6-1995

Optimal Issue Separation in Modern Products Liability Litigation

James A. Henderson Jr.
Cornell Law School, james-henderson@lawschool.cornell.edu

Fred Bertram

Michael J. Toke

Optimal Issue Separation in Modern Products Liability Litigation

James A. Henderson, Jr.,* Fred Bertram** & Michael J. Tõke***

I. Introduction

Much of what this Paper says about issue separation in products liability litigation could be said about any other area of tort law—indeed, about any other area of American law. We have chosen products liability for two principal reasons. First, it is an area in which, at least arguably, we have a comparative advantage.[1] And second, it provides some clear examples of the general issue separation phenomena that we want to talk about. Like all other systematic approaches to problem solving,[2] our system of products liability litigation must devise ways of breaking down complex problems into their separate, constituent elements so that solutions derived by the system are, and appear to be,[3] rational, consistent, and fair.[4] Issue separation is achieved substantively when the rules and standards governing products liability distinguish among different aspects of patterns of conduct and their consequences, allowing the litigation system to reach socially appropriate decisions regarding such conduct.[5]

---

* Frank B. Ingersoll Professor of Law, Cornell University. A.B. 1959, Princeton University; LL.B. 1962, LL.M. 1964, Harvard University.

** B.A. 1980, Metropolitan State College, Denver; Candidate for J.D. 1996, Cornell Law School.

*** B.A. 1992, Nazareth College of Rochester; M.S. in Economics 1993, University of North Texas; Candidate for J.D. 1996, Cornell Law School.

1. One of the authors is co-reporter, with Professor Aaron D. Twerski, of the new *Restatement of Torts (Third): Products Liability*. The other two authors, second-year students at the Cornell Law School, spent hundreds of hours helping to research the *Restatement* project.

2. Such approaches include, without limitation, systems of logic, language, literary criticism, mathematics, religion, and economic analysis.

3. For an argument that a major objective of decisionmaking by juries is to achieve public acceptance of verdicts as statements about litigated events rather than merely statements about what happened at trial, see Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1366-68 (1985).

4. The test we use to determine whether solutions are "rational" is whether they further the objectives of the liability system. *See infra* notes 34-43 and accompanying text.

5. Substantive issue separation also affects risk-creating behavior, rather than merely official behavior, when individual actors use the substantive law, prior to accidental loss, to guide their

Issue separation occurs procedurally during litigation when either the judge or the jury[6] is able, or required, to focus on one substantive element, or issue, to the exclusion of the others.[7] Obviously, substantive issue separation is a necessary condition to procedural separation; the substantive law must identify and define the relevant issues before the participants in adjudication can hope to do so. But even if the rules of products liability purport to separate issues substantively, official decisionmakers at trial may ignore such separation and consider the case as a whole unless procedurally prevented, or at least discouraged, from doing so.[8]

This Paper argues that, although the structure of our legal system inevitably requires some issue separation, in any given system there can be too much of the wrong kind, or too little of the right kind, of issue separation. The goal should be optimal separation, measured qualitatively and quantitatively. That is, the goal should be to achieve those patterns of issue separation that maximize the net benefits derived from operating a products liability system.[9]

Reviewing developments over the last several decades, including the new *Restatement of Torts (Third): Products Liability*, Part II of this Paper concludes that the substantive law of products liability has been moving in the right direction from the standpoint of achieving optimal issue separation. No megatrend is discernible. Rather, areas that had become overly complex and formal are becoming less so, and areas that had remained overly simplistic and generalized are reversing direction, rendering the imposition of liability more predictable and even-handed.

Part III considers developments in issue separation from a procedural perspective, beginning with what might be described as the traditional patterns of response. Although these traditional patterns might at first be considered anomalous, reflection reveals them to be sensible and arguably close to optimal. Part III considers more recent procedural developments, mainly in response to so-called "mass tort" challenges. These developments, including nontraditional applications of trial bifurcation, trifurcation,

---

conduct. After the fact of accidental loss, issue separation also affects behavior pre-trial, during settlement negotiations, and post-trial, during appeal. But the focus of this Paper is on the litigation process.

6. Participants at trial also include the parties and their lawyers. But the focus here is on judges and juries.

7. Clearly, perfect separation is not attainable. Issues are to some extent inextricably interconnected. *See infra* notes 133-135 and accompanying text.

8. Empirical studies indicate that triers of fact tend to consider cases as a whole, notwithstanding procedural efforts to keep issues separated. *See, e.g.*, REID HASTIE ET AL., INSIDE THE JURY (1983) (discussing the story model of juror cognitive processing, according to which "evidence is comprehended and organized into one or more plausible accounts describing 'what happened' at the time of events testified to during trial").

9. *See infra* notes 35-43 and accompanying text.

and beyond, are more controversial and raise serious questions of propriety in the minds of many observers.[10] Part III concludes that, on balance, many of these recent procedural developments represent appropriate responses to problems in a carefully circumscribed area of products liability litigation.

II. Substantive Issue Separation in American Products Liability Law

A. What Constitutes Substantive Issue Separation?

In its most fundamental form, substantive issue separation occurs when the law—here, the law of products liability—identifies certain aspects of a case as independent elements upon which the outcome depends. These elements may usefully be characterized as links in a chain connecting the defendant's conduct with legal responsibility to the plaintiff. In most cases, only one or two of these elements are contested, but the number of potentially contestable elements in a products liability case is surprisingly large.[11]

The form of substantive issue separation that is the subject of this Paper occurs when a factual consideration deemed relevant to the outcome in a products liability case is made the subject of a distinct legal rule—an element of the case—and thus is determinative of its outcome.[12] In contrast, the form of issue conflation discussed in this Paper occurs when a relevant factual consideration is recognized as one of a number of factors bearing on outcome, none of which is by itself determinative.[13] It follows that this type of issue separation is accomplished by the adoption of more-or-less formal, fact-specific legal rules; issue conflation of the sort focused on in this analysis is accomplished by the adoption of more-or-less informal, norm-embracing legal standards to which a number of factual circumstances are relevant.[14] In products liability law, an example of a legal

---

10. *See infra* notes 227-241 and accompanying text.

11. They include duty, breach, causation, plaintiff's conduct, elements of recovery, and measurement of damages. Each of these major headings, in turn, breaks down into many independent subheadings. Duty, for example, breaks down into time-of-sale, pre-sale, and post-sale. Time-of-sale breaks down into whether the transaction is a "sale," whether the sale is "commercial," whether the seller is engaged in selling the type of product in question, whether what is sold is a "product," and so forth. *See generally* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1, 4 and 5 (Tentative Draft No. 2, 1995).

12. The reference here to "outcome" does not necessarily focus on whether the plaintiff wins or loses in a given case, but includes the legal outcome with respect to a major element in the case. For example, the factual circumstance that an alleged design defect consists of a manufacturer's failure to include a safety device that would have prevented a plaintiff's injury may in some jurisdictions rule out the defense of plaintiff's fault as a matter of law, *see infra* note 71 and accompanying text, but the plaintiff will nevertheless lose unless a design defect is established.

13. When conflated, factual circumstances no longer present "issues" in the same elemental sense as when they are separated by a formal rule. *See infra* note 74 and accompanying text.

14. Between specificity and generality, enough gray area exists to allow one to characterize the relationship between legal standards and legal rules as a continuum. *See* Isaac Ehrlich & Richard A.

rule formulating an independent element is a rule that holds a product design to be nondefective as a matter of law if the risk that materializes in the plaintiff's harm is obvious.[15] An example of a legal standard conflating the factor of obviousness of risk is a standard that holds a product design nondefective if—based on all the circumstances, including the obviousness of the risk—the design is not shown to be unreasonably dangerous.[16] This standard serves to separate the issue of product defectiveness from other issues, but it refuses to allow obviousness to be independently controlling.

Legal rules, such as the independent element identified above, reflect normative liability decisions, reached at the time of rule formulation regarding the legal consequences flowing from a certain factual circumstance. In contrast, the legal standard regarding the obviousness of product design risks relies on the underlying norm of unreasonableness, leaving to the trier of fact the major portion of the task of reaching the normative liability decision at the time when the standard is applied to the facts of a particular case. Again, although the relatively vague standard conflates factual considerations that might themselves be treated as independent elements of the plaintiff's claim or the defendant's response, the standard itself presents an independent element that serves to separate the legal issue of defectiveness in a products liability case.

B. What Constitutes Optimal Substantive Issue Separation?

Simply stated, optimal issue separation, or optimal rule specificity, occurs when the substantive law consists of a combination of rules and standards such that no other combination would increase the net social benefits derived from operating the liability system.[17] We are not concerned with issues of pure substance unconnected with form. Whether the plaintiff's last name starts with a consonant is, on any rational view, irrelevant to whether the product seller should be liable, and a holding that

---

Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 257 (1974) ("Any choice along the specificity-generality continuum will generate a unique set of costs and benefits."). Because legal standards and legal rules give rise to, respectively, issue conflation and issue separation, issue conflation and issue separation may likewise be described as a continuum. For clarity, however, issue separation and issue conflation are presented in this Paper as a dichotomy. JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 67-68 (4th ed. 1994); *cf. id.* at 258 ("To facilitate exposition, we will sometimes treat the specificity-generality continuum as if it were a dichotomy between 'rules' and 'standards.'").

15. For actual decisions supporting such a rule, see *infra* notes 59, 64.

16. For actual decisions supporting this approach, see *infra* note 66.

17. *See* Ehrlich & Posner, *supra* note 14, at 261, 261-77 (noting that the optimum choice on "the continuum between the highly specific rule and the highly general standard" is "the choice that maximizes the excess of benefits over costs"). Ehrlich and Posner's analysis includes the effects of rules and standards on primary behavior, a consideration not included in this Paper. *See supra* note 5.

makes that factor relevant would be open to criticism whether the court adopts a very specific rule, a very general standard, or anything in between. Whatever its form, such a holding would detract from the goals of the products liability system. Instead, our focus is on whether a factual circumstance relevant to liability should be controlling or should be merely one of several factual circumstances to be weighed in determining liability under a more general standard.

Our analysis of the development of American products liability law draws on two previous lines of inquiry regarding the appropriate forms to which liability law should adhere. According to the first line of inquiry, which comes from the law and economics literature,[18] both specific rules and general standards have, relative to each other, characteristic advantages (benefits) and disadvantages (costs). The objective is to maximize the ratio of benefits to costs in light of the instrumental social objectives sought to be achieved.[19] At the risk of oversimplification, rules have the potential advantage of lowering the costs of applying the law to the facts of individual cases because they focus attention on just a few facts from among the many and allow judges greater opportunity to resolve issues as a matter of law early in the litigation.[20] Compared with specific rules, general standards tend to call for more protracted inquiry at trial and only comparatively infrequently will support summary judgments or directed verdicts.[21]

The problem with rules is that they often require outcomes that, on the facts of given cases, are at odds with the recognized objectives of the liability system. The "fit" between the rule and desired outcomes is less perfect with rules than with general standards.[22] Indeed, standards

---

18. The position is advanced in Ehrlich & Posner, *supra* note 14, at 261-71.

19. *Id.* at 261.

20. *Id.* at 264-65. Of course, if the lack of "fit" between rules and outcomes becomes too great, problems of overinclusion and underinclusion will arise, leading to more protracted and lengthy trials. *Id.* at 268-70.

21. *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1532-33 (1973) (criticizing the capacity of courts to establish product safety standards, and citing courts' ability to "only address themselves on a case-by-case basis to the social problem of product safety" (footnote omitted)); Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 524, 524-25 (1982) (arguing that the demise of clear "no duty" rules in tort law has raised the daunting possibility that "all design defect litigation will proceed to trial on the issue of risk-utility balancing to determine whether the product design was reasonable").

22. *See, e.g.*, Ehrlich & Posner, *supra* note 14, at 268 (noting that, because of imperfect fit, allocative inefficiency occurs when a standard is reduced to a rule). Professor Twerski argues that, in the absence of no-duty rules, judges could improve their responses to motions for directed verdict or summary judgment by better weighing the available factors. Twerski, *supra* note 21, at 526. Twerski notes that "courts have begun to identify a host of factors with implications for important social policies, each of which individually may not be sufficient to support a directed verdict," but in combination would be sufficient. *Id.*

frequently take the form of expressions that come close to stating the objectives of the system of liability. Rules have an "off-the-rack" harshness that standards largely (at least facially) avoid by purporting to "tailor-make" outcomes to conform to factual circumstances. Of course, if the standard is too vague—for example, holding product designs defective if they are "unreasonably dangerous"—then the individual biases of the triers of fact may hold too much sway and the outcomes reached in actual cases may not further the substantive goals of the system.[23] According to the efficiency perspective, a liability system should try to achieve the optimal mix of rules and standards, with just the right levels of specificity and generality. In other words, the system should achieve just the right degree of substantive issue separation.

The second line of inquiry—advanced elsewhere by one of the authors[24]—asserts that the process of adjudication is inherently ill-suited to solving problems without guidance, in the form of substantive rule specificity, sufficient to enable the litigants to pursue orderly chains of logic and insist on the proverbial "single right result."[25] For example, if the test for defective product design were to be couched in terms of whether the defendant's design is "bad for society," the judge and jury would have the almost total discretion usually associated with a manager.[26] The litigants would be reduced to supplicants, asking—in the literal sense of the word—rather than demanding a favorable outcome as a matter of right.[27]

Clearly, this second, process values-oriented approach to the question of appropriate rule specificity could be fit into the economic efficiency model with only a little adjustment.[28] But proponents of the process approach would resist doing so.[29] The right of litigants to meaningful participation in the adjudication of liability claims is based as much in

---

23. This assumes that goals do exist with which to measure the success of any liability regime.

24. James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); Henderson, *supra* note 21.

25. Henderson, *supra* note 21, at 1534-39.

26. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1301 (1991) ("The elimination of the linchpin element of defectiveness would eliminate the baseline framework upon which intelligent analysis . . . rests.").

27. *See* Henderson, *supra* note 21, at 1539 (asserting that if courts are vested with excessive discretion to adjudicate claims, plaintiffs will never be entitled to relief under law, but would be forced to rely on the favor of the court).

28. James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 917 (1982). Granting the litigants a meaningful chance to be heard would be a characteristic advantage (benefit) of specific rules; denying the chance to be heard would be a characteristic disadvantage (cost) of general standards. *See supra* text accompanying note 18.

29. *See, e.g.*, Henderson, *supra* note 28, at 917-18 (suggesting that process constraints have a basis independent of economic efficiency).

shared, inherently nonquantifiable notions of fairness as it is in notions (shared or not) of allocative efficiency.[30] Moreover, unlike the efficiency approach, this process does not purport to explain everything that happens, or should happen, in the formulation of liability rules.[31] In any event, the authors of this Paper believe that important aspects of current products liability law can be adequately understood only in light of this fundamental process constraint on legitimate rule and standard formulation.

C. *A Critique of Substantive Issue Separation in Historic and Current American Products Liability Law*

American products liability law has, over the last thirty years, progressed through stages that have increasingly achieved greater optimality of substantive issue separation and conflation. To support this position, we will in this subpart provide a review and critique of the more important accomplishments. This analysis assumes that the new *Restatement of Torts (Third): Products Liability* project[32] accurately captures the current state of the law. The research supporting the conclusions reached in the *Restatement* project is exhaustive.[33]

1. A Brief Overview of the Social Policy Objectives of Products Liability Law.—In order to assess the substantive developments in American products liability law over the last thirty years, it is necessary to identify the policy objectives believed by many observers to be advanced by holding liable sellers of defective, harm-causing products. These objectives have been examined at length elsewhere by other writers and thus will only be briefly summarized here. As reflected in the above discussion of rule specificity, two lines of inquiry currently dominate. One school, reflected in the law and economics literature,[34] views allocative efficiency as the primary objective of liability law.[35] This instrumental view emphasizes the role of tort liability in creating incentives for actors—product sellers, product users, and consumers—to invest optimally in

---

30. *See id.* at 918, 917-18 ("Any system purporting to rely on self-applying rules of behavior that came to be characterized by widespread violations of these constraints would not simply be inefficient and unfair—it could no longer claim to be governed by the rule of law.").

31. The process constraints advanced by Henderson, *supra* note 28, at 911-16, represent four necessary conditions to a fair and workable system of tort law, but are not by themselves sufficient conditions to achieving that end.

32. At the time of this writing, the American Law Institute has just published its Tentative Draft No. 2 of the *Restatement (Third) of Torts: Products Liability*.

33. The 315-page draft represents the published research on the 13 substantive sections to date.

34. *See supra* note 18.

35. William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 110 (1983); Alan Schwartz, *Causation in Private Tort Law: A Comment on Kelman*, 63 CHI.-KENT L. REV. 639, 639 (1987).

care.[36] The rules and standards imposing liability reflect a search for the actor who is, in any given circumstance, the cheapest (most efficient) cost avoider.[37] Users and consumers may be said to be held liable on this view whenever they suffer a loss and are denied tort recovery.[38]

The competing view regarding the objectives served by the products liability system is commonly referred to as one of achieving fairness.[39] In contrast to efficiency, fairness is a noninstrumental objective.[40] Liability is imposed not to create forward-regarding incentives for safety, but rather to redress what is considered, from a backward-regarding perspective, to be a wrong. Fairness has variously been viewed in the products liability context as vindicating the plaintiff's right to be free from unjustified disappointment in a product's performance,[41] to be free from suffering what may be regarded as the intentional imposition of injury,[42] or to be free from suffering injury so that others may be unjustifiably enriched.[43] However one couches the fairness principle, the important point is that liability is not a means to an end, but an end in itself.

2. A Critique of Substantive Issue Separation.—Undoubtedly, the attempt to define the concept of product defectiveness in a unitary fashion

---

36. *See* Schwartz, *supra* note 35, at 648 (stating that the efficiency theory "works by creating incentives for firms to engage in risk minimizing behavior, the incentives being the imposition of costs").

37. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

38. *See id.* at 1060 (noting that liability is placed on a tort victim by the decider of the case only if the victim was in a better position to judge accident and avoidance costs and could have acted on that judgment).

39. *E.g.*, Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 152-57 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537, 539-40 (1972); David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 436 (1993).

40. *See* Fletcher, *supra* note 39, at 538-59 (arguing that rational economic analysis of tort standards as tools for the optimal distribution of risks and benefits has obscured the goal of moral notions of fairness, which underlies all liability systems).

41. *See* F. Patrick Hubbard, *Reasonable* Human *Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465, 465 (1978) (arguing that "liability for product-related injuries ought to be apportioned in accordance with reasonable *human* expectations" (emphasis in original)).

42. *See* Paul A. LeBel, *Intent and Recklessness as Bases of Products Liability: One Step Back, Two Steps Forward*, 32 ALA. L. REV. 31, 67 (1980) (suggesting that imposition of products liability via intentional tort standards could force manufacturers to internalize the social costs of "outrage, frustration, and demoralization" caused by the perception that companies have "written off" their customers' safety).

43. *See, e.g.*, Suvada v. White Motor Co., 210 N.E.2d 182, 186 (Ill. 1965) (concluding that the imposition of liability on the party creating the risk of injury and earning profit in part from that risk is inherently just); Thomas A. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1092 (1965) (arguing that manufacturers should pay for damages the risk of which has been deliberately assigned by the manufacturer to the consumer).

illustrates the single most important failure of nascent American products liability law to separate issues adequately. The single statement in Section 402A of the *Restatement (Second) of Torts*—that "one who sells any product *in a defective condition unreasonably dangerous to the user or consumer*" is strictly liable for harm caused by the defect[44]—has proven woefully inadequate to allow courts to adjust to the reality that, in fact, there are three different ways in which a product may be defective. The new *Restatement (Third) of Torts*, accurately reflects the current state of American products liability law: a product may be defective because of a manufacturing defect,[45] a defective design,[46] or a failure adequately to instruct or warn.[47] For the objectives of products liability to be furthered, product manufacturers must be held strictly liable only for harm caused by manufacturing defects.[48] Manufacturer liability for defective designs and failures to instruct or warn must be based on fault.[49] The failure of Section 402A to separate these distinct issues was undoubtedly its most significant shortcoming.

This shortcoming in Section 402A was compounded by its failure to articulate the legal test for defective design. Courts have experimented over the past thirty years with a number of different ways of defining defective design.[50] One candidate—whether the product design fails to meet consumer expectations—has proven to lack sufficient substantive content to support rational and consistent adjudication of the issue of defective design.[51] A majority of courts have gravitated toward a more

---

44. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added).

45. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (Tentative Draft No. 2, 1995) ("[A] product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product . . . .").

46. *Id.* § 2(b).

47. *Id.* § 2(c).

48. *See id.* § 2 cmt. a (noting that strict liability in the defective manufacture context "serves several purposes," including discouraging consumption of defective products, reducing transaction costs by eliminating fault from the plaintiff's case, and encouraging investment in product safety).

49. *See id.* ("Subsection 2(b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objective as does liability predicated on negligence."); *see also* JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 492-93 (2d ed. 1992).

50. *See* HENDERSON & TWERSKI, *supra* note 49, at 512-62 (reviewing the various approaches taken in the caselaw to the design defect issue).

51. In one criticism of the consumer expectations test, Dean Page Keeton observed that a California court's use of a bifurcated test that retains consumer expectations as one part of the design defect determination demonstrates the inadequacy of the consumer expectations test alone. W. Page Keeton, *Products Liability Design Hazards and the Meaning of Defect*, 10 CUMB. L. REV. 293, 309 (1979). Dean Keeton observed that

> [t]he court's primary justification for the retention of the contemplation test is the ease with which the plaintiff can establish a design defect under this test by circumstantial evidence. If a claimant proves that a product fails under circumstances the ordinary

specific test: whether a reasonable alternative design was available to the manufacturer that would, at acceptable cost, have prevented or reduced the plaintiff's harm.[52] Under this test, incorporated into the new *Restatement*, plaintiffs in most cases must prove that technology available at the time of manufacture and distribution would have helped the plaintiff.[53] This approach invites a more focused analysis, leading to more reasoned and consistent outcomes.[54]

Another area in which issue separation has prevailed over time involves whether a plaintiff may establish defectiveness by showing that the product in question should never have been distributed, even if the plaintiff cannot show that a reasonable alternative design would have helped the plaintiff. One of the authors has elsewhere written that such a claim constitutes an attempt to impose liability for the distribution of a category of products and is beyond the capacity of the adjudicatory process to resolve.[55] Categorical liability essentially asks the same question as was posed hypothetically in the previous section: Is distribution of *X* category of products, on balance, bad for society? Notwithstanding a handful of failed attempts,[56] courts in this country have unanimously refused to allow

---

> purchaser or user would not have expected, a case has been made. That is clearly so, but the question is, should it be so? I think not.

Id. at 310 (footnote omitted) (discussing Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978)). Prosser and Keeton further criticize the consumer expectations test:

> The meaning [of consumer expectations] is ambiguous and the test is very difficult of application to discrete problems. What does the reasonable purchaser contemplate? In one sense, he does not "expect" to be adversely affected by a risk or hazard unknown to him. In another sense, he does contemplate the "possibility" of unknown "side effects." In a sense the ordinary purchaser cannot reasonably expect anything more than that reasonable care in the exercise of the skill and knowledge available to design engineers has been exercised. The test can be utilized to explain most any result that a court or jury chooses to reach. The application of such a vague concept in many situations does not provide much guidance for a jury.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 699 (5th ed. 1984) (citation omitted).

52. For a collection of authorities—overwhelming in number—supporting this view, see RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporters' note at 59-84 (Tentative Draft No. 2, 1995).

53. *Id.* § 2 cmt. d ("To establish a prima facie case of defect, plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm.").

54. *See, e.g.*, James A. Henderson, Jr., *Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 779-80 (1979) (criticizing the inconsistency, arbitrariness, and vagueness of liability rules not grounded in cost-benefit analysis).

55. *See* Henderson & Twerski, *supra* note 26, at 1297-1328, 1331 (discussing "product-category liability" and concluding that "nonjudicial regulators are better equipped than courts to respond to market failure relating to broad categories of product").

56. Several courts have sought to impose liability based on a risk-utility analysis absent a showing that a reasonable alternative design was available. *See* Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 115-16 (La. 1986) (concluding that an asbestos manufacturer can be held strictly liable for

triers of fact to answer such an open-ended, nonadjudicable question,[57] and the new *Restatement* agrees with this sensible solution.[58]

In addition to these examples of early products liability law's failure to separate issues adequately, examples abound in which courts and legislatures in the first three decades of the development of this body of law unwisely separated issues when separation was unnecessary. Such unnecessary issue separation unjustifiably elevated certain factual circumstances to controlling status. The obviousness of design-related risks was in fact given controlling status in what came to be known as the "patent danger" rule.[59] Simply stated, the patent danger rule holds that a product design cannot be found to be defective when the design-related risk that causes the

---

a product that fails to meet risk-utility norms because the dangers created by its use, even if unforeseen at the time of manufacture, outweigh its utility); O'Brien v. Muskin Corp., 463 A.2d 298, 306 (N.J. 1983) (holding that an above-ground swimming pool with a vinyl bottom may be defective based on a risk-utility analysis even though no alternative design was feasible). A third court may have imposed liability on the theory that the overall danger of the product outweighed its benefits. *See* Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1153-60 (Md. 1985) (holding that manufacturers of cheap handguns—"Saturday Night Specials"—could be held liable for injuries suffered by innocent third parties at the hands of criminals). However, each of these judicial attempts at imposing such liability have either been overturned or sharply curtailed by legislation. *See* LA. REV. STAT. ANN. § 9:2800.56(1) (West 1991) (overruling *Halphen*); MD. CODE ANN., art. 27, § 36-I(h) (1992) (overruling *Kelley*); N.J. STAT. ANN. § 2A:58C-3(3) (West 1987) (limiting *O'Brien*).

57. For cases involving firearms, see Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1533-34 (11th Cir. 1986); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1273 (5th Cir. 1985); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 773 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); Riordan v. International Armament Corp., 477 N.E.2d 1293, 1298-99 (Ill. App. Ct. 1985); Knott v. Liberty Jewelry & Loan, Inc., 748 P.2d 661, 663-64 (Wash. Ct. App.), *review denied*, 110 Wash. 2d 1024 (1988). For cases involving cigarettes, see Kotler v. American Tobacco Co., 731 F. Supp. 50, 52 (D. Mass.), *aff'd*, 926 F.2d 1217 (1st Cir. 1990), *vacated*, 112 S. Ct. 3019 (1992); Gianitsis v. American Brands, Inc., 685 F. Supp. 853, 856-57 (D.N.H. 1988); Miller v. Brown & Williamson Tobacco Corp., 679 F. Supp. 485, 489 (E.D. Pa.), *aff'd*, 856 F.2d 184 (3d Cir. 1988); Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1158-59 (E.D. Pa. 1987). For a case involving minitrail bikes, see Baughn v. Honda Motor Co., 727 P.2d 655, 660 (Wash. 1986) (en banc).

58. A comment to § 2 of the new *Restatement* states that "[t]he requirement . . . that plaintiff show a reasonable alternative design applies even though the plaintiff alleges that the category of product sold by the defendant is so dangerous that it should not have been marketed at all. . . . Absent proof of defect under [§ 2], however, courts should not impose liability based on a conclusion that an entire product category should not have been distributed in the first instance." RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 cmt. c (Tentative Draft No. 2, 1995). As examples of such categories of products, comment c lists "alcoholic beverages, tobacco, firearms, and above-ground swimming pools." *Id.* The comment concludes that

> courts have not imposed liability for categories of products that are generally available and widely used and consumed, solely on the ground that they are considered socially undesirable by some segments of society. Instead, courts have concluded that the issue is better suited to resolution by legislatures and administrative agencies that can more appropriately consider whether distribution of such product categories should be prohibited.

Id.

59. The leading case is Campo v. Scofield, 95 N.E.2d 802 (N.Y. 1950), *overruled by* Micallef v. Micele Co., 348 N.E.2d 571 (N.Y. 1976).

plaintiff's harm is obvious.[60] The assumption underlying this rule is that when the relevant design risks are obvious, the user or consumer can take measures to avoid injury and, in any event, is in no position to complain on fairness grounds.[61] Thus, when a distracted or weary worker's hand is caught in the openly obvious moving parts of a productive machine, resulting in injury, the worker as plaintiff cannot reach the trier of fact with a claim that the machine should have been equipped with a safety guard.[62] Or when a large-earth moving machine backs up and runs over a bystander on a noisy construction site, the victim cannot complain that the earth mover should have been equipped with a loud horn to warn bystanders that the machine is moving in reverse.[63]

Over time, American courts have come to realize that the patent danger rule is based on extremely doubtful premises. It is only too human for weary workers to suffer lapses in attentiveness. Bystanders with their backs turned in a noisy work environment can hardly hope to save themselves when they cannot hear the earth mover coming toward them. In short, victims of such product designs are not efficient risk minimizers and have every right to argue to triers of fact that reasonable design alternatives are available at acceptable cost and could have reduced or prevented their injuries. Gradually, the patent danger rule has given way to a more sensible approach that allows triers of fact to determine whether manufacturers have breached a duty to design against obvious risks.[64] The new *Restatement* embraces this more appropriate approach.[65] Today, in a clear majority of jurisdictions, the obviousness of design-related risks is relevant to the issue of design defect, but is not controlling.[66]

---

60. *Id.* at 804.

61. *Id.*

62. *Id.* at 803.

63. *See, e.g.*, Pike v. Frank G. Hough Co., 467 P.2d 229 (Cal. 1970) (involving the same fact pattern, although the court overturned the patent danger rule).

64. *See, e.g.*, Beloit Corp. v. Harrell, 339 So. 2d 992, 996-97 (Ala. 1976); Byrns v. Riddell, Inc., 550 P.2d 1065, 1068 (Ariz. 1976) (en banc); *Pike*, 467 P.2d at 235; Camacho v. Honda Motor Co., 741 P.2d 1240, 1245 (Colo. 1987) (en banc), *cert. dismissed*, 485 U.S. 901 (1988); Auburn Mach. Works Co. v. Jones, 366 So. 2d 1167, 1172 (Fla. 1979); Brown v. Clark Equip. Co., 618 P.2d 267, 273 (Haw. 1980); Besse v. Deere & Co., 604 N.E.2d 998, 1002 (Ill. App. Ct. 1992), *appeal denied*, 612 N.E.2d 511 (Ill. 1993); Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 444 (Ind. 1990); Siruta v. Hesston Corp., 659 P.2d 799, 806 (Kan. 1983); Nichols v. Union Underwear Co., 602 S.W.2d 429, 433 (Ky. 1980); Uloth v. City Tank Corp., 384 N.E.2d 1188, 1192-93 (Mass. 1978); Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 213 (Minn. 1982); Sperry-New Holland v. Prestage, 617 So. 2d 248, 256 (Miss. 1993) (all rejecting the patent danger rule as an absolute defense to liability). The patent danger rule retains vitality in a few jurisdictions. *E.g.*, Weatherby v. Honda Motor Co., 393 S.E.2d 64, 67 (Ga. Ct. App. 1990); McCollum v. Grove Mfg., 293 S.E.2d 632, 635 (N.C. Ct. App. 1982), *aff'd*, 300 S.E.2d 374 (N.C. 1983).

65. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. c (Tentative Draft No. 2, 1995).

66. *E.g.*, *Beloit*, 339 So. 2d at 996-97; *Byrns*, 550 P.2d at 1068; *Pike*, 467 P.2d at 235; *Camacho*, 741 P.2d at 1247-48; *Auburn Mach. Works*, 366 So. 2d at 1170-72; *Brown*, 618 P.2d at 273; *Besse*,

Many other examples of this general movement of the substantive law of products liability from specific rules to more general standards are available and have been captured in the new *Restatement* project. The *Restatement* rejects post-sale product misuse, modification, and alteration, which have in some jurisdictions been recognized as formal, single-factor barriers to recovery for harm caused by allegedly defective products.[67] Like the patent danger rule, these formal rules are based on arguably outmoded underlying assumptions used to determine which parties are capable risk avoiders and which claims of defective design should be entitled to reach triers of fact. In place of these rules, the new *Restatement* adopts an approach that renders post-sale product misuse, modification, and alteration relevant, but not controlling, to the more basic issues of the case, such as defectiveness at the time of sale, causation, and plaintiff's fault.[68]

A final example of movement away from excessive substantive issue separation is courts' changing attitudes toward elevating specific factual aspects of the products liability plaintiff's conduct to the status of formal rules. Influenced by language in Section 402A,[69] some courts over the years have held that when the plaintiff merely fails to discover a product defect, there should be no reduction whatsoever in recovery based on contributory or comparative fault.[70] Other courts have held that elimination or apportionment of recovery is, as a matter of law, inappropriate when the

---

604 N.E.2d at 1001-02; *Siruta*, 659 P.2d at 806; *Nichols*, 602 S.W.2d at 433; *Uloth*, 384 N.E.2d at 1192-93; *Holm*, 324 N.W.2d at 212-13; *Sperry-New Holland*, 617 So. 2d at 256.

67. *See, e.g.*, Kromer v. Beazer East, Inc., 826 F. Supp. 78, 81-82 (W.D.N.Y. 1993) (rejecting plaintiff's strict products liability claim because defendant's product, a printer/slotter press, had been modified by disabling a safety interlock device); Barnes v. Harley-Davidson Motor Co., 357 S.E.2d 127 (Ga. Ct. App. 1987) (denying recovery to a motorcycle accident victim due to his knowing misuse of the product); Talley v. City Tank Corp., 279 S.E.2d 264 (Ga. Ct. App. 1981) (holding that the defendant was not liable for the death of a city employee caused by a truck design defect which had been altered by the city rather than the defendant).

68. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 cmt. b (Tentative Draft No. 2, 1995) (stating that questions of a plaintiff's misuse, alteration, or modification of an allegedly defective product should be resolved by reference to prevailing standards of causation and comparative fault); *id.* § 12 cmt. c (concluding that liability should be apportioned between plaintiff and defendant when a plaintiff's "misuse, alteration, or modification of a product constitutes substandard plaintiff conduct").

69. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965) ("Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product . . . .").

70. *See, e.g.*, Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 891 (Alaska 1979) ("If the focus is on the nature of the product as defective, and the jury has found the lack of safety device to render the product defective, it is inconsistent to turn around and reduce the user's recovery merely because he bought and used the product as marketed."); Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 148 (N.J. 1979) ("The defendant manufacturer should not be permitted to escape from the breach of its duty to an employee . . . when observance of that duty would have prevented the very accident which occurred."); Bexiga v. Havir Mfg. Corp., 290 A.2d 281, 286 (N.J. 1972) ("It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against.").

product lacks a safety feature that would have protected against the plaintiff's injury.[71] Still other courts (and some statutes) have held that a plaintiff's preaccident knowledge of product-related risk should, as a matter of law, be a complete defense as assumption of the risk.[72]

Consistent with our analysis of substantive issue separation, the majority (and the better) view is that all specific forms of a plaintiff's failure to conform to applicable standards of care should be presented to the trier of fact for the purpose of apportioning liability between the plaintiff and the product seller or distributor.[73] Once again, a general

---

71. *See, e.g.*, Murray v. Fairbanks Morse, 610 F.2d 149, 161 n.14 (3d Cir. 1979) (stating the "legitimate concern . . . that if contributory negligence, in the sense of failing to discover the product defect, is recognized as a category of plaintiff's fault, almost every case . . . will be open to loss apportionment"); West v. Caterpillar Tractor Co., 336 So. 2d 80, 92 (Fla. 1976) ("[C]omparative negligence is a defense in a strict liability action if based upon grounds other than the failure of the user to discover the defect in the product or . . . to guard against the possibility of its existence."); Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854, 863 (W. Va. 1982) ("[C]omparative negligence is available as an affirmative defense in a cause of action founded on strict liability so long as the complained of conduct is not a failure to discover a defect or to guard against it."); *see also* IDAHO CODE § 1405(1)(a) (1990) (providing that a plaintiff's failure to inspect a defective product may not be used to reduce damages).

72. *See, e.g.*, IND. CODE ANN. § 33-1-1.5-4 (West Supp. 1994) (providing that voluntary and unreasonable assumption of a known risk is a complete bar to recovery); NEB. REV. STAT. § 25-21,185.12 (Supp. 1994) (providing assumption of risk as an affirmative defense); Tafoya v. Sears Roebuck & Co., 884 F.2d 1330, 1341, 1341-42 (10th Cir. 1989) (applying Colorado law and upholding the trial court's jury instruction that "voluntary assumption of risk is an affirmative defense, which if established, would preclude the plaintiff's recovery"); Bowling v. Heil Co., 511 N.E.2d 373, 377 (Ohio 1987) (stating that "an otherwise strictly liable defendant has a complete defense if the plaintiff voluntarily and knowingly assumed the risk occasioned by the defect").

73. *See, e.g.*, Huffman v. Caterpillar Tractor Co., 908 F.2d 1470, 1473-77 (10th Cir. 1990) (holding that in products liability cases, Colorado's comparative fault statute subsumes ordinary negligence and all forms of culpable conduct, rather than only assumption of risk and product misuse); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 288-89 (5th Cir. 1975) (applying Mississippi law and holding that questions of defectiveness, unreasonable dangerousness, and misuse are issues of fact and are thus to be decided by the jury); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45, 45-46 (Alaska 1976) ("[P]ure comparative negligence can provide a predicate of fairness to products liability cases in which the plaintiff and defendant contribute to the injury."); Daly v. General Motors Corp., 575 P.2d 1162, 1170, 1168-72 (Cal. 1978) (extending a system of comparative fault to strict products liability cases and noting that "the majority of . . . states which have addressed the problem . . . have extended comparative principles to strict products liability"); *West*, 336 So. 2d at 92 (stating that comparative negligence is a defense in a strict liability action "if based upon grounds other than the failure of the user to discover the defect in the product or the failure of the user to guard against the possibility of its existence"); Armstrong v. Cione, 738 P.2d 79, 82-83 (Haw. 1987) (holding that, in a case based on strict tort liability, Hawaii would apply pure comparative negligence rather than modified comparative negligence mandated by statute for negligence actions); Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197, 204-05 (Ill. 1983) (holding that, in a products liability action, the defenses of misuse and assumption of the risk will no longer bar recovery, but will be factored into the apportionment of damages using comparative fault); Kennedy v. City of Sawyer, 618 P.2d 788 (Kan. 1980) (holding that the doctrine of comparative fault or comparative causation is applicable to strict liability and implied warranty claims in products liability cases); Omnetics, Inc. v. Radiant Technology Corp., 440 N.W.2d 177, 181 (Minn. Ct. App. 1989) (reiterating that strict liability claims remain subject to comparative fault principles).

standard has replaced fact-specific rules. The new *Restatement* explains why it embraces this form of issue conflation:

> The position that plaintiff's fault should not be separated into discrete categories is reasonable. Recognition of such special categories tends to result in either a plaintiff being completely absolved from responsibility or being completely barred from recovery. The litigation becomes engaged in competing efforts to fit plaintiff's conduct into one or another of the categories. This, in turn, spawns appellate litigation seeking precise definition of the category boundaries. That effort has proven costly and largely futile. By and large, the trier of fact should be able fairly to assess the appropriate percentages of responsibility in the circumstances of a case. Such fact-sensitive evaluations are better adapted to apportioning liability than is reliance on discrete categories of plaintiff conduct. Courts always retain the power to review whether the percentage of responsibility assigned to a plaintiff is unreasonable.[74]

To summarize our views on substantive issue separation in historic and current American products liability law, courts have, over the past thirty years, moved appropriately in both directions along the rule-standard continuum. Some important issues—chief among which are the distinctions among types of product defects and the test for defective product design—have been subjected to much-needed separation. Other issues—such as the patent danger rule; rules governing post-sale product misuse, modification, and alteration; and the role of plaintiff's fault—have been subjected to issue conflation. All of these substantive law developments have been recognized by the new *Restatement* and are salutary from the perspective of accomplishing the social objectives of the modern products liability system. We now turn to matters of procedure.

III. Procedural Issue Separation in American Products Liability Litigation

Even if courts have accomplished nearly optimal patterns of substantive issue separation, it remains to be considered whether the same conclusion can be reached regarding procedural issue separation. As earlier observed, achieving the former is a necessary, but not a sufficient, condition to achieving the latter. Empirical work indicates that unless procedurally encouraged or required to keep legal issues separate in their deliberations, triers of fact tend to conflate legal issues.[75] The discussion

---

74. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 cmt. d (Tentative Draft No. 2, 1995).

75. *See, e.g.*, HASTIE ET AL., *supra* note 8, at 231 (inferring from an empirical study of simulated jury trials that jurors are incapable of keeping verdict categories and their legal elements in order, which may lead to issue conflation); Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental*

that follows is divided into three parts. The first two parts consider procedural issue separation in traditional contexts. The third considers the subject in the context of modern, so-called mass tort litigation.

A. Procedural Issue Separation in Traditional Single-Verdict Litigation

In cases tried to a single verdict, judges make two types of decisions of particular relevance here: whether to give the case to the jury, and, if so, on what instructions. Regarding the first of these decisions, judges respond to motions from both sides to resolve contested legal issues as a matter of law.[76] When the applicable substantive law has separated the various factual issues with greater formality, the judge is more likely to grant such motions. But whatever the extent of substantive separation, the applicable procedural rules require the moving parties to identify the specific issues to be resolved as a matter of law. To this extent, the procedures at trial do respect the issue separation accomplished by the applicable substantive law. Indeed, by focusing on specific issues in granting these motions, trial courts (and, in cases in which trial courts' rulings on these motions are the subject of appeal, appellate courts) may clarify and sometimes actually change the substantive law.

An interesting aspect of the trial court's responses to issue-specific motions is the nature of the response when one side—often the defendant—argues that the other side's proof has failed on two or more separate issues necessary to the other side's success. Assuming that the issues singled out for attack via such motions are independent of one another,[77] and that the nonmoving party bears the burden of production of evidence on each of the issues,[78] statistical theory requires that the trial court conjoin the two or more issues by multiplying the estimated individual probabilities that the factual circumstances referred to in each substantive issue did, indeed, occur.[79]

Investigation of Procedural Issues in Complex Tort Trials, 14 LAW & HUM. BEHAV. 269, 281 (1990) (presenting a study in which juries tended to conflate issues of causation and liability more in unitary trials than in bifurcated trials); *see also* Nesson, *supra* note 3, at 1365 (suggesting that verdicts are often based not on a legal determination of individual issues, but rather on a more subjective belief about the event or the evidence generally).

76. These motions include motions to dismiss, motions for summary judgment, and motions for directed verdicts. *See generally* HENDERSON ET AL., *supra* note 14, at 3-5 (outlining the pleadings typically available to litigants).

77. An issue is independent from another when its resolution does not logically affect the resolution of the other issue. Nesson, *supra* note 3, at 1385 n.92.

78. These motions are almost always made by the party who does not bear the burden of production, which is the defendant in most tort cases. *See generally* HENDERSON ET AL., *supra* note 14, at 5-6.

79. Such a conjunction by the court would recognize the statistical rule that the probability of two independent events occurring together is the product of the probability of each occurring separately.

However, trial courts tend to react to these multi-issue motions in violation of statistical theory. The proof of each disputed issue is tested on its own merits against a standard that asks whether a jury might find for the nonmoving party on a preponderance of the evidence; that is, the court determines whether a jury could find that the factual circumstances referred to did occur on a "more probable than not" basis. If the court answers this question in the affirmative on any issue, the court concludes that the issue is for the jury and moves on to the next issue to which the motion relates. In effect, this approach separates the issues procedurally to a greater degree than arguably is justified. This point can be seen more clearly if one considers a defendant who has moved for a directed verdict on the ground that the plaintiff has failed to produce sufficient evidence relating to three separate issues on which the plaintiff bears the burden of production. If the trial court concludes that the plaintiff has produced sufficient proof on each issue by a bare preponderance, the court will give the case to the jury notwithstanding the fact that the probability that the events supporting all three issues did occur is considerably less than fifty percent.

Assuming that the trial court decides to give a products liability case to the jury, the other type of decision that the court must make is how to give the case to the jury—that is, on what sort of instructions. To what extent do products liability jury instructions typically reflect issue separation? Assuming that the jury is asked to return a general verdict, the answer is somewhat mixed. On the one hand, juries are typically invited to address each contested issue identified in the instructions in the same manner as does the trial court when it responds to motions to take the case from the jury. Issue conjunction is not only not required, but the jury is often explicitly instructed to treat each contested issue separately and independently, on the basis of a preponderance of the evidence.[80] Thus, juries are invited to return general verdicts favoring the party that bears the burden of persuasion even when the overall probability of the accuracy of that party's factual contentions when addressed conjunctively is considerably below fifty percent.[81]

On the other hand, trial courts often—indeed, typically—give jury instructions in products liability cases that do not approach giving the jury all of the contested factual issues. Instead, general instructions are often given that invite the jury to consider the evidence as it tells "a whole story" about the entire case and, by way of reaching a general verdict, to

---

See Nesson, *supra* note 3, at 1385-86 (observing that in a case comprised of two independent elements, the rule of conjunction would require the plaintiff to prove each element to a greater degree than 50%).

80. *Id.* at 1386.

81. *Id.*

"do the right thing."[82] From this perspective, the jury instruction reflects, at best, only a feeble attempt to achieve procedural issue separation. To some extent during actual jury deliberations, these "whole story" instructions may offset the court's failure to require the jury to conjoin the issues it must decide.

Because real juries rarely report their findings in detail and never record their deliberations for posterity, most of what is known about juror and jury behavior comes from empirical work using mock juries.[83] Many psychologists who have studied jury behavior accept one or another of what are referred to as "story models" of jury decisionmaking.[84] According to these analysts, when a juror receives information about a case from the judge, attorneys, and witnesses, the juror's first task is to comprehend and organize—to encode for purposes of retaining—that information. The juror organizes the information into one or more possible accounts of the events subject to dispute. The juror is aided in organizing this information by a "general knowledge about the structure of human purposive action sequences."[85] The next step is to establish the decisional options before the jury by way of appropriate categories of verdict response.[86] Then evidence must be sorted out according to what may and may not be properly considered. Having sorted out the evidence, plausible sequences of events must be constructed and evaluated. Finally, each story construction must be tested to measure the quality of its fit with the possible outcomes as given to the jury by the judge.[87]

---

82. Recognizing the leeway that judges have traditionally exercised over the framing of jury instructions, the new *Restatement* states that

> [t]he necessity of proving a reasonable alternative design as a predicate for establishing design defect is addressed initially to the courts. Sufficient evidence must be presented so that reasonable persons could conclude that a reasonable alternative could have been practically adopted. Assuming that a court concludes that sufficient evidence on this issue has been presented, the issue is then for the trier of fact. This Restatement takes no position regarding the specifics of how a jury should be instructed. So long as jury instructions are generally consistent with the rule of law set forth in § 2(b), their specific form and content are matters of local law.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (Tentative Draft No. 2, 1995).

83. *See, e.g.*, HASTIE ET AL., *supra* note 8, at 37 (noting that the use of mock juries is necessitated by laws prohibiting scrutiny of actual juries and provides the advantage of controlled experimental methods).

84. *See, e.g.*, JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 296-99 (1987) (describing the story model used by jurors in deliberations and offering several practical implications that this model has on trial attorneys); HASTIE ET AL., *supra* note 8, at 22-23 (discussing various theories of the story model and citing several disciplines and academic studies that endorse the model).

85. HASTIE ET AL., *supra* note 8, at 22.

86. These verdict categories are constructed based on jury instructions. FREDERICK, *supra* note 84, at 297.

87. This description of the process of the story method is adapted from *id.* at 296-97; HASTIE ET AL., *supra* note 8, at 18-22.

Even if this description fairly represents how jurors respond to instructions from courts, we must assess whether this process serves justice or the social goals of products liability. Professor Kevin M. Clermont has observed that by allowing jurors to formulate stories in this way, and by providing "obscure instructions only at the end of oral trials, the law seems determined to discourage applying the standard of proof element by element."[88]

Even if the instructions purport to encourage element-by-element application by the jury of the standard of proof, those same instructions, playing off jurors' psychological tendencies to view the case as a whole, may cause an appropriate enough level of issue conjunction to reach acceptably correct outcomes. Empirical work suggests this is probably what is happening.[89] Clermont apparently takes this view as well. He observes that the tendency of jury charges and directed verdicts to focus on an element-by-element theory rather than a holistic approach does not justify generally an element-by-element approach. "[I]nstead of supporting risky assertions on the law's nontruth purposes, here the small practical impact of the law's subtle illogic may simply have failed to generate reform."[90]

It is interesting to speculate regarding how such a purely holistic approach might affect decisions in specific cases. At least two distinct possibilities present themselves. Let us assume that the products liability case before the jury involves three contested issues: design defect, causation, and damages. If the first and third issues are quite strong for the plaintiff, a "case as a whole" approach may carry the day for the plaintiff on causation even if that issue is weak when considered separately. On the other hand, if all three issues are relatively weak, the jury may return a defendant's verdict even though, taken separately, all three issues could be resolved for the plaintiff on a bare preponderance of the evidence. If one accepts the legitimacy of juries adopting a "case as a whole" approach, both of these reactions are appropriate.

B. Procedural Issue Separation in Traditional Multi-Verdict Litigation: Special Verdict Practice

To this point, we have considered the question of procedural issue separation in the context of general jury verdicts. The impact of special

---

88. RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 671-72 (6th ed. 1990). Professor Clermont is a co-editor of this casebook. He further observes that sometimes the law acts on the element-by-element theory and thereby impedes the holistic practice, as when the judge directs a verdict or requires a special verdict. But these actions, uncommon to begin with, only rarely would serve to sustain a showing that did not conjoinedly meet the standard of proof. *Id.* at 672.

89. *See supra* note 75.

90. FIELD ET AL., *supra* note 88, at 672.

verdict practice remains to be considered.[91] Briefly stated, a special verdict contains the jury's separate findings of fact made in response to specific questions put by the trial judge.[92] Today, special verdicts are an authorized alternative to general verdicts in federal courts,[93] as well as in the majority of state jurisdictions,[94] and they are used with increasing frequency.[95] When the judge decides—either on a motion by one of the parties or on the judge's own accord—to submit the case to the jury on a special verdict, a combination of three factors results in a very high degree of procedural issue separation. First, a judge submitting a special verdict to the jury must clearly identify and separate the contested issues. In contrast to instructions that ask the jury to return a general verdict which vary greatly in the degree and clarity of issue separation,[96] special verdict forms separate the issues identified by the judge and organize them in a comprehensible manner.[97] Thus, juries who are asked to return special

---

91. In federal courts, the special verdict procedure is made available by Rule 49(a) of the Federal Rules of Civil Procedure. For a general discussion of this procedural tool, see CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 94, at 674, 674-76 (5th ed. 1994) [hereinafter WRIGHT, FEDERAL COURTS] (describing the special verdict procedure as "[a] more drastic, and controversial, procedure" than general verdicts and specific interrogatories accompanying general verdicts); John R. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1968) (stating that special verdicts eradicate some problems of communicating with the jury and allow limited retrials on specific issues); Samuel M. Driver, *The Special Verdict—Theory and Practice*, 26 WASH. L. REV. 21, 25-27 (1951) (pointing out that special verdicts contain certain drawbacks in spite of their benefits, especially in complex litigation); Samuel M. Driver, *A Consideration of the More Extended Use of the Special Verdict*, 25 WASH. L. REV. 43, 48 (1950) (proposing that special verdicts are superior to general verdicts and should be used more widely); Ernest Guinn, *The Jury System and Special Verdicts*, 2 ST. MARY'S L.J. 175, 176-81 (1970) (concluding that special verdicts are less flexible, more time consuming, and no more free of personal bias than general verdicts); Abner E. Lipscomb, *Special Verdicts Under the Federal Rules*, 25 WASH. U. L.Q. 185, 213 (1940) (contending that the special verdict simplifies the jury's task); Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253 (1920) (presenting one of the earliest arguments in favor of special verdicts and emphasizing their advantages in reducing jury error, focusing issues for consideration, and producing a clear statement of the results); Charles A. Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199, 201-06 (1966) [hereinafter Wright, *Special Verdicts*] (explaining the arguments for and against the regular use of special verdicts and concluding that they are beneficial when used to clarify complicated litigation); Robert Dudnik, Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 517-29 (1965) (observing that no consensus exists concerning the value of a special verdict).

92. *See* HENDERSON ET AL., *supra* note 14, at 17.

93. FED. R. CIV. P. 49(a).

94. *See, e.g.*, CAL. CIV. PROC. CODE § 624 (West 1976); ILL. ANN. STAT. ch. 735, § 5/2-1108 (Smith-Hurd 1992); N.Y. CIV. PRAC. L. & R. 4111 (McKinney 1992 & Supp. 1995).

95. Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 21 (1990).

96. *See* Elizabeth A. Faulkner, Comment, *Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts*, 21 ARIZ. ST. L. REV. 297, 306-07 (1989) (observing that general verdict instructions are confusing because they are long and often include many hypothetical variations).

97. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 381 (4th ed. 1992) (contending that special verdict instructions are easier to frame and understand, thereby guiding jurors to focus only on the relevant legal issues).

verdicts are, arguably, better able to identify and understand the contested issues than those who are not. Especially in complex products liability litigation, which may involve several theories of liability as well as several defenses, special verdict practice helps to ensure an outcome based on a careful consideration of the issues, rather than a verdict based on what the jury feels was the "right thing to do."

A second factor encouraging issue separation is that the judge is often not permitted or not required to instruct the jury on the legal consequences of its findings on a special verdict form.[98] Thus, at least theoretically, the jury is unable to consider the case as a whole and, at least in more complex cases, is not able to frame answers according to some desired outcome. From this perspective, issue conjunction at the jury level is almost completely eliminated. Once the judge identifies the issues, the jury must, in law, make findings on each of them independently. When an issue has been answered, the issue is treated as established and the jury is instructed to consider the next question. Thus, at no time is the jury given a chance to consider the joint probability of the contested issues.

---

98. There is considerable disagreement whether it is proper for the judge to instruct the jury on the legal consequences of its answers to the special verdict questions. For court decisions holding such instruction as being error, see Gullet v. St. Paul Fire & Marine Ins. Co., 446 F.2d 1100, 1105 (7th Cir. 1971); Thedorf v. Lipsey, 237 F.2d 190, 193-94 (7th Cir. 1956); Argo v. Blackshear, 416 S.W.2d 314, 315 (Ark. 1967); Mitchell v. Perkins, 54 N.W.2d 293, 297 (Mich. 1952); Smith v. Capital Fin. Co., 157 N.E.2d 315, 317 (Ohio 1959). For cases holding such instruction not to be error, see Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 632 (E.D. La. 1975), *aff'd*, 280 F.2d 784, 790 (5th Cir. 1960); Loup-Miller v. Brauer & Assocs.-Rocky Mountain Inc., 572 P.2d 845, 847 (Colo. Ct. App. 1977); Seppi v. Betty, 579 P.2d 683, 692 (Idaho 1978); Thomas v. Board of Township Trustees, 582 P.2d 271, 280 (Kan. 1978); Roman v. Michell, 413 A.2d 322, 327 (N.J. 1980); Smith v. Gizzi, 564 P.2d 1009, 1013 (Okla. 1977); McGowan v. Story, 234 N.W.2d 325 (Wis. 1975).

This aspect of special verdict practice has generated a significant amount of academic commentary. *E.g.*, 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2509 (2d ed. 1995) (asserting that the preferable rule is to allow the jury to know the legal effects of its answers); Carlos C. Cadena, *Comparative Negligence and the Special Verdict*, 5 ST. MARY'S L.J. 688 (1974); Leon Green, *Blindfolding the Jury*, 33 TEX. L. REV. 273 (1955) (contending that instructing the jury as to legal consequences is more in line with the historical origins and policy goals of special issues practice); Milton Heumann & Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343 (1983) (arguing that due process requires that jurors be informed of mandatory sentencing schemes before they decide a defendant's guilt); Thomas H. Ryan, *Are Instructions Which Inform the Jury of the Effect of Their Answers Inimical to Justice?*, 1940 WIS. L. REV. 400 (suggesting that it is futile to attempt to keep jurors from figuring out the consequences of their special issue answers); Glenn E. Smith, *Comparative Negligence Problems with the Special Verdict: Informing the Jury of the Legal Effects of the Answers*, 10 LAND & WATER L. REV. 199 (1975) (observing that the adoption of a comparative negligence statute does not require Wyoming to adopt a blindfold rule for jury instructions); Wright, *Special Verdicts*, *supra* note 91, at 204-06 (arguing against following the Texas and Wisconsin systems of blindfolding the jury as to the effects of its answers); David E. Pierce, Note, *Informing the Jury of the Legal Effects of Its Answers to Special Verdict Questions Under Kansas Comparative Negligence Law—A Reply to the Masses; A Case for the Minority View*, 16 WASHBURN L.J. 114 (1976) (arguing that in cases under the Kansas comparative negligence statute, informing the jury of the consequences of its answers would usurp the legislative and judicial functions).

Finally, issue conjunction at the judge's level is eliminated almost completely. If the judge decides to let the case go to the jury on a special verdict, although the judge may question the overall probability of the plaintiff's case, the facts in the verdict form are treated as established once the form is returned. The judge is consequently bound to apply the law to the factual issues as found, and only in rare instances will the judge reject the jury's findings.[99] Special verdict practice may, therefore, frequently result in verdicts based on a conjunctive probability of the factual contentions that is considerably below fifty percent.

The special verdict arguably separates the issues to a greater degree than is justified. Consequently, many commentators, including judges, have criticized the practice as an interference with the traditional role of the jury.[100] Proponents of special verdict practice argue that the court's inability to conjoin the issues it must decide is offset by increased judicial efficiency;[101] by the increased protection this device offers against any potential bias, emotion, or public opinion;[102] and also by insurance of a jury decision representing a coherent view of what occurred.[103] In products liability, for example, the jury might be asked to determine whether the challenged product is defective. If the jury were simply instructed that a product may be defective in either manufacture, design, or warning, and then asked to return a yes-no answer, the jury might find in favor of the plaintiff, even though a majority of the jurors could not agree on the specific nature of the defect. In such a case, the special verdict format would result in the opposite verdict because each defect question would be

---

99. *See* Gallick v. Baltimore & Ohio R.R., 372 U.S. 108, 119 (1963) (holding that courts must attempt to harmonize seemingly inconsistent findings before disregarding a jury's special verdict). A judge may refuse to enter judgment only if the findings are truly irreconcilable. *E.g.*, Burger King Corp. v. Mason, 710 F.2d 1480, 1489 (11th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984); Andrasko v. Chamberlain Mfg. Corp., 608 F.2d 944, 947 (3d Cir. 1979). *See generally* Donald Olander, Note, *Resolving Inconsistencies in Federal Special Verdicts*, 53 FORDHAM L. REV. 1089 (1985) (discussing the problems of finding and reconciling inconsistencies in special verdicts).

100. *See* Order Amending the Rules of Civil Procedure, 374 U.S. 865, 868 (1963) (statement of Justices Black and Douglas) (criticizing special verdicts as "another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases according to their own judgments"); WRIGHT, FEDERAL COURTS, *supra* note 91, § 94, at 675, 675 & n.27 ("[T]hose who look on the jury as a means by which the law is made to speak the voice of the man in the street urge that the special verdict should be used rarely.").

101. *See, e.g.*, Brown, *supra* note 91, at 346-48 (arguing that special verdicts are more efficient because they allow the appellate court to identify the tainted issue, limiting or avoiding a second trial).

102. For a relevant discussion of the weakness of the general verdict by the late Judge Jerome Frank, see Skidmore v. Baltimore & Ohio R.R., 167 F.2d 54, 61 (2d Cir.) (contending that "[t]he general verdict enhances . . . the power of appeals to the biases and prejudices of the jurors"), *cert. denied*, 335 U.S. 816 (1948).

103. *See* Sunderland, *supra* note 91, at 258-59 (arguing that special verdicts result in superior findings of fact because the procedure requires detailed consideration of the facts and separate analysis of legal issues).

submitted to the jury separately and there would be no majority finding of any defect.[104]

Commentators have argued that even when given special verdict instructions, a jury may decide the case according to their view of the case as a whole and answer the questionnaire "by checking off the answers which will lead to the result [they] favor[ ]."[105] Empirical work suggests that this may be what is actually happening. Studies of mock jury decisions indicate that the type of verdict given to the jury only insignificantly affects the final outcome of the case, lending support to the contention that juries, even when instructed to return a special verdict, decide the case holistically rather than issue-by-issue.[106]

C. *Radical Procedural Issue Separation in Modern Mass Products Liability Litigation: Issue Bifurcation*

1. Issue Bifurcation in Traditional Tort Litigation.—An overview of the early development of bifurcation in non-class-action settings supports two relevant conclusions. First, the American judicial system developed and utilized bifurcation long before the advent of mass torts and class actions. Second, the arguments for and against the use of bifurcation in the modern mass tort setting often echo, and thus continue to make relevant, the arguments made for and against the use of bifurcation in the earlier context of simpler trials.

At common law, a jury trial was conceived as a unified whole. Liability and damages were not treated in separate proceedings, even upon a remand for retrial prompted by error on only one issue.[107] In the nineteenth century, American law began to depart from this common-law

---

104. *See, e.g.*, Roosth & Genecov Prod. Co. v. White, 152 Tex. 619, 262 S.W. 99 (1953) (requiring submission of separate special questions for each one of 21 separate factual bases for a claim of defective design); *see also* Brodin, *supra* note 95, at 66 (noting that courts have used the special verdict to ensure a truly unanimous decision of the jury).

105. Dudnik, *supra* note 91, at 493.

106. *See* Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 LAW & PSYCH. REV. 1, 30 (1990) (discussing a study in which the verdicts did not differ significantly between general and special verdicts). Although the type of verdict used did not affect the jury's decision, it did affect the allocation of damages. Juries given a special verdict form returned relatively higher compensatory damages and relatively lower punitive damages. *Id.* at 20.

107. *See, e.g.*, Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 497 (1931) (noting that if a verdict at common law was erroneous with respect to any issue, a new trial was directed to all). Certain situations did exist in which issues were tried separately. For example, a judgment for ejectment typically did not include damages. The plaintiff had to bring a second action for trespass to collect damages. FIELD ET AL., *supra* note 88, at 437-38; *see also* Lewis Mayers, *The Severance for Trial of Liability from Damage*, 86 U. PA. L. REV. 389, 391 (1938) (discussing an action for accounts-rendered as a two-stage trial). The common-law system was based upon discovering one issue upon which the controversy turned. FIELD ET AL., *supra* note 88, at 409, 412. This single-issue mindset may have obscured and even precluded the possibility of considering bifurcation.

tradition.[108] By the early twentieth century, a Massachusetts court could claim that "the great weight of authority in this country supports" retrial on damages alone when "the verdict is satisfactory in all particulars as a determination of liability."[109] The New York Code of Civil Procedure, developed and amended in the nineteenth and early twentieth centuries, included provisions not only for consolidation and severance of actions but also for separate trial of one or more issues.[110] These provisions in New York set the standard for other states.[111]

Federal practice developed along similar lines. The Equity Rules of 1912 allowed the trial court in its discretion separately to hear and dispose of certain defenses before the main trial.[112] The Supreme Court, in an important 1931 decision, held that, upon retrial, separable and error-free issues did not have to be retried, as long as "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice."[113] With the promulgation of the Federal Rules of Civil Procedure in 1938, issue separation both at trial and on retrial formally became an integral part of the unified federal civil procedure system.[114] In 1960, following the countrywide call of Judge

---

108. Simmons v. Fish, 97 N.E. 102, 103 (Mass. 1912) (listing nineteenth-century cases allowing retrial on damages alone). British procedure also departed from tradition, since 1875 allowing courts to try one or more issues prior to consideration of others. Mayers, *supra* note 107, at 397.

109. *Simmons*, 97 N.E. at 105. This case recounts the Massachusetts history of retrial upon a single issue and lists decisions from many states supporting this aspect of American common law. *Id.* at 103-04.

110. Sections 497, 817, 819, and 1220 of the New York Code of Civil Procedure were consolidated into a single section (§ 96) of the Civil Practice Act of 1921, which states that "[a]n action may be severed and actions may be consolidated whenever it can be done without prejudice to a substantial right." N.Y. CIV. PRAC. ACT § 96, *reprinted in* 1 GILBERT'S CIVIL PRACTICE ANNOTATED 74 (1922). Section 443 of the Civil Practice Act, an 1876 provision and its 1907 amendment, permitted separate trial of one or more issues in the discretion of the court. CLEVENGER'S ANNUAL PRACTICE OF NEW YORK 5-10 (1960) [hereinafter CLEVENGER'S].

111. For a list of states with promulgated rules or other authority for severance of issues, 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, 846 & nn. 85-86 (1961). Some commentators argue that a court may have the inherent power to sever any issue unless expressly prohibited by law. Mayers, *supra* note 107, at 396-97 & nn.18-19; Note, *Original Separate Trials on Issues of Damages and Liability*, 48 VA. L. REV. 99, 102 (1962) ("[T]he courts have the power even in the absence of statute, to order separate trials of any issues, for it is within a court's province to regulate rules of procedure, as long as it stays within constitutional and statutory limitations."); *see also Simmons*, 97 N.E. at 104.

112. Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627, 656-57 (1912). Rule 29 states, in part, that "[e]very defense heretofore presentable by pleas in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court." *Id.*

113. Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 499-500 (1931); *see infra* notes 154-157 and accompanying text.

114. Rule 42(b) of the Federal Rules of Civil Procedure allows "a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." FED. R. CIV. P. 42(b). Rule 59(a) analogously states that "[a] new trial may be granted to all or any of the parties and on all or part of the

Miner for routine separation of liability and damages in tort cases as a time-saving response to overcrowded dockets,[115] the Northern District of Illinois promulgated Rule 21, which specifically authorized routine separation of liability and damages in tort cases.[116] Although rules of this sort have not become the standard,[117] they do underscore the extent to which radical procedural issue separation became almost routine in the context of earlier, simpler trials.

These processes of procedural issue separation did not develop without controversy. Interestingly, the issues that have arisen in the controversy over the propriety of procedural issue separation in the traditional one-plaintiff trial are precisely those considered in Part I of this Paper: efficiency,[118] fairness,[119] the importance of the parties' right to jury trial,[120] and the tradition underlying what has come to be known as the "story model."[121]

Historically, the argument most frequently encountered in favor of the more extreme forms of procedural issue separation centers on their efficiency, focusing on avoidance of delay and reduction in expenditure of time and resources.[122] Advocates of issue separation also argue that separation enhances fairness by preventing prejudice to the parties.[123] In

---

issues." FED. R. CIV. P. 59(a). Courts have severed a variety of issues besides liability and damages. For examples of the separation of issues other than liability and damages, see CLEVENGER'S, *supra* note 110, at 5-10 (reprinting a provision of New York's 1876 Civil Practice Act, providing for separate trials of issues at the court's discretion); 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 42.03[1] (1995) (extensively annotating Federal Rule of Civil Procedure 42(b)); 9 WRIGHT & MILLER, *supra* note 98, § 2389.

115. Julius H. Miner, *Court Congestion: A New Approach*, 45 A.B.A. J. 1265, 1265-66 (1959).

116. N.D. Ill. Civ. R. 21 (1960), *reprinted in* Weinstein, *supra* note 111, at 844. This rule specifically mentions the curtailment of delay as its purpose. It does not demand separation; instead, it encourages separation. *Id.*

117. At least two other federal judicial districts have enacted a rule requiring separate trials for liability and damages; the rule operates like a rebuttable presumption for separation. *See* Albert P. Bedecarré, *Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases*, 17 B.C. ENVTL. AFF. L. REV. 123, 125-36 (1989).

118. *See supra* text accompanying note 5.

119. *See supra* text accompanying note 4.

120. *See supra* text accompanying note 8.

121. *See supra* notes 82-87 and accompanying text (discussing the whole story model). The pro and con positions presented in the following discussion come not only from law review articles, but also from published judicial decisions. Any judicial system that practices issue separation assumes the role of an advocate of this approach. Published decisions can also serve as a source for opposition arguments because the rebutted position must be presented and, hopefully, presented fairly.

122. *See* Miner, *supra* note 115, at 126-28. The Illinois rule, *supra* note 116, was upheld in Hosie v. Chicago & N.W. Ry., 282 F.2d 639 (7th Cir. 1960), which commended that district "for their search for methods and means to expedite the disposition of cases upon their calendars." *Id.* at 643. The same arguments can be found in Simmons v. Fish, 97 N.E. 102, 104 (Mass. 1912).

123. *See, e.g.*, Bedecarré, *supra* note 117, at 137 (noting that proponents believe that bifurcation enhances fairness by divorcing the emotion involved with determining damages from the rational determination of liability).

the context of appellate remands for retrial, these factors are quite clear. Retrial of a properly decided liability issue, when error has tainted only the monetary damages issue, arguably works injustice upon the plaintiff who already has proven the claim adequately to the jury.[124] On this view, a complete retrial wastes judicial time and resources and results in unnecessary delay.

As one moves from the context of a remand for retrial to the context of the original trial, similar arguments are raised. Earlier proponents of separate trials for liability and damages claimed that separation saved the time and expense of deposing, hearing, and defending against damages in all those cases in which the defendant wins on the liability issue.[125] A study of actual cases tried in the Northern District of Illinois after the inception of Local Rule 21 indicates that, indeed, significant time can be saved—viewed optimistically, twenty percent of all court time spent on tort claims.[126]

Natural targets for efficiency-based arguments favoring bifurcation are those cases conjoining a comparatively easy liability issue with a far more difficult and time-consuming damages issue. Here again, early proponents of bifurcation claimed that efficiency supports separation because the difficult and time-consuming damages issue need not be tried if the defendant wins on the easier liability issue.[127] Proponents also argued that bifurcation results in more accurate determinations of liability. For example, an uncertain liability issue will not be tainted or overpowered by a clear and emotionally compelling damages issue.[128] A unitary trial in such a situation could bias the jury in favor of a severely disabled plaintiff with an all-but-nonexistent legal claim, resulting in unfairness to the defendant.

---

124. *Id.* at 104; *see also* Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 499 (1931) (holding that the Seventh Amendment does not require retrial of the entire case when only part of the verdict is in error).

125. *E.g.*, Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1606-07 n.3 (1963).

126. *Id.* at 1619. *But see* Weinstein, *supra* note 111, at 847-49 (expressing skepticism about the ability to assess accurately the time savings, noting that a similar study in New York was inconclusive about any time saving).

127. *See, e.g.*, Rickenbacher Transp., Inc. v. Pennsylvania R.R., 3 F.R.D. 202 (S.D.N.Y. 1942) (holding, in a train accident involving damages to 35 discrete consignments of goods on a delivery truck, that "in furtherance of convenience . . . it would be better if the issue of liability [were] tried and determined" before a possibly moot consideration of the multifarious damage claims); Weinstein, *supra* note 111, at 841 (explaining that courts had gradually come to sever liability and damage trials in cases in which damage determination would prove extremely complex, or conversely, liability determination was fairly simple, for instance in cases in which a defendant presented a strong claim for summary judgment as to liability).

128. *See* Mayers, *supra* note 107, at 393-95 (discussing how evidence of injuries resulting from an automobile accident might influence a jury's determination of the negligence issue); Weinstein, *supra* note 111, at 834-35 (arguing that empirical studies suggest that jurors consider liability and damages as one element, discounting a plaintiff's damage award based on a finding of comparative negligence).

Early opposition to bifurcation revolved around two separable but logically connected fairness issues: the right to jury trial and the integral unity of liability and damages. Opponents argued that the constitutional right to a jury trial requires a jury trial essentially as it was practiced when the Constitution was ratified in 1791—a unified trial in which the jury hears and decides the whole case together.[129] Tampering with the jury trial was perceived as tantamount to a denial of the constitutional right to a jury trial.[130] Although the Supreme Court declared that the right to a jury trial does not demand strict adherence to a dead form and that issue separation does not substantively affect the jury right,[131] the idea of the traditional unitary trial continues to wield power.[132]

Traditional opponents of issue bifurcation advanced a second, but related, argument: Issues can seldom, if ever, truly be separated, even the issues of liability and damages.[133] This normative corollary to the whole story model claims that a tort case constitutes an indivisible unit and should be tried as a whole. Bifurcation affects not just the jury right, but the nature of the trial and its outcome.[134] The same study that indicated that separation does, indeed, save judicial time also indicated that separation dramatically affects the outcome of trials: whereas defendants won 42% of jury-deliberated unified trials, they won in 79% of the trials in which the jury addressed liability alone.[135]

---

129. Bedecarré, *supra* note 117, at 137; Note, *supra* note 111, at 103; *cf.* Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 498 (1931) (noting that trial bifurcation on damages issues was not practiced when the Seventh Amendment was ratified, but allowing resubmittal of damages issues despite such historical argument).

130. Bedecarré, *supra* note 117, at 137; Note, *Separation of Issues of Liability and Damages in Personal Injury Cases: An Attempt to Combat Congestion by Rule of Court*, 46 IOWA L. REV. 815, 829-30 (1961).

131. *Gasoline Prods.*, 283 U.S. at 498. This case actually entailed the separation of issues on retrial, *id.* at 495-96, but is frequently cited as authority for separation of issues for trial, *see infra* notes 156-157.

132. Mayers argued that reverence for the traditional jury accounted for the reticence of New York judges to retry damages alone, long after *Simmons* and the development of statutory authority to do so. Mayers, *supra* note 107, at 398-401.

133. Albert E. Brault, *Should the Issues of Liability and of Damages in Tort Cases Be Separated for the Purposes of Trial?*, 1960 INS. L.J. 798, 803.

134. Proceduralists in the United States were aware of the power of these arguments. A 1966 amendment of Rule 42 of the Federal Rules of Civil Procedure added to claim and issue separation the caveat: "always preserving inviolate the right of trial by jury as declared by the Seventh Amendment of the Constitution or as given by a statute of the United States." FED. R. CIV. P. 42(b). *Gasoline Products* and *Simmons*, among countless other cases, enunciated the requirement that bifurcation must be denied unless issues are clearly separable. Nevertheless, the mere fact that issue separation continues to be practiced suggests that relative, rather than absolute, positions will prevail.

135. Maurice Rosenberg, *Court Congestion: Status, Causes and Proposed Remedies*, *in* THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 29, 48 (Harry W. Jones ed., 1965); Zeisel & Callahan, *supra* note 125, at 1617. Rosenberg uses the figure of 79% for jury-deliberated, liability-alone trials won by defendants. Analysis of Zeisel and Callahan's tables indicates that 78% is the true percentage. Further analysis of their tables indicates that defendants won 45% of unified trials and

2. Issue Bifurcation in Mass Tort.—Until now, we have discussed bifurcation in the context of traditional, two-party litigation. We now turn to procedural issue separation as it is utilized in mass tort products liability cases. The term "mass tort" has several meanings. For the purpose of this Paper, a mass tort products liability trial involves a large number of plaintiffs, usually over one hundred, who were allegedly injured by the same product. Moreover, a means exists—typically a class action mechanism—by which all or a significant percentage of plaintiffs may be legally bound by the outcome at trial.[136] The examples that follow are limited to products liability class actions involving toxic substances or defective products. The analysis, however, has far broader implications.

In mass products liability litigation, when all of the individual cases share a number of discreet, potentially dispositive issues, the system-wide savings resulting from trying these common issues in consolidated trials can be compelling. Lured by the promise of more efficient administration of justice, some judges have combined issue bifurcation with the liberal joinder rules of the Federal Rules of Civil Procedure and structured the trial to adjudicate the common, dispositive issues first.[137] These judges are not alone in favoring this approach. At a time when federal courts are being deluged with a growing stream of litigation, issue bifurcation is seen by many as a technique that may enable the trial judge to dispose of a case in a way that advances judicial efficiency and is fair to the parties.[138]

Judicial efficiency is only one of the justifications for issue bifurcation in mass tort litigation. A fairness rationale has recently surfaced during the massive asbestos litigation. Because injury from asbestos does not become apparent until a significant time after the person was exposed—and, in fact,

---

82% of separated trials that went to a verdict when directed verdicts were added into the equation. Even if settlements are added in as a win for plaintiffs, defendants still fare much better in liability-alone trials, winning 34% of regular trials and 56% of separated trials. *Id.*

Taking these figures as indicative of a real shift in jury decisions in separation, regression toward an equilibrium on claims decided for and against the plaintiff would result in either fewer actions actually being brought or those that are brought being worth less in settlements, judgments, or both. Again, given that these figures demonstrate a significant shift in jury decisions, these decisions could be indicative of greater accuracy, because the jury analyzes one issue in an antiseptic environment, or of lesser accuracy, because the jury has decided an issue ripped from its context.

136. *See* FED. R. CIV. P. 23 (setting forth the procedure for class action lawsuits in federal courts).

137. *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 785 (E.D.N.Y. 1980), *modified*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re* Paris Air Crash of Mar. 3, 1974, 69 F.R.D. 310, 318, 318-23 (C.D. Cal. 1975) (citing FED. R. CIV. P. 1 and its general policy of "just, speedy, and inexpensive determination of every action" as justifying a trial court's broad discretion in bifurcating liability and damage issues while joining similarly situated parties in actions arising from an airline crash causing 346 deaths). Other ways by which judges can control their dockets include mandatory court-annexed arbitration and court-structured settlement conferences.

138. *E.g., In re* Paris Air Crash of Mar. 3, 1974, at 319-23.

exposure does not always result in injury—the courts are faced with a large number of plaintiffs who do not currently manifest injury, but who must file the claim in order to toll applicable statutes of limitation. If these cases proceed to trial, the courts must estimate potential damages based on the likelihood that the plaintiff will suffer harm in the future and the likely extent of that harm. The resulting judgments are divorced from reality, reflecting only probabilities. In some cases, plaintiffs who do not later suffer any harm are bestowed a windfall. In other cases, when plaintiffs suffer belated injury, the earlier, probabilities-based damages awards are almost certain to be inadequate. Faced with this dilemma, some courts have proceeded to try only limited issues at the time plaintiffs who do not exhibit any injuries file their claims. Such limited adjudication tolls the statutes of limitation on the whole claim and allows these plaintiffs to return, if necessary, with a later claim for damages based on actual harm.[139]

Issue bifurcation, as noted earlier,[140] is expressly authorized by Rule 42(b) of the Federal Rules of Civil Procedure. Rule 42(b) empowers a federal trial judge to order a separate trial of any claim or issue if he finds that such separation would serve judicial convenience, would avoid or reduce prejudice to each party, or would further judicial expedition and economy.[141] Because the rule sets these conditions forth in the

---

139. The terms "green card" or "pleural registry" are used to describe a system in which suspension of the statutes of limitation is accomplished by a defendant's waiver of a future right to assert the defense of statute of limitations in exchange for moving the case to the inactive docket. *See, e.g.*, Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 293 (E.D. Pa. 1994); Carlough v. Amchem Prods., Inc., No. 93-215, slip op. at 6 (E.D. Pa. Apr. 15, 1993). The discovery rule has also been used to toll the statutes of limitation in products liability actions involving latent diseases caused by asbestos exposure. *See, e.g.*, Rose v. A.C. & S., Inc., 796 F.2d 294, 297-98 (9th Cir. 1986) (holding that the discovery rule did not toll the statute of limitations against asbestos manufacturers until the plaintiff learned all of the essential elements of his causes of action). *See generally* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992) (proposing mandatory deferral registries in courts with large asbestos caseloads, citing such factors as long latency periods for asbestosis, the high transaction costs of full-scale asbestos litigation, and the need to clear dockets so that gravely ill claimants can get first access to judicial resources without destroying less urgent claims by other plaintiffs); Lori J. Khan, Comment, *Untangling the Insurance Fibers in Asbestos Litigation: Toward a National Solution to the Asbestos Injury Crisis*, 68 TUL. L. REV. 195 (1993) (identifying the two crucial, unresolved issues in judicial interpretation of liability for claims of patent and latent asbestos injury to be when an asbestos injury "occurs" so as to trigger a manufacturer's liability and what should be the scope of insurers' coverage for such mature claims).

140. *See supra* note 114 and accompanying text.

141. FED. R. CIV. P. 42(b). Rule 42(b) states that

> [t]he 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 claim . . . or of any separate issue . . . always preserving inviolate the right of trial as declared by the Seventh Amendment to the Constitution or as given by statute of the United States.

Id.

alternative, the trial judge can order a bifurcated trial if any one of the conditions is satisfied.[142] While neither the text nor the commentaries to Rule 42(b) elaborate on the exact process by which the judge is to decide whether bifurcation is justified, courts and commentators have announced several principles to guide judges' decisions. Foremost, the trial judge must protect the litigants' Seventh Amendment right of trial by jury[143] and must ensure "a fair and impartial trial [and process] to all litigants through a balance of benefit and prejudice."[144] In reaching this decision, the burden is on the moving party to persuade the court that bifurcation is appropriate in the case at hand.[145] Second, because bifurcation infringes upon the jury's role as the factfinder, bifurcation should be the exception rather than the rule.[146] Finally, the trial judge may take into account other factors,[147] which include, but are not limited to, the degree of overlap in the evidentiary proof of the issues sought to be tried

---

142. *See, e.g., In re* Paris Air Crash of Mar. 3, 1974, 69 F.R.D. 310, 318-19 (C.D. Cal. 1975) ("It is noted that the standards of *convenience, avoidance of prejudice,* and what will be *conducive to expedition and economy* are all in the *alternative*. Thus, they need not all be present for separation or severance, but the presence of any one of them is sufficient to sustain an order for a separate trial in the exercise of an informed discretion." (emphasis in original)); *see also* Davis & Cox v. Summa Corp., 751 F.2d 1507, 1517 (9th Cir. 1985) (upholding the severance of a counterclaim based on judicial efficiency because discovery concerning the counterclaim would have substantially delayed the trial of the original complaint); Fidelity & Casualty Co. v. Mills, 319 F.2d 63, 63-64 (5th Cir. 1963) (stating that "Rule 42(b) . . . gives the trial court broad discretion to order a separate trial . . . in order to further convenience or to avoid prejudice").

143. FED. R. CIV. P. 42(b); *see also* FED. R. CIV. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.").

144. Kimberly-Clark Corp. v. James River Corp., 131 F.R.D. 607, 609 (N.D. Ga. 1989).

145. *See, e.g.*, McCrae v. Pittsburgh Corning Corp., 97 F.R.D. 490, 492 (E.D. Pa. 1983) ("A defendant seeking bifurcation has the burden of presenting evidence that a separate trial is proper in light of the general principle that a single trial tends to lessen the delay, expense and inconvenience to all parties.").

146. *See, e.g., Kimberly-Clark,* 131 F.R.D. at 608 ("Because bifurcation works an infringement on such an important aspect of the judicial process [the role of the jury as factfinder], courts are 'cautioned that [it] is not the usual course that should be followed.'" (citations omitted)); *see also* 9 WRIGHT & MILLER, *supra* note 98, § 2390 (reporting that many courts believe that "separation of this kind should be used sparingly"); *id.* § 2388 (noting that "[t]he piecemeal trial of separate issues in a single suit is not to be the usual course").

147. In *Kimberly-Clark,* the court set forth Rule 42(b)'s general factors—convenience, prejudice, expedition, and economy—and discussed seven other considerations upon which a court may properly rely in deciding whether to bifurcate: (1) whether the issues sought to be tried separately are significantly different; (2) whether they are triable by jury or the court; (3) whether discovery has been directed to a single trial of all issues; (4) whether the evidence required for each issue is substantially different; (5) whether one party would gain some unfair advantage from separate trials; (6) whether a single trial of all issues would create the potential for jury bias or confusion; and (7) whether bifurcation would enhance or reduce the possibility of a pretrial settlement. *Kimberly-Clark,* 131 F.R.D. at 608-09; *see also* Reading Indus. v. Kennecott Copper Corp., 61 F.R.D. 662, 664-65 (S.D.N.Y. 1974) (granting bifurcation upon consideration of several of the *Kimberly-Clark* factors).

separately,[148] the effect of separation on clarity,[149] the possibility of jury confusion,[150] and the likelihood that the separated issue would be dispositive to the case.[151] Consequently, "the question is one that seems to depend on the facts of each case, [and is] a matter to be determined by the trial judge exercising a sound discretion."[152]

The discretion given to the trial judge to separate issues for trial is very broad, but by no means unlimited. In *Gasoline Products Co. v. Champlin Refining Co.*,[153] the seminal 1931 case mentioned in the preceding section, the Supreme Court held that "[w]here the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice."[154] The Court went on to say that the issue in that case could not be tried separately from the others because resulting jury confusion and uncertainty would "amount to a denial of a fair trial."[155] Although *Gasoline Products* addressed the remand on appeal of a single issue, many courts consider the test announced therein to be the standard for determining whether an issue may be tried separately without a violation of the Seventh Amendment. Thus, the *Gasoline Products* test has been applied by appellate courts to determine whether a district court overstepped its discretion to separate issues of liability and damages,[156] and its appropriateness was also affirmed in the context of separating the issue of generic causation for an individual trial under Rule 42(b).[157]

---

148. *See, e.g.*, Procter & Gamble Co. v. Nabisco Brands, Inc., 604 F. Supp. 1485, 1491-92 (D. Del. 1985) ("[B]ifurcation will often be inadvisable if there would be substantial overlap between the issues to be proved at both trials."); Akzona Inc. v. E.I. DuPont de Nemours & Co., 607 F. Supp. 227, 233 (D. Del. 1984) (holding that an overlap in evidence was not "significant" enough to militate against bifurcation).

149. *See, e.g.*, Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Fuel Oil, 704 F.2d 1038, 1042 (8th Cir. 1983) ("[A] trial judge may separate the claims in the interests of . . . clarity . . . .").

150. Payne v. A.O. Smith Corp., 99 F.R.D. 534, 536 (S.D. Ohio 1983) (listing the risk of jury confusion among several factors to be considered before granting bifurcation).

151. *See, e.g.*, Barnell v. Paine Webber Jackson & Curtis Inc., 577 F. Supp. 976, 978 (S.D.N.Y. 1984) (granting the defendant's motion for a separate trial on the issue of the plaintiff's timeliness in filing a discrimination complaint with the EEOC and stating: "[S]ince the trial of this issue may obviate the need for any further proceedings herein, a significant saving of time and money may follow from a separate trial on this issue."); *see also* 9 WRIGHT & MILLER, *supra* note 98, § 2388 (encouraging a separate trial for single issues that would be dispositive of the entire case or foreclose other issues).

152. Southern Ry. v. Tennessee Valley Auth., 294 F.2d 491, 494 (5th Cir. 1961) (holding that a trial court's severance of an apportionment issue was not an abuse of discretion).

153. 283 U.S. 494 (1931).

154. *Id.* at 500.

155. *Id.*

156. *In re* Innotron Diagnostics, 800 F.2d 1077, 1086 (Fed. Cir. 1986); Helminski v. Ayerst Lab., 766 F.2d 208, 212 (6th Cir. 1985).

157. Hoffman v. Merrell Dow Pharmaceuticals, Inc. (*In re* Bendectin Litig.), 857 F.2d 290, 309 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989).

Thus, only very vague standards exist for determining the appropriateness of a judge's decision to hold a bifurcated trial. If the issues in a case are clearly separable, bifurcation is unquestionably within the judge's discretion.[158] On the other hand, if the issues are sufficiently connected, and holding a bifurcated trial would infringe on the litigants' rights to a fair and impartial trial, all efficiency considerations must yield.[159] In all other cases, the judge's decision to bifurcate the trial will be reversed on appeal only if the parties can demonstrate that the court clearly abused its power.[160]

In addition to the efficiency and fairness arguments supporting issue bifurcation, the language of Rule 42(b) and the Advisory Committee Note to the 1966 amendment suggest that the changes to Rule 42 were intended to encourage the use of this technique.[161] Nevertheless, the device has been used infrequently.[162] This is in large part due to the fact that, despite the promises of judicial time saving and fairness, the practice is, as will be discussed in a later section, controversial. We now turn to a brief overview of how the courts have utilized issue bifurcation in mass products liability litigation.

In mass tort products liability cases that are bifurcated by trial judges, the issue most often separated for initial trial is the question of generic causation—whether the challenged product could theoretically have caused the injury suffered.[163] From several perspectives, the issue of generic causation lends itself well to bifurcation. The issue is determined on a theoretical, laboratory level and is often limited to scientific evidence and expert testimony. The issue does not involve evidence from individual

---

158. *See id.* ("[M]any courts have upheld cases bifurcated between liability and damages because the evidence pertinent to the two issues is wholly unrelated . . . ."); *see also In re Innotron Diagnostics*, 800 F.2d at 1086 (noting that separate trials are appropriate when the issues are "distinct and separable").

159. Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931).

160. *E.g.*, Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 541 (8th Cir. 1977) ("A trial court's severance of trial will not be disturbed on appeal except for an abuse of discretion."); Chicago, Rock Island & Pac. Ry. v. Williams, 245 F.2d 397, 404 (8th Cir.) (stating that the district court's ruling on bifurcated trials "will not be disturbed on appeal in the absence of a clear abuse of discretion"), *cert. denied*, 355 U.S. 855 (1957).

161. "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 . . . ." FED. R. CIV. P. 42(b). "In certain suits in admiralty separation for trial of the issues of liability and damages . . . has been conducive to expedition and economy . . . ." FED. R. CIV. P. 42(b) advisory committee's note; 9 WRIGHT & MILLER, *supra* note 98, § 2388 ("[T]he language changes in Rule 42 were intended to give rather delphic encouragement to the trial of liability issues separately from those of damages . . . .").

162. *See* 9 WRIGHT & MILLER, *supra* note 98, § 2390 ("[I]t is not surprising that federal courts, in many kinds of litigation have ordered liability and damages tried separately, although this has not been done routinely.").

163. *See* Bedecarré, *supra* note 117, at 124 (discussing how bifurcation of trials evolved from sorting out cross claims and counterclaims to deciding issues of causation).

cases and is not likely to be connected with other issues in the case. Finally, it is a potentially dispositive issue; only if the plaintiffs are able to show that the product could have caused their injuries will they be able to proceed with their claim.

The major impediment to litigating generic causation separately is the requirement that in cases involving exposure to, or consumption of, toxic substances, the dose rates of the members of the plaintiff class be relatively uniform. That is, the generic causation issue is comprehensible only if the trier of fact can assume a certain level of exposure to the dangerous product, and that assumed exposure level must be consistent among all, or most, of the plaintiffs.[164] Thus, assuming the problem of uniform dose rates can be solved, decisions to try the issue of generic causation separately, before the other issues, further the efficiency rationales behind issue bifurcation.

The first products liability case to order bifurcation of the issue of generic causation was *In re Beverly Hills Fire Litigation*.[165] The *Beverly Hills* case arose out of a fire in the crowded Supper Club that left 165 patrons and employees dead and many other people injured.[166] The individual actions were consolidated, and shortly before the beginning of trial, the judge ordered a three-phase bifurcated trial structure.[167] During the first phase, the jury was to determine, generically, whether the connection of aluminum wiring, such as that manufactured by the defendants, to an electrical device could have resulted in the fire at the Supper Club. Problems associated with uniform dose rates were not involved because the defect did not involve exposure to or consumption of a toxic substance. In a second trial phase, to be held if plaintiffs prevailed in the first phase, the jury was to consider whether collusive actions by the defendants violated a legal standard of care. Only if plaintiffs prevailed on both causation and fault would a third trial phase be held to determine compensatory and punitive damages.[168]

The causation phase of the trial took twenty-two days of trial and nearly eleven calendar weeks to complete.[169] In the end, the jury concluded that the connection of the aluminum wire could not have caused

---

164. In Yandle v. PPG Indus., Inc., 65 F.R.D. 566 (E.D. Tex. 1974), the court refused to certify a class because it was uncertain about the length and concentration of exposure of each claimant to the asbestos dust.

165. 695 F.2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

166. *Id.* at 210.

167. The judge ordered two trials. The second trial was to be divided into two phases, liability of the defendants and damages. *Id.*

168. *Id.*

169. *Id.* at 211.

the fatal fire.[170] Accordingly, the judge entered a judgment in favor of the defendants, and appeals followed.

Although the United States Court of Appeals for the Sixth Circuit reversed the trial court's judgment,[171] it did uphold the judge's decision to polyfurcate the trial. In its decision, the *Beverly Hills* court rejected the plaintiffs' contention that trying the issue of causation separately from the other issues was not supported by any authority.[172] It did, however, acknowledge that such practice presents certain dangers. The court warned that the sterile, laboratory atmosphere created by separate phases of trial "may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of their [entire case]."[173] This observation notwithstanding, the *Beverly Hills* court recognized the discretion bestowed upon the trial judge by the clear language of Rule 42(b), which allows the judge to decide the most effective method of managing the case. Given the value of trial separation in expediting case resolution, the court of appeals could not conclude that the court below abused that discretion when the judge ordered the trial polyfurcated.[174]

The *Beverly Hills* court was careful to limit its approval of trial separation. In cases of lesser complexity than the *Beverly Hills* litigation, the court suggested considerations of fairness and efficiency might point toward a more traditional, holistic approach.[175] Thus, the court left any decisions to employ a polyfurcated trial structure to the trial judge's informed discretion, taking under consideration the facts of the case at bar.[176]

The next products liability case after *Beverly Hills* to bifurcate the issue of generic causation was the massive Agent Orange litigation.[177] The case involved claims brought by thousands of Vietnam War veterans

---

170. *Id.*

171. *Id.* at 227. The judgment was reversed because a juror had conducted an improper experiment at home and reported his findings to the other jurors. The findings were factually at odds with the plaintiffs' evidence and theory. *Id.* at 211-12.

172. *Id.* at 216.

173. *Id.* at 217.

174. *Id.* at 227.

175. *Id.* at 217.

176. *Id.*

177. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980), *modified*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). *See generally* David R. Gross, *Factual and Legal History of the Agent Orange Litigation to Date*, *in* PREPARATION AND TRIAL OF A COMPLEX TOXIC CHEMICAL OR HAZARDOUS WASTE CASE 361 (PLI Litig. & Admin. Prac. Course Handbook Series No. 271, 1984) (outlining the use of Agent Orange and providing an overview of the consolidation and bifurcation procedures used); Ellen Tannenbaum, *The Pratt-Weinstein Approach to Mass Tort Litigation*, 52 BROOK. L. REV. 455 (1986) (tracing the Agent Orange litigation from its beginning through settlement); Symposium, *Procedural History of the Agent Orange Product Liability Litigation*, 52 BROOK. L. REV. 335 (1986) (highlighting the complex procedural history of the Agent Orange litigation).

and their families for various injuries allegedly suffered as a result of coming in contact with the herbicide known as Agent Orange during the veterans' tours of duty.[178] Eventually, the cases were consolidated and brought to the Eastern District of New York. After taking over the case from Judge Pratt,[179] Chief Judge Weinstein certified two plaintiffs classes and ordered a separate trial to determine whether the injuries suffered by the plaintiffs could have theoretically been caused by contact with Agent Orange.[180]

In his opinion accompanying the class certification and order of a separate trial, Judge Weinstein devoted significant attention to the aims and implications of his decision. He noted that a total or partial determination on the issue of causation would save considerable time for the court, as well as the litigants.[181] In fact, the separate trial on the limited issue of causation regarding each type of injury complained of by the claimants was to serve as a "test case" for all of their claims.[182] Because the viability of all the claims depended on establishing a theoretical link between Agent Orange and the injuries, a negative finding on the issue of causation would have ended the litigation. A positive finding, on the other hand, would have conclusively established the necessary link for all litigants, thus eliminating the need to retry generic causation individually.[183]

Interestingly, Judge Weinstein's opinion did not mention the problem of dose rate. On their facts, the claims presented by various class members reflected a wide variety of levels of exposure to dioxin, the toxic ingredient in the relevant defoliants. Although the issue of generic causation was to be tried without regard to differentiation in exposure levels of various claimants,[184] the baseline dose rate assumptions would, presumably, cover most, if not all, class members.

The defendants objected to separating causation for a separate trial. Arguing that a positive finding on this issue would necessitate further trials on the remaining liability issues, as well as potentially on damages issues, the defendants contended that such bifurcation would violate their right to have their liability with respect to each of the plaintiffs determined by a

---

178. *"Agent Orange,"* 506 F. Supp. at 768. The class action was brought by more than 15,000 individuals, mostly veterans and their families. PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 4 (1986).

179. Judge Pratt presided over the case from 1979 until 1983, when he was elevated to the Second Circuit.

180. *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 724 (E.D.N.Y. 1983).

181. *Id.* at 723.

182. *Id.*

183. *Id.*

184. *In re* Diamond Shamrock Chems. Co., 725 F.2d 858, 860-61 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

single jury.[185] In his decision, Judge Weinstein recognized the potential jury-right problem created by bifurcation—that liability issues are seldom totally separable. He nevertheless decided against the defendants' objections, holding that even though the question for the subsequent juries would be whether Agent Orange actually did cause the specific injury, such questions were accompanied by a "tacit admission" that the product is capable of causing such injuries in the first place.[186] The defendants then petitioned for a writ of mandamus to vacate the class certification.[187] They argued that the issue of generic causation, identified as the common issue, was insignificant and an improper basis for class certification.[188] Shortly after the United States Court of Appeals for the Second Circuit declined to issue the writ, the parties settled without any admission of liability.[189] Thus, the Agent Orange litigation demonstrates how trial separation may further judicial efficiency by, rightfully or not, prodding the parties towards settling the case.

In re Richardson-Merrell "Bendectin" Products Liability Litigation provides the paradigm of the way in which issue bifurcation can be utilized in a mass tort trial.[190] The *Bendectin* case involved claims brought on behalf of children with birth defects allegedly caused by their mothers' ingestion of the drug Bendectin, an antinausea medicine designed to combat morning sickness among pregnant women.[191] Approximately 1200 such actions, which originated in a number of different federal judicial districts and which involved an array of different liability theories,[192] were consolidated for a joint trial of the common liability issues.

Once all actions had been transferred to the United States District Court for the Southern District of Ohio, the trial judge ordered the trial separated with the issue of generic causation to be tried first.[193] If the

---

185. *Id.* at 724.

186. *Id.*

187. *Id.* at 859.

188. *Id.* at 860.

189. *See In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 768 (E.D.N.Y. 1984) (preliminary settlement order), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

190. 624 F. Supp. 1212 (S.D. Ohio 1985), *aff'd sub nom* Hoffman v. Merrell Dow Pharmaceuticals, Inc. (*In re* Bendectin Litig.), 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). For an analysis of the case and its history, see Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992).

191. *Richardson-Merrell*, 624 F. Supp. at 1266-67; Sanders, *supra* note 190, at 348-51.

192. Plaintiffs requested relief on the grounds of negligence, breach of warranty, strict liability, fraud, and gross negligence, and asserted a rebuttable presumption of negligence per se for defendant's violation of the misbranding provisions of the Federal Food, Drug, and Cosmetic Act (FDCA). *See, e.g.*, Mekdeci v. Merrell Nat'l Lab., 711 F.2d 1510, 1512 (11th Cir. 1983) (describing the causes of action pleaded by one of the first Bendectin plaintiff's lawsuit, including "strict liability, negligence, breach of warranty and fraud").

193. *Richardson-Merrell*, 624 F. Supp. at 1248-49.

plaintiffs had succeeded in establishing that ingestion of Bendectin at common dose rates during pregnancy could result in birth defects, a trial on causation regarding specific categories of birth defects and other common issues would have followed.[194] Only if the plaintiffs prevailed in these two segments of the trial would the cases have been returned to their districts of origin for a trial of specific causation and damages issues.[195] Thus, the trial judge structured the trial in a way that held the greatest promise of judicial efficiency by first testing the issues most dispositive of the plaintiffs' claims.

In order to allow the jury to consider generic causation as a separate issue, the trial judge excluded from the courtroom all plaintiffs less than ten years old and all visibly deformed plaintiffs over that age.[196] He was clearly concerned about the impact these plaintiffs would have on the jury's ability to evaluate fairly the evidence presented. The court held that the probative value of allowing the jury to see these plaintiffs during the limited causation trial was nonexistent, while the potential prejudice to the defendant was beyond calculation.[197] Thus, the judge hoped to establish an environment in which the issue of generic causation could be scientifically adjudicated.

The *Bendectin* plaintiffs strenuously opposed structuring the trial in this fashion. The judge, however, ruled against their objections, justifying his decision on the grounds of necessity and judicial economy.[198] Eventually, a twenty-two day trial on the generic causation issue was held, a trial that was strictly limited to expert testimony and scientific and technical evidence.[199] At the end of the trial, the judge asked the jury the following question: "[Have] the plaintiffs established by a preponderance of evidence that the ingestion of Bendectin at therapeutic doses during the period of fetal organogenesis is a proximate cause of human birth defects?"[200] After a short period of deliberation, the jury answered this question in the negative.[201] The verdict for the defendants on the limited question of generic causation eliminated the need to try the remaining issues of the plaintiffs' case.

The adoption of the polyfurcated trial structure, as well as the exclusion of plaintiffs with visible deformities, was vigorously challenged by the plaintiffs on appeal. The plaintiffs' primary argument was that the

194. *Id.*
195. *Id.* at 1251.
196. *Id.* at 1222-24.
197. *Id.* at 1223-24.
198. *Id.* at 1221.
199. *Id.* at 1218.
200. *Id.* at 1267.
201. *Id.* at 1218. The jury deliberated for less than one day. *Id.*

issue of causation could not rationally or coherently be tried separately. Relying on the language in *Gasoline Products*, the plaintiffs argued that the issue of generic causation was inseparable from other liability issues and as such could not be tried separately without resulting in injustice.[202] The plaintiffs then attacked the trial judge's decision to bifurcate the trial "because the ruling unfairly prejudiced presentation of their case."[203] This argument rested primarily on the language in *Beverly Hills* that warned against trying issues in the sterile, laboratory environment created by bifurcation.[204] Finally, the plaintiffs also challenged, on Fifth and Seventh Amendment grounds, the trial judge's decision to exclude from the courtroom all plaintiffs with visible deformities.[205]

Without the benefit of an established body of law on the question of trial separation, the *Bendectin* court deferred significantly to the trial judge's discretion in this area. The court held that the issue of causation was separable and that bifurcating the trial promoted efficiency without unduly prejudicing plaintiffs' rights.[206] Limiting its decision to whether the trial judge abused his discretion, the court decided that holding a separate trial on the issue of causation was proper.[207] The *Bendectin* court also upheld the exclusion from the courtroom of the young and visibly deformed plaintiffs.[208]

Trial separation in *Beverly Hills*, the Agent Orange litigation, and the Bendectin litigation at least arguably promoted judicial efficiency. This was not the case in *Anderson v. W.R. Grace & Co.*[209] *Anderson* combined claims brought by the residents of a community after they discovered that their neighborhood had experienced an abnormally high incidence of leukemia. In their claims, the plaintiffs alleged that the defendants, W.R. Grace & Co. and Beatrice Corp., caused their health problems by polluting neighborhood water wells.[210]

---

202. Hoffman v. Merrell Dow Pharmaceuticals (*In re* Bendectin Litig.), 857 F.2d 290, 308 (6th Cir. 1988) (stating that "where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial alone may be had without injustice" (quoting Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931))), *cert. denied*, 484 U.S. 1006 (1988).

203. *Id.* at 314.

204. *In re* Beverly Hills Fire Litig., 695 F.2d 207, 217 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

205. *In re Bendectin Litig.*, 857 F.2d at 322-23 (noting the plaintiffs' argument that the exclusion violated their due process and fair trial rights by preventing them from exhibiting their injuries).

206. *Id.* at 320.

207. *Id.*

208. *See id.* at 322-25 (holding that the plaintiffs' rights were adequately protected by allowing them to view the trial on closed-circuit television and to talk with their lawyers through "communicative devices").

209. 628 F. Supp. 1219 (D. Mass. 1986).

210. *Id.* at 1223.

After extensive discovery lasting more than four years, the defense moved to separate the case into individual issue trials according to Rule 42(b).[211] Over the plaintiffs' objections, the trial judge ordered a four-phase trial that went beyond separating generic causation from other issues. In the first phase, the jury was to determine the defendants' legal responsibility for the plaintiffs' exposure to its toxic products. In other words, the first phase was limited to establishing whether toxins from the defendants' plant had reached the water supply during a time when the defendants were legally liable in tort.[212]

If the plaintiffs succeeded in establishing that they were exposed to one or more of the defendants' chemicals through the water supply within the legally relevant time, the second minitrial would address the issue of causation with respect to the plaintiffs' cases of leukemia.[213] The third phase would decide whether the chemicals were the cause of the plaintiffs' array of other health problems.[214] Finally, the fourth phase would assess punitive damages.[215]

As the legal responsibility phase of the trial came to an end, the trial judge decided to further narrow this issue and submit to the jury a set of four interrogatories regarding each of the defendants.[216] The interrogatories addressed the type of chemicals that may have contaminated the wells, the time at which the contamination had occurred, and whether the contamination was the result of the particular defendant's negligence.[217] Eventually, the jury returned a verdict in favor of defendant Beatrice Corp. and a contradictory verdict finding W.R. Grace & Co. negligent in contaminating the wells. Based on this inconsistent verdict, the court ordered a new trial with respect to defendant W.R. Grace & Co.[218] Thus, any efficiency gains hoped for when the decision to bifurcate was originally made were never realized when the resulting jury confusion necessitated a new trial.

3. Commentators' Reactions to Issue Bifurcation in the Mass Tort Setting.—The primary argument for issue bifurcation in any setting has been and continues to be its reputed efficiency. Academic proponents of bifurcation repeat the judicial rationale presented in the preceding section:

---

211. Mitchell Pacelle, *Contaminated Verdict*, AM. LAW., Dec. 1986, at 75, 77.

212. Anderson v. Cryovac, Inc., 862 F.2d 910, 914 (1st Cir. 1988).

213. *Id.*

214. *Id.*

215. *Id.*; Pacelle, *supra* note 211, at 77.

216. Pacelle, *supra* note 211, at 77.

217. *Id.* (reproducing the text of the four interrogatories).

218. Anderson v. Cryovac, Inc., 862 F.2d 910, 915 n.2 (1st Cir. 1988); Pacelle, *supra* note 211, at 79-80.

a judicial system faced with thousands of similar cases that threaten to overwhelm the dockets saves considerable time and expense and avoids delays by consolidating these cases for common trial of their common elements.[219] For example, if general causation in 10,000 factually similar cases is being tried in a solitary trial, much repetitive testimony, many jury selections, and thousands of days that otherwise would be expended by judges, court reporters, and others will be saved.[220] Of course, in all situations in which the defendant wins, there will also be no individualized trials on issues not reached in the common trial. The parties, especially the defendants, will also realize savings of time and expenses by the avoidance of duplicative proceedings.[221]

Proponents further argue that accuracy and fairness support issue separation in the mass tort setting in the same way that they support bifurcation in the traditional tort trial. For example, procedural issue separation prevents prejudice to the defendant resulting from the tainting of an unclear liability issue by the presentation of clear and extensive damages.[222] Stated more generally, separating out one issue results in a more accurate decision uncontaminated by other considerations.[223] The statistical studies that indicate that bifurcated trials result in different outcomes than unitary trials[224] are viewed by proponents as reflecting this greater decisional accuracy.[225]

Proponents cite a third ground for support, one that is not so clearly applicable in the traditional setting: decisional consistency.[226] A

---

219. *See* G. Lee Garrett, Jr. & Anthony E. Diresta, *Strategies for Multi-Claim Litigation and Settlement Techniques*, *in* PRODUCT LIABILITY OF MANUFACTURERS: PREVENTION AND DEFENSE 473, 511 (PLI Litig. & Admin. Prac. Course Handbook Series No. 289, 1985) (noting that commentators who support issue bifurcation "emphasize its effect on judicial economy and efficiency"); Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 73 (1993).

220. A judge involved in the Bendectin mass tort litigation "estimated that the time necessary to conduct full trials on the approximately 700 pending Bendectin cases would consume 21,000 trial hours, the equivalent of 105 judge years." Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N. KY. L. REV. 541, 543 (1989) (footnotes omitted).

221. *See* Garrett & Diresta, *supra* note 219, at 516 ("The most obvious advantage of bifurcation to defendants is the savings associated with a shorter trial where resolution of the first issue or claim is dispositive of the other, such as where a defendant prevails on the causation or liability issue.").

222. *See id.* at 518-19 (noting that "contemporaneous presentation of liability and damage evidence" may influence a sympathetic jury toward a finding of liability).

223. *See id.* at 519 ("By removing damages from the consideration of juries deciding liability, such juries will be unable to compromise verdicts . . . and are . . . more likely to decide liability issues based on the merits of the claim.").

224. *See supra* note 135 and accompanying text.

225. *See, e.g.*, Garrett & Diresta, *supra* note 219, at 518-21; Sanders, *supra* note 219, at 75 (both arguing that bifurcation results in more accurate decisions by avoiding prejudicial juries, compromised verdicts, and inflated damage awards).

226. *See, e.g.*, Gerald W. Boston, *A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience*, 18 COLUM. J. ENVTL. L. 181, 363-64 (1993)

consolidated trial on any issue or issues will obviously generate a single consistent outcome on the issue for all cases, whereas single trials could result in irreconcilable verdicts on very similar fact patterns. This observation assumes, of course, that inconsistent outcomes in factually similar cases in some way act to delegitimize the judicial system.

Opposition to mass tort bifurcation reflects a broad spectrum of views. One commentator, for example, favors consolidation for pretrial discovery, but opposes actual issue bifurcation.[227] Another commentator contends that cause-in-fact ought to be the smallest separable merits issue, opposing the separation of general and specific causation for trial.[228]

Opponents view bifurcation in the mass tort setting as straying even further from the right to a traditional jury than bifurcation in the traditional tort setting. Here, rather than simply separating damages from liability, liability itself may be divided into sub-units, one or more of which may be tried in isolation from the rest of the case. This results in further sterility and fragmentation[229] and places an exaggerated emphasis on an issue that might have played but a small part in a unitary trial.[230] From this perspective, the jury's role resembles more that of a special master and less that of the traditional jury that hears and decides a whole case.[231]

It is equally important that the plaintiff is no longer in control of the claim.[232] Not only may issue separation occur against the plaintiffs' will, but also the plaintiffs probably will not be able to control trial strategy.[233] Because attorneys are chosen by the court for consolidated trials, the plaintiffs' control over their attorneys is greatly diminished, if not lost altogether.[234]

Opponents of bifurcation further express skepticism about the efficiency argument, claiming that it overstates the case. First, the heroic predictions of a judiciary overwhelmed by mass tort claims are untenable

---

(suggesting that all plaintiffs in mass exposure litigation be subjected to a scientific causation standard to create greater conformity and consistency).

227. Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69.

228. Bedecarré, *supra* note 117, at 160, 164.

229. *See id.* at 138 (suggesting the potential for a "succession of intra-liability trials").

230. *Id.* at 139.

231. *See id.* at 164 (arguing that extreme bifurcation transforms the jury from an "impartial factfinder and social conscience," into "a special master assigned technical questions").

232. *See generally* Trangsrud, *supra* note 227, at 70-76 (discussing the historical importance placed on individual claim autonomy for plaintiffs in major tort cases).

233. *See* Bedecarré, *supra* note 117, at 145-46 (citing an example of a plaintiff's failed objection to polyfurcation on the ground that he had the right to determine the sequence of factual issues presented at trial); Edward Brunet, *The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 290-91 (1991) (observing that litigant autonomy "consistently loses in recent complex-litigation developments").

234. *See* Trangsrud, *supra* note 227, at 83 (commenting that "the individual [mass tort] plaintiff is in a poor position to exercise influence over lead counsel for the plaintiff group or the course of the complex litigation").

because the settlements reached in the vast majority of cases will be in line with the results in the first handful of cases decided.[235] Second, they argue, the savings occur only if the defendant wins. If the plaintiffs win on some particular issue, the cases must be remanded, and the vast amount of time and resources consumed in the consolidated trial on a relatively small point may be a greater expenditure than would have occurred in separate trials.[236]

Finally, within the opposition to bifurcation, an undercurrent of skepticism is detectable concerning judicial objectivity in the mass tort setting.[237] With potentially thousands of similar cases pending, greater pressure might be placed upon the courts to consolidate cases and to try separated issues,[238] even those cases that might not be legitimately separable.[239] Moreover, because efficiency principles are, at least superficially, easier to apply than others,[240] judges will inevitably tend to favor them over competing principles despite the lack of a constitutional mandate for efficiency.[241]

4. The Proper Role of Claims Consolidation and Issue Bifurcation in Modern Mass Products Liability Litigation.—The objections to consolidation and bifurcation identified in the preceding section are sufficiently important to warrant careful assessment of that procedural technique. We conclude that this radical form of issue separation should be used in mass products liability litigation only when two conditions are satisfied: First, any issue to be tried separately must be common to all of the claims.

---

235. *Id.* at 78.

236. *See* Bedecarré, *supra* note 117, at 162 (arguing that trial time can be greatly increased when fractured proceedings ultimately proceed to verdict). Proponents of bifurcation are also aware of this possibility. *See, e.g.*, Garrett & Diresta, *supra* note 219, at 522 ("It is intuitive that if liability is found the total length of the trials will be significantly longer, especially if a new jury is impanelled for the damage trial.").

237. *See* Trangsrud, *supra* note 227, at 84-86 (arguing that efficiency concerns in mass trials create incentives for trial judges to engage in "extraordinary judicial behavior" at the expense of fairness concerns).

238. *See* Brunet, *supra* note 233, at 277-78. The court in *In re* Beverly Hills Fire Litig., 695 F.2d 207 (6th Cir. 1982), seemingly conceded this point. After admitting the "danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action," the court acknowledged that "[i]n a litigation of lesser complexity, such considerations might well have prompted the trial judge to reject such a procedure." *Id.* at 217.

239. *See* Bedecarré, *supra* note 117, at 158-59 (discussing the Agent Orange litigation, in which the issue of causation was tried separately despite doubts as to the viability of the separation); *supra* notes 177-89 and accompanying text.

240. *See* Brunet, *supra* note 233, at 277 (asserting that efficiency principles are easy to apply and are favored by judges concerned with docket reduction).

241. *See id.* at 290 (stating that no specific constitutional provision favors efficiency principles over fairness concerns). For the view that efficiency arguments may be legitimate constitutional arguments, see PHILIP BOBBITT, CONSTITUTIONAL FATE 59-73 (1982) (discussing prudential argument, one of six modalities of constitutional argument).

Second, the relevant societal interests must clearly outweigh the interests of individual claimants in having the trier of fact hear and consider all of the evidence in a single, unified proceeding. The first of these conditions is evident from earlier discussions; the second requires further elaboration.

For societal interests to outweigh individual interests in the manner just described, the claims must be such that the possibility of liability threatens the continued vitality of product markets believed by the judge to be important to the general public interest. For this condition to obtain, the risks that form the shared conceptual basis of the claims must be generic to the product involved: the product must be claimed to have been defectively designed or marketed. When such defects give rise to sufficient numbers of claims to deserve the appellation "mass tort," two antisocial results will be generated if liability is imposed without adequate justification: First, the product in question will be driven from the marketplace notwithstanding its demonstrated societal benefits. Second, and more broadly, future investment in product innovations that carry the potential for such massive liability will be excessively and inappropriately discouraged.[242] In contrast, manufacturing defects, by their very nature, carry no similar implications. Even when a mechanical defect in a jumbo jet airliner causes an accident generating many liability claims, the aircraft production industry is not threatened.

The product categories most likely to present the described profile justifying consolidation and bifurcation are prescription drugs, medical devices, and toxic chemical substances. When millions of persons are exposed to such products, and hundreds of thousands allege to have suffered serious injury because of generic defects, not only specific defendant manufacturers, but also entire industries, are threatened. It should also by now be obvious that the issue most likely to be tried separately in such cases is generic causation.[243] Only after it is established that the product in question is capable of causing the types of harm for which claimants seek tort recovery should the industries involved be severely threatened. Once generic causation is established, the quasi-strict liability imposed managerially through massive settlement procedures is arguably justified.[244]

Of the mass tort cases described earlier in this Paper, the *Bendectin* litigation is the paradigm.[245] Society at large has a significant interest in not discouraging prescription drug research and development, an interest

---

242. *See generally* Henderson & Twerski, *supra* note 26, at 1286-92, 1310-14 (discussing the likely effects of expanding products liability on the marketplace).

243. *See supra* notes 163 and accompanying text.

244. *See generally* Peter H. Schuck, *Mass Tort Litigation: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. (forthcoming May 1995).

245. *See supra* notes 190-208 and accompanying text.

clearly threatened by the unjustified imposition of liability for harms not caused by such drugs.[246] In circumstances in which society's interests arguably exceed those of individual plaintiffs in having juries hear their "whole stories," the relatively more sterile, less emotional contemplation of binding bifurcated trials of generic causation issues probably serves societal goals better than would case-by-case, or whole-case, litigation.

IV. Conclusion

This Paper assesses issue separation in modern products liability litigation. The project begins with substantive issue separation—the identification and separation of certain aspects of a case as independent factual elements upon which the outcome depends. A review of the development of products liability law over the past thirty years indicates that changes in this area have increasingly approached the optimal level of substantive issue separation. This has come about by two methods: the necessary separation of issues not clearly separated previously and the conflation of issues that should not have been given independent determinative status to begin with. Perhaps the best example of recent issue separation begins with Section 402A of the *Restatement (Second) of Torts*.[247] That Section defines product defectiveness in a unitary fashion, failing adequately to differentiate among the different ways in which a product may be defective. The first two sections of the proposed new *Restatement (Third) of Torts*, reflecting modern American products liability law, differentiate among manufacturing defects, defective designs, and failures adequately to instruct or warn.[248] The new *Restatement* also explicitly defines the legal standards by which the manufacturer's liability is determined in relation to each type of defect.[249] Thus, the separation of the unitary concept of "defect" into its three constituent independent elements is the most important achievement of the new *Restatement*.

Equally significant have been examples in recent years of products liability decisions that have transformed factual considerations that in earlier law were independently determinable of outcome into elements that are relevant but that affect outcomes only when considered in conjunction with other elements.

Perhaps the clearest example of the converse process of issue conflation, whereby single factors have power only in conjunction with

---

246. The prescription drug Bendectin was withdrawn from the market because of the threat of massive tort liability. Paul M. Barrett, *Top Court Agrees to Clarify Use of Scientific Evidence in Trials*, WALL ST. J., Oct. 14, 1992, at B9.

247. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

248. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-2 (Tentative Draft No. 2, 1995).

249. *Id.* § 2.

other factors, is the new *Restatement*'s abandonment of the so-called patent danger rule.[250] Simply stated, the patent danger rule holds that a product design cannot be found to be defective when the design-related risk that causes plaintiff's harm is obvious.[251] The assumption underlying this rule is that when the relevant design risks are obvious, the user or consumer can take measures to avoid injury and, in any event, is in no position to complain on fairness grounds. Thus, when a distracted or weary worker catches a hand in the openly obvious moving parts of a productive machine and suffers injury, the worker cannot reach the trier of fact with a claim that the machine should have been equipped with a safety guard.

Over time, American courts have come to realize that the patent danger rule is based on extremely doubtful premises. It is only too human for otherwise careful workers to suffer lapses in attentiveness. And machines can put nonuser bystanders at risk. In short, victims of such product designs are not, after all, efficient risk minimizers, and have every right to argue to triers of fact that reasonable design alternatives are available, at acceptable cost, to reduce or avoid their injuries. Gradually the patent danger rule has given way to a more sensible approach that allows triers of fact to determine whether manufacturers have breached duties to design against obvious risks. The new *Restatement* embraces this more appropriate approach.[252] Today, in a clear majority of jurisdictions, the obviousness of design-related risks is relevant to the issue of design defect, but is not controlling. Design itself has been disaggregated from the broader issue of "defects," and "obviousness" has been taken down from its throne and aggregated around design as one of many relevant considerations.

Many other examples of this general movement of the substantive law of products liability from specific rule to more general standard are available and have been captured in the new *Restatement* project. Post-sale product misuse, modification, and alteration have, in some jurisdictions, come to be recognized as formal, single-factor barriers to recovery for harm caused by allegedly defective products. Like the patent danger rule based on the obviousness of design-related risks, these formal rules are based on arguably out-moded underlying assumptions regarding who are, and are not, capable risk avoiders and who should be entitled to reach triers of fact with claims of defective design. Consistent with this analysis, the new *Restatement* rejects these single-factor, no-duty rules and adopts in their place a conflationary, integrative approach that treats post-sale

250. *Id.* at § 2 cmt. c, reporter's note.

251. *See supra* text accompanying notes 59-66.

252. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. c (Tentative Draft No. 2, 1995).

product misuse, modification, and alteration as relevant to, but not controlling over, the more basic issues such as defectiveness at time of sale, causation, and plaintiff's fault.[253]

Regarding procedural issue separation, this Paper divides into two main parts: the traditional and the nontraditional—one may almost say "radical"—forms of separation. Substantive issue separation is a necessary, but not a sufficient, condition for procedural issue separation—the breaking up of issues for separate consideration at trial. In traditional single-trial litigation, the system, by seeming to require each issue to be decided separately by the jury on a preponderance of the evidence, countenances verdicts at odds with the probability of the conjoined events all actually having occurred. Empirical work with mock trials suggests, however, that a jury applies a "whole story" analysis to the entire case. Thus, little procedural issue separation occurs in traditional single-trial litigation, despite attempts at separation in jury instructions.

Special verdicts, by formally demanding the jury to consider and decide separately each delineated issue, would seem to eliminate issue conjunction by the jury. Again, however, empirical studies with mock juries suggest that, even using a special verdict approach, a jury applies a "whole story" analysis rather than deciding a case issue by issue. Thus, little actual procedural issue separation may occur in either the general-verdict or special-verdict setting of the unitary trial.

Issue bifurcation—the physical isolation of issues for separate trials—is neither new nor uncontroversial. Beginning with retrial on damages alone when the liability issue was untainted, issue bifurcation in the tort setting progressed through the separation of liability from damages at the trial stage to the modern mass tort situation of consolidation (for purposes of binding all claimants) and bi- or tri-furcation.

The primary rationale for bifurcation in consolidated mass cases is its reputed efficiency—the almost self-evident savings of the time and resources of the judiciary and, secondarily, of the parties. Proponents also argue that procedural issue separation prevents prejudice to the defendant through the tainting of an unclear liability issue by the presentation of clear and extensive damages.

Opposition to bifurcation centers on the right to a jury trial and fairness issues. Opponents argue that the jury right means a jury trial as it was practiced when the Constitution was ratified—a trial in which the jury hears and decides everything relevant to the case, not one in which the jury hears and decides a solitary issue ripped from its "whole story" context. Opponents cite changed outcomes, loss of plaintiff autonomy, and skepticism about the efficiency rationale in support of their position.

---

253. *Id.* § 2 cmt. o.

The authors believe that there is an optimal procedural issue separation just as there exists optimal substantive issue separation. In the mass products liability setting, consolidation and bifurcation are indicated only when two requisites occur. First, the issue to be tried separately must be common to all the claims, and, second, there must be a significant societal issue that extends beyond the plaintiffs' case and threatens, if liability is imposed improperly, the economic well-being of entire industries. Not invariably, the gatekeeper issue will be generic causation in which the plaintiffs have experienced a comparable, though not necessarily invariate, range of exposures or dose rates. These situations arguably justify precisely those characteristics of bifurcation that generate controversy: the sterile atmosphere, the austere consideration of an isolated issue, and the marginal, but nonetheless palpable, pro-defendant tilt to the proceeding. When society has a stake in the outcome beyond the interests of the litigants, the authors of this Paper deem it necessary that generic causation be critically determined in a nonemotional, clinical, and detached manner. Pro-liability error here would have far greater impact than on just the respective pocketbooks of the litigants.

This moderate position neither denies the value of issue bifurcation nor ignores the compelling quality of its opponents' arguments. Rather, our position seeks to define those areas of mass products liability litigation in which both the characteristics of bifurcation are especially desirable and the litigants' interests in the traditional "whole story" jury trial might be justly outweighed by other considerations.