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Defender

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The details matter: Ontario Court of Appeal provides fresh analysis on expert evidence admissibility



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Pederson v. Forget, [2026 ONCA 118](#) offers a recent commentary on the issue of admissibility of expert evidence. The decision shows that it is not enough for an expert themselves to be qualified by the court; each piece of their proposed evidence will be vetted and must pass scrutiny. The court will not allow a piece of unreliable evidence to be admitted, even if it is only one aspect of otherwise accepted evidence.

The Trial Decision

The case arises from an incident in which the Appellant, Ms. Pederson, slipped when descending hardwood stairs in the home of the Respondents, the Forget's, resulting in injury. The jury trial centered around the issue of liability - were the Forget's negligent in allowing their stairs to be in an allegedly unsafe, slippery state? It was the role of the experts to offer their opinion on the slip resistance of these stairs after the application of different cleaning products. Ms. Pederson's expert, Mr. Jenish, conducted four tests and wrote four corresponding reports. Though the trial judge qualified him as an expert, his first test was deemed inadmissible. Ms. Pederson appealed on the basis this exclusion was an error.

The Appeal

There are two steps that are taken to assess the admissibility of expert evidence. Step one requires that threshold requirements be met, specifically: the proposed evidence is relevant and necessary, no exclusionary rule applies, and the expert is properly qualified. The second step is then for the judge to act as a gatekeeper of the tentatively admissible evidence and ensure that there are no risks that would outweigh its benefits to the trial process.

The evidence of Mr. Jenish satisfied the first step with ease. The evidence was relevant and necessary to understanding the mechanics of the incident. However, when applying the second

step, the trial judge found that the first test Mr. Jenish conducted warranted exclusion. The testing conditions and variables of the first test were too different from those that existed at the time of the incident, specifically, the type of flooring, timing of the cleaning, and clothing worn by the Plaintiff. This in turn hindered the probative value of the test.

The Court of Appeal emphasized the risks associated with expert evidence. Finders of fact and juries in particular may be more prone to accepting the opinion of experts who have an impressive curriculum vitae and speak from a position of authority. There is a risk that a jury faced with a well-presented firm opinion may abdicate its fact-finding role on the understandable assumption that a person labelled as an expert by the trial judge knows more about his or her area of expertise than the individual members of the jury would.

As was the case here, the risk of admitting the unreliable test and having the jury nonetheless accept its findings outweighed the benefit of the evidence assisting the jury in understanding the slip resistance of various products. It is the job of the trial judge to keep a jury's task as straightforward as possible, and it was therefore well within their role as the gatekeeper to exclude this evidence.

The Court of Appeal further noted an appeal is not a forum to ask that evidence simply be weighed differently. Even if it could be said that the evidence was improperly excluded, the question would then be whether its admission would have made a difference to the outcome. Barring an affirmative answer to this question, there will be no miscarriage of justice as a result of the exclusion of expert evidence. In this case, the barring of Mr. Jenish's first test did not prevent the Defendants from advancing the theory the stairs were reasonably safe for use, as there was other testing available.

Takeaways

Near perfect, if not exact testing conditions are required to admit expert evidence. Even the most minor discrepancies between characteristics of the accident/incident and those employed during testing will have significant impacts on admissibility. As a result, it may be appropriate to have multiple reports, in the event one is considered inadmissible. Appellate judges will show deference to the decision of the trial judge on admissibility findings, thus further emphasizing the importance of litigants ensuring proper testing is done early.

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