Trial Law TIPS

Roy D. Wasson's
TIP #15

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Bifurcation of Trial Issues of Liability and Damages "To B . . . or Not to B . . ." *Revisited*

Introduction

"Bifurcation," as our readers know all-too-well, is the process of having separate trials of two sets of issues in a lawsuit. In the typical personal injury case, the issues most commonly bifurcated are liability and compensatory damages. In capital murder trials where the jury must make findings relevant to sentencing, courts bifurcate the guilt phase from the penalty phase. In domestic relations cases, courts sometimes bifurcate the less complex issue of dissolving a marriage from the more difficult issues of child custody and support, alimony and property distribution. Commercial matters can involve the bifurcation of legal issues, such as liability on a contract, from equitable issues, such as injunctive remedies.

Wasson & Associates, Chartered
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com

The trial courts of Florida are given the broad discretionary authority to bifurcate trials under Fla. R. Civ. P. 1.270(b). Occasionally a plaintiff's attorney will agree to bifurcate a personal injury case in order to avoid the time and expense of bringing-in distant damages experts in a case where liability may or may not be proven. In very serious cases where the consequences of the defendant's actions are clear—such as the death of the absent father or the paralysis of your wheelchair-bound client—you may agree to bifurcation, or at least not object too strenuously when the issues of liability and damages are severed for separate trials.

But more often the defense seeks bifurcation to hide from the jury the facts concerning the consequences of the defendant's negligence during the liability phase. Some trial court judges have adopted a policy of Aalways" bifurcating personal injury cases, with the stated purpose of shortening trials; one Miami judge for years claimed that she Anever" had to try a damages case because the jury either found no liability, or the damages issue settled after a finding of liability. One can only wonder how many of those Ano liability" verdicts would have been different if the jury had heard the whole story in the first place.

When faced with a defendant's Motion to Bifurcate, the trial lawyer has an uphill battle to keep the case together. The defense was given even more ammunition in the form of a pro-bifurcation article written by former Miami-Dade Circuit Judge David Tobin, called "*To B. . . or Not to B. . . ." Means Bifurcation,* 74 Fla. Bar. J. 14 (Nov. 2000). Using similar logic as that of his colleague on the bench in Miami, mentioned above, Judge Tobin in his article stated that only a single bifurcated case during a three-year span of time ever went to trial on damages. This TIP revisits some of the conclusions reached by Judge Tobin and provides the trial attorney with the best authorities to persuade your judge to deny bifurcation.

General Statements of Law Regarding Bifurcation

There are numerous cases which make it clear that a trial court's ruling concerning bifurcation is subject to a very deferential abuse of discretion standard of review. *See, e.g. Roseman v. Town Square Ass'n., Inc.,* 810 So. 2d 516 (Fla. 4th DCA 2001). Those who are moving for bifurcation frequently cite cases like

Microclimate Sales Co. v. Doherty, 731 So. 2d 856, 858 (Fla. 5th DCA 1999), which states that Abifurcation is generally proper absent a specific threat of inconsistent verdicts or prejudice to a party." A more recent case affirms denial of bifurcation where the facts and issues were intertwined and overlapping. *Valliappan v. Cruz*, 917 So. 2d 257 (Fla. 4th DCA 2005).

Further, there is some excellent general language indicating that bifurcation should not routinely be granted. For example, in *Weasel v. Weasel,* 419 So. 2d 698, 699 (Fla. 4th DCA 1982), the court acknowledged the trial court's discretionary power to bifurcate, but held that "such procedure should be employed with caution and will be the exception rather than the rule." In *Williams v. Williams,* 659 So. 2d 1306, 1307 (Fla. 4th DCA 1995), the court held that "only under exceptional circumstances should a trial court exercise its discretion to bifurcate." In cases involving attempts to bifurcate claims against some of the parties from other claims, the courts have held that "where the facts and issues underlying the claims are intertwined, the trial court should conduct a single trial." *Bethany Evangelical Church v. Calandra*, 994 So. 2d 478, 479 (Fla. 3d DCA 2008)

Judge Tobin in his article dispatched some of the foregoing authorities as meaningless in the personal injury context, because those cases involved dissolution of marriage proceedings. While there are somewhat different considerations involved in domestic relations cases from those involved in personal injury cases, the foregoing authorities are not expressly limited to divorce cases, so the litigant who is attempting to defeat bifurcation may find them useful as general statements of law. Domestic relation cases and personal injury cases share one common and important reason why bifurcation should not be routinely granted: "Splitting the process can cause multiple legal and procedural problems which ***result in delay and additional expense*** to the litigants." *See Claughton v. Claughton,* 393 So. 2d 1061, 1062 (Fla. 1980)(emphasis added).

The authors of Rule 1.270 did not share the modern-day belief that bifurcation should be the rule, rather than the exception. The Authors' Comments to the Rule, written more than thirty-five years ago are instructive: "Generally, ***justice requires that an action should not be handled piecemeal when it reasonably can***

be avoided, and it should be administered with the least expense and vexation to the parties." (emphasis added). Thus, there is ample authority to support a trial court's decision to deny bifurcation, even before reaching the facts of a particular case. The next section addresses specific fact situations in which bifurcation may be especially inappropriate.

Bifurcation Improper Where Damages Evidence Relevant on Liability

In a personal injury case where evidence concerning the nature or extent of the Plaintiff's damages may be relevant to the liability issue, the trial court should deny a contested motion to bifurcate to permit the jury to fully and fairly consider the liability issue. One such case is *Scandinavian World Cruises (Bahamas) Ltd. v. Barone,* 573 So. 2d 1036 (Fla. 3d DCA 1991). In *Barone,* the trial court bifurcated the case and excluded evidence that the plaintiff had suffered an organic brain injury as a result of a slip and fall accident aboard a ship. Following a verdict in favor of the defendant, the trial court granted the plaintiff's motion for new trial, which was affirmed on appeal by the Third DCA.

The court in the *Barone* case held that the evidence of the plaintiff's injuries "was necessary to explain certain confusing and inconsistent testimony of the plaintff, including a glaring inconsistency as to where the plaintiff had slipped and fallen on the defendant's cruise ship." 573 So. 2d at 1037. Absent evidence of the plaintiff's injuries, the jury's determination on the liability issue was tainted in *Barone.*

In cases in which the defendant denies causation and there is a need to relate the plainitff's particular injuries to the mechanism of the accident, a trial court should not bifurcate the case because evidence regarding the two issues is necessarily intertwined. For example, in *Hardee Mfg. Co. v. Josey,* 535 So. 2d 655, 656 (Fla. 3d DCA 1988), the court affirmed the denial of the defendant's motion to bifurcate in a rear-end collision case, holding that, because "factors concerning the cause and nature of the injuries would, unavoidably, have been adduced at a separate trial on liability," the denial of bifurcation was correct.

In any lawsuit in which issues involved in two or more aspects of the case are intertwined, with a resulting overlap in evidence and argument concerning those issues, the court should take a long and hard look at bifurcation and deny such a motion where the result would be to cause an unnecessary duplication in effort by the parties. *See generally, e.g., Maris Dist. Co. v. Anheuser-Busch, Inc.,* 710 So. 2d 1022 (Fla. 5th DCA 1998).

In a more balanced article concerning the subject, the author (our esteemed List Mate, Dan Cytryn) addresses the issue of bifurcating personal injury cases where liability and damages are interrelated, as follows:

> For instance, medical testimony regarding the injury suffered by the plaintiff has to be elicited in order for the jury to determine the issues of the comparative negligence of the plaintiff who did not wear a seat belt or a shoulder harness. The seat belt issue necessitates both liability and damages testimony because medical testimony is required to determine the extent of comparative negligence of the plaintiff. Therefore, bifurcation of such a case would never be appropriate.
>
> . . . Even if liability is admitted by the defendant in a personal injury trial, testimony and evidence as to the extent of the impact is relevant to prove or disprove damages. Further, speed and force of impact testimony may also be relevant for the jury to consider in the damages phase in determining whether a particular collision could cause the injury claimed. In an auto collision case, it may be necessary to present testimony of police officers, witnesses to the accident, accident reconstructionists and biomechanical engineers in both the liability and damage aspects of a bifurcated personal injury trial, because that testimony may be relevant to both liability and damages. The potential need to call the same witnesses in both aspects of the trial mitigates against bifurcation because there may not be a cost,

WASSON & ASSOCIATES, CHARTERED
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com

> or time-savings if the same witnesses have to be called in both phases of the trial.

Dan Cytryn, *Bifurcation in Personal Injury Cases: Should Judges be Allowed to Use the "B" Word?,* 26 Nova L. R. 249, 256 (2001)(Emphasis added and footnotes deleted). Dan's article contains many other useful thoughts and arguments against bifurcation.

Appellate guru Barbara Green has often litigated the bifurcation issue, and has made the point that the manner in which an accident happened is almost always relevant to the issue of damages because of the psychological impact which a gruesome collision or other injury-producing event may have upon the plaintiff. Barbara has convinced judges not to bifurcate citing cases including *White v. Westlund,* 624 So. 2d 1148 (Fla. 4th DCA 1993), in which the defendant admitted liability but the Plaintiff introduced evidence of the bizarre nature of the accident and other liability issues on the question of her psychological damages. While bifurcation is not involved in the *White* case (it was a case involving admitted liability in which the defense argued to exclude evidence of how the accident happened during the damages phase), the cases involving admissions of liability should be applicable by analogy.

Other Considerations/Policy Arguments

Those advocating bifurcation frequently argue that it should be taken as a given that there will be substantial savings of time and expense by courts and litigants if cases are tried only on liability first. However, that assertion should not be automatically accepted without some analysis. One of the most time-consuming aspects of a trial is voir dire and jury selection.

Although attorneys do not frequently see the administrative effort involved, the court systems in Florida spend a great deal of time summoning jurors and bringing them to the courthouses to be assembled into panels and sent to courtrooms for jury selection. The time and effort required of courts and litigants to find and select jurors in liability-only cases will not be appreciably less than that involved in picking juries for cases involving both liability and damages. And even if some or most cases which are bifurcated

never result in trials on damages, those which do require second trials will necessarily result in a doubling of the time, trouble and expense of locating and empaneling jurors. In these times of political turmoil about finding sources of funding for the court system, judges who are considering motions to bifurcate should consider the impact of bifurcating, which will necessitate two juries in some cases, as well as the first jury in all the same cases which otherwise would be tried.

Other public policy reasons which support the proposition that bifurcation should rarely be granted includes the observation and Dan Cytryn's article that bifurcation calls into question the accuracy of verdicts where jurors are not given the whole story because "bifurcation obscures the magnitude of the case itself and the significance of the jury's decision." 26 Nova L. Rev. at 255.

Bifurcation in Punitive Damages Cases

A form of bifurcation is required in punitive damages cases, pursuant to the authority of *W.R. Grace & Co. v. Waters,* 638 So. 2d 502 (Fla. 1994). However, that procedure does not require bifurcation of the liability issues from the issues of compensatory damages, even where those liability issues include conduct on the part of the defendant which is in the nature of reckless or intentional misconduct sufficient to support an award of punitive damages.

Defendants are frequently using the bifurcation requirement applicable to punitive damages cases in an effort to conceal from the jury their intentional misconduct which gives rise to claims for both compensatory and punitive damages. One defense approach is to admit liability and seek a trial only on the issue of compensatory damages first, followed by trials on the issues of entitlement and amount of punitive damages, but so far the appellate courts have not fallen for that tactic. *See, e.g., Dessanti v. Contreras,* 695 So. 2d 845 (Fla. 4th DCA 1997).

There is no requirement under the *W.R. Grace v. Waters* procedure that the trial court "trifurcate" a case involving punitive damages, preventing evidence on the defendant's liability for punies until after the compensatory damage award. *See, e.g., Saint Paul v. Coucher,* 837 So. 2d 483 ("Bifurcating in this manner will ***always result in a jury*** being questioned about, and ***hearing***

evidence of, alleged willful and wanton conduct ***in the same phase of the trial*** in which the jury is required to assess compensatory damages"). Therefore, the only issue which needs to be tried separately in a punitive damage case is the amount issue, primarily involving the financial wherewithal of the defendant.

Even though there may also be some additional evidence of the egregiousness of the defendant's misconduct in the last phase of a punitive damages trial, the defense cannot use *W.R. Grace v. Waters* to keep from the jury all the evidence of its misconduct until after the compensatory damage phase.

Conclusion

There are several sources of Florida law which hold that bifurcation should be the exception, rather than the rule. There are more reasons for denying bifurcation than for granting it in the typical personal injury case. Bifurcation often operates to deceive the jury, and will not be as economical as its proponents promise, due to the need for a first jury in every case which is tried and a second jury in some cases which would not otherwise be necessary. Don't let the defense win this one without a fight.

Keep Tryin!

Roy