
Reverse Bifurcation: Litigating Damages Before Liability?

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To slice and dice in litigation, Federal Rule of Civil Procedure 42(b) permits a trial court, “in furtherance of convenience or to avoid prejudice,” to order a separate trial of “any claim” or “separate issue.” It is under Rule 42(b) that bifurcated trials occur, in which the causality and liability phases are typically separated from the damages phase of the trial. A trial may be further divided with a trial on causation, followed by a trial on liability, and then a trial on damages. Bifurcation has been a frequent device in environmental disputes, the most famous instance being a trial on causation involving groundwater contamination in *A Civil Action*. *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986).

But Rule 42(b) also permits “reverse” bifurcation, where first causation or damages are tried, followed by a separate trial on liability, if one is ever held. Called a “drastic” technique by one court, an “extraordinary” technique by another, and a “subject of serious dispute” by yet another, reverse bifurcation is by no means a standard case management approach. But in asbestos litigation, reverse bifurcation is used regularly with considerable success. See Drury Stevenson, *Reverse Bifurcation*. 75 U. CIN. L. REV. 213 (2006). Considering its success in asbestos cases, should reverse bifurcation be used more in environmental and toxic tort cases?

According to common wisdom, defendants embrace bifurcation so they can divorce themselves from a plaintiff’s injuries during the first phase and then focus solely on their actions and causation in a less emotional later phase. Some believe defendants seek bifurcation of liability and damages to avoid the risk of a sympathetic verdict. Others view bifurcation as a technique to foster a “sterile trial atmosphere” to dampen the jury process. Because of the artificial separation of issues and claims, as the theory goes, a jury is less likely to understand the entire context of the case. By comparison, some believe reverse bifurcation ensures a compensatory damage award that actually compensates plaintiffs for their injuries and does not artificially inflate to punish the defendant in response to inflammatory liability evidence. Under this view, reverse bifurcation promotes efficiency the most because a plaintiff with no injury or a clear alternative never gets to the liability phase. According to one survey of judges, bifurcation speeds up the trial process, expedites settlements, reduces transaction costs, and improves the fairness of outcomes. *Issues in Civil Procedure: Judges’ Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half of Their Time on General Civil Cases*. 69 B.U.L. REV. 731, 745 (1989).

When considering bifurcation, the first legal issue one must address is whether it implicates the Seventh Amendment, which provides for a jury trial in disputes involving more than \$20. Reviewing this issue, Judge Weinstein notes it was common practice for the common-law courts in England to

sever issues for trial, as was it common for courts in the United States prior to the adoption of the Federal Rules of Civil Procedure. *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 2001 U.S. Dist. LEXIS 1114 (E.D.N.Y. 2001). For Judge Weinstein, the Seventh Amendment is not violated where the bifurcated issue is adaptable to a separate trial without creating confusion and uncertainty amounting to a denial of a fair trial.

The day-to-day use of reverse bifurcation first emerged during the flood of asbestos-related litigation, as courts began looking for ways to minimize the time, expense, and burden on the court’s docket imposed by the skyrocketing number of suits. In a typical asbestos case, the first phase examines whether the plaintiff has a disease caused by asbestos and what damages the plaintiff suffered as a result. The second phase focuses on what warnings the defendant should have given and whether the products that caused the plaintiff’s injuries were the defendant’s. Although there may be some overlap of witnesses between the first and second phases, the same witnesses may testify in both phases of the trial; however, the issues and those witnesses’ testimony are often different. Most courts have upheld the use of reverse bifurcation in asbestos cases. See e.g., *Angelo v. Armstrong World Indust.*, 11 F.3d 957, 965 (10th Cir. 1993).

Outside the asbestos context, reverse bifurcation has been used in a wide range of cases, although the total number of cases employing reverse bifurcation still remains relatively small. Reverse bifurcation has been used in cases involving the Educational Improvement Plan, oil field royalties, Federal Employer’s Liability Act, worker’s compensation, and diet drug liability.

But to date, only a handful of reported decisions involve reverse bifurcation in environmental cases. The West Virginia Supreme Court addressed reverse bifurcation in two related decisions involving chemical exposure. At issue in the first of these cases, *State ex rel. Crafton v. Burnside*, was a “case management plan” adopting reverse bifurcation on damages and causation. 207 W. Va. 74, 528 S.E.2d 768 (2000). After switching counsel, the petitioner sought reversal of the case management plan. When the lower court denied the motion, the plaintiffs filed a petition for writ of mandamus, seeking to prevent the plan. The court granted the writ, based on the consent by the plaintiffs, and remanded the issue to the lower court for de novo review of whether the plan of reverse bifurcation should be used. In conducting its de novo review on remand, the *Crafton* court strongly cautioned the court to carefully weigh the benefits and detriments of reverse bifurcation. Taking up the issue on remand, the lower court adopted reverse bifurcation and also consolidated several trials.

In *State ex rel. Atkins v. Burnside*, 212 W. Va. 74, 569 S.E.2d 150 (2002), the West Virginia Supreme Court again condemned the use of reverse bifurcation in all but the narrowest set of circumstances. A chemical exposure case, *Burnside* involved a challenge to a discovery management plan, which consolidated nine cases with an additional fourteen filed much later. The discovery management plan also provided that discovery would be conducted under a reverse bifurcation plan, which meant that discovery would be allowed only on damages, and then later on liability.

In *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1244 (Utah 1998), the Utah Supreme Court considered the propriety of reverse bifurcation in a leaking underground storage tank (UST) case, where the key issue was “stigma” damages. In addition to challenging the trial court’s granting of summary judgment on statute of limitations grounds, the plaintiffs also challenged the trial court’s granting of reverse bifurcation. The Walkers contended that the reverse bifurcation order prejudiced their rights. The Utah Supreme Court agreed, noting that “[r]egardless of convenience, however, an order to bifurcate trial ‘is an abuse of discretion if it is unfair or prejudicial to a party’ or if ‘the issues are [not] clearly separable.’” According to the court, in this case, which involved the migration of petroleum contamination and claims based on trespass and nuisance, the issue of damages was not separable from the issue of defendants’ liability under the trespass and nuisance claim. For the court, the issue of damages presented to the jury during the first phase of the trial was not separable from the issue of the defendants’ liability under trespass and nuisance claims asserted as to avoid unfairness.

Considering bifurcation generally, the *Walker Drug* court noted that it can “seriously interfere with the proper” adjudication of closely related issues. With respect to the trespass and nuisance claims, the court noted that because the issues of damages and liability were not clearly separable, bifurcation of the trial “inescapably resulted in jury confusion that prejudiced plaintiffs and undermined the fairness of the trial.” Having made this conclusion, the court noted “[t]he trial court’s discretion under rule 42(b) to improve the efficiency or convenience of trial must always yield to its more fundamental duty to ensure that trial be fair and impartial.”

The overarching question for trial courts and appellate courts is whether reverse bifurcation is pro-defendant or pro-plaintiff. According to one court handling an asbestos case, defendants favor reverse bifurcation where actual damages and individual causation are tried before liability. Another court disagreed, finding that even if damages are fixed, plaintiffs still want to proceed to trial. Still another court believed reverse bifurcation disadvantaged plaintiffs. *Dunn v. Owens-Corning Fiberglass*, 774 F. Supp. 929, 938 (D.V.I. 1991).

As for whom it actually benefits, bifurcation may favor the plaintiff or defendant, depending on the number of jurors initially in favor of imposing liability. See Meiring de Villiers, *A Legal and Policy Analysis of Bifurcated Litigation*, 2000 COLUM. BUS. L. REV. 153, 188 (2000). If the liability evidence is relatively weak and convincing only to a minority of jurors, bifurcation would favor defendants. Theoretically at least, unitary trial of the same case would find the defendant liable and give the plaintiff at least a compromise award. If the evidence were convincing to a majority of jurors, bifurcation would favor

plaintiffs. Villiers concludes that a plaintiff is usually better off under bifurcation if evidence of liability is relatively strong but that a unitary trial is preferable if the converse is true.

The only known empirical studies on the impacts of reverse bifurcation are by economists. In analyzing almost all asbestos trials during 1987 to 2001, reverse bifurcation affected trial outcomes significantly. See Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365 (2006). When trials were reverse bifurcated, according to White, a plaintiff’s probability of winning rose by 29 percent. According to White, reverse bifurcation was more effective than bifurcation because deciding damages resolves more uncertainty than deciding liability. But if a defendant proceeds to a trial in reverse bifurcation on damages, White concludes the reverse-bifurcated trials will tend to have higher damage awards. It is for this reason that a reverse-bifurcated trial has a better chance of causing the parties to settle after the first stage than a straight bifurcated trial. According to Professor White, reverse bifurcation benefitted plaintiffs more than defendants, at least in asbestos cases, a result contrary to common wisdom in the literature.

As for other benefits, Landes concludes that reverse bifurcation actually saves more money than ordinary bifurcation. William M. Landes, *Sequential Versus Unitary Trials: An Economic Analysis*, 22 J. LEGAL STUD. 99 (1993). According to Landes, litigating damages may be dispositive because once damages are known a party may choose to drop the lawsuit or settle rather than litigate liability. But at the same time, with the expected cost savings, reverse bifurcation may lead to more suits and a lower settlement rate overall.

According to Senior Judge Jack Weinstein, a civil procedure star, reverse bifurcation “is useful where the parties have excellent information about the likelihood of success on the issue of liability and the real sticking points are the individual issues of causation and damages.” See *Simon v. Philip Morris Inc. et al.*, 200 F.R.D. 21, 37 (E.D.N.Y. 2001). That description fits a wide range of environmental and toxic tort cases. Under CERCLA contribution suits, for example, proportionate share is often the key legal issue, far less so than liability. Just as a *Lone Pine* order may force causation to the head of the case, and just as a *Daubert* motion may highlight concerns over causation, it may be time to focus on reverse bifurcation as a new tool in case management. Given the right set of facts, the right legal issues, and the right judge, reverse bifurcation could become a valuable tool in handling large toxic tort and contamination cases. But given the wrong application, reverse bifurcation could unfairly reallocate the burdens of proof in a civil trial.

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