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NOTES AND COMMENTS

The Chiropractor in North Carolina: Statutory Expert Witness

INTRODUCTION

One of the most basic of all rules of evidence is that a witness who testifies to a fact capable of being perceived by the senses must have had an opportunity to observe, and must have observed the fact.¹ Furthermore, if the witness is termed a lay witness, any opinions and inferences he or she may have, as formulated from the facts perceived, are inadmissible.² It should be noted, however, that numerous exceptions, or rather distinctions, to the above tenet exist in the case law.³ The reasons for generally disallowing opinions and inferences on the part of lay witnesses appear nearly as varied. It is said that to admit such would invade the province of the jury;⁴ it would be a waste of time if the witness is no better qualified than the jury to form an opinion from the facts;⁵ or, an influential and highly regarded witness may unfairly sway the jurors.⁶

The expert witness vis à vis the lay witness enjoys a more favorable status in the law as regards opinions and inferences.⁷ As noted above regarding lay witnesses, fact and opinion stand in contrast. Opinion evidence is generally inadmissible whenever the witness can relate the facts so that the jury can adequately understand them and the jury is as qualified as the witness to draw inferences and conclusions from the facts.⁸ The syllogism is completed by the conclusion that if either of these conditions is absent, the evidence is admissible.⁹

1. C. MCCORMICK, LAW OF EVIDENCE § 10 (2d ed. 1972). (hereinafter cited as MCCORMICK). See also *Barnett v. Aetna Life Ins. Co.*, 139 F.2d 483 (3d Cir. 1943); *State v. Johnson*, 92 Idaho 533, 447 P.2d 10 (1968).

2. 1 STANSBURY'S NORTH CAROLINA EVIDENCE §§ 122-126 (Brandis Revision, 1973) (hereinafter referred to as STANSBURY). STANSBURY sees the general understanding of the word opinion as "referring to any narrative statement by a witness which does not describe facts directly perceived by his senses in the fullest detail that could reasonably be expected of an average witness and reasonably be understood by an average juror." *Id.* § 122, at 384-85.

3. *Id.* § 122, at 385 n.5.

4. See generally 1 STANSBURY § 126; *Wood v. Ins. Co.*, 243 N.C. 158, 90 S.E.2d 310 (1955); *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962).

5. *Taylor v. Security Co.*, 145 N.C. 383, 59 S.E.2d 139 (1907); 1 STANSBURY § 123, at 386.

6. 7 N.C. L. REV. 320 (1929), and 16 N.C. L. REV. 180 (1938). For arguments in favor of relaxing or even banishing the opinion rule as to laymen see 1 STANSBURY § 126 and MCCORMICK §§ 11-12.

7. MCCORMICK § 13 and citations at n.63.

8. 1 STANSBURY § 124, at 388.

9. *Id.*

The definitive question to be answered as to whether the testimony of an expert is or is not admissible should be, "Is *this witness* better qualified than *this jury* to form an opinion from *these facts*?"¹⁰

Whether a witness qualifies as an expert is mainly a fact question, with the determination ordinarily within the exclusive province of the trial judge.¹¹ Furthermore, case law in North Carolina indicates that it is not difficult to qualify as an expert witness.¹² "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."¹³

Once the trial judge has determined that the witness possesses the requisite skill to be deemed an expert, that finding will not be disturbed on appeal,¹⁴ absent abuse of discretion by the judge,¹⁵ or lack of evidence to support such a finding.¹⁶

The competence of a witness as an expert is not dependent upon which of the learned professions he is a member, but upon his skill in the particular matter at issue.¹⁷ Thus, it would appear that, at least in North Carolina, any witness having skill and experience beyond the ken of the average layman in a particular profession should be tendered and accepted as an expert within the confines of such skill and experience. There is one profession whose members' skills and experiences are notably beyond the knowledge of the average juror and yet, prior to the 1977 Session of the North Carolina General Assembly, such members were not recognized as expert witnesses. The profession is chiropractics, and its professional practitioners are chiropractors.

Prior to the 1977 Session of the North Carolina General Assembly there was no authority, either common law or statutory, for the use of

10. *Id.* § 132, at 425-26. McCORMICK § 13 warrants the use of expert testimony upon the satisfaction of two elements. Initially, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average juror. Second, the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or influence will probably aid the trier in his search for truth.

11. *State v. Combs*, 200 N.C. 671, 158 S.E.2d 252 (1931); *State v. Smith*, 223 N.C. 457, 27 S.E.2d 144 (1943); *State v. Peterson*, 225 N.C. 540, 35 S.E.2d 645 (1945).

12. 1 STANSBURY § 133, at 429 nn. 78-81.

13. *Id.* § 133, at 429. The wide range of subject matter to which expert opinion has been directed in North Carolina disproves the existence of a limitation on expert testimony that such testimony must relate to some trade or pursuit requiring special skill or knowledge. The only question is whether the particular matter under investigation is one on which the witness can be helpful to the jury because of his superior knowledge. 1 STANSBURY § 134 at p. 433 (Citations omitted).

14. *Seawell v. Brame*, 258 N.C. 666, 129 S.E.2d 283 (1963); *State v. Howard*, 274 N.C. 186, 162 S.E.2d 495 (1968).

15. *State v. Moore*, 245 N.C. 158, 95 S.E.2d 548 (1956); *Brixey v. Cameron*, 9 N.C. App. 339, 176 S.E.2d 7 (1970).

16. See note 14 *supra*.

17. *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313 (1942).

chiropractors in personal injury actions as expert witnesses. That was changed by the enactment of North Carolina General Statute § 90-157.2.¹⁸ In fact, the only case which addressed the issue of a chiropractor as an expert witness was a 1971 court of appeals case.¹⁹ In that case, damages were sought for personal injuries allegedly resulting from the defendant's negligent operation of her automobile. A chiropractor was qualified, without objection, to testify as an expert in the field of "chiropractory." The court noted that there was respectable authority to be found holding that a chiropractor is competent to testify in a personal injury action as an expert witness, concerning matters within the scope and profession of chiropractics.²⁰ Notwithstanding such respectable authority, the court held the chiropractor's testimony as to the probable cause of the injury, future pain and suffering, his future prognosis, and the permanence of the injuries sustained by the plaintiff, to be far beyond the limitations of his qualifications as an expert in the field of chiropractics, and ordered a new trial.²¹ Thus, the opinion does not mention either a lack of evidence to support a finding of expertise or an abuse of discretion on the part of the trial judge. It might conceivably be regarded as either.²²

It is easy to imagine the quandary faced by the personal injury lawyer prior to the enactment of North Carolina General Statute § 90-157.2. He could either attempt to tender his chiropractor as an expert witness and risk nonqualification or reversal on appeal, or he could lose valuable testimony of perhaps the only person who has extensively examined the plaintiff. In view of *Allen v. Hinson*,²³ it would not be a particularly envious position to find oneself. The question thus becomes, "Does North Carolina General Statute § 90-157.2 obviate the sort of quandary alluded to?" or, in the alternative, "What will be the ambit of this statutory section in allowing chiropractors to testify as experts?"

GENERAL RULE

It is a general rule that a chiropractor is competent to testify as an expert or medical witness concerning matters within the scope of the

18. N.C. Gen. Stat. § 90-157.2 (1975). Doctor of Chiropractic as expert.—A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law as to etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological, and pathological considerations within the scope of chiropractic.

19. *Allen v. Hinson*, 12 N.C. App. 515, 183 S.E.2d 852 (1971).

20. *Id.* at 516-17, 183 S.E.2d at 853-54.

21. *Id.* at 517-19, 183 S.E.2d at 854-55.

22. 1 STANSBURY § 133, at 430 n.86.

23. See note 19 *supra*.

profession and practice of chiropractics.²⁴ In *Andrade v. Correia*,²⁵ a personal injury action arising out of an automobile accident, the Supreme Judicial Court of Massachusetts held that a chiropractor is not incompetent to give opinion testimony merely because he is a chiropractor and not a doctor of medicine. "A chiropractor may be found by a trial judge to be qualified to give expert testimony within the scope of his experience and the limited scope of the permissible practice of a chiropractor."²⁶

The ambit of the general rule is arguably extended in the case of *Ducote v. Allstate Ins. Co.*,²⁷ a personal injury again arising out of an automobile wreck. In *Ducote*, a chiropractor was permitted to testify as to the plaintiff's injuries. Defendant's objection was that chiropractors are not licensed to practice in the state of Louisiana and accordingly, plaintiff's witness should not be allowed to testify. However, the court held that "the fact that a witness is not licensed to practice under the laws of the jurisdiction is immaterial insofar as it concerns his competence to testify as an expert, which is based upon his specialized training, knowledge and experience."²⁸

In *Line v. Nourie*,²⁹ a case of first impression for the Minnesota Supreme Court, a pedestrian was struck by a motor vehicle. The issue before the court was whether a chiropractor is competent to express an expert opinion in a personal injury action as to the probable effects, duration, or future medical requirements of an injury. The court held that a chiropractor can render opinions based on reasonable chiropractic certainty as to the probable effects, permanence, and future medical requirements of any injury where a proper foundation for such opinions has been laid.³⁰ The *Line* court, while declining to preclude *all* opinion testimony of a chiropractor, couched the issue of a chiropractor's competence to testify as an expert not only in terms of chiropractic certainty, but also in terms of a proper foundation being laid.

The Oklahoma Supreme Court resolved this issue some forty-five years ago in *Inter Ocean Oil Co. v. Marshall*.³¹ The court in *Marshall* noted that there are many manners and methods of treating and healing the human body which might not be strictly termed "medical science," but nevertheless are recognized as scientific methods, rendering their qualified practitioners eligible to testify as expert witnesses within

24. 31 AM. JUR. *Chiropractors* § 107 (1967). See also Annot. 52 A.L.R.2d 1384 (1957) (Citations omitted).

25. 358 Mass. 786, 267 N.E.2d 503 (1971).

26. *Id.* at 787, 267 N.E.2d at 504.

27. 242 So.2d 103 (La. App. 1970).

28. *Id.* at 106.

29. 298 Minn. 269, 215 N.W.2d 52 (1974).

30. *Id.* at 276, 215 N.W.2d at 56.

31. 166 Okla. 118, 26 P.2d 399 (1933).

the scope of their knowledge, according to their qualifications.³² The court went on to hold that when a duly licensed chiropractor is called as an expert witness and establishes his qualifications, he is competent to testify as an expert chiropractic witness.³³

These cases and others from various jurisdictions typify the majority rule that a chiropractor is competent to give opinion testimony within the scope and practice of his profession.³⁴

RESTRICTIVE LANGUAGE

Most of the courts which have addressed the issue of a chiropractor as an expert witness have also inserted language restricting the scope of his testimony. In *Yelloway, Inc. v. Hawkins*,³⁵ a personal injury action arising out of an accident between a bus and a wagon, a chiropractor testified as to the nature and extent of the plaintiff's injuries, and gave an opinion as to the probable duration thereof. However, the chiropractor's testimony was substantially restricted to the parts of the body with which his profession dealt, and to the effects of injuries to such parts upon the general health of the injured person.³⁶

The North Carolina statute regarding chiropractors³⁷ is very specific

32. *Id.* at 123, 26 P.2d at 404.

33. *Id.*

34. See also *Johnston v. Peairs*, 117 Cal.App. 208, 3 P.2d 617 (1931); *Voight v. Indus. Comm'n*, 297 Ill. 109, 130 N.E. 470 (1921); *Lowman v. Kuecker*, 246 Iowa 1227, 71 N.W.2d 586 (1955); *O'Dell v. Barrett*, 163 Md. 342, 163 A. 191 (1932); *Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171 (1956); *Agler v. Schine Theatrical Co.*, 59 Ohio App. 68, 17 N.E.2d 118 (1938); *Carmine v. Tibbets*, 158 Or. 21, 74 P.2d 974 (1937); *Ward v. N. Am. Rayon Corp.*, 211 Tenn. 535, 366 S.W.2d 134 (1963).

35. 38 F.2d 731 (8th Cir. 1930).

36. *Id.* at 735.

37. N.C. GEN. STAT. § 90-143. Definitions of chiropractic; examinations; educational requirements.—Chiropractic is herein defined to be the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body. It shall be the duty of the North Carolina State Board of Chiropractic Examiners (hereinafter referred to as "Board") to examine for license to practice chiropractic every applicant who complies with the following provisions: He shall, before he is admitted to examination, furnish proof of good moral character and satisfy the Board that he has completed two years of prechiropractic college education and received credits for a minimum of 60 semester hours. He shall exhibit a diploma or furnish proof of graduation from a chiropractic college accredited by the Council on Chiropractic Education or holding recognized candidate for accreditation status with the Council on Chiropractic Education or a college teaching chiropractic that, in the Board's opinion, meets the equivalent standards established by the Council on Chiropractic Education, requiring an attendance of not less than four academic years, and supplying such facilities for clinical and scientific instruction, as shall meet the approval of the Board. The examination shall include but not be limited to the following studies: Neurology, chemistry, pathology, anatomy, histology, physiology, embryology, dermatology, diagnosis, microscopy, gynecology, hygiene, eye, ear, nose and throat, orthopody, diagnostic radiology, jurisprudence, palpation, nerve tracing, chiropractic philosophy, theory, teaching and practice of chiropractic.

Provided further, that the said Board may license by reciprocity, upon application, any chiropractor holding a license issued to him by a regular board of chiropractic examiners in another

in its definitions of chiropractics, the licensing examination and educational requirements. Thus, one might assume that with the enactment of North Carolina General Statute § 90-157.2,³⁸ the North Carolina courts will also be restrictive within the dictates of the statutes governing chiropractics and chiropractors.³⁹ The court in *Allen v. Hinson* should have applied the same logic and permitted that portion of the chiropractor's testimony that admittedly was within the scope and practice of chiropractics. A reading of the North Carolina statutes governing chiropractors and chiropractics reveals that the subject is sharply restricted within a relatively confined area.⁴⁰ This should have a bearing on the determination of competency of the witness to give expert opinion evidence. It is primarily a matter of satisfying the trial court that the offered evidence does in fact lie within the scope of chiropractic expertise.⁴¹ The extent of formal chiropractic education, number of years experience, number of patients examined and treated, and the nature of the ailment under consideration are all determinative of the competency of the chiropractor to testify as an expert witness in these areas.⁴²

EXPERT PROGNOSIS

Several courts, and the number is ever increasing, have held that a chiropractor is competent to express his opinion as to the prognosis (probable effects, duration, permanence, future medical requirements) of a personal injury.⁴³ Again, it is essential that his testimony be confined within the areas in which the chiropractor might be qualified as an expert.

In *O'Dell v. Barrett*,⁴⁴ a chiropractor treated the plaintiff, Barrett, for a pelvic and spine injury due to an automobile accident. The chiropractor was allowed to testify that the injury *would* result in curvature of the spine. The doctor had examined Barrett both before and after the accident. The post-accident examination revealed an "exaggerated tilt, and also a rotation of the lower part of the spine, as if some concussional force had twisted her spine out of place."⁴⁵ The court held:

state when said Board is satisfied that such applicant has educational qualifications equal to those prescribed by said Board for admission to practice chiropractic in this State, and upon proof of good and moral character and that he has practiced chiropractic under such license for at least one year. (Cum. Supp. 1977)

38. See note 18 *supra*.

39. N.C. GEN. STAT. §§ 90-143 to 90-157.2 (Cum. Supp. 1977).

40. *Id.*

41. See generally text at nn. 11 to 17.

42. Comment, *The Chiropractor As An Expert Witness?*, 15 MERCER L. REV. 431 (1964).

43. See generally Annot. 52 A.L.R.2d 1384, 1390 (1957) (Citations omitted).

44. 163 Md. 342, 163 A. 191 (1932).

45. *Id.* at 346, 163 A. at 192.

In view of the fact that the state has recognized the qualifications of the chiropractor who testified in this case to treat maladjustments of the spinal column by the method specified, and in view of his long and extensive experience in the field of his licensed practice, we would not feel justified in ruling that the court below was wrong in allowing the witness to describe the probable effect upon the spinal column of a disarrangement of the pelvis, . . . especially when the witness was testifying in reference to conditions which he had personally examined.⁴⁶

In a 1971 Colorado case,⁴⁷ a personal injury action arising from an automobile accident, the defendant alleged that the court erred in allowing a chiropractor to give an opinion as to the permanent disabilities of the plaintiff. The witness had been qualified as a chiropractic expert and his opinion was expressed within the limits of "reasonable chiropractic probability." The court held the testimony admissible, reasoning that the objections raised by the defendant went to the weight to be given the evidence and not its admissibility.⁴⁸

In *Watson v. Ward*,⁴⁹ plaintiff's truck collided with defendant's negligently driven truck. It is interesting to note here that the only medical evidence presented was that of a chiropractor. The defendant objected to the qualification of the chiropractor to testify that the plaintiff's injuries were permanent, and contended that opinions of future disability must be based on reasonable medical probability and not on the opinion of a chiropractor.⁵⁰ The chiropractor diagnosed the plaintiff's injury as that commonly known as whiplash. The *Watson* court, following another Texas case,⁵¹ dismissed the defendant's objection by holding that "It is a general rule that a chiropractor is competent to testify in a personal injury action as an expert or medical witness, concerning matters within the scope of the profession and practice of chiropractic."⁵² The court, however, did note that the chiropractor was not qualified to operate on the human body or write medical prescriptions.⁵³

In view of the court decisions in *Barrett*, *Howell* and *Watson*, as well as numerous others, the personal injury lawyer should not hesitate to use the plaintiff's chiropractor to elicit testimony regarding the probable effects, duration and permanence of the injuries sustained; moreover, there is now very good authority for the use of chiropractic

46. *Id.* at 347, 163 A. at 192.

47. *Howell v. Cussons*, 29 Colo. App. 572, 489 P.2d 1056 (1971).

48. *Id.* at 574, 489 P.2d at 1057. The judge also refused to instruct the jury to the effect that from the plaintiff's failure to call her present treating physician an inference that his testimony would be adverse to her contention may be drawn.

49. 423 S.W.2d 457 (Tex. Civ. App. 1968).

50. *Id.* at 459.

51. *Md. Cas. Co. v. Hill*, 91 S.W.2d 391 (Tex. Civ. App. 1936).

52. 423 S.W.2d at 459 (Tex. Civ. App. 1968). *See also* note 43 *supra*.

53. *Id.*

testimony in establishing the future medical requirements of the plaintiff.⁵⁴

CAUSATION

The weight of authority also indicates that a chiropractor is competent in a personal injury action to express his opinion as to the probable cause of an injury to or the physical condition of the injured person—at least where proper foundation is laid and the matter is within the scope of the profession and practice of chiropractics.⁵⁵

*Glowczwski v. Foster*⁵⁶ involved a personal injury action as a result of a rear-end automobile collision in which the plaintiff suffered whiplash. The defendant objected to a hypothetical question asked of Dr. Wentz, a chiropractor, involving the causal relationship between the collision and the condition in which he found the plaintiff.⁵⁷ The court, in overruling the defendant's objection, noted that "such matters as determining the qualifications of an expert witness rest primarily in the discretion of the trial court."⁵⁸

In *Harder v. Thrift Constr. Co.*,⁵⁹ a trained and licensed chiropractor was allowed to testify as an expert witness in a workman's compensation proceeding regarding matters within the purview of the statute governing the practice of chiropractics and prescribing the qualifications of its practitioners. The plaintiff was injured when a quantity of molten lead struck his right arm, inflicting first and second degree burns. The plaintiff subsequently died of a syphilitic condition. The plaintiff's chiropractor was allowed to testify that such burns can affect the superficial nerves and bring on an irritation of the nervous tract; furthermore, it is entirely possible that the burns which the plaintiff received may have activated a latent syphilitic condition, resulting in the affliction which the plaintiff suffered and his death.⁶⁰

Obviously, medical science has made tremendous advances over the past forty-six years since the *Harder* case. Nevertheless, the *Harder* and *Foster* cases⁶¹ are exemplary of situations in which chiropractors have been permitted to testify as expert witnesses to the causal connection between the accident in question and the injuries of which the plaintiff complains.

54. See notes 44 to 53 *supra*.

55. 31 AM. JUR. 2d *Chiropractors* § 107 (1967); See also Annot. 52 A.L.R.2d 1384, 1389 (1957) (Citations omitted).

56. 359 S.W.2d 406 (Mo. App. 1962).

57. *Id.* at 410-11.

58. *Id.* at 411.

59. 53 S.W.2d 34 (Mo. App. 1932).

60. *Id.* at 37.

61. See note 56 *supra*.

MISCELLANEOUS

There are some situations in which a chiropractor has been allowed to testify as an expert witness even though his formal training did not cover the area of expertise in question. One of these situations involves the use by a chiropractor of x-rays, and the interpretation thereof. In *Gully v. Lowe*,⁶² the plaintiff sued the defendant for personal injuries incurred in an intersectional automobile collision. Dr. Pennell, a recently graduated chiropractor, testified that the study of x-rays was a necessary part of the course of study which he had completed for graduation; that he had made x-rays previous to the one in question; and that the making and interpretation of x-rays was a part of almost every course of treatment.⁶³ The court, in allowing the testimony of Dr. Pennell regarding the taking and interpretation of x-rays, held:

The objections now urged go largely to the weight of the testimony of this witness, a matter primarily for the jury. The fact that x-ray study is not prescribed as a mandatory subject for examination . . . is not determinative; neither is it so prescribed of osteopathy . . . or for the practice of medicine. The question is rather whether the witness has been presumably qualified by the study of a prescribed course or by actual experience in practice.⁶⁴

An early Georgia case⁶⁵ reached the same result by holding:

One who has practiced as an x-ray specialist for fifteen years, and who has made a special study of the anatomy of the human body during that period, may testify to the making of x-ray pictures of certain bones of a particular person, and may give his opinion therefrom as to whether the bones have been injured, *even though the witness is not a graduate of a medical school and has not been licensed to practice medicine.*⁶⁶

Thus, the courts do not, as a general rule, look only to formal instruction regarding the use and interpretation of x-ray photographs; rather, one's x-ray expertise is measured in terms of *either* study of a prescribed course, *or* actual experience in practice.⁶⁷

Finally, it is interesting to note that chiropractors have been determined competent to testify as expert witnesses in actions against physicians and surgeons. In a 1931 North Dakota case,⁶⁸ the defendant, a

62. 314 S.W.2d 232 (Mo. 1958).

63. *Id.* at 238.

64. *Id.* at 238-39. The court also noted by way of analogy that in sundry cases a member of one branch of the healing arts has been permitted to testify as an expert, and more or less in opposition to members of another branch, where his testimony and the issue then involved concerned a matter inherent in the teachings of his school. *Id.* (Citations omitted).

65. *Robertson v. Aetna Life Ins. Co.*, 37 Ga. App. 703, 141 S.E. 504 (1928).

66. *Id.* at 704, 141 S.E. at 505 (emphasis added).

67. *Accord*, *Ness v. Yeomans*, 60 N.D. 368, 234 N.W. 75 (1931).

68. *Ness v. Yeomans*, 60 N.D. 368, 234 N.W. 75 (1931).

physician and surgeon, was charged with malpractice arising from the setting and treatment of a broken arm. Many of the defendant's objections centered around the testimony of L. M. Ellithorpe, a duly and regularly licensed chiropractor. The plaintiff, to prove his case, introduced certain x-ray pictures, some of which were taken by Dr. Ellithorpe. The defendant's theory of objection was that "because the witness was a chiropractor, pursuing a system of treatment for human ills different from that pursued by the defendant, he was not competent to give expert testimony."⁶⁹ The court, in allowing the chiropractor's expert testimony, opined:

The fact that he was a chiropractic [sic] was a mere incident, except so far as it showed his knowledge and study of human anatomy. . . . It is not the school which he follows; but his knowledge, experience, and special training which qualifies the witness to testify as an expert in such cases. A chiropractor may testify as to matters in which he is qualified to speak so long as he is not attempting to testify in regard to a school of treatment separate and distinct from his. . . . The weight given his testimony is for the jury.⁷⁰

In *Wemmett v. Mount*,⁷¹ an action for malpractice against plaintiff's physician, the plaintiff, at the suggestion of his physician, submitted to diathermic treatment by an employee of the plaintiff's physician. Due to the negligence of the physician's employee (she left the room while the machine was operating and forgot about the plaintiff), the plaintiff suffered burns which caused three running sores on plaintiff's abdomen. A chiropractor, Dr. R. C. Ellsworth, testified over the objection of the defendant that he had used a diathermy machine in the treatment of patients. Dr. Ellsworth testified, in effect, that it is not an approved method to leave the patient alone in the room with electrodes of a diathermy machine applied to his body.⁷² In overruling the defendant's objection, the court ruled:

It is the general rule that in a malpractice action a physician or surgeon is entitled to have his treatment of his patients tested by the rules and principles of the school of medicine to which he belongs. . . . However, the rule, which confines the inquiry as to a practitioner's skill and care to the rules and principles of the school of medicine to which he belongs, does not exclude the testimony of physicians of other schools or experts in other lines where such testimony bears on a point as to which the principles of the schools or experts in other lines when such testimony bears on a point as to which the principles of the schools do or should concur, such as the dangers incident to the use of x-rays, or the existence of a condition that should be recognized by any physician.

69. *Id.* at 372, 234 N.W. at 76.

70. *Id.* at 372-73, 234 N.W. at 76-77.

71. 134 Or. 305, 292 P. 93 (1930).

72. *Id.* at 313, 292 P. at 96.

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. . . Where physicians of different schools were practicing in a way common to the different schools or at work in a common field, then their treatment may be tested by a physician of either school.⁷³

Inasmuch as the use of a diathermy machine was a common incident of both the defendant's and the expert witness' practices, the testimony of Dr. Ellsworth was found to be competent as to the issue of negligence.

CONCLUSION

Inasmuch as North Carolina General Statute § 90-157.2 was only recently enacted, its effect on case law has not been felt. Certainly it would behoove the personal injury lawyer in North Carolina to make this statutory section an integral part of his arsenal of trial tactics and procedures. The General Assembly has hopefully eliminated those problems associated with *Allen v. Hinson*,⁷⁴ furthermore, while there is a paucity of case law in North Carolina regarding chiropractors as expert witnesses, a good personal injury lawyer need only look to other jurisdictions to see how different issues have been resolved. Many of these jurisdictions determined these legal questions as much as forty or fifty years ago.

The personal injury lawyer should be prepared to use a chiropractor to establish the causal connection between the accident in question and the injuries of which the plaintiff complains; to establish the extent of injuries; to establish the permanence of injuries; and, to establish future medical requirements, including pain and suffering. Courts in the various jurisdictions are constantly expanding the field of chiropractic testimony. The cases above are by no means exhaustive of the case law construing chiropractors as expert witnesses. Rather, most represent general trends in which the jurisdictions concur.

The law clearly recognizes the chiropractor as a member of the healing arts, albeit in a restricted form. Nevertheless, within that restricted scope and practice of chiropractics the law recognizes the chiropractor as an expert witness. Thus, while the case law interpreting § 90-157.2 of the North Carolina General Statutes has yet to develop, the North Carolina courts will presumably look to other jurisdictions in an effort to resolve the issue(s) at bar, opening a novel and broad area of expert medical testimony.

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73. *Id.* at 313-14, 292 P. at 96.

74. See note 19 *supra*.