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 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 Wis. 2d R1, R205 (1973); 1991 a. 32.

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).

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 Wis. 2d R1, R206 (1973).

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. Milw. 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 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).

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).

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).

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).

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).

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). Reasoning adopted, State v. Davis, 2002 WI 75, 254 Wis. 2d 1, 645 N.W.2d 913.

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).

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.

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.

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.

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.

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.

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.

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 Wis. 2d R1, R208 (1973); 1991 a. 32.

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 s. 907.03 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).

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.

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.

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, ___ Wis. 2d ___, ___ N.W.2d ___.

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).

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.