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Evidence - Admissibility of Expert Opinion

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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. Since State v. David, 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." After David several cases were decided which liberalized the rule considerably while others held fast to David. 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." 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. 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. 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.

2. 222 N.C. 242, 22 S.E.2d 633 (1942).
3. Id. at 254, 22 S.E.2d at 640.
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.\textsuperscript{10} The exclusion provided the basis for defendant's appeal following his conviction on all three counts.\textsuperscript{11}

On appeal under Chapter 7A, section 27(a) of the North Carolina General Statutes,\textsuperscript{12} the North Carolina Supreme Court remanded the case for a new trial.\textsuperscript{13} The Court cited numerous cases but noted that none contained "any sort of universally applicable rule"\textsuperscript{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.\textsuperscript{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."\textsuperscript{16}

\textsuperscript{10.} Id. at 457, 251 S.E.2d at 409.
\textsuperscript{11.} Id. at 458, 251 S.E.2d at 409.
\textsuperscript{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").
\textsuperscript{13.} 296 N.C. at 466, 251 S.E.2d at 414.
\textsuperscript{14.} Id. at 462, 251 S.E.2d at 412.
\textsuperscript{15.} Id.
\textsuperscript{16.} Id. at 463, 251 S.E.2d at 412.
Since attorneys first used experts to give their opinions, courts carefully have limited the scope of their testimony. 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. 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.

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

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

By bringing the law of expert opinion evidence in line with the practice of the "experts in the particular field," 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. While some North Carolina cases make inroads on the restrictive view, other cases adhere to it. In Penland v. Bird Coal
Co., 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." 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." Next, in Todd v. Watts, 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. 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. The then uncertain rule became even more confused with the decision in State v. DeGregory, DeGregory, mentioning Penland 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." Within a year State v. Bock 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. 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). After Bock, although many cases had dealt with the admis-

27. Id. at 30, 97 S.E.2d at 435.
28. Id. at 31, 97 S.E.2d at 436.
30. Id. at 420, 152 S.E.2d at 451.
31. Id. at 422, 152 S.E.2d at 452.
33. Id. at 132, 203 S.E.2d at 801.
34. Id. at 134, 203 S.E.2d at 802.
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. I 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. Whether a court chose to follow the restrictive or liberal view, ample precedent was available to support its decision.

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. The rule from *Wade* is broader: inherent reliability of the information is the key to admissibility.

In forming this rule the Court relied heavily on *Penland* and *DeGregory*, reconciled *Bock* and, regrettably, completely ignored *Todd*. *Bock*, considered inconsistent with the forward-looking *Penland*, is understood more easily under the *Wade* rule. The *Wade* test of admissibility is "inherent reliability" 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).*

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").
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.

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