University of Arkansas at Little Rock Law Review

Volume 5 | Issue 3 Article 4

1982

Civil Procedure—Rule 42(b)—Bifurcation of the Issues of Liability and Damages at Trial

Margaret Gammill

NOTES

CIVIL PROCEDURE—RULE 42(b)—BIFURCATION OF THE ISSUES OF LIABILITY AND DAMAGES AT TRIAL. *Hunter v. McDaniel Brothers Construction Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981).

Michael Crosno was killed and Pattie Jean Crosno injured when their pickup truck collided with a mobile home in tow behind a tractor-truck operated by an employee of McDaniel Brothers Construction Company. Pattie Jean Crosno was a passenger in the pickup truck. A personal injury action was filed on behalf of Pattie Jean Crosno, a minor, by her mother, Patty Crosno Hunter. Richard Alan Crosno joined a wrongful death claim for the estate of Michael Crosno in this action.

The trial court, on its own motion, and over the objections of the plaintiffs, ordered a bifurcated trial on the issues of liability and damages, with the issue of liability to be tried first. The trial court relied upon rule 42(b)[1] of the Arkansas Rules of Civil Procedure for its authority to order the bifurcation. The jury returned a verdict of no liability and thus did not reach the issue of damages.

The plaintiffs, on appeal, contended that the bifurcation of the issues of liability and damages deprived them of the right to a jury trial, as guaranteed by the Arkansas Constitution[2] and rule 38 of the Arkansas Rules of Civil Procedure.[3] They argued in the alternative that if rule 42(b) did permit such a bifurcation, the trial court abused its discretion by applying the rule to plaintiffs' case.

After noting that the bifurcation procedure in question presented an issue of first impression, the Arkansas Supreme Court

---

1. ARK. R. CIV. P. 42(b) provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues.

2. ARK. CONST. art. II, § 7, provides in pertinent part: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law . . . ."

3. ARK. R. CIV. P. 38 provides in part: "Any party may demand a trial by jury of any issue triable of right by a jury . . . ."

affirmed the lower court on both points. *Hunter v. McDaniel Brothers Construction Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981).

Bifurcation of the issues of liability and damages did not exist at common law.[4] Specific statutory authority for the severance procedure first appeared in rule 42(b) of the Federal Rules of Civil Procedure, adopted in 1938.[5] It apparently was drafted as a response to the liberal joinder rules of the Federal Rules of Civil Procedure.[6] Rule 42(b) was amended in 1966 to provide as follows:

> The court in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, or issues, always preserving inviolate 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.[7]

Prior to being used as authority for the bifurcation of liability and damages in a personal injury action, rule 42(b) was used in a variety of other contexts well suited for severance. For example, separate trials have been ordered in cases involving issues such as

---

4. C. CLARK, HANDBOOK OF LAW OF THE CODE PLEADINGS § 73, at 472 (2d ed. 1947). *Cf.* Mayers, *The Severance for Trial of Liability from Damage*, 86 U. PA. L. REV. 389, 396 (1938) (while Mayers acknowledges a lack of case law supporting the right to bifurcate at common law, he proposes that an inherent right to bifurcate existed at common law, but was simply unexercised).

5. FED. R. CIV. P. 42(b) provides: "The court, in furtherance of convenience or to avoid prejudice . . . may order 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."

6. *See* Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83 (2d Cir. 1939); Note, *Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure*, 39 MINN. L. REV. 743 (1955).

FED. R. CIV. P. 18(a) provides: "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party." In effect, this allows unlimited joinder of claims in order to expedite a determination of the issues and to avoid delay and inconvenience. Confusion, however, sometimes results from combining certain issues or claims. Rule 42(b) was drafted to prevent this. *See* Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83, 85 (2d Cir. 1939).

7. The 1938 version of Rule 42(b) was amended by authorizing a separate trial "when separate trials will be conducive to expedition and economy," and by adding the provision that begins with the words "always preserving." The purpose of the amendment was to unify admiralty procedure and civil procedure. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2388, at 280 (1971).

patent[8] and copyright[9] litigation; threshold issues such as jurisdiction[10] and venue;[11] and affirmative defenses such as statute of limitations,[12] laches,[13] and validity of a release.[14] Thus it seems that use of the device is a newcomer only in the area of personal injury actions.

The federal courts have advanced many reasons for the adoption of the severance concept. One such reason is to allow a simplified presentation of factual questions in complex cases. This rationale was relied upon in one of the earliest cases involving separation of issues in a personal injury action, *Rickenbacher Transportation, Inc. v. Pennsylvania Railroad*.[15] In *Rickenbacher*, the plaintiff's truck, containing the shipments of thirty-five consignors, was hit by the defendant's train. Since the damages question would have required detailed evidence from thirty-five out-of-state sources, the court found it more practical to first determine the defendant's lia-

8. *See, e.g.*, Woburn Degreasing Co. v. Spencer Kellogg & Sons, 37 F. Supp. 311 (W.D.N.Y. 1941). In defense of a patent infringement suit, the defendant asserted multiple defenses, the least complicated of which was an asserted invalid patent. Upon the defendant's motion, a separate trial was granted on the issue of validity. The trial court's separation of this issue was upheld on appeal on the basis of convenience and a potential time savings.

9. *See, e.g.*, Eisman v. Samuel Goldwyn, Inc., 30 F. Supp. 436 (S.D.N.Y. 1939). The court remanded for trial only one of a number of issues, expressly finding under rule 42(b) that this course was necessary and proper in order to further convenience and avoid delay.

10. *See, e.g.*, Glaspell v. Davis, 2 F.R.D. 301 (D. Or. 1942). In a suit in which diversity of citizenship was necessary to establish jurisdiction, the court held that the existence of diversity was a threshold issue which deserved an early and separate determination under rule 42(b).

11. *See, e.g.*, Clark v. Lowden, 48 F. Supp. 261 (D. Minn. 1942), *appeal dismissed*, 135 F.2d 740 (8th Cir. 1943). In a FELA action brought in Minnesota, the defendant asserted that the plaintiff was contractually bound to assert his claim in Illinois. The court apparently utilized rule 42(b) and ordered a separate trial of this venue issue.

12. *See, e.g.*, Seaboard Terminals Corp. v. Standard Oil Co., 30 F. Supp. 671 (S.D.N.Y. 1939). The defendants asserted a statute of limitations defense to a suit for injury to business resulting from an alleged conspiracy of the defendants in violation of certain anti-trust laws. Because this issue was potentially dispositive of the case, the court granted plaintiffs' request for a separate trial, citing rule 42(b).

13. *See, e.g.*, Greenspon v. Parke, Davis & Co., 8 F.R.D. 485 (S.D.N.Y. 1948). The defendant moved for a separate trial on its defense of laches. The court held that while such was authorized by rule 42(b), the motion was untimely filed and would not result in a savings of time because the proof necessary to resolve this issue was the same as that necessary to resolve issues raised by the plaintiff's complaint.

14. *See, e.g.*, Bedser v. Horton Motor Lines, Inc., 122 F.2d 406 (4th Cir. 1941). In this personal injury action, the defendant asserted a prior release executed by the plaintiff as a bar to the plaintiff's claim. The court, citing rule 42(b), granted the defendant's motion for a separate trial on this issue over the plaintiff's objection and found that no prejudice resulted to the plaintiff because of the separate trial.

15. 3 F.R.D. 202 (S.D.N.Y. 1942).

bility.[16] One of the more often cited cases, *In re Texas City Disaster Litigation*,[17] used this same reasoning to justify bifurcation. This case involved 273 suits by 8,485 plaintiffs seeking damages totalling approximately $200,000,000. In order to avoid making a complex case even more complicated, the court severed the issue of liability.[18]

The federal courts have also used the severance device to alleviate delay of trials and congestion of court calendars.[19] In *O'Donnell v. Watson Brothers Transportation Co.*,[20] Judge Miner, an outspoken advocate of bifurcation,[21] stated:

> Delay causes hardship. Delay brings our courts into disrepute. Delay results in deterioration of evidence through loss of witnesses, forgetful memories and death of parties and makes it less likely that justice will be done when a case is reached for trial. Delay effects settlements favorable to defendants because it

---

16. *Id.* at 203.

17. 197 F.2d 771 (5th Cir. 1952).

18. *Id.* at 772. *See also* Bvocik v. Firestone Tire & Rubber Co., 277 F. Supp. 210 (E.D. Wis. 1967), which involved complex liability and damages issues, several third-party defendants, and, originally, 70 prospective witnesses. In granting the defendant's motion for a separate trial on the issue of damages, the court stated, "The complexity of both the liability and the damage issues warrants . . . the use of the separate trial device . . . . [S]eparate trials will be conducive to expedition and economy." *Id.* at 211.

19. *See, e.g.*, Mosley v. General Motors Corp., 497 F.2d 1329 (8th Cir. 1974); Hosie v. Chicago & N.W. Ry., 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); Zenith Radio Corp. v. Radio Corp. of Am., 106 F. Supp. 561 (D. Del. 1952).

20. 183 F. Supp. 577 (N.D. Ill. 1960). In this personal injury action, the court, on its own motion, ordered a separate trial on the issue of liability. Following a jury verdict for the plaintiff, the damages issue was continued by agreement of the parties so that the parties could exhaust any settlement possibilities. The court approved this procedure since it eliminated the need for a second trial.

21. Miner, *Court Congestion: A New Approach*, 45 A.B.A. J. 1265 (1959). Judge Miner authored N.D. ILL. CIV. R. 21, which provides:

> Pursuant to and in furtherance of Rule 42(b) Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counter-claim or third-party claim.
>
> In the event liability is sustained, the Court may recess for pretrial or settlement conference or proceed with the trial on any or all of the remaining issues before the Court, before the same jury or before another jury as conditions may require and the Court shall deem met.
>
> The Court, however, may proceed to trial upon all or any combination of issues if, in its discretion, and in furtherance of justice, it shall appear that a separate trial will work a hardship upon any of the parties or will result in a protracted or costly litigation.

> slowly wears a claimant down and compels him to accept less money as time goes on. This is a serious evil.[22]

In a slightly different context, separation has also been invoked in instances in which it would save substantial time and expense in litigation.[23] The convenience of the parties rather than the convenience of the court appears to be the motivating factor.[24] In connection with this proposition, an authoritative study was conducted for the sole purpose of determining the amount of time actually saved by separation of the issues.[25] The research revealed that the procedure would save approximately twenty per cent of the time necessary to try the cases in the traditional manner.[26]

Finally, split trials have been ordered to avoid prejudice to one of the parties and to provide a just disposition of the case.[27] In *Moss v. Associated Transport, Inc.*,[28] the court recognized that the "paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience of witnesses must yield thereto."[29]

Bifurcation, however, is not appropriate in every case. One of the primary reasons is that the bifurcation procedure may result in a

---

22. 183 F. Supp. at 581. *See also* Kisteneff v. Tiernan, 514 F.2d 896 (1st Cir. 1975). It became apparent that there would be a delay between the end of both parties' evidence on liability and the jury's consideration of the issue because the plaintiff's medical expert would be temporarily unavailable to testify. The court was concerned that such delay would impair the jury's deliberations and thus ordered separate trials.

23. *See, e.g.*, Rossano v. Blue Plate Foods, Inc., 314 F.2d 174 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963); Molinaro v. Watkins-Johnson CEI Div., 60 F.R.D. 410 (D. Md. 1973); LoCicero v. Humble Oil & Ref. Co., 52 F.R.D. 28 (E.D. La. 1971).

24. *E.g.*, Rossano v. Blue Plate Foods, Inc., 314 F.2d 174, 176 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963). The court was presented with an automobile negligence action which, if determined in favor of the defendant, would "eliminate expense for all concerned . . . ." Severance was ordered and upheld. *See also* LoCicero v. Humble Oil & Ref. Co., 52 F.R.D. 28, 30-31 (E.D. La. 1971). The court in *LoCicero* held that separation of issues "promises convenience, potential economy, clearer jury understanding of the issues, less embracive closing arguments, a shorter jury charge at each stage of the trial."

25. Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

26. *Id.* at 1624.

27. *See, e.g.*, Reading Indus. v. Kennecott Copper Corp., 61 F.R.D. 662 (S.D.N.Y. 1974); Lusk v. Pennzoil United, Inc., 56 F.R.D. 645 (N.D. Miss. 1972); Baker v. Waterman S.S. Corp., 11 F.R.D. 440 (S.D.N.Y. 1951).

28. 344 F.2d 23 (6th Cir. 1965).

29. *Id.* at 26 (citing Baker v. Waterman S.S. Corp., 11 F.R.D. 440 (S.D.N.Y. 1951)). *See also* Nettles v. General Accident Fire and Life Assurance Corp., 234 F.2d 243, 247 (5th Cir. 1956) (holding that the trial court, in trying the issue of liability separately from the issue of damages, exercised proper discretion furthering convenience so long as no prejudice was shown); Rossano v. Blue Plate Foods, Inc., 314 F.2d 174, 176 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963).

lawsuit being tried piecemeal.[30] Severance is also not appropriate in a case in which the issues are so interwoven that a separate trial would cause injustice.[31] Moreover, separation is denied when the evidence is overlapping in order to avoid a duplication of witnesses' testimony.[32]

A number of articles have been written in general opposition to bifurcation.[33] A common argument is that bifurcation substantially changes the nature of the jury trial itself.[34] The federal courts, however, do not appear to have been influenced by this line of thought. In *Hosie v. Chicago & Northwestern Railway*,[35] the plaintiff argued that separation of the issues of liability and damages violated his

---

30. *E.g.*, Eichinger v. Fireman's Fund Ins. Co., 20 F.R.D. 204 (D. Neb. 1957). This was an action by a grain elevator owner as plaintiff and by the owner of the stored grain as plaintiff-intervenor, against the contractor who constructed the elevator and the insurors of the elevator and its contents, for damages due to an explosion. The court refused to try first the issue of liability, because separate trials would result in a duplication of evidence and would hamper a just disposition of the case. The court stated:

> [I]t may well be recognized that within the thought of the Rules as a whole, and as a procedural charter, there is an impalpable suggestion that, in default of controlling considerations to the contrary, a single submission of all the issues in a civil action should be favored rather than their resolution in piecemeal trials.

Id. at 207. *See also* Zenith Radio Corp. v. Radio Corp. of Am., 106 F. Supp. 561 (D. Del. 1952). (Under rule 42(b), "[i]ssues should not be tried piecemeal unless necessary to prevent undue delay or to promote the interests of justice").

31. United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961). The lower court's decision to separate liability from damages was reversed because the two issues were so interwoven. The plaintiffs were seeking exemplary damages which as a matter of law, depended upon the degree of the defendant's liability. Neither could be submitted to the jury independently without causing confusion and uncertainty. *See also* Franchi Construction Co. v. Combined Ins. Co. of Am., 580 F.2d 1 (1st Cir. 1978). (An issue should not be tried separately unless it is clearly so distinct and separable from other issues that a separate trial will not cause an injustice). *See also* Hosie v. Chicago & N.W. Ry., 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961). (Question about injury had important bearing on question of liability).

32. Lusk v. Pennzoil United, Inc., 56 F.R.D. 645 (N.D. Miss 1972).

33. *See, e.g.*, Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831 (1961); 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 (1961); Note, *Federal Rules of Civil Procedure—Severability of Issues—Do Separate Trials of Issues of Liability and Damages Violate the Seventh Amendment*, 36 NOTRE DAME LAW. 388 (1961); Note, *Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure*, 39 MINN. L. REV. 743, 760-61 (1955).

34. *See, e.g.*, 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2390, at 299 (1971); Comment, *Implications of Bifurcation in the Ordinary Negligence Case*, 26 U. PITT. L. REV. 99, 105-10 (1964); Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 832-35 (1961).

35. 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

fundamental right to a trial by jury.[36] In response to the plaintiff's constitutional argument, the appellate court stated that "[t]he Seventh Amendment does not require the retention of all the old forms of procedure; nor does it prohibit the introduction of new methods for ascertaining what facts are in issue."[37]

Another controversial issue is whether rule 42(b) contemplates the use of the *same* jury for both trials, or whether a different jury may be used for each trial.[38] If severance of liability and damages requires the use of two juries, a substantial amount of the time saved by separation might be consumed in impaneling juries. Moreover, this again raises doubts concerning the seventh amendment right to a trial by jury.[39] Although the United States Supreme Court has not ruled directly on this question, the United States Court of Appeals for the Seventh Circuit has addressed the problem. In *O'Donnell v. Watson Brothers Transportation Co.*,[40] the court expressed the view that although the "better and preferred practice is to submit the damage issue to the same jury which has decided the liability issue,"[41] separate juries may be used if the procedure "does not work a hardship upon any of the litigants, does not result in unwarranted protracted litigation, and does not unduly increase the costs of suit."[42]

The propriety of bifurcation in any given case is within the trial

36. *Id.* at 642. U.S. CONST. amend. VII provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

37. 282 F.2d at 643. The court cited Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931), in which the Supreme Court in effect sanctioned the bifurcation of issues when it remanded a case for trial on the issue of damages only. This necessarily required determination of liability by one jury and fixation of damages by another jury.

38. *E.g.*, United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961); O'Donnell v. Watson Bros. Transp., 183 F. Supp. 577 (N.D. Ill. 1960).

39. *E.g.*, Hosie v. Chicago & N.W. Ry., 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); Alabama v. Blue Bird Body Co., 71 F.R.D. 606 (M.D. Ala. 1976).

40. 183 F. Supp. 577 (N.D. Ill. 1960).

41. *Id.* at 580. *See generally* Hosie v. Chicago & N.W. Ry., 282 F.2d 639, 643 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961) (The court discussed this proposition but did not pass on it.).

42. O'Donnell v. Watson Bros. Transp., 183 F. Supp. 577, 581 (N.D. Ill. 1960); *see also* Driver v. Phillips, 36 F.R.D. 261 (E.D. Pa. 1964) (Separate trials of the issues of liability and damages before the same or different juries may be ordered in an appropriate case because it will save the time of the court and will facilitate the possibility of settlement after the liability trial. Ordinarily, the damage issue should be tried to the same jury that decided the liability issue.); United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961) (when issues of liability and damages are interwoven, separate juries should not be ordered).

court's sound discretion.[43] It does not necessarily depend upon the wishes of the parties, since the courts occasionally order a separate trial over the objection of both parties.[44] The courts, however, have consistently held that the judge should exercise *informed* discretion and should not make a "wholesale" application of the bifurcation procedure.[45] Furthermore, the Advisory Committee on Civil Rules did not intend indiscriminate utilization but rather cautioned that bifurcation "is not to be routinely ordered," but to "be encouraged where experience has demonstrated its worth."[46] Perhaps the best discussion of why discretion must be exercised is found in *Lis v. Robert Packer Hospital*:[47]

> [T]he rule in this circuit since 1972 has been that the decision to bifurcate *vel non* is a matter to be decided on a case-by-case basis and must be subject to an informed discretion by the trial judge in each instance . . . . A general policy of a district judge bifurcating all negligence cases offends the philosophy that a decision must be made by a trial judge only as a result of an informed exercise of discretion on the merits of each case.[48]

The importance of the manner in which the court exercises its discretion lies in the rule that, absent an abuse of discretion, a trial court's judgment will not be overturned on appeal.[49]

The application by the states of a rule the same as or similar to federal rule 42(b) has received varied treatment. Many jurisdictions have followed the federal lead and adopted the bifurcation procedure by rule or statute.[50] Of these jurisdictions, a number have de-

---

43. *E.g.*, Moss v. Associated Transp., Inc., 344 F.2d 23 (6th Cir. 1965). (Under rule 42(b) the ordering of separate trials on the issues of liability and damages is within the sound discretion of the trial judge.) *See also* Mosley v. General Motors Corp., 497 F.2d 1330, 1332 (8th Cir. 1974) ("Rule 42(b) vest[s] in the district court the discretion to order separate trials or make such other orders as will prevent delay or prejudice."); Idzojtic v. Pennsylvania R.R., 456 F.2d 1228, 1230 (3rd Cir. 1972) ("The district court is given broad discretion in reaching its decision whether to separate the issues of liability and damages.").

44. *E.g.*, Hosie v. Chicago & N.W. Ry., 282 F.2d 639, 642 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

45. *See, e.g.*, Moss v. Associated Transp., Inc., 344 F.2d 23, 26 (6th Cir. 1965); Frasier v. Twentieth Century-Fox Film Corp., 119 F. Supp. 495, 497 (D. Neb. 1954); Molinaro v. Watkins-Johnson CEI Div., 60 F.R.D. 410, 413 (D. Md. 1973).

46. Advisory Committee Note to the 1966 Amendment of Rule 42(b), 39 F.R.D. 113.

47. 579 F.2d 819 (3d Cir.), *cert. denied*, 439 U.S. 955 (1978).

48. *Id.* at 824. *See also* Note, *Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure*, 39 MINN. L. REV. 743, 760-61 (1955).

49. *E.g.*, Nettles v. General Accident Fire and Life Assurance Corp., 234 F.2d 243 (5th Cir. 1956).

50. ALA. R. CIV. P. 42(b); ALASKA R. CT. 42(b); ARIZ. R. CIV. P. 42(b); CAL. CIV. PRO. CODE § 598 (West 1976 & Supp. 1982) (specifically provides for split trial on liability); CAL.

termined bifurcation proper in a manner consistent with federal precedent.[51] Several of the jurisdictions, however, have taken a more conservative approach to use of the procedure than that taken by the federal courts,[52] and at least one state has completely refused to utilize rule 42(b) in its rules of civil procedure.[53] Many states have apparently not had an occasion to apply the rule in this regard.[54] A few states simply have no statute or case law authorizing bifurcation.[55] Finally, two states' statutes so clearly provide for split trials that no case law exists on this issue.[56]

CIV. PRO. CODE § 1048(b) (West 1980); COLO. R. CIV. P. 42(b); DEL. SUPER. CT. CIV. R. 42(b); FLA. R. CIV. P. 1.270(b); GA. CODE ANN. § 81A-142(b) (1977); IDAHO R. CIV. P. 42(b); KAN. CIV. PRO. STAT. CODE ANN. § 60-242(b) (1976); KY. R. CIV. P. 42.02; ME. R. CIV. P. 42(b); MD. R. P. § 501(a); MASS. R. CIV. P. 42(b); MICH. GEN. CT. R. 505.2; MINN. R. CIV. P. 42.02; MO. ANN. STAT. § 510.180(2) (Vernon 1952); MONT. R. CIV. P. 42(b); NEV. R. CIV. P. 42(b); N.J. RUL. 4:38.2 (specifically provides for split trial); N.M. R. CIV. P. FOR DIST. CT. 42(b); N.Y. CIV. PRAC. LAW § 603 (McKinney 1976); N.C. R. CIV. P. 42(b); N.D. R. CIV. P. 42(b); OHIO R. CIV. P. 42(b); OKLA. STAT. ANN. TIT. XII § 323 (West Supp. 1981); OR. R. CIV. P. 53(b); PA. R. CIV. P. 213(b); R.I. R. CIV. P. 42.02; S.D. COMP. LAWS ANN. § 15-6-42(b) (1967 & Supp. 1981); TENN. R. CIV. P. 42(b) (only when non-jury); TEX. R. CIV. P. 174(b); UTAH R. CIV. P. 42(b); VT. R. CIV. P. 42(b); VA. CODE § 8.01-281(b) (1977 & Supp. 1982) (only on motion of party); WASH. CT. R. 42(b); W. VA. R. CIV. P. 42(c); WYO. R. CIV. P. 42(b).

51. Coburn v. American Liberty Ins. Co., 341 So. 2d 717 (Ala. 1977); Woods v. Harker, 22 Ariz. App. 83, 523 P.2d 1320 (1974); Watts v. Mantooth, 196 So. 2d 230 (Fla. Dist. Ct. App. 1967); Cline v. Kehs, 148 Ga. App. 350, 246 S.E.2d 329 (1978); Tilley v. International Harvester Co., 208 Kan. 75, 490 P.2d 392 (1971); Heiserman v. Baltimore & A.R.R., 15 Md. App. 657, 292 A.2d 140 (1972); State *ex rel.* Blond v. Stubbs, 485 S.W.2d 152 (Mo. Ct. App. 1972); Culley v. City of N.Y., 25 A.D.2d 519, 267 N.Y.S.2d 282 (1966); Vander Veer v. Toyota Motor Distribs., 282 Or. 135, 577 P.2d 1343 (1978); Brown v. General Motors Corp., 67 Wash. 2d 278, 407 P.2d 461 (1965).

52. Randolph v. Scott, 338 A.2d 135 (Del. Super Ct. 1975) (Rule 42(b) does not envision routine separation of liability and damages); Arnold v. Dirrim, 198 N.E.2d 426 (Ind. Ct. App. 1979) (The court found the policy of the law is to limit the number of trials when possible and thus denied bifurcation); Peasley v. Quinn, 373 Mich. 222, 128 N.W.2d 515 (1964) (The mere expectation of saving time does not justify bifurcation); Heidbreder v. Northhampton Township Trustees, 64 Ohio App. 2d 95, 411 N.E.2d 825 (1979) (The trial court did not abuse its discretion in refusing to order bifurcation, even though testimony concerning injuries may have influenced the jury); Fields v. Volkswagon of Am., 555 P.2d 48 (Okla. 1976) (Bifurcation was approved when both parties agreed to it).

53. Eubanks v. Winn, 420 S.W.2d 698 (Tex. 1967); Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648 (1956).

54. These states include Alaska, Colorado, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, West Virginia, and Wyoming.

55. These states are Connecticut, Hawaii, Louisiana, Mississippi, Nebraska, New Hampshire, South Carolina, Wisconsin, and Illinois. Illinois presents an interesting contrast, in that the United States District Court for the Northern District of Illinois has adopted a bifurcation rule that almost requires a separate trial for liability. See *supra* text accompanying note 20.

56. CAL. CIV. PRO. CODE, § 598 (West 1976 & Supp. 1982); N.J. RULE 4:38-2.

In *Hunter v. McDaniel Brothers Construction Co.*,[57] the Arkansas Supreme Court relied heavily on federal precedent in reaching its decision. The court rejected the appellants' arguments that bifurcation constituted an infringement upon the right to a jury trial.[58] The court noted that rule 42(b) of the Arkansas Rules of Civil Procedure was virtually identical to rule 42(b) of the Federal Rules of Civil Procedure and adopted the federal application of rule 42(b).[59]

The court found little merit in the appellants' argument that the facts presented interwoven issues of liability and damages. The appellants argued that since they were required to prove the existence of damages in order to establish liability, they should have been allowed to prove the existence of damages through the introduction of photographs of the vehicles involved in the accident and through testimony concerning the position of Michael and Patty Crosno after impact.[60] The court further found that liability in the case was not dependent on the nature of the damages suffered, but rather was totally unrelated to the damages.[61]

Of greater significance was the court's rejection of the appellants' final argument, which was an alleged abuse of discretion by the trial court in its application of rule 42(b).[62] The court stated that even a vehicular collision case is appropriate for a bifurcated trial, provided that the bifurcation furthers convenience, avoids delay and prejudice, and serves the needs of justice.[63] According to the court, the primary concern of rule 42(b) should be efficient judicial administration, not the wishes of the parties, provided no prejudice is suffered.[64] The court tempered this rule with the requirement that rule 42(b) be applied on a case-by-case basis through the exercise of informed discretion,[65] and further stated that routine bifurcation would likely constitute an abuse of discretion.[66]

Hunter elicited a vigorous dissent from Justice Purtle, joined by

57. 274 Ark. 178, 623 S.W.2d 196 (1981).

58. *Id.* (citing Hosie v. Chicago and N.W. Ry., 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961) and C. WRIGHT, LAW OF THE FEDERAL COURTS § 97, at 433-34 (2d ed. 1970)).

59. 274 Ark. at 180, 623 S.W.2d at 198.

60. *Id.*

61. *Id.* (citing Hosie v. Chicago & N.W. Ry., 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961)).

62. *Id.* at 181, 623 S.W.2d at 199.

63. *Id.* at 181, 623 S.W.2d at 198.

64. *Id.*

65. *Id.* (citing Lis v. Robert Packer Hosp., 579 F.2d 819 (3d Cir.), *cert. denied*, 439 U.S. 955 (1978).

66. *Id.* at 181, 623 S.W.2d at 199.

Chief Justice Adkisson and Justice Hays.[67] The dissenters stated that this bifurcation denied the appellants their right to a jury trial and, further, that the bifurcation of different issues in a single trial was not authorized by rule 42(b).[68] The dissent was particularly concerned with the fact that the jury never considered the damages of the plaintiffs. Allowing the jury to decide liability first, reasoned the dissent, encouraged a finding for the defendant in order to save the necessity of a second trial on the issue of damages.[69] The dissenters were also troubled by the trial court's initiation of the bifurcation procedure, stating that bifurcation should occur only with the consent of the parties.[70]

The time for serious argument against bifurcation of liability and damages in Arkansas is past. With the decision in *Hunter* bifurcation is now firmly entrenched in Arkansas civil procedure.

Unfortunately, *Hunter* leaves a number of unanswered questions. For instance, the court clearly indicated that the trial court should exercise "informed discretion" in the application of rule 42(b),[71] citing *Lis v. Robert Packer Hospital*.[72] Yet from a precedential standpoint, the court's reasoning in *Hunter* does not provide the necessary essentials of such "informed discretion." The question whether the trial court abused its discretion was clearly presented[73] but not clearly answered. While the court did state in general terms the purpose of rule 42(b), it did not state that the bifurcation in *Hunter* was necessary to avoid prejudice,[74] to save time and expense

67. *Id.* at 183, 623 S.W.2d at 200 (Purtle, J. dissenting).

68. *Id.*

69. *Id.* at 184, 623 S.W.2d at 200.

70. *Id.*

71. *Id.* at 181, 623 S.W.2d at 198.

72. 579 F.2d 819 (3d Cir.), *cert. denied*, 439 U.S. 955 (1978). See *supra* text accompanying note 47.

73. 274 Ark. at 181, 623 S.W.2d at 198. The question of informed discretion has been presented in other jurisdictions and has been answered in a more informative and precedential manner. For instance, in Randolph v. Scott, 338 A.2d 135 (Del. Super Ct. 1975), the court declined to grant the defendant's motion for separate trials on the issues of liability and damages. However, the court enumerated situations in which bifurcation would be proper, thus providing future guidelines. In Brown v. General Motors Corp., 67 Wash. 2d 278, 407 P.2d 461 (1965), the trial court's severance was permitted to stand. The appellate court clearly set forth its rationale in upholding bifurcation. *See also* Coburn v. American Liberty Ins. Co., 341 So. 2d 717 (Ala. 1977); Peasley v. Quinn, 373 Mich. 222, 128 N.W.2d 515 (1964); Vander Veer v. Toyota Motor Distribs., 282 Or. 135, 577 P.2d 1343 (1978).

74. *E.g.*, Moss v. Associated Transp., Inc., 344 F.2d 23, 26 (6th Cir. 1965).

in litigation,[75] to provide for the convenience of the parties,[76] witnesses,[77] or trial court,[78] or to simplify the presentation of issues in a complex case.[79] In a round-about way the court stated that routine bifurcation would constitute an abuse of discretion.[80] Perplexingly, the court did not indicate why the trial court's bifurcation was anything other than routine.[81]

Equally troublesome is the fact that the trial court was permitted to order a bifurcation on its own motion.[82] As pointed out in the dissent, there is nothing in rule 42(b) that explicitly allows the trial court to take upon itself the decision of whether the issue of liability should be tried separately.[83] In a judicial system based on two-party advocacy, it would seem best to leave the initiation of bifurcation to the parties.

The court was not faced with the issue of whether the same jury would have to try both the issue of liability and the issue of damages. No doubt at some point it will be given the opportunity to pass upon this facet of bifurcation.

Hunter will undoubtedly catch the eye of many personal injury attorneys in Arkansas. The decision ushers in a new era in personal injury litigation. Gone is the potential to shore up weak liability cases with sympathy-invoking injuries. Tradition has been sacrificed in the interest of judicial economy.

Margaret Mayfield Gammill

75. *E.g.*, Rossano v. Blue Plate Foods, Inc., 314 F.2d 174, 176 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963); Fields v. Volkswagon of Am., 555 P.2d 48, 54 (Okla. 1976).

76. *E.g.*, LoCicero v. Humble Oil & Ref. Co., 52 F.R.D. 28, 30 (E.D. La. 1971); Watts v. Mantooth, 196 So. 2d 230, 232 (Fla. Dist. Ct. App. 1967).

77. *E.g.*, Watts v. Mantooth, 196 So. 2d 230, 232 (Fla. Dist. Ct. App. 1967).

78. *E.g.*, O'Donnell v. Watson Bros. Transp., 183 F. Supp. 577, 581 (N.D. Ill. 1960); Brown v. General Motors Corp., 67 Wash. 2d 278, 407 P.2d 461, 464 (1965).

79. *E.g.*, *In re* Texas City Disaster Litigation, 197 F.2d 771, 772 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15 (1953); Richenbacher Transp., Inc. v. Pennsylvania R.R., 3 F.R.D. 202, 203 (S.D.N.Y. 1942); Coburn v. American Liberty Ins. Co., 341 So. 2d 717, 718 (Ala. 1977).

80. 274 Ark. at 181, 623 S.W.2d at 199.

81. *Id.*

82. At least two other jurisdictions appear to have permitted severance on the court's own motion. Cline v. Kehs, 146 Ga. App. 350, 246 S.E.2d 329 (1978); Watts v. Mantooth, 196 So. 2d 230 (Fla. Dist. Ct. App. 1967). *But cf.* Fields v. Volkswagon of Am., 555 P.2d 48 (Okla. 1976) (in which bifurcation was permitted upon agreement of both parties).

83. 274 Ark. at 184, 623 S.W.2d at 200.