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 the attorney 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. Blakely 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 (1977).

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).

A res ipsa loquitur instruction permits a jury to draw an inference of general negligence from the circumstantial evidence. Before a res ipsa loquitur instruction can be given, the evidence must conform to these requirements: 1) the event in question must be of the kind that does not ordinarily occur in the absence of negligence; and 2) the agency or instrumentality causing the harm must have been within the exclusive control of the defendant. A res ipsa loquitur instruction may be grounded on expert testimony in a medical malpractice case; the res ipsa loquitur standards are satisfied if the testimony and the medical records taken as a whole would support the inference of negligence or if direct testimony is introduced that the injury in question was of the nature that does not ordinarily occur if proper skill and care are exercised. Kelly v. Hartford Casualty Insurance 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).

Stating guidelines for admission of testimony by hypnotized witnesses. 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 videotape, 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. See also 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 AHP, Inc., 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727, 98–2162.

If the state is to introduce *Jensen*, 147 Wis. 2d 240 (1988), 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*, 179 Wis. 2d 346 (1993). 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*, 179 Wis. 2d 346 (1993), 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.

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.

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 777, 00–2830.

Under the first part of the inquiry, a defendant must demonstrate that the proffered testimony satisfies each of the following four requirements: 1) the testimony of the expert witness meets the standards under this section governing the admission of expert testimony; 2) the expert testimony is clearly relevant to a material issue in the case; 3) the expert testimony is necessary to the defendant's case; and 4) the probative value of the expert testimony outweighs its prejudicial effect. Under the second part of the inquiry, the court must determine whether the defendant's right to present the proffered evidence is nonetheless outweighed by the state's compelling interest to exclude the evidence. State v. St. George, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, 00–2830.

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 U.S. 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 the witness 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 operating while intoxicated (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*, 2002 WI 50, 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. Kubiak. 74 MLR 261 (1991).

State v. Dean: A Compulsory Process Analysis of the Inadmissibility of Polygraph Evidence. Katz. 1984 WLR 237.

The Psychologist as an Expert Witness. Gaines. WBB Apr. 1973.

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

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

NOTE: The above annotations relate to this section as it existed prior to 2011 Wis. Act 2, which added a new standard to sub. (1) and created sub. (2).

Expert testimony about retrograde extrapolation of the defendant's blood alcohol concentration was admissible. The court's gate–keeper function is to ensure that the expert's opinion is based on a reliable foundation and is relevant to material issues. The court is to focus on the principles and methodology the expert relies upon, not on the conclusion generated. The question is whether the scientific principles and methods that the expert relies upon have a reliable foundation in the knowledge and experience of the expert's discipline. State v. Giese, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687, 13–2009.

If experts are in disagreement, it is not for the court to decide which of several competing scientific theories has the best provenance. The accuracy of the facts upon which the expert relies and the ultimate determinations of credibility and accuracy are for the jury, not the court. As stated in *Daubert*, 509 U.S. 579 (1993), vigorous cross–examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. State v. Giese, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687, 13–2009.

The evidentiary standard under sub. (1) made effective February 1, 2011, did not apply to expert testimony in the ch. 980 discharge petition trials in this case because the discharge petitions did not "commence" "actions" or "special proceedings" but were part of the underlying commitments. The original ch. 980 commitments in this case began several years before the standard was adopted, and the filings in this case did not constitute the "commencement" of an "action" or a "special proceeding." Because the legislature had a rational basis for not applying the evidentiary standards under sub. (1) to expert testimony in post–February 1, 2011, discharge petitions that seek relief from pre–February 1, 2011, commitments, no violation of equal protection or due process occurred. State v. Alger, 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346, 13–0225.

Sub. (1) adopts the reliability test established by *Daubert*, 509 U.S. 579 (1993). *Daubert* itself acknowledges that its test for the admissibility of expert evidence is "flexible." In this case, the proposed expert testimony did not neatly fit the *Daubert* factors. This did not, however, require exclusion. The court appropriately considered other factors bearing upon the reliability of the testimony and found that she had "sufficient knowledge, skill, experience, and training" to qualify her as an expert. State v. Smith, 2016 WI App 8, 366 Wis. 2d 613, 874 N.W.2d 610, 14–2653.

The drug recognition evaluation (DRE) protocol is a nationally standardized protocol for identifying drug intoxication based on the well–established concept that drugs cause observable signs and symptoms, affecting vital signs and changing the physiology of the body, and testimony based on the DRE protocol is subject to sub. (1). State v. Chitwood, 2016 WI App 36, 369 Wis. 2d 132, 879 N.W.2d 786, 15–0097.

Daubert, 509 U.S. 579 (1993), provided the following illustrative, non–exhaustive list of factors a court may consider in deciding whether expert testimony based upon scientific, technical, or other specialized knowledge is reliable: 1) whether the theory or technique employed by the expert is generally accepted in the relevant community; 2) whether it has been subject to peer review and publication; 3) whether it has been tested; and 4) whether the known or potential rate of error is acceptable. State v. Chitwood, 2016 WI App 36, 369 Wis. 2d 132, 879 N.W.2d 786, 15–0097.

A trial court's obligation to act as a gatekeeper under *Daubert*, 509 U.S. 579 (1993), does not require it to conduct a *Daubert* admissibility analysis if there is no objection to the testimony, and the trial court's failure to sua sponte engage in such an analysis does not constitute plain error under s. 901.03 (4). State v. Cameron, 2016 WI App 54, 370 Wis. 2d 661, 885 N.W.2d 611, 15–1088.

To determine whether expert testimony is admissible under sub. (1), a court must engage in a three–step analysis, considering whether: 1) the witness is qualified; 2) the witness's methodology is scientifically reliable; and 3) the testimony will assist the trier of fact to determine a fact in issue. Bayer v. Dobbins, 2016 WI App 65, 371 Wis. 2d 428, 885 N.W.2d 173, 15–1470.

A trial court should admit medical expert testimony if physicians would accept it as useful and reliable. Expert medical opinion testimony is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline. Instead of exclusion, the appropriate means of attacking shaky but admissible experience–based medical expert testimony is by vigorous cross–examination, presentation of contrary evidence, and careful instruction on the burden of proof. Seifert v. Balink, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816, 14–0195.

When the reliability of expert medical testimony is challenged under the reliability prong of sub. (1), the specific focus is on the reliability of the methods used by the expert. The trial court must be satisfied that the testimony is reliable by a preponderance of the evidence. In expert medical evidence, the methodology often relies on judgment based on the witness's knowledge and experience. Reliability concerns may focus on the personal knowledge and experience of the medical expert witness. A circuit court has discretion in determining the reliability of an expert's principles,

methods, and the application of the principles and methods to the facts of the case. Seifert v. Balink, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816, 14–0195.

Because the expert in question applied an accepted medical method relied upon by physicians and had extensive personal experiences and knowledge pertaining to the standard of reasonable care, the circuit court did not erroneously exercise its discretion in admitting the expert's testimony. Failure to rely on literature is no bar to admissibility. *Daubert*, 509 U.S. 579 (1993), supports the circuit court in the instant case: publication, which is but one element of peer review, is not a sine qua non of admissibility; it does not necessarily correlate with reliability. Seifert v. Balink, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816, 14–0195.

A social worker's testimony about the absence of indications during a cognitive graphic interview of an alleged child sexual assault victim, either that the child had been coached or was being dishonest, did not violate the rule prohibiting a witness from giving an opinion that another mentally and physically competent witness is telling the truth, and was admissible for three reasons: 1) the testimony was limited to the social worker's observations of indications of coaching and dishonesty; 2) by limiting her testimony to indications of coaching and dishonesty, the social worker did not provide a subjective opinion as to the child's truthfulness; and 3) such testimony may assist the jury. State v. Maday, 2017 WI 28, 374 Wis. 2d 164, 892 N.W.2d 611, 15–0366.

The general principles of *Daubert*, 509 U.S. 579 (1993), are not limited to scientific knowledge. The analysis applies to all expert testimony. State v. Jones, 2018 WI 44, 381 Wis. 2d 284, 911 N.W.2d 97, 15–2665.

Sub. (1) requires that circuit courts make five determinations before admitting expert testimony: 1) whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; 2) whether the expert is qualified as an expert by knowledge, skill, experience, training, or education; 3) whether the testimony is based upon sufficient facts or data; 4) whether the testimony is the product of reliable principles and methods; and 5) whether the witness has applied the principles and methods reliably to the facts of the case. State v. Jones, 2018 WI 44, 381 Wis. 2d 284, 911 N.W.2d 97, 15–2665.

The admissibility of expert testimony is governed by this section. The court's role with regard to the admissibility of evidence is often described as that of a gatekeeper. Before 2011 Wis. Act 2, the court's role was simply to determine whether the evidence made a fact of consequence more or less probable. The heightened standard under this amended section does not change this gatekeeping function. It does, however, require more of the gatekeeper. Instead of simply determining whether the evidence makes a fact of consequence more or less probable, courts must now also make a threshold determination as to whether the evidence is reliable enough to go to the factfinder. State v. Jones, 2018 WI 44, 381 Wis. 2d 284, 911 N.W.2d 97, 15–2665.

Expert testimony at a *Machner*, 92 Wis. 2d 797 (1979), hearing regarding the reasonableness of trial counsel's performance is admissible, but only to the extent the expert focuses on factual matters and does not offer the expert's opinion on the reasonableness of trial counsel's conduct or strategy. Expert testimony is admissible to address questions of fact, not law. State v. Pico, 2018 WI 66, 382 Wis. 2d 273, 914 N.W.2d 95, 15–1799.

Sub. (1) continues to permit an expert witness to testify in the form of an opinion "or otherwise," including exposition testimony on general principles without explicitly applying those principles to, or even having knowledge of, the specific facts in the case. If an expert testifies in the form of an opinion, then the expert must apply the principles and methods reliably to the facts of the case. State v. Dobbs, 2020 WI 64, 392 Wis. 2d 505, 945 N.W.2d 609, 18–0319.

When expert testimony is proffered in the form of an exposition on general principles, the circuit court, as gatekeeper, must consider the following four factors: 1) whether the expert is qualified; 2) whether the testimony will address a subject matter on which the factfinder can be assisted by an expert; 3) whether the testimony is reliable; and 4) whether the testimony will fit the facts of the case. State v. Dobbs, 2020 WI 64, 392 Wis. 2d 505, 945 N.W.2d 609, 18–0319.

There is no categorical rule that would condition the admissibility of relevant canine scent evidence on there being physical or forensic evidence corroborating the dog alerts. Rather, expert testimony regarding dog alerts, like all other expert testimony, may be admitted if the court concludes the evidence satisfies the threshold reliability criteria in this section and is not otherwise subject to exclusion under s. 904.03. State v. Bucki, 2020 WI App 43, 393 Wis. 2d 434, 947 N.W.2d 152, 18–0999.

Sub. (1) requires the trial court to determine, by a preponderance of the evidence and according to whichever criteria it deems appropriate, that the proffered expert testimony is based on adequate facts and a sound methodology and is thus sufficiently reliable to go before a jury. Personal knowledge and experience may form the basis for expert testimony. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. To assess reliability in this context, the witness must explain how the experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. State v. Hogan, 2021 WI App 24, 397 Wis. 2d 171, 959 N.W.2d 658, 19–2350.

Given the widespread availability of Fitbits and other similar wireless step–counting devices in today's consumer marketplace, the circuit court in this case reasonably concluded Fitbit evidence was not so unusually complex or esoteric that the jury needed an expert to understand it. State v. Burch, 2021 WI 68, 398 Wis. 2d 1, 961 N.W.2d 314, 19–1404.

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

Guarding the Gate: Six Years of *Daubert* in Wisconsin Courts. Aprahamian. Wis. Law. Mar. 2017.

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. 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 777, 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 an 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. Wausau General Insurance Co., 2005 WI App 216, 287 Wis. 2d 511, 706 N.W.2d 311, 04–0663.

In an operating while intoxicated (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*, 2002 WI 50, 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.

That part of this section that a properly qualified expert witness may rely on inadmissible material if that material is of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, rests on the commonsense reality that a testifying expert could not be required to replicate all of the experiments and personally make all of the observations either underlying the development of the expert's field or otherwise relevant to the expert's opinion. Permitting the expert to rely on inadmissible material in accordance with this section does not violate a defendant's right to confrontation. State v. Heine, 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409, 13–1022.

The disclosure of otherwise inadmissible information under this section is to assist the jury in evaluating the expert's opinion, not to prove the substantive truth of the otherwise inadmissible information. In this case, the state's reference to the DNA evidence during closing arguments was a shift from a non–hearsay impeachment purpose to a substantive use to prove the truth of the matter asserted. The DNA evidence was inadmissible hearsay, and it was erroneously received during trial and closing argument as no limiting instructions were given to the jury as to its consideration of the DNA evidence. The DNA evidence, at a minimum, could not be presented to the jury without proper limiting instructions and could not be used by the state as substantive evidence. State v. Thomas, 2021 WI App 55, 399 Wis. 2d 277, 963 N.W.2d 887, 20–0032.

An Evaluation of Drug Testing Procedures Used by Forensic Laboratories and the Qualifications of Their Analysts. 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*, 224 Wis. 2d 72 (1999), 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*, 224 Wis. 2d 72 (1999), and *Glenn*, 2004 WI 24, a medical witness must testify about the witness's 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 the witness's 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.