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# Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Makings Power

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# ROUTINE BIFURCATION OF JURY NEGLIGENCE TRIALS: AN EXAMPLE OF THE QUESTIONABLE USE OF RULE MAKING POWER*

JACK B. WEINSTEIN**

## I. INTRODUCTION

The Federal District Court for the Northern District of Illinois recently adopted a rule providing for submission of the issues of negligence to a jury before evidence on the issue of damages is introduced (hereinafter sometimes referred to as the bifurcation rule or split trial rule). While reflecting a commendable spirit of judicial responsibility for reducing court congestion, the issue of its propriety raises some of the most subtle and difficult problems of the proper relation of courts to legislature in our system of independent branches of government; of the characterization of matters as substantive and procedural for various purposes; of the common law system of case by case development as opposed to legislation by act or rule; and of the effect of constitutional limitations in inhibiting proposed solutions to pressing problems.

Our procedural principles are sufficiently broad, and we have sufficient analogous devices so that precedent can be found to embellish an opinion finding the requisite power in our courts to uphold the bifurcation rule. But the rule must be considered in the context of the structure of our tort law as it in fact has developed into a working institution for compensating the injured. The effective legal rights of injured persons are based upon substantive rights—the law of negligence, contributory negligence and allowable damages—as attenuated, warped and reinforced by the hazards, the costs and the ameliorating influences of our procedures for obtaining remedies. Any change of procedure which makes it more or less difficult to obtain a remedy will have an impact on a party's effective legal rights, will shift the balance somewhat between plaintiffs and defendants. Where the effective legal rights are only minutely affected, this result

* This essay is a fragment, somewhat reworked, of a paper delivered at the Association of American Law Schools meeting of December, 1960 on three German procedural devices—separate trials of issues of negligence and damages, a judgment declaring liability with subsequent fixing of damages, and periodic payments of judgments in negligence cases—and the problems involved in utilizing them in this country. The author acknowledges with gratitude the assistance of Morton L. Price, a member of the New York Bar, in the preparation of that paper. The view expressed was in general agreement with Kaplan's suggestion that these devices can not "be effectively or safely engrafted on our present system without other profound changes." Kaplan, *Civil Procedure: Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409, 422 (1960); *cf. id.* at 423.

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of a proposed change in procedure can be ignored. The bifurcation rule, however, has within it potentialities for a major change in the relative position of plaintiffs and defendants in negligence cases and the rule cannot be appraised merely by procedural efficiency tests which might be appropriate for other proposed procedures.

## II. SOME FUNDAMENTAL CONCEPTIONS

### *A. The Jury System*

The jury, as we know it, is not designed solely to resolve issues of fact on a rational basis—making findings to be utilized according to rules of substantive law determined by a judge to reach a legal result. If this were the only function the jury served, few would bother defending it. The jury is nurtured as an institution for deciding legal disputes in a way that litigants and the community find acceptable.[1] The jury responds without any feeling of guilt, in a way that the trained judge cannot—or should not—to the immediate community sense of fairness as well as to rules of law and the logic of evidence.

Discretion of the jury is not, of course, unlimited—at least in civil cases.[2] Nonetheless, in a negligence case, control over the jury through devices such as summary judgment, directed verdicts and remittitur is minimal. Some of the devices designed to force jurors to be more rational—such as special verdicts—have disappointed their proponents because they have been calculated to force juries to act in strict conformity to legal theory,[3] ignoring the fact that the matrix of their decisions is often community consensus.[4]

How often in a negligence case that goes to trial can it be said that no reasonable juror might find for one side rather than the other?

1. See the collection of quotations to the same effect by Coke, Holmes, Pound, Thayer and Traynor in James, *Sufficiency of the Evidence and Jury-Controlling Devices Available Before Verdict*, 47 VA. L. REV. 218, 247-248 (1961). *Cf.* Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1021-22 (1956).

2. See, *e.g.*, New York, N.H. & H. R.R. v. Henegan, 364 U.S. 441 (1960).

3. *Cf.* Morgan, *A Brief History of Special Verdicts and Special Interrogatives*, 32 YALE L.J. 575, 589 (1923). See, generally, James, *Sufficiency of the Evidence and Jury-Controlling Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961).

4. *Compare* McCormick, *Jury Verdicts upon Special Questions in Civil Cases*, JUDICIAL ADMINISTRATION MONOGRAPHS 72 (Series A 1942) *with* Stout, *Our Special Issue System*, 36 TEXAS L. REV. 44 (1957); Gay, *Blindfolding the Jury: Another View*, 34 TEXAS L. REV. 368 (1956); Green, *A Rebuttal*, 34 TEXAS L. REV. 382 (1958); Gay, *A Rejoinder*, 34 TEXAS L. REV. 512 (1956); Green, *A Reply to Mr. Gay's Rejoinder*, 34 TEXAS L. REV. 681 (1956). The debate quickly spills over into areas of disagreement on desirable substantive rules and the issue of the better risk bearer versus liability based on fault. See also Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 24 INS. COUNSEL J. 368, 370, 372 (1957).

What witnesses are to be believed, what parts of their testimony should be rejected, which of competing hypotheses should be adopted —and what are their probative force—are questions which allow a wide scope for the exercise of juror judgment. Built into the substantive law of negligence, contributory negligence and cause are the flexible standards of the reasonable man and his foresight. Those cases that go to trial today in the main involve allegations of serious and permanent injury.[5] How serious are the injuries, what is the prognosis, how will earning capacity be affected over the years, what value should be placed on pain and suffering, what is the probable cost of treatment or the future value of dollars which must be paid now (not to mention the unspoken rate of taxes)?[6] These are questions which make unchallengeable any verdict within a wide range.

Trials by jury are sought for a variety of reasons (including some, such as delay, which are not commendable). In the main, however, jury demands represent a strongly felt need for a "fair decision," for the judgment of reasonable and unbiased peers instead of the logical, legally proper, result. This phenomenon is not unique in jury trials; it explains some of the trend to arbitration in commercial and labor cases.

The amelioration of the strict rule of contributory negligence by the jury system is one of the most striking examples of this function of the jury.[7] While some accidents happen despite all that a careful man could do to avoid them, in most cases it is likely that both parties were partly responsible; most jurors have had enough personal experience with cars and other hazards of modern life to realize this. Yet recent studies indicate that practically anyone injured today can recover something.[8] While most of these recoveries are by settlement, settlement practices are in large measure affected by a prediction of a

5. Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115, 1130 (1959).

6. See, *e.g.*, the excellent summary on this and the whole spectrum of problems in the study of Automobile Accident Litigation, JUDICIAL COUNCIL OF CALIFORNIA, EIGHTEENTH BIENNIAL REPORT 43-44 (1961).

7. See, *e.g.*, 2 HARPER & JAMES, TORTS 1228-29 (1956); ULMAN, A JUDGE TAKES THE STAND 31-33 (1933); James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 717 (1938); Kalven, *The Jury, The Law, and The Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 167 (1958); Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674 (1934); Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005, 1006 (1957); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953); Tooze, *Contributory versus Comparative Negligence*, 12 NACCA L.J. 211, 212 (1953); Salter, *The Civil Jury and the Theory of Contributory Negligence*, 40 CHI. B. RECORD 59, 60-61 (1958).

8. Franklin, Chanin & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 33-35 (1961); Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005, 1007 (1957) ("[O]f every hundred persons who assert personal injury claims, some ninety-six are compensated either by settlement or successful litigation.")

hypothetical jury verdict. The system is like a comet with settled cases and bench trials streaming behind, but inexorably following, the relatively small number of jury verdicts.[9] Harper and James have summarized the situation well as follows:

> Any procedural device which effectively keeps the jury within their theoretical sphere [of fact finding] tends to restrict liability and to prevent the jury from performing their possible role of keeping the actual operation of the law more responsive to human needs than an archaic substantive law would permit if it were carried out in letter and spirit.[10]

One of the chief ways the jury has, in practice, substituted a form of comparative negligence rule for the contributory negligence rule is by discounting damages because of contributory negligence, rather than finding no liability at all.[11] Recent empirical studies confirm what lawyers have long believed. As Kalven put it, summarizing some of this research: "[I]n many cases the discount [of damages] results from something . . . impossible to detect in the verdict. The jurors individually and within their own minds may simply fuse the liability and damage issues sufficiently to shade their estimate of the damages."[12]

From what has been said it would seem that forcing the jury to separate damages from liability might have a substantial impact on the nature of their verdicts. This is recognized by the proponents of the bifurcation rule who rely upon this effect as a major reason for adopting it.[13] As one defendant's lawyer put it, "the separation of the trial will tend to reduce prejudice against defendants and should

9. An interesting illustration of reliance upon this relationship is a recent advertising circular of the "Statewide Jury Verdicts Publishing Co." proposing to provide a "Valuation Handbook" based on types of jury verdicts from which subscribers will be able to "select an injury valuation which corresponds with your injury facts" and "adjust it by the liability factor." *Cf.* Zeisel, *The Jury and the Court Delay*, 328 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 46, 50 (1960) (no "major difference" between judge and jury on contributory negligence).

10. 2 HARPER & JAMES, TORTS 894 (1956).

11. ULMAN, A JUDGE TAKES THE STAND 31 (1933); James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 717 (1938); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953); *cf.* Franklin, Chanin & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 35 (1961).

12. Kalven, *The Jury, The Law, and The Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 167 (1958). See also Hunting, *Payment for Accident Victims: The Claimant's Eye View*, 33 N.Y.S.B.J. 81, 84 (1961) ("they believe almost to a man, that unintentional fault on their own part should not be a bar to recovery, and that at most, if their own fault is to be considered it should only have the effect of reducing somewhat the amount of money . . ."); See also Rosenberg, *Payment for Accident Victims: The Law and the Money*, 33 N.Y.S.B.J. 89, 91 (1961).

13. Mayers, *The Severance For Trial of Liability from Damage*, 86 U. PA. L. REV. 389, 394-95 (1938) (suggesting that this may force a change in our law of damages); Miner, *Court Congestion: A New Approach*, 45 A.B.A.J. 1265, 1268 (1959) ("It will eliminate or reduce so-called 'nuisance' cases in which liability is doubtful."). See also 74 HARV. L. REV. 781, 782 (1961).

eliminate or greatly reduce the effect of sympathy and compassion in personal injury litigation."[14]

### *B. The Problem of Distinguishing Substance and Procedure; The Rule Making Power*

Morgan, in an article which is the bench-mark for all who would survey the terrain of *Erie v. Tompkins'* effect on the conduct of trials, has warned of the dangers to clear thinking of reliance on the terms "substance" and "procedure."[15] "The time is past," this rightly venerated scholar declared, "when the decision of important questions should turn on mere classification."[16] One reason for the difficulty is our Anglo-American penchant for solving substantive problems by procedural devices.[17] In determining whether a district court may adopt a rule, however, the terminology cannot be ignored, for the statute authorizing the Supreme Court to adopt rules provides, in part: "Such rules shall not abridge, enlarge or modify any substantive right."[18] The power of the district court to enact a rule, derived as it is from Rule 83 of the Federal Rules of Civil Procedure,[19] is no greater than that of the Supreme Court.[20] No suggestion has been made that in the federal district courts there is an inherent right to control major incidents of practice.[21]

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14. Vogel, *The Issues of Liability and of Damages in Tort Cases Should Be Separated for the Purpose of Trial,* A.B.A. SECTION ON INS. PROCEEDINGS 265, 269 (1960).

15. Morgan, *Choice of Law Governing Proof,* 58 HARV. L. REV. 153, 158 (1944).

16. *Id.* at 195.

17. HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 4 (1960). *Cf.* Kaplan, *Civil Procedure: Reflections on the Comparison of Systems,* 9 BUFFALO L. REV. 409, 430 (1960).

18. 28 U.S.C. § 2072 (1958). The provision further requires the rules to "preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution," but this seems to add nothing to the constitutional requirement.

19. Miner, *Court Congestion: A New Approach,* 45 A.B.A.J. 1265, 1268 (1959).

20. *Cf.* Washington-Southern Nav. Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 635-36 (1924): "Nor can a rule abrogate or modify the substantive law. . . . It is [as] true of rules of practice prescribed by this court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred." *But cf.* Crescent Wharf & Warehouse Co. v. Pillsbury, 259 F.2d 850, 852 (9th Cir. 1958): "[P]rocedural rules may impinge . . . upon substantive rights" in admiralty.

21. *Cf.* Miner v. Atlass, 363 U.S. 641, 644, 653, 655 (1960). Whatever the historical argument in favor of the inherent power of rule making [see, *e.g.*, Morgan, *Judicial Regulation of Court Procedure,* 2 MINN. L. REV. 81, 93 (1918); Pound, *The Rule-Making Power of the Courts,* 12 A.B.A.J. 599, 601 (1926); Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally,* 23 ILL. L. REV. 276 (1928); *cf.* Levin & Amsterdam, *Legislative Control over Rule-Making: A Problem in Constitutional Revision,* 107 U. PA. L. REV. 1, 30-31 (1958)], acquiescence by the federal courts would make the argument somewhat absurd. Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 19 (1825). *Cf.* Kaplan & Greene, *The*

Under almost any of the various tests proposed for application of the *Erie* rule, a rule which may have a substantial impact on the law of contributory negligence would appear to require application of the state rule—*i.e.*, would be classified as "substantive."[22] It does not matter that the bifurcation rule concerns the conduct of jury trials and that the federal courts have indicated considerable ambivalence about following state jury controlling practices.[23] This is because the federal constitutional right to a jury provides a powerful brake on practice modifications affecting the jury trial.[24] Were a state to adopt a bifurcation rule and were a defendant thereafter to demand that it be applied in a diversity case, there remains some doubt about the outcome of a collision between the federal policy of *Erie* and the federal policy favoring the jury system. But where, as here, both policies argue in favor of rejecting the rule, it should be characterized as substantive for *Erie* purposes.

No firm definition of what is procedural for purposes of dividing responsibility for change in civil practice between legislature and courts is presently possible.[25] For, added to the *Erie* difficulties is the factor of a history of separation of powers assigned to branches of government theoretically independent but interdependent in so many ways that the relation between them can probably only be assessed by an historically grounded intuition.[26] "Issues of this

*Legislature's Relation to Judicial Rule-Making: An Appraisal of Winesberry v. Salisbury*, 65 HARV. L. REV. 234, 251-52 (1951).

22. Palmer v. Hoffman, 318 U.S. 109 (1943). It has a "material influence upon the outcome of litigation" [see Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)]; a variation in the rule would "encourage forum shopping" [Horowitz, *Erie R.R. v. Tompkins—A Test to Determine Those Rules of State Law to Which Its Doctrine Applies*, 23 So. CAL. L. REV. 204, 215 (1950)]; it represents an important state policy "diverging from those of . . . neighbors" [Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)]; and, in theory at least, it may be expected to "affect people's conduct at the stage of primary private activity" [HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 634 (1953)].

23. Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525, 538 (1958) ("there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts"). See also Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273 (1959). *Cf.* Dick v. New York Life Ins. Co., 359 U.S. 437, 444-45 (1959). *Cf.* Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 174-76 (1944).

24. See the dissenting opinion in Galloway v. United States, 319 U.S. 372 (1943) and compare it with the majority opinion in Wilkerson v. McCarthy, 336 U.S. 53 (1949).

25. For a collection of the extensive writings on rule making power see THIRD PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, 891-92 (N.Y. Leg. Doc. No. 17, 1959); INSTITUTE OF JUDICIAL ADMINISTRATION, RULE MAKING POWER OF THE COURTS 36 (Supp. 1958). *Cf. e.g.*, Note, *The Court v. The Legislature: Rule-Making Power in Indiana*, 36 IND. L.J. 87, 91 n.15 (1960).

26. *Cf.* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 20-22 (1825) on delegation of rule making power. The case caused a political furor because it affected state-federal relations. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 584 (1953).

subtlety and variety can be handled only in broad terms," recently concluded Hurst in viewing the sweep of legal history in this country.[27] The balance will be different from jurisdiction to jurisdiction, from subject to subject, and will vary with the persons who hold office at the moment.[28]

The most recent instance of a full scale attempt to revise the statutes and rules of a state and to redivide responsibility for control of practice occurred in New York. There the draftsmen "proceeded on the theory that details of procedure should be governed by judicially-made rules while basic policies and procedures having a direct effect on substantive rights ought to be controlled by statute."[29] As Levin and Amsterdam have demonstrated with respect to other tests which have been suggested—and the New York test is subject to much the same criticism—such canons are not determinative when they are applied to the hard cases where "details" of practice and the "how" of litigation affect policy and substance.[30]

It is true, of course, that courts under our system continue to make and change substantive as well as procedural law. A case changing the law of criminal responsibility[31] or holding that a husband may steal from a wife,[32] or abandoning limitations on a hospital's liability for "medical" acts,[33] or extending liability for food sold for family consumption,[34] modifies substantive rights as effectively as a statute. Yet the decision to change the law when the legislature has not acted is surely one of the most excruciating a sensitive judge is called upon to make. For there is no one but his fellow judges who can stop him when he proposes to stray beyond those "limits which precedent and custom and the long silent and almost indefinable practice of other judges . . . have set to judgemade innovations."[35]

27. HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 25 (1960).

28. *Cf.* Harris, *The Extent and Use of Rule Making Authority*, 22 J. AM. JUD. SOC'Y 27, 29 (1938) ("[T]he courts and legislature will by experience and decisions mark at least roughly the boundary between what constitutes procedure" and matters "exclusively within legislative control.")

29. THIRD PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 452 (N.Y. Leg. Doc. No. 17 1959). See Weinstein, *Proposed Revision of New York Civil Practice*, 60 COLUM. L. REV. 50, 52-53 (1960). The proposed statute and rules are set out in ADVANCE DRAFT, FINAL REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, (Leg. Doc. No. 15, 1959). Its proposals failed of adoption at the 1961 legislature because of a disagreement about the proper scope of rule making power.

30. Levin & Amsterdam, *Legislative Control Over Judicial Rule Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 21-23 (1958). The authors recognize the substantive importance of the jury trial. *Id.* at 18-19.

31. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

32. People v. Morton, 308 N.Y. 96, 123 N.E.2d 790 (1954).

33. Bing v. Thunig, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957).

34. Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773 (1961).

35. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 103 (1921). See *id.* at 129: "They have the power, though not the right, to travel beyond the wall of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power they violate the law."

Courts may not, under our theory of separation of powers, change the law whenever they feel it is outworn or that the legislature has neglected to act when it should have. One of the prices we pay for our system is that divided responsibility for substantive and procedural law may lead to stagnation where the courts are not able to act and the legislature cannot be moved to act. The law revision commissions and judicial councils have been only partly successful in bridging the chasm of inaction that lies between courts and legislature. The committees now revising federal practice might well consider the advisability of drafting statutes for Congress as well as rules for the Supreme Court where both are needed in the solution of some problems.

Court-made case law reforms in the area of compensation of tort victims must of necessity be piece-meal and will probably serve only to botch up further a system already badly misshapen. The legislature alone has organs for investigation, for balancing demands of various parts of our society and for developing a scheme of compensation based upon rational grounds.[36] Justice Traynor summarized the matter well when he stated: "Obviously . . . [courts] cannot undertake the comprehensive studies, or act upon them, for rational solution of such overwhelming problems as arise from the daily destruction on the highways. . . . In all likelihood the reforms that . . . studies suggest will sooner or later materialize in legislation, where they most appropriately belong."[37] As Mr. Justice Jackson wrote in rejecting a proposal that the Supreme Court modify by case law a minor rule of evidence: "To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice."[38]

Compensation of persons injured accidently supports one of the largest industries in our society. Billions of dollars a year in insurance premiums, lawyers' fees, and recoveries are involved.[39] For a large portion of the bar, negligence cases represent a substantial source of income, without which it would be impossible to continue practicing law.[40] The system is so deeply imbedded in our economy that only

36. JUDICIAL COUNCIL OF CALIFORNIA, 18TH BIENNIAL REPORT *Automobile Accident Litigation* 16 (1961).

37 Traynor, *Comment on Courts and Lawmaking* in PAULSEN, LEGAL INSTITUTIONS TODAY AND TOMORROW 55-56 (1959).

38. Michelson v. United States, 335 U.S. 469, 486 (1948).

39. *E.g.*, Franklin, Chanin & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1-2 (1961); Rosenberg, *Payment for Accident Victims: The Law and the Money*, 33 N.Y.S.B.J. 89, 90 (1961) ("total cost of accidental injuries in this country is $15 billion a year." In New York City alone lawyers' fees from non-industrial accidents are "about $75 million" a year.).

40. *Id.* at 33.

a legislative body capable of weighing the interests of various segments of our society ought to attempt modifications. The jury system, as we now know it, is an important element in this structure. The argument that the legislature will not act because so many of its members are lawyers[41] with a stake in the present system is not relevant to the question of power and responsibility of the courts.[42]

The fact is that legislatures have failed to adopt a comparative negligence rule, and by inaction continued the present system. That present system is not one in which a serious attempt is made to limit the jury's ability to compromise. One of the serious defects of a federal rule which changes the practical impact of the negligence law is that the state courts will probably continue to follow the traditional system. Pressure on the state legislature to recognize the effective change in the law of comparative negligence will thus be at a minimum and all the problems sought to be avoided by the *Erie* doctrine will be present.

Granting rule making power to change procedure compounds the difficulties of the courts instead of solving them. For a rule—unlike much case law—usually requires a calculated decision to make a change which cannot be rationalized as a necessary accommodation to other relatively fixed parts of the law. Paradoxically, then, the court is probably less free to modify substantive rights indirectly by changes in procedural rules than it is to affect them directly by traditional case law development. When rules are submitted to the legislature, as are the rules adopted by the Supreme Court, some overstepping of the bounds of procedure into the area of substance may be justified in view of the uncertain location of the boundary. An argument of legislative participation is then tenable[43] and this, perhaps, justifies extension of diversity jurisdiction by such rules as those for compulsory counterclaims or class actions.[44] At least there is then assurance that "basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters."[45] But where the rule is made by a district court, even this justification does not exist. The spirit of our doctrine of separation of powers requires judicial forebearance; the better the judge the higher the price he will probably pay in frustration for the passivity required by his office.

41. Newman, *A Legal Look at Congress and the State Legislatures,* in PAULSEN, LEGAL INSTITUTIONS TODAY AND TOMORROW 67, 69 (1959).
42. *Cf.* Breitel, *The Courts and Lawmaking,* in PAULSEN, LEGAL INSTITUTIONS TODAY AND TOMORROW 12-15 (1959).
43. Sibbach v. Wilson Co., 312 U.S. 1, 15-16 (1941).
44. See Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 BUFFALO L. REV. 433, 456-57 (1960).
45. Miner v. Atlass, 363 U.S. 641, 650 (1960). See also Carbo v. U.S., 364 U.S. 611, 625 (1961) (Warren, C. J. dissenting).

Where the substantive impact is relatively small there is no need for judicial repose. For example, at the time it adopted the bifurcation rule the District Court for the Northern District of Illinois also enacted a rule—based on the New York practice[46]—providing for use by the court of a panel of medical experts. This rule is designed to give the court and jury a more accurate view of the facts. Similarly, a rule which would expand the hearsay exceptions should be classified as procedural for rule making purposes;[47] it would be designed to permit the jury to reach a more accurate decision on the facts; it would not interfere with its power to modify the law.[48]

## III. PRESENT USE OF SEPARATE TRIALS OF SEPARABLE ISSUES

There has gradually crept into our law through rule, statute and case law development widespread severance of issues in many types of litigation. The assumption has, however, heretofore been that separation of issues ought to be ordered only when there is a highly persuasive reason.

*Multiparty litigation* has furnished a clearcut need for severance of liability and damage issues. Where many plaintiffs are joined and there is an issue of liability common to all of them but damages differ for each party, separate trials are the only way to make the jury system workable. The *Texas City Disaster Litigation*[49] illustrates the extreme possibilities of complex litigation in our society. A separate finding that the United States was not liable in some 273 consolidated suits obviated the necessity for hearing evidence of damages to 8485 plaintiffs suing on various death, personal injury and property damage claims. Many other cases, though not as dramatic,

46. Civil Rule 20, Fed. Dist. Court N.D. Ill., 2 FED. RULES SERV. 2d 1048 (1960). See Miner, *Court Congestion: A New Approach*, 45 A.B.A.J. 1265, 1268 (1959); SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, IMPARTIAL MEDICAL TESTIMONY (1956); ZEISEL, KALVEN & BUCHHOLZ, DELAY IN THE COURT 120 *passim* (1959).

47. *Cf. Ex parte* Peterson, 253 U.S. 300, 309-11 (1920).

48. Even in the field of evidence, the court's power to act by rule is limited because of rules such as those of privilege which reflect policies other than accurate resolution of questions of fact at trial. See Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535 (1956). See also Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341 (1959); SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 87-88 (N.Y. Leg. Doc. No. 13, 1958); Levin & Amsterdam, *Legislative Control over Judicial Rule Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 22-23 (1958); Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 482 (1940). *But cf.* Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 562-73, (1956). Levin and Amsterdam discuss the earlier New Jersey history at *id.* 93. See also N.J. REV. STAT. § 2A:84A-1 to -49 (Supp. 1960).

49. 197 F.2d 771 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15 (1953). See 38 MINN. L. REV. 175 (1954).

furnish examples of valuable applications of the practice.[50] Joinder of many parties may add confusion as well as length to the trial and in such cases the complexity of the issues justifies severance of liability and damages.[51]

*Unusual difficulty in proving one issue* may warrant its being postponed while a simpler issue is tried. In *Rickenbacher Transportation, Inc. v. Pennsylvania Railroad*,[52] the plaintiff's truck containing shipments from 35 consignors was hit by the defendant's train. The damage question would have required detailed evidence from 35 sources. Another factor in that case justifying delay of the damage question until liability had been established was that the trial was held in New York and most of the consignors possessing the evidence concerning damages were in Ohio. In another case the liability issue was severed where the plaintiffs planned to introduce an unusual amount of medical testimony to prove damages;[53] aware of the questionable nature of his ruling, the judge stated that he intended to allow the plaintiff to introduce some evidence of injuries during the liability phase of the trial, "thus enabling the jury to have a fair idea of the importance to the plaintiff of the litigation."[54]

*When, as a matter of law, there is no triable issue as to liability,* the liability question in negligence actions has been severed by virtue of well recognized procedural devices. Summary judgment in favor of the plaintiff on the issue of liability[55] results in a separate trial of damages; judgment in favor of the defendant on the issue of liability obviates the need for hearing evidence on damages. A default judgment may be followed by an inquest on damages.[56] A successful plea of collateral estoppel may bar further litigation of one issue; in a jurisdiction where it is permissible to bring two separate actions for damages arising out of the same accident—*i.e.*, one for personal injuries and another for property damage—a determination in the first trial that one party was responsible for the accident usually limits the second trial to the issue of damages unclaimed in the

50. Nettles v. General Accident Fires & Life Assur. Corp., 234 F.2d 243 (5th Cir. 1956) (three suits consolidated); Hassett v. Modern Maid Packers, Inc., 23 F.R.D. 661 (D. Md. 1959) (consolidation of five cases); Opal v. Material Serv. Corp., 9 Ill. App. 2d 433, 133 N.E.2d 733 (1956) (joinder of four plaintiffs); Schultz v. Gilbert, 300 Ill. App. 417, 20 N.E.2d 884 (1939) (eight plaintiffs joined); Chudyk v. 5th Ave. Coach Line, Inc., 6 App. Div. 2d 1003, 177 N.Y.S.2d 981 (1st Dep't 1958) (severance of issues where 24 actions were joined).

51. Schultz v. Gilbert, 300 Ill. App. 417, 20 N.E.2d 884 (1939). The court suggested severance on retrial since the verdict showed that the jury was confused.

52. 3 F.R.D. 202 (S.D.N.Y. 1942).

53. Schollmeyer v. Sutter, 2 Misc. 2d 215, 151 N.Y.S.2d 795, *appeal dismissed as premature*, 3 App. Div. 2d 665, 158 N.Y.S.2d 354 (2d Dep't 1957).

54. 2 Misc. 2d at 216.

55. See, *e.g.*, N.Y.R. Civ. P. 113 (subd. 3).

56. *E.g.*, Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937).

first suit.[57] The defendant himself often has power to antiseptisize the trial by admitting negligence in the complaint or by offering to stipulate.[58]

*Errors in the first trial* are sometimes the basis for a partial new trial on less than all issues. While the Supreme Court has ruled that the practice is constitutional if the issues are "clearly separable,"[59] it has yet to hold that tort liability and damages can be so regarded as separable.[60] It is unlikely that a flat rule against retrials of less than all issues in negligence cases is to be expected, although they certainly will not be encouraged in such litigation. Where there is evidence of a compromise verdict, a new trial, solely on the issue of damages, is not permitted in recognition of the peculiar relation of damages to liability in negligence and other cases.[61] Most state courts permit the use of partial new trials in negligence actions[62] and those, such as Texas, which do not allow the practice, justify their position by citing the interrelation of damages and liability.[63] The principal argument against severing any issue for retrial is that a jury which was incorrect on one matter might have decided all the issues erroneously.[64]

*The devices of remittitur and additur* are closely akin to the granting of partial new trials.[65] Costly negligence litigation is often terminated by their use as a voluntary substitute for a partial or complete new trial.

*Severance of auxiliary issues* similarly has proved to be expedient in a number of negligence cases. Prior determination of the validity

57. See Note, *Developments in the Law of Res Judicata,* 65 HARV. L. REV. 818, 845 (1952). See also a case comment in 12 WASH. & LEE L. REV. 115, 121 (1955).

58. *Cf.* Fuentes v. Tucker, 31 Cal. 2d 1, 187 P.2d 752 (1947).

59. Gasoline Prods. Inc. v. Champlin Ref. Co., 283 U.S. 494 (1931). See *id.* at 500: "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice."

60. See Neese v. Southern Ry., 350 U.S. 77 (1955), *reversing* 216 F.2d 772 (4th Cir. 1954).

61. For a discussion of the treatment of compromise verdicts see 33 NOTRE DAME LAW. 129, 131 (1957); Annot., 29 A.L.R.2d 1199, 1214 (1953).

62. See Annot., 29 A.L.R.2d 1199, 1205 (1953). But compare 17 N.Y. JUDICIAL COUNCIL ANN. REP. 183, 201-02 (1951). See also SECOND REPORT OF ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 311-13 (N.Y. Leg. Doc. No. 13, 1958).

63. Texas Employers' Ins. Ass'n v. Lightfoot, 139 Tex. 304, 162 S.W.2d 929 (1942); Fisher v. Coastal Transp. Co., 149 Tex. 224, 230 S.W.2d 522 (1950).

64. See 17 N.Y. JUDICIAL COUNCIL ANN. REP. 183, 192 (1951) for a discussion of partial new trials and a proposed statute on the subject. Under the proposed statute, liability and damage would be proper subjects for separate retrial but the issues of contributory negligence, proximate cause and foreseeability would not be severable.

65. *E.g.,* Smyth Sales, Inc. v. Petroleum Heat & Power Co., 141 F.2d 41 (3d Cir. 1944); Fisch v. Manger, 24 N.J. 66, 130 A.2d 815 (1957).

of a release is a procedure that is frequently used in many jurisdictions.[66] Timeliness of service of notice, as is often required in suits against governmental bodies, is another issue which, in most cases, should be tried before great time and expense are consumed by a trial on the merits.[67] Most of these ancillary issues involve precise dispositive questions which can be relatively easily answered[68] and in which the jury's power to temper the law is minimal.[69]

In addition to these instances of separate trials there is the common law power of the court to regulate order of proof at the trial. At least one Federal judge has made it a practice to initially allow evidence of liability where he feels that there is a great likelihood of a directed verdict.[70] New York judge will, where he believes a directed verdict on liability will be required, obtain a verdict from the jury on the issue of liability before receiving evidence of damages.[71] In effect, he is taking care to protect himself against a reversal in much the same way that federal judges reserve decision on a rule 50(a) motion with the hope that a sensible jury will obviate the need for judgment notwithstanding the verdict under rule 50(b).

The common law rule permitting the judge to control order of proof is embodied in rule 224 of the Pennsylvania Rules of Civil Procedure which provides:

> The court may compel the plaintiff in any action to produce all his evidence upon the question of the defendant's liability before he calls any witness to testify solely to the extent of the injury or damages. The defendant's attorney may then move for a non-suit. If the motion is

66. See, *e.g.*, Burton v. Niagara Mohawk Power Corp., 280 App. Div. 356, 113 N.Y.S.2d 483 (3d Dep't 1952).

67. Karolkiewicz v. City of Schenectady, 28 F. Supp. 343 (N.D.N.Y. 1939). In Hilowitz v. Board of Educ., 272 App. Div. 826, 70 N.Y.S.2d 176 (2d Dep't 1947), severance of this issue was denied.

68. Compare the proposed New York rule providing for an early dispositive motion where, among other grounds, the "cause of action may not be maintained because of release, payment, collateral estoppel, res judicata, arbitration and award, discharge in bankruptcy, statute of limitation, statute of frauds, or infancy or other disability . . . ." and for immediate trial of the issue. N.Y. ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, ADVANCE DRAFT OF FINAL REPORT A-464, A-465, A-466 (N.Y. Leg. Doc. No. 15, 1961); First Preliminary Report of the N.Y. ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 81, 83-85 (N.Y. Leg. Doc. No. 6(b), 1957); Korn & Paley, *Survey of Summary Judgment, Judgment on the Pleadings and Related Pre-Trial Procedures*, 42 Cornell L.Q. 483, 496-499 (1957). Compare Rules of the Supreme Court of England, order xxv, rule 2 Annual Practice (1957). See, *e.g.*, Calva v. J. Laskin & Sons Corp., 279 App. Div. 907, 113 N.Y.S.2d 223 (1952) (res judicata).

69. *But cf.* Mihalchik v. Schepis Constr. Co., 8 App. Div. 2d 618, 185 N.Y.S.2d 99 (2d Dep't 1959) (severance of the issue as to whether a motor vehicle was being operated with the owner's consent).

70. See remarks of Judge Holtzoff, in ATT'Y GEN. REP., PROCEEDINGS OF THE CONFERENCE ON COURT CONGESTION 32-33 (1956); *cf.* Holtzoff, *A Judge Looks at the Rules*, WEST PUBLISHING CO., 1959 FEDERAL RULES OF CIVIL PROCEDURE 1, 7.

71. See Sobel, *infra* note 93.

> refused, the trial shall proceed. The court may, however, allow witnesses to be called out of order if the court deems it wise so to do.[72]

This procedure permits the court to determine whether plaintiff has made out a prima facie case of negligence—*i.e.*, has satisfied his burden of coming forward with evidence. It does not, as does the rule for separate trials of the Northern District of Illinois discussed below, permit a test by the defendant of whether the plaintiff has satisfied his burden of persuading the jury on the issue of negligence.[73]

## IV. ROUTINE USE OF SEPARATE TRIALS OF NEGLIGENCE AND DAMAGE ISSUES IN NEGLIGENCE CASES

### *A. The Rule as Adopted*

As a device for clearing calendar congestion—and this is the chief motive for its adoption[74]—the bifurcation rule should be routinely applied in practically all cases. It is designed for such application. The rule seems to require severance whenever any party or the judge asks for it unless it appears "that a separate trial will work a hardship upon any of the parties or will result in a protracted or costly litigation." It reads as follows:[75]

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

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72. GOODRICH-AMRAM, STANDARD PENNSYLVANIA PRACTICE § 224-1 *passim* (1961); *cf.* Agate v. Dunleavy, 398 Pa. 26, 28-29, 156 A.2d 530, 531 (1959).

73. See Brault, *The Issues of Liability and of Damages in Tort Cases Should Not Be Separated for the Purposes of Trial,* PROCEEDINGS OF A.B.A. SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 274, 276 (1960), approving the Pennsylvania rule but rejecting the Northern District of Illinois rule.

74. Miner, *Court Congestion: A New Approach,* 45 A.B.A.J. 1265, 1268, 1333 (1959); Miner, *A Suggestion for Relief of Court Congestion,* 55 THE BRIEF 93, 97-99 (1960). *Cf.* Mayers, *The Severance for Trial of Liability from Damage,* 86 U. PA. L. REV. 389, 395 (1938).

75. Civil Rule 21, Federal District Court, Northern District of Illinois. 2 FED. RULES SERV. 2d 1048 (1960).

Without reaching the "more difficult question" of whether use of two juries rather than one would violate the seventh amendment, the Court of Appeals recently held the rule valid.[76] The "essential character of a trial by jury was preserved," it declared.[77] Substantial reliance was placed upon the Supreme Court's adoption of rule 42(b) of the Federal Rules of Civil Procedure which provides:

> The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

The court, interpreting rule 42(b) as permitting the district court practice, felt it "must assume the [Supreme] Court had in mind the statutory admonition that 'Such rules * * * shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.' "[78] Impliedly approving the routine use of this rule, the court warned the district judges that the rule ought not be used "where a question as to injuries has an important [evidentiary] bearing on the question of liability."[79]

No analysis of the opinion or of the cases relied upon is required. Historical precedents for the practice are so sparse as to be useless.[80] The draftsmen of federal rule 42(b) apparently did not envisage its being used in routine cases.[81] The leading treatise assumes that it will be reserved for relatively few cases.[82]

Other federal and state courts are studying this bifurcation device with the hope that it will reduce the backlog of untried negligence cases. In the Supreme Court, New York County, it was quietly tried in the spring of 1960 on an experimental basis and silently abandoned. The Judicial Conference of the District of Columbia has voted to reject the rule.[83] The Judicial Council of California has recommended "enactment of a measure" to permit its "judicious use."[84]

76. Hosie v. Chicago & Nw. Ry., 282 F.2d 639 (7th Cir. 1960), *cert. denied,* 81 Sup. Ct. 695 (1961); see also Gregory v. Campbell, *petition for mandamus denied,* Civ. No. 12825 (7th Cir., Nov. 5, 1959), *cert. denied,* 361 U.S. 960 (1960).

77. Hosie v. Chicago & Nw. Ry., note 76 *supra,* at 643.

78. *Ibid.*

79. *Id.* at 643-44.

80. See MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 272 (1952); Mayers, *The Severance for Trial of Liability from Damage,* 86 U. PA. L. REV. 389, 391-93 (1938).

81. 5 MOORE, FEDERAL PRACTICE ¶ 42.01 [2] (1952). *Cf.* Los Angeles Brush Corp. v. James, 272 U.S. 701, 707-08 (1927).

82. 5 MOORE, FEDERAL PRACTICE ¶ 42.03 (1951 Supp. 1960). See also Note, *Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure,* 39 MINN. L. REV. 743, 761 (1955); *cf.* 17 N.Y. JUDICIAL COUNCIL ANN. REP. 179, 196 (1951).

83. Brault, *The Issues of Liability and of Damages in Tort Cases Should Not Be Separated for the Purposes of Trial,* PROCEEDINGS OF A.B.A. SECTION OF INSURANCE NEGLIGENCE AND COMPENSATION LAW 274, 275-276 (1960).

84. JUDICIAL COUNCIL OF CALIFORNIA, EIGHTEENTH BIENNIAL REPORT 57 (1961).

To date some twenty states have adopted the equivalent of rule 42(b)[85]—relied upon in justifying the bifurcation rule. Other states appear to have sufficient statutory and case law authority to permit separate trials of issues.[86] It cannot be assumed, however, that all of the states which have adopted rule 42(b) or its equivalent will permit severance of the liability and damage issues in personal injury litigation. The Texas Supreme Court recently refused to allow such severance despite the existence of a provision in the Texas Rules of Civil Procedure identical with rule 42(b);[87] it declined to extend the practice to negligence litigation because it felt that the issues of liability and damages were so interrelated as to be inseparable. An opposite conclusion would have been inconsistent with the Texas practice of prohibiting separate retrial of either the liability or damage issues in personal injury litigation.[88] The Appellate Division in New York[89] and the appellate courts of Illinois[90] have intimated their approval of the practice but have not had occasion to pass on its propriety as a device to be routinely used in negligence cases.

85. ARIZ. R. CIV. P. 42(b); COLO. R. CIV. P. 42(b); DEL. CH. CT. R. 42(b), DEL. SUPER. CT. (CIV.) R. 42(b); IDAHO R. CIV. P. 42(b); IOWA R. CIV. P. 186; KY. R. CIV. P. 42.02; ME. R. CIV. P. 42(b); MD. RULE 501 (a); MINN. R. CIV. P. 42.02; MO. REV. STAT. § 510.180 (1949); MONT. REV. CODES ANN. § 93-4906 (1947); NEV. R. CIV. P. 42(b); N.J. RULES 4:43-2; N.M. STAT. ANN. § 21-1-1 42(b) (1953); N.Y. CIV. PRAC. ACT § 443; PA. R. CIV. P. 213(b); TEX. R. CIV. P. 174(b); UTAH R. CIV. P. 42(b); WASH. CT. R. OF PLEADING, PRAC. & PROC. 42(a); W. VA. R. CIV. P. 42(c); WYO. R. CIV. P. 42(b).

86. McArthur v. Shaffer, 59 Cal. App. 2d 724, 139 P.2d 959 (Dist. Ct. App. 1943) ("An action may be severed . . . .", CAL. CODE CIV. PROC. § 1048, interpreted to allow separate trials of issue); Opal v. Material Serv. Corp., 9 Ill. App. 2d 433, 450, 133 N.E.2d 733, 742 (1956) (authority to sever issues can be implied from the provisions of the Illinois Civil Practice Act and Supreme Court Rules giving the trial court broad discretion to sever causes of action and to control the course of litigation); Ibey v. Ibey, 94 N.H. 425, 427, 55 A.2d 872, 873 (1947) ("The order of trial procedure is for the court to determine. It may properly defer a question of damages for a later trial."); CONN. GEN. STAT. § 52-31 (1959) (court can transfer issue or cause of action to another court); KAN. GEN. STAT. ANN. § 60:2904 (1949); OKLA. STAT. ANN. tit. 12, § 588 (1960) (permits separate trials where several defendants); W. VA. CODE ANN. § 5639 (1955) (allows separate verdicts on different issues); 10 OKLA. L. REV. 388 n.21 ("Oklahoma courts have the inherent power to serve claims for trial").

87. Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648 (1958).

88. See cases cited in note 63 *supra*.

89. See Chudyk v. 5th Ave. Coach Line, Inc., 6 App. Div. 2d 1003, 177 N.Y.S.2d 981 (1st Dep't 1958). *Compare* Berman v. H. J. Enterprises, Inc., 145 N.Y.L.J. No. 100, p.1, col. 1 (App. Div. 1st Dep't, May 11, 1961) (approving split trial in "special circumstances"; the court informed the jury "that the plaintiff was substantially injured and badly hurt" before submitting the issue of liability).

90. See Shultz v. Gilbert, 300 Ill. App. 417, 20 N.E.2d 884 (1939).

*B. Evaluation of the Rule As a Device for Relieving Calendar Congestion*

Despite the authoritative ruling of the Seventh Circuit, there remains doubts about the power of the court to adopt a rule which makes a change in the jury system so radical that it would effect a substantial change in the effective rights of litigants. If the rule is invalid or unwise then the fact that the new system may save court time is irrelevant. The court ought not to use it whether on an experimental or permanent basis.

If it is authorized then, of course, prediction of its ability to save time is important. Zeisel has already predicted that the federal court for the Northern District of Illinois' "move is bound to save at least 20 per cent of the court's trial time."[91] He also noted that: "An exact measure of the time saved by the split-trial rule will soon emerge from the experience of the Chicago court. There steps have been taken . . . to gauge the exact effect of the rule."[92] In view of the difficulties in obtaining reliable data, such promise of exactitude in assessing the effect of the rule is particularly striking.

The test of the bifurcation practice in New York proved quite in-

91. Zeisel, *The Jury and the Court Delay*, 328 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 46, 52 (1960).

92. *Id.* n. 12. At the author's request, the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts prepared statistical tables for the United States District Court for the Northern District of Illinois covering the fiscal years 1958, 1959 and 1960 on actions commenced, removed, terminated and tried, and on the median time intervals in civil cases reaching trial. They are inconclusive in the absence of a detailed study of the type undertaken by Zeisel. One of these tables is set out below.

*United States District Court for the Northern District of Illinois*
*Median Time Intervals in Civil Cases Reaching Trial*
*Fiscal Years 1958, 1959 and 1960*

[Bifurcation Rule Adopted November 3, 1959]

| | Number of Cases | | | Interval Filing to Disposition | | | Interval Filing to trial | | | Interval Issue to trial | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| *Fiscal Year* | *Total* | *Court* | *Jury* | *Total* | *Court* | *Jury* | *Total* | *Court* | *Jury* | *Total* | *Court* | *Jury* |
| 1958— | | | | | | | | | | | | |
| Total (median) | 220 | 123 | 97 | 23.7 | 24.0 | 21.8 | 21.6 | 18.9 | 22.7 | 15.0 | 13.9 | 16.2 |
| Negligence | 97 | 17 | 80 | 22.0 | 24.6 | 21.9 | 21.6 | 24.6 | 21.6 | 16.2 | 15.4 | 16.5 |
| Other | 123 | 106 | 17 | 23.8 | 23.3 | 28.4 | 21.2 | 18.8 | 27.0 | 13.9 | 13.8 | 14.3 |
| 1959— | | | | | | | | | | | | |
| Total | 243 | 91 | 152 | 21.0 | 19.8 | 21.8 | 18.7 | 17.0 | 21.1 | 13.3 | 10.7 | 14.0 |
| Negligence | 144 | 15 | 129 | 21.5 | 18.1 | 21.7 | 21.0 | 18.1 | 21.1 | 13.7 | 12.9 | 14.0 |
| Other | 99 | 76 | 23 | 20.5 | 19.8 | 26.2 | 17.3 | 16.7 | 22.9 | 11.8 | 10.4 | 15.8 |
| 1960— | | | | | | | | | | | | |
| Total | 208 | 95 | 113 | 20.0 | 18.7 | 22.6 | 19.4 | 16.8 | 22.4 | 13.6 | 10.0 | 15.5 |
| Negligence | 117 | 21 | 96 | 20.0 | 17.9 | 21.2 | 20.0 | 17.9 | 20.9 | 14.7 | 12.8 | 15.4 |
| Other | 91 | 74 | 17 | 19.9 | 19.7 | 36.6 | 18.4 | 16.3 | 35.8 | 9.8 | 8.7 | 16.7 |

conclusive.[93] As the result of antipathy from bench and bar the bifurcated trial will probably be used only in rare cases in New York with no intention that it have any significant impact on calendar delays.

One of the problems in analyzing the rule's operation in the Northern District of Illinois will be that it was originally envisaged that two separate juries might be used in trying the two issues.[94] Recognizing that separate trials by separate juries would entail two *voir dire,* instructions to two juries, twice the number of opening statements, twice the number of closing statements, two charges by the court, and, perhaps, a greater chance of mistrial since the jurors will be in no position to compromise in the liability trial, Judge Miner, the system's leading public proponent, has recently indicated that the preferred way to handle these cases is to have the same jury decide both issues.[95] In light of the suggestion of the court of appeals that use of separate juries might raise a "difficult" constitutional question,[96] it is not unlikely that the practice of using the same jury

93. A paper discussing the New York experience prepared by Arthur H. Sobel, a third year student at the Law School of Columbia University, in connection with the school's Seminar in the Administration of Civil Justice will be on file in the Law Library. Cases were selected by the court from a biased sample, the decision to assign cases within the sample for split trials was not made by any valid sampling device and record keeping was inadequate. The following table should, therefore, be used with extreme caution:

Split-Trial Experiment New York County 1960

Cases Settled and Jury Waivers

| | | Col. 1 % cases settled before trial began | Col. 2 % cases settled after trial began | Col. 3 (Col. 1 plus Col. 2) Total % cases settled) | Col. 4 % Jury Waiver based on all cases *not* settled *before* trial |
|---|---|---|---|---|---|
| No split trials allowed (54 cases) | Line A | 20% | 51% | 71% | 53% (of 43 cases) |
| Split trials allowed in court's discretion (46 cases) | Discretion not exercised (26 cases) Line B | 57% | 8% | 65% | 9% (of 11 cases) |
| | Discretion exercised (20 cases) Line C | 25% | 45% | 70% | 40% (of 15 cases) |

94. See the second paragraph of the rule set out in text at note 75 *supra,* referring to "the same . . . or another jury."

95. O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577 (N.D. Ill. 1960).

96. Hosie v. Chicago Nw. Ry., 282 F.2d 639, 642 (7th Cir. 1960), *cert. denied,* 81 Sup. Ct. 695 (1961).

will become the invariable one absent a stipulation. In a recent case expounding at length his rationale for the rule Judge Miner declared:

> The Court is of the opinion that the better and preferred practice is to submit the damage issue to the same jury which has decided the liability issues. It is the more expeditious, economical and less time-consuming procedure. Anticipating the trial of all issues to the same jury, the courts should permit that jury to be interrogated and qualified concerning damages as well as liability. Where, however, liability is established and a settlement is anticipated or reached, but not yet consummated, or additional medical proof or further preparation for trial on damages is desired, and the attorneys require additional time, a stipulation may be entered to discharge that jury and to try damages before a new jury.[97]

The number of cases which can be expected to go beyond this first stage is so small that—were calendar congestion the only consideration—the added time for empanelling a second jury and even, perhaps, repeating some of the testimony could be ignored.[98] Doubts about constitutionality rather than pure considerations of procedural efficiency furnish a better explanation of Judge Miner's decision.

Many of the advantages foreseen from split trials might well be lost, if it is known that the same jury is to be used. Some jurors are rather sophisticated and they might well inform their fellows that they ought to find for the plaintiff if they wanted to hear the medical testimony and give the plaintiff "something" even though he might have been partly responsible for the accident. This "sophisticated jury effect" may take a little while to be felt but a close check should be made to determine whether the rate of verdicts for the plaintiff on the first stage seems higher than would be expected.

The need for questioning of jurors to prepare them for deciding the issue of damages is also of considerable importance. On *voir dire,* counsel, in a trial where the plaintiff claims a cancer due to trauma, could hardly be prevented from explaining the nature of the injury in order to find out whether the attitude of the panel is opposed to traumatic etiology in such diseases. Control of the *voir dire* by

97. O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 580 (N.D. Ill. 1960).

98. The suggestion has been made that the split trial will make it more difficult for the juries to compromise so that "it will probably tend to increase the incidence of hung juries." 74 HARV. L. REV. 781, 782 (1961). The incidence of hung juries is so small and their cause is such that this result seems unlikely. See, *e.g.,* NEW YORK JUDICIAL CONFERENCE, THIRD ANNUAL REPORT 182 (1958); NEW YORK JUDICIAL COUNCIL, FIFTH ANNUAL REPORT 36 (1939). See also Kalven, *A Report on the Jury Project of the University of Chicago Law School,* 24 INS. COUNSEL J. 368, 372-73 (1957). The matter is, however, relatively easy to check statistically and the study of the Northern District Rule should include this factor.

the judge in federal courts reduces, but does not eliminate, the problem.

Perhaps the most important factor influencing calendar congestion is the percentage of settlements at various stages before trial and during trial. The slightest unfavorable change in the settlement ratio might easily nullify any hypothetical time saved by the severance device and might add considerably to the current backlog in the courts. We can assume that there will be a great number of settlements once liability has been established—indeed, only a minute percentage of cases will go beyond the first stage—but how will severance of issues affect the before-trial settlement ratio? There cannot be a definite answer to this question until the practice has been observed over a substantial period.

Studies of the effect of a rule instituting a comparative doctrine are slightly helpful in the analysis of the settlement ratio problem. Separate trials might well revitalize the contributory negligence doctrine and encourage an all-or-nothing approach to jury verdicts. The experience of the Arkansas courts, where the opposite result was achieved by the adoption of a comparative negligence rule,[99] is suggestive. The Arkansas "before and after survey" found agreement among the state's lawyers that the comparative negligence rule had, Rosenberg reported, a favorable effect on pretrial settlements.[100] However, the same attorneys felt that negligence litigation had increased as a result of the new rule.[101] Separate trials, therefore, might adversely affect the pretrial settlement ratio but they might also decrease litigation—certainly an excellent way to alleviate court congestion. Such an effect could not be determined for years and would probably be masked by the impact of other variables.

Any decrease in negligence cases in the federal courts would have to be weighed against increases in the state courts, the number of removals by defendants into the federal courts, and increases in the business of other districts. To the extent that plaintiffs felt disadvantaged by the bifurcation rule they might be influenced to commence their action in the state court or, venue permitting, in another district of the federal courts. Such shifts are difficult to ascertain. The recent increase in the monetary requirement in diversity cases from $3,000 to $10,000 provides added, but not insuperable, problems for the statistician.[102]

99. ARK. STAT. ANN. § 27-1730 (Supp. 1959).
100. Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89, 99, 100 (1959).
101. *Id.* at 98-99.
102. 28 U.S.C. § 1332, as amended July 25, 1958, by Pub. L. 85-554, 72 Stat. 415, (1958). A paper discussing the impact of this change prepared by Mayer Rabinovitz, a third-year student at the Law School of Columbia University,

Another important factor in assessing the impact of the rule is its effect on jury waivers. Since all agree that jury trials take longer than bench trials—although there is considerable variation in the estimates of the difference[103]—any appreciable change in the rate of waivers at the point of trial would be an important factor in the court's workload. Whether increased jury waivers by plaintiffs would offset a lesser number of waivers by defendants is not clear.[104] This factor would vary depending upon the bar's reaction to particular judges and to local juries.

An overall impact of the rule will also be somewhat muffled by the pressure to abandon it in some individual cases where a two stage trial would—if the second stage were in fact tried—predictably, take more time because of necessary repetition of testimony.[105] Yet, if the bifurcation system is to operate most efficiently, and if it is to be tested in any meaningful way, a two stage trial should be had even in those cases where some repetition of testimony is indicated, for the settlement of cases after the first stage will probably obviate the need for practically all second stage trials. In fact, as already noted, the Seventh Circuit has already indicated that the rule should not be strictly enforced.[106] Unless the judges in the Northern District of Illinois are more righteous than most other judges, it is not unlikely that some of them will respond to pressures from the bar and that a varying percentage of cases, chosen by different judges using varying criteria, will be tried in the traditional way. This will complicate the problem of quantitative analysis.

There will also be some tendency to deny split trials where convenience of witnesses may be involved. Will the doctor, who has been accorded special consideration by our courts, be required to

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in connection with the school's Seminar in the Administration of Justice will be on file in the Law Library.

103. *Compare* ZEISEL, KALVEN, & BUCHHOLZ, DELAY IN THE COURT 71 n.1 (1959) (Judge Peck reports 250% longer); *id.* at 81 (author's estimate 40% longer) *with* Hazard, Book Review, 48 CALIF. L. REV. 360, 369-70 (1960) (questioning the validity of the estimate by Zeisel, Kalven, and Buchholz and pointing to California time studies showing a 300% difference).

104. See Column 4 of table in note 93 *supra.*

105. See, *e.g.,* Rabin v. Brooklyn Trust Co., 191 Misc. 321, 77 N.Y.S.2d 614 (Sup. Ct. 1947) (question as whether damages were related to fire in question); House v. Scheffler, 27 N.Y.S.2d 681 (Sup. Ct. 1940), *aff'd,* 261 App. Div. 1088, 27 N.Y.S.2d 1002 (2d Dep't 1941) (court refused to try normally separable issue of release where the plaintiff's defense to the release was mental incompetency resulting from the accident). See also Grissom v. Union Pac. R.R., 14 F.R.D. 263 (D. Colo. 1953) (denial of separate trial on issue of release issued shortly after accident when plaintiff may have been in state of shock). The courts have ruled that in certain actions severance is not possible since damages must be proved in order to establish liability. McClain v. Socony-Vacuum Oil Co., 10 F.R.D. 261 (S.D. Mo. 1950) (antitrust action); United States *ex rel.* Rodriguez v. Weekly Publications, Inc., 9 F.R.D. 179 (S.D.N.Y. 1949) (action based on fraud).

106. See text accompanying note 79 *supra.*

return to court on another day if he should arrive in court at the wrong stage of the trial? Or will he be required to make two appearances where the issues of damage and liability are interdependent?

Another factor which must be considered in evaluating procedural efficiency is the possibility of court time spent on contested motions on severances. If the practice becomes generally accepted such motions will, of course, become less important.

Aside from the difficulty in assessing the amount of trial time saved, some awkward problems arise where issues are rigidly compartmentalized. Will the injured party, who has no testimony on the question of liability, be barred from the courtroom during that phase of the trial? Will the survivors of an accident victim be barred from the courtroom during the initial phase of the trial? How will *voir dire* be handled?[107] Separate trials will require trial lawyers to depart from long established modes of trial procedure. The attempt to seal off the jury treatment of liability will probably be met by the development of new techniques and strategies to introduce evidence of injuries during the trial of the liability issue.

Whether, after the system has fully adjusted itself to the change, plaintiffs will be seriously disadvantaged or there will be a total appreciable saving time is impossible to say with certainty on the basis of *a priori* reasoning. It is fairly clear, however, that the system presents a serious risk of disadvantage to the plaintiff.

## V. CONCLUSION

As our law now stands, each party is entitled to a traditional trial by jury—*i.e.*, with all the evidence and issues presented at one time —unless there is some good reason why the issues should be separately tried. Two reasons are given by its main proponent for routine use of the bifurcated trial: first, it improves the trial by forcing the jury to decide according to the law as laid down by the judge, and, second, it saves time and this saving is required because of calendar congestion. Neither of these reasons is an acceptable basis for adoption of a rule. By changing the jury trial in a way which, by hypothesis, will change the result, the modification affects the practical substantive rights of the parties. The court may not reject the current system on the ground that it can supply one that works better. Nor is its position buttressed by arguing that we can no longer afford the time required by the present system, for this is an argument to be directed to the people and the legislature which has power to change the system of tort compensation, not the basis for assumption of

107. See text accompanying notes 97 and 98 *supra*.

power by the courts. No study published to date furnishes acceptable quantitative proof that the split trial, routinely applied, over the long run will appreciably reduce calendar congestion.

Separate trials of negligence and damages should remain the exception unless the legislature acts to change the rule. Under present conditions split trials are appropriate in cases such as those where the proof of damages is greatly disproportionate to proof of liability, or where the evidence necessary to prove damages is not readily ascertainable, or where the issues are so complex as to confuse the jury. Since the Northern District of Illinois has used its rule for a substantial length of time, there may be some justification for continuing the practice until an acceptable study of its effect is completed.

Even if there is no bifurcation rule in force, there may be instances where the parties are willing to stipulate for a split trial. The cost and other difficulties in arranging for medical witnesses may be so great that both parties would be anxious to avoid their appearance until after the liability issue is settled.[108] This alternative might well be suggested to the parties at the pretrial hearing. Since most cases will be settled after the liability issue is determined, the court ought not reject such a stipulation on the ground that honoring it may require two trials and thus waste court time.

The courts may rightfully experiment with devices designed to present the facts more fairly to the jury (the impartial medical examiner plan could be so classified) or to exercise control over the jury more effectively where such control is permitted (Federal Rule 50(b) based upon a reservation of decision on a motion for directed verdict is an illustration). It ought not force substantive changes on the parties merely on the justification of existing delays in the courts. The courts should be the first to realize "that court congestion is a community problem which depends for its solution not only upon the courts and the judiciary but also upon the other coordinate branches of government."[109]

108. One of the New York lawyers who normally represents plaintiffs indicated his support for the rule on the ground that it saved substantial expense in retaining medical experts. See Sobel, *op. cit. supra* note 93.

109. Letter to New York Legislature, New York Judicial Conference dated February 11, 1961.