severe and the issues of liability were close.[23] The appellate court upheld the trial court's refusal to bifurcate because factors pertaining to the cause and nature of the injuries would have had to have been introduced into evidence if the trial had been bifurcated and the liability aspect tried first.[24]

Several years later, in *Scandinavian World Cruises (Bahamas) Ltd. v. Barone*,[25] a slip and fall case, the appellate court affirmed a trial court's order granting a new trial where the "trial court's bifurcation of the issues of liability and damages prejudiced the plaintiff...." since the plaintiff had suffered a brain injury, and medical testimony was required to explain the confusing and inconsistent testimony of the plaintiff.[26] The next decision

16. *Id.*
17. *Id.*
18. 249 So. 2d 30 (Fla. 1971).
19. *Id.* at 32.
20. *Id.* at 33.
21. *Id.* at 35.
22. 535 So. 2d 655 (Fla. 3d Dist. Ct. App. 1988).
23. *Id.* at 656.
24. *Id.*
25. 573 So. 2d 1036 (Fla. 3d Dist. Ct. App. 1991).
26. *Id.* at 1037.

that mentioned the bifurcation of liability and damages in a personal injury case was *Dade County School Board v. Garcia.*[27] There, the appellate court, without any explanation as to how they arrived at their decision, held, *inter alia*, that the trial court abused its discretion in bifurcating an automobile accident case.[28]

At the time of the writing of this article, the Fourth District Court of Appeal rendered its decision in *Roseman v. Town Square Ass'n.*[29] The case involved a claim for personal injuries sustained when a front door of a condominium complex allegedly closed quickly on the plaintiff.[30] The trial court granted the defendant's motion to bifurcate the trial on liability and damages, holding that the issue the jury would decide in the liability phase was as follows. "[W]as there negligence on the part of Town Square Association which was a legal cause of the door striking Mindy Roseman?"[31]

In holding that it was not an abuse of discretion for the trial judge to allow bifurcation of the case, the court found, "[t]here was no dispute as to where on Roseman's body she was struck or how hard the blow was."[32] The court also pointed out that "[t]here was no dispute at trial regarding whether the incident actually occurred."[33] Further, the court stated that any claim that medical care and treatment rendered immediately after the incident would buttress plaintiff's claim was "immaterial to the liability issues of negligent maintenance or failure to warn of the dangerous condition."[34]

There have been a total of eight decisions in Florida since the first one thirty-nine years ago, discussing the issue of bifurcation of the liability and damage aspects of personal injury cases. None of these decisions provides any meaningful standard for trial courts in determining whether bifurcation is appropriate.

### B. *Case Law of Other States*

A review of the case law of other states provides mixed results. For instance, Illinois and Texas do not allow the bifurcation of liability and

27. 723 So. 2d 377 (Fla. 3d Dist. Ct. App. 1998).

28. *Id.*

29. 26 Fla. L. Weekly D1833 (Fla. 4th Dist. Ct. App. July 25, 2001). At the time this article went to publication, plaintiff's motion for re-hearing and for clarification had not been decided, and the decision was not final.

30. *Id.* at D1833.

31. *Id.*

32. *Id.* at D1834.

33. *Id.*

34. *Roseman*, 26 Fla. L. Weekly at D1834.

damages in personal injury cases under any circumstances.[35] In contrast, New York mandates bifurcation in most personal injury cases.[36] It appears that thirteen states, Alaska, Hawaii, Idaho, Kentucky, Mississippi, Missouri, Montana, New Hampshire, Rhode Island, Utah, Vermont, Wisconsin, and Wyoming, have not taken a position on the issue. Ten states allow bifurcation of the liability and damage aspects of personal injury cases only in extraordinary or exceptional situations.[37] The remaining twenty-four states appear to allow bifurcation on a discretionary basis. In addition, the federal courts generally appear to favor the bifurcation of personal injury cases.

## III. EXAMINING THE POTENTIAL IMPACT OF BIFURCATION BY TYPE OF CASE

It is important to remember that "[t]he decision to separate the trial of liability from damages . . . is not merely a matter of trial management [but] involves a decision that could very well impact and influence the outcome of the trial."[38] Trying a personal injury case on the issue of liability alone is like trying a case in a vacuum, or in a laboratory setting. The jury doesn't hear the whole story, but only part of the story. It is analogous to telling a story without an ending, or telling a joke without a punch line. For an injured plaintiff, the potential impact on her case is certainly no joke. The "laboratory" or "sterile" effect and its impact on a negligence action has been described as follows:

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35. *See* Mason v. Dunn, 285 N.E.2d 191 (Ill. App. 1972); Iley v. Hughes, 311 S.W.2d 648 (Tex. 1958).

36. *See,* e.g., Fetterman v. Evans 612 N.Y.S. 2d 479 (N.Y. App. Div. 1994).

37. *See* Coburn v. Am. Liberty Ins. Co., 341 So. 2d 717, 719 (Ala. 1977) (holding bifurcation should be ordered "sparingly" and in "exceptional cases"); Randolph v. Scott, 338 A.2d 135, 137 (Del. 1975) (calling the bifurcation procedure in personal injury cases "extraordinary"); Brake v. Central Serv. Co., 7 N.W.2d 184, 185 (Iowa 1942); Detloff v. Taubman Co., 315 N.W.2d 582, 583 (Mich. Ct. App. 1982) (holding bifurcation permitted "only upon the most persuasive showing"); Grosfield v. Clearwater Clinic, 417 N.W.2d 640, 642 (Minn. 1988) (calling the use of bifurcation on personal injury cases an "extraordinary remedy"); Griffin v. Werner Enters. Inc., 1999 WL 419900 (Neb. Ct. App. 1999) (calling bifurcation an "extraordinary measure"); Wertz v. Kephart, 542 A.2d 1019, 1022 (Pa. 1988) (stating bifurcation should be "cautiously applied"); Burks v. Harris, 1992 WL 322375 (Tenn. Ct. App. 1993) (holding bifurcation allowed "in only the most exceptional cases and upon a strong showing of necessity"); Brown v. Gen. Motors Corp., 407 P.2d 461, 464 (Wash. 1965) (stating bifurcation should be "cautiously applied"); Andrews v. Reynolds Mem'l Hosp., Inc., 499 S.E.2d 846, 856 (W.Va. 1997) (stating "bifurcation should be granted only when clearly necessary").

38. Cavender v. McCarty, 479 S.E.2d 887, 893 (W. Va. 1996).

> According to the sterile-trial theory, bifurcation obscures the magnitude of the case itself and the significance of the jury's decision. In other words, juries that do not hear evidence regarding the plaintiff's injuries and damages will not feel sympathy, and therefore are less likely to care about what they are doing. This concern may be valid because sympathy does appear to be an emotional trigger for taking matters more seriously. In this respect, sympathy enhances legal decision making by acting as a natural emotional signpost that points out: (1) the existence of a "justice-related matter," (2) relevant facts that might be overlooked in a non-sympathetic environment, or (3) the path towards the "just" outcome. Hence, sympathy can help juries decide cases within the law by grabbing their attention and highlighting the fact that someone has been hurt and may deserve the juries help. By putting aside evidence that might invoke sympathy, bifurcation presents a risk that the jurors will lack the natural stimulus to give the issues serious consideration.... [W]here the circumstances require a greater impression, the trial court might allow the plaintiff to present a limited amount of injury evidence during the separated liability stage so the jury can "begin to comprehend the significance of the claims to the plaintiffs. Trial judges and litigants can and will think of other means to ensure that the jury appreciates the significance of the issues and takes its role seriously."[39]

In light of these concerns and the following issues, it will become apparent why the whole story is generally necessary for a fair trial of a personal injury case.

### A. *Automobile Accident Cases*

Certainly, in automobile accident cases, the jury can determine the percentage of fault of each party to an accident in the liability aspect of a bifurcated proceeding, but what if there is a seat belt issue? For instance, medical testimony regarding the injuries suffered by the plaintiff has to be elicited in order for the jury to determine the issues of the comparative negligence of the plaintiff who did not wear a seatbelt or shoulder harness. The seatbelt issue necessitates both liability and damages testimony because medical testimony is required to determine the extent of comparative

39. Gensler, *supra* note 3, at 767–69.

negligence of the plaintiff. Therefore, bifurcation of such a case would never be appropriate.

Bifurcation may also be inappropriate in other automobile accident cases not entailing a seatbelt issue. Even if liability is admitted by the defendant in a personal injury trial, testimony and evidence as to the extent of the impact is relevant to prove or disprove damages.[40] Further, speed and force of impact testimony may also be relevant for the jury to consider in the damages phase in determining whether a particular collision could cause the injury claimed.[41] In an auto collision case, it may be necessary to present testimony of police officers, witnesses to the accident, accident reconstructionists, and biomechanical engineers in both the liability and damage aspects of a bifurcated personal injury trial, because that testimony may be relevant to both liability and damages. The potential need to call the same witnesses in both aspects of the trial mitigates against bifurcation because there may not be any cost, or time-savings if the same witnesses have to be called in both phases of the trial.[42]

Bifurcation of liability and damages in vehicular collision cases can actually increase the time and expense of litigating a case. The increased cost and time can occur in cases where a defendant would otherwise have admitted liability and simply chosen to try the case on causation, or on causation and damages alone. Where bifurcation is allowed, a defendant may have an increased desire to contest liability. That is because without bifurcation, a defendant fears that its decision to contest liability may adversely affect it on damages, particularly if the liability defense is somewhat tenuous. With the trial bifurcated, the fear dissipates, especially if separate juries will be used for each phase.

### B. *Non-Vehicular Accidents*

Bifurcation of the liability and damage portions of non-vehicular accidents presents additional problems. For example, in a trip or slip and fall case, where the plaintiff's injuries are not visible at the time of trial, or

40. *See* Allstate Ins. Co. v. Kidwell, 746 So. 2d 1129 (Fla. 4th Dist. Ct. App. 1999); Traud v. Waller, 272 So. 2d 19 (Fla. 3d Dist. Ct. App. 1973) (holding that photographs of property damage to vehicles may be admissible as tending to prove the extent of the forces or lack thereof in the collision).

41. *See* Bryant v. Buerman, 739 So. 2d 710 (Fla. 4th Dist. Ct. App. 1999).

42. This assumes the use of two different juries to try the liability and damage aspects of the trial. The use of different juries for each aspect of the trial is discussed *infra* in section IV.B.

do not visibly appear serious, jurors will be likely scratching their heads trying to figure out why the plaintiff is even bringing a claim, especially if they have no idea what injuries the plaintiff suffered. Jurors are unlikely to care about what caused the plaintiff to fall if they are not told about the extent of the injuries sustained.

C. *Products Liability Cases*

In a products liability case with a strict liability count, the main liability issue usually is whether the product is unreasonably dangerous to the user or consumer.[43] How can jurors in a bifurcated trial on liability determine whether the product is unreasonably dangerous to users or consumers, if they do not know the extent of the damage that the product caused to the injured plaintiff? For example, the jurors might determine that a product that can cause a cut to a finger is not unreasonably dangerous, but that a product that causes a finger to be cut off is unreasonably dangerous. In a products liability case, jurors should know what damages and what injuries a product can cause, and have caused in a particular case, in order to be able to determine liablity. For example, whether the product is defective and unreasonably dangerous to the user or consumer. If the case is bifurcated, the jurors will likely be precluded from learning that important information in the liability phase. Bifurcation is therefore generally inappropriate in products liability cases.

D. *Medical Malpractice Cases*

Bifurcation of liability and damages is inappropriate in medical malpractice cases as well. A medical malpractice case requires medical testimony in the liability, causation, and damage aspects of the trial. In most cases, the treating physician's testimony will be required to establish both liability and damages. It is impractical to bifurcate the trial because it is difficult to separate at what point the medical testimony on liability ends, and the medical testimony on causation and damages begins. If the plaintiff prevails on liability, not only will there not be a time savings, but the same treating physicians who were called to testify in the liability aspect of the case may well have to be called again for the damages aspect of the case.[44]

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43. West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).

44. *See* Dobress v. N. Shore Univ. Hosp., 678 N.Y.S.2d 870, 872 (N.Y. Sup. Ct. 1998) In medical malpractice cases, because liability and damages invariably requires the

Where the plaintiff prevails in a bifurcated case, the case will have taken longer because there are two jury selections, two openings, two closings, etc. Therefore, there is no time savings, as the case may take more time than a unified trial. Further, there may be extra costs involved in having to call witnesses in both aspects of a bifurcated trial. Even in New York, where bifurcation is the general rule in personal injury cases, the bifurcation of the issues of liability and damages has been recognized as inappropriate in most medical malpractice actions.[45]

E. *Intentional Tort Claims*

Intentional tort claims are also generally inappropriate for bifurcation. For example, in an assault and battery or false arrest case, the conduct of the defendant leading to the determination of liability is relevant to a determination of the amount of actual damages suffered by the plaintiff. In a false arrest case, how the plaintiff was treated by the defendant is relevant to determine the extent of the mental anguish suffered by the plaintiff. Further, for example, the jury may have to assess the extent of the conduct in determining whether future psychiatric care is reasonably required, based upon the circumstances surrounding the incident. Bifurcation is inappropriate in these types of intentional tort claims.

F. *Cases with a Punitive Damage Claim*

Personal injury cases with a punitive damage claim should not be bifurcated for trial on liability and damages with different juries, because the same jury that hears liability and damages must also hear the punitive damage phase in order to have any semblance of judicial economy. Otherwise, the entire trial will have to be repeated for the new jury in the punitive damage phase. To avoid that, the only part of the personal injury claim that should be bifurcated is the determination of the amount of punitive damages.[46]

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testimony of the same medical expert witnesses, "there is no real saving in terms of time or court facilities." *Id.* at 872.

45. *Id.* *But see* Barracca v. St. Francis Hosp., 634 N.Y.S.2d 941 (N.Y. Sup. Ct. 1995).

46. *See* W.R. Grace & Co. v. Waters, 638 So. 2d 502 (Fla. 1994).

### G. *Death Cases*

In any case involving a death where a person has a claim for their mental pain and suffering resulting from the death, bifurcation is inappropriate. This is because the circumstances surrounding how the person died, "the liability aspect," very likely will be relevant to the claim for mental pain and suffering. That is because the more horrific or elongated the circumstances surrounding the death of a loved one was, the more credible is the claim for a larger mental pain and suffering award.

## IV. BIAS AND PREJUDICE

If jurors are not told of the extent of the damages suffered by the plaintiff, the bias factor against the plaintiff will increase.[47] That is the case because many jurors verbally express in jury selection that they are not interested in cases where the damages are small or not obvious.[48] That being the case, why should jurors be interested in a case where there is no visible injury to the plaintiff and the injuries have not been explained to the jury? Having personally selected at least eighty juries in personal injury trials, I as well as any experienced trial lawyer or judge, can tell you that it is commonplace that many jurors do not want to be there in the first place. Further, many jurors have biases and prejudices against many different types of personal injury cases.[49]

Judge Tobin's proposal to "instruct the jury that the plaintiff has injuries, and in some cases it would be appropriate for the court to state that the plaintiff has either serious or significant injuries,"[50] doesn't resolve the problem, and may actually create a new problem. For instance, instructing the jury that the plaintiff has serious or significant injuries prejudices the defense. A competent defense attorney should only agree to allow the court to say that the plaintiff "alleges" she has sustained injuries as a result of the incident, not that the plaintiff "has sustained" serious or significant injuries.

47. *See generally* Fazzolari v. City of W. Palm Beach, 608 So. 2d 927 (Fla. 4th Dist. Ct. App. 1992). During jury selection, half of the jury panel in this non-bifurcated personal injury trial stated that they had negative feelings about personal injury lawsuits. *Id.*

48. *See, e.g.*, Goldenberg v. Reg'l Imp. & Exp. Trucking Co., 674 So. 2d 761 (Fla. 4th Dist. Ct. App. 1996) (discussing a juror expressing the opinion that if there is not a substantial injury, she feels the person making the claim is dishonest).

49. *See generally* Sisto v. Aetna Cas. & Sur. Co., 689 So. 2d 438 (Fla. 4th Dist. Ct. App. 1997) (holding that it is reversible error to fail to allow attorney in jury selection to inquire of opinions, feelings, or beliefs of jurors concerning personal injury lawsuits).

50. Tobin, *supra* note 1, at 16.

On the other hand, using the word "alleges" does nothing for the plaintiff except raise the level of suspicion of the jurors as to the legitimacy of the case as a whole, particularly when they are not going to hear anything about the plaintiff's injuries in the bifurcated trial on liability. There is potentially an insurmountable array of problems that go into the discussion concerning whether jurors should be told of the extent or existence of injuries in the liability portion of a bifurcated trial, and there is no satisfactory resolution.

### A. *Causation of Injury and Damages*

Causation of injury is a significant problem area when personal injury cases are bifurcated for separate trials on liability and damages. Simply because an incident occurred (for example, a slip or trip and fall), does not necessarily mean that a person was injured as a result of the incident. If the jurors are not told details about causation and the extent of the injury, and if the plaintiff's injuries are not visibly apparent, jurors may have difficulty conceptualizing why they are in the courtroom. Further, in many cases, the medical evidence may "be important to both the liability issue as well as to the damages issue."[51] That is why evidence pertaining to causation and the extent of damages in most cases is a relevant part of the equation that a jury must have in order to render a fair verdict.

The issues of causation and damages are especially important to the liability issue in non-vehicular collision cases where there might be unusual liability situations. Unfortunately, it is these types of unusual cases where trial judges have the greatest tendency to bifurcate the case. The more unusual the liability situation, the more difficult it will be for the plaintiff to win the liability aspect of a bifurcated trial.[52] That is because the jurors may very well have difficulty perceiving how the incident caused the damages. Even though causation of injury and damages are not issues that the jurors are supposed to consider in the liability phase, their inability to understand how the incident caused damages will play a role in their deliberations in the liability phase. To eliminate the prospect of that occurring, bifurcation should be avoided in unusual or atypical liability situations.

New York is the only state in the United States where bifurcation in personal injury cases is the general rule. However, even in New York, bifurcation in a personal injury trial is not permitted where it is necessary for

51. *See, e.g.*, Griffin v. Werner Enters., Inc., 1999 WL 419900 (Neb. Ct. App. 1999).

52. *See, e.g.*, Randolph v. Scott, 338 A.2d 135, 137 (Del. 1975) (holding "nebulosity surrounding the exact circumstances of the accident" is a factor mitigating against bifurcation).

a plaintiff, in order to establish liability, to offer medical evidence of the injuries and of the force necessary to cause such injuries.[53] Further, medical proof of the plaintiff's injuries may be necessary to determine the actual force of the impact.[54]

B. *Same Jury Trying Both Issues*

The use of the same jury to try both liability and damages in a bifurcated trial is extremely prejudicial to the plaintiff because the jurors are more likely to render a defense verdict. Jurors will know that they will be required to return to try the damages phase if they find for the plaintiff on liability. If the judge intends from the beginning that the trial is to continue on damages with the same jury, the jury will have to be told the approximate length of the trial and asked how long they can stay. Therefore, when it is time for them to deliberate on the liability aspect of the trial, considering how long the trial has already taken, the jurors will figure out that if they find for the plaintiff they will have to return and decide damages.[55]

Unless the jurors are incensed over the conduct of the defendant, the natural tendency of the majority of the jurors will be to get on with their lives and go back to their work, school, and families. Even though we know that jurors generally tend to do the right thing, subconsciously, at best, and consciously, at worst, the jurors will want to leave as soon as possible in order to avoid spending several extra days or even weeks in the courtroom. It is simply human nature to try to accomplish a result in the quickest possible time frame. The only way for the jurors to get out of jury service quicker is for the jury to render a defense verdict on liability.

C. *Different Juries for Same Case*

Separate juries for liability and damages pose at least three additional problems that mitigate against bifurcation. First, an additional session of jury selection is required, so that the time savings hoped to be gained by the

53. Cybulski v. Bethlehem Steel Corp., 68 N.Y.S.2d 212 (N.Y. App. Div. 1999); Roman v. McNulty, 471 N.Y.S.2d 625 (N.Y. App. Div. 1984); Tate v. Stevens, 713 N.Y.S.2d 598 (N.Y. App. Div. 2000).

54. Aldous v. Honda Motor Co., 1996 WL 312189 (N.D.N.Y.) (holding where evidence of plaintiff's injuries is necessary to establish liability, bifurcation should be denied).

55. Jurors may know this from any of the following sources: 1) having previously served on a personal injury case; 2) having family members who have gone through a personal injury trial; 3) having attorney friends or people involved in the personal injury field; or 4) their own common sense and life experiences.

bifurcation is reduced. Second, the plaintiff is prejudiced because if the plaintiff wins, the trial on the damages aspect most likely will be scheduled months away, because the trial judge will be inclined to let the case sit, hoping that the parties will settle after the first part of the trial. Additionally, different juries for each phase of trial may pose constitutional problems or be held to violate statutory provisions regarding how a jury is to be comprised.

## V. THE RECENT ARTICLE ON BIFURCATION

The article on bifurcation by Judge Tobin overlooks several other significant problems. First, two of the three cases mentioned in the article as alleged authority for bifurcation are not personal injury cases. For instance, *Microclimate Sales Co. v. Dougherty*[56] involved a cause of action for infringement upon patent license rights.[57] Another case cited in the article was a cause of action for specific performance of a contract.[58]

Second, the article overlooks the unfairness to the parties. Under the method proposed in *To B . . . or Not to B . . . "B . . . " Means Bifurcation*,[59] if the plaintiff prevails on liability, the case is then delayed with the *hope* that the case will settle.[60] If the case does not settle, both the plaintiff and the defendant will have to attend two trials. A trial causes upheaval in a person's life. It affects their work schedule and their personal lives. A trial is a traumatic experience to the majority of litigants and to the average person, and with bifurcation, both parties may have to go through two trials instead of one.

Third, the main benefactor of the bifurcation is the defendant and/or her insurance carrier, whose money is earning interest while the plaintiff waits additional time for the damages phase of the trial to be concluded. Certainly, bifurcation *may* induce settlement in some situations.[61] On the other hand, an argument can be made that bifurcation could actually discourage settlement. For instance, bifurcation gives the defense two separate shots at the plaintiff's case. With separate juries, the threat that the jury will punish the defendant for frivolously contesting liability is eliminated. If the trial on

56. 731 So. 2d 856 (Fla. 5th Dist. Ct. App. 1999).

57. *Id. See generally Randolph*, 338 A.2d at 136. (stating that bifurcation hypothetically makes "it more difficult for a party to obtain a legal remedy").

58. Hernandez v. Leiva, 391 So. 2d 292 (Fla. 3d Dist. Ct. App. 1980).

59. Tobin, *supra* note 1, at 14.

60. *Id.* at 16.

61. *Id.*

damages is deferred, defendants may be more willing to contest liability because the potential time period when the plaintiff will be eligible to collect is further deferred.

Most cases that are separated into two phases, with damages to be tried after a break, will likely discourage settlement because a significant factor that encourages the defendant to settle a case is the imminent threat of a final judgment. Cases settle on the "courthouse steps" because there is the imminent threat of a final judgment. The deferral of the ultimate outcome, i.e., a potential final judgment, almost never operates as an inducement for the defendant to offer an early settlement. In such cases, bifurcation promotes none of the purposes for which it was intended.

Additionally, no plaintiff wants to wait, who knows how long, to go through two trials. Bifurcated cases may settle at a higher rate than non-bifurcated cases, but only because most plaintiffs would rather take less then have to go through two trials and a much longer delay to get full compensation. Any experienced trial lawyer knows that very few individual plaintiffs or defendants are enamored by the concept of sitting through *any* type of trial. Surely, the concept of having to potentially sit through *two* separate trials is even less appealing to most litigants.

## VI. STATISTICAL DATA

Circuit Judge David L. Tobin's statistical data is relevant only to prove that more bifurcated cases in his division settled than non-bifurcated cases.[62] What the article does not address is how unfairly the bifurcation process affects the plaintiffs whose cases are bifurcated. Additionally, his statistics regarding jury verdicts are unclear.[63] He states that since 1997, there were forty-two cases on his trial calendar that were bifurcated, but he is unclear regarding how many of those trials resulted in defense or plaintiff verdicts.[64]

This writer performed a study using Westlaw's Florida Jury Verdict Reporter database (FL-JV).[65] The research, as of February 2001, reflected a

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62. *Id.* at 18.

63. *Id.*

64. Tobin, *supra* note 1, at 18.

65. This study was accomplished by performing several Westlaw searches on the *Florida Jury Verdict* database (FL-JV). For example, to ascertain the number of verdicts for the plaintiff in bifurcation trip or slip and fall cases, the search performed was "verdict /3 defendant and slip! or trip!" and "liability only" or "bifurcate!" (The author maintains a copy of all searches performed and the specific data, as it is too cumbersome to be included in this article).

database of 8769 personal injury cases, of which 102 were bifurcated.[66] The difference in the success rate of plaintiffs whose cases were bifurcated, versus those whose cases were not, was stunning. Although plaintiffs won (received any verdict) in 59.5% of all personal injury cases that were not bifurcated, plaintiffs prevailed only 23.5% of the time when the cases were bifurcated.[67]

In slip or trip and fall cases, although plaintiffs received a verdict in 47.3% of cases that were not bifurcated, plaintiffs only prevailed in 12.1% of those cases that were bifurcated.[68] In motor vehicle collisions, although

66. A telephone call to the *Florida Jury Verdict Reporter*, a publication of Florida Legal Periodicals, Inc., at 1-800-446-2998, on July 16, 2001, revealed that 60% of cases published are through contracted employees of Florida Legal Periodicals, Inc., and the research performed by them. The other 40% of cases are submitted by attorneys. On the inside cover of the latest edition of the *Florida Jury Verdict Reporter*, it is stated that:

> [t]he information contained in this publication is derived from trial court records and from submissions by attorneys. Post-trial alteration or modification by appellate courts is not generally reflected. Cause and nature of injury are generally those alleged by counsel for Plaintiff. The Florida Jury Verdict Reporter (FJVR) is directed primarily to tort cases and publishes both Plaintiff's and Defendant's verdicts as well as settlements .... This publication is designed solely to provide information concerning the subject matter covered. It is not disseminated for the purpose rendering legal or other professional advice. While we strive for utmost accuracy in our reporting, no warranties are made regarding the accuracy of information contained in the case reports. Verification should be sought in court documents and/or with attorneys of record. Any and all liability for inaccuracies in our published reports is hereby disclaimed.

67. BIFURCATION OF PERSONAL INJURY CASES: Disposition of Cases Without Bifurcation

| TYPE OF CASE | VERDICT FOR PLAINTIFF Number / Percentage | VERDICT FOR DEFENDANT Number / Percentage |
|---|---|---|
| All Cases | 5155 / 59.5% | 3512 / 40.5% |
| Trip or Slip and Fall | 562 / 47.3% | 626 / 52.7% |
| Motor Vehicle Accidents | 2613 / 72% | 1016 / 28% |
| Product or Strict Liability | 224 / 46.5% | 258 / 53.5% |
| Medical Malpractice | 262 / 36.1 % | 463 / 63.9% |

plaintiffs received a verdict of any sort in 72% of those cases that were not bifurcated, plaintiffs only received a verdict in 27.8% of those cases that were bifurcated.[69]

These statistics are alarming and are remarkably similar to a study conducted forty years ago.[70] The forty-year-old study demonstrated that while plaintiffs won 58% of the time when personal injury trials were not bifurcated, plaintiffs only won 21% of the time in bifurcated cases.[71] One author states, "these statistics, if still valid, would suggest that defendants can substantially alter the nature of the proceedings as to time employed and result obtained by merely implementing the procedural mechanisms afforded by the rule."[72] Furthermore, as was stated by Jennifer M. Granholm and William J. Richards in *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*:[73] "[b]ifurcation thus appears to tilt the scales of justice in favor of defendants,"[74] and "threaten[s] the ultimate goal of the legal system—the fair resolution of disputes."[75]

## VII. THE APPROPRIATE USE OF BIFURCATION IN LIMITED CIRCUMSTANCES

Bifurcation may be appropriate and beneficial to the plaintiff in one instance. For instance, in cases where the plaintiff has failed to be candid

BIFURCATION OF PERSONAL INJURY CASES: Disposition of Cases with Bifurcation

| TYPE OF CASE | VERDICT FOR PLAINTIFF Number / Percentage | VERDICT FOR DEFENDANT Number / Percentage |
|---|---|---|
| All Cases | 24 / 23.5% | 78 / 76.5% |
| Trip or Slip and Fall | 4 / 12.1% | 29 / 87.9% |
| Motor Vehicle Accidents | 10 / 27.8% | 26 / 72.2% |
| Product or Strict Liability | 1 / 20% | 4 / 80% |
| Medical Malpractice | N/A | 1 / N/A |
| Other Negligence | 9 / 33.3% | 18 / 66.7% |

Statistics from the *Florida Jury Verdict Reporter* and Westlaw since 1987.

68. *Id.*

69. *Id.*

70. Bruce J. Berman, FLORIDA CIVIL PROCEDURE 282 n.43 (1998 ed.) (quoting from Vander Car v. Pitts, 166 So. 2d 837 (Fla. 2d Dist. Ct. App. 1964)).

71. *Id.*

72. *Id.*

73. 26 U. TOL. L. REV. 505 (1995).

74. *Id.* at 513.

75. *Id.* at 506.

with regard to prior medical history or prior injuries, and that evidence will be presented at a unitary trial, a jury will have the tendency to punish the plaintiff for the false statements or omissions. These false statements or omissions regarding prior medical history or prior injuries are legally irrelevant to the liability phase in a bifurcated trial. Thus, in an appropriate case, the bifurcation of the issues of liability and damages can preclude a jury from hearing irrelevant evidence, which in all likelihood, would tend to prejudice them against the plaintiff. However, a plaintiff should not seek bifurcation of a trial simply because the plaintiff has made misrepresentations. Before a plaintiff seeks bifurcation, the plaintiff must be certain that the problems previously delineated in this article do not outweigh the potential benefits of precluding the jury from hearing about the false statements or omissions during the liability phase of a bifurcated trial.

## VIII. CONCLUSION

Although the bifurcation of liability and damages may be appropriate in very limited circumstances in personal injury cases, it should be the exception rather than the rule. The appellate courts should adopt a standard for the trial court to apply in determining whether bifurcation is appropriate. Although several states have adopted standards such as: bifurcation should be cautiously applied; allowed only in extraordinary circumstances; or sparingly applied; these standards really provide no guidance to trial courts.[76]

The standard that should be adopted is that bifurcation of liability and damages is permitted only when the benefits of bifurcating the proceedings clearly outweigh the detriment and prejudice to any party opposing the bifurcation. The abuse of discretion standard can then be applied by the appellate court to ascertain whether the trial court abused its discretion in applying this standard. Further, bifurcation should always be permitted when all of the parties agree.

The test for the trial court to consider in determining whether bifurcation is appropriate should include consideration of the following factors:

1. Are the benefits of bifurcation outweighed by the prejudice to any party opposing the bifurcation order?

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[76] *See id.* at 514 n.37.

2. Will many of the same witnesses determining liability be required to testify in the damages phase of the trial?
3. Have the defendants admitted causation of injury?
4. Is a significant cost and time savings reasonably likely to occur as a result of the bifurcation?
5. Will causation and/or damage issues and testimony be required for the jury to have a thorough understanding of the liability aspect of the case?
6. Is the factual scenario a commonplace occurrence that the jury will easily comprehend, or are the facts unusual and a scenario that the jurors may not comprehend how the injury was caused without hearing the evidence of causation and damages?

These factors are self-explanatory, except perhaps number three, which deals with causation. Whether the defendant has admitted causation is important, because if not, medical testimony may be required in the liability phase to prove that the incident in fact occurred. In other words, if the defendant is contesting whether the incident actually occurred, or whether it occurred in the manner alleged by the plaintiff, then causation and perhaps even damage testimony will be required to corroborate the plaintiff's claim.

As stated previously, the standard of appellate review would be abuse of discretion, with the paramount consideration being the avoidance of prejudice to any party. In other words, a trial court abuses its discretion when the trial court orders bifurcation and the benefits of bifurcation are outweighed by the prejudice to any party opposing the bifurcation order.

Bifurcation in personal injury cases is a procedure that is highly favorable to the defense. Although there may be some overall time-savings in the bifurcation of some personal injury cases, the constitutional rights of all litigants to a fair trial are more important than a potentially small time-savings. Bifurcation of liability and damages in personal injury cases should be reserved for the limited circumstances set forth in this article.