A Gatekeeper Stage for Lay Opinion Evidence

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ABSTRACT

In a growing number of cases appellate courts have admitted what looks like expert opinion evidence under the *Graat* test. This poses a real risk that expert opinion evidence will be improperly admitted. The temptation is to try to draw abstract lines distinguishing between matters about which lay witnesses can give an opinion and those requiring expertise. We argue that it is unnecessary to devise that kind of bright-line rule, which is bound to be controversial. What we need is a means of living comfortably with the idea that some opinions occupy a disputed and ambiguous no-man's-land straddling the line separating lay and expert opinion. This may be accomplished by attributing to the trial judge, in cases where opinion evidence is adduced pursuant to *Graat*, a "gatekeeper function" of the sort recognized in *Mohan* and *White Burgess* – a responsibility to weigh the costs and benefits of admission – and by taking seriously the idea that opinion evidence, thought putatively given by a lay witness, may raise the very kinds of concerns that animate the heightened test of admissibility for expert opinions. Taking this approach would, we believe, lower the stakes of funneling opinion evidence through one test of admissibility rather than the other.

I. INTRODUCTION

Opinion evidence is presumptively inadmissible. It can be admitted under either the Supreme Court's decision in *Graat* or the framework

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established in *Mohan* and subsequently developed in *White Burgess*.[1] The *Graat* test was crafted with lay opinion evidence squarely in mind and is relatively easy to satisfy. The *Mohan/White Burgess* test, by contrast, applies to expert opinion evidence and is quite demanding. The different tests, and the different demands they make, reflect the fact that concerns over the use of expert opinion evidence are typically regarded as being far greater than those surrounding the use of lay opinion evidence. Yet in a growing number of cases appellate courts have admitted what looks like expert opinion evidence under the *Graat* test.[2] This poses a real risk that expert opinion evidence will be improperly admitted.

The temptation is to draw – or, more accurately, try to draw – abstract lines distinguishing between matters about which lay witnesses can give an opinion and those requiring expertise. Some commentators have suggested that this kind of line-drawing is essential, implicitly in order to ensure that the admissibility of opinion evidence is determined according to the appropriate test. In this brief paper, we argue that it is unnecessary to devise that kind of bright-line filtration rule, which is bound to be controversial (and arguably ineffective) in any event. What we need, in our submission, is a means of living comfortably with the idea that some opinions occupy a disputed and ambiguous no-man's-land straddling the line separating lay and expert opinion. This may be accomplished by attributing to the trial judge, in cases where opinion evidence is adduced pursuant to *Graat*, a "gatekeeper function" of the sort recognized in *Mohan* and *White Burgess* – a responsibility to weigh the costs and benefits of admission – and by taking seriously the idea that opinion evidence, thought putatively given by a lay witness, may raise the very kinds of concerns that animate the heightened test of admissibility for expert opinions. Taking this approach would, we believe, lower the stakes of funneling opinion evidence through one test of admissibility rather than the other.

II. THE BLURRY BOUNDARIES OF *GRAAT*

Since the Supreme Court of Canada's decision in *Graat*, it has been clear that the threshold for admitting lay opinion evidence is mere "helpfulness."[3] Though witnesses are generally expected to testify about

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1 *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*].

2 See *infra* notes 17-23 and accompanying text.

3 *R v Graat*, [1982] 2 SCR 819 [*Graat*].

what they saw and heard rather than their opinions, *Graat* sensibly recognizes that it is not always easy to distinguish between the two,[4] and overzealous attempts to police the line would inevitably lead to the exclusion of valuable evidence. In particular, there will frequently be cases in which perception and interpretation blur together, and where it is untenable to expect witnesses to provide "unfiltered" descriptions of what they saw – or, if they can, to expect the trier of fact to make sense of them. In our day-to-day lives, we can easily distinguish between someone "staggering" and someone "tripping," even if we have trouble describing (even to ourselves) how the gait of the former precisely differs from that of the latter.[5] Likewise, most adults tend to know an intoxicated person when they see one, even if they would have trouble describing, in detail, what it is about that individual's breath, eyes, movement, manner of talking, and behaviour that makes such an interpretation reasonable.[6] Even if a witness could articulate that more-or-less raw data, the trier of fact would likely be more confused than assisted by the effort. Sometimes it is just easier to understand the essence of the testimony when a witness says that "the accused was drunk."

In short, the Court's approach in *Graat* reflects the intuition that, for better and for worse, human beings do not perceive and then interpret; they interpret as they perceive.[7] Hence, the Court in *Graat* emphasized that the lay witnesses had an opportunity to perceive matters for themselves; had the "experiential capacity" to correctly interpret what they saw; and that their opinion about the defendant's state of intoxication was "a compendious statement of facts that are too subtle and too complicated to

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4 *Ibid* at 835.

5 The example is drawn from King & Pillinger, *Opinion Evidence in Illinois* (1942) at 1, as reported in Ron Delisle et al, *Evidence: Principles and Problems*, 10th ed (Carswell, 2012) at 871.Note that this is not the most recent edition of the casebook, but more recent editions have not included the hypothetical.

6 See *Graat*, *supra* note 3. See also David M Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at 198-9; *R v Valentine*, 2009 CanLII 81007 at 6 (Ont Sup Ct): "A driver may have no difficulty distinguishing a Ford from a Volvo, though he or she may well have difficulty articulating just what makes one different from the other. A cook may know at a glance whether an electric mixer is a Sunbeam or KitchenAid, but similarly have difficulty describing the structure of each." Consider also Simon Barnes, *How to be a Bad Birdwatcher* (London, UK: Short Books, 2012) at 123 (describing "the jizz.")

7 On this point, consider the discussion of "System 1" thinking in Daniel Kahneman, *Thinking, Fast and Slow* (Toronto: Doubleday, 2011).

be narrated separately and distinctly."[8] This was captured by Sopinka, Lederman, and Bryant in their formulation of the test:

> 1. The witness has personal knowledge of the observed facts;
> 2. The witness must be in a better position than the trier of fact to form the opinion in question;
> 3. The witness has the necessary experiential capacity to form the opinion; and
> 4. The opinion must be a compendious mode of stating facts that are subtle or complicated, and that, therefore, cannot be narrated as effectively without resort to conclusions.[9]

For the reasons we have given, this summary is fine as far as it goes. But it neglects an important ambiguity in *Graat*. The Court had no trouble concluding that <u>any</u> adult would have the experiential capacity to recognize someone as intoxicated, and so there was no need to decide whether a witness could give a lay opinion on a subject where one could <u>not</u> expect laypersons, by and large, to have the necessary experiential capacity to form one. What *Graat* does not firmly resolve is the situation where a lay witness has unusual experience or training on a particular matter. Can she offer an opinion on it under the *Graat* test, even though most other laypersons would be ill-equipped to do so?

In quietly leaving this question open, Sopinka, Lederman, and Bryant were simply reproducing an ambiguity in *Graat*. The Court in *Graat* did not say precisely <u>why</u> it mattered that "[o]rdinary people with ordinary experience are able to know that someone is too drunk to perform certain tasks."[10] Justice Dickson (as he then was), writing for the Court, made the remark in the course of explaining why there was comparatively little danger that triers of fact would treat lay opinion evidence with undue deference.[11] The trier of fact would, he observed, be in as good a position as the witness to decide what inferences were warranted. There was, in other words, no risk that the trier of fact would treat the witness as an expert. Read as a

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8 *Graat*, *supra* note 3 at 841.

9 Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 3d ed (Toronto, LexisNexis Canada, 2009) at 776. Two appellate courts, in civil cases, have adopted this passage as authoritative: *Hunt (Guardian of) v Sutton Group Incentive Realty Inc*, 2002 CanLii 45019 at para 17 (Ont CA); *Jorna & Craig Inc v Chiasson*, 2020 NSCA 42 para 65.

10 *Graat*, *supra* note 3 at 840.

11 *Ibid*.

whole, the passage can be read as an oblique suggestion that, in determining the admissibility of lay opinion evidence, one should consider whether laypersons generally would share the experiential capacity of the witness. This would seem to have implicitly informed Paciocco and Stuesser's version of the *Graat* test which, in contrast to Sopinka, Lederman, and Bryant, emphasizes that there can be no "overlap" between expert and lay opinion:

> 1. The witness must be in a better position than the trier of fact to form the opinion in question;
> 2. The conclusion is one that persons of ordinary experience are able to make;
> 3. The witness, *though not expert*, has the necessary experiential capacity to form the opinion; and
> 4. The opinion must be a compendious mode of stating facts that are subtle or complicated, and that, therefore, cannot be narrated as effectively without resort to conclusions.[12]

But the underlined portions do not find unambiguous support in *Graat*. For the most part, the quoted passage from Justice Dickson's opinion simply states that lay witnesses are not entitled to special deference – and, indeed, hints that this is just as true for experts – and that the frailties in their opinions can be brought out in cross-examination. Justice Dickson notes: "If the witness lacks the relevant experience, or is otherwise limited in his testimonial capacity, or if the witness is not sure whether the person was intoxicated to the point of impairment, that can be brought out in cross-examination."[13] Strikingly, that sentence focuses on the ways in which the lay witness specifically may have lacked the opportunity to accurately perceive events, or the experiential capacity to interpret them. It does not state that laypersons must share that capacity as a condition of admissibility, or even say whether, if they do not, such a point could go to weight.

Consider, too, the various traditional exceptions, articulated in *Graat*, to the exclusionary rule for opinion evidence:

> We start with the reality that the law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions. The subjects upon which the non-expert witness is allowed to give opinion evidence is a lengthy one. The list ... is by no means exhaustive: (i) the identification of handwriting, persons and things; (ii) apparent

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12 David M Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at 839 [emphasis added].

13 *Graat*, *supra* note 3 at 840.

> age; (iii) the bodily plight or condition of a person, including death and illness; (iv) the emotional state of a person—*e.g.* whether distressed, angry, aggressive, affectionate or depressed; (v) the condition of things—*e.g.* worn, shabby, used or new; (vi) certain questions of value; and (vii) estimates of speed and distance.[14]

Here, too, the basis for these exceptions lends itself to competing interpretations. Did the Court recognize these exceptions because these are the sorts of matters on which laypeople generally have the experiential capacity to opine? Or are we focused on the lay witness' particular opportunities to perceive and draw reasoned inferences from what she saw and heard? This is not obvious. With respect to several exceptions, the case law has tended to focus on the latter question. For example, when determining whether a lay witness can attribute a piece of handwriting to a specific individual, the focus tends to be on whether she had an opportunity to scrutinize that person's handwriting in the past, and is able to distinguish between different styles of handwriting, and not on whether non-expert members of the public can generally do so.[15] But it is perhaps significant that, where a comparator piece of handwriting is not disputed, the trier of fact may be permitted to rely on its own judgment in the absence of any opinion evidence.[16] This suggests that the exception presupposes that any lay witness is, in principle, capable of engaging in this sort of comparison. Likewise, matters such as apparent age, bodily plight or condition, emotional state, and the condition of things are all matters on which most adults would have the capacity to give an opinion. That does not, however, tell us whether this is a necessary condition for admitting lay opinion evidence – only that it is a condition which tends to be satisfied for most if not all of the traditional exceptions.

So *Graat* left us hanging as to whether witnesses could give lay opinions on matters not within the ordinary experience of non-experts. Notwithstanding Paciocco and Stuesser's take on the matter, many appellate courts have concluded that witnesses can.[17] For example, in *Hill*, the Ontario Court of Appeal concluded that a police officer could testify that the treads on a pair of shoes were similar to those found at the crime

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14 *Ibid* at 835.

15 See e.g. *Pitre v R*, [1933] SCR 69.

16 See *R v Abdi* (1997), 34 OR (3d) 499, 116 CCC (3d) 385 (ONCA).

17 Most of these examples are drawn from *R v Gavin*, 2018 PECA 6 at para 45 [*Gavin*].

scene, on the basis that "he owned the same type of shoes."[18] In *Sargent*, the Alberta Court of Appeal found no error in permitting an officer to testify that "a particular tool could be used to break into a Honda automobile."[19] In *Foley*, the British Columbia Court of Appeal held that a forestry worker could provide an "opinion that an area of forest had been recently logged."[20] In *Ilina*, the Manitoba Court of Appeal ruled that a police officer could offer his lay opinion, based on other stains near the blood on the floor, that the crime scene had been cleaned before law enforcement had arrived.[21] In *Gavin*, the Prince Edward Island Court of Appeal held that a fisheries officer could give his lay opinion that an activity he had observed through Forward Looking Infrared Radar was lobster fishing.[22] In *HB*, the Ontario Court of Appeal held that a police officer could offer his opinion about the typical reactions of a person just told that her spouse was accused of sexual abuse.[23] In none of these cases was it obvious that the opinion was grounded in a capacity shared by laypersons generally. On the contrary, the value of the opinion in each stemmed largely from the experiential background of the witness.

And this leaves aside the wide range of lower court decisions. In *Halton Regional Conservation Authority*, a lay witness was permitted to testify about the "freshness of topsoil."[24] In *Valentine*, a witness was allowed to give a lay opinion identifying the caliber of a gun.[25] In *Colpitts*, a police officer was allowed to give his lay opinion, based on a report written by a securities investigator concerning the trading of certain stocks, that the defendants

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18 *R v Hill* (1986) 32 CCC (3d) 314 (Ont CA), as described in *Gavin*, *supra* note 17at para 45.

19 *R v Sargent*, 2006 ABCA 411, as described in *Gavin*, *supra* note 17at para 45.

20 *R v Foley*, 1996 BCCA 708, as described in *Gavin*, *supra* note 17at para 45.

21 *R v Ilina* (2003), 172 CCC (3d) 240, 170 Man R (2d) 207 (Man CA) [*Ilina*]. The case is discussed in Jason M Chin, Jan Tomiska& Chen Li, "Drawing the Line Between Lay and Expert Opinion Evidence" (2017) 63:1 McGill LJ 89 at 100-01 [Chin, Tomiska & Li]; Peter Sankoff, *The Law of Witnesses and Evidence in Canada* (Toronto: Thomson Reuters, 2021) at ch 16, s 16.4 [Sankoff].

22 *Gavin*, *supra* note 17.

23 *R v HB*, 2016 ONCA 953 [*HB*] , discussed in Sankoff, *supra* note 21 at ch 16, s 16.4.

24 *Halton Regional Conservation Authority v Ahmad*, 2016 ONCJ 54, as described in *Gavin*, *supra* note 17at para 45.

25 *R v Valentine*, 2009 CanLii 81007 (Ont Sup Ct), discussed in *Gavin*, *supra* note 17 at para 45.

were linked to the manipulation of stock prices.[26] In *Hachem*, a lay witness who spoke classical Arabic was permitted to offer his opinion about the meaning of remarks (alleged by the Crown to have been a threat) made by the defendant against his wife.[27]

Furthermore, the Supreme Court itself has hinted that lay opinion evidence may be offered on matters outside the ken of the ordinary trier of fact. In *Lee*, a police officer was permitted to give his lay opinion about the significance of footsteps in the snow – i.e., that their pattern and size indicated that the complainant had been chased by the defendant on the evening in question. A majority of the Alberta Court of Appeal found that this was not in error.[28] The Supreme Court dismissed the appeal – indeed, stating that there was "no basis for appellate intervention on this ground" – partly on the basis that "any school child would deduce [that someone was running away from others] from the tracks in the snow which the witness observed."[29] The latter remark, of course, undercuts any suggestion that *Lee* stands authoritatively for the proposition that lay witnesses can offer opinions on matters beyond the experiential capacity of non-experts. What is more, the Court noted that the defence "made no objection to the admissibility of the evidence at trial and in fact relied on it as supporting the appellant's testimony."[30] This makes it difficult to draw clear conclusions about the legal proposition for which *Lee* stands. Nonetheless, the notion that just *anyone* could look at footprints in the snow, and grasp their significance, is sufficiently counter-intuitive that one is inclined to read <u>something</u> into it.[31]

III. The Importance of the Distinction

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26 *R v Colpitts*, 2016 NSSC 271, discussed in Chin, Tomiska, & Li, *supra* note 21at 103-05.

27 *R v Hachem*, 2017 ABPC 186 at paras 89-91, discussed in Lisa A Silver, "Back to Burgess: The Impact of the *White Burgess* Expert Evidence Regime in Alberta Decisions" (2019) 57 Alberta L Rev 1 at 7. The trial judge expressed doubt about the correctness of this decision, at para 89.

28 *R v Lee*, 2010 ABCA 1, aff'd 2010 SCC 52.

29 *Lee* SCC, *supra* note 28at para 3.

30 *Ibid* at para 6.

31 See Justice Berger's dissent in *Lee* ABCA, *supra* note 28, as well as the discussions in Chin, Tomiska & Li, *supra* note 21 "at 101-03 and Sankoff, *supra* note 21 at ch 16, s 16.2(b).

Without suggesting at this juncture that any – still less all – of these cases are wrongly decided, they do raise profound questions about the scope of the lay opinion rule and its relationship to expert opinion. Put bluntly, we need some sense of whether evidence may be admitted under both *Graat* and *White Burgess*; and, if not, where one ends and the other begins. The not-unreasonable intuition of many is that the two regimes cannot overlap in such a way that the choice of which to use is left completely up to the adducing party, since this would allow litigants (in particular, the Crown in criminal cases) to circumvent the more demanding test for the admissibility of expert evidence set out in *Mohan* and *White Burgess*.[32]

Admissibility is not the only concern, of course. For years, the courts and legislators alike have been constructing procedural requirements designed to modulate the admissibility of expert evidence, recognizing that this type of witness poses special risks to opposing parties and the system at large. Section 657.3, for example, is one of the only provisions in the *Code* to impose specific disclosure requirements upon both the Crown and defence. Without defining what an expert is, it nonetheless imposes rules that are designed to promote "the fair, orderly and efficient presentation" of this type of evidence.[33]

The rules did not emerge out of nowhere. During the inquiry into the wrongful conviction of Guy Paul Morin, a trial that involved some highly questionable expert testimony, amongst other problems, the Commission assessed the risks posed by treating this variant of opinion as a simple question of evidentiary admissibility. It recognized that "expert evidence is frequently technical and complex" and there were obvious disadvantages in following the normal rules of admissibility that permit parties to adduce evidence as they choose, a situation that results in the full thrust of the evidence only becoming clear at the trial stage. One problem with this approach is that parties "understandably often require the assistance of other experts in order to properly respond to expert evidence." As a consequence, tendering this evidence at trial without giving the other party advance notice "can lead to undesirable delays" when adjournments are inevitably required to allow a party to respond and take time to grapple with the significance of the opinion. [34]

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32 See Chin, Tomiska & Li, *supra* note 21at 123.

33 *Criminal Code*, RSC 1985, c C-46, s 657.3 [*Code*].

34 The Honourable Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin, Volume 1* (Ontario Ministry of the Attorney General, 1998) at 358.

For this reason, section 657.3 requires, amongst other things, that parties provide early notice of any expert testimony they intend to tender and a detailed copy of the expert report prepared for the case or a summary of the anticipated opinion. Following the lead of the civil courts, judges are also now requiring that experts sign an acknowledgement form showing that "the witness recognizes and accepts [their] duty to the Court to be independent, impartial and free of bias."[35]

Allowing experts to testify as non-experts would undermine the important objectives served by these rules. At their core, the provisions recognize that opposing parties are disadvantaged when the nature and foundation of an expert opinion can only be fully explored after the witness gives testimony at trial. Amongst other concerns, this process minimizes the chances of assessing whether the underlying science, logic, or experience providing the basis for the particular opinion is flawed or deficient.

There would thus seem to be at least two important reasons to distinguish and separate the two types of admissible opinion. But the case law has not done so, at least not effectively. Indeed, in many of the cases we have mentioned, the adducing party expressly argued that the opinion of the witness in question could be characterized either as lay or expert.[36] Consider, as well, the Supreme Court's decision in *White Burgess*. There, the Court endorsed a modified version of the two-stage admissibility inquiry proposed by Justice Doherty in *Abbey*. Under his approach, it would fall to the trial judge to decide, as a threshold matter, whether "the proposed opinion [relates] to a subject matter that is properly the subject of expert opinion evidence."[37] This was distinct from a subsequent inquiry, to take place at the second ("gatekeeper") stage, in which the trial judge would decide whether, and to what extent, it was "necessary" to admit the opinion.[38] Whereas the necessity inquiry would entail a nuanced weighing of costs and benefits, the proper subject inquiry would ostensibly have involved no weighing: either the opinion would pertain to a matter demanding special expertise, or it would not.

What is striking is that, although the Supreme Court endorsed much of Justice Doherty's proposed framework in *White Burgess*, it did not accept these aspects of it. On its modified approach, the inquiry into necessity

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35 *R v Patterson*, 2020 NSSC 151 at para 101.

36 See e.g. *Ilina*, *supra* note 21.

37 *R v Abbey*, 2009 ONCA 624 at para 80 [*Abbey*].

38 *Ibid* at paras 93-95.

occurs at the threshold stage, and there is no independent determination of "proper subject matter" at all. Arguably, the necessity criterion would involve just the sort of inquiry into proper subject matter that Justice Doherty envisioned. But the Court in *White Burgess* did not expressly explain why it made this modification, leaving open the possibility that it did not wish judges to draw hard-and-fast lines around those matters reserved for experts and those reserved for lay witnesses.

The clearest recent signal was given in *Bingley*. There, the Supreme Court was called upon to decide whether the opinion of a certified Drug Recognition Expert, concerning the defendant's state of impairment while driving, was admissible. The majority concluded that it was. In reaching that conclusion, however, the majority focused on its admissibility as an expert opinion. Significantly, the majority cast serious doubt on the proposition that it could also be admitted as a lay opinion. Chief Justice McLachlin (as she then was) observed: "Constable Jellinek formed his opinion through the application of specialized training and experience in performing a prescribed drug recognition evaluation. In those circumstances, his evidence cannot be characterized as lay opinion."[39] In other words, the opinion could not be admitted under *Graat* because of the way in which it was formed – i.e., through the application of a specialized methodology that ordinary laypersons would not have been trained to use.

Bingley provides a strong hint that the Sopinka Lederman & Bryant formulation of the *Graat* test is at best imprecise and at worst positively misleading. But that does not end the matter. In part, that is because the remarks from *Bingley* were made *in obiter*. There is, however, another issue. For the Paciocco and Stuesser formulation is also dissatisfying. After all, it is not at all obvious how trial judges are supposed to distinguish between opinions that persons of "ordinary experience" can form and those which they cannot. It cannot be the case that, to be admissible as lay opinion evidence, the matter must be within the experiential capacity of everyone. The question, rather, must be the degree of ubiquity of the capacity in issue. Moreover, there is a sense in which lay witnesses who offer opinions do something very similar to what many experts do; namely, engage in interpretation. When a lay witness claims that an individual was "upset" or "shocked," attributes a piece of handwriting to a particular person, expresses a view as to the value of an item, or the velocity of a moving car,

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[39] *R v Bingley*, 2017 SCC 12 at para 34 [emphasis added].

she is interpreting perceived phenomena. This is not fundamentally different from what many experts do. All this means that the precise placement of any line distinguishing expert from non-expert opinion will be artificial, even somewhat arbitrary. Courts might well prefer not to involve themselves in such contentious decisions – at least expressly.

We do not want to categorically dismiss the idea that some elegant and uncontroversial test for distinguishing between expert and lay opinion could be found (though we are skeptical).[40] Rather, we want to suggest that there may be ways to resolve the practical problems created by the overlap between *Graat* and *White Burgess*, without having to draw abstract and contentious lines between "ordinary knowledge" and "expert knowledge."

IV. *GRAAT*'S IMPLICIT GATEKEEPER STAGE

Our starting point is the "parenthetical" observation by Justice Brown in *HB* that "to the extent one relies on the special experience or training of a person as a basis for admission of his or her opinion, one is moving into the realm of expert opinion evidence, thereby bringing into play the standard factors governing the admissibility of that type of evidence."[41] The central insight is that opinion evidence, even if admissible under *Graat* – however one conceives of the test applied in that case – may nonetheless raise some or all of the concerns that animate the more demanding admissibility frameworks established in *Mohan* and *White Burgess*. Insofar as it does, the trial judge must exercise appropriate care in ensuring that those concerns are sufficiently dispelled or muted before allowing the trier of fact to make use of the opinion as evidence. The "helpfulness" of the opinion – the fact that it gives the trier of fact access to personal observations that would otherwise be too subtle or complicated to articulate without confusion – may be treated as a benefit of its admission, but it does not follow that this benefit will offset or outweigh the potential costs.

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40 See Michael J Saks & Barbara A Spellman, *The Psychological Foundations of Evidence Law* (New York: New York University Press, 2016) at 121.

41 *HB*, *supra* note 23 at para 144 (Justice Brown concurring). It is worth noting that Justice Gillese, for the majority, took a more "orthodox" approach to the case, concluding that an officer could give an opinion about the emotional state of the witness, and what it meant, simply because it came within an "accepted categor[y] upon which lay witnesses are allowed to express opinions," resolving all debate, at para 74.

Fundamentally, this argument rests on the (perhaps controversial) claim that both *Graat* and *Mohan/White Burgess* require a cost-benefit assessment as a precondition for admitting opinion evidence. This should come as no surprise in the context of expert evidence, since the Supreme Court has expressly said that the trial judge's job at the "gatekeeper stage" is precisely to conduct just such an analysis.[42] As the Supreme Court in *White Burgess* observed, however, opinion evidence – whether lay or expert – is problematic insofar as "*ready-formed inferences* are not helpful to the trier of fact *and might even be misleading*."[43] The problem, according to the Court, is that the trier of fact is not provided with the underlying *bases* for opinions, and is therefore unable to assess their reasonableness and significance. In the absence of that information, the trier of fact may be unduly tempted simply to defer to the opinion of the witness.

Now, the risk of undue deference is especially acute when the opinion is offered by an expert. The Court in *Graat*, however, did not obviously proceed on the basis that such risks vanish altogether in the context of lay opinion. Indeed, the result in that case surely rested, at least in part, on the premise that the officers could be effectively cross-examined on the reliability of their perceptions of the defendant and his driving, any doubts that they might have about it, and that that they were not being held out as experts deserving special respect or deference and would not be regarded as such by the trier of fact. The presupposition, in short, was that the trier of fact would be in a position to assess the reasonableness of the inference of impairment; that it could and would look behind the opinion. Though Paciocco and Stuesser may have been wrong to say that *Graat* requires – say, as a "threshold matter" - the opinion to be one that a person of ordinary experience could make, the reasoning in that case strongly hints that the risks of inappropriate deference can and should be considered when determining admissibility.

Underscoring this point, consider the "ultimate issue" rule. To the extent that a given opinion is dispositive of the core issue or issues to be decided by the trier of fact, it may be excluded, notwithstanding its "helpfulness," because it poses special dangers. The risk that typically exists with respect to lay opinion – i.e., the risk that the trier of fact will simply defer to the witness' judgement about what happened rather than consider

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42 *White Burgess*, *supra* note 1at paras 20-24; *Abbey*, *supra* note 37 at paras 79-95.

43 *White Burgess*, *supra* note 1 at para 14.

whether his or her inference is reasonable or reliable – becomes heightened inasmuch as deference on that question amounts, in effect, to abdication of its fact-finding responsibility altogether.

The idea that *Graat* requires a degree of "balancing" has, no doubt, been obscured by Justice Dickson's decidedly relaxed language of "helpfulness." Nothing in *Graat* stands for the proposition that lay opinion evidence is presumptively admissible, but that seemingly low, all-or-nothing bar for admissibility, practically speaking, seems to invite lawyers and judges to "wave it in" without giving much thought to exactly how helpful it is relative to its costs. Yet as we have seen, the potential costs do seem to matter to the *Graat* analysis, at least in principle. And it is clear that when we consider the reasons for admitting lay opinion evidence, helpfulness is not all-or-nothing. Rather, it can be more or less helpful.

To see why, return to *Graat*. If and when lay opinion evidence is admitted, it is ostensibly because we cannot reasonably expect witnesses to articulate the personal observations upon which it rests, i.e., because the underlying perceptions may be too "subtle or complicated." If we required witnesses to articulate them as a precondition for admissibility, so the reasoning goes, we would either lose all of the evidence they had to offer – both facts and opinion – or hopelessly obscure its significance to the trier of fact. To avoid such results, the Court in *Graat* held that, where the choice is to admit testimony as "factual" or exclude it as "opinion," we should err on the side of admission rather than exclusion. The opinion is admitted, "incidentally" as it were, in order to give the trier of fact access to personal observations that would otherwise be lost altogether. The benefits of admission, we might say, will typically outweigh the costs. The extent to which this is true, though, will vary from case to case, not least because it may be possible to access some of the personal observations of the witness, but not all. A witness, asked to explain his or her inference that the defendant was "drunk," may be able to testify that an individual was "staggering" and "smelled of alcohol," without necessarily being able to articulate all of the observations upon which he or she relied. The opinion itself, though now unpacked to some degree, may still be helpful, because there are some observations that would be lost, and (perhaps more importantly) the trier of fact may still have trouble making sense of the witness' evidence, as well as its significance, in the absence of a "compendious statement."

So, the very logic of *Graat* arguably implies that there is a sliding scale along which lay opinion evidence may be more or less helpful or beneficial, and that the costs of admission may be too great even where a minimum threshold of helpfulness has been crossed. With that in mind, we would suggest that, inasmuch as the special concerns associated with expert opinion evidence are in play by virtue of the testimony being provided, these should be thrown into the mix. Here, we would make a few observations.

First, to the extent that the witness or the adducing party claims to have arrived at his or her interpretation of personal observations, by applying facts, techniques or methodologies learned or acquired through special training or experience, there is at least a theoretical possibility that the trier of fact will defer to the witness. Depending on the force with which this claim is asserted, as well as its plausibility under the circumstances, there may be more or less need to ensure that the trier of fact is emboldened and equipped to exercise independent judgement – i.e., to properly scrutinize the underlying bases for the witness' opinion and assess its reasonableness. In determining just how much the witness relies upon his or her "expertise," we need not confine ourselves to express assertions to that effect (e.g., "in my experience as…"; "during training we were told that…")[44] but should also be alert to implicit claims. For example, the witness may unpack the method of reaching the opinion in such a way that it becomes clear to the trier of fact that a specialized technique or methodology has been used to reach it. The witness might also adopt technical language, draw significantly upon training or special experience that allows them to provide the conclusion, or adopt a defensive attitude or posture suggesting that others are not qualified to challenge the conclusions reached.[45] In some cases, as in *Lee*, the very nature of the opinion provided may suggest a claim of expertise: a police officer who testifies that he or she can "read" footprints in the snow is arguably trading upon popular myths about the sleuthing abilities of detectives, whether intentionally or not.

The mere fact that a witness, or the adducing party, makes a claim of expertise is not dispositive of anything. The focus should be on the extent of the claim and its plausibility, and only by way of determining whether the concerns which animate *Mohan* and *White Burgess* are realistically in

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44 See e.g. *HB*, *supra* note 23.

45 *Inquiry Into Pediatric Forensic Pathology in Ontario: Executive Summary* (Ontario Ministry of the Attorney General, 2008) at 16-17.

play. If they are, then we should consider the extent to which the risks of undue deference may be mitigated or nullified. In particular, we should consider whether, and to what extent, opposing counsel is in a position to effectively cross-examine the witness on the underlying bases for the opinion, the training and experience of the witness, the reliability of the technique or methodology, and the willingness and ability of the witness to explain the technique and its application in the case at bar.

The difficulty, of course, is that effective cross-examination does not just magically happen. As a practical matter, it may demand significant preparation and advance notice. Recall the procedural requirements that surround the admission of expert opinion evidence. These are designed, of course, to make it possible for opposing counsel to cross-examine prospective experts on, among other things, their qualifications, potential biases, and the merits of the background facts, interpretive methodology, and techniques. This advance preparation is what makes a *voir dire* effective as a means of ensuring that expert opinion satisfies some minimum threshold of reliability and will not be treated with undue deference by the trier of fact. Yet in these overlap cases, there is usually little or no opportunity for counsel to prepare; to scrutinize the putative expert's training, and the merits of the technique or methodology he or she employed in forming the opinion. Rather, opposing counsel and the trial judge are being asked to re-assess – "on the fly," as it were – the admissibility of opinion evidence initially admitted on a different basis altogether.

In some instances, this may not be a significant problem. It may have been sufficiently clear to opposing counsel that, even though the opinion in question was being adduced under *Graat*, it would rest on special training or experience. But in other cases, opposing counsel may justly complain at being taken by surprise. With this in mind, the trial judge should carefully consider whether, given the specific risks of undue deference posed by the opinion evidence in issue, the testimony is sufficiently probative and helpful to justify the administrative cost and inconvenience of an adjournment. An adjournment – perhaps even a short one – may give opposing counsel a suitable opportunity to prepare.[46]

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[46] In other cases, it will not. Again, the more the evidence shades into the realm of expert opinion, the more the courts should recognize the real difficulties of "catching up" at a late stage. Counsel may require their own expert, who might not be readily available. Any assessment of this type should take the difficulties of preparing into account in deciding how to proceed.

Alternatively, the appropriate course of action, bearing in mind the need to resolve the matter in a fashion congenial to all of the parties, may be an instruction to the trier of fact simply to disregard any suggestion that the witness has special expertise warranting deference; and possibly an instruction to disregard the evidence altogether.

Finally, we would observe that there is potentially an interesting interplay between *Graat* and *Mohan*. Suppose that a witness is cross-examined on the basis for his or her opinion, and in the process reveals that it rests on the interpretation of personal observations using background facts and techniques gleaned through specialized training. It may be that, in order to establish the relevance or probative value of the training to the formation of the opinion (per *Mohan*), the witness will need to articulate the personal observations that were interpreted according to the technique or methodology relied upon. If the witness does not or cannot do so, the trier of fact is – to that extent at least – placed in a position in which they cannot effectively scrutinize the basis for the opinion. If the witness does indeed unpack the personal observations underlying the opinion, however, there is less basis for admitting the opinion itself under *Graat* – since, to the extent the personal observations undergirding the opinion were articulated by the witness, it can no longer be claimed that they are so subtle or complicated that the trier of fact must rely on the opinion in order to get to them. Without suggesting that this renders the opinion inadmissible under *Graat*, it does complicate the cost-benefit analysis.

Again, we emphasize that this is a balancing exercise that should be approached in a flexible rather than rigid (or brittle) spirit. The point is not to 'punish' the adducing party for ostensibly circumventing the *Mohan* and *White Burgess* framework, but to ensure that the values that animate it are given appropriate expression in cases where opinion evidence, implicating questions of expertise, is admitted under *Graat*.

V. Conclusion

Historically, witnesses were called exclusively to relate what they knew, saw or heard – not what inferences they drew. (Indeed, the term "witness" is derived from the Old English "witan," meaning "to have knowledge of" or "to perceive.") Etymology notwithstanding, though, the Supreme Court was right to recognize in *Graat* that the line separating fact and opinion is

sometimes rickety, and that questions of admissibility should not lean too heavily upon it. In much the same way, we have suggested, knowledge does not fall into hermetically-sealed containers labeled "lay" or "expert." It represents a continuum, along which one blurs into the other, and little should turn on which label is applied in a given case.

Like all matters that are measured across a spectrum, there will be easy and hard cases. The forensic scientist providing analysis of DNA results is readily slotted into the "expert" category and treated with all the care required by that form of evidence. The ordinary witness who describes a gunshot as being "very close" and "an incredibly loud sound" can do so without the need for preliminary qualification. Our concern is with the tricky cases occupying the zone within which lay and expert knowledge begin to shade into one together. When a putatively lay witness takes the stand and makes express or implicit claims of expertise, it is unhelpful to ask whether the opinion is the product of "ordinary experience." Dwelling on that question will inevitably lead to both over- and underinclusive results. On one hand, the result might be the exclusion of useful evidence. On the other, the evidence might be admitted without taking care to ensure that the opposing party does not suffer real prejudice.

In order to avoid these results, the courts should focus less on threshold questions of "ordinariness" and more on the concerns traditionally raised by expert evidence in the particular context of the opinion being offered by the witness. Where these concerns are prominent, the judges should assess whether they can be remedied in a manner that is fair to the affected party – substantively and procedurally – and ensure that the trier of fact is not likely to defer to the "expertise." And where they cannot, the evidence should be excluded, regardless of how the evidence is labelled at first instance.