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If Your Expert Doesn't Know the Product he is Testifying on, You're Gonna Have a Bad Time


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Most will remember the case McDougall v. Black & Decker Canada Inc. as being the leading Alberta case on the issue of spoliation. A fire occurred which burned down the Plaintiffs' house. The Fire Department who initially investigated the fire determined that there were two possible causes of the fire – either improper disposal of smoking materials or a malfunctioning cordless electric drill manufactured and distributed by the Defendant, Black & Decker.

By the time this litigation was commenced, the house had been demolished and reconstruction had begun. In addition, parts of the suspect drill, which had been retained by the Plaintiffs' expert, had gone missing. Black & Decker applied to have the action dismissed on the basis of spoliation and argued it was unable to defend, as it was not given the opportunity to inspect the fire scene nor the drill to determine the cause of the fire. At the Court of Appeal level, a ruling was made that whether or not spoliation had occurred was best left up to the trial judge to determine. The Court of Appeal reversed the Chamber's decision to dismiss the action and provided the Defendant an opportunity to question the Plaintiffs' expert (Earl Moker), obtain all of his photos and require the production of his report.

The case then proceeded to trial. In Justice Sulyma's recent decision, she discussed each witness' evidence, paying particular attention to the expert witnesses.

The experts proffered by the Plaintiffs, gave evidence that the probable cause of the fire was the overcharging failure of the battery packs and charger. However, this finding was based on a significant resulting bulge in the battery packs.

Upon cross-examination of the Plaintiffs experts, as well as evidence provided by the Defendant's expert witnesses, it became clear that the original premise of the investigators was a faulty one, in that it was determined as a fact that the bulging of the battery packs could not have indicated overcharging of the pack prior to being inserted into the drill. The main witness for the Plaintiffs, Mr. Maskell, made serious admissions in his cross-examination that rebutted his initial conclusions on the fire. These included an

admission by Mr. Maskell that he was not aware of the systems contained in the product that were specifically designed to overcome the risks of overcharging. Therefore, he had to admit that the pack could not have been charging in the drill and could not have been overcharged before insertion. Justice Sulyma took this admission as proof that the drill therefore was not energized and could not have been the source of the fire.

Even though the Plaintiffs' lay witnesses testified that the battery pack was in the charger at the time of the fire, Justice Sulyma found that the design of the battery pack and charger described above was not considered by the Plaintiffs' investigators. This finding lead to her conclusion that there was not sufficient evidence to show the charger was energized and caused the fire.

Justice Sulyma concluded:

> "The plaintiff in a products liability case has the burden of proof in proving the two issues at hand. It is difficult to reach that standard if there are competing valid expert opinions. That is not the case here. The Plaintiffs' experts were not just playing catch up; the effect of cross examination and the evidence of the competing experts effectively knocked out a tenet of their case. At the very least, the effect of the whole of the evidence is to put the Plaintiffs in the position of a 50-50 proof, which is proof that fails on a balance of probabilities. However, in this case, I am of the view that it is not a situation of 50-50, but rather, the effect of the defence case as a whole negates the Plaintiffs' theories of the source and cause of the fire and, accordingly, the Plaintiffs have not satisfied the burden of proof, either regarding defect or cause. The action is dismissed."

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