



## Newsletters

### A Primer on Illinois' Dead Man's Act and the Defense of Medical Negligence Claims

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### A Primer on Illinois' Dead Man's Act and the Defense of Medical Negligence Claims

#### **I. The Dead Man's Act and Its "Same Event Exception" Generally**

In Illinois, the Dead Man's Act has unique implications on claims of medical negligence brought on behalf of a deceased person or person under a legal disability. The Act and a significant exception thereto (the "same event exception") state, in pertinent part, as follows:

In the trial of any action in which any party sues . . . as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, except in the following instances:

(a) If any person testifies on behalf of the representative to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event.

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As used in this Section:

(a) "Person under legal disability" means any person who is adjudged by the court in the pending civil action to be unable to testify by reason of mental illness, an intellectual disability, or deterioration of mentality.

(b) "Representative" means . . . a guardian or guardian ad litem for a person under legal disability.

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The general purpose of the Dead Man's Act is to maintain fundamental fairness, which may be achieved by barring evidence that the deceased or legally disabled person could have refuted and by equalizing the position of the parties in relation to testimony. Meanwhile, the purpose of the same event exception is to preclude the trier of fact from being shown a one-sided picture of the event in question. Failure to object on grounds of the Dead Man's Act will result in its waiver.



With respect to suits brought on behalf of a person under a legal disability, a plaintiff must petition the trial court for the necessary adjudication of mental illness, intellectual disability, or deterioration of mentality. Competency to testify for purposes of the Dead Man's Act depends, in part, upon whether the allegedly legally disabled person can comprehend and answer questions. This may be the subject of expert testimony. It bears noting, however, that a "person under legal disability" for purposes of the Dead Man's Act does not include a minor.

## II. Limitations and Waiver of the Dead Man's Act

Certain testimony may entirely circumvent the reach of the Dead Man's Act. For example, evidence of facts that the legally disabled person could not refute are not rendered inadmissible by the Act. To that end, generally, the proponent of the Dead Man's Act must put forth evidence that the legally disabled person would have observed the conversation or event in question. For further example, events that do not specifically refer to the issues being litigated are not necessarily barred by the Dead Man's Act.

In *Vazirzadeh v. Kaminski*, the First District noted that "[o]nly unwitnessed conversations with the decedent are off-limits." This naturally implies that a witnessed conversation or event cannot be kept from the jury despite the Dead Man's Act. In *Vazirzadeh*, the conversation at issue was unwitnessed and plaintiff's counsel did not open the door to the decedent's conversation with the defendant doctor; thus, the trial court erred in allowing the defendant doctor to testify about such conversation.

Even testimony barred by the Dead Man's Act may be admitted if the trial court, in its discretion, determines that justice so requires under the rule of completeness or fundamental fairness. In *Beard v. Barron*, the First District noted that the objective of the Act "is not fulfilled where . . . the plaintiff is permitted to elicit testimony from the defendant medical doctor during an adverse examination that he missed important symptoms exhibited by his patient, while at the same time denying him the opportunity to answer questions posed by plaintiff as to why he did not find these symptoms significant to warrant further testing."

Turning to the same event exception, the Illinois Supreme Court has held that one may waive application of the Dead Man's Act in a medical malpractice action by offering into evidence a defendant doctor's notes from a meeting with the deceased patient and offering testimony about the notes. This evidence "opened the door" to testimony by the defendant doctor regarding his meeting with the deceased.

In *Hoem v. Zia*, the plaintiff alleged that defendants failed to diagnose and treat plaintiff's decedent, thereby causing him to die of a heart attack. The jury rendered a verdict for the defense. The appellate court reversed on grounds that the defendant doctor was improperly allowed to testify regarding complaints voiced by the decedent at an office visit.

The Illinois Supreme Court, however, found that testimony of plaintiff's expert witness and the introduction of the defendant doctor's office notes "opened the door" to the defendant doctor's testimony. The *Hoem* Court noted that the plaintiff's expert witness was not merely interpreting the notes but "putting a gloss" on them by implying that the decedent specifically sought treatment for a heart-related problem. To allow the plaintiff to introduce her version of why decedent went to the doctor without giving an equal opportunity to the defendant doctor would be fundamentally unfair. Thus, since the plaintiff "opened the door," the defendant could provide testimony otherwise prohibited by the Dead Man's Act.

At least one case, *Haist v. Wu*, held that allegations of medical negligence may alone result in waiver of the protections of the Dead Man's Act. In *Haist*, the plaintiff argued that the defendant doctor should not be allowed to testify about advice given to the decedent beyond the written medical record --- particularly, a meeting and conversation in the defendant's office. Of significance, the *Haist* Court held as follows:

Plaintiff alleged that the defendant's failure to impress on her the urgency of her situation was negligence. Plaintiff also alleged negligence in defendant's failure to obtain a phone number from the decedent and his failure to contact her with the results of the ultrasound test. To allow the plaintiff to make these allegations and then to claim the Dead Man's Act as a bar to defendant in explaining what had happened would be palpably unjust and in direct contravention of the act's goal of fairness.



It should be noted, however, that the plaintiff in *Haist* did call defendant as a witness and elicited testimony regarding the office visit, his diagnosis of a possible ectopic pregnancy or miscarriage, and the fact that his office records did not state a phone number.

### III. Practical Considerations for the Defense

The reach of the Dead Man's Act is confined to unwitnessed conversations or events; thus, the Act should not apply to any event that may have possibly been witnessed. Indeed, the primary purposes of the Act are to bar evidence that the plaintiff could have refuted and to equalize his position with his treaters in relation to testimony. Insofar as a witness observed the events in question, they may testify accordingly, thereby preserving the Act's notion of fundamental fairness. The same argument applies to events that occurred outside of the presence of the deceased or person under a legal disability --- for example, a medical record dictated and transcribed outside of the presence of such individual.

A plaintiff will have to tread very lightly with regard to opening the door to events outside the medical record, lest they trigger the same event exception to the Dead Man's Act. The strength of a waiver argument will depend upon the testimony elicited by opposing counsel through the plaintiff, the treaters, and the experts, as well as the specific medical records introduced into evidence. If such evidence is supplementation rather than interpretation, this opens the door to events otherwise barred by the Dead Man's Act. To that end, one should be mindful of testimony that can be characterized as putting the witness' own "gloss" on existing facts contained in the medical record. At the very least, in the vein of *Haist*, it should be argued that a plaintiff's mere allegations of medical negligence effectively waive the Act.

If a plaintiff raises the Dead Man's Act, an argument should be made that completeness outweighs any generic policy promoted by the Act. Specifically, the jury should be given a full and complete picture of the medical care before rendering any verdict, despite any technical fulfillment of the Dead Man's Act. This especially concerns any events that do not relate to ultimate issues in the case. It should also be argued that barring any events outside of the medical record represents a slippery slope in terms of public policy. Juries should not be boxed in given the intricacies of modern medicine and the fact that even the best provider may inadvertently omit an item in a medical record.

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735 ILCS 5/8-201 (West 2017).

*Gunn v. Sobucki*, 216 Ill.2d 602, 609 (2005).

*Haist v. Wu*, 235 Ill. App. 3d 799, 818 (1st Dist. 1992).

*Kelley v. First State Bank of Princeton*, 81 Ill. App. 3d 402, 416 (3d Dist. 1980). See also *In re Estate of Goffinet*, 318 Ill. App. 3d 152, 156 (4th Dist. 2001).

See *Green by Fritz v. Jackson*, 289 Ill. App. 3d 1001, 1007-08 (1st Dist. 1997).

See McElroy, Michael P., 2 *Horner Probate Prac. & Estates* § 43:7 (West 2015) ("A minor who is not suing as a representative of a deceased person is not within the [Dead Man's Act] . . .").

*Rerack v. Lally*, 241 Ill. App. 3d 692, 695 (1st Dist. 1992) ("The purpose of the Dead Man's Act is to bar only that evidence which the decedent could have refuted.").

See *id.*

See, e.g., *DeMarco v. Univ. of Health Sciences/Chi. Med. Sch.*, 40 Ill. App. 3d 474, 485 (1st Dist. 1976) (further emphasizing that, although dean of medical school was deceased, his secretary could have been called to contradict plaintiff student's testimony).



*Vazirzadeh v. Kaminski*, 157 Ill. App. 3d 638, 645 (1st Dist. 1987).

*Id.* See also *Herron v. Anderson*, 254 Ill. App. 3d 365, 375-76 (1st Dist. 1993) (in light of the rule of completeness, trial court did not err in refusing redaction of certain testimony of a telephone conversation between decedent and defendant doctor, a portion of which plaintiff overheard).

See, e.g., *Herron v. Anderson*, 254 Ill. App. 3d at 376 (1st Dist. 1993). The rule of completeness provides that, whenever a statement or writing has been admitted, the remainder should be admitted so as to place the originally offered statement in the proper context and to convey the true meaning to the jury. *Lawson v. G.D. Searle & Co.*, 64 Ill.2d 543, 556 (1976).

See, e.g., *Beard v. Barron*, 379 Ill. App. 3d 1, 13 (1st Dist. 2008).

*Id.*

*Hoem v. Zia*, 159 Ill.2d 193, 201 (1994).

*Id.* at 201.

See also *Fleming v. Moswin*, 976 N.E.2d 447, 472-73 (1st Dist. 2012) (plaintiffs waived testimonial bar of the Dead Man's Act due to their expert testifying about the meaning and implications of undocumented information in the decedent's medical record); *Malanowski v. Jabamoni*, 332 Ill. App. 3d 8, 13 (1st Dist. 2002) (same holding due to elicitation of testimony from expert witness about the meaning of the defendant doctor's progress notes). *But see Theofanis v. Sarrafi*, 339 Ill. App. 3d 460, 478-79 (1st Dist. 2003) (trial court erred in admitting defendant doctor's notes and testimony about conversations with stroke patient because, on initial examination, plaintiffs' counsel confined questioning to acts that the doctor performed subsequent to such conversations).

*Haist v. Wu*, 235 Ill. App. 3d 799 (1st Dist. 1992). See also *Wasleff v. Dever*, 194 Ill. App. 3d 147, 154 (1st Dist. 1992) (identifying the plaintiff's complaint as one of several reasons that he waived application of the Dead Man's Act).

235 Ill. App. 3d at 819.

*Id.*

*Id.* at 820.