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THE ILLINOIS DEAD MAN'S STATUTE–ITS EFFECT ON THE PERSONAL INJURY TRIAL

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LIKE numerous other jurisdictions, Illinois has adopted a statute which provides for the protection of parties who are suing or being sued as representatives, heirs, devisees or legatees for decedents. This statute has been denominated as the "Dead Man's Act."[1] The statute provides that no party to a lawsuit shall be permitted to testify on his own Motion or behalf, when any adverse party is suing or defending in a representative capacity as an executor, administra-

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1 ILL. REV. STAT. ch. 51, § 2 (1965). No party to any civil action suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own Motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as a Trustee or Conservator of any habitual drunkard, or person who is mentally ill or mental deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:

First–In such action, suit or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee or devisee shall have attained his or her majority.

Second–When, in such action, suit or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest, may testify concerning the same conversation or transaction.

Third–Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any persons having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest, shall also be permitted to testify as to the same conversation or transaction.

Fourth–Where, in any such action, suit or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation.

Fifth–When in any such action, suit or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency.

tor, heir, legatee or devisee for a decedent, unless called upon to testify by the protected party.

The statute contains five exceptions to the preceding general rule. First, a party may testify with regard to facts occurring subsequent to the death of the decedent. Second, when any agent of such deceased or incompetent person shall testify regarding any conversation or transaction between such agent and the party ordinarily barred from testifying, then, the party so barred may testify concerning the same conversation or transaction. Third, when any party who has an interest in the litigation shall testify on behalf of the party who is protected by the statute, then, the party who would ordinarily be restricted from testifying may under such circumstances testify regarding the same conversation or transaction. Fourth, when any party who is not a litigant, or a party in interest, nor the agent of the protected party, shall on behalf of the protected party testify to a conversation or transaction by the restricted party, occurring prior to the death of and in the absence of the decedent, then, the party who would ordinarily be barred from testifying may likewise testify to the same conversation or transaction. Fifth, when the deposition of the deceased person shall be read into evidence at trial, then, the restricted party may testify regarding all matters contained in such deposition as were admissible into evidence.

Many works on this statute have been quick to point out the gross inequities that its operation is capable of perpetrating. This author fully recognizes such shortcomings of the "Dead Man's Act," and certainly does not undertake to condone or justify them. However, it is worthwhile to consider that in the past, the Illinois Courts on numerous occasions have endeavored to define the purposes and spirit of this statute. The courts have seen as the purpose of the "Dead Man's Act," the protection of the estates of decedents against fraudulent claims,[2] the assistance to executors and administrators of decedent estates who are unable to produce evidence to rebut the testimony of living parties making adverse claims against decedent estate and thereby to place all party litigants in such matters on an equal footing,[3] and the prevention of temptation to commit perjury.[4]

[2] Friederich v. Wolf, 383 Ill. 638, 50 N.E.2d 755 (1943).

[3] Combs v. Younge, 281 Ill. App. 339 (1935); Rouse v. Tomasek, 279 Ill. App. 557 (1935).

[4] Redden v. Inman, 6 Ill. App. 55 (1880).

Although some of the foregoing interpretations are unacceptable to many attorneys, the "Dead Man's Act," despite agitation for its abolition, nevertheless remains a very real part of Illinois law. Furthermore, with the ever present backlog of personal injury lawsuits on most court calendars, the "Dead Man's Act" presents some very real and oftentimes troublesome problems to the trial advocate engaged in either the prosecution or defense of personal injury cases. The purpose of this work shall be to explore some of the common factual situations arising under circumstances wherein the "Dead Man's Act" is applicable and, hopefully, to develop some feasible solutions.

The primary consideration for the attorney involved in litigation wherein there has been the death or incapacity of one of the party litigants is to ascertain those parties whose testimony is rendered incompetent by operation of the "Dead Man's Statute" and to ascertain a means of proving his case in the light of such incompetency.

One of the more common fact situations involves a deceased plaintiff suing surviving joint tortfeasors who are principal and agent. The principal's liability is passive under the theory of 'respondeat superior' and the agent's liability is active. If there has been no severance of trial against both defendants, the defendant agent would be incompetent to testify at a joint trial.[5] Here the prudent course of procedure for the defense would be severance of trial between the defendants. Consequently, at the trial of the defendant principal alone, the agent would be a competent witness.[6] Failure by the defense to accomplish such severance results in the parties standing trial as co-defendants, with the defendant agent who is generally the operator of the defendant principal's vehicle being incompetent to testify.[7] On the other hand, the prudent course for the prosecution would be to join the defendant driver/agent, name him as a party defendant and serve him with process.

Failure to serve the driver/agent will destroy his standing as a party to the litigation and will thereby render him competent to testify even though he may be named party defendant in the complaint.[8] Where the defendant agent has been made a party, an offer by him to waive any personal benefit from his testimony and to testify solely on behalf

[5] Blachek v. City Ice & Fuel Co., 311 Ill. App. 1, 35 N.E.2d 416 (1941).

[6] *Ibid.*; Feitl v. Chicago City Ry., 211 Ill. 279, 71 N.E. 991 (1904).

[7] Hann v. Brooks, 331 Ill. App. 535, 73 N.E.2d 624 (1947).

[8] Sankey v. Interstate Dispatch, 339 Ill. App. 420, 90 N.E.2d 265 (1950).

of the co-defendant principal will not be effective in avoiding the statutory prohibition against such testimony.[9]

One of the more interesting developments of the principal-agent situations occurs where the principal and agent both as co-defendants are found guilty. Should the agent never appeal from the judgment and verdict, while the principal, on the other hand, does appeal, and the Appellate Court reverses the judgment and verdict as to the principal only and remands the cause for a new trial as to this party only, the agent would not be considered an interested party in the new trial and would be competent to testify therein.[10]

Consequently, we may observe that in dealing with the situation of co-defendant principal and agent defending a claim brought by the administrator or executor of the estate of a deceased plaintiff, the tenor of the decisions would dictate to the prosecution to be diligent in joining and prosecuting the principal and agents as joint tortfeasors, being especially vigilant that proper service of process has been made upon all party defendants. Conversely, the defense in such situations should be geared toward a severance of the trial of the defendants.

Illinois Courts have on numerous occasions undertaken to define the nature of an interest that will act to disqualify a party from testifying by operation of the "Dead Man's Act." The test generally adopted is whether a party will gain or lose as a direct result of the lawsuit.[11] The disqualifying interest must be actual and not based upon belief, theory,[12] or future speculation.[13] The interest must be such that pecuniary gain or loss of the party will be directly and immediately affected by the judgment. Any lesser interest will not bar the testimony but merely goes to its creditability.[14]

Stockholders in corporations that are parties to lawsuits have been found not to have so connected an interest in the litigation as to be barred from testifying.[15] The mother and wife, respectively, of two

[9] Sullivan v. Corn Products Ref. Co., 245 Ill. 9, 91 N.E. 643 (1910).

[10] Webb v. Willett Co., 309 Ill. App. 504, 33 N.E.2d 636 (1941).

[11] Brownlie v. Brownlie, 351 Ill. 72, 183 N.E. 613 (1932).

[12] Latham v. Rishel, 384 Ill. 478, 51 N.E.2d 531 (1943); Allen v. North, 271 Ill. 190, 110 N.E. 1027 (1915).

[13] Hughes v. Williams, 300 Ill. App. 108, 20 N.E.2d 860 (1939).

[14] Spencer v. Wilsey, 330 Ill. App. 439, 71 N.E.2d 804 (1947).

[15] Anthoney Ittner Buick Co. v. Ashby, 198 Ill. 562, 64 N.E. 1109 (1902); National Woodenware & Copperage v. Smith, 108 Ill. App. 777 (1903).

joint defendants have been held incompetent to testify.[16] The courts have gone so far as to hold wives incompetent to testify even where they become divorced from a party during the pendency of the litigation.[17] A party who is a next friend to a minor involved in the litigation remains disqualified from testifying as long as he retains the status of next friend. However, upon the minor attaining majority and the removal of the next friend as a named party to the litigation, the next friend's previous disqualification to testify ceases.[18]

In wrongful death actions, the defendant motorist, in the absence of circumstances constituting a waiver of the protection of the statute, has been held incompetent to testify.[19] Even in situations wherein the decedent and the surviving defendant were the sole occupants of an automobile, the surviving defendant was barred from testifying by the statute.[20] Parties to an accident who as a result of their participation in the accident are deemed by the Court to have a sufficient and direct interest in the result of the litigation will be disqualified from testifying.[21]

The "Dead Man's Act" likewise operates to curtail the testimony of surviving personal injury plaintiffs. Joint plaintiffs each claiming against the estate of a deceased defendant will be incompetent to testify on each other's behalf so long as their actions remain unsevered.[22] The intelligent alternative would be for the co-plaintiffs to maintain separate lawsuits. Conversely, the defense should seek a consolidation of such actions on the basis that they arise from a similar occurrence and involve similar parties.

A plaintiff suing a corporate defendant and their deceased agent as joint tortfeasors would ordinarily be incompetent under the statute to testify in his own behalf. This incompetency may be alleviated by the dismissal of the deceased agent as a party defendant or by having the jury appropriately instructed that the plaintiff's testimony is admissible as limited solely to the liability of the principal corporate defendant.[23]

[16] De May v. Brew, 306 Ill. App. 505, 29 N.E.2d 114 (1940).

[17] *Supra* note 7.

[18] Freeman v. Easeley, 117 Ill. 317, 7 N.E. 656 (1886).

[19] Countryman v. Sullivan, 344 Ill. App. 371, 100 N.E.2d 799 (1951).

[20] Robinson v. Workman, 7 Ill. App. 2d 42, 129 N.E.2d 32 (1955).

[21] Mernick v. Chiodini, 12 Ill. App. 2d 249, 139 N.E.2d 784 (1956).

[22] Braun v. Lawder, 344 Ill. App. 423, 100 N.E.2d 348 (1951).

[23] Clark v. A. Bazzoni & Co., 7 Ill. App. 2d 334, 129 N.E.2d 435 (1955).

Counsel for protected parties must be vigilant regarding the tender by the opposition of testimony that is incompetent under the statute because the operation of the "Dead Man's Act" is not automatic. A timely and specific objection to the proffered testimony must be made at the trial level or any objection will be considered waived.[24] On the other hand, counsel for the incompetent party should at least endeavor to call his witness in jury trials because there always exists the hopeful possibility that no objection to the competency of the witness will be made. Even in the event of objection, the jury has had the opportunity to observe that the witness was willing to testify yet was prevented from so doing. This technique coupled with an appropriately illuminating instruction at the conclusion of the trial[25] will go far toward apprizing the jury of the disadvantage encountered by a surviving party litigant.

The calling of the incompetent party to testify by the protected party is effective in partially relieving such incompetency to testify. Illinois, however, is particularly conservative on this proposition and has been known to subscribe to the 'Half Open Door Rule.' Under this rule the incompetency of the witness is lifted only as to matters upon which he was interrogated by the other party.[26]

This provision has the potential of enabling the protected party to use an otherwise incompetent party's testimony to his best interest without endangering his own position. Consider the situation of a wrongful death claim against co-defendants who are sued as principal and agent wherein the issue of agency is disputed. The alleged agent can be called to testify regarding solely the issue of agency without any fear that such testimony would render this witness competent to testify regarding the issue of liability.[27] Another effective use of the 'half open door rule' is the calling by the protected party of an otherwise incompetent party as an adverse witness,[28] making a singular query which this party must answer in a particular manner and thereupon impeaching said witness with a contrary inconsistent statement

[24] Weinstein v. Morris, 281 Ill. App. 12 (1935); Becker v. Foster, 64 Ill. App. 192 (1896).

[25] ILLINOIS PATTERN JURY INSTRUCTIONS §§ 5.01–.06 (1961).

[26] Perkins v. Brown, 400 Ill. 490, 81 N.E.2d 207 (1948).

[27] Hann v. Brooks, *supra* note 7; Blumb v. Getz, 294 Ill. App. 432, 13 N.E.2d 1019 (1938).

[28] ILL. REV. STAT. ch. 110, § 60 (1965).

made by him in a prior deposition.[29] This will only operate to allow the impeached party to testify as to those portions of the depositions as might tend to explain the impeaching portion.[30] The 'half open door theory' also can be useful to a protected party for the limited purpose of questioning the incompetent party concerning the description of his vehicle and the identification of the parties with him at the time of the occurrence.[31] This is especially effective in establishing the defective nature of the incompetent party's vehicle and to lessen the impact of impartial witnesses called by the incompetent party to testify if it can be shown that the incompetent party was unaware of the presence of such witnesses at the scene of the accident at the time and place when it happened.

As a caveat to trial counsel attempting to glean a maximum advantage from the 'half open door theory' great care must be taken not to question the incompetent party too fully. Once inquiry has been made into various aspects of negligence under adverse examination, the door is opened, and the otherwise incompetent party may be further examined by his counsel regarding the negligent conduct of the deceased party.[32] Likewise, a proffer by the protected party to read into evidence portions of the incompetent party's deposition will constitute a waiver of the incompetent party's restriction against testifying and will enable the latter to testify regarding the entire transaction.[33]

Where one of the co-defendants is deceased and represented by an administrator or executor at trial, there is the danger that an otherwise incompetent plaintiff will be allowed to testify if the surviving defendant takes the witness stand and testifies regarding the occurrence.[34] Clearly, the plaintiff's counsel in this situation must strive to present a sufficiently potent case that will coax the surviving defendant into testifying, thereby waiving the protection of the "Dead Man's Statute" and enabling the plaintiff to testify as to his version. These tactics are applicable only where the interests of the co-defendants are similar. Where the interests of the co-defendants are adverse at the

[29] De Young v. Ralley, 329 Ill. App. 1, 67 N.E.2d 221 (1946).

[30] *Ibid.*

[31] Washington v. Peterson, 320 Ill. App. 140, 49 N.E.2d 883 (1943).

[32] Combs v. Younge, *supra* note 3.

[33] *In re* Hershon's Estate, 329 Ill. App. 328, 68 N.E.2d 482 (1946).

[34] Beebe v. Workman, 336 Ill. App. 1, 82 N.E.2d 701 (1948).

time of occurrence and at the time of trial, the testimony of a surviving co-defendant will be barred by the "Dead Man's Statute."[35]

It is virtually elementary that the plaintiff in a personal injury, as in any other type of lawsuit, has the burden of proceeding and must make out at least a prima facie case or face the undesirable alternative of a directed verdict against him. Conversely, the defendant against whom a prima facie case has been made likewise has the burden of introducing sufficient rebutting evidence or face a verdict directed against him. Under these circumstances it is clear that the protected party under the "Dead Man's Statute" will most likely be required to introduce some evidence. The introduction of such evidence will in the appropriate situation unseal the lips of an otherwise incompetent party under the statute.

Where the plaintiff is deceased, the testimony of an occurrence witness such as a close relative of the plaintiff regarding the occurrence will be effective to open the door and allow the defendant to testify.[36] Nevertheless, such testimony lifts the statutory prohibition only as to the transaction testified to on behalf of the protected party. It does not operate to enable the protected party to testify concerning such transactions which were not covered in the witness' testimony.[37]

Although a litigant may have been present at the time and place of the occurrence which is the subject of the lawsuit, the mere fact that he is a party in interest bars his testimony.[38] On the other hand, an independent witness who is neither a litigant nor a party in interest will never be prohibited from testifying. A litigant or one having an interest in the litigation whose testimony has been rendered incompetent by the statute cannot make himself competent to testify by calling a witness, interrogating said witness upon a particular issue and, thereafter, seeking to testify himself, regarding this issue.[39] Thus, the prudent protected party should never call an interested witness whose interests are aligned with the protected party to testify unless such testimony is necessary to meet the burden of proof or disproof.

Conversations involving the incompetent party that is incompetent to testify appear to be a peculiar characteristic of lawsuits involving

[35] Elwell v. Hicks, 238 Ill. 170, 87 N.E. 316 (1909).

[36] Van Meter v. Goldfarb, 317 Ill. 620, 148 N.E. 391 (1925).

[37] Calkins v. Calkins, 220 Ill. 111, 77 N.E. 102 (1906).

[38] Ogden v. Keck, 253 Ill. App. 444 (1929).

[39] Johnson v. McKnight, 313 Ill. App. 260, 39 N.E.2d 700 (1942).

the "Dead Man's Act." Where the conversation occurred in the presence of the decedent, the testimony of witnesses as to this conversation will not render the incompetent party competent.[40] On the other hand, where the conversation occurred in the absence of the decedent, as is frequently the situation at the scene of a wrongful death accident, then testimony regarding a conversation with the incompetent party will operate to relieve the prohibition against him with respect to that conversation and to the facts reasonably pertinent to it.[41] The prosecution must be very cautious in considering whether to have a witness testify as to such a conversation and should resort to such testimony only when necessary to sustain the burden of proving their case or rebutting that of the opposition.

There will always be the situation of trial counsel and the court being in disagreement as to the law governing the procedure of the trial. Disagreement as to the law governing trial procedure will arise regarding the proposition of whether the testimony of a proffered witness is or is not barred by the "Dead Man's Statute." Upon receiving an adverse ruling, counsel should make careful objections for the purpose of properly preserving the appellate record. After doing so the counsel should not sit by idly and merely observe the testimony of the disputed witness. Such a witness should be carefully cross examined in light of the testimony rendered and with reference to the particular trial situation. Such cross examination and interrogation of the witness will not operate as a waiver of the objection as to his competency to testify.[42]

With respect to incompetency based upon interest in the lawsuit, we may once again consider the hypothetical arrangement of a plaintiff claiming against two or more defendants where one of the defendants being deceased is protected under the "Dead Man's Act." Where the interests of the defendants are adverse both the plaintiff and surviving defendant are per se incompetent to testify. Plaintiffs' counsel under these circumstances should carefully consider which defendant's liability is stronger and more manifest. Where the liability against the deceased defendant is the stronger, the plaintiff might be wise in dropping his claim against the living defendant, thereby rendering

[40] Ruckman v. Alwood, 71 Ill. 155 (1873).

[41] Judy v. Judy, 261 Ill. 470, 104 N.E. 256 (1914); Crow v. Blaser, 335 Ill. App. 281, 81 N.E.2d 742 (1948).

[42] Lotta v. Lotta, 6 Ill. 2d 397, 129 N.E.2d 153 (1955).

this party competent to testify as a witness for proving the liability of the deceased defendant.[43] Conversely, where liability is stronger against the living defendant, it would appear that the wisest course for the plaintiff would be to dismiss his claim against the deceased defendant and proceed solely against the surviving defendant, thereby obviating any restrictions of the "Dead Man's Act." However, any benefit derived by the plaintiff from this technique can be nullified by an alert surviving defendant who impleads the estate of the deceased defendant back into the lawsuit and by so doing revives the applicability of the "Dead Man's Act."

We are living in an age where large scale and liberal discovery procedures are the rule. Depositions have become the mainstay, if not at the very least an integral part of such discovery framework. Let us next consider the applicability of depositions to the trial situation involving the "Dead Man's Act."

At first blush, it would appear that once litigation has commenced, especially in our present age of large backlogs in most court calendars, every party to litigation should be zealous in having his deposition taken and appropriately filed with the court for use in evidence in the event that his opponent should die or become incapacitated in any of the manners described in the statute. As salutary as the above procedure may appear to be, it unfortunately is not always effective. For instance, the decisions have held that depositions taken while the suit is pending are not to be considered at trial where the adverse party died subsequent to the taking of the deposition yet prior to the time of trial. This is true even where, as in the case of an evidence deposition where the deposition transcript was filed with the clerk of the court,[44] yet the deponent was not cross examined by opposing counsel.[45]

However, an evidence deposition may always be considered in evidence regarding matters which occurred subsequent to the death of the protected party.[46]

The protected party must be most wary with regard to the introduction of the incompetent party's deposition into evidence. Such

[43] Kleinhans v. Ohde, 350 Ill. App. 177, 112 N.E.2d 498 (1953); Wuebbles v. Shea, 294 Ill. App. 157, 13 N.E.2d 646 (1938).

[44] Smith v. Billings, 177 Ill. 446, 53 N.E. 81 (1898).

[45] Winger v. Chicago City Bank & Trust Co., 325 Ill. App. 459, 60 N.E.2d 560 (1945).

[46] Bogart v. Brazee, 331 Ill. 160, 162 N.E. 877 (1928).

an introduction into evidence would operate toward waiving the protection of the statute.[47]

Similarly when the estate of a protected party has introduced into evidence any deposition of the incompetent party whose testimony was previously restricted by the statute, the protected party by so doing lifts the incompetency of such party to testify.[48] The inherent danger of introducing depositions is manifest and should be resorted to only when absolutely necessary under the circumstances. Counsel who undertakes to have depositions read into evidence should be further aware that the lifting of such incompetency by the adverse party operates not merely to testifying as a mere denial of the statements included in the deposition, but enables the otherwise incompetent party to testify as to all circumstances included in said deposition, to the fullest extent of his knowledge.[49]

Where the circumstances are such that the protected party's deposition although taken and filed with the court, but where there was no cross-examination of the deponent by opposing counsel, the incompetent party cannot remove his incompetency by the introduction of such a deposition into evidence.[50] This rule applies likewise to surviving adverse party defendants as well as to the surviving party plaintiff where one of the co-defendants died prior to trial.[51]

Finally, before departing from this phase of the topic, it is worthwhile to consider the situation of a deceased defendant who has left behind him a self-serving evidence deposition. The substance of this deposition will not of itself in any way assist the surviving plaintiff in making out a prima facie case, nor can it be used to lift the surviving plaintiff's incompetency to testify in his own behalf. The estate of the defendant under these circumstances is at least temporarily in the enviable position of adopting a wait and see attitude until it has ascertained whether the plaintiff will be able to present a prima facie case. If such prima facie case is presented by the plaintiff, then the estate of the defendant could thereupon introduce into evidence the deposition of the deceased defendant. Although this technique will lift the incompetency of the plaintiff to testify in rebuttal, it will under the

[47] *In re* Hershon's Estate, *supra* note 33; Turner v. Lee, 254 Ill. 141, 98 N.E. 246 (1912).

[48] De Costa v. Bischer, 287 Ill. 598, 122 N.E. 819 (1919).

[49] Eastman v. United Marble Co., 224 Ill. App. 256 (1922).

[50] Doggett v. Greene, 254 Ill. 134, 98 N.E. 219 (1912).

[51] *Ibid.*

circumstances operate to save the defendant's estate from having a verdict directed against him and thereby enable him to have this matter go to the trier of fact for determination upon the merits of the controversy.

As noted earlier, the essential purpose of this work is not to criticize the "Dead Man's Act." Nevertheless, a candid study and consideration of this statute patently reveals some of its basic shortcomings especially when viewed in the light of its effect upon the personal injury trial. The niceties in the decisions which seek to justify the statute and establish a rational basis for its continued existence never go any further than to view it as a statute enacted for the purpose of protecting estates from claims based upon testimony which they are unable to rebut. This rationale of placing all parties on an equal footing remains sound and just, so long as impartial witnesses are available to testify who have no personal interest in the litigation. Every practitioner who has encountered any amount of personal injury litigation is strongly aware that the presence and existence of such witnesses is not the general rule. In situations where the "Dead Man's Act" is applicable and where there exist no impartial disinterested witnesses the statute no longer operates as a shield to protect helpless estates, but moves in the nature of a sword to cut off legitimate claims.

In factual situations where the "Dead Man's Act" applies, the true problem facing the personal injury plaintiff is the issue of liability; the imperative and vital need of presenting sufficient evidence to create a prima facie case and avoid a directed verdict of not guilty. Proof of damage is basically unaffected by the statute because where a defendant has died prior to trial, the surviving plaintiff can testify regarding his own physical condition at trial time.[52] In the same manner, doctors are competent to testify regarding treatment rendered and costs assessed therefor, employers may testify as to lost time and mechanics may testify concerning property damage. Thus, a plaintiff who has successfully met the liability hurdle is not usually restricted by the statute regarding a showing of his special damages and the amount of present pain and suffering. Nevertheless, we must never lose sight of the fact that the true problem facing the claimant is that of liability. One of the greatest hardships wrought by the "Dead

[52] Heil v. Kastengren, 328 Ill. App. 301, 65 N.E.2d 579 (1946); Bogart v. Brazee, *supra* note 46.

Man's Act," will occur where the defendant is dead, the plaintiff survives and there are no impartial eye witnesses to testify. Here the act will operate to seal the plaintiff's lips and bar his testimony regarding the facts of the occurrence.[53] As a result of such incompetency to testify, the plaintiff's cause of action faces a virtually mandatory directed verdict of 'not guilty.' Thus we may very well have a personal injury claimant, who may have sustained very serious and disabling injuries out of an occurrence wherein the issues of liability are decidedly in his favor, being denied his rightful recovery for no other reason than the fact that the tortfeasor responsible has died prior to the time of trial.

The above illustration shows an urgent need for some legislative modification that would operate to lift the incompetency of the plaintiff in this factual situation.

Conversely, it can be meritoriously argued on behalf of the defense that an undeserving plaintiff could recover from the estate of the deceased defendant if the plaintiff's incompetency to testify were to be removed.

However, the overall justice that would be accomplished as a result of the proposed legislative modification of the "Dead Man's Act" would justify any minor setbacks to the defense. The defense would still be protected in that the plaintiff although his lips are unsealed must still by his testimony make out a prima facie case. The defense would likewise still have full opportunity to cross examine the plaintiff and to recall him to the witness stand as an adverse witness,[54] in an effort to bring out any inaccuracies or impeach his testimony. Furthermore, the defense, in our age of liberal discovery wherein depositions of doctors, employers and various other persons having a knowledge of a plaintiff's damages, are readily available coupled with the opportunity of having a plaintiff examined by a physician of the defendant's choosing,[55] would not be at any real disadvantage at trial with respect to the issues of damages.

Although it may be argued that a plaintiff in the absence of the proposed modification could conceivably make out a prima facie case by use of careful habit evidence, such evidence may often times have very slight practical application to the issues of the particular case and the

[53] Ruspartini v. Steffek, 414 Ill. 70, 110 N.E.2d 198 (1953).

[54] *Supra* note 28.

[55] ILL. REV. STAT. ch. 101, § 17 (1965).

court in the exercise of judicial discretion may deem such evidence insufficient to have created a prima facie case.

Therefore, the lifting of the incompetency of a surviving personal injury plaintiff to testify against an estate of a deceased defendant where there are no impartial disinterested witnesses operates to enable a trier of fact to at least hear testimony regarding the controversy which is in litigation and to have some evidentiary basis for determining the rights of the parties instead of being forced to direct a verdict of 'not guilty' without first hearing a scintilla of evidence as to the merits of the controversy.

Under the existing Act, the estate of a deceased plaintiff may introduce evidence showing the careful habits of the decedent in order to prove the liability of the surviving defendant.[56] Where the surviving defendant is the only eyewitness to the occurrence, he cannot avoid the introduction of careful habits evidence by offering himself as a witness to the prosecution.[57] The careful habits of the decedent without more has been held sufficient to create a prima facie case of liability, thereby leaving the matter for ultimate determination by a trier of fact.[58] The plaintiff under these circumstances should likewise take care to see that the jury is appropriately instructed that they must consider the careful habits of the decedent in making their decision. Failure by the court under these circumstances to use such a proffered instruction constitutes reversible error.[59]

Although 'careful habit' evidence is effective at times toward creating a prima facie case on behalf of the deceased party's estate, it certainly is not the strongest evidence. The very nature of such evidence operates to give the defense the opportunity to argue that the decedent was acting in a careful and prudent manner at the time of the accident, i.e. the introduction of such evidence operates towards removal of any incompetency by the surviving defendant.[60]

The defense by tendering an impartial witness may, if such a witness exists, cause all testimony and evidence regarding careful habits of the decedent to be struck from the record.[61] Clearly, such occur-

[56] Zeller v. Durham, 33 Ill. App. 2d 273, 179 N.E.2d 34 (1962); Hurley v. Tipton, 46 Ill. App. 2d 127, 196 N.E.2d 399 (1964).

[57] Nordman v. Carlson, 291 Ill. App. 438, 10 N.E.2d 53 (1937).

[58] *Ibid.*

[59] Zeller v. Durham, *supra* note 56.

[60] Hawthorne v. New York City R.R., 2 Ill. App. 2d 338, 119 N.E.2d 516 (1954).

[61] Rouse v. Tomasek, 279 Ill. App. 557 (1935).

rence or eyewitness testimony by the defense is more convincing than the 'careful habits' evidence introduced by the prosecution and, as a general rule, will give the defense some advantage.

The use of 'careful habit' testimony is not a fool proof means of assuring a surviving plaintiff that he will be successful in making out a prima facie case, and it is not a potent argument on behalf of the defense against the previously proposed legislation that a surviving plaintiff should be allowed to testify regarding liability when the defendant is deceased and there are no impartial witnesses available. For such evidence may often have slight practical application to the issues of a particular case and the court in the exercise of judicial discretion may deem such evidence insufficient to have created a prima facie case.

A perplexing problem for the estate of the deceased plaintiff will arise when there is an impartial witness whose version of the occurrence favors the defense. The existence and proffering of such a witness by the defense, as noted earlier, renders inadmissible any 'careful habit' testimony. Difficult as this problem may appear for the prosecution, it is not altogether hopeless. The prosecution may under these circumstances resort to the physical facts of the accident such as the condition of the street where the accident took place, the damage to the vehicles, their position after the accident, the position of the decedent's body, skid marks and weather. Such evidence where it is clearly presented and shows a reasonable basis regarding liability will be effective toward creation of a prima facie case of liability.[62]

There is almost an endless number of factual situations which can possibly develop wherein the "Dead Man's Act" would be applicable. This in turn provides an affluent source of problems that the trial advocate must effectively solve if he is to ultimately prevail. It would be impractical to endeavor to conceive all such factual situations and discuss them; therefore, only the more likely and frequent ones have been considered. These problems indiscriminately affect both the prosecution and the defense sides of personal injury litigation. Our purpose has been to show through a thoughtful consideration of the "Dead Man's Act" and the judicial decisions construing it, that a majority of the restrictions manifested by the "Dead Man's Act" can be overcome.

[62] *Supra* note 57.