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Extending Graham's Interpretive Theory into Common Law: A Multiple-Case Study

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EXTENDING GRAHAM'S INTERPRETIVE THEORY INTO COMMON LAW:
A MULTIPLE-CASE STUDY

By

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Abstract

What determines the outcome of judicial decisions? A traditional answer to this question is that it involves a complex application of rules derived from the reasons for judgment of analogous common law decisions and applicable statutes under the doctrine of *stare decisis*. This answer is problematic. One significant problem of this answer is its inability to explain the outcome of cases where the judgment does not appear to be based on these traditionally recognized sources. An alternative answer, provided by a particular field of legal scholarship, Legal Realism, posits that “other” factors make a significant impact on the outcome of a given case. A recent legal realist theory offered by R. Graham utilizes principles of Legal Realism, Economics, and Interpretive Theories to form a framework for describing the actual constraining forces acting on judges when they are tasked with interpreting statutes. Central to this theory is the influence of the deciding judge’s self-interest on the outcome of his or her interpretive decisions. The primary purpose of the current paper is to extend Graham’s multi-disciplinary theory from its current application to statutory interpretation to now also include common law interpretation. Secondly, this paper will provide a multiple-case example of how this interpretive theory would apply to a series of judgments related to limits placed on cross-examination that are particularly troublesome for the seemingly inconsistent and surprising decisions.

Key Words

Legal Realism, Critical Legal Studies, Law and Economics.

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Foreword

Understanding how legal decisions are reached, including the extrajudicial forces that are at play, and the nature of, and constraints on, expert testimony are all factors relevant to my future career as an expert witness concerning the determination of future care costs in personal injury litigation. As such I have undertaken a review of current Interpretive Theory, through the lens of a theory advanced by R Graham in the context of statutory law, and applied it to common law. This analysis provides insights into how the Canadian judicial system works and helps inform my preparation as an expert witness, particularly as it relates to the need for precision in the written or spoken word. It also informs that even with precision the written or spoken word may be subject to interpretation in different ways. Clearly the search for truth and justice demand careful scrutiny of words, intent and interpretation for all stages in the judicial process, from witness through to the trier of fact in all jurisdictions at all levels of the judicial process.

Chapter 1

1.1 General Introduction

The constraining forces acting on a judge's common law decision are supposed to be prior judicial decisions and applicable legislation but occasionally there are decisions that stand out for being reached in a manner that does not appear to be predicated on these constraining forces. Viewed exclusively through the lens of precedent and stare decisis, these decisions do not make sense. Even a cursory review of the relevant authoritative law reveals that the decision reached was not a logical extension or application of the law cited in the published decision.¹ Fortunately, there exists a type of legal philosophy that is well-suited to explain these surprising decisions; Legal Realism.

Legal Realism has many denominations, but all of these denominations include one main theme. In *The Canadian Legal System*, Gall summarized this common theme of Legal Realism:

In analyzing the judicial process, it is not sufficient merely to conclude that a judge is deciding the cases of individual litigants having regard only to the particular facts adduced in evidence, as such facts are applied to cold, hard, legal rules, be they statutory in nature or in the nature of precedent cases at common law. There are in short, other components to judicial decision-making.²

In other words, there are factors at play that inform a judge or justice's decision on a particular legal issue other than the confined scope of factors that influence legal decisions under the traditional view. Generally, proponents of Legal Realism view themselves as appreciative of the human element in judicial decision-making and do not

¹ If any case-law is cited at all.

² G Gall, *The Canadian Legal System* (5th edn Carswell Toronto 1995) at 220.

limit their understanding of judicial decision-making to how it *ought* to operate; instead they view the judicial decision-making as how it *in fact* operates.³ Yet, despite Legal Realism's noble efforts to accurately portray determinants of judicial decisions it has been slow to gain widespread acceptance.⁴

A recent advancement in describing what actually informs judicial decisions was made by Professor Graham. His theory provides a lens, founded upon principles of micro-economics, critical legal studies and various theories of statutory interpretation, through which one can examine published decisions of cases involving statutory interpretation and gain a fuller understanding of the factors that affected the outcome. Graham's theory posits that judicial self-interest constrains interpretive choices available when judges examine legislation.⁵ Graham claims that, when examined through this lens, judicial decisions are a result of the judge evaluating the various possible interpretations of a given legal text and choosing the one that most closely coincides with the judge's personal preferences. Factors such as time and reputation are prominent costs and benefits considered in this model when determining the chosen interpretive outcome of the judge on a particular section of legislation. The stated purpose of this theory is to apply Price Theory to Statutory Interpretation to more accurately describe the factors deciding the outcome of judicial decisions.

³ *Ibid* at 13.

⁴ Graham 'What Judges Want: Judicial Self-interest and Statutory Interpretation' (2009) 30 Stat L R at 46.

⁵ *Ibid* at 39.

1.2 Purpose and Map

While Graham's theory has thus far been constrained to an examination of the judicial interpretation of legislation, I propose that it could be extended to an examination of the judicial interpretation and application of Canadian case law. Thus, the purpose of this paper is to extend Graham's description of the constraints on judicial interpretation of legislation to also include factors constraining common law interpretation. To this end, I will first review components of Graham's theory and describe what their common law interpretation counterpart might look like. Secondly, in the form of a multiple-case study, I will apply Graham's theory in a manner that is designed to shed light on other potential factors influencing some confusing decisions made in a series of cases resolving issues plaguing the limitations placed on the rights of cross-examination.

Chapter 2.

2.1 The Traditional View of the Common Law

In the traditional view, the Canadian legal system has two main sources of law; statutory enactments and cases adjudicated by courts.⁶ Statutory enactments are the most important legal sources of law⁷ and can be formed by the Parliament of Canada and each provincial legislature.⁸ Decisions made by courts adjudicating particular issues are the second major source of law. In these decisions, the courts set out, *inter alia*, the reasons for decision, otherwise known as the *ratio decidendi*. The *ratio decidendi* serves

⁶ Customs, morality, authoritative sources are other potential sources of law: Gall, note 2 p 7.

⁷ The Constitution is more important than "ordinary" statutes but does still count as a special form of legislation (one that isn't passed by Parliament or a provincial legislature, but through the collective efforts of all relevant legislative bodies).

⁸ Subordinate legislation can be enacted by a person, body or tribunal subordinate to a sovereign body; *ibid* at 39.

as a guiding principle for future cases involving similar fact scenarios. The Courts follow these principles in future cases under the doctrine of *stare decisis*. *Stare decisis* literally translates as “to stand by decided matters,” and is an abbreviation of the Latin phrase “*stare decisis et non quieta movere*” which translates as “to stand by decisions and not to disturb settled matters.”⁹ Though the doctrine of *stare decisis* has a large body of research devoted to establishing its influence on the law, the traditional description of *stare decisis* can be briefly described as a rule that the decision of a higher court acts as binding authority on a lower court within that same jurisdiction.¹⁰ This doctrine is intended to promote fair and just treatment¹¹ and is desirable for promoting stability, certainty and order in the law. To wit, Benjamin Cardozo noted:

It will not do to decide the same question one way between one set of litigants and the opposite way between another. “If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look for the same judgement today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.” Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.¹²

2.2 Legal Realism

There are critics of this romantic, traditional view of *stare decisis* and precedent. For these critics the question becomes: If not traditionally recognized sources of law, what then determines the outcome of judicial decisions? To answer this question, prominent

⁹ *Ibid* at 38.

¹⁰ HK Lucke ‘*Ratio Decidendi: Adjudicative Rationale and Source of Law*’ 1 *Bond L R* 37 (1989).

¹¹ W K Frankena *Ethics* 2nd edn (Englewood Cliffs, NJ: Prentice-Hall Inc, 1973) at 49.

¹² B Cardozo ‘*The Nature of the Judicial Process*’ (New Haven and London: Yale University Press, 1921) at 9-50.

legal scholars¹³ have suggested *other* factors that decide the outcome. Other factors, that are not accounted for in the traditional view of sources of law, have empirical and logical evidence supporting their contribution to the decision making process of judges.¹⁴ Such factors include: dislike of a lawyer; gratitude to the appointing authorities; desire of advancement; irritation with or even a desire to undermine a colleague; willingness to trade votes; desire to be on good terms; not wanting to disagree with people one likes; fear for personal safety; fear of ridicule; reluctance to offend; influencing the direction of policy; being the object of deference by lawyers and litigants; being adored by legal academics; gaining high judicial office; seeing the morally worthier party prevail in a particular case; leisure time; desire for prestige; promoting the public interest; avoiding reversal; enhancing reputation; reaching the outcome they prefer; increasing their leisure time; anticipating what other people or groups will think of them based on their decisions; seeing that their will is obeyed; being promoted.¹⁵ While proving Legal Realism is outside the scope of this paper and is not necessary because it is here, it is predictive and persuasive. Instead, specific issues that are problematic with respect to strict adherence to *stare decisis* in the following case study will be elaborated.

¹³ See: F Schauer 'Lecture: Incentives, Reputation, and the Inglorious Determinants of Judicial Behaviour' 68 U Cin L Rev 615; K Llewellyn *The Common Law Tradition: Deciding Appeals* (Boston, MA: Little, Brown & Co, 1960).

¹⁴ M Gerhardt 'The Limited Path Dependency of Precedent' 7 U Pa J Const L 903, 911 (2005).

¹⁵ R Posner 'What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)' (1993) 3 Supreme C Econ Rev 1; F Schauer 'Incentives, Reputation, and the Inglorious Determinants of Judicial Behaviour' (2000) 68 U Cin L Rev 615, 69; B Friedman 'The Politics of Judicial Review' (2005) 84 Tex L Rev 257, 258.

Another critique of the efficacy of *stare decisis* and precedent is that it largely depends on finding a *ratio decidendi* within the decision. This is uniquely a common law problem. The *ratio decidendi*, is the “binding essence of a judicial decision”,¹⁶ or as defined in the 1957 House of Lords decision: “the principle of law propounded by the judge as the basis of his decision.”¹⁷ In critique of the above mentioned classical definitions of *ratio decidendi*, HK Lucke noted:

...such definitions seem to imply that the determination of the *ratio decidendi* is not an unduly difficult task: first one searches the precedent for a convenient statement of rule, then one ensures by an appropriate test that this rule was actually the basis of the decision rather than mere *obiter dictum*, and then one applies the rule to the facts of later cases, rather as one would apply a statutory provision.¹⁸

However, critics question whether a *ratio decidendi* can be readily identified. Specific questions raised, regarding the easy identification and the efficacy of a *ratio decidendi*, include whether or not a ratio can be derived from five separate judges’ opinions in a case and whether a *ratio decidendi* is ever a meaningful and useful concept?

Further, legal realists argue that the number of tools available can be used strategically by lawyers, judges and justices to, persuade a given audience in a manner that suits the user’s best interests. This is in opposition of some rigid construction of law that is unable to be manipulated; a construction of law propagated in the traditional view. Some examples of legal argument tools that lawyers and judges can use to “work around” *stare decisis* include: (1) arguing the precedent case does not stand for the legal proposition for which it has been cited; (2) arguing that the proposition was in *obiter*

¹⁶ *Supra*, note 10.

¹⁷ JL Montrose ‘*Ratio and the House of Lords*’ (1957) 20 MLR 124.

¹⁸ *Supra*, note 10.

dicta; (3) arguing that the case has been effectively overruled by a decision of a higher court or by way of statute; (4) arguing that the cases are considerably factually different and thus distinguishable, either in a restrictive or non-restrictive manner; (5) arguing that public policy has changed and the old decision is distinguishable based on the change of circumstance; and (6) arguing that there is another precedent of equal weighting that stands for the opposite proposition.¹⁹ It appears there is room for lawyers, judges and justices to work with when determining precedent decisions and their respective principles. This flexibility destabilizes the law, and forces the judge to make more questionable decisions. That is, lawyers are able to argue and judges and justices are able to rationalize old decisions on the basis that the *rationes decidendi* cited in those decisions are mistaken interpretations, as a tool used in building their respective arguments or decisions.

2.3 Analytical Framework

To extend Graham's theory into the common law, I will review some key assumptions in his theory. Then, I will describe some key differences between statutory interpretation and common law interpretation that could alter the decision-making process the judge goes through when interpreting common law.

Graham's theory, which analyzes a judge's interpretive decision as the outcome of weighing the competing costs and benefits, is an extension of a micro-economic approach of analysing decision making in general. A central assumption to this theory is

¹⁹ *Supra*, note 2 at 363-365.

that judges have preferences. A judge's set of preferences can be wide ranging and vary considerably among cases and amongst judges, some examples include reputation and political influence. Graham noted:

According to the Realist vision, judges interpret texts in ways that give effect to their own preferences. According to micro-economics, 'people choose to perform those actions which they think will promote their own interests'. When they manipulate the law in the direction of their own policy preferences, judges fulfill the basic predictions of economics, acting as self-interested utility maximizers. All things being equal, an interpretation which promotes the judge's personal policy preferences will generate (for the judge) more utility than a contrary interpretation. As a utility maximizer the judge is very likely to select the interpretation that coincides with his or her preferences.²⁰

Further, it is assumed that these preferences can be compared. D Kennedy described the assumptions made with respect to preferences in this model:

First the preferences of any given agent are typically not sensitive to the preferences of other agents. Second, for any given individual, all options are taken to be preferentially comparable, i.e., the preference ordering is connected. Third, individual preferences are often assumed to be monetizable, that is, the individual can put a dollar value on how much he or she prefers one alternative to another. Fourth, in more formal treatments, it is customary to operationalize the concept of individual preference by supposing that for a person to prefer x to y is consistently to choose x over y in a variety of settings in which both options are available.²¹

The preference set of a particular judge will influence how he or she calculates the cost or benefit of a given common-law interpretive decision. While the influence of a judge's preferences on an interpretive decision may seem self-centered and unrealistic at first glance, it becomes more reasonable if you consider that a judge may have a preference

²⁰ *Supra*, note 4 at 51.

²¹ D Kennedy 'Law and Economics from a Philosophical Perspective' in P Newman *The New Palgrave Dictionary of Economics and The Law* (1998) at 460.

for being seen as a quality judge. A quality judge defined broadly as the one whose decisions are based on logical, well-founded principles that are clearly described.

When extending this framework into common law interpretation it must, again, be assumed that judges are ordinary people responding rationally to incentives,²² that the preferences of the judges will still vary and that the outcomes of the interpretive decision will be influenced by the particular set of preferences of the judge. However, an adjustment of these preferences should be made to reflect the differences between statutory interpretation and common law interpretation. It is possible that a switch from statutory to common law interpretation could alter the costs and benefits associated with a judge's preferences. One example is that a common law interpretive decision involves interpreting a colleague's writing as opposed to that of a legislative author. This could provide incentive to interpret the text in a way that is in line with current political values which would strengthen the previous court's decision and aid the relationship with the prior judge. Another example is that differences exist in the public expectations of judges. It might be easier for a judge to engage in the ideological manipulation of the common law because, simply put, that's the judge's job. In statutory interpretation, by contrast, judges are supposed to be passive actors, simply carrying out parliament's will.²³ While judges are expected to "make law" when engaged in common law reasoning, the factors they consider when "making law" are supposed to be confined to prior decisions, logic, and the 'equities' of the case.

²² Posner noted how an analysis could be performed of the exceptional "genius judges".

²³ R Graham *Statutory Interpretation: Theory and Practice* (Emond Montgomery Toronto 2001) at 4. Judges as passive actors refers only to Originalist judges. By contrast, judges who use dynamic interpretation are openly activist.

Each of the above noted differences between statutory and common law interpretation may affect the cost/benefit calculation the judge takes into consideration when making a decision. For example, in common law interpretation, a judge will maintain much of the reputational payout because they are more responsible for the direction and interpretation of the law while at the same time experience less time-cost because there are less cost factors because they don't need as much justification to overturn a common law decision. This combination of moderate payout and low time cost in common law interpretation would incentivise the judge, relative to a statutory interpretation, to decide on an interpretation that accords more closely with their own preferences.

One possible complaint with this view would arise from the question of - why would judges make interpretive choices that appear to act against their preferences? A possible answer is that it is likely a matter of us, as observers of the decision, not having a complete understanding of the influences on that judge. For example, a judge acquitting a person who he thinks is deserving of punishment. Perhaps, while he thinks that *this* offender deserves punishment (and the judge therefore pays a 'preference cost' by letting him evade punishment), the judge values something else, like "narrow interpretations of criminal law", more highly than 'justice' in this particular case. Therefore, in a thorough analysis of a given decision, we must consider flip side of the "benefits" which would be the costs. An important scarce resource affecting all judges in some manner is time. Time is a factor the judge weighs when considering the utility gained from a particular interpretation with given interpretation against utility cost from

time required to sell the interpretation. Time spent on a decision is justified rationally if the payoff for a particular outcome is great. Specifically, Graham wrote:

Why would judges, who are expected (like the rest of us) to be self-interested utility maximizers, some-times act in ways that seem to undermine their personal preferences? Why do not judges always interpret legislation in a way that gives effect to their own ideological goals? This can be explained as a manifestation of self-interest. In many cases, the costs associated with the ideological manipulation of text are so great that the judge will be unwilling to incur those costs in pursuit of specific policy objectives.²⁴

...judges weigh the costs and benefits to themselves of those competing interpretations. The higher the cost (to the judge) associated with a given interpretive choice, the less likely the judge is to choose that outcome; the greater the benefit (to the judge) flowing from the relevant choice, the more likely the judge is to choose that outcome.²⁵

These factors provide incentives for making decisions in a particular direction. The conscious or unconscious summation of these competing factors results in the chosen outcome.

In summary, the purpose of extending Graham's theory is to help explain surprising judicial common law decisions. The theory explains the decision-making process by a considering various factors that act as incentives or disincentives in reaching a particular interpretive outcome. The aforementioned differences between common law and statute may alter the weight of these factors in the cost/benefit calculation performed by the judge. In the second half of this paper a series of cases and decisions will be explored that are superficially (doctrinally) confusing decisions. The identification of "other" factors that may influence the outcome of these decisions may shine some light

²⁴*Ibid* at 51.

²⁵*Ibid* at 52.

upon the confusing decisions and serve as an exploratory study, and an early attempt to validate the extension of this statutory theory into the common law.

Chapter 3

3.1 Overview of Multiple Case Study

Given that the words used in common-law decisions are prone to a wide-array of interpretation at best and total deconstruction at worst,²⁶ the constraints they are intended to place on judges deciding the outcome of a given case are limited. What actually constrains the interpretive possibilities of the principles of law offered in common-law decisions is judicial self-interest. The following multiple-case study exemplifies how judicial self-interest constrains judicial interpretation of common-law precedent by commenting on some surprising and problematic common-law decisions. Select decisions within this multiple-case study are surprising because they do not appear to be logical extensions of the authoritative case-law precedent, which, in the traditional view of the source of law, should determine the outcome of a case decision. Instead “other factors”, that are *not* principles of law, will be noted for their potential to affect the judge or justices preferred outcome of a case and for their potential to influence a given judicial decision. While each case within this multiple-case study technically could be examined with this framework, the focus of this analysis is on the decisions that, at the surface level, appear particularly confusing, if not haphazard.

²⁶ *Supra*, note 21 ch 2.

Both series of cases examined within this multiple-case study purport to define the limits of the types of questions that can be put to expert witnesses in cross-examination. The first case examined will be *R v Howard*.²⁷ The Supreme Court of Canada's decision of *Howard* was unclear and the most reasonable interpretation of it unfortunately varied from previously well-established principles of evidence law. The second case examined, *R v Lyttle*,²⁸ wrestles with the surprising language chosen in the *Howard* decision and authoritative the law imposed by it.

3.2 Howard Facts and Overview

In dissent of the Supreme Court Decision of *Howard*, Justice L'Heureux Dubé provided a tidy summary of the fact scenario and a brief recounting of the prior court's decisions:

In the early morning of October 20, 1979, nearly ten years ago, Gregory McCart was driving a taxicab [page1350] in the area of the Brunswick Hotel in the City of London. Shortly after 2:00 am, he informed his dispatcher that he had found a fare. This was his last communication with the dispatcher. Later that morning, McCart's lifeless body was found in a corn field ten miles southwest of the city. McCart had been brutally beaten to death with a steel stake. The circumstances of the killing are set out in full in the judgment of the Court of Appeal below and need not be repeated here...

Trudel and the appellant were tried jointly and on November 15, 1980, a jury returned a verdict of guilty as charged against each of the co-accused. This conviction was appealed and in January of 1983, the Court of Appeal found that the trial judge had erred in some respects and ordered a new trial. Prior to the commencement of the appellant's second trial, Trudel entered a plea of guilty to second degree murder. This plea was accepted by the Crown. Counsel for the Crown then read the facts of the case and, while counsel gave no explicit account of Trudel's presence at the scene of the crime, he did say that Trudel's shoes "were identified as having made the footprints near the body in the field". Counsel for Trudel made no objection to the Crown's statement of the facts nor did he object to the Crown's recommended sentence. Trudel was sentenced to life imprisonment without eligibility for parole for a period of twelve years.

The appellant for his part entered a plea of not guilty. His sole defence was in the nature of an alibi, namely, that at all relevant times he was with Trudel and that neither Trudel nor he were at [page 1351] the scene of the murder. Giving testimony at his second trial,

²⁷ [1989] 1 SCR 1337.

²⁸ [2004] 1 SCR 193, SCJ No 8.

the appellant acknowledged being at the Brunswick Hotel with Trudel until closing time, though he denied getting a cab there. The appellant testified that he and Trudel walked and eventually hitched a ride to Lambeth in the middle of the night. There, they wandered around for some two hours before calling a cab which picked them up at approximately 5:00 am. Together with Trudel, the appellant said he then proceeded to a bootleggers home in London where both of them drank beer with another person until 7:00 am. During cross-examination, the appellant stated that he did not know what happened to McCart.

In support of his defence, the appellant called two experts on footprints, Dr. Morton and Dr. Watt. Dr. Morton was called to give evidence only at the appellant's second trial. He testified that on the basis of the data in the record, he could not come to any conclusions as regards the footprints found near McCart's body. For his part, when testifying at the appellant's first trial, Dr. Watt had said that the same data did not establish any link between the footprints and Trudel's shoes. Before Dr. Watt took the stand at the appellant's second trial, the Crown sought a ruling on a question it proposed to address to him in cross-examination. The question was whether Dr. Watt would change his opinion in light of the information that, since he initially testified in the accused's first trial, Trudel pleaded guilty to murdering McCart and thereby apparently admitted that the footprints were his. The Crown did not seek to confront Dr. Morton's evidence with the same cross-examination.

The trial judge ruled that he would allow the proposed question. The appellant then elected not to call Dr. Watt. On November 30, 1983, a jury returned a verdict of guilty of first degree murder against the appellant. On an appeal against this conviction, a unanimous Court of Appeal (Cory J.A., as he then was, Zuber and Grange J.J.A.) dismissed the appeal: see (1986), 29 C.C.C. (3d) [page1352] 544.²⁹

There are two key aspects of the fact scenario and case history to note.³⁰ Firstly, the co-defendant of Mr. Howard changed his plea prior to the onset of the second trial. Secondly, the trial judge permitted crown counsel to put questions to the expert about whether they incorporated the change of plea into their expert opinion.

3.3 Howard – Second Appeal – Trial 2.

A convenient starting point for the discussion of the first series of cases which involved what was ultimately a series of superficially confusing decisions is the second Ontario

²⁹ *Howard, supra*, note 25 at paras 24-28.

³⁰ As they apply to this analysis and inasmuch as they determine what relevant law should be cited in the traditional view to inform the judge in making their decision.

Court of Appeal decision³¹ of Mr. Howard's case. In this case, Mr. Howard's counsel appealed the second conviction decided by the trial court claiming that the prosecution put an improper question to the defence expert witness. This claim was borne out of the exchange between counsel and trial judge pertaining to whether crown counsel could put to the defence expert questions regarding the basis of their opinion. In the decision of the second *Howard* appeal, Cory JA broke down the issue of *what-type-of-questions-can-be-put-to-expert-witnesses* into two sub-components. Firstly, whether a defendant's plea is admissible as evidence and, secondly, whether a counsel can put questions to an expert witness about the foundation of their opinion. With respect to the first sub-issue, the admissibility of evidence, Cory JA, stated:

There can be no doubt that a plea of guilty by a co-accused is not admissible as part of the Crown's case against an accused. An accused can only be affected by his own confession and not those of his accomplices.³²

Cory JA cited *R v Berry* (1957)³³ and *R v Lessard* (1979)³⁴ in support of the above noted proposition. To address the second sub-component of the issue at appeal, whether an expert can be asked question about the foundations of their opinion, Cory JA noted:

The ability to cross-examine a witness as to the basis for his opinion and the factors which he has taken into account and those which he has omitted can be relevant, pertinent and indeed vital to testing that opinion.³⁵

³¹ *R v Howard*, [1986] OJ No 535, 29 CCC (3d) 544.

³² *R v Lyttle*, [2002] OJ No 3308, 61 OR (3d) 97.

³³ 118 CCC 55 at 60 (Ont CA).

³⁴ 50 CCC (2d) 175 (Que CA).

³⁵ *R v Howard*, [1986] 15 OAC 255, 29 CCC (3d) 544.

Cory JA cited the 1971 Ontario Superior Court decision of *R v Rosik*³⁶ and the 1982 Supreme Court of Canada decision of *R v Abbey*³⁷ in support of the second sub-issue proposition of law. The cases Cory J cited are clear and authoritative in describing their stance on this matter, leaving little interpretive leeway for future readers. Together, these four cases are strong supports for what was, really, a settled issue of law; questions put to an expert witness about the foundation of their opinion are not only allowed but are also an integral part of the search for truth. The expert's opinion provides an important inference that the Court would otherwise be unable to make on its own and is invaluable in numerous litigation settings.³⁸ Being able to challenge the opinion-evidence of the expert, for example, by questioning the foundation of the opinion, is an important aspect of making a full defence. In the 1991 Supreme Court of Canada case *R v Seaboyer*, McLachlin J (as she then was) noted:

...In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent.³⁹

Significantly restraining a defence counsel's cross-examination of an expert witness, by disallowing questions challenging the foundation of their opinion, limits their ability to make a full defence to which they are entitled. Simply put, the defence counsel should have been able to cross-examine the expert about the foundation of their opinion.

³⁶ [1971] 2 OR 47, 13 CRNS 129.

³⁷ [1982] 2 SCR 24, [1983] 1 WWR 251.

³⁸ Schauer and Spellman *Is Expert Evidence Really Different* Notre Dame L Rev 1 (2014) at 3.

³⁹ 2 SCR 577, at 608. McLachlin J relied on *R v Wray*, [1971] SCR 272, which was available at the time of *Howard*, to ground the Court's stance on excluding defence evidence.

While Cory J's decision had a strong legal basis, it also accomplished another objective that, potentially, may have been of judicial interest; the twice-convicted defendant goes to jail and does not "get-out" on what the public may consider a "legal-loophole." Generally speaking, the public likes to see convicted persons meet justice and this decision may provide the judge with a reputation boost from this esteem granting population or, rather, prevent the loss of reputation from deciding an alternate outcome.

3.4 Howard – Supreme Court Decision.

Following the dismissed appeal by Cory JA, Mr. Howard's counsel further pursued this issue by appealing to the Supreme Court of Canada. McIntyre, Lamer, Le Dain, La Forest and L'Heureux-Dubé JJ were present and heard the appeal for the Supreme Court, though Le Dain J took no part in the judgment. The issue brought before the court was: did the Ontario Court of Appeal err in upholding the trial judge's ruling that crown counsel was entitled to adduce evidence through the defence expert, evidence relating the plea of the co-accused?

The appellant argued that it would be overly prejudicial to allow the question to be put to the expert witness. Specifically the appellants stated:

1. Since a guilty plea does not amount in law to an admission of facts read in at such a plea, there were no facts concerning the footprints at [page 1346] the scene of the crime being Trudel's for the Crown to put to the defence footprint expert.
2. Even if Trudel's position at his guilty plea constitutes an admission of the fact that the footprints at the scene of the crime were his, such an admission is inadmissible in evidence.

Only Trudel could give the necessary first hand evidence that he made the footprints in issue, and he was not called by the Crown.

3. In any event, the fact of Trudel's admission is irrelevant to the opinion of an expert, as the proper parameters for the basis of such opinions are governed by the prevailing professional standards of the particular expertise.

4. In the alternative, if the admission is relevant, it is inadmissible. The real object of the proposed line of questioning was not to assess the reliability of the expert opinion, but rather to establish the truth of the matters put to the expert. Since the predominant effect of the proposed questions would be to introduce inadmissible hearsay which could be potentially misused by a jury, the questions should be disallowed. Further, the prejudicial effect of the evidence so introduced would far outweigh its probative value because the Crown could not prove the guilty plea from whence it came.

5. A limiting instruction would be insufficient in this case as the jury would be incapable of accepting the evidence as applicable solely to the basis for the expert's opinion and not applicable to its own truth.⁴⁰

The respondent, Crown counsel, argued "the intended question was relevant because the trier of fact is entitled to know the basis of an opinion advanced by an expert in order to assess its probative value."⁴¹ Both the appellant's and the respondent's arguments are logical and well-reasoned, though stylistically different, interpretations of what precedent should apply to this scenario. While the approach taken by the Ontario Court of Appeal to address this issue was to break it down into two sub-issues and cite authoritative law governing the composite issues, this was not the approach taken by the Supreme Court of Canada. In contrast, Justice Lamer did not cite any previous

⁴⁰ *Howard, supra*, note 25, para 13.

⁴¹ *Ibid*, para 14.

cases,⁴² let alone authoritative law, as would be expected. Instead, Lamer J provided a broad statement of law and ultimately in favour of the appellants.

Although the decision of Justice Lamer that was in favour of the appellants can't simply be classified as right or wrong, it *was* problematic. When deciding between the two propositions, Lamer J was essentially deciding which type of risk the Court would accept; the risk of prejudicing the plaintiff by not putting all possible probative questions to the expert or risk of prejudicing the defence by allowing potentially prejudicial questions to be put to the expert. While this is a tough theoretical issue, it boils down to a matter of preference of where to place the risk. This balance of risk was already well-settled by the Canadian Courts to be in favour of erring on the side of allowing questions to be put in cross-examination and in this respect Lamer J's decision was inconsistent and therefore problematic. Further, Lamer J included no citations of common law precedent that would have convinced future courts of its appropriateness. Instead, the decision was written in a more general manner, laying down a broad principle of evidence law. This broad statement of evidence law constrained cross-examination more than what was needed for the case at bar, and was a dramatic step towards a more restrictive cross-examination. The following broad and sweeping statement of law appears to have been offered as a solution to the issue of the case and may serve as the *ratio decidendi*.

Lamer CJ stated:

⁴² Lamer J could have cited *R v Turner* [1975] QB 834 where the Court noted that the particular experts used in the case should remember that the facts upon which they base their opinion must be proved by admissible evidence and added that this principle is often overlooked.

It is not open to the examiner or cross-examiner to put as a fact, or even a hypothetical fact, that which is not and will not become part of the case as admissible evidence. On this ground alone, the question should have been denied.⁴³

The most straightforward interpretation of this statement is that it stands for a broad proposition that restricts cross-examination to questions based on facts established in evidence and was in fact applied this way in *R. v. Fiqia* (1993)⁴⁴ and *R. v. Fickes* (1994).⁴⁵ That this statement is the intended interpretation is supported by a later statement made by Lamer J that indicated the appeal could be resolved in full by addressing this issue. Specifically, Lamer J noted: “On this ground alone, the question should have been denied”⁴⁶ further solidifying the interpretation that this is the offered *ratio decidendi*. Indeed, in the dissent of Howard Justice L’Heureux Dubé interpreted the principle stated by Lamer J as one that stood for the proposition noted above.

If, as the reasons given by my colleague Lamer J. suggest, the cross-examination was to be limited to the facts which will “become part of the case as admissible evidence”, then it would become all but impossible for the accused as well as the Crown to cross-examine expert witnesses as to the basis of their opinion. I do not believe that such an inflexible approach is warranted. The greater latitude allowed to an expert in examination-in-chief involves in my view a correlative latitude in cross-examination as to the basis of the expert’s opinion.
47

In this statement, Justice L’Heureux-Dubé noted the “reasons” of Lamer J. The word “reasons” likely means the “reasons for decision” which is otherwise known as the “*ratio decidendi*”. This indicates Justice L’Heureux-Dubé interpreted Justice Lamer’s

⁴³ *Howard, supra*, para 17.

⁴⁴ 145 AR 241 (CA), at paras 44-50.

⁴⁵ 132 NSR (2d) 314 (CA), at paras 9-10.

⁴⁶ *Howard, supra*, para 17.

⁴⁷ *Ibid*, para 43.

judgment as standing for the above noted proposition, further reinforcing the idea that the noted statement was intended to stand as the *decidendi*.⁴⁸

Also included in the Howard decision was a statement about the role of experts in court. Chief Justice Lamer also noted the only scenario where the question put by the Crown to the expert witness could be properly put:

Experts assist the trier of fact in reaching a conclusion by applying a particular scientific skill not shared by the judge or the jury to a set of facts and then by expressing an opinion as to what conclusions may be drawn as a result. Therefore, an expert cannot take into account facts that are not subject to his professional expert assessment, as they are irrelevant to his expert assessment; a fortiori, as injecting bias into the application of his expertise, he should not be told of and asked to take into account such a fact that is corroborative of one of the alternatives he is asked to scientifically determine. If the Crown experts had been told by the police when they were retained that Trudel had in fact confessed and that he acknowledged facts that had established that it was his footprint, we would be left in doubt as to whether their conclusion is a genuine scientific conclusion. This is so because their expertise does not extend to Trudel's credibility, and what he admits to is totally irrelevant to what they were asked to do to help the Court, that is apply their scientific knowledge to the relevant "scientific facts", i.e., the moulds, etc.⁴⁹

In this excerpt there are no case law citations. The inclusion of the paragraph, as noted by Lamer J, is intended to explain a situation where the question could be properly put which is a separate issue than the one at bar and is therefore not the reason why Lamer J made the decision. Generally, from a reader's perspective it appears as a useful anecdote. Under the traditional view of the law, this type of comment would be

⁴⁸ In the face of a scathing dissent, one would expect a lengthier, more-reasoned decision by Justice Lamer. This was not the case in Howard.

⁴⁹ *Howard*, *supra* note 26 at 19.

considered “obiter dictum” which, traditionally, is not authoritative law. Therefore, to the typical reader, this would not likely be identified as the reasons for the decision.⁵⁰

If the originally identified statement that stood for the requirement of a factual basis for questions put to expert witnesses is the ratio⁵¹ and it is not an extension or application of precedent law or thoroughly described legal reasoning, then how did Lamer J arrive at the decision? Perhaps, Lamer J disagreed with prior case law, or wished to consolidate previous well-regarded case decisions of lower courts into a more authoritative Supreme Court decision. Whatever the motivation may be, Lamer J’s ultimately decision influenced evidence law much more than was needed to settle the issue at bar.

In summary, the outcome of the Howard decision was a matter of preference for how to balance the abstract concepts of probative and prejudicial questions. Although previous common law decisions had decided to err on the side of allowing “probative” questions, this decision, by contrast, drastically reverses that trend making the outcome ill-chosen from a doctrinal perspective of the law.

Lamer J’s decision drastically transformed the law governing cross-examination. Under the “broad, sweeping statement” Lamer J made, one simply could not put questions to experts in cross-examination without first laying an evidentiary basis for asking that question. This had never been the law before Howard, and greatly restricted the

⁵⁰ Alternatively, Howard’s decision has also been interpreted by Ontario Courts as to the admissibility of evidence, as it was seen in *R v Norman* (1993), 87 CCC (3d) 153 (ON CA).

⁵¹ Inasmuch as one can identify a ratio.

otherwise broad right of cross-examination. Under traditional views of cross-examination, counsel could ask whatever questions were arguably relevant to the case, provided that they were helpful in testing the evidence of the expert. Under the Howard view, one could only ask a question if there was some other evidence that laid the basis for asking the question. This was an obvious departure from prior decisions – a fact made obvious by the fact that Lamer J refrained from citing any authority for his limited view of the scope of cross-examination.

3.5 Lyttle

During the time between the *Howard* decision and the initial trial of *Lyttle*, the composition of the Supreme Court of Canada had changed.⁵² Firstly, Cory J, of *Howard's* appellate decision, was appointed to the Supreme Court of Canada on February 1, 1989. Cory J's decision of *Howard* was overturned by the Supreme Court of Canada, something he may not agree with and would like to see reversed. Therefore, Cory J's fellow justices may derive benefit, in the form of gratitude from Cory J, by distinguishing the *Howard* Supreme Court decision that had overturned Cory J's appellate level decision. Secondly, Lamer CJ, who had overturned Cory J's decision of *Howard*, had retired from the Supreme Court of Canada which may have potentially lessened the reputational conflict of reversing or distinguishing a decision made by him.

⁵² Howard's Supreme Court of Canada appeal was heard between May 19, 1988 and May 18, 1989.

Ten years after the Supreme Court's decision of *Howard*, a crime was committed that prompted the court to revisit the so-called *Howard* Principle. The facts of the crime committed in *Lyttle* were summarized by Major and Fish JJ as follows:

On February 19, 1999, Stephen Barnaby was viciously beaten by five men with baseball bats, four of them said to have been masked. He was found outside an apartment building, collapsed, shivering, with broken bones and with other severe injuries to his head and legs. He had no wallet, no house keys and no identification.

Barnaby told a uniformed officer, with whom he spoke briefly soon after the attack, that he had been beaten over a gold chain.

Detective Sean Lawson, initially assigned to the case, stated in his "Occurrence Report" that the attack was believed to be over a drug debt and the victim was being less than truthful. His suspicion in this regard was based on a conversation with Barnaby at the hospital, on the ferocity of the beating, and the fact that Barnaby had a drug-related conviction, and on other elements of Detective Lawson's own preliminary investigation.

On the following morning referring to the Barnaby attack in his "Daily Major" report summarizing all serious crimes that had occurred during his shift, Detective-Sergeant Ian Ganson wrote: "believed to be [over] a drug debt [...] further inquiries". Ganson, it should be noted, never spoke directly with Barnaby. He merely noted, in the usual way, on information he had received from subordinate investigation and uniformed officers.

Lawson's "Occurrence Report" and Ganson's "Daily Major" report were disclosed to the defence [page 199] in a timely manner, as required by law. See *R. v. Stinchcombe*, [1999] 3 SCR 326.

Detective Michael Korb and his partner, Detective Martin Ottaway, took over the investigation the day after the attack and obtained a statement from Barnaby at the hospital. Korb and Ottaway were aware of the "drug debt gone bad" theory mentioned by Lawson and Ganson, but both testified that it did not influence their investigation. Unlike Lawson and Ganson, Korb and Ottaway believed Barnaby's version of the assault and the reasons for it.

Barnaby, at a photographic line-up, identified the appellant as the unmasked attacker.

There are two key points to glean from this fact scenario. First, the report made by the arresting officers detailing a potential drug deal gone bad theory was not entered into evidence. Second, the trial judge would not allow questions to be put to other experts about the drug deal gone bad theory because there was no factual basis and, three, the

rationale for the prohibiting the question was that the Howard principle required a factual predicate.

In a *voir-dire*, prior to Mr. Lyttle's trial before the Ontario Superior Court of Justice, the trial judge and the defence counsel had several verbal exchanges with respect to the types of questions that could be put to the expert witnesses.⁵³ Over the course of these exchanges between counsel and judge, the trial judge made it clear that questions put to expert witnesses required substantive evidence. The trial judge plainly stated:

...but the law is quite clear that if you are making an allegation of that nature and of that substance, that you are required then to commit to leading some evidence in that regard...

But I can only tell you the law is that if you are going to make those allegations by cross-examining, in the course of cross-examination of the Crown witnesses, you had better follow up with substantive evidence...

I am just saying that there will be a strict adherence to the rules of evidence, which require that if you ask a question of the nature we have discussed, that, at some point, you are required to produce some foundation or substantive basis for asking that question...

If you fail to follow-up, and under the R. v. Howard case you are obligated to...⁵⁴

The trial judge claimed to be merely enforcing the law. However, the use of the above the noted deferential phraseology, suggests the trial judge could have ulterior motives. For example, the trial judge could have been using the Howard decision strategically. By using Howard to limit a particular line of questioning by the counsel or to satisfy some other preference the trial judge is able to deflect

⁵³ *R v Lyttle*, [2004] 1 SCR 193, SCJ No 8.

⁵⁴ *Ibid*, at para 25.

issues of trial fairness due to the obligation to follow *stare decisis*. While many different ulterior motives are possible, the judge did in fact use *Howard* as the reason to deny the question being put to the expert. Ultimately, the line of questioning was not put to the new police officers who did not file the *drug deal gone bad* report, counsel did not put the question to the original authors, and Mr. Lyttle was convicted.

3.6 Lyttle Appeal

Mr. Lyttle appealed the trial decision on the grounds that the evidentiary directive of Lamer J in *Howard* should be confined to questions put to expert witnesses and that its application to this case fundamentally altered the presentation of the defence. It is important to note, for this appeal to make sense, that the police officers were not going to be examined as expert witnesses. Therefore, confining the *Howard* ruling to experts would make its controversial principle of law irrelevant to the cross-examination of the witnesses in *Lyttle*. If this appeal were to be upheld, then the defence counsel's proposed defence would be allowed without having to give up the rights to the final questioning of that expert which is a crucial part of the examination.

The proposition to limit *Howard* to expert witnesses is smart and strategic. This argument gives Carthy JA an "out" of the doctrine of *stare decisis* by constraining *Howard*. Moreover, it allows Carthy JA to navigate the complexities of distinguishing a prior decision without suffering a "reputational hit" because it

isn't a tortured extension of logic to limit *Howard* in this way. Again, the Howard decision is ill-conceived, but this is a clever way to reduce the severity and scope of its impact. However, Carthy JA did not take the "out", instead, Carthy JA decided that *Howard* was misunderstood and that it could not stand for the proposition that the trial judge and others had interpreted it. Carthy JA stated:

Lamer J. could not have been intending to lay down a broad rule encompassing all forms of cross-examination and to be overruling well-established authorities of this court and others without referring to them. The implications of such a strict rule would pervade and restrict all traditional cross-examination containing any element of speculation.⁵⁵

The above paragraph could be interpreted as a veiled-jab at Lamer J because it is quite clear that this *was* what Lamer J had intended for *Howard* to stand for. Carthy JA ultimately held that the trial judge had erred in requiring the defence counsel to provide substantive evidence for questions put to expert witnesses but that the mistake did not constitute a substantial wrong or miscarriage of justice as described in s. 686(1)(b)(iii) of the Criminal Code.

3.7 Lyttle Supreme Court Decision

The Supreme Court's decision of Lyttle,⁵⁶ written by Major and Fish JJ, was lengthy and calculated. The Court distinguished the law cited by the trial judge, laid out the actual, probably revised, intentions from *Howard*, re-stated their intentions for how this issue should be dealt with from here on, and diverted the onus of the blame from the Supreme Court to the trial judge.

⁵⁵ *Lyttle, supra*, note 26.

⁵⁶ [2004] 1 SCR 193, SCJ No 8.

These strategic actions indicate that the Court read Lamer J's decision in *Howard* and determined it was ill-conceived and ought to be changed. The judges then, as self-interested utility maximizers, retroactively came up with a different basis for Justice Lamer's decision that made it more consistent with prior decisions and re-articulated it in a way that was far narrower than Lamer J probably intended. These actions were clearly in the best-interests of the *Lyttle* judges because the law was restored to a more sensible place which likely satisfies their desire to do "good" judging, and achieves another likely goal of "reputation building." To accomplish these goals, the court diverted the blameworthiness of the ill-conceived *Howard* principle from Lamer J to the courts that had interpreted it. The Supreme Court noted on many occasions that the blame of *Howard* lay with the lower courts who had, apparently, misinterpreted it. Evidence of the Court preserving the reputation of the Supreme Court by diverting blameworthiness can be seen throughout the decision of *Lyttle*, where Major and Fish JJA noted;

"We agree as well (with Court of Appeal) that the judge's error resulted from his understandable misapplication of this Court's decision in *R. v. Howard*, [1989] 1 SCR 1337.⁵⁷

...Central to the trial judge's ruling in this case was his understandable but mistaken view of *Howard*...⁵⁸

...In our respectful opinion, the ratio of *Howard* has been misunderstood and misapplied. *Howard* dealt essentially with the admissibility of evidence. Unfortunately, the reasons of Lamer J. have been applied beyond their context and the record in this case leaves no doubt that a misapprehension of *Howard* weighed heavily on the trial of the appellant...⁵⁹

⁵⁷ *Lyttle, supra*, para 4.

⁵⁸ *Ibid*, para 53.

⁵⁹ *Ibid*, para 55.

...By requiring an evidentiary foundation on the basis of *Howard*, the trial judge erred in law.”⁶⁰

The Court accomplished the goal of “making the law make sense” by distinguishing *Browne v. Dunn*⁶¹ which was used by the trial judge of Lyttle as support for the proposition that an evidentiary foundation is required for questions put in cross-examination. Specifically, the Court wrote: “The rule in *Browne v. Dunn* requires counsel to give notice to those witness whom [page213] the cross-examiner intends later to impeach” and “... the foregoing rule in *Browne v. Dunne* remains a sound principle of general application, though irrelevant to the issue before the trial judge in this case.”⁶²

This reinforces the Court’s message that the trial judge was mistaken and relieves the Court of the duty to abide by *stare decisis* since *Browne* no longer applied.

A second tactic used by the Court in *Lyttle* included relocating the *ratio decidendi* of *Howard*. The Court dismissed the notion that the *ratio decidendi* of *Howard* was the statement made regarding an evidentiary requirement for questions put in cross-examination and instead identified a separate statement as the *ratio decidendi*. The Court noted:

The *ratio of Howard*, at p. 1348, is that counsel should not inject bias into the application of the witness’s expertise by being told of, and asked to take into account, a fact that is corroborative of one of the alternatives he is asked to “scientifically determine.”⁶³

⁶⁰ *Ibid*, para 67

⁶¹ 1893 6 R 67 (HL).

⁶² *Ibid*, para 65.

⁶³ *Ibid*, para 58.

This was not the intended *ratio decidendi* and the Supreme Court knew it. The above noted excerpt is best-suited as *obiter dictum*. As noted earlier, all signs pointed to the “evidentiary requirement” statement as the statement most likely intended to be the *ratio decidendi*. However, the Court likely chose to relocate the *ratio decidendi*, instead of perhaps trying to rework or justify it, because the “evidentiary requirement” *ratio decidendi* was unsalvageable. By simply relocating the *ratio decidendi* the Court satisfies the expectation of having a reason for judgment along with the de-basing of the trial judge’s supporting citations the path was cleared for the Court to write a new restorative and authoritative position on the issue.

In summary, Lyttle, from an objective perspective, had the effect of restoring the law to a “pre-Howard” state with respect to the cross-examination of expert witnesses. This decision, to restore the law to a “pre-Howard state”, was deemed worthwhile to the incumbent Supreme Court members following the removal and addition of Lamer J and Cory J’s respective interests, but only if the decision could be framed in such a way that protected the reputation of the Supreme Court. Thus, the Lyttle decision was rife with strategic choices made by the Supreme Court members to deflect criticism away from the Supreme Court toward lower Courts.

3.8 Conclusion

In conclusion, the first chapter of this paper briefly reviewed a few key concepts of the traditional view of law. Upon close examination, some of these concepts, such as the identification of *stare decisis* and the source of law, are less stable than they initially

appear to be. Investigating these concepts exposes the traditionalist perspective of law to some uncomfortable questions, for example, what actually determines the outcome of a judicial decision? Fortunately, Legal Realism and in particular Graham's theory, which has thus far been applied to legislation, can help answer some of uncomfortable questions. Graham's theory posits that judicial self-interest serves as the constraint to the infinite deconstruction that is possible with the language our law written in. The influence of judicial self-interest is especially noticeable in common law cases where the outcome of the case is surprising. Together, the two series of cases examined in the second half of the paper exemplify how judicial self-interest shapes common law interpretation. In the first case, *Howard*, Lamer J over-stated the law in broad and sweeping terms without reliance on the context of other decisions making the final decision problematic. In the second case, *Lyttle*, the Supreme Court revisited the problematic decision of *Howard* and restored the law back to its pre-*Howard* state but did so in a self-interested and strategic way. Judicial self-interest was pervasive throughout each of these decisions but was most apparent in the Supreme Court decision of *Lyttle* where the Court shifted the blame of the poorly conceived *Howard* decision from the Supreme Court to lower courts in an attempt to preserve the reputation of the Supreme Court.

The Supreme Court has suggested throughout the *Howard* and *Lyttle* decisions that their interpretations are driven by stare decisis and not, more simply, a result of the Court giving effect to their own preferences. The reasoning for this, of course, is that the Supreme Court does not want to take blame for their own decisions, but prefers to cast

the blame for unpopular decisions on the prior law, or other factors that are ostensibly beyond their control. I find this behaviour unsettling, but understandable. Over the last year, my idealistic view of the Courts has vanished and has been replaced by, what I think, is a more nuanced and realistic view. Clearly, common law adjudication involves more than just the application of rules. Clearly, there are numerous extra-legal factors that do affect the outcome of common law decisions. This altered view of what affects judicial outcomes has not diminished my respect for the Courts. Instead, I have gained more respect for the Court. I am now aware of the multitude of factors that *do* affect a judicial outcome, what factors *should* affect a judicial outcome, and what is *reasonable* to expect from judges deciding a case. Further, this more nuanced understanding of common law adjudication has, to me, reinforced the importance of the duties of the expert witness. By acting in a bipartisan manner and staying within our professional scope we can improve the validity of the opinions that judges take into consideration when making their decision, which would reduce the potential discounting of an expert's opinion due to their potential bias and lead to improved common law adjudication.

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