

**IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BOLTON COUNTY COURT
(HIS HONOUR JUDGE WARNOCK)**

Royal Courts of Justice
Strand
London, WC2

25 January 2007

Before:

**LORD JUSTICE BUXTON
LADY JUSTICE SMITH**

KIRKMAN

CLAIMANT/APPELLANT

- v -

**EURO EXIDE CORPORATION
(CMP BATTERIES LTD)**

DEFENDANT/RESPONDENT

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**MR C LIMB (instructed by Messrs Fieldings Porter) appeared on behalf of the Appellant
MR D NOLAN QC (instructed by Messrs Langleys) appeared on behalf of the Respondent**

HTML VERSION OF JUDGMENT

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1. LADY JUSTICE SMITH: This is an appeal brought with the permission of Tuckey LJ against a Case Management Order made by HHJ Warnock at the Bolton County Court. The appeal concerns the distinction between evidence of fact and expert opinion in the context of a personal injury action.

2. The claimant seeks damages for personal injury. In September 2001 he had an accident at work and he fell into a hole about 2 feet deep. His foot became stuck and he suffered a wrenching injury to the right knee. He had some previous history of a problem with his right knee. At the age of 17 he had a motorcycle accident. In 1994 his knee was investigated and a diagnosis was made of damage to the anterior cruciate ligament. The claimant was referred to Mr Anthony Banks, a consultant orthopaedic surgeon at what was then the Bolton Royal Infirmary. There is some confusion on the papers before us as to what treatment he then received. In any event, his knee problems subsided, but they recurred in 2001. The claimant's GP referred him back to Mr Banks and an appointment was made for 9 October 2001. However, on 25 September 2001 the claimant had his accident at work. He attended the hospital. The initial diagnosis was of a soft-tissue injury to the right knee. He was treated and told to keep his appointment, already made, with Mr Banks as a follow-up. On 9 October the claimant saw Mr Banks. An MRI scan was ordered; that was available in late November. It appears that thereafter Mr Banks advised an operation to reconstruct the anterior cruciate ligament. The operation took place on 8 May 2002. Most unfortunately the claimant developed MRSA, a virulent infection. He had extensive treatment, but eventually in 2003, he had to submit to an above-knee amputation of the right leg.
3. The claimant commenced proceedings in respect of the accident at work. Liability was not an issue, but an important issue arose as to whether or not the need for the operation which resulted in the development of MRSA was necessitated by the accident or whether the claimant would have undergone the operation even if he had not had the accident at work. This issue plainly makes a great deal of difference to the damages to be recovered.
4. The claimant initially obtained medical reports from an orthopaedic surgeon named Mr David Markham, but he has not sought to rely upon those. He also obtained medical reports from Mr Banks. The gist of these was that, had it not been for the accident at work, the claimant would not have had surgery in May 2002, although it was Mr Banks' view that he might have needed surgery in due course, say in about three to five years' time. Mr Banks also expressed the view that MRSA was an extremely rare complication in this kind of knee surgery. The accident at work had led to the surgery taking place when it did; that had led to the infection, which led to the amputation.
5. The claimant's solicitor also obtained an expert report from another orthopaedic surgeon, Mr Peter Kay. He referred quite extensively to Mr Banks' report and concluded that, absent the accident at work, it was likely that the claimant would have soldiered on without an operation for some further time and might never have needed one at all. As MRSA is a very rare complication, its occurrence would have been unlikely if the operation had taken place at any other time. The defendant's medical expert, Mr Parkinson, was of the view that the claimant's knee had deteriorated to such an extent before September 2001 that, even absent the accident at work, he would probably have had an operation in March 2002 with the same consequences as had in fact occurred.
6. Since meeting to discuss the case, Mr Kay and Mr Parkinson are now much closer in their opinions. Their joint review is that the claimant's underlying condition made surgery almost inevitable, but the accident brought forward the need for it to take place by about three months.
7. In May 2005, Deputy District Judge Jones ordered that the issue of causation be heard separately. Each party was given permission to rely on the evidence of one medical expert. It appears that the claimant's solicitor decided to rely on Mr Kay, and it was proposed to call Mr Banks as a witness of facts. Accordingly a witness statement was prepared, dated 17 September 2004. At a case management conference on 19 September 2004 the claimant sought permission to pursue this course, but District Judge Shaw would not allow it. She considered that the witness statement contained expert evidence. She made an order which included the following at paragraph 4:

"The Claimant is refused permission to rely upon the statement of Anthony Banks dated 17 September 2004 as

it comprises expert evidence. For the avoidance of doubt the Court does not exclude Mr Banks as a possible witness of fact. Any amended written expert report arising herefrom is to be served by 1 November 2005."

8. Thereafter another statement was drafted for Mr Banks, dated 7 October 2005. However, the defendant was still not prepared to accept that it contained only evidence of fact and the matter went back to District Judge Shaw. The defendant took exception to paragraph 5 of the new statement, which said:

"I have been asked whether I would have advised Mr Kirkman to undergo surgery following his referral to me in 2001 in the absence of the September 2001 accident. I would not have advised the surgery which Mr Kirkman in fact underwent in the absence of the accident in September 2001."

He added at paragraph 6:

"I have been asked by the solicitors acting for Mr Kirkman not to give reasoning for the advice I would have given in the absence of the accident of September 2001 in order to avoid giving opinion evidence. I am fully willing to give my reasons if asked."

9. District Judge Shaw directed that Mr Banks should attend court to give evidence, and that the question of whether his proposed evidence contained expert opinion should be left to the trial judge.
10. The defendant was still not satisfied and appealed to a circuit judge. The defendant asserted that the parties had agreed that, in accordance with the requirements for equality of arms, each party should be permitted to call only one expert witness. It contended that the claimant's attempt to rely on Mr Banks as well as Mr Kay breached the order made by District Judge Shaw in September 2005 because paragraph 5 of the new statement comprised expert evidence. The defendant also contended that the District Judge's order of 10 January 2006, in which she left the decision to the trial judge, had been wrong. It was submitted that the question in issue was one of admissibility of evidence and must be determined before the hearing of the action.
11. The claimant in opposition contended, first, that there had not been any specific agreement between the parties that they should have the same number of experts; second, that Mr Banks' new statement contained only evidence of fact and did not breach the case management order. In any event, the District Judge's recent order leaving the matter to the trial judge was sensible and should not be disturbed.
12. HHJ Warnock allowed the appeal and directed that the claimant could not rely on Mr Banks' statement; he held that it was expert evidence. The claimant sought permission to appeal to this court. Gage LJ refused, but on a renewed application Tuckey LJ thought that the point about whether the contentious part of Mr Banks' evidence was fact or expert evidence was arguable and sufficiently important to warrant consideration by this court. He gave permission on that point only.
13. Before us, the same arguments have been repeated as were put before HHJ Warnock. They have been set out in lengthy skeleton arguments, elaborated with references to authority. Today Mr Nolan for the appellant submits that, because paragraph 5 contains a statement relating to a hypothetical situation and is the evidence of a person with expertise, a professional person, it is perforce expert evidence. He submits that the attempt to rely on

Mr Banks' evidence is a means of subverting the decision made at an earlier stage that there should be only one expert witness on each side.

14. It seems to me that the point this court has to decide is a short one. Before I address it I wish to say this. The problem that has arisen in this case seems to me to stem from the rigid application of the aspirational objective within the Civil Procedure Rules that the parties to litigation should operate under equality of arms. This objective has been interpreted to mean that it is desirable for each party to have permission to deploy similar resources. Each party will, in general, be limited to instructing the same number of experts; the number will depend upon what is proportionate, bearing in mind the importance and complexities of the issues in the case. However, the desirability for equality of arms was not intended to result in an absolute rule that, in every case, the parties must be limited to calling the same number of experts. There may be circumstances in which that general rule should give way for the sake of achieving the overriding objective of dealing with the case justly. The case of [ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust \[2003\] EWCA CIV 1284](#), to which we referred in the skeleton arguments, was an example of such a case, although the circumstances there were quite different from the present.
15. Here the claimant initially instructed Mr Banks as an expert. His early reports consisted of a mixture of factual matters of which he, as the treating doctor, was personally cognisant, and also of his expert opinion. But, for reasons of their own, the claimant's team considered that they did not wish to rely upon him as their expert. They still wanted, and felt that they needed, to call him; as the treating doctor, his evidence would be central to the judge's finding. It seems to me that in the circumstances of this case there were good arguments in favour of relaxing the usual rule that each side should only have permission to call the same number of experts. However, that course was not followed. Instead the claimant's team took the view that the important aspects of Mr Banks' evidence were factual and set about the rather artificial process of separating the factual aspects of his report from the expert ones.
16. The kernel of Mr Banks' proposed evidence, as re-drafted, is the statement that if the claimant had presented himself in October 2001 and had not recently had an accident he, Mr Banks, would not have advised the claimant to undergo a ligament reconstruction. In my view, that is clearly a statement of fact. He is there saying what he would have done in a set of circumstances which did not in fact happen. True, in saying that, Mr Banks is relying upon his knowledge and his experience as a professional person. But he is not expressing an expert opinion.
17. I can see that the distinction may not be immediately obvious. I suggest that the distinction can be seen by applying the following tests. One is to consider the difference between the positions between Mr Kay and Mr Parkinson on the one hand and Mr Banks on the other hand in the present case. Mr Kay and Mr Parkinson have no personal knowledge of the facts; they bring their expertise to bear upon their understanding of the claimant's chronic condition, absent the accident. They express a view as to what most competent surgeons would advise; or, put another way, what it is probable that an unidentified surgeon on whom the claimant attended would have advised. In giving their opinions they are advising as to their understanding of received medical wisdom applicable to the circumstances of this case.
18. Mr Banks' position is quite different. He is the doctor who would in fact have advised the claimant. He is saying what he would have advised the claimant to do. He is not saying that that advice would have been correct, or that most competent surgeons would have given that advice, or that an unidentified surgeon to whom the claimant presented would have given similar advice. He is speaking only for himself. He might, if asked in cross-examination, be able to justify his advice as good and correct. In doing so he would almost certainly have to express expert opinion. On the other hand, it might be possible for the defendant to attack his advice as bad or incorrect, but the correctness of his advice or whether it accorded with received medical wisdom is not in issue; the only issue is what he would have advised. His evidence as to that might be challenged, at least theoretically, on the basis that it is not true, or more realistically on the basis that it is not reliable, but if it was sought to challenge his evidence on the basis that no other orthopaedic surgeon would have advised as he had done,

his answer could quite properly be: "Well, that may be so, but right or wrong that's what I would in fact have advised".

19. The other way in which one can be satisfied that this is evidence of fact is to compare it, as Mr Limb invited us to do, with the evidence of the employer, who states that if his employee (the claimant) had not been injured, he (the employer) would have promoted him to a more senior position within, say, two years. No-one would suggest that such evidence is inadmissible; no-one would suggest that it is expert evidence, although it is founded upon the witness's knowledge, experience and expertise. The usefulness of the employer's statement is that he has sufficient knowledge of the claimant's qualities and the needs of his own business to be able to give a credible statement as to what would have happened if the claimant had not been injured. But although the evidence depends upon a degree of expertise, it is not expert evidence. I can see no essential difference between the evidence of the employer and the evidence of Mr Banks.
20. In my judgment, it is clear that the evidence which it is proposed that Mr Banks should give is evidence of fact and for that reason the appeal should be allowed.
21. However, I would add that it seems to me unfortunate that District Judge Shaw's second order was ever challenged. She realised that Mr Banks' evidence was important in the case, and, being apparently unsure as to whether it was strictly limited to factual matters, she left it to the judge to decide upon the limit of his evidence. In my view it is a pity that matters were not left as she directed; a good deal of time and money has been spent on this point. The appellant has now established the only point that was before this court: that Mr Banks' statement as redrafted comprises evidence of fact. However, I can see that there is every possibility that, when Mr Banks gives that evidence, he might be cross-examined in such a way as to draw him into the expression of expert opinion. It must be a matter for the trial judge's discretion, in my view, whether to permit such a development. If the judge thinks that it will be useful as an aid to reaching a just decision, no doubt he or she will allow it.
22. Accordingly, I would allow this appeal and direct that Mr Banks be permitted to give evidence in accordance with his statement dated 7 October 2005, and leave the extent of any further development of that evidence to the discretion of the trial judge.
23. LORD JUSTICE BUXTON: I agree with the order that my Lady, Lady Justice Smith, proposes for the reasons that she gives, and also with the directions that she gives as to the future handling of this matter.

Order: Appeal allowed.