
Bifurcation, Shmifurcation: How Much Should We Give 'Em?

By Laurie R. Kuslansky, Ph.D.

Juries Want the Whole Story

It feels incomplete to come into the middle of a movie. When jurors are confronted with bifurcation (of liability and damages), they often disregard what is an unnatural and artificial separation between cause and effect and seek to experience the whole “movie.” To feel comfortable about their decisions, they attempt to fill in the blanks from the missing phase by speculating. If they do not get the full picture, whether about cause (liability) or effect (damages), they seek to complete the picture themselves rather than look at only half alone to inform the merit (liability) or impact (damages) of their decision.

On the other hand, in unbifurcated cases, despite instructions to consider only liability, and to consider damages only IF and WHEN liability is found, the most common and least expected question to start deliberations is: “How much should we give them?”

Liability and Damages-Bargaining Chips

For jurors, just as cause and effect are fluid concepts, liability and damages are causally linked. Jury research has shown not only that jurors go back and forth in using one while arguing the other, but that liability and damages are used as bargaining chips by disputing jury camps in deliberations. For example, when plaintiff jurors insist on liability, defense jurors often rebuke damages, saying, “but I won’t give them a dime.” To overcome this, plaintiff jurors often bargain, saying, “Well, if you agree to say that the defense did something wrong, we can consider giving less.” Or they forestall defense jurors, saying, “Let’s cross that bridge when we come to it. We aren’t talking about the money. When we do that, you can state your opinion about it then.”

When to Discuss Alternative Damages?

The conventional wisdom is that with a strong liability

KROLL ONTRACK®

TRIAL GRAPHIX.

defense, it may be better not to argue alternative damages because jurors perceive it as an offer that serves as a confession of blame, shows a lack of confidence in one's case, is a betrayal to staunch defense jurors, and is confusing because it contradicts the liability defenses.

With a weaker liability case, one cannot afford not to offer alternative damages. When the amounts are indecent, one cannot afford the risk of failing to offer a more reasonable basis to mitigate the damages.

You Take the High Road; I'll Take the Low Road

In general, the most common way jurors decide damages is by a compromise verdict, i.e., computing the average of all individual jurors' desired award amounts and dividing by the number of jurors to find the mean. Typically, outlying high-awards raise the average more than conservative awards suppress it. This occurs when jurors cannot fathom a way to change their own or others' minds. The paradox is that, while they are stuck or stubborn about their individual position, they are not terribly committed to a specific result, since they are willing to derive a higher or lower number through what they perceive to be a fair process that accounts for the group's differences rather than fight to the end to achieve their desired amount. Average-taking also occurs when jurors disagree about, or lack, an objective criterion or formula that makes sense, instead pitching each one's ad hoc logic to determine a number that feels right to them.

Wild Cards

It is not uncommon for plaintiff-oriented jurors to feel and express greater passion, vehemence and dogma than defense jurors. In deliberations of bifurcated cases, defense jurors are at an even greater disadvantage when they are less well armed to refute plaintiff jurors with the facts about what happened. This leaves more room for plaintiff jurors to weave and invent drama where it may not have existed in the liability phase.

Exceptions to the Rule

Once liability is found, jurors are more inclined to follow the actual evidence on damages if provided with formulas they can use by themselves with little or no subjectivity (e.g., number of years until retirement x \$ salary = future lost wages; number of infringing units sold x% in reasonable royalties, etc.). The fewer subjective decisions in the formula, the more chance jurors will use it. An important way to present such evidence to jurors is visually, through the type of graphics that create a template that they can reuse in the jury room.

Connecting the Dots

When faced with bifurcation, trial counsel should consider what information jurors won't be told, what jurors might assume or fabricate on their own to create a whole story, and ways to fill in the gaps for them instead of assuming the jury will feel complete with only half the story. Mock jury research before trial can assist counsel in identifying the gaps and what is optimal to tell, even when you are only permitted to tell them half the story.

© 2004

Additional Reading

Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary? Greene, E., et al., *Law and Human Behavior*, Vol. 24, No. 2, 2000.

Chin, A. & Peterson, M. (1985). Deep pockets, empty pockets: Who wins in Cook County? *Santa Monica: Rand Corporation*.

Hans, V. & Ermann, D. (1989). Responses to corporate versus individual wrongdoing. *Law and Human Behavior*, 13, 151-166.

Horowitz, I. & Bordens, K. (1990). An experimental investigation of procedural issues in complex tort trials. *Law and Human Behavior*, 14, 269-285.

Landsman, S., et al. (1998). Be careful what you wish for: The paradoxical effects of bifurcating claims for punitive damages. *Wisconsin Law Review*, 1998, 297-342.

MacCoun, R. (1996). Differential treatment of corporate defendants by juries: An examination of the "deep-pockets" hypothesis. *Law and Society Review*, 30, 121-161.

Vidmar, N. (1993). Empirical evidence on the deep pockets hypothesis: Jury awards for pain and suffering in medical malpractice cases. *Duke Law Journal*, 43, 217-266.