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NOTE

Evidence—*State v. Wade*—Expert Testimony and the Dual Reliability Test

The North Carolina Supreme Court has handed down a confusing and often contradictory series of decisions over the last sixty years on the admissibility of expert testimony based in whole or in part on hearsay.¹ The traditional North Carolina rule provided two avenues through which expert testimony could be presented to the jury: an expert could testify to, and base an opinion on, facts within his personal knowledge or observation, or could answer a hypothetical question incorporating relevant facts that had already been entered into evidence.² In the recent case of *State v. Wade*,³ however, the supreme court held that an expert may base his opinion in whole or in part on reliable hearsay and present the otherwise inadmissible foundation to the jury.⁴ Unfortunately, while *Wade* does represent a departure from older case authority, it falls short of obtaining its ostensible objectives⁵ of reconciling the inconsistencies of past cases and of formulating a universally applicable rule on the admissibility of expert opinion testimony.

Defendant Wade confessed to the killing of his wife and two children and was subsequently indicted for first degree murder. In an attempt to prove defendant's insanity, defense counsel called a psychiatric expert to give his opinion on whether defendant could distinguish between right and wrong at the time he committed the crime.⁶ The psychiatrist first testified that he had seen defendant on three occasions after the crime for a total of three hours and had conducted a standard psychiatric examination to determine defendant's mental con-

1. See text accompanying notes 27-78 *infra*.

2. *State v. David*, 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 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.

Id. at 254, 22 S.E.2d at 640. See 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 136, at 445 (Brandis rev. 1973).

3. 296 N.C. 454, 251 S.E.2d 407 (1979).

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

5. See *id.*

6. *Id.* at 456, 251 S.E.2d at 408.

dition.⁷ Defense counsel then asked the psychiatrist what defendant had said during the examinations concerning his state of mind at the time of the crime.⁸ The trial court sustained the prosecution's objection that the question called for hearsay testimony but allowed the expert to read his answer into the record on *voir dire*.⁹ There, the doctor described the five stage diagnostic process he used as well as defendant's responses, and then gave his diagnosis that defendant was paranoid and psychotic, suffering from delusions, hallucinations and persecution complexes.¹⁰ At the conclusion of the *voir dire* testimony, the psychiatrist gave his opinion that defendant did not know the difference between right and wrong at the time he committed the crime.¹¹

When the jury returned, defense counsel attempted to introduce the psychiatrist's opinion on the ultimate issue of insanity. The court finally admitted the expert's opinion but did not allow him to tell the jury that the opinion was based in part on defendant's out-of-court statements.¹² Defendant was subsequently convicted of second degree murder.¹³

On appeal, the North Carolina Supreme Court found error in the trial court's exclusion of the psychiatrist's testimony on the basis for his opinion.¹⁴ The two major issues presented in the appeal were whether an expert psychiatric opinion based in part on hearsay should be admitted, and if so whether the foundation for such an opinion should be admitted.¹⁵ Justice Exum, writing for the court, held¹⁶ that if the hearsay foundation for an opinion is reliable then an expert can testify to the opinion as well as to the facts and data he relied on in forming it.¹⁷

In allowing an expert to base an opinion in part on hearsay state-

7. Record at 34.

8. *Id.* at 35.

9. *Id.* at 37-43.

10. *Id.* at 36.

11. *Id.* at 42.

12. *Id.* at 44-54.

13. *Id.* at 69-70.

14. 296 N.C. at 455-56, 251 S.E.2d at 408.

15. *Id.* at 459, 251 S.E.2d at 410.

16. The court also held that evidence of a history of mental illness in defendant's family is admissible only upon a showing that "(1) there is independent evidence of insanity on the part of the person, (2) the same type of mental disorder is involved, and (3) the mental disorder is hereditary in character." *Id.* at 464, 251 S.E.2d at 413.

17. *Id.* at 462, 251 S.E.2d at 412. The decision rests on earlier cases which are said to support the following two propositions:

(1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not

ments the court recognized the validity of the expert's "expertise".¹⁸ The court found that the dangers in presenting out-of-court statements to jurors are minimized when a witness has been specially trained to interpret such statements for a particular use.¹⁹ In addition, by allowing an expert to base an opinion on facts and data compiled by other experts, the court recognized that the increasing specialization in modern medicine necessitates reliance on information prepared by others.²⁰

Despite its deference to the witness' expertise, the court retained some judicial control by requiring that the hearsay foundation for an opinion be inherently reliable.²¹ The process by which an expert is determined to be qualified creates a presumption of reliability when the expert bases an opinion on facts or data derived by practices normally used in his profession.²² Nonetheless, a second indication of reliability²³ must be gleaned from the circumstances under which the out-of-court statements were made before they will be admitted.

independently admissible into evidence. The opinion, of course, may be based on information gained in both ways.

(2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion.

Id.

18. The witness "was duly qualified as an expert in the field of psychiatry." *Id.* at 456, 251 S.E.2d at 408.

19. *Id.* at 463, 251 S.E.2d at 412. The court noted that defendant was sent to the expert witness as a *patient for treatment*. *Id.* The record suggests that this may not be entirely accurate. Defendant was examined on three separate occasions, once in jail for 45 minutes, and twice while in custody at a mental health clinic, for a total of three hours contact. Record at 34. These examinations were conducted outside of normal therapeutic environments, and the second examination was made at the request of defense counsel. *Id.* at 39.

The *bona fide* patient-physician relationship with an expectation of treatment and cure is assumed to lend reliability to statements made by a defendant to a doctor. This, along with the nature of the entire examination, which was described as a "carefully designed attempt to gain an understanding of defendant's state of mind," were sufficient, according to the court, to insure reliability. 296 N.C. at 463, 251 S.E.2d at 412.

20. 296 N.C. at 461-62, 251 S.E.2d at 411 (citing *Birdsell v. United States*, 346 F.2d 775, 779-80 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965)). Note, however, that there was no evidence that the testifying psychiatrist in *Wade* had relied on information supplied by other experts.

21. *Id.* at 462, 251 S.E.2d at 412. The standards to determine what is inherently reliable must be culled from earlier cases. See authorities cited in notes 27-77 and 80 *supra*.

22. The expert must be better qualified than the jury to form an opinion on the facts presented to him. Thus, reliability here means accuracy and not necessarily trustworthiness, although professional ethics and credibility arguments can enter the qualification proceeding to assure an initial level of trustworthiness. See D. STANSBURY, *supra* note 2, § 132, at 424-28.

23. The term "secondary reliability" was chosen because the court makes two findings. The first is the routine qualification proceeding undertaken by the trial judge. "To be an expert . . . [i]t 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." 1 D. STANSBURY, *supra* note 2, § 133, at 429.

Once so qualified, the expert is then considered in terms of his relationship with the subject

The traditional rule governing the acceptable basis for expert testimony allows opinion founded on personal knowledge or facts presented in a hypothetical question.²⁴ As the scope and content of expert testimony have grown, however, courts have been faced with increasingly difficult evidentiary questions regarding the proper foundation for expert opinion. Deviations from the general rule have often been mandated by the regular reliance of experts in the field on non-conforming sources of information or by the need to admit an opinion that, although formulated under circumstances that are technically violative of the rule, would be useful in the resolution of the issue before the trier of fact.²⁵ In addition, the supreme court has created exceptions to the rule when the circumstances under which an opinion is formed render the opinion sufficiently reliable.²⁶ The court's applica-

matter of his testimony. This examination, also undertaken by the trial judge, is the secondary reliability test. See notes 87-90 *infra*.

24. See authorities cited in note 2 *supra*.

25. North Carolina cases that have focused on the problems of expert testimony based on hearsay have dealt most often with three subjects: the psychiatrist's opinion of a criminal defendant's sanity, the physician's opinion regarding the extent of a patient's disability in a personal injury action, and the appraiser's opinion of the value of real estate in a condemnation proceeding. *E.g.*, *Cogdill v. Highway Comm.*, 279 N.C. 313, 182 S.E.2d 373 (1971) (condemnation proceeding); *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E.2d 432 (1957) (physician's opinion in worker compensation proceeding); *State v. Alexander*, 179 N.C. 759, 103 S.E.383 (1920) (psychiatric opinion).

Psychiatric and other medical professionals rely to a great extent on hearsay sources in their practice. The trial judge in *Wade*, for example, recognized that a psychiatrist's opinion as to the sanity of a defendant necessarily requires conversations with the accused:

[T]he cases which deal with this subject certainly leave something to be desired as far as clarity is concerned. I take the view and I'm going to rule that this witness may give his opinion despite the fact that it is largely based upon statements which were made to him by the defendant. The Court's position being that in no other way I can think of can a psychiatrist go about his business. If he's required to observe objective symptoms and leave out any subjective findings based upon what that man has said, I cannot see how he can perform any useful function so far as the Court is concerned.

Record at 49.

On appeal the North Carolina Supreme Court recognized that conversation between a psychiatrist and a defendant is essential to an understanding by the former of the latter's state of mind:

Conversation, and its interpretation and analysis by a trained professional, is undoubtedly superior to any other method the courts have for gaining access to an allegedly insane defendant's mind. When it is conducted with the professional safeguards present here, it provides a sufficient basis for the introduction of an expert diagnosis into evidence.

296 N.C. at 463, 251 S.E.2d at 412; see also *State v. DeGregory*, 285 N.C. 122, 203 S.E.2d 794 (1974). In *DeGregory*, the court stated that a psychiatrist may base an expert opinion on the defendant's sanity "upon both his own personal examination and other information contained in the patient's official hospital record." *Id.* at 134, 203 S.E.2d at 802.

26. See authorities cited at notes 27-77 *infra*. The traditional explanation for the restriction against admission of hearsay-based expert opinion "seems to be that the jury is asked to accept as evidence the witness' inference, based upon someone's hearsay assertion of a fact which is, pre-

tion of this secondary reliability test has been inconsistent, however, causing confusion and inefficiency at the trial court level.

The 1920 case of *State v. Alexander*²⁷ was the first to employ a secondary reliability test. There, defendant offered psychiatric testimony corroborating his insanity defense to a homicide charge.²⁸ The psychiatrist testified that defendant was insane and that his conclusion was based on conversations he had had with defendant subsequent to the crime.²⁹ Testimony on the substance of these conversations, however, was barred.³⁰ On appeal, the North Carolina Supreme Court upheld the admissibility of the psychiatrist's opinion, despite its partial hearsay foundation in inadmissible conversations with defendant, because defendant's assertion of insanity from before the crime to the time of trial assured the testimony's reliability.³¹ The court reasoned that statements made during examinations subsequent to the crime, and the meaning of these statements, were a reliable indicator of defendant's condition at the time of the crime.³²

sumably, not supported by any evidence at the trial and which therefore the jury has no basis for finding true." C. McCORMICK, LAW OF EVIDENCE § 15, at 34 (2d ed. 1972)

The court in *Wade* responded to this problem with the argument that once an opinion based on inadmissible substantive evidence is admitted "the expert may testify to the information relied on in forming it for the purpose of showing the basis of the opinion." 296 N.C. at 462, 251 S.E.2d at 412.

The demarcation between hearsay and personal knowledge is often very obscure. See C. McCORMICK, *supra* note 26, § 253, at 608-13. The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matters asserted." FED. R. EVID. 801(c). An opinion based on hearsay is theoretically unacceptable because it uses the evidence substantively to form the basis of the testimony without having that foundation subjected to oath or cross-examination.

Several classes of information are considered to be exceptions to the general hearsay exclusion rule. Rule 803 lists twenty four exceptions to the rule when the declarant is available, such as present sense impressions, FED. R. EVID. 803(1), and statements for purposes of medical diagnosis or treatment. FED. R. EVID. 803(4). Rule 804 lists five categories of applicable exceptions when the declarant is unavailable. FED. R. EVID. 804(1)-(5). North Carolina has a more limited set of exceptions that generally apply only when the declarant is unavailable and the declaration is "more than ordinarily trustworthy." 1 D. STANSBURY, *supra* note 2, § 144, at 479. See also *id.* § 144-65, at 478-561.

27. 179 N.C. 759, 103 S.E. 383 (1920).

28. *Id.* at 765, 103 S.E. at 386.

29. *Id.* at 765-66, 103 S.E. at 386-87.

30. *Id.* at 765, 103 S.E. at 386; see *State v. Wade*, 296 N.C. at 459, 251 S.E. 2d at 410 (discussion of the limited appeal in *Alexander*).

31. *Id.* at 766, 103 S.E. at 386.

32. *Id.* (quoting *People v. Nino*, 149 N.Y. 317 (1896)):

The examination of the experts was directed to his mental condition at the time they saw him; and from the conclusion they then reached, and the medical and other facts proved, they would be competent to give, on the trial, an opinion as to his sanity or insanity at the time of the homicide.

Id.

In *Penland v. Coal Co.*,³³ the court identified another element assuring the reliability of a medical opinion derived from a patient's out-of-court statements.³⁴ During plaintiff's hearing for workers' compensation benefits, a medical expert testified that plaintiff sought treatment from him for a persistent chest ailment.³⁵ As part of the diagnostic stage of treatment, plaintiff told the physician about his on-the-job accident.³⁶ Upon finding no other physically observable cause of plaintiff's disability, the doctor concluded that "based on subjective statements made by the claimant" the accident caused plaintiff to lose twenty-five per cent of his ability to perform his job.³⁷ In upholding admission of the doctor's opinion, the supreme court focused on the expert's position as a treating physician, and reasoned that a patient will be deterred from making false or self-serving statements if subsequent treatment is based on the statements.³⁸

Although the *Penland* and *Alexander* courts allowed admission of certain opinions derived from a patient's out-of-court statements, the next series of decisions barred expert opinion based in part on the statements of others. In *Seawell v. Brame*,³⁹ the doctor who had treated plaintiff after an on-the-job accident testified in a workers' compensation hearing that the accident caused plaintiff's ailment.⁴⁰ The doctor explained that this conclusion, from which he charted a course of treatment, was based on conversations with plaintiff as well as with plaintiff's family and a fellow employee.⁴¹ In barring admission of the opinion and its basis, the supreme court found that the third-party communications to the doctor, in which the parties indicated that before the accident plaintiff had never suffered symptoms similar to the ones complained of at the hearing, were not sufficiently reliable to sup-

33. 246 N.C. 26, 97 S.E.2d 432 (1957).

34. *Id.* at 30-31, 97 S.E.2d at 435-36.

35. *Id.* at 29, 97 S.E.2d at 434-35.

36. *Id.* at 29-30, 97 S.E.2d at 435.

37. *Id.*

38. *Id.* at 31, 97 S.E.2d at 436. The court admitted both the physician's opinion and the foundation supporting the diagnosis because the physician had treated plaintiff:

[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 to him 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.

Id.

39. 258 N.C. 666, 129 S.E.2d 283 (1963).

40. *Id.* at 669-70, 129 S.E.2d at 286.

41. *Id.* at 669, 129 S.E.2d at 286.

port the expert's opinion.⁴²

Without mentioning *Penland*, the court reverted to the traditional rule of *State v. David*: "[An expert] 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."⁴³ Although both *Penland* and *Seawell* involved treating physicians, the two cases are distinguishable in that the source of the physician's information in the latter case came in part from parties who did not have a direct stake in assuring proper treatment.⁴⁴

Two years after *Seawell*, in *Ingram v. McCuiston*,⁴⁵ the court barred an expert opinion based on another type of hearsay—the opinion of another expert.⁴⁶ At the trial of a personal injury action, plaintiff's medical expert testified, in response to a hypothetical question, that in his opinion plaintiff was suffering from a permanent physical and neurotic disorder.⁴⁷ The witness had referred plaintiff to a psychiatrist for an assessment of her mental condition.⁴⁸ While the psychiatrist had not yet testified to his diagnosis that plaintiff was suffering an extremely depressive reaction to the accident, the hypothetical assumed as a fact the psychiatric diagnosis.⁴⁹ On appeal the supreme court found the reliance on the diagnosis of the psychiatrist fatal to the admission of the physician's expert opinion. Adopting the rule laid down in a Maryland court of appeals case decided thirty years earlier,⁵⁰ the

42. *Id.* at 671, 129 S.E.2d at 287-88.

43. *Id.* at 671, 129 S.E.2d at 287 (quoting *Spivey v. Newman*, 232 N.C. 281, 284, 59 S.E.2d 844, 847 (1950)).

44. 258 N.C. at 671, 129 S.E.2d at 287-88. Third-party statements made to treating physicians are not considered reliable because the outside parties have no vested interest in getting proper treatment.

45. 261 N.C. 392, 134 S.E.2d 705 (1964).

46. *Id.* at 401, 134 S.E.2d at 711-12.

47. *Id.* at 394-99, 134 S.E.2d at 707-10.

48. *Id.* at 401, 134 S.E.2d at 711.

49. *Id.*

50. Although a medical expert may base his opinion upon the *facts* testified to by another expert, the witness may not have submitted to him, as part of the *facts* to be considered in the formation of his inference and conclusion, the *opinion* of such other expert on all or some of the facts to be considered by the witness from whom the answer is sought. To do so would destroy the premises of fact upon which an expert, by reason of his own peculiar technical skill and knowledge, is permitted to give in evidence his own inference and opinion.

Id. at 401, 134 S.E.2d at 712 (quoting *Quimby v. Greenhawk*, 166 Md. 335, 340, 171 A. 59, 61 (1934) (emphasis added)).

In *Quimby* contradictory opinion testimony as to the mental capacity of testator had already been introduced and formed part of the basis for subsequent opinion on the same issue. The supreme court's adoption of that rule in *McCuiston* is misplaced because the physician had, in his

court held that an expert cannot base his opinion "upon the opinions, inferences, or conclusions of other witnesses . . . unless their testimony is put to him hypothetically as an assumed fact."⁵¹

In *Todd v. Watts*⁵² the court demonstrated even more clearly its confusion over the admissibility of expert testimony based on hearsay. Like *Penland*, *Todd* involved statements made by the patient to the physician.⁵³ The physician who treated plaintiff for injuries resulting from an auto accident testified in a subsequent personal injury action to the permanency and cause of plaintiff's continuing pain.⁵⁴ His conclusions were based in part on conversations he had had with plaintiff during which they discussed specifics of the accident.⁵⁵ On appeal of an award to plaintiff, the supreme court, per Justice Sharp, ignored *Penland*, however, and held that it was error to allow the physician to give his opinion because he "had no personal knowledge that plaintiff was involved in an automobile accident . . . or, if she was, that she sustained any injuries."⁵⁶ In dissent, Chief Justice Parker relied on *Penland* to point out that the testimony was "competent and properly

treatment, relied on the psychiatrist's opinion and, to literally apply the Maryland rule would effectively bar the opinion testimony of a medical expert who relied on the diagnoses of colleagues to aid in his treatment of a patient.

The problem of opinion based on opinion is closely related to that of opinion based on hearsay. Under the rule set forth in *McCuston*, an expert testifying in response to a hypothetical question will never be allowed to rely on the diagnoses of other physicians that are based on the same physical or mental conditions, even though such corroborating opinion formed a basis for subsequent treatment. This rule artificially and unnecessarily distinguishes between the professional routine and the courtroom.

Although this seems to be the majority rule, see C. McCORMICK, *supra* note 26, § 15, at 34-35, n.99, there are several decisions to the contrary, *id.* § 15, at 35 n.2, and the majority rule has been criticized:

If the statements [diagnoses or record of examination by another physician, hospital charts, records of symptoms and treatment] . . . are attested to by the expert as the basis for a judgment upon which he would act in the practice of his profession, it seems that they should ordinarily be a sufficient basis even standing alone for his direct expression of professional opinion on the stand, and this argument is reinforced when the opinion is founded not only upon reports but also in part upon the expert's first hand observation. The data of observation will usually enable the expert to evaluate the reliability of the statement.

Id. § 15, at 36.

51. 261 N.C. at 401, 134 S.E.2d at 712 (citing *State v. David*, 222 N.C. 242, 22 S.E.2d 633 (1942)).

52. 269 N.C. 417, 152 S.E.2d 448 (1967).

53. See D. STANSBURY, *supra* note 2, § 136, at 447 n.71 ("It is possible to distinguish [*Todd*] . . . from *Penland v. Coal Co.* . . . though on highly technical grounds. It is also possible to interpret the *Todd* decision as overruling *Penland*."); Note, *Evidence—Expert Testimony—Physician's Opinion Based on Patient's Statements*, 46 N.C.L. REV. 960 (1968).

54. 269 N.C. at 419-21, 152 S.E.2d at 450-51.

55. *Id.*

56. *Id.* at 420, 152 S.E.2d at 451 (citing *Spivey v. Newman*, 232 N.C. 281, 284, 59 S.E.2d 844, 847 (1950); *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 111 S.E.2d 884 (1960)).

admitted."⁵⁷ In addition, he noted that the majority's decision was impractical "because a doctor customarily relies upon such statements made to him by a patient in the practice of his profession."⁵⁸

The recognition that an expert must be allowed to base an opinion on information derived by practices normally used in his profession led the court, in its 1974 decision in *State v. DeGregory*,⁵⁹ to resurrect the *Penland* rule. *DeGregory* arose from defendant's conviction on a murder charge. Prior to trial the court had confined defendant to a state mental hospital for an assessment of his mental condition.⁶⁰ At trial the state called a psychiatrist who had examined defendant and asked whether he had an opinion on defendant's mental capacity at the time of the crime based on interviews with defendant and facts and data contained in the hospital record.⁶¹ Over defense counsel's objections, the trial court admitted the opinion that defendant was not insane.⁶² On appeal the supreme court affirmed.⁶³ The court, however, carefully avoided mention of *Penland* and instead expanded the interpretation of the personal knowledge rule: "[The traditional rule] 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* . . . an expert has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible."⁶⁴ This ruling, which virtually eliminated the previous North Carolina bar against a hearsay foundation for an expert's opinion,⁶⁵ was completely at odds with Jus-

57. *Id.* at 422, 152 S.E.2d at 452 (Parker, C.J., dissenting).

58. *Id.* at 422-23, 152 S.E.2d at 452. In *Todd*, the court was faced with a fact situation in which the physician was presumptively reliable as a qualified expert in his field and the secondary reliability test seemingly had been met because plaintiff's declarations took place within a *bona fide* patient-physician relationship with an expectation of treatment and cure.

59. 285 N.C. 122, 203 S.E.2d 794 (1974).

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

61. *Id.* at 131, 203 S.E.2d at 800. The expert was asked: "Based upon your own personal examination and interview of Earl 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?" *Id.* (emphasis in original).

62. *Id.* at 130-31, 203 S.E.2d at 799.

63. *Id.* at 135, 203 S.E.2d at 803.

64. *Id.* at 132, 203 S.E.2d at 801 (emphasis in original).

65. See 1 D. STANSBURY, *supra* note 2, § 136, at 447:

Originally . . . a physician was not allowed to express an opinion based upon statements made to him by his patient. It was then apparently held that the opinion of a medical expert is not rendered inadmissible because it is based wholly or in part on the "case history" as related by the patient for the purpose of diagnosis and treatment. But the latest [as of 1973] decision seems, unfortunately, to revert to the former rule, though it may not be wholly definitive.

tice Sharp's refusal in *Todd* to allow a treating physician to assume that an injured patient had been in an auto accident because he had no personal knowledge that such an accident had actually occurred.⁶⁶

In allowing an expert to base an opinion on information compiled by other doctors as well as statements of defendant, the supreme court in *DeGregory* went even further than *Penland* had gone.⁶⁷ The court, however, limited its reasoning to the idea that experts should be able to employ normal medical practices and failed to find any secondary reliability in the hearsay evidence.⁶⁸ Unlike *Penland* there was no doctor-patient relationship with an expectation of treatment and cure to support reliability. Nor was the length of time defendant had asserted insanity or the duration of the expert's examination a factor in the court's decision. In fact, the expert's testimony was based on an examination performed in preparation for testimony at trial.⁶⁹

Id. See also; Annot., 55 A.L.R.3d 551 (1971) (admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital reports).

66. See note 54 *supra*; 1 D. STANSBURY, *supra* note 2, § 136, at 249-50 (Cum. Supp. 1979); Note, *Expert Medical Opinion Evidence in North Carolina: In Search of a Controlling Precedent*, 8 N.C. CENT. L.J. 267, 284-86 (1977).

67. The *DeGregory* court allowed an expert to base his opinion on the patient's statements as well as on hospital records. This extension of the *Penland* rule and its application to non-treating psychiatrists constituted a major expansion of the allowable hearsay bases for expert testimony. Citing *Birdsell v. United States*, 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965), to justify this expansion, the *DeGregory* court stated:

Judge Friendly, writing for the court, first noted that prior decisions had established that opinions as to sanity contained in hospital records are not admissible under the Business Records Act, 28 U.S.C. § 1732, but that such an opinion is admissible in evidence if the expert rendering it is made available for cross-examination.

285 N.C. 122, 133, 203 S.E.2d 794, 802 (1974). But see 1 D. STANSBURY, *supra* note 2, § 136, at 250 n.71 (Cum. Supp. 1979).

68. The reliability problems that have been focused upon by the court in similar situations were seemingly ignored here. *Penland* suggested that opinions of non-treating physicians were unreliable and *McCuiston* seemed to say that opinions based on the diagnoses of colleagues were suspect. In *DeGregory*, these considerations were subsumed in Justice Huskins' expansion of the personal knowledge rule, but that rule was also confused with the idea of allowing hearsay-based opinion if that was the normal professional practice in the expert's field. Applying a rule created for eminent domain proceedings the court stated:

An integral part of an expert's work is to obtain all possible information, data, detail, and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but that 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.

285 N.C. at 133, 203 S.E.2d at 802 (quoting *People v. Gangi Corp.*, 15 Cal. Rptr. 19, 25 (Ct. App. 1961), *rev'd sub nom on other grounds*, 57 Cal.2d 346, 19 Cal. Rptr. 473, 369 P.2d 1 (1962)).

69. 285 N.C. at 122, 203 S.E.2d at 794. The psychiatrist testified for the State as a rebuttal witness to defendant's assertion of insanity: "[D]efendant . . . was admitted under court order for observation and evaluation and spent approximately sixty days in the hospital." *Id.* at 128, 203

In 1975 Chief Justice Sharp took the opportunity presented in a dispute over the admissibility of psychiatric expert testimony in a homicide case to attempt a reconciliation of *Todd* and *Penland* in light of *DeGregory*. In *State v. Block*,⁷⁰ a psychiatrist had examined defendant for two hours in a sheriff's office two days before the commencement of trial in preparation as an expert witness for defendant.⁷¹ At trial, the expert testified on *voir dire* that defendant had told him of a number of incidents from his past, that he had conversed with defendant's family and friends, and that on this basis he believed that the accused was pathologically intoxicated on the night of the murder.⁷² The jury returned, and the trial judge sustained the state's objection to the introduction of the expert's opinion.⁷³

The North Carolina Supreme Court resurrected the *Todd* rule requiring personal knowledge or a properly based hypothetical question,⁷⁴ and cited *Penland* for the proposition that hearsay is a proper basis for an expert medical opinion only when there is "professional treatment . . . with a view of effecting a cure."⁷⁵ Because the psychiatrist's only relationship with defendant in *Bock* was for the purpose of forming an opinion to deliver at trial, the supreme court agreed with the conclusion of the trial court that the psychiatrist's opinion should not be admitted.⁷⁶

The history of the supreme court's efforts prior to *Wade* to resolve the tension between the trustworthiness of information relied on by an expert in his professional routine and the more restrictive reliability

S.E.2d at 799. The expert stated: "Personally, I spent about three hours with [defendant]. . . . My testimony is predicated on the three hours which I spent with [defendant] and upon the information furnished me by members of my staff." *Id.* at 131, 203 S.E.2d at 800-01.

70. 288 NC. 145, 217 S.E.2d 513 (1975), *aff'd in part, vacated in part*, 428 U.S. 903 (1976) (mem.).

71. *Id.* at 153, 217 S.E.2d at 518.

72. *Id.* at 153-54, 217 S.E.2d at 518-19.

73. *Id.* at 154, 217 S.E.2d at 519.

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

75. *Id.*

76. *Id.* The court cited *Penland* approvingly for the proposition that "[t]he opinion of a physician . . . is not ordinarily rendered inadmissible by the fact that it is based wholly or in part on statements made to him by the patient, if those statements are made 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." *Id.* at 163, 217 S.E.2d at 524 (emphasis in original). Finding that "[t]he motive which ordinarily prompts a patient to tell his physician the truth is absent here," the *Bock* court therefore held the psychiatrist's opinion properly excluded. The court, however, ignored *DeGregory* and *McCuiston* and failed to examine other possible bases for meeting the secondary reliability test such as the length of the psychiatrist's exposure to defendant and the length of time that defendant had asserted his insanity.

requirements of the rules of evidence⁷⁷ is one of inconsistency and confusion.⁷⁸ Indeed, prior to *Wade*, Professor Brandis noted: "Since no case has been overruled and no thorough judicial attempt to reconcile these various decisions has been made . . . there is at hand a convenient precedent for the next decision, whatever its tenor may be."⁷⁹ The opinion in *Wade* was ostensibly an attempt to reconcile the discord of past cases and to lay down a rule that could be applied universally to expert opinion.⁸⁰ In fact, the broadest interpretation of *Wade* would permit the admission of an expert opinion based in part on hearsay whenever it meets the standards of the secondary reliability test. The *Wade* court itself, however, seems to have restricted the significance of its decision through its haphazard reliance on prior cases and the ap-

77. Indeed, a balance between the trustworthiness of information that experts normally rely on and the rules of evidence is difficult to achieve, particularly in light of the differing standards of reliability that often exist even within an expert's profession. See McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463 (1977).

But the standards of reliability in any particular field must take into account the special situation in which it arises. A medical doctor making an emergency diagnosis at the scene of an accident will not use the same standards of reliability as he did in the research laboratory he left just before starting home. Trials are supposed to provide an opportunity for calm deliberation, appropriately taking longer to review events than the events themselves may have taken to transpire. The standard of reasonableness that the judge should apply is the judicial one, looking at the expert's field for guidance but not for ultimate decision.

Id. at 486.

78. The various secondary reliability tests which have evolved from past cases do not address the general problem that many experts must rely on hearsay in forming a meaningful opinion regardless of their relationship to the subject matter of the testimony. See Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473 (1962). The subsections of the Rheingold article are an excellent catalogue of the information commonly relied on by medical experts in forming opinions: education, training, and subsequent learning; experience; medical books and periodicals; scientific principles and facts, general medical knowledge, statistical information, and methodologies of tests; personal observation; tests and investigations; body movements; prior acquaintance; second hand knowledge from patients, relatives, lay observers, other doctors, nurses and technicians; results of tests performed or interpreted by others; hospital records; legal sources; observation at trial; prior testimony of witnesses; and hypothetical assumptions.

Even a hurried survey of the various bases indicates that hearsay in one form or another pervades all of medical testimony, just as it pervades the whole medical routine and practice. And by the very exclusion of material deemed hearsay, often as the result of rather legalistic, technical reasoning, much that is of value to the doctor in his practice and to the court in the determination of the medical facts of the case is lost.

Id. at 527. See also 2 J. WIGMORE EVIDENCE § 665(b), at 784-85 (3d ed. 1940); Comment, *The Physician's Testimony—Hearsay Evidence or Expert Opinion: A Question of Professional Competence*, 53 TEX. L. REV. 296 (1975).

No professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths. Hence a reliance on the reported data of fellow scientists, learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men.

2 J. WIGMORE, *supra*, § 665(b), at 784 (emphasis in original).

79. 1 D. STANSBURY, *supra* note 2, § 136, at 250 n.71 (Cum. Supp. 1979).

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

parent limitation of its discussion to the hearsay-based opinion of *medical* experts. Moreover, by failing to expressly overrule any of these prior cases, despite their inconsistency among themselves and with *Wade*, the *Wade* court falls short of eliminating the confusion of the past sixty years.

Perhaps the only rule that can assuredly be gleaned from *Wade* is that a medical expert may base an opinion on conversations with the patient⁸¹ and on the reports of other medical experts⁸² if there is "sufficient indication of the reliability of [the patient's] statements in the nature of [the expert's] entire examination."⁸³ If the expert testifying is a treating physician, then, under the rationale of prior cases,⁸⁴ the patient's statements during the treatment stage are likely to be sufficiently reliable for the expert to base an opinion on them. Because Justice Exum cited *DeGregory* with approval, it is possible that even a non-treating doctor can testify to an opinion based on the patient's statements, particularly if the doctor's examination was thorough.⁸⁵ With the exception of the reports of other medical expert's, however, third-party communications remain an unacceptable basis under the secondary reliability test because the declarants do not have a substantial vested interest in the accuracy of their statements.⁸⁶

81. This portion of the rule is within the facts of *Wade*.

82. The *McCuiston* decision, barring a physician's opinion based on another physician's diagnosis, has apparently been overruled *sub silentio* by the *Wade* court's dictum: "[T]he physician making a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them." 296 N.C. at 461-62, 251 S.E.2d at 411 (quoting *Birdsell v. United States*, 346 F.2d 775, 779-80 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965)). Of course, the information supplied by other experts is subject to the same hearsay requirements to which the opinion of the testifying expert is subject.

83. 296 N.C. at 463, 251 S.E.2d at 412. Justice Exum maintained the traditional rule requiring personal knowledge by expanding the definition of personal knowledge to include a patient's statements and other doctors' reports. 296 N.C. at 461, 251 S.E.2d at 411. He failed to mention, however, *Todd v. Watts*, 269 N.C. 417, 152 S.E.2d 448 (1967), in which Justice Sharp specifically rejected an expansion of the personal knowledge definition. *Id.* at 420-21, 152 S.E.2d at 451.

84. See, e.g., *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E.2d 432 (1957).

85. In *DeGregory*, a nontreating physician was allowed to give an opinion based on defendant's personal statements and information contained in hospital records. Although a person may not necessarily give accurate statements to a doctor who examines him solely in preparation to testify, the doctor may be able to judge the reliability of the statements through a thorough examination and through comparing his opinion with the opinion of other experts.

The *Wade* court referred to *Bock* to support barring testimony of a psychiatrist who had seen defendant only two hours in preparing to testify, 296 N.C. at 460-61, 251 S.E.2d at 411. The only apparent distinction between *DeGregory* and *Bock* is that the examination in *DeGregory* was more encompassing. See 1 D. STANSBURY, *supra* note 2, § 136, at 250 n.71 (Cum. Supp. 1979); Note, *Expert Medical Opinion Evidence in North Carolina: In Search of a Controlling Precedent*, 8 N.C. CENT. L.J. 267, 278-86 (1977).

86. 296 N.C. at 460-61, 251 S.E.2d at 411. The court cited *Seawell* with approval. The court's belief that third party communications are not sufficiently reliable, however, is suspect. A

The range of experts to which the relaxed requirements of *Wade* will apply is also not readily apparent. Although the expert testifying in *Wade* was a psychiatrist, the language in the opinion⁸⁷ and its rationale⁸⁸ suggest that *Wade* extends to other medical experts as well. Whether or not experts outside of the medical field now enjoy the relaxed hearsay requirements of *Wade* is unclear. Perhaps the answer depends on whether the expert must necessarily rely on his client's statements or on information supplied by other experts in his normal professional routine.⁸⁹

The use of the hypothetical question as the preferred means of eliciting expert testimony based on matters outside of the witness's personal knowledge is also in doubt after *Wade*. The *Wade* court held that once an expert opinion is found to meet the secondary reliability test and is, therefore, admissible, the information on which it is based is also admissible.⁹⁰ The hearsay foundation for an expert opinion, regardless of its reliability, cannot technically be included in a hypothetical question, however, because it is not a fact in evidence "or such as the jury will be justified in inferring from the evidence."⁹¹ Therefore, the foundation must be elicited on direct examination subsequent to the expert's testimony on the opinion itself. Whether this means that the hypothetical question in regard to the facts and assumed inferences already in evidence, and the subsequent examination of the expert for the reliable hearsay portion of the basis, will be used in combination to support expert opinion is not clear. It is reasonable to infer from

member of a patient's family, for example, would have the same vested interest that the patient has in making sure that information about the patient given to the physician is accurate enough for the physician to base treatment on it.

87. The court refers in its holding to "a physician." 296 N.C. at 462, 251 S.E.2d at 412.

88. Medical experts other than psychiatrists must rely on their patients' statements as well as opinions of other doctors in their everyday practice.

89. *Wade* provides minimal guidance for the trial judge in his determination of inherent reliability. He is advised to look to the totality of the circumstances surrounding the expert-subject relationship, the specific qualifications of the expert, and the typical practice in the expert's field. In many cases—for example, an economist's opinion on damages in a wrongful death action—he will have no better idea than the average layman as to what is inherently reliable. Perhaps the better rule is to let the opinion in and hope that the qualification process has rid the court of quacks and liars, and that the exposure of the foundation to the jurors is clear enough to allow them to decide for themselves what is reliable.

90. 296 N.C. at 462, 251 S.E.2d at 412.

91. 1 D. STANSBURY, *supra* note 2, § 137, at 452. See C. MCCORMICK, *supra* note 26, § 14, at 31-34; McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 471-74 (1977); Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 522-26 (1962). In fact, because the hearsay foundation for an expert opinion "is not independently admissible into evidence," 296 N.C. at 462, 251 S.E.2d at 412, it could not possibly be introduced into evidence prior to the expert's testimony.

Wade, however, that once an expert's opinion is determined to be admissible under the secondary reliability test, it need not be *preceded* by the examining attorney's elucidation of its basis in the form of the cumbersome hypothetical question. This result is laudable because in practice the hypothetical question has been confusing to both the witness and jury, often leads to opinions not actually intended, is unnecessarily time consuming, and is subject to the abuses of manipulative practitioners.⁹² Its replacement by direct examination of the expert as the tool in presenting the foundation for an expert opinion to the jury will aid the fact-finding process.⁹³

The Federal Rules of Evidence provide much more leeway for the admission of expert opinion than even *Wade's* relaxation of the requirements in North Carolina will permit. The federal trial courts are not asked to apply the secondary reliability test; they instead defer to the presumption of reliability inherent in professional standards of practice.⁹⁴ As a result, the basis for an expert opinion is rarely the reason for its exclusion from evidence.⁹⁵ Under this system the hypothetical question becomes obsolete, except for its obvious tactical ad-

92. See J. WIGMORE, *supra* note 78, § 686, at 812.

The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and futile obstruction.

Id. See generally C. McCORMICK, *supra* note 26, § 16, at 36.

93. The *Wade* court cited *State v. Griffin*, 99 Ariz. 43, 406 P.2d 397 (1965), for the proposition that the jury is entitled to hear the foundation for the psychiatric opinion:

[T]o allow a psychiatrist as an expert witness to answer without any explanation . . . would impart a meaningless conclusion to the jury. The jury must be given an opportunity to evaluate the expert's conclusion by his testimony as to what matters he took into consideration to reach it. Therefore the psychiatrist should be allowed to relate what matters he necessarily considered as a 'case history' not as to indicate the ultimate truth thereof, but as one of the bases for reaching his conclusion, according to accepted medical practice. The court should therefore exercise care in the manner in which such testimony is elicited, so that the jury may understand that the case history does not constitute factual evidence, unless corroborated by other competent evidence.

296 N.C. at 463-64, 251 S.E.2d at 412 (quoting *State v. Griffin*, 99 Ariz. at 49, 406 P.2d at 401).

94. See *United States v. Sims*, 514 F.2d 147 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975).

The rationale in favor of the admissibility of expert testimony based on hearsay is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion. This relates directly to one of the functions of the expert witness, namely to lend his special expertise to the issue before him. In so doing, various experts customarily rely on evidence not independently admissible in the courtroom.

Id. at 149.

95. For a discussion of the reliability requirements used under FED. R. EVID. 703, see note 99 *infra*.

vantages in certain situations, since opinions are no longer inadmissible merely because they are based on hearsay.⁹⁶

Rather than bogging down trials with often unwieldy hypothetical questions or appeal-provoking decisions on secondary reliability, Rule 703⁹⁷ allows the introduction of expert opinion based on the "presentation of data to the expert outside of court and other than by his own perception"⁹⁸ if the foundation for the opinion is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."⁹⁹ In addition, the federal rules do not require that the foundation always be presented to the jury.¹⁰⁰ The rationale of the drafters in extending the scope of expert testimony was that judicial practice should be brought into conformity with the professional standards of experts outside of court.¹⁰¹ As the United States

96. See 11 MOORE'S FEDERAL PRACTICE § 703.10 (2d ed. 1976).

97. FED. R. EVID. 703.

98. FED. R. EVID. 703, Advisory Committee's Note; see 11 MOORE'S FEDERAL PRACTICE § 703.01 (2d ed. 1976).

99. FED. R. EVID. 703. In one sense the Federal Rules do have a secondary reliability test. The trial judge must determine what is reasonably relied on in a particular field. Such determinations, however, are easier to make than those based on the specific secondary reliability test required by *Wade*. The reasoning underlying the Federal Rules is that allowing the expert to base his opinion on hearsay will permit the fact-finding process of the trial to proceed on the same reliability level as the fact-finding process within the expert's profession. As the drafters warn, however, some sources used by "professionals" cannot be admitted as reasonably relied upon. For example, "[t]he language would not warrant admitting in evidence the opinion of an 'accidentologist' as to the point of impact in an automobile collision based on statements of bystanders." *Id.*, Advisory Committee's Note; see McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 483-87 (1977).

100. The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

FED. R. EVID. 705. Under the rule, the trial court can in its discretion require preliminary disclosure of the basis of the expert's opinion through use of a hypothetical question. *Id.*

101. FED. R. EVID. 703, Advisory Committee's Note. See C. McCORMICK, *supra* note 26, § 15; 2 J. WIGMORE, *supra* note 78, § 686, at 812-13. The Rules also specifically allow admission of a patient's declarations to a physician as substantive evidence under an exception to the hearsay rule. FED. R. EVID. 803(4). This exception includes "[s]tatements made for 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." *Id.* Moreover, this exception is not restricted to statements made to the treating physician. See *id.*, Advisory Committee's Note; 11 MOORE'S FEDERAL PRACTICE § 803(4) [5] (2d ed. 1976):

The statements need not be made to a physician. For purposes of the rule, statements to nurses, ambulance drivers, other medical attendants, or even third persons are admissible, so long as they are "reasonably pertinent" to diagnosis or treatment. . . . [S]tatements made *after* diagnosis or treatment would be irrelevant and inadmissible hearsay.

Id. See *id.* § 803(4)[4]; McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 490-92 (1977). The Rules do not further distinguish between statements made to

Court of Appeals for the Ninth Circuit has noted: "Years of experience teach the expert to separate the wheat from the chaff and to use only those sources and kinds of information which are of a type reasonably relied upon by similar experts in arriving at sound opinions on the subject."¹⁰²

The continued resistance to the federal approach in North Carolina is based on a legitimate concern with ensuring the trustworthiness of testimony at trial.¹⁰³ Indeed, under the Federal Rules, some biased and self-serving information may filter through the expert's professional sieve. The cost of excluding some opinions because they fail to satisfy a secondary reliability test, however, is far greater than the benefit that such caution bestows on the fact-finding process.¹⁰⁴ The appli-

a treating physician and to one diagnosing solely in preparation for trial. FED. R. EVID. 803(4). See *id.*, Advisory Committee's Note:

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. . . . [R]ule [803(4)] . . . 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.

102. *United States v. Sims*, 514 F.2d 147, 149 (9th Cir. 1975).

103. Some argue that the standards of the expert's practice are not reliable enough for the courtroom. See note 77 *supra*; Comment, *The Physician's Testimony—Hearing Evidence or Expert Opinion: A Question of Professional Competence*, 53 TEX. L. REV. 296, 321-22 (1975). But see Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 532-34 (1962).

104. This is the general theory behind the approach of the Federal Rules. See note 99 *supra*. Two recent comments, however, have strongly criticized the freedom extended to psychiatrists and psychologists giving opinion testimony under the Federal Rules of Evidence. See Comment, *The Psychologist as Expert Witness: Science in the Courtroom?* 38 MD. L. REV. 539 (1979); Comment, *Hearsay Bases of Psychiatric Opinion Testimony: A Critique of Federal Rule of Evidence 703*, 51 S. CAL. L. REV. 129 (1978).

The latter comment identifies the two potential sources for unreliable hearsay bases as the methodology used to collect and analyze the information and the expert's own biases in collecting and interpreting the data. Psychiatric data, as opposed to physical data, is susceptible to both of these biases. The reliability that the drafters of the Federal Rules of Evidence assumed to exist in a professional's diagnostic process may not bear the same weight in the field of psychiatry.

The nature of the opinion testimony required of the testifying psychiatrist . . . may often preclude the application of the treatment rationale to assess its reliability. Psychiatric opinions rendered in court often are of no use to a psychiatrist in his practice in developing a treatment program for a mentally ill patient.

Id. at 148.

The author makes several suggestions intended to increase the usefulness and reliability of the psychiatric expert's testimony. Courts should make sure that the particular psychiatrist employs the diagnostic method upon which his testimony is based. The trial court must also make some assessment of the methodology used by the psychiatrist and determine if it is appropriate to the situation, accepted in the field and properly implemented. The case study method, which is standard procedure in most psychiatric examinations, is subject to several abuses. There is no objective evidence (e.g., x-rays, blood counts, tests) that can be analyzed by others. The expert must also impart meaning to the subjective behavior and "longitudinal history" of the patient. For all these reasons the comment suggests that the trial court must be more careful in its use of

cation of the dual reliability test in North Carolina, as demonstrated by the line of cases leading up to *Wade*, has been marred by three persistent drawbacks—decisions on the admissibility of opinions turning on minor and insignificant variations in the circumstances surrounding the testimony; an invitation to appeal on previously unaddressed fact situations; and the application of different rules to virtually indistinguishable fact situations. The result is an inconsistent and almost incomprehensible body of law that can only serve to obfuscate the fact-finding process.

A better solution to the problem of ensuring the trustworthiness of expert opinion testimony would be to adopt the deference of the Federal Rules to the expert's professional expertise yet require, as *Wade* does, that the basis for the expert's opinion be exposed to the jury on direct examination.¹⁰⁵ Exposure of the Foundation tends to close the gap between the expert's background and the jury's ignorance by interjecting the practical demand that the testimony meet the common sense standards of jurors.¹⁰⁶ Indeed, jurors are probably as well qualified as

expert psychiatric testimony and its acceptance of the professional safeguards of that profession than of other medical testimony. *Id.* at 154-58. One must ask, however, whether the logistical burden on the court justifies such pre-trial investigation and whether trial court judges have the available resources to make such inquiries.

105. For a general discussion of the relationship between North Carolina rules governing expert medical testimony and the Federal Rules of Evidence, see Comment, *Expert Medical Testimony: Differences Between the North Carolina Rules and Federal Rules of Evidence*, 12 WAKE FOREST L. REV. 833 (1976).

Fourteen states have now adopted rules of evidence with provisions identical or similar to Federal Rules 703 and 705: Arizona, ARIZ. REV. STAT. ANN., R. EVID. 703; Arkansas, ARK. STAT. ANN. § 28-1001 UNIFORM R. EVID. 703; Maine, ME. REV. STAT. ANN., ME. R. EVID. 703; Minnesota, MINN. STAT. ANN., EVID. R. 703; Montana, MONT. REV. CODES ANN. § 93-3002 R. EVID. 703; Nebraska, NEB. REV. STAT. § 27-703; Nevada, NEV. REV. STAT. § 50.285; New Mexico, N.M. STAT. ANN. R. EVID. (1978); North Dakota, N.D. R. EVID., 703; Oklahoma, OKLA. STAT. ANN. tit. 12 § 2703; South Dakota, S.D. R. EVID., § 19-15-3; Washington, WASH. R. EVID.; Wisconsin, WIS. STAT. ANN. § 907.03; and Wyoming, WYO. R. EVID. 703 all adopted rules identical to Federal Rule 703 without change.

Arizona, ARIZ. REV. STAT. ANN., R. EVID. 705; Arkansas, ARK. STAT. ANN. § 28-1001 UNIFORM R. EVID. 705; Michigan, MICH. R. EVID. 705; Minnesota, MINN. STAT. ANN. EVID. R. 705; Montana, MONT. REV. CODES ANN. § 93-3002 R. EVID. 705; North Dakota, N.D. R. EVID. 705; Oklahoma, OKLA. STAT. ANN. tit. 12, § 705; Washington, WASH. R. EVID., 705; and Wyoming, WYO. R. EVID., 705 all adopted rules identical to Federal Rule 705.

Florida, FLA. STAT. ANN., EVID. CODE § 90.705; Maine, ME. REV. STAT. ANN., ME. R. EVID., 705; Nebraska, NEB. STAT. ANN. § 27-705; New Mexico, N.M. STAT. ANN., R. EVID. 705; Nevada, NEV. REV. STAT. §§ 50.315, 50.325, 50.335; and Wisconsin, WIS. STAT. ANN. 907.05, each adopted rules similar to Rule 705.

See 2 J. WIGMORE, *supra* note 78, § 686, at 368 (Supp. 1979); 3 J. WEINSTEIN'S EVIDENCE ¶703 [04], at 239, ¶ 705 [02], at 255 (Cum. Supp. 1979).

106. See 2 J. WIGMORE, *supra* note 78, §§ 672-86; 11 MOORE'S FEDERAL PRACTICE ¶705.10 (2d ed. 1976); C. MCCORMICK, *supra* note 26, § 293, at 692-94.

The task of considering declarations only as an explanation of the basis for an opinion and not as proof of the truth of those declarations is probably beyond the ability and

judges to determine if the circumstances under which an expert opinion is formed render that opinion reliable.

Although *Wade* purports to depart significantly from the traditional rule regarding expert testimony, it is not a solution to the logical inconsistencies that result from use of a dual reliability test. Perhaps the better rule is to allow all opinions derived by normal professional practices, ensure that exposure of the foundation to the jury is clear enough to allow it to determine whether an opinion is reliable, and hope that the qualification process has rid the court of those who would base their professional judgments on biased or self-serving statements.

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inclination of jurors. . . If jurors are to be expected reasonably to decide cases involving medical issues, they must be provided not only with conclusory opinions but with the full explanation for those opinions.

Id. at 694.

