The Law of Evidence in Wisconsin

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THE LAW OF EVIDENCE IN WISCONSIN

INTRODUCTION.

The outline given below of the law of evidence in Wisconsin, although quite comprehensive, is not intended or designed to be exclusive. It is merely a resumé of the subject with the interjection of Wisconsin propositions, and is one of the many outlines which I have prepared in some twenty odd legal subjects on the completion of the various courses.

Evidence, it must be remembered, is one of the largest and most comprehensive studies in the law. Its object, of course, is to filter the great coagulation of facts which one party or the other endeavors to get before the jury, and to sift the curdle from the cream. In this process the judge may be compared to the strainer. It is for him to determine what evidence is admissible and what is not.

Now it is evident that all the curdle is not waste; nor all the cream pure. There is some of the mixture that is so intermediate that it is extremely difficult for the court to determine whether it should be allowed to pass through his metaphorical sieve, or reject it. It is at this point that the contest between counsel becomes acute and a thorough knowledge of the precise laws of evidence demanded.

Let us, therefore, approach the all-important question with caution. Does the fact that certain evidence is absolutely rejected mean that the point sought to be proved is unapproachable? Precisely not. It simply means that the point or probandum must be hit by other evidence, evidence that is admissible. Examples of this proposition are needless, as the point is self-explanatory and plainly conceivable.

We can now proceed to discuss the real rules of evidence, the strands of the sieve, so to speak; and the first great mass of rules are those which eliminate certain kinds of evidence and are known as

THE ELIMINATIVE RULES.

I. Exhibition and view to the jury.

1. There is no rule against the exhibition of the thing itself in a criminal case.

_Herman vs. State_, 73 Wis. 248.
2. A view of the premises by the jury is allowable in a criminal case.
   Section 2852.

3. A view is also allowable in a civil case.
   Sections 2852 and 4095a.
   *Moritz vs. Larsen*, 70 Wis. 569.

II. Character as evidence.

1. Accused's character as evidence of an act.
   A. The prosecution is absolutely prohibited in the first instance from putting up accused's base character to show he did an act.
   B. Accused may offer good character to show he did not do the act.
   C. If the accused does introduce his own supposed good character, then in rebuttal the prosecution may deny that good moral character.
   D. When the accused's character is admissible it is limited to that trait which is related to the act charged.
      *Paulson vs. State*, 118 Wis. 89.

2. Character as evidence of an act in civil cases.
   A. Evidence of general character of the parties to civil cases, where character is not part of the issue, is inadmissible.
      *Wright vs. Mc Kee*, 37 Vt., 161.
      But evidence of good character is admissible in assault, seduction, and kindred cases, the same as in criminal cases, and under the same rules.
      *Gough vs. St. John*, 16 Wend. 645.
   B. Moral character is not admissible in civil cases to show a party did or did not do an act, but where moral character is relevant, as in fraud, it is admissible to show one did or did not do an act.
      *Ruan vs. Perry*, 3 Caines R120.
   C. Where a negligent act is in issue, character is not admissible.
      *Innes vs. City of Milwaukee*, 96 Wis. p. 179.
3. Modes of using deceased's character for violence in homicide cases.
   
   A. Character of deceased for violence is used for showing that he was the aggressor, and state in rebuttal may show deceased's character for peacefulness.
   
   B. Character of deceased is admissible to show that defendant believed self-defense was necessary; and defendant need not show knowledge of deceased's reputation.

   *Bowles vs. State, 28 N. E. 115.*

4. Character as an issue in civil cases.
   
   A. Where character is a part of issue under the pleadings and not evidential of an act, it may be given in evidence.

   *Bofard vs. McLany, 1 Nott. & McC. 268.*

III. Conduct as evidence.

1. Conduct as evidence of accused's moral character.
   
   A. Where accused's character is admissible in a criminal case it can never be evidenced by specific acts of misconduct, but only by general reputation.

   *Paulson vs. State, 118 Wis. 89.*

2. Conduct as evidence of accused's intent, knowledge, motive.
   
   A. Misconduct of accused may be used to show motive, knowledge, or intent.

   *Kollock vs. State, 88 Wis. 663.*

   **Note** — Sentence increase statutes:
   
   Sections 4736, 37, 38, 38m.

3. Conduct as evidence of character in other cases.
   
   A. Where character is in issue in civil cases, it may be evidenced by specific acts of misconduct.

4. Conduct as evidence of knowledge, intent, plan, habit, etc., in civil cases.
   
   A. In a civil case a party's particular act may be shown in negligence cases to prove master's negligence in retaining a servant, and in general to charge with notice.

   *Morrow vs. St. Paul City Ry. Co., 71 Minn. 326.*
B. Other instances of the defective operation of a machine or defective or dangerous condition of a place are inadmissible in this state, except to show notice. 

*Phillips vs Town of Willow*, 70 Wis. 6.

IV. Qualifications of witnesses.

1. Mental capacity and moral incapacity.

   A. Formerly insanity absolutely disqualified a proposed witness. Now it merely disqualifies a witness on the insane delusion it affects.

   Section 4085.


   B. No specific age absolutely disqualifies a witness, and it is a question for the court.

   Section 4085.

   C. A criminal record does not disqualify a witness, but may be used to affect his credibility.

   Section 4073.

2. Emotional incapacity.

   A. Interest in the cause does not disqualify a witness with the exception of the so-called survivor statutes.

   Sections 4068, 4070.

   B. A husband or wife may testify for or against each other, unless such communication is privileged.

   Section 4072.

3. Subjects of witness' qualifications.

   A. All the qualifications of the ordinary witness are presumed.

   B. The qualifications of an expert witness must always be shown.

   An expert is a witness who possesses already the special experience required to testify on a subject requiring special experience.
4. Assuming capacity, witness must have exercised senses in that

A. They must have observed.
   a. In general a witness swears only to what has fallen under his senses.
   b. But, handwriting can be testified to in the following ways:
      (I) Having seen him write the very paper in dispute. (Observation.)
      (II) By having seen him write some other document.
      (III) Didn't see him write, but received a letter from him which was acted on. (Exception to observation rule.)
         
         Daniels vs. Foster, 26 Wis. 686.

      (IV) Handwriting expert. (Exception.) Here the type of writing is shown by a witness and the comparison made by the expert.
         The questions to be put to the expert follow:
         "Have you a type of —— in your mind?
         "Assuming specimens are written by ——, now, is the type the same on this paper?"

B. They must recollect.
   a. Communicate answers on question being put.
   b. Present recollection revived—a witness can refresh his memory at the discretion of the judge by using any document.
         Davis vs. Field, 56 Vt. 426.
   c. Past recollection recorded—when a witness desires to read from a document recording a recollection he cannot revive, the document must have been written—
      (I) When he had a recollection.
      (II) Recorded while it was fresh.
      (III) But one need not have made document if verified by him.
         Acklen's Executor vs. Hickman, 63 Ala. 494.
C. They must narrate what they recollect.
   a. Leading questions are not allowable on direct examination, but only on cross-examination, with the following exceptions:
      (I) In introductory testimony.
      (II) If witness is unwilling to testify, court in its discretion may allow cross-examination.
           Section 4068.
      (III) If memory is exhausted and you would stimulate such memory.
           Misleading questions are never allowed.

b. A photograph, to be admissible, must be verified by someone testifying either
   (I) That he has seen the original and it is the same.
       *Hibbe vs. Maple Creek*, 121 Wis. 668.
   (II) Or, if no one has seen the original, as an X-ray photo, then the process must be verified as a correct one.
       *Mauch vs. Hartford*, 112 Wis. 40.

c. Opinion rule.—As a witness can only tell what he saw or heard, and not give his inferences by the general rule, yet there are the exceptions:
   (I) That a lay witness can give his inference when he could not reproduce all the data, making the jury capable of drawing inferences, as saying one is drunk or insane.
   (II) An expert witness can always draw inferences.

Rules of Thumb.
A lay witness can't give opinion as to sanity in Wisconsin.

*Boorman vs. Northwestern Mut. Relief Co.*, 90 Wis. 144.
A lay witness can't give opinion as to safety of a place.

*Crawford vs. Christian*, 102 Wis. 51.
A lay witness cannot give his opinion as to quality of work done.  
*Palmer vs. Goldberg*, 128 Wis. 103.

(III) Opinion to character.

(1) In Wisconsin, probably, opinion as to defendant's character is not admissible.

(2) A witness may testify as to his opinion of a witness' character if in the following form:
   1. "Do you know his reputation for veracity? Is it good or bad?"
   2. "Knowing that reputation, would you believe him under oath?"

(IV) Opinion to handwriting.

(1) Authorship of handwriting may be evidenced by showing alleged specimens of the party's handwriting to a witness for comparison when proved to satisfaction of the court to be genuine, and such evidence may be submitted to the jury.
   Section 4189a.

(2) Such comparison is for the expert witness.  
*Colbert vs. State*, 125 Wis. 434.

(V) The Hypothetical Question.

(1) A hypothetical form of question need not be used as a basis for an expert witness who draws his opinion from personal observation.  
*Estate of Bean*, 159 Wis. 67.

(2) A hypothetical question is insufficient where its basis is not proved.  
*Estate of Bean*, 159 Wis. 67.

(3) A hypothetical question must contain all material, uncontroverted evidence.  
*Pfeiffer vs. Radke*, 144 Wis. 430.
V. Impeachment of witnesses.

1. General traits of character.
   A. The moral character of a witness is presumed at first, but he may be impeached for want of veracity. *Wilson vs. Young*, 31 Wis. 574.
   B. When accused becomes a witness, he can only be impeached as such. *Wilson vs. State*, 3 Wis. 798.
   C. A witness' mental defects are not admissible against him. *Alleman vs. Stepp*, 52 Ia., 626.

2. Specific conduct.
   A. You cannot call another witness to prove first witness told a lie on a former occasion not relevant to the issue. *Parroski vs. Goldberg*, 80 Wis. 339.
   B. A conviction of any kind of crime may be used to impeach a witness. Section 4073. *Kock vs. State*, 126 Wis. 470.
   C. On cross-examination of a witness, questions can be put to him of his particular acts of misconduct, at the discretion of the court. *Buel vs. State*, 104 Wis. 132.
   D. A witness may be asked whether he has been arrested for an offense, if followed by proof of conviction for it. *State vs. Thornton*, 117 Wis. 338.

3. Contradiction and self-contradiction.
   A. A witness may be contradicted by another witness or his own self-contradiction for purpose of discrediting him on facts relevant to the case that would have been admissible for another cause, irrespective of contradiction or self-contradiction. *Hinton vs. Cream City R. R. Co.*, 65 Wis. 323.
   B. But in discrediting a witness by his own self-contradiction or by other expressions, he must first be warned by being asked whether he made the expression, mentioning time, place, and person to whom made. *Parroski vs. Goldberg*, 80 Wis. 339.
   This warning may be dispensed with in case of deposition.
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4. Who may be impeached.
   A. One’s own witness may never be discredited by bad moral character.
   B. One’s own witness may never be discredited by contradiction from another, unless relevant to the case, and the witness could have testified in any event.
   C. Nor can one’s own witness be discredited by self-contradiction, unless under above circumstances.
   D. Under the above rules, if plaintiff calls a witness and tries to impeach him, he is his witness; while if defendant tries, after first calling him as his witness, he is his own witness.
   Subject to Section 4068.

VI. Corroboration of witness.
   1. A witness’ credit may be corroborated by his good moral character only after it has been discredited.
   
   Ledens vs. Schumers, 12 Ill. 263.
   
   2. A witness’ credit may be corroborated by his consistent statements made out of court only where they assist in showing his testimony was not of recent contrivance.


VII. Party’s admissions and confessions.
   1. In general.
      A. Extra judicial admissions are not conclusive on the party making them.
      
      Emery vs. State, 101 Wis. 627.
      
      B. A real stipulation cannot be contradicted.
      
      Reha vs. Pelnar, 86 Wis. 408.
      
   2. Third Person’s admissions.
      A. An admission by a party having a similar interest is not admissible.
      
      
      B. The admissions by a predecessor in title against his title is not evidence against him.
      
      Leek vs. Mulholland, 48 Wis. 413.
      
      C. An agent’s admissions are receivable against his principal when made within the scope of his authority.
      
      Davis vs. Henderson, 20 Wis. 520.
3. Implied admissions.
   A. From conduct.
      a. An inference arises against the holder of a deed if it is in his possession or under his control and he refuses to deliver it to the other party on due notice.
      b. No inference can be drawn from evidence that repairs were made after an injury due to supposed negligence of defendant.
         *Lind vs. Uniform S. & P. Co.*, 140 Wis. 183.
      c. No inference can be drawn in failing to produce a witness who might testify favorably.
      d. No inference can be drawn because of violation of safety regulation of company.
         *Sparks vs. Wis. Cent. Ry. Co.*, 139 Wis. 108.
   B. From silence.
      a. Inferences are admissible from a party's silence in not answering a letter of claim by the opponent.
      b. The fact that things are said orally in ones presence by the opponent does not create an inference, tho not denied.
         *Hinton vs. Wells*, 45 Wis. 268.
4. Admissions in litigation.
   A. In Wisconsin a compromise offer which is real or hypothetical permits no inference to be drawn from it.
      *John DeWolf Co. vs. Harvey*, 161 Wis. 535.
   B. An inference is admissible from a party's pleadings in the same or another suit, and such admission is conclusive.
      *Schoeth vs. Drake*, 139 Wis. 18.
      *Denton vs. White*, 26 Wis. 679.
5. Confessions.
   A. A confession, if made without threat or promise of favor, is admissible even tho made while under arrest.
      *Hints vs. State*, 125 Wis. 405.
Under the Federal Rule a confession made to a police officer is not admissible, as it is presumed it was secured by threat or favor.


B. A confession made by a witness under oath is admissible.

C. The above confession rules are not applicable to a statement denying guilt.

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**EDITOR'S NOTE**—This is to be continued in the next issue.