

Drawing the Line Between Lay and Expert Opinion Evidence*

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

* Cite, with permission, as:

Jason M Chin, Jan Tomiska, and Chen Li, “Drawing the Line Between Lay and Expert Opinion Evidence” (forthcoming) 63:1 McGill Law Journal.

(This version of the manuscript has not yet been edited by the McGill Law Journal team.)

**Jason M. Chin, Lecturer, T.C. Beirne School of Law, University of Queensland. Jan Tomiska, University of Toronto. Chen Li, University of Toronto. We are deeply indebted to Caitlin Goss, Ed Imwinkelried, Harvey Lim, Matt Thompson, David White, and two anonymous reviewers for their *expert* advice and feedback on previous drafts. Many of the ideas contained herein were discussed at the annual meeting of the Evidence Based Forensics Initiative in Wollongong, New South Wales and the first author’s legal research seminar at the University of Toronto Faculty of Law. Thank you also to Thomas Palmer for research assistance. This research was supported by a start-up grant from the University of Queensland awarded to the first author.

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. 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 this problem 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 – were authority figures but were not qualified as 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.

Table of Contents

Abstract	2
Table of Contents	3
Part I. Introduction	4
Part II. The Rising Bar for Expert Opinion.....	7
Part III. The Lay Opinion Rule and its Lost Moorings.....	11
A Crime Scene Cleanup in R v Ilina.....	14
Footsteps in the Snow in R v Lee	16
The Lay Forensic Accountant in R v Colpitts	19
Part IV. The Hazards of Lay Experts.....	21
Methodology versus Qualia	22
Specious Nexus between Authority and Evidence	33
Failures in the Lay Opinion Jurisprudence	37
Part V. Lay Opinion Evidence, The Next Generation	45
Lay Opinion 2.0	48
Conclusion	53

Part I. 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 rules 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 that exceeds their own personal observations and qualifications. Worse still, as police, they are cloaked in the same raiment of authority that makes all expert evidence so dangerous. We believe that this is a serious problem, and one that has largely flown under the radar in Canada.¹

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”.² The 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 compared to the Crown.³

¹ But 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 SMU L Rev 73 [Imwinkelried], Susan C Scieszinski, “Note, Using Nonscientific Expert Testimony: A Play-by-Play Toolkit” (2013) 61 Drake L Rev 1162, and Anna Lvovsky, “The Judicial Presumption of Police Expertise” (2017) 130 Harv L Rev 20 [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 Crim LJ 8 [San Roque].

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

³ David L Faigman et al, *Modern Scientific Evidence* (Thomson Reuters, 2015-2016) at § 1:10 [Faigman]; Gary Edmond & Kent Roach, “A Contextual Approach to the Admissibility of the State’s Forensic Science and Medical Evidence” (2011) 61 UTLJ 343 at 363 [Edmond].

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, encompassing 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 overpowered the complainant.⁴ The accused, wishing to rebut that evidence, cannot also 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: 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 substantively and procedurally more 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*.

⁴ *R v Lee*, 2010 ABCA 1 at para 26, [2010] 474 AR 203 [*Lee*].

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 the case when they 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 bodies⁵ or generally meet the more stringent reliability requirements imposed on expert opinions.

The second hazard amplifies the first: these lay witnesses providing *ipse dixit* are, by all appearances, not lay people. Rather, they are often police officers with some superficial experience investigating the areas on which they are opining – for instance, an expert in police dog behaviour opining on the significance of a pattern of shoeprints in the snow. These quasi-experts can be expected to hold sway over the trier of fact, but are not required to prove they are properly qualified or their methods 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.⁶ Several decisions, on even the most charitable reading, are irreconcilable. This inconsistent approach creates confusion and injustice.

⁵ National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (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* (Washington DC: Executive Office of the President, 2016) [PCAST Report].

⁶ [1982] 2 SCR 819 at para 46, 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, [2016] NSJ No 382 [*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."

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 but has been widely disregarded. Our 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.

Part II. 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's 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 on four requirements enunciated in *R v Mohan*: (1) logical relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and, (4) a properly qualified expert.⁷ Evidence meeting those requirements must then pass another more discretionary test, balancing the evidence's benefits to the trial process against its potential risks, including consumption of time and potential to create confusion.⁸

The *Mohan* test has grown stricter over the past several years. Summarizing this body of law, the Supreme Court stated in 2015 that: "The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the

⁷ *Mohan*, *supra* note 2 at paras 17-21.

⁸ *Ibid* at 22-23; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 23-24, [2015] 2 SCR 182 [*White Burgess*].

judge's gatekeeping role.”⁹ 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 problem of unreliable expert opinion impacting the legal system. This issue was viscerally documented in the miscarriages of justices found in *The Inquiry into Pediatric Forensic Psychology in Ontario* and *The Commission on Proceedings Involving Guy Paul Morin*.¹⁰ Both public commissions highlighted the detrimental impact of unreliable science on the criminal justice system. More generally, empirical research finds that invalid forensic science is present in approximately 60% of wrongful convictions.¹¹

Underlying the concern over reliability is the risk that the trier of fact will uncritically adopt the expert’s ready-made inferences.¹² For example, Justice Goudge warned that experts must support their opinions with 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 verifications.”¹³

In keeping with the warnings in the Kaufman and Goudge reports, reliability is now a requirement when the subject matter of the expert evidence is novel or contested science. In such

⁹ *Ibid* at para 20; *R v Sriskanda*, 2016 ONCJ 667 at para 19, CarswellOnt 18574 [*Sriskanda*].

¹⁰ Ontario, *Inquiry into Pediatric Forensic Pathology in Ontario* (2008) (Chair: Stephen T Goudge), Retrieved from < <https://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/index.html> > [Goudge]; *The Commission on Proceedings Involving Guy Paul Morin* (Toronto: Ontario Ministry of the Attorney General, 1998) (Chair: Fred Kaufman) [Kaufman]; and see: Bruce A MacFarlane QC, “Wrongful Convictions: Determining Culpability when the Sands Keep Shifting” (2014) 47:2 UBC L Rev 597.

¹¹ Brandon L Garrett & Peter J Neufeld, “Invalid Forensic Science Testimony and Wrongful Convictions” (2009) 95:1 Va L Rev 1 and see generally: Barack Obama, “The President’s Role in Advancing Criminal Justice Reform” (2017) 130:3 Harv L Rev 811 at 860-862.

¹² Lisa Dufraimont, “New Challenges for the Gatekeeper: the Evolving Law on Expert Evidence in Criminal Cases” (2011-2012) 58 Crim LQ 531; Jason M Chin & Scott Dallen, “*R v Awer* and the Dangers of Science in Sheep’s Clothing” (2016) 63 Crim LQ 527 [Dallen]; *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(J-L)*, 2000 SCC 51 at para 25, [2000] 2 SCR 600 [*JLJ*].

¹³ Goudge, *supra* note 10 at 77.

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.*¹⁴ 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; and, (4) whether the evidence is generally accepted in the field from which it comes.¹⁵ Although commentators have bemoaned the fact that judges appear reluctant to engage in a full *Mohan-Daubert* analysis,¹⁶ there are several examples of courts excluding scientific evidence for want of a reliable foundation.¹⁷

Even if the evidence's reliability is beyond reproach, courts increasingly exclude it as being unnecessary.¹⁸ For instance, Canadian courts are loathe to admit expert evidence about the limitations of eyewitness memory, excluding such evidence on the grounds that it is unnecessary common sense information.¹⁹ This issue arises when eyewitnesses give evidence – admitted as lay opinion evidence – identifying the accused at a crime scene.²⁰ To discredit the identification,

¹⁴ 509 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 33, 50-55 and contested science in *Trochym*, *supra* note 12 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.

¹⁵ *Daubert*, *ibid* at 593-595.

¹⁶ Edmond, *supra* note 3; Dallen, *supra* note 12; Emma Cunliffe & Gary Edmond, "Gaitkeeping in Canada: Missteps in Assessing the Reliability of Expert Testimony" (2013) 92 Can Bar Rev 327-268. And in the US, see Jennifer Groscup et al, "The Effects of *Daubert* on the Admissibility of Expert Admissibility in State and Federal Criminal Cases" (2002) 8:4 Psychol Pub Pol'y & L 339.

¹⁷ E.g., see: *JLJ*, *supra* note 12; *Trochym*, *supra* note 12; *Bialkowski v Banfield*, 2011 BCSC 1045, [2011] BCWLD 7123 [*Bialkowski*]; *R v Klymchuk*, [2005] OJ No 5094, 203 CCC (3d) 341 (Ont CA) [*Klymchuk*]. And, for a summary, see Goudge, *supra* note 10 at 480-487.

¹⁸ Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 4th ed (Ontario: LexisNexis, 2014) at 795-799 [Lederman]; Emma Cunliffe, "Without fear or favour? Trends and possibilities in the Canadian approach to expert human behavioural evidence" (2006) 10 *The International Journal of Evidence and Proof* 280-315; *R v D(D)*, 2000 SCC 43 at para 51, 191 DLR (4th) 60 [DD]. Disabusing myths and stereotypes remains a ground for admitting expert evidence, see: Martha Shaffer, "The battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after *R. v. Lavallee*" (1997) 47:1 *The University of Toronto Law Journal* 1-33.

¹⁹ *R v McIntosh*, [1997] OJ No 3172, 35 OR (3d) 97 (Ont CA), leave to appeal refused [1997] SCCA No 610, [1998] 1 SCR xii [*McIntosh*]. See Jill Copeland, "Helping Jurors Recognize the Frailties of Eyewitness Identification Evidence" (2002) 46 *Crim LQ* 188-209 for a review.

²⁰ *Lederman*, *supra* note 18 at 775-780.

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.²¹

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.²² For example, in a very thoughtful decision of the Nova Scotia Provincial Court, Justice Ross excluded a police officer for bias.²³ This officer, who the Crown tendered 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.²⁴

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.²⁵ Further, Ontario and British Columbia have codified the duty of experts in their respective civil procedure rules.²⁶ A signed

²¹ *McIntosh*, *supra* note 19 at paras 19-20; *Copeland*, *supra* note 19.

²² *White Burgess*, *supra* note 8.

²³ *R v Tremblett*, 2012 NSPC 121, [2012] NSJ No 712 [*Tremblett*]. See also *R v Van Bree*, 2011 ONSC 4273, [2011] OJ No 3259 [*Van Bree*] and *R v Kovats*, 2000 BCPC 176, [2000] BCJ No 2579 [*Kovats*].

²⁴ *Tremblett*, *ibid* at paras 29-33.

²⁵ 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*, RRP 1990, Reg 194, r 53.03(1) [ON 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”. In British Columbia and Alberta, parties must serve the expert reports at least 84 days and 120 days before the scheduled trial date, respectively, see: British Columbia, *Supreme Court Civil Rules*, [RCBC 1996] C 443, r 11-6(3) [BC Rules] and Alberta, *Rules of Court*, AR 124/2010, r 218.1.

²⁶ ON Rules, *ibid* r 4.1.01; BC Rules, *ibid* r 11-2(1).

acknowledgement of the duty to assist the court in a fair and non-partisan manner within the expert's area of expertise is to be submitted along with the report.²⁷

Part III. 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,²⁸ and accordingly, the prejudices they present. In reviewing this trend, we begin with the historic rule. We then trace its growth through two appellate cases, and a recent trial decision building on those cases.

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 (e.g., identification of handwriting known to the witness, the emotional state of a person).²⁹ 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 robbing a store.³⁰ That identification is an opinion based on a multitude of facts, many of which are unconscious cognitive processes beyond the witness' reckoning:³¹

²⁷ ON Rules, *ibid* r 53.03(2.1); BC Rules, *ibid* r 11-2(2).

²⁸ Imwinkelried, *supra* note 1 at 84-92.

²⁹ Guy Pratte, Nadia Effendi & Jennifer Brusse, "F- Experts in Civil Litigation: A Retrospective on Their Role and Independence with a View to Possible Reforms" In Mr Justice Todd L Archibald & Mr Justice Randall Echlin, eds, *Annual Review of Civil Litigation* (Toronto: Carswell, 2008) at II 3(a) [Pratte]; *Graat*, *supra* note 6 para 46; *Sherrard v Jacob*, [1965] NI 151 at 4 [*Sherrard*].

³⁰ Lederman, *supra* note 18 at 771.

³¹ *Ibid*.

[..] 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.

This is a sensible and pragmatic concern with the lay evidence rule that tracks the scientifically founded limit on our ability to report on our cognitive processes.³² At the same time, the system of carve-outs (e.g. 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.³³ Specifically, it indicated that lay opinion evidence is admissible when its probative value is not overcome by the prejudice it introduces.³⁴ In performing this analysis the court considered four factors:³⁵

(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

³² Timothy D Wilson, *Strangers to Ourselves: Discovering the Adaptive Unconscious* (Cambridge: Harvard University Press 2002) [Wilson]; Timothy D Wilson & Elizabeth W Dunn, "Self-Knowledge: Its Limits, Value, and Potential for Improvement" (2003) 55 Annual Review of Psychology 17.1-17.26.

³³ *Graat*, *supra* note 6 at paras 48-64.

³⁴ Hamish Stewart, "Justice Frank Iacobucci and the Revolution in the Common Law of Evidence" 57:2 UTLJ 479-497 at 481-483

³⁵ *Ibid* at paras 49-59; Lederman, *supra* note 18 at 774. The rule in *Graat* is routinely synthesized this way, see 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] OJ No 4428 at para 95, 51 OR (3d) 97 (Ont CA) [Marchand]; *Toronto Dominion Bank v Cambridge Leasing Ltd*, 2006 NBQB 134 at para 5, 297 NBR (2d) 27 [TD]; David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 197 [Paciocco].

mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about.

Graat concerned the admissibility of two police officers' opinion that the accused was intoxicated.³⁶ 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.³⁷ Further, the opinion (3) did not require "scientific, technical, or specialized testimony".³⁸ 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.³⁹

Although the evidence was admitted, Justice Dickson issued an important and often overlooked caution.⁴⁰ 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, in which the accused's civilian witness was cross-examined on the fact that he did not have 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.⁴¹

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.⁴² This incoherence undermines the practical benefits that *Graat*

³⁶ *Graat*, *supra* note 6 at para 8.

³⁷ *Ibid* at para 50.

³⁸ *Ibid* at para 54.

³⁹ *Ibid* at paras 52-53.

⁴⁰ *Ibid* at paras 60-62. See also *R v Jessome*, 2006 NSPC 65 at para 22, 251 NSR (2d) 102 [*Jessome*].

⁴¹ *Graat*, *supra* note 6 at para 60.

⁴² See the cases at note 6.

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)*.⁴³ 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.

A Crime Scene Cleanup in *R v Ilina*

In *R v Ilina*, the Court of Appeal for Manitoba considered the conviction of a 55-year old university researcher for the murder of her husband.⁴⁴ 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.⁴⁵ In support of this theory, two investigating officers, Sergeant Bell and Constable Rautavuori, testified that they 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.⁴⁶ On cross-examination, both Sergeant Bell and Constable Rautavuori said that they would defer to Sergeant Maclean's opinion. One of the

⁴³ 2011 SCC 17 at para 4, [2011] 1 SCR 628. Consider also the diseconomy in *R v Bingley* 2017 SCC 12 at para 34, 135 WCB (2d) 356 [*Bingley*], in which the Supreme Court corrected a trial court's decision to admit a drug recognition *expert* as a lay witness.

⁴⁴ *R v Ilina*, 2003 MBCA 20, [2003] MJ No 30 [*Ilina*].

⁴⁵ *Ibid* at paras 6-27.

⁴⁶ *Ibid* at paras 64-66.

primary issues on appeal was the admissibility of the two officers' opinion, which had been 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 the cases that followed it had established a more permissive approach.⁴⁷ 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 in 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.

Admission of the lay officer's testimony gave rise to difficulty with respect to the judge's instructions to the jury. Despite assuring 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 would have to be weighed against one another. 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.⁴⁸ This misstep, however, did not merit appellate intervention.⁴⁹

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. However, the latter body of knowledge was not evidence in

⁴⁷ *Ibid* at paras 72-75.

⁴⁸ *Ibid* at para 84.

⁴⁹ *Ibid*.

court, and thus not open to cross-examination.⁵⁰ 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, *R v 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.⁵¹

Footsteps in the Snow in *R v Lee*

The accused in *R v Lee* was convicted by a jury of sexual assault in relation to an act of oral sex.⁵² 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.⁵³ Both provided accounts marked by inconsistencies.⁵⁴ 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 Carriere'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 Court of Appeal

⁵⁰ Imwinkelried, *supra* note 1 at 94.

⁵¹ 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, and; *R v Abbey*, 2009 ONCA 624 at paras 62-65, [2009] OJ No 3534 [*Abbey*]. For a review of this doctrine, see: Helena Likwornik, "Overstepping and Sidestepping: The Expert Evidence Dance" (2017) 35:4 *The Advocates' Journal* 24-26.

⁵² *Lee*, *supra* note 4; 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.

⁵³ *Lee*, *ibid* at para 4.

⁵⁴ *Ibid* at paras 5, 18-24.

for Alberta split 2-1, with the majority upholding the conviction and finding the shoeprint evidence admissible. 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.⁵⁵ Shortly after, the complainant appeared at a nearby home of a stranger and reported a sexual assault. 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?"⁵⁶ Sergeant Carriere responded, detailing his experience beyond that of a dog expert to someone with an apparent expertise in interpreting the patterns left by shoeprints: "For sure. And over six and a half years it's been my experience that [...] using that expertise is following footprints at times..."⁵⁷ 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 shoeprints 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

⁵⁵ *Ibid* at paras 2-4.

⁵⁶ *Ibid* at para 26.

⁵⁷ *Ibid*.

off.”⁵⁸ This account threatened the accused’s credibility and was relied on by the trial judge for that purpose.⁵⁹

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, rather noting there was no rule: “[w]hatever rule there may have been against a lay witness giving opinion evidence, it has not survived the decision in *Graat*.”⁶⁰ 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.⁶¹

Justice Berger, in dissent, concluded that the footprint analysis was not lay opinion, but rather expert opinion requiring scrutiny under the *Mohan-Daubert* test.⁶² Interpreting the shoeprints required scientific or specialized expertise that Sergeant Carriere lacked.⁶³ Furthermore, the subject matter of Sergeant Carriere’s opinion did meet the lay opinion exception. His inferences were “not of the same character”⁶⁴ as the more typical lay opinions, such as opinions about a person’s age or mental state.

⁵⁸ *Ibid.*

⁵⁹ The accused claimed the encounter was consensual, see *ibid* at para 29.

⁶⁰ *Ibid* at para 31.

⁶¹ 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*], and 1873 New Brunswick decision that was abstracted but never completely reported. We discuss these cases in Part IV.

⁶² *Lee*, *supra* note 4 at paras 25, 52.

⁶³ *Ibid* at para 53.

⁶⁴ *Ibid* at para 55.

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 doctrine by allowing the lay witness to testify beyond his own personal observations.

The Lay Forensic Accountant in *R v Colpitts*

In *R v Colpitts*, a lay opinion issue arose on the 24th 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").⁶⁵ On that 24th day, the defence applied to limit the evidence of one of the Crown's key witnesses, a veteran police officer named Ian Black.⁶⁶ Officer Black intended to provide evidence from his investigation, which forensically linked the accused parties to the alleged crime.⁶⁷ The Crown had initially tendered Officer Black as an expert witness,⁶⁸ but resiled from that position, advising that "none of Mr. Black's testimony will constitute expert opinion."⁶⁹ 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.⁷⁰ To this end, Officer Black had gathered data on the trading of KHI stocks from "account statements and the Toronto Stock Exchange".⁷¹ After confirming the report's accuracy, Officer Black compared its

⁶⁵ *Colpitts*, *supra* note 6 at para 1.

⁶⁶ *Ibid.*

⁶⁷ *Ibid* at para 5.

⁶⁸ *Ibid* at para 3.

⁶⁹ *Ibid* at para 4.

⁷⁰ *Ibid* at para 5.

⁷¹ *Ibid.*

findings with the timing of e-mails sent by various suspects, including the accused parties. Based on the “strength of that comparison”,⁷² 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”.⁷³

The defence argued that Officer Black’s opinion was too “complex” to properly be the subject of lay opinion.⁷⁴ 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.⁷⁵ Justice Coady of the Nova Scotia Supreme Court ultimately agreed with the Crown. The evidence was admissible as a “compendious expression of technical data”.⁷⁶ 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.⁷⁷ Justice Coady also relied heavily on *Lee*. He did not draw any express analogy, but after excerpting *Lee*, he did note that “Justice Berger concluded the disputed evidence was neither expert evidence nor novel science”, but rather a common sense inference.⁷⁸ 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 the rapid expansion of lay opinion doctrine since *Graat*. For one, unlike in *Graat*, Officer Black’s opinion went well beyond a

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid* at para 24.

⁷⁵ *Ibid* at para 7.

⁷⁶ *Ibid* at para 25.

⁷⁷ *Ibid* at para 20.

⁷⁸ *Ibid* at para 21.

judgment of intoxication to a complicated series of inferences that required 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. And finally, *Ilna* 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 than in *Ilna* 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. In Part IV, we will delve more deeply into these hazards.

Part IV. 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 that 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. But, as seen in the last section, lay opinion evidence is often brought by police officers with experience in fields only speciously related to the evidence. And 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.

Methodology versus *Qualia*

The first principle is that you must not fool yourself—and you are the easiest person to fool.⁷⁹

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.⁸⁰ 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”.⁸¹ 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 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.⁸² Nisbett and

⁷⁹ 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 [Feynman]; Marcus Munafò et al, “A manifesto for reproducible science” (2017) 1 *Nature Human Behaviour* 1-9 at 7 [Munafò].

⁸⁰ Lederman, *supra* note 18 at 771.

⁸¹ *Graat*, *supra* note 6 at para 52, quoting John D Heydon, *Cross on Evidence*, 5th ed (Sydney Australia: Butterworths, 1996) at 448. In *Elwin v Nova Scotia Home for Coloured Children*, 2013 NSSC 196, 332 NBR (2d) 35 [*Elwin*], Justice LeBlanc characterized permissible lay opinion as that “assessed on a subconscious level.” Employing this distinction, testimony about the finances of a boarding home was found to require expertise.

⁸² Richard E Nisbett & Timothy DeCamp Wilson, “Telling More Than We Can Know: Verbal Reports on Mental Processes” (1977) 84:3 *Psychol Rev* 231 [Nisbett].

Wilson made their landmark finding in the context of judgment and decision making.⁸³ They asked consumers to choose between several sets of stockings and asked for their reasons for that 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, but previous studies had shown an unconscious bias towards items on the consumer's right (likely driven by the custom of shopping from left to right).⁸⁴ 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 cognitive processes,⁸⁵ what types of opinions deserve the lay opinion rule's concession to unconscious ratiocination? We suggest that the justification holds true for many of the forms of lay opinion identified in *Graat* (e.g., eyewitness identifications, judgments of speed and distance).⁸⁶ But the opinions in *Lee*, *Ilna* 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

⁸³ 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: Journal of the econometric society* 263-291. For an application within law see Jeffrey J Rachlinski, "The 'New' Law and Psychology: A Reply to Critics, Skeptics and Cautious Supporters" (2000) 85 *Cornell Law Review* 739-766 [Rachlinski].

⁸⁴ Nisbett, *supra* note 82 at 244.

⁸⁵ Indeed, the legal implications are myriad, see: NAS Report, *supra* note 5 at 122-124, 184-185; Goudge, *supra* note 10 at 387-390; 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) 13 *Law, Prob & Ris* 1 [Edmond 2]; Rachlinski, *supra* note 83; David L Faigman, Christopher Slobogin & John Monahan, "Group to Individual (G2i) Inference in Scientific Expert Testimony" 81:2 *The University of Chicago Law Review* 417-480 at 460-462 [G2i].

⁸⁶ *Graat*, *supra* note 6 at para 46.

biased in ways that they cannot know.⁸⁷ This is supported by the fact that, despite most eyewitnesses' best intentions and their own confidence, eyewitness identifications are demonstrably unreliable and account for 79% of wrongful convictions.⁸⁸ Similarly, we fully expect that the police officers in *Ilina*, *Lee*, and *Colpitts* had every intention of honestly and accurately fulfilling their legal duty. The distinction is that those police officers were giving evidence on fields that can be subjected to scientific methodologies.

Methodologies, unlike *qualia*, are transparent and verbalizable, and thus open to scrutiny. In this spirit, the quote from Richard Feynman that began this subsection is often related to scientists to encourage them to continuously interrogate their own practices and adhere to rigorous methodology.⁸⁹ In the remainder of this subsection, we discuss some biases that may have affected the judgment of the witnesses in *Ilina*, *Lee* and *Colpitts*. In all of 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 (e.g.,

⁸⁷ As a result, 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 University of Colorado Law Review 1258-1303 at 1283. This renders them difficult to cross examine, *R v Miaponoose* [1996], 30 OR (3d) 419 at paras 11-12, 2 CR (5th) 82: "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."

⁸⁸ Brandon L Garrett, "Judging Innocence" (2008) 108:1 Colum L Rev 55 at 60. While beyond the scope of this article, we must note here that it is illogical that Canadian courts regularly exclude the one group that can comment on the accuracy of eyewitness identifications – psychological scientists, 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 Man LJ 543.

⁸⁹ Munafò, *supra* note 79 at 7.

the Earth is the centre of the galaxy, 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.”⁹⁰ Contextual bias has less of a motivational flavour, and is simply “where individuals are influenced by irrelevant background information”.⁹¹ For instance, with respect to contextual bias, Itiel Dror and colleagues have found that exposure to emotional case details can bias fingerprint matching judgments.⁹²

Both effects are pervasive, influencing the questions we ask, how we ask them, and the weight we place on the data we collect to answer those questions. And importantly, we are typically unaware that our judgment is being influenced.⁹³ A recent leading report of a committee of the National Academies of Sciences (“NAS Report”) found that several forensic sciences do not properly control for confirmation and contextual bias.⁹⁴

Various methodological safeguards can help counter confirmation and contextual bias.⁹⁵ 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 (PCAST) recommended that fingerprint analysts avoid knowledge of other facts of the case and disclose when they did have such knowledge.⁹⁶ Inadequate blinding

⁹⁰ Raymond S Nickerson, “Confirmation Bias: A Ubiquitous Phenomenon in Many Guises” (1998) 2:2 *Rev Gen Psychol* 175 at 175; PCAST Report, *supra* note 5 at 31; Edmond 2, *supra* note 85 at 6; Alan D Gold, *Expert Evidence in Criminal Law: The Scientific Approach*, 2nd ed (Toronto: Irwin, 2009) at 98.

⁹¹ PCAST Report, *ibid*.

⁹² 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 *Appl Cogn Psychol* 799.

⁹³ NAS Report, *supra* note 5 at 185: “typically one is not aware that his or her judgment is being affected”. See also: Lilienfeld et al, “Why Many Clinical Psychologists are Resistant to Evidence-based Practice: Root Causes and Constructive Remedies” (2013) 33 *Clin Psychol Rev* 883 [Lilienfeld 2013].

⁹⁴ NAS Report, *ibid* at 184-185.

⁹⁵ G2i, *supra* note 85 at 445.

⁹⁶ PCAST Report, *supra* note 5 at 10, 88-91; See also Gary Edmond et al, “Thinking forensics: Cognitive science for forensic practitioners” (2016) *Sci Justice* at 4 [Edmond 3].

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 reported 100% certainty of a fingerprint match.⁹⁷

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.⁹⁸ 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.⁹⁹ This method helps safeguard against fishing expeditions driven by a pre-conceived 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 address such issues. Sergeant Carriere interpreted a complex set of footprints and other markings “with no set pattern”¹⁰⁰ across a wide area. He somehow extracted a very specific narrative of a pursuer cutting off another, a fall, and then an apparent running getaway. Moreover, as part of the investigating team,¹⁰¹ he was not blind to Lee’s identity, the Crown’s theory of the case, or other emotionally evocative facts about the accusation.

⁹⁷ PCAST Report, *ibid* at 90.

⁹⁸ D Stephen Lindsay, “Replication in Psychological Science” (2015) 26:12 *Psychological Science* 1827-1832; Jason M Chin, “Psychological science’s replicability crisis and what it means for science in the courtroom” (2014) 20:3 *Psychology, Public Policy and Law* 225; Barbra A Spellman, “A Short (Personal) Future History of Revolution 2.0” (2015) 10:6 *Perspectives on Psychological Science* 886-899; Munafò, *supra* note 79.

⁹⁹ PCAST Report, *supra* note 5 at 10.

¹⁰⁰ *Lee*, *supra* note 4 at para 26.

¹⁰¹ *R v Lee*, [2012] AWLD 2670 at para 15, 2008 CarswellAlta 2353 (Alta QB).

Pattern-matching engages one of the key unconscious processes underlying confirmation bias, what psychologists call meaning maintenance.¹⁰² 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 is apophenia, or the “tendency to see patterns in random data.”¹⁰³ 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.¹⁰⁴ This process is fast and unconscious, with a lack of meaning causing discomfort and resolution proving satisfying.¹⁰⁵

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: “it is difficult to avoid biases in experience-based judgments, especially in the absence of a feedback mechanism to correct an erroneous judgment.”¹⁰⁶

For these types of subjective judgments, the PCAST Report suggests black box studies to determine if the methodology is itself valid.¹⁰⁷ 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 judgment. Black box studies would then expose a sample of examiners to patterns in which the ground truth is known (e.g., if, in fact, a struggle between two people produced the pattern of footprints) and determine if examiners can determine this truth

¹⁰² 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* 88-110.

¹⁰³ Munafò, *supra* note 79 at 1.

¹⁰⁴ 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 Pers Soc Psychol* 697 at 702-703.

¹⁰⁵ Travis Proulx, Michael Inzlicht & Eddie Harmon-Jones, “Understanding All Inconsistency compensation as a palliative response to violated expectations” (2012) 16:5 *Trends Cogn Sci* 285.

¹⁰⁶ NAS Report, *supra* note 5 at 149. And see PCAST Report, *supra* note 5 at 114-117.

¹⁰⁷ PCAST Report, *ibid* at 50-54.

and with what error rate. And if the methodology is found to be valid, individual examiners should be “proficiency tested” periodically to determine if they can reliably apply this method.¹⁰⁸ Characterizing Sergeant Carriere as a lay witness sidesteps any questions that would address 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.”¹⁰⁹ 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.”¹¹⁰

For example, there is a widely held illusory correlation between arthritic pain and the weather.¹¹¹ 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 (i.e., 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”). And widespread belief in the myth makes the pain-sufferer especially attuned to confirmatory instances, whereas disconfirmatory instances (e.g., absence of pain) are less salient and more easily forgotten. In the casino and the stock market

¹⁰⁸ *Ibid* at 57-59.

¹⁰⁹ Ashley L Watts, Sarah F Smith & Scott O Lilienfeld, “Illusory Correlation” in Robin L Cautin & Scott O Lilienfeld, ed, *The Encyclopedia of Clinical Psychology* (Malden, MA: Wiley-Blackwell, 2015) 1 at 1; and see: Lilienfeld et al, “Scientific Research in Forensic Samples” in Maaïke Cima, eds, *The Handbook of Forensic Psychopathology and Treatment* (New York: Routledge, 2016) 25 at 38 [Lilienfeld et al].

¹¹⁰ NAS Report, *supra* note 5 at 124.

¹¹¹ Donald A Redelmeier & Amos Tversky, “On the belief that arthritis pain is related to the weather” (1996) 93:7 PNAS 2895 [Redelmeier].

domain, illusory correlations have been termed the “gambler’s fallacy”¹¹² to reflect the manner in which individuals read patterns into random winning and losing streaks.¹¹³

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 (i.e., the instances in which the technique uncovers the criminal and everyone celebrates are more salient than inconclusive cases).¹¹⁴ 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.¹¹⁵ Subsequent empirical evidence supported his hypothesis.¹¹⁶

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 e-mails 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 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

¹¹² Amos Tversky & Daniel Kahneman, “Belief in the Law of Small Numbers” (1971) 76:2 Psychol Bull 105.

¹¹³ Jügen Huber, Michael Kirchler & Thomas Stöckl, “The Hot Hand Belief and the Gambler’s Fallacy in Investment Decisions under Risk” (2010) 68:4 Theory Decis 445; see Edmond 2, *supra* note 85 at 6.

¹¹⁴ Lilienfeld et al, *supra* note 109 at 38-39.

¹¹⁵ Paul Slovic, “Psychological Study of Human Judgment: implications for Investment Decision Making” (2001) 2:3 The Journal of Psychology and Financial Markets 160-172.

¹¹⁶ Jennifer C Bender, Carol L Osler & David Simon, “Noise Trading and Illusory Correlations in US Equity Markets” (2012) 17:2 Rev Finance 625 [Bender].

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 significant correlation between the weather and joint pain.¹¹⁷ Similarly, inferential statistics could have helped determine how unlikely the timing of the impugned trades and e-mails in *Colpitts* were, 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:¹¹⁸

...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.

For example, imagine flipping a coin 100 times without predefining what you will accept as evidence the coin is not fair. Even if, in total, the experiment returned 50 heads and 50 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.

¹¹⁷ Redelmeier, *supra* note 111 at 2895. This was also the case in the Bender study, *ibid.*

¹¹⁸ A D de Groot, “The meaning of ‘significance’ for different types of research [translated and annotated by Eric-Jan Wagenmakers, et al].” (2014) 148 *Acta psychologica* 188-194.

It is unclear whether Officer Black performed these tests and with what degree of rigour. Perhaps more importantly, the lay opinion rule 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*.¹¹⁹

Similar challenges are present in *Ilina*. The officers opining that there was evidence of a cover-up were basing their evidence on their experience with examples that readily came to mind.¹²⁰ Limited in their qualifications, they had no way of knowing how often a blood stain appears next 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.¹²¹

Finally, and to bring the discussion full-circle, Lilienfeld describes the “no-bias bias”, or in other words, the tendency for all the unconscious biases discussed herein to go unnoticed.¹²² Indeed, as we began this subsection: it is easy to fool ourselves.¹²³ 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

¹¹⁹ *Market Surveillance Administrator, Re*, [2015] AWLD 4488 at paras 473-475, [2015] AWLD 4494; *Apotex Inc v Sanofi-Aventis*, 2012 FC 553 at paras 97-98, 113-114, [2012] FCJ No 620.

¹²⁰ Dallen, *supra* note 12 at 40.

¹²¹ Robin M Hogarth, Tomas Lejarraga & Emre Soyer, “The Two Settings Of Kind and Wicked Learning Environments” (2015) 24:5 *Current Directions in Psychological Science* 379-385.

¹²² Lilienfeld 2013, *supra* note 93.

¹²³ Feynman, *supra* note 79.

on how we are being unconsciously influenced. The no-bias bias renders the police experts difficult to cross-examine and unduly persuasive because they can confidently say they believe their account is accurate.¹²⁴ Indeed, empirical research finds that jurors and judges are swayed by confidence: witness confidence accounts for 50% of the variance in jury judgments about the believability of eyewitnesses¹²⁵ and judges tend to prefer confident experts.¹²⁶ 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.¹²⁷ And the commissions and researchers who have studied these miscarriages of justice unanimously recommend stricter adherence to methodologies designed to combat these unconscious biases. Methodologies transform *qualia* into testable assumptions.¹²⁸ It is possible to evaluate a methodology's reliability by observing its error rate: how many false positives and negatives does it produce?¹²⁹ 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?¹³⁰ The National Academy of Sciences recognized the value of methodology in minimizing unconscious bias:¹³¹

¹²⁴ See note 87.

¹²⁵ Gary L Wells, R C L Lindsay, Tamara J Ferguson, "Accuracy, confidence, and juror perceptions in eyewitness identification" (1979) 65 J Appl Psychol 440-448.

¹²⁶ Anthony Champagne, Daniel Shuman & Elizabeth Whitaker, "An empirical examination of the use of expert witnesses in American courts" (1992) 31 Jurimetrics J 375-392.

¹²⁷ See note 10.

¹²⁸ For instance, see *Abbey*, *supra* note 51, which adopted a flexible approach to the reliability of expert witnesses, but still emphasized the importance of methodology at paras 87, 119.

¹²⁹ See *JLJ*, *supra* note 12 at paras 51-55; Dallen, *supra* note 12 at 541.

¹³⁰ NAS Report, *supra* note 5 at 124; Dallen, *ibid* at 540.

¹³¹ NAS Report, *ibid* at 124.

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.

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.

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.¹³²

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 be clearer to the 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 (i.e., the behaviour of tracking dogs). The jury might have easily jumped to the conclusion that he was an expert in the field at

¹³² *R v Hart*, 2014 SCC 52 at para 8, [2014] 2 SCR 544 [*Hart*].

issue, despite the fact he was expressly not qualified to make such conclusions.¹³³ 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.”¹³⁴ Moreover, police receive training in courtroom presentation and are often persuasive and confident witnesses.¹³⁵ The result, as the Supreme Court warned in the quote above, is a volatile mix of unreliability and prejudice.

Safeguards surrounding expert evidence emerged to manage precisely this risk that the trier of fact would be unduly swayed by the mere authority of the witness.¹³⁶ This authority has been described in various ways, from “impressive credentials”,¹³⁷ to the “mystique of science”¹³⁸ when the witness is a scientist, and the “superficial attractiveness”¹³⁹ of police witnesses. And over the past several years, both in Canada and in the U.S., the rules have tightened in response to such arguments from authority causing demonstrable miscarriages of justice.

There is scientific support for these cautions: research demonstrates that people, when they lack knowledge of a field, attorn to opinions of experts. In other words, they focus on the extrinsic qualities of the message, such as the qualifications of the speaker and how confident he or she seems, as opposed to the content of the message.¹⁴⁰ Such shortcuts may work in some

¹³³ *Lee*, *supra* note 4 at para 52.

¹³⁴ Edmond 3, *supra* note 96 at 4; Australian courts have also confronted the specious nexus, for instance by allowing translators to also provide voice identification opinion, see San Roque, *supra* note 1 at 12.

¹³⁵ Lvovsky, *supra* note 1 at 10, reviewing police and FBI training materials; Adam Benforado, *Unfair The New Science of Criminal Injustice* (New York: Broadway Books, 2015) at 136.

¹³⁶ *JLJ*, *supra* note 12 at para 55; *McIntosh*, *supra* note 19 at para 17.

¹³⁷ *Abbey*, *supra* note 51 at para 90; *R v Myles*, [2011] OJ No 4559 at para 28, 97 WCB (2d) 377 (Ont SCJ) [*Myles*].

¹³⁸ *DD*, *supra* note 18 at para 41; *Mohan*, *supra* note 2 at para 23.

¹³⁹ *Sekhon*, *supra* note 2 at para 50; *R v Mulaj*, 2014 ONSC 4405 at para 50, [2014] OJ No 4405.

¹⁴⁰ Richard Petty & John T Cacioppo, *Communication and persuasion: Central and peripheral routes to attitude change* (New York: Springer Science & Business Media, 2012); Robert B Cialdini, *Influence The Psychology of Persuasion* (New York: Harper Collins, 2007) at 208-236.

cases, but 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.”¹⁴¹

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 shoeprint 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 there 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”.¹⁴² 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 but ultimately found it was not serious enough an error to require a new trial.¹⁴³

Finally, *Colpitts* is also problematic. In *Colpitts*, Officer Black, was a senior police officer with over 20 years of experience investigating commercial crimes.¹⁴⁴ The Crown, in fact,

¹⁴¹ *Mohan*, *supra* note 2 at para 28.

¹⁴² Goudge, *supra* note 10 at 77.

¹⁴³ *Ilina*, *supra* note 44 at para 84.

¹⁴⁴ *Colpitts*, *supra* note 6 at para 3.

originally sought to qualify him as an expert. And, having been deeply involved in the investigation, Officer Black could speak knowledgably 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.

Courts have largely failed to recognize the specious nexus when admitting lay evidence, but there is a basis in the case law for this point. Justice Dickson recognized it in *Graat*, warning that an officer's opinion that a person is intoxicated could easily be outweighed by a jury.¹⁴⁵ And at the admission stage, the British Columbia Court of Appeal in *R v Ratté*¹⁴⁶ used a contextual approach¹⁴⁷ to exclude the lay opinion of a police officer investigating the murder of the accused's wife. 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 and her experience in the field.¹⁴⁸ *Ratté* also provides an example of how a jurisprudential approach to lay opinion has failed. It analogizes closely to *Colpitts* but was not referenced in that case. We will return to this issue in the following section.

To summarize, 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. And it is an especially pernicious

¹⁴⁵ *Graat*, *supra* note 6 at para 60.

¹⁴⁶ 2012 BCCA 352, 95 CR (6th) 387 [*Ratté*].

¹⁴⁷ Edmond, *supra* note 3; we will discuss a contextual approach to lay opinion evidence in Part V.

¹⁴⁸ *Ratté*, *supra* note 146 at para 40.

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.

Failures in the Lay Opinion Jurisprudence

Graat adopted a more flexible and principled approach to lay opinion. In many ways, this was a logical correction because the previous rules – a system of carve outs – negatively impacted judicial economy¹⁴⁹ and widely diverged across provinces, creating uncertainty.¹⁵⁰ Principled approaches, however, can devolve into unstructured exercises in judicial discretion.¹⁵¹ This appears to be the case with the post-*Graat* lay opinion rule, in reference to which a majority 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*.”¹⁵²

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 *Lee* majority only analogized to one modern Canadian case, *Powell*, in which the police officer giving lay opinion testified that a footprint and shoe appeared to be of the same size and tread pattern.¹⁵³ To make matters worse, *Powell* only relied on one

¹⁴⁹ *Graat*, *supra* note 6 at para 46; Pratte, *supra* note 29 at II 3(a); Lederman, *supra* note 18 at 770-771, citing John Wigmore, *A Students' Textbook of the Law of Evidence* (Chicago: Foundation Press, 1935) at 156.

¹⁵⁰ *Graat*, *ibid* at paras 27-28.

¹⁵¹ *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 at para 85, [2014] 1 SCR 177; and for a review of rules versus principled-based legal reasoning, see: Daniela Murynka, “Give Me One Good Reason: The ‘Principled Approach’ in the Canadian Judicial Opinion” (2015) 40:2 Queen’s LJ 609.

¹⁵² *Lee*, *supra* note 4 at para 31.

¹⁵³ *Powell*, *supra* note 61 at para 6; In the Florida decision, *White*, *supra* note 61, the police officer’s opinion was that a shoeprint appeared to come from a size ten shoe with a smooth sole. *Foley*, *supra* note 61, the third case relied on by the majority, was unreported except for a brief summary in Stevens’ Digest. 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.

authority, a trial decision admitting the lay opinion of two civilians that a truck driver was intoxicated (i.e., a *Graat*-type fact pattern).¹⁵⁴ 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, given the developments in the law,¹⁵⁵ “police officers may give opinion evidence on observations made during their investigations”.¹⁵⁶ 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.¹⁵⁷ 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 factor, which states that the witness should have personally observed the case-specific facts.¹⁵⁸ 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.¹⁵⁹ This 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.*,¹⁶⁰ which likely represents its closest factual analogy. In *TD*, the New Brunswick Court of Queen's Bench considered whether a financial projection

¹⁵⁴ *R v Goodine*, 2004 NBPC 30, 66 WCB (2d) 266.

¹⁵⁵ *Colpitts*, *supra* note 6 at para 24.

¹⁵⁶ *Ibid* at para 10.

¹⁵⁷ *Ibid* at para 5.

¹⁵⁸ *Graat*, *supra* note 6 at para 50;

¹⁵⁹ And 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.

¹⁶⁰ *Supra* note 35.

could be the appropriate subject matter of lay opinion. The Court ultimately excluded the evidence on the basis of *Graat*'s principle¹⁶¹ that the evidence be a matter of the witness's personal experience. A projection, by its prospective nature, cannot be a matter of personal experience.¹⁶²

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.¹⁶³ The Court in *American Creek Resources Ltd v Teuton Resources Corp* relied on *Marchand* for precisely this point.¹⁶⁴ *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:¹⁶⁵

The evidence his counsel seeks to adduce does not consist of everyday 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 documentation and reports**, taking into account his own experience.

¹⁶¹ *Graat*, *supra* note 6 at para 50; Lederman, *supra* note 18 at 774.

¹⁶² *TD*, *supra* note 35 at para 7.

¹⁶³ *Marchand*, *supra* note 35 at para 97.

¹⁶⁴ *American Creek*, *supra* note 35 at para 22.

¹⁶⁵ *Ibid* at para 18 [emphasis added].

TD, Marchand, and *American Creek* all bear a strong similarity to *Colpitt's* facts, with witnesses analyzing data relating to occurrences they did not personally observe. Furthermore, *American Creek* being an appellate decision, should carry as much weight in Nova Scotia as the extra-provincial appellate decisions *Colpitts* did rely on.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ 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.¹⁶⁹ 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

¹⁶⁶ Those being *Ilna*, *supra* note 44 and *Lee*, *supra* note 4.

¹⁶⁷ *Elwin*, *supra* note 81 at paras 88, 90, 94, 96.

¹⁶⁸ Imwinkelried, *supra* note 1.

¹⁶⁹ *Ibid* at 86.

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,¹⁷⁰ whereas the lay witness is restricted to personal observations. We will revisit this analysis 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 *Mohan*, this indicates courts have found that expertise is *necessary* to assist the trier of fact on those topics.¹⁷¹ 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.¹⁷² Surprisingly, this type of analysis is uncommon in the lay opinion jurisprudence.¹⁷³

Had the majority in *Lee* considered the gait¹⁷⁴ and shoeprint¹⁷⁵ analysis case law, they would have found Justice Berger was correct: they are regularly the subject matter of expert opinion. Similarly, forensic accountants and securities investigators are frequently qualified as

¹⁷⁰ See *ibid* at 91-92 for the U.S. authority on allowing such evidence and *Bleta v R*, [1964] SCR 561, 48 DLR (2d) 139 for the position in Canada.

¹⁷¹ *Mohan*, *supra* note 2 at para 25-27.

¹⁷² *Graat*, *supra* note 6 at para 54.

¹⁷³ Of the cases reviewed in this article, only Justice Berger, in dissent in *Lee*, *supra* note 4, engaged in this reasoning, at para 52.

¹⁷⁴ In *Roscoe v Halifax (Regional Municipality)*, 2011 NSSC 485 at para 32, 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.”; *R v Aitken*, 2012 BCCA 134, 92 CR (6th) 384.

¹⁷⁵ *R v Smith*, 74 WCB (2d) 135 at paras 32-38, 2007 [2007] OJ No 2172 (Ont SCJ); *R v Perlett*, 82 OR (3d) 89 at paras 28-31, [2006] OJ No 3498 (Ont CA) [*Perlett*]; NAS Report, *supra* note 5 at 145-150.

experts in prosecutions like that in *Colpitts*.¹⁷⁶ 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*.¹⁷⁷

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.¹⁷⁸ This was especially problematic 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,¹⁷⁹ with the defence arguing that the expert's opinion was unreliable because he uncritically accepted Officer Black's lay opinion.¹⁸⁰ 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,¹⁸¹ it is incumbent on the trial judge to define the nature and scope of expert opinion before assessing admissibility. Allowing expert

¹⁷⁶ *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.

¹⁷⁷ *Klymchuk*, *supra* note 7; *R v Ranger*, 67 OR (3d) 1, 59 WCB (2d) 21 (Ont CA).

¹⁷⁸ *Ilina*, *supra* note 44 at paras 81-91.

¹⁷⁹ *R v Colpitts*, 2016 NSSC 219 at para 30, 376 NSR (2d) 336.

¹⁸⁰ *Ibid* at para 32.

¹⁸¹ See the cases at note 51.

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.¹⁸² 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.¹⁸³ Similarly, the police witnesses in *Ilina* and *Lee* had only limited experience in the areas they opined on. Indeed, 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 have also faced potential exclusion for bias under the expert rules.¹⁸⁴ Sergeant Carriere in *Lee* and Officer Black in *Colpitts* would have been especially at risk because of their extensive investigatory involvement. For instance, in *R v Tremblett* and *R v Kovats*, deep involvement in an investigation was found to raise an apprehension of bias such that the officers were excluded.¹⁸⁵ Still, exclusion for bias remains a

¹⁸² *R v S(F)*, [1997] OJ No 2502, 34 OR, (3d) 332 (Ont CA); *Walker Estate v York-Finch General Hospital*, [1996] OJ No 5072, 5 CPC (4th) 240 (Ont Gen Div); *Bialkowski*, *supra* note 17.

¹⁸³ *R v Abbey*, 2011 ONSC 1260 at para 52, 8 CR (6th) 385; see also *Sriskanda*, *supra* note 9 and *Meady v Greyhound Canada Transportation Corp*, 2010 ONSC 4519, 14 CPC (7th) 361.

¹⁸⁴ *White Burgess*, *supra* note 8 at para 45.

¹⁸⁵ *Tremblett*, *supra* note 23 at para 29; *Kovats*, *supra* note 23 at para 21.

high bar¹⁸⁶ when it comes to police witnesses.¹⁸⁷ 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.¹⁸⁸ With regard to forensic scientific evidence, the party proffering it must demonstrate that the methodology has been tested and possesses a low error rate.¹⁸⁹ 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.¹⁹⁰ For example, in *R v Myles*, a police officer's expert evidence about gangs was excluded because he could not explain his methodology.¹⁹¹

Finally, expert evidence is subject to a discretionary gatekeeping analysis in which its costs and benefits are evaluated.¹⁹² The evidence at issue in the cases we have reviewed would also likely run into trouble at this stage. In particular, the consumption of court time and

¹⁸⁶ See, for instance, *R v Gager*, 2012 ONSC 388, 99 WCB (2d) 325.

¹⁸⁷ See *Lvovsky*, *supra* note 1 for the issues raised by police witnesses, in general.

¹⁸⁸ See note 14.

¹⁸⁹ *JLJ*, *supra* note 12 at paras 51-55.

¹⁹⁰ *Abbey*, *supra* note 51 at para 119; *Sriskanda*, *supra* note 9 at para 32.

¹⁹¹ *Myles*, *supra* note 137 at paras 44-45; and in *Sriskanda*, *ibid* at para 34, the police expert had “conducted no independent research or experiments.”, thus failing *Abbey*'s flexible standard for specialized knowledge.

¹⁹² *White Burgess*, *supra* note 8 at para 24.

prejudice involved in the witnesses providing duplicative evidence in *Ilina* and *Colpitts* would militate towards exclusion.¹⁹³

Part V. Lay Opinion Evidence, The Next Generation

Courts and academics have devoted a great deal of thought to how expert evidence should be harnessed to assist the trier of fact while simultaneously avoiding undue prejudice. This work has already demonstrated its value,¹⁹⁴ with several instances of unreliable evidence excluded from reaching the ultimate decision.¹⁹⁵ 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,¹⁹⁶ 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."¹⁹⁷ These

¹⁹³ *R v K (A)*, 45 OR (3d) 641 at para 99, 176 DLR (4th) 665 (Ont CA).

¹⁹⁴ Although, not as much as some would like: see the academic commentary at note 16.

¹⁹⁵ See note 17.

¹⁹⁶ *Lee*, *supra* note 4 at para 31.

¹⁹⁷ *Ibrahim*, *supra* note 6 at para 176.

approaches not only contradict each other, but are also difficult to reconcile with decisions that fully engage with all four of the factors¹⁹⁸ that Justice Dickson considered in *Graat*.¹⁹⁹

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 that derive from specialized and scientific knowledge.²⁰⁰ 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 combination"²⁰¹ of unreliability and prejudice, it may be the 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.²⁰²

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 gatekeep forensic science unduly burden the accused, who are ill-equipped to rebut unreliable forensics.²⁰³ And, ironically, trial judges reserve their most

¹⁹⁸ i.e., personal knowledge, better vantage point than trier of fact, experiential capacity, and compendious statement of facts.

¹⁹⁹ See note 35.

²⁰⁰ *Graat*, *supra* note 6 at para 54.

²⁰¹ *Hart*, *supra* note 132 at para 8.

²⁰² Imwinkelried, *supra* note 1 at 84-88.

²⁰³ Edmond, *supra* note 3; Faigman, *supra* note 3 at § 1:10.

strict reliability scrutiny not for forensic evidence led by the prosecution, but for evidence led by plaintiffs in civil trials.²⁰⁴ 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.²⁰⁵ 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 for the accused to call to rebut that evidence other than, potentially, other police officers present at the scene of the crime. There is little recourse other than hiring an expensive expert and attempting to qualify him or her under the relatively onerous *Daubert-Mohan* test.²⁰⁶

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.²⁰⁷ 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 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 loathe to admit the Crown's witness.

²⁰⁴ Edmond, *ibid* at 398; Michael Risinger, "Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?" (2013) 64:1 Alb L Rev 99.

²⁰⁵ See note 35 and *M & P Logging v Carrier Lumber Ltd*, 2001 BCCA 125, 85 BCLR (3d) 207, and *Cambie Surgeries Corp v British Columbia (Attorney General)*, 2016 BCSC 1896, [2016] BCWLD 7510.

²⁰⁶ And see San Roque, *supra* note 1 at 14 for description of an Australian case in which an accused's expert, who would have disagreed with the Crown's lay witness, was excluded.

²⁰⁷ Edmond, *supra* note 3 at 396-408.

Courts should be similarly sensitive to the role the evidence plays in the totality of the case.²⁰⁸ 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.²⁰⁹ This represents a thoughtful approach that is live to the prejudices that flow from police testimony. There is no reason that the lay opinion test should not be as contextually sensitive.

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.²¹⁰

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 and (2) characterization of the reasoning process and witness; (3) categorical exclusion of opinion that is not the result of the witness's own observations; and, (4) discretionary gatekeeping of unduly prejudicial evidence. Evidence failing our test should either be excluded or resubmitted as expert evidence.

²⁰⁸ *Mohan*, *supra* note 2 at para 29; There is some evidence of resistance to lay opinion that goes to the ultimate issue, see: Justice David M Watt, *Watt's Manual of Criminal Evidence* (Toronto: Thomson Reuters, 2016) at §30.01 — General Principles of Lay Opinion Evidence.

²⁰⁹ *Van Bree*, *supra* note 23 at para 126.

²¹⁰ *White Burgess*, *supra* note 8 at paras 22-25.

Step 1: Identification

First, the trial judge should identify the generalization the witness is relying on, the case-specific facts, and the comparison between those elements.²¹¹ For example, in *Ilna*, 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.²¹²

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 *Ilna*, 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 were relying on anecdotes relayed by other police officers. In such cases, their opinions were 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

²¹¹ Imwinkelried, *supra* note 1 at 94-99.

²¹² Given that the party tendering the evidence bears the burden of demonstrating its admissibility, he or she should assist the trier of fact in clarifying these elements of the opinion, see *ibid* at 94.

expressly guided by professional standards,²¹³ rather than Officer Black's own judgment.

- (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,²¹⁴ the trial judge can determine if the opinion at issue is one typically given by experts and guided by methodology. 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.

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

²¹³ *Colpitts*, *supra* note 6 at para 5.

²¹⁴ e.g., see National Judicial Institute, *Science Manual for Canadian Judges* (National Judicial Institute, 2013).

the permissible scope of an expert's testimony should be established at as early a stage as possible.²¹⁵

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 have also been scoped to include only the evidence that Officer Black personally observed. For instance, he would have been permitted to give a description of the content and timing of the accused's e-mails. 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.

Step 4: The Lay Opinion Gatekeeper

In the tradition of the rule in *Mohan*,²¹⁶ evidence that survives steps 1 through 3 should be subjected to a discretionary weighing of the benefits and costs to the trial. 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

²¹⁵ See the cases at note 51.

²¹⁶ *Mohan*, *supra* note 2 at paras 22-24.

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.²¹⁷

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 *Ilina* 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, *Ilina* is distinguishable from cases where the witness cannot 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 towards 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 have also provided a strong reason to exclude it.

²¹⁷ *Graat*, *supra* note 6 at para 50.

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 oft-overlooked problem. But that 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.