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Legislative Expansion of Judicial Bifurcation: North Carolina’s Double-Edge Sword

KIP NELSON

While the portrait of a trial has traditionally been painted as a single proceeding that determines all of the relevant issues, bifurcated proceedings are those in which some issues or claims are separated. Federal and state courts generally have the authority to bifurcate proceedings in their discretion. The North Carolina General Assembly, however, recently passed a law that limits a judge’s discretion and institutes a presumption in favor of bifurcation. This statute is the first of its kind in the country and is a significant change in trial procedure. Other states are already considering similar legislative reforms. The issue rekindles important policy questions including the role of legislatures in governing judicial proceedings and the leveraging power of corporate defendants. This Article discusses the implications of such legislative reform and concludes that more research is necessary to determine the value of bifurcation. Using North Carolina state and federal cases as an example, as well as a discussion of the practical and policy consequences of bifurcated proceedings, the Article argues that bifurcation decisions should be placed within the trial court’s discretion rather than with the legislature.

I. INTRODUCTION

The process is inherently so absurd, so at variance with the procedure followed in investigations in every other department of life, that only our lifelong inurement to it makes it possible for us to accept it without question.1

Professor Lewis Mayers, the author of the above quotation, was not talking about obtaining a judicial clerkship or deciding which law school to attend. Professor Mayers was talking about the practice of trying the issues of liability and damages simultaneously, in one judicial proceeding. The traditional concept of a trial, at least in the civil context, consists of one proceeding in which the jury determines whether the defendant is liable and, if so, the amount of money to which the plaintiff is entitled. However, the modern trend is moving away from a unitary proceeding and instead moving toward dividing a trial into two components, a procedure referred to as bifurcation. More generally, something is bifurcated when it is “[f]orked or divided into two parts or branches, as the . . . tongues of snakes.” It is that procedure for which Professor Mayers was advocating in the context of civil jury trials.

While historically the civil trial did consist of one proceeding, recent decades have seen an increasing trend in bifurcation. In bifurcated proceedings, judges separate out certain issues or claims, purportedly for the purpose of having a more manageable trial. The Federal Rules of Civil Procedure and almost every state permit a trial judge to bifurcate proceedings in his or her discretion. However, state legislatures (largely as a result of influential corporate lobbyists) are seeing increasing requests to enact legislation that allows for more bifurcated proceedings. The North Carolina General Assembly recently expedited this trend by creating a statutory presumption in favor of bifurcation. Under this law, passed as part of a medical liability reform

4. 75 A.M.JUR.2D TRIAL § 83 (2007).
5. Fed. R. Civ. P. 42(b) (“For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.”).
6. Most states have provisions in their rules of civil procedure that model the federal rule, although the actual language varies widely. See, e.g., Ala. R. Civ. P. 42(b) (“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 of any number of claims, cross-claims, counterclaims, third-party claims, or issues . . . .”); 735 ILL. COMP. STAT. 5/2-1006 (2008) (“An action may be severed . . . as an aid to convenience, whenever it can be done without prejudice to a substantial right.”).
7. 75 A.M.JUR.2D TRIAL § 83.
statute, a judge is instructed to separate the issue of liability from the issue of damages unless the opposing party can show good cause for a unitary proceeding.9 This standard is one-of-a-kind in statutory law and actually contradicts much of what other courts and theorists have said regarding the propriety of bifurcation.

The benefit of such a legislative mandate remains to be seen. The intent of this Article is to ask whether such a drastic change was properly researched or will ultimately prove helpful—for judges, plaintiffs, or defendants. A statutory provision in favor of bifurcation seems to accept the argument that “juries are simply incapable, statistically, of following instructions and that the time-tested method of submitting all the evidence to one jury in a personal injury suit should be abandoned.”10 Those calling for legislative reform, including those in the North Carolina General Assembly, have not provided any support for this argument, and other states would do well to analyze whether this argument has merit.

To that end, this Article discusses the role of bifurcation in modern jurisprudence, with North Carolina serving as a self-proclaimed laboratory. Part II presents a brief history of bifurcation, its role in criminal and civil cases, and the new law’s effect on that role. Part III then compares those positions with the presence of bifurcation in federal proceedings. Part IV discusses the effects of a legislative presumption in favor of bifurcation, ranging from evidentiary implications to policy justifications. Finally, Part V provides a proposed standard to apply under such a statutory presumption and provides a standard for other state legislatures considering such a change. In the end, the thesis remains the same: a statutory presumption in favor of bifurcation requires more research and contemplation than has been evidenced thus far.

II. THE DEVELOPMENT OF BIFURCATION: ONE STATE’S EXAMPLE

Bifurcation is not a new concept in criminal or civil jurisprudence, but it is gaining increasing attention in both spheres. Although the practice of bifurcation has been around for centuries, judges have been reluctant to encourage its expansion.11 In North Carolina specifically, bifurcation has slowly been gaining adhesion in both criminal and civil

9. See id.


North Carolina’s new law, however, takes this growth to a whole new level.

A. History of Bifurcation Generally

At common law, it was relatively common to see a two-stage trial for a limited number of specific types of actions. According to Professor Mayers, for example, the claim of account-render was traditionally separated into two portions: first, to determine whether the defendant had an obligation to account for a balance due and, second, to determine the amount that the plaintiff was owed. Even at that time, however, separate trials were not very common for most types of litigation. When Professor Mayers was writing in 1938, he found it “at least arguable that, without any express statutory or other authorization, our courts . . . have the inherent power to sever any issue for separate trial.” Still, even though some jurisdictions (including England and the state of New York) had statutory provisions permitting bifurcation, such a procedure was seldom used.

Thus, bifurcation, in the sense of the term as used in this Article, is essentially a creature of the last eighty years. The earliest reference to the term “bifurcation” in twentieth-century litigation appears in two 1928 dissenting opinions from the Supreme Court of California. However, the option of separating the liability and damages portions of trials began to gain momentum even without the term “bifurcation.” The Supreme Court of the United States eventually started using the

12. See, e.g., Roberts v. Young, 464 S.E.2d 78, 82 (N.C. Ct. App. 1995) (noting the importance of bifurcation and quoting the legislative comment to Rule 42: “the power of severance is an indispensable safety valve to guard against the occasion where a suit of unmanageable size is thrust on the court”).
14. Id.
18. People v. Fook, 273 P. 779, 786 (Cal. 1928) (Preston, J., dissenting); People v. Troche, 273 P. 767, 774 (Cal. 1928) (Preston, J., dissenting).
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term in the 1960s.\textsuperscript{20} The term entered North Carolina jurisprudence shortly thereafter.\textsuperscript{21} Federal courts were given formal authority in 1966 to “order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.”\textsuperscript{22} North Carolina courts were given similar authority the following year.\textsuperscript{23} “The 1970s was marked by the continuing, if slow, growth of bifurcation decisions and the accelerating use of bifurcation within claims . . . .”\textsuperscript{24} Since then, bifurcation has become increasingly common in both criminal and civil cases.\textsuperscript{25}

B. Bifurcation in North Carolina Criminal Cases

Before the 1970s, the normal practice in North Carolina was to establish guilt and a sentence in the same criminal trial.\textsuperscript{26} Defendants’ attempts to seek bifurcation were rebutted.\textsuperscript{27} In \textit{State v. Sanders}, for example, the Supreme Court of North Carolina rejected such an argument.\textsuperscript{28} At that time, North Carolina courts consistently relied on the one-proceeding model espoused in the sentencing statute of the day.\textsuperscript{29} The court also quoted the Supreme Court of the United States, which stated that “[t]wo-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of

\textsuperscript{20}. See Brady v. Maryland, 373 U.S. 83, 90–91 (1963) (noting that the criminal defendant had a bifurcated trial); Hewitt-Robins, Inc. v. E. Freight-Ways, Inc., 371 U.S. 84, 85 n.\textsuperscript{*} (1962) (explaining that the litigation had been bifurcated into two district courts).

\textsuperscript{21}. See State v. Spence, 155 S.E.2d 802, 809 (N.C. 1967) (explaining that the defendant had moved to bifurcate the issue of insanity from his homicide trial), vacated by 392 U.S. 649 (1968).


\textsuperscript{24}. Stephan Landsman et al., \textit{Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages}, 1998 Wis. L. REV. 297, 304.

\textsuperscript{25}. See, e.g., Marshall v. Williams, 574 S.E.2d 1, 4 (N.C. Ct. App. 2002) (affirming the trial court’s decision to bifurcate a civil case, \textit{sua sponte}, “for the purpose of judicial economy, for the ease of understandability and presentation to the jury, and again after lengthy consideration of the best presentation of this matter”).

\textsuperscript{26}. See, e.g., State v. Sanders, 174 S.E.2d 487, 492 (N.C. 1970) (“This Court has consistently upheld the single-verdict procedure established by this statute.”), rev’d \textit{on other grounds}, 403 U.S. 948 (1971).

\textsuperscript{27}. See id. at 493.

\textsuperscript{28}. Id.

\textsuperscript{29}. Id. at 492.
constitutional law, or even as a matter of federal procedure."³⁰ Although
the defendant in Sanders was hopeful that the federal Supreme Court
would change that practice, the state court ruled otherwise: "we do not
think we should anticipate that that Court will declare unconstitutional
a practice approved in many states, including our own, for so many
years."³¹

By statute, however, a criminal trial must now be bifurcated
whenever the State of North Carolina seeks the death penalty.³² This
requirement for bifurcation was added to the state statutes in 1977.³³
Since that time, a jury must first determine whether a defendant in a
death penalty case is guilty and then, if it so finds, determine whether
the defendant should receive a sentence of death or life in prison.³⁴
Until the recent tort reform legislation, this law was the only one in the
State that explicitly encouraged bifurcation.³⁵

In the separate sentencing hearing in capital cases, there is no
requirement to resubmit evidence from the guilt portion of the trial.³⁶
By statute, all previous evidence is permissible for the jury to consider in
determining punishment.³⁷ Furthermore, a court has permission to
receive any evidence deemed to have probative value.³⁸ Thus, a
defendant is not entitled to a different jury in the sentencing
proceeding.³⁹ Instead, the evidence received at the sentencing hearing is
cumulative and added upon the evidence previously received in the guilt
phase.⁴⁰

Bifurcated criminal proceedings are not limited to cases of first-
degree murder, however. In any felony trial, a judge may decide that a
separate sentencing proceeding is necessary.⁴¹ Furthermore, the statute
on habitual felons requires a jury first to determine whether the

³⁰ Id. at 492–93 (quoting Spencer v. Texas, 385 U.S. 554, 568 (1967)).
³¹ Id. at 493.
407.
³⁴ Id.
³⁶ Id. § 15A-2000(a)(3).
³⁷ Id.
³⁸ Id.
³⁹ See, e.g., State v. Taylor, 283 S.E.2d 761, 769 (N.C. 1981) ("Under Article 100 of
Chapter 15A of the General Statutes of North Carolina, it is intended that the same jury
should hear both phases of the trial unless the original jury is unable to reconvene.").
⁴¹ Id. § 15A-1340.16(a1).
defendant committed a felony and second to determine if he is a habitual felon.\footnote{Id. § 14-7.5.} In cases of impaired driving, a jury first determines whether the statute has been violated, and the judge then determines the appropriate sentence.\footnote{Id. § 20-138.1(d); see also United States v. Kendrick, 636 F. Supp. 189, 190 (E.D.N.C. 1986) (describing the “bifurcated procedure”).} Bifurcation between defendants may also be used to protect a defendant from being prejudiced by the introduction of evidence that is only relevant to a co-defendant.\footnote{See, e.g., State v. Tirado, 599 S.E.2d 515, 537 (N.C. 2004) (noting that the trial court bifurcated sentencing proceedings to admit a co-defendant’s statement without prejudicing the other defendant).} Bifurcated trials are permitted in other situations as well, and the decision is generally within the trial court’s discretion.\footnote{See, e.g., State v. Lopez, 681 S.E.2d 271, 272 (N.C. 2009) (discussing a bifurcated trial on charges of second-degree murder and assault with a deadly weapon).}

The Supreme Court of North Carolina recently recognized a “long-standing principle that when a statute is silent on whether to bifurcate, trial judges have the inherent authority and discretion to manage proceedings before them.”\footnote{State v. Ward, 694 S.E.2d 729, 730 (N.C. 2010).} Notably, the court did not cite to any authority for this “long-standing principle.”\footnote{See id.} In State v. Ward, the defendant was convicted of several felonies, including first-degree murder.\footnote{Id. at 730, 735.} After remand from the Supreme Court of North Carolina for a new sentencing proceeding, the defendant sought to bifurcate the determination of mental retardation from the capital sentencing hearing.\footnote{Id. at 735.} The trial court denied his motion, which the Supreme Court of North Carolina affirmed.\footnote{Id. at 730, 735.} Because the statute neither required nor prohibited bifurcation, the decision was within the trial court’s discretion.\footnote{State v. Huff, 381 S.E.2d 635, 678 (N.C. 1989); State v. Helms, 201 S.E.2d 850, 853 (N.C. 1974).} Using the same rationale, the court had previously decided that bifurcation was not required between proceedings to determine insanity and proceedings to determine guilt.\footnote{Ward, 694 S.E.2d at 732.}

The Ward Court did note, however, that “[t]he evidence presented to the jury on these questions may overlap somewhat.”\footnote{Ward, 694 S.E.2d at 732.} At the same
time, the court opined that the evidence would likely be significantly different.\textsuperscript{54} Even though the statute permits a court to consider a wide range of evidence,\textsuperscript{55} the ordinary rules of evidence generally apply in the sentencing proceeding.\textsuperscript{56} The court did not discuss further the evidentiary issues associated with bifurcation.

The purposes of bifurcation in the criminal context have not been always been clear. Apparently, the bifurcated approach is for the defendant’s benefit.\textsuperscript{57} According to the Supreme Court of North Carolina, because “the determination of guilt is entirely divorced from the imposition of punishment,” “the nature of the bifurcated trial itself serves to prevent the issue of probable punishment from bleeding over into the determination of guilt or innocence.”\textsuperscript{58} Alternatively, it has been stated that “[t]he purpose of bifurcating the trial is to avoid prejudice to the defendant and confusion of the jury during the proceeding on the principal offense.”\textsuperscript{59} Even defense attorneys may be confused about the purpose of bifurcation, as one attorney remarked after being asked why a capital proceeding is bifurcated, “God only knows.”\textsuperscript{60}

In a bifurcation setting, the two proceedings are intended to be distinct and separate.\textsuperscript{61} However, an allusion to the second proceeding during the first proceeding is not strictly prohibited. In \textit{State v. Gibbs}, for example, the prosecutor made comments during \textit{voir dire} alluding to the penalty phase that, the defendant argued, implied the penalty phase would be reached.\textsuperscript{62} Rather than finding the comments prejudicial, the Supreme Court of North Carolina found that the prosecutor’s comments “simply refer[red] to the conditional nature of bifurcated capital prosecutions.”\textsuperscript{63} Similarly, prosecutors are permitted to ask potential jurors about their views on the death penalty.\textsuperscript{64} The Supreme Court of

\begin{itemize}
\item \textsuperscript{54} Id.
\item \textsuperscript{55} N.C. GEN. STAT. § 15A-2000(a)(3) (2013).
\item \textsuperscript{56} State v. Cherry, 257 S.E.2d 551, 559 (N.C. 1979) (“The language of this statute does not alter the usual rules of evidence or impair the trial judge’s power to rule on the [admissibility of evidence].”).
\item \textsuperscript{57} See State v. Barfield, 259 S.E.2d 510, 541–42 (N.C. 1979).
\item \textsuperscript{58} Id.
\item \textsuperscript{60} Bell v. Cone, 535 U.S. 685, 707 (2002) (Stevens, J., dissenting).
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id. at 342; see also State v. Prevatte, 570 S.E.2d 440, 467–68 (N.C. 2002) (relying on \textit{Gibbs}).
\item \textsuperscript{64} See State v. Hinson, 311 S.E.2d 256, 260–61 (N.C. 1984).
\end{itemize}
North Carolina has repeatedly rejected the argument that a bifurcated trial in death penalty cases results in a jury that is improperly inclined to find guilt.65 Thus, a trial court’s preliminary comments on the nature of a bifurcated trial does not “precipitate[] a rush to judgment by the jury.”66

Absent a statutory mandate, a defendant is not entitled to bifurcation of the sentencing proceeding.67 The decision to bifurcate any issue, crime, or defendant is left to the trial court’s discretion.68 Except in very narrow circumstances, North Carolina has left that decision to the trial judges who are closest to the proceedings.

North Carolina is, of course, not the only state to bifurcate proceedings in criminal trials.69 The Supreme Court blessed, and actually encouraged, bifurcated proceedings to satisfy the constitutional prohibition against cruel and unusual punishment.70 In theory, the two proceedings are treated as “separate universes, governed by very different rules.”71 But some continue to question the viability of a bifurcated system in which the same jury determines both the conviction and the sentencing.72

For purposes of this Article, four points are important to remember from the criminal context. First, bifurcation makes voir dire trickier. Second, a defendant is ordinarily not entitled to bifurcation. Third, a strict division between the proceedings is not always maintained.

65. Id.
67. See, e.g., State v. Lopez, 681 S.E.2d 271, 272 (N.C. 2009) (discussing a bifurcated trial on charges of second-degree murder and assault with a deadly weapon); see also State v. Tirado, 599 S.E.2d 515, 537 (N.C. 2004) (noting that the trial court bifurcated sentencing proceedings to admit a co-defendant’s statement without prejudicing the other defendant).
68. Wallace v. Evans, 298 S.E.2d 193, 196 (N.C. Ct. App. 1982) (“Whether . . . there should be severance rests in the sound discretion of the trial judge.”).
69. See, e.g., FLA. STAT. § 921.141 (2011) (prescribing bifurcation in cases of capital felonies).
70. Gregg v. Georgia, 428 U.S. 153, 195 (1976) (explaining that constitutional concerns “are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information”).
72. See, e.g., id. at 1972 (arguing that the Sixth Amendment should apply with equal force to both phases of the trial); Susan D. Rozelle, The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation, 38 ARIZ. ST. L.J. 769, 771–72 (2006) (arguing that a different jury should hear the sentencing phase).
Fourth, the value of bifurcation is still unclear. All four of those points have salient applicability in the civil arena as well.

C. Bifurcation in North Carolina Civil Cases

Bifurcation is not limited to the criminal context; it also applies in civil litigation. Given the trial judge’s broad authority to separate issues or claims, bifurcation is permissible in many different facets. For example, since 1995 North Carolina has permitted a defendant to seek bifurcation of compensatory damages from a determination regarding punitive damages. Under statute, “[e]vidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages.” What was once considered a negative is now mandated by statute.

Bifurcation is also permitted without specific statutory authority, and a few examples will suffice to demonstrate the breadth of the resultant possibilities. In Lewis v. Purcell, the trial court granted the defendants’ motion to bifurcate proceedings to determine a disputed property line and then, if necessary, to adjudicate separately the plaintiffs’ claims for unlawful timber cutting. Because the plaintiffs failed to establish the property line as alleged, there was no need to address the second proceeding or its attendant evidentiary questions. In McArtan v. Barnum, the trial court bifurcated the case first to determine whether a partnership existed and second to determine the claims and damages. In Daugherty v. Cherry Hospital, the case was bifurcated to determine, as a threshold matter, whether the plaintiff’s claims were time barred. In another case, the trial court granted a motion to bifurcate a case between claims of negligence and breach of

73. See N.C. GEN. STAT. § 1A-1, Rule 42(b) (2013).
74. Id. § 1D-30.
75. Id.; see also Rhyne v. K-Mart Corp., 594 S.E.2d 1, 6 (N.C. 2004) (analyzing the punitive damages statute after bifurcated proceedings in the trial court).
76. See Tridyn Indus., Inc. v. Am. Mut. Ins. Co., 251 S.E.2d 443, 448 (N.C. 1979) (explaining previous rulings on appealability because “[n]ot to have permitted an immediate appeal might have resulted in a bifurcated trial in which one proceeding would have been directed toward compensatory and another toward punitive damages”).
78. See id. at *10–11.
contract on the one hand and a contractual provision that purportedly limited damages on the other. In *Vernon v. Cuomo*, the North Carolina Business Court bifurcated the trial to first determine liability and then to determine the value of the disputed shares. More recently, the Court of Appeals of North Carolina affirmed a trial court’s decision to separate a plaintiff’s product liability claims from a claim for unfair or deceptive trade practices.

Bifurcation may also result from an agreement between the parties. The parties in *Kraft v. Town of Mt. Olive*, a quiet title action, agreed to a bifurcated trial to determine first whether the plaintiff was entitled to quiet title and second whether the defendant-town had acquired a prescriptive easement over the property. In another case, the parties agreed to bifurcate the proceedings to determine the enforceability of a covenant not to compete first, and then to determine separately the issues of breach and damages. Of course, such an agreement still requires the trial court’s blessing.

Additionally, courts have encouraged bifurcation in other settings. In a legal malpractice case, it was proper for the trial court to bifurcate the proceedings to determine whether the plaintiff had a valid claim against the purported tortfeasor before determining whether the attorneys were negligent. In such situations, in which the plaintiff must prove “a case within a case,” the Court of Appeals of North Carolina found that “the trying of both cases at once would likely have prejudiced the present defendants in defending themselves.”

Furthermore, that court has held that where an insurance carrier is defending a case as an unnamed defendant, trial of the coverage issues should be bifurcated. In all of these cases, the parties either agreed to the bifurcation or the trial court, exercising its discretion, found that bifurcation would be beneficial and expeditious.

87. Id. at 7.
A judge has had, until recently, the authority to bifurcate proceedings *sua sponte*.89 In *Marshall v. Williams*, although the plaintiffs objected to the bifurcation, the Court of Appeals of North Carolina upheld the trial court’s decision to bifurcate without a motion from a party.90 Furthermore, the defendants stipulated that the plaintiff’s injury was a direct result of the accident, so the plaintiffs were not denied any opportunity to present evidence on an essential element of their claim.91 Under the compensatory-punitive damages bifurcation, however, a motion is required.92 Without a motion, evidence regarding the second issue (which would otherwise be separated) is admissible at any time during the plaintiff’s case-in-chief.93 Under the new law, a motion is also required to bifurcate the liability and damages issues.94

The Supreme Court of North Carolina also approved a bifurcated trial in *In re Will of Hester*.95 *Hester* concerned three purported wills of a testator.96 After the propounders submitted the last of the three wills for probate, a jury determined that the testator lacked sufficient mental capacity to execute that will.97 In a subsequent proceeding, the jury determined that the second of the three wills was valid.98 The Supreme Court of North Carolina approved of the bifurcated approach, as the decision was within the trial court’s discretion.99 The question to ask is “whether separation of the issues furthers convenience and avoids prejudice.”100 According to the court, “[b]ifurcation was the most reasonable and sensible approach under the circumstances.”101

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89. See, e.g., Jay Grp., Ltd. v. Glasgow, 534 S.E.2d 233, 234 (N.C. Ct. App. 2000) (explaining that “[t]he trial court, *ex mero motu*, ordered that the issues of liability and damages be bifurcated into separate trials before the same jury”).
91. Id.
92. Ward v. Beaton, 539 S.E.2d 30, 36 (N.C. Ct. App. 2000) (“[T]he defendant is not entitled to bifurcation until the defendant files such a motion.”).
93. Id.
94. N.C. GEN. STAT. § 1A-1, Rule 42(b) (2013).
95. *In re Will of Hester*, 360 S.E.2d 801, 802 (N.C. 1987).
96. Id.
97. Id. at 803.
98. Id. at 803–04.
99. Id. at 804.
100. Id. at 804–05.
101. Id. at 805; see also Kirkman v. Wilson, 390 S.E.2d 698, 700 (N.C. Ct. App. 1990) (noting that the trial court “ordered a bifurcated trial because there were numerous issues in controversy”), vacated by 401 S.E.2d 359 (N.C. 1991).
Bifurcation is also applicable to cases involving termination of parental rights. Those cases involve a two-part process: an adjudicatory phase and a dispositional phase.\(^{102}\) The first phase asks whether there is an adequate basis to terminate parental rights, and the second phase determines whether termination is in the best interest of the child.\(^{103}\) However, “so long as the court applies the different evidentiary standards at each of the two stages, there is no requirement that the stages be conducted at two separate hearings.”\(^{104}\)

The different evidentiary standards in those two phases may be easy to state but difficult to apply. Therefore, the Court of Appeals of North Carolina has established a presumption that a judge is adequately equipped to determine whether grounds for termination exist before proceeding to consider evidence regarding the best interest of the child.\(^{105}\) The empirical question of whether this presumption has a basis in fact has not been answered. Claims from parents alleging that improper evidence was received during the first proceeding are cursorily dismissed.\(^{106}\) Thus, North Carolina relies on its trial court judges to separate evidence between the two phases, regardless of the difficulty in a particular case.

But North Carolina’s new law affects bifurcation in a more limited sense of separating the issue of liability from the issue of damages. Thus, this Article is chiefly concerned with bifurcation between proceedings involving the same parties. Trials may be divided in other situations, such as severing claims or severing some of the parties.\(^{107}\) Although there are related evidentiary issues in those situations, the scope of this new law is limited to bifurcation in the sense of two


\(^{103}\) Id. at *5–6.

\(^{104}\) In re Shepard, 591 S.E.2d 1, 6 (N.C. Ct. App. 2004).

\(^{105}\) In re White, 344 S.E.2d 36, 38 (N.C. Ct. App. 1986).


different proceedings involving identical parties. In other words, this statutory provision concerns the decision “to sever issues within a single trial or proceeding for separate submission to the same jury.”

Before this law was passed, courts still had the authority to bifurcate the liability and damages portions of a trial. In Blackwood v. Cates, for example, the parties agreed to bifurcate the trial to determine liability first and then to determine damages. In Rushing v. Aldridge, a referee bifurcated the damages issues in an adverse possession trial. Again, the decision was left to the trial court's discretion. Even before the passage of the law, courts have had “broad discretion authority to determine when bifurcation is appropriate.” Thus, courts would occasionally bifurcate the liability and damages issues. The difference was that the decision was based upon an examination of the specific facts and circumstances rather than a statutory mandate. Similarly, courts have long had the authority to grant summary judgment on the issue of liability even if there is a genuine issue of material fact as to the amount of damages.

In Land v. Land, the trial court granted the defendants’ motion to bifurcate the liability and damages portions of the trial. A jury found against the defendants on the liability issues, and the defendants then sought to appeal. The Court of Appeals of North Carolina dismissed the appeal as interlocutory. However, the court also ruled that “[t]he issues decided at the first trial are thus separate and distinct from those to be decided at the second trial, and there is no possibility of a second jury rendering a verdict inconsistent with the verdict of the first jury.” The court seemed to assume that the issues were completely separate.

112. Id. at 570, 576.
115. N.C. GEN. STAT. § 1A-1, Rule 56(c) (2013) (“A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages.”).
117. Id.
118. Id. at 518.
119. Id. at 516 (emphasis added).
and distinct, but it did not explain why. The court did “acknowledge that there will, of necessity, be some repetition of evidence at the second trial to orient the second jury as to the nature of plaintiffs’ claims for compensatory and punitive damages,” but the court held that such repetition “does not mean that the same issues will be decided at the second trial.”

Other cases have similarly shown that the evidence does indeed overlap between the two proceedings. In Hester, for example, even though the first proceeding only determined the validity of the last of three wills, all three of the purported wills were received into evidence. Similarly, evidence of liability and compensatory damages may often be the same evidence as that presented for punitive damages. Although “evidence relating solely to punitive damages shall not be admissible” in the compensatory damages portion of the trial,” plaintiffs may introduce “the totality of their evidence during the compensatory damages portion of the trial to establish liability.”

Furthermore, some courts have recognized that the two proceedings are not really that “separate and distinct.” Thus, a court on remand cannot re-try a punitive damages issue without also re-trying the liability and compensatory damages issues. Instead, a court on remand must “start over at the beginning” to examine the liability issues before reaching the issue of punitive damages. The purpose of such a rule is so that the same jury can try all of the relevant issues. Conversely, when a case is bifurcated between liability and damages, a court may permissibly re-try only the damages issue if it is “separate and distinct from the other issues and the new trial can be had without danger of complication with other matters in the case.”

120. Id.
123. See generally Fortune v. First Union Nat’l Bank, 371 S.E.2d 483, 486 (N.C. 1988) (discussing the standard for when a trial may be bifurcated).
125. Id.
Because the decision to bifurcate is solely within the trial court’s discretion, it is reviewed under the abuse of discretion standard. But that is not to say that North Carolina has a general policy favoring bifurcation. While the decision to bifurcate the issues of liability and damages is ostensibly in the trial court’s discretion, appellate courts are not keen on bifurcating without substantial justification. In Headley v. Williams, the Court of Appeals of North Carolina said that “[t]he decision to bifurcate a trial in furtherance of convenience or to avoid prejudice is left to the discretion of the trial court,” but it also directed the lower court that, on remand, “a single trial of the negligence and damages issues is recommended.” In other words, the decision is up to the trial court, but it had better be the right decision.

Moreover, litigants’ attempts to blur the line between the two proceedings are often rebutted. For example, North Carolina’s statutes on cartways generally “contemplate a bifurcated procedure[,]” in which the first question is whether the petitioner has a right to a cartway and the second question is where the cartway should be located. When a party argued that a petitioner had failed to identify the proper location for the cartway in the first phase of the proceeding, the Court of Appeals of North Carolina quipped that the party had put “the cart before the horse.” Because of the bifurcated nature of the proceedings, such an argument was meritless because that issue was explicitly confined to the second phase of the proceeding.

In the civil context, the justifications for bifurcation may be a little different than in the criminal context. According to the Eastern District of North Carolina, “simplification of discovery is the ‘major benefit’ of bifurcation.” On the other hand, one “favored purpose” of bifurcation is “avoiding a difficult question by first dealing with an easier, dispositive

129. See, e.g., Headley v. Williams, 590 S.E.2d 443, 448 (N.C. Ct. App. 2004) (suggesting to trial judges that a single trial is recommended in most cases).
130. See id.
131. Id. (quoting Wallace v. Evans, 298 S.E.2d 193, 196 (N.C. Ct. App. 1982)).
132. See Vance Trucking Co. v. Phillips, 311 S.E.2d 318, 321 (N.C. Ct. App. 1984) (recommending that the trial court “enter findings and conclusions that will establish the appropriateness of severance” because, in the appellate court’s opinion, a single trial “would not present a suit of unmanageable size”).
134. Id. at 121.
135. See id.
issue."137 Another court declared that “the purpose” of bifurcation is “conservation of judicial resources and simplification of issues.”138 Or, more generally perhaps, bifurcation “is primarily a device that safeguards the defendant's rights.”139

D. North Carolina's New Law on Bifurcation

Trial courts' discretionary authority was significantly changed by a portion of North Carolina’s Tort Reform Act140 that has heretofore received little attention. The Act added a new portion to North Carolina’s Rules of Civil Procedure, which are codified in the General Statutes.141 The new provision reads:

Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars ($150,000), the court shall order separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial. Evidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable. The same trier of fact that tries the issues relating to liability shall try the issues relating to damages.142

The entire Act itself had a tortured history, as it was a piece of legislation cobbled together from previous attempts at tort reform.143 The 2011 version was sponsored by three state senators: Tom Apodaca, Harry Brown, and Bob Rucho.144 The bill was ratified by both houses of the General Assembly only to be vetoed by Governor Beverly Perdue in June 2011.145 Governor Perdue maintained that she was “committed to passing meaningful medical malpractice reform” but that the version of the bill presented to her was “unbalanced.”146 The next month, however,

137. Danjaq LLC v. Sony Corp., 263 F.3d 942, 961 (9th Cir. 2001) (citing Hirst v. Gertzen, 676 F.2d 1252, 1261 (9th Cir. 1982)).
141. See N.C. GEN. STAT. § 1A-1 (2013).
142. Id. § 1A-1, Rule 42(b)(3).
143. See, e.g., S.B. 979, 2009–10 Gen. Assemb. (N.C. 2009) (proposing provisions similar to those of the Act that was enacted).
146. Id.
the legislature overrode the veto, and the law went into effect on October 1, 2011.\footnote{147}

Because of other provisions in the Tort Reform Act, including a cap on noneconomic damages,\footnote{148} the bifurcation provision received little attention in the media or in the General Assembly.\footnote{149} One state representative introduced an amendment to the bill to delete the provision on bifurcation, but the amendment was voted down.\footnote{150} The Senate's version of the bill would have placed the bifurcation threshold at seventy-five thousand dollars ($75,000) and would have removed all judicial discretion by making bifurcation mandatory.\footnote{151} Aside from these proposed changes, however, the provision on bifurcation was largely inconspicuous.

Most commentators assume that the provision was added to benefit defendants, usually corporations and hospitals.\footnote{152} According to the North Carolina Medical Society, such a bifurcated approach “[a]ddresses the classic jury error of confusing bad outcomes with medical negligence.”\footnote{153} The theory behind the provision is that separating the issue of damages from the issue of liability will lead to more just results because jurors determining liability will not be swayed by sympathy for the plaintiff’s damages.\footnote{154} The politically correct reason for the provision is that “everybody is more fairly treated that way.”\footnote{155}

\footnote{148. See N.C. GEN. STAT. § 90-21.19(a) (2013). Under the new law, noneconomic damages in medical malpractice cases are generally limited to five hundred thousand dollars ($500,000). See id.}
\footnote{149. See, e.g., Rob Christensen, Ex Chief Justices Battle Over Medical Malpractice, NEWS & OBSERVER (Feb. 15, 2011, 1:18 PM), http://projects.newsobserver.com/under_the_dome/ex_chief_justices_battle_over_medical_malpractice (focusing on the cap on noneconomic damages).}
\footnote{154. See id.}
\footnote{155. Lis v. Robert Packer Hosp., 579 F.2d 819, 823 (3d Cir. 1978) (quoting the trial court’s rationale for bifurcation in a negligence case).}
The language of the bifurcation provision is apparently based on the similar provision regarding bifurcation of compensatory and punitive damages, which was passed in 1995. This previous law has gained traction among other jurisdictions. Some states have passed similar laws to the bifurcation provision on punitive damages, while other states have proposed bills patterning the North Carolina statute. Still other states have passed laws with different procedural aspects but similar policy justifications.

Under the current statutes, then, a future trial in North Carolina has the very distinct possibility of being trifurcated. A jury would first determine whether the defendant is liable, then determine the amount of compensatory damages, and then determine the amount of punitive damages. Given the percentage of cases that actually proceed to trial, it is far from clear that such a tripartite approach would actually serve the interests of judicial economy or benefit the parties as alleged. Regardless of its effects, however, the new law is a significant change in civil procedure based on North Carolina’s limited history of bifurcation.

III. BIFURCATION IN FEDERAL COURTS

In federal court, the standard for bifurcation is a little more stringent. Although federal courts have broad discretion to decide

156. See N.C. GEN. STAT. § 1D-30 (2013). That provision reads:

Upon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages.

157. See, e.g., OHIO REV. CODE ANN. § 2315.21 (LexisNexis 2011) (bifurcating the trial into two phases, one to determine compensatory damages and another to determine punitive damages).


159. See, e.g., S.D. CODIFIED LAWS § 21-1-4.1 (2011) (“In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.”).
whether bifurcation is appropriate, a moving party has the burden of showing that such bifurcation is merited. The standards for bifurcation in federal court are generally consistent across the country, but the federal courts in North Carolina serve as a good comparison to the state court decisions described above.

In Scarbro v. New Hanover County, an individual defendant sought to bifurcate the liability and damages issues to obtain an early determination on his defense of qualified immunity. The trial court denied the motion, reasoning that “once it is clear that such early resolution is impossible, trial is necessary, and it is assumed that ‘a single trial will be more expedient’ than separate trials.” The court accepted the defendant’s argument that “most or even all of the evidence” related to damages would be “separate and distinguishable from evidence related to liability.” But because there would be some overlap in the evidence, the court ruled that bifurcation was not appropriate. The defendant’s claims of prejudice were similarly outweighed by “the prejudice that would accrue from ‘depriving plaintiff of her legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action . . . replacing it with a sterile or laboratory atmosphere in which causation is parted from the reality of the injury[.]’”

The defendant made a similar motion in Snoznik v. Jeld-Wen, Inc. Snoznik involved a products liability action against a window manufacturer in which the defendant sought to bifurcate the liability and
damages issues. In support of its argument, the defendant cited a study from Harvard University which allegedly demonstrated that even juries that are instructed to separate evidence of liability from issues of damages “fail to follow such instructions.” Rejecting such an argument, the court deemed itself “well aware that the plaintiff's and defendant's bar are well equipped to commission studies providing fodder on any number of issues.” The court went on to explain that “[t]he tradition under the seventh amendment has been, for the last 220 years, for the same jury to determine liability and damages. Such a tradition—nay a right—should not be so quickly abandoned . . . .” The court further quoted a fellow federal district court:

[D]efendants maintain that bifurcation will serve the interests of expedition and economy. The Court fails to see how this can be so. For example, two trials would require the Court to conduct similar voir dire examinations twice. Twice as many citizens would be required to take the time to travel to the Court to participate in jury selection. Standard preliminary and final jury instructions would also be given in both trials. More[over], as plaintiff points out, some witnesses may have to testify at both trials. The Court finds that the interests of expedition and economy would be served best by a single trial.

In essence, the court concluded it could not find that bifurcation would lead to greater convenience or expediency for anyone involved. In 

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Notwithstanding the broad discretion conferred by Rule 42(b), the bifurcation of issues and the separate trial of them is not the usual course of events. Nothing else appearing, a single trial will be more expedient

169. See id. at *1.
170. Id. at *3.
171. Id.
172. Id. at *3–4.
174. See id. at *6–8; see also Layman v. Alexander, 343 F. Supp. 2d 483, 495 (W.D.N.C. 2004) (denying the defendants' motion to bifurcate the trial into liability and damages phases because "one trial will serve the convenience of the parties and the Court, will not prejudice either the Plaintiff or the Defendants, and will minimize expenses and delays to each party").
and efficient. The party requesting separate trials bears the burden of convincing the court that such an exercise of its discretion will (1) promote greater convenience to the parties, witnesses, jurors, and the court, (2) be conducive to expedition and economy, and (3) not result in undue prejudice to any party. Merely presenting some proof which supports bifurcation is not enough. The benefit of bifurcation must outweigh the disadvantages.\(^{176}\)

The court went on to find that “[e]ven if the issues are separable for purposes of the Seventh Amendment, a court will likely decline to bifurcate if there will be a significant overlap of evidence at the two trials which would make separation inefficient and inexpedient.”\(^{177}\) The court ultimately concluded that the defendant had not met its burden of showing that bifurcation was justified.\(^{178}\)

Indeed, federal courts seem to take this burden seriously. When evidence is intertwined, courts will deny a motion to bifurcate.\(^{179}\) Similarly, a federal court denied a defendant’s motion to bifurcate the issue of punitive damages when the court was “unconvinced the Defendant would be prejudiced by not bifurcating these proceedings or that bifurcation would expedite the trial or facilitate judicial economy.”\(^{180}\) Even in the criminal context, courts are reluctant to bifurcate issues that could be tried together.\(^{181}\) Indeed, one district court found that the decision to bifurcate the proceedings is “one used as a last resort.”\(^{182}\)

\(^{176}\) Id. at 387 (citations omitted).

\(^{177}\) Id. at 388.

\(^{178}\) Id. at 395; see also Belmont Textile Mach. Co. v. Superba, S.A., 48 F. Supp. 2d 521, 526 (W.D.N.C. 1999) (finding that defendant failed to meet its burden to justify bifurcation).

\(^{179}\) See, e.g., United States v. Jaimes-Cruz, No. 7:08-CR-139-1, 2009 U.S. Dist. LEXIS 64900, at *6–8 (E.D.N.C. July 24, 2009) (denying a defendant’s request to bifurcate drug-related charges from immigration-related charges); Wittenberg ex rel. J.W. v. Winston-Salem/Forsyth Cnty. Bd. of Educ., No. 1:05CV00818, 2007 U.S. Dist. LEXIS 65257, at *7 (M.D.N.C. Sept. 4, 2007) (denying a motion to bifurcate challenges to two different Individualized Education Programs because “[t]he factual and legal issues in the two claims are nearly identical”).


\(^{181}\) See, e.g., United States v. Corbett, No. 3:07cr144, 2007 U.S. Dist. LEXIS 92106, at *5 (W.D.N.C. Dec. 5, 2007) (denying a defendant’s motion to bifurcate “because the prejudicial effect of introducing a defendant’s past conviction can be avoided through the use of a limiting instruction” (citing United States v. Silva, 745 F.2d 840, 844 (4th Cir. 1984))).

For example, in *Technimark, Inc. v. Crellin, Inc.*183 the court provided three reasons for denying the defendant’s motion to bifurcate liability from damages.184 First, proof of damages would not be particularly complex.185 Second, the court found a potential overlap in the evidence of the two issues, which would only add to the expense of litigation if the two issues were tried separately.186 Third, arguments centered on “judicial economy” were not enough to bifurcate the issues because bifurcation would require a new jury for the second issue, thereby increasing the burden on the judiciary.187 Furthermore, if the court were to agree with the reasoning that bifurcation created judicial economy, “there would be a strong argument supporting bifurcation in nearly every civil trial.”188

That is not to say, however, that federal courts always refuse to bifurcate proceedings. For example, one former district court judge for the Middle District of North Carolina conducted a bench trial on the issue of liability and ordered a separate proceeding to calculate damages.189 Within the same district, a case of gender discrimination was similarly bifurcated between damages and liability.190 Another district court ordered bifurcation in a claim for unfair or deceptive trade practices,191 as did a different district court in a case of union members’ claims against their union,192 yet none of these courts provided detailed reasoning for the decision to bifurcate.

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184. Id. at *3–4.
185. Id. at *4–5.
186. Id. at *5.
187. Id.
188. See *Universal Furniture Int’l, Inc. v. Collezione Europa, USA, Inc.*, 599 F. Supp. 2d 648, 650 (M.D.N.C. 2009), *aff’d*, 618 F.3d 417 (4th Cir. 2010).
The courts that have provided reasoning have largely relied on the complexity of the issues at hand. One district court bifurcated the liability and damages issues in a patent infringement case “because of the complex nature of the damages determination and the extensive discovery that is often necessary to prove the nature and extent of those damages.” As one judge explained, “[t]he most common justification for separate trials is that the discovery and/or the trial of the issues of liability and damages are sufficiently complex so that the two issues should proceed separately.”

Importantly, federal courts are not bound by state rules regarding the propriety of bifurcation. In Rosales v. Honda Motor Co., the Fifth Circuit upheld the district court’s decision to separate the liability and damages issues even though the rules in Texas likely would have precluded bifurcation. Similarly, the Sixth Circuit upheld bifurcation in a diversity case even though the plaintiff alleged that he had a state


195. See, e.g., Oulds v. Principal Mut. Life Ins. Co., 6 F.3d 1431, 1435 (10th Cir. 1993) (noting that “bifurcation of trials is permissible in federal court even when such procedure is contrary to state law”).

“constitutional right to have all the issues of fact submitted to the same jury at the same time.”197

As in the North Carolina state courts, federal courts may also bifurcate under other circumstances. For example, a court may bifurcate claims against private parties, which are heard before juries, from claims against the United States, which can only be heard by the court.198 One federal court granted a motion to bifurcate a declaratory judgment claim regarding the existence of a partnership and a claim of unjust enrichment from other claims of liability.199 Another court granted a motion to bifurcate a trial “into non-secret and secret segments” to keep the public from uncovering sensitive trade confidences.200

More generally, federal courts have held that “[b]ifurcation of proceedings into separate trials concerning liability and damages is appropriate when ‘the evidence pertinent to the two issues is wholly unrelated’ and the evidence relevant to the damages issue could have a prejudicial impact upon the jury’s liability determination.”201 In other words, bifurcation is deemed acceptable in that it “furthers convenience when the separable issues are substantially different.”202 This standard seems to be in line with Supreme Court precedent on the propriety of granting a partial new trial, which is permitted if it “clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.”203

IV. EFFECTS AND IMPLICATIONS OF BIFURCATION

North Carolina’s new law creates a chasm not only between North Carolina and other states but also between North Carolina and federal jurisprudence. The wisdom of such a move is unclear. There is little consensus on the value of bifurcation in general, and as one federal court described:

Those who favor the trial of liability separate from damages in personal injury actions emphasize the time savings, and also suggest that in theory there should be no difference in the eventual outcome of the case. But an equally impressive argument is advanced that in many cases, especially personal injury negligence cases, the separation might affect the outcome of the case.204

Weighing these considerations, the Third Circuit “disapprove[d] of a general practice of bifurcating all negligence cases.”205 More generally, the scholarly debate in favor of and against bifurcation rages strong across the country.206

According to the Connecticut Health Care Advisory Board, the traditional system of non-bifurcation “implicitly implies the assumption of wrongdoing.”207 It is somewhat ironic that civil defendants claim that non-bifurcated proceedings imply fault while criminal defendants claim that bifurcated proceedings imply the same thing. Yet North Carolina’s new law may imply “right-doing.” In other words, jurors will be left to analyze a defendant’s liability in a vacuum, without the benefit of a full view on the consequences of the defendant’s actions. Of course, that may be the very purpose of bifurcation for some supporters. The theory in favor of bifurcation is that when jurors disagree on liability, an award of damages becomes a “bartering mechanism” through which jurors can settle their differences.208 Thus, the theory goes, jurors improperly

204. Lis v. Robert Packer Hosp., 579 F.2d 819, 824 (3d Cir. 1978).
205. Id.
208. De Villiers, supra note 2, at 178.
compromise to find liability in exchange for a lesser award of damages. Proponents of bifurcation therefore assume that bifurcation will benefit litigants (in other words, defendants) by leading to more just results and will benefit judges by shortening the length of litigation. But some have recognized that bifurcation may actually create, rather than solve, these problems. The Antitrust Section of the American Bar Association has identified several problems with bifurcation, including the admissibility of evidence that would otherwise be excluded, increased willingness of judges to admit evidence of a defendant's financial condition, and procedural complications on appeal. Furthermore, separating a trial into two phases may cause delay, confusion, and prejudice to the plaintiff.

As in the criminal context, civil bifurcation may spawn as many concerns as it dispels. This issue can be seen in the varying results of empirical studies intended to measure the effect of bifurcation. In the civil context, the three principal studies “suggest that bifurcated juries tend to find the defendant liable less often than in comparable nonbifurcated trials.” But when the defendant is found liable, the awarded damages (both compensatory and punitive) are significantly higher. This result is somewhat unsurprising, as several studies have found that an award of damages has some correlation to the reprehensibility of the defendant’s conduct. If the jury does not hear about the reprehensibility of the defendant’s conduct, then the jury is

209. See id. at 172–73.
210. Id. at 173.
211. See id. at 197.
213. Id. at 84.
215. See id. at 672 (noting that in “civil trials, bifurcation tends to reduce the odds of a defendant being found liable but appears to foster larger damage awards when the defendant is deemed liable”). Some research refutes this argument, however. See, e.g., Edith Greene et al., Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?, 24 LAW & HUM. BEHAV. 187, 197–98 (2000) (finding that “trial structure had no effect on compensatory damages”). Greene and her colleagues also found that “[c]ontrary to the assumptions of many commentators, evidence related to punitive damages did not prejudice mock jurors' thinking about compensatory damages.” Id. at 201.
216. See Greene et al., supra note 215, at 196–97, 201.
less likely to find the defendant liable. In the criminal arena, however, bifurcated proceedings may make juries more likely to convict. No research has yet analyzed this discrepancy.

This Article is certainly not the first to recognize a parallel between bifurcation in criminal and civil contexts. “In the context of criminal law, bifurcation of the guilt and punishment phases of trial is accepted as a procedure necessary in many instances to satisfy due process. The similarities between the process of deciding civil liability and criminal guilt are numerous.” However, the analogy may be more apt between criminal sentencing and punitive damages, as both are intended to punish the defendant and deter additional wrongdoing. Compensatory damages, on the other hand, are not intended to punish the defendant at all.

Still, a law such as North Carolina’s that institutes a presumption in favor of bifurcation has implications for all parties involved in litigation—judges, plaintiffs, defendants, and juries. Bifurcation creates a morass of complex issues including potential prejudice to the parties, the necessity of additional evidentiary rulings, the pursuit of judicial economy, and the role of the jury. These issues are discussed below.

A. Prejudice—To Either Party

The traditional theory of civil bifurcation is that it helps the defendant by removing the emotional and sympathetic factor concerning

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217. See id. at 200–01.

218. See generally Verla Seetin Neslund, Comment, The Bifurcated Trial: Is It Used More Than It Is Useful?, 31 EMORY L.J. 441, 441–42 (1982) (noting how opponents of bifurcation in criminal trials argue that it is impossible for juries to draw the line between guilt and sanity, thus generally leading to more convictions).


221. FOWLER V. HARPER ET AL., HARPER JAMES & GRAY ON TORTS § 25.1 (3d ed. 2007) (“The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to the plaintiff by the defendant’s breach of duty.”) (emphasis in original).

222. See N.C. GEN. STAT. § 1A-1, Rule 42(b)(3) (2013).
the plight of the plaintiff from the jury’s deliberations.\textsuperscript{223} While bifurcation may actually prejudice the plaintiff as a result, it may have the unexpected potential for prejudicing the defendant as well.

Bifurcation may hurt or help a plaintiff, depending on the strength of the evidence and the “distribution of risk attitudes” among the jurors.\textsuperscript{224} If the evidence of liability is weak or unclear, bifurcation will prejudice the plaintiff by removing from the jury any evidence of injury and any proclivity toward sympathy.\textsuperscript{225} Furthermore, if the jury is already inclined to mistrust personal injury or tort plaintiffs, then bifurcation could prejudice the plaintiff for the same reasons.\textsuperscript{226} The result will, of course, turn on the facts of the case—both before and during trial.

Additional prejudice to the plaintiff may be evident in a less visible but similarly concrete way. There is something to be said for an injured plaintiff having an opportunity to have his day in court to say, “This is what you did to me.” Regardless of whether the defendant is found liable, there is often a need for psychological closure to a traumatic event. Presenting evidence of damages may be precisely the thing for which a plaintiff is looking, regardless of the ultimate outcome.

Bifurcation is not intended to take away a plaintiff’s right to a jury trial, but bifurcation may muddy the waters when one considers its practical implications. For example, under North Carolina’s new legislation, the trial judge will have to determine whether proffered evidence relates “solely to compensatory damages.”\textsuperscript{227} Yet the plaintiff seeking to prove negligence must prove four\textit{essential} elements: duty, breach of duty, proximate cause, and damages.\textsuperscript{228} Thus, a plaintiff might find itself in the awkward position of losing the opportunity to present evidence on an essential element of its claim. Recognizing this difficulty, the Tenth Circuit avoided the argument by deciding a case on other grounds.\textsuperscript{229} Other courts have denied motions to bifurcate because proof

\textsuperscript{223} See de Villiers, supra note 2, at 191 (noting that “[c]ommentators have attributed the observation that unitary trials lead to more liability verdicts than bifurcated trials to the possibility of jury sympathy for the plaintiff”).
\textsuperscript{224} Id. at 158.
\textsuperscript{225} See id.
\textsuperscript{226} See id.
\textsuperscript{227} See N.C. GEN. STAT. § 1A-1, Rule 42(b).
\textsuperscript{228} See, e.g., Estate of Mullis v. Monroe Oil Co., 505 S.E.2d 131, 135–38 (N.C. 1998) (discussing general negligence principles).
\textsuperscript{229} See Easton v. City of Boulder, 776 F.2d 1441, 1447 (10th Cir. 1985) (declining to decide whether bifurcation prejudiced the plaintiff by precluding him from presenting evidence of damages because the issue of probable cause was dispositive of his claim).
of damages is an essential element of a plaintiff’s claim.\textsuperscript{230} Still other courts have attempted to distinguish “[p]roof of damage” from “calculation of damages.”\textsuperscript{231} But the North Carolina General Assembly has not given any guidance on how to address these issues. Plaintiffs in North Carolina, and their attorneys, may be asking themselves how they can avoid a directed verdict when they are not permitted to offer evidence of injury.\textsuperscript{232} “The substantive law applicable in [the field of torts] makes actual damage a prerequisite to a plaintiff’s right of action[,]”\textsuperscript{233} yet in some ways, bifurcation makes actual damage an afterthought.

An extreme example of this difficulty can be seen in the case of \textit{Chartone, Inc. v. Bernini}, arising out of the state courts of Arizona.\textsuperscript{234} The underlying claim in the case was relatively straightforward—personal injury attorneys alleged that two companies charged unreasonable fees to produce medical records.\textsuperscript{235} Before trial, the judge granted the attorneys’ motion to bifurcate the proceedings into liability and damages phases.\textsuperscript{236} During the liability phase, the parties were not allowed to introduce evidence relating to damages.\textsuperscript{237} The companies moved for judgment as a matter of law, arguing that the attorneys had no evidence of damages and had thus failed to establish an essential element of their claim.\textsuperscript{238} The judge decided to appoint a special master to determine the


\textsuperscript{232} See, e.g., Gulesian v. Ne. Bank of Lincoln, 447 A.2d 814, 817 (Me. 1982) (affirming defendant’s motion for a directed verdict “[b]ecause there was no evidence in the record of damages proximately caused by the [defendant]

\textsuperscript{233} Harper et al., supra note 221, § 25.1.


\textsuperscript{235} Id. at 1105.

\textsuperscript{236} Id. (ordering that the trial would be bifurcated, but that the same jury would hear both phases if liability was found).

\textsuperscript{237} Id.

\textsuperscript{238} Id. at 1106.
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proper amount of damages if the jury found the companies liable, and, in response, it was the same companies that argued “they had been prejudiced in conducting their defense by defending only on the question of liability and not damages.”

Upon review, the Arizona Court of Appeals criticized the judge’s handling of the case. The appellate court realized that “some evidence was precluded on the ground it related to damages, not liability. Yet, at the end of the trial, the judge maintained that evidence relating to damages had been admitted, essentially penalizing [the companies] for failing to establish factual issues relating to damages.” The appellate court concluded that “because [the companies] had justifiably believed they were only trying the issue of liability, it was unfair to penalize them for conducting their defense accordingly.” The court remanded the matter for a trial on damages alone.

Under North Carolina’s new legislation, situations like the one in Chartone are more and more likely to appear. Complicated issues regarding what evidence relates to injury and what evidence relates to causation will be inherent in most tort cases. Bifurcation in some instances may actually deprive a party of a right to a fair trial under the Seventh Amendment of the United States Constitution. But there is no indication that the North Carolina General Assembly considered that implication when it cavalierly passed this new law.

Bifurcation is ostensibly for the benefit of the defendant, yet it is sometimes the plaintiff that also seeks bifurcation. Such a maneuver may be a plaintiff’s effort to protect itself, but it may also be an example of how bifurcation can prejudice the defendant.

Indeed, defendants may actually stand to lose by bifurcating a trial. According to some research, “the expected damage award for bifurcated trials conditional upon a finding of liability against the defendant is greater than the corresponding conditional expectation for unitary trials.” It seems to be true that plaintiffs win more unitary trials than bifurcated

239. Id.
240. Id. at 1111.
241. Id.
242. Id. at 1112.
243. Id. at 1114.
245. De Villiers, supra note 2, at 189 (emphasis in original).
When liability is found, however, the damage awards are usually higher in bifurcated trials than in unitary trials.247 Moreover, some courts have recommended bifurcation as a way to lessen the prejudice to the plaintiff rather than the defendant. For example, in Taylor v. RaceTrac Petroleum, Inc., the Court of Appeals of Georgia chastened the trial court for denying a motion to bifurcate and remarked that “[t]he better practice would have been to bifurcate the trial.”248 In Taylor, a man was killed in a car accident, and the defendant company had sold alcohol to the driver of the other vehicle.249 The company introduced evidence regarding the decedent’s prior drug and alcohol abuse and reckless driving, apparently in an attempt to shield itself from liability.250 Aside from the relevancy problems, the court explained that even if the evidence were relevant to damages, it should have been separated into a separate damage proceeding to avoid prejudice to the plaintiff.251 In this situation, bifurcation may actually prejudice the defendant by taking away its ability to present all relevant facts to the jury.

Thus, both sides may be prejudiced by bifurcating the liability phase from the damages phase. Yet bifurcation is purportedly instituted “to ‘avoid prejudice,’ not to create it.”252 If it is shown that a general practice of bifurcation is prejudicial to the plaintiff or the defendant, such a practice deserves a second look.

B. Evidentiary Problems

Generally, bifurcation is not allowed when evidence on the issues overlaps or the issues are so “intertwined” that attempts at separation will actually lead to more confusion and less efficiency.253 Conversely, bifurcation is generally permitted if the two subjects are not intertwined.254 According to the North Carolina General Assembly, therefore, evidence of liability and evidence of damages will not be

246. Id. at 191.
247. Id.
249. Id. at 283.
250. Id. at 284.
251. Id. at 285.
253. See WRIGHT & MILLER, supra note 201, § 2390.
254. See id.
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intertwined in tort cases in which the plaintiff seeks more than $150,000 in damages.\textsuperscript{255} That assumption necessitates a closer examination.

A hypothetical example might make this evidentiary problem more concrete.\textsuperscript{256} Peter is a twelve-year-old boy who is riding in a vehicle that is involved in a head-on collision. As a result of the collision, the vehicle's spare tire is dislodged, hits the seat in which Peter is sitting, and renders him a paraplegic. Peter's parents bring suit against the vehicle's manufacturer, alleging that the system intended to keep the spare tire in place was defective. Peter's expert witness proposes to testify that the impact from the tire was the primary cause of Peter's injuries and that Peter would not be a paraplegic if he had not been hit by the tire.

Assuming the trial is bifurcated under the new law, what evidence is about liability and what evidence is about damages? Would Peter's expert witness be permitted to testify that a dislodged tire could cause paraplegia? Could he testify that Peter would not have been injured in absence of the impact? Or would the testimony be limited to potential injuries that could be caused by a dislodged tire? If the latter, would Peter be receiving a fair trial? Furthermore, would Peter need to hire a separate expert to testify at the latter damages portion, or would he be required to have the same expert make a second appearance?

Perhaps liability and damages are not as easily separated as the North Carolina General Assembly believes. At least in the discovery context, courts have recognized that the issues are not totally “separate and distinct.”\textsuperscript{257} When evidence overlaps between the issues of liability and damages, bifurcation is generally not appropriate.\textsuperscript{258} In other words, “[b]ifurcation is usually not ordered when the issues of liability and

\textsuperscript{255} See N.C. GEN. STAT. § 1A-1, Rule 42(b)(3) (2013).

\textsuperscript{256} This example is taken from the case of Thorndike v. DaimlerChrysler Corp., No. 00-198-B, 2003 U.S. Dist. LEXIS 8203 (D. Me. May 15, 2003).

\textsuperscript{257} See, e.g., Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC, No. 09-C-0916, 2010 U.S. Dist. LEXIS 98573, at *5 (E.D. Wis. Sept. 7, 2010) (“Another reason to deny bifurcation is that damages and liability are not easily compartmentalized... Bifurcation would likely require the parties, and possibly this Court, to wade into the morass inherent in drawing lines between discovery relevant to damages and discovery relevant to liability.”); BASF Catalysts LLC v. Aristo, Inc., No. 2:07-cv-222, 2009 U.S. Dist. LEXIS 16263, at *5 (N.D. Ind. Mar. 2, 2009) (“Postponement does not equate with economy. In fact, many courts have noted that bifurcation can lead to additional discovery disputes that actually add time and costs to the litigation.”).

\textsuperscript{258} See, e.g., R.E. Linder Steel Erection Co. v. Wedemeyer, Cernik, Corrubia, Inc., 585 F. Supp. 1330, 1334 (D. Md. 1984) (refusing to bifurcate when the plaintiff intended to use “some of the same witnesses” on the issues of liability and damages).
damages are intertwined and witnesses who testify regarding liability can also be expected to testify as to damages.\textsuperscript{259} The General Assembly has not provided any reason to conclude that the issues of liability and damages are generally not intertwined in tort cases, yet the law assumes that they can be easily distinguished.\textsuperscript{260} Courts have recognized, though, that in some instances, “factors concerning the cause and nature of the injuries would, unavoidably, have been adduced at a separate trial on liability.”\textsuperscript{261} It is far from clear that evidence of liability and evidence of damages can be as easily separated as the General Assembly assumed.

Furthermore, the same problems that plague \textit{voir dire} procedures in the criminal context are present, to some degree, in the civil context. For example, “in a trial where the plaintiff claims a cancer due to trauma, [counsel] could hardly be prevented from explaining the nature of the injury in order to find out whether the attitude of the panel is opposed to traumatic etiology in such diseases.”\textsuperscript{262} In other words, a description of the injury may be necessary to ascertain jurors’ views on the claimed injury, much like a description of the sentencing proceeding in a capital murder case may be necessary to ascertain jurors’ views on the death penalty. Does such evidence relate “solely” to compensatory damages, or does the \textit{voir dire} procedure bring it beyond that scope? If the former, it should not be permitted under the new law.\textsuperscript{263}

In a similar vein, evidence of damages may be necessary for a certain inference to be made. For example, the injuries received by a party in an automobile accident are likely “relating solely to compensatory damages.”\textsuperscript{264} Yet those same injuries are also indicative of how fast the other vehicle was traveling. The propriety of excluding such evidence has not been established, and courts will have to grapple with these and similar issues under the new law.

“Certainly, where evidence of damages is extraordinarily complex or time consuming and it is not necessary to deal with it during the liability phase, bifurcation of liability and damages makes good sense.”\textsuperscript{265} But even if that is true, a presumption in favor of bifurcation, such as North

\textsuperscript{260} See N.C. GEN. STAT. § 1A-1, Rule 42(b)(3).
\textsuperscript{263} See N.C. GEN. STAT. § 1A-1, Rule 42(b).
\textsuperscript{264} Id.
\textsuperscript{265} Cunningham & Hutchinson, \textit{supra} note 219, at 815.
Carolina’s, assumes that in all tort cases the evidence of damages is extraordinarily complex or time consuming. The evidentiary implications of bifurcation in the ordinary course of things have yet to be delineated, and North Carolina courts now find themselves faced with yet another daunting task.

As Judge Weinstein predicted back in 1961, “[t]he attempt to seal off the jury treatment of liability will probably be met by the development of new techniques and strategies to introduce evidence of injuries during the trial of the liability issue.” 266 Litigants in North Carolina will now have the opportunity and the motivation to fulfill Judge Weinstein’s prophecy.

C. Judicial Economy

Another proffered reason to bifurcate trials is to promote judicial economy. If a defendant is not found liable, a second phase on damages is unnecessary. Even if the defendant is found liable, the parties may be more likely to settle. Thus, the theory goes, bifurcation serves to shorten the length of trial and save the resources of both the parties and the courts.267 But this assumption also deserves closer inspection.

Empirical evidence does suggest that bifurcation actually shortens the length of trials.268 In 1959, a federal court in Illinois imposed a local rule that any party could move for a separate trial on the issue of liability.269 In response to this rule, a study was conducted to determine the amount of time that would be saved by separating the issues.270 Of 186 personal injury cases tried in front of a jury during the study period, sixty-nine (or thirty-seven percent) were bifurcated into liability and damages phases.271 Of the non-bifurcated cases, seventy-eight percent continued to the end of the trial; of the bifurcated cases, only fifteen percent did.272 After attempting to control for several variables, the authors of the study concluded that bifurcation “will save, on the average, about 20 per cent [sic] of the time that would be required if these cases were tried under traditional [one-phase] rules.”273

266. Weinstein, supra note 262, at 852.
268. Id. at 1624.
269. Id. at 1606–07.
270. Id. at 1607.
271. Id. at 1609.
272. Id. at 1610.
273. Id. at 1624.
No study has contradicted that finding, and yet it is still incomplete.\textsuperscript{274} For example, the authors of the study did not consider the length of time that passed before trial.\textsuperscript{275} A statutory mandate, such as North Carolina’s, will certainly move parties, usually defendants, to seek bifurcation.\textsuperscript{276} Judges will then have to determine additional issues, including: (1) whether the opposing party can show good cause to avoid bifurcation, (2) whether discovery should be bifurcated between liability and damages, and (3) exactly what evidence will or will not be permitted in the liability phase.\textsuperscript{277} These decisions will likely entail hearings and additional time, but those considerations are not considered in the general argument that bifurcation shortens the length of trials.\textsuperscript{278} Given these additional factors, one wonders whether under laws like North Carolina’s “little if any time, expense or burden would be spared.”\textsuperscript{279}

In the ordinary tort case, the issue of damages may be less complex than the issue of liability. Assuming the defendant is liable, it could be a comparatively straightforward task to determine the amount that the plaintiff should be compensated. Hence, when other courts have considered motions to bifurcate the damages phase, they have recognized that “the savings might amount to only a day of testimony. Such savings would evaporate should the damages phase become necessary. Furthermore, bifurcation requires a certain degree of duplication of efforts by the parties, counsel, and the Court.”\textsuperscript{280} Thus, even if the actual time spent in trial decreases, that is not to say that judicial economy is necessarily served. Indeed, “the mere possibility that a trial on damages may become unnecessary does not establish that the bifurcation promotes judicial economy.”\textsuperscript{281}

\textsuperscript{274} See generally Landsman et al., \textit{supra} note 24 (discussing several of the limitations of the study and questions that it has spawned).

\textsuperscript{275} See \textit{Zeisel & Callahan, supra} note 267, at 1624.

\textsuperscript{276} See N.C. GEN. STAT. § 1A-1, Rule 42(b)(3) (2013).


\textsuperscript{278} See \textit{Zeisel & Callahan, supra} note 267, at 1624 (omitting in the conclusion that bifurcation shortens trials the likely necessary argument and additional time required for judges to determine these issues).


Moreover, it is uncertain whether bifurcation aids or hinders settlement. At least one court found it important to ensure discovery of both liability and damages because a full understanding of damages “not only assists the parties in preparing for trial, it also educates each party on the other's view of the damages, which, in turn, assists each party in evaluating essential elements of the matters in issue and in assessing the risks associated with an adverse decision in the action.” 282 Thus, a unitary trial may actually facilitate settlement, thereby serving judicial economy. Other courts have found, however, that bifurcation may help settlement because once liability is determined, “the knowledge of the liability verdict and the savings in cost of expensive damage discovery will provide both room and the means for compromise.” 283

A bifurcated proceeding merely modifies, rather than eliminates, much of the pre-trial debate. If evidence on damages is precluded until a later proceeding in which it is deemed necessary, parties may avoid fighting over certain expert witnesses, evidence of injuries, and damage calculations. However, those debates would simply be replaced with debates over what evidence will be admitted in the liability phase—specifically, what will and will not be permitted. Once again, it is unclear whether bifurcation actually serves to promote judicial economy.

Finally, and perhaps most importantly, if the entire purpose of bifurcation is to expedite tort litigation, then the provision may be proper. 284 But if there is more at stake, such as prejudice to either party and preservation of the jury’s role, then a closer examination is required before North Carolina or other states enact such a drastic change in litigation practice. “While economy and convenience may properly be considered in the decision to bifurcate, neither is the ultimate objective.” 285 Indeed, “[a] 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.” 286 In its haste, the North Carolina General

283. F&G Scrolling Mouse, L.L.C. v. IBM Corp., 190 F.R.D. 385, 392 (M.D.N.C. 1999); see also Industrias Metalicas Marva, Inc. v. Lausell, 172 F.R.D. 1, 5–6, 8 (D.P.R. 1997) (finding that bifurcation may promote judicial economy by, among other things, facilitating settlement).
284. Zeisel & Callahan, supra note 267, at 1624.
286. Id. (quoting Baker v. Waterman S.S. Corp., 11 F.R.D. 440, 441 (S.D.N.Y. 1951)); see also Weinstein, supra note 262, at 832 (“The bifurcation rule . . . has within it potentialities for a major change in the relative position of plaintiffs and defendants in
Assembly may have missed the importance of that paramount consideration.

D. The Jury’s Perspective

While the three issues described above have received significant attention in the literature, little has been said about how the juries themselves are affected by bifurcation. Courts have recognized that “the traditional role of the factfinder [is] to make an ultimate determination on the basis of the case presented in its entirety.” The jury is expected to listen to all of the evidence and make a reasoned decision that represents the will of the public at large. Thus, federal courts have expressed concern that bifurcation “would cause greater delay and might complicate the proceedings by creating a piecemeal quality to the trial, making it harder for the trier of fact to see the case as a whole.” Mandatory bifurcation does not take away the fact that the evidence in a unitary proceeding may give a more complete picture of what really happened. From the jury’s point of view, for example, seeing how much someone actually suffered may be necessary to determine whether the defendant’s action was a proximate cause of injury sufficient to impose liability.

The rules on remand recognize the importance of the jury’s perspective. As explained earlier, courts on remand can only retry a solitary issue if the remaining issues are completely separate and distinct. According to one commentator, “[t]he particular frailties of juries, while decried by some, were not the overriding concern of the Court in making this decision. The Court focused instead on avoiding confusion of the trier of fact due to incomplete information.” Perhaps similar consideration should be given to the jury’s role in the first instance.

negligence cases and the rule cannot be appraised merely by procedural efficiency tests which might be appropriate for other proposed procedures.”

292. Bedecarre, supra note 277, at 129.
Bifurcation is also intended to help the jury make a more logical decision without being swayed by sympathy for the injured party. But torts such as “[w]rongful death actions, in and of themselves, are sufficient to evoke the sympathy of most juries. The fact that such actions necessarily involve testimony related to the death of a mother, father or child does not require bifurcation of the liability and damage issues.” Sympathy, in and of itself, is not a sufficient reason to bifurcate all tort proceedings. Jurors are already instructed to make their decision based on the facts and “not be swayed by pity, sympathy, partiality or public opinion.” North Carolina’s new law implicitly assumes that juries do not or cannot follow that charge.

Protecting against jury sympathy may have more of a role in non-tort cases in any event. A jury determining whether a defendant has breached a contract or violated a criminal statute should not be swayed by the effect on the alleged victim. But a jury determining whether a defendant acted reasonably under the circumstances may want to know how that reasonable or unreasonable action affected others, even if, in theory, the determination of liability should not be swayed by the resultant damages. An otherwise unreasonable risk seems a lot more reasonable if it does not harm anyone. Conversely, an otherwise reasonable risk seems unreasonable when it harms others a great deal. While it could be argued that the effects of conduct should not taint a jury’s determination of reasonableness, it is also arguable that jurors make a less-informed decision without the benefit of all of the information.

In addition, North Carolina’s highest court presumes that jurors follow a trial court’s instructions. The General Assembly did not explain why that presumption was inadequate in tort claims involving damages more than $150,000. Indeed, courts usually recognize that jurors are often asked to make contingent determinations. In any trial,

294. Id.
296. 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, 827 (1961) (“Perhaps it can be said unequivocally that juries have no business considering the extent of damages in deciding the issue of liability.”).
If bifurcated or not, the justice system expects a jury to determine whether the defendant is liable and then determine the extent of the plaintiff’s injuries. To protect the jury system itself, courts “invoke a ‘presumption’ that jurors understand and follow their instructions.” As the Honorable Frank Easterbrook explained, “this is not a bursting bubble, applicable only in the absence of better evidence. It is a rule of law—a description of the premises underlying the jury system, rather than a proposition about jurors’ abilities and states of mind.” This foundational principle remains true, even if juries reach compromise verdicts that are the foundation of the theory in support of bifurcation. The difference between bifurcation and ordinary jury instructions is that in a bifurcated setting, “the jury cannot fill the void created by the court’s ruling.” Whether that problem is a negative or is a positive for the jury system remains to be determined, but it is, at the very least, an issue to consider.

Some have further argued that bifurcation actually helps the jury by making a trial more manageable and by giving the jurors more discrete issues to decide. However, research has not always shown that to be the case. One study found that “bifurcation does not enhance memory of compensatory case facts and most legal instructions about compensatory damages.” And it is often the most difficult cases that reach the jury in the first place. Once again, it is unclear what effect bifurcation has on the jurors themselves.

Knowledge of the bifurcation will affect the way that jurors react to testimony. Judge Weinstein provided this helpful commentary:

Many of the advantages foreseen from split trials might well be lost, if it is known that the same jury is to be used. Some jurors are rather sophisticated and they might well inform their fellows that they ought to find for the plaintiff if they wanted to hear the medical testimony and give the plaintiff “something” even though he might have been partly responsible for the accident.

299. Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993).
300. Id.
301. See id. ("Jurors reach compromise verdicts, although they aren’t supposed to.").
304. Landsman et al., supra note 24, at 333.
305. Id.
Conversely, sophisticated jurors might also realize that finding in favor of the plaintiff means that they will have to endure another set of evidence and another set of deliberations. As a result, some jurors may be tempted to find in favor of the defendant simply to shorten their own time in the jury box. Subconsciously or consciously, then, the bifurcated procedure affects the way that jurors view a trial.

In addition to how jurors independently view a bifurcated trial, the defendant may use bifurcation as a sword, rather than as a shield, only to further exacerbate this problem. Defendants could use bifurcation as a tool to manipulate jurors to find in their favor. This possibility can be seen in one recent case in which the defendant made this closing argument in the liability phase of a bifurcated trial: “If you answer ‘yes’ to any of these issues, [plaintiff’s counsel] will talk about another phase of this trial, okay? And we’re back for another phase of this trial, okay? Got to answer the first six issues ‘no.’” If there was any doubt as to whether the jurors understood the implications of the first decision, such doubt was wholly obliterated through the defendant’s frank statement. The judicial system trusts jurors to make fair and deliberate decisions, but common sense may push jurors to get out of jury duty as quickly as possible.

V. NORTH CAROLINA’S PREDICAMENT

Not only does North Carolina’s judicial system face problems associated with jurors’ views of bifurcation, but it also must battle through the unknown and possibly unintended consequences of adopting such a novel rule. North Carolina lawyers and judges will be the first to encounter any unanticipated problems as they interpret the new statute without any guidance from the General Assembly. This Part first describes the difficulties with North Carolina being the only state to have such a provision. It then offers a suggestion for judges attempting to apply the provision and a suggestion for other states considering such a change in their litigation procedure.

A. Unwisely Breaking New Ground

North Carolina’s adoption of the new law, creating a presumption in favor of bifurcated trials, contradicts the established rules in the
majority of jurisdictions. The Sixth Circuit admonished that bifurcation “should be resorted to only in the exercise of informed discretion and in a case and at a juncture which move the court to conclude that such action will really further convenience or avoid prejudice.” Furthermore, the new law contravenes what other jurisdictions have long accepted as the preferred procedural practice. For example, it is “a settled principle in Texas law [that] liability and damage issues are so interrelated in a personal injury case that it is error to try them separately.” Unlike the evidence relating to punitive damages, the line between evidence of a defendant's liability and the evidence used to calculate compensatory damages is much harder to demarcate.

In addition to the absence of any past or current precedent for North Carolina's decision, bifurcation of liability and compensatory damages in tort cases is “[t]he most hotly debated development in issue bifurcation, and the slowest to gain acceptance for common usage.” One wonders why the General Assembly adopted such a drastic change in the most controversial area within tort law without so much as conducting research into the rule's efficacy, considering its future implications, or providing any rationale for their decision. As of now, the statute separates punitive damages and compensatory damages from the question of liability, but is it a far leap for the General Assembly to later bifurcate another piece of the trial, such as causation? This type of “polyfurcation” is not necessarily in the public or the judicial system's best interest. North Carolina’s new presumption favoring bifurcation creates an atmosphere of uncertainty for judges and lawyers as they try to sort out the implications of the new law.

Although North Carolina is the only state to create a presumption in favor of bifurcation by statute, New York has a clear policy favoring bifurcation of liability from damages adopted by regulation. In New York, “[j]udges are encouraged to order a bifurcated trial of the issues of liability and damages in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues

309. See, e.g., Rowley & Moore, supra note 206, at 6–9.
311. Cunningham & Hutchinson, supra note 219, at 810 (citing Eubanks v. Winn, 420 S.W.2d 698, 701 (Tex. 1967)).
312. Bedecarre, supra note 277, at 134.
313. See generally id. (discussing the problems and implications associated with “polyfurcation” under Rule 42(b)).
and a fair and more expeditious resolution of the action."315 However, even that standard has an exception, "where the nature of the injuries has an important bearing on the question of liability."316 Nevertheless, a comprehensive national study, albeit a few years old, found that bifurcation is still relatively rare.317 Perhaps there is a reason for the majority of jurisdictions’ reluctance to encourage bifurcation of compensatory damages from the defendant’s liability.

North Carolina’s adoption of a presumption in favor of bifurcation also eliminates much of the judge’s discretion, which goes against the traditional view of utilizing bifurcation only when it will decrease prejudice and increase judicial efficiency. Courts have recognized that in some instances jury sympathy is inevitable.318 Similarly, it may be that the defendant has no likelihood of winning on the issue of liability and, therefore, bifurcation would be improper.319 Or the opposite may be true, such that bifurcation is appropriate in the interests of efficiency and judicial economy when there is a clear showing that the plaintiff has no likelihood of winning on the liability issue.320 However, on other occasions, the issues of liability and damages will be so interrelated such that bifurcation is not appropriate.321 The difficulty exists in the establishment of a presumption of bifurcation, which largely removes the discretion afforded to trial judges in every other aspect of the trial proceedings.

The problem is not simply that North Carolina’s rule is different than other jurisdictions, but that the General Assembly has forged ahead with the new rule on bifurcation without analyzing the effect or value of the old rules. For example, North Carolina, in contrast to every other state, already had a separate rule of severance for cases against a

315. Id.
318. Ake v. General Motors Corp., 942 F. Supp. 869, 877 (W.D.N.Y. 1996) (denying motion to bifurcate because some evidence would be relevant to both phases and jury sympathy would exist in any case, as jury in both phases would know that the decedent had died in a fire).
managed-care entity.\textsuperscript{322} Under the managed-care rule, when a party includes a claim involving a managed-care entity and files a motion, the court must order “separate discovery and a separate trial of any claim, cross-claim, counterclaim, or third-party claim.”\textsuperscript{323} Thus, bifurcation in this situation is mandatory so long as a motion is made, and, given the wording of the rule, there is little doubt as to the intended beneficiary of such a provision. North Carolina is the only state to codify such a requirement even though research has not been conducted into this provision’s benefit.

Furthermore, and more conspicuously, North Carolina has already separated the issue of liability for punitive damages from the issue of liability for compensatory damages.\textsuperscript{324} In cases that must analyze punitive damages, there may be less prejudice than in the liability-damages bifurcation because the type of evidence permitted in punitive damages may cloud the issue of liability. One federal court found that bifurcation of the liability and damages phases of a products liability trial was not required when “exclusion of the evidence of other incidents and the punitive damages claims reduced many of the prejudice and complexity issues of concern to the defendant.”\textsuperscript{325} North Carolina, however, has not attempted to undergo any systematic research into the benefit of this type of bifurcation, even though it has been instituted for more than ten years.

In contrast, one of the states that is dealing with bifurcation and attempting to understand its consequences is Ohio. Ohio is investigating the constitutionality of a mandatory bifurcation provision for punitive damages cases.\textsuperscript{326} During the oral argument in Flynn v. Fairview Village Retirement Community, Ltd., counsel for the defendant argued that both parties had a substantive right to a fair trial.\textsuperscript{327} Implicit in that argument is that mandatory bifurcation provides a fair—or fairer—trial, but nobody has attempted to explain whether that

\textsuperscript{322} N.C. GEN. STAT. § 1A-1, Rule 42(b)(2) (2013).

\textsuperscript{323} Id.

\textsuperscript{324} Id. § 1D-30.


\textsuperscript{326} See Flynn v. Fairview Vill. Ret. Cmty., Ltd., 970 N.E.2d 927, 929 (Ohio 2012) (per curiam) (noting that “[b]y denying appellants’ motions to bifurcate under R.C. 2315.21(B), the trial court implicitly determined that the S.B. 80 amendment to the statutory provision is unconstitutional, i.e., that Civ.R. 42(B) prevails over the conflicting statutory provision”).

assumption is accurate. Defendant's counsel conceded that “[c]ertainly there are going to be situations where some evidence lends itself into both [compensatory and punitive damage analysis].” If that is the case, then under most courts' jurisprudence, including North Carolina's, bifurcation is not proper because the issues are not completely “separate and distinct.”

Additionally, some states have followed North Carolina's example and require bifurcation of punitive damages. Another example of bifurcation across the states is the requirement of bifurcation of liability insurance coverage from a damages claim against an insured. Overall, states have imposed rules requiring bifurcation in a limited number of specific cases, but North Carolina is the first state to impose such a broad rule of bifurcation. In 2006, there was “no case holding that courts are required to bifurcate all trials that involve questions of liability as well as questions of damages.”

Moreover, the policies behind bifurcating the issue of punitive damages are largely different than the policy reasons for separating liability determinations from compensatory damages. Legislatures have generally required, and courts have generally held, that some safeguards are necessary to ensure that defendants are not burdened with excessive punitive damages awards because punitive damages are intended to punish the defendant rather than compensate the plaintiff. Bifurcating the punitive damages phase is one way to ensure that a jury is only given information about the defendant's net worth when deciding the amount of punishment to be inflicted. Compensatory damages,

328. Id. at 9:44.
331. See, e.g., ALA. R. CIV. P. 18(c).
333. N.C. GEN. STAT. § 1D-25 (2013) (requiring a statutory maximum of three times the amount of compensatory damages or $250,000, whichever is greater, for punitive damage awards).
335. N.C. GEN. STAT. § 1D-1 (“Punitive damages may be awarded . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts.”).
336. See id. § 1D-3 (“In determining the amount of punitive damages, if any, to be awarded, the trier of fact . . . [m]ay consider only that evidence that relates to,” among other things, “[t]he defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.”); Ward v. Beaton, 539 S.E.2d 30, 36 (N.C. Ct. App. 2000)
however, are not intended to punish the defendant at all; rather, they are intended to compensate the plaintiff for injuries sustained.\(^{337}\) The amount of damages is significantly, if not inextricably, intertwined with the injury itself.\(^{338}\) If compensatory damages are so linked with the injury, it may be difficult to determine how to separate the evidence in the average tort case.

That difference may explain why courts have recognized that bifurcation “should be carefully and cautiously applied and be utilized only in a case and at a juncture where informed judgment impels the court to conclude that application of the rule will manifestly promote convenience and/or actually avoid prejudice. Piecemeal litigation is not to be encouraged.”\(^{339}\) The North Carolina General Assembly has not only taken that “informed judgment” away from the judiciary, but it may have shown a lack of informed judgment on its own part.

Furthermore, “[i]t is the consensus view that separate trials are not available to litigants as a matter of right.”\(^{340}\) North Carolina’s new law seems to disagree.\(^{341}\) States certainly have the right, and perhaps the obligation, to experiment with different legislation. As Justice Brandeis famously remarked, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”\(^{342}\) But it is also wise to examine past steps before taking new steps forward. North Carolina has not studied the effects of bifurcation of punitive damages or the effects of bifurcation in medical malpractice cases, yet it now forges ahead with an even more comprehensive bifurcation statute. Such experimentation is dangerous, if not reckless.


\(^{338}\) See, e.g., Ammons v. S. Ry. Co., 52 S.E. 731, 732 (N.C. 1905) (explaining that while punitive damages “are independent of the injury inflicted or the legal wrong committed,” compensatory damages are “those by which the actual loss sustained is measured and the injured party recompensed”).


\(^{340}\) Cunningham & Hutchinson, supra note 219, at 817.

\(^{341}\) N.C. GEN. STAT. § 1A-1, Rule 42(b)(3).

\(^{342}\) New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
When serving as a laboratory, states should be diligent scientists and review past studies before designing new ones. States should also be cautioned to maintain a realistic approach to experimentation. As the Sixth Circuit admonished, there is a risk that this trend in increased bifurcation will create “a sterile or laboratory atmosphere in which [liability] is parted from the reality of injury.”

B. A Proposed Standard

That difficulty is largely avoidable. For North Carolina jurists who are interpreting the new statute, this Article suggests implementation of the standard from Technimark, Inc. v. Crellin, Inc. Under that standard, a judge should only bifurcate the liability and damages issues if it finds that: (1) proof of damages will be sufficiently complex, (2) there is no potential overlap between the issues, and (3) judicial economy will actually be served by bifurcation. A contrary finding of any of these elements should constitute “good cause” to deny bifurcation under the statute.

For other states considering a change to their bifurcation rules, a similar standard should be employed. However, rather than creating a presumption in favor of bifurcation, the states should follow the lead from federal courts and assume a single trial, but allow a party to show that bifurcation is appropriate under the standard set out above. Bifurcation is likely proper in some circumstances. The possibility of inflammatory and prejudicial evidence being admitted in the liability phase is real. But to place a presumption of bifurcation is to put the cart before the horse. The moving party should have the burden of showing that evidence would be prejudicial in some way or that bifurcation is otherwise appropriate. When the liability issue is complex or witnesses will overlap, bifurcation should be denied.

Instead of bifurcating the litigation, a better solution is to keep the trial in one proceeding and rely on the trier of fact to apply the appropriate standard. Such a rule has been applied in North Carolina’s

345. Id. at *4–6.
346. N.C. GEN. STAT. § 1A-1, Rule 42(b)(3).
domestic cases. In that setting, “[t]he statutes contain no requirement that the two stages in a termination of parental rights proceeding be conducted at two separate hearings, so long as the court applies the appropriate evidentiary standards at each of the two stages.” Indeed, North Carolina presumes that the trier of fact is able to separate the two issues and is able to consider the evidence according to the applicable legal standards. Thus, the Court of Appeals of North Carolina deemed it “well established” that “so long as the court applies the different evidentiary standards at each of the two stages, there is no requirement that the stages be conducted at two separate hearings.” In the domestic context, “[e]vidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered by the court during the dispositional stage.” That same rule can apply to civil cases more generally. A presumption in favor of bifurcation is not necessary. Rather, as with most civil and criminal situations, the decision to bifurcate should be left to the discretion of the trial judge, and the moving party should bear the burden of demonstrating its propriety.

If judges were omniscient and could see the future enough to predict which cases would proceed to a damages phase, then bifurcation would in fact promote judicial economy without prejudicing either party. If that were the case, judges could preclude evidence of damages altogether. In reality, however, judges are not omniscient, and they certainly cannot predict how a jury will decide a particular case. Although some cases are more clear-cut than others, most cases fall in the middle. A presumption of bifurcation in that instance is inappropriate.

Empirical research, albeit flawed, has also demonstrated to some degree that bifurcation is not as effective as clear jury instructions. At
least some judges agree. Overall, however, the research conflicts on whether bifurcation actually helps or hinders juries. Rather than forge ahead by adding multiple bifurcation statutes, additional research should be conducted to determine the efficacy of bifurcation as well as its prejudicial effects.

In making this determination, courts should follow the advice given by appellate courts for the other bifurcation provisions under Rule 42. Specifically, a trial court “should enter findings and conclusions which clearly establish that severance is appropriate.” These findings and conclusions will not only enable a more effective appellate review but will also allow for a more general review of the efficacy and propriety of bifurcation.

Exercising their discretion, even under a rule such as North Carolina’s, courts would do well to consider bifurcation and its effects carefully. Courts have identified numerous factors to consider in making this decision. The District Court for the District of Colorado has given the most comprehensive list:

1. Will separate trials be conducive to expedition of the litigation and economy? 
2. Will separate trials be in furtherance of convenience to the parties and avoid prejudice? 
3. Are the issues sought to be tried separately significantly different? 
4. Are the issues triable by jury or by the court? 
5. Has discovery been directed to single trial of all issues or separate trials? 
6. Will substantially different witnesses and evidence be required if issues are tried separately? 
7. Will a party opposing severance be significantly prejudiced if it is granted? 
8. Will an unfair advantage be afforded to a party if bifurcation is granted? 
9. Will management of trial, delineation of issues, and clarity of factual questions be substantially enhanced by bifurcation? 
10. Will bifurcation assist efficient judicial administration of the case?

Courts should consider all of these factors in making the bifurcation determination and then produce their findings and conclusions.


355. Compare Greene et al., supra note 215 (finding that jurors were not affected by bifurcated evidence), with Christine M. Shea Adams & Martin J. Bourgeois, Separating Compensatory and Punitive Damage Award Decisions by Trial Bifurcation, 30 LAW & HUM. BEHAV. 11 (2006) (finding that bifurcated juries were more likely to use evidence correctly).


VI. CONCLUSION

Whether for good or ill, “[s]eparate trials will require trial lawyers to depart from long established modes of trial procedure.” Trial lawyers in North Carolina are now faced with the task of understanding the arguments for and against bifurcation on a deeper level than ever before. Judges are faced with the task as well. The impact of this new statute should not be underestimated.

“[W]hen it is seen that the split trial reduces by more than half the cases in which personal injury plaintiffs are successful, it is apparent that bifurcation makes a substantial change in the nature of the jury trial itself.” Such a substantial change should entail careful and deliberate thought. That kind of deliberation is missing in the passage of North Carolina’s law. Indeed, if this change “is to be done, and if the Constitution permits it to be done, the change should come from those who are elected to make laws, with full awareness of what they are doing.” The North Carolina General Assembly has provided no evidence that it had full awareness of what it was doing. To the contrary, it has proceeded to pass new laws in favor of bifurcation without addressing or analyzing the issues described above.

To conclude, this Article respectfully disagrees with Professor Mayers and instead argues that a unitary proceeding is not “inherently . . . absurd.” Indeed, bifurcation in all cases, criminal and civil, is the exception rather than the rule. As Professor Douglass persuasively argues in the criminal context, “[w]e cannot assume . . . that separation of trial and sentencing is part of the natural order of things.” Judges have shown some reluctance to bifurcate for their own reasons, but some of those reasons could include a respect for the problems described above. That reluctance “perhaps reflects judicial concern about bifurcation’s impact on outcomes or heightened uneasiness about juror blindfolding.”

Life experience is replete with examples of unitary proceedings that may actually gain from separation. A potential student may benefit from first determining where he should go to school and then evaluating how much it will cost. An automobile purchaser may benefit from a similar

358. Weinstein, supra note 262, at 852.
359. Wright & Miller, supra note 201, § 2390.
361. See Mayers, supra note 1, at 389.
363. Landsman et al., supra note 24, at 306.
analysis. But there is also something to be said for gathering a complete picture and making a determination based on the totality of the circumstances. Bifurcation, with all of its value, distorts that picture in the litigation context—for the parties, the judges, and the jury. Legislatures and courts, including those in North Carolina, should be aware of the distinct possibility of replacing “an exciting and gallant experiment in the conduct of serious human affairs” with the type of sterile laboratory discouraged by other courts.365

365. In re Beverly Hills Fire Litig., 695 F.2d 207, 217 (6th Cir. 1982) (discouraging the creation of “a sterile or laboratory atmosphere in which causation is parted from the reality of injury”).