
The Impact of Bifurcation On Jury Damages Awards

By Dorothy K. Kagehiro, Ph.D.

One suggested tort reform has been the bifurcation of the liability phase from the damages phase of a trial. This suggested reform is based on the assumption that bifurcation would segregate the evidence that is relevant to the consideration of liability issues from that which is relevant to the consideration of damages, and thereby reduce the undue influence of especially provocative and irrelevant evidence. It has been assumed for many years that the bifurcation of liability from damages evidence would be favorable to defendants, especially in tort cases.

Rule 42(b) of the Federal Rules of Civil Procedure permits trial proceedings to be separated by the trial judge: (1) for reasons of convenience; (2) when conducive to expedition or economy; or (3) to avoid prejudice. Examples of substances involved in complex tort litigation in which bifurcation has been considered are: the Agent Orange defoliant widely used during the Vietnam conflict and its alleged causal role in health problems among veterans exposed to it; Bendectin, a morning sickness drug, and its alleged causal role in birth defects; the Dalkon Shield intrauterine birth control device also alleged to cause birth defects; and diethylstilbesterol (DES), synthetic estrogen once prescribed for the prevention of miscarriages, and its alleged causal role in ectopic pregnancies among the daughters of women who had taken it.

This article presents the findings of laboratory experiments from the field of psychology that have investigated the effects of bifurcation on juror decision-making. Two sorts of bifurcation are examined: liability from damages, and punitive damages from compensatory damages. The findings from these studies suggest that bifurcation may have less impact – and an impact not always favorable to defendants – on jury awards than has been touted by tort reformers.

An experimental approach to the study of legal issues has been criticized on grounds of limited ability to generalize actual litigation. But an “artificial” laboratory experiment can sometimes be superior to a “real” trial. Certain questions can only be answered under controlled circumstances unconstrained by reality. In actuality, attorneys could never try a dispute as a unified case, observe the outcome, and then try the same dispute as a bifurcated case and observe that outcome in order to study the effect of bifurcation (and only of bifurcation) on jury verdict and damages awards. The experimental method permits the study of the effect of bifurcation distinct from the camouflaging effect of other trial factors. Until such time as “real life” tests of bifurcation can be devised and carried out, experimental investigations are a better substitute than armchair speculation.

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TRIAL GRAPHIX.

Bifurcation of Damages From Liability

A group of social scientists conducted a research study that was primarily concerned with the effect of jury instructions, but which also included a comparison of a unified trial versus a bifurcated trial. See Wissler, "The Impact of Jury Instructions on the Fusion of Liability and Compensatory Damages," 25 *Law & Human Behavior* 125-39 (2001). The research subjects were 499 university students, and the hypothetical was an automobile negligence case. The research design was a 2x4 between-subjects factorial; i.e., two levels of defendant responsibility (low versus high) were crossed with four levels (or versions) of jury instructions. In the control version, the surrogate jurors were presented with the case facts, instructions on liability, and the definitions of the elements of damages. Two other versions varied the type of jury instructions provided. In the fourth version, surrogate jurors were presented with the case facts and liability instructions. They then judged the defendant's liability. Next, they were presented with evidence of the plaintiff's injuries and the requested amount of compensatory damages, instructions on the elements of damages, and then they awarded compensatory damages.

Bifurcation of the mock trial did not reduce awards for general damages or for medical expenses. Awards for lost earnings were higher in the bifurcated trial than in the unified trial. There were no differences in jurors' perceptions of the defendant's carelessness, in their proportion of fault assigned to the defendant, or in the likelihood that the defendant would be found liable. Surrogate jurors in the bifurcated trial were less confident about their liability decisions than were jurors in the unified condition.

Bifurcation of Punitives From Compensatories

Another research study investigated the effect of bifurcation of punitive damages decisions from compensatory damages decisions. See Greene, "Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?," 24 *Law & Human Behavior* 187-205 (2000). The research subjects were 559 jury-eligible university students. The research design was a 2x2x2 between-subjects factorial. Two levels of defendant wealth (low versus high) were crossed with two levels of defendant conduct (less versus more reprehensible), and two levels of trial structure (unified versus bifurcated). All of the surrogate jurors were presented with the same manipulated variation of three different case summaries. The first of these was a product liability action, and was based on the facts of *Herman v. Sunshine Chemical Specialties, Inc.*, 133 N.J. 329, 627 A.2d 1081 (1993). The second was an automobile negligence

matter, based on the facts of *Holben v. Midwest Emery Freight System, Inc.*, 525 F.Supp. 1224 (W.D. Pa. 1981). The third, a medical malpractice case, was based on the facts of *West v. Vari-Care, Inc.*, CV91-617 (Baldwin County, Alabama Circuit Court 1993). The case summaries ranged in length from 1,100 to 1,400 words.

The surrogate jurors in the Greene study were informed that the defendant in each case had been found liable for negligence; their task was to determine damages. In the unified trials, the surrogate jurors were presented with all of the evidence and instructions on awarding of compensatory and punitive damages before making their award decisions. In the bifurcated trials, the surrogate jurors were presented with the case evidence, including information about the plaintiff's injuries, and instructions about awarding compensatory damages before they awarded compensatory damages.

Then they were presented with evidence about the defendant's wealth and conduct and instructions about awarding punitive damages before they awarded punitive damages.

The surrogate jurors did not use evidence of defendant conduct or defendant wealth in determining their compensatory damages awards, and trial structure had no effect on this non-use. Punitive damage awards were higher in the bifurcated versions of all three cases than in the unified versions. The researchers speculated that bifurcation increased the salience of evidence regarding defendant wealth and conduct by its separation from the previously presented case information. Since the research design did not include defendant-mitigating evidence, the saliency explanation could not be tested with defense-favorable information.

A 1990 study offered an assessment of bifurcation at various phases of trial. See Horowitz & Bordens, "An Experimental Investigation of Procedural Issues in Complex Tort Trials," 14 *Law & Human Behavior* 269-85 (1990). The research subjects were 768 paid volunteers from the jury pools of two Ohio state court venues. The subjects comprised eight six-person juries per experimental condition (a total of 128 juries). The research design involved two levels of trial structure (unified or bifurcated), two levels of order of evidence presentation (liability first or causation first), and four levels of adjudicated decisions. The stimulus case, presented in a four-hour audiotape, was mass toxic tort litigation based on *Wilhoite v. Olin Corp.*, CV 83-5021 (N.D.Ala. 1985).

The juries in the unified trials heard evidence for all four trial issues (causation, liability, compensatory damages,

and punitive damages) before they rendered their decisions. The juries in the bifurcated trials heard evidence bifurcated at various points: liability evidence only before rendering their verdict; liability evidence, verdict, then causation evidence, verdict; liability and causation evidence, verdicts, then compensatory damages evidence, award decision; liability evidence, causation evidence, compensatory damages evidence, verdict and award decisions, and then punitive damages evidence, award decision.

Most of the unified-trial mock juries decided in favor of the plaintiffs; a majority of the bifurcated-trial juries decided in favor of the defendant. However, those bifurcated-trial jurors that found for the plaintiffs awarded higher damages, especially compensatory damages. In the Horowitz & Bordens study, bifurcated-trial juries were not informed that, if they awarded compensation, they would then be asked to consider the possibility of punitive damages. The unified-trial jurors were aware of the possibility of awarding both types of damages.

The authors in the Horowitz & Bordens study interpreted their findings as follows. Unified-trial jurors had greater opportunity for evidence from one issue to intrude upon their decision making on another issue, including pro-plaintiff damages evidence. A greater proportion of the evidence heard by the bifurcated-trial jurors contained testimony less favorable to the plaintiffs than in the unified trials. However, those few juries in the bifurcated trials that overcame this hurdle and decided in favor of the plaintiffs despite their relatively weaker case then went on to award higher compensatory damages than their counterparts in the unified trials.

Based on jury research in actual bifurcated toxic tort and product liability cases, the current author confirms the Horowitz & Bordens findings in part and rejects them in part. General causation is often a weaker issue for corporate clients than is specific causation. For example, plaintiff-oriented jurors tend to be more fearful of the health effects of environmental contamination and the potential side effects of drugs than are defense-oriented jurors. Compared to defense-oriented jurors, plaintiff-oriented jurors are less trusting of medical or scientific experts and their assurances of no harm. Hence, plaintiff-oriented jurors are very willing to give the benefit of the general causation doubt to the plaintiffs – if a chemical or drug cannot be proven to be safe, they then conclude that it could cause the type of illness suffered by the plaintiffs. And for plaintiff-oriented jurors, it is an easy leap of logic from “could cause” to “did cause.”

On the other hand, evidence of specific causation or

exposure often favors the corporate defendants in environmental or toxic tort litigation. Defense-oriented jurors tended to take a narrower view of the evidence than did plaintiff-oriented jurors; defense-oriented jurors remained focused on whether the chemical or product caused harm to the plaintiffs. While plaintiff-oriented jurors were willing to assign liability based on general causation and some proof of negligence or misbehavior on the part of the defendant, defense jurors demanded proof of specific causation. Evidence of alternative causes or plaintiff negligence came into play, the weaker the plaintiff’s general causation case and the less egregious the corporate defendant’s behavior.

Bifurcation could be beneficial to corporate defendants as a way of reducing the impact of provocative evidence and giving the defendant an opportunity to focus the jury on the issues that are strongest for the defendant, especially specific causation. However, if it appears likely that the jury will find in favor of the plaintiff on the issues of causation and liability, the value of bifurcation is lost, and indeed, as the previous studies suggested, bifurcation may hurt the defendant. Bifurcation is a two-edged sword. Defendants run the risk of higher damages if jurors overcome the hurdle of pro-defense specific causation/ exposure evidence and find for the plaintiffs.

Implications for Jury Research

As noted above, actual tort litigation does not permit the controlled, laboratory research approach afforded to researchers such as Horowitz & Bordens in their trial simulation. As a close approximation, corporate defendants should consider a variation of a mock summary trial, known to jury research firms as a trial structure comparison with risk analysis. This research design permits trial attorneys and their clients to explore the impact of bifurcation on verdict preferences and damage awards. In this expanded version of the standard mock trial, jurors recruited from the trial venue hear summary presentations of the case by the attorneys. Half of the jurors are exposed to the unified trial before deliberations. In one variation, the other half of the jurors are exposed to causation/liability evidence before their first round of deliberations; if a pro-plaintiff verdict results, they are exposed to damages evidence before a second round of deliberations. In a second variation, the other half of jurors can be instructed to assume that the defendant has been found liable, to permit the attorneys to focus on their damages theories, before the jurors begin deliberations.

Whichever design variation is selected, in-depth statistical analyses are conducted on the individual questionnaire information provided by the jurors. A risk analysis

can be calculated for the sum-total of compensatory damages across all categories and punitive damages for jurors, or separately by category of damages. The results provide a direct comparison of trial structure effects on verdicts and damage awards; i.e., the data provide answers to the following questions. Does bifurcation reduce the likelihood of a pro-plaintiff verdict in this specific case? If so, does the reduction justify attorney efforts to move for bifurcation? Does bifurcation increase damage awards if a pro-plaintiff verdict results? If so, does the risk of an increase in overall damage awards outweigh the liability advantage, if any, afforded by bifurcation?

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