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NO EXPERTISE REQUIRED: HOW WASHINGTON D.C. HAS ERRED IN EXPANDING ITS EXPERT TESTIMONY REQUIREMENT

Colin Miller[1]

In 2005, Marlin Godfrey brought a diversity action in the United States District Court for the District of Columbia against Allen Iverson and his bodyguard, Jason Kane, stemming from a brawl at Eyebar, a Washington, D.C. nightclub.[2] Godfrey alleged that Kane attacked him, causing him emotional and physical injuries, including a concussion, a ruptured eardrum, a burst blood vessel in his eye, and a torn rotator cuff.[3] The jury found for Godfrey and entered a verdict against Kane for intentional infliction of emotional distress as well as assault and battery.[4] The deeper pockets, however, belonged to Iverson. Godfrey was able to convince jurors that the NBA star was liable for the negligent supervision of his muscle and they awarded Godfrey $260,000, including $250,000 for pain and suffering.[5]

Thereafter, Iverson and Kane "move[d] for judgment as a matter of law, or, alternatively for a new trial," but the court denied their motion, prompting their appeal to the United States Court of Appeals for the District of Columbia.[6] On appeal, Iverson and Kane argued, *inter alia*, "that the district court should have granted judgment as a matter of law on the negligent supervision claim because Godfrey did not introduce expert testimony to establish the standard of care Iverson owed in supervising Kane."[7] If the court was applying the law of any other jurisdiction, the argument would have fallen on deaf ears, however, the appellants' argument "stem[med] from a peculiar aspect of common law negligence in the District of Columbia."[8]

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[1]Associate Professor, The John Marshall Law School; Blog Editor, EvidenceProf Blog: http://lawprofessors.typepad.com/evidenceprof/.

[2] Godfrey v. Iverson, 559 F.3d 569, 570 (D.C. Cir. 2009).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Godfrey v. Iverson, 503 F. Supp. 2d 363, 363-66 (D.D.C. 2007).

[7] *Iverson*, 559 F.3d at 571.

[8] *Id.* at 571-72.

Like other courts, those in the District of Columbia ("D.C.") place the burden of proving the defendant's deviation from an applicable standard of care on the plaintiffs, and, in garden variety negligence cases, plaintiffs typically can meet this burden without resorting to expert testimony.[9] D.C. law, however, has an expert testimony requirement: "'[I]f the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson,' D.C. law requires expert testimony to establish the pertinent standard of care unless it is 'within the realm of common knowledge and everyday experience' of the jurors."[10] Such a requirement is not anomalous in the professional malpractice context,[11] and the *Iverson* court claimed that D.C.'s requirement was in fact born out of such cases.[12]

According to the court, the D.C. Court of Appeals has deviated from the norm by "[r]ecently . . . requir[ing] expert testimony in a wider variety of case . . . even in those that might initially seem to fall within jurors' common knowledge."[13] This was problematic for Godfrey because courts applying D.C. law routinely require expert testimony on deviation from an applicable standard of care "in negligence cases . . . which involve issues of safety, security and crime prevention."[14] Nonetheless, Iverson ended up having considerably less success in D.C.'s courts of law than he had on the basketball courts at Georgetown. The court denied his motion, finding that no expert testimony was "needed to establish the standard of care for an individual who is present while his personal bodyguard, acting on his behalf in clearing a room in a nightclub, beats a customer and causes significant injuries."[15] The court acknowledged that its result was atypical in this regard; the aberrant antithesis to D.C.'s burgeoning expert testimony requirement.[16] This essay argues that D.C. courts should stem the tide and circumscribe the expert testimony requirement to only professional malpractice cases and trials involving truly technical matters.

Part I argues that the creation of an expert testimony requirement was itself an act of negligence as the D.C. Court of Appeals mistook the test for determining when expert testimony is *permitted* for a test for deciding when expert testimony is *required*. Part II contends that the D.C. Court of Appeals' broad reading of the expert testimony requirement is irreconcilably inconsistent with Federal Rule of Evidence 701, which D.C. courts have implicitly adopted.

Part III notes two pernicious effects of D.C. decisions requiring expert testimony on deviation from an applicable standard of care except "in cases in which everyday experience makes it clear that jurors could not reasonably disagree over the care required."[17] First, D.C. courts have replaced the typical requirement that plaintiffs asserting negligence merely need to raise triable issues of fact to reach the jury with the higher standard of proving they are entitled to judgment as a matter of law. Second, these D.C. decisions, if taken to their logical conclusion, can be read as precluding any lay opinion testimony on standards of care.

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[9] *Id.* at 572.
[10] *Id.* (quoting District of Columbia v. Arnold & Porter, 756 A.2d 427, 433 (D.C. 2000)).
[11] *See, e.g.,* O'Neil v. Bergan, 452 A.2d 337, 341 (D.C. 1982).
[12] *Iverson*, 559 F.3d at 572.
[13] *Id.*
[14] *Id.* (quoting Briggs v. Wash. Metro. Area Transit Auth., 481 F.3d 839, 845-46 (D.C. Cir. 2007)).
[15] *Id.* at 573.
[16] *Id.* at 572-73.
[17] *Briggs*, 481 F.3d at 845.

Part IV concludes, however, that D.C. courts actually have taken these decisions to their *illogical* conclusion, frequently allowing prosecutors to admit lay opinion testimony when expert opinion testimony should be required (despite prosecutors having to prove guilt beyond a reasonable doubt) while precluding plaintiffs that have sued the state from presenting lay opinion testimony "in a number of cases that, on first blush, appear to be within the realm of common knowledge."[18]

I. How Did We Get Here? The Inauspicious Origin of D.C.'s Expert Testimony Requirement

Federal Rule of Evidence 702 provides that an expert may testify in the form of an opinion or otherwise if, *inter alia*, "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . ."[19] Several state rules of evidence contain the same or similar clauses, and many courts read them as permitting expert testimony on issues that are beyond the common knowledge of laypersons.[20] For instance, the Supreme Court of Indiana allows expert testimony if the subject in question is "so distinctly related to some science, profession, business or occupation as to be beyond the knowledge of the average lay person."[21] D.C. courts apply a strikingly similar standard. In its 1966 opinion in *Waggaman v. Forstmann*, the D.C. Court of Appeals noted that:

> It is well settled in this jurisdiction that to warrant the use of expert testimony the subject dealt with must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman and the witness must have such skill, knowledge or experience in that field or calling that his opinion will probably aid the trier in his search for truth.[22]

In *Forstmann*, landlords sued a tenant, claiming that he caused $1,489.30 in damages to their furnished apartment.[23] The trial court precluded the landlords from presenting expert opinion testimony on the issue of whether the damage to their furnishings went beyond normal wear and tear, rejecting their argument that such testimony was permissible because "their situation differ[ed] from the standard rental case because of the expensive furnishings in the apartment and the special character of the neighborhood."[24] The jury returned a verdict in favor of the landlords, but awarded them only $175. The landlords appealed.[25] Finding that the aforementioned standard was not satisfied, the D.C. Court of Appeals affirmed, precluding the admission of expert testimony.[26] The court found that "[t]he question of the amount of damages was properly within the province of the jury and there was competent evidence upon which it could make its award of $175."[27]

As these facts make clear, *Forstmann* merely dealt with the issue of when parties *may* present expert opinion testimony, not the issue of when parties *must* present expert testimony. Indeed,

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[18] *Id.*
[19] Fed. R. Evid. 702.
[20] *See, e.g.,* Ala. R. Evid. 702.
[21] Fox v. State, 506 N.E.2d 1090, 1095 (Ind. 1987).
[22] Waggaman v. Forstmann, 217 A.2d 310, 311 (D.C. Cir. 1966).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 312.
[27] *Id.*

Forstmann was a case where the plaintiffs recovered in spite of the trial court finding that they could not present expert opinion testimony on damages. Twelve years later, though, in 1978, the same court managed to pull something from *Forstmann* which simply was not there.[28]

In *Davis v. District of Columbia*, Thomas Edward Davis was part of a small social gathering in his apartment that ended when metropolitan police officer Edward Eugene Howard arrived and accidentally shot Davis when his revolver discharged as he was removing it from its holster.[29] Davis thereafter sued Howard and the District of Columbia, bringing causes of action sounding in negligent supervision and training against the latter party.[30] The trial court granted the District of Columbia's motion for a directed verdict on these causes of action "on the ground that expert testimony was required regarding the adequacy of the police department's weapons training program."[31] According to the court, by not presenting such expert testimony Davis "failed to establish a standard of care against which the jury could measure the actions of the corporate defendant."[32]

Upon Davis' subsequent appeal the D.C. Court of Appeals affirmed, citing *Forstmann* for the proposition that "[i]t is clear that when the subject dealt with is so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman, its clarification calls for the use of expert testimony."[33] Of course, the *Forstmann* opinion said no such thing. On the contrary, the decision merely set forth the test for when expert testimony *may* be presented and said nothing about when expert testimony *must* be presented.[34] Thus, with one sweep of the pen, the D.C. Court of Appeals created an expert testimony requirement out of cloth and a mistaken reading of precedent.

This is where the court erred in *Iverson*. D.C. courts might have held that expert testimony was required in prior professional malpractice cases,[35] but it was *Davis,* a case sounding in negligent supervision and training, which created D.C.'s "expert testimony requirement"[36] and it is the language of that opinion that D.C. courts still quote today.[37] This inauspicious origin helps explain why the D.C. Court of Appeals has demanded expert testimony regarding failure to meet applicable standards of care in a wider variety of cases than other jurisdictions. Despite the court's claim in *Iverson*, the 1978 opinion of the D.C. Court of Appeals in *Davis* makes clear that there is nothing recent about this trend.[38] Instead, the D.C. Court of Appeals has regularly required expert testimony for decades, even in cases "that might initially seem to fall within jurors' common knowledge."[39]

For example, in *Katkish v. District of Columbia*, John Katkish claimed that on May 20, 1994, he called the D.C. Tree and Landscape Division of the Department of Public Works to issue a

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[28] Davis v. District of Columbia, 386 A.2d 1195 (D.C. 1978).
[29] *Id.* at 1198.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 1200.
[34] *See Forstmann*, 217 A.2d at 312.
[35] *See, e.g.,* Harris v. Cafritz Memorial Hospital, 364 A.2d 135, 137 (D.C.1976).
[36] *See Iverson*, 559 F.3d at 572.
[37] *See, e.g.,* Convit v. Wilson, 980 A.2d 1104, 1123 (D.C. 2009).
[38] *Iverson*, 559 F.3d at 572.
[39] *Id.*

complaint regarding a dead tree that "had shifted and was leaning more prominently toward his house."[40] The Division did not respond before May 27, 1994, when the "large tree fell on his house."[41] Katkish thereafter brought a negligence action against the District of Columbia and the trial court found that the opinion testimony of his two expert witnesses – an arborist and an expert in utility arboriculture – was inadequate because they "failed to define a national standard of care for the maintenance of leaning trees."[42] As a result, the court found against Katkish based upon the lack of expert testimony on standard of care and, on appeal, the D.C. Court of Appeals affirmed finding that "the trial court did not err in ruling that the standard of reasonable care and maintenance of a dead and leaning tree by a municipality, at least in the non-emergency situation presented here, are beyond the ken of the average person."[43]

In another case, *Scott v. James*, plaintiff Doris Scott visited Edna's Beauty Salon and was provided hair relaxer by one of the salon's stylists.[44] About three or four hours after leaving the salon, Scott's hair started "to dry out and get brittle and . . . started to shed," and a couple of weeks later her hair "began to come out in clumps."[45] Scott thereafter brought a negligence action against her hair stylist and the salon's owner, claiming that "expert testimony of a standard of care was not necessary in order for her to make a prima facie case of negligence because 'the facts of [the] case [were] such that a person of ordinary intelligence and experience could easily find that [defendants] breached their duty of care.'"[46] The trial court, however, entered a directed verdict for the defendants and the D.C. Court of Appeals later affirmed, crediting the defendants' argument "that the standard of care when applying a hair relaxer is beyond the knowledge of the average juror and therefore must be established by an expert."[47]

Furthermore, in *Rajabi v. Potomac Electric Power Company*, plaintiffs filed a negligence action against Washington D.C. and the Potomac Electric Power Company ("Pepco") after a streetlight fixture on Canal Street fell on their car on July 1, 1991.[48] Before trial, the plaintiffs indicated that they were going to attempt to prove the defendants' negligence via opinion testimony about the "poor condition" of two other streetlights near the scene of the accident as well as evidence concerning the contract between D.C. and Pepco.[49] That contract required Pepco to provide one cleaning of the Canal Street lights per year.[50] Pepco cleaned the lamps and replaced the fixtures on Canal Street in May of 1990 and was scheduled to do the same in May of 1991, but, due to, *inter alia*, budgetary constraints, D.C. asked Pepco to defer replacement until September 1991.[51]

The defendants moved for summary judgment to dismiss the complaint, and the plaintiffs responded by arguing that because the language of the contract indicated the lights needed to be cleaned at twelve-month intervals, the court should deny the motion.[52] The trial court disagreed,

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[40] 763 A.2d 703, 704 (D.C. 2000).
[41] *Id.*
[42] *Id.* at 704-05.
[43] *Id.* at 706.
[44] 731 A.2d 399, 401 (D.C. 1999).
[45] *Id.*
[46] *Id.* at 402.
[47] *Id.*
[48] 650 A.2d 1319, 1321 (D.C. 1994).
[49] *Id.* at 1321-22.
[50] *Id.* at 1321.
[51] *Id.*
[52] *Id.* at 1321-22.

however, and the D.C. Court of Appeals later affirmed finding that the plaintiffs were required to present expert testimony on standard of care because the issue of "[w]hether a particular maintenance schedule for street lights, such as that set forth in the contract, is sufficient to protect passers-by from the hazard of failing light globes is not within the knowledge of the average lay person."[53]

Curiously, D.C.'s only exception to this "expert testimony requirement" is an exceedingly narrow "common knowledge" exception, pursuant to which "[p]roof of a deviation from the proper standard of care does not require expert testimony where the events from which the negligence arose are 'within the realm of common knowledge and everyday experience.'"[54] According to a recent opinion of the United States Court of Appeals for the District of Columbia, however, this exception "is recognized only in cases in which everyday experience makes it clear that jurors could not reasonably disagree over the care required."[55] That opinion provided three representative illustrations.

First, in *Bostic v. Henkels and McCoy, Inc.*, the court held that "expert testimony was not needed to permit a jury fairly to decide that leaving . . . [a gap of six to seven inches] between boards covering a trench on which pedestrians were expected to walk was negligence, particularly in the absence of safety cones and signs or other warnings of a hazardous condition."[56] Next, in *District of Columbia v. Shannon*, expert testimony on the standard of care was similarly not required in an action involving a "child's thumb [being] ripped out of her hand after getting caught in an open hole in the metal handrail of a playground slide."[57] Finally, in *Jimenez v. Hawk*, the D.C. Court of Appeals found that the jury "surely could use its common sense and everyday experience to infer reasonably from the evidence that an abandoned tank neither removed from nor secured in the ground as required by the D.C. Fire Code, in which used motor oil had been stored over the years, constituted negligence . . . ."[58]

As noted, the *Davis* opinion explains both D.C.'s broadly applied expert testimony requirement and its narrowly construed common knowledge exception, but an explanation is not a justification. The next section argues that this broad reading of D.C.'s expert testimony requirement to exclude lay opinion testimony on standard of care in most cases is indefensible under Federal Rule of Evidence 701, which D.C. courts have implicitly adopted.

II. Behind the Times: The Inconsistency between D.C.'s Expert Testimony Requirement and Federal Rule of Evidence 701

Federal Rule of Evidence 701 provides that:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding

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[53] *Id.* at 1322.
[54] District of Columbia v. White, 442 A.2d 159, 164 (D.C. 1982) (quoting Matthews v. District of Columbia, 387 A.2d 731, 734-35 (D.C. 1978)).
[55] Briggs v. Wash. Metro. Transit Auth., 481 F.3d 839, 845 (D.C. Cir. 2007).
[56] 748 A.2d 421, 425-26 (D.C. 2000).
[57] *Briggs*, 481 F.3d at 845 (construing District of Columbia v. Shannon, 696 A.2d 1359, 1365-66 (D.C. 1997)).
[58] 683 A.2d 457, 462 (D.C. 1996).

> of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.[59]

Subsection (c) of the Rule was included via a 2000 amendment in response to the Supreme Court's opinion in *Daubert v. Merrell Dow Pharms., Inc.*[60] in order to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing."[61] The advisory committee's note to the amendment made clear that:

> [t]he amendment [was] not intended to affect the 'prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences."[62]

D.C. courts have applied Federal Rule of Evidence 701 in their opinions,[63] but their broad reading of D.C.'s expert testimony requirement to exclude lay opinion testimony on standard of care in most cases illustrates that they misinterpret the principles behind it. The Advisory Committee made clear that testimony regarding "degrees of light or darkness" is a "prototypical example[]" of lay opinion testimony contemplated under Rule 701, establishing that lay witnesses can offer testimony about how insufficient lighting could affect culpability.[64] Indeed, in jurisdictions not applying D.C. law, courts have consistently permitted such testimony and have found it sufficient to support verdicts for negligence plaintiffs.[65]

For example, in *Gillespie v. Terminal R. Ass'n of St. Louis*, the plaintiff brought a negligence action against the Terminal Railroad Association of St. Louis after she overstepped a "step down" with a 6-inch riser in St. Louis's Union Station.[66] In addition to testifying that the vestibule where she fell was "dark or dim and that she looked and did not or could not see the step," the plaintiff presented no expert testimony but instead provided lay opinion testimony of a general electric foreman and the former electrical engineer for the city of St. Louis.[67] These lay witnesses opined "that it was necessary to have the vestibule lights burning in order to have sufficient illumination" at the site of the fall.[68] After the court found for the plaintiff, the defendant appealed and the court of appeals found that this testimony was properly permitted, concluding that "[a]n opinion, when not a mere guess or conjecture but an inference drawn by one of requisite experimental capacity from adequate data, *is evidence*."[69]

Moreover, in *M & M Pipe and Pressure Vessel Fabricators, Inc. v. Roberts*, the plaintiffs established the defendant's negligence in a four-car accident in part by presenting the lay opinion

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[59] Fed. R. Evid. 701.
[60] 509 U.S. 579 (1993).
[61] Fed. R. Evid. 701 advisory committee's note to the 2000 amendment.
[62] *Id.* (quoting Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190, 1196 (3d Cir. 1995)).
[63] *See, e.g.,* Fateh v. Rich, 481 A.2d 464, 470 (D.C. 1984).
[64] Fed. R. Evid. 701 advisory committee's note to the 2000 amendment.
[65] Gillespie v. Terminal R. Ass'n of St. Louis, 204 S.W.2d 598, 600 (Mo. App. 1947).
[66] *Id.*
[67] *Id.* at 603-04.
[68] *Id.* at 604.
[69] *Id.*

testimony of an officer who "opined that the broken brake lights [on the defendant's pickup truck] contributed to the accident."[70] The Supreme Court of Mississippi subsequently affirmed the verdict against the defendant, concluding that "Rule 701 of the Mississippi Rules of Evidence authorizes such opinion testimony by lay witnesses."[71] That court noted that "[i]t does not take an expert to know that if brake lights are not functioning, an accident may occur. Who among us has not been forced to react quickly after belatedly discovering that the brake lights on the car in front of us do not work?"[72]

The court's holding is consistent with the Advisory Committee's conclusion "that the distinction between lay and expert witness testimony is that lay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'"[73] Courts applying D.C.'s expert testimony requirement, however, require civil plaintiffs to present expert, not lay, opinion testimony on such issues, to avoid both the testimony being excluded and the granting of a motion for summary judgment or directed verdict. To wit, in *Briggs v. Washington Metropolitan Transit Authority*, a mother brought a wrongful death and survival action against the District of Columbia and other entities after an assailant murdered her son on a temporary walkway at a D.C. metro station.[74] One of her contentions was "that several lights within the enclosure were not working, leaving the lighting too dim on the night of her son's murder[,]" but the action never reached trial.[75] The defendants moved for summary judgment, claiming, *inter alia*, that by not proffering expert opinion testimony, the mother failed as a matter of law to demonstrate an applicable standard of care, and the district court granted the motion.[76]

On appeal, the United States Court of Appeals for the District of Columbia affirmed, rejecting the mother's argument that "safety [and] lighting . . . are matters of common knowledge which should not even require expert testimony."[77] The court acknowledged that "[a]t first blush, there is arguably some . . . appeal to [the mother's] suggestion that the average juror does not require advice from experts to determine whether lighting must be increased . . . ."[78] Nonetheless, the court found "such a judgment based on bare intuition of this sort would be misguided" and noted that "[t]he D.C. Court of Appeals has required expert testimony in a number of cases that, on first blush, appear to be within the realm of common knowledge."[79] The court cited some of the opinions mentioned in the previous section and noted "that the 'common knowledge' exception to the expert testimony requirement is recognized only in cases in which everyday experience makes it clear that jurors could not reasonably disagree over the care required."[80]

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[70] 531 So.2d 615, 620 (Miss. 1988).
[71] *Id.*
[72] *Id.*
[73] Fed. R. Evid. 701 advisory committee's note to the 2000 amendment (quoting State v. Brown, 836 S.W.2d 530, 549 (Tenn. 1992)).
[74] 481 F.3d 839, 841 (D.C. Cir. 2007).
[75] *Id.* at 842.
[76] *Id.* at 843.
[77] *Id.* at 845.
[78] *Id.* (quoting Varner v. District of Columbia, 891 A.2d 260, 266 (D.C. 2006)).
[79] *Id.*
[80] *Id.*

The court then concluded the case before it was not one of these cases, and that, in light of the cited precedent, it was "constrained to hold that expert testimony was required."[81] According to the court, the problem for the mother was that "[w]hile lay persons can certainly distinguish between illumination and complete darkness, there is nothing to indicate that common knowledge includes a universal standard of 'adequate' lighting within a temporary construction walkway."[82]

The opinion of the D.C. Court of Appeals in *Briggs* is fundamentally at odds with the advisory committee's note to the amendment to Rule 701, which states "that the distinction between lay and expert witness testimony is that lay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'"[83] In other words, as long as jurors can use a process of reasoning familiar in their everyday lives to determine whether there has been deviation from a standard of care, courts applying D.C. law should allow for the admission of lay opinion testimony. Those courts should not, and, as will be noted *infra*, cannot, only allow for the admission of lay opinion testimony where jurors would necessarily have to agree with the witness's conclusions.

Indeed, the advisory committee's note to the amendment to Rule 701 strongly intimates that, as in *Gillespie*,[84] courts should permit lay opinion testimony by professionals in many fields on industry standards and standards of care. The advisory committee cited the Third Circuit's opinion in *Lighting Lube, Inc. v. Witco Corp.* for the proposition that "most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert."[85] The Committee reasoned that "[s]uch opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business."[86]

This intimation is confirmed by the elucidation of many courts allowing lay opinion testimony on industry standards and standards of care by professionals. For instance, in *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co, Ltd.*, the Eleventh Circuit found that a district court did not err in allowing ship repairers to offer lay opinion testimony about industry standards, the reasonableness of the defendant's charges, and the time it took to complete the repairs."[87] The Eleventh Circuit relied upon the advisory committee note to Rule 701 and found that the testimony was properly received because the lay witnesses "testified based upon their particularized knowledge garnered from years of experience within the field."[88]

The Eleventh Circuit's opinion was not anomalous. Courts applying Federal Rule of Evidence 701 or state counterparts have consistently allowed lay opinion testimony to establish deviation from or conformity with applicable standards of care. In *Wactor v. Spartan Transportation*

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[81] *Id.* at 846.
[82] *Id.*
[83] Fed. R. Evid. 701 advisory committee's note to the 2000 amendment (quoting State v. Brown, 836 S.W.2d 530, 549 (Tenn. 1992)).
[84] *See Gillespie*, 204 S.W.2d at 604.
[85] Fed. R. Evid. 701 advisory committee's note to the 2000 amendment (construing Lightning Lube, Inc. v. Witco Corp. 4 F.3d 1153 (3d Cir. 1993)).
[86] *Id.*
[87] 320 F.3d 1216, 1217 (11th Cir. 2003).
[88] *Id.* at 1223.

Company, the Eighth Circuit found no error with the admission of lay opinion testimony by two Army Corps of Engineers lockmen that the wrapping of a lockline on a towboat "was not correct procedure and that the excessive wraps subsequently caused the lockline to foul and break . . ."[89] In *Harms v. Laboratory Corporation of America*, the United States District Court for the Northern District of Illinois allowed a testing laboratory's operations manager to offer lay opinion testimony on "the standards of care utilized by [the laboratory] in conducting testing on [the plaintiff's] sample and other samples."[90]

Finally, in *Adorno v. Correctional Services Corporation*, the United States District Court for the Southern District of New York partially denied Correctional Services Corporation's motion for summary judgment dismissing a lawsuit by two former inmates alleging that it negligently hired, retained, trained, and supervised an employee who sexually abused them.[91] The court found that several of the plaintiffs' claims could proceed to trial despite the defendant's invocation of the D.C. Court of Appeals' opinion in *Clark v. District of Columbia*.[92] In that opinion, the D.C. Court of Appeals noted that it had repeatedly found against inmates bringing negligence actions who did not present expert testimony because "the standard of care owed by the District of Columbia to persons in its custody is a matter beyond the ken of the average juror that requires expert testimony."[93] The Southern District of New York turned aside this argument, noting that "[n]o such rule exists in New York . . . and there is thus no basis for this Court to conclude that a New York court would decide that the standard of care owed to persons in custody must in all circumstances be considered 'beyond the ken of the average juror.'"[94]

Indeed, as the D.C. Court of Appeals acknowledged in *Iverson*, no such rule exists in any other jurisdiction; rather, it is "a peculiar aspect of common law negligence in the District of Columbia."[95] Moreover, as noted in *Lighting Lube*, "'the modern trend favors the admission of [lay] opinion testimony, provided that it is well founded on personal knowledge and susceptible to specific cross-examination.'"[96] The District of Columbia's expert testimony requirement is clearly inconsistent with the modern trend and Federal Rule of Evidence 701, and courts applying D.C. law should thus circumscribe the requirement to professional malpractice cases and trials involving truly technical matters.[97]

However, even if courts applying D.C. law began allowing lay opinion testimony on standard of care in a wider variety of cases, they could still find such testimony insufficient to support verdicts in favor of negligence plaintiffs without violating the principles behind Rule 701. This is because Rule 701, like other rules of evidence, only deals with the issue of *admissibility* not the issue of *liability*. With this in mind, the next section contends that it is clear that courts are applying D.C.'s expert testimony requirement in such a way that requires an improper evidentiary showing by plaintiffs in negligence suits.

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[89] 27 F.3d 347, 351 (8th Cir. 1994).
[90] 155 F.Supp.2d 891, 904 (N.D. Ill. 2001).
[91] 312 F.Supp.2d 505, 508-09 (S.D.N.Y. 2004).
[92] 708 A.2d 632 (D.C. Cir. 1997).
[93] *Adorno*, 312 F.Supp.2d at 515 (quoting *Clark*, 708 A.2d at 634 (D.C. 1997)).
[94] *Id.*
[95] *Iverson*, 559 F.3d 569 at 571-72.
[96] *Lightning Lube*, 4 F.3d 1153, 1175 (3d. Cir. 1993) (quoting Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 403 (3d Cir. 1980)).
[97] Fed. R. Evid. 701.

III. Shifting Standards: How D.C.'s Expert Testimony Requirement Compels Plaintiffs in Negligence Suits to Prove Entitlement to Judgment as a Matter of Law

In cases decided under D.C. law, a defendant can prevent a complaint or cause of action from reaching the jury by bringing a successful motion for summary judgment or directed verdict, with the former usually made before trial and the latter typically made at trial.[98] When a defendant moves for summary judgment, the court must deny the motion unless "the facts, construed in a light most favorable to the party opposing the motion, and the inferences from those facts, would not entitle the party opposing the motion to have a favorable jury verdict sustained."[99] In other words, a court should only grant such a motion "if (1) taking all reasonable inferences in the light most favorable to the nonmoving party, (2) a reasonable juror, acting reasonably, [c]ould not find for the nonmoving party, (3) under the appropriate burden of proof."[100] A plaintiff has the burden of proving negligence by a preponderance of the evidence.[101] As such, a court should not grant a defendant's motion for summary judgment in a negligence action unless the facts, construed in the light most favorable to the plaintiff, and the inferences from those facts, would not entitle a reasonable juror, acting reasonably, to find for the plaintiff by a preponderance of the evidence. In ruling on a directed verdict motion, the trial judge focuses on the same question: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[102]

These standards clearly demonstrate that D.C.'s expert testimony requirement, as well as its exceedingly narrow common knowledge exception, improperly require numerous plaintiffs involved in negligence suits to make the evidentiary showing required of parties *moving* for summary judgment or directed verdicts rather than the requirement for *opposing* those same motions. As noted, "the 'common knowledge' exception to the expert testimony requirement is recognized only in cases in which everyday experience makes it clear that jurors could not reasonably disagree over the care required."[103] Thus, the problem for the mother in *Briggs* who brought a negligence action after her son was killed at a D.C. metro station with allegedly insufficient lighting was that, according to the court, "[w]hile lay persons can certainly distinguish between illumination and complete darkness, there is nothing to indicate that common knowledge includes a universal standard of 'adequate' lighting within a temporary construction walkway."[104]

If there were a common knowledge, universal standard of adequate lighting within a temporary construction walkway and jurors thus could not reasonably disagree on the issue of whether the defendant deviated from the level of care required, the mother would have established her entitlement to judgment as a matter of law on the issue. The mother in *Briggs*, however, was *opposing* a motion for summary judgment and should not have been required to make such an evidentiary showing. Instead, she merely needed to present evidence which, taking all reasonable inferences in the light most favorable to her, presented sufficient disagreement to require submission to a jury. In other words, the mother only should have been required to present non-expert evidence regarding the standard of care with which jurors could reasonably agree.

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[98] Richardson by Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 828-29 (D.C. Cir. 1988).
[99] Nader v. Toledano, 408 A.2d 31, 42 (D.C. Cir. 1979).
[100] *Id.*
[101] In re C.W., 916 A.2d 158, 166-67 (D.C. Cir. 2007).
[102] Hill v. White, 589 A.2d 918, 921 (D.C. Cir. 1991).
[103] *Briggs*, 481 F.3d at 841.
[104] *Id.* at 846.

Perhaps the most illustrative example indicating that courts applying D.C. law are not applying the correct standards to plaintiffs in negligence suits is *District of Columbia v. Freeman*, a case in which the D.C. Court of Appeals reversed a jury verdict in favor of the plaintiff after a full trial. [105] In *Freeman*, the guardian of six year old Ronald Smith brought suit against the District of Columbia after the boy was struck by a car while walking in a crosswalk at the intersection of Kenilworth Avenue and Douglas Street.[106] Two theories of liability were considered by the jury:

> (1) The absence of a sign warning of the approaching crosswalk was alleged to [ha]ve proximately caused Ronald's injuries. (2) The District's knowing failure to install appropriate traffic signals-in addition to or instead of the crosswalk-at a hazardous intersection allegedly was the proximate cause of Ronald's injuries.[107]

In addition to, *inter alia*, eyewitness testimony, the plaintiff presented the following evidence: (1) aerial photographs, diagrams, and dimensions of the intersection with references that a school was located nearby, and that children frequented the area; [108] (2) a warning sign, which normally stood approximately two hundred feet before the crosswalk, had been down for over a year prior to the accident; [109] (3) the testimony of Frank Hilton, a neighborhood resident, "that people in the area had been 'trying [to] get a stop sign' at the intersection for many years;"[110] and (4) the testimony of Kim Gray, who indicated "that 'accidents had been occurring at Kenilworth and Douglas,' and that she brought this to the attention of District officials between 1978 and 1979."[111]

Furthermore, the plaintiff demonstrated that in 1974, Willie Hardy, a member of the Council of the District of Columbia visited the intersection, had met with area residents, police officers, and District officials, and talked with them "'about how dangerous [the intersection] was and how many persons had had accidents, accidents had taken place there,'" and that in 1979, Hardy again visited the intersection and spoke to Douglas Schneider, then the Director of the D.C. Department of Transportation, who told her "that the intersection 'was poor planning and certainly a hazard to persons crossing...since that walk is a very short distance from where automobiles exit.'"[112] Finally, and over the defendant's objection, Schneider testified as a lay witness that "[I]t would be safer from a pedestrian's point of view if the crosswalk which carried pedestrians across the main roadway of Kenilworth Avenue, the high speed lanes . . . had been designed to cover all of the roadway so that the pedestrians would be carried over the entire roadway including the little [access] roadway as well as the high speed lanes."[113]

After the jury returned a verdict for the plaintiff, the District of Columbia appealed.[114] The district conceded "that its failure to restore the downed warning sign was negligent," but the D.C. Court of Appeals found that this act of negligence was not the proximate cause of the child's injuries.[115] That left only the second theory of liability, and, according to the court, "the fatal flaw in

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[105] District of Columbia v. Freeman, 477 A.2d 713 (D.C. Cir. 1984).
[106] *Id.* at 714.
[107] *Id.*
[108] *Id.* at 719.
[109] *Id.* at 714.
[110] *Id.* at 717.
[111] *Id.* at 717-18.
[112] *Id.* at 718.
[113] *Id.*
[114] *Id.* at 714.
[115] *Id.* at 715-17.

[plaintiff]'s presentation was the lack of expert testimony from traffic engineers, designers, or highway safety experts, placing the evidence in an appropriate context for the jury."[116] According to the court, the plaintiff failed to comply with D.C.'s expert testimony requirement because "[t]he layman, although he may cross the street regularly, does not possess the technical knowledge needed to judge the city's decision to install a crosswalk, instead of a stop sign, light, or crossing guard, at a particular intersection."[117]

The D.C. Court of Appeals justified its reversal by claiming that its expert testimony "requirement serves to preclude the jury from engaging 'in idle speculation which is prohibited.'"[118] Here, the court again confused different standards. Similar to other courts,[119] those applying D.C. law hold that a party is entitled to judgment as a matter of law if the nonmoving party has presented "no evidence" to support a claim or defense because "'juries cannot be permitted to engage in idle speculation.'"[120] As the *Gillespie* court noted, however, "[a]n opinion, when not a mere guess or conjecture but an inference drawn by one of requisite experimental capacity from adequate data, *is evidence*."[121] Thus, as long as a the plaintiff presents non-expert evidence regarding deviation from an applicable standard of care with which jurors could reasonably agree, a court should deny a defendant's motion for summary judgment or directed verdict. Indeed, courts are supposed to submit cases to the jury when "the evidence presents a sufficient disagreement . . ."[122]

The *Freeman* opinion clarifies that most plaintiffs in D.C. cannot reach the jury even when they present lay opinion testimony if there is the possibility of such disagreement.[123] In professional malpractice cases and trials involving truly technical matters, an expert testimony requirement is appropriate because jurors cannot comprehend complicated issues without expert assistance; in cases which appear to be within the realm of common knowledge, such a requirement is indefensible.

In fact, if taken to its logical conclusion, D.C.'s expert testimony requirement would compel the exclusion of all lay opinion testimony on the standard of care. As noted, Federal Rule of Evidence 701(b) only allows for the admission of lay opinion testimony where it is "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue . . ."[124] Under subsection (b), courts have consistently held that lay opinion testimony is unhelpful, and thus not admissible, when the jury could just as easily draw the same conclusion based upon the evidence presented.[125]

For instance, in *Lynch v. City of Boston*, the First Circuit held that a district court did not err in precluding a lay witness – who provided detailed factual testimony about a plaintiff's exceptional work for a food drive program – from offering opinion testimony about which party was

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[116] *Id.* at 719.
[117] *Id.* at 719-20.
[118] *Id.* at 719 n.19 (quoting Hughes v. District of Columbia, 425 A.2d 1299, 1303 (D.C. Cir. 1978)).
[119] *See, e.g.*, Gibbs v. Wickersham, 133 S.W.3d 494, 496 (Ky. Ct. App. 2004).
[120] Wilson v. Wash. Metro. Transit Auth., 912 A.2d 1186, 1190 (D.C. Cir. 2006) (quoting Marinopoliski v. Irish, 445 A.2d 339, 341 (D.C. 1982)).
[121] *Gillespie*, 204 S.W.2d at 600.
[122] *Hill*, 589 A.2d at 921.
[123] *See Freeman*, 477 A. 2d at 713.
[124] Fed. R. Evid. 701.
[125] *See, e.g.*, Walker v. State, 740 So. 2d 873, 882 (Miss. 1999).

responsible for the success and growth of the program.[126] According to the First Circuit, this testimony was properly excluded under Rule 701(b) because "the jury, unaided by [the lay witness'] opinion, could readily have drawn the inference from [the witness'] detailed factual account of [the plaintiff]'s exceptional work . . . that [the plaintiff] was . . . responsible for the success and growth of the . . . program . . ."[127] Moreover, in *United States v. Wantuch*, the Seventh Circuit held that a district court erred by allowing the prosecution to present lay opinion testimony on the issue of whether a defendant had knowledge of the illegality of his actions; the Wantuch Court reasoned that "in light of all of the evidence against" the defendant, "[t]he jury was just as capable as [the lay witness] of inferring that [the defendant] knew he was committing a crime . . ."[128]

As noted, courts applying D.C.'s testimony requirement may compel civil plaintiffs to present expert opinion testimony "if the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson."[129] Courts applying D.C. law only allow lay opinion testimony where the common knowledge exception would apply, as seen in "cases in which everyday experience makes it clear that jurors could not reasonably disagree over the care required."[130] But if jurors could not reasonably disagree over the care required, a court would have to preclude lay opinion testimony on the standard of care because the jurors could, and indeed, would have to draw the same conclusion as the witness. Following this argument to its logical conclusion, courts applying D.C. law could never allow lay opinion testimony on the standard of care.

Of course, courts applying D.C. law sometimes have allowed lay opinion testimony on standard of care, but this only underscores the seeming arbitrariness of D.C.'s expert testimony requirement and common knowledge exception. As noted, in its opinion in *District of Columbia v. Shannon*, the D.C. Court of Appeals held that the common knowledge exception applied in an action involving a "child's thumb [being] ripped out of her hand after getting caught in an open hole about one inch in diameter in the metal handrail of a playground slide."[131] Because it held the exception applied, the court found no problem with the plaintiff's presentation of lay opinion testimony from a private investigator.[132] In that case, the investigator testified that the handrail on the subject slide was missing and that there were holes in its metal-pipe siderail.[133] The investigator then offered his opinion that because the "handrailing was missing . . . a child sitting on the slide would grab the metal pipe siderail, rather than the handrail. [He] testified that the holes were an inch in diameter-large enough for [him] to stick in his little finger."[134]

In affirming the admission of this lay opinion testimony and a verdict entered in favor of the plaintiff, the court distinguished itself in *Messina v. District of Columbia*.[135] In *Messina*, a father brought a negligence action against the district after his fourth grade daughter fell off of an eight-foot high

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[126] Lynch, 180 F.3d at 16.
[127] *Id.* at 17.
[128] Wantuch, 525 F.3d at 510.
[129] *Davis*, 386 A.2d at 1195.
[130] *Briggs*, 481 F.3d at 845-46.
[131] *Id.* (*construing* District of Columbia v. Shannon, 696 A.2d 1359, 1365-66 (D.C. 1997)).
[132] *Shannon*, 696 A.2d at 1362.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 1365-66.

set of monkey bars onto hard packed mud and dirt covered with woodchips and broke her arm.[136] The D.C. Court of Appeals affirmed the entry of judgment as a matter of law in favor of the District of Columbia.[137] The issue in *Messina* was that the father failed to present expert testimony on the "national standard of care for playground safety."[138] According to the court in *Shannon*, the case before it did not present a similar issue because:

> [The case did] not involve anything so esoteric. It takes no expert knowledge of human behavior to know that children stick their fingers in holes. Nor does it take expert knowledge of playground equipment to find that with the handrail of a playground slide missing - as Shannon's investigator testified it was, and as the photos introduced in evidence showed - a child would be likely to put his or her hand directly on the siderail within reach of the uncapped hole.[139]

If the court were correct, the investigator's opinion testimony would not have been "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue,"[140] and the court should have excluded it.[141] Of course, this begs the question of whether the court was indeed correct and whether, generally, courts applying D.C. law have drawn a reasoned distinction between cases requiring expert testimony and those triggering the common knowledge exception.

At best, the dichotomy appears arbitrary. To illustrate, these courts have found expert testimony is *not* required to prove that a slide with a missing handrail and one inch holes in its metal-pipe siderail violates an applicable standard of care,[142] while it *is* required to prove the same with regard to monkey bars eight feet above hard packed mud and dirt covered with woodchips.[143] Furthermore, the courts hold that plaintiffs do not need to present expert testimony to prove that that a gap of six to seven inches between boards covering a temporary trench violated an applicable standard of care,[144] but such testimony is required to prove the same with regard to several lights not working in an enclosure containing a temporary walkway.[145] Finally, jurors may infer that an abandoned tank neither removed from nor secured in the ground in which used motor oil had been stored over the years, constituted negligence,[146] yet they cannot infer the same with regard to a dead, prominently leaning tree that was neither removed nor secured despite a call from a citizen.[147]

There does not appear to be any rational distinction between many of the cases that D.C. courts require expert testimony regarding deviation from an applicable standard of care and the rare cases where a court may find the common knowledge exception will suffice. Accordingly, this distinction makes sense, given that the foundation for D.C.'s expert testimony requirement is as

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[136] Messina, 663 A.2d at 537.
[137] *Id.*
[138] *Id.* at 539.
[139] *Shannon*, 696 A.2d at 1365-66.
[140] Fed. R. Evid. 701.
[141] *Id.*
[142] *Shannon*, 696 A.2d at 1365-66.
[143] *Messina*, 663 A.2d at 537.
[144] *Bostic*,748 A.2d at 425-26.
[145] *Briggs*, 481 F.3d at 845.
[146] *Jimenez*, 683 A.2d at 462.
[147] *Katkish*, 763 A.2d at 704.

fragile as a house of cards. The aforementioned *Davis v. District of Columbia* reveals something invidious beneath the seeming arbitrariness of D.C. law in this regard.[148]

IV. Criminal Negligence: Washington D.C.'s Expert Testimony Requirement and the Inequity between Standards of Proof Placed on Prosecutors and Plaintiffs

As noted, the D.C. Court of Appeals repeatedly has found against inmates bringing negligence actions who did not present expert testimony because "'the standard of care owed by the District of Columbia to persons in custody is a matter beyond the ken of the average juror that requires expert testimony.'"[149] Moreover, courts applying D.C. law routinely require expert testimony on deviation from an applicable standard of care "'in negligence cases . . . which involve issues of safety, security and crime prevention.'"[150] For instance, in *Hughes v. District of Columbia*, the D.C. Court of Appeals affirmed the entry of a directed verdict against an inmate who was assaulted and brought a negligence action against D.C. but failed to present expert testimony regarding the standard of care.[151] Meanwhile, in both *District of Columbia v. Moreno*[152] and *District of Columbia v. Carmichael*,[153] juries entered verdicts in favor of inmates who had brought negligence actions against D.C. after being stabbed and hospitalized. The D.C. Court of Appeals, however, reversed both verdicts because each plaintiff failed to present expert testimony on the standard of care.[154] Unsurprisingly, in reaching each of these decisions the court relied upon *Davis*,[155] the opinion which mistakenly created D.C.'s expert testimony requirement and used it to dismiss negligent supervision and training claims against the District of Columbia after a police officer accidentally shot the plaintiff.[156]

The D.C. Court of Appeals has even applied the expert testimony requirement in security and crime prevention cases that are not based strictly in negligence. In *Tillman v. Washington Metropolitan Area Transit Authority*, a man arrested for alleged fare-avoidance on the D.C. metro brought an action against, among others, his arresting officers, alleging, *inter alia*, negligence and excessive force during his arrest.[157] At trial, the accused testified that after the officers placed him in handcuffs, he "complained that the handcuffs were too tight, and the officers responded that the more he struggled, the tighter they would get."[158] Meanwhile, his treating physician "testified concerning injuries to [the man's] wrists allegedly related to his handcuffing."[159] At the close of the evidence, the trial court entered a directed verdict in favor of the defendants and the D.C. Court of Appeals later affirmed, concluding:

> We do not believe that jurors are so familiar with the appropriate level of tightness of handcuffs and with the appropriate response of police officers to complaints by arrested individuals concerning the tightness of handcuffs, that the jury here

[148] *See Davis*, 386 A. 2d at 1195.
[149] *See Adorno*, 312 F.Supp.2d at 508-09.
[150] *See Briggs*, 481 F.3d at 845-46.
[151] *See* Hughes, 425 A.2d at 1303.
[152] District of Columbia v. Moreno, 647 A.2d 396, 397 (D.C. Cir. 1994).
[153] District of Columbia v. Carmichael, 557 A.2d 312, 312 (D.C. Cir. 1990).
[154] *See Moreno*, 647 A.2d at 399; *See Carmichael*, 577 A.2d at 314.
[155] *See Moreno*, 647 A.2d at 399; *Carmichael*, 577 A.2d at 314; *Hughes*, 425 A.2d at 1303.
[156] *See supra* notes 28-32 and accompanying text.
[157] 695 A.2d 94, 95 (D.C. 1997).
[158] *Id.*
[159] *Id.* at 95 n.3.

> reasonably could find for the plaintiff in the absence of expert testimony or of similar evidence establishing the standard of care.[160]

As argued above, such decisions are based upon the D.C. Court of Appeals' fallacious and seemingly arbitrary creation of D.C.'s expert testimony requirement in *Davis*, inconsistent with the principles behind Rule 701, as well as the standards governing summary judgment and directed verdicts.[161] By considering how the D.C. Court of Appeals has treated lay opinion testimony offered against criminal defendants, however, it becomes clear that there is invidious discrimination against the accused.

In *Sanders v. United States*, three men were convicted of multiple gun-related crimes, including armed robbery.[162] Partial basis for their convictions was a surveillance videotape of the robbery as well as lay witness opinion testimony identifying two of the defendants on the videotape.[163] The defendants thereafter appealed, claiming, *inter alia*, that this lay opinion testimony was improperly received.[164] The prosecution responded "that because of the lack of clarity on the videotape it was helpful for the jury to hear the opinions of lay persons who were familiar with" the two defendants.[165]

The opinion of the D.C. Court of Appeals began by noting that "[t]he trial court applied Federal Rule of Evidence 701 . . . in admitting the testimony."[166] Specifically, the trial court held that the lay opinion testimony from individuals familiar with the defendants was helpful to the jury because the videotape was "not all that clear," the robbers were wearing hats, and none of the photographs taken from the videotape depicted the frontal portions of the robbers' faces."[167] The D.C. Court of Appeals then held that the majority of courts applying Federal Rule of Evidence 701 or state counterparts have allowed such lay opinion testimony and decided to follow the trend, at least in cases in which the jury could not just as easily draw the same conclusion based upon the evidence presented.[168] According to the court, before lay witnesses can provide such opinion-based testimony, "the trial judge at least should be reasonably satisfied that because of the either obscured or altered appearance of the defendant in the photograph or the videotape, or changed appearance of the defendant, the lay witness is more likely to accurately identify the defendant than is the factfinder."[169] The D.C. Court of Appeals found this standard satisfied the case before it and affirmed the defendants' convictions.[170]

There are at least three fundamental problems with opinions like *Sanders*. First, the D.C. Court of Appeals found that lay witness identification is admissible wherein "the witness is more likely to accurately identify the defendant than is the factfinder,"[171] (*i.e.,* when the testimony would be helpful to the trier of fact.) Conversely, in negligence cases, the same court has also found that lay

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[160] *Id.* at 97.
[161] *Davis*, 386 A.2d at 1198.
[162] 809 A.2d 584,587 (D.C. 2002).
[163] *Id.* at 593.
[164] *Id.*
[165] *Id.*
[166] *Id.* at 594.
[167] *Id.*
[168] *Id.* at 594-96.
[169] *Id.* at 596.
[170] *Id.* at 596-97.
[171] *Id.* at 596.

opinion testimony is only admissible "in cases in which everyday experience makes it clear that jurors could not reasonably disagree over the care required,"[172] (*i.e.,* in cases in which the testimony would not be helpful to the trier of fact.) Second, the D.C. Court of Appeals found this lay opinion testimony admissible by relying upon the holdings of a majority of other courts on the issue while it continually flouts the prevailing precedent on the admissibility of lay opinion testimony on standard of care. In fact, the court cited its previous opinion in *Carter v. United States* for the proposition that "[m]odern rules of evidence permit non-expert witnesses to express opinions as long as those opinions are based on the witness' own observation of events and are helpful to the jury."[173] The D.C. Court of Appeals has not applied this decision's reasoning to most lay opinion testimony on standard of care since *Davis*, and the court's opinion in *Carter* highlights the third problem.

In *Carter*, Officer Ralph Nitz was investigating illegal narcotics activity and observed Robert Carter, Michael Day, and Carlos Dorsey through binoculars.[174] The facts suggest that Officer Nitz saw Carter say something to Day, Day give Carter a small object, Carter hand the object to Dorsey, and Dorsey give Carter a sum of money and walk away.[175] He then radioed descriptions of the men to other police officers, who arrested the men and recovered heroin from Dorsey.[176] The *Carter* opinion is silent on the issue of whether drugs were recovered from Carter.[177] At the trial of Carter and Day for distribution of cocaine, a detective testified generally "about the practices of drug sellers who work in two-person teams."[178] The only witness who actually observed the alleged transaction and could thus testify about whether it was in fact a drug transaction was Officer Nitz, who provided factual testimony about what he observed.[179] Officer Nitz also testified as a lay witness that "what he had seen from his observation post 'led [him] to believe that a narcotic transaction had occurred involving Mr. Day and Mr. Carter and Mr. Dorsey.'"[180]

By considering the difference between the "beyond a reasonable doubt" standard of proof applied to prosecutors and the "by a preponderance of the evidence" standard of proof applied to negligence plaintiffs, it becomes apparent that opinions such as *Carter* are inexcusable. In its 2001 opinion in *Rivas v. United States*, the D.C. Court of Appeals detailed the difference between the two standards of proof:

> The reasonable doubt standard of proof requires the factfinder 'to reach a subjective state of near certitude of the guilt of the accused' . . . Proof of a fact beyond a reasonable doubt is thus 'more powerful' than proof that the fact is 'more likely true than not;' more powerful, even, than proof 'that its truth is highly probable.'[181]

The aforementioned opinions in this section reveal that the D.C. Court of Appeals requires inmates and arrestees to present expert testimony regarding deviation from an applicable standard of care to reach the jury. The only exception to this requirement is "in cases in which everyday

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[172] *Briggs*, 481 F.3d at 845.
[173] *Id.* at 594 (quoting Carter v. United States, 614 A.2d 913, 919 (D.C. 1992)).
[174] *Carter*, 614 A.2d at 914.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.* at 914.
[179] *Id.* at 919.
[180] *Id.*
[181] 783 A.2d at 133 (quoting Jackson v. Virginia, 443 U.S. 307 (1979); Smith v. U.S., 709 A.2d 78 (1998)).

experience makes it clear that jurors could not reasonably disagree over the care required."[182] As noted, by applying this standard, the D.C. Court of Appeals improperly has required these plaintiffs to make the evidentiary showing required of parties *moving* for summary judgment or directed verdicts, not those *opposing* them.[183] The above explanation of the "beyond a reasonable doubt" standard also makes it appear that courts applying D.C. law are requiring inmates and arrestees not presenting expert testimony on standard of care to make the evidentiary showing required of prosecutors.

These holdings are unwarranted when considered alone, but they become even more troubling given that cases such as *Carter* seem to establish that courts applying D.C. law merely require prosecutors to make the evidentiary showing required of plaintiffs in negligence suits. Essentially, in *Carter*, the only evidence available that Carter and Day were distributing drugs was the lay opinion testimony provided by an officer interpreting what he saw. Unless jurors could not reasonably disagree over the issue of whether the transaction observed by the officer was a drug deal, the court should have applied D.C.'s expert testimony requirement to reverse the defendant's convictions. Thus, the third problem with opinions like *Sanders* is that they fail to require expert testimony when prosecutors need to prove guilt beyond a reasonable doubt while other opinions impose such a requirement on negligence plaintiffs who merely need to prove liability by a preponderance of the evidence.

This problem is exacerbated when the negligence plaintiff is an inmate because inmates often have no cash and little access to credit, making it difficult for them to hire experts.[184] Moreover, D.C. courts do not merely require negligence plaintiffs to present expert testimony; instead, they require them to present very specific expert testimony on deviation from an applicable standard of care. For instance, in the previously mentioned *Moreno* case, the plaintiff presented the expert testimony of Dr. E. Eugene Miller, who "testified that the American Correctional Association standards provide national guidelines for prison administration," and that the District of Columbia deviated from the applicable "standard of care in four areas."[185] According to the D.C. Court of Appeals, this testimony was insufficient to avoid a directed verdict because Miller "vaguely referred to standards of the American Correctional Association, but failed to elicit what those standards said, rather he only concluded that the District of Columbia violated those standards."[186]

V. Conclusion

Davis v. District of Columbia is the foundation supporting D.C.'s expert testimony requirement and it explains, but does not justify, the rationale behind decisions of the D.C. Court of Appeals requiring expert testimony in a wider variety of negligence cases than other jurisdictions, even those that seem to fall within the common knowledge of jurors. By understanding how the creation of this requirement was itself an act of negligence, and how the requirement conflicts with Federal Rule of Evidence 701 and the evidentiary burden placed on plaintiffs, it becomes apparent that the requirement is unsupportable. If the D.C. Court of Appeals repudiated *Davis*, D.C.'s house of cards

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[182] *Briggs*, 481 F.3d at 845.
[183] *See id.*
[184] Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1611 (2003).
[185] *Moreno*, 647 A.2d at 398.
[186] *Id.* at 400.

would fall, and its expert testimony requirement could be circumscribed to malpractice cases and trials involving truly technical matters.