whether the disclaimer was subject to the test of reasonableness under Section 2 (2) of UCTA in the cases of *Smith v. Eric Bush* and *Harris v. Wyre Forest D.C.* referred to above. His Lordship favoured the approach adopted in *Smith v. Eric Bush* on the particular facts. It is not yet known whether this decision will be appealed.

As can be seen from the above, in assessing the reasonableness test under UCTA the Judges have done little more than decide the problem directly in issue and much therefore depends on judicial interpretation in each case. In that sense, no case is a precedent for any other. Further, the appellate courts have been reluctant to provide the lower courts with guidelines. Bridge LJ in *George Mitchell (Chesterhall) Limited v. Finney Lock Seeds Limited* (1983) 2AER 737 (HL) case stated that in determining whether a contractual term was fair and reasonable "an appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly or obviously wrong". It was also stated in this case that the courts are reluctant to re-write a clause and that whether a clause is reasonable will depend on all the circumstances of the case.

THE UNITED STATES JURY SYSTEM – OUT OF CONTROL?

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This brief article will not resolve the debates raging in America over the problems of the U.S. legal and judicial systems, including the alarming increase in the criminal case load, the status of Tort Reform Legislation, limitations on contingent fees, abuses of discovery, merit selection versus political appointment of judges, certification of legal specialists nor the debates over litigation versus mediation versus arbitration. Nor will it go into exhaustive details or attempt to persuade the reader of the merits of what is set forth hereafter. This is one trial lawyer's opinion of the U.S. jury system, based on 21 years of practical experience and exposure to a wide variety of cases and lawyers from around the United States.

To begin, the right to a trial by jury is guaranteed by the U.S. Constitution – the Sixth Amendment for criminal trials and the Seventh Amendment for civil trials. The several states have enacted constitutions which ratify this basic principle of American constitutional law, though in civil cases the right to jury trial can be waived under the various Rules of Civil Procedure or

abolished in certain administrative or regulatory situations. The usual justification for abolishment is that the constitutional guarantee of trial by jury applies only where the prerogative existed at common law or by statute at the time the Constitution was adopted. Thus, in America we are confronted with the reality of jury trials in a substantial number of civil lawsuits, a reality which some suggest changing solely on the suspect grounds of self-interest.

It is my belief that the jury system has served this country well for several hundred years and will continue to do so. However, there are problems with the system, especially on the civil side of the ledger. The rules of the game have changed over the years, as have the numbers and types of players. As science, industry and technology have progressed, the legal issues presented have become more complex. Our courts have been slow to adequately deal with these changes and the increasing complexity of issues being presented to them for resolution. But this is no different from any society throughout the centuries. We must react and adapt, or fall by the wayside.

One uncontrovertible fact is that America has become a litigious society. Problems that in the past may have been solved over the back fence now find their way into our courts. Not only are we more litigious but, because of scientific and technological discoveries, the definition of catastrophe has been changed to include incidents of staggering proportion – nuclear and space accidents, injury and death from chemicals and products such as dioxin, asbestos or football helmets, as well as new diseases which stump the medical community while forcing society to wrestle with them.

Balanced against these imponderables are several historical components of the American trial system. We still operate with judges, lawyers, parties, jurors, witnesses and the selective attention of the media. We also have to acknowledge the competing interests which are present in most societies; public vs. private rights, individual vs. establishment, civic responsibility vs. special interest, and then come to some resolution which is guaranteed not to please everyone. Throw into the equation the potential for backlash and the increasing fragmentation of the professional community and we reach the inescapable conclusion that some changes are in order.

Let's examine the components in the system, albeit in a necessarily superficial way. Most judges in America are first empowered through political appointment. This is true for both federal and state judges, though federal judges are appointed for life subject to removal for cause. Once appointed, most state judges must seek reappointment, either through election or some form of merit selection review. All judges in America are underpaid,

irrespective of their qualifications or competence, when viewed in relation to their importance in the system and society. Thus, we know that some judges find their way into the system who are ill-equipped to competently and impartially preside over a trial, an event which is an awesome social and professional responsibility.

Next let's assess the lawyers, but in a non-Shakespearean context. U.S. law schools graduate lawyers at the rate of more than 35,000 per year! Some studies have suggested that 10-15% of these new lawyers cannot find positions in the legal system. And many who do tend to locate in the more populous areas of the country. For example, in six of the most populous of North Carolina's 100 counties, we have an average of one lawyer per 355 residents. The entire state averages one lawyer per 744 residents. And North Carolina has one of the most favourable attorney-population ratios in the United States! One unfortunate by-product of this influx has been a lessening of the ethical and competence standards within the profession. Another by-product of this influx is that the number of good plaintiff's lawyers has increased, thus narrowing the gap between the traditionally strong defence bar and the plaintiff's bar.

Let's now move to one of the critical ingredients of the fuel that makes the system operate – the parties. In the old days, they were generally people or organizations whose perception was that they were right, and even if they were wrong, it probably wouldn't cost a million dollars for the privilege of being so informed. But new factors began coming into play. Inflation and fluctuating interest rates changed some of the numbers in the equation. The U.S. Supreme Court became more vocal about individual rights. Consumer protection became a rallying cry in many camps. And the establishment was challenged – repeatedly – by various and sundry plaintiffs. Once racial and sexual discrimination became public legal targets, others were sure to follow. Alleged, and often proven, criminals were given increased protection from possibly over-zealous law enforcement officials. And people started to sue, in increasing numbers, such new groups of defendants as doctors, lawyers, accountants and other professionals. New legal theories evolved or were created by ingenious plaintiff's lawyers.

Throughout this evolution, the public was frequently being reminded that the insurance industry was ever-present in most of these disputes. Inevitably this public educational exercise led more and more parties to challenge those perceived to have wronged them. We became a nation so concerned with rights that some may have forgotten their corresponding individual responsibilities.

And that brings us to the juror, that indescribable peer by whom every party is entitled to be judged on their day in court. Jury duty should be a cornerstone in the foundation of American democracy, a participatory exercise to insure the continuation of our democratic society. But this idealistic statement is fraught with many pitfalls and traps. Some individuals called for jury duty seek to be excused because they simply do not want to be inconvenienced or bothered. Others seek excuse for legitimate personal or business reasons. In any event, it is sometimes too easy to be excused from jury service. Thus, most jury pools are lacking certain elements of middle and upper class people who may tend to add balance and depth to any jury.

Futhermore, jurors are necessarily in that group of citizens who have been involved in the public educational process described above. Thus, it is likely that every jury pool will consist of some people who, because of this educational exposure, will have a particular prejudice in every case. And, unlike the British system, American lawyers have a large part in the selection process, trying to select 12, or in some cases 6, fair and impartial jurors to hear and decide the case. This could be paraphrased as trying to determine which jurors are more likely to be predisposed to vote in favour of your client's position. Unavoidably, no matter how they are instructed by the judge or influenced by the lawyers or evidence, they will bring to their deliberations some distilled portion of their own background and perceptions, including these individual prejudices.

In my experience, almost all jurors make a good faith and honest effort to behave the way the system expects them to behave; fairly, impartially and without being influenced by sympathy. However, they are also in the position of having to decide issues where reasonable minds can, and continue to, disagree. The ultimate disposition of the issues is in their hands and they must decide. It is as simple as that.

And on what does the jury base its decision? One might say the evidence before it, either testimony or various types of exhibits. In all candor, we know it is more than that. Not only is it the usual factors such as the demeanor and credibility of witnesses, it is the appearance and personality of the parties and attorneys and the perceptions of the judge – all of those multiple factors, tangible and intangible, that good trial lawyers worry about.

Witnesses have always been a component in any trial, but times have changed. Witnesses used to be people who, for whatever reason, had some firsthand factual knowledge about the case being tried. Occasionally, you may have had some type of expert witness, but it was not the usual

procedure. When experts testified, it was either a very complicated matter or a case of professional malpractice. We can all remember when it was virtually impossible to find a respectable professional who was willing to testify against another professional. In our modern society, however, almost every case involves some type of expert witness. Futhermore, consulting firms have been established whose sole purpose is to evaluate and testify for or against any trial issue. In my opinion, this proliferation of available expert testimony has been a definite factor in the increase in large jury verdicts.

And now to the last component – the media. Historically, the written press has covered the legal happenings of the community, state and nation, with varying degrees of emphasis and success. Then television was invented. News which used to take days to be relayed to the public was now being conveyed instantaneously, sometimes even as the event was happening. At the same time, we must acknowledge one of the unspoken goals of the media, which has been and continues to be to improve ratings or increase subscriptions. And we are told the American public is not interested in good or boring news stories. Thus, the element of sensationalism or controversy is an ever-present measuring device as to what gets telecast or published.

In the legal system, this usually means a matter of burning interest at the local level or something truly spectacular at the national level. Many times this translates to a large settlement or jury verdict or efforts to fill a vacancy on the Supreme Court. Once a settlement or verdict occurs, it would be unreasonable to expect the media to give a full and objective report of the entire case or trial, including the jury's verdict, since they do have time or space limitations. Thus, the headlines usually alert the public to a very large number and the names of the parties. After that, the report usually varies depending on the experience and talent of the reporter. Realistically, the average news consumer may never read or listen beyond the headline. The culmination of this process is that another future juror has been partially educated about the legal system.

How often does the media report dismissals of cases, or verdicts for defendants, or do follow-up articles of any type? Such actions are unusual at best. It is no surprise that the debate over fair trials versus free press continues and that the relationship between the media and legal profession is generally poor.

So there we have a very brief description of the components of the system, a system which has remained essentially unchanged for the last 200 years and which was never envisioned to cope with the types of problems and issues now presented. When viewed in the context of this article and my experience,

I conclude that some changes in our legal system may be in order. But drastic tampering with our jury system is not one of them!

Our constitutional democracy is based on the premise that all members of society are equals before the law. Without extended discussion of the practical realities and limitations of life and the socioeconomic hierarchies in our society, I accept that premise. Thus, any party wishing to have a day in court and be judged by a jury must have that wish respected. To my knowledge, none of the much debated tort reform legislation will seriously challenge that right, though the various proposed screening mechanisms and economic caps will obviously impact the numbers of cases which will ultimately be tried to a jury.

We must also remember that some cases conceivably may be too large and lengthy or too complicated for trial by a judge and jury. We know that some cases may be more expeditiously, efficiently and equitably handled without a judge or jury, by one or more people with particular expertise in a particular area. While simple to state, acceptance of these ideas is likely to be slow and plodding, given the wide variety of interests, perspectives and philosophies which must be accommodated. For example, one strong-willed party or attorney can generally defeat any effort to mediate or arbitrate unless there is a compelling and legally enforceable contractual provision which controls the situation. Yet intellectually we recognize that some arbitrators are not only fair and objective, but much more qualified by training and experience than any judge or juror we are ever likely to draw in a trial.

Before we panic, let's try to put the matter into perspective. The insurance industry is demonstrably cyclical, and some recent cycles have been tougher than their predecessors. To some extent, so is the American legal system, though our pendulum tends to move more slowly and methodically. Occasional large verdicts are no more threatening to the legal system and insurance industry than uncontrolled interest rates and bad management are threatening to business and the global economy. But they are facts of life with which we must deal. I'm simpleminded enough to believe that if we have a system that has worked well for two centuries, maybe the system is okay, but some of the component parts could stand a little scrutiny. While what I'm about to say may be construed as overly simplistic or even naïve, I nonetheless feel compelled to suggest the possibility that less than drastic measures may reverse the trends of the last several decades. Many segments

Let's conclude by discussing only three of the components of the legal system – judges, lawyers and the media – and in reverse order. The system would benefit from more responsible and better informed media representatives. The media should go beyond the headlines and actually present an unbiased, objective story rather than pay lip service to those sometimes illusory objectives. They should also adhere to a mandatory policy of doing non-biased follow-up stories on every sensational or controversial case which is filed. If its newsworthy when it is filed, it should continue to be newsworthy as it progresses to an ultimate conclusion, irrespective of what the conclusion may be.

While the media should be cleaning up its act, so should the legal profession. Public opinion of lawyers in America is at an all time low. The suspected reasons for this are many, including but certainly not limited to, the traditional reluctance by the profession to police itself, the failure to plan for and deal effectively with the proliferation of lawyers over the past two decades, the general public naïvete and ignorance about the profession and its individuality, which has been both compounded and exploited by the irresponsible or illegal actions of a small segment of the profession, and the public's unwillingness to recognize and deal with the complexities of life in modern society.

Transpose variables such as those into a lawsuit, vis-a-vis the legal system's ability to affirmatively solve everyone's problems, and unltimately into a courtroom and the potential for malfunction has to be acknowledged. Legal proceedings are becoming more of a theatrical production, if not a quest for riches, than a quest for truth, fairness and justice. This trend is disturbing to many and must be confronted.

Last, but not least, we must discuss the judicial system – a topic of long standing and substantial debate both within and without the legal community. It would obviously be naïve to presume that all judges are equally endowed with intelligence, character, integrity and common sense. Nor will they be equally motivated by the same degree of dedication to the ideals of truth, fairness and justice. But I honestly believe this country can come up with some better criteria for selection of judges than political affiliation and activity or a willingness to work for two to three times less than first year lawyers are being paid in larger firms in big cities. Perhaps if we as a society became more committed to finding more qualified judges and paying them a comparable worth, many of the system's problems could either be solved or considerably lessened. Certainly judges should fairly control the courtroom. Some do not. Certainly judges should fairly control the lawyers and parties. Some do not. Certainly judges should fairly exercise legal and judicial experience to control or curb jury verdicts which are so

outrageous as to be outside the parameters of the jury's bailiwick. Some do not.

Am I advocating a species of super-judge? I think not. I'm advocating that we make better and more concerted efforts to select judges worthy of the challenge and awesome responsibility which they will possess and then pay them accordingly. Better judges can immediately remedy some of the concerns expressed herein. The improvement of the judiciary will improve the level of performance in our trial courts and increase the likelihood of fair and objective results.

At the end of the day, the American jury system will survive, just as the world insurance industry will survive. Some maintenance will be required, some tinkering may be necessary, and some parts may need to be retooled, or even replaced by better and more adaptable parts. But the challenges will be confronted and resolved in a manner that is less disruptive than some predict. It is my opinion that this particular pendulum has nearly reached its zenith and that the disturbing trends in our system will soon reverse and the pendulum will begin its slow descent towards inevitable future confrontations.

THE CASE OF THE DISAPPEARING HORSES.
by Gordon W. Shaw

The solicitors in the nearby Kentish market town apologized that an upper limit of £200 had been imposed by the Law Society Legal Aid office for an expert's report. A difficult case with six apparently material non-disclosures at proposal stage. Not least, six previous convictions including dishonesty as well as GBH.

Minded to suggest they try elsewhere, I leafed through the documents. Insurance of horses has always held a personal fascination. Way back, in company employment, I had insisted on a firing operation being carried out on a thoroughbred's damaged leg, frightening threats from the placing broker notwithstanding. The owner equally insisted that the horse be put down and I was vastly encouraged when he (if a gelding be he) recovered completely and went on to win the odd selling plate.

Herbie Lee went to the high street broker to insure the three horses he had bought over the previous fortnight. "Hello Herbie" said a broker counter clerk "how's Chrissie and the kid?" Chrissie was Herbie's common law wife and the couple had been at school with the girl clerk who helped Herbie with