CHAPTER 907

EVIDENCE — OPINIONS AND EXPERT TESTIMONY

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

907.01 Opinion testimony by lay witnesses. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:

(1) Rationally based on the perception of the witness.

(2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

(3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02 (1).

History: Sup. Ct. Order, 59 Wis. 2d R1, R205 (1973); 1991 a. 32; 2011 a. 2.

When a victim admitted injecting heroin about 72 hours before testifying, the trial court properly denied the defendant's request that the witness display his arm in the presence of the jury in an attempt to prove that the injection was more recent. Edwards v. State, 49 Wis. 2d 105, 181 N.W.2d 383 (1970).

An attorney, not qualified as an expert, could testify regarding negotiations in which he was an actor, including expressing opinions about the transaction, but could not testify as to what a reasonably competent attorney would or should do in similar circumstances. Hennig v. Ahearn, 230 Wis. 2d 149, 601 N.W.2d 14 (Ct. App. 1999), 98−2319.

Using Lay Opinion Evidence at Trial. Coaty. Wis. Law. May 2009.

907.02 Testimony by experts. (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

(2) Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.

History: Sup. Ct. Order, 59 Wis. 2d R1, R206 (1973); 2011 a. 2.

A chemist testifying as to the alcohol content of blood may not testify as to the physiological effect that the alcohol would have on the defendant. State v. Bailey, 54 Wis. 2d 679, 196 N.W.2d 664 (1972).

The trial court abused its discretion in ordering the defendant to make its expert available for adverse examination because the agreement was for the exchange of expert reports only and did not include adverse examination of the expert retained by the defendant. Broaster Co. v. Waukesha Foundry Co. 65 Wis. 2d 468, 222 N.W.2d 920 (1974).

In a personal injury action, the court did not err in permitting a psychologist specializing in behavioral disorders to refute a physician's medical diagnosis when the specialist was a qualified expert. Qualification of an expert is a matter of experience, not licensure. Karl v. Employers Insurance of Wausau, 78 Wis. 2d 284, 254 N.W.2d 255 (1977).

The standard of nonmedical, administrative, ministerial, or routine care in a hospital need not be established by expert testimony. Any claim against a hospital based on negligent lack of supervision requires expert testimony. Payne v. Milwaukee Sanitarium Foundation, Inc. 81 Wis. 2d 264, 260 N.W.2d 386.

In the absence of some additional expert testimony to support the loss, a jury may not infer permanent loss of earning capacity from evidence of permanent injury. Koele v. Radue, 81 Wis. 2d 583, 260 N.W.2d 766 (1978).

Res ipsa loquitur instructions may be grounded on expert testimony in a medical malpractice case. Kelly v. Hartford Cas. Ins. Co. 86 Wis. 2d 129, 271 N.W.2d 676 (1978).

A hypothetical question may be based on facts not yet in evidence. Novitzke v. State, 92 Wis. 2d 302, 284 N.W.2d 904 (1979).

It was not error to allow psychiatric testimony regarding factors that could influence eye witness identification, but to not allow testimony regrading the application of those factors to the facts of the case. Hampton v. State, 92 Wis. 2d 450, 285 N.W.2d 868 (1979).

A psychiatric witness, whose qualifications as an expert were conceded, had no scientific knowledge on which to base an opinion as to the accused's lack of specific intent to kill. State v. Dalton, 98 Wis. 2d 725, 298 N.W.2d 398 (Ct. App. 1980).

Medical records as explained to the jury by a medical student were sufficient to support a conviction; the confrontation right was not denied. Hagenkord v. State, 100 Wis. 2d 452, 302 N.W.2d 421 (1981).

Polygraph evidence is inadmissible in any criminal proceeding. State v. Dean, 103 Wis. 2d 228, 307 N.W.2d 628 (1981).

Guidelines for admission of testimony by hypnotized witnesses are stated. State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

Expert testimony regarding fingernail comparisons for identification purposes was admissible. State v. Shaw, 124 Wis. 2d 363, 369 N.W.2d 772 (Ct. App. 1985).

Bite mark evidence presented by experts in forensic odontology was admissible. State v. Stinson, 134 Wis. 2d 224, 397 N.W.2d 136 (Ct. App. 1986).

An expert may give opinion testimony regarding the consistency of the complainant's behavior with that of victims of the same type of crime only if the testimony will assist the fact−finder in understanding evidence or determining a fact, but the expert is prohibited from testifying about the complainant's truthfulness. State v. Jensen, 147 Wis. 2d 240, 432 N.W.2d 913 (1988).

Experience, as well as technical and academic training, is the proper basis for giving expert opinion. State v. Hollingsworth, 160 Wis. 2d 883, 467 N.W.2d 555 (Ct. App. 1991).

If the state seeks to introduce testimony of experts who have personally examined a sexual assault victim that the victim's behavior is consistent with other victims, a defendant may request an examination of the victim by its own expert. State v. Maday, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993). See also State v. Schaller, 199 Wis. 2d 23, 544 N.W.2d 247 (Ct. App. 1995), 94−1216.

Expert opinion regarding victim recantation in domestic abuse cases is permissible. State v. Bednarz, 179 Wis. 2d 460, 507 N.W.2d 168 (Ct. App. 1993).

When the state inferred that a complainant sought psychological treatment as the result of a sexual assault by the defendant, but did not offer the psychological records or opinions of the therapist as evidence, it was not improper for the court to deny the defendant access to the records after determining that the records contained nothing material to the fairness of the trial. State v. Mainiero, 189 Wis. 2d 80, 525 N.W.2d 304 (Ct. App. 1994).

An expert may give an opinion about whether a person's behavior and characteristics are consistent with battered woman's syndrome, but may not give an opinion on whether the person had a reasonable belief of being in danger at the time of a particular incident. State v. Richardson, 189 Wis. 2d 418, 525 N.W.2d 378 (Ct. App. 1994).

Expert testimony is necessary to establish the point of impact of an automobile accident. Wester v. Bruggink, 190 Wis. 2d 308, 527 N.W.2d 373 (Ct. App. 1994).

Scientific evidence is admissible, regardless of underlying scientific principles, if it is relevant, the witness is qualified as an expert, and the evidence will assist the trier of fact. State v. Peters, 192 Wis. 2d 674, 534 N.W.2d 867 (Ct. App. 1995).

An indigent may be entitled to have the court compel the attendance of an expert witness. It may be error to deny a request for an expert to testify on the issue of suggestive interview techniques used with a young child witness if there is a "particularized need" for the expert. State v. Kirschbaum, 195 Wis. 2d 11, 535 N.W.2d 462 (Ct. App. 1995), 94−0899.

Items related to drug dealing, including gang−related items, is a subject of specialized knowledge and a proper topic for testimony by qualified narcotics officers. State v. Brewer, 195 Wis. 2d 295, 536 N.W.2d 406 (Ct. App. 1995), 94−1477.

Generally expert evidence of personality dysfunction is irrelevant to the issue of intent in a criminal trial, although it might be admissible in very limited circumstances. State v. Morgan, 195 Wis. 2d 388, 536 N.W.2d 425 (Ct. App. 1995), 93−2611.

As with still photographers, a video photographer's testimony that a videotape accurately portrays what the photographer saw is sufficient foundation for admission of the video tape, and expert testimony is not required. State v. Peterson, 222 Wis. 2d 449, 588 N.W.2d 84 (Ct. App. 1998), 97−3737.

It was error to exclude as irrelevant a psychologist's testimony that the defendant did not show any evidence of having a sexual disorder and that absent a sexual disorder a person is unlikely to molest a child because the psychologist could not say that the absence of a sexual disorder made it impossible for the defendant to have committed the alleged act. State v. Richard A.P. 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998), 97−2737. Reasoning adopted, State v. Davis, 2002 WI 75, 254 Wis. 2d 1, 645 N.W.2d 913, 00−2916.

When the issue is whether expert testimony may be admitted, and not whether it is required, a court should normally receive the expert testimony if the requisite conditions have been met and the testimony will assist the trier of fact. State v. Watson, 227 Wis. 2d 167, 595 N.W.2d 403 (1999), 95−1067.

A witness's own testimony may limit the witness's qualifications. A witness who disavowed being qualified to testify regarding the safety of a product was disqualified to testify as an expert on the product's safety. Green v. Smith & Nephew APH, Inc. 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727, 98−2162.

If the state is to introduce *Jensen* evidence through a psychological expert who has become familiar with the complainant through ongoing treatment, or through an intensive interview or examination focused on the alleged sexual assault, the defendant must have the opportunity to show a need to meet that evidence through a psychological expert of its own as required by *Maday.* State v. Rizzo, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93, 99−3266.

A determination of whether the state "retains" an expert for purposes of *Maday* cannot stand or fall on whether or how it has compensated its expert. An expert's status as the complainant's treating therapist does not preclude that expert from being "retained" by the state for purposes of *Maday.* State v. Rizzo, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93, 99−3266.

For a defendant to establish a constitutional right to the admissibility of proffered expert testimony, the defendant must satisfy a two−part inquiry determining whether the evidence is clearly central to the defense and the exclusion of the evidence is arbitrary and disproportionate to the purpose of the rule of exclusion, so that exclusion undermines fundamental elements of the defendant's defense. State v. St. George, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 277, 00−2830.

When an expert was permitted to testify in a sexual assault case about common characteristics of sexual assault victims and the consistency of those characteristics with those of the victim at trial, a standing objection to the expert's testifying was insufficient to preserve specific errors resulting from the testimony. State v. Delgado, 2002 WI App 38, 250 Wis. 2d 689, 641 N.W.2d 490, 01−0347.

An expert's specious claims about his credentials did not render his testimony incredible or render him unqualified as a matter of law. To hold testimony incredible requires that the expert's testimony be in conflict with the uniform course of nature or with fully established or conceded facts. Questions of reliability are left for the trier of fact. Ricco v. Riva, 2003 WI App 182, 266 Wis. 2d 696, 669 N.W.2d 193, 02−2621.

Field sobriety tests are not scientific tests. They are merely observational tools that law enforcement officers commonly use to assist them in discerning various indicia of intoxication, the perception of which is necessarily subjective. The procedures an officer employs in determining probable cause for intoxication go to the weight of the evidence, not its admissibility. City of West Bend v. Wilkens, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324, 04−1871.

The United States Supreme Court and Wisconsin Supreme Court have recognized that, although it is not easy to predict future behavior and psychiatrists and psychologists are not infallible, they can opine about future behavior. Brown County v. Shannon R. 2005 WI 160, 286 Wis. 2d 278, 706 N.W.2d 269, 04−1305.

The fact that the witness was a forensic scientist did not preclude her from forming an expert opinion about the accuracy of a desk reference based on experience. The forensic scientist properly used the *Physician's Desk Reference* to presumptively determine the identity of suspected Oxycontin. The result of this presumptive test was supported both by a confirmatory test and other circumstantial evidence. State v. Stank, 2005 WI App 236, 288 Wis. 2d 414, 708 N.W.2d 43, 04−1162.

There is no presumption of the admissibility of expert eyewitness testimony in cases involving eyewitness identification. State v. Shomberg, 2006 WI 9 288 Wis. 2d 1, 709 N.W.2d 370, 04−0630.

No expert should be permitted to give an opinion that another mentally and physically competent witness is telling the truth. An opinion that a complainant was sexually assaulted or is telling the truth is impermissible. In asserting that because the complainant was not highly sophisticated she would not have been able to maintain consistency throughout her interview unless it was something that she experienced, a witness testified that the complainant had to have experienced the alleged contact with defendant. The testimony was tantamount to an opinion that the complainant was telling the truth. State v. Krueger, 2008 WI App 162, 314 Wis. 2d 605, 762 N.W.2d 114, 07−2064.

Expert testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. A suggested test for deciding when experts may be used is whether the untrained layperson would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject. The proper standard is helpfulness, not absolute necessity. State v. Swope, 2008 WI App 175, 315 Wis. 2d 120, 762 N.W.2d 725, 07−1785.

Whether a witness is qualified to give an opinion depends upon whether he or she has superior knowledge in the area in which the precise question lies. State v. Swope, 2008 WI App 175, 315 Wis. 2d 120, 762 N.W.2d 725, 07−1785.

Expert testimony is not generally required to prove a party's negligence, and requiring expert testimony before a claim can get to the jury is an extraordinary step that should be ordered only when unusually complex or esoteric issues are before the jury. This principal applies equally to a breach of contract action because it is a general rule that expert testimony is not necessary when the issue is within the realm of the ordinary experience of the average juror. Racine County v. Oracular Milwaukee, Inc., 2009 WI App 58, 317 Wis. 2d 790, 767 N.W.2d 280, 07−2861. Affirmed. 2010 WI 25, 323 Wis. 2d 682, 781 N.W.2d 88, 07−2861.

In an OWI prosecution, even if a defendant establishes a constitutional right to present an expert opinion that is based in part on portable breath test results, applying the *St. George* test, the right to do so is outweighed by the state's compelling interest to exclude that evidence. Permitting the use of that evidence as the basis for an expert opinion would render meaningless the legislature's forbidding of that evidence in OWI prosecutions under s. 343.303, an act that promotes efficient investigations of suspected drunk driving incidents and furthers the state's compelling interest in public safety on its roads. State v. Fischer, 2010 WI 6, 322 Wis. 2d 265, 778 N.W.2d 629, 07−1898.

An electronic monitoring device (EMD) report did not present an issue that is particularly complex or unusually esoteric. Additionally, the EMD involves scientific principles that are indisputable and fully within the lay comprehension of the average juror. As such, expert testimony was not required to properly establish a foundation for the report's admissibility. State v. Kandutsch, 2011 WI 78, 336 Wis. 2d 478, 799 N.W.2d 865, 09−1351.

The admissibility of novel scientific evidence: The current state of the *Frye* test in Wisconsin. Van Domelen. 69 MLR 116 (1985)

Scientific Evidence in Wisconsin: Using Reliability to Regulate Expert Testimony. 74 MLR 261.

State v. Dean: A compulsory process analysis of the inadmissibility of polygraph evidence. 1984 WLR 237.

The psychologist as an expert witness. Gaines, 1973 WBB No. 2.

Scientific Evidence in Wisconsin after *Daubert*. Blinka. Wis. Law. Nov. 1993.

The Use and Abuse of Expert Witnesses. Brennan. Wis. Law. Oct. 1997.

The *Daubert* Standard in Wisconsin: A Primer. Blinka. Wis. Law. March 2011.

907.03 Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

History: Sup. Ct. Order, 59 Wis. 2d R1, R208 (1973); 1991 a. 32; 2011 a. 2.

The trial court properly admitted the opinion of a qualified electrical engineer although he relied on a pamphlet objected to as inadmissible hearsay. E. D. Wesley Co. v. City of New Berlin, 62 Wis. 2d 668, 215 N.W.2d 657 (1974).

A chiropractor could testify as to a patient's self−serving statements when those statements were used to form his medical opinion under sub. (4). Klingman v. Kruschke, 115 Wis. 2d 124, 339 N.W.2d 603 (Ct. App. 1983).

The trial court erred by barring expert testimony on impaired future earning capacity based on government surveys. Brain v. Mann, 129 Wis. 2d 447, 385 N.W.2d 227 (Ct. App. 1986).

While opinion evidence may be based upon hearsay, the underlying hearsay data may not be admitted unless it is otherwise admissible under a hearsay exception. State v. Weber, 174 Wis. 2d 98, 496 N.W.2d 762 (Ct. App. 1993).

Although this section allows an expert to base an opinion on hearsay, it does not transform the testimony into admissible evidence. The court must determine when the underlying hearsay may reach the trier of fact through examination of the expert, with cautioning instructions, and when it must be excluded altogether. State v. Watson, 227 Wis. 2d 167, 595 N.W.2d 403 (1999), 95−1067.

For a defendant to establish a constitutional right to the admissibility of proffered expert testimony, the defendant must satisfy a two−part inquiry determining whether the evidence is clearly central to the defense and the exclusion of the evidence is arbitrary and disproportionate to the purpose of the rule of exclusion, so that exclusion undermines fundamental elements of the defendant's defense. State v. St. George, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 277, 00−2830.

This section implicitly recognizes that an expert's opinion may be based in part on the results of scientific tests or studies that are not his or her own. State v. Williams, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, 00−3065.

Medical experts may rely on the reports and medical records of others in forming opinions that are within the scope of their own expertise. Enea v. Linn, 2002 WI App 185, 256 Wis. 2d 714, 650 N.W.2d 315, 01−2781.

This section does not give license to the proponent of an expert to use the expert solely as a conduit for the hearsay opinions of others. As in a civil proceeding there is no independent right to confront and cross−examine expert witnesses under the state and federal constitutions. Procedures used to appoint a guardian and protectively place an individual must conform to the essentials of due process. Walworth County v. Therese B. 2003 WI App 223, 267 Wis. 2d 310, 671 N.W.2d 377, 03−0967.

This section is not a hearsay exception and does not make inadmissible hearsay admissible but makes expert's opinion admissible even if the expert has relied on inadmissible hearsay in arriving at the opinion, as long as the hearsay is the type of facts or data reasonably relied on by experts in the particular field in forming opinions on the subject. A circuit court must be given latitude to determine when the underlying hearsay may be permitted to reach the trier of fact through examination of the expert with cautioning instructions for the trier of fact to head off misunderstanding and when it must be rigorously excluded altogether. Staskal v. Symons Corporation, 2005 WI App 216, 287 Wis. 2d 511, 706 N.W.2d 311, 04−0663.

In an OWI prosecution, even if a defendant establishes a constitutional right to present an expert opinion that is based in part on portable breath test results, applying the *St. George* test, the right to do so is outweighed by the state's compelling interest to exclude that evidence. Permitting the use of that evidence as the basis for an expert opinion would render meaningless the legislature's forbidding of that evidence in OWI prosecutions under s. 343.303, an act that promotes efficient investigations of suspected drunk driving incidents and furthers the state's compelling interest in public safety on its roads. State v. Fischer, 2010 WI 6, 322 Wis. 2d 265, 778 N.W.2d 629, 07−1898.

An evaluation of drug testing procedures. Stein, Laessig, Indriksons, 1973 WLR 727.

907.04 Opinion on ultimate issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

History: Sup. Ct. Order, 59 Wis. 2d R1, R211 (1973).

907.05 Disclosure of facts or data underlying expert opinion. The expert may testify in terms of opinion or inference

and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross−examination.

History: Sup. Ct. Order, 59 Wis. 2d R1, R213 (1973); 1991 a. 32.

907.06 Court appointed experts. (1) APPOINTMENT. The judge may on the judge's own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of the judge's own selection. An expert witness shall not be appointed by the judge unless the expert witness consents to act. A witness so appointed shall be informed of the witness's duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, if any; the witness's deposition may be taken by any party; and the witness may be called to testify by the judge or any party. The witness shall be subject to cross−examination by each party, including a party calling the expert witness as a witness.

(2) COMPENSATION. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and cases involving just compensation under ch. 32. In civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs but without the limitation upon expert witness fees prescribed by s. 814.04 (2).

(3) DISCLOSURE OF APPOINTMENT. In the exercise of discretion, the judge may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(4) PARTIES' EXPERTS OF OWN SELECTION. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(5) APPOINTMENT IN CRIMINAL CASES. This section shall not apply to the appointment of experts as provided by s. 971.16.

History: Sup. Ct. Order, 59 Wis. 2d R1, R215 (1973); Sup. Ct. Order, 67 Wis. 2d 784; 1991 a. 32.

As sub. (1) prevents a court from compelling an expert to testify, it logically follows that a litigant should not be able to so compel an expert and a privilege to refuse to testify is implied. Burnett. v. Alt, 224 Wis. 2d 72, 589 N.W.2d 21 (1999), 96−3356.

Under *Alt*, a person asserting the privilege not to offer expert opinion testimony can be required to give that testimony only if: 1) there are compelling circumstances present; 2) there is a plan for reasonable compensation of the expert; and 3) the expert will not be required to do additional preparation for the testimony. An exact question requiring expert opinion testimony and a clear assertion of the privilege are required for a court to decide whether compelling circumstances exist. *Alt* does not apply to observations made by a person's treating physician relating to the care or treatment provided to the patient. Glenn v. Plante, 2004 WI 24, 269 Wis. 2d 575, 676 N.W.2d 413, 02−1426.

Under *Alt* and *Glenn*, a medical witness must testify about his or her own conduct relevant to the case, including observations and thought processes, treatment of the patient, why certain actions were taken, what institutional rules the witness believed applied, and the witness's training and education pertaining to the relevant subject. Subject to the compelling need exception recognized in *Alt* and *Glenn*, a medical witness who is unwilling to testify as an expert cannot be forced to give an opinion of the standard of care applicable to another person or of the treatment provided by another person. A medical witness who is alleged to have caused injury to the plaintiff by medical negligence may be required to give an opinion on the standard of care governing his or her own conduct. Carney−Hayes v. Northwest Wisconsin Home Care, Inc. 2005 WI 118, 284 Wis. 2d 56, 699 N.W.2d 524, 03−1801.

907.07 Reading of report by expert. An expert witness may at the trial read in evidence any report which the witness made or joined in making except matter therein which would not be admissible if offered as oral testimony by the witness. Before its use, a copy of the report shall be provided to the opponent.

History: Sup. Ct. Order, 59 Wis. 2d R1, R219 (1973); 1991 a. 32.