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POLYFURCATION AND THE RIGHT TO A CIVIL JURY TRIAL: LITTLE GRACE IN THE WOBURN CASE

*Sandra A. Smith**

I. BACKDROP

A. *Woburn, Massachusetts*

It was January, 1972, and Anne Anderson thought her son Jimmy might have a cold.[1] He was feverish and pale and had lost his appetite.[2] Strangely enough, he was showing some mild bruising even though he had been in bed recently due to his sickness.[3] Worried about her son, Anne, along with her husband Charles, took Jimmy to the family pediatrician.[4]

Dr. McClean, after a quick physical, noted Jimmy's pallor, bruises, and persistent fever and thought Jimmy might not have a cold, but some sort of blood disorder.[5] Further tests at Massachusetts General Hospital confirmed that three and a half-year old Jimmy Anderson had leukemia.[6]

After Jimmy's diagnosis, Anne learned that one block away from her house, the Zona family and the Nagle family both had boys with leukemia.[7] A year and a half later, Kevin Kane, from the other side of the Aberjona marsh, was diagnosed with leukemia. The Kane family lived in a house about a quarter of a mile away from the Andersons' in east Woburn.[8]

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[1] *See* JONATHAN HARR, A CIVIL ACTION 14 (1995).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See* HARR, *supra* note 1, at 15.

[7] *See id.* at 18.

[8] *See id.* at 21.

In November of 1975, while at Massachusetts General Hospital with Jimmy, Anne learned that a baby in a nearby room had died of leukemia.[9] The Lilley family, from Woburn, had just lost their son.[10] A year later, Donna Robbins, also from Woburn, learned her son Robbie had leukemia.[11] Four years after Robbie's diagnosis, Donna Robbins lost her son to the disease.[12]

All in all, there were nineteen cases of leukemia in Woburn between 1965 and 1980, triple the national norm.[13] Eleven children died from the disease.[14]

Shocked by the number of leukemia-stricken children in her neighborhood, Anne Anderson searched for some commonalties.[15] She noted that the air and water were shared by all the families with leukemia victims.[16] Anne theorized that the terrible tasting water had something to do with Woburn's leukemia epidemic.[17] Anne's theory was dismissed by her husband, her family doctor, her church pastor, and the specialist at Massachusetts General Hospital.[18]

Things changed in 1979, when the town newspaper revealed city water wells G and H had been shut down. The wells closed because they were contaminated with trichloroethylene, a toxic industrial solvent, "that has been found to be carcinogenic."[19]

B. *The Trial*

The discovery of toxic contamination in the city wells serving east Woburn led thirty-three individuals to file a lawsuit against two suspected polluters, the W.R. Grace Corporation (Grace) and Beatrice Foods, Inc. (Beatrice).[20] Both companies had industrial subsidiaries

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[9] *See id.* at 27.

[10] *See id.* at 27–28.

[11] *See* HARR, *supra* note 1, at 30.

[12] *See id.* at 34.

[13] *See* Michael Coakley, *Polluted-Well Case Has Legal Heads Turning*, CHICAGO TRIB., Mar. 16, 1986, at C1.

[14] *See id.*

[15] *See* HARR, *supra* note 1, at 21.

[16] *See id.*

[17] *See id.*

[18] *See id.* at 20, 25–26.

[19] *See id.* at 39; *see also* Evan T. Barr, *Poisoned Well: The New Age of Toxic Tort*, THE NEW REPUBLIC, Mar. 17, 1986, at 18 (stating trichloroethylene "has been found to cause cancers in lab animals, liver damage, neurological disorders, and cell mutation in humans").

[20] *See* Third Amended Complaint at 1, Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988) (No. 82–1672-S).

operating within 2,400 feet of Woburn wells G and H.[21] The primary cause of action on the final complaint was negligent dumping of toxic chemicals, specifically trichloroethylene (TCE) and tetrachloroethylene (perc), which plaintiffs claimed caused leukemia and other injuries to the victims.[22]

Beatrice was implicated in the case because one of its lesser-known divisions, the John J. Riley Tannery, operated in east Woburn.[23] The Riley division, still actively treating and processing hides, owned fifteen acres of land which bordered the Aberjona River near wells G and H, and was cited in the complaint as a major source of TCE contamination.[24] Neighboring the fifteen acres, other industrial businesses operated such as the Whitney Barrel Company and Aberjona Auto Parts, potentially contributing to the waste on the property owned by Beatrice.[25]

Grace's property was located farther to the north and east of the Aberjona River.[26] While Grace made it clear in a press release that it did not produce chemicals at its Woburn site,[27] employees stated that they used TCE as a solvent for cleaning greasy machine parts at the Woburn facility.[28]

The working class families from Woburn filed suit against Beatrice and Grace claiming that the companies' negligent dumping of toxic chemicals led to the contamination of the city wells and eventually caused their children to die.[29] Judge Walter Jay Skinner presided over the Woburn case after it appeared in the United States District Court for the District of Massachusetts.[30] Faced with a complex toxic tort case involving two defendants and thirty-three plaintiffs, Judge Skinner polyfurcated the case into various stages to simplify the trial

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[21] Dan Kennedy, *Environmental Tragedy and the Limits of Science* (visited Feb. 5, 1997) <http://www1.shore.net/~dkennedy/woburn_trial.html>. Beatrice Foods Company, through the Riley Tannery, was responsible for environmental liabilities on fifteen acres of Tannery property, which was located about 700 feet from wells G and H. *See id.* W.R. Grace & Company owned and operated the Cryovac Division which was located about 2400 feet northeast of the wells. *See id.*

[22] *See* Third Amended Complaint, *supra* note 20, at 37.

[23] *See* HARR, *supra* note 1, at 90.

[24] *See id.* at 92.

[25] *See id.* at 92–93.

[26] *See id.* (map located on page before table of contents).

[27] *See id.* at 95.

[28] *See* HARR, *supra* note 1, at 175–76.

[29] *See* Third Amended Complaint, *supra* note 20, at 12.

[30] *See* HARR, *supra* note 1, at 105.

process.[31] Using Federal Rule of Civil Procedure 42(b), he divided the case into four consecutive parts.[32] Judge Skinner hoped that splitting the trial would create a logical evidentiary pathway and would decrease the potential for jury confusion.[33] The first part of the Woburn trial was the Waterworks phase.[34] This phase addressed the question of whether Grace and Beatrice negligently dumped TCE and perc and whether those particular chemicals reached wells G and H.[35] The second phase of the trial, intended to be the Medical Causation phase, never occurred due to a negative finding for Beatrice on the Waterworks phase and a settlement between the plaintiffs and Grace.[36] The Medical Causation phase would have addressed whether TCE and perc caused the plaintiffs' leukemia.[37] The third and fourth phases of the trial, had the plaintiffs won on both previous parts, would have addressed damages.[38]

The Woburn case, as it has come to be called, is a prime example of how complex toxic tort cases are split into separate parts at trial in order to meet the needs of an overburdened judicial system. While Rule 42(b) permits judges to split issues at trial, applying the rule to mass tort cases has unique implications. The intricacies and complexities of the cases magnify the effects of issue separation. This Comment will use the Woburn trial as an illustration of Rule 42(b)'s infringement on the plaintiff's right to a fair jury trial.[39]

II. Introduction

Rule 42(b) permits the separation of issues at trial when such separation would further convenience, economy, or avoid prejudice to the parties.[40] The text of the rule itself incorporates a specific limiting provision declaring that severance may not infringe on the Seventh

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[31] *See id.* at 286–87.

[32] *See id.*

[33] *See* Third Day Pre-Trial Conference at 3–66, Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988) (No. 82–1672-S).

[34] *See* Harr, *supra* note 1, at 287.

[35] *See id.*

[36] *See id.* at 287, 392, 448.

[37] *See* Third Day Pre-Trial Conference, *supra* note 33, at 3–67.

[38] *See* Harr, *supra* note 1, at 286–87. The book discusses a three-phase trial but the pre-trial hearing transcript reveals that a four-phase trial was intended with phase three covering individual plaintiffs and phase four resolving damages. *See* Third Day Pre-Trial Conference, *supra* note 33, at 3–67.

[39] *See* Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988).

[40] *See* Fed. R. Civ. P. 42(b).

Amendment right to a civil jury trial.[41] In the tort context, issue separation most commonly splits apart questions of liability from damages.[42] This allows duty, breach of duty, and causation to be decided in a wholly separate trial from the damages element. Mass tort and toxic tort cases have been subjected to further separation on the liability issue with causation alone broken out and tried separately before the rest of the case.[43]

Complexity is the often cited justification for such a piecemeal approach to mass tort trials.[44] Multiple plaintiffs, multiple defendants, numerous theories of liability, and often voluminous expert testimony on causation collectively contribute to trials of overwhelming complexity.[45] The severance allowed by Rule 42(b), on its face, appears to be an effective means to simplify and categorize the competing forces of complex tort cases.

Such a piecemeal approach, while imposing categorization and order on a trial, may violate the injured party's Seventh Amendment right to a jury trial.[46] Of particular significance is the difficulty plain-

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[41] *See id.*

[42] *See* Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 831 (1961) (addressing local rule in Northern District of Illinois that requires submission of evidence on negligence to go to jury first before evidence on damages); *see also* CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2390 (1995).

[43] *See In re* Bendectin Litig., 857 F.2d 290, 294, 306 (6th Cir. 1988) (issue of proximate cause tried first in thalidomide pharmaceutical toxic tort suit where plaintiffs claimed birth defects resulted, in part, from manufacturer's negligence).

[44] *See Bendectin*, 857 F.2d at 316; *In re* Beverly Hills Fire Litig., 695 F.2d 207, 216–17 (6th Cir. 1982).

[45] *See* Robert F. Blomquist, *Bottomless Pit: Toxic Trials, The American Legal Profession, and Popular Perceptions of the Law*, 81 CORNELL L. REV. 953, 956, 958 (1996) (book review).

[46] *See* Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U.L. REV. 727, 747 (1991) (citing Harry Kalven, Jr. & Hans Zeisel, THE AMERICAN JURY 52 (1966)). A follow-up study done by Hans Zeisel and Thomas Callahan shows that plaintiffs win in forty-two percent of unified trials yet they win in only twelve percent of the trials in which liability is tried on its own before damages. *See* Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving, A Statistical Analysis*, 76 HARV. L. REV. 1606, 1617 (1963) (study done by Zeisel and Callahan expanded on studies done in connection with the University of Chicago and Professor Harry Kalven, Jr. under the Jury Project). The procedural rule permitting bifurcation of issues clearly has substantive impacts that are outcome-determinative in negligence trials. *See id.; see also* Cecil, *supra*, at 747 (noting many jury researchers rely on Kalven & Zeisel study while early reviewers found methodological shortcomings); Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 514 (1995) (quoting Charles Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 569 (1967) (arguing effect of bifurcation on civil plaintiffs is "important side effect on substantive rights" which should require legislative action)).

tiffs face in proving the causation element in toxic tort negligence cases.[47] Causation in the toxic tort context often requires substantial amounts of expert scientific and medical testimony.[48] Such medical theories offered up as proof push the boundaries of scientific knowledge, not to mention the boundaries of the legal definition of proximate causation.[49]

Federal courts are repeatedly unwilling to recognize violations of the Seventh Amendment resulting from the causation issue being tried separately in toxic tort cases.[50] Plaintiffs, with the burden of proof, not only must avoid summary judgment to survive in the courtroom, but must be able to coherently present evidence of the entire case and controversy to the jury.[51]

Polyfurcation, by parsing down trials to discrete elements of law, takes away the jury's ability to add their sense of fairness to the verdict.[52] By separating out the legally constructed segment of causation from such complex toxic tort claims, the law imposes its power of definition on the jury and on society.[53] Without learning more about the toxic tort case before them, juries are forced by judicial and legal boundaries to hear only one part of the controversy and their ability to weigh links between the legal elements disappears.[54]

The current law interpreting Rule 42(b) fails to recognize the loss of jury power as a result of issue polyfurcation.[55] This Comment

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[47] *See* Albert P. Bedecarre, Comment, *Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases*, 17 B.C. ENVTL. AFF. L. REV. 123, 150 & n.202 (1989) (citing Allen v. United States, 588 F. Supp. 247, 411–15 (1984) where "but for" test was reduced to substantial factor test in leukemia victims' case claiming nuclear testing caused illness); *see also In re* Breast Implant Cases, 942 F. Supp. 958, 962 (E.D.N.Y. 1996) (latency problematic to pinpointing link between injury and silicone breast implants).

[48] *See, e.g.*, *Bendectin*, 857 F.2d at 313 n.18; *Breast Implant*, 942 F. Supp. at 960–61.

[49] *See Breast Implant*, 942 F. Supp. at 960–61 (court appointed Rule 706 panel of experts to review scientific evidence regarding causation in silicone breast implant case); *see also* Schneck v. I.B.M., (No. 92-4370 GEB), 1996 U.S. Dist. LEXIS 10126, *12–*13 (D.N.J. 1996) (defining mature mass torts as having litigation background establishing causation, essentially creating legal knowledge or legal recognition of causation).

[50] *See, e.g.*, *Bendectin*, 857 F.2d at 316; *Breast Implant*, 942 F. Supp. at 962.

[51] *See Breast Implant*, 942 F. Supp. at 961.

[52] *See* Weinstein, *supra* note 41, at 832; *see also* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) (stating ability to curtail right to jury trial should be carefully scrutinized).

[53] *See* ANDREA DWORKIN, PORNOGRAPHY, MEN POSSESSING WOMEN 17 (1981) (describing the power of definition, naming and articulating boundaries as "great" and "sublime").

[54] *See* Cecil, *supra* note 45, at 746 (difference between judge and jury decisions most often over issues where community values come into play).

[55] *See, e.g.*, *Bendectin*, 857 F.2d at 315–16; *Breast Implant*, 942 F. Supp. at 962. Interestingly, Judge Jack B. Weinstein bifurcated the *Breast Implant* case in spite of the fact that he authored

argues that there are three mechanisms in Rule 42(b) application that work to infringe on an injured party's Seventh Amendment right to a jury trial. First, the lack of a well-defined common law standard delineating severable issues, combined with limited appellate review, too often permits judges to separate issues that are inter-related.[56] The lack of a definitive standard combined with abuse of discretion review creates an area of unchecked judicial discretion that infringes on the right to a fair jury trial.[57] Second, polyfurcation of issues reinforces the power of evidentiary exclusions in the Federal Rules of Evidence, keeping more factual knowledge about the case and controversy from the jury.[58] By creating multiple trials within a single cause of action, the point of reference for evidentiary tests changes from the entire case and controversy to a single legal element.[59] Evidence relevant or probative to the case as a whole may no longer be relevant or probative to any single legal element.[60] Lastly, polyfurcation encourages the construction of the law as purely scientific and rational.[61] Although these may be valuable elements, their presence to the exclusion of all else removes the jury's constitutionally protected role from the law.

Section III of this Comment provides background on the original purpose of Rule 42(b) and its use in the tort context. Section IV discusses the tension between the Seventh Amendment right to a jury trial and the evolving focus of the federal court system on pretrial case management. Section V summarizes mass tort and toxic tort cases where Rule 42(b) has been applied. Section VI discusses the mechanisms that operate in Rule 42(b) application to infringe on a plaintiff's right to a jury trial in the toxic tort context. Section VII

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a 1961 law review article while he was a professor of law at Columbia, warning against dangers of issue severance. *See Breast Implant*, 942 F. Supp. at 958; Weinstein, *supra* note 41, at 831.

[56] *See, e.g., Breast Implant*, 942 F. Supp. at 960–61 (disregarding plaintiff witness testimony that systemic and local injuries are linked and related).

[57] *See* Todd Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS. L. REV. 41, 84 (1995).

[58] *See* FED. R. EVID. 403 (requiring balancing of probative and prejudicial value of evidence).

[59] *See, e.g., In re* Beverly Hills Fire Litig., 695 F.2d 207, 217 (6th Cir. 1982) (excluding documents probative on defendants knowledge of aluminum wiring's greater propensity to cause fires, but prejudicial because they singled out defendants from one another). The question of relevance for any offered piece of evidence shifts from one of relevance to the cause of action as a whole to a smaller one of relevance to a particular legal element.

[60] *See id.*

[61] *See, e.g., Breast Implant*, 942 F. Supp. at 960–61 (special Rule 706 panel of experts appointed to review scientific evidence).

concludes with a recommendation for closer scrutiny by the court system and academics alike of the effects of Rule 42(b) severance.

III. Background on Rule 42(b)

A full critique of the use of Rule 42(b) in the toxic tort context requires a review of the rule itself and its historical development. Rule 42(b) of the Federal Rules of Civil Procedure permits a district court judge to order separate trials of "any claim or issue" that might otherwise be brought as a unified, single action.[62] The Advisory Committee Notes to the 1966 Amendment state that "separation . . . is not to be routinely ordered . . ." and go on to explain "it is important that it be encouraged where experience has demonstrated its worth."[63] The text of the rule sets forth the parameters for allowing separation of issues. The relevant language is as follows: "The court, in furtherance of convenience, or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of any separate issue . . . or issues . . . ."[64] Convenience, economy and prejudice are essentially the main drivers of Rule 42(b) separation. Accordingly, issue separation is not routine, but must meet one of the specified goals in order to be justified.[65]

The need for a rule permitting separation of claims and issues was in part due to the Federal Rules' liberal joinder policy.[66] In order to avoid delay and expense associated with unrelated counter-claims, courts were quick to apply Rule 42(b) to the separation of entire claims but slower to use the rule for separation of issues within one cause of action.[67] For example, in *Gasoline Products v. Champlin Refining*, petitioner bought suit to recover royalties under a gasoline processing license agreement.[68] The respondent counter-claimed, al-

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[62] *See* Fed. R. Civ. P. 42(b).

[63] *See id.*

[64] *See id.*

[65] *See In re* Bendectin Litig., 857 F.2d 290, 307 (6th Cir. 1988) (stating piecemeal trial not the usual course but resorted to only when separation will achieve the purposes of the rule); *see also* Weinstein, *supra* note 41, at 831 (criticizing local rule requiring routine bifurcation of negligence trials in Northern District of Illinois).

[66] *See* 5 James Wm. Moore, Moore's Federal Practice ¶ 42.03[1] (2d ed. 1996); *see also* Fed. R. Civ. P. 20(b). Rule 20(b) permits the district court to order separate trials where there has been joinder of parties to "prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party." *See* Fed. R. Civ. P. 20(b); *see also* 5 Moore, *supra*, ¶ 42.03[1] n.1.

[67] *See* Weinstein, *supra* note 41, at 840 (stating that assumption has been that separation of issues ought to be ordered only where there is highly persuasive reason).

[68] *See* Gasoline Prod. v. Champlin Ref., 283 U.S. 494, 495 (1931).

leging that the petitioner had breached a separate contract by failing to construct gasoline treating towers for respondent's gasoline treatment plant.[69] Due to an error made in the calculation of the damages award on the counter-claim, the United States Court of Appeals for the First Circuit ordered a retrial of the damages issue only.[70] The United States Supreme Court prohibited a retrial of solely the damages portion of the counterclaim on remand.[71] The Court found that the question of damages was so "interwoven with that of liability that [damages could not] be submitted to jury independently of [liability] without confusion and uncertainty, which would amount to a denial of a fair trial."[72] The new trial was required to resolve both liability and damages on the tower construction contract.[73] The court stated that in order to figure damages appropriately, the jury must know or determine the terms of the contract, the dates of formation and breach, a reasonable time for performance, the number of towers to be built, the capacity of the towers, and whether or not there was a guarantee on the towers' quality.[74] The issue of damages was found to be not so "distinct and separable" that it could be tried separately to a jury without violating the parties' right to a fair trial.[75] While forcing the entire counterclaim to be retried in full, the Supreme Court allowed the verdict on petitioner's initial royalty claim to stand unaffected because the issues "arising [under] . . . the royalty contract [were] clearly separable from all others."[76]

Although *Gasoline Products* was decided before the enactment of the Federal Rules of Civil Procedure, it remains the leading case involving issue separation.[77] The language "interwoven" subsequently has been adopted by federal courts to define issues that must be tried together in order to provide a fair jury trial to the parties.[78] The language "distinct and separable" has been adopted to define issues that may be tried separately under Rule 42(b) without infringing on the parties' right to a jury trial.[79]

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[69] *See id.*

[70] *See id.* at 496.

[71] *See id.* at 500.

[72] *See id.*

[73] *See Gasoline Prod.*, 283 U.S. at 500.

[74] *See id.*

[75] *See id.*

[76] *See id.* at 499.

[77] *See, e.g., In re* Bendectin Litig., 857 F.2d 290, 308 (6th Cir. 1988) (relying on Gasoline Prod. v. Champlin Ref., 283 U.S. 494, 500 (1931)); MOORE, *supra* note 65, ¶ 42.03[1].

[78] *See, e.g.*, United Air Lines, Inc. v. Wiener, 286 F.2d 302, 305 (9th Cir. 1961).

[79] *See Bendectin*, 857 F.2d at 308.

The text of the rule provides for separation of issues "in furtherance of convenience," "to avoid prejudice," or when "conducive to expedition and economy."[80] It is within the district judge's discretion to balance these concerns and decide whether separation would be appropriate.[81]

For example, in *Beeck v. Aquaslide 'N' Dive*, the plaintiffs sued a water slide manufacturer in a products liability case.[82] The plaintiff injured himself while using a pool slide during a work outing.[83] Aquaslide 'N' Dive denied manufacturing the slide and motioned for a separate trial to determine who manufactured the product.[84] The United States District Court for the District of Iowa granted the motion based on the dispositive nature of the initial question and the possibility that it could save trial time, unnecessary expense and preparation for all parties.[85] The United States Court of Appeals for the Eighth Circuit also noted that a separate trial protected Aquaslide 'N' Dive from substantial prejudice, keeping evidence of plaintiff's severe injuries away from the jurors while they determined the manufacturer of the product.[86] The United States Court of Appeals for the Eighth Circuit upheld the bifurcation, finding that judicial economy was furthered and prejudice to the defendant was avoided.[87] Reviewing on an abuse of discretion standard, the appellate court found that one of the purposes of Rule 42(b), judicial economy, had been met without prejudicing either party.[88]

The United States Court of Appeals for the First Circuit upheld the bifurcation of issues in *Lisa v. Fournier Marine*.[89] The plaintiff in *Lisa* sustained serious permanent injuries resulting from the loss of oxygen while in a sealed compartment on defendant's barge.[90] The trial court separated questions regarding the status of the appellant and the barge from the theories of liability claimed in the case.[91] Once

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[80] *See* FED. R. CIV. P. 42(b).

[81] *See* Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 542 (8th Cir. 1977) (balance of concerns led court to approve bifurcation).

[82] *See id.* at 538.

[83] *See id.* at 539.

[84] *See id.* at 541.

[85] *See id.*

[86] *See Beeck*, 562 F.2d at 541.

[87] *See id.* at 542.

[88] *See id.*; *see also* Airlift Int'l v. McDonnell Douglas Corp., 685 F.2d 267, 269 (9th Cir. 1982) (abuse of discretion standard).

[89] *See* Lisa v. Fournier Marine Corp., 866 F.2d 530, 532 (1st Cir. 1989).

[90] *See id.* at 531.

[91] *See id.* at 531–32.

the status of the parties was determined, the case moved forward on the applicable theories of liability.[92] The jury found for the defendant on all the claims.[93] On appeal, the First Circuit upheld the bifurcation because (i) determining the status of the parties before continuing the trial avoided confusing the jury with mutually exclusive theories of causation; and (ii) the plaintiff failed to show any material prejudice resulting from the bifurcation.[94]

Issue separation on its face appears to provide expeditious results in trials that have many potential issues and dispositive questions that can be raised early on, potentially avoiding the need for the remainder of the trial. Yet issue separation is not always proper. Judges are required to decide questions of bifurcation on a case-by-case basis, using their informed discretion and balancing all the equities involved.[95] For example, the First Circuit upheld a district court judge's decision not to bifurcate proceedings in a suit to recover disability insurance monies.[96] In *Gonzalez-Marin v. Equitable Life Assurance Society of the United States*, the defendant insurance company motioned to bifurcate the trial between liability and damages and also motioned the court to exclude the disabled plaintiff from the courtroom.[97] The defendant based both of the motions on the premise that jurors' viewing of plaintiff's injuries would be unfairly prejudicial to their case.[98] The First Circuit opinion cited the United States Court of Appeals for the Sixth Circuit's decision in *Helminski v. Ayerst Laboratories* and merged its discussion of the bifurcation and exclusion motions.[99] The First Circuit found that the defendant failed to show that viewing the plaintiff would substantially impair the jury and therefore found that the motion contained only conclusory allegations of prejudice.[100] The appeals court took special note that the trial court judge had directed counsel to bring the plaintiff into the courtroom before the jury entered and wait until after the jury left to take him away thereby

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[92] *See id.*

[93] *See id.* at 531.

[94] *See Lisa*, 866 F.2d at 531.

[95] *See* Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 542 (8th Cir. 1977) (balance of concerns led court to approve bifurcation); Stratagem Dev. Corp. v. Heron Int'l N.V., 153 F.R.D. 535, 551 (S.D.N.Y. 1994) (court must consider risks of prejudice, possible confusion, inconsistent adjudications of common issues, burden on parties, witnesses, and available judicial resources).

[96] *See* Gonzalez-Marin v. Equitable Life Assurance Soc'y of the United States, 845 F.2d 1140, 1141, 1146 (1st Cir. 1988).

[97] *See id.* at 1145.

[98] *See id.*

[99] *See id.* at 1145–46 (citing Helminski v. Ayerst Lab., 766 F.2d 208 (6th Cir. 1985)).

[100] *See id.* at 1146.

decreasing the potential attention to plaintiff's injuries while plaintiff traveled to his chair.[101] The First Circuit found that the trial judge's directive reflected a sensitivity to the parties' conflicting rights of due process and fair trial and upheld the denial of defendant's motion to bifurcate and the motion to exclude the plaintiff.[102]

A. *Rule 42(b) in the Tort Context*

In the tort context, Rule 42(b) is most commonly used to separate liability and damages.[103] Not only does putting the dispositive question of liability first save potentially unnecessary trial time, but it keeps evidence regarding plaintiff's injuries out of the courtroom until liability is firmly established.[104] Supporters of issue bifurcation in the tort context stress the need for jurors to decide the question of liability rationally, without being improperly swayed by the emotional power of the plaintiff's injuries.[105]

In *Helminski v. Ayerst Laboratories*, the Sixth Circuit upheld bifurcation in a negligence case where plaintiff claimed her son's severe mental retardation was caused by her exposure to defendant's anesthesia, Fluothane, while she was pregnant.[106] In response to defendant's objections that the injured party be called as a witness,[107] the trial court bifurcated the case, making the injured plaintiff's testimony irrelevant to the liability phase. The trial court also excluded the injured plaintiff from the courtroom, preventing the jury from seeing him throughout the liability phase of the trial.[108] The bifurcation was upheld because the evidence relevant to damages (the extent of the plaintiff's injuries) could have a prejudicial impact on the jury's liability determination and because the evidence supporting the two issues was "wholly unrelated."[109] On appeal, the Sixth Circuit separated the discussion of the plaintiff's exclusion from the courtroom and found that, as a party to the lawsuit, he was excluded improperly from the courtroom.[110] Such improper exclusions infringed on the

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[101] *See Gonzalez-Marin*, 845 F.2d at 1147.

[102] *See id.*

[103] *See* MOORE, *supra* note 65, ¶ 42.03[1].

[104] *See* WRIGHT & MILLER, *supra* note 41, § 2390; *see also* Helminski v. Ayerst Lab., 766 F.2d 208, 211 (6th Cir. 1985).

[105] *See, e.g., Helminski*, 766 F.2d at 212.

[106] *See id.* at 210, 218.

[107] *See id.* at 212.

[108] *See id.*

[109] *See id.*

[110] *See Helminski*, 766 F.2d at 218.

plaintiff's due process rights.[111] However, the Sixth Circuit found neither the exclusion nor the bifurcation to be reversible error, primarily because the jury had already heard some evidence of the plaintiff's condition due to the late bifurcation of the case during the trial.[112] Therefore, the jury was able to "visualize the very human dispute" in the lawsuit.[113]

The United States Court of Appeals for the First Circuit also upheld the bifurcation in *Kisteneff v. Tiernan*.[114] The appellant in *Kisteneff* claimed reversible error from the splitting of liability and damages in an assault and battery case when the trial was already underway.[115] Due to the scheduling difficulties of the appellant's testifying doctor, medical testimony regarding the plaintiff's injuries could not be presented for five days.[116] As all other evidence had been presented in the case, the trial judge severed the issues of liability and damages so the jury could decide the question of liability without a five-day delay.[117]

The appellant, in challenging the bifurcation, argued that the doctor's testimony would be probative to liability on the severity of the blow received.[118] The First Circuit rejected that argument because the appellant did not assert that appellee responded to a minor provocation with excessive force.[119] Appellant had argued that appellee struck the first blows and so the severity of the blow had no bearing on the legal argument made in the case.[120] Therefore, the doctor's testimony was not probative to the liability phase of the trial, but just to the damages phase.[121]

Upholding the separation, the First Circuit cited Wright & Miller's *Federal Practice and Procedure* treatise explaining that logically, liability must be established before the amount of damages can be determined.[122] Of additional interest to the court of appeals was the effort made by the trial judge to try the issues together.[123] Only upon

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[111] *See id.* at 213.
[112] *See id.* at 218.
[113] *See id.* at 219.
[114] *See* Kisteneff v. Tiernan, 514 F.2d 896, 897 (1st Cir. 1975).
[115] *See id.*
[116] *See id.*
[117] *See id.*
[118] *See id.*
[119] *See Kisteneff*, 514 F.2d at 897.
[120] *See id.*
[121] *See id.*
[122] *See id.* (citing WRIGHT & MILLER, *supra* note 41, § 2390).
[123] *See id.*

learning that the jury deliberations would be delayed did the trial judge bifurcate the case and send the question of liability to the jury on its own.[124]

Overall, the common law interpretations of Rule 42(b) demonstrate that severance decisions must be made on a case-by-case basis.[125] Each situation must be separately reviewed and the factors of convenience, economy and prejudice to the parties must be balanced to achieve a fair trial.[126] District judges' decisions to bifurcate trials will be overturned only when there has been an abuse of discretion.[127] Accordingly, there are few limits on Rule 42(b)'s application because of its case-by-case determination and limited review required of issue separation decisions.

B. *Procedure v. Substance*

The Sixth Circuit, as noted above in the *Helminski* case, expressed concern about the jury's recognition of the human aspect of the lawsuit.[128] This concern is particularly valid in light of the text of Rule 42(b).[129] The 1966 Amendment to Rule 42(b) added the language "always preserving inviolate the right of trial by jury as declared by the Seventh Amendment."[130] This language was added at the same time courts increasingly were separating the issues of liability and damages.[131] The Advisory Committee recognized the potential for issue separation to interfere with a full and fair civil jury trial. It is that right the Advisory Committee intended to protect from procedural interference.

Accordingly, further discussion of Rule 42(b) requires a brief overview of the procedure versus substance argument in the Rule 42(b) context. While this Comment does not focus on that argument, what follows is a summarized discussion of the procedure versus substance

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[124] *See Kisteneff*, 514 F.2d at 897.

[125] *See* Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 542 (8th Cir. 1977) (case-by-case basis).

[126] *See id.* at 542 (balancing of the equities); *see also* Strategem Dev. Corp. v. Heron Int'l N.V., 153 F.R.D. 535, 551 (S.D.N.Y. 1994) (court must consider risks of prejudice, possible confusion, inconsistent adjudications of common issues, burden on parties, witnesses, and available judicial resources).

[127] *See* Airlift Int'l v. McDonnell Douglas Corp., 685 F.2d 267, 269 (9th Cir. 1982) (abuse of discretion standard).

[128] *See* Helminski v. Ayerst Lab., 766 F.2d 208, 219 (6th Cir. 1985).

[129] *See* FED. R. CIV. P. 42(b).

[130] *See id.* advisory committee's note.

[131] *See id.*; Weinstein, *supra* note 41, at 831 (critiquing local rule that recommends routine separation of liability and damages in negligence trials).

debate as it has been applied in the Rule 42(b) area. As noted below, courts routinely find Rule 42(b) a procedural rather than a substantive rule of law.

The Seventh Amendment "preserves the right to a jury trial in suits at common law . . . ."[132] The Supreme Court in *Galloway v. United States* reiterated the historical test of *United States v. Wonson*; namely that the Seventh Amendment preserves the right to a jury trial according to the common law as it existed in 1791.[133] The *Galloway* Court greatly impacted Rule 42(b) because it held that the Seventh Amendment "[does] not bind the federal courts to the exact procedural incidents or details of a jury trial according to the common law in 1791."[134] This 1943 ruling reinforced the newly enacted Federal Rules of Civil Procedure by permitting the courts to change the trial process to parallel a modernized society, but forced the substantive protections of the law to remain the same.[135]

Cases involving Rule 42(b) follow that decision finding the application of Rule 42(b) to be procedural in nature.[136] For example, in *Moss v. Associated Transport*, the Sixth Circuit, relying on the distinction between substance and procedure, upheld the bifurcation of a case in federal court although state law prohibited such severance.[137]

The parties in *Moss* brought various claims for death, personal injury, and property damage resulting from the collision of two tractor trailers.[138] The United States District Court for the District of Tennessee separated the issues of liability from damages and went to trial with liability questions first.[139] The judgment resulted in a finding that Moss's negligence caused the accident.[140] On appeal, the appellant cited Tennessee Supreme Court cases prohibiting the submission of separate issues to a jury in personal injury cases.[141] The Tennessee Supreme Court, in *Harbison v. Briggs Brothers Paint Manufacturing*, had found "depravation of the [state] constitutional right to trial by jury" where the trial judge by interrogatory had the jury resolve

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[132] *See* U.S. CONST. amend. VII.

[133] *See* Galloway v. United States, 319 U.S. 372, 390 (1943); United States v. Wonson, 28 F.Cas. 745 (C.C.D. Mass. 1812).

[134] *See Galloway*, 319 U.S. at 390.

[135] *See id.*

[136] *See* Cecil v. Missouri Pub. Serv. Corp., 28 F. Supp. 649, 650 (W.D. Mo. 1939).

[137] *See* Moss v. Associated Transp. Inc., 344 F.2d 23, 25 (6th Cir. 1965).

[138] *See id.* at 24.

[139] *See id.* at 25.

[140] *See id.*

[141] *See id.* at 26.

only one particular issue.[142] In *Harbison*, the Tennessee Supreme Court stated that the plaintiff had a state constitutional right to have all issues of fact submitted to the same jury at the same time.[143]

The *Moss* court, relying on *Erie v. Tompkins Railroad*, noted that "procedural labels do not foreclose inquiry into the possible substantive impact of a federal rule."[144] The appellant argued in *Moss* that bifurcation at the trial court allowed the surviving widows of the deceased drivers to gain the sympathy of the jury.[145] Appellant claimed that evidence of his injuries, which would have countered such one-sided sympathy, was unfairly kept out of the trial due to the severance of liability and damages.[146] Additionally, appellant asserted that, under the *Erie* doctrine, Tennessee law applied and the federal trial court improperly affected his substantive rights by denying him a fair jury trial as protected by Tennessee law.[147]

Resolving the appeal, the Sixth Circuit stated that it would be "unjustified" to assume there would have been a different outcome had the issues of liability been submitted to the jury at the same time as damages.[148] Therefore, the court quickly found that the requisite showing of substantive impact affecting the outcome of the case, required by *Guaranty Trust v. York*, was not met and the application of Rule 42(b) in *Moss* was held to be procedural, rather than substantive.[149]

Additionally, in the United States Court of Appeals for the Fifth Circuit's *Rosales v. Honda Motor* opinion, the court found Rule 42(b)'s application to be primarily procedural where bifurcation conflicted with state law prohibiting severance of issues in personal injury cases.[150] Citing *Hanna v. Plumer*, the Fifth Circuit reiterated that "the constitutional provision for a federal court system augmented by the Necessary and Proper Clause carries with it Congressional power to make rules governing the practice and pleading in those courts."[151] The court went on to state that this "includes a power to regulate matters, which though falling within the uncertain area between sub-

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[142] *See Moss*, 344 F.2d at 26 (citing Harbison v. Briggs Bros., 209 Tenn. 534 (1962)).
[143] *See id.*
[144] *See id.* at 27
[145] *See id.* at 25.
[146] *See id.* at 26.
[147] *See Moss*, 344 F.2d at 26–27.
[148] *See id.* at 27.
[149] *See id.*
[150] *See* Rosales v. Honda Motor Co., 726 F.2d 259, 262 (5th Cir. 1984).
[151] *See id.* at 261.

stance and procedure are rationally capable of classification as either."[152] Rule 42(b), the court explained, is not primarily substantive because it does not "[affect] people's conduct at the stage of primary activity" and it is not "a right granted for one or more non-procedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[153]

The labeling of Rule 42(b) as procedural allows the federal courts to separate issues in diversity cases where applicable state law might prohibit the severance.[154] But as *Rosales* points out, the lines between procedure and substance are not always definitive.[155] The now Federal District Judge Weinstein, in a 1961 law review article, argues against such bifurcation where a state law requires a unified trial.[156] He asserts that applying the state law would meet the substantive concerns of *Erie* while the unified trial would meet the federal court's desire to protect the constitutional right to a jury trial.[157] The conflict, he claims, is easily resolved here, because both the federal and state policies point to classifying the rule as substantive.[158] Accordingly, the blanket classification of Rule 42(b) as procedural may be a tenuous one and cases such as *Moss* and *Rosales* demonstrate the recognition by state courts that severance indeed does have some substantive impact.[159]

IV. Right to a Jury Trial

The classification of Rule 42(b) as procedural permits its use to alter the process of trials.[160] By changing the way in which a case is presented, the jury's role arguably changes as well. As the jury plays an important role in tort litigation, the impact of Rule 42(b)'s use is significant. Judge Weinstein notes that jurors are valued because they do not decide issues solely on a rational basis, but decide questions of fact in a way the litigants and community find desirable.[161] Moreover,

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[152] *See id.* (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)).

[153] *See id.* at 262.

[154] *See id.*; *see also* Erie R.R. Co. v. Tompkins, 307 U.S. 64 (1938); Moss v. Associated Transp. Inc., 344 F.2d 23, 26 (6th Cir. 1965).

[155] *See Rosales*, 726 F.2d at 262.

[156] *See* Weinstein, *supra* note 41, at 836.

[157] *See id.*

[158] *See id.*

[159] *See, e.g., Rosales*, 726 F.2d at 262; *Moss*, 344 F.2d at 27.

[160] *See, e.g., Rosales*, 726 F.2d at 262; *Moss*, 344 F.2d at 27.

[161] *See* Weinstein, *supra* note 41, at 832.

they respond in ways that judges should not: to the immediate community sense of fairness.[162]

The critical role played by the jury, while impossible to define completely, does encompass the following ideals: "to infus[e] the law with the values of the community,"[163] to "serv[e] as a check on judicial power,"[164] to act as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[165] Finally, it should be noted that "the strongest objection originally taken against the Constitution . . . was the want of an express provision securing the right of trial by jury in civil cases."[166] Indeed the role of a civil jury is an important one, highly valued by our system of government.[167]

Unfortunately this intangible role is being diminished as the managerial judging movement takes hold.[168] Rule 42(b) separation is just one of the many pre-trial moves that increase the impact judges have at the outset of trials.[169] Pressures of increased litigation and crowded dockets have fueled judges' expanded involvement with cases as they move through the court system.[170]

The expanded use of Rule 42(b) as a judicial tool flows from systemic increased judicial management of complex cases and must be reviewed only as part of a larger picture. One example of the legal system's official endorsement of this judicial involvement is the evolution of Rule 16, which permits the judge to order a conference before trial with counsel from both parties to discuss a number of issues.[171] The original 1938 rule listed six reasons for scheduling a conference with parties' attorneys: to consider (1) simplification of the issues; (2) the necessity or desirability of amendments to the pleadings; (3) the possibility of obtaining admissions of fact and documents which will avoid unnecessary proof; (4) the limitation of the number of expert witnesses; (5) the advisability of a preliminary reference of issues to

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[162] *See id.*

[163] *See* Cecil, *supra* note 45, at 728.

[164] *See* Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment*, 53 OHIO ST. L.J. 1005, 1033–34 (1992).

[165] *See* Galloway v. United States, 319 U.S. 372, 397 n.1 (1943) (Black, Douglas, Murphy, J.J., dissenting).

[166] Parsons v. Bedford, 28 U.S. 433, 3 Pet. 433, 446 (1830).

[167] *See* Peterson, *supra* note 56, at 84; Klein, *supra* note 164, at 1033–34.

[168] *See* Peterson, *supra* note 56, at 84.

[169] *See id.*; Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 376, 379–80 (1982).

[170] *See id.* at 379.

[171] *See* FED. R. CIV. P. 16; Peterson, *supra* note 56, at 70.

a master for findings to be used as evidence when the trial is to be by jury; and (6) such other matters as may aid in the disposition of the action.[172]

Amendments in 1983 and 1993 significantly broadened the list of permissible topics for Rule 16 conferences.[173] Some of the expansions include the ability to address "formulation and simplification of the issues, including the elimination of frivolous claims or defenses," the authority to require pretrial conferences for scheduling and case management, and the ability to address "the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37."[174]

Professor Judith Resnick, a prominent scholar in the area of judicial procedure, analogizes judicial case management to judicial activism.[175] Yet, this form of judicial activism, she warns, will go unchecked, because managerial judging is less visible, usually more unreviewable, and offers fewer procedural safeguards to protect litigants from abuse of judicial authority.[176] Despite Resnick's cautionary words, the movement toward increased judicial case management was secured when Congress passed the Judicial Improvements Act of 1990.[177] Title I of the statute requires that all federal district courts implement a Civil Justice Expense and Delay Reduction Plan (the Plan) within three years of the statute's enactment.[178] Incorporated into the Plan for the United States District Court for the District of Massachusetts, the site of the 1986 Woburn trial, is an express provision under Local Rule 16.3 permitting a judicial officer, "in furtherance of the scheduling order . . . [to] provide for the . . . phased resolution . . . or bifurcation of issues for trial consistent with Federal Rule 42(b)."[179]

Sanctions for non-compliance with any of the rules of the Plan explicitly include dismissal of the case, but state that sanctions will be at the sound discretion of the judicial officer,[180] who will determine when a sanction is appropriate and tailor the sanction to the particular

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[172] *See* FED. R. CIV. P. 16 advisory committee's note; Peterson, *supra* note 56, at 69–70.

[173] *See* FED. R. CIV. P. 16 advisory committee's note; Peterson, *supra* note 56, at 69–70.

[174] *See* FED. R. CIV. P. 16; Peterson, *supra* note 56, at 70–71.

[175] *See* Resnick, *supra* note 166, at 380.

[176] *See id.*

[177] *See* Judicial Improvements Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471–482 (1994)).

[178] *See Federal Civil Practice* (93-05.07) 7, (MCLE 1992).

[179] Federal District Court for the District of Massachusetts Local Rule 16.3, *reprinted in* Rules Supplement 30, 17:7 (2d ed., LAWYERS WKLY. 1997).

[180] *See id.*

situation.[181] Interestingly, there are few limits on judicially imposed sanctions, thereby furthering the judicial influence over trials, their processes and most importantly, their outcomes.

The United States Supreme Court has upheld sanctions administered in *Link v. Wabash Railroad*, in reaction to non-compliance with pre-trial proceedings.[182] The Court upheld the dismissal of a case because the plaintiff's counsel did not attend a scheduled pre-trial conference.[183] The Court based its decision on the necessity that courts have the authority to manage their own affairs "so as to achieve the orderly and expeditious disposition of the cases."[184]

The congressional mandate of the Judicial Improvements Act and the court necessity argument made in *Link*, taken together, evidence an atmosphere that will encourage the increased expansion of judicial authority in the courtroom.[185] This pre-trial discretion will impact cases in a variety of ways before they even reach the trial stage. Consequently, less flexibility exists for the parties to gather and present information to the jury in the manner they deem proper. Rule 42(b) is just one piece of the larger judicial management puzzle. While it may be addressed separately, the impacts of Rule 42(b) are necessarily linked to the other procedural mechanisms affecting parties at any given trial. With more and more of these procedural moves being made at the pre-trial phase, juries will be less involved with the trial, will have a more structured trial from which to render a verdict, and consequently, will be less able to act as a check on judicial discretion.

Professor Todd Peterson, in his article, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, highlights three main areas impacted by the expanded discretionary power of federal district judges.[186] First, the unrestrained discretionary control of the pre-trial process makes it easy for a judge to allow bias to influence the management of the case.[187] Peterson notes the potential for various types of bias, from racial and gender bias, to ideological bias, that may affect the case.[188] Second, he points out that

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[181] *See id.*

[182] *See* Peterson, *supra* note 56, at 65.

[183] *See id.* (citing Link v. Wabash R.R., 370 U.S. 626 (1962)); *see also* Peterson, *supra* note 56, at 65.

[184] *See* Peterson, *supra* note 56, at 80.

[185] *See* Judicial Improvements Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471–482 (1994)); *see also id.* (citing Link v. Wabash R.R., 370 U.S. 626 (1962)).

[186] *See id.* at 78.

[187] *See id.*

[188] *See id.*

arbitrary decisions are fostered simply because pre-trial decisions are unguided and unreviewable.[189] Third, as the final decision-maker in the case, a federal judge has large coercive power to force parties to settle, which significantly limits party autonomy.[190]

Rule 42(b), as one of the many pre-trial case management techniques, is at risk of somewhat arbitrary application by federal district judges. The judicial order mandating bifurcation is not reviewable on direct appeal as a final verdict.[191] It is reviewable after a final judgment has been made in the entire case and may constitute reversible error if separation is found to have unfairly prejudiced a party.[192]

Of particular significance to complex tort cases is the economy and time-savings that result from bifurcation of negligence trials.[193] Judges deciding whether or not to bifurcate issues in complex cases are pressured by heavy caseloads, backlogged dockets, and a legal system encouraging judicial activism at the pre-trial stage.[194] The decision-maker facing the question of bifurcating a negligence trial does not act in a vacuum. With complex cases requiring significant judicial resources no matter what the trial format, judges, not surprisingly, will be pressured to apply Rule 42(b) whenever they can.

The only limit on the widespread application of Rule 42(b) is found in the text of the rule itself: "always preserving inviolate the right to trial by jury as declared by the Seventh Amendment."[195] The court in *Gasoline Products* interprets Rule 42(b)'s Seventh Amendment limitation, holding that the right to a jury trial encompasses the right to have an issue of fact decided without jury confusion and uncertainty.[196] Confusion can arise from the independent presentation of "interwoven" issues to the jury.[197]

In *Beacon Theatres v. Westover* the court notes that judges should use their discretion "wherever possible" to preserve a litigant's right to a jury trial.[198] In *Beacon Theatres*, the United States District Court judge permitted the separation of a case which placed the trial of

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[189] *See id.*

[190] *See* Peterson, *supra* note 56, at 81.

[191] *See* WRIGHT & MILLER, *supra* note 41, § 2392.

[192] *See id.*

[193] *See* Zeisel & Callahan, *supra* note 45, at 1619.

[194] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 102, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. § 471 (1994)).

[195] *See* FED. R. CIV. P. 42(b).

[196] *See* Gasoline Prod. v. Champlin Ref., 283 U.S. 494, 500 (1931).

[197] *See id.*

[198] *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959).

equitable issues before the trial of the legal issues.[199] On appeal, the United States Supreme Court prohibited severance and lauded the importance of the jury as a fact-finding body. The Court went on to explain that putting the legal issues together with the equitable issues would preserve the litigant's right to a jury trial by having the jury decide all relevant facts at once.[200] As such, the Supreme Court, in 1959, displayed a sensitivity to the effects of Rule 42(b) severance on the jury trial received by the litigants and importantly recognized that single factual determinations by the jury may bear on two seemingly distinct parts of a case.[201]

V. Complex Torts—Heightened Issue Separation

Although the jury's role is a critical one in a civil trial, the balancing of economy, efficiency, and potential prejudice to the parties still occurs by the trial judge in every case affected by Rule 42(b). Logically, the organizational benefits and time-saving potential of Rule 42(b) have a higher marginal value to a judge faced with a particularly complex case. The potential gain from severance in those cases weighs heavily in favor of issue separation. Multiple plaintiffs, multiple defendants, and scientific evidence combine to create a potentially overwhelming trial for a judge to coordinate. Not surprisingly, legal scholars recommend issue separation in complex cases.[202] Concerns of complexity inevitably focus on the jury, with issue separation supporters positing that lay juries are not capable of understanding the relevance and significance of all the facts presented together.[203] Additionally, because issue separation limits the presentation of evidence to narrow legal issues, it is viewed as a procedurally sound way of forcing juries to make decisions based on evidence, not emotion.[204]

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[199] *See id.*

[200] *See id.* at 508.

[201] *See id.* at 510.

[202] *See* Manual for Complex Litigation § 21.632 (3d ed. 1995).

[203] *See* Cecil, *supra* note 41, at 743. "While the accuracy of [unreasonable jury awards leading to increased litigation] is in doubt, the result has been to cast doubt on the competence of the civil jury to render a fair and reasoned decision . . . ." *Id.* "Juries are not competent to decide issues in complex, lengthy trials. Critics claim that jury attention span decreases in long trials, especially antitrust, products liability, or medical malpractice cases, which entail complicated evidence. In addition, juries are likely to be misled, or confused in such cases by the 'battle of experts' over technical evidence, thereby eliminating any chance for a fair, rational decision." *Id.* at 744 n.104; *see also* Judyth W. Pendell, *Enhancing Juror Effectiveness: An Insurer's Perspective*, 52 Law & Contemp. Probs. 311, 311–12 (1989) (recommending narrowing and severing issues to enhance juror effectiveness).

[204] *See* Wright & Miller, *supra* note 41, § 2390; *see also* Pendell, *supra* note 200, at 311–12 (recommending narrowing and severing issues to enhance juror effectiveness).

The trend with complex tort cases is to separate the trial into continually smaller pieces beyond simply liability and damages.[205] The United States District Court for the Southern District of Ohio in *In re Bendectin Litigation* separated out the issue of proximate causation for trial and allowed evidence first on that issue alone.[206] If plaintiffs succeeded, the questions of liability and damages would have followed in separate trials.[207]

The plaintiffs in the *Bendectin* case brought claims against Merrell Dow Pharmaceuticals on behalf of children with birth defects, alleging that defendant's anti-nausea drug, intended to alleviate morning sickness, caused birth defects.[208] The *Bendectin* case involved 1180 claims in approximately 844 multi-district cases.[209] After twenty-two days of trial on proximate causation alone, the jury found that Bendectin was not the proximate cause of plaintiffs' injuries.[210]

The plaintiffs appealed from the trial court verdict claiming prejudicial error in the trifurcation of the case.[211] The court analogized the three-phase trial to bifurcation, applying the same legal standards to the trifurcation, including the case-by-case balancing requirement of the purposes set forth in Rule 42(b).[212] Relying on a case that upheld severance of the statute of limitations issue, the court stated that "Rule 42(b) is sweeping in its terms and allows the court, in its discretion, to grant a separate trial of any kind of issue in any kind of case."[213]

The United States Court of Appeals for the Sixth Circuit rejected the plaintiffs' argument that the resolution of issues was rendered more difficult by the trifurcation of the case.[214] The Sixth Circuit stated that trifurcation substantially improved the manageability of the presentation of proofs and concluded that trifurcation, if anything, enhanced the jury's ability to comprehend the causation issue.[215]

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[205] *See, e.g., In re* Bendectin Litig., 857 F.2d 290, 306 (6th Cir. 1988) (issue of proximate cause tried separately); *In re* Beverly Hills Fire Litig., 695 F.2d 207, 210 (6th Cir. 1982) (separated out causation-in-fact for separate trial).

[206] *See, e.g., Bendectin*, 857 F.2d at 306.

[207] *See id.* at 295.

[208] *See id.* at 293–94.

[209] *See id.*

[210] *See id.* at 294.

[211] *See Bendectin*, 857 F.2d at 314.

[212] *See id.* at 308; *see also* Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 542 (8th Cir. 1977) (balancing concerns in severance decisions).

[213] *See Bendectin*, 857 F.2d at 308 (decision whether to try issues separately is within sound discretion of trial court).

[214] *See id.* at 315.

[215] *See id.*

The *Bendectin* court cited Wright & Miller's *Federal Practice and Procedure* treatise to support the premise that judges may separate any issue of any kind.[216] Interestingly, Wright & Miller base their efficiency argument supporting trifurcation in part on the Kalven and Zeisel study done in connection with the University of Chicago in the 1950s.[217] The Kalven and Zeisel figures show defendants win in seventy-nine percent of bifurcated trials, yet win in only forty-two percent of unified cases.[218] Quickly assuming that emotional decision-making accounts for the disparity in percentages, Wright & Miller advocate not only the time-saving benefits of issue separation but argue that separation avoids prejudice to the defendant as well.[219]

That same study, according to a recent law review article, shows that complexity does not drive differing results between judge and jury verdicts.[220] This premise counters the idea that complexity creates jury confusion. In complex cases, emotional decision-making does not necessarily substitute for lack of understanding by juries.[221] Researchers found verdict disparities between judges and juries were notably increased in cases where community values played a role.[222] This would lead one to believe that issue separation inappropriately uses complexity as a justification to keep issues away from a jury that could comprehend the issues but might decide the case differently than judges.[223] If in fact community values account for judge and jury verdict disparities, issue separation in those instances would limit the role of the jury and violate the Seventh Amendment.[224]

The *Bendectin* court, by citing Wright & Miller, embraces the conclusion reached by the treatise authors and unfortunately overlooks

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[216] *See id.* at 308 (citing CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2389 (1971)).

[217] *See* Cecil et al., *supra* note 45, at 747 (citing Harry Kalven, Jr. & Hans Zeisel, THE AMERICAN JURY 52 (1966)).

[218] *See id.* at 747; *see also* WRIGHT & MILLER, *supra* note 41, § 2390.

[219] *See* WRIGHT & MILLER, *supra* note 41, § 2390.

[220] *See* Cecil, *supra* note 45, at 746.

[221] *See id.* at 728, 762.

[222] *See id.* at 746.

[223] *See id.* at 762.

[224] *See id.* at 729 (assumptions regarding juror comprehension are incorrect and so should be invalid as basis for polyfurcation and restriction of jury input); *see also* Granholm & Richards, *supra* note 45, at 534 (noting that juries were "ahead of" the legal doctrine with respect to comparative negligence).

The Sixth Circuit, in *In re Bendectin Litigation* cites their own ruling in *In re Beverly Hills Fire Litigation* to support the splitting of cases into more than two phases. *See In re* Bendectin Litig., 857 F.2d 290, 308 (6th Cir. 1988). Interestingly, the *Manual for Complex Litigation* warns against issue separation where it would "prevent a litigant from presenting a coherent picture

a valid argument that polyfurcation of trials in complex tort cases may infringe on the plaintiff's right to a jury trial.[225] The discussion below points out three ways in which the law may infringe on a civil jury trial in a complex tort case. First, the lack of a well-defined common law standard combined with abuse of discretion review permits judges to separate issues under Rule 42(b) when the issues are related and intertwined.[226] Second, trials within a larger trial magnify the impact of the Federal Rules of Evidence on the case and permit the exclusion of evidence helpful to a plaintiff more often than in a unified trial.[227] Third, polyfurcation encourages the law to be purely scientific, decreasing the jury's ability to infuse the law with community values.[228]

A. *Lack of a Limiting Standard*

In the Woburn case, it is understandable that Judge Skinner polyfurcated the trial. Precedent in earlier toxic tort cases and mass tort cases demonstrates that trifurcation decisions are upheld on appeal and lauded for their rationality and economical use of the courts' time.[229] The *Manual for Complex Litigation* states that severance of issues can often reduce the length of trial and improve comprehension of issues and evidence.[230] Wright & Miller's *Federal Practice and Procedure* supports the severance of issues, crediting issue bifurcation with increased time-savings at trial and more rational decision-making by juries.[231]

The Woburn case involved thirty-three plaintiffs, two defendants, a singular causal event and multiple claims including negligence, nui-

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to the trier of fact" and cites the *Bendectin* case for such a premise. The *Bendectin* case permits issue separation and should have been decided differently in order to clearly support the concept recommended in the *Manual for Complex Litigation*. As it is, the irony is all too strong that the *Bendectin* case is being used as an example of issue separation that does *not* result in jury confusion and an incoherent picture for the trier of fact.

[225] *See Bendectin*, 857 F.2d at 307 (also citing United States v. 1071.08 Acres of Land, 545 F.2d 1350, 1352 (3d Cir. 1977)). While the court did note that this was no "ordinary" case, it still relied upon the basic premise that trifurcation decisions are within the trial judge's discretion. *See id.*

[226] *See, e.g., In re* Breast Implant Cases, 942 F. Supp. 958, 960–61 (E.D.N.Y. 1996) (permitting severance necessarily disregards witness testimony that systemic and local injuries are related).

[227] *See, e.g., In re* Beverly Hills Fire Litig., 695 F.2d 207, 217 (6th Cir. 1982) (excluding documents in causation phase that would be admissible in trial on liability generally).

[228] *See* Cecil, *supra* note 45, at 730 (noting that legal rules develop in part from juror wisdom using comparative negligence as an example).

[229] *See, e.g., id.* at 308.

[230] *See* MANUAL FOR COMPLEX LITIGATION § 21.632.

[231] *See* WRIGHT & MILLER, *supra* note 41, § 2390 (discussing concerns about severance and concluding that some constitutional concerns are insubstantial).

sance, and emotional distress.[232] As a complex mass tort case, Woburn would appear to be a "textbook" case for severance.[233] It is reasonable, and expected, that Judge Skinner might inquire into issue separation benefits of potential time-savings, prevention of prejudice to the defendants, and categorical convenience in presenting evidence.

Complexity, present in the Woburn case, has been a consistent justification for the bifurcation of mass tort trials. The Sixth Circuit in *In re Beverly Hills Fire Litigation* supported bifurcation of liability and damages in part because the proof required for various issues was extensive and expensive.[234] The *Bendectin* appeals court upheld separation of the proximate cause element because the multiplicity of litigation "could substantially immobilize the entire Federal Judiciary" with 1100 cases each taking 38 days of trial time.[235] Not surprisingly, in the Woburn case, creating a manageable trial plan concerned Judge Skinner because the case involved thirty-three plaintiffs, and a novel toxic tort causation claim.[236]

Transcripts from the Woburn case reveal that Judge Skinner voiced his concerns regarding the complexity of the trial as early as December 6, 1985, two months before the beginning of the trial.[237] Judge Skinner commented to counsel that submitting all thirty-three causation and damages issues in one trial would be "unbelievably cumbersome or unworkably cumbersome."[238] Additionally, during more extensive discussions with counsel about the trial plan, Judge Skinner expressed a significant interest in "efficiency and clarity and logical progression in the evidentiary presentation."[239]

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[232] *See* Third Amended Complaint, *supra* note 20, at 1, 36–39.

[233] *See* MANUAL FOR COMPLEX LITIGATION § 33.2; *see also* Peter Shuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 338 n.7 (1986). Peter Shuck, Professor of Law at Yale Law School and author of a book on the Agent Orange litigation, defines complex litigation to include some or all of the following:

> numerous parties raising unprecedented claims, which are to be resolved on the basis of a massive and ambiguous factual record concerning events or relationships that span long time periods and large geographical areas, and which will require resolution of novel procedural, choice of law, substantive, and remedial issues. Adjudication of such a case is very costly and time consuming, and any judgment or settlement reached, even one for money damages, is likely to be difficult to implement.

Shuck, *supra*, at 338 n.7.

[234] *See In re* Beverly Hills Fire Litig., 695 F.2d 207, 216 (6th Cir. 1982).

[235] *See In re* Bendectin Litig., 857 F.2d 290, 316 (6th Cir. 1988).

[236] *See* HARR, *supra* note 1, at 175–76; *see also* Third Amended Complaint, *supra* note 20, at 12.

[237] *See* Hearing at 27–28, Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988) (No. 82–1672-S).

[238] *See id.* at 27.

[239] *See* Third Day Pre-Trial Conference, *supra* note 33, at 3–66.

The only precedential limit Judge Skinner had before him when making the polyfurcation decision was the standard set down in *Gasoline Products*.[240] The *Gasoline Products* standard states that issues may be presented independently to a jury so long as they are separate and distinct.[241] Specifically, the United States Supreme Court declared that any separation of interwoven issues resulting in jury confusion and uncertainty would amount to a denial of a fair jury trial.[242]

As future cases have interpreted the separate and distinct standard, little guidance has been provided as to what "separate and distinct" actually means. *Bendectin* interpreted separate and distinct to require evidence supporting each issue to be different and that one issue must logically flow from the other.[243] In *Bendectin*, the testimony and evidence required for proximate cause was considered different from the evidence required to prove injuries to the plaintiffs and consequently justified the fact that proximate cause could be tried on its own to the jury.[244] Additionally, the court put weight on the logical progression of issues requiring liability to be established before any damage determination could be made.[245]

Later courts have found "general causation" being tried on its own as problematic. In *Schneck v. International Business Machines*, the United States District Court for the District of New Jersey rejected a motion to have causation tried first as a separate issue with respect to a consolidation of ten plaintiffs' "repetitive stress injury" claims allegedly caused by the use of various products produced by the defendant.[246] The New Jersey court rejected the motion, because the resolution of general causation would not resolve specific plaintiffs' claims or any specific medical conditions with respect to particular products produced by the defendant.[247] The *Schneck* court quoted the *Manual for Complex Litigation* and noted that "empirical research suggests that decisions to consolidate and bifurcate trials may affect jury decisions about liability and damages."[248] The court followed that argument up with broad general language from numerous cases de-

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[240] *See* Gasoline Prod. v. Champlin Ref., 283 U.S. 494, 498 (1931).
[241] *See id.*
[242] *See id.* at 500.
[243] *See In re* Bendectin Litig., 857 F.2d 290, 309 (6th Cir. 1982).
[244] *See id.* at 308–14.
[245] *See id.* at 309.
[246] *See* Schneck v. I.B.M., 1996 U.S. Dist. LEXIS, at *23–*24 & n.7 (D.N.J. 1996).
[247] *See id.*
[248] *See id.* at *16.

claring that justice cannot be sacrificed even if judicial economy were furthered.[249]

The case-by-case interpretation of separate and distinct issues results in hundreds of distinguishable cases for a district judge to review when attempting to apply Rule 42(b) to a particular case. There is simply no "separate and distinct" standard that assists the judge in determining the limits of Rule 42(b) applicability to a unique case. Juror confusion and uncertainty is the strongest precedential measure of a limit to issue separation.[250] The United States Supreme Court has at least made clear that jury confusion and uncertainty amounts to a denial of a fair trial.[251] It is then up to the district court judge to predict whether polyfurcation will create or avoid jury confusion.

Jury confusion and uncertainty existed in the Woburn case as demonstrated by the jury's inconsistent interrogatory responses.[252] In answering the various interrogatories, the jury found that Grace was responsible for a significant portion of the TCE and perc found in wells G and H, and that Grace had acted negligently.[253] Although the jurors could not determine when Grace first began making a "substantial contribution" to the contamination of Wells G and H, they determined *negligence* was responsible for Grace's "substantial contribution" beginning in September, 1973.[254] Without knowing when Grace first started "substantially contributing" pollutants to wells G and H, it is unclear how the jury determined the September, 1973 date for Grace's *negligent* "substantial contribution" of toxins to the wells.[255]

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[249] *See id.* at *17 ("consolidation is never appropriate if the fair and impartial administration of justice would be jeopardized"). *See also In re* Repetitive Stress Injury Litig., 11 F.3d 368, 374 (2d Cir. 1993) (mass torts becoming a self-fulfilling prophecy where individual issues are diminished at the expense of due process rights); Malcolm v. National Gypsum Co., 995 F.2d 346, 350 (2d Cir. 1993); *In re* Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 853 (2d Cir. 1992) (explaining systemic urge to aggregate litigation must not be allowed to trump dedication to individual justice, and each individual plaintiff's and defendant's cause must not be lost in the "shadow of a towering mass litigation"); Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990) ("obligation of courts to deliver justice cannot ever be sacrificed for the benefit of cheaper and more rapid dispositions").

[250] *See* Gasoline Prod. v. Champlin Ref., 283 U.S. 494, 500 (1931).

[251] *See id.*

[252] *See* Kennedy, *supra* note 21.

[253] *See* Kennedy, *supra* note 21.

[254] *See* Kennedy, *supra* note 21. The jury interrogatories and answers, paraphrased for clarity, are as follows: 1. Was Grace responsible for TCE and perc in the wells? *Yes*; 2. When did Grace first begin making a substantial contribution to the wells? *Not Determined*; 3. Had Grace acted negligently? *Yes*; 4. When did Grace first begin making a substantial contribution to the wells as a result of its negligence? *September, 1973. See* Kennedy, *supra* note 21.

[255] *See* Kennedy, *supra* note 21.

Jurors interviewed after the trial indicated that the wording of the interrogatories was to blame for their confusion. In an interview with a reporter from *The American Lawyer*, jurors commented that the phrasing of the jury questions "made it impossible for them to perform their duty."[256]

The confusion experienced by the jurors because of the poorly worded questions necessarily implicates the polyfurcation of the case. Toxic tort cases justify polyfurcation, in part, based on jury instructions and the use of interrogatories.[257] In the Woburn case, the questions posed to the jury and the difficulty the jurors had responding resulted, in part, from the limited trial presented to the jury. The jurors did not hear all the facts related to the controversy which would have helped them understand the chronology of events being tried in the courtroom. For example, evidence of when the plaintiffs first started getting sick was relevant to when contaminants may have first reached the wells. While evidence of plaintiffs' injuries could not have been used to establish defendant's liability, additional information about the context of the well contamination would have helped the jury reach the whole truth of the matter.

Judge Skinner, in hearing testimony, expressed concern that plaintiffs would use a circular argument to prove the defendants' well contamination caused the injuries.[258] While that is indeed a very valid concern, keeping contextual information from the jury serves to confuse the jury and hinder the most truthful and accurate resolution of the facts in question. Information regarding when plaintiffs first began getting sick may not be *legally* relevant to causation, but keeping the information from the jury does not serve the ends of justice because it does not aid the jury in reaching an accurate picture of the entire case and controversy at hand.[259] The timing of plaintiffs' first signs of sickness would have placed the causation evidence in context with the injuries claimed by plaintiffs and would have given jurors a more complete picture of the realities contested by the parties. Forcing the jury to answer very limited, very specific questions with less than all available and relevant information is illogical and cannot be

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[256] *See* Kennedy, *supra* note 21.

[257] *See In re* Beverly Hills Fire Litig., 695 F.2d 207, 214 (6th Cir. 1982) (judge's instruction brought human concern to the jury).

[258] *See* Hearing, *supra* note 237, at 28 (explaining that plaintiffs cannot use evidence of sickness and timing of sickness to prove well contamination).

[259] *See id.* at 217 (information excluded due to prejudice on question not yet before the court and such information would have been admissible in a unified trial).

justified simply because the law has imposed rigid legal categories and artificial structure on our organic world. The polyfurcation patronizes the jury, assumes that less information is safer for the jury to decide upon, and unfortunately results in jury confusion about the case at hand.

The current standard for interpreting Rule 42(b) applicability fails to recognize the loss of meaning that results from the deconstruction of a cause of action. Juror confusion existed in the Woburn trial, yet under the *Gasoline Products* separate and distinct test, Rule 42(b) authorized polyfurcation and exclusion of contextual facts from the case.[260] Case-by-case determination of whether issues are separate and distinct does not allow the development of applicable precedent to guide judges in their severance determinations. Judge Skinner had little legal precedent before him that defined jury confusion or more fully interpreted separate and distinct according to the complexities of the Woburn case. The lack of interpretive precedent guiding severance decisions limits the check on judicial power that normally exists with precedent and stare decisis.[261] It expands the discretionary power afforded to judges and it lessens the uniformity intended to be forwarded by the Rules of Civil Procedure. The practical effect of the ill-defined separate and distinct standard is that it inadequately protects the right to a fair jury trial, as guaranteed by the Seventh Amendment.[262]

B. *Increased Influence of the Rules of Evidence*

The use of Rule 42(b) may also infringe on an injured party's right to a jury trial because of the increased influence of the Federal Rules of Evidence within the entire trial. The Federal Rules of Evidence, adopted in 1975, essentially codified the existing common law rules of evidence and brought some uniformity to the admissibility of evidence in federal courts. Importantly, the underlying purpose of the Rules of

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[260] *See* Gasoline Prod. v. Champlin Ref., 283 U.S. 494, 500 (1931).

[261] *See* Peterson, *supra* note 56, at 56 & n.48. "'Secondary discretion' exists when the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision. . . . It gives the trial judge a right to be wrong without incurring reversal." *See id.* at 56.

[262] *See* Zeisel & Callahan, *supra* note 45, at 1617–19 (showing defendants have increased success in bifurcated trials). Without a complete understanding of how trials change due to bifurcation, courts should be far less willing to sever issues in the toxic tort context. Causation may be the most difficult issue to prove for plaintiffs, and that is exactly why they should be afforded every opportunity to share information with the jurors.

Evidence includes aiding the court in reaching the truth of the matter and providing justice to the parties.[263]

But the Rules of Evidence are not without flaws. For example, researchers revealed that in an asbestos case, the adversarial presentation of scientific evidence led the jury to misunderstand the development of asbestosis.[264] Evidence presented to jurors in the case did not emphasize the variable nature of asbestosis.[265] Accordingly, jurors gathered from the facts presented that all individuals with asbestosis would become severely disabled and die as a result of the disease.[266] Researchers blamed self-interested presentation of complex testimony for the misconceptions of the jurors in the study.[267] While our evidentiary system relies on adversarial presentation of facts, that presentation does not always encourage the just, fair, or truthful result.

Reinforcing flaws such as this, the separation of issues magnifies the impact of the Rules of Evidence on an entire trial. Each party will of course utilize the exceptions available in the Rules of Evidence to exclude opposing party's testimony. To the extent that more trials within each case allow evidence to be excluded, less information will ultimately reach the jury.

Relevance, required by Rules 401 and 402, must exist between the offered piece of evidence and the singular legal element at trial in a particular phase. The relevance requirement shrinks from the entire case to one prong of a cause of action. Consequently, areas of potential probativeness narrow and areas of potential prejudice increase at each and every stage of the trial. The relevance window closes somewhat for each piece of evidence. Evidence relevant to liability and damages must pass evidentiary tests for liability and damages separately in a bifurcated case rather than passing a broader evidentiary test once in a unified trial.

Splitting of issues may be lauded for its organizational benefits, but such categorization will force the exclusion of evidence from the jury as a result of the link between legal categories and evidentiary boundaries.

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[263] *See* Professor Dean Hashimoto, Lecture at Boston College Law School (Sept. 2, 1997).

[264] *See* Cecil, *supra* note 45, at 755.

[265] *See id.*

[266] *See id.*

[267] *See id.*

In *In re Beverly Hills Fire Litigation,* for example, the trial court separated the issue of causation in a hotel fire case.[268] The plaintiffs claimed that faulty aluminum wiring within an empty wall caused the fire which resulted in the deaths of 165 people and injuries to many others.[269] Plaintiffs contended that due to a number of physical characteristics of "old technology" wiring, heat developed at the connection of the aluminum branch circuit wiring, and this heat eventually ignited the wooden studs and other building material in the wall.[270] Defendants argued that the area in question was not proven to be wired with aluminum wiring, and additionally, that the fire started in a different area as a result of copper wiring and numerous fire code violations.[271] Defendants included several manufacturers of "old technology" aluminum wiring who potentially supplied products for the building.[272]

On appeal, plaintiffs argued that separating out the causation question prohibited probative evidence from admission into the trial.[273] The documents excluded at trial supported plaintiffs' theory that aluminum wiring has a greater propensity to cause fires and showed that some defendants knew of this propensity.[274] The trial judge determined that the documents were "admissions as to some defendants" regarding knowledge that aluminum wiring causes fires, but hearsay as applied to other defendants.[275] Further, the judge found that the documents, probative on the issue of liability, were inadmissible in the causation phase because their probative value was outweighed by the potential for prejudice if a specifically identified defendant were singled out.[276]

In the *Beverly Hills Fire* case, the hearsay exception,[277] the narrower relevance requirement,[278]and the prejudice exception[279] acted to exclude evidence helpful to the plaintiffs' case that would have been admissible in a unified trial.[280] The overall strength of plaintiffs' case

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[268] *See In re* Beverly Hills Fire Litig., 695 F.2d 207, 210 (6th Cir. 1982).
[269] *See id.* at 210–11.
[270] *See id.*
[271] *See id.* at 211.
[272] *See id.* at 210.
[273] *See Beverly Hills Fire*, 695 F.2d at 216.
[274] *See id.* at 217.
[275] *See id.*
[276] *See id.*
[277] *See* FED. R. EVID. 801, 802.
[278] *See id.* 401, 402.
[279] *See id.* 403.
[280] *See id.* at 216–17 advisory committee's note.

or plausability of plaintiffs' theory did not get heard in full by the jury. Relying on this example is not an attempt to argue that the documents were *legally* relevant to causation, but merely demonstrates that legal relevance tests become narrower in polyfurcated trials and may act to create a scenario where evidence relevant to the entire case may never be relevant to any narrowly defined legal element and may interfere with the parties' right to present their case in full.

Plaintiffs face an uphill battle when trying to prove causation in a toxic tort case. Issue separation limits the amount of probative evidence plaintiffs may bring in a toxic tort trial and serves to cut the tenuous strings that may exist for plaintiffs to prevail in a courtroom. This evidentiary limitation may infringe on an injured party's right to a fair trial.

Polyfurcation of the Woburn case resulted in having questions of negligent dumping and groundwater contamination tried first.[281] This restricted the jury from hearing anything not legally relevant to those issues. Jurors did not hear evidence of the timing of plaintiffs' injuries or anything else excludable under the multiple exceptions available in the Rules of Evidence. Due to the adversarial presentation of evidence, the jury also never heard the results of the Riley Tannery's own hydrogeological study done in 1983.[282] The study found that groundwater underneath the Tannery flowed to the east, toward the city wells, through very porous soil, confirming plaintiffs' expert testimony offered at trial.[283]

With polyfurcation magnifying the impact of the Rules of Evidence, flaws inherent in the rules multiply each time a new trial stage gets carved out by a judge. At some point, the narrower evidentiary question unjustly acts to exclude evidence the original rules never intended to be prohibited from the courtroom.

C. *Law . . . More Than Just Science and Logic*

Issue separation in the toxic tort context encourages the law to be purely scientific and legally rational. Such scientific requirements, to the exclusion of all else, improperly limit the role of the jury in toxic tort litigation when causation is tried separately. By allowing a case to be split into progressively smaller elements, the jury is no longer

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[281] *See* HARR, *supra* note 1, at 287; *see also* Third Day Pre-Trial Conference, *supra* note 33, at 3–66, 3–67.

[282] *See* HARR, *supra* note 1, at 459–60.

[283] *See id.* at 460.

able to render a verdict on the entire "case or controversy" and their ability to infuse community values into the law is diminished.[284]

Issue separation occurs at the discretion of the trial judge. Judicial discretion therefore, creates the categories that will be tried separately and defines the boundaries of supporting evidence that the court will permit the jury to hear. The definitions of severed issues become impossible to check by jury verdict and enlarge the discretionary and potentially arbitrary power of district court judges.[285]

Comparative negligence is an often-used example that demonstrates the jury's infusion of community values into tort law.[286] Before comparative negligence existed, contributory negligence required judgment for the defendant if the plaintiff was found to be negligent in any way, no matter how limited the transgression.[287] With contributory negligence as the law, juries would return verdicts for the plaintiffs with discounted damages rather than judgment for defendants.[288] The jury's own value balancing led the law to eventually adopt comparative negligence as a legal standard.[289]

It could be argued that sympathy for the plaintiffs' injuries had supported the juries' awards of discounted damages without regard to the logic and rationality of the law.[290] Such an argument oversimplifies the situation and discredits the actions taken by the jury. There are in fact other ways to analyze the jury's discounted damages approach. The jury could be balancing a different set of values than those allowable by law or simply according different weight to the values already incorporated into the legal doctrine. For example, in the risk assessment context, experts traditionally determine overall risk on the basis of mortalities caused by an activity.[291] While laypersons often estimate a similar number of deaths from the same activity, their overall risk assessment may be higher than the experts' re-

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[284] *See* Cecil, *supra* note 45, at 728. "When a democratic society seeks to impose the rigors of the law on an individual, it must justify those standards to a panel of citizens and allow the austere expression of the law to become infused with the values of the community." *Id.*

[285] *See* Klein, *supra* note 164, at 1034 (noting before there was a draft Constitution, each state actively promoted juries as a check on judges).

[286] *See* Weinstein, *supra* note 41, at 834; *see also* Cecil, *supra* note 45, at 730.

[287] *See* Weinstein, *supra* note 41, at 834; *see also* Cecil, *supra* note 45, at 730.

[288] *See* Weinstein, *supra* note 41, at 834; *see also* Cecil, *supra* note 45, at 730.

[289] *See* Cecil, *supra* note 45, at 730; Granholm & Richards, *supra* note 45, at 534 (noting three state supreme courts credited juries with being "ahead of them" in comparative negligence doctrine).

[290] *See* Weinstein, *supra* note 41, at 834–35 & n.14.

[291] *See* Cecil, *supra* note 45, at 761–62 (citing Slovic, 236 SCI. 280, 285 (1987)) (expressing unsuccessful expert attempts to educate public, whom experts believe harbor "irrational fears").

sults.[292] Laypersons simply value other factors in addition to mortality figures.[293] Researchers have determined that "dread risk" is a significant additional factor considered by laypersons in risk assessment.[294] "Dread risk" is defined as "a combination of the perceived lack of control over the activity, the potential for catastrophe, the likelihood of fatal consequences in the event of an accident, and the degree of inequitable distribution of risks and benefits."[295] Accordingly, when experts and laypersons disagree about the level of risk an activity generates, the differences are due to additional factors incorporated into the laypersons' formula. Rationality and understanding do not disappear from the laypersons' risk assessment. The values incorporated into the formula are simply *different* than those infused into the risk formula by the "experts."[296] Importantly, scholars suggest that the values incorporated by laypersons and "overlooked by formal analysis" are often essential for human welfare or psychological well-being.[297]

Redefining the mechanics of jury decision-making to include different, but rational decision-making would undermine the assumption that emotion or sympathy is always to blame for disparate jury-judge verdicts.[298] Recognizing that juries make rational yet different decisions would comport with the value the Framers of the United States Constitution placed on the jury's role in the courtroom.[299] Currently, the law assumes that juries and litigants need to be protected from sympathetic jury decisions.[300] Polyfurcation is lauded as a mechanism that forces rational decision-making in juries while avoiding sympathetic or prejudicial decision-making.[301] This limited perspective, when used by the law, incorrectly justifies paternalistic treatment of

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[292] *See id.* at 762 (noting nuclear power as example where experts and laypersons differ on their risk assessments).

[293] *See id.*

[294] *See id.*

[295] *See id.*

[296] *See* Cecil, *supra* note 45, at 762.

[297] *See id.* (citing Fischoff, *Behavioral Aspects of Cost-Benefit Analysis*, ENERGY RISK MGMT. 269, 279–80 (1979)).

[298] This approach directly contradicts the conclusion reached by Wright & Miller in their treatise (which is often cited by judges in case law to support severance decisions) that juries decide complex cases based on emotion. *See* WRIGHT & MILLER, *supra* note 41, § 2390; *see also In re* Bendectin Litig., 857 F.2d 290, 308 (6th Cir. 1988); Helminski v. Ayerst Lab., 766 F.2d 208, 212 (6th Cir. 1985).

[299] *See* Klein, *supra* note 164, at 1033–34; *see also* Galloway v. United States, 319 U.S. 372, 397 n.1 (1943).

[300] *See* WRIGHT & MILLER, *supra* note 41, § 2390.

[301] *See id.; see also Helminski*, 766 F.2d at 212.

jurors and leads to increased separation of issues, especially in cases where injuries may be severe.

This narrow viewpoint is significant, particularly in the area of causation in the toxic tort context. The law demands causation be proved by scientific methods.[302] Courts reject the possibility that any level of common experience could aid the jury in finding causation in toxic tort cases.[303] Yet common experience or empirical evidence exists where science breaks down. Common experience sets the pathway for scientific development and is arguably the only truth available until science begins to explain our reality. This common experience boundary is used to justify the severance of causation into its own unique trial without regard to the circumstantial evidence excluded from the courtroom.

In Woburn for example, the jury was not allowed to hear any evidence about when the plaintiffs became sick. Such information was excluded because of the polyfurcation of the case. As discussed above, information about when plaintiffs first became sick would have avoided jury confusion at the time of the jury interrogatories. Evidence of illness may have affected the jury's perception of the chemical solvent activity on defendants' properties.

Legally, such an inference could be criticized as not relevant to the defendants' chemical dumping activities and the groundwater flow under defendants' properties. Yet, such a criticism assumes two things: first, that the adversarial court system encourages truth-telling by blamed parties; and second, that the scientific evidence regarding chemical solvents under defendants' properties incorporates all necessary information to protect society from harm.

Woburn demonstrates that these two assumptions are incorrect and supports the premise that evidence of the timing of plaintiffs' illnesses should have been provided to the jury. First, the Woburn trial did not encourage truth-telling by defendant Beatrice. Criticism could be pointed at the phrasing of eleven requests by plaintiffs' counsel for information about defendants underground solvent lev-

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[302] *See In re* Breast Implant Cases, 942 F. Supp. 958, 961 (E.D.N.Y. 1996).

[303] *See Bendectin*, 857 F.2d at 314. The court refused to apply § 433B of the Restatement which would have allowed an alternate jury instruction. *See id.* The court rejected § 433B application because there was no element of common experience in finding causation: "[T]he linkage between ingestion of the drug and the birth defects is simply not supplied by common experience." *See id.*

els.[304] Yet that would overlook the systemic problem that still permitted defendant Beatrice to keep its own hydrogeologic data out of the trial.

Second, the battle of the scientific experts in the Woburn case resulted in the jury finding that Beatrice did not act negligently.[305] Yet, the EPA and the United States Geological Service, after the trial, reported that the Beatrice land was in fact a "source of contamination to the wells."[306]

The legally permitted severance of the Waterworks phase clearly did not incorporate enough information to protect society from harm. The limited trial addressing negligent dumping and contamination of the water wells may, on its face, comport with Rule 42(b) and the Federal Rules of Evidence. Yet somehow the law did not "catch" a problem deeply harmful to the Woburn community. This failure of the law to reach toxic tort harms in the trial context should act to discourage severe polyfurcation of complex tort cases until the separate and distinct nature of complex elements can truly be determined.

VI. Conclusion

Rule 42(b)'s application in the toxic tort context is particularly harmful to injured parties. There are three mechanisms that serve to deny plaintiffs a fair jury trial in severed cases. First, case-by-case application of an ill-defined common law standard combined with limited appellate review provides judges little guidance for severing issues. With increased docket pressure and a legal system encouraging judicial case management, toxic tort cases will continue to be tried in pieces, solely because of their complexity. Second, creating many trials within one cause of action triggers the exclusions in the Rules of Evidence more often than a unified trial would. Because causation is so difficult to prove for plaintiffs in toxic tort cases, this creates an unfair impact on injured parties and violates their right to place before the jury all the probative evidence of their case and controversy. Lastly, bifurcation restricts the ability of the jury to infuse the law with community values necessary for the proper development of the law.

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[304] Interview with Jan Schlictmann, Plaintiffs' Attorney in the Woburn Case (Mar. 1997).

[305] *See* Harr, *supra* note 1, at 287, 392, 448 (negative responses from jury as to Beatrice).

[306] *See* Kennedy, *supra* note 21.

The Woburn trial highlights the problems inherent in Rule 42(b) application. Until the substantive impacts of Rule 42(b) application are fully recognized by the law, splitting of toxic tort cases should be more closely scrutinized by appellate courts, academics, and practitioners.