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15th July 1998

Dear Mr. Walker,

re: Potential Claim against Irwin Mitchell

As promised, I have now considered the papers delivered to me by Irwin Mitchell.

These include the papers of Wilford Smith & Co and Elliot Mather Smith.

In summary, my advice is that whilst there are aspects of the case that ought to have been dealt with that were not, and I will detail these below, I cannot say whether or not these investigations, if undertaken, would have improved or reduced your prospects of success. My advice is that there are not reasonable prospects of success in successfully pursuing a negligence claim against Irwin Mitchell. Certainly, I would not advise your spending any more money on pursuing them as it would be a case of throwing good money after bad.

If you become financially eligible for legal aid, it may be possible to obtain a legal aid certificate which, if granted, will enable you to instruct solicitors and counsel to advise on your prospects in more detail. If your circumstances change from when we met on the 28th of April in so far as your savings become reduced, I would suggest that it may be worth while applying for legal aid. Without legal aid, however, I would not advise you to proceed. My firm will not be prepared to take the case on a conditional fee basis.

I will deal with what I consider to be the relevant points as follows:-

1. Investigations which should have been undertaken in my view

(a) The accident itself

I note that legal aid was granted to Wilford Smith on the 8th of May 1990. Had I been dealing with

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the case I would have arranged an inspection of the actual JCB involved in the accident and the pick-up truck together, either at the site, if possible, or elsewhere. This inspection would have been attended by yourself, a representative of your solicitors and a nominated health and safety expert. Photographs and measurements of the actual vehicles involved in the accident could have been taken and used which were potentially of greater value than the site inspection arranged in November 1993. I would also have written to Gary Hather Plant Hire and their insurers (Norwich Union) at the outset telling them that I wanted them to retain the pick-up truck, the hose and the JCB pending inspection. I cannot say whether this inspection would have improved or worsened your chances of success, but certainly I believe it should have been carried out in 1990.

(b) The re-fuelling process

In my view, attempts should have been made in 1990 and indeed in subsequent years to trace and interview employees or former employees of Gary Hather Plant Hire to ascertain what was the firm's practice for re-fuelling JCB's. This evidence would have shown whether or not it was normal and accepted practice to fuel the JCB's with the arms raised or with the engines running. In addition, it may have been appropriate to obtain evidence from men in the building trades and/or an expert who would say whether or not it was common practice to stand on a JCB during the fuelling process. I cannot say whether or not this evidence, if obtained, would have helped. The only way that this can be checked is to now find former employees of Gary Hather Plant Hire who worked there in 1989/1990 and see what evidence they would give. This evidence was not obtained and I cannot see any record of it having been discussed between you and your various solicitors.

3. The hearing at Leeds

From the Irwin Mitchell file notes it appears as if you were given little option but to accept the payment into Court and ultimately the offer that was made.

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It does not appear from the paperwork that you were ever given the option of the case proceeding rather than settling which, of course, was your choice. At all times you had the right to insist that the case should proceed as although you had received advice to the contrary from your barrister, it would have been entirely reasonable and possible for you to have insisted that the case should have proceeded rather than accepting the offer concerned. I am surprised that you were apparently put under such pressure on the morning of the trial as although you had previously been advised of your prospects of success on several previous occasions, including a conference with counsel on the 29th of March 1996, Mr. Ireland of Irwin Mitchell had previously advised you that the payment into Court and, indeed, an informal offer from Keeble Hawson of £95,000.00 should have been rejected. Indeed, Mr. Ireland recorded that he advised you to reject £95,000.00 on the 24th of July 1996. You, of course, wanted to turn the offer down. I think that with hindsight Mr. Ireland should have relayed that offer to counsel so that Mr. Chruszcz QC could have advised you about the increased offer prior to the hearing.

4. The evidence from JCB

I have seen this evidence and I know that it was brought to the attention of Mr. Chruszcz QC prior to the hearing. The evidence suggested that in 90% of cases, men climbed up onto the JCB's during the re-fuelling process. This tended to contradict the evidence being put forward on behalf of the Defendants. I do not think this documentation was ever shown to Messrs. Keeble Hawson who acted for the Defendant, and it was not in the trial bundle. As it was obtained so shortly before the trial, Keeble Hawson would almost certainly have objected to its introduction and, had there been an application to the Court to introduce the evidence at that late date, it may not have succeeded. Even if the evidence had been introduced and admitted, it is my opinion that it would have slightly strengthened your own arguments, but not by a great deal, and would certainly not have guaranteed success by any means.

5. Your prospects of success

In spite of everything I have mentioned above, for you to have reasonable prospects of succeeding with an negligence claim, you will have to show that, more likely than not, if the above steps were taken, then you would have received substantially more than £95,000.00 in total if your claim had proceeded to Court. Because the case did not proceed to Court we will have to speculate as to whether or not a Judge would have awarded you more than £95,000.00 based on the evidence as it would have been presented by Irwin Mitchell and, if it had been presented as outlined above. You had been advised by Mr. Chruszcz QC that there was a small possibility that your claim might have failed altogether, in which case, you would have got nothing. He also advised that if you succeeded in establishing primary liability then there may well have been a finding of contributory negligence against you of 50% or possibly more. I note that advice of this nature had been given to you consistently and regularly since the advice of Mr. Makey of counsel in May 1994 obtained by Elliot Mather Smith.

Based on the witness statements and the expert evidence in the trial bundle, I do not think that we will be able to show a Judge hearing a negligence claim that, had the case proceeded on the 12th and 13th of December 1996 and thereafter, that you would have received more than £95,000.00.

The full value of your claim was not known then as reports were awaited. I am aware of the problems with the evidence from Mr. Douglas and the problems regarding your pre-accident earnings. Based on your evidence and that of Messrs. Darbyshire and Haines for the Defendant there was always a small but substantial possibility that you would have lost altogether. The greater likelihood in my opinion is that there would have been a finding of contributory negligence against you. I know that that was not your view, but I am giving my opinion independently based upon the evidence and not the views of either Mr. Chruszcz QC or Irwin Mitchell.

This appears to be the advice of Peter Clark of Graysons, by implication, as I know that he has seen the papers.

6. Conclusion

With regret, I must advise that it is not worth taking this matter further forward. That is subject to the proviso that if you obtained legal aid, it may be worth investigating the matter further to try and see what the outcome would have been had Wilford Smith carried out the investigations I suggested in 1990. This may be impossible to do.

This is my honest and independent advice and I am sorry if you find it disappointing. I enclose my receipted account for the work undertaken to date.

Your files can be collected from my office upon 24 hours' prior notice or, if you prefer, I can have them delivered to you.

I would like to thank you for instructing me in this matter. Please note that should you wish to proceed with the case, you will have to instruct other solicitors as I am not prepared to act further.

Wishing you all the best for the future.

Yours truly,



J.M. STITTLE