THE CASE FOR BIFURCATION OF ISSUES IN A CLASS ACTION PROCEEDING

By William E. McNally and Barbara E. Cotton[1]

Introduction

It is probably a fair reflection to note that Canadian courts are reticent to bifurcate issues in a trial and, indeed, it may be said that there is an implicit presumption against bifurcation[2].

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[2] See *Royal Bank* v. *Kilmer Van Nostrand Co.*(1994), 29 C.P.C. (3d) 191, wherein it is stated that:

> "Although a party to litigation does have a right to have all of the issues tried at one time and although courts discourage multiplicity of proceedings, there are many factors relating to the trial of civil actions in a jurisdiction such as Toronto that recommend to the courts that all reasonable efforts be made to cut down the length of trials, to reduce the inconvenience to witnesses, to curtail the expense wherever practicable and to protect and preserve the very limited public resources available to conduct such trials….These considerations ought not to overwhelm the considerations of justness and fairness…At all times, these latter concepts are dominant....It is my view that in a case where the concepts of prejudice and/or injustice can be demonstrated, even to a modest degree, they should always outweigh the concepts of expedience and convenience but, under a circumstance where the concepts of prejudice and injustice are only raised by inference and philosophy and without proofs, a strong case in support of convenience and expedience should carry the day."

See also *Bank of Nova Scotia* v. *George Hill Cartage Ltd.*, [2001] O.J. No. 1776, wherein it is stated: "...In a case such as this, where the concepts of prejudice and/or injustice can be demonstrated, even to a modest degree, considerations of justness and fairness should always outweigh the concepts of expedience and convenience:..."

Perhaps the apparent reticence for a bifurcation of issues is best illustrated by the cautionary comments of the esteemed authors Stevenson & Cote in *Civil Procedure Guide 2002*[3]. In discussing the Alberta rules which allow for bifurcation, the authors state: "Bitter experience shows that these Rules are usually sirens whose song lures a lawsuit onto the rocks. There is rarely any argument for a split, other than the hope of saving time and money . . . Splitting off issues to try first usually ends by consuming more time and money, not less." [4]

It is the thesis of this article, however, that bifurcation of issues can indeed be beneficial in a class action proceeding, given the usual complexity of the issues, the numerous parties involved, the individuality of some issues pertaining to certain members of the class, and the need for a complex and frequently individualized proof of damages. It can be posited that, in a class action proceeding, bifurcation of issues can reduce the length of the ultimate trial proceedings, particularly if the severed issue or issues are dispositive of the case. If the initial phases of the bifurcated trial are dispositive, such as a trial of the liability issues before the damage issues, the failure to prove the dispositive issues may well end the litigation and the subsequent frequently complex issues, such as damage claims, need never be heard. Bifurcation might also allow for the winnowing of issues for discovery and other pre-trial procedures and result in concomitant focus. There is an increased possibility that the litigants will be more ably represented as separation of the litigation into discreet issues encourages more efficient preparation by counsel and allows counsel to focus on the issue(s) then before them. Some of the party litigants may be excluded from portions of discovery and trial preparation that do not pertain to them, and thus wasteful efforts on the part of counsel are avoided. In the event that the matter proceeds by way of a jury trial, bifurcation of the

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[3] Stevenson & Cote, *Civil Procedure Guide 2002* (Edmonton, Alberta: Juriliber, 2001)

[4] At p. 186

issues may reduce the complexity of the matters presented to the jury and thereby facilitate jury deliberation. Further, early resolution of some issues might promote settlement of the action.

This article will commence by briefly reviewing the current attitude of the courts to bifurcation of issues, in general, discussed with an emphasis on Alberta jurisprudence, as Alberta is the home jurisdiction of the authors. The article will then turn to a brief review of Canadian case law dealing with bifurcation of issues in a class action setting proceeding, and will suggest that, because of the paucity of such Canadian jurisprudence, one must turn to the American authorities for guidance. After noting a caution sounded with respect to the relevance of American class action jurisprudence in a Canadian context, the article will then briefly review the history of the American approach to bifurcation of issues in general. The benefits of bifurcation of issues within a class action proceeding will then be discussed and a review made of selected American cases. The article will then conclude that, notwithstanding the general reticence of Canadian courts to bifurcate issues in a trial, such reticence is not apt when applied to the complexities of a class action proceeding. The American stance of a ready bifurcation of issues in a class action proceeding is recommended.

The Current Posture Towards Bifurcation of Issues in General

Bifurcation of issues in Alberta proceeds by way of application pursuant to Rule 221 of the Alberta *Rules of Court*. This rule permits the Court, in its discretion, to order any question or issue arising in a proceeding to be tried separately.

The general principles governing an application pursuant to Rule 221 have recently been reviewed by Binder J. of the Alberta Court of Queen's Bench in *Tanguay* v. *Vincent*[5], as follows:

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[5] (1999), 75 Alta. L.R. (3d) 90

- The courts do not encourage the piecemeal trial of actions, but where the issue is readily severable and where the court is satisfied that the cost of a long trial may thereby be saved, the order will be granted;

- The test is whether there is some evidence which will make it at least probable that the issue will put an end to the action;

- There is a danger in granting such orders, and they should be granted only in exceptional circumstances where it is clear that the questions to be determined are completely severable, and where the determination will substantially expedite the litigation or materially curtail the cost of the same;

- Lord Denning's "just and convenient" test[6] has not been adopted in Alberta;

- The courts should not attempt to determine substantial or difficult questions as preliminary issues;

- Where it appears clear that the trial of the preliminary issues would not save time or money unless the applicant wins them completely, it is worth asking whether such a complete win is highly likely;

- The amount of documentation to be produced should be considered, and the court must be satisfied that the cost of a long trial would be saved by the granting of the order;

- The following appear to be the relevant factors: 1. Will it end the suit, at least if decided one way?; 2. Will there be a saving in time or money spent on litigation,

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[6] Propounded in *Coenen* v. *Payne et al.*, [1974] 2 All E.R. 1109

again at least if decided one way?; 3. Will it create an injustice?; 4. Are the issues complex or difficult?; and 5. Will it result in a delay in the trial?; and

- There is little that is unique or unusual in finding a Plaintiff with limited resources who faces a considerable expense of a long trial with multiple experts, nor is increased chance of settlement a persuasive factor.[7]

The reticence of the courts to bifurcate issues, in general, is evidenced by many cases. For example, in *Oberik* v. *Mendoza*[8] Veit J. of the Alberta Court of Queen's Bench dismissed an action claiming damages as a result of a motor vehicle accident on the basis that, if the issue of liability were determined separately, it could still be appealed and overturned, leading to a new trial on all the issues, an even greater inconvenience than a single trial of liability and damage issues. Further, there was a possibility that all of the witnesses would have to be called twice if there was a bifurcation of the liability and damages issue. Thus there was no guarantee of a benefit and the potential for some mischief if severance of the issues was allowed[9].

In cases in which bifurcation of the liability and damages issues have been allowed, such as *Vanderlee* v. *Doherty*[10], the judge, (in this case also Veit J.), emphasised that the plaintiff seeking severance had made an undertaking not to appeal the liability decision until the damages decision was made; the plaintiff seeking severance was an individual and of limited financial means, and not a business or corporation, (presumably with deeper pockets); the determination of the issue of liability could end the lawsuit or at least result in useful negotiations concerning settlement of

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7 Other leading Alberta cases outlining the general principles governing a rule 221 application are *Moseley* v. *Spray Lakes Saw Mills (1980) Ltd.* (1994), 26 Alta. L.R. (3d) 359 and *Lim* v. *Home Insurance Company* (1995), 168 A.R. 308, varied as to the stated issue at (1996), 43 Alta. L.R. (3d) 301

8 (1998), 225 A.R. 399

9 See also *Swamy* v. *Schell* (2000), 269 A.R. 66 for similar sentiments.

10 (2000), 258 A.R. 194

damages; there was a realistic possibility of settlement and both the plaintiff and defendant could save considerable court costs if the damage portion of the trial did not have to be heard.

It would seem that a similar approach to bifurcation is taken in Ontario. In the leading case of *Bourne* v. *Saunby*[11] the following factors were outlined as helpful in evaluating the merits of a plaintiff's motion for bifurcation of the liability issues from the damages issues:

- are the issues to be tried simple?;

- are the issues of liability clearly separate from the issues of damages?;

- is the factual structure upon which the action is based so extraordinary and exceptional that there is good reason to depart from normal practice requiring that liability and damages be tried together?;

- does the issue of causation touch equally upon the issues of liability and damages?;

- will the trial judge be better able to deal with the issues of the injuries of the plaintiff and his financial losses by reason of having first assessed the credibility of the plaintiff during the trial of the issue of damages?;

- can a better appreciation of the nature and extent of injuries and consequential damage to the plaintiff be more easily reached by trying the issues together?;

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11 (1993), 23 C.P.C. (3d) 333

- are the issues of liability and damages so inextricably bound together that they ought not to be severed?;

- if the issues of liability and damages are severed, are facilities in place which will permit these two separate issues to be tried expeditiously before one court or before two separate courts, as the case may be?;

- is there a clear advantage to all parties to have liability tried first?;

- will there be a substantial saving of costs?;

- is it certain that the splitting of the case will save time, or will it lead to unnecessary delay?;

- has there been an agreement by the parties to the action on the quantum of damages?;

- if a split is ordered, will the result of the trial on liability cause other plaintiffs in companion actions, based on the same facts, to withdraw or settle?; and

- is it likely that the trial on liability will put an end to the action?

Canadian Bifurcation of Issues Within a Class Action Proceeding

It must be noted at the outset that both the Ontario and the British Columbia class action statutes expressly contemplate the bifurcation of individual issues from the common issues[12].

[12] *Class Proceedings Act,* 1992, S.O. 1992, c. 6 ss. 11, 25; *Class Proceedings Act* R.S.B.C. 1996, c. 50, ss. 11, 27

This express contemplation of bifurcation within the Ontario and British Columbia statutes has been noted in the case law[13].

There have been very few examples of bifurcation of issues within a class action proceeding in Canada, however. In *Authorson (Litigation Guardian of)* v. *Canada (Attorney General)*[14] a class action was commenced claiming pension benefits for incapacitated veterans. The action had a national class with claims going back some 70 years. The action was apparently bifurcated between the liability and the damage issues, but there was no discussion of the general principles of bifurcation in the case. In *Webb* v. *K-Mart Canada Ltd.*[15] a class action was brought on behalf of former employees of K-Mart alleging wrongful dismissal. An issue arose as to whether the issue of sufficiency of notice could be bifurcated from the issue of whether the employees were properly terminated due to a reorganization and this bifurcation was granted, again without any discussion of the principles.

In view of the paucity of Canadian authorities and the relative wealth of experience of the American courts with class action proceedings it therefore seems a good idea to look to the American literature and jurisprudence for guidance.

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13 *Carom et al.* v. *Bre-X Minerals Ltd. et al.* (1999), 44 O.R. (3d) 173, affirmed at (1999), 46 O.R. (3d) 315, reversed at (2000), 51 O.R. (3d) 236, leave to appeal to the S.C.C. dismissed at 2001 CarswellOnt 3609; *Wilson* v. *Servier Canada Inc. et al. (*2000), 50 O.R. (3d) 219, leave to appeal refused at (2000), 52 O.R. (3d) 201, application for leave to appeal to the S.C.C. dismissed at 2001 CarswellOnt 3077

14 [2001] O.J. No. 2924, additional reasons at 2001 CarswellOnt 2598

15 [1998] O.J. No. 5469

The American Experience

A Cautionary Note

It should be noted at the outset that one justice of the Ontario Court of Justice (General Division), Brockenshire J., has on two occasions sounded a cautionary note as to the applicability of American cases dealing with bifurcation of issues in a class action proceeding to a Canadian context. In *Webb* v. *K-Mart Canada Ltd.*[16], Brockenshire J. stated:

> ". . . It is I think clear that, due to differences in law, class action decisions in the United States, while very helpful and generally instructive, have to be looked at with considerable caution . . ."

In the earlier case of *Nantais et al.* v. *Telectronics Proprietary (Canada) Limited et al.*[17] Brockenshire J. also registered concern, stating:

> "Further, I recognize the inherent dangers of lifting statements from U.S. decisions out of the U.S. matrix, where the underlying assumptions could be much different than ours. Look, as an example, at the series of articles in the August 1995 issue of the American Bar Review on tort reform. I know that in the 1980s, the American view of bifurcated bench trials of personal injury cases was different from ours, and that the law on product liability as set out in the American

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16 See note 15

17 (1995), 25 O.R. (3d) 331, leave to appeal refused at 347

> restatement was different from ours. I also know that two studies of the American jurisprudence were carried out before the Ontario Act [the *Class Proceedings Act*] was drafted, in purposely different form from U.S. Rule 23.1..."

These cautionary comments must be kept in mind.

One aspect featured in American literature and jurisprudence on bifurcation which is obviously different than the Canadian experience is the overwhelming use of jury trials in civil matters in the United States, a situation much different than in Canada. Thus, much of the American comment with respect to the benefits of bifurcation because of its effects on jury trials and jury deliberation is not applicable within a Canadian context. On the other hand, there are two constitutional arguments made frequently in the American courts against bifurcation, (that bifurcation offends the Seventh Amendment and the "Erie Doctrine"), which have no application in Canada. On balance, therefore, it seems that much of the American literature and judicial comments on bifurcation is of interest and largely applicable to Canadians as well.

History of the American Approach to Bifurcation of Issues In General

The history of the American approach to bifurcation of issues, in general, also reflects a reticence of the judiciary to bifurcate and, indeed, it is frequently said that there is a "presumption" against bifurcation. This posture of the American judiciary towards bifurcation in general, however, has not been evidenced in the approach that the American judiciary takes to class action proceedings in particular, where bifurcation has been much more readily granted.

The history of the general American approach to bifurcation is well set out by Steven S. Gensler in his recent article "Bifurcation Unbound"[18]. This article notes that bifurcation as it currently exists in the United States began in 1938 with the adoption of the *Federal Rules of Civil*

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[18] (2000), 75 *Washington Law Review* 705

Procedure. The enactment of Rule 42(b) marked the first time a statute or rule expressly authorized federal judges to try issues separately within a single action at law.[19]

At almost the same time that Rule 42(b) authorized separate trials, Professor Lewis Mayers[20] condemned the unitary trial as irrationally absurd. Professor Mayers argued that bifurcation was primarily a tool of efficiency which would yield the additional benefit of reducing

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[19] Federal Rule of Civil Procedure 42(b) reads in relevant part:

> "Separate Trials. 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 a third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party-claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a Statute of the United States."

[20] Lewis Mayer, "The Severance for Trial of Liability from Damage", 86 *U. Pa. L. Rev.* 389 (1938)

compromise and sympathy verdicts. Professor Mayers believed that bifurcation would ultimately advance the interests of efficiency, the rule of law, and genuine law reform.

This view was echoed by a champion of bifurcation, Julias Miner of the U.S. District Court for the Northern District of Illinois, who proposed to his colleagues that they adopt a rule providing for an initial trial on liability in personal injury and other civil litigation as a prerequisite to adjudicating the extent of injury and the extent of damages. The Eastern division of the United States District Court for the Northern District of Illinois agreed and adopted what became known as Local Rule 21, which encouraged but did not require bifurcation of liability in damages and tort cases.

Local Rule 21 garnered immediate critical attention and its most formidable opponent was Jack Weinstein, then a professor at Columbia University, who contended that bifurcation interfered with the role of the jury. Professor Weinstein argued that the true value of juries was not to find facts or apply law, but to satisfy "a strongly felt need for a fair decision, for the judgement of reasonable unbiased peers instead of the logical, legally proper, result".[21] In his mind, procedural devices like bifurcation that forced juries to stay within the law prevented them from keeping the actual operation of the law more responsive to human needs.

The Northern District of Illinois asked Heinz Zeisel of the University of Chicago Law School to study the effect of Local Rule 21 on the court's trial load.[22] Professor Zeisel hypothesized that routine bifurcation would save substantial trial time because many cases would have a finding of no liability and many other cases would settle after a determination of liability. The study confirmed Professor Zeisel's hypothesis: bifurcation reduced trial time by about 20%. Although bifurcated

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21 Jack B. Weinstein, "Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power", 14 *Vand. L. Rev*. 831 (1961) at 833

22 Hans Zeisel & Thomas Callahan, "Split Trials and Time Saving: A Statistical Analysis", 76 *Harv L. Rev. 1606* (1963)

trials require two verdicts, they were found to be no longer than unitary trials, and in fact, may have been shorter. Further, bifurcation did not increase overall jury deliberation time.

The Zeisel & Callahan study is described in more detail by Joseph Sanders in "From Science to Evidence: The Testimony on Causation in the Bendection Cases"[23] as follows:

> Empirical research suggests that bifurcation is resource-saving, even in single plaintiff - single defendant cases. In the early 1960s, the Northern District of Illinois instituted a program to encourage split trials. The juries considered liability and damages separately... Zeisel and Callahan studied the effects of this experiment and found that the bifurcated trials lasted an average of 4.0 days, as opposed to 4.7 days for unitary trials. This difference might be explained by a selection effect - the choosing of different types of cases for each alternative. To control for this factor, Zeisel and Callahan compared all trials of judges who never bifurcated trials with all trials of judges who bifurcated some of their trials. The study reported that if the court had tried all its personal injury jury cases under the separation rule, it would have saved 0.8 days out of 3.8 days, or 21% of the total trial time. Moreover, bifurcation led to a higher settlement rate during trial when the jury found for the plaintiff in the liability phase of the trial. Zeisel and Callahan concluded that separation may save trial time, not only in cases ending in defendants' verdicts, but in cases resulting in plaintiff's verdicts as well.
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> The Zeisel and Callahan study also considered whether bifurcation had four possible negative consequences: an increase in jury deliberation time, an increase in jury waivers, an increase in the percentage of hung juries, and a decrease in the pre-trial settlement rate. The data refuted each of these concerns. Weighted deliberation time was shorter for split trials, the frequency of jury waivers remained nearly the same, the rate of hung juries remained constant, and the pre-trial settlement rate for all cases decided during the two years prior to the experiment was identical to the settlement rate for all cases decided during the first two years of the experiment. . ."

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[23] (1993), 46 *Stan. L. Rev*. 1

In 1966, however, Rule 42(b) of the *Federal Rules of Civil Procedure* was amended. The amendments to the Rule itself took no position on the merits of increased bifurcation, but the accompanying Advisory Committee notes stated that separation of issues for trial was not to be routinely ordered and was cited as creating a rule-based presumption against issue bifurcation.[24] With the passing of Judge Miner, bifurcation lost its most vocal champion and "the bifurcation movement beat a hasty and whimpering retreat".[25]

Steven S. Gensler states that bifurcation practise in the United States has changed little from bifurcation practice in the 1960s. Although the federal judiciary states that it is overwhelmingly in support of bifurcation, in practice bifurcation remains controversial and is used infrequently. Most federal judges employ a presumption against bifurcation.

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[24] See *Kimberly-Clark Corp*. v. *James River Corp*. 131 F.R.D. 608 (N.D. Ga. 1989); *Angelo* v. *Armstrong World Indus. Inc*. 11 F. 3d 957 (10th Cir. 1993); *Hamm* v. *American Home Products Corp*. 888 F. Supp. 1037 (E.D. Cal. 1995)

[25] Steven S. Gensler, "Bifurcation Unbound" (2000), 75 *Wash. L. R*. 705

Bifurcation is regularly employed in complex litigation, however, such as mass tort claims, and is common in patent litigation, complex environmental litigation, anti-trust litigation and complex employment litigation. ". . . In these situations, the courts typically support the decision to bifurcate by saying that bifurcation will be more efficient, save trial time, and improve jury comprehension. This attitude parallels (or perhaps follows) that of the *Manual for Complex Litigation*, which also endorses the use of bifurcation in complex litigation as a means of promoting efficiency, reducing the length of trial, improving jury comprehension, and increasing settlement rates. Recently, the American Law Institute's Complex Litigation Project similarly concluded that bifurcation could promote efficiency and fairness in multi-party, multi-forum complex litigation. Thus, in the complex-litigation arena, the role of bifurcation appears firmly entrenched and, if anything, seems likely to grow even larger."[26]

As noted, there are arguments against bifurcation that seem to be unique to American jurisprudence. For example, it is frequently argued that bifurcation violates the Seventh Amendment. The Seventh Amendment provides, in part, that: ". . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the Rules of Common Law.". These two clauses are generally viewed as distinct, with the first clause guaranteeing the litigants in a federal court the right initially to have their claims decided by juries and the second clause preventing judges or later juries from second-guessing the first jury's decision. It is argued that these clauses which protect trial by jury are violated by bifurcation.

It is also argued that the "Erie Doctrine" also impacts on bifurcation in federal courts. The "Erie Doctrine" holds that federal courts apply state substantive law and federal procedural law.

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[26] Steven S. Gensler, "Bifurcation Unbound"(2000), 75 *Wash. L. Rev.* 705

The Benefits of Bifurcation in Class Action Proceedings

A general case for the benefits of bifurcation of issues in a complex proceeding such as a class action proceeding can be found in American literature. For example, the *Manual for Complex Litigation*[27] states:

> "Whether the litigation involves a single case or many cases, severance of certain issues for separate trial under Fed. R. Civ. P. 42(b) can be advantageous. Severance can reduce the length of trial, particularly if the severed issue is dispositive of the case, and can also improve comprehension of the issues in evidence. Severance may prevent trial of an issue early in the litigation, which can impact settlement negotiations as well as the scope of discovery. The advantage of separate trials should, however, be balanced against the potential for increased costs, delay (including delay in reaching settlement), and inconvenience, particularly if the same witnesses may be needed to testify at both trials, and of unfairness if the result is to prevent a litigant from presenting a coherent picture to the trier of fact."

The American Law Institute in its recommendations near the conclusion of the Complex Litigation Project[28] stated:

> "b. *The promotion of fairness and efficiency by the use of issue severance.* The opportunity to sever complex litigation into common and individual issues promotes fairness and efficiency in several ways. First, allowing for consolidation of issues rather than entire claims increases the possibility that the individual litigant will be represented adequately (assuming, of course, that teams of counsel are utilized or that the transferee action proceeds on a representative or class basis), without sacrificing the ability of individual parties to control the litigation of unique issues. . . .

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[27] Federal Judicial Centre, *Manual for Complex Litigation* (3d) (St. Paul's, Minnesota: West Publishing Company, 1995) at pp. 119, 120

[28] The American Law Institute, *Complex Litigation Project, Proposed Final Draft* (Philadelphia, Pa.: The American Law Institute, 1993)

Second, separate treatment of common issues generally will ensure expeditious processing for all the litigants. When damages are severed from the liability issues and stayed for later determination, for example, a failure to prove liability or general causation will end the litigation and individual damage claims need never be heard. Even when liability and causation are established, the conclusion of the action still will be furthered because the likelihood of settlement greatly increases once the party's liability positions are delineated clearly...

The assurance of expedited treatment reduces expense and the risk of collusion. Deserving plaintiffs are less likely to accept unfair or unreasonable settlements due to a lack of sufficient resources because the claims will be resolved more promptly.

Allowing the separate treatment of common issues early in the litigation also provides an opportunity to determine critical auxiliary issues, such as the tolling of the statute of limitations or the application of claim preclusion, saving the parties needless trial preparation if one of those issues is decided adversely to the plaintiffs. If the defendant believes that he has a valid global defence, the severance of that issue may result in its early determination, avoiding the cost and burden of discovery, other pre-trial proceedings, as well as a trial with respect to all issues...

Fairness to the defendant also may be enhanced by the bifurcation of liability and damage issues. Plaintiffs are somewhat less likely to bring nuisance suits when the defendant's liability is doubtful because, with separate trials, they will not be able to invoke jury sympathy with evidence of the damages until liability is determined. These advantages must be weighed against the concern that bifurcation of cases into their constitute elements for separate trials in some instances may affect the ultimate liability resolution. . .

Allowing the processing of the simpler issues first also may avoid ever having to reach issues that would present unusual difficulty or expense. The jury only needs to tackle the complex issue if the plaintiff prevails on the simpler matter . . .

Separation of the litigation into discreet issues and ordering their resolution also may encourage more efficient attorney preparation because counsel may focus their efforts on one or two questions at a time. The attorneys need to prepare the remaining portions of the action only if those issues are not dispositive of the case. The

> transferee judge may shape the proceedings further to conform to the individual interests of the parties, excusing some litigants from portions of discovery in trial preparation that do not pertain to them and thereby avoiding wasteful efforts on the part of counsel . . ."

The benefits of bifurcation have been further noted by Tom Alan Cunningham and Paula K. Hutchinson in "Bifurcated Trials: Creative Uses of the *Moriel* Decision"[29], as follows:

> "It is possible to generalize regarding circumstances in which a bifurcated trial would be advantageous in the administration of justice. Bifurcation is appropriate when it would shorten the trial. This is particularly true in cases where the issue tried first would dispose of the entire case . . . Bifurcation of liability and damages would not unduly lengthen many trials where the issues are all presented to the same jury as is true in criminal cases. Only one *voir dire* examination would be required. . . . Judicial discretion in trial management is sufficiently broad to minimize loss of time in cases in which separate trials would otherwise serve the interests of justice. 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.
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> Bifurcation can be appropriate as a means to facilitate the scheduling of witness testimony . . .
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> Bifurcation is proper where the liability evidence doesn't significantly overlap the damage testimony, and it should be ordered where the evidence on one issue would unduly prejudice an objective determination of other issues. . .
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> It is the consensus view that separate trials are not available to litigants as a matter of right. Bifurcation is a tool with which to do justice by furthering convenience and avoiding prejudice. It should not be employed routinely. . .
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> The test is whether, under the existing circumstances, the benefits of bifurcation outweigh the need to avoid piecemeal litigation . . ."

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[29] (1994), 46 *Baylor L. Rev*. 87

Selected American Cases Granting Bifurcation of Issues in a Class Action Proceeding

The reticence of the American courts to grant bifurcation in general was evidenced in the early class action case of *Danyo* v. *Great Lakes Steel Corporation*[30]. In this case Danyo and 57 others brought a class action against Great Lakes Steel Corporation and others seeking declaratory and injunctive relief under the *Environmental Protection Act*, damages for common-law nuisance, trespass and negligence and punitive damages. They alleged the defendants had discharged pollutants into the air and operated their plants with such noise and vibration as to damage the plaintiff's real and personal property and to adversely affect their health. All named plaintiffs who were homeowners in the area asserted damage to their real property and their claims varied as to the amount. Most named plaintiffs asserted separate and distinct personal property claims and asserted general claims for personal injuries, primarily to their eyes and respiratory system.

The defendants moved for a summary or accelerated judgement, attacking the class action device as inappropriate. They also moved for a severance of the plaintiffs' claims for injunctive relief with provision for a separate trial as to each defendant and separate from the trial of any damage claim. They further moved for severance of all original named plaintiffs with regard to their damage claims with provisions for separate pleadings and separate trials. The trial judge denied the defendants' motions for severance of the plaintiffs' claim for injunctive relief from those for damages, denied the dismissal of the class action, and denied separate trials of the damage claims, *inter alia*. On appeal the trial judge was affirmed, with the appellate court holding that the division of a lawsuit into separate trials was within the discretion of the trial judge but was an extraordinary remedy designed for selective application to those cases in which the convenience of the parties and

[30] 286 N.W. 2d 50 (Court of Appeals of Michigan, 1979)

the court or the avoidance of prejudice compelled the deviation from traditional trial practises. The court's discretionary power should be exercised only upon the most persuasive showing that the convenience of all parties and of the court required such drastic action or that prejudice to a party could not otherwise be avoided than by separation of the issues.

Bifurcation was allowed in the later case of *Betts* v. *General Motors Corporation* [31]. This case involved a consolidated action to recover damages for wrongful deaths and personal injuries arising out of an automobile collision that occurred on the Kansas turnpike in 1978. The case involved a high-speed, head-on collision between a 1974 Ford pick-up truck and a 1973 Chevrolet Monte Carlo which was towing a 1972 Chevrolet Vega by the use of a rented U-Haul trailer. The accident was caused by the negligence of the driver of the Ford pick-up, who lost control of his vehicle while he apparently fell asleep. Five members of the Betts family were passengers in the Monte Carlo. A fire broke out after the collision and all of the Betts family died, except one five-year old child. The driver of the Ford pick-up was also killed. The plaintiffs were the heirs-at-law of the Betts family. They alleged negligence and product liability. The product liability theory was advanced on the basis that General Motors was liable as a manufacturer for the design and installation of the fuel tank at a location where it was likely to rupture in a collision and cause a gasoline fire. Prior to the trial the court, on the motion of General Motors, bifurcated the issues of liability and damages so that in phase one of the trial the liability, if any, of General Motors, U-Haul and the Kansas Turnpike Authority could be determined. General Motors was acquitted in the liability phase of the trial, and the plaintiffs appealed.

The plaintiffs argued on appeal that the trial court had abused its discretion in ordering the bifurcated trial on the issue of liability and damages. One jury was empanelled to resolve all the issues presented in the case, but the trial was presented in two stages. The appellate court found no error in the ordering of the bifurcation of the trial and stated per Prager J.:

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[31] 689 P. 2d 795 (Supreme Court of Kansas, 1984)

> "The (trial court) pointed out the advantages of a bifurcated trial in terms of jury comprehension of the issues, economy of court time, and reducing the trial expenses to the parties. It noted that the additional expenses of time and resources might be unnecessary if determination of the fault issues made the damages issues moot or enhanced the prospects of settlement. One of the stated reasons for the order of bifurcation was that there were six separate plaintiffs, each maintaining multiple causes of action, requiring at least twelve separate determinations of fault, eleven determinations of actual damages, and six punitive damage decisions. These determinations by the jury would be simplified for the jury in a bifurcated trial. . ."

There are many examples of the American courts ordering bifurcation of liability and damage issues in a class action proceeding in recent years. For example, in *Re Paoli Railroad Yard PCB Litigation*[32] the Paoli Railway Yard stored and handled PCBs, which were fire-resistant insulating fluids used in railroad car transformers. In the mid-1980's the Environmental Protection Agency documented relatively high levels of PCBs in the soil in the Yard and in the nearby water and land. The plaintiffs in the class action proceeding were individuals who had lived for many years in the vicinity of the Yard in areas identified by the Environmental Protection Agency as having experienced the most severe PCB-laden run-off. In 1986, 38 plaintiffs brought action claiming injury caused by exposure to the PCBs and other chemicals from the Yard as well as damages for emotional distress caused by fear of future injury. Some of the plaintiffs also claimed for the decrease in the value of their property.

Initially the defendants were granted a summary judgement dismissing the claim, but this was reversed on appeal. Interlocutory skirmishing over the evidence of expert witnesses then took place. The District Court then, pursuant to Federal Rule of Civil Procedure 42(b), ordered that the trial proceed in two phases, phase one involving "the issues of exposure, causation, medical monitoring and property damages". If the jury returned a verdict favourable to the plaintiffs in phase one, phase two would determine the plaintiffs' liability for all claims and the amount, if any, of

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[32] 113 F. 3d 444 (United States Court of Appeals for the Third Circuit, 1997)

punitive damages. After 13 days of phase one testimony, the jury returned a verdict for the defendants on all claims. This matter was then appealed.

The plaintiffs contended that the District Court's bifurcation of the trial violated their right to trial by jury as guaranteed by the Seventh Amendment because the jury would have to make foreseeability determinations when considering the causation issues of phase one, whereas a different jury would have to make the same determinations when considering the negligence issues of phase two. This argument of the plaintiffs was dismissed by the appellate court, with Becker, Circuit Judge, stating:

> "Fed. R. Civ. P. 42(b) authorizes district courts to bifurcate lawsuits into separate trials "in furtherance of convenience or to avoid prejudice", or when separate trials "will be conducive to expedition and economy". . . Severance of the question of liability from other issues can "reduce the length of trial, particularly if the severed issues [are] dispositive of the case, and can also improve comprehension of the issues in evidence". *Manual for Complex Litigation* . . . In the case at bar, the interests of judicial economy and convenience counselled strongly in favour of severing the issues relating to plaintiffs' exposures to PCBs and causation of the injuries from the issues of defendants' culpability. Phase one focussed on plaintiffs' exposure to PCBs while phase two would have concerned whether the conduct of several railroad operators and manufacturers caused that exposure. The trial of the phase one issues alone lasted three weeks and involved dozens of witnesses. Resolution of the phase one issues obviated the need for a trial on the issues of the defendants' liability, which undoubtedly would have taken months and would have involved issues more complicated than the phase one trial, all at additional cost to the parties. Thus, bifurcation preserved judicial resources and reduced the expenses of the parties, and the District Court did not abuse its discretion in ordering such a process. . ."

Further, the bifurcation was found not to offend the Seventh Amendment.

In *Re Brand Name Prescription Drugs Anti-Trust Litigation*[33] the plaintiff pharmacies

[33] 1998 U.S. Dist. LEXIS 9040,

and defendant manufacturers moved to bifurcate the trial of the pharmacies' claims alleging a price-fixing conspiracy between the manufacturers and defendant wholesalers of prescription drugs. Each filed different plans for bifurcation. The court granted the motions to bifurcate the trial, concluding that the issue of liability needed to be fully answered in phase one of the trial. Accordingly, in phase one the jury was asked to determine whether a price conspiracy existed and, if so, who the participants were and whether conspiracy caused any injury to the pharmacies. If liability was found in phase one, the court held that in phase two of the trial the jury would determine the amount of damage caused by each member of the conspiracy. The court noted that there might be some overlap of the evidence, but stated that the issues decided in phase one would not be re-litigated in the damages phase. The court per Charles P. Kockoras, District Judge, stated:

> "In demarcating this line of bifurcation, the Court is aware that there may be some areas of overlap in which certain evidence may be relevant in both phases of the trial. The Court will ensure that issues decided in Phase I will not be re-litigated in the damages phase of the case; the parties can rest assured that no one will be allowed to get two bites at a single apple. Of course, that does not mean that certain evidence may not be relevant to both liability and damages, and thus the Court may allow some duplicative evidence if it is appropriate. It is the Court's hope, however, that such duplication can be minimized."

In *Bates* v. *United Parcel Service*[34], the plaintiffs were hearing-impaired employees who sought to represent a class of defendant shipping company employees who used sign language as a primary means of communication. The employees alleged that the company required all drivers to meet Department of Transportation hearing standards, which precluded assessment of whether individual employees could perform the job. Further, the company failed to develop interactive policies to address the communication barriers in the workplace, failed to address communication barriers and had subjective personnel policies that created an illegal glass ceiling. The proposed class were of at least 460 members scattered geographically throughout the nation. The trial was

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[34] 2001 U.S. Dist. LEXIS 19842

bifurcated into a liability phase, followed by a damages phase. In granting the bifurcation Thelton E. Henderson, District Judge stated:

> "In addition to seeking class certification, Plaintiffs proposed that the trial be bifurcated into two phases: a first phase to determine class liability and equitable relief issues, and a second phase to address named plaintiffs and class damages. A court might bifurcate any trial "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy". . . This district court has "broad discretion" to order separate trials under this rule. . . Factors to be considered when determining whether to bifurcate a trial include: avoiding prejudice, separability of the issues, convenience, judicial economy, and reducing risk of confusion.
>
> This Court agrees with the Plaintiffs that bifurcating the trial into a liability phase followed by a damages phase would be appropriate. . . . First, the Court finds that no prejudice will result from bifurcation of trial. Next, despite UPS's arguments to the contrary, the issues of liability and damages are separable in this case. . . . Thus, liability, as well as what equitable relief would be appropriate should liability be found, depends on questions of law and fact common to the class and subclass; these questions relate to the policies and practises that UPS has employed during the period in question and whether those policies and practices comply with ADA and California laws. The appropriate level of damages, by contrast, depends on individualized questions, such as each class member's employment history, the particular communication barriers faced by each class member, and the accommodations UPS has provided to each class member. Each phase would therefore require the parties to present different types of evidence. . .
>
> The final three bifurcation factors - convenience, judicial economy, and reducing the risk of confusion - also weigh in favour of bifurcating the trial. Because the issues of liability and damages are separable, it would be convenient to bifurcate. Moreover, reducing the types and amounts of evidence to be produced in each phase of trial would promote judicial economy and reduce the risk of confusion. Judicial economy would be further promoted because bifurcation might eliminate the need to consider evidence of damages. If the first phase results in no finding of liability to the class by UPS, then the second phase to determine individual and class damages would become irrelevant . . ."

The recent case of *Simon et al.* v. *Philip Morris Incorporated et al.*[35] reviews the history of bifurcation in the United States in some detail and in the result grants bifurcation of a class action proceeding between the liability and damage issues. This case involved a mass tort class regarding smoking injuries. Weinstein, Senior District Court Judge, commenced by noting the broad discretion of the trial judge to sever issues for trial, stemming as it did from common law courts of equity. He then stated: "By bifurcating issues like general liability or general causation and damages, a court can await the outcome of a prior liability trial before deciding how to provide relief to the individual class members.". And further: "Courts can make relatively simple divisions within a single claim, including separating liability issues from those of damages where bifurcation would promote the efficient disposition of the case or simply a difficult set of issues for the jury. "He then reviewed in detail the Seventh Amendment argument and concluded that it did not prohibit bifurcation. Neither did the fact that there may be a duplication of evidence. "The very nature of injuries arising from mass production and mass marketing efforts makes trial judges' discretion to sever issues for trial one of the most necessary and natural in their arsenal of tools required for the shaping of these types of cases for efficient adjudication.".

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[35] 2001 U.S. Dist. LEXIS 1114,

Conclusion

Having taken a close look at American literature and selected jurisprudence dealing with the bifurcation of issues within a class action proceeding, it can be seen that the American courts have overcome the reticence applied to bifurcation in general and have acknowledged that bifurcation of issues is a valuable tool within the class action context. Although cognizant of the cautionary note that American jurisprudence should not be applied without further reflection in a Canadian context, it seems that the American approach in readily bifurcating issues in a class action makes good sense. Class action proceedings in Canada, as in the United States, are significantly different from litigation in general and almost always introduce complexities resultant from the numerous parties before the court, the numerous issues arising, the need to proceed on common issues as well as on individualized issues and the difficulties in assessing damages, which also may be individualized within the class. In view of the many benefits resultant from bifurcation in a complex litigation proceeding, perhaps best articulated by the American Law Institute in the Complex Litigation Project report, it is suggested that class action proceedings in Canada should proceed in posture much as the American class action proceedings have proceeded to date, with a willingness to bifurcate issues. Bifurcation within the context of a class action proceeding, in the Canadian context, may well not be a siren song leading litigators to the shoals; it may in fact be a means to ensure focus, efficiency and fairness.