Spring 2000

Prejudice, Confusion, and the Bifurcated Civil Jury Trial: Lessons from Tennessee

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PREJUDICE, CONFUSION, AND THE BIFURCATED CIVIL JURY TRIAL: LESSONS FROM TENNESSEE

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When most people think of a civil jury trial, they envision the traditional "unitary" trial, in which the jury hears all the evidence on all the issues at the same time, and decides all the issues at the same time.[1] The unitary trial is certainly the norm—and has been so throughout the history of American civil jury practice[2]—but it is not the only option. In the federal courts, and most state courts, the trial judges have the option of separating issues for trial.[3] This procedure is commonly known as "bifurcation."[4] In a bifurcated trial, the jury hears the evidence on one or more issues and decides those issues prior to hearing the evidence on any remaining issues.[5]

Bifurcation can promote many core procedural values. One of the most important reasons to bifurcate issues is to increase efficiency.[6] Other important criteria for procedures include fairness and accuracy.[7] Bifurcation can serve those values too. One way to improve fairness, for example, is to

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1. *See* Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705 (forthcoming 2000).

2. *See* Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 305 tbl.1 (chart listing the total number of times bifurcation was raised in federal court from 1940 to 1995, based on federal decisions available through Westlaw).

3. *See* FED. R. CIV. P. 42(b); 1 JAMES D. GHIARDI ET AL., PUNITIVE DAMAGES: LAW AND PRACTICE §§ 12.05-.08 (discussing state bifurcation laws).

4. *See* 8 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 42.20(3) (3d ed. 1999).

5. Landsman et al., *supra* note 2, at 299. The most common form of bifurcation is the separate trial of liability and damages in personal injury or other tort cases. *See* Gensler, *supra* note 1.

6. Indeed, I have argued elsewhere that efficiency typically will be the dominant factor in a court's decision whether to bifurcate issues. *See* Gensler, *supra* note 1. Bifurcation achieves that goal if it eliminates the need to try a large part of the case, either because the defendant prevails on an early issue or because the parties settle after the resolution of an early issue. *Id.*

7. *See A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 692-93 (1995); *see also* Michael Bayles, *Principles for Legal Procedure*, 5 LAW & PHIL. 33 (1986) (identifying nine principles of procedure, including efficiency, accuracy, and fairness).

reduce prejudice. Bifurcation can do that by keeping prejudicial evidence relevant only to Issue B away from the jury when it decides Issue A.[8] Similarly, one way to improve accuracy might be to increase comprehension. Bifurcation can accomplish that by narrowing the range of issues the jury is to consider at any given time, thereby letting the jurors focus on fewer issues at a time, and, in all likelihood, forcing the lawyers to present testimony in a more orderly fashion.[9] But while most courts recognize prejudice and confusion as central factors in choosing a unitary versus a bifurcated trial, few aggressively bifurcate to achieve these potential benefits.[10]

This Article uses Tennessee bifurcation practice as a case study to explore in detail how trial structure intersects with prejudice and confusion. Part I describes bifurcation practice in Tennessee. Part II critiques Tennessee's bifurcation practice from the perspective of reducing prejudice. Part III then considers Tennessee's bifurcation practice from the perspective of reducing jury confusion. This Article concludes that Tennessee and jurisdictions with similar bifurcation practices fail to recognize the most important ways that issue separation can limit prejudice and reduce jury confusion. For jurisdictions serious about improving the quality of civil jury decision making, bifurcation warrants a second and closer look.

I. BIFURCATION IN TENNESSEE STATE COURTS

Issue bifurcation is still a "teenager" in Tennessee civil courts. Prior to 1986, it was considered unconstitutional; the Tennessee Supreme Court held in *Harbison v. Briggs Brothers Paint Manufacturing Co.* that Article I, section 6 of the Tennessee Constitution gives litigants a right to have all issues of fact decided at the same time in jury trials.[11] Thus, in *Harbison* the court reversed

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8. *See infra* notes 105-21 and accompanying text.

9. *See infra* notes 124-35 and accompanying text.

10. Rule 42(b), for example, specifically states that federal courts can bifurcate to "avoid prejudice." FED. R. CIV. P. 42(b). Most federal courts, however, have adopted a presumption against bifurcation, and many place a heavy burden on a party moving for bifurcation to show extreme prejudice. *See* Gensler, *supra* note 1. Similarly, state courts frequently state that bifurcation, while within the discretion of the trial judge to order, should be used cautiously and sparingly. *See* 75 AM. JUR. 2d *Trial* § 120 (1991). The Texas Supreme Court has taken one of the most extreme positions, holding that trial courts may never bifurcate the issues of liability and damages in personal injury actions despite a state procedural rule authorizing issue separated trials. Iley v. Hughes, 311 S.W.2d 648, 651 (Tex. 1958). Not all jurisdictions are so hostile. New York, for example, enacted a special statute encouraging bifurcation of liability and damages in personal injury cases. MCKINNEY'S NEW YORK RULES OF COURT, *Uniform Rules—Trial Courts* § 202.42 (2000). Under current New York law, "it is generally recognized that such bifurcated trials are highly favored." 105 N.Y. JUR. 2D *Trial* § 222 (1992); *see also* DAVID D. SIEGEL, NEW YORK PRACTICE 215-16 (3d ed. 1999) (discussing practice under Rule 202.42).

11. Harbison v. Briggs Bros. Paint Mfg. Co., 354 S.W.2d 464, 471-72 (1962). Article

a defense verdict in a product negligence action because the trial court had the jury decide, as a threshold matter, whether the defendant was the entity that sold the injury-causing product to the plaintiff.[12] A Tennessee court of appeals subsequently applied the *Harbison* rule to reverse a defense verdict in a personal injury action because the trial court had the jury decide, as a threshold matter, whether the plaintiffs had executed a full release such that their claims were barred by the affirmative defense of accord and satisfaction.[13]

In 1986, the Tennessee Supreme Court repudiated its constitutional ban on issue bifurcation in *Ennix v. Clay*.[14] In that case, the trial court had bifurcated liability and damages in a personal injury action arising out of a multi-car accident.[15] The jury returned a liability verdict for all the defendants.[16] Following *Harbison*, the court of appeals reversed, holding that the bifurcated trial "had deprived the [plaintiffs] of their constitutional right to have all controverted issues of fact submitted to the jury at the same time."[17] The Tennessee Supreme Court disavowed its earlier holding in *Harbison*, however, stating that "[w]hile a litigant has a constitutional right to have material controverted issues submitted to the jury, our constitution does not mandate that all such issues be submitted to the jury at the same time."[18]

I, section 6 of the Tennessee Constitution provides:

> Section 6. That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

TENN. CONST., art. I, § 6.

12. The plaintiff had been severely burned when a can of liquid bug killer he was using exploded. *Harbison*, 354 S.W.2d at 466. The plaintiff identified the specific can that injured him and introduced it into evidence to demonstrate that the label on the can failed to warn that the contents were flammable. *Id.* at 473 (Burnett, J., dissenting). The defendants, however, testified that the label on the can was not their label, that they had never sold a product with that label, and that the products they sold to the plaintiff in fact had a different label. *Id.* at 473-74. In other words, the defendant's entire defense was that the plaintiff was suing the wrong entity. Accordingly, the judge submitted to the jury as a "special issue" this single issue of whether the defendant was the source of the can, reserving all other issues. *Id.* at 466. The jury found in favor of the defendant, answering "No." *Id.* at 467.

13. Winters v. Floyd, 367 S.W.2d 288, 290 (Tenn. Ct. App. 1962). For comparison, the federal courts have bifurcated affirmative defenses under Federal Rule of Civil Procedure 42(b) for decades. *See* Note, *Separate Trials on Liability and Damages in "Routine Cases": A Legal Analysis*, 46 MINN. L. REV. 1059, 1062 (1962) (citing cases); *see also* Landsman et al., *supra* note 2, at 299 ("The clearest and least controversial use of Rule 42(b) bifurcation involves the early adjudication of what the law refers to as 'affirmative defenses.'").

14. 703 S.W.2d 137 (1986).

15. *Id.* at 138.

16. *Id.*

17. *Id.*

18. *Id.* at 139. Citing the U.S. Supreme Court's decision in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931) (holding that the Seventh Amendment allowed

But while *Ennix* made issue bifurcation constitutional,[19] it also made issue bifurcation very difficult to obtain. Nominally, the court committed the decision whether to bifurcate issues "to the sound discretion of the trial judge," who was to consider "the possibility of juror confusion, the risk of prejudice to either party, and the needs of judicial efficiency."[20] As a practical matter, though, the decision stymied trial judges from actually using bifurcation by admonishing them that "the interests of justice will warrant a bifurcation of the issues *in only the most exceptional cases and upon a strong showing of necessity.*"[21]

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judges to separate issues through use of partial remand), the Tennessee Supreme Court stated, "our constitution is concerned with substance rather than form, and antiquated forms of procedure need not be retained." *Ennix*, 703 S.W.2d at 139. The court noted that Tennessee practice, even under *Harbison*, had allowed courts to separate the issues of liability and damages through a partial remand. *Id.*

19. Oddly, the Tennessee Rules of Civil Procedure do not explicitly authorize issue bifurcation in civil jury trials. Rule 42.02 of the Tennessee Rules of Civil Procedures provides:

> Separate Trials. The court for convenience or to avoid prejudice may in jury trials order a separate trial of any one or more claims, cross-claims, counterclaims, or third-party claims, *or issues on which a jury trial has been waived by all parties.*

TENN. R. CIV. P. 42.02 (emphasis added). The discrepancy with *Ennix*—which makes no mention of Rule 42.02, yet clearly states that trial courts have discretion to bifurcate jury trials—is most likely an historical accident. In 1971, when the Rules were adopted, the Tennessee Supreme Court interpreted the Tennessee State Constitution to preclude issue bifurcation. Harbison v. Briggs Bros. Paint Mfg. Co., 354 S.W.2d 464, 471-72 (1962). Because *Ennix* overruled *Harbison* in 1986, both Rule 42.01 and Rule 49.03 have been amended to eliminate *Harbison*-based restrictions. *See* ROBERT BANKS, JR. & JUNE F. ENTMAN, TENNESSEE CIVIL PROCEDURE § 6-12(i) (1999). It is most likely that the failure to eliminate the *Harbison*-based restriction in Rule 42.02 was an oversight and "appears to be ignored." *Id.* Indeed, the Advisory Commission Comments to the 1997 amendments specifically provide: "Former constitutional concerns about a 'right' to have a general jury verdict on all issues no longer exist in light of *Ennix v. Clay*, 703 S.W.2d 137 (Tenn. 1986)." TENN. R. CIV. P. 42.01 advisory commission's comment (1999). Regardless, it now seems well-settled that trial courts in Tennessee have some power to try issues separately, either under Rule 42.02 or under their general powers to oversee trial practice and procedure. However, at least one commentator has suggested that there is still a constitutional right to have the *same jury* decide all the issues in a case, whether those issues are presented in a unitary or bifurcated format. *See* LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 22-3 n.7 (1999).

20. *Ennix*, 703 S.W.2d at 139.

21. *Id.* (emphasis added). The court erected another barrier to bifurcation by stating that "[a]bove all, the issues at trial must not be bifurcated unless the issue to be tried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* (citing *Gasoline Prods.*, 283 U.S. at 500). While other courts and commentators have attempted to formulate a standard for separability based on the "without injustice" language, it is unlikely that the Supreme Court intended that result. *See* Gensler, *supra* note 1 (pointing out that the court was focusing on whether the trial judge *had kept* the issues separate, such that they could be split by a partial remand, not whether the trial judge *could have separated* the issues for trial initially).

Similarly, the Tennessee Supreme Court's application in *Ennix* of its new bifurcation standards was anything but bifurcation-friendly. The court held that "the issues of liability and damages were so interwoven that bifurcation was improper."[22] However, neither the facts of the case nor the court's reasoning supports that conclusion. The court noted that bifurcation of liability and damages is inappropriate "where the nature of the plaintiff's injuries would have an important bearing on the issue of liability."[23] But the court did not even attempt to explain why the plaintiffs' injuries in this case supported their liability case, and nothing about the facts of the case suggests any connection.[24] The court's primary objection to bifurcation in *Ennix* seems to be that the bifurcation prevented the plaintiffs from presenting medical testimony regarding their injuries during the liability portion.[25] The plaintiffs claimed it was necessary for them to introduce evidence of their injuries during the liability phase in order to lend credibility to their claims that they could not remember how the accident occurred due to amnesia allegedly suffered as a result of the accident.[26] It is certainly true that the plaintiffs should have been allowed to introduce at the liability stage medical testimony supporting their injuries to fend off impeachment.[27] But the bifurcated trial structure did not prevent that. The trial judge's error was not in having the jury decide liability and damages separately, but in erroneously excluding relevant injury-based evidence from the liability phase.[28] The

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22. *Ennix*, 703 S.W.2d at 140.

23. *Id.* (citing Schwartz v. Binder, 457 N.Y.S.2d 109, 110 (N.Y. App. Div. 1982)).

24. The New York courts, for example, routinely reject challenges to bifurcating liability and damages in car accident cases, requiring the objecting plaintiffs to identify exactly why their injuries are probative of how the accident occurred. *See, e.g.*, Cutsogeorge v. Hertz Corp., 658 N.Y.S.2d 77, 77 (N.Y. App. Div. 1997) ("[T]he plaintiff failed to show a need to introduce evidence of the injuries he suffered in order to establish liability."); Berthoumieux v. We Try Harder, Inc., 566 N.Y.S.2d 240, 240 (N.Y. App. Div. 1991) ("[N]othing in the record indicates that plaintiff's injuries were probative of how the accident occurred.").

25. *Ennix*, 703 S.W.2d at 140.

26. *Id.*

27. Logically, it is easy to see that a claim of amnesia might meet with skepticism from the jury in the absence of any evidence of physical injuries that could have caused it. Even so, the New York precedent cited by the Tennessee Supreme Court is not entirely apposite. In New York, evidence of amnesia is directly relevant to the issue of liability because it reduces the plaintiff's burden of proof. *See* Mignott v. Sears, Roebuck & Co., 475 N.Y.S.2d 44, 46 (N.Y. App. Div. 1984). In contrast, Tennessee has no such rule, and amnesia is neither an element of nor a defense to a negligence claim. *See, e.g.*, TENNESSEE PATTERN JURY INSTRUCTIONS 30 CIVIL 2.40 [hereinafter T.P.I. - CIVIL] (burden of proof and preponderance of evidence); T.P.I. - CIVIL 5.01 (duty of driver).

28. *See* BANKS & ENTMAN, *supra* note 19, § 6-12(h), at 468 ("If the evidence was relevant to the credibility of the witnesses' claims to amnesia, as the Court asserted, it should have been admissible in the liability phase notwithstanding the bifurcation order."). Thus, with regard to trial structure, *Ennix* really only presented an "efficiency" problem—whether there was so much evidence relevant to both liability and damages that the duplication of testimony would make

court's efforts to find reversible error in the *trial structure*, however, even as it acknowledged that the real error lay in the exclusion of relevant evidence,[29] reinforced the message to the Tennessee courts that bifurcation, while constitutional, was strongly disfavored and constituted a risky use of the trial courts' structural discretion.

Despite this general hostility to issue bifurcation, the Tennessee Supreme Court subsequently recognized an absolute right to one particular form of issue bifurcation. In *Hodges v. S.C. Toof & Company*,[30] the court held that, in cases where the plaintiff is seeking punitive damages, defendants have the absolute right to demand that the issue of the *amount* of punitive damages be bifurcated from the issues of compensatory liability, compensatory damages, and punitive liability.[31] The court's stated purpose of this format is to ensure that the jury does not hear evidence regarding the defendant's financial condition and net worth while it is considering the liability issues or calculating compensatory damages (unless the defendant wants the jury to hear such evidence).[32] Thus, the implicit rationale for the bifurcation mechanism set forth in *S.C. Toof* was that separating the issue of the amount of punitive damages would reduce the risk that the jury will find punitive liability for the "wrong" reasons.[33]

Procedurally, the mandatory bifurcation rights created in *S.C. Toof* pose

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bifurcation inefficient. *See* Gensler, *supra* note 1 (discussing the effect of overlapping evidence on the efficiency of bifurcation). However, it is not unprecedented for appellate courts to characterize the erroneous exclusion of evidence in a bifurcated trial as an error of trial structure. *See, e.g.*, Martin v. Heideman, 106 F.3d 1308, 1311-12 (6th Cir. 1997) (holding that the trial court abused its discretion in bifurcating liability and damages in an excessive force case "because the extent of the plaintiff's damages was relevant to the question of liability" and "the district court limited evidence of the severity of [the plaintiff's] injury").

29. The court explicitly notes: "[T]he jury was denied relevant information which was material to the determination of the credibility of these witnesses." *Ennix*, 703 S.W.2d at 140.

30. 833 S.W.2d 896 (Tenn. 1992).

31. *Id.* at 901. Bifurcation of punitive damage issues is now quite common in the state and federal courts. *See* James R. Mckown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 447-48 (1995) (collecting state statutes and cases); 1 GHIARDI ET AL., *supra* note 3, § 12.03 (discussing federal cases).

32. 833 S.W.2d at 901. Many defendants will want to introduce evidence of their net worth, either because it is low and they want the jury to know that even a modest punitive damages award would be crippling, or because it is significant but not nearly as big as jurors might assume it to be. *See* P. Steven Hacker, Comment, *Tennessee Attempts to Tighten the Purse Strings on Punitive Damages:* Hodges v. S.C. Toof & Co., 60 TENN. L. REV. 983, 1003 (1993). Indeed, it has been suggested that some defendants have been prejudiced by not being able to introduce evidence of their net worth because the jury erroneously assumed that a poor defendant was a rich company—and presumably let that assumption influence its decision to award punitive damages in the first place. *Id.* at 1001; *see also* David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors Be Given to Determine the Amount of a Punitive-Damage Award?*, 57 MD. L. REV. 174, 222 (1998).

33. Hacker, *supra* note 32, at 1001.

a bit of a puzzle. *Ennix* purported to vest trial courts with broad discretion to bifurcate issues in jury trials, considering the possibility of confusion, the risk of prejudice, and the needs of judicial efficiency.[34] *S.C. Toof* erects a categorical rule that leaves the trial judge no discretion.[35] But since *S.C. Toof* never mentions *Ennix* (or Rule 42.02, for that matter), we do not know how they fit together. One possibility is that the court intended to place the punitive damages trial structure outside the general *Ennix* framework.[36] It seems most likely, though, that the court conceived the new bifurcation rights to be an application of *Ennix*, albeit a categorical one: under *S.C. Toof*, the trial court still makes a discretionary decision regarding trial structure, but in this situation the trial court's "sound discretion" always counsels in favor of bifurcating the issue of the amount of punitive damages when the defendant so requests. In other words, the court concluded that trying the amount of punitive damages along with compensatory liability, compensatory damages, and punitive liability is always so confusing, prejudicial, or inefficient that unitary adjudication is a per se abuse of the trial court's discretion.

Regardless of how the court intended *S.C. Toof* to fit with *Ennix* or Rule 42.02, the court's motive for requiring the separate trial of the amount of punitive damages was to combat prejudice, not to cure confusion or achieve efficiency.[37] The *S.C. Toof* bifurcation rule certainly is not a function of efficiency; the opinion never mentions efficiency at all. In fact, the only thing the court says about its bifurcation rule is that it is intended to keep evidence of the defendant's wealth away from the jury while the jury considers the

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34. *Ennix*, 703 S.W.2d at 139 (holding that the decision whether to bifurcate "must be left to the sound discretion of the trial judge").

35. Glynna K. Parde, Comment, *Torts*—Hodges v. S.C. Toof & Co.: *New Substantive and Procedural Changes in the Awarding of Punitive Damages in Tennessee*, 23 MEMPHIS ST. UNIV. L. REV. 239, 252-53 (1992).

36. Another possibility, albeit an even less likely one, is that the Tennessee Supreme Court was attempting to supplant Rule 42.02. *See* Hacker, *supra* note 32, at 1002-03 (discussing the court's authority to alter the Tennessee Rules of Civil Procedure).

37. Admittedly, this is an oversimplification. As a whole, *S.C. Toof* represents the Tennessee Supreme Court's effort to revamp the way Tennessee courts handled punitive damages in an effort to ensure compliance with due process after the United States Supreme Court opined that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991). Following the United States Supreme Court's admonition that punitive damage standards need to "impose[] a sufficiently definite and meaningful constraint on the discretion of . . . factfinders," *id.* at 1045, the Tennessee Supreme Court adopted a scheme that built in several layers of procedural protection, bifurcation being just one of those protections. *S.C. Toof*, 833 S.W.2d at 901-02 (also limiting bases for punitive damages, requiring clear and convincing evidence, listing factors relevant to amount of punitive damages, and requiring trial judge to review award and give findings of fact and conclusions of law on propriety of the award). This Article is not suggesting that the Tennessee Supreme Court would have mandated bifurcation of the amount of punitive damages independent of its goal of ensuring compliance with the Due Process Clause.

liability issues.[38] Logically, this could signal a concern over either confusion or prejudice: evidence of the defendant's net worth might confuse the jury by making the trial seem more complex, or it might improperly influence the verdict of a perfectly coherent and understanding jury. But the fact that the court made bifurcation of net worth a defendant's option tells us the court was concerned with prejudice. If the court was concerned with jury confusion, it would not have made bifurcation of net worth optional at the defendant's election.

The fact that *S.C. Toof* mandates bifurcation as a bulwark against prejudice-driven punitive damages awards leads to even more puzzling questions about Tennessee's overall bifurcation policy. If the risk of prejudice invariably compels bifurcation in the context of punitive damages, why is bifurcation so disfavored in general? Is there something about the intermingling of the issues of punitive damages and compensatory damages that poses a unique risk of prejudice? Or is it that evidence of net worth poses a unique risk of prejudice? And, finally, what role does (or should) the potential for jury confusion play in choosing a trial structure?

The rest of this Article tries to answer the questions raised by the Tennessee Supreme Court's seemingly contradictory approach to bifurcation. Specifically, this Article turns to the robust and growing body of interdisciplinary scholarship on jury decision making to assess how well Tennessee's approach serves the goals of limiting prejudice and reducing jury confusion. Although any specific conclusions must be limited to Tennessee law, the purpose of studying Tennessee's approach, and the larger aim of this Article, is to draw general lessons and insights applicable everywhere.

II. BIFURCATION AND PREJUDICE: A JURY COMMUNICATIONS CRITIQUE

It is an indisputable (or, at least as far as I know, undisputed) fact that juries sometimes use evidence for an improper purpose. Stated otherwise, evidence that is only relevant to Issue B frequently influences how a jury resolves Issue A. When this occurs, the party whose case suffered from the jury's improper use of evidence is said to have been "prejudiced."[39]

The law guards against prejudiced decision making in several ways. Cases are submitted for jury decision making only if there is enough evidence to sustain the claim, thereby ensuring that a jury's decision cannot be based solely on prejudice.[40] When the case is submitted to a jury, evidentiary rules

38. *S.C. Toof*, 833 S.W.2d at 901.

39. More accurately, the evidence gives rise to "unfair prejudice." As one commentator explains: "Since all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for [a judicial remedy] is given a more specialized meaning: an undue tendency to suggest a decision on an improper basis." MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 403.1, at 179-80 (3d ed. 1991).

40. *See* FED. R. CIV. P. 50 (judgment as a matter of law); TENN. R. CIV. P. 50 (same); FED.

exist to keep out entire categories of jury-biasing information.[41] The judge can also exclude relevant information on a case-by-case basis if the risk of prejudice is too high.[42] When jury-biasing information does make it into the trial, courts attempt to de-bias the jury through limiting instructions, which instruct the jury regarding the permissible use of specific pieces of evidence.[43] And, finally, courts typically instruct the jury that its decisions must be based on the evidence and the law and not for reasons like bias, passion, or sympathy.[44]

The Tennessee Supreme Court's decision in *S.C. Toof* illustrates yet another procedural device designed to eliminate evidentiary prejudice—the issue-separated trial. In *S.C. Toof*, the Tennessee Supreme Court ordered that when punitive damages are sought, the defendant is entitled, upon request, to have the issue of the amount of punitive damages tried separately from the issues of compensatory liability, compensatory damages, and punitive liability.[45] The court imposed this procedural safeguard on top of—not to supplant or replace—the procedural safeguards generally applicable in all jury trials. For example, on remand, the trial judge retained the power to direct a verdict on punitive liability.[46] And while none of the categorical prejudice rules bar evidence of a defendant's net worth, the trial judge certainly could have given limiting instructions admonishing the jury to use net worth evidence only for its proper purpose. Presumably, therefore, the Tennessee Supreme Court thought that the risk of prejudice from net worth evidence was so high that the "normal" procedural safeguards were inadequate and that the only effective way to ensure that the jury did not find punitive liability based

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R. CIV. P. 56 (summary judgment); TENN. R. CIV. P. 56 (same).

41. For example, the rules of evidence generally exclude evidence of subsequent remedial measures, *see* FED. R. EVID. 407; TENN. R. EVID. 407, evidence of settlement offers or discussions, *see* FED. R. EVID. 408; TENN. R. EVID. 408, and evidence regarding liability insurance, *see* FED. R. EVID. 411; TENN. R. EVID. 411.

42. *See* FED. R. EVID. 403; TENN. R. EVID. 403.

43. *See* FED. R. EVID. 105; TENN. R. EVID. 105.

44. 3 DEVITT ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS (CIVIL) § 71.01 (1987) ("You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion."); T.P.I - CIVIL 15.01 ("You must not be influenced by any personal likes or dislikes, prejudice or sympathy.").

45. 833 S.W.2d at 901.

46. The Tennessee Supreme Court affirmed the compensatory liability and damages award and remanded only the punitive liability and damages award. *Id.* at 902. On remand, the new standards for punitive damages articulated in *S.C. Toof* required the plaintiff to "prove the defendant's intentional, fraudulent, malicious, or reckless conduct by clear and convincing evidence." *Id.* at 901. Accordingly, the trial court retained the power—if not the responsibility—to direct a verdict for the defendant on remand if the plaintiff could not present evidence sufficient to sustain that burden. *See, e.g.*, Nelms v. Walgreen Co., No. 02A01-9805-CV-00137, 1999 WL 462145 (Tenn. Ct. App. July 7, 1999) (affirming the directed verdict for the defendant on the punitive damages claim).

on the depth of the defendant's pockets was to withhold the issue of the amount of punitive damages until later.

The question considered here is not whether the rules of evidence and the available judicial instructions are in fact inadequate to combat the so-called "deep-pockets effect" such that a change to the trial structure was necessary.[47] Rather, the question is why the Tennessee Supreme Court endorses issue separation to remedy that specific form of prejudice, but seems to eschew issue separation to remedy all other forms of prejudice. The *S.C. Toof* trial format exemplifies this disparity. Under it, the jury jointly decides at least three issues in the first phase: (1) compensatory liability; (2) amount of compensatory damages; and (3) punitive liability.[48] The Tennessee Supreme Court seems unconcerned with the risk that the unitary trial of these issues might prejudice jurors in the way they decide each issue. Why the different treatment? Is it because the risk of prejudice from net-worth evidence is uniquely severe?[49] Is it because the risk of prejudice attendant to commingling all the other issues is modest? The Tennessee Supreme Court offers no explanation.

A. Prejudice and the Defendant's Net Worth.

Evidence regarding the defendant's net worth is a classic example of evidence with a narrow probative value. On the one hand, Tennessee law explicitly instructs the factfinder to consider the defendant's net worth in determining the size of a punitive damages award.[50] Indeed, to the extent the factfinder's goal is to assess punitive damages in an amount large enough to make the award hurt, but not so large as to be fatal, the defendant's financial condition is essential.[51] On the other hand, the defendant's net worth usually is not relevant to any other issue. Certainly, the defendant's financial condition has no bearing on the appropriate measure of compensatory

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47. Commentators have questioned the effectiveness of limiting instructions for decades. As Justice Jackson proclaimed over 50 years ago, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 366 U.S. 440, 453 (1949) (Jackson, J., concurring) (citations omitted). More recently, Professor Neal Feigenson has described limiting instructions as "famously ineffective." *See* Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 73 (1997).

48. *S.C. Toof*, 833 S.W.2d at 901.

49. The Texas Supreme Court seems to think so. In holding that defendants may insist that the trial court try the issue of the amount of punitive damages separately, the Texas Supreme Court stated that "[b]ifurcating only the amount of punitive damages . . . eliminates the most serious risk of prejudice, while minimizing the confusion and inefficiency that can result from a bifurcated trial." Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994).

50. *S.C. Toof*, 833 S.W.2d at 901.

51. *Coppinger*, 698 S.W.2d at 74. *See generally* Hacker, *supra* note 32, at 1000.

damages. Nor is the defendant's financial condition ordinarily relevant to the defendant's compensatory or punitive liability.[52] Thus, the jury should consider the defendant's net worth, if at all, for only a limited purpose.

However, the conventional wisdom has long held that juries are influenced by evidence of the defendant's wealth—its "deep pockets"—regardless of its relevance to the legal issue at hand.[53] By the 1980s, the idea that juries assess damages based on the depth of the parties' pockets had become "an integral part of American legal folklore,"[54] and it remains prevalent.[55] Even the U.S. Supreme Court has hinted at the deep-pockets phenomenon. In a case approving of the punitive damages standards adopted by Alabama, which exclude consideration of the defendant's net worth, the Court noted that "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."[56]

During the late 1980s and early 1990s, however, a series of influential articles by Valerie Hans,[57] Neil Vidmar,[58] Robert MacCoun[59] and others led to a mass reconsideration of the traditional deep-pockets theory. The studies

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52. It can be argued that a defendant's size and wealth (or lack thereof) could support a claim that a defendant chose to disregard a known risk because it felt it had little to lose. *See* Hacker, *supra* note 32, at 1001 n.142. For purposes of this Article, however, I assume that, as will be the case in most situations, there is no logical link between the defendant's wealth and its liability for compensatory or punitive damages.

53. *See* Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 337 (1998) [hereinafter Hans, *Illusions*] ("Lawyers consider it a truism that juries penalize corporations for their financial resources, using them as deep pockets from which to compensate undeserving plaintiffs . . . .").

54. Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 224 (1993) [hereinafter Vidmar, *Deep Pockets*].

55. *See, e.g.*, Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 665 (1980) ("Evidence of the defendant's wealth . . . may give rise to what one writer has dubbed the "Robin Hood" syndrome."); Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 210 (1998) ("[E]vidence that a defendant has a huge net worth often contributes to a staggering verdict.").

56. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991); *see also id.* ("The factfinder must be guided by more than the defendant's net worth."); Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) ("The presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses.").

57. Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, LAW & CONTEMP. PROBS., Autumn 1989, at 177 [hereinafter Hans, *Jury's Response*]; Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 LAW & HUM. BEHAV. 151 (1989).

58. *See* Vidmar, *Deep Pockets*, *supra* note 54; Neil Vidmar et al., *Damage Awards and Jurors' Responsibility Ascriptions in Medical Versus Automobile Negligence Cases*, 12 BEHAV. SCI. & L. 149 (1994).

59. *See* Robert J. MacCoun, *Differential Treatment of Corporate Defendants By Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 L. & SOC'Y REV. 121 (1996).

confirmed that, on average, corporate defendants pay more than individual defendants.[60] But the consensus among the studies was that corporations pay more not because they have deeper pockets than individuals, but because jurors tend to hold corporate defendants to a higher standard of care.[61] Across corporate defendants as a category, however, variations in wealth yield no statistically significant variations in the size of damage awards.[62]

If the deep-pockets effect is indeed a myth, then the trial format mandated by *S.C. Toof* is, at its best, a solution in search of a problem.[63] At its worst,

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60. Hans & Ermann, *supra* note 57, at 157; MacCoun, *supra* note 59, at 125-26.

61. Hans & Ermann, *supra* note 57, at 162; Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242, 246 (1996) [hereinafter Hans, *Contested Role*]; MacCoun, *supra* note 59, at 141. It is as yet unclear exactly why jurors hold corporations to a higher standard of care. It may be that jurors expect greater care from corporations because of their greater capacity to cause harm. *See* Hans, *Contested Role*, *supra*, at 246 ("[C]ommercial enterprises frequently affect a large number of individuals . . . and thus may be given greater responsibility."); MacCoun, *supra* note 59, at 141 ("Jurors may be less forgiving of defendants engaged in endeavors that potentially expose a great many people to risk . . . ."). An alternative explanation is that jurors see corporations as having a "nonfinancial resource superiority" over individuals in that corporations, being composed of many individuals, have more "heads" to detect and prevent potential risks. Hans, *Jury's Response*, *supra* note 57, at 195; *see also* Hans & Ermann, *supra* note 57, at 163 (using the term "nonfinancial resource advantages"). One commentary summarizing the literature concludes that "the differences in awards are due to differences in perceptions of the defendants' intentionality, responsibility, recklessness, or competence to avoid the injury." Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 759 n.32 (1999). An obvious lingering deep-pockets permutation—so far not supported by the empirical studies, yet still quite plausible—is that jurors assume that even a "poor" corporation has sufficient financial resources such that it should be held to a higher standard of risk detection and prevention. *See, e.g.*, Hans, *Illusions*, *supra*, note 53, at 351 (quoting a mock juror as saying that corporations should be held to a higher standard because of their greater organizational resources, including the "resources of capital to make an informed decision").

62. *See* Landsman et al., *supra* note 2, at 317 tbl. 3, 319 tbl. 4 (in a mock asbestos trial, finding no statistically significant effect of defendant net worth on frequency of compensatory liability verdicts or size of compensatory damage awards); Edith Greene et al., *Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?*, 24 LAW & HUM. BEHAV. 187, 200 (2000) [hereinafter Greene, *Is Bifurcation Necessary?*] (finding no effect of net worth on compensatory damage awards in any of three mock personal injury scenarios); *see also* Hans, *Illusions*, *supra* note 53, at 346; MacCoun, *supra* note 59, at 136-38; NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS 206-12 (1995) (finding no statistically significant effect of net worth on the frequency of compensatory liability judgments).

63. Empirically, the door is not completely closed on the deep-pockets effect. All the existing studies analyze the effect of defendant net worth on compensatory liability and damages. To my knowledge, no study has analyzed the effect of defendant net worth on punitive liability decisions. One might expect that future empirical work will refute the deep-

S.C. Toof imposes on the court and the litigants an unnecessary layer of procedural complexity and, to the extent of any repeat evidence, inefficiency. The *S.C. Toof* trial format is deficient in yet another respect. Whatever the normative arguments might be for doing so,[64] the law does not hold corporate defendants to a higher standard of care than individual defendants.[65] Yet

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pockets effect in that context as well. This gap in the body of empirical work is particularly relevant to this Article: in *S.C. Toof*, the Tennessee Supreme Court was concerned only with the risk that juries might find liability for punitive damages based on evidence of the defendant's wealth. *See* Hodges v. S.C. Toof, 833 S.W.2d 896, 900 (Tenn. 1992) (announcing "a new procedure aimed at providing specific criteria to guide a jury in deciding whether to award punitive damages and, if so, in what amount"). The court does not discuss the possibility that separating the issue of the amount of punitive damages might also prevent juries from finding compensatory liability or setting compensatory damages based on the defendant's net worth. *Cf.* Campen v. Stone, 635 P.2d 1121, 1128 (Wyo. 1981) ("Not only may the evidence of wealth affect the determination of whether punitive damages should be awarded, but it may further encourage compensatory damages to be based upon the defendant's ability to pay."); *see also* Mogin, *supra* note 55, at 210 ("Unless the amount of punitive damages is determined in a separate phase of the trial, it seems clear that admission of evidence of wealth also may skew the jury's assessment of liability for compensatory and punitive damages and of the amount of compensatory damages.").

64. *See* Richard Lempert, *Why Do Juries Get a Bum Rap? Reflections on the Work of Valerie Hans*, 48 DEPAUL L. REV. 453, 454 (1998) (characterizing the differences in verdicts against corporations and individuals as reflecting "normatively defensible judgements about the different capacities of businesses and individuals to foresee and avoid harm").

65. Tennessee law defines negligence as the failure to exercise reasonable care under the circumstances. *See* Pittman v. Upjohn Co., 890 S.W.2d 425, 428 (Tenn. 1994). What is reasonable depends on the risk of injury that attends a particular situation and the foreseeability of that risk. *See* Doe v. Linder Constr. Co., 845 S.W.2d 173, 178 (Tenn. 1992). The law itself makes no distinction between what is "reasonable care" for a corporation versus what is "reasonable care" for an individual. *See* T.P.I. - CIVIL 3.05 (articulating a single standard of care); T.P.I. - CIVIL 1.04 ("The fact that a corporation is a party must not influence you in your deliberations or in your verdict. Corporations and persons are equal."). In some circumstances, a corporate defendant might possess certain institutional advantages that would raise the bar on what is considered "reasonable care." *Cf.* RESTATEMENT (SECOND) OF TORTS § 289(b) & cmt. m (stating that when an actor has superior qualities "the standard [of care] becomes . . . that of a reasonable man with such superior attributes"). A corporate defendant might have more information routinely available such that risks are more readily foreseeable or have infrastructure in place that makes preventive measures less costly. But the additional expectations flow from the determination of reasonable care *under those specific circumstances*, not because the corporation is subject to a *higher* standard of care. Presumably, the reasonable care expected of an individual defendant with access to the same information and infrastructure would be the same. What appears to be happening, however, is that juries automatically expect more from a defendant solely because it is a corporation, perhaps based on assumptions that all corporations possess some "superior attributes" bearing on what would constitute "reasonable care under the circumstances." To the extent that juries assume that corporations possess attributes superior to individuals, it is just as much a bias as allocating damages based on wealth.

juries appear to do exactly that—awarding higher damages against corporate defendants on that basis. The *S.C. Toof* bifurcation scheme does not correct that prejudice (nor could any bifurcation scheme) because the problem is not one of trial structure. Regardless of whether the court holds a unitary trial or a bifurcated trial, if jurors subconsciously hold corporate defendants to a higher standard of care than they do individual defendants and this bias persists despite instructions to the contrary, the only effective way to correct the problem is to withhold the identity of the defendant from the jury.

B. Prejudice and the Phase-One Issues.

The trial format set forth by the Tennessee Supreme Court in *S.C. Toof* leaves all of the other issues joined for trial. The opinion states that "[d]uring the first phase, the factfinder *shall determine* (1) liability for, and the amount of, compensatory damages and (2) liability for punitive damages."[66] Of course, nothing in *S.C. Toof* explicitly forbids further issue separation, so it is possible courts could depart from the two-phase structure outlined in *S.C. Toof*.[67] That seems unlikely, however, given the general hostility to issue separation that runs through *Ennix v. Clay*.[68] Indeed, one can easily read *S.C. Toof* as taking *Ennix* one step further. In *Ennix*, the Tennessee Supreme Court expressed its clear preference for trying compensatory liability and compensatory damages together. In *S.C. Toof*, the court added punitive liability to that pile.

There is ample reason to fear that trying compensatory liability, compensatory damages, and punitive liability will result in prejudice. It has long been believed that compensatory damages evidence—in particular, evidence of the plaintiffs' injuries in personal injury cases—influences juries' decisions on compensatory liability. It has also been suspected that punitive liability evidence improperly influences juries' decisions on compensatory liability and damages. A sizable and growing body of empirical evidence generally confirms the existence of these prejudices, but also indicates that they are more complicated than the simple "pro-plaintiff" bias originally perceived.

1. Prejudice Arising from Trying Compensatory Liability and Compensatory Damages Together.

Several studies have found that, at least in personal injury cases, plaintiffs win more liability verdicts when the jury decides compensatory liability and

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66. 833 S.W.2d at 901 (emphasis added).

67. *See* Parde, *supra* note 35, at 248 n.70 (asking whether the first phase of a bifurcated trial may "be further separated under Rule 42.02").

68. 703 S.W.2d 137 (Tenn. 1986); *see supra* notes 19-29 and accompanying text.

compensatory damages at the same time.[69] The absence of sympathy-generating injury evidence in the bifurcated trials probably accounts for the lower win rates. Brian Bornstein conducted a mock jury study in which he measured sympathy for plaintiffs across varying levels of injury severity.[70] As he had expected, Bornstein found that jurors were more sympathetic—held a more positive sentiment—toward the plaintiffs who were more severely injured.[71] Moreover, the high-sympathy jurors were substantially more likely to find causation and liability than the low-sympathy jurors, even though the liability evidence remained constant.[72] More recently, Edith Greene conducted an automobile negligence jury simulation to measure the effect of injury severity on jurors' liability decisions.[73] Greene found that "[i]n general, the more severe the plaintiff's injuries, the harsher the judgment against the defendant."[74] While Greene attributed some of this effect to hindsight bias, she also detected a sympathy effect—many jurors stated they were motivated to find liability based, in part, on "a desire to compensate the plaintiff for economic loss and for pain and suffering."[75]

Overall, these studies seem to confirm what most probably suspected: compensatory damages evidence significantly influences compensatory liability verdicts by arousing juror sympathy.[76] Bifurcation is a structural cure for the improper effects [77] of sympathy. When liability and damages are tried separately, the jury does not hear damages evidence when it decides liability,

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69. *See* Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1612 tbl.3 (1963) (bifurcation cut plaintiff win rates in personal injury cases from 66% to 44%); Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269, 281-82 (1990) (in a mock toxic-tort trial, juries were significantly less likely to find for the plaintiff on causation or liability when the trial was bifurcated).

70. Brian H. Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28 J. APPLIED SOC. PSYCH. 1477, 1485 (1998).

71. *Id.*

72. *Id.*

73. *See* Edith Greene et al., *The Effects of Injury Severity on Jury Negligence Decisions*, 23 LAW & HUM. BEHAV. 675 (1999) [hereinafter Greene, *Injury Effects*].

74. *Id.* at 690. The most significant exception was that increased injury severity yielded fewer plaintiff liability verdicts when the liability case against the defendant was a close call. *Id.* at 686, 691-92. Greene hypothesizes that when severe injuries resulted from arguably reasonable conduct, "jurors were hesitant to find fault and saddle a questionably errant defendant with an enormous damage award." *Id.* at 690.

75. *Id.*

76. While the most recent studies confirm a sympathy effect, the earliest studies yielded more mixed results. *See* MacCoun, *supra* note 59, at 127 (listing earlier studies).

77. Although sympathy can lead to improper decision making, sympathy in the courtroom is not all bad. For a discussion of some the potential benefits of sympathy in jury trials, see Feigenson, *supra* note 47, at 29-40 (arguing that, among other things, sympathy can improve jury decision making by helping jurors recognize the need for justice and motivating them to take their role more seriously).

so the sympathy effect is unlikely to take root.

This is not to say that bifurcation is pro-defendant or anti-plaintiff. Outside the context of personal injury, bifurcation may not be pro-anything.[78] Even in personal injury cases, the impact of the choice between a unitary trial and a bifurcated trial may not be so cut and dry. As noted above, a unitary trial can harm plaintiffs in severe injury cases if the enormity of the damages causes juries to give defendants the benefit of the doubt.[79] Alternatively, a unitary trial of liability and damages can harm plaintiffs if some aspect of the damages case might cause the jury to feel antipathy for the plaintiff, rather than sympathy.[80] Finally, there is some evidence that bifurcation might hurt defendants, even assuming that it leads to more defense verdicts on liability, by increasing the size of compensatory damage awards.[81]

The point here, however, is not to establish whether bifurcation more often favors plaintiffs or defendants, if either. Rather, the point is to show that juries allow damages evidence to influence their liability verdicts; as a result, trying liability and damages separately can minimize this form of evidentiary prejudice.[82] Compared to the limited (if not nonexistent) deep-pockets effect, the sympathy effect is a much greater prejudice risk.

2. Adding Punitive Liability to the Unitary Trial of Compensatory Liability and Compensatory Damages.

S.C. Toof does more than just leave the issues of compensatory liability

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78. In non-personal injury cases, in which there is typically less sympathy-generating evidence, bifurcation may have no effect on liability verdicts at all. *See* Gensler, *supra* note 1.

79. *See supra* note 74.

80. Gensler, *supra* note 1; *see, e.g.*, Taylor v. Racetrac Petroleum, Inc., 519 S.E.2d 282, 284-85 (Ga. Ct. App. 1999) (holding that where the defendant proposed to introduce evidence of the wrongful-death plaintiff's drug and alcohol use to establish the plaintiff's lowered life expectancy, trial court should have bifurcated liability and damages to avoid prejudice to plaintiff on the issue of liability).

81. *See* Horowitz & Bordens, *supra* note 69, at 278. Anecdotally, the Chicago plaintiff's bar vehemently opposed the Northern District of Illinois's enacting a local rule encouraging bifurcation of liability and damages in tort cases, but backed off its opposition when, after judges began regularly bifurcating personal injury cases, they saw damage awards rise. *See* Richard S. Miller, *A Program for the Elimination of the Hardships of Litigation Delay*, 27 OHIO ST. L.J. 402, 418 n.44 (1966) (citing a 1962 address by Judge Bernard M. Decker of the Circuit Court of Illinois).

82. Another study suggests that the converse may also be true—that liability evidence may influence damage awards. *See* Edith Greene et al., *The Effect of Defendant Conduct on Jury Damage Awards*, 85 J. APPLIED PSYCH. __ (forthcoming 2000). Ordinary bifurcation—liability first, damages second, same jury—would not correct this effect, however, because the jury would still have heard liability evidence before deciding damages. To correct for it, the court would either have to have the jury decide damages first and then liability, or decide liability first, but empanel a new jury to decide damages. Both options would add cost and decrease efficiency.

and damages joined for trial. Under the two-phase format advanced by the Tennessee Supreme Court, the issue of punitive liability is added to the first phase: "During the first phase, the factfinder shall determine (1) liability for, and the amount of, compensatory damages and (2) liability for punitive damages . . . ."[83] There appear to be two ways in which these issues might influence each other in a legally improper way.

A recent pathbreaking study by Stephan Landsman indicates that punitive damages evidence prejudices juries' determinations of both compensatory liability and compensatory damages.[84] The study compared the effect of bifurcating the punitive damages component of a mock product liability trial.[85] When the compensatory phase was tried alone (i.e., the entire punitive phase was bifurcated), the plaintiff prevailed 42.8% of the time.[86] When the compensatory and punitive phases were tried at the same time, however, the plaintiff prevailed 55.2% of the time.[87] The trial structure had a similar effect on the amount of compensatory damages awarded: jurors who heard punitive damages evidence as part of a unitary trial awarded larger compensatory damages awards as the strength of the compensatory liability case increased.[88] The Landsman study was carefully structured so that the punitive damages evidence had no legally cognizable connection to the issues of compensatory liability or damages.[89] Accordingly, "[t]hat the addition of punitive information produced a significantly higher percentage of plaintiff victories clearly signals that a substantial number of jurors made improper use of punitive case facts in assessing compensatory liability, despite instructions to the contrary."[90]

What exactly caused the prejudice in that study? Not net worth.[91] Rather, it appears that the prejudicing agent was evidence that the defendant knew about the potentially injurious attributes of its product but had suppressed the information.[92] That the defendant acted so callously, of course, was not relevant to either the fact of compensatory liability or to the dollar value of the harm caused to the plaintiffs.[93] For most people, however, it will come as no

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83. 833 S.W.2d at 901.

84. Landsman et al., *supra* note 2.

85. The study was modeled after typical asbestos litigation, but the asbestos was called "beryllium" in the study to avoid the baggage that comes with asbestos. *Id.* at 309.

86. *Id.* at 317.

87. *Id.*

88. *Id.* at 321. This is a significant result because the strength of the liability case should determine whether damages should be awarded at all (*i.e.*, establish liability), but should not influence the amount of the damages sustained by the plaintiff.

89. *Id.* at 308, 334.

90. *Id.* at 334. These differences disappeared, however, when the participants deliberated in six-person juries. *Id.* at 322.

91. *See id.* at 313 n.60.

92. *Id.* at 321; *see id* at 311-12 (discussing contents of punitive damages evidence).

93. *Id.* at 334.

surprise that evidence of a defendant's egregious misconduct can tip the scales in favor of a plaintiff's verdict on liability or increase the size of the compensatory damages award.[94]

In a typical case, trying punitive liability together with compensatory liability and damages opens up numerous avenues for prejudice.[95] Under Tennessee law, for example, recklessness is but one of four bases for punitive liability; plaintiffs can also establish liability for punitive damages by introducing evidence that the defendant acted intentionally, fraudulently, or maliciously.[96] Evidence that the defendant had a "conscious objective" to cause harm, was defrauding the victim, or acted out of "ill will, hatred, or personal spite" easily could make the difference in a close case on compensatory liability—such as a close case on causation or the appropriate standard of care.[97] When punitive damages evidence is added to the mix, the opportunities for prejudice grow even larger. Tennessee law, for example, permits the factfinder to consider (in addition to the defendant's wealth) the

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94. *But see* Corinne Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 LAW & HUM. BEHAV. 189, 202 (1996) (finding that defendant "reprehensibility" did not affect the size of punitive damage awards). The results of the Cather study, it should be noted, can be reconciled with the results of the Landsman study. First, the Cather study did not measure whether reprehensibility affected the issue of punitive liability. Second, the Landsman study concluded that defendant reprehensibility affected damages only past a "tipping point" based on the strength of the compensatory liability case. Landsman et al., *supra* note 2, at 321. Thus, the punitive damages evidence increased compensatory damages in the moderate strength liability cases, but not in the weak liability cases. *Id.* Because the Cather study informed the participants that liability had been established, it presented no evidence on negligence. Assuming the Landsman study's "tipping point" hypothesis is correct, the results of the Cather study are consistent; because the Cather study did not vary compensatory case strength, one would expect no variation in the effect of reprehensibility on the size of damage awards assuming an equal distribution of participants who would project the compensatory liability evidence as either below or above the tipping point.

95. In the Landsman study, net worth and egregiousness were the only possible prejudicing agents. *See* Landsman et al., *supra* note 2, at 311-12 (discussing contents of punitive damages presentation).

96. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992).

97. *See* 1 GHIARDI ET AL., *supra* note 3, § 12.01, at 1-2 ("Introducing evidence which probes the reckless or malicious nature of defendant's conduct to support a punitive damage award . . . threatens also to influence the jury's determination on substantive liability and compensatory damages."). Along this vein, it is probably no coincidence that cases involving claims for punitive damages often result in excessive compensatory damages awards. *See, e.g.*, Metcalfe v. Waters, 970 S.W.2d 448, 449 (Tenn. 1998) (affirming the lower court's reversal of a compensatory damages award as excessive in a case in which the plaintiff sought punitive damages based on the defendant attorneys' intentional concealment of prior malpractice); Pullen v. Textron, Inc., 845 S.W.2d 777, 780 (Tenn. Ct. App. 1992) (compensatory damages award reversed as product of "passion, prejudice or caprice" in a case in which the plaintiff sought punitive damages for malicious prosecution).

"reprehensibility" of the defendant's conduct, whether the defendant ignored or attempted to conceal known misconduct, and whether the defendant profited from its misdeeds.[98] Here, too, it seems perfectly plausible that the antipathy generated against the defendant by this type of information "may influence the jury and lead it to compromise any doubts it may have on the initial question of liability."[99] Thus, in this respect, the *S.C. Toof* format of trying the amount of punitive damages separately may actually serve its intended purpose of combating prejudice, albeit in a way not overtly anticipated by the Tennessee Supreme Court.

Prejudice may flow in the other direction as well—from evidence relevant to the issue of compensatory damages to punitive liability. As discussed above, Bornstein's study demonstrated that juror sympathy rises with the severity of the plaintiff's injuries, and that this sympathy corresponds with an increase in compensatory liability verdicts.[100] Bornstein also found, however, that increased injury severity generated increased antipathy toward the defendant:

> Although the defendant's behavior and characteristics were exactly the same in both conditions, the defendant who was being sued in the high-severity condition was perceived significantly less favorably . . . . Increasing the amount of positive sentiment felt for one party was accompanied by increased negative feelings for that party's antagonist. . . . This finding suggests that jurors do not perceive the participants at trial independently; rather, there is a tradeoff, such that the more favorably one feels toward one of the opposing sides, the less favorably are one's sentiments toward the other side.[101]

This injury-generated antipathy led jurors to find compensatory liability in order to punish the defendants. Even when the only thing the jurors could do

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98. *S.C. Toof*, 833 S.W.2d at 901-02. While the *S.C. Toof* bifurcation scheme separates the issue of the amount of punitive damages, the Tennessee Supreme Court has specifically held that only net worth evidence is banned from phase one of the trial. Metcalfe v. Waters, 970 S.W.2d 448, 452 (Tenn. 1998) ("[O]nly evidence of a defendant's net worth is deemed inadmissible in determining a defendant's liability for punitive damages.").

99. Mallor & Roberts, *supra* note 55, at 665 (speculating about effect of evidence of similar misconduct); *see also* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 9 n.27 (1992) ("[E]vidence of the defendant's . . . social standing [] or other bad acts may be admissible for the determination of punishment, but prejudicial to the question of whether a product is defective or caused the plaintiff's injuries."); *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1530 (1997) [hereinafter *The Civil Jury*] ("[E]vidence regarding . . . other bad acts committed by the defendant may be admissible and relevant to the issue of punitive damages, but irrelevant and highly prejudicial in the jury's determination of compensatory damages.").

100. Bornstein, *supra* note 70, at 1485.

101. *Id.* (statistical information and citations omitted).

was fine the defendants (with the money from the fine going to the government and not the plaintiffs), increasing the severity of the plaintiff's injuries caused an increase in liability verdicts from 7.7% to 30.8%.[102] In other words, the increased injury severity affected the jurors' perceptions enough that an additional 23% of the jurors found liability even though all they could do was punish the defendant, and even though their decision to fine the defendant had no bearing on whether the plaintiff would recover any compensation.

The results of Bornstein's study intimate a significant prejudice risk when compensatory damages and punitive liability are tried together. Neither the severity of the plaintiff's injuries nor the amount of money necessary to compensate the plaintiff for those injuries has any bearing on whether the defendant acted intentionally, fraudulently, maliciously, or recklessly. Increased injury severity, however, created enough ill will toward the defendant to cause almost a quarter of the participants in the Bornstein study to find compensatory liability as punishment. It is no large leap to think that this ill will would be just as likely, if not more likely, to prejudice jurors when they are asked directly whether the defendant deserves to be punished.

Once again, the point here is not to determine who wins and who loses when punitive damage claims are bifurcated. (On that score, the best evidence is that it is a split decision: plaintiffs are less likely to prevail on punitive liability, but receive substantially higher punitive damage awards when they are successful.[103]) The point is to show that juries allow punitive damages issues (other than net worth) to improperly influence their compensatory liability verdicts and damage awards, and vice versa. Trying punitive damages claims separately from compensatory claims can reduce this form of prejudice.[104] The trial format set forth in *S.C. Toof*, however, affirmatively

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102. *Id.* at 1492 tbl. 3. Bornstein measured the effect of injury severity across three groups with different abilities to affect the parties. The first group ("normal") could assess damages against the defendant and award them to the plaintiff; the second group ("separated") could only take money from the defendant (but not give it to the plaintiff); a third group ("control") could make findings but neither take money from the defendant nor give it to the plaintiff. *Id.* at 1493. As with the first phase of the study, increasing injury severity in the "normal" trial condition also increased juror sympathy for the plaintiff and the percentage of liability findings—from 7.7% to 42.3%. *Id.* at 1492 tbl. 3. Of course, because the "normal" group both took money from the defendant and gave it to the plaintiff, we don't know if the increased injury severity stimulated an increased desire to compensate the plaintiff or an increased desire to punish the defendant.

103. *See* Greene et al., *Is Bifurcation Necessary?*, *supra* note 62, at 198; Landsman et al., *supra* note 2, at 323, 329.

104. *See* Jane Mallor & Barry Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1012 (1999) (endorsing statutory provisions for bifurcating punitive damage trials as "a positive step toward a principled approach in that they help to avoid compromise on the liability decision and overly harsh penalties that might result from passion or prejudice").

joins these various issues for trial.

C. *Bifurcation to Combat Prejudice: From Theory to Practice.*

Although bifurcation is no magic elixir to cure all forms of prejudice,[105] it can be strong medicine for many. For example, bifurcation can be an effective measure to combat a prejudicial effect of damages evidence on liability. The best evidence available confirms that the sympathy effect generated by evidence of a plaintiff's personal injuries is real and powerful.[106] And the sympathy effect is a prejudice—the law does not define reasonable care or causation based on a sliding scale according to the severity of the plaintiff's injuries. From this perspective, one can see considerable merit to New York's approach of encouraging bifurcation of liability and damages in personal injury cases, and requiring the party opposing bifurcation to explain the need for a unitary trial.[107] At the very least, the evidence on prejudice counsels that states (like Tennessee) should stop branding issue separation procedures with a scarlet "B" and start seeing bifurcation as a cure rather than a problem.

Competing values, of course, will limit when trial judges should bifurcate issues to combat prejudice. Judges must consider efficiency when structuring the trial.[108] Based on the available evidence, a more aggressive use of bifurcation is more likely to help efficiency than to hinder it, at least in the

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105. Arguably the most pervasive prejudice is the hindsight bias. Negligence law instructs jurors that "[t]he actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the event.'" *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992) (quoting 5 PROSSER AND KEETON ON TORTS § 31, p. 170 (5th ed. 1984)). In practice, however, people consistently overestimate the odds of an event occurring (*i.e.*, its foreseeability) once they learn that it actually happened. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging In Hindsight*, 65 U. CHI. L. REV. 571, 576-81 (1998). In one recent study, only 33% of the participants thought the risk of a particular accident was high enough to enjoin the activity, but 67% of the participants assessed punitive liability in hindsight. Reid Hastie et al., *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 LAW & HUM. BEHAV. 597, 605 (1999). Bifurcation offers no remedy to the hindsight bias because the jury will learn that there has been an accident while deciding liability, if not during voir dire. *Cf. id.* at 612 ("The possibility of hiding the outcome from the jury, perhaps with bifurcated trials and multiple juries, seems impractical and unlikely to achieve the desired results."). For a discussion of possible uses of bifurcation to combat hindsight bias in cases alleging the negligent release of a subsequently violent mental health patient, see David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations*, 7 BEHAV. SCI. & L. 485, 493-95 (1989).

106. *See supra* notes 69-77 and accompanying text.

107. *See supra* note 10.

108. *See* FED. R. CIV. P. 42(b); *Ennix v. Clay*, 703 S.W.2d 137, 139 (Tenn. 1986) ("The trial court should consider . . . the needs of judicial efficiency . . . .").

long run.[109] Nevertheless, some of the most difficult bifurcation decisions for judges arise when a unitary proceeding would lead to prejudice, but a bifurcated proceeding would be much less efficient—typically due to a large overlap of evidence.[110] Consider also a situation where two issues are shown to each severely prejudice the resolution of the other. The only effective form of bifurcation in that context would be to use different juries, a prospect that is laden with inefficiency and, in some jurisdictions (Tennessee being one of them), unconstitutional.[111]

Changes to punitive damage trial formats appear to be in order as well. Many jurisdictions parallel Tennessee in bifurcating only the amount of punitive damages while trying punitive liability along with compensatory liability and damages.[112] But, to the extent that format serves only to segregate evidence of the defendant's net worth, it appears misdirected.[113] More importantly, it fails to remedy other more serious risks of prejudice, such as the impact of compensatory damages evidence and punitive liability evidence on compensatory liability.[114] Now comes the hard part. It is one thing to say that prejudice requires a different form of issue separation, but it is quite another thing to find a single, preferable alternative.

One possibility is to try the compensatory issues in the first phase and the punitive issues in a second phase.[115] This format is certainly one step better at combating prejudice than *S.C. Toof* in that it separates the potentially prejudicial issue of punitive liability from the jury's decision on the compensatory issues. But there are two significant problems. First, it does not counteract the prejudicial effect of compensatory damages evidence on the issue of compensatory liability. Second, in many cases it will not combat prejudice stemming from punitive liability because the plaintiff will be able

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109. *See* Gensler, *supra* note 1 (concluding that attrition after the jury decides liability, either from a defense verdict or a settlement, is likely to make bifurcation more efficient overall even if it makes cases that are tried in full longer).

110. *See id.*

111. *See* PIVNICK, *supra* note 19, at 753-54.

112. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (West 1997). *See generally* 1 GHIARDI ET AL., *supra* note 3, § 12.10 (discussing parallel state laws).

113. *See supra* notes 57-65 and accompanying text.

114. *See supra* notes 69-77 and accompanying text and notes 84-99 and accompanying text.

115. *See, e.g.*, MISS. CODE ANN. § 11-1-65(b) (Supp. 1998); N.J. STAT. ANN. § 2A:15-5.13 (West Supp. 2000); OHIO REV. CODE ANN. § 2315.21(B) (1998 & Supp. 1999). During the 1990s, Congress considered, but rejected, numerous product liability reform bills that would have bifurcated all punitive issues from the compensatory issues. *See, e.g.*, Product Liability Reform Act of 1998, S. 2236, 105th Congress, § 110(a)(2) (1998). The Western District of Tennessee rejected this bifurcation format in *Thomas v. Allen-Stone Boxes, Inc.*, 925 F. Supp. 1316, 1317 (W.D. Tenn. 1995), although it appears the court was simply applying Rule 42(b) to the facts and was not purporting to establish a categorical rule.

to introduce the same evidence to prove compensatory liability.[116] In that situation, trying compensatory liability separately from punitive liability will fail to achieve its intended purpose and at the same time, will compromise efficiency by requiring a duplication of testimony.[117]

A different possibility might be to try compensatory liability and punitive liability together in the first phase, reserving compensatory damages and punitive damages for the second phase. This solves the problem of compensatory damages prejudicing compensatory liability. But it leaves intact the risk of punitive liability prejudicing compensatory liability. Overall, this option seems best suited to cases in which the severity of the plaintiff's injuries portend a powerful sympathy effect, and there is a significant overlap of evidence between compensatory and punitive liability.[118]

A final set of possible permutations involves trying the issue of compensatory liability by itself in a first phase, leaving all other issues for a subsequent phase or phases. The trial could be bifurcated, for example, with the jury deciding compensatory liability in the first phase and compensatory damages, punitive liability, and punitive damages in the second phase. Or the trial could be trifurcated, with the jury deciding compensatory liability in the first phase, compensatory damages in the second phase, and punitive liability and damages in the third phase. Or perhaps the court could have the jury

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116. A plaintiff attempting to prove that a defendant was negligent is ordinarily entitled to "over-prove" his case on liability by introducing evidence that the defendant acted recklessly, and then use the same evidence to prove recklessness entitling him to punitive damages. *See, e.g.*, Metcalfe v. Waters, 970 S.W.2d 448, 452 (Tenn. 1998) (holding that a lawyer's neglect of client's case and attempts to conceal his malpractice were the basis for both malpractice liability and punitive damages award). In a claim for malicious prosecution, the defendant's malice is a required element of the cause of action. *See* Roberts v. Federal Express Corp., 842 S.W.2d 246, 248 (Tenn. 1992).

117. For a while, courts in Georgia utilized a trifurcated trial structure in which the jury determined compensatory liability and damages in the first phase, punitive liability in the second phase, and punitive damages in the third phase. *See* Webster v. Boyett, 496 S.E.2d 459, 461 (Ga. 1998). The Georgia Supreme Court ultimately instructed Georgia courts that trifurcation of this type would be rarely warranted. *Id.* at 463. The Georgia Supreme Court was right to look on this form of trifurcation with disfavor; the evidence refuting the "deep-pockets" theory suggests that there is little reason to try punitive liability separately from punitive damages. A better trial format, then, would simply be to try compensatory issues first and punitive issues second. Ironically, the Georgia Supreme Court had adopted exactly that format in 1985, only to have it supplanted two years later by the current Georgia statutory scheme, which requires that the amount of punitive damages be tried in a separate proceeding. *Id.* at 461 (discussing effect of Georgia Tort Reform Act of 1987).

118. Efficiency does not appear to be an obstacle to this trial structure, at least not compared to an *S.C. Toof* format, which already separates the amount of punitive damages. Thus, the marginal inefficiency, if any, would result from separating compensatory liability and damages. As noted above however, reserving the issue of compensatory damages holds the potential to increase efficiency rather than decrease it. *See supra* note 109 and accompanying text.

decide punitive liability in the second phase instead, reserving both compensatory damages and punitive damages for the third phase.[119] Any of these formats would seem to address the major prejudices—the influence of punitive evidence and damages evidence on the threshold compensatory liability issue.[120] Here too, the potential for inefficiency depends on how many cases are resolved after compensatory liability and, for the cases requiring a second phase, how much compensatory liability evidence would need to be repeated during the subsequent phases.[121] If the major prejudices do in fact lead to more frequent plaintiff's verdicts on liability, then a trial format that counteracts these prejudices might lead to enough cases terminating after the liability phase so that it is the most efficient trial format overall, even if it requires more repeated testimony in those cases that require all of the phases.

As the previous discussion makes clear, however, there is no "one size fits all" approach to structuring a jury trial involving punitive damages. The balance between prejudice and efficiency can be tricky and defies a rigid rule. Nevertheless, it is fair to say that the approach of bifurcating only the amount of the punitive damages is flawed, both for its overkill and its oversights. The best course seems to be two-pronged. First, appellate courts and legislatures should dispense with rigid rules and return to more flexible schemes that give trial judges latitude to tailor the trial structure to fit the case. Second, trial judges should take advantage of this latitude and give more serious consideration to the effects of prejudice, particularly insofar as they impact the threshold issue of compensatory liability.

III. BIFURCATION AND CONFUSION: AN OVERLOOKED FACTOR

Another goal of trial procedure is (or at least should be) to structure the proceedings in a way that enhances jury comprehension. Commentators often identify bifurcation as a means of enhancing jury comprehension and reducing jury confusion.[122] The Tennessee Supreme Court seems to agree, or at least

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119. This format would then address prejudice that injury-driven antipathy against the defendant might have on punitive liability. *See supra* notes 100-02 and accompanying text.

120. "[T]he general rule in [Tennessee is] that actual or compensatory damages must be found as a predicate for the recovery of punitive damages." Whittington v. Grand Valley Lakes, Inc., 547 S.W.2d 241, 243 (Tenn. 1977). *See generally* 4 DAMAGES IN TORT ACTIONS § 40.04[2] (1995) (surveying jurisdictions regarding prerequisites for punitive damages award).

121. In the trifurcation options, there are additional efficiency risks to analyze based on the overlap of evidence between the second and third phases of the trial.

122. *See* AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 3.06 cmt.b, at 110-11 (1994) [hereinafter COMPLEX LITIGATION REPORT]; Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 767 (1991) ("[B]ias and confusion in jury decisionmaking may be reduced by focusing jurors' attention on discrete issues."); William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 143-44 (asserting that singling

so it says.[123] Bifurcation practice in Tennessee, however, suggests that Tennessee courts do not take this concern very seriously.

Bifurcation can aid jury comprehension in several ways. First, bifurcation defers the jury's consideration of certain issues. Thus, a dispositive determination of a simple issue can obviate the need for the jury to decide a more complicated one.[124] Second, bifurcation pushes the lawyers toward a more issue-based ordering of the evidence rather than a witness-based presentation of the evidence.[125] As a result, jurors hear the evidence on those issues in closer proximity, with less intervening distraction and in a format that more closely tracks the "story" of what happened.[126] Third, bifurcation "can significantly reduce the number of witnesses, evidentiary exhibits, and instructions that jurors must evaluate and comprehend" at each stage.[127] Jurors have a hard enough time as it is understanding and applying legal instructions.[128] Breaking up the trial into segments should simplify that task.[129]

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out the issue of causation for separate trial "permits the jury to concentrate on one major issue at a time therefore improving jury comprehension"); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS. L. REV. 95, 156-58 (1996) ("By enabling the jury to focus on one issue at a time, evidence becomes more orderly and understandable to the jurors."); Thomas E. Maloney, Comment, *Implications of Bifurcation in the Ordinary Negligence Case*, 26 U. PITT. L. REV. 99, 100 (1964) ("By forcing the jury to decide one question at a time the opportunity for confusion is undeniably lessened.").

123. *See* Ennix v. Clay, 703 S.W.2d 137, 139 (Tenn. 1986) (holding that "the trial court should consider the possibility of juror confusion" when deciding whether to bifurcate).

124. *See* COMPLEX LITIGATION REPORT, *supra* note 122, § 3.06 cmt. b, at 111.

125. *See* Cecil et al., *supra* note 122, at 767 ("Separation of issues for trial may promote the logical presentation of evidence, thereby facilitating jurors' memories . . . and enhancing the quality of jury deliberations and decisions."); Strier, *supra* note 122, at 140 (asserting that the unitary trial results in a "hodgepodge" that "confounds the logical ordering of evidence necessary to systematic consideration of findings on specific issues").

126. Recent work on the Story Model of jury decision making suggests that juror story construction—the method by which jurors decide cases—is enhanced when the evidence is presented in "story" order rather than witness order. *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Jury Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 542-43 (1991).

127. *The Civil Jury*, *supra* note 99, at 1498 ("[J]udges can bifurcate tort trials so that jurors can consider liability issues without being burdened by the calculation of damages.").

128. As the authors of one commentary write, "[j]uries routinely struggle with jury instructions on the applicable law, often misunderstanding legal concepts that are critical to the correct application of the governing law to the facts." Paula L. Hannaford et al., *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247, 256 (1998); *see also* Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287, 307 (1998) (finding that "jurors' inability to comprehend legal concepts . . . led them to ignore essential legal considerations").

129. *But see* Landsman et al., *supra* note 2, at 330, 333 (finding no comprehension benefits from bifurcation at either the compensatory phase or the punitive phase). While the results of

Cases containing punitive damages claims present additional ways bifurcation can ease juror confusion. First, bifurcating the punitive issues prevents any confusion about the discretionary nature of punitive damages, which, unlike compensatory liability and damages, are not awarded as a matter of right.[130] Second, bifurcation of the punitive issues can ease any confusion caused when compensatory liability and punitive liability consider the same factors and evidence but are governed by different standards of proof.[131] In a malicious prosecution case in Tennessee, for example, the jury determines whether the plaintiff has proved "malice" by a preponderance of the evidence for compensatory liability,[132] but determines whether the defendant acted maliciously by clear and convincing evidence for punitive liability.[133] It is questionable whether jurors can accurately apply different standards of proof to the same facts at the same time. Finally, a punitive damage claim essentially doubles the jury's workload by doubling the number of issues in a normal personal injury case. More evidence and more issues are likely to translate into more confusion. A strong consensus exists that bifurcation can ease confusion in so-called "complex" litigation;[134] cases involving punitive damages claims seem to qualify.[135]

To date, Tennessee courts have given short shrift to the potential for bifurcation to improve jury comprehension and reduce jury confusion. In *Ennix v. Clay*, the Tennessee Supreme Court recognized "the possibility of juror confusion" as a factor for trial courts to consider in determining whether to bifurcate,[136] but then made only a passing reference to it when explaining why it was rejecting bifurcation in that case.[137] The court did not even

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this study temper my sanguinity about the comprehension benefits of bifurcation, I do not take them as refuting the proposition that bifurcation eases juror confusion. The mock trial in that study was only two hours and forty-five minutes long. *Id.* at 315. The participants made their decisions within a few hours of viewing the tape. *Id.* Thus, the study was not able to recreate the realities of a typical civil jury trial, in which the jury must digest many days worth of testimony and then recall it all and apply it days later. It is in that context—cutting a four-day trial into two two-day trials, for example—that bifurcation holds its promise for improving jury recall and comprehension.

130. *See* 1 GHIARDI ET AL., *supra* note 3, § 12.04, at 13.

131. *See id.* at 13-14; *The Civil Jury*, *supra* note 99, at 1530; Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 1002 (1989).

132. *See* Smith v. Hartford Mut. Ins. Co., 751 S.W.2d 140, 143-44 (Tenn. Ct. App. 1987).

133. *See* Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992).

134. *See* Gensler, *supra* note 1.

135. *See The Civil Jury*, *supra* note 99, at 1530 (advocating bifurcation of punitive damages issues to help "reduce the confusion that may result when a jury must make a series of decisions or resolve several different complex issues at once"). *But see* Landsman et al., *supra* note 2, at 33 (finding no increase in jury comprehension in bifurcated punitive damages trials).

136. Ennix v. Clay, 703 S.W.2d 137, 139 (Tenn. 1986).

137. *Id.* at 140.

mention the possibility of easing jury confusion in *S.C. Toof.* Thus, it should come as no surprise that not a single reported decision from any Tennessee court discusses jury confusion as a grounds for issue bifurcation .

Courts should give the comprehension benefits of bifurcation more serious consideration. Even in simple cases, bifurcation stands to simplify the jury's task to some degree by reducing the amount of evidence, the number of issues, and delay between hearing the evidence and fact-finding. In more complex litigation, improving comprehension might play a more forceful, perhaps even dispositive, role.[138] Reducing jury confusion might also play a greater role in non-personal injury cases, in which prejudice is not as likely to be a significant concern.[139] In summary, simplifying the jury's task is a legitimate concern that, in most cases (even simple cases), dovetails with reducing prejudice and achieving efficiency as reasons to bifurcate.

IV. CONCLUSION

In many jurisdictions, the conventional approach to issue bifurcation, as exemplified by Tennessee law, is to acknowledge issue bifurcation as a permissible procedural device but to shun it in practice. From the perspective of jury communications, this approach overlooks opportunities to advance the core procedural values of limiting prejudice and reducing jury confusion. At least in the context of personal injury cases, the empirical evidence shows that intermingling the issues of liability and damages poses a significant risk that the jury will decide these issues for legally impermissible reasons. In all contexts, to reflexively try all the issues at the same time seems to make the jury's decision-making task more complicated and confusing than necessary.

Ironically, many jurisdictions that generally disfavor (or at least fail to endorse) bifurcation follow Tennessee in mandating that, in cases presenting claims for punitive damages, juries decide the issue of the amount of punitive damages separately from the other issues in order to combat the so-called "deep-pockets" effect. This format is laudable in that it attempts to remedy prejudice by altering trial structure. But as the deep-pockets effect seems to be more myth than reality,[140] the altered format is no more than a misdirected effort that fails to remedy any real prejudice. Worse, it fails to address the far more significant prejudices attendant to trying all together the issues of compensatory liability, compensatory damages, and punitive liability. Finally the risk of jury confusion arising from trying these issues together is

138. In punitive damages cases, for example, in which the burdens of proof are different, a court might separate compensatory liability and punitive liability to ease jury confusion even though doing so will not combat prejudice because the evidence will be substantially the same.

139. In a breach of contract claim with complex damages, for example, bifurcation of liability and damages can allow the jury to hear and decide the contract issues without being distracted by evidence regarding the cost of cover or lost profits.

140. *See supra* Part II.A.

particularly acute in punitive damages cases, which typically are more complex and often have different burdens of proof governing similar claims.

The more we learn about civil jury decision making, the harder it is to passively accept the conventional unitary trial format. Much of what jury critics dislike about civil juries—errors of bias, mistake, or misunderstanding—is the natural consequence of the jury process, in which people without formal legal training are made to listen to days of testimony on each and every aspect of the case, from liability to compensation to punishment, and then asked to render an accurate and informed decision on the case as a whole, while at the same time keeping the evidence (much of it inflammatory) in separate conceptual compartments. If our legal system is serious about improving the quality of jury decision making, taking bifurcation more seriously would be a step in the right direction. And we might even improve efficiency to boot.