SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Garnier*, 2017 NSSC 259

Date: 2017 09 12
Docket: Hfx No. 454738
Registry: Halifax

Between:

Her Majesty the Queen

v.

Christopher Garnier

DECISION: *VOIR DIRE* 2A
Ability of Dr. Timothy Moore to Testimony on VD2

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	August 10 and 11, 2017, in Halifax, Nova Scotia
Written Decision:	April 12, 2018
Counsel:	Carla Ball and Christine Driscoll, for the Crown Joel Pink, Q.C., Vanessa Christie, Nicola Watson, for the Defence

By the Court:

Overview

[1] The Crown alleges that Christopher Garnier murdered Catherine Campbell on September 11, 2015.

[2] Mr. Garnier was arrested for murder on September 16, 2015. Over the course of nine and a half hours he provided a statement in which he confessed to killing Ms. Campbell. The Crown wishes to have that statement admitted as part of the case against Mr. Garnier. A pre-trial blended *voir dire* was conducted, during which counsel argued the voluntariness of the statement as well as *Charter* issues raised by Mr. Garnier. Mr. Garnier wants to call Dr. Tim Moore, a cognitive psychologist, to testify:

> as an expert capable of giving opinion evidence in the following areas, all related to the psychology of memory as it is affected by interrogation and tactics:
>
> - How memories are formed and how gaps in memories can arise;
> - Factors that may compromise the reliability of auto biographical recollections;
> - The phenomenon of source amnesia;
> - The phenomenon of false memories;
> - Distinguishing an authentic memory from the one which may have arisen through imagination inflation;
> - The difficulty of distinguishing an illusory memory from one based on actual experience;
> - The notion of where the memory comes from;
> - The notion that imagined events can be mistaken for actual events; and
> - The constructive and reconstructive nature of memory. [Emphasis added]

[3] Mr. Garnier also wishes to have Dr. Moore's report, dated June 19, 2019 [sic], admitted into evidence. The Crown objects to Dr. Moore providing evidence on this *voir dire* and objects to his report being admitted into evidence.

[4] For the reasons that follow, I will allow Dr. Moore to testify generally as to the psychology of memory, but I will not allow him to testify about interrogation techniques and tactics, nor can he provide an opinion about the truthfulness of Mr.

Garnier's statement. Dr. Moore's report, which discusses interrogation techniques used in Mr. Garnier's case, along with the ultimate reliability and truthfulness of Mr. Garnier's statement, is not admissible on the *voir dire*. Although prohibited from providing opinion evidence regarding interrogation techniques and tactics on this *voir dire*, Dr. Moore is permitted to provide opinion evidence in the following areas, all related to the psychology of memory:

- How memories are formed and how gaps in memories can arise;
- Factors that may compromise the reliability of autobiographical recollections;
- The phenomenon of source amnesia;
- The phenomenon of false memories;
- Distinguishing an authentic memory from the one which may have arisen through imagination inflation;
- The difficulty of distinguishing an illusory memory from one based on actual experience;
- The notion of where the memory comes from;
- The notion that imagined events can be mistaken for actual events; and
- The constructive and reconstructive nature of memory.

Expert Opinion Evidence Generally

[5] The law in Canada regarding the admissibility of expert testimony has evolved significantly over the last two decades. In *R. v. Marquard*, [1993] 4 S.C.R. 223, McLachlin J. (as she was then), speaking for the majority, said at pp. 248-250:

> It is a fundamental axiom of our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion. This Court affirmed that proposition in *R. v. Béland*, *supra*, at p. 408, in rejecting the use of polygraph examinations as a tool to determine the credibility of witnesses:

> From the foregoing comments, it will be seen that the rule against oath-helping, that is, adducing evidence solely for the purpose of bolstering a witness's credibility, is well grounded in authority.

A judge or jury who simply accepts an expert's opinion on the credibility of a witness would be abandoning its duty to itself determine the credibility of the witness. Credibility must always be the product of the judge or jury's view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter: see *R. v. B. (G.)* (1988), at p. 149, *per* Wakeling J.A., affirmed [1990] 2 S.C.R. 3. Credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis. The expert who testifies on credibility is not sworn to the heavy duty of a judge or juror. Moreover, the expert's opinion may be founded on factors which are not in the evidence upon which the judge and juror are duty-bound to render a true verdict. Finally, credibility is a notoriously difficult problem, and the expert's opinion may be all too readily accepted by a frustrated jury as a convenient basis upon which to resolve its difficulties. All these considerations have contributed to the wise policy of the law in rejecting expert evidence on the truthfulness of witnesses.

On the other hand, there may be features of a witness's evidence which go beyond the ability of a lay person to understand, and hence which may justify expert evidence. ...

For this reason, there is a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact. Professor A. Mewett describes the permissible use of this sort of evidence as "putting the witness's testimony in its proper context." He states in the editorial "Credibility and Consistency" (1991), 33 *Crim. L.Q.* 385, at p. 386:

> The relevance of his testimony is to assist -- no more -- the jury in determining whether there is an explanation for what might otherwise be regarded as conduct that is inconsistent with that of a truthful witness. It does, of course, bolster the credibility of that witness, but it is evidence of how certain people react to certain experiences. Its relevance lies not in testimony that the prior witness is telling the truth but in testimony as to human behaviour.
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> ...
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> There are concerns. As the court stated in *R. v. J. (F.E.)*, [(1990), 53 C.C.C. (3d) 94, 74 C.R. (3d) 269, 36 O.A.C. 348 (C.A.)], and *R. v. C.(R.A.)*(1990), 57 C.C.C. (3d) 522, 78 C.R. (3d) 390, the court must require that the witness be an expert in the particular area of human conduct in question; the evidence must be of the sort that the jury needs

> because the problem is beyond their ordinary experience; and the jury must be carefully instructed as to its function and duty in making the final decision without being unduly influenced by the expert nature of the evidence.
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> The conditions set out by Professor Mewett, reflecting the observations of various appellate courts which have considered the matter, recommend themselves as sound. To accept this approach is not to open the floodgates to expert testimony on whether witnesses are lying or telling the truth. It is rather to recognize that certain aspects of human behaviour which are important to the judge or jury's assessment of credibility may not be understood by the lay person and hence require elucidation by experts in human behaviour.

[6] The defence wants to call Dr. Moore to testify regarding the ultimate reliability and truthfulness of Mr. Garnier's statement to the police. Mr. Garnier says that his confession was false and that this false statement was the product of faulty police interrogation techniques. As McLachlin J. indicates in *Marguard*, Dr. Moore cannot be permitted to cross the line between expert testimony on the psychology of memory and assessment of the credibility of Mr. Garnier himself.

[7] More recently, in *R. v. Abbey*, 2017 ONCA 640, Laskin J.A. for the unanimous court reviewed the state of the law regarding the admissibility of expert evidence since *Marquard*. He summarized law in this regard as it developed from *R. v. Mohan*, [1994] 2 S.C.R. 9, up to *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, with the following remarks:

> [47] The test in *White Burgess* is now the governing test for the admissibility of expert evidence. It adopts a two-stage approach, first suggested in *Abbey #1*: the first stage focuses on threshold requirements of admissibility; the second stage focuses on the trial judge's discretionary gatekeeper role. Each stage has a specific set of criteria.
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> [48] The test may be summarized as follows:
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> Expert evidence is admissible when:
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> (1) It meets the threshold requirements of admissibility, which are:
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> a. The evidence must be logically relevant;
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> b. The evidence must be necessary to assist the trier of fact;
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> c. The evidence must not be subject to any other exclusionary rule;
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> d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:

i. Impartial,

ii. Independent, and

iii. Unbiased.

e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a. Legal relevance,

b. Necessity,

c. Reliability, and

d. Absence of bias.

[49] In short, if the proposed expert evidence does not meet the threshold requirements for admissibility it is excluded. If it does meet the threshold requirements, the trial judge then has a gatekeeper function. The trial judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission. If the trial judge is so satisfied then the expert evidence may be admitted; if the trial judge is not so satisfied the evidence will be excluded even though it has met the threshold requirements.

...

[52] Before leaving the *White Burgess* test for the admissibility of expert evidence, I make three additional points, which I will elaborate on when discussing the fresh evidence.

[53] First, recent case law, including *White Burgess* itself, has emphasized the importance of the trial judge's gatekeeper role. No longer should expert evidence be routinely admitted with only its weight to be determined by the trier of fact. As Cromwell J. said in *White Burgess*, at para. 20, "[t]he unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role". Cromwell J.'s observation echoes the point Binnie J. made in the earlier Supreme Court of Canada decision *R. v. J.-L.J.*, 2000 SCC 51 (CanLII), [2000] 2 S.C.R. 600, at para. 28: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility."

[54] Second, case law since *Mohan* has also emphasized the importance of the reliability of the evidence to its admissibility. See, for example, *R. v. J.-L.J.* and *R. v. Trochym*, 2007 SCC 6 (CanLII), [2007] 1 S.C.R. 239. In *Abbey #1*, at para. 87, Doherty J.A. pointed out that at the gatekeeper stage of

> admissibility the reliability of the proposed expert evidence is central to its probative value and thus to the benefits of admitting it. And as I will discuss, the unreliability of Totten's opinion evidence on teardrop tattoos, as demonstrated by the fresh evidence, is what disqualifies its admission.
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> [55] The third and final point is that in *White Burgess*, at para. 45, Cromwell J. resolved a debate in the case law and held that an expert's lack of impartiality and independence and an expert's bias go to the admissibility of the expert's evidence as well as to its weight, if admitted. At the admissibility stage these qualities are relevant to the threshold requirement of a properly qualified expert, and they are again relevant at the gatekeeper stage. Cromwell J., however, did point out at para. 49 of his reasons that rarely will a proposed expert's evidence be ruled inadmissible for failing to meet this threshold requirement.

Dr. Timothy Moore

[8] Dr. Moore testified on the qualification *voir dire*. His CV was placed into evidence and his proposed report was provided to the court.

[9] Dr. Moore is the Chairman of the Department of Psychology at Glendon College, part of York University. He has been a professor since 1971. Dr. Moore has lectured and published on many areas of cognitive psychology over the span of his career. Over the past decade or so, Dr. Moore has published and lectured on topics related to police interrogation techniques and false confessions. He has been admitted and rejected as an expert in various courts.

[10] Dr. Moore has not conducted any experiments or testing regarding police interrogations or the Reid technique.

[11] Dr. Moore has never met, interviewed or examined Mr. Garnier. He has not reviewed the Crown disclosure in this case, with the exception of the two video and audio recorded interviews of Mr. Garnier conducted on September 16, 2015, which are the subject of this admissibility *voir dire*.

[12] Dr. Moore proposes to provide expert opinion evidence regarding the psychology of memory. In addition, he intends to provide opinion evidence regarding interviewing techniques used by the police, including the "Reid Technique" and how these interviewing tactics can lead to false confessions and wrongful convictions. He also intends to provide opinion evidence about the possible lack of reliability of Mr. Garnier's statement due to the interviewing techniques employed by the police.

[13] In his report Dr. Moore critiques the manner of the interviewers' questions, the manner in which Mr. Garnier was treated by the police, and the length of the interview, and comes to a conclusion regarding the voluntariness of Mr. Garnier's statement and the reliability of his answers. All of this opinion is provided without the benefit of any of the Crown disclosure, aside from Mr. Garnier's own statements.

[14] At p. 2 of his report, Dr. Moore states:

> The basic social science tenets of social cognition that delineate the principles of persuasion have been identified and elaborated upon for decades. Research on social influence can be found in many peer-reviewed journals, and there are numerous forensic psychology journals that routinely address the psychology of interrogations and false confessions. There are clearly identifiable interrogation techniques that investigators commonly and effectively use to encourage guilty suspects to confess. An ideal interrogation strategy is one that secures confessions from guilty suspects but not from innocent ones. The "Reid technique" is the most influential and widely used police interrogation procedure in North America. Several comprehensive critiques have identified a number of fundamental and inter-related assumptions of that protocol that raise concerns about the diagnosticity of the procedure. A procedure has useful diagnosticity to the extent that it increases the ratio of true to false confessions. The issue is not whether or not the Reid procedure is effective at eliciting genuine confessions from the guilty. Clearly it is. The problem is that the method carries with it an inherent risk of extracting false confessions from the innocent.

[15] So, while Dr. Moore says that the Reid technique is effective in eliciting genuine confessions from guilty persons, he says it also has an inherent risk of extracting false confessions from innocent people. Dr. Moore's report suggests that he is able to determine whether the statement or confession is voluntary and reliable. For instance at p. 4 of his report Dr. Moore states:

> Th interrogation contained many of the standard features of the Reid technique mentioned above. Most certainly it was guilt presumptive (e.g., "*I know you killed her. There's no question about that*".); it was long (9.5 hours); it was intimidating and demoralizing; and it was replete with ploys designed to wear down the accused. During the 6th hour of the interrogation, CG's resolve to follow his lawyer's advice to remain silent appeared to collapse and he began to answer the detectives' questions. In my opinion, his decision to speak was not intentional. Rather, he simply succumbed to the intense pressure to which he was subjected. Further, CG's statements during the remaining portion of the interrogation were, in my view, of questionable reliability because of the manner

> in which they were elicited. In what follows I explain the rationale for these conclusions.

[16] Similarly, Dr. Moore concludes at p. 14:

> For the reasons outlined above, I do not perceive CG's statements to have been freely or willingly given. Moreover, in light of the means by which they were elicited they are, in my opinion, of dubious reliability in any case.

[17] Some of what is contained in Dr. Moore's report is advocacy dressed up as an expert opinion. He opines about Mr. Garnier's possible state of mind, without having interviewed him. He acknowledges that Mr. Garnier would not be unusually susceptible to interrogative influences, but then hypothesizes that he might have been susceptible for reasons that could apply to anyone. At p. 13-14 of the report, Dr. Moore states:

> Some suspects are dispositionally more vulnerable to interrogative influences than others. Juveniles, the cognitively impaired or psychologically disordered persons are at heightened risk. CG was none of these, however there were some specific aspects of his situation at the time of the interrogation that could have increased his susceptibility to the interrogative tactics. These include low blood sugar, sleep deprivation, and a possible reaction to medication withdrawal. CG was arrested at 1:20am on September 16, 2015. The paper trail does not show where he was lodged after 5:19am, nor whether he ate or slept prior to the beginning of the interrogation at 1:02pm. Possibly not, in which case he could have been fatigued before the interrogation even started, and also glucose deprived. He did not eat anything until near the end of the 9-hour interrogation and he reported having been sleeping poorly in the days preceding it (p. 150). Sleep deprivation and glucose depletion both, independently, contribute to impairments in attentional focus, working memory, executive control, and emotional impulse regulation. Decision making is negatively affected. In other words, the suspect's ability to resist the persuasive tactics of the interrogators is weakened.
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> Alcohol-induced memory impairments are well documented in the research literature. CG reported that he had been drinking rum with Mitch at his (Mitch's) place prior to their going downtown on the night in question. They ended up at Cheers where they were drinking shots. They "drank a lot" according to CG (p. 164, 172). CG arrived at the Ale House at 1am and left with the victim at about 3:40am. CG did not recall the cab ride, or entering the apartment (p. 148, 193, 194). As noted above he also professed little or no memory for most of the ensuing events. CG was shown crime scene photos at various points throughout the interrogation. In the context of possible partial amnesia for his actions, presenting photos was potentially risky because the mental images formed as a result of perusing the pictures could, over time, become mistaken by CG for

> actual memories based on experience. Attempting to retrieve a memory that may not have been encoded and stored in the first place can result in the formation of illusory memories.

[18] In *R. v. Pearce*, 2014 MBCA 70, the court was dealing in part with an appeal of the trial judge's refusal to allow Dr. Moore to provide expert evidence regarding false confessions in the circumstances of that case. In summarizing the issues relating to Dr. Moore, Mainella J.A. stated, for the court:

> 38 Dr. Moore was called to testify on the areas of how police investigative techniques can affect the reliability of a confession and to give his opinion on the reliability of the appellant's confession. Part of his proposed expert evidence was to explain the police interviewing strategy known as "the Reid Technique." The Reid Technique has coercive aspects such as the use of confrontation, deception, false empathy and minimization of the suspect's conduct. According to Dr. Moore, this can cause a false confession. Dr. Moore's opinion was that the appellant's confession was not reliable because of the manner of interrogation, the lack of confirmatory evidence as to the details of the confession and the personal circumstances of the appellant.
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> 39 The judge ruled, for reasons similar to her conclusions about Dr. Peterson, that Dr. Moore's proposed evidence did not meet the requirements of *Mohan* because it lacked any scientific foundation and was unnecessary evidence. The judge noted that the factors Dr. Moore uses to assess the reliability of a confession are not "matters of scientific study" (at para. 62). She said such factors "are routinely canvassed by counsel and can be understood by the jury without the assistance of an expert" (*ibid*).
>
> 40 The judge also held that Dr. Moore lacked the necessary objectivity of an expert witness.

[19] As Mainella J.A. noted, it is not uncommon in cases of an alleged false confession for an accused to attempt to adduce expert evidence:

> 64 In cases of an alleged false confession, it is not uncommon for an accused to attempt to adduce expert evidence to explain why a confession, declared voluntary within the meaning of the confessions rule, is nevertheless false or unreliable (e.g., *Phillion v. The Queen*, [1978] 1 S.C.R. 18 at 22-24 (*Phillion 1978*)). Here, the appellant attempted to call expert evidence from Drs. Peterson and Moore to explain to the jury issues related to the phenomenon of false confessions and to give their opinion on the reliability of the appellant's confession.

[20] In upholding the trial judge's decision not to admit Dr. Moore's evidence, on necessity grounds, Mainella J.A. said:

92 The thesis of Dr. Moore is that while the Reid Technique is quite successful in getting true confessions from genuinely guilty people, it can also result in false confessions from innocent people. He conceded at the *voir dire* that the error rate of the Reid Technique is unknown and there is no interrogation procedure he knows of "that will elicit genuine valid confessions from the guilty but not from the innocent."

93 The methodology Dr. Moore uses to prepare an opinion about a confession's reliability is to review the context of the confession to identify what he believes are reliability risks. He explained his methodology during the *voir dire* as follows:

> .... So when I look at the disclosures that I get, I mean I also look at the context, I mean where did this come from, I mean what was the crime, what other evidence, if there is any other evidence, is accompanying the so-called confession, how was the interrogation conducted, over what period of time, what do we know about the suspect, do they have any idiosyncratic susceptibilities. ....

94 Expert evidence directed solely to the question of credibility is not admissible because it usurps the function of the jury (*Marquard* at p. 248). I fail to see how Dr. Moore's opinion evidence is necessary for the jury. There is nothing unique or scientific to his methodology. He does exactly what the jury is asked to do, consider all the evidence in assessing the weight to give to a confession. If Dr. Moore's methodology can be described as a field of expertise, it would have to be treated as novel science requiring greater threshold reliability before being admissible. Sopinka J. explained in *Mohan* (at p. 25):

> In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

95 Dr. Moore conceded in his evidence that his methodology is not "an exact science," nor does he claim that it is. The subject matter of his evidence is not outside the experience and knowledge of a jury; a jury is quite capable of determining the reliability of a confession looking at the overall context without the help of an expert (*Mohan* at p. 23-24). There is also a danger to the fact-finding process in allowing such expert evidence. Such evidence usurps the jury's province and the jury may simply attorn to the expert's opinion (*D.D.* at para. 53).

96 After stating Dr. Moore's evidence failed to meet the necessity requirement of *Mohan*, the judge also expressed her concerns as to him being objective in the following manner (at para. 66):

> ... I found much of Dr. Moore's report to read like that of an advocate rather than an impartial expert. For this reason and because his evidence

> does not canvass areas that would not or could not be canvassed by counsel without the assistance of an expert, I find that it is not admissible.
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> 97 As the appellant points out, traditionally questions of the impartiality of an expert witness are matters of weight reserved for the jury to decide. However, that does not mean a trial judge is powerless to act at the admissibility stage if he or she has palpable concerns about an expert witness's objectivity or independence as the judge did here. The trial judge's gatekeeper role, particularly in the context of a jury trial, mandates that the fact-finding process is not distorted by inappropriate expert testimony (*J.-L.J.* at para. 61). This includes the power to exclude the evidence of a proposed expert when it can provide no or minimal assistance to the trier of fact due to the witness's lack of objectivity or independence. As O'Connor A.C.J.O. explained in *Alfano v. Piersanti et al*., 2012 ONCA 297, 291 O.A.C. 62 (at para. 111):
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> > ... [T]he court retains a residual discretion to exclude the evidence of a proposed expert witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it of minimal or no assistance. In reaching such a conclusion, a trial judge may take into account whether admitting the evidence would compromise the trial process by unduly protracting and complicating the proceeding: see *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 91. If a trial judge determines that the probative value of the evidence is so diminished by the independence concerns, then he or she has a discretion to exclude the evidence.
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> …
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> 98 The judge's finding that Dr. Moore was more of an advocate rather than an impartial expert would, in my view, under *Alfano* be reason to exclude his evidence on the basis of a lack of impartiality even if it had met the criteria of *Mohan*. The paramount duty of an expert witness when participating in the litigation process either in preparing a report or testifying is to the court and the public, not to the party that retains him ... On review of the record, I am not satisfied that the judge erred in law in finding that Dr. Moore lacked the necessary objectivity expected of an expert witness.

[21] *Pearce* was decided prior to the Supreme Court of Canada's decision in *White Burgess*. In *White Burgess*, the court emphasized the need for experts to provide impartial testimony and to not advocate on behalf of the party who calls them to testify.

[22] In *R. v. J.F.*, 2015 ONSC 3067, Conlan J. reached a different conclusion regarding Dr. Moore's trial testimony regarding the reliability and credibility of the accused's confession. Justice Conlan outlined the parties' positions:

> 4 The first witness for the Defence was Timothy Moore ("Professor Moore"). A *voir dire* was held to determine the admissibility of proposed expert evidence to be given by Professor Moore. There was only one witness on the *voir dire*, Professor Moore. The hearing was completed in about one-half day. At the end of submissions on May 12, I ruled that Professor Moore would be permitted to give expert opinion evidence in the following areas, all related to memory: (i) misinformation effects, (ii) factors that may compromise the reliability of autobiographical recollections, (iii) distinguishing an authentic memory from one which may have arisen through imagination inflation, (iv) the difficulty of distinguishing an illusory memory from one based on actual experience, (v) source amnesia or source monitoring failure: the notion of where the memory comes from, (vi) the notion that imagined events can be mistaken for actual events, and (vii) the constructive and reconstructive nature of memory.
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> 5 There were two other fields suggested by Defence counsel, cognitive psychology and memory generally, which I declined to accept as they are too broad. Further, they are redundant as the other areas are subsumed within those umbrella categories.
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> 6 The reason why the Defence wants to elicit evidence from Professor Moore is to combat the statement given by the accused to the police, which statement could be interpreted as being inculpatory. For example, in that statement, J.F. says that he thinks that he might have had sex with C.S. while she was sleeping.
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> 7 Consent is the key issue at trial. Reports from the Centre of Forensic Sciences (Exhibits 1 and 2) are powerful evidence that sexual intercourse between the accused and the complainant took place. And the complainant testified at trial that she does not remember any sexual encounter between her and J.F. because she was passed out after a night of drinking alcohol and smoking marihuana. She had been a guest of her very good friend, J.F., at his employer's Christmas party in Blue Mountains.
>
> 8 The Defence wants to argue that I should place little if any weight on the statement of J.F. to the police (and the apology letter that he wrote to C.S. during the interview) because his seemingly inculpatory admissions may be the function of false memories rather than true memories of actual events.
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> 9 The Crown opposes the admissibility of Professor Moore's evidence.

[23] In *J.F.*, the Crown conceded that Dr. Moore was a properly qualified expert. There is no indication in the decision whether the defence wanted Dr. Moore qualified to provide opinion evidence regarding voluntariness in the context of police interrogation techniques. It is clear that the defence did want to call into question the reliability and credibility of certain inculpatory admissions, as the defence claimed they might be false memories. As Conlan J. found:

> 13 There is much common ground between counsel with regard to the criteria applicable to the first step. The Crown concedes that Professor Moore is a properly qualified expert. And the Crown concedes that there is no exclusionary rule in play here.
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> 14 I agree with both of those concessions by the Crown. Professor Moore is the Chair of the Department of Psychology at Glendon College/York University. He has been a frequent lecturer on memory-related subjects at events for judges and lawyers. He teaches in the area of psychology and the law. He has extensive publications, some of which are devoted to memory-related subjects, all outlined in his impressive curriculum vitae... He has given expert opinion evidence many times in Ontario, at both levels of Court, in the same areas being suggested in this case. He is, undoubtedly, a properly qualified expert.

[24] Finding no exclusionary rule, Conlan J. went on to consider relevance and necessity:

> 18 Logical relevance has been established. There is a relationship between the evidence (Professor Moore's report was marked Exhibit 2 on the *voir dire*) and the fact in issue that it is tendered to establish (that what J.F. said to the police officer was the product of false memories rather than true memories of actual events). It matters not that the Professor cannot say more than he has in the report, that is that it is possible that J.F.'s memories of what happened between him and C.S. are illusory. The link still exists. It is not necessary that the tendered expert opinion evidence be expressed with certainty. It is enough that it, arguably, tends to prove the fact in issue. Although it is a relatively close-call in this case, I find on balance that Professor Moore's evidence crosses the hurdle of logical relevance. What ultimate weight I give to that evidence is yet to be determined.
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> 19 On the issue of legal relevance, the Crown does not argue that Professor Moore's evidence is misleading or unduly prejudicial or that it involves an inordinate amount of time. The only argument advanced by the Crown is that it has no probative value. I disagree.
>
> 20 In the absence of the Professor's evidence, the Defence would not be able to argue in closing submissions that J.F.'s seemingly inculpatory admissions to the police officer are unreliable because they may have been the product of false memories. First, that would be wholly speculative. Second, I would be unfamiliar with what false memories are, how they are created, how they manifest themselves, and so on.
>
> 21 Professor Moore's evidence has some probative value in that it provides some evidentiary foundation for the prospect that J.F.'s admissions were based on false memories, and it helps me understand the concept of illusory memory.
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> 22 With regard to necessity, the Crown submits that I do not need Professor Moore's evidence to decide whether J.F.'s statement is reliable. With respect, I

> think that the said submission oversimplifies the purpose of the proposed expert opinion evidence.
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> 23 It is true that I, as a judge, decide issues of credibility and reliability virtually every day. But I know nothing about the psychology of memory. I know nothing about false memories versus true ones. Those are the issues that I need assistance with. And that assistance can come from Professor Moore. I will ultimately decide how much weight, if any, to place on the statement of J.F. to the police. That is my domain. Professor Moore will not be permitted, nor does he intend from a review of his report, to usurp my function as the trial judge and the ultimate arbiter of credibility and reliability.
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> 24 Put another way, I conclude that the evidence of Professor Moore is necessary (not merely helpful) to allow me to appreciate the facts, due to their technical nature. Those facts surround the issue of whether J.F.'s recounting to the police of what happened (or what he thinks might have happened) was the product of false memories. I am unlikely to be able to form a correct judgment on that matter without the help of Professor Moore's special knowledge.
>
> 25 Again, this is a relatively close-call. The Crown makes a powerful argument that Professor Moore's evidence may not be of much value if, in the end, it can be used by both sides equally to support its theory of whether J.F.'s statement to the police amounts to a true/false confession. Still, however, I am of the view that I need Professor Moore's evidence to understand the psychological concepts so that I can be informed enough to make my own correct judgment of what weight, if any, to place on that statement.
>
> 26 I am satisfied, on balance, that Professor Moore's evidence is relevant and necessary.

[25] Dr. Moore was also qualified to give expert opinion evidence in nine areas, all related to the psychology of memory, by Tufts J. in *R. v. Hawkes*, 2017 NSPC 4. In the specific circumstances of that case, an historical sexual assault alleged to have occurred approximately forty years prior to the trial, Tufts J. felt that Dr. Moore's evidence was necessary to assist him, as the trier of fact, for the following reasons:

> 97. … I accepted this submission. In particular, it was my opinion that it was necessary to understand the phenomenon of "imagination inflation" and "the constructive nature of memories" to assist in assessing the credibility of the testimony of the witnesses in this proceeding. Further, it was necessary, in my opinion, to understand that these phenomena could explain how memories which were vivid and detailed might be otherwise inaccurate or even false. I think it is common sense that memories fade over time and that small details around events and their sequence or timing can be inaccurate. Even remembering that particular persons were present who were not or other more significant details incorrectly is

> not uncommon. However, more detailed and vivid recall of an entire event which may be untrue is not necessarily a matter of common sense, in my opinion. I accepted that Professor Moore's evidence was necessary for understanding that phenomenon.
>
> 98 I also accepted the necessity of hearing Professor Moore's opinion regarding alcohol effect on the transfer of memory from short to long term and on the phenomenon of "filling" in gaps of memory. While these latter two topics have an element of common sense, the scientific basis is beyond the experience of a trier of fact such that it is necessary to receive that opinion evidence.

[26] Judge Tufts did not consider aspects of Dr. Moore's evidence that went directly to the credibility of witnesses:

> 104 Professor Moore was also asked to opine, particularly, about the testimonies of some of the witnesses. I have not considered this evidence. In my opinion Professor Moore's testimony and Appendix C of his report risks usurping the role of the trial judge in assessing credibility. I did not consider his opinion of the reliability of the particular trial witnesses in my analysis set out below.
>
> 105 I did find Professor Moore's testimony helpful regarding the phenomenon of imagination inflation and recreated memories in particular. It did provide a scientific basis for what is, for the most part, common sense. In my analysis I applied what trial judges and juries are directed to employ -- logic, common sense and human experience -- noting the strengths and weaknesses of the testimonies of each witness and the evidence as a whole.
>
> 106 The indicia of unreliability which Professor Moore identified are ones I had identified in any event, as I will explain later.
>
> 107 As I noted earlier I did find his evidence about how the phenomenon of imagination inflation and reconstructed memory as it relates to a memory which is vivid and has "richness of detail" to be informative.

[27] In *R. v. Leslie*, 2008 ONCJ 666, Dr. Moore's proposed testimony regarding false confessions was not allowed by Jennis J., who stated:

> 9 In my view, this type of evidence may be much more relevant and helpful to a jury when assessing the reliability/credibility of an admitted statement since as quoted by Mr. Justice Rosenberg from *R. v. Oickle*, "It may seem counter-intuitive that people would confess to a crime they did not commit." That principle has much less validity on a voluntariness *voir dire*. Case law and legal history is replete with examples of false confessions obtained by the authorities and it is indeed the primary motivating principle behind the voluntariness rule. The heart of Dr. Moore's opinion evidence is related in the following passage,

> Answer: Right, well part of the problem is that most interrogations are guilt presumptive in the sense that the purpose of the interrogation is to extract a confession from a suspect who is presumed guilty. And in the course of the interrogation, denials on the part of the suspect are either denied themselves or ignored or contradicted as frequently and aggressively as necessary. Proffered explanations on the part of the suspect are contradicted or ignored. The interrogator may minimize the seriousness of the act in question. The interrogator may imply leniency if the suspect confesses or begins to confess so the danger is because the exercise is guilt presumptive, the suspect may not appreciate that so there is a particular dynamic in which the suspect attempts to exonerate themselves or at the very least explain and provide an innocent account of what may have happened and the account is discounted or ignored or contradicted and this may go on for a considerable length of time and it may induce in the suspect a degree of anxiety and possible helplessness, hopelessness, futility. Sometimes some constrained choices are offered to the suspect, both of which are inculpatory. And what may sometimes happen is that the suspect may perceive that the only way out of an onerous situation is to sign on or accept the inculpatory interpretation that the interpreter is putting on the account of what may or may not have happened. So, essentially the suspect begins to think in short-term rather than long-term simply because of the aversive nature of the situation they're in.

10 What Dr. Moore is describing, essentially, is a scenario which inherently be characterized as a combination of threats, inducements and oppressive circumstances. That is not the domain of specialized knowledge but, rather, a confirmation that one must assess with common sense and human experience whether, in all the circumstances, that words said and the actions of the police officer, including tone of voice and body language, constituted either by themselves, or in combination, threats and/or inducements and/or an atmosphere of oppression, which caused the accused to make a statement or statements. The maximization/minimization technique referred to is simply an aspect of that. The second part of the analysis is the effect on the accused which obviously must be contextual. As stated in *Fitton*, [1956] S.C.R. 958,

> The strength and mind and will of the accused, the influence of custody or it's surroundings, the effect of questions or conversations all call for delicacy and appreciation of the part they have played behind the admission and to enable the Court to decide whether what was said was fully and voluntarily said, that is was free from influence of hope or fear aroused by them.

11 Consequently, I find that in these circumstances and on the evidence presented the proposed testimony does not meet the standards of relevance or necessity as defined in the Mohan test and therefore the evidence is inadmissible at this stage. Thank you.

[28] In *R. v. Whitehead*, 2016 CM 3009, Dr. Moore's evidence was not admitted on a Court Martial. The presiding military judge said:

> [10] Is the proposed opinion logically relevant to a material issue? On its face, the proposed opinion is relevant to a material issue which is the reliability of the testimony provided by one complainant.
>
> [11] So, it brings me to the second step which, according to case law, is called the "gatekeeper inquiry." On this issue, there are three questions that must be asked. First, the one which was at the heart of the debate before this Court yesterday, is the proffered opinion evidence necessary to a proper adjudication of the facts to which that evidence is directed?
>
> [12] Assessing reliability of a witness's testimony, as the one provided by Officer Cadet R.S., in my opinion, does not require scientific knowledge nor is it something of a technical nature in the circumstances of this case. This witness provided an explanation from the time the incident occurred to the time she testified before this Court about what she did and said, about what she knew and why she did or did not remember some things; and she was cross-examined thoroughly on those issues.
>
> [13] Knowing some aspects of how memory works does not assist the court in its task to assess reliability of her testimony. It does not go beyond knowledge and experience of the judge in order to appreciate the logic and veracity of the testimony. Essentially, was her testimony fabricated or not, and the fact, if it is fabricated, was it done conscientiously or not rely more on what she told and how the court will appreciate it than anything else.
>
> [14] I would add that I read the decision that was submitted to me, *R. v. J.F.*, 2015 ONSC 3067 (CanLII). Judge Conlan wrote that decision and I think her context was a bit different than mine in the sense that she had to assess the confession provided by the accused about his crime. Basically, he confessed his crime, and the fact of having some scientific perspective on why he did such a thing seemed relevant to her in those circumstances. I am not facing the same context.
>
> [15] The fact that Officer Cadet R.S. testified the way she testified and reported things the way she reported them does not require an assessment if it is the result of a false memory or not and is not crucial in this matter in order to make a decision. Essentially, the court is able to form its own opinion without help.
>
> [16] I would say that, in some other circumstances, as it was reflected by Professor Moore, a judge may, because of the circumstances, come to a conclusion that he may need expert opinion. I am not saying here that Professor Moore is not qualified or has no expertise at all to provide to the court; I am just saying that in order to make the determination the court has to make, his help is

> not required in the circumstances of this case, so it does not bind any other judge or trial judge about such issue. The decision is for this case only.
>
> [17] Then, it is the Court's decision that Officer Cadet Whitehead failed to meet his burden, which is to prove on a balance of probabilities that the opinion evidence of Professor Moore, as described earlier in this decision, is necessary.

White Burgess Analysis

[29] Applying the *White Burgess* analysis, I render the following conclusions:

a. The evidence must be logically relevant

[30] Evidence as to the psychology of memory generally, and as encapsulated by the nine areas proposed by Mr. Garnier, is logically relevant to the voluntariness of Mr. Garnier's police statement. The courts must vigorously guard against involuntary statements being admitted into evidence.

b. The evidence must be necessary to assist the trier of fact

[31] Evidence as to the psychology of memory generally is necessary for me to understand the arguments the defence want to put forward regarding voluntariness. However, Dr. Moore's opinion as to the ultimate reliability and truthfulness of Mr. Garnier's statement is not necessary to my determination of voluntariness. Nor is Dr. Moore's general testimony regarding police interrogations and tactics. Expert evidence is not required to analyze the police interrogation tactics. This is something that can be argued by counsel and understood by the court without the assistance of an expert in these circumstances.

c. The evidence must not be subject to any other exclusionary rule

[32] Some of Dr. Moore's evidence intrudes into issues that are exclusively my domain, specifically the reliability of the statement.

d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:

i. **Impartial,**
ii. **Independent, and**
iii. **Unbiased.**

[33] Dr. Moore says he is impartial, independent and unbiased. This is a close call, as some of Dr. Moore's report is advocacy on behalf of Mr. Garnier. However, I am satisfied that the aspects of his evidence bearing on the psychology of memory can be advanced in an impartial, independent, and unbiased manner.

e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose

[34] Dr. Moore has not provided the proper foundation for the provision of expert opinion regarding police interrogation tactics and/or the Reid Technique. He may have an interest in this area of study but, on this qualification *voir dire*, Mr. Garnier has not shown that there is reliable science to support Dr. Moore's opinions on those issues.

[35] There was no evidence presented that Dr. Moore meets the threshold level of reliability required to permit him to provide his opinion regarding the Reid Technique or other police interrogation techniques or tactics.

"Gatekeeping"

[36] The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a. Legal relevance,
b. Necessity,
c. Reliability, and
d. Absence of bias.

[37] Dr. Moore's evidence regarding the psychology of memory is necessary, reliable and admissible on this voluntariness *voir dire*. However, his opinion regarding police interrogations and tactics, including the Reid technique, is not. Therefore, part of his proposed testimony passes stage one of the test. If I am wrong, conducting the stage two analysis, as gatekeeper, the benefit of admitting Dr. Moore's evidence regarding the psychology of memory outweighs its risks. However, the risks of admitting his proposed testimony regarding police interrogations and tactics far outweigh any possible benefit, based on the lack of foundation presented on the qualification *voir dire*.

Conclusion

[38] In *Hawkes*, Tufts J. allowed Dr. Moore to testify regarding the psychology of memory, but ignored his testimony regarding the truthfulness of certain witnesses. In *Pearce*, Mainella J.A. observed that a trial judge may admit all, some or none of an expert's evidence, depending on the given context:

> 73 Finally, admitting expert evidence is not an "all or nothing proposition" (*Abbey* at para. 63). A trial judge may admit all, some or none of an expert's evidence depending on the given context. Accompanying this discretion over whether the content of the evidence is properly admissible under the *Mohan* criteria is the duty of the trial judge to define and enforce the proper scope of the expert evidence during the trial (*Sekhon* at paras. 46-47).

[39] Dr. Moore will be permitted to give opinion evidence regarding the psychology of memory as noted. He will not be permitted to give opinion evidence about police interrogation techniques or tactics, the Reid technique or the ultimate reliability and truthfulness of Mr. Garnier's statement. His report is not admissible.

Arnold, J.