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 W (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 rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

History: Sup. Ct. Order, 59 W (2d) R205; 1991 a. 32.

907.02 Testimony by experts. 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.

History: Sup. Ct. Order, 59 W (2d) R206.

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

The trial court abused its discretion in ordering 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 defendant. Broaster Co. v. Waukesha Foundry Co. 65 W (2d) 468, 222 NW (2d) 920.

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

Standard of nonmedical, administrative, ministerial or routine care in hospital need not be established by expert testimony. Any claim against hospital based on negligent lack of supervision requires expert testimony. Payne v. Milw. Sanitarium Foundation, Inc. 81 W (2d) 264, 260 NW (2d) 386.

Jury may not infer permanent loss of earning capacity from evidence of permanent injury in absence of some additional expert testimony to support such loss. Koele v. Radue, 81 W (2d) 583, 260 NW (2d) 766.

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

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

Admissibility of psychiatric testimony for impeachment purposes discussed. Hampton v. State, 92 W (2d) 450, 285 NW (2d) 868 (1979).

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

See note to Art. I, sec. 7, citing Hagenkord v. State, 100 W (2d) 452, 302 NW (2d) 421 (1981).

Polygraph evidence is inadmissible in any criminal proceeding unless Stanislawski stipulation was executed on or before September 1, 1981. State v. Dean, 103 W (2d) 228, 307 NW (2d) 628 (1981).

See note to 972.11, citing State v. Armstrong, 110 W (2d) 555, 329 NW (2d) 386 (1983).

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

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

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

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

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.

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

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

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.

History: Sup. Ct. Order, 59 W (2d) R208; 1991 a. 32.

The trial court properly admitted an opinion of a qualified electrical engineer although he relied on a pamphlet objected to as inadmissible hearsay. Comment on 907.03 and Judicial Council note. E. D. Wesley Co. v. City of New Berlin, 62 W (2d) 668, 215 NW (2d) 657.

See note to 908.03, citing Klingman v. Kruschke, 115 W (2d) 124, 339 NW (2d) 603 (Ct. App. 1983).

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

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 W (2d) R211.

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 W (2d) R213; 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 W (2d) R215; Sup. Ct. Order, 67 W (2d) 784; 1991 a. 32.

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 W (2d) R219; 1991 a. 32.