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Evidence - Admissibility of Expert Opinion

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EVIDENCE—ADMISSIBILITY OF EXPERT OPINION—*State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1979).

INTRODUCTION

The North Carolina Supreme Court made significant progress toward resolving the uncertainty in the law on the admissibility of medical expert opinion evidence in *State v. Wade*.[1] Since *State v. David*,[2] the rule in North Carolina was that an expert must base his opinion testimony on either (1) "personal knowledge or observation" or (2) "a hypothetical question addressed to him, in which the pertinent facts are assumed to be true, or rather, assumed to be so found by the jury."[3] After *David* several cases were decided which liberalized the rule considerably[4] while others held fast to *David*.[5] Without having overruled or reconciled any of these cases, the Court appeared to have "a convenient precedent for the next decision, whatever its tenor may be."[6] The next decision, which fell in line with and clarified the line of cases which more liberally allowed admission of expert opinion evidence, was *Wade*.[7] The Court held that a medical expert may testify to the information on which he based his opinion, even though obtained from the patient himself, provided the information is inherently reliable.

THE CASE

Wade was a criminal prosecution on three counts of second-degree murder.[8] Defendant did not deny having committed the murders; instead, he offered in his defense a plea of not guilty by reason of insanity. Defendant called an expert psychiatric witness[9]

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1. 296 N.C. 454, 251 S.E.2d 407 (1979).
2. 222 N.C. 242, 22 S.E.2d 633 (1942).
3. *Id.* at 254, 22 S.E.2d at 640.
4. *See* State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974); Penland v. Bird Coal Co., 246 N.C. 126, 97 S.E.2d 432 (1957).
5. *See* State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); Todd v. Watts, 269 N.C. 560, 152 S.E.2d 448 (1967).
6. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 136, at 250 (Supp. 1979).
7. 296 N.C. 454, 251 S.E.2d 407 (1979); *see* 1 D. STANSBURY, *supra* note 6, § 136, at 250 (commenting that *Wade* "has now, to a considerable extent, clarified the rule").
8. 296 N.C. at 455, 251 S.E.2d at 407.
9. *Id.* at 456, 251 S.E.2d at 408.

Dr. Eugene Douglas Maloney who examined defendant in the months after the killings. Although the trial court admitted in evidence Dr. Maloney's ultimate conclusion regarding defendant's mental condition, it ruled inadmissible the expert's statements indicating the basis of his ultimate conclusion. Specifically, the court refused to allow testimony including defendant's statements and behavior during examinations with Dr. Maloney subsequent to the murders.[10] The exclusion provided the basis for defendant's appeal following his conviction on all three counts.[11]

On appeal under Chapter 7A, section 27(a) of the North Carolina General Statutes,[12] the North Carolina Supreme Court remanded the case for a new trial.[13] The Court cited numerous cases but noted that none contained "any sort of universally applicable rule"[14] which could decide the case. From the "pattern of their holdings," the Court synthesized its own two-part rule:

> (1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways. (2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion.[15]

The Court found that Dr. Maloney's information was reliable even though supplied by defendant in that (1) defendant was sent to him "as a patient for treatment" and (2) Dr. Maloney "took into account the entirety of what defendant said together with his own interpretation and analysis of it and the objective manifestations that accompanied it."[16]

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10. *Id.* at 457, 251 S.E.2d at 409.

11. *Id.* at 458, 251 S.E.2d at 409.

12. N.C. GEN. STAT. § 7A-27 (Cum. Supp. 1977) ("Appeals of right from the courts of the trial division—(a) From a judgment of a superior court which includes a sentence of death or imprisonment for life, unless the judgment was based on a plea of guilty or nolo contendre, appeal lies of right directly to the Supreme Court").

13. 296 N.C. at 466, 251 S.E.2d at 414.

14. *Id.* at 462, 251 S.E.2d at 412.

15. *Id.*

16. *Id.* at 463, 251 S.E.2d at 412.

BACKGROUND

Since attorneys first used experts to give their opinions, courts carefully have limited the scope of their testimony.[17] The traditional rule is that an expert may give his opinion either on the basis of information obtained through personal observation or in response to a properly formulated hypothetical question.[18] Following the traditional rule, an expert witness could not testify as to his opinion if it were based on information he had received from a third person, whether that be his patient, his colleague or someone else. Nor could an expert witness offer testimony which was in any way grounded on the opinion, inference or conclusion of another.[19]

The modern trend favors a more liberal admission of experts' opinions.[20] Illustrative of this view is the rule in federal courts as

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17. *See* E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 10-13 (2d ed. 1972).

18. Birmingham Amusement Co. v. Norris, 216 Ala. 138, 112 So. 633 (1927); State v. Romo, 66 Ariz. 174, 185 P.2d 757 (1947); Krueger v. Friel, 330 Ill. App. 557, 71 N.E. 815 (1947); McDonald v. Robinson, 207 Iowa 1293, 224 N.W. 820 (1929); George v. Shannon, 92 Kan. 801, 142 P. 967 (1914); State v. Fishel, 228 Md. 189, 179 A.2d 349 (1962); Independent School Dist. No. 35 v. A. Hedenberg & Co., 214 Minn. 82, 7 N.W.2d 511 (1943); De Donato v. Wells, 328 Mo. 448, 41 S.W.2d 184 (1931); Hornby v. State Life Ins. Co., 106 Neb. 575, 184 N.W. 84 (1921); Stanley Co. of America v. Hercules Powder Co., 16 N.J. 295, 108 A.2d 616 (1954); Weibert v. Hanan, 202 N.Y. 328, 95 N.E. 688 (1911); State v. David, 222 N.C. 242, 22 S.E.2d 633 (1942); Krenger v. Palmer, 9 Ohio App. 2d 9, 222 N.E.2d 651 (1966); Cobb v. Spokane, Pac. & S. Ry., 150 Or. 226, 44 P.2d 731 (1935); Green v. Ashland Water Co., 101 Wis. 258, 77 N.W. 722 (1898).

19. Manufacturers' Accidental Indem. Co. v. Dorgan, 58 F. 945 (6th Cir. 1893); State v. Gevrey, 61 Ariz. 296, 148 P.2d 829 (1944); O'Brien v. Wallace, 137 Colo. 253, 324 P.2d 1028 (1958); Barker v. Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143 (1906); Mt. Royal Cab Co. v. Dolan, 168 Md. 633, 179 A. 54 (1935); Thompson v. Banker's Mut. Cas. Ins. Co., 128 Minn. 474, 151 N.W. 180 (1915); Hays v. Hogan, 273 Mo. 1, 200 S.W. 286 (1917); Stanley Co. v. Hercules Powder Co., 16 N.J. 295, 108 A.2d 616 (1954); State v. Lichtman, 66 N.J. Super. 386, 169 A.2d 184 (1961); Zelenka v. Indus. Comm'n, 165 Ohio St. 587, 138 N.E.2d 667 (1956); Robertson v. Coca Cola Bottling Co., 195 Or. 668, 247 P.2d 217 (1952); Kearner v. Charles S. Tanner Co., 31 R.I. 203, 76 A. 833 (1910).

20. 3 J. WIGMORE, EVIDENCE § 688 (Chadbourn rev. 1970).

> Physician's knowledge of symptoms based on hearsay of patients and others. Here, again, the law cannot afford to stultify itself by refusing to recognize, in testimonial rules, the safe and accepted practice of medical science. When a physician examines a patient to ascertain his ailment and to prescribe for it, a portion of his reasons for acting must be the patient's own statements. To exclude testimony not wholly independent of this foundation for opinion is, in strictness, to exclude almost always

stated in Federal Rule of Evidence 703:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or *made known to him at or before the hearing.* If of a type *reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence* [emphasis added].[21]

By bringing the law of expert opinion evidence in line with the practice of the "experts in the particular field,"[22] the federal rule sets it on a more rational foundation.

In North Carolina, some respected case authority supports a restrictive attitude toward admission of expert testimony based on other than personal observation or a proper hypothetical question.[23] While some North Carolina cases make inroads on the restrictive view,[24] other cases adhere to it.[25] In *Penland v. Bird Coal*

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medical testimony based on a personal examination.
E. CLEARY, *supra* note 17, §§ 14, 16.

21. FED. R. EVID. 703; *see* Birdsell v. United States, 346 F.2d 775 (5th Cir.), *cert. denied,* 382 U.S. 963 (1965).

22. FED. R. EVID. 703, Advisory Committee Note:
Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only within expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross examination, ought to suffice for judicial purposes.

23. *See, e.g.,* Cogdill v. North Carolina State Highway Comm'n, 279 N.C. 313, 182 S.E.2d 373 (1971) (an expert witness cannot base his opinion on hearsay testimony); Ingram v. McCuiston, 261 N.C. 392, 134 S.E.2d 705 (1964); Seawell v. Brame, 258 N.C. 666, 129 S.E.2d 283 (1963) (opinion based on conversations with plaintiff's wife, family members and former employee not allowed); State v. Alexander, 179 N.C. 759, 765, 103 S.E. 383, 386 (1920) (a psychiatric witness was allowed to give his opinion based on defendant-patient's statements during examination for treatment, but the statements were not admitted because they did "not throw any light on the present condition or the past condition of the man's mind").

24. *See* State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974); Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

25. *See* State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); Todd v. Watts, 269 N.C. 417, 152 S.E.2d 448 (1967). *Bock* has been cited as being in agreement with the restrictive view; but, as will be shown, it now has been reconciled by the North Carolina Supreme Court in *Wade.*

Co.,[26] a physician who had examined plaintiff for treatment of a chest condition which plaintiff claimed entitled him to workmen's compensation benefits from defendant gave his opinion as to the nature and extent of the injuries "based on subjective statements by the claimant."[27] On appeal from a plaintiff's verdict, the North Carolina Supreme Court affirmed, holding that "[i]n such cases statements of an injured or deceased person, while not admissible as evidence of the facts stated, may be testified to by the physician to show the basis of his opinion."[28] Next, in *Todd v. Watts*,[29] the North Carolina Supreme Court ordered a new trial on grounds that an expert had been permitted to testify where his opinion was based entirely on subjective statements of the plaintiff.[30] The majority reached its decision which seems diametrically opposed to *Penland* without mentioning *Penland*. In the dissent Mr. Chief Justice Parker argued strongly that *Penland* should control.[31] The then uncertain rule became even more confused with the decision in *State v. DeGregory*.[32] *DeGregory*, mentioning *Penland*[33] and failing to mention *Todd*, held that an expert properly may base his opinion "upon both his own personal examination and other information contained in the patient's official hospital record."[34] Within a year *State v. Bock*[35] held the opinion testimony of an expert inadmissible when based on out-of-court information received in preparation for trial from the patient, his family and friends.[36] This decision cited both *Penland* (for the distinction between a physician examining a patient for treatment and one examining him in preparation for trial) and *Todd* (for the general rule that ordinarily an expert's opinion testimony may not be based on hearsay or on information not included in a proper hypothetical question).[37] After *Bock*, although many cases had dealt with the admis-

26. 246 N.C. 26, 97 S.E.2d 432 (1957).
27. *Id.* at 30, 97 S.E.2d at 435.
28. *Id.* at 31, 97 S.E.2d at 436.
29. 269 N.C. 417, 152 S.E.2d 448 (1967).
30. *Id.* at 420, 152 S.E.2d at 451.
31. *Id.* at 422, 152 S.E.2d at 452.
32. 285 N.C. 122, 203 S.E.2d 794 (1974).
33. *Id.* at 132, 203 S.E.2d at 801.
34. *Id.* at 134, 203 S.E.2d at 802.
35. 288 N.C. 145, 217 S.E.2d 513 (1975).
36. *Id.* at 162, 217 S.E.2d at 524.
37. *See* State v. Bock, 228 N.C. 145, 217 S.E.2d 513 (1975). *Bock* has been cited as being in contradiction to the liberal rules of *Penland* and *DeGregory*. 1 D. STANSBURY, *supra* note 6, § 136, at 250; Comment, *Expert Medical Opinion*

sibility of expert opinion testimony, North Carolina still lacked a clear and integrated statement of the rule.[38] Whether a court chose to follow the restrictive or liberal view, ample precedent was available to support its decision.[39]

ANALYSIS

The importance of *Wade* is the North Carolina Supreme Court's analysis of the development of the law concerning admission of expert opinion testimony in North Carolina and its drafting of a clear and integrated statement of the rule. The narrow holding of *Wade,* which adds nothing to *Penland,* is that a physician may testify both to his expert opinion which is based in whole or in part on statements made to him by his patient during an examination for treatment and to the content of those statements on which he bases his opinion, not as substantive evidence but to show the basis for his opinion.[40] The rule from *Wade* is broader: inherent reliability of the information is the key to admissibility.[41]

In forming this rule the Court relied heavily on *Penland*[42] and *DeGregory,*[43] reconciled *Bock*[44] and, regrettably, completely ignored *Todd. Bock,* considered inconsistent with the forward-looking *Penland,*[45] is understood more easily under the *Wade* rule. The *Wade* test of admissibility is "inherent reliability"[46] and not simply a hearsay/non-hearsay distinction. Thus the inadmissibility of the expert's opinion in *Bock* is not due merely to the fact that the expert based his opinion on declarations made by defendant to the expert out of court. The fact alone that defendant made such declarations tells nothing of their inherent reliability. Rather, that is

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Evidence in North Carolina—In Search of a Controlling Precedent, 8 N.C. CENT. L.J. 267 (1977).

38. State v. Wade, 296 N.C. at 462, 251 S.E.2d at 412 (1979).

39. 1 D. STANSBURY, *supra* note 6, § 136, at 250 ("Since no case has been overruled and no thorough judicial attempt to reconcile the various decisions has been made, this writer can only conclude that there is at hand a convenient precedent for the next decision, whatever its tenor may be").

40. State v. Wade, 296 N.C. 454, 251 S.E.2d 407 (1979).

41. *Id.* at 462, 251 S.E.2d at 412.

42. *Id.* at 460, 251 S.E.2d at 410.

43. *Id.* at 461, 251 S.E.2d at 411.

44. *Id.* at 462, 251 S.E.2d at 411, 412.

45. *See* 1 D. STANSBURY, *supra* note 6, § 136, at 250; Comment, *Expert Medical Opinion Evidence in North Carolina—In Search of a Controlling Precedent,* 8 N.C. CENT. L.J. 267 (1977).

46. State v. Wade, 296 N.C. at 462, 251 S.E.2d at 412.

the beginning of analysis. One can read *Bock* as merely one step in defining the more liberal *Wade* rule. True, *Bock* excluded opinion testimony; however, the information on which the expert based his testimony was gathered in a two-hour examination only two days before the trial and in preparation for trial.[47] Other information was obtained from relatives and friends of the patient.[48] Neither *Penland* nor *DeGregory* suggested that such information would be a reliable basis for an expert's opinion. Under *Wade* that information would seem to lack the inherent reliability necessary to serve as a basis for an expert's admissible opinion.

CONCLUSION

Just what is inherently reliable remains to be defined by case law. The rule from *Penland* and *Wade* is that a patient's statements to a physician for the purpose of diagnosis and treatment are inherently reliable.[49] *DeGregory* holds that, generally, information relating to the diagnosis and treatment of a patient supplied by members of a physician's staff to the physician are inherently reliable.[50] Further, *Wade* and *DeGregory* both cite a federal case, *Birdsell v. United States*,[51] for the proposition that "[w]ith the increased division of labor in modern medicine, the physician making a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them; records sufficient for diagnosis in the hospital ought to be enough for opinion testimony in the courtroom."[52] Such a guideline provides an excellent aid to North Carolina trial practitioners who have been troubled by this area of law.

In any thorough analysis of *Wade*, note one caveat: the *Wade* Court completely ignored *Todd*. Justice Exum's opinion in *Wade* remains incomplete due to this small, but significant, matter. Although the *Wade* rule seems authoritative on its face, *Todd* remains as silent authority for the old rule. Barring legislative action, the Court should address the inconsistency presented by *Todd* at its earliest opportunity.

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47. State v. Bock, 288 N.C. at 162, 217 S.E.2d at 523 (1975).

48. *Id.* at 162, 217 S.E.2d at 524.

49. State v. Wade, 296 N.C. 454, 251 S.E.2d 407 (1979); Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

50. State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974).

51. 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965).

52. *Id.* at 779-80.

From the conservative rule of *David* which denied the admission of expert opinion testimony based on information acquired from others, the courts have staggered to the forward-looking stature. *Wade* represents one block laid toward a solid foundation for a more clearly understood law of expert opinion testimony in North Carolina courts. Elimination of the *Todd* contradiction would complete the foundation and place North Carolina trial practitioners on a solid footing.

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