The Dead Man's Act - Staying Alive and Well

Amundsen Davis Aerospace Alert
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Numerous states have enacted statues (commonly known as the Dead Man's Act *735 ILCS 5/8-201* in Illinois) aimed to remove temptations of a survivor to testify regarding matters that cannot be rebutted because of the death of the only other individual witnessing a conversation or event underlying a lawsuit. In particular, the act prohibits testimony by a person whose interests are adverse to the deceased about matters that the deceased could have refuted. The public policy being that the living cannot recover in favor of or against a decedent's estate if the decedent would have been able to offer a firsthand account of an evidentiary point. These statutes are not intended to disadvantage the living. However, the application of the act rarely fails to have this effect.

A recent Illinois Appellate Court decision, ***Spencer v. Strenger Wayne***, is a helpful reminder on the true breadth and gravity of the Dead Man's Act. In *Spencer*, the plaintiff slipped and fell on a mat in the defendant's garage while exiting the defendant's vehicle. The defendant died during the pendency of the case. The trial court granted summary judgment in favor of the decedent defendant following his death because there was no admissible evidence to prove the plaintiff's claims. Specifically, due to the decedent defendant's "presence" during the plaintiff's fall, the plaintiff would be effectively barred from testifying regarding the fall at trial pursuant to the Dead Man's Act. Absent this evidence, the negligence claim failed as a matter of law.

In attempting to avoid the reach of the Dead Man's Act and circumvent summary judgment, the plaintiff argued that the decedent defendant was not in a position to see what caused the plaintiff to slip and fall and could not have refuted the plaintiff's testimony. This lack of "presence" by the decedent defendant would have made the testimony admissible to support her case. In rejecting this argument, though, the trial court stated: "to basically speculate about what the decedent may or may not have been able to see while plaintiff was in her presence would undercut the entire purpose of the Dead Man's Act." Had the decedent defendant been able to testify, he may have offered a contrary observation of how the plaintiff exited the vehicle, where the plaintiff stepped, what the plaintiff stepped on, if the mat slipped or not, if the plaintiff tripped as opposed to slipped, or other matters directly affecting a causation evaluation.

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Accordingly, the appellate court affirmed the trial court's position. The court acknowledged that had there been admissible evidence that the decedent defendant was in the driver's seat of the car at the time of the fall, as claimed by the plaintiff, such that he was unable to have witnessed the fall and therefore could not testify as to the facts surrounding the fall, the plaintiff might as well have been able to testify about the events. However, without this admissible evidence, the only source for the information was the plaintiff. Therefore, in light of the defendant's death during the litigation, the plaintiff's testimony related to her fall was subject to and barred by the Dead Man's Act. The admissible evidence was thus insufficient to raise a genuine issue of material fact as to whether the decedent defendant's negligence was the proximate cause of the fall and summary judgment in favor of the decedent defendant was appropriate.

Overall, this refresher on the inadmissibility of evidence following the death of an individual present during a case's critical conversations and/or events is readily applicable to aerospace litigation. Establishing seemingly small facts as early and as clearly as possible can make all of the difference. If the decedent defendant had confirmed his location in the car at the time of the fall prior to his death, the *Spencer* case very well could have seen another outcome. Accordingly, whether the Dead Man's Act is working for or against you, it is important to remember that its claws of inadmissibility remain severe and overarching.