

Irwin Mitchell
Mark S Thomson
First
September 2005

HQ04X01648

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

DAVID ALAN WALKER

Claimant

and

(1) CHARLES CHRUSZCZ
(2) IRWIN MITCHELL

Defendants

Name	Mr Mark S Thomson
Address (<i>business address if statement given in professional capacity</i>)	5th Floor, South Wing Trafford House Chester Road Manchester M32 0RS
Telephone Number	0161 786 8320
Occupation	Solicitor

WITNESS STATEMENT

1. I qualified as a solicitor in April 1990 and joined Irwin Mitchell in their Sheffield office as an assistant solicitor in October 1990. There I specialised in Claimant personal injury work, initially supervised by John Pickering, one of the partners. I left Irwin Mitchell in about 1999 to join Fentons in Old Trafford Manchester where I am now a partner.
2. In August 1994 I took over the conduct of Mr Walker's personal injury claim against his former employers, Gary Hather Plant Hire Limited ("Hather") when his Legal Aid Certificate was transferred to Irwin Mitchell from his previous solicitors. I then dealt with his claim until March 1996 when I handed it over to my colleague, Stephen Ireland. It is now almost nine years since I had any dealings with the case and I am making this statement having refreshed my memory by reading a copy of my correspondence file, the pleadings, the witness statements, and the expert evidence in relation to Mr Walker's claim.
3. Mr Walker had been represented by two firms of solicitors – Wilford Smith and Elliott Mather Smith - before he instructed Irwin Mitchell. They had issued proceedings, exchanged witness statements and obtained various medical reports. They had also obtained and disclosed expert engineering evidence from Mr Barker of Strange, Strange & Gardner, consulting engineers.

However, it would be fair to say that Mr Walker was very unhappy with the way his previous solicitors had handled his claim.

4. During my stewardship of the file the steps I took to prepare the action for trial included the following:
 - 4.1 I wrote to Mr Walker's previous employers and obtained the information needed to prepare a special damages calculation. I prepared a Schedule of Special Damages myself in March 1995. I also had a special damages calculation prepared by one of Irwin Mitchell's specialist clerks in August 1995.
 - 4.2 During 1995 I obtained up to date medical reports from Professor Saleh, consultant orthopaedic surgeon, Dr Goodhead, consultant psychiatrist, Mr Douglas, consultant orthopaedic surgeon, and Mr Bickerstaff, consultant orthopaedic surgeon. I also obtained a report from Langman & Co, employment experts; a report from Jacqueline Webb & Company, rehabilitation cost consultants; and a report from Pauline Howard, physiotherapist.
 - 4.3 I arranged a conference with Counsel, Henry Witcomb, on 2 March 1995 and carried out various steps required by him including:
 - 4.3.1 obtaining leave to amend the Particulars of Claim to include an allegation of breach of statutory duty
 - 4.3.2 obtaining an Order for discovery by Hather
 - 4.3.3 preparing further detailed witness statements by Mr Walker
 - 4.3.4 obtaining a report from a second engineering expert, Mr Freytag of Cassells (UK) Limited, because the report of the existing expert, Mr Barker of Strange, Strange & Gardner, was unsatisfactory for reasons to which I refer below.
 - 4.4 I obtained authority from the Legal Aid Board to appoint Leading Counsel and I arranged for a conference with Mr Chruszcz, Leading Counsel, on 29 March 1996.
 - 4.5 I obtained, in December 1995, an Order for a split trial.
5. The conference with Mr Witcomb took place on 2 March 1995. At that conference, Mr Witcomb confirmed that, given the potential value of the claim, it was suitable for Leading Counsel to be appointed and he subsequently, on 28 March 1995, provided a written Opinion that Leading Counsel should be instructed. The Legal Aid Board gave authority for the instruction of Leading Counsel on 26 June 1995.
6. By July 1995 Mr Walker was becoming very dissatisfied with the amount of time his case was taking to come to trial. However, the medical position in July 1995 was uncertain as it was possible that Mr Walker would have further surgery, namely an above the knee amputation on his left leg. In August 1995 I arranged for a conference with Leading Counsel, Charles Chruszcz, to take place on 13 September 1995. However, at about that time Mr Walker's consultant, Mr Douglas, agreed to perform an above the knee amputation and for that reason the conference

with Leading Counsel was postponed.

7. Since the amputation was likely to take place well into 1996 with consequent delays in finalising the medical evidence, I agreed with Mr Walker, who was in financial difficulties that, to speed things up, we should apply for an Order that liability and quantum should be tried separately and on 21 December 1995 it was ordered that there should be a split trial. I set the action down for trial on 29 February 1996 and after that I handed the file over to Stephen Ireland because it was intended that I would move from Sheffield to Irwin Mitchell's Leeds office.

8. I have read Mr Walker's Particulars of Claim and am very surprised about the following assertions:

Paragraph 14: *"...notwithstanding whatever a Judge might make of the Claimant as a witness, there was no realistic prospect of the Claimant failing to establish primary liability on Hather through the negligent action of Haines, his servant or agent. Furthermore, in the circumstances, the defence of contributory negligence might succeed in fixing some, but only some, responsibility on the Claimant. As to the percentage that a Judge might determine, there is no realistic prospect of the Judge fixing more than 50% liability on the Claimant, and depending on the view formed by the Judge of the evidence of Haines, there was a significant chance that the contribution of the Claimant would be assessed at much less than 50%".*

Paragraph 28: [In summary] there was no risk that the Claimant might fail to establish primary liability on the part of Hather or in the alternative the risk was so slight as not to warrant a discount on value of the claim of more than about 5%.

Paragraph 29.2: *"Proper consideration of the impact of the statement of Haynes, coupled with the statement of Derbyshire, the photographs and the witness evidence of the Claimant would have led to an apportionment of liability of 10% or less to the Claimant and 90% or more to Hather".*

9. I find these assertions surprising for a number of reasons.

10. In this case, the Defendant denied liability and the Defendant's solicitors made it clear to me in a conversation on 12 September 1995 that their insurance clients were not accepting any liability for Mr Walker's accident.

11. The assertion that there was no or little risk that Mr Walker might fail to establish liability is out of line with the views of Christopher Makey, Counsel instructed by Elliott Mather Smith, and out of line with the view of Mr Witcomb. Likewise, the assertion in paragraph 29.2 of the Particulars of Claim that liability would have been apportioned at 10% or less to the Claimant and 90% or more

to Hather was out of line with those Counsel's Advices. Mr Makey had advised in writing three times and he had made it clear that his view was that Mr Walker's case was a difficult one which would be decided on the basis of witness credibility. Although he had advised in June 1994 that there was at least a 50% chance of Mr Walker succeeding on liability, he also said that there was a complete conflict of fact in the case and that therefore it was one where, if an offer were made on behalf of the Defendant subject to a finding of contributory negligence on the part of Mr Walker, his advice would be to accept such offer if it was up to 50%. He also said that his instructing solicitors might, for the purposes of negotiation, consider accepting a finding of contributory negligence on the part of Mr Walker of up to 60%. When Mr Witcomb advised on 28 March 1995 that the case was suitable for leading counsel, he said that it was clear that both liability and quantum would be live issues at trial and that liability was not without complication.

12. I should also say that on 22 March 1995 I applied for an interim payment of £10,000 on behalf of Mr Walker because he was short of money. However, District Judge Bellamy refused to order an interim payment stating that on the evidence of the witness statements before him, which included the witness statement of Mr Walker, and the statements of Hather's employees, Haynes and Derbyshire, he was of the opinion that there was a serious doubt as to whether Mr Walker would succeed at trial.
13. My own view was that Mr Walker had a prima facie case but that there were a number of difficulties.
14. Firstly, there were irreconcilable conflicts between Mr Walker's evidence and the evidence of Mr Hather's witnesses. These conflicts related to whether Mr Walker was acting in the course of his employment at the time the accident occurred and the precise circumstances in which the accident happened. On the latter issue, Hather's case was that the accident occurred when Mr Walker jumped unexpectedly onto the JCB whilst the hydraulic ram was being lowered, and Haynes and Derbyshire flatly contradicted Mr Walker's case that he was standing on the JCB in order to assist them in refuelling it when the accident occurred.
15. Secondly, a crucial factor in the case was the amount of time that Mr Walker was standing on the side of the JCB before the accident occurred. Mr Walker's evidence on this point seemed to be inconsistent as set out on pages 9 – 11 of my Instructions to Mr Witcomb. Whilst Mr Walker maintained to me that he was standing on the JCB for between 30 and 60 seconds before the accident happened, it seemed that on other occasions Mr Walker had given evidence which suggested that the accident happened almost as soon as he climbed onto the JCB. In my Instructions I referred to the statement given by Mr Walker to Mr Allen, the chief safety officer for J F Finnegan Limited, at whose site Mr Walker's accident occurred, and which seemed to suggest that the accident happened almost as soon as Mr Walker put his foot onto the chassis of the JCB. At the time of instructing Mr Witcomb I only had an unsigned copy of that statement.

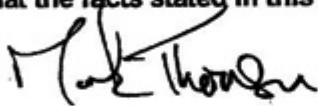
Subsequently, I obtained a copy of the signed statement.

16. The evidence of Mr Barker of Strange, Strange & Gardner was affected by the inconsistency in Mr Walker's evidence because, in his report, Mr Barker stated that Mr Walker was stood on the chassis of the JCB for some 4 to 5 seconds when the JCB bucket was lowered. However, Mr Walker maintained that he told Mr Barker that he was standing on the side of the JCB for 45 seconds. It seems that Mr Walker had discussed this with his previous solicitor who was not prepared to ask Mr Barker to change his report. As I said above, Mr Barker's report had been disclosed to Hather's solicitors. Whilst Mr Barker was prepared to say that he must have misheard Mr Walker, this was clearly embarrassing to Mr Walker's case. It was for this reason that in May 1995 I instructed Cassells UK Limited to prepare a report in place of Mr Barker.
17. I also recall that on the day of the accident Mr Walker was intending to drive even though he was disqualified from driving because of a drink driving conviction. I felt that this did not enhance his credibility.
18. I understand that it is being asserted on behalf of Mr Walker that, regardless of whether his evidence was accepted, he would nevertheless have succeeded in his action against Hather. I understand that his case is based on the premise that Hather's driver must have been negligent, because either:
 - 18.1 he was looking forwards when he lowered the hydraulic ram of the JCB and in that event was negligent either in failing to see Mr Walker or (having seen him) in lowering the hydraulic ram while his was there; or
 - 18.2 he was looking backwards when he lowered the hydraulic ram and in that event was negligent in not looking forwards before lowering it.I understand that it is asserted that Mr Walker would therefore have succeeded on primary liability whether his evidence was accepted or rejected.
19. I did not view Mr Walker's claim in this way. I thought that Mr Walker was likely to establish liability but that his prospects of success depended on him coming across as a good witness. My fear was that Mr Walker would be a poor witness because his explanation as to how long he had been on the JCB had changed significantly as I described in my instructions to Mr Witcomb.
20. I thought that if Mr Walker's evidence was not believed, then there was a real chance that the Judge would find that he had jumped unexpectedly onto the JCB whilst the hydraulic arm was being lowered, so that the accident was entirely his own fault.
21. Hather alleged in its defence that Mr Walker's accident was exclusively his fault on the grounds of his own negligence. Like the various Counsel who had advised Mr Walker I felt that even if Mr Walker succeeded in establishing liability on the part of Hather, it was likely that there would be a

significant reduction in his damages on the grounds of his contributory negligence. In my instructions to Mr Witcomb I summarised the views of previous Counsel instructed in the case as follows:

"...the consensus of opinion is that the Plaintiff will probably establish primary liability but with a finding that he was contributorily negligent by 50/60%".

I believe that this reflected my views at the time.

Statement of Truth		
I believe that the facts stated in this statement are true		
Signed		Position or office held
		Partner, Fentons.
		Date
		21st September 2005.

BW Ref: (ROG)-SIF001-0370742 – Roger Gilbert

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Defendants

**WITNESS STATEMENT
OF MARK S THOMSON**

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Witness statement of Mr Mark S Thomson/06/09/05