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Although *Donoho* and *McCorkle* indicate that administration of state law on military bases does not interfere with federal law, they are limited in that they involve only state and county governments; not the military. It must be remembered that no cases exist which directly involve the extent to which a base commander can regulate children's protective service activity by state personnel on base. The cases previously alluded to simply state that (before the enactment of ACAP) where federal funds partially support state child welfare programs, those states must also provide child welfare services to children residing on military bases. But, from all indications, it seems that the carrying out of such programs does not interfere with the military.

CONCLUSION

It is clear that exclusive jurisdiction does not mean absolute jurisdiction in all areas of law. The subject of child abuse and neglect belongs to the laws of the states and not to the federal government. However, state administration of these laws on a military base is subject to regulation by the base commander, in the interests of discipline and security. Although the extent to which military restrictions on state authorities on base is not clear, it seems certain that full proscription of such state activity would not be supported by a court of law. State social workers have a right and a duty to provide children's protective services on military bases.

WILLIAM D. ACTON, JR.

Expert Medical Opinion Evidence in North Carolina: In Search of a Controlling Precedent

I. INTRODUCTION

The common-law system of proof has always been rigid and demanding in its insistence upon the most reliable source of information in a given case; particularly when the testimony is that of an expert medical witness.¹ In North Carolina, and most other jurisdictions, this policy has resulted in the gradual development of highly complex evidentiary rules relating to the admissibility of opinion and hearsay evidence by qualified experts.² Although his value as an expert³ is desired by the courts because of his superior

1. C. MCCORMICK, *LAW OF EVIDENCE* §§ 10-13 (2d ed. 1972). (hereinafter cited as MCCORMICK)

2. *Id.* at §§ 13-15.

3. Qualification as an expert is largely a question of fact and ordinarily within the exclusive province of the trial judge. Qualifications are not rigid. "It is enough that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject." (Citations omitted) 1 STANSBURY'S NORTH CAROLINA EVIDENCE 429 (Brandis Revision, 1973). (hereinafter referred to as STANSBURY)

skill in a particular field, and his ability to form an expert opinion will be helpful to a jury of laymen, severe restrictions usually have been imposed upon the nature of the expert's testimony.

To make full use of the possibilities of expert testimony the witness must be permitted to give his opinion on facts not within his personal knowledge; but, since it is ultimately the jury's province to find the facts as well as to draw the necessary inferences therefrom, the facts upon which he grounds his opinion must be brought before the jury in accordance with recognized rules of evidence. When these facts are all within the expert's own knowledge, he may relate them himself and then give his opinion; or, within the discretion of the trial judge, he may give his opinion first and leave the facts to be brought out on cross-examination. When the facts are not within his knowledge they must, as a general rule, be testified to by other witnesses and then incorporated, expressly or by reference, in a hypothetical question addressed to the expert. If he has personal knowledge of some of the facts but not all, a combination of these two methods may be employed.⁴ (citations omitted)

What exactly is or is not within the expert medical witness' "personal knowledge" or "personal observation"? Is the opinion of a medical expert rendered inadmissible in North Carolina because it is based, wholly or in part, on the case history of a patient related to the physician for the purpose of diagnosis *or* treatment? Is the opinion of a medical expert rendered inadmissible in North Carolina because it is based, wholly or in part, on statements made by a third party, rather than by the patient? May the medical expert testify directly to the results of his examination and his "opinion" thereon, or must his opinion be elicited by a properly formed hypothetical question? If the facts assumed in a hypothetical question are based partially on a medical case history, is the hypothetical insufficient to form the basis for an admissible opinion?

At the present time there are no definitive answers to these questions and no clear rules for the guidance of practicing attorneys in North Carolina. Two recent decisions⁵ of the North Carolina Supreme Court have been mutually contradictory—neither expressly nor impliedly overruling prior precedents.⁶ "Since no case has been overruled and no thorough judicial attempt to reconcile these 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."⁷

4. *Id.* at 445-46.

5. *State v. Bock*, 288 N. C. 145, 217 S.E.2d 513 (1975), *modified* — U.S. —, 96 S. Ct. 3208 (1976) (modified as to the death penalty); *State v. DeGregory*, 285 N.C. 122, 203 S.E.2d 795 (1974).

6. See STANSBURY at 143 (Supp. 1976).

7. *Id.*

The exclusionary rules in question rest on the hearsay rule, and exceptions thereto, and govern the admission of statements made to physicians; especially as to the distinction between attending and non-attending physicians. Since the new FEDERAL RULES OF EVIDENCE question the validity of these distinctions as rules of evidence,⁸ and since the North Carolina Supreme Court has not definitively ruled on the above questions,⁹ the time seems especially appropriate to review the existing rules, to highlight the conflicts and to stress the urgent need for legislative or judicial resolution of the dilemma.

II. DEVELOPMENT OF THE RULES IN NORTH CAROLINA

A. *Penland v. Bird Coal Company*

Originally, in North Carolina a physician was excluded from testifying as to his opinion based upon statements made to him by his patient.¹⁰ However, a more liberal rule was adopted in *Penland v. Bird Coal Company*,¹¹ a workmen's compensation case. In *Penland*, the plaintiff sought damages for injuries suffered in a fall while working as a truck driver for the defendant employer. His evidence showed that he suffered a broken rib and a punctured lung. The plaintiff testified that he was unable to do any heavy work without extensive pain and that he suffered from fatigue and shortness of breath.¹²

A medical expert, specializing in surgery, testified that the plaintiff was referred to him by another physician for treatment of his chest condition. He further related the case history the plaintiff had given him concerning his on-the-job injury and indicated that the plaintiff had no history of any other injuries. From his examination of the plaintiff, the physician testified that there was a "delay in the quickness of his movements caused by the pain produced when he moves . . . amounting to . . . a functional disability . . . of a general nature of 25 per cent." On cross-examination, the physician testified that "I found no objective symptoms; all findings that I have are based on subjective statements made by the claimant . . . as a result of my examination, there was no physical cause of disability, no x-ray cause of disability—none deemable."¹³

From a finding for the plaintiff, the defendant appealed on the ground that the physician's opinion as to plaintiff's disability was "incompetent evi-

8. FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, Rules 703, 803 (4), (West 1976). (expert testimony and medical testimony) (hereinafter cited as FEDERAL RULES OF EVIDENCE)

9. See note 6 *supra*.

10. See STANSBURY at 447. Cf. *State v. Alexander*, 179 N.C. 759, 103 S.E. 383 (1920).

11. 246 N.C. 26, 97 S.E.2d 432 (1957).

12. *Id.* at 29, 97 S.E.2d at 434.

13. *Id.* at 29-30, 97 S.E.2d at 435. It is significant that the expert's opinion in *Penland* was not based on objective tests, but rather on personal examination and observation, resulting in a subjective opinion.

dence in view of the witness' admissions, made on cross-examination, to the effect that the testimony was based upon 'subjective statements made by the claimant'.¹⁴ The superior court reversed the award of the Full Commission and plaintiff appealed.

In finding for the plaintiff, the North Carolina Supreme Court held:

[T]he rule is that ordinarily the opinion of a physician is not rendered inadmissible by the fact that it is based wholly or in part on statements made by the patient, if those statements are made, as in the instant case, in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment and cure. *'In 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.'*¹⁵ (emphasis added)

It should be noted that, in *Penland*, the expert medical testimony was not elicited by an appropriately phrased hypothetical question, based on facts properly introduced in evidence.¹⁶ Rather, the testimony of the treating physician as to the patient's statements was held admissible on the ground that the statements were not presented as substantive evidence (*i.e.* to prove the truth of the matter asserted), but only to show the basis of the expert's opinion. Accordingly, the testimony was not treated as hearsay,¹⁷ since testimony is not generally objectionable as hearsay if introduced for any reason other than to prove the truth of the matter stated.¹⁸ In contrast to the above rule, Rule 803 (4) of the FEDERAL RULES OF EVIDENCE¹⁹ treats such statements as hearsay, instead of nonhearsay, but allows their admission as

14. *Id.*

15. *Id.* at 31, 97 S.E.2d at 436.

16. See note 4 *supra* and accompanying text.

17. "Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *Chandler v. Jones*, 173 N.C. 427, 92 S.E. 145 (1917). "[W]henever the assertion of any person, other than that of the witness itself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay." STANSBURY § 138, at 459-60. "Hearsay evidence is testimony in court, or written evidence of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." MCCORMICK § 246, at 584.

18. STANSBURY § 141, at 467. See *State v. Crump*, 277 N.C. 573, 178 S.E.2d 366 (1971); *Highway Comm. v. Conrad*, 263 N.C. 394, 139 S.E.2d 553 (1965) (An expert witness may testify as to the basis of his opinion because it is not offered to show the truth or falsity of such matters, but how the witness arrived at value. It is therefore not hearsay evidence.) *Gonzales v. Hodsdon* 420 P.2d 813 (Idaho 1966) ("In such an instance the patient's statements are not regarded as hearsay: the statements are introduced without regard for the truthfulness of the fact stated, but merely as observed facts forming part of the physician's data.") 420 P.2d at 816. *Contra* *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314 (Mo. 1962); *Reid v. Yellow Cab Co.*, 131 Ore. 27, 279 P. 635 (1929); *Paulk v. Thomas*, 115 Ga. App. 436, 154 S.E.2d 872 (1967).

19. "Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof *insofar as reasonably pertinent* to diagnosis or treatment." (emphasis added)

an exception to the hearsay rule. Furthermore, Rule 703 allows the opinion testimony of experts to be based on facts or data which need not be admissible in evidence (*e.g.* oral hearsay).²⁰ The reason for enactment of these more liberal federal rules will be discussed in greater detail later in this comment. For the present, it should be noted that the judicial rule stated in *Penland* was favorably received in North Carolina,²¹ particularly since it freed "litigants, courts and juries from the mazes and misuses of the hypothetical question."²²

B. *Todd v. Watts*

In *Todd v. Watts*,²³ however, the court apparently reversed itself. Justice Sharp, speaking for the majority, held that allowing a physician to express an opinion based on matters beyond his personal knowledge and not properly grounded upon a hypothetical question was error.²⁴ In *Todd*, plaintiff sought damages for injuries allegedly suffered in an automobile accident. Her evidence tended to show that during the collision she had been thrown forward, striking her head on the windshield and her knees on the dashboard, while wrenching her back. An orthopedic physician who had treated the plaintiff testified as an expert witness on her behalf. He first related the history of her complaints, including a congenital spinal defect, as told to him by the plaintiff on her first visit to the physician for treatment. This testimony also included references to the recent accident and a recitation of how her injuries were caused. There was no objection to this testimony although, on request of defense counsel, its use was limited to corroborating the testimony previously given by the plaintiff.²⁵ The doctor was then asked, over objection, to give his diagnosis from his examination, and his opinion based on the statements of the patient and his subsequent examination (not in response to a hypothetical questions), as to the permanency and *cause* of the plaintiff's injuries.²⁶ The jury awarded damages to the plaintiff.

20. "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) See FEDERAL RULES OF EVIDENCE, Rule 803 (Hearsay Exceptions: Availability of Declarant Immaterial) and commentary thereto; FEDERAL RULES OF EVIDENCE, Rule 703 (Bases of Opinion Testimony By Experts) and commentary thereto.

21. See Brandis, *Evidence, Survey of North Carolina Case Law*, 45 N. C. L. REV. 934 (1967).

22. Note, *Evidence—Expert Testimony—Physician's Opinion Based on Patient's Statements*, 46 N. C. L. REV. 960, 964-965 (1968).

23. 269 N.C. 417, 152 S.E.2d 448 (1967).

24. *Id.* at 421, 152 S.E.2d at 451.

25. *Id.* at 422, 152 S.E.2d at 451. As several writers noted, this seemed consistent with North Carolina's liberal use of the "corroboration rule" which allows testimony otherwise excluded as hearsay. See STANSBURY § 136, N. 71, at 447; note 22 *supra*, n. 3, at 960-61.

26. *Id.* at 419-20, 152 S.E.2d at 450-51.

The North Carolina Supreme Court awarded a new trial, solely because of error in admitting the expert medical testimony. The majority regarded the testimony of the expert as incompetent in view of his admission, on cross-examination, to the effect that his testimony was based entirely upon the subjective statements of the plaintiff.²⁷

Since it is the jury's province to find the facts, the data upon which an expert witness bases his opinion must be presented to the jury in accordance with established rules of evidence. 'It is well settled in the law of evidence that a physician or surgeon may express his opinion as to the cause of the physical condition of a person if his opinion is based either upon facts within his personal knowledge, or upon an assumed state of facts supported by evidence and recited in a hypothetical question.' A witness is not permitted to base his opinion upon facts of which he has no knowledge.²⁸ (citations omitted)

In a strong and well-reasoned dissent, Parker, C. J., quoted the *Penland* rule as controlling and consistent with the general rule that: "In such cases statements of an injured or diseased person, while not admissible as evidence of the facts stated, may be testified by the physician to show the basis of his opinion."²⁹ (citations omitted) In conclusion, the Chief Justice stated:

To hold, as the majority opinion does, that Dr. Piggott's diagnosis and opinion are inadmissible in evidence because based in part on statements given to him in 1963 by plaintiff when she was examined by him for the purpose of rendering to her medical assistance, is *unpractical, because a doctor customarily relies upon such statements made to him by a patient in the practice of his profession, and such a holding defies the usual processes of medical thought*.³⁰ (emphasis added)

The exact intent of the majority in *Todd* with regard to overruling or limiting the rule in *Penland* remained speculative, because *Penland* was completely ignored in the majority opinion.³¹

C. *State v. DeGregory*

Whereas the majority in *Todd* ignored *Penland*, and the more liberal rule stated therein, in the more recent case of *State v. DeGregory*³² a unanimous court resurrected *Penland* and ignored *Todd*.

27. *Id.* at 421, 152 S.E.2d at 451.

28. *Id.* at 420, 152 S.E.2d at 451.

29. *Id.* at 422, 152 S.E.2d at 452.

30. *Id.* See STANSBURY § 136, n. 71, at 447; note 22 *supra*. Although the Chief Justice urged a continuation of the more liberal *Penland* rule, he still distinguished the testimony of a treating physician from that of an examining physician (for the purpose of testimony at trial).

31. See STANSBURY § 136, at 447. Professor Brandis, in referring to the decision in *Todd v. Watts* stated: "But the latest decision seems unfortunately, to revert to the former rule, though it may not be wholly definitive." *Id.*

32. 285 N.C. 122, 203 S.E.2d 794 (1974).

In *DeGregory*, the defendant was charged with first-degree murder. The defendant was confined to a state mental hospital for a period of approximately two months for psychiatric evaluation to determine his *capacity* to stand trial.³³ Subsequently, at trial, the defendant entered pleas of not guilty and not guilty by reason of insanity.³⁴

The evidence for the state tended to show that the defendant *DeGregory*, a resident of Florida, shot and killed the victims when he was their house guest in Charlotte, North Carolina.³⁵

The defendant, testifying as a witness in his own behalf, stated that he was staying with the *Powells* on the date of their deaths. He further testified that he remembered Mrs. *Powell* coming home at approximately 9:30 P.M. on that day. He stated that he remembered having the murder weapon in his possession at that time. Finally, he testified that he remembered "being in the bedroom changing clothes . . . [and] Mrs. *Powell* coming into the bedroom, kissing him in an improper way and talking to him" ³⁶ He could recall no other events concerning the murders in question.³⁷

The defendant further testified that "on several occasions, after arguments with his wife, he would have lapses of memory and labor under the delusion that he had a twin brother named Michael."³⁸ A lay witness testified to the fact that the "defendant thinks he has a twin brother named Michael; that Michael hated sex and was an avenger; and that defendant was convinced to a certainty that Michael, in fact, did exist."³⁹ It was his opinion that the defendant did not have the capacity to distinguish between right and wrong at the time of the murders.⁴⁰

A clinical psychologist, Dr. *Ann McMillan*, interviewed and examined the defendant in Florida, shortly after his arrest. She testified as an expert witness for the defense. She testified that she conducted thirty hours of examination and testing on the defendant, including the taking of statements from the defendant concerning his background and medical history.⁴¹ On direct examination, not in response to a hypothetical question, and without objection, Dr. *McMillan* testified that she had found the defendant to be mentally ill, suffering from schizophrenia with paranoid tendencies. It was her professional opinion that the defendant did not have the legal capacity to

33. *Id.* at 128, 203 S.E.2d at 799.

34. *Id.*

35. *Id.* at 123-26, 203 S.E.2d at 795-97.

36. *Id.* at 126, 203 S.E.2d at 797-98.

37. *Id.*

38. 285 N.C. at 127, 203 S.E.2d at 798.

39. *Id.* at 128, 203 S.E.2d at 799.

40. *Id.*

41. *Id.* Dr. *McMillan* related the medical history in detail, without objection, to the court. Record at 94-95, *State v. DeGregory*, 285 N.C. 122, 203 S.E.2d 794 (1974).

know right from wrong at the time of the murders.⁴²

As part of the state's rebuttal evidence, Dr. Robert Rollins testified as a medical expert specializing in psychiatry.⁴³ He testified that, while the defendant was at Dorothea Dix Hospital for *psychiatric evaluation to determine his capacity to stand trial*,⁴⁴ he was under Dr. Rollins' direction and control. He also indicated that he had with him the official hospital records concerning the defendant. The records had not, however, been entered in evidence. Dr. Rollins was asked to relate what the official records showed concerning the defendant.⁴⁵

42. 285 N.C. at 128, 203 S.E.2d at 799.

It is my professional opinion that Karl was legally insane at the time I worked with him. In my opinion, Karl did not have the capacity to know right from wrong on March 2, 1972. I think Karl, having a history of going into the fugue or amok stages, he would not have known what he was doing and probably would not have remembered afterward because more commonly than not there is complete amnesia after an act of this nature. Record at 95-96.

43. *Id.* Dr. Rollins was Superintendent of Dorothea Dix Hospital in Raleigh, North Carolina, with extensive training and experience in psychiatry and psychiatric examination of criminal defendants. At the time of his testimony he had been at Dorothea Dix Hospital for over six years. Record at 102-03.

44. *Id.* The fact that Dr. Rollins examined the defendant for the *then* stated purpose of determining his mental capacity to stand trial and *later* testified concerning the defendant's mental condition at the time of the crime (in rebuttal to the affirmative defense of insanity raised at trial) would appear to raise a serious constitutional question—as to the defendant's fifth amendment rights. However, the courts have generally refused to accept this constitutional argument, so long as the defendant is represented by counsel. In essence, the competency question has not been distinguished from the question of criminal responsibility. These two separate legal issues have been confused and merged by the courts. *See* A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 179-217 (DHEW Pub. No. ADM 76-176, 1975); R. PERKINS, PERKINS ON CRIMINAL LAW 850-88 (2d ed. 1969).

Questions concerning the relevancy of Dr. Rollins' testimony, as to the defendant's mental condition at the time of the crime, would also appear to be appropriate. However, the authority in North Carolina seems to be contrary and such testimony is considered relevant and competent. *See generally* STANSBURY §§ 70, 77, 90, 97.

At the federal level, the questionable result (from the defendant's viewpoint) of merging and confusing the legal issues of competency to stand trial and criminal responsibility at the time of the crime (as to the insanity defense) would appear to be precluded by the precise language of the statute—at least where no prior notice is given the defendant of the dual function of the examination.

No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. 18 U.S.C. § 4244 (1970). *See* United States v. Alvarez, 519 F.2d 1036 (3rd Cir. 1975), United States v. Driscoll, 399 F.2d 135 (2nd Cir. 1968), Taylor v. United States, 222 F.2d 398 (U.S. App. D.C. 1955). *But see* United States v. McCracken, 488 F.2d 406 (5th Cir. 1974), United States v. Mattson, 469 F.2d 1234 (9th Cir.) *cert. denied* 410 U.S. 986 (1972), United States v. Jacquillon (5th Cir.), 469 F.2d 380, *cert. denied* 410 U.S. 938 (1972), United States v. Julian, 469 F.2d 371 (10th Cir. 1972), Ashton v. United States, 324 F.2d 399 (U.S. App. D.C. 1963). *See also* United States v. Barrera, 486 F.2d 333 (2nd Cir.), *cert. denied* 416 U.S. 940 (1973).

Unfortunately, the competency provisions of the recently enacted North Carolina Criminal Procedure Act contain no such saving language. *See* N.C. GEN. STAT. § 15A-1002 (1975).

45. 285 N.C. at 128, 203 S.E.2d at 799. In response to a defense question asking whether his testimony would be predicated on the results of the tests themselves, Dr. Rollins replied: "It

Over objection by the defense, the direct examination of the witness was continued and the state proffered the following question, which was clearly not in hypothetical form: "Based upon your own personal examination and interview of Karl DeGregory, *and any other information contained in his official record of which you were the custodian and had available to you*, did you make a diagnosis of the defendant?"⁴⁶

Once again, over objection by defense counsel to the second part of the question, Dr. Rollins testified that:

Based upon my examination, I am of the opinion that Mr. DeGregory is *not*⁴⁷ a paranoid schizophrenic. I have some general knowledge of the circumstances surrounding the crime with which Karl DeGregory is charged . . . Personally, I spent three hours with Karl DeGregory. *My testimony is predicated on the three hours which I spent with Karl DeGregory and upon information furnished me by members of my staff . . . [I] was not treating Mr. DeGregory. I was just diagnosing . . .* I am satisfied that Karl DeGregory was *not*⁴⁸ criminally insane based upon my three hours with him . . . As stated in my report, I said 'No psychiatrist can express a conclusive opinion about the *mental responsibility of an individual at a particular time*⁴⁹ unless he had examined the individual on or about that time; even then his opinion is only that, an opinion.'⁵⁰ (emphasis added)

In concluding his testimony, Dr. Rollins discussed the nature of a psychiatric evaluation.⁵¹ The witness was excused. After being properly charged, the jury returned a verdict of murder in the first degree in both cases and the defendant was sentenced to life imprisonment on each indictment.⁵²

would be my discussions with people who did various tests in terms of what I thought we ought to look for and my discussions with them as to what the tests showed." Record at 104.

46. 285 N.C. at 131, 203 S.E.2d at 800.

47. At this point in his testimony, Dr. Rollins uses the present tense, apparently referring to the defendant's present mental capacity to stand trial.

48. At this point in his testimony, Dr. Rollins changed to the past tense, apparently referring to the defendant's mental capacity at the time he examined him.

49. At this point in his testimony, Dr. Rollins appears to have impliedly referred to the defendant's mental state at the time of the actual crime.

50. 285 N.C. at 131, 203 S.E.2d at 800-01. Record at 106-107.

51. Evaluation is not based on specifically what the patient says but the totality of the relationship between the client and the examiner. If the patient had told me about other times of disassociation and if I believed what he had told me about the other times of disassociation, *I would have been more likely to reconsider the present incident an episode of dissociative reaction.* Record at 108. (emphasis added).

At this point in his testimony it is clear that Dr. Rollins' testimony refers to the state of mind of the defendant at the time of the crime and not to the defendant's capacity to stand trial, for which Dr. Rollins had originally examined him.

52. 285 N.C. at 129, 203 S.E.2d at 799. It is interesting to note that, after the prosecution witness' extensive testimony as to the psychiatric examination and diagnosis, with the resultant conclusion that the witness was without psychosis; and the jury's finding of a verdict of murder in the first degree, that the court, after pronouncing sentence, went on to recommend:

It appearing to the court from the evidence in this case that the defendant is in need of psychiatric examination and evaluation, it is the recommendation of the court that he be given a complete psychiatric examination and evaluation as soon after his commitment as

On appeal, counsel for the defense argued that inclusion of the testimony of Dr. Rollins, based on the second part of the state's question (information based on the official record, which was not in evidence) was reversible error. The defense relied on the courts' holding in *State v. David*.⁵³

In affirming the judgment of the lower court and holding the testimony of Dr. Rollins admissible, Justice Huskins, speaking for a unanimous court, stated:

Defendant's interpretation of the quotation from *State v. David*, supra, is too limited. The quotation states that an expert may base his testimony on facts within his personal knowledge or observation, or may base his opinion on facts presented in a hypothetical question, *but it does not purport to limit facts and information within the personal knowledge of an expert to knowledge derived solely from matters personally observed*. As demonstrated in opinions of this court since *State v. David*, supra, *an expert witness has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible*.⁵⁴ (emphasis added)

Completely ignoring the more recent decision in *Todd*, and failing to consider or distinguish the fact that Dr. Rollins' testimony was based on an examination and evaluation for the purpose of diagnosis and eventual testimony at a criminal prosecution (*not treatment*), the court resurrected the rule in *Penland*.

In *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E.2d 432 (1957), the testimony of a physician was challenged because his opinion was based on statements made to him by the patient during the course of a professional examination. We noted that although the statements of the injured patient were '*not admissible as evidence of the facts stated, [they could] be testified to by the physician to show the basis of his opinion*' and held that it is permissible for a physician to base his opinion, *wholly or in part on such statements*, if made by the

possible and that he be accorded such treatment and care thereafter as this examination may indicate to be necessary and desirable. Record at 5.

Although it is far beyond the scope of this comment, Professor Abraham S. Goldstein's brilliant and definitive work on the complexities and hazards of the insanity defense is considered both pertinent (as to expert testimony) and independently worthy of serious study by a criminal trial attorney. See A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967).

53. 222 N.C. 242, 22 S.E.2d 633 (1942). "There are two avenues through which expert opinion evidence may be presented to the jury: (a) Through testimony of the witness based on his own personal knowledge or observation; and (b) Through testimony of the witness based on 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." 222 N.C. at 254, 22 S.E.2d at 640. See STANSBURY at 446. The defense argued:

The question posed to Dr. Rollins complies with neither requirement of the foregoing cited authority. Furthermore, Dr. Rollins was asked, in effect, to base his opinion, in part, on records which were never before the Court. The defendant contends this error is prejudicial as it related to his insanity defense. The Court, in overruling this objection, allowed Dr. Rollins to render an expert opinion based on information obtained by some one else, which information was inadmissible in evidence. Brief for Appellant at 14-15.

54. 295 N.C. at 132, 203 S.E.2d at 801.

patient in the course of professional treatment, or during the course of an examination made for the purposes of treatment and cure.⁵⁵ (emphasis added)

After reiterating the far more liberal *Penland* rule, the court went on to quote from *Highway Commission v. Conrad*⁵⁶ (another precedent which antedated *Todd*), which referred to the testimony of an expert witness retained only for the purpose of trial, and quoted a rule even more liberal in scope.

The fact that certain elements are not independently admissible in evidence . . . does not bar their consideration by an expert witness in reaching an opinion. Thus, it has been said: 'An integral part of an expert's work is to obtain all possible information, data, detail, and material which will aid him at arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion. It is proper for the expert when called as a witness to detail the facts upon which his conclusion or opinion is based and this is true even though his opinion is based entirely on knowledge gained from inadmissible sources.' (People v. Ganghi Corp., Cal. App., 15 Cal. Rptr. [19] 25).⁵⁷

The court went on to cite *Potts v. Howser*,⁵⁸ a decision handed down after *Todd*. In *Potts*, the court held that the medical expert's testimony was admissible, even though it was based partly on a radiologist's report and accompanying x-rays, which were used by him to diagnose the plaintiff's injuries, but which were not introduced into evidence.

Finally, the court relied on numerous federal decisions to support its holding in the instant case.⁵⁹ In particular, they relied upon *Birdsell* for the rule that the testimony of a psychiatrist based upon a personal interview and an examination of a defendant's case history, tests and hospital records, not in evidence, was admissible "if the expert rendering it is made available for cross-examination."⁶⁰ In *DeGregory*, the court concluded that:

*On these authorities, and on reason as well, we hold that it was proper for Dr. Rollins to base his expert opinion as to the sanity of Karl DeGregory upon both his own personal examination and other information contained in the patient's official hospital record. The question was proper and the answer was competent.*⁶¹ (emphasis added)

55. *Id.*

56. 263 N.C. 394, 139 S.E.2d at 553 (1965).

57. *Id.* at 399, 139 S.E.2d at 447. *Accord.* State v. Arnold, 218 Or. 43, 341 P.2d 1089 (1959).

58. 274 N.C. 49, 161 S.E.2d 737 (1968).

59. United States v. Davila-Nater, 474 F.2d 270 (5th Cir. 1973); Birdsell v. United States, 346 F.2d 775 (5th Cir.), cert. denied, 382 U.S. 963 (1965). (and cases cited therein)

60. 285 N.C. at 133-34, 203 S.E.2d at 802.

61. *Id.* In his analysis of the DeGregory decision, Professor Brandis noted: The opinion seemed to proceed on the assumption that the hospital record would not have

The court in *DeGregory* did go on to note that even if Dr. Rollins could not base his opinion on inadmissible evidence, that

*[H]is testimony discloses that his opinion of defendant's sanity is based strictly on his own personal observation of defendant. At one point Dr. Rollins said: 'Based upon my own examination I am of the opinion that Mr. DeGregory is not a paranoid schizophrenic.' Later on cross-examination, he made the following statement: 'I am satisfied that Karl DeGregory was not criminally insane based upon my three hours with him.' Although Dr. Rollins did at one point in his testimony state that his testimony was based on both his personal interview with Karl DeGregory and information furnished by his staff, it is clear that on the crucial question of Karl DeGregory's sanity, he based his testimony solely on his personal observation of defendant. It thus appears that defendant has not been prejudiced by the doctor's testimony even under the more restrictive view of the law urged by defendant.*⁶² (emphasis added)

D. *State v. Bock*

A little over a year after the court's holding in *DeGregory*, the North Carolina Supreme Court handed down its most recent decision concerning the critical evidentiary rules in question. In *State v. Bock*,⁶³ a trial situation almost identical with that of *DeGregory*, expert medical opinion testimony, by an examining (*not treating*) physician, was held inadmissible because it was based on matter beyond the expert's personal knowledge and not grounded upon a proper hypothetical question.⁶⁴

In *Bock*, the defendant was charged with first-degree murder.⁶⁵ In an effort to establish the fact that the defendant was legally unconscious at the time of the alleged murder and consequently unable to form the requisite

been independently admissible as a business record (see § 155). STANSBURY at 143 (Supp. 1976). (emphasis added)

62. 285 N.C. at 134, 203 S.E.2d at 802-03. Commenting on this portion of the opinion, Professor Brandis stated:

(The Court also held that the critical part of the opinion of the witness was based solely upon his personal observations; but the devotion of one paragraph to this and nine to the other ground of decision rather indicates that the latter was not judicially conceived to be dictum.) STANSBURY at 143 (Supp. 1976).

63. 288 N.C. 145, 217 S.E.2d 513 (1975), modified — U.S. —, 96 S.Ct. 3208 (1976).

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

65. *Id.* at 147, 217 S.E.2d at 515. Testifying in his own defense, the defendant stated that on the day in question he had a friend purchase two fifths of Bacardi Rum. Bock testified that he consumed between one and two fifths during the subsequent twelve hour period. Bock testified further that he recalled having intercourse with the victim on the night in question, that they argued and fought about money and, as he was getting into her car, she came at him with his knife. He remembered grabbing her arm, but did not recall what happened thereafter. Bock stated that he did not recollect stabbing the victim or running over her. (The victim was killed by one of the 55 stab wounds inflicted upon her body by a sheath knife belonging to the defendant and subsequently her body was run over by her own car, driven by the defendant.) He indicated that he had only a fragmentary recollection of his return to the party and events prior to his arrest the following morning. Record at 58-70. *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), modified — U.S. —, 96 S. Ct. 3208 (1976).

specific intent for first-degree murder,⁶⁶ the defense called Dr. Charles E. Smith as an expert witness.⁶⁷ Dr. Smith, a forensic psychiatrist, testified he had observed and examined the defendant for a period of *over two hours*, two days prior to the term of court, for the purpose of giving testimony at trial.⁶⁸ After this brief direct examination, defense counsel posed a hypothetical question for the witness.⁶⁹

In the presence of the jury, the witness further indicated that since the examination in question he had also *personally interviewed* members of Bock's family and friends (third parties) concerning the defendant's past history, development, and mental state.⁷⁰

66. Ordinarily unconsciousness or automatism is a complete, not a partial defense to a criminal charge. *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969). *Cf.* 21 Am. Jur. 2d *Criminal Law* § 29 (1965). Voluntary intoxication which results in unconsciousness, however, cannot lead to a complete acquittal. *See* Annot. 8 A.L.R.2d 1231 (1963). (Modern Status of the Rules as to Voluntary Intoxication as Defense to a Criminal Charge) *See also* *Bratty v. A.-G. for N. Ireland*, 3 A.E.R. 523 (1961). However, in North Carolina, when a defendant charged with first-degree murder is *utterly unable* to form the requisite specific intent, due to voluntary intoxication, the grade of the offense is reduced to second-degree. *State v. Bunn*, 283 N.C. 444, 196 S.E.2d 777 (1973). (emphasis added)

67. Dr. Smith testified that he was a Professor of Psychiatry at the University of North Carolina Medical School and Director, Mental Health Services, North Carolina Department of Correction. He further testified that he had previously served as Medical Director and Chief Psychiatrist for the Federal Bureau of Prisons; that he had devoted some 25 years to the work of examining criminal defendants in various aspects of trial proceedings and that during the previous five years he had examined approximately 2,000 persons who were committed to the Department of Correction for diagnostic study. Record at 76. *See* N. C. GEN. STAT. § 148-12 (1975).

68. 288 N.C. at 153, 217 S.E.2d at 518. Dr. Smith testified further that his examination included questions concerning both the defendant's past history and the allegations in the instant case. Record at 77.

69. I will ask you, based upon your experience and training and your observation and examination of Robert Gary Bock, and in addition that if the jury should find as a fact in this case that Robert Gary Bock, Jr. met with a girl known as 'Candy' on the 22nd day of November, 1973, and if the jury should find further that they had never met on a prior occasion; that on the date that they met, he went with her in her automobile, with him driving; that he was under the influence of some intoxicating beverage; that he had not eaten during that day; that he had had approximately four to five hours sleep during that day; that he and the girl attended a gathering for a brief time at the home of one Martin Bergman; that they left the gathering together, and after again having sexual intercourse they mutually engaged in a heated argument, the subject of which was the payment of money by Robert Gary Bock to the girl; that during and in the course of that argument Bock struck her with his fist and knocked her down; that she then got up and advanced upon him with an open knife, and that Bock seized the arm holding the knife; and if the jury should find further as a fact that thereafter Karen Wilkes Stewart died as a result of multiple stab wounds inflicted upon that occasion and that Robert Gary Bock inflicted them, do you have an opinion satisfactory to yourself as to whether or not Robert Gary Bock could have been not conscious of what was transpiring at the time he inflicted all or any of those wounds? Record at 77-78.

Although this hypothetical appears to be properly formed and based on testimony properly in evidence, the state's objection to the hypothetical question was sustained. However, in the absence of the jury, Dr. Smith replied: "I am unable to form an opinion on that question." Record at 78.

It should be noted that Dr. Smith's inability to form an opinion was not based on the inadequacy of the hypothetical, but rather on the complexity of the hypothetical question. *See* note 71, *infra*.

70. 288 N.C. at 153, 217 S.E.2d at 518. Counsel for the defense then asked Dr. Smith the following: "Would you describe your examination, please, for the court with reference to

On voir dire, in the absence of the jury, Dr. Smith testified *for the record only* concerning the results of his examination and observations. He noted that the defendant had a significant history of drinking to excess and that, in the past, on several occasions during his drinking spells he had experienced blackout spells, lapses of memory or amnesia. As to his mental condition, the witness found the defendant to be "insecure, inadequate and a chronically anxious person who is very prone to rebel and to make angry."⁷¹ At this point the jury returned and defense counsel posed the following hypothetical question:

these—." The state's objection to testimony involving statements made by someone other than the defendant was sustained.

Counsel for the defense then asked the witness: "As to statements made by the defendant in your clinical analysis of him, would you describe that examination?" The state's objection to the question was sustained.

Counsel for the defense then asked Dr. Smith: "Will you tell the court results of your examination?" The objection was sustained and the jury excused. Record at 79. *Note the strong similarity between this series of questions and those asked of Dr. Rollins in DeGregory.*

71. 288 N.C. at 153, 217 S.E.2d at 518-19. Further attempts by defense counsel to elicit the witness' expert medical opinion, based on hypothetical questions or the examination alone, were objected to by the state and sustained by the court. Record at 80-85.

At one point the following exchange took place between defense counsel and Dr. Smith: [Q.] Based on your examination alone, if he has testified that he does not recall what occurred after a point at which a girl was advancing on him with a knife until the occasion when he was driving an automobile, do you have an opinion satisfactory to yourself as to whether or not he could in fact be unable to recall that period of time?

A. Yes, I do have an opinion on that. I think I have stated that he probably would not have a true recall of the totality of the events.

Q. What is the basis of your opinion that he probably does not recall that period of time?

A. My opinion derives from my examination of him, my efforts to develop from him what happened, *my independent efforts*. (emphasis added)

Q. And that is all?

A. Yes. My impressions are reinforced by what I viewed today in the courtroom but I came here persuaded that he could not recall this.

Q. Are the additional facts he has testified he does not recall such as to keep you from being able to form an opinion that you would otherwise be able to form?

A. No. I simply prefer to limit my answer to my examination. *As far as the hypothetical you have laid out, the question is too complex for me to understand and be responsive to.* I would have to study that question before I could respond to it. Record at 83. (emphasis added)

None of the above testimony was held to be admissible in open court and it was accepted for the record only. However, the opinion of Dr. Smith, who had some 25 years of experience as a medical expert witness at trial proceedings, concerning the complexity of the hypothetical question, is worthy of special notice. Dr. Smith is not alone in his criticism of the hypothetical question. The hypothetical question has been consistently criticized by legal scholars. See STANSBURY § 137; MCCORMICK § 16. Professor Wigmore stated in no uncertain terms his conclusion that "[i]ts abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice. 2 J. WIGMORE, EVIDENCE § 686 (3d ed. 1940). For a landmark decision on the hazardous hypothetical, see *Rabata v. Dohner*, 45 Wis.2d 111, 172 N.W.2d 409 (1969).

Equally worthy of note, in highlighting the confusion which currently exists concerning the admissibility of expert medical opinion, is the following exchange, which took place between defense counsel, Dr. Smith and the prosecutor—in the presence of the judge:

Q. *I am not able to have you testify what he told you during the examination*, but I can have you testify what he told the jury. (emphasis added)

A. I don't see why I can't testify to what a man tells me in the course of an examination. *That is not hearsay.* (emphasis added)

[Prosecutor]: *It is hearsay.* The only way you can repeat what he said to you would be for corroboration. Record at 85. (emphasis added)

Q. Dr. Smith, based upon your examination and observation of Robert Gary Bock, Jr., and further if the jury should find as a fact that at some time in the early morning of the 23rd of November, an altercation arose between Robert Gary Bock, Jr. and an individual identified as Candy, and that sometime after that altercation Robert Gary Bock, Jr. was driving an automobile down a dirt road, do you have an opinion satisfactory to yourself as to whether or not Robert Gary Bock, Jr. could in fact be unable to recall that interval between those two incidents?⁷²

The state's objection to the hypothetical question was sustained and Dr. Smith was precluded from answering, except for the record. Had he been allowed to answer, the witness would have testified:

It is my opinion that during the period between the onset of this altercation and the last stated event in the hypothetical question the defendant entered into a state of *pathological intoxication*⁷³ in which his *consciousness was clouded* to the extent that he probably in fact does not have complete recall for the events encompassed within this time span.⁷⁴ (emphasis added)

The witness was excused. At the close of all the evidence the defense renewed its motion for a nonsuit, specifically moving for nonsuit as to the charge of first-degree murder. The motion was denied. A jury instruction submitted to the court by the defense, on self-defense, was denied. An instruction proffered by the defendant as to the defense of unconsciousness was allowed.⁷⁵ The jury returned a verdict of guilty to the charge of murder in the first degree and the defendant was sentenced to death.⁷⁶

72. 288 N.C. at 154, 217 S.E.2d at 519.

73. Pathological intoxication as a criminal defense, or as related to "partial responsibility", is in a state of conflict today. See Lewin, *Psychiatric Evidence in Criminal Cases For Purposes Other Than The Defense of Insanity*, 26 SYRACUSE L. REV. 1051 (1975); comment, *Intoxication As A Criminal Defense*, 55 COLUM. L. REV. 1210 (1955). For a recent North Carolina case discussing the defense, see *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970).

74. 288 N.C. at 154, 217 S.E.2d at 519. On cross-examination of the witness, the following exchange took place between the prosecutor and Dr. Smith:

[Prosecutor]: I would ask you, Doctor, if you saw the defendant on only one occasion?

A. Yes, that is correct.

Q. And whatever opinions you might have about the defendant or his past—would those opinions be based on whatever he may have said to you?

A. Yes, counselor, it is *substantially based upon my examination of him*. (emphasis added)

Q. And whatever he may have said?

A. *Based upon my examination of him* and we did converse during the examination. Record at 86. (emphasis added)

Again, note the similarity of the responses on cross-examination here to those on cross-examination of Dr. Rollins in the DeGregory case.

75. 288 N.C. at 154, 217 S.E.2d at 519. After the jury had retired to consider its verdict, and it had been out for three minutes, the *prosecutor* requested that the judge instruct the jury concerning a possible finding that if the defendant, as a result of his intoxication, was unable to form a specific intent, he could not be found guilty of first-degree murder. The jury was so instructed and again retired to find its verdict. Record at 110.

76. 288 N.C. at 154, 217 S.E.2d at 519.

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On appeal, counsel for the defense argued that exclusion of Dr. Smith's testimony was reversible error.⁷⁷ In affirming the judgment of the lower court, and holding the testimony of Dr. Smith inadmissible, Sharp, C. J., speaking for a unanimous court, cited *Todd* as controlling. The court held that "the facts assumed in the hypothetical question were obviously insufficient to enable Dr. Smith to form a satisfactory opinion."⁷⁸ Referring to STANSBURY § 137 (form of the hypothetical question), the court stated:

Patently, the doctor's opinion was based upon evidence which was not included in the question, as well as upon facts which were not in evidence at all. The latter was the defendant's history of excessive drinking followed by blackout spells or periods of amnesia, which the doctor obtained from the defendant, his family and friends. However, neither defendant himself nor anyone else testified that he had such a history. Obviously, therefore, Dr. Smith's opinion was based in major part upon hearsay evidence.⁷⁹

Citing *Cogdill v. Highway Commission*,⁸⁰ the court also noted that:

Where an expert witness testifies as to facts based upon his personal knowledge, he may testify directly as to his opinion. Generally,

77. *Id.* at 161-62, 217 S.E.2d at 523. He argued that Dr. Smith's testimony as to his psychiatric examination served as a basis for his clinical opinion as to the defendant's mental state and was nonhearsay. Referring to STANSBURY § 136, the appellant *did not* cite DeGregory, but referred to the decisions in both Penland and Todd. DeGregory, however, has been cited as controlling in *State v. Wright*, 29 N.C. App. 752, 225 S.E.2d 645 (1976). The appellant distinguished *Todd* on the ground that:

[T]he objectionable feature there was that the facts of the automobile accident (analogous here to the facts of the killing) were not submitted hypothetically, subject to jury acceptance of testimony already offered. Read as a whole, the case cannot be said to exclude medical findings as a partial basis for opinion, even though these findings result from numerous factors, some of which may be statements made to others. Stated more simply, it is one thing to exclude testimony of an expert about the very event which is the subject of the trial when he has no firsthand knowledge of the event, yet quite another thing to exclude evidence of medical findings . . . No useful purpose is served and the law does not require the blind application of the hearsay rules to testimony which relates only to medical findings. Brief for the Appellant at 28, *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), *modified* — U.S. —, 96 S. Ct. 3208 (1976).

On appeal, the state also *failed* to cite DeGregory, but did cite STANSBURY § 136, Penland, and Todd. The state, however, relied on the rule in Todd concerning an expert opinion being grounded upon the patient's statements to the witness, and concluded that since Dr. Smith only talked to the defendant for two hours he necessarily relied upon the defendant's statements and version of what happened on the night of the murder. In concluding its argument, the state relied on the Penland distinction between a physician who examines a patient for treatment and cure and one who examines a patient for no other purpose than trial—contending that Dr. Smith's testimony was properly excluded for that reason. Brief for the State at 25, *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), *modified* — U.S. —, 96 S.Ct. 3208 (1976). Note, however, that the total time of examination by Dr. Rollins in DeGregory was only a matter of minutes longer than the total examination time of Dr. Smith in Bock. Furthermore, it should be noted that, in DeGregory, Dr. Rollins also examined the defendant for no other purpose than for trial.

78. 288 N.C. at 162, 217 S.E.2d at 524.

79. *Id.*

80. 279 N.C. 313, 182 S.E.2d 373 (1971). (nonjury inverse condemnation proceeding against the Highway Commission)

however, an expert witness cannot base his opinion on hearsay evidence. And when the facts are not within the knowledge of the witness himself, the opinion of an expert must be upon facts supported by the evidence, stated in a proper hypothetical question.⁸¹

The court went on to state the rule in *Penland* (for the distinction between the opinion of a treating physician and the opinion of a physician examining a patient for the purpose of trial only) and concluded that:

In such a situation it is reasonable to assume that the information which the patient gives the doctor will be the truth, for self-interest requires it. Here, however, Dr. Smith did not examine the defendant for the purpose of treating him as a patient, but for the purpose of testifying as a witness for defendant in this case in which he is charged with first-degree murder. The motive which ordinarily prompts a patient to tell his physician the truth is absent here. The evidence was therefore incompetent and properly excluded.⁸²

III. AN ANALYSIS OF THE CONFLICT

The conflict in precedents, as regards the admission of expert medical opinion in North Carolina, is obvious from a close examination of the records and opinions in *Penland*, *Todd*, *DeGregory* and *Bock*. Professor Brandis, in his analysis of the court's decision in *State v. Bock*, succinctly encapsulates the conflict and underlines the dilemma faced by North Carolina criminal trial attorneys in search of a guiding precedent.

As indicated in the original note, the majority in *Todd v. Watts* ignored *Penland*. Reciprocally, in *DeGregory*, a unanimous Court resurrected *Penland* and ignored *Todd*. Subsequently, in *State v. Bock*, *supra* note 64, the Court cited with approval both *Todd* (for the proposition that the facts assumed in a hypothetical were insufficient to form the basis for a satisfactory opinion) and *Penland* (for the proposition that a treating physician may express an opinion based wholly or in part on statements made to him by the patient). The latter proposition is obviously more stringent than the rule applied to the prosecution expert in *DeGregory*, which, in its turn, was ignored in *Bock*. The Court in *Bock* sustained exclusion of the opinion of a defense psychiatrist (not engaged in treatment) as to the probability that defendant did not have complete recall of events, since the opinion was based upon evidence not included in the hypothetical question, and also upon facts, not in evidence at all, reflected in statements to the witness by defendant's family and friends, as well as by defendant. In other words, the opinion 'was based in major part upon hearsay evidence'. Since no case has been overruled and no thorough judicial attempt to reconcile these various decisions has been made, this writer can only conclude that

81. 288 N.C. at 162, 217 S.E.2d at 524.

82. *Id.*

there is at hand a convenient precedent for the next decision, whatever its tenor may be.⁸³

In *Penland* the court apparently adopted as a controlling precedent, the more modern rule reflected in several other jurisdictions.⁸⁴ This rule allows the opinion of an expert, based on facts not in evidence, to be admitted—not as substantive evidence, but only to show the basis of the expert's opinion. The court retained, however, the traditional distinction between a treating and examining physician.⁸⁵

In *Todd*, without overruling, distinguishing or limiting its prior decision in *Penland*—indeed, without even mentioning this essentially correlative holding—the court returned to the traditional rules.⁸⁶ It is possible to distinguish *Todd* from *Penland* on the ground that in *Penland* the expert related his opinion as to the past symptoms of the plaintiff, whereas in *Todd* the opinion could arguably be said to have been based on the patients' statements of the external cause.⁸⁷ However, if this was the distinction that the court used, "it seems overly technical . . . since it seems highly improbable that the jury failed to comprehend that the opinion testimony as to cause implicitly assumed that plaintiff was involved in the collision (not in dispute)"⁸⁸ It is possible also that the court in *Todd* was reacting to the manner of the statement of opinion by the expert (*i.e.* as a fact). The court may have relied on the rule that expert opinion as to cause invades the province of the jury, if it is stated as a certainty and not in the more constrained "could" or "might" terminology.⁸⁹ However, if this was the rationale behind the decision in *Todd*, it is certainly inconsistent with the holding in *DeGregory*, where the expert's opinion was obviously stated as a fact.⁹⁰ It would, however, be consistent with the expert's opinion in *Bock*,⁹¹ which the court might have considered to be in the objectionable terms of certainty. Nevertheless, it seems highly unlikely that the jury considered the expert's response in *Bock* as fact rather than opinion. Further, such a fine line of distinction can hardly be justified as a rule of exclusion for testimony which can mean the difference between life and death for the defendant.

83. STANSBURY at 143 (Supp. 1976).

84. *Gentry v. Watkins-Carolina Trucking Co.*, 249 S.C. 316, 154 S.E.2d 112 (1967); *Danner v. Chandler*, 205 Okla. 185, 236 P.2d 503 (1951); *Groat v. Walkup Drayage & Warehouse Co.*, 14 Cal. App. 2d 530, 580 P.2d 200 (1936); *Poropat v. Olympic Peninsula Motor Coach Co.*, 163 Wash. 78, 299 P. 979 (1931); *Acme Cement Plaster Co. v. Westman*, 20 Wyo. 143, 122 P. 89 (1912).

85. See STANSBURY § 136.

86. *Todd v. Watts*, 269 N. C. 417, 152 S.E.2d 448 (1967).

87. See STANSBURY § 136; Comment, *Evidence—Expert Testimony—Physician's Opinion Based on Patient's Statements*, 46 N.C.L. REV. 960 (1968).

88. Brandis, *Evidence, Survey of North Carolina Case Law*, 45 N.C.L. REV. 934, 950. See the authorities cited in the Chief Justice's quotation from *Penland*, in his dissent in *Todd*. *Todd v. Watts*, 269 N.C. 417, 422, 152 S.E.2d 448, 452 (1967).

89. See STANSBURY § 137.

90. See note 48 *supra* and accompanying text.

91. See note 74 *supra* and accompanying text.

In *DeGregory*, the court apparently readopted as a controlling precedent the more modern rule of *Penland* (while ignoring its decision in *Todd*) and, at the same time, appeared to abandon the questionable distinction between the treating and examining physician.⁹² Read as a whole, the opinion relied heavily on federal decisions⁹³ and appeared to reflect almost total adoption of the rationale behind the FEDERAL RULES OF EVIDENCE.⁹⁴ In the Advisory Committee's Note on Rule 703, the committee indicated that inadmissible facts or data upon which an expert can base his opinion may be derived from three possible sources—first hand observation, a hypothetical question or data obtained by the expert out of court and other than by his own perception.⁹⁵

In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of experts themselves when not in court. 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 with the 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.⁹⁶ (emphasis added)

The above rationale is apparent throughout most of the opinion in *DeGregory*. Further, the court even appears to sanction opinion testimony as to an ultimate issue (sanity).⁹⁷ Certainly the viability of the use of cross-examination,⁹⁸ to provide the requisite circumstantial guarantees of necessi-

92. See STANSBURY § 136. The FEDERAL RULES OF EVIDENCE, Rule 803 (4), treats statements made for purposes of medical diagnosis or treatment as an exception to the hearsay rule "insofar as reasonably pertinent to diagnosis or treatment." *Id.* at 103.

In the Advisory Committee's Note, it is concluded that:

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field. *Id.* at 110.

93. See note 59, *supra*.

94. See notes 19-22 *supra*.

95. FEDERAL RULES OF EVIDENCE at 81. The rules thereby eliminate the problematical hairline distinction as to when the expert is relying on personal observation and when he is relying on the patient's statements as a basis for his opinion.

96. *Id.* at 81-82. See Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473 (1961).

97. See FEDERAL RULES OF EVIDENCE, Rule 704.

98. *Id.* Rule 705.

ty and trustworthiness, is demonstrated in *DeGregory*—but, it is also demonstrated in *Penland, Todd, and Bock*.

Only at the conclusion of its opinion, and in apparent dictum,⁹⁹ does the court backslide toward the “personal observation” distinction.¹⁰⁰ Certainly this latter distinction falls in the face of the court’s decision in *Bock*; but *DeGregory* was ignored in the *Bock* opinion. Accordingly, the only possible factual distinction between *DeGregory* and *Bock* appears to be the length of the examinations (three hours in the former case compared to over two hours in the latter) and a contradictory, if not totally irreconcilable conclusion regarding “personal observation”. The only other possible distinction between the two decisions is the type of *other information* partially relied upon by the expert as a basis for his opinion—in *Bock*, the medical history taken personally by the expert from the defendant and his relatives (at most, oral hearsay) and in *DeGregory*, the medical record (at most, double hearsay). Clearly the latter distinction would, if valid, favor the inclusion of the testimony in *Bock*, rather than the testimony in *DeGregory*.

IV. CONCLUSION

The chaos and confusion surrounding this area of evidentiary law in North Carolina clearly militates toward the necessity for immediate legislative or judicial resolution of this conflict. As a minimum, there must be judicial reconciliation of the various conflicting decisions. However, it is suggested, in view of the complexity of the existing rules, and the apparent irreconcilable differences inherent in these decisions, that the North Carolina Legislature should take early action to adopt the clear, consistent and modern FEDERAL RULES OF EVIDENCE.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence *to the end that the truth may be ascertained and proceedings justly determined*. FEDERAL RULES OF EVIDENCE, Rule 102. (emphasis added)

Clearly the same rationale which supports the FEDERAL RULES OF EVIDENCE justifies the adoption in North Carolina of evidentiary rules which acknowledge that a competent expert’s reliance on an item of information in forming his opinion may provide an indication of that information’s reliability.¹⁰¹ The legislature should ensure the courts recognize the ability of a competent expert to evaluate information that he receives from others. His general experience, coupled with his investigation into the particular case, presumably gives him sufficient background to question someone effective-

99. See STANSBURY at 143 (Supp. 1976).

100. See note 62 *supra* and accompanying text.

101. Indeed, perhaps the best method of ensuring uniform application of evidentiary rules by the courts, in every case, is through the adoption by the legislature of uniform rules of evidence, using the FEDERAL RULES OF EVIDENCE as a model.

ly on the crucial facts and to properly evaluate the answers. Further, if the adversary doubts the reliability of the answers and desires to challenge the expert's opinion because of the hearsay element it is partially based upon, then he has ample opportunity to cross-examine the expert to determine the care and competence which the expert exercised in his examination or interview and his reasons for relying on the information obtained.

It appears that legal experts refuse to recognize similar expert ability in physicians.

Yet all of the scientific disciplines, including medicine, rest primarily on a foundation of training to establish those facts relevant to the scientific practice that they involve. Thus, a doctor bases his diagnosis of a case first on his general expertise as a physician, including his education in medical school, his internship at a hospital, his continued readings in medical treatises and journals, information gleaned in conversations with other physicians, and practical experience gained as a practitioner. Most of these sources are hearsay, and the validity of the small amount of information that is not based on hearsay—the physician's personal observations—depends on the physician's ability to compare the observations to his past learning. A physician can competently base his opinion on hearsay sources because his mastery of the scientific information allows him to assess the hearsay's validity. That is, in fact, the very basis of his qualification as an expert.

When the physician turns to a particular case he may also receive information from many sources in addition to his own examination. The patient may describe both his present and past symptoms and the manner in which the disease or injury occurred. Similarly, the patient's relatives, friends, other doctors, nurses, medical technicians, laboratory tests, and x-rays may convey information to the physician. *Although the doctor receives all this information, he may not rely on all of it because his medical expertise will direct him to the information that relates to his diagnosis and will provide a frame of reference against which to check that data's reliability. Thus, the physician's general background becomes a part of the diagnosis of a particular case and vests it with nearly the same degree of reliability as other observations comprising his general experience.*

The physician's expertise and his method of diagnosis provide some circumstantial guarantees that the information on which he actually relies in reaching an opinion will be reliable. When the physician testifies, cross-examination can further test the accuracy of that information by establishing his opportunity to evaluate the particular hearsay statement in question and ascertaining whether he in fact subjected the information to critical evaluation.¹⁰² (emphasis added)

102. Comment, *The Physician's Testimony—Hearsay Evidence or Expert Opinion: A Question of Professional Competence*, 53 TEX. L. REV. 296, 316-317 (1975).

In the final analysis, the primary concern must be for early action by at least one of our coordinate branches of government—the legislature or the judiciary. Without a governing statute or clearly controlling precedent, the practicing attorney may well find himself in the somewhat uncommon, and certainly undesirable, position of the defense counsel in *Bock*.¹⁰³ Further, with the probable enactment of a constitutional death penalty in North Carolina¹⁰⁴ in the near future, the need for early legislative or judicial action can hardly be minimized.¹⁰⁵

Pending legislative or judicial resolution of the conflict, attorneys would be well advised to follow the traditional rules of introducing evidence, as enunciated in *Todd*.¹⁰⁶ Caution should dictate a careful review of the case with the expert witness prior to trial.¹⁰⁷ Finally, at trial, all necessary

103. In the alternative, appellant contends that if the testimony of Dr. Smith was properly excluded, but could have been introduced if presented in another manner, then that testimony was of such value and relevance to his defense that failure to properly introduce it amounts to incompetence of counsel. The testimony of Dr. Smith contained matters which the jury should have heard in order to fully and fairly consider the issues at trial. Either the Trial Court erred, or defense counsel did. It is respectfully submitted that, in either event, a new trial is required. Brief for Appellant at 28-29.

104. Durham Morning Herald, Jan. 13, 1977, at 1, Col. 3. Surely a legislature which adopts a constitutional death penalty has a clear mandate to ensure the courts which apply such a penalty are guided by clear, consistent and just rules of evidence.

105. NOW, THEREFORE, in compliance with the law, the judgment of the court pronounced upon Robert Gary Bock, Jr., is:

That the defendant, Robert Gary Bock, Jr., be taken hence by Charles G. Wimberly, High Sheriff of Moore County, North Carolina, and by him delivered into the custody of the warden of the State Prison of North Carolina in the City of Raleigh, North Carolina, to be by said warden safely detained until Friday, the 5th day of April, Nineteen Hundred and Seventy-four, the said warden of the State Prison of North Carolina or, in the case of his death, inability, or absence, a deputy warden of said institution shall, between the hours of ten o'clock A.M. and four o'clock P.M., convey the said Robert Gary Bock, Jr., to the place prepared for execution, and then and there upon the day designated, the 5th day of April, Nineteen Hundred and Seventy-four, between the hours fixed on said day, cause the said Robert Bock, Jr. to inhale lethal gas of sufficient quantity to cause death, and the administration of said lethal gas must be continued until the said Robert Gary Bock, Jr. is dead.

AND MAY GOD HAVE MERCY ON HIS SOUL.

Record at 4-5, *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), modified —U.S. —, 96 S.Ct. 3208 (1976).

106. This is particularly true in view of the motion practice recently adopted in the NORTH CAROLINA CRIMINAL PROCEDURE ACT. N.C. GEN. STAT. § 15A-959 (1975). Section 959 of this Act requires notice of the defense of insanity. Further, the Official Commentary to that section states:

This section covers two overlapping situations. The first relates to an intention to raise the defense of insanity. The second relates to an intention to introduce expert testimony relating to mental disease, defect, or other mental state. A defendant intending to raise the defense of insanity would always wish to come forward with his own expert; however, there may be a number of situations where the defense of insanity itself is not technically raised but expert testimony as to mental state will be introduced to negative the defendant's culpability with respect to some element of the offense. This section would require notice in either situation. The defendant must give the notices required in this section, whether a demand is made by the solicitor or not. *Id.* (emphasis added)

107. See Wecht, *The Medical Witness—What Are The Attorney's Responsibilities*, 10 FORUM 377 (1974-75). With these essential pretrial conferences, the possibility that an expert medical witness will be unable to form an opinion, due to the complexity of a hypothetical question, becomes rather remote.

evidence should be meticulously introduced and carefully incorporated into a properly framed hypothetical question, designed to elicit carefully phrased opinions from witnesses.

JOHN M. METZGER

**North Carolina Eminent Domain-Constitutional
Challenges to Chapter 506 of the North Carolina Session
Laws of 1967: “Quicktake” Condemnation**

INTRODUCTION

The eminent domain law of North Carolina is a complex and often confusing collection of statutes that have been enacted one on top of another with little, if any, consideration for the impact on the existing body of law.¹ This oft-cited critical pronouncement of North Carolina Eminent Domain law sets the stage for the analysis contained herein.

The present array of “granting law,” authorizes more than seventy condemnors to condemn property, and the composite of “procedural law” includes over eighteen separate procedures for effectuating the grant of condemnation authority. Condemnees, attorneys and even judges, often-times evince uncertainty and confusion both about the nature of the authority and the scope of the application of procedures used in exercise of the authority. Pronouncements of the North Carolina Supreme Court may apply to one procedure but not to another, thus inevitable confusion results when courts must interpret different procedures. In turn, the landowner must prepare to defend, if necessary, against the taking of his property amongst a myriad of procedures—some affording greater protection of the owner’s property interests than others.

Inherent in the condemnation process is the conflict between the protection of the owner’s property rights and the public’s need for administrative convenience and expedience. Thus, the proliferation of different procedures is largely a reflection of dissimilar judgments as to what is more important in a specific type of condemnation,² protection of personal property or administrative expedience. When the totality of circumstances indicates that a particular procedure reflects administrative convenience as the prevailing

1. Phay, *The Eminent Domain Procedure of North Carolina: The Need For Legislative Action*, 45 N.C.L. REV. 587 (1967).

2. *Id.* at 589.