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Evidence -- Expert Testimony -- Physician's Opinion Based on Patient's Statements

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viso,[17] the unique character of custody proceedings,[18] and the lack of a strong foundation for the physician-patient privilege[19] all strongly favor this step. It is in fact necessary to return the "polar star" to its rightful position.[20]

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Evidence—Expert Testimony—Physician's Opinion Based on Patient's Statements

In *Todd v. Watts*,[1] plaintiff sought damages for persistent headaches and backaches allegedly resulting from injuries she had sustained in an automobile collision. Her evidence showed a collision, and that she had been thrown forward, striking her head on the windshield, her knees on the dashboard and wrenching her back. An orthopedic surgeon who had treated plaintiff testified in her behalf. He first related the history of the complaints, as told by the plaintiff on her first visit to him for treatment. This testimony included reference to the accident and a recitation that she told him "she was thrown forward when the collision occurred, striking her head and forehead against the front windshield glass, breaking the glass and abrading her forehead. She told me . . . she also wrenched and contused both knees and her low back."[2] There was no objection to this testimony, although on request of defense counsel its use was limited to corroborating the testimony previously given by the plaintiff.[3] The doctor then was asked to give certain opinions as

[17] The proviso was inserted by the legislature to prevent the privilege from serving as a bar to justice.

[18] As noted above, time may be a controlling factor in this type of litigation. Also, it may be extremely important to the welfare of the child that the initial determination be correct.

[19] *See* Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 Yale L.J. 607 (1943).

[20] The question of whether to remove a child from the custody of its natural mother is one over which judges have agonized from time immemorial. *See In re* Two Mothers, 1 Kings 3:11-28, decided by King Solomon, evidently the first 'reported' case. Klein v. Klein, 204 So. 2d 239 (Fla. Ct. App. 1967), *aff'd per curiam*, 18 L. Ed. 2d 1580 (1967).

[1] 269 N.C. 417, 152 S.E.2d 448 (1967). For a previous discussion of this case, see Brandis, *Evidence, Survey of North Carolina Case Law*, 45 N.C.L. REV. 934, 949-51 (1967) [hereinafter cited as Brandis].

[2] 269 N.C. at 421, 152 S.E.2d at 451-52 (dissenting opinion).

[3] *Id.* at 421, 152 S.E.2d at 451. This seems consistent with North Caro-

to the permanency and cause of plaintiff's continuing pains. Over objection, he was permitted: (1) to give his diagnosis, which included reference to both the accident and the resultant injuries; (2) to answer that, in his opinion, plaintiff would suffer "some continuing lumbo-sacral strain and persistent headaches as a result of her auto accident;" and (3) to answer that a congenital spine defect found in plaintiff could have been aggravated by an injury received in the accident.[4] The jury awarded damages to the plaintiff. The North Carolina Supreme Court awarded a new trial (Chief Justice Parker dissenting), solely because of error in admitting this testimony.

The majority held that allowing the physician to express an opinion based on matter beyond his personal knowledge and not properly grounded upon a hypothetical question was error. The dissenting Chief Justice relied on the earlier case of *Penland v. Bird Coal Company*[5] (which the majority did not mention). That case held a treating physician's opinion to be admissible although based wholly or in part on statements of the patient and allowed the physician to testify to the statements in order to show the basis for his opinion, even when not admissible as substantive evidence.[6] As a result of the majority holding, the viability of the *Penland* rule is open to serious question.

In considering the effect of *Todd* on the *Penland* decision, certain related problems should be distinguished. As a practical matter, a doctor might be called upon to testify to what his patient told him for one of two reasons. First, the testimony might be sought as substantive evidence, i.e., to prove the truth of the matter stated.[7] This is clearly hearsay[8] and, to be admissible, it must fall under

lina's liberal use of the "corroboration" rule to allow testimony otherwise excludable as hearsay. *See, e.g.*, Bowman v. Blankenship, 165 N.C. 519, 81 S.E. 746 (1914). The rule is discussed in D. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE §§ 50-52 (2d ed. 1963) [hereinafter cited as STANSBURY].

[4] 269 N.C. at 419-20, 152 S.E.2d at 450-51.

[5] 246 N.C. 26, 97 S.E.2d 432 (1957).

[6] *Id.* at 31, 97 S.E.2d at 436.

[7] *See, e.g.*, Peterson v. Richfield Plaza, 252 Minn. 215, 89 N.W.2d 712 (1958).

[8] "[W]henever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay." STANSBURY § 138, at 336. See also C. MCCORMICK, LAW OF EVIDENCE § 225 (1954) [hereinafter cited as MCCORMICK].

one of the recognized exceptions to the hearsay rule.[9] Second, the doctor might base his opinion on his patient's statements and repeat the statements only to show the grounds for his opinion.[10] In the former instance, due to a high degree of trustworthiness,[11] most courts allow a witness (physician or layman) to testify to a person's statements of *present pain and suffering* as substantive evidence.[12] Admitting a patient's statements to his treating physician of *past symptoms* seems equally trustworthy,[13] and courts are beginning to adopt this view.[14] If the patient's statements concern the supposed *cause* of his injuries or illness, they are usually not admissible to prove the occurrence of the causal event.[15]

Although some courts fail to recognize it,[16] the hearsay problems

[9] Professor Wigmore described the requirements for allowing hearsay testimony as being (1) necessity, and (2) a circumstantial probability of trustworthiness. 5 J. WIGMORE, EVIDENCE §§ 1421, 1422 (3d ed. 1940) [hereinafter cited as WIGMORE].

[10] *See, e.g.,* Goldstein v. Sklar, 216 A.2d 298 (Me. 1966).

[11] See WIGMORE §§ 1421-22, 1718.

[12] See Biles v. Holmes, 33 N.C. 16 (1850) (statements to physician); Salinas v. Casualty Co. of California, 323 S.W.2d 600 (Tex. Civ. App. 1959) (statements to layman). Many North Carolina cases recognizing this exception to the hearsay rule are collected in Note, 13 N.C.L. REV. 228 (1935).

[13] "A patient has an equal motive to speak the truth; what he has felt in the past is as apt to be important in his treatment as what he feels at the moment." Meaney v. United States, 112 F.2d 538, 540 (2d Cir. 1940) (L. Hand, J.). For obvious reasons, statements of past symptoms to a layman would not be imbued with a similar motive for truth, and thus the hearsay exception as applied to laymen does not extend beyond declarations of present pain and suffering. See WIGMORE § 1722. Note further that the reasons for the hearsay exception are not so readily applicable when the physician is consulted only to qualify him to testify. See note 20 *infra.*

[14] Meaney v. United States, 112 F.2d 538 (2d Cir. 1940); *accord,* Peterson v. Richfield Plaza, 252 Minn. 215, 89 N.W.2d 712 (1958) (overruling prior inconsistent cases). North Carolina has approached, if not adopted, this exception. *See* Moore v. Summers Drug Co., 206 N.C. 711, 175 S.E. 96 (1934), *noted in* 13 N.C.L. REV. 228 (1935).

[15] Roosa v. Loan Co., 132 Mass. 439 (1882); Pinter v. Parsekian, 92 N.J. Super. 392, 223 A.2d 635 (Super. Ct. 1966); WIGMORE § 1722. *But cf.* Hillman v. Utah Power & Light Co., 56 Idaho 67, 51 P.2d 703 (1935); Greenfarb v. Arre, 62 N.J. Super. 420, 163 A.2d 173 (Super. Ct. 1960) (patient deceased, no other testimony as to cause available), *petition for cert. denied,* 33 N.J. 454, 165 A.2d 233 (1960); MCCORMICK § 266.

[16] *See* Paulk v. Thomas, 115 Ga. App. 436, 154 S.E.2d 872 (1967); Schears v. Missouri Pac. R.R., 355 S.W.2d 314 (Mo. 1962); Reid v. Yellow Cab Co., 131 Ore. 27, 279 P. 635 (1929). In *Reid,* a concurring justice pointed out: "The prevailing opinion fails to recognize the distinction between receiving in evidence the communications of a patient to his physician as proof of the truth of the matter stated and admitting them for the purpose of showing the basis of the physician's judgment." *Id.* at 35-36, 279 P. at 638 (discussing the distinction).

set out above are not involved when the treating physician gives his opinion grounded on the patient's subjective statements and relates this history only to show the basis for the opinion.[17] Testimony is not generally objectionable as hearsay if introduced for any reason other than to prove the truth of the matter stated.[18] Absent these hearsay considerations, there seems no logical basis for differentiating between opinions based on patient's statements of present pain and suffering, past symptoms or cause. Courts not applying hearsay rules to physician opinion testimony usually do not make these distinctions.[19] Finally, the above rules which allow admission of patient's statements, either as substantive evidence or as basis for opinion, usually do not extend to statements made by the plaintiff to a *non-treating* physician[20] or to statements made to the treating physician by a third party (rather than the patient).[21] This note is confined to the *Todd* context of statements made by a *patient* to a *treating physician* and referred to by the physician during the trial only as indicating *basis for opinion.*

As pointed out by the dissenting Chief Justice in *Todd,* the general rule is that a treating physician may base his opinion on state-

[17] "In such an instance the patient's statements are not regarded as hearsay; the statements are introduced without regard for the truthfulness of the fact stated, but merely as observed facts forming part of the physician's data." Gonzales v. Hodson, 420 P.2d 813, 816 (Idaho 1966). Instructions that the statements are to be considered only in explanation of the physician's opinion should counteract any tendency of the jury to use the evidence as proof of the facts stated. Goldstein v. Sklar, 216 A.2d 298 (Me. 1966).

[18] STANSBURY § 141.

[19] *See* WIGMORE § 688.

[20] Most courts exclude patient's statements as substantive evidence when the physician was consulted to qualify him to testify, even when the statements are of present pain and suffering. MCCORMICK § 267; WIGMORE § 1721. Distinctions between treating and non-treating physicians also are made when the patient's statements are used only as grounds for the physician's opinion. Troj v. Smith, 199 So. 2d 285 (Fla. 1967) (distinction between treating and diagnosing physician); Rossello v. Friedel, 243 Md. 234, 220 A.2d 537 (1966); Cooper v. Seaboard Airline R.R., 163 N.C. 150, 79 S.E. 418 (1913) (dictum). *Contra,* Waldrop v. Driver-Miller Plumbing & Heating Corp., 61 N.M. 412, 301 P.2d 521 (1956); *see* Ray, *Testimony of Physicians as to Plaintiff's Injuries,* 26 TUL. L. REV. 60, 67-69 (1951).

[21] Seawell v. Brame, 258 N.C. 666, 129 S.E.2d 283 (1962) (opinion based on facts related by patient's wife and others); WIGMORE § 688(4). *But see* State Realty Co. v. Ligon, 218 Ala. 541, 119 So. 672 (1929) (opinion based on report of another doctor); Yellow Cab Co. v. Henderson, 183 Md. 546, 39 A.2d 546 (1944) (doctor's opinion based on history given by injured child's mother). *See generally* Comment, *The Admissibility of Expert Medical Testimony Based in Part Upon Information Received From Third Persons,* 35 S. CAL. L. REV. 193 (1962).

ments made to him by his patient for purposes of treatment[22] and, in doing so, may testify to these statements insofar as they show the grounds for his opinion.[23] Courts adopting this rule have not disapproved the well established device of the hypothetical question as a proper method of extracting opinion testimony.[24] It seems rather that asking the doctor to repeat what he has learned of the case history from his patient and then asking his opinion thereon is a permissible alternative to the hypothetical question method. To be logically consistent with a fundamental concept of expert opinion testimony,[25] it would still seem necessary for the facts contained in the statements to be introduced at some point as substantive evidence, since a jury cannot be expected to evaluate an opinion, whether elicited by a hypothetical question or otherwise, without first being able to determine the validity of its factual basis.[26] Thus it appears that this rule functions much like the hypothetical question. "[T]he only difference is that in the former instance the witness supplies both the premise and the answer, whereas in the latter [opinion based on hypothetical question] he supplies only the one."[27]

Despite the similarity between the two methods of admitting doctors' opinion testimony, the rule allowing a physician to base his opinion on his patient's subjective statements, and in doing so to indicate these statements as his premise, seems a desirable one to maintain. It frees litigants, courts and juries from the mazes

[22] People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944); Brown v. Blauvelt, 152 Conn. 272, 205 A.2d 773 (1964) (dictum); Electro-Motive Div., General Motors Corp. v. Industrial Comm'n, 32 Ill. 2d 35, 203 N.E.2d 408 (1965); State v. Ward, 10 Utah 2d 34, 347 P.2d 865 (1959). Numerous authorities for this rule are cited in 31 Am. Jur. 2d *Expert and Opinion Evidence* § 108 (1967); Annot., 51 A.L.R.2d 1051 (1957); Annot., 65 A.L.R. 1217 (1930).

[23] Lowery v. Jones, 219 Ala. 201, 121 So. 704 (1929); Wise v. Monteros, 93 Ariz. 124, 379 P.2d 116 (1963); Simpson v. Heiderich, 4 Ariz. App. 232, 419 P.2d 362 (1966); Goldstein v. Sklar, 216 A.2d 298 (Me. 1966). *See also* authorities cited note 22 *supra*; WIGMORE §§ 655, 1720(1). Annotations collecting cases on this rule can be found in Annot., 130 A.L.R. 977 (1941); 80 A.L.R. 1527 (1932); 67 A.L.R. 10 (1930).

[24] *See* People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944) (example of use of both devices in same testimony).

[25] *Cf.* WIGMORE § 672.

[26] Peters v. Mutual Life Ins. Co. of New York, 107 F.2d 9 (3d Cir. 1939).

[27] Reid v. Yellow Cab. Co., 131 Ore. 27, 37, 279 P. 635, 638 (1929) (concurring opinion). For example, the doctor might be asked for his opinion "based on these things the patient told you, to which you have testified."

and misuses of the hypothetical question.[28] Since it is in step with the common practices of medical science, there seems no compelling reason to place judicial mistrust on medical opinion based on the same subjective statements the physician frequently must consider for purposes of treatment.[29] North Carolina had clearly adopted this rule in *Penland v. Bird Coal Company*.[30] The *Todd* decision places the future of this rule in confusion and doubt.

The effect of *Todd* on the *Penland* rule is purely conjectural, since the majority chose neither to discuss nor cite the earlier case.[31] There are, however, several possible interpretations. First, it may be argued that *Penland* has been distinguished and limited to its factual context.[32] This possibility stems from the fact that the medical opinions in these cases are grounded on slightly different types of statements by the patients. In *Penland,* a Workmen's Compensation case,[33] plaintiff sought payment for disability suffered from a fall while at work. His physician repeated what the patient had told him—a case history of a broken rib, punctured lung, and subsequent weakness and easy tiring—and gave an opinion as to percentage of disability based on this history. He did not relate the opinion

[28] The hypothetical question is frequently criticized by writers. Professor Wigmore wrote forcefully that "[i]ts abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice." WIGMORE § 686. See also MCCORMICK 33-34 & nn.2 & 3. The North Carolina court recognized the wide dissatisfaction with the hypothetical question in Ingram v. McCuiston, 261 N.C. 392, 399-400, 134 S.E.2d 705, 711 (1964) (dictum) (six page hypothetical question).

[29] *See* WIGMORE § 688. Physicians occasionally take the opportunity to proselytize in court for judicial acceptance of the rule allowing them to base their opinions on the subjective statements of their patients. See Wise v. Monteros, 93 Ariz. 124, 126, 379 P.2d 116, 117 (1963) ("'The history of these cases . . . [is] the only way that a physician can deduce what happened . . . .'"); Paulk v. Thomas, 115 Ga. App. 436, 441, 154 S.E.2d 872, 877 (1967) ("'[S]o I can't come in and start feeling of a man's spine—he's got to tell me something about it. . . .'").

[30] 246 N.C. 26, 31, 97 S.E.2d 432, 436 (1957).

[31] Part of the confusion resulting from *Todd* springs from the very fact that the majority avoided any mention of *Penland.* The earlier case was clearly brought to their attention, both by the dissenting opinion and in the plaintiff's brief. Brief for Appellee at 13.

[32] See Brandis 950.

[33] The rules of evidence in hearings before administrative tribunals seem somewhat less stringently enforced. STANSBURY § 4. Hence it might be argued that the *Todd* majority considered the *Penland* rule valid in a hearing before the Industrial Commission, but not in a jury trial. However, the court in *Penland* gave no indication that the rule was to be so limited. Further, had the *Todd* majority intended to distinguish *Penland* on this basis, it seemingly would have done so expressly.

of disability directly to the fall, but rather to the *past symptoms* of the plaintiff.[34] In *Todd,* however, the opinion dealt with and was based on the patient's statements of external *cause* (accident and initial injuries).[35] Due to the trustworthiness and necessity requirements of exceptions to the hearsay rule, this distinction between statements of past symptoms and statements of external cause is frequently made when the issue is admissibility of the patient's statements as substantive evidence.[36] Even assuming the validity of this distinction, there seems no strong reason for applying it to the question of admissibility of opinion.[37] The problems and policies of the hearsay rule are not involved.[38] To disallow medical opinion based on patient's statements of supposed cause is to divest the doctor of a normal part of his total considerations for purposes of diagnosis and treatment.[39] It simply seems unnecessary and impractical to balance the outcome of litigation on such a tenuous distinction.

Another possible effect of *Todd* is that the *Penland* rule has been abandoned altogether. The *Todd* majority quoted a standard rule regarding the eliciting of a physician's opinion as to cause by hypothetical question[40] and stated that "[a] witness is not permitted to base an opinion on facts of which he has no knowledge,"[41] but that

[34] 246 N.C. 26, 30, 97 S.E.2d 432, 435.

[35] See note 4 *supra* and accompanying text.

[36] *Compare* authorities cited note 14 *supra with* authorities cited note 15 *supra.*

[37] See note 19 *supra* and accompanying text. Express efforts to exclude medical opinion testimony as to cause when based on patient's history of the case, including statements of supposed cause, have been rejected by many courts. Atchison, T. & S.F. Ry. v. Preston, 257 F.2d 933 (10th Cir. 1959); North American Acc. Ins. Co. v. Burkett, 281 P.2d 434 (Okla. 1956). See also WIGMORE § 688(3); Annot., 66 A.L.R.2d 1082, 1100-04 (1959); Annot., 136 A.L.R. 965, 980-82 (1942).

[38] Cases cited note 17 *supra.*

[39] WIGMORE § 688(3). Even when a physician would not need to consider possible causes for purposes of diagnosing or treating his patient, there would seem no need to exclude his opinion based on his patient's statements of supposed cause.

[40] "'It is well settled in the law of evidence that a physician or surgeon may express his opinion as to the cause of the physical condition of a person if his opinion is based either upon facts within his personal knowledge, or upon an assumed state of facts supported by evidence and recited in a hypothetical question.'" 269 N.C. 420, 154 S.E.2d 451, quoting from Spivey v. Newman, 232 N.C. 281, 284, 59 S.E.2d 844, 847 (1950). The court in *Spivey* was dealing with the form of a hypothetical question and the physician's answer. The holding does not appear to address itself to an issue such as the one in *Todd.*

[41] 269 N.C. 420, 152 S.E.2d 451. Authority for this proposition came

"this . . . is what the doctor purported to do. . . . The doctor could not assume the source of the symptoms which plaintiff reported to him. . . ."[42] The court further stated that "[t]he Physician's opinion as to possible cause of these symptoms and their probable permanency, should have been elicited as the response to a properly phrased hypothetical question. . . ."[43] The references to "cause" and "source" in this language lend weight to the aforementioned possibility that *Todd* was meant to limit the *Penland* rule to opinions utilizing patient's statements of past symptoms. Considered together, however, the court's observations permit an even broader interpretation: that in no event will a physician's opinion, if not based on matter within his personal knowledge, be admissible unless elicited by a hypothetical question. To grant such exclusive status to the hypothetical question would in effect do away with the *Penland* rule.

Any final analysis of *Todd* must depend at least partly on the reasons for the ruling in that case itself. A main objection of the court in *Todd* to the physician's opinion seems to have been the manner in which it was stated. As phrased by the majority, although the physician had no personal knowledge of the plaintiff's accident or initial injuries, "Yet he stated as a fact . . ." that she had low back injuries and pain and that certain results occurred in or were caused by her automobile accident.[44] The court stated that "Whether plaintiff had persistent headaches and continuous backaches and if so, whether the collision caused them, were crucial questions in the case."[45] This language is reminiscent of the rule that expert opinion as to cause "invades the province of the jury" if stated in terms more definite than "could" or "might."[46] The rule has been applied in cases where improperly phrased hypothetical questions called forth medical opinions as to cause in terms of certainty analogous to the situation in *Todd*.[47] Although severely criticized by many courts

from Robbins v. Meyers Trading Post, Inc., 251 N.C. 663, 111 S.E.2d 884 (1959), in which a witness was erroneously allowed to give his opinion as to the probable value of a house had it been constructed "exactly like" another home, the witness having never seen the other house. Any relation between this case and the question of admissibility of a physician's opinion based on his patient's statements is tenuous, at best.

[42] 269 N.C. at 420-21, 152 S.E.2d at 451.

[43] *Id.*

[44] 269 N.C. 420, 152 S.E.2d 451.

[45] *Id.* at 421, 152 S.E.2d at 451.

[46] See STANSBURY § 137, at 332-33.

[47] Stathopoulos v. Shook, 251 N.C. 33, 110 S.E.2d 452 (1959) (injuries

and writers[48] and frequently avoided by technical distinctions,[49] this "could" or "might" rule has never been repudiated by the North Carolina Court.[50] The majority in *Todd* may have had this concept in mind. If so, the ruling in the case was possibly intended to prevent prospectively similar errors in opinion testimony as to cause, since by definition a "properly phrased hypothetical question" must state the grounds for the opinion as assumptions and elicit that opinion in the proper "might" or "could" incantation.[51] If this was the rationale behind the *Todd* decision, it is arguable that the holding should be limited in future application to those situations where the physician's opinion as to *cause* is sought. Even then use of the *Penland* rule should be allowed unless the opinion is stated in the objectionable terms of certainty.[52] This construction of *Todd* would leave the *Penland* rule as a functioning alternative to the rigors of the hypothetical question. It would also permit complete restoration of the *Penland* rule if the "could" or "might" rule is ever abandoned.[53]

It seems that a new trial was awarded in *Todd*—and a practical evidentiary rule jeopardized to an undeterminable degree—because the plaintiff found herself on the wrong side of an exceedingly fine line. It is highly unlikely, in light of all the surgeon's testimony,[54] that the jury considered the part held erroneous as "fact" rather than opinion as to cause based on certain implicit assumptions.[55]

"were caused by the collision"); Patrick v. Treadwell, 222 N.C. 1, 21 S.E.2d 818 (1912).

[48] *E.g.*, Griswold v. Consolidated Prod. Co., 232 Iowa 328, 5 N.W.2d 646 (1942). *Griswold* collects, quotes and discusses both text and case authority in a lengthy opinion criticizing the "invading the province of the jury" and "could" or "might" rules.

[49] STANSBURY § 137 at 333 & n.67.

[50] The rule has in fact been reiterated in recent decisions. Apel v. Queen City Coach Co., 267 N.C. 25, 147 S.E.2d 566 (1966) (Higgins, J., quoting but indicating dissatisfaction with the rule); Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964), *noted in* 43 N.C.L. REV. 979 (1965).

[51] STANSBURY § 137.

[52] So long as the "could" or "might" rule remains functional, attorneys would be wise to instruct their physician-witnesses to avoid stating opinions as to cause in any terms other than the approved formula, even if the opinion is to be elicited by the hypothetical question method.

[53] Since the court has indicated dissatisfaction with the rule, Apel v. Queen City Coach Co., 267 N.C. 25, 147 S.E.2d 566 (1966), its abandonment hopefully is in the near future.

[54] See note 2 *supra* and accompanying text.

[55] It is further relevant to the technicality of the decision that these implicit assumptions were largely uncontradicted. See Brandis 950-51.

"If any error was involved, it seems hardly prejudicial enough, standing alone, to justify a new trial, at which the questions will explicitly state the assumptions clearly implicit in the testimony at the first trial."[56]

Pending judicial exposition of the scope of *Todd's* effect on the *Penland* rule, attorneys should follow the *Todd* formula of introducing evidence and having it incorporated into a hypothetical question designed to elicit carefully phrased opinions of their physician-witnesses. Caution is advised, for *Todd's* undermining of *Penland* and its spiritual affinity with criticized evidence concepts[57] may wipe out verdicts presumptively grounded on medical testimony which, though uniformly acceptable outside of court, is not twisted into phrases suitable for the strangely dissimilar ears of jurymen.

RICHARD W. ELLIS

Evidence—Traffic Violations to Impeach a Witness

Although counsel may coach his witness to "assume a virtue, if you have it not,"[1] with the witness having a criminal record, it may be of little avail. Courts have assumed that such a witness does not have virtue and have not hesitated to allow questions about prior criminal convictions for impeachment purposes,[2] "to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case."[3]

In the recent case of *Ingle v. Roy Stone Transfer Corporation*,[4] the North Carolina Supreme Court held that it was not error for the trial judge to allow defense counsel on cross examination to question plaintiff's witness concerning the following convictions: speeding 65 miles per hour in a 55 miles per hour zone, exceeding a safe speed, drunken driving, operating a motor vehicle while his

[56] *Id.* at 951.

[57] See note 28 *supra* (hypothetical question); note 48 *supra* ("could" or "might" rule).

[1] Shakespeare, *Hamlet* (III iv 160); *see* Bander, *Shakespeare and the Law*, CASE & COMMENT, Jan.-Feb. 1968 at 47.

[2] 3 J. WIGMORE, EVIDENCE § 926 (3d ed. 1940) [hereinafter cited as WIGMORE].

[3] State v Nelson, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930).

[4] 271 N.C. 276, 156 S.E.2d 265 (1967).