

# Drawing the Line Between Lay and Expert Opinion Evidence

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Article abstract

This article examines the vanishingly thin line between lay and expert opinion evidence in Canada. In Parts I and II, we set the stakes — the dangers involved in expanding the scope of admissible opinion evidence. Canadian trial courts have been warned by peak scientific bodies and public commissions like the Goudge Inquiry about the dangers of attorning to persuasive expert witnesses. Thus, expert evidence faces new hurdles, both substantively and procedurally. This scrutiny has inspired parties to seek refuge in the more flexible and discretionary lay opinion evidence rules. But newfound vigilance to expert opinion is invalidated if the same evidence can be admitted as lay opinion. Parts III and IV illustrate these problems as we examine three cases in which authoritative lay witnesses opined on topics requiring specialized training and expertise. Three hazards are readily apparent from this analysis: (1) the lay witnesses opined on matters in which there are established methodologies to control for unconscious bias, but did not follow these methodologies; (2) the lay witnesses— police officers—though authority figures, were not qualified experts in the area they were opining on, and; (3) the lay opinion jurisprudence has failed to meaningfully distinguish between lay and expert opinion. In Part V, we seek to fill this void by proposing a new analytic approach—Lay Opinion 2.0—which draws on both the practical and epistemological distinction between lay and expert opinion to provide an efficient and fair test for the admission of lay opinion evidence.

## DRAWING THE LINE BETWEEN LAY AND EXPERT OPINION EVIDENCE

*Jason M. Chin, Jan Tomiska, and Chen Li\**

This article examines the vanishingly thin line between lay and expert opinion evidence in Canada. In Parts I and II, we set the stakes — the dangers involved in expanding the scope of admissible opinion evidence. Canadian trial courts have been warned by peak scientific bodies and public commissions like the Goudge Inquiry about the dangers of attorning to persuasive expert witnesses. Thus, expert evidence faces new hurdles, both substantively and procedurally. This scrutiny has inspired parties to seek refuge in the more flexible and discretionary lay opinion evidence rules. But newfound vigilance to expert opinion is invalidated if the same evidence can be admitted as lay opinion. Parts III and IV illustrate these problems as we examine three cases in which authoritative lay witnesses opined on topics requiring specialized training and expertise. Three hazards are readily apparent from this analysis: (1) the lay witnesses opined on matters in which there are established methodologies to control for unconscious bias, but did not follow these methodologies; (2) the lay witnesses— police officers— though authority figures, were not qualified experts in the area they were opining on, and; (3) the lay opinion jurisprudence has failed to meaningfully distinguish between lay and expert opinion. In Part V, we seek to fill this void by proposing a new analytic approach— Lay Opinion 2.0—which draws on both the practical and epistemological distinction between lay and expert opinion to provide an efficient and fair test for the admission of lay opinion evidence.

Cet article examine la différence de plus en plus mince entre la preuve d'un témoin ordinaire et la preuve d'un témoin expert au Canada. Dans les parties I et II, nous présentons les enjeux au centre de cet article. Les tribunaux canadiens de première instance ont été avertis par des organismes scientifiques de pointe et par des commissions publiques comme la commission Goudge des dangers d'acquiescer à des témoignages d'experts convaincant. Ainsi, la preuve d'expert est confrontée à de nouveaux obstacles, tant sur le plan matériel que procédural. Cette attention particulière a encouragé les parties à se tourner vers les règles qui s'appliquent aux témoins ordinaires, qui sont plus flexibles et discrétionnaires. Pourtant, la vigilance récemment découverte pour les opinions d'experts se voit invalidée si la même preuve peut être admise en tant que preuve ordinaire. Les parties III et IV illustrent ces problèmes, examinant trois cas dans lesquels des témoins ordinaires faisant autorité dans leur domaine ont donné un avis sur des sujets exigeant une formation et une expertise spécialisées. Trois risques ressortent spontanément de cette analyse: (1) les témoins ordinaires ont donné leur opinion sur des questions pour lesquelles il existe des méthodologies de contrôle des biais inconscients, mais ils n'ont pas suivi ces méthodologies; (2) les témoins ordinaires — des policiers — bien que représentant des figures d'autorité, n'ont pas été qualifiés d'experts dans le domaine dans lequel ils ont donné leur avis; et (3) la jurisprudence portant sur la preuve ordinaire n'a pas distingué de manière claire l'opinion des experts et des témoins ordinaires. Dans la partie V, nous cherchons à combler ce vide en proposant une nouvelle approche analytique — la preuve testimoniale ordinaire 2.0 — qui s'appuie sur la distinction à la fois pratique et épistémologique entre le témoignage du témoin ordinaire et celui de l'expert, afin de fournir un critère efficace et équitable pour l'admission de la preuve ordinaire.

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## Introduction

Evidence in the form of opinion, any opinion, is presumptively inadmissible. Expert opinion evidence is subject to increasingly stringent substantive and procedural requirements prior to its admission into court. This heightened gatekeeping of expert opinion has motivated parties to sidestep those requirements and admit evidence as lay opinion, which is subject to a more flexible and discretionary test. As a result, it has never been more important for courts to draw a coherent distinction between lay and expert opinion. This has not been the case with lay witnesses—often police officers—now opining on traditionally expert topics in a manner exceeding their own personal observations and qualifications. Worse still, as police officers, they are cloaked in the same raiment of authority that makes expert evidence so dangerous. We believe this is a serious problem, and one that has largely flown under the radar in Canada.<sup>1</sup>

Trial judges gatekeep expert evidence because of the risk that the trier of fact will uncritically accept an opinion “cloaked with an aura of expertise.”<sup>2</sup> This gatekeeping function has the further benefit of avoiding lengthy battles between experts when that expertise is not relevant, necessary, reliable, or qualified to begin with. This is crucially important to the criminally accused parties who are frequently underfunded in comparison to the Crown.<sup>3</sup>

The exception for lay opinion did not evolve to undermine these expert rules, but rather as a concession to practicality—a recognition that some experiences, like eyewitness identifications and judgments of speed, are difficult to enunciate without resorting to opinion. Evidence now admitted as lay opinion regularly goes far beyond these humble beginnings, encom-

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<sup>1</sup> For recent U.S. consideration of the issue, see Edward J Imwinkelried, “Distinguishing Lay From Expert Opinion: The Need to Focus on the Epistemological Differences Between the Reasoning Process Used by Lay and Expert Witnesses” (2015) 68:1 SMU L Rev 73 [Imwinkelried]; Susan C Scieszinski, “Note, Using Nonscientific Expert Testimony: A Play-by-Play Toolkit” (2013) 61:4 Drake L Rev 1161, and Anna Lvovsky, “The Judicial Presumption of Police Expertise” (2017) 130:8 Harv L Rev 1995 [Lvovsky] (for a consideration of the issue in the context of police testimony). In Australia, see Gary Edmond & Mehera San Roque, “Quasi-Justice: Ad Hoc Expertise and Identification Evidence” (2009) 33:1 Crim LJ 8 [San Roque].

<sup>2</sup> *R v Sekhon*, 2014 SCC 15 at para 75, [2014] 1 SCR 272 [Sekhon]. See also *R v Mohan*, [1994] 2 SCR 9 at 21, 114 DLR (4th) 419 [Mohan].

<sup>3</sup> See David L Faigman et al, *Modern Scientific Evidence: The Law and Science of Expert Testimony*, vol 1, 2015–2016 ed (Eagan, MN: Thomson Reuters, 2016) at para § 1:10 [Faigman et al]; Gary Edmond & Kent Roach, “A Contextual Approach to the Admissibility of the State’s Forensic Science and Medical Evidence” (2011) 61:3 UTLJ 343 at 362–63 [Edmond, “Contextual Approach”].

passing conclusory opinions about police investigations, forensic gait analysis, and complex accounting opinions. This approach can result in manifestly unjust outcomes. For instance, under the lay rule, an investigating police officer may give lay opinion that a complex series of footsteps he viewed in the snow indicated there was a chase, and that the accused cut off the complainant.<sup>4</sup> The accused, wishing to rebut that evidence, cannot in turn call a lay witness because the lay opinion rule, at least notionally, requires personal observation of the facts. Thus, the accused has little choice but to call an expert, who is likely expensive and may not pass the more stringent test for expert opinion.

In what follows, we will first review the expert and lay opinion rules to establish the stakes at the center of this article: why the distinction between lay and expert opinion evidence is so important. The expert opinion rules, in response to several notorious miscarriages of justice, have become in substance and in procedure increasingly demanding over the past two decades. It is therefore important that courts correctly distinguish between lay and expert opinions, lest parties undermine expert opinion doctrine by admitting their evidence as lay opinion. We then highlight three decisions emblematic of the permissive approach to lay testimony.

We go on to detail three hazards that emerge from our review of the case law. First, lay opinion evidence is unmoored from its original conception as a succinct summary of *qualia*. Rather, lay witnesses now opine on areas where methodologies exist to control for unconscious biases. For example, humans are excellent pattern seekers and regularly identify illusory patterns in large sets of data. This is especially true when people have some preconceived notion or bias about what they should find, as investigating police officers often do. Yet, because the lay opinion rule is more permissive, lay witnesses need not follow methodologies recently prescribed by peak scientific bodies or generally meet the more stringent reliability requirements imposed on expert opinions.<sup>5</sup>

The second hazard amplifies the first: the lay witnesses providing *ipse dixit* are, by all appearances, not lay people. Rather, they are often police officers with some superficial investigative experience in the areas on which they are opining—for instance, an expert in police dog behaviour opining on the significance of a pattern of shoe-prints in the snow. These

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<sup>4</sup> See *R v Lee*, 2010 ABCA 1 at para 26, [2010] 474 AR 203 [*Lee*].

<sup>5</sup> See United States, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Document N° 228091, received August 2009 (Washington, DC: National Academies Press, 2009) [NAS Report]; United States, President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Court: Ensuring Scientific Validity of Feature-Comparison Methods*, Report to the President, September 2016 (Washington DC: Executive Office of the President, 2016) [PCAST Report].

quasi-experts can be expected to hold sway over the trier of fact, but they are not required to prove that they are properly qualified or that their methods are reliable.

Third, courts have failed to adopt a coherent jurisprudential approach to lay opinion across Canada. The principles from the leading Supreme Court case, *R. v. Graat*, are inconsistently applied and sometimes ignored altogether.<sup>6</sup> Several decisions, even when given a charitable reading, are irreconcilable. The courts' inconsistent approach creates confusion and injustice.

Taking these three hazards into account, we offer an improved approach to lay opinion evidence. As a guiding principle, we suggest a return to *Graat*, which remains the leading Supreme Court case on lay opinion which, as we demonstrate, has been widely disregarded. Our proposed approach provides a more structured analysis based on *Graat's* principles, which we believe will assist trial judges in applying the proper scrutiny to lay opinion.

## I. The Rising Bar for Expert Opinion

In this part, we will review the preconditions for admissibility of expert evidence: what the party tendering the expert must prove before the expert evidence is admitted. We will also discuss the current trend in expert evidence law, whereby the doctrine has grown increasingly restrictive.

Expert evidence is subject to a relatively onerous test prior to its admission. The party seeking to admit the evidence must establish its admissibility by satisfying four requirements enunciated in *R. v. Mohan*:

1. Logical relevance;
2. Necessity in assisting the trier of fact;
3. Absence of an exclusionary rule;
4. A properly qualified expert.<sup>7</sup>

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<sup>6</sup> [1982] 2 SCR 819 at 835, 144 DLR (3d) 267 [*Graat*]. Regarding disagreement over *Graat's* meaning, see *Lee, supra* note 4 at para 31 (“Whatever rule there may have been against a lay witness giving opinion evidence, it has not survived the decision in *Graat*”); *R v Colpitts*, 2016 NSSC 271 at para 22, 370 NSR (2d) 148 [*Colpitts*]; *R v Ibrahim*, 2016 ONSC 7665 at para 176, 129 WCB (2d) 406 [*Ibrahim*] (“However, although the court in *Graat* eased considerably the rule against lay opinions, it did not discard it entirely”).

<sup>7</sup> *Mohan, supra* note 2 at 20–26.

Evidence meeting those requirements must then pass another more discretionary test, consisting of balancing the evidence's benefits to the trial process against its potential risks, including consumption of time and likelihood to create confusion.<sup>8</sup>

The *Mohan* test has grown stricter over the past several years. Summarizing this body of law, the Supreme Court stated in 2015 that: “[t]he unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge’s gate-keeping role.”<sup>9</sup> More specifically, this trend has seen heightened scrutiny of experts’ reliability, independence and impartiality, and an insistence on necessity over mere helpfulness.

Courts are increasingly attuned to the negative impact of unreliable expert opinion on the legal system. This issue was viscerally documented in the miscarriages of justices found in the *Inquiry into Pediatric Forensic Pathology in Ontario* and *The Commission on Proceedings Involving Guy Paul Morin*.<sup>10</sup> Both public commissions highlighted the detrimental impact of unreliable science on the criminal justice system. More generally, empirical research finds that invalid forensic science (admitted as expert evidence) is present in approximately 60% of wrongful convictions that included forensic scientific evidence.<sup>11</sup>

Underlying the concern over reliability is the risk that the trier of fact will uncritically adopt the expert’s ready-made inferences.<sup>12</sup> For example, Justice Goudge warned that experts must support their opinions with

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<sup>8</sup> *Ibid* at p 21; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 23–24, [2015] 2 SCR 182 [*White Burgess*].

<sup>9</sup> *Ibid* at para 20; *R v Sriskanda*, 2016 ONCJ 667 at para 19, 134 WCB (2d) 578 [*Sriskanda*].

<sup>10</sup> See Ontario, *Inquiry into Pediatric Forensic Pathology in Ontario*, by The Honourable Stephen T Goudge (Toronto: Ontario Ministry of the Attorney General, 2008) [*Goudge Inquiry*]; Ontario, *The Commission on Proceedings Involving Guy Paul Morin*, vol 1 (Toronto: Ontario Ministry of the Attorney General, 1998) [Kaufman Report]. See also Bruce A MacFarlane, QC, “Wrongful Convictions: Determining Culpability when the Sands Keep Shifting” (2014) 47:2 UBC L Rev 597 at 607–09.

<sup>11</sup> See Brandon L Garrett & Peter J Neufeld, “Invalid Forensic Science Testimony and Wrongful Convictions” (2009) 95:1 Va L Rev 1 at 9. See generally Barack Obama, “The President’s Role in Advancing Criminal Justice Reform” (2017) 130:3 Harv L Rev 811 at 860–62.

<sup>12</sup> See Lisa Dufraimont, “New Challenges for the Gatekeeper: The Evolving Law on Expert Evidence in Criminal Cases” (2012) 58 Crim LQ 531 at 550; Jason M Chin & Scott Dallen, “*R. v. Awer* and the Dangers of Science in Sheep’s Clothing” (2016) 63:4 Crim LQ 527; *White Burgess*, *supra* note 8 at paras 16–18; *R v Trochym*, 2007 SCC 6 at para 34, [2007] 1 SCR 239 [*Trochym*]; *R v J-LJ*, 2000 SCC 51 at para 25, [2000] 2 SCR 600 [*JLJ*].

more than just their credentials: “Anecdotal evidence and authoritative claims based largely on personal experience characterized the experience-based approach, making the opinions reached largely unquantifiable and shielding them from independent verification.”<sup>13</sup>

In keeping with the warnings in the Kaufman and Goudge Reports, reliability is now a requirement for admissibility when the subject matter of the expert evidence is novel or contested science. In such cases, the party tendering the evidence must demonstrate its reliability according to the four factors found in the leading U.S. case, *Daubert v. Merrell Dow Pharmaceuticals Inc.*<sup>14</sup> These four factors are:

1. Whether and how the evidence has been tested;
2. The error rate associated with the evidence;
3. Whether the evidence has been peer-reviewed and published;
4. Whether the evidence is generally accepted in the field from which it comes.<sup>15</sup>

Although commentators have bemoaned judges’ apparent reluctance to engage in a full *Mohan-Daubert* analysis,<sup>16</sup> there are several examples of courts excluding scientific evidence for want of a reliable foundation.<sup>17</sup>

Even if the evidence’s reliability is beyond reproach, courts increasingly exclude it as being unnecessary.<sup>18</sup> For instance, Canadian courts are

<sup>13</sup> *Goudge Inquiry*, vol 2, *supra* note 10 at 77.

<sup>14</sup> 509 US 579 (1993), 113 S Ct 2786 [*Daubert*]. The Supreme Court applied *Daubert* in the case of novel science in *JLJ*, *supra* note 12 at paras 3, 50–55 and in the case of contested science in *Trochym*, *supra* note 122 at paras 36–54. See also *White Burgess*, *supra* note 8 at para 23 for the high court’s most recent description of the legal test for admitting expert evidence.

<sup>15</sup> *Daubert*, *supra* note 14 at 593–95.

<sup>16</sup> See Edmond, “Contextual Approach”, *supra* note 3 at 391; Chin & Dallen, *supra* note 12 at 529; Emma Cunliffe & Gary Edmond, “Gaitkeeping in Canada: Mis-steps in Assessing the Reliability of Expert Testimony” (2014) 92:2 Can Bar Rev 327 at 348–49. In the US, see Jennifer L Groscup et al, “The Effects of *Daubert* on the Admissibility of Expert Testimony in State and Federal Criminal Cases” (2002) 8:4 Psychology, Public Policy & L 339 at 341.

<sup>17</sup> See e.g. *JLJ*, *supra* note 12; *Trochym*, *supra* note 12; *Bialkowski v Banfield*, 2011 BCSC 1045, 24 BCLR (5th) 171 [*Bialkowski*]; *R v Klymchuk* (2005), 203 CCC (3d) 341, 205 OAC 57 (ONCA) [*Klymchuk*]. For a summary see *Goudge Inquiry*, vol 3, *supra* note 10 at 480–87.

<sup>18</sup> See Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 4th ed (Markham, ON: LexisNexis, 2014) at 795–99 [Lederman]; Emma Cunliffe, “Without Fear or Favour? Trends and Possibilities in the Canadian Approach to Expert Human Behavioural Evidence” (2006) 10:4 Intl J Evidence & Proof 280 at 299–301; *R v D(D)*, 2000 SCC 43 at paras 30, 51, [2000] 2 RCS 275 [*DD*]. Disabusing myths



loathe to admit expert evidence about the limitations of eyewitness memory, excluding such evidence on the grounds that it is unnecessary common sense information.<sup>19</sup> This issue arises when eyewitnesses give evidence—admitted as lay opinion evidence—identifying the accused at a crime scene.<sup>20</sup> To discredit the identification, the defence often attempts to call an expert to explain flaws in the identification, such as use of a biased or misleading photo line-up. Courts consistently find that such expert evidence is common knowledge, and thus inadmissible.<sup>21</sup>

Courts are also increasingly willing—but still very reluctant—to exclude expert evidence for bias when the expert appears to be acting as an advocate, rather than someone neutrally assisting the court. This position contrasts with a more liberal standard in which questions of partiality go to weight, rather than admissibility.<sup>22</sup> For example, in a very thoughtful decision of the Nova Scotia Provincial Court, Justice Ross excluded a police officer for bias.<sup>23</sup> This officer, tendered by the Crown as an expert on the practices of drug dealers, had been so intimately involved in the investigation, that he could not provide an objective opinion.<sup>24</sup>

In addition to these changes strengthening the substantive law of expert evidence, parties seeking to admit expert evidence also face additional procedural requirements. For example, parties seeking to tender expert evidence are typically held to a strict procedural timeline for serving their expert's report, usually far in advance of the trial.<sup>25</sup> Further, Ontario and

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and stereotypes remains a ground for admitting expert evidence, see e.g. Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after *R. v. Lavallee*" (1997) 47:1 UTLJ 1 at 5.

<sup>19</sup> See *R v McIntosh* (1997), 117 CCC (3d) 385, 35 OR (3d) 97 (ONCA), leave to appeal to SCC refused [1998] 1 SCR xii [*McIntosh*]. See also Jill Copeland, "Helping Jurors Recognize the Frailties of Eyewitness Identification Evidence" (2002) 46:2 Crim LQ 188 for a review of the matter.

<sup>20</sup> See *Lederman*, *supra* note 18 at 775–80.

<sup>21</sup> See *McIntosh*, *supra* note 19 at paras 19–20; Copeland, *supra* note 19.

<sup>22</sup> See *White Burgess*, *supra* note 8 at paras 33, 45.

<sup>23</sup> See *R v Tremblett*, 2012 NSPC 121, 325 NSR (2d) 6 [*Tremblett*]. See also *R v Van Bree*, 2011 ONSC 4273, 96 WCB (2d) 22 [*Van Bree*]; *R v Kovats*, 2000 BCPC 176, [2000] BCJ No 2579 (QL) [*Kovats*]; *R v Livingston*, 2017 ONCJ 645, 356 CCC (3d) 514.

<sup>24</sup> See *Tremblett*, *supra* note 23 at paras 29–33.

<sup>25</sup> In Ontario, the party who intends to call an expert witness must serve the expert report no less than 90 days before the scheduled pre-trial conference pursuant to the *Rules of Civil Procedure*, RRO 1990, Reg 194, s 53.03(1) [*Ontario Rules*]. According to *Westerhof v Gee Estate*, 2015 ONCA 206 at para 60, 124 OR (3d) 721, witnesses giving their opinion as "participant witnesses", in other words those giving opinions based on their observations of the events at issue, typically lay opinion witnesses, need not comply with these rules. Further, the rules themselves expressly refer to "experts".

British Columbia have codified the duty of experts in their respective civil procedure rules.<sup>26</sup> A signed acknowledgement of the duty to assist the court in a fair and non-partisan manner within the expert's area of expertise must be submitted along with the report.<sup>27</sup>

## II. The Lay Opinion Rule and its Lost Moorings

Given the stricter approach to expert evidence, it has never been more important that courts police the border between lay and expert opinion. As we shall demonstrate below, the opposite has occurred. Lay and expert opinion are now nearly identical in the topics they relate to, the type of reasoning they engage in, and accordingly, the prejudices they present. In reviewing this trend, we begin by presenting the historic rule. We then trace its growth through two appellate cases, and a recent trial decision building on those cases.<sup>28</sup>

Prior to the Supreme Court's decision in *Graat*, trial courts were much more dubious of lay opinion evidence. It was only admissible if it fell into one of several categories such as the identification of handwriting known to the witness, or the emotional state of a person.<sup>29</sup> Over time, courts and academics noted that lay opinion in practice was often not prejudicial and could assist the trier of fact. For instance, Justice Lederman and colleagues provide the example of an eyewitness identifying a man she saw

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In British Columbia and Newfoundland and Labrador, parties must serve the expert reports at least 84 days and 10 days respectively before the scheduled trial date (see *Supreme Court Civil Rules*, BC Reg 168/2009 pursuant to *Court Rules Act*, RSBC 1996, c 80, s 11-6(3) [*British Columbia Rules*] and *Rules of the Supreme Court*, 1986, Nfld Reg 78/99, s 46.07 pursuant to *Judicature Act*, SNL 1986, c 42, Schedule D). In Saskatchewan, parties must serve the expert reports at least 30 days before the scheduled pre-trial conference date, or 90 days before the scheduled trial date (see *The Queen's Bench Rules*, Sask Reg 109/2017, s 5-46, s 5-47, pursuant to *The Queen's Bench Act*, SS 1998, Q-1.01).

- <sup>26</sup> See *Ontario Rules*, *supra* note 25, s 4.1; *British Columbia Rules*, *supra* note 25 s 11-2(1).
- <sup>27</sup> See *Ontario Rules*, *supra* note 25, s 53.03(2.1)(7); *British Columbia Rules*, *supra* note 25 s 11-2(2).
- <sup>28</sup> See Imwinkelried, *supra* note 1 at 84–92 (“while both lay and expert opinions rest on a comparison between a generalization and a case-specific fact or facts, lay and expert opinions differ with respect to one term of the comparison, namely, the generalization the witness relies on” at 89).
- <sup>29</sup> See Guy Pratte, Nadia Effendi & Jennifer Brusse, “Experts in Civil Litigation: A Retrospective on Their Role and Independence with a View to Possible Reforms” in The Honourable Mr Justice Todd L Archibald & The Honourable Mr Justice Randall Echlin, eds, *Annual Review of Civil Litigation* (Toronto: Carswell, 2008) at 173–76 [Pratte]; *Graat*, *supra* note 6 at 835–36; *Sherrard v Jacob*, [1965] NI 151 at 4, 1965 WL 20480 (CA).

robbing a store.<sup>30</sup> That identification is an opinion based on a multitude of facts, many of which stem from unconscious cognitive processes beyond the witness's reckoning:

it is apparent that the witness' testimony is an opinion or conclusion based on physical and perceptual sensations that he or she has experienced in the past and with which the witness has compared to his or her observations of the events in issue. To rule such testimony inadmissible because it constitutes an opinion would conflict with natural mental processes which translate a person's perception into words.<sup>31</sup>

This is a sensible and pragmatic reason for admitting lay opinion with the lay evidence rule that tracks the scientifically founded limit on our ability to report on our cognitive processes.<sup>32</sup> At the same time, the system of carve-outs, based on elements such as identity, age, sobriety, was drawing increasing criticism for being overly technical and arbitrary. Together, these pressures brought about the Supreme Court's foundational lay opinion decision—*R. v. Graat*.

*Graat* did away with the categorical approach and adopted a more flexible analysis.<sup>33</sup> Specifically, it indicated that lay opinion evidence is admissible when its probative value is not overcome by the prejudice it introduces.<sup>34</sup> In performing this analysis, the Court considered four factors:

(1) the witness has personal knowledge of observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about.<sup>35</sup>

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<sup>30</sup> See Lederman, *supra* note 18 at 771.

<sup>31</sup> *Ibid.*

<sup>32</sup> See generally Timothy D Wilson, *Strangers to Ourselves: Discovering the Adaptive Unconscious* (Cambridge, MA: Harvard University Press 2002); Timothy D Wilson & Elizabeth W Dunn, "Self-Knowledge: Its Limits, Value, and Potential for Improvement" (2003) 55:1 Annual Rev of Psychology 493.

<sup>33</sup> See *Graat*, *supra* note 6 at 835–41.

<sup>34</sup> See generally Hamish Stewart, "Justice Frank Iacobucci and the Revolution in the Common Law of Evidence" 57:2 UTLJ 479 at 481–83

<sup>35</sup> See *Graat*, *supra* note 6 at 835–41; Lederman, *supra* note 18 at 774. The rule in *Graat* is routinely synthesized this way, see e.g. also *American Creek Resources Ltd v Teuton Resources Corp*, 2013 BCSC 1042 at para 14, 50 BCLR (5th) 180, *aff'd* 2015 BCCA 170 [*American Creek*]; *Marchand (Litigation Guardian of) v Public General Hospital Society of Chatham* (2000), 51 OR (3d) 97, 138 OAC 201 at para 95, (ONCA) [*Marchand*]; *Toronto Dominion Bank v Cambridge Leasing Ltd*, 2006 NBQB 134 at para 5, 297 NBR

*Graat* concerned the admissibility of two police officers' opinion that the accused was intoxicated.<sup>36</sup> Justice Dickson, as he then was, applied the above approach to rule the officers' opinions admissible. Specifically, he held that the officers were (1) making personal observations of Graat's state of inebriation, and (2) were better positioned than the judge to do so.<sup>37</sup> Further, the opinion (3) did not require "scientific, technical, or specialized testimony."<sup>38</sup> Finally, the opinion that a person is intoxicated (4) derives from a constellation of facts difficult to enunciate separately, and thus is more usefully provided as an opinion.<sup>39</sup>

Although the evidence was admitted, Justice Dickson issued an important and often overlooked caution.<sup>40</sup> He warned that when a police officer provides lay opinion, the judge or jury may be inclined to prefer that authority figure's opinion over the evidence of a similarly placed witness. There was a hint of this phenomenon in *Graat* itself, where the accused's civilian witness was cross-examined on not having the same level of experience identifying drunkenness as do police officers. To this point, Justice Dickson noted that police testimony deserves no extra weight because it is not based on expertise.<sup>41</sup>

Following *Graat*, which remains Canada's leading lay opinion decision, courts have widely failed to engage with the doctrine it laid down, with some disputing that *Graat* places any restriction on lay opinion at all.<sup>42</sup> This incoherence undermines the practical benefits that *Graat* was meant to carry. For instance, failure to distinguish between lay and expert opinion by allowing a police officer to opine on the meaning of a bite mark required Supreme Court intervention and a new trial in *R. v. A.(J.)*.<sup>43</sup> In the remainder of this section, we highlight three decisions that demonstrate the rapid expansion of lay opinion. Two are appellate decisions and the third is a very recent application of *Graat*, which expressly builds on the doctrine flowing from the two appellate decisions.

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(2d) 27 [TD]. See also David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 197–98.

<sup>36</sup> *Graat*, *supra* note 6 at 823.

<sup>37</sup> *Ibid* at 836.

<sup>38</sup> *Ibid* at 838.

<sup>39</sup> *Ibid* at 837–38.

<sup>40</sup> *Ibid* at 839–41. See also *R v Jessome*, 2006 NSPC 65 at para 22, 251 NSR (2d) 102.

<sup>41</sup> See *Graat*, *supra* note 6 at 839–40.

<sup>42</sup> See the cases referenced at note 6.

<sup>43</sup> 2011 SCC 17 at para 4, [2011] 1 SCR 628. Consider also the diseconomy in *R v Bingley* (2017 SCC 12 at para 34, [2017] 1 SCR 170 [*Bingley*]), in which the Supreme Court corrected a trial court's decision to admit a drug recognition *expert* as a lay witness.

### A. *A Crime Scene Cleanup in R. v. Ilina*

In *R. v. Ilina*, the Court of Appeal for Manitoba considered the conviction of a fifty-five-year-old university researcher for the murder of her husband.<sup>44</sup> The basis of the conviction was circumstantial: the deceased had been bludgeoned to death in the house he shared with his wife, the accused, and then dragged out onto the carport. Bloodstained clothes were found in the couple's washing machine. The Crown argued the accused staged the scene to look like a robbery.<sup>45</sup> In support of this theory, two investigating officers, Sergeant Bell and Constable Rautavuori, testified that they had observed a clear, odourless stain surrounding the bloodstains inside the house, and opined that this indicated an attempted cleanup. The Crown's blood analysis expert, Sergeant Maclean, disagreed. Based on photographs taken by Constable Rautavuori and on his own viewing of the crime scene two days later, the expert officer concluded there was no evidence of a clean-up.<sup>46</sup> On cross-examination, both Sergeant Bell and Constable Rautavuori said they would defer to Sergeant Maclean's opinion. One of the primary issues on appeal was the admissibility of the two officers' opinion, admitted at trial as lay opinion.

The Court of Appeal upheld the trial judge's decision to admit Sergeant Bell and Constable Rautavuori's opinion evidence. The court minimally engaged with lay opinion law, merely noting that *Graat* and subsequent cases had established a more permissive approach.<sup>47</sup> First, the Court of Appeal simply stated it would have been "difficult" for the non-expert officers to give their testimony as factual observations rather than as opinion. The court gave no support for this conclusion, and it is unclear where the complexity lies in simply stating that a bloodstain was situated adjacent to a clear, odourless, wet spot on the carpet. The Court of Appeal then noted that the testimony in question did not call for specialized knowledge, even though Sergeant Maclean had been qualified as an expert in this very matter.<sup>48</sup>

Admission of the lay officer's testimony gave rise to difficulty with respect to the judge's instructions to the jury. Despite assuring the defence counsel he would place the officers' testimony in the proper context, he merely instructed the jury that the expert and lay crime scene testimony

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<sup>44</sup> See *R v Ilina*, 2003 MBCA 20 at para 2, 170 Man R (2d) 207 [*Ilina*].

<sup>45</sup> *Ibid* at paras 6–27.

<sup>46</sup> *Ibid* at paras 64–66.

<sup>47</sup> *Ibid* at paras 72–75.

<sup>48</sup> *Ibid* at para 21.

would have to be weighed against one another.<sup>49</sup> On review, the Court of Appeal expressed disapproval, suggesting the trial judge should have reminded the jury of the lay officers' express deferral to the expert.<sup>50</sup> This misstep, however, did not merit appellate intervention.<sup>51</sup>

*Ilina* raises serious questions about the trial judge's gatekeeping function. The officers were ostensibly comparing the case-specific facts of *Ilina* to a generalization about their experiences with similar crimes. The latter body of knowledge, however, was not evidence in court, and thus not open to cross-examination.<sup>52</sup> Furthermore, the jury could be expected to have trouble discounting the officers' opinions because there is a specious connection between their testimony and their experiences as police officers. This danger is heightened in the following case, *Lee*, in which the witness *was an expert*, but not in the area in which he gave testimony. *Lee* demonstrates a closely related failure of gatekeeping that occurs when the witness is qualified as an expert in one area but gives evidence beyond that topic as a lay witness.<sup>53</sup>

### ***B. Footsteps in the Snow in R. v. Lee***

The accused in *Lee* was convicted by a jury of sexual assault in relation to an act of oral sex.<sup>54</sup> The only issue on appeal was whether the evidence gave rise to a reasonable doubt regarding consent. As is often the case, the credibility of the accused and complainant was central to this determination.<sup>55</sup> Both provided accounts marked by inconsistencies.<sup>56</sup> The testimony of a police dog handler, Sergeant Carriere, supported the complainant's account. Sergeant Carriere was qualified as an expert at trial to give evidence about the reactions of his dog, but also gave evidence about the pattern and size of the footsteps he saw in the snow and what they indicated about the incident. The accused contended that Sergeant Carri-

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<sup>49</sup> *Ibid* at paras 82–83.

<sup>50</sup> *Ibid* at para 84.

<sup>51</sup> *Ibid*.

<sup>52</sup> See Imwinkelried, *supra* note 1 at 95.

<sup>53</sup> Trial judges have a positive duty to circumscribe expert testimony to the area in which the expert was qualified, see *Bingley*, *supra* note 43 at para 17; *Sekhon*, *supra* note 2 at paras 46–48; *R v Abbey*, 2009 ONCA 624 at paras 62–65, 97 OR (3d) 330 [*Abbey*]. For a review of this doctrine, see Helena Likwornik, “Overstepping and Sidestepping: The Expert Evidence Dance” (2017) 35:4 Adv J 24.

<sup>54</sup> See *Lee*, *supra* note 4 at para 1. The Supreme Court upheld the majority's decision with respect to the lay opinion issue in *R v Lee*, 2010 SCC 52 at para 6, [2010] 3 SCR 99.

<sup>55</sup> See *Lee*, *supra* note 4 at para 4.

<sup>56</sup> *Ibid* at paras 5, 18–24.

ere's opinion about gait and footprint identification was inadmissible as lay opinion—being the proper subject matter of expert evidence, an expertise Sergeant Carriere did not possess. The Alberta Court of Appeal split two to one, with the majority upholding the conviction and finding the shoe print evidence admissible, while Justice Berger, in a forceful dissent, would have excluded the evidence.

Some context about the allegations is useful to understand the importance of Sergeant Carriere's testimony. On the night of the incident, the accused, the complainant, and her friend got into an argument at a nightclub. Eventually, the friend left, and the complainant performed oral sex on the accused behind a nearby school. Shortly after, the complainant appeared at a nearby home of a stranger and reported a sexual assault.<sup>57</sup> Sergeant Carriere's analysis of the footprints in the snow entering and leaving the area supported the complainant's account.

Several aspects of Sergeant Carriere's testimony are worth highlighting. First, the Crown attempted to buttress the sergeant's opinion by emphasizing expertise that he had not been qualified for: "Is that part of your training, to notice when you have a chance to see footprints visibly and you notice something about them, are you trained to come to conclusions about that?"<sup>58</sup> Sergeant Carriere responded, detailing his experience beyond that of a dog expert to someone with an apparent expertise in interpreting the patterns left by shoe prints: "For sure. And over six and a half years it's been my experience that . . . using that expertise is following footprints at times."<sup>59</sup> Sergeant Carriere went on to rely on this expertise to provide a narrative of what, to a naïve reader, resembles a Rorschach-like pattern of shoe prints and other markings in the snow: "There was no set pattern in them, but you could see how the outer layer would be the small foot impressions and then the larger ones were, of course, trying to cut that person off."<sup>60</sup> This account threatened the accused's credibility and was relied on by the trial judge for that purpose.<sup>61</sup>

On appeal, the majority held that Sergeant Carriere's opinion was admissible as lay opinion evidence. Notably, they did not engage in a substantive discussion of the requirements for lay opinion evidence, noting rather that there was no rule: "Whatever rule there may have been against a lay witness giving opinion evidence, it has not survived the deci-

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<sup>57</sup> *Ibid* at paras 2–4.

<sup>58</sup> *Ibid* at para 26.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid*.

<sup>61</sup> The accused claimed the encounter was consensual, see *ibid* at para 29.

sion in *Graat*.”<sup>62</sup> Although they did not acknowledge the existence of a rule, the majority did state that Sergeant Carriere’s interpretation represented a common sense inference and a compendious statement of fact. To these two points, the majority relied on, without comment, just one modern Canadian case.<sup>63</sup>

Justice Berger, dissenting, concluded that the footprint analysis was not lay opinion, but rather expert opinion requiring scrutiny under the *Mohan-Daubert* test.<sup>64</sup> Interpreting the shoe prints required scientific or specialized expertise that Sergeant Carriere lacked.<sup>65</sup> Furthermore, the subject matter of Sergeant Carriere’s opinion did meet the lay opinion exception. His inferences were “not of the same character”<sup>66</sup> as the more typical lay opinions, such as those concerning a person’s age or mental state.

In the final case in this section, *R. v. Colpitts*, the trial judge relied heavily on *Ilina* and *Lee* to allow the evidence of a police officer who opined on various forensic accounting analyses. *Colpitts* puts on display the same dangers present in *Ilina* and *Lee*, while further expanding lay evidence rule by allowing the lay witness to testify beyond his own personal observations.

### C. *The Lay Forensic Accountant in R. v. Colpitts*

In *Colpitts*, a lay opinion issue arose on the twenty-fourth day of what would prove a lengthy criminal fraud trial. The accused parties were “charged with unlawfully affecting the public market price of Knowledge House Incorporated (KHI)”.<sup>67</sup> On that twenty-fourth day, the defence applied to limit the evidence of one of the Crown’s key witnesses, a veteran police officer named Ian Black.<sup>68</sup> Officer Black intended to provide evidence from his investigation, which forensically linked the accused parties

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<sup>62</sup> *Ibid* at para 31.

<sup>63</sup> This case is *R v Powell*, 2006 ABCA 267, [2006] AWLD 2952 [*Powell*]. The majority also relied on *White v State*, 375 So 2d 622 (App Ct 1979) [*White*], a Florida decision, and *R v Foley*, (James Gray Stevens, *A Digest of the Reported and Unreported Cases Determined in the Supreme Court of Judicature of the Province of New Brunswick* (Saint John: J&A McMillan Printers and Publishers, 1874) at 201 [*Foley*]), a 1873 New Brunswick decision that was abstracted but never completely reported. We discuss these cases in Part IV.

<sup>64</sup> See *Lee*, *supra* note 4 at paras 52–53, Berger JA dissenting.

<sup>65</sup> *Ibid* at para 53.

<sup>66</sup> *Ibid* at para 55.

<sup>67</sup> *Colpitts*, *supra* note 6 at para 1.

<sup>68</sup> *Ibid*.



to the alleged crime.<sup>69</sup> The Crown had initially tendered Officer Black as an expert witness,<sup>70</sup> but resiled from that position, advising that “none of Mr. Black’s testimony will constitute expert opinion.”<sup>71</sup> This tactic proved successful: the evidence was admitted.

Officer Black’s opinion resulted from a series of analyses and inferences, ultimately connecting the accused parties to the illegal stock manipulation. First, Officer Black’s evidence affirmed the accuracy of an expert report prepared by a securities investigator.<sup>72</sup> To this end, Officer Black had gathered data on the trading of KHI stocks from “account statements and the Toronto Stock Exchange.”<sup>73</sup> After confirming the report’s accuracy, Officer Black compared its findings with the timing of emails sent by various suspects, including the accused parties. Based on the “strength of that comparison,”<sup>74</sup> he compiled a narrower group of suspects, the *connected group*, which included the accused. Finally, Officer Black performed analyses on that connected group. He compared their KHI trading activity with the rest of the market, and he analyzed the amount of late-day trading they engaged in using “established criteria”.<sup>75</sup>

The defence argued that Officer Black’s opinion was too complex to properly be the subject of lay opinion.<sup>76</sup> The Crown disagreed: he was merely synthesizing thousands of pages of seized documents and his testimony would therefore be of immense help to the court.<sup>77</sup> Justice Coady of the Nova Scotia Supreme Court ultimately agreed with the Crown. The evidence was admissible as a “compendious expression of technical data.”<sup>78</sup> In coming to his decision, Justice Coady relied primarily on *Ilina* and *Lee*.

Justice Coady found *Ilina* analogous because the officers in that case, as in *Colpitts*, had privileged access to the evidence in question: they saw the fluids before they dried.<sup>79</sup> Justice Coady also relied heavily on *Lee*. He

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<sup>69</sup> *Ibid* at para 5.

<sup>70</sup> *Ibid* at para 3.

<sup>71</sup> *Ibid* at para 4.

<sup>72</sup> *Ibid* at para 5.

<sup>73</sup> *Ibid*.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid* at para 24.

<sup>77</sup> *Ibid* at para 7.

<sup>78</sup> *Ibid* at para 25.

<sup>79</sup> *Ibid* at para 20.

did not draw any express analogy, but after excerpting *Lee*, he noted that “Justice Berger concluded the disputed evidence was neither expert evidence nor novel science,” but rather a common sense inference.<sup>80</sup> Though mistakenly referring to Justice Berger, who dissented in *Lee*, Justice Coady’s assessment of the majority’s decision is accurate.

*Colpitts* is emblematic of the hazards that flow from the rapid expansion of lay opinion doctrine since *Graat*. For one, unlike in *Graat*, Officer Black’s opinion went well beyond a judgment of intoxication to a complicated series of inferences requiring reference to accounting standards and statistical methodologies that would safeguard against the Officer’s subjective biases. Moreover, the Nova Scotia court did not recognize the danger posed by Officer Black’s status as an authority figure with no proven qualifications in accounting. Finally, *Ilina* and *Lee* are dubious authorities for the admission of Black’s evidence. While Officer Black indeed had access to data from the alleged offences, the nature of that access was vastly different from that in *Ilina*, wherein evidence became inaccessible as fluids dried over time. In contrast, Officer Black was analyzing permanently stored data, much of it gathered by other investigators and thus not gleaned from his own personal observations. We will now delve more deeply into these hazards.

### III. The Hazards of Lay Experts

In this section, we will explore three hazards that flow from the rapid expansion of lay evidence documented above. The first hazard is unconscious bias and the fact that lay witnesses need not demonstrate they relied on a methodology to control that bias. A lack of methodology would not be so problematic if not for the second hazard, a specious nexus between the witness’s authority and his or her evidence. A trier of fact might be expected to discount a lay person’s evidence if it were brought by a true lay person. As seen in the last section, however, lay opinion evidence is often brought by police officers with experience in fields only speciously related to the evidence. Thirdly, many of the issues we found are attributable to a jurisprudence that has developed incoherently, with little heed paid to cases with similar facts and the general principles of evidence law. We will address these hazards in order, beginning with unconscious bias and the importance of methodology in controlling for that bias.

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<sup>80</sup> *Ibid* at para 21.

### A. *Methodology versus Qualia*

The first principle is that you must not fool yourself—and you are the easiest person to fool.<sup>81</sup>

As we described in Part III, the justification for admitting lay opinion is one of necessity: the facts underlying these opinions are unconscious mental processes that cannot be put into words.<sup>82</sup> Justice Dickson confirmed this interpretation in *Graat*, adopting a passage from *Cross on Evidence* stating that lay opinion should be admissible when that opinion was made “without conscious ratiocination”.<sup>83</sup> In this subsection, we will first demonstrate that this justification accords with the current psychological scientific understanding of unconscious cognitive and affective processes, which finds they are indeed unverbalizable. However, these unconscious processes are often biased in ways we cannot know or report on. We will document several forms of unconscious bias that may have infected the opinions in *Ilna*, *Lee*, and *Colpitts*. We then suggest that in cases like these, where methodologies exist to control for unconscious bias, there is danger in exempting witnesses from a legal standard that would demand they follow such procedures.

Much of the current research on unconscious thought was inspired by Richard Nisbett and Timothy Wilson, who found that humans *cannot* report on these processes.<sup>84</sup> Nisbett and Wilson made their landmark finding in the context of judgment and decision-making.<sup>85</sup> They asked consumers to choose between several sets of stockings and justify their

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<sup>81</sup> Richard P Feynman, “Cargo Cult Science: Some Remarks on Science, Pseudoscience, and Learning How to Not Fool Yourself” (1974) 37:7 *Engineering and Science* 10 at 12 [Feynman], cited in Marcus Munafò et al, “A Manifesto for Reproducible Science” (2017) 1:1 *Nature Human Behaviour* 1 at 7 [Munafò et al].

<sup>82</sup> See Lederman, *supra* note 18 at 771.

<sup>83</sup> *Graat*, *supra* note 6 at 837, citing John D Heydon, *Cross on Evidence*, 5th ed (Sydney: Butterworths, 1996) at 448. In *Elwin v Nova Scotia Home for Coloured Children*, Justice LeBlanc characterized permissible lay opinion as that “assessed on a subconscious level” (2013 NSSC 196 at para 88, 332 NBR (2d) 35 [*Elwin*]). Employing this distinction, testimony about the finances of a boarding home was found to require expertise.

<sup>84</sup> See Richard E Nisbett & Timothy DeCamp Wilson, “Telling More Than We Can Know: Verbal Reports on Mental Processes” (1977) 84:3 *Psychology Rev* 231 [Nisbett].

<sup>85</sup> Their research sits in a broader field exploring the important but long unrecognized role that unconscious processes play in thinking and deciding. This phenomenon was at the heart of Nobel Prize-winning work in behavioural economics, which uncovered biases that were long unnoticed, not only by the market actors perpetuating them, but also by leading economists devoted to studying financial markets. For instance, see Daniel Kahneman & Amos Tversky, “Prospect Theory: An Analysis of Decision under Risk” (1979) 47:2 *Econometrica* 263. For an application of these findings to law, see Jeffrey J Rachlinski, “The ‘New’ Law and Psychology: A Reply to Critics, Skeptics and Cautious Supporters” (2000) 85:3 *Cornell L Rev* 739 [Rachlinski].

choice. The most popular choice was the set on the far right, with most consumers giving persuasive reasons, such as its softness and superior knit. The rub was that all of the stockings were the same: previous studies had shown an unconscious bias toward items on the consumer's right (likely driven by the custom of shopping from left to right).<sup>86</sup> The participants' reasons could not have been accurate and were rather post hoc justifications for their unconscious bias.

If so much of judgment and decision-making is girded by unverbalizable (i.e. unconscious) cognitive processes,<sup>87</sup> what types of opinions deserve the lay opinion rule's concession to unconscious ratiocination? We suggest that the unconscious ratiocination justification holds true for many of the forms of lay opinion identified in *Graat*, for example eyewitness identifications, judgments of speed, and distance.<sup>88</sup> But the opinions in *Lee*, *Ilina*, and *Colpitts* are distinguishable because they sit in fields, in which methodologies exist to control for unconscious biases. We do not mean to imply that lay witnesses giving identifications or judgments of speed are not biased. In fact, they very likely are biased in ways they cannot know.<sup>89</sup> In fact, despite most eyewitnesses' best intentions and their own confidence, eyewitness identifications are demonstrably unreliable and account for 79 % of wrongful convictions.<sup>90</sup> Similarly, we fully believe the police officers in *Ilina*, *Lee*, and *Colpitts* had every intention to honestly and accu-

<sup>86</sup> See Nisbett, *supra* note 84 at 243–44.

<sup>87</sup> Indeed, the legal implications are myriad. See NAS Report, *supra* note 5 at 122–24, 184–85; *Goudge Inquiry*, vol 3, *supra* note 10 at 387–90; PCAST Report, *supra* note 5 at 31; Gary Edmond et al, “Contextual Bias and Cross-contamination in the Forensic Sciences: the Corrosive Implications for Investigations, Plea Bargains, Trials and Appeals” (2014) 14:1 L Probability & Risk 1 at 19 [Edmond, “Contextual Bias”]; Rachlinksi, *supra* note 85; David L Faigman, Christopher Slobogin & John Monahan, “Group to Individual (G2i) Inference in Scientific Expert Testimony” 81:2 U Chicago L Rev 417 [Faigman, Slobogin & Monahan, “G2i”].

<sup>88</sup> See *Graat*, *supra* note 6 at 835.

<sup>89</sup> This is because eyewitnesses typically possess a “sincere belief” in their own accuracy. See Amy D Trenary, “*State v Henderson*: A Model for Admitting Eyewitness Identification Testimony” (2013) 84:4 U Colo L Rev 1257 at 1283. This renders them difficult to cross examine, as highlighted in *R v Miaponoose* ([1996], 30 OR (3d) 419 at paras 11–12, 2 CR (5th) 82 (ONCA)) where the court stated “While the circumstances surrounding the witness identification can be subject to scrutiny in cross-examination, many of the more subjective processes that have led to it are impossible to expose in this fashion.”

<sup>90</sup> See Brandon L Garrett, “Judging Innocence” (2008) 108:1 Colum L Rev 55 at 60. While beyond the scope of this article, we must note that it is illogical that Canadian courts regularly exclude psychological scientists, the one group that can comment on the accuracy of eyewitness identifications. See Copeland, *supra* note 19. For an alternate view on the role of faulty eyewitness identifications in Canada, see Lee Steusser, “Experts on Eyewitness Identification: I Just Don’t See It” (2006) 31:3 Man LJ 543.

rately fulfill their legal duty. The distinction is that those police officers were giving evidence on matters that can be subjected to scientific methodologies.

Methodologies, unlike *qualia*, are transparent, verbalizable, and thus open to scrutiny. In this spirit, Richard Feynman's quote, which began this subsection, is often related to scientists to encourage them to continuously question their own practices and adhere to rigorous methodology.<sup>91</sup> In the remainder of this subsection, we discuss some biases that may have affected the judgment of the witnesses in *Iina, Lee, and Colpitts*. In all these cases, the witnesses' opinions concerned fields governed by varying degrees of methodological principle and thus, methodology should have been demanded. Or, at the very least, they should have been subjected to a rule of evidence that would require such questions be asked.

Two unconscious biases can deeply influence opinion evidence in ways the witness is unaware of: confirmation bias and contextual bias. Confirmation bias describes the process by which we force incoming information to fit a pre-existing theory we have about the world, for example the Earth is the centre of the galaxy, or my in-laws are a pain-in-the-neck. More specifically, it is "the seeking or interpreting of evidence in ways that are partial to existing beliefs."<sup>92</sup> Contextual bias, on the other hand, has less of a motivational flavour, and is simply "where individuals are influenced by irrelevant background information."<sup>93</sup> For instance, with respect to contextual bias, Itiel Dror and colleagues have found that exposure to emotional case details can bias fingerprint matching judgments.<sup>94</sup>

Both effects are pervasive, influencing the questions we ask, how we ask them, and the weight we attribute to the data we collect to answer those questions. Very importantly, we are typically unaware that our judgment is being influenced.<sup>95</sup> A recent leading report of a committee of

<sup>91</sup> See e.g. Munafò et al, *supra* note 81 at 7.

<sup>92</sup> Raymond S Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises" (1998) 2:2 *Rev General Psychology* 175 at 175. See also PCAST Report, *supra* note 5 at 31; Edmond, "Contextual Bias", *supra* note 87 at 6; Alan D Gold, *Expert Evidence in Criminal Law: The Scientific Approach*, 2nd ed (Toronto: Irwin Law, 2009) at 98ff.

<sup>93</sup> PCAST Report, *supra* note 5 at 31.

<sup>94</sup> See Itiel E Dror et al, "When Emotions Get the Better of Us: the Effect of Contextual Top-down Processing on Matching Fingerprints" (2005) 19:6 *Applied Cognitive Psychology* 799.

<sup>95</sup> See NAS Report, *supra* note 5 at 185 ("typically one is not aware that his or her judgment is being affected"). See also Scott O Lilienfeld et al, "Why Many Clinical Psychologists are Resistant to Evidence-based Practice: Root Causes and Constructive Remedies" (2013) 33 *Clinical Psychology Rev* 883 [Lilienfeld 2013]; Kathleen A Kennedy &

the National Academies of Sciences found that several forensic sciences do not properly control for confirmation and contextual bias.<sup>96</sup>

Various methodological safeguards can help counter confirmation and contextual bias.<sup>97</sup> One of the most fundamental methodological safeguards is “blinding” the technician to the source of the sample. For instance, a 2016 report from the U.S. President’s Council of Advisors on Science and Technology recommended that fingerprint analysts avoid knowledge of other facts of the case and disclose when they have such knowledge.<sup>98</sup> Inadequate blinding was implicated as a source of a high-profile misidentification of the perpetrator of a 2004 bombing in Madrid. In that case, an FBI examiner had reported a 100 % certainty of a fingerprint match.<sup>99</sup>

More recently, other safeguards have gained traction, such as making procedures open to scrutiny and pre-defining a methodology so that it cannot be altered during the analysis to favour one conclusion over another.<sup>100</sup> In this vein, and also in the context of fingerprints, the PCAST Report suggested analysts should pre-commit—in a manner that cannot be changed after the fact—to the features of the found fingerprint, the “latent” fingerprint, that will be matched to the known fingerprint.<sup>101</sup> This method helps safeguard against “fishing expeditions” driven by a preconceived notion that there should be a match to a certain known fingerprint.

Sergeant Carriere’s testimony in *Lee* admitted of many opportunities for confirmation and contextual bias. As lay testimony, it was not held to a reliability standard that would have demanded the Crown to address such issues. Sergeant Carriere interpreted a complex set of footprints and other markings “with no set pattern” across a wide area. He somehow extracted a very specific narrative of a pursuer cutting off another, a fall,

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Emily Pronin, “Bias Perception and the Spiral of Conflict” in Jon Hanson, ed, *Ideology, Psychology, and Law* (Oxford: Oxford University Press, 2012).

<sup>96</sup> See NAS Report, *supra* note 5 at 184–85.

<sup>97</sup> See Faigman, Slobogin & Monahan, “G2i”, *supra* note 87 at 445–46.

<sup>98</sup> See PCAST Report, *supra* note 5 at 10, 88–91. See also Gary Edmond et al, “Thinking Forensics: Cognitive Science for Forensic Practitioners” (2016) *Science Justice* 144 at 147 [Edmond, “Thinking Forensics”].

<sup>99</sup> See PCAST Report, *supra* note 5 at 90.

<sup>100</sup> See D Stephen Lindsay, “Replication in Psychological Science” (2015) 26:12 *Psychological Science* 1827; Jason M Chin, “Psychological Science’s Replicability Crisis and What It Means for Science in the Courtroom” (2014) 20:3 *Psychology, Public Policy & L* 225 at 235; Barbara A Spellman, “A Short (Personal) Future History of Revolution 2.0” (2015) 10:6 *Perspectives on Psychological Science* 886 at 892; Munafò et al, *supra* note 81 at 3.

<sup>101</sup> See PCAST Report, *supra* note 5 at 10.

and then an apparent running getaway.<sup>102</sup> Moreover, as part of the investigating team, he was not blind to Lee's identity, the Crown's theory of the case, or other emotionally evocative facts about the accusation.<sup>103</sup>

Pattern-matching engages one of the key unconscious processes underlying confirmation bias, what psychologists call meaning maintenance.<sup>104</sup> Meaning maintenance researchers find that humans readily seek and find patterns in noise, and then ascribe a narrative to these patterns. The term for this phenomenon is apophenia, or the "tendency to see patterns in random data."<sup>105</sup> In one study, Daniel Randles and colleagues found that participants experiencing a feeling of meaninglessness were more apt to find patterns in random strings of letters.<sup>106</sup> This process is fast and unconscious, with a lack of meaning causing discomfort and resolution proving satisfying.<sup>107</sup>

Even experts in the field on which Sergeant Carriere was opining have been criticized for lack of methodological rigour. Indeed, the NAS Report warned against conclusions from shoeprint analyses because it is impossible to know, over time, how often the expert is right or wrong: "[I]t is difficult to avoid biases in experience-based judgments, especially in the absence of a feedback mechanism to correct an erroneous judgment."<sup>108</sup>

For these types of subjective judgments like the above, the PCAST Report suggests black box studies to determine if the methodology is itself valid.<sup>109</sup> The term "black box" refers to the black box of the examiner's mind where, without objective standards, it is impossible to know exactly how the examiner is coming to his or her conclusion. Black box studies would then expose a sample of examiners to patterns in which the ground

<sup>102</sup> *Lee*, *supra* note 4 at para 26.

<sup>103</sup> See *R v Lee*, [2012] AWLD 2670 at para 15, 2008 CarswellAlta 2353 (ABQB) (WL).

<sup>104</sup> See Steven J Heine, Travis Proulx & Kathleen D Vohs, "The Meaning Maintenance Model: On the Coherence of Social Motivations" (2006) 10:2 *Personality and Social Psychology Review* 88 at 89ff.

<sup>105</sup> Munafò et al, *supra* note 81 at 1.

<sup>106</sup> See Daniel Randles et al, "Is Dissonance Reduction a Special Case of Fluid Compensation? Evidence That Dissonant Cognitions Cause Compensatory Affirmation and Abstraction" (2015) 108:5 *J Personality & Social Psychology* 697 at 702–03.

<sup>107</sup> See Travis Proulx, Michael Inzlicht & Eddie Harmon-Jones, "Understanding All Inconsistency Compensation as a Palliative Response to Violated Expectations" (2012) 16:5 *Trends in Cognitive Science* 285 at 286. See also Travis Proulx & Michael Inzlicht, "Moderated Disanxiousuncertlibrium: Specifying the Moderating and Neuroaffective Determinants of Violation-Compensation Effects" (2012) 23:4 *Psychological Inquiry* 386.

<sup>108</sup> NAS Report, *supra* note 5 at 149. See also PCAST Report, *supra* note 5 at 114–17.

<sup>109</sup> *Ibid* at 50–54.

truth is known, for example if, in fact, a struggle between two people produced the pattern of footprints, and determine if examiners can discover this truth and with what error rate. If the methodology is found to be valid, individual examiners should be “proficiency tested” periodically to determine if they can reliably apply this method.<sup>110</sup> Characterizing Sergeant Carriere as a lay witness sidesteps any questions regarding the validity of his method.

Consider also a related manifestation of unconscious bias—the illusory correlation: a “tendency of individuals to perceive statistical associations that are objectively absent, or at least to perceive statistical associations that are more pronounced than objectively exist.”<sup>111</sup> As the NAS Report explained, it “can lead one to formulate overly simple models of reality and thus to read too much significance into coincidences and surprises. More generally, human intuition is not a good substitute for careful reasoning when probabilities are concerned.”<sup>112</sup>

For example, there is a widely held illusory correlation between arthritic pain and the weather.<sup>113</sup> Illusory correlations are perpetuated by various mechanisms, such as generalizing from small sample sizes, spurious coexistence of distinctive events, and over-attendance to confirmatory data, that is confirmation bias. In the pain-weather example, a person has a lifetime of data from which to pick out distinctive instances of the correlation (e.g., “that time it rained all week on vacation and my knees ached.”) Widespread belief in the myth makes the pain sufferer especially attuned to confirmatory instances, whereas disconfirmatory instances, such as the absence of pain, are less salient and more easily forgotten. In the casino and the stock market domain, illusory correlations have been

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<sup>110</sup> *Ibid* at 57–59.

<sup>111</sup> Ashley L Watts, Sarah F Smith & Scott O Lilienfeld, “Illusory Correlation” in Robin L Cautin & Scott O Lilienfeld, ed, *The Encyclopedia of Clinical Psychology* (Chichester, UK: Wiley-Blackwell, 2015) 1 at 1. See also Scott O Lilienfeld et al, “Scientific Research in Forensic Samples” in Maaïke Cima, ed, *The Handbook of Forensic Psychopathology and Treatment* (New York: Routledge, 2016) 25 at 38 [Lilienfeld et al].

<sup>112</sup> NAS Report, *supra* note 5 at 124.

<sup>113</sup> See Donald A Redelmeier & Amos Tversky, “On the Belief that Arthritis Pain is Related to the Weather” (1996) 93:7 *Proceedings of the National Academy of Sciences of the United States of America* 2895 [Redelmeier & Tversky].



termed the “gambler’s fallacy”,<sup>114</sup> to reflect the manner in which individuals read patterns into random winning and losing streaks.<sup>115</sup>

Scott Lilienfeld and colleagues have noted that forensic situations are particularly fertile grounds for illusory correlations because of the lack of objective benchmarks and salience of confirmatory data. In other words, the instances in which the technique uncovers the criminal, and everyone celebrates are more salient than inconclusive cases.<sup>116</sup> This is especially true in equities trading, where there is a great deal of data from which to find spurious patterns and produce the gambler’s fallacy. Paul Slovic, whose work has informed much of the modern approach to behavioural economics, made precisely this observation in explaining why myths about being able to beat the market persist.<sup>117</sup> Subsequent empirical evidence supported his hypothesis.<sup>118</sup>

Similarly, Officer Black’s opinion in *Colpitts* could be entirely based on a cocktail of the gambler’s fallacy, illusory correlation, and confirmation bias. Recall that he compared the timing of the accused parties’ trades and emails with broader market activity and concluded they were involved in manipulating the stock price. However, sifting through the trade data, there may be many instances when the timing of their trades deviated from the market average purely by chance. As with the example of arthritic pain, the trades were particularly salient to the witness. Further, Officer Black entered into a long and difficult investigation focused on the accused parties, who were notorious Halifax businessmen and legal professionals. It would have been difficult for him to shield himself from contextual and confirmation bias.

Scientists attempt to combat illusory correlations with inferential statistical methodologies. In fact, this was a key component of the arthritic pain and weather study referenced above. The authors, Donald Redelmeier and Amos Tversky, first established that there was no statistically

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<sup>114</sup> See Amos Tversky & Daniel Kahneman, “Belief in the Law of Small Numbers” (1971) 76:2 *Psychology Bull* 105 at 106.

<sup>115</sup> See generally Jügen Huber, Michael Kirchler & Thomas Stöckl, “The Hot Hand Belief and the Gambler’s Fallacy in Investment Decisions Under Risk” (2010) 68:4 *Theory Decision* 445 at 446. See also Edmond, “Contextual Bias”, *supra* note 87 at 6.

<sup>116</sup> See Lilienfeld et al, *supra* note 111 at 38–39.

<sup>117</sup> See Paul Slovic, “Psychological Study of Human Judgment: Implications for Investment Decision Making” (2001) 2:3 *Journal Psychology & Financial Markets* 160 at 166–168.

<sup>118</sup> See e.g. Jennifer C Bender, Carol L Osler & David Simon, “Noise Trading and Illusory Correlations in US Equity Markets” (2012) 17:2 *Rev Finance* 625 [Bender].

significant correlation between the weather and joint pain.<sup>119</sup> Similarly, inferential statistics could have helped determine the unlikelihood of the timing of the impugned trades and emails in *Colpitts*, or if they were consistent with chance. And even these statistical tests would have had to be performed with a high degree of rigour. For instance, statistician Adriaan De Groot describes the mistake even seasoned statisticians can make when they sift through a large dataset:

he will be on his guard for spurious correlations; but nevertheless he still attempts, by means of a procedure that consists of searching, trying, and selecting, to “extract from the material what is in it”. Of course, this means that he will also extract that which is in there accidentally.<sup>120</sup>

For example, imagine flipping a coin hundred times without predefining what you will accept as evidence the coin is not fair. Even if, in total, the experiment returned fifty heads and fifty tails, the experimenter might say: “well, for flips 10–19, there were 8 heads and 2 tails; this is evidence it’s not a fair coin.” In other words, if the researcher does not predefine what he or she is looking for—as fingerprint analysts must do in light of the PCAST recommendations reviewed above—the results lose much of their probative value.

It is unclear whether Officer Black performed these tests and with what degree of rigour. Perhaps more importantly, the lay opinion rule did and does not require he be qualified to do any of this. And, at the risk of sounding like a broken record, the lay test does not provide an opportunity to exclude Officer Black on this basis. By contrast, forensic accountants, qualified as experts, must perform what is known as an econometric analysis, which determines if the event at issue in the case affected a market price, *statistically controlling for other possible effects*.<sup>121</sup>

Similar challenges are present in *Ilina*. The officers opining that there was evidence of a cover-up were basing their conclusions on their experience with examples that readily came to mind.<sup>122</sup> Limited in their qualifications, they had no way of knowing how often a bloodstain appears next

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<sup>119</sup> See Redelmeier & Tversky, *supra* note 113 at 2895. The Bender study also relied on inferential statistics to demonstrate illusory correlation, specifically in the context of trading, see Bender, *supra* note 118.

<sup>120</sup> AD de Groot, “The Meaning of ‘Significance’ for Different Types of Research [Translated and Annotated by Eric-Jan Wagenmakers et al]” (2014) 148 *Acta Psychologica* 188 at 190.

<sup>121</sup> See *Market Surveillance Administrator, Re*, [2015] AWLD 4488 at paras 473–75, [2015] AWLD 4494; *Apotex Inc v Sanofi-Aventis*, 2012 FC 553 at paras 97–98, 113–14, 410 FTR 78.

<sup>122</sup> For a similar explanation, see Chin & Dallen, *supra* note 12 at 540.

to a different stain and how often there is an innocent explanation. Their conclusion was particularly troubling when compared to the contrary opinion of the crime scene investigator, who would be expected to see more investigations through to the end, and thus know more about the accuracy of the correlation. In fact, researchers have found that feedback about the accuracy of one's judgments is a key component in building expertise.<sup>123</sup>

Finally, and to bring the discussion full circle, Kathleen Kennedy and Emily Pronin describe the “bias blind spot”, or in other words, the tendency for all the unconscious biases discussed herein to go unnoticed.<sup>124</sup> Indeed, as we began this subsection, it is easy to fool ourselves.<sup>125</sup> Again, we do not think any of the police witnesses in the cases we have highlighted intentionally misled their respective judges and juries. Rather, as Nisbett and Wilson demonstrated, despite our best efforts, we cannot report on how we are being unconsciously influenced. The bias blind spot renders the police experts difficult to cross-examine and unduly persuasive because they can confidently say they believe their account is accurate.<sup>126</sup> Indeed, empirical research finds that jurors and judges are swayed by confidence. Witness confidence accounts for 50 % of the variance in jury decisions about the believability of eyewitnesses,<sup>127</sup> and judges tend to prefer confident experts.<sup>128</sup> In the cases we described, confidence may be diagnostic of nothing but blithe inadvertence to unconscious bias.

It should be no surprise at this point that unconscious biases have been at the heart of many prominent miscarriages of justice.<sup>129</sup> The commissions and researchers who have studied these miscarriages of justice unanimously recommend stricter adherence to methodologies designed to combat unconscious biases. Methodologies transform *qualia* into testable

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<sup>123</sup> See e.g. Robin M Hogarth, Tomas Lejarraga & Emre Soyer, “The Two Settings of Kind and Wicked Learning Environments” (2015) 24:5 *Current Directions in Psychological Science* 379.

<sup>124</sup> See Lilienfeld 2013, *supra* note 95 at 896.

<sup>125</sup> See Feynman, *supra* note 81 at 12.

<sup>126</sup> See sources cited *supra* note 89.

<sup>127</sup> See Gary L Wells, RCL Lindsay & Tamara J Ferguson, “Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification” (1979) 64:4 *J Applied Psychology* 440.

<sup>128</sup> See Anthony Champagne, Daniel Shuman & Elizabeth Whitaker, “An Empirical Examination of the Use of Expert Witnesses in American Courts” (1992) 31:4 *Jurimetrics J* 375 at 391. Furthermore, judges, when asked about how they determine if an expert is credible, listed several factors related to confidence (e.g., demeanor)

<sup>129</sup> See sources cited *supra* note 10.

assumptions.<sup>130</sup> It is possible to evaluate a methodology's reliability by observing its error rate: how many false positives and negatives does it produce?<sup>131</sup> It is also possible to cross-examine a methodology for bias. For instance, does the methodology contain safeguards for unconscious bias, such as keeping the experimenter blind to whether the sample came from a control or experimental group?<sup>132</sup> The National Academy of Sciences recognized the value of methodology in minimizing unconscious bias:

All of these sources of bias are well known in science, and a large amount of effort has been devoted to understanding and mitigating them. The goal is to make scientific investigations as objective as possible so the results do not depend on the investigator.<sup>133</sup>

Without methodology, the putative lay testimony in *Ilina, Lee, and Colpitts* was *ipse dixit* and, in fact, the worst kind of *ipse dixit*: the witnesses were not qualified to begin with.

### ***B. Specious Nexus between Authority and Evidence***

Experience in Canada and elsewhere teaches that wrongful convictions are often traceable to evidence that is either unreliable or prejudicial. When the two combine, they make for a potent mix — and the risk of a wrongful conviction increases accordingly. Wrongful convictions are a blight on our justice system and we must take reasonable steps to prevent them before they occur.<sup>134</sup>

If a true lay person had brought the evidence in the cases described above, it would have been easier for the judge or jury to discount it. For instance, and at the risk of alienating a substantial portion of our audience, what if a local law professor had passed by the putative crime scene in *Lee* and observed the impressions in the snow? This professor might have come to a similar conclusion with the same lack of training and methodology. But with the professor, it would have been clearer to the

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<sup>130</sup> For instance, see *Abbey*, *supra* note 53 at paras 87, 119, which adopted a flexible approach to the reliability of expert witnesses, but still emphasized the importance of methodology. Nevertheless, weaknesses in that flexible standard were recently exposed at the appeal of *Abbey*'s retrial. The Court of Appeal for Ontario agreed with the accused that the Crown's expert, a sociologist, had misstated his findings in several published works. These findings, which did not conform with open social-scientific methodological standards, withstood scrutiny under the 2009 *Abbey* Court's flexible approach despite later proving unreliable (*R v Abbey*, 2017 ONCA 640 at paras 69-125, 2017 CarswellOnt 12134 (WL)). For a review of open social-scientific methods and their value to law, see the sources referenced at *supra* note 100.

<sup>131</sup> See *JLJ*, *supra* note 12 at paras 51–55; Chin & Dallen, *supra* note 12 at 541.

<sup>132</sup> See NAS Report, *supra* note 5 at 124; Chin & Dallen, *supra* note 12 at 540.

<sup>133</sup> See NAS Report, *supra* note 5 at 124.

<sup>134</sup> *R v Hart*, 2014 SCC 52 at para 8, [2014] 2 SCR 544 [*Hart*].

trier of fact that this was a mere compendious statement of fact rather than an expert opinion.

The potential impact of Sergeant Carriere’s opinion on the jury in *Lee* was wildly different. He was an authority figure in a closely related field, that is the behaviour of tracking dogs. The jury might have easily jumped to the conclusion that he was an expert in the field at issue, despite the fact he was expressly not qualified to make such conclusions.<sup>135</sup> Cognitive scientists have long warned about generalizing expertise from one domain to a closely related one: “Critically, superior performance in a particular domain does not guarantee superior performance in another, even when the domains seem similar.”<sup>136</sup> Moreover, police officers receive training in courtroom presentation and are often persuasive and confident witnesses.<sup>137</sup> The result, as the Supreme Court warned in the quote from *Hart* above, is a volatile mix of unreliability and prejudice.

Safeguards surrounding expert evidence emerged to manage precisely the risk of having the trier of fact unduly swayed by the mere authority of the witness.<sup>138</sup> This authority has been described in various ways, from “impressive credentials”,<sup>139</sup> to the “mystique of science”<sup>140</sup> when the witness is a scientist, and the “superficial attractiveness”<sup>141</sup> of police witnesses. And over the past several years, both in Canada and in the United States, the rules have tightened in response to such arguments from authority causing demonstrable miscarriages of justice.<sup>142</sup>

There is scientific support for this caution: research demonstrates that people lacking knowledge in a given field attorn to the opinions of experts. In other words, people focus on the extrinsic qualities of the message, such as the qualifications of the speaker and how confident he or she

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<sup>135</sup> See *Lee*, *supra* note 4 at para 52.

<sup>136</sup> Edmond, “Thinking Forensics”, *supra* note 98 at 147. Australian courts have also confronted the specious nexus by allowing, for instance, translators to provide voice identification opinion, see e.g. San Roque, *supra* note 1 at 12.

<sup>137</sup> See e.g. Lvovsky, *supra* note 1 at 2005 (reviewing police and FBI training materials); Adam Benforado, *Unfair: The New Science of Criminal Injustice* (New York: Crown Publishers, 2015) at 135–37.

<sup>138</sup> See *JLJ*, *supra* note 12 at para 55; *McIntosh*, *supra* note 19 at para 17.

<sup>139</sup> *Abbey*, *supra* note 53 at para 90; *R v Myles*, [2011] OJ No 4559 at para 28, 97 WCB (2d) 377 (ONSC) [*Myles*].

<sup>140</sup> *DD*, *supra* note 18 at para 41; *Mohan*, *supra* note 2 at 21 citing *R v Bédand*, [1987] 2 SCR 398 at p 434, 43 DLR (4th) 641.

<sup>141</sup> *Sekhon*, *supra* note 2 at para 50; *R v Mulaj*, 2014 ONSC 4405 at para 50, 114 WCB (2d) 635.

<sup>142</sup> See generally Part II, *supra*.

seems, as opposed to the content of the message.<sup>143</sup> Such shortcuts may work in some cases, but they are especially problematic when there is a specious nexus between the qualifications of the speaker and the topic he or she is opining on. Further, unconscious and unverbalizable biases give rise to overconfident witnesses, who in turn may “usurp the functions of the trier of fact.”<sup>144</sup>

*Ilina*, *Lee*, and *Colpitts* all present striking examples of the specious nexus between authority and evidence. As noted, *Lee* is especially problematic because the police officer wore two hats in closely related fields: dog handling, and shoe print and gait analysis. A juror would have understandable difficulty in distinguishing between the police officer’s expert evidence in one field and lay evidence in the other.

The lay officers in *Ilina* pose a similar problem. Jurors were likely influenced by the fact that Sergeant Bell and Constable Rautavuori were police officers who had surely observed several crime scenes, presenting what Justice Goudge called “authoritative claims based largely on personal experience.”<sup>145</sup> But lay opinion law does not demand an inquiry into witnesses’ qualifications and reliability. The trial judge struggled with this very issue in his jury instructions, attempting to explain how the jury should balance the evidence of the three police officers, two in their capacity as mere observers and one, as an expert. And recall, the Court of Appeal disapproved of the trial judge’s approach to instructing the jury but ultimately found, it was not a serious enough error to order a new trial.<sup>146</sup>

Finally, *Colpitts* is also problematic. In *Colpitts*, Officer Black, was a senior police officer with over twenty years of experience investigating commercial crimes.<sup>147</sup> The Crown, in fact, originally sought to qualify him as an expert. Having been deeply involved in the investigation, Officer Black could speak knowledgeably and confidently about it. In short, these factors likely made him a persuasive witness. They did not, however, demonstrate his ability to perform inferential statistics to determine the likelihood that the accused’s trading activity meaningfully differed from the market as a whole and in relation to forensic accounting standards.

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<sup>143</sup> See e.g. Richard E Petty & John T Cacioppo, *Communication and Persuasion: Central and Peripheral Routes to Attitude Change* (New York: Springer-Verlag, 1986) at 142–43; Robert B Cialdini, *Influence: The Psychology of Persuasion* (New York: Harper Collins, 2007) at 208–36.

<sup>144</sup> *Mohan*, *supra* note 2 at 24.

<sup>145</sup> *Goudge Inquiry*, vol 3, *supra* note 10 at 408.

<sup>146</sup> See *Ilina*, *supra* note 44 at para 84.

<sup>147</sup> See *Colpitts*, *supra* note 6 at para 3.

Courts have largely failed to recognize the specious nexus when admitting lay evidence, but there is a basis in the jurisprudence for caution in such cases. Justice Dickson recognized it in *Graat*, warning that an officer's opinion of a person being intoxicated could easily be outweighed by a jury.<sup>148</sup> Similarly, at the admission stage, the British Columbia Court of Appeal in *R. v. Ratté*<sup>149</sup> used a contextual approach to exclude the lay opinion of a police officer investigating the murder of the accused's wife.<sup>150</sup> The officer's testimony summarized her lengthy investigation but also included a conclusory opinion regarding the whereabouts of the wife. In holding that this lay opinion should have been excluded, the Court of Appeal factored in the prejudicial impact of the witness's status as police officer and her experience in the field.<sup>151</sup> *Ratté* also provides an example of how the jurisprudential approach to lay opinion has failed (i.e., carefully developing the boundaries of admissible lay opinion through the case law). It analogizes closely to *Colpitts* but was not referenced in that case. We will return to this issue in the following section.

Overall, when lay opinion strays from a summary of unverbalizable *qualia* to authoritative claims about the conclusion of a police investigation, it is nothing more than the *ipse dixit* warned about in countless expert evidence cases. Furthermore, it is an especially pernicious variety of *ipse dixit* because the witness's experience may have nothing to do with the area on which he or she is opining. This phenomenon has been made possible by a fractured and incoherent lay opinion jurisprudence.

### C. Failures in the Lay Opinion Jurisprudence

*Graat* adopted a more flexible and principled approach to lay opinion, which has, over time, resulted in the very uncertainty the Court sought to avoid. In many ways, the decision was a logical correction to the previous rules—a system of carve outs—which negatively impacted judicial economy,<sup>152</sup> widely diverged across provinces, and created a great deal of uncertainty.<sup>153</sup> Principled approaches, however, can devolve into unstructured

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<sup>148</sup> See *Graat*, *supra* note 6 at 841.

<sup>149</sup> 2012 BCCA 352, 95 CR (6th) 387 [*Ratté*].

<sup>150</sup> See generally Edmond, "Contextual Approach", *supra* note 3. We will discuss a contextual approach to lay opinion evidence in Part V, *infra*.

<sup>151</sup> See *Ratté*, *supra* note 149 at para 40.

<sup>152</sup> See *Graat*, *supra* note 6 at 835; Pratte, *supra* note 29 at 172–76; Lederman, *supra* note 18 at 770–72, citing John H Wigmore, *A Students' Textbook of the Law of Evidence* (Chicago: Foundation Press, 1935) at 156.

<sup>153</sup> See *Graat*, *supra* note 6 at 838.

exercises in judicial discretion.<sup>154</sup> This appears to be the case with the post-*Graat* lay opinion rule, in reference to which the majority of judges of the Alberta Court of Appeal, in *Lee*, said: “Whatever rule there may have been against a lay witness giving opinion evidence, it has not survived the decision in *Graat*.”<sup>155</sup>

Indeed, *Lee* may be the most egregious of the cases we reviewed in its failure to advance the law incrementally. Recall that in *Lee*, the police officer developed a narrative to explain a complex pattern in the snow. The majority in *Lee* only analogized to one modern Canadian case, *Powell*, in which the police officer giving lay opinion testified that a footprint and the shoe appeared to be of the same size and tread pattern.<sup>156</sup> To make matters worse, *Powell* only relied on one authority, a trial decision admitting the lay opinion of two civilians that a truck driver was intoxicated, that is a *Graat*-type fact pattern.<sup>157</sup> These leaps are vast: in just two cases, permissible lay opinion in Alberta expanded from the assessment of drunkenness by a civilian to a series of inferences about a complicated pattern by an authority figure. Neither court provided an explanation or principled justification for the expansion.

*Colpitts* then relied on *Lee* and *Ilina* for the general proposition that, “[g]iven the developments in the law”,<sup>158</sup> “police officers may give opinion evidence on observations made during their investigations.”<sup>159</sup> However, Officer Black in *Colpitts* was not recounting a firsthand experience, as was the case in *Graat*, *Ilina*, and *Lee*. Rather, he was analyzing data gathered by others and, in fact, affirming the accuracy of an expert report.<sup>160</sup> His judgment called for accounting procedures and standards that were not in evidence. These facts not only diverge from the precedents in *Lee* and *Ilina*, but also seem to run afoul of *Graat*’s personal observation

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<sup>154</sup> See *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 at para 85, [2014] 1 SCR 177. For a review of rules versus principled-based legal reasoning, including reference to the law of evidence, see Daniella Muryanka, “Give Me One Good Reason: The ‘Principled Approach’ in the Canadian Judicial Opinion” (2015) 40:2 Queen’s LJ 609.

<sup>155</sup> *Lee*, *supra* note 4 at para 31.

<sup>156</sup> See *Powell*, *supra* note 63 at para 6. In the Florida decision, *White*, *supra* note 63, the police officer’s opinion was that a shoeprint appeared to come from a size ten shoe with a smooth sole. *Foley* (*supra* note 63), the third case relied on by the majority, was unreported except for a brief summary. That abstract leaves it unclear whether the witness was a police officer, and what legal test was applied to the evidence. The witness opined that tracks in the snow, going and coming, appeared to be from the same shoe.

<sup>157</sup> See *R v Goodine*, 2004 NBPC 30, 66 WCB (2d) 266.

<sup>158</sup> *Colpitts*, *supra* note 6 at para 24.

<sup>159</sup> *Ibid* at para 10.

<sup>160</sup> *Ibid* at para 5.



factor, which states that the witness should have personally observed the case-specific facts.<sup>161</sup> As we will detail below, several other decisions—none relied on in *Ilina, Lee*, or *Colpitts*—have excluded lay opinion for this failure of personal observation.<sup>162</sup> This inadvertence represents a second failure of the lay opinion jurisprudence: disregarding of relevant authority.

The parties in *Colpitts* may not have drawn Justice Coady's attention to *Toronto Dominion Bank v. Cambridge Leasing Ltd.*,<sup>163</sup> which likely represents its closest factual analogy. In *TD*, the New Brunswick Court of Queen's Bench considered whether a financial projection could be the appropriate subject matter of lay opinion. The court ultimately excluded the evidence on the basis of *Graat's* principle that the evidence be a matter of the witness's personal experience.<sup>164</sup> A projection, by its prospective nature, cannot be a matter of personal experience.<sup>165</sup>

*TD* is one of several cases that have drawn a harder line at *Graat's* personal knowledge principle. For instance, the Court of Appeal for Ontario in *Marchand* excluded a nurse's lay evidence because it deviated from her own experience and instead delved into the actions of another nurse and the standard of care for nurses.<sup>166</sup> The court in *American Creek* relied on *Marchand* for precisely this point.<sup>167</sup> *American Creek* concerned a breach of contract claim in the mining industry. The parties disputed whether certain expenses were properly characterized as exploration costs. The impugned lay witness would have opined on whether drilling patterns indicated exploration or another purpose. The court characterized the testimony as specialized knowledge rather than lay opinion because it was not a summary of the witness's own observations:

The evidence his counsel seeks to adduce does not consist of every-day inferences from observed facts which he, as the observer, was in a better position to make than I am because he was there. Rather, his evidence will concern matters of specialized, technical expertise upon which he proposes to comment **on the basis of his review of**

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<sup>161</sup> See *Graat*, *supra* note 6 at 836.

<sup>162</sup> Note that this distinction stays closer to the rule's original conception as an individual's perceptions, the foundations of which are unverbalizable and not subject to methodology.

<sup>163</sup> *Supra* note 35.

<sup>164</sup> See *Graat*, *supra* note 6 at 836; Lederman, *supra* note 18 at 774.

<sup>165</sup> See e.g. *TD*, *supra* note 35 at para 7.

<sup>166</sup> See *Marchand*, *supra* note 35 at para 97.

<sup>167</sup> See *American Creek*, *supra* note 35 at para 22.

**documentation and reports**, taking into account his own experience.<sup>168</sup>

*TD, Marchand*, and *American Creek* all bear a strong similarity to the facts in *Colpit*, with witnesses analyzing data relating to occurrences they did not personally observe. Furthermore, *American Creek* being an appellate decision, it should carry as much weight in Nova Scotia as the extra-provincial appellate decisions relied on in *Colpitts*.<sup>169</sup> In any event, we are surprised the court in *Colpitts* did not recognize an earlier—high profile—decision of the very same court. In that case, *Elwin v. Nova Scotia Home for Coloured Children*, the Nova Scotia Supreme Court excluded evidence from an orphanage’s director because it pertained to financial information outside of her personal experience.<sup>170</sup>

Stricter adherence to *Graat*’s “personal observation” factor, besides finding purchase in the cases above, correlates with recent American academic work. There, Edward Imwinkelried has lucidly detailed a key distinction between lay and expert opinion.<sup>171</sup> First, he notes that both varieties of opinion concern a comparison between a generalization and case-specific facts. For instance, a *lay* handwriting identification witness has viewed the defendant’s handwriting many times before (i.e., the generalization) and then compares that to a contract in evidence at trial (i.e., the case-specific fact). Similarly, an *expert* psychologist compares a body of knowledge about a disease (i.e., the generalization) to the symptoms of the plaintiff (i.e., the case specific fact).

The distinction, according to Imwinkelried, is how the generalization and case-specific facts are acquired.<sup>172</sup> The expert may, and is often expected to, go beyond his or her personal observations in coming to a generalization. Rather than remaining confined to personal experience, the expert draws from a body of knowledge, most or all of it discovered by other experts. The lay witness, on the other hand, is expected to stay within his or her personal observations. The same distinction holds for case-specific facts: the expert may also go beyond personal observations, to considering hypotheticals and second-hand reports, whereas the lay witness is restricted to personal observations.<sup>173</sup> We will revisit this anal-

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<sup>168</sup> *Ibid* at para 18 [emphasis added].

<sup>169</sup> Those being *Ilina*, *supra* note 44 and *Lee*, *supra* note 4.

<sup>170</sup> See *Elwin*, *supra* note 83 at paras 88, 90, 94, 96. See also Nisbettm *supra* note 82.

<sup>171</sup> See Imwinkelried, *supra* note 1.

<sup>172</sup> *Ibid* at 86.

<sup>173</sup> *Ibid* at 91–92 (for the U.S. authority on allowing such evidence). See also *Bleta v R*, [1964] SCR 561, 48 DLR (2d) 139 for the position in Canada.

ysis in Part V, in which we propose a revised framework for admitting lay opinion evidence into court.

Finally, a stronger jurisprudential approach should attempt to align expert and lay opinion case law. In other words, if the impugned evidence has typically been admitted as expert evidence, then according to *Mohan*, this indicates courts have found that expertise is *necessary* to assist the trier of fact on those topics.<sup>174</sup> How then could the same evidence be brought by laypeople in the cases we surveyed? Moreover, recall that *Graat* distinguished between lay opinion and cases where “scientific, technical, or specialized testimony” was necessary.<sup>175</sup> Surprisingly, this type of analysis is uncommon in the lay opinion jurisprudence.<sup>176</sup>

Had the majority in *Lee* considered the case law involving gait<sup>177</sup> and shoeprint<sup>178</sup> analysis, they would have found Justice Berger was correct. These situations are regularly the subject matter of expert opinion. Similarly, forensic accountants and securities investigators are frequently qualified as experts in prosecutions like that in *Colpitts*.<sup>179</sup> And crime scene investigators are called as experts to provide the forensic evidence of the sort given by the two lay police officers in *Ilina*.<sup>180</sup>

This confusion between lay and expert topics was particularly stark in *Ilina* and *Colpitts*, wherein lay and expert witnesses provided substantively the same evidence *within the same trial*. In *Ilina*, the Crown’s own crime scene expert gave evidence that contradicted that of the lay officers, a phenomenon that proved problematic when the judge instructed the jurors about how to weigh the three opinions.<sup>181</sup> This was especially prob-

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<sup>174</sup> See *Mohan*, *supra* note 2 at 23–24.

<sup>175</sup> See *Graat*, *supra* note 6 at 838.

<sup>176</sup> Of the cases reviewed in this article, only Berger, JA, in dissent in *Lee*, *supra* note 4, engaged in this reasoning, at para 52.

<sup>177</sup> In *Roscoe v Halifax (Regional Municipality)*, 2011 NSSC 485, 312 NSR (2d) 201, Justice Muise excluded evidence similar to Sergeant Carriere’s gait analysis: “He is not qualified to give expert evidence on backwards running gaits” at para 32. See also *R v Aitken*, 2012 BCCA 134, 92 CR (6th) 384.

<sup>178</sup> See *R v Smith*, 74 WCB (2d) 135, 2007 [2007] OJ No 2172 at paras 32–38 (ONSC); *R v Perlett*, 82 OR (3d) 89 at paras 28–31, 212 CCC (3d) 11 (ONCA); NAS Report, *supra* note 5 at 145–50.

<sup>179</sup> See *R v Wood*, 2001 NSCA 38 at paras 69–76, 191 NSR (2d) 201, where the expert was a forensic accountant who also served as an investigator; *R v Duffy*, 2015 ONCJ 693, 333 CCC (3d) 402; *R v Nguyen*, 2012 BCPC 554, [2012] BCJ No 3046.

<sup>180</sup> See e.g. *Klymchuk*, *supra* note 17 at paras 22–32; *R v Ranger* (2003), 67 OR (3d) 1 at paras 25–35, 178 CCC (3d) 375 (ONCA).

<sup>181</sup> See *Ilina*, *supra* note 44 at paras 81–91.

lematic for the accused because the lone expert opinion, which was favourable to her case, faced two speciously lay opinions. And towards the end of the *Colpitts* trial, a battle was fought over qualifying an expert securities investigator to opine on the same subject matter as Officer Black,<sup>182</sup> with the defence arguing that the expert's opinion was unreliable because he uncritically accepted Officer Black's lay opinion.<sup>183</sup> The experience in *Colpitts* therefore demonstrates both the inconsistency in defining lay opinion and the unfairness this inconsistency can cause. The evidence was admitted over the defence's protestations, allowing the possibility that unreliable lay opinion could provide the foundation for expert evidence.

Failure to enforce the limits of lay opinion evidence also undermines expert evidence law. As the courts in *Abbey*, *Sekhon*, and *Bingley* held, it is incumbent on the trial judge to define the nature and scope of expert opinion before assessing admissibility.<sup>184</sup> Allowing expert opinion to be admitted as lay opinion evidence renders this rule ineffective because evidence beyond the scope could simply be admitted as lay opinion. Indeed, the evidence in the cases we discussed would be vulnerable to exclusion under the expert rules.

If applied, *Mohan's* properly qualified expert requirement would likely exclude some of the cases we have discussed. The lay witnesses in *Ilina* and *Lee* were law enforcement officers with some on-the-job experience in the areas they were opining on. This, however, may not be enough expertise under *Mohan*, which requires not just experience but specialized knowledge. For instance, general medical practitioners are excluded from opining on specialized disciplines.<sup>185</sup> The same holds for police officers. In the retrial of *R. v. Abbey*, for instance, a police officer with extensive experience investigating gangs was not permitted to testify about the meaning of a particular tattoo in gang culture because his knowledge in that specialized area was merely anecdotal.<sup>186</sup> Similarly, the police witnesses in *Ilina* and *Lee* had only limited experience in the areas they opined on. In-

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<sup>182</sup> See *R v Colpitts*, 2016 NSSC 219 at paras 30, 32, 376 NSR (2d) 336; *R v Colpitts*, 2016 NSSC 48, 370 NSR (2d) 148.

<sup>183</sup> *Ibid* at para 32.

<sup>184</sup> See *Bingley*, *supra* note 43 at para 17; *Sekhon*, *supra* note 2 at paras 46–48, *Abbey*, *supra* note 53 at paras 62–65.

<sup>185</sup> See *R v Selles* (1997), 34 OR, (3d) 332 (ONCA), 116 CCC (3d) 335; *Walker Estate v York-Finch General Hospital* (1996), 66 ACWS (3d) 81, 5 CPC (4th) 240 (ONCJ (GD)); *Bialkowski*, *supra* note 17.

<sup>186</sup> See *R v Abbey*, 2011 ONSC 1260 at para 48, 82 CR (6th) 385. See also *Sriskanda*, *supra* note 9 at para 33; *Meady v Greyhound Canada Transportation Corp*, 2010 ONSC 4519 at para 38, 14 CPC (7th) 361.

deed, this may be why the Crown elected to call them as lay rather than expert witnesses—they would have failed the *Mohan* test.

The police witnesses in *Ilina*, *Lee*, and *Colpitts* would also have faced potential exclusion for bias under the expert rules.<sup>187</sup> Sergeant Carriere in *Lee* and Officer Black in *Colpitts* would have been especially at risk because of their extensive investigatory involvement. For instance, in *Tremblett* and *Kovats*, deep involvement in an investigation was found to raise an apprehension of bias such that the officers were excluded.<sup>188</sup> Still, exclusion for bias remains a high bar when it comes to police witnesses.<sup>189</sup> The mere risk, however, that the witness would be excluded for bias might motivate investigating teams to control for unconscious bias by keeping the potential witness blind to contextual features that might impact his or her analysis. Therefore, there is still deterrence value in subjecting the witness to a rule of evidence that is sensitive to bias.

With regard to reliability, none of the lay witnesses in *Ilina*, *Lee*, or *Colpitts* seems to have taken any methodological measures to establish their reliability and thus remove or measure the unconscious biases we documented above. As a result, they may have been excluded if they were called as experts because expert witnesses must provide a reliable basis for their opinions.<sup>190</sup> With regard to forensic scientific evidence, the party proffering it must demonstrate that the methodology has been tested and possesses a low error rate.<sup>191</sup> Specialized knowledge must also be reliable but is subject to a more flexible inquiry into whether the expert followed the appropriate standards in the field.<sup>192</sup> For example, in *Myles*, a police officer's expert evidence about gangs was excluded because he could not explain his methodology.<sup>193</sup>

Finally, expert evidence is subject to a discretionary gatekeeping analysis in which its costs and benefits are evaluated.<sup>194</sup> The evidence at issue in the cases we have reviewed would also likely run into trouble at

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<sup>187</sup> See *White Burgess*, *supra* note 8 at para 45.

<sup>188</sup> See *Tremblett*, *supra* note 23 at para 29; *Kovats*, *supra* note 23 at para 21.

<sup>189</sup> See e.g. *R v Gager*, 2012 ONSC 388 at paras 186–98, 99 WCB (2d) 325. See generally *Luovsky*, *supra* note 1 for the issues raised by police witnesses.

<sup>190</sup> See sources referenced, *supra* note 14.

<sup>191</sup> See *JLJ*, *supra* note 12 at paras 51–55.

<sup>192</sup> See *Abbey*, *supra* note 53 at para 119; *Sriskanda*, *supra* note 9 at para 32.

<sup>193</sup> See *Myles*, *supra* note 139 at paras 44–45. See also *Sriskanda*, *supra* note 9 at para 34, where the police expert had “conducted no independent research or experiments”, thus failing *Abbey*'s flexible standard for specialized knowledge.

<sup>194</sup> See *White Burgess*, *supra* note 8 at para 24.

this stage. In particular, the consumption of court time and prejudice involved in the witnesses providing duplicative evidence in *Ilina* and *Colpitts* would militate toward exclusion.<sup>195</sup>

#### IV. Lay Opinion Evidence, The Next Generation

Courts and academics have devoted a great deal of thought on how expert evidence should be harnessed to assist the trier of fact, while simultaneously avoiding undue prejudice. This work has already demonstrated its value,<sup>196</sup> with several instances of unreliable evidence excluded from reaching the ultimate decision.<sup>197</sup> It is time to devote some attention to lay opinion, which poses its own practical and epistemic challenges, thus requiring deeper consideration than it has been given in the years since *Graat*. In this section, we will map out a path forward for lay opinion evidence law and suggest where that line may be drawn. We will begin with principles and then lay out a framework for the admission of lay opinion evidence.

We are not suggesting a drastic change in Supreme Court jurisprudence or the introduction of new legislation. Rather, the root of the problem, as we noted in our discussion of the failed jurisprudential approach, is disagreement between courts about what exactly *Graat* stands for. For instance, consider the contrast between the majority in *Lee*'s statement that there is no rule,<sup>198</sup> with a 2016 statement from an Ontario trial court: "However, although the court in *Graat* eased considerably the rule against lay opinions, it did not discard it entirely."<sup>199</sup> These approaches not only contradict each other, but are also difficult to reconcile with decisions that fully engage with all four of the factors<sup>200</sup> that Justice Dickson considered in *Graat*.<sup>201</sup>

In fact, many of the hazards we identified flow from a simple failure to fully consider the existing authority. For instance, Justice Dickson distinguished between the lay opinion found in the facts of *Graat* and opinions

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<sup>195</sup> See *R v K (A)* (1999), 176 DLR (4th) 665 at para 99, 45 OR (3d) 641 (ONCA); *JLJ*, *supra* note 12 at para 47

<sup>196</sup> Although, not as much as some would like, see the academic commentary at note 16.

<sup>197</sup> See sources referenced, *supra* note 17.

<sup>198</sup> See *Lee*, *supra* note 4 at para 31.

<sup>199</sup> *Ibrahim*, *supra* note 6 at para 176.

<sup>200</sup> That is to say personal knowledge, better vantage point than trier of fact, experiential capacity, and compendious statement of facts.

<sup>201</sup> See sources referenced, *supra* note 35.

that derive from specialized and scientific knowledge.<sup>202</sup> Further, his caveat about police officers serving as lay witnesses finds a home in our discussion of the specious nexus. In light of the Supreme Court's recent warning about the injustices that flow from the "potent mix"<sup>203</sup> of unreliability and prejudice, it may be time to elevate Justice Dickson's caveat to a more prominent place in lay opinion doctrine.

Finally, the "personal knowledge of observed facts" component of *Graat* accords with Imwinkelried's suggestion that lay and expert witnesses primarily differ in whether witnesses are permitted to base their reasoning on information beyond their firsthand observations. There is an expectation that experts are standing on the shoulders of giants in developing their opinions; indeed, that is a large part of their value. The same cannot be said for lay witnesses whose function is to provide an opinion about what they personally observed.<sup>204</sup>

This failure to adhere to *Graat* in distinguishing between lay and expert opinion disproportionately affects the criminally accused. In the domain of expert evidence law, researchers have noted that failures to gate-keep forensic science unduly burden the accused, who are ill-equipped to rebut unreliable forensics.<sup>205</sup> And, ironically, trial judges reserve their strictest reliability scrutiny not for forensic evidence led by the prosecution, but for evidence led by plaintiffs in civil trials.<sup>206</sup> This pattern seems to hold for lay evidence as well. Of the cases we found, in which lay opinion was excluded, the majority were from the civil arena.<sup>207</sup> And as we noted in our introduction, an extreme imbalance can occur when the Crown's police witnesses are admitted under the lay rules. In such cases, there is no one the accused can call on to rebut that evidence other than, potentially, other police officers present at the scene of the crime. There is

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<sup>202</sup> See *Graat*, *supra* note 6 at 838.

<sup>203</sup> *Hart*, *supra* note 134 at para 8.

<sup>204</sup> See Imwinkelried, *supra* note 1 at 84–89.

<sup>205</sup> See Edmond, "Contextual Approach", *supra* note 3 at 361–63; Faigman et al, *supra* note 3 at para § 1:10.

<sup>206</sup> See Edmond, "Contextual Approach", *supra* note 3 at 398 ("judges tend to screen expert evidence adduced by plaintiffs in tort and product-liability suits more aggressively than they do expert evidence"); D Michael Risinger, "Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?" (2000) 64:1 Alb L Rev 99 at 110.

<sup>207</sup> See generally *supra* note 35; *M & P Logging Ltd v Carrier Lumber Ltd*, 2001 BCCA 125, 85 BCLR (3d) 207; *Cambie Surgeries Corp v British Columbia (Attorney General)*, 2016 BCSC 1896, 93 BCLR (5th) 353.

little recourse other than hiring an expensive expert and attempting to qualify him or her under the relatively onerous *Daubert-Mohan* test.<sup>208</sup>

To counter this imbalance in the expert sphere, some researchers have prescribed a contextual approach informed by criminal justice principles such as the presumption of innocence.<sup>209</sup> In our view, courts should also take a contextual approach to lay opinion, especially when it so closely resembles expert opinion. For instance, in *Lee*, Sergeant Carriere’s lay opinion about the meaning of the footsteps in the snow would be very difficult for the accused to rebut without an expert. *Graat* itself did not seem to foresee situations like *Lee* because in *Graat*, the accused had two lay witnesses of his own who also made personal observations. In cases like *Lee*, we suggest courts should be contextually sensitive and thus loath to admit the Crown’s witness.

Courts should be similarly sensitive to the role the evidence plays in the totality of the case.<sup>210</sup> In fact, there is precedent for this approach when police witnesses are being admitted as experts. In *Van Bree*, for example, Justice Annis excluded portions of a police officer’s opinion for bias because the officer’s evidence was so central to the case.<sup>211</sup> This represents a thoughtful approach that is live to the prejudices flowing from police testimony. There is no reason the lay opinion test should not be as contextually sensitive.

### A. *Lay Opinion 2.0*

Drawing on the above discussion, we will now offer our vision of an improved framework for trial judges to follow in deciding to admit or exclude lay opinion. Our goal is to retain *Graat*’s principles and flexibility by overlaying a structured approach on top of this leading case. We drew inspiration from Justice Doherty’s two-step reconceptualization of the *Mohan* test in *Abbey*, which gained acceptance amongst trial judges across Canada and was eventually adopted by the Supreme Court.<sup>212</sup>

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<sup>208</sup> See San Roque, *supra* note 1 at 14 for the description of an Australian case, *R v Madigan*, [2005] NSWCCA 170, in which an accused’s expert, who would have disagreed with the Crown’s lay witness, was excluded.

<sup>209</sup> See generally Edmond, “Contextual Approach”, *supra* note 3 at 396–408.

<sup>210</sup> See *Mohan*, *supra* note 2 at 24–25; There is some evidence of resistance to lay opinion that goes to the ultimate issue; see The Honourable Mr. Justice David Watt, *Watt’s Manual of Criminal Evidence* (Toronto: Thomson Reuters, 2016), § 30.01.

<sup>211</sup> See *Van Bree*, *supra* note 23 at para 126.

<sup>212</sup> See *White Burgess*, *supra* note 8 at paras 22–25.



Lay Opinion 2.0 structures the admissibility inquiry by asking key questions to ground the reasoning and identify the issues, and then builds on those insights in the final discretionary balancing stage. It follows four steps:

1. Identification;
2. Characterization of the reasoning process and witness;
3. Categorical exclusion of opinion that is not the result of the witness's own observations;
4. Discretionary gatekeeping of unduly prejudicial evidence.

Evidence failing our test should either be excluded or resubmitted as expert evidence.

#### 1. Step 1: Identification

First, the trial judge should identify “the generalization the ... witness is relying on ... the case-specific fact or facts” and the comparison between those elements.<sup>213</sup> For example, in *Ilina*, the generalization was the officers' previous viewings of crime scenes with clear fluids adjacent to blood. The case-specific fact was the observation of the crime scene. The comparison was the judgment of similarity between the previous crime scenes and the instant one. This identification step is an opportunity for precision, something that is notoriously absent from the current approach. It is also integral to the next stage, characterization.<sup>214</sup>

#### 2. Step 2: Characterization

Second, the trial judge should characterize both the elements from step 1 and the witness providing the opinion. This characterization exercise will typically map onto the following questions.

- (a) Personal or Second-hand Observation: Are the elements identified at step 1 based on personal observations? In *Ilina*, if the officers had indeed been making their own observations instead of relying on secondhand anecdotes, then their generalizations were personal observations. However, it may be that they had never seen other similar crime scenes, but that they were relying on anecdotes relayed by other police officers. In such cases, their opinions were

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<sup>213</sup> Imwinkelried, *supra* note 1 at 94. See generally *ibid* at 94–99.

<sup>214</sup> Given that the party tendering the evidence bears the burden of demonstrating its admissibility, it should assist the trier of fact in clarifying these elements of the opinion, *ibid* at 94.

no more than guesses lacking any foundation and would be excluded in Step 3. Similarly, in *Colpitts*, one of the case-specific facts was a report that Officer Black did not prepare, and the comparative exercise was expressly guided by professional standards, rather than Officer Black's own judgment.<sup>215</sup>

- (b) Methodology or Qualia: Are the elements of the opinion subject to professional or scientific methodology? Drawing from the case law on expert evidence and numerous syntheses of it, the trial judge can determine if the opinion at issue is one typically given by experts and guided by methodology.<sup>216</sup> Further, what are the unconscious biases that these methodologies seek to control? Alternatively, is the judgment predominantly based on unconscious processes? Here, eyewitness identifications founded on *qualia* clearly contrast with the forensic accounting in *Colpitts* and the footprint analysis in *Lee*.
- (c) Source of the Evidence: Who is providing the opinion? Is it a person with authority in the eyes of the trier of fact? How closely related is that authority to the evidence (i.e., is there a specious nexus)? Trial judges should be aware of the prejudices that flow from admitting a witness with an air of authority, but minimal verifiable ability to provide a reliable opinion, a factor for consideration at step 4.

### 3. Step 3: Exclusion of Secondhand Evidence

At this third step, evidence that is not based on personal observation should be categorically excluded and the witness's evidence properly scoped to exclude such evidence. This scoping is a direct extension of the Supreme Court's directive in *Sekhon* and *Bingley* that the permissible scope of an expert's testimony should be established at as early a stage as possible.<sup>217</sup>

Given that modern lay opinion often strays into prejudicial areas, it should be scoped as well. This direction may save a great deal of time in cases like *Colpitts*, where the lay evidence could also have been scoped to include only the evidence that Officer Black personally observed. For in-

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<sup>215</sup> See *Colpitts*, *supra* note 6 at para 5.

<sup>216</sup> See e.g. National Judicial Institute, *Science Manual for Canadian Judges*, Ottawa, National Judicial Institute, 2013.

<sup>217</sup> See the cases referenced at note 53.

stance, he would have been permitted to give a description of the content and timing of the accused's emails. Such evidence could then have been relied on by the Crown's expert, who was admitted later in the course of the trial.

We prefer to consider the presence of methodology in a more discretionary manner at step 4 because lay and expert opinion frequently overlap in their subject matter. In other words, lay and expert witnesses both opine on topics like voice and handwriting identification. Therefore, the failure to use methodology should be sensitive to context; it is much more problematic when an apparent expert fails to use methodology to avoid bias than when a true layperson does the same.

#### 4. Step 4: The Lay Opinion Gatekeeper

In the tradition of the rule in *Mohan*, evidence that survives steps 1 through 3 should be subjected to a discretionary weighing of the benefits and costs to the trial.<sup>218</sup> In terms of costs, prejudice from the specious nexus found in step 2 should weigh heavily in the trial judge's calculus. Put slightly differently, the trial judge should take into account the degree to which the witness's authority gives a false sense of security about the evidence's reliability. Further, failure to follow methodology to counter unconscious bias is a significant impediment to a fair trial and militates against admitting the evidence.

Benefits, in keeping with original purpose of the lay opinion rule, derive from utility to the trier of fact in making an informed decision. The trial judge should therefore consider admitting the opinion when the facts underlying it are unverbalizable *qualia* that cannot be admitted any other way. Similarly, and in keeping with *Graat*, a witness, better placed than the judge to draw the inference and one having the necessary experiential capacity, should be favoured over those who cannot establish those advantages.<sup>219</sup>

Identifying benefits also demands consideration of whether the witness seeks to go beyond giving a compendious statement of facts. For example, the police officers in *Ilna* did not provide their opinion that there was a cleanup out of any form of necessity. Rather, the exact same information—everything except the opinion—could have been conveyed by simply describing what they saw: a pool of blood adjacent to a clear liquid. In this respect, *Ilna* is distinguishable from cases where the witness can-

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<sup>218</sup> See *Mohan*, *supra* note 2 at 20–21.

<sup>219</sup> See *Graat*, *supra* note 6 at 836.

not provide as accurate a comparison, as identified in step 1, without resorting to opinion—for example, an eyewitness identification.

Elements of a contextual approach should also be considered at step 4. For instance, the fact that Sergeant Carriere's footprint analysis was effectively impossible to rebut by the accused should militate toward its exclusion or application of the more searching expert rules. Likewise, in *Colpitts*, the fact that Officer Black's forensic evidence was duplicative and cut to the heart of the Crown's case should also have provided a strong reason to exclude it.

## Conclusion

Surveying the boundaries of the lay opinion exception poses a distinct challenge for courts and legal scholars. It is a task that draws on the purpose of the exception, the limits of human psychology, and the trial judge's duty to gatekeep another type of evidence—that brought by experts. This challenge has, by and large, not been met. As we demonstrated in our survey of the case law, courts across Canada widely disagree over the content of the lay opinion rule, and sometimes over whether a rule exists at all. Moreover, this is an issue with significant stakes, especially to the criminally accused who regularly face adversarial lay witnesses bearing all the hallmarks of expert witnesses. We hope that we have shed an analytic light on this often overlooked problem. But this is just the first step. Canadian courts should adopt a more structured framework to the admission of lay opinion, one that will both prevent unfairness and accurately determine truth.

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