
Establishing Presumption of Death of a Missing Person: A Tale of Two Presumptions

Nor Azlina Mohd Noor¹, Ahmad Shamsul Abd Aziz²

¹*School of Law, Legal and Justice Research Centre, UUM COLGIS,*

²*Universiti Utara Malaysia, 06010, Sintok Kedah Malaysia*

¹*norazlyna@uum.edu.my / ²sham@uum.edu.my*

Abstract

In Malaysia, a corpse must be located before a death may be officially recorded. However, if a court order is required as the assumed dead individual's body has not been located, then the person must be considered legally absent. In order to determine the legal status of a missing person who is considered dead in Malaysia, this article will analyse the two presumptions under the current laws, both of which originate from common law concept. This is because the courts, using the presumption principle, will often rule that a missing person is presumed dead after a certain amount of time has passed and when no new evidence has surfaced suggesting the individual is alive. The legislative provisions of Malaysian Evidence Act 1950 and reported cases were analysed in this article using a qualitative doctrinal legal research approach. This article finds that the presumption of death under section 108 of the Malaysian Evidence Act 1950 provides a useful counterpoint to the presumption of life under section 107. The Malaysian Evidence Act 1950 has provided conclusive evidence that the common law idea has taken hold in Malaysia. Only two elements that were firmly established in common law were incorporated into Section 108. These two elements are that the person who is missing must not have been heard of for a period of seven years, and that the person who is missing must not have been heard of during that time by those who would naturally have heard of him. If these two elements are met, then the person who is missing is considered to be missing. The omission has been addressed as a result of the court's decision even though section 108 of the Malaysian Evidence Act 1950 is silent on the third element of the common law principle on the necessity to undertake proper inquiries in demonstrating the absence of the missing person.

Keywords: presumption of death, missing person, survivorship, evidence, law, Malaysia

Introduction

In Malaysia, registering the death of a person is only possible if the corpse can be located first. This is one of the requirements for the process. In order for the law to acknowledge that a person is no longer presumed to be alive, there must be proof of the individual's physical body. On the other hand, a court order would be required in the event if the believed deceased corpse of the missing individual could not be located. It is impossible to conclude that the individual who went missing is dead since there is no body to support that position (Noor & Aziz, 2017). It is reasonable to believe that in accordance with the provisions of section 18 of the Births and Deaths Registration Act 1957, the death of every person who passes away in Malaysia as well as the reason for their passing must be registered by the Registrar for the registration area in which the death took place. This is done by entering in a register in duplicate in the manner that is prescribed such particulars pertaining to the death. It is recommended that this be taken into consideration. However, if there is sufficient circumstantial evidence to establish a reasonable person's judgement that the individual is dead on the balance of probability, then a death certificate may be issued without a court order. This was the situation in the case of the unexplained disappearance of MH370. For instance, in the case of an unexplained disappearance, if there is evidence that, on the balance of probability, suggests that the person has passed away, then a reasonable person would be justified in believing this (Mohamed, 2015).

Judiciary precedents have established that, without new proof to the contrary, a missing person may be presumed deceased once a certain period of time has passed. When someone is gone from their usual routines, they are said to be missing. Based on this assumption, the disappearance of this individual raises uncertainties for his or her safety and well-being because people who are most likely to have heard from the missing person do not know where the person is or why they disappeared (Noor, Aziz, and Halim, 2018). The presumption is a legal principle that takes into account the fact that seven years have passed and a person vanish without explanation. It is to be regarded as equivalent to death under the law, regardless of the jury's belief. (Stone, 1981) An inference of fact taken from other known or confirmed facts is what Backer (2001) calls a presumption. It's a rule of law that says a judge can infer anything about the truth of the case based on a single piece of evidence

unless the opposite is shown to be true. The presumption requires a finding of the fact of death after certain stipulated facts are proven to the court's satisfaction in the absence of evidence to the contrary (Stone, 1981). Both common law and legislation can be responsible for the formation of legal presumptions. They are not necessarily the product of a line of reasoning that may be considered rational. In most cases, they are a reflection of a number of different policy issues. A contentious topic that has important significance and legal repercussions for a missing person who is considered dead can be decided in a manner that is both predictable and definitive by virtue of the presumption of death principle, which provides a framework for doing so (Noor, Aziz & Halim, 2018). This similar viewpoint is shared by Islamic legal doctrine as well (Mohamed & Ramlee, 2015).

In the case of *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, 173 Atl. 644, 649 (1934), an English court in the United Kingdom, presumptions were described as "phantoms of logic flickering in the twilight but fading in the sunlight of actual facts." This description was given by the court in the context of the case. Similarly, in the case of *Mockowik v. Kansas City* (1906) 196 Mo 550 at page 571, the court commented that "presumptions may be regarded as the bats of the law," implying that they "flit in the darkness but vanish in the sun-shine of actual facts." It indicates that a presumption is not an indisputable proof of a fact since it might be disproved by any later fact. This is what it signifies. The vast majority of presumptions are disputable, which means that they may be disproved or, at the very least, their veracity can be called into question by the available evidence (Noor & Aziz, 2017).

Presumption of death and presumption of survivorship are not to be confused with one another. Presumption of death refers to the idea that a person has died if they have suddenly vanished and have been continually missing for a lengthy period of time. A court can issue an order declaring someone presumed dead in accordance with the presumption of death. This allows for the missing person's estate to be handled, insurance benefits to be distributed, or a spouse to remarry. To the contrary, presumption of survivorship specifies the order of death when two or more individuals die in circumstances in which the order of death cannot be ascertained. The Malaysian Presumption of Survivorship Act 1950 specifies the rules that apply to Malaysia's presumption of survivorship. Regarding a person's right to claim property, the presumption of survivorship is established by Section 2 of the Act. The legislation states it in the following way: "In all cases where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court) for all purposes affecting the title to property be presumed to have occurred in order of seniority and accordingly the younger shall be deemed to have survived the elder."

A person's absence does not change who owns their belongings or has authority over their affairs. If the missing person is presumed deceased, the people left behind may have trouble, if not a complete inability, to acquire a death certificate. In the absence of a death certificate, a missing person is presumed to be alive for most legal reasons. There are a few different scenarios in which the missing person might be assumed to be deceased.

Presumption Of Death Based On Common Law Principle

The idea of presumption of death has been widely recognised from the beginning of recorded history. When there has been no contact with a person for seven years, the court will presume that individual to be dead under common law until proof to the contrary is shown. Many works have been written on the subject, and discussions on it date back to the early 1900s. None in the common law legal community has raised any objections to this theory, which has gained widespread acceptance. The judge in *Re Aldersey* [1905] 2 Ch 181, 187–88 conceded that a presumption of death after seven years was irrational, but he justified his conduct as "the best manner of cutting knot which is impossible of being untied." This fundamental idea is so well established that it has been put on hold for several years. The presumption of death in English common law, which was established by the courts, states that "where there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more and it is proved that there are persons who would be likely to have heard of him over that period, that those persons have not heard of him, and that all due inquiries have been made appropriate to the circumstances, [...] there arises a rebuttable presumption of law that he died sometime within that period". (Halsbury Law of England, 1973).

The fundamental characteristics of common law are the presumption of life for a missing person for up to seven years and the presumption of death after that time period has elapsed. An alternative to the presumption of life is the assumption of death. The presumption of death is based on the proof of three elements in common law. As a first requirement, the individual in question must have disappeared from public view seven years ago. Second, he must have avoided being seen by the people who would have heard about him under normal circumstances. Third, there should be proper investigations to confirm the missing individual is not present. The *Chard v. Chard* [1955] 3 All ER 721 case is illustrative of this view. The court ruled that a missing person is deemed dead if there is no sign of life for seven years, no communication has been established with the persons who are most likely to have heard from the missing person, and attempts to locate the missing person have been made without success.

The person who wishes to evoke presumption of death doctrine must demonstrate that all reasonable efforts have been made to locate the missing person, including but not limited to publishing notice of the proceedings and making contact with the person's relatives. For example, in the case of *A v. H (Presumption of Death)* [2016] EWHC 762 (Fam), The judge came to the conclusion that the unavoidable circumstance in which the missing person was left (the wife has been missing in Somalia since 1998 because she was caught in the civil wars and ended up living in terrible conditions in a refugee camp) and the fact that she has not been heard from through any of the community networks strongly suggests that she is no longer alive. This conclusion was reached in light of the fact that the wife went missing in Somalia since 1998.

In addition, the presumption can be disproved by evidence that runs counter to it, which means that a person can be presumed to be dead even if they have been missing for a period of time that is shorter than seven years. When one party makes a presumption about another, the burden of proving that the assumption is false shifts to the other party. Therefore, it is not always the case that an individual is presumed to be deceased after an absence of seven years.

Two Presumptions Under Malaysian Evidence Act 1950

In Malaysia, like in the other countries governed by common law, the courts have traditionally been the ones responsible with determining whether or not an individual who has gone missing should be deemed to have passed away upon receiving a request to do so. In doing so, the court acted in conformity with a rule of common law that was adopted by the courts of England. Both the assumption that the individual is still alive and the presumption that they have passed away form the basis of the legislation as it now stands in relation to the status of missing persons. Through the Malaysian Evidence Act 1950, the notion of common law has become established in Malaysia. Both section 107 and section 108 of the Act include the proposition in their respective provisions. Both provisions combined the presumption of life under common law for a period of seven years and the presumption of death after the period of seven years (Noor, Aziz & Halim, 2018). These two provisions are identical in content to Sections 109 and 110 of the Evidence Act of Singapore 1997. On the basis of this assumption, references to the instances from Singapore are made whenever it is acceptable to do so.

Presumption of Continuance of Life

When a person is shown to have been living at one point in the past, the law will presumptively believe that they are still living unless it can be demonstrated that they have been missing for a period of time that is significantly longer than the average length of a human life. This is the general rule. In this scenario, the presumption of life is over if there is proof of his continuous, indecipherable absence from home and of the non-receipt of information on him over a period of seven years. In addition, there must not have been any information received about him during this time. Therefore, it will be assumed that he has passed away after the passage of seven years has passed.

The presumption that a person will continue to live may be found in Section 107 of the Malaysian Evidence Act 1950. It is the responsibility of the person who argues that a person has passed away to provide proof of their claim if the person in question has been living within the last thirty years. In other words, in accordance with section 107, it is presumed that a person is still alive if it can be demonstrated that they have been alive within the past thirty years, and the burden of proving that they are no longer alive is placed on the person who asserts that they have been deceased for more than thirty years. The provision in this section states that "when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it." In other words, the burden of proof lies with the person who asserts that the deceased person is alive.

The presumption of life, whether in law or fact, is founded on the average life expectancy in a condition of affairs that are considered to be normal. The presumption is invalidated when the circumstances do not warrant it. Therefore, the inference of death may be drawn from an extended period of absence from home, and this is what the term "presumption of death" refers to. In addition, the whereabouts of the individual who has gone missing has not been reported by anyone who would be in a position to normally contact with him if he is still alive. If there is no reason to believe that he would communicate if he were alive, then there is no justification for drawing the conclusion that he is dead based on the fact that he has not communicated. The legal presumption of death due to an absence of seven years is unheard of. This presumption is based on a rule of convenience that is derived from the natural assumption. In situations in which there is no evidence to support a natural assumption, there will also be no evidence to support a legal presumption (Hinton, 1925).

Presumption of Death

Section 108 of the Malaysian Evidence Act 1950 accounts for situations when the only piece of information available is that a person has been missing for seven years or longer. It provides that "When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who

would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.”

The section is designed for the purpose of determining whether a man is alive or dead at the time when the question arises in a dispute in a court or proceedings (Mohd Aslam Khan Syed Gulam v. C Mageswary Chandran & Ors [2018] 1 LNS 1785). In this case, it was held that the High Court will only issue a presumption of death declaration if the applicant can prove that seven years have passed since the last contact with the missing person.

An applicant who asserts that a person is dead must bear the burden of proof in accordance with Section 107 of the Malaysian Evidence Act 1950 if the person in question has been alive within the last thirty years. This provision applies when the person in question has been alive within the past thirty years. If, however, such a person has not been heard of by those who would have normally heard of him for a period of seven years, section 108 would then apply to shift the burden of proof back to any person who asserts that the person in question is still alive. This would be the case if the section were to apply. The term "facts" refers to and encompasses any items, states, or conditions that are capable of being recognised by the senses. For example, something that a man has heard or seen is a fact. The purpose of this clause is to supplement the provision found in section 106 of the Malaysian Evidence Act 1950, which states that "where any fact is especially within the knowledge of any individual, the burden of proving that fact is on him."

It is only possible to use Section 108 to establish the presumption of the fact that a person has died but it is not possible to use it to prove the specific moment when a person died. An applicant who seeks a declaration of presumption of death with respect to a person when that person has been absent for less than seven years would not benefit from this presumption, since it is reasonable to assume that the person has passed away (Noor & Halim, 2015). In the case of Prudential Assurance Company v. Edmonds [1877], 2 App. Cas. 487, at page 509, Lord Blackburn declared that "... in order to raise a presumption that a man is dead from his not having been heard of for seven years, you must inquire amongst those who, if he was alive, would be likely to hear of him, and see whether or not there has been such an absence of hearing of him as would raise the presumption that he was dead."

Hence, an applicant for a declaration of death can rely on section 108 to invoke the presumption of death in a case where the alleged deceased has not been heard of for seven years by persons who would naturally have heard of him. This is because the presumption of continuance of life that section 107 contains would have come to an end in such a case. In reality, provision 108 is a caveat that applies to provision 107. The following court decisions provide further support for the proposition that these sections complement one another and that section 108 of the Evidence Act of 1950 serves as a proviso to section 107.

No	Case	Court decision
1	Re Osman Bachit [1997] 2 CLJ Supp 269	Augustine Paul JC (who he was back then) held that the presumption of death is an exception to the presumption of life. The burden of proof rests on the person asserting that he is still alive by denying that he has died, as per section 108 of the Malaysian Evidence Act 1950, It asserts that if a man has not been heard of for seven years by people who would ordinarily have known of him had he been alive, the presumption of continued existence evaporates. The following Section 108 shall be construed as a proviso to Section 107 of that Act.
2	Re Ex Parte Application of Ridzwan Ibrahim (Presumption Of Death) [2004] 1 CLJ ISL 445	According to the ruling by Heliliah Mohd Yusof J., Section 108 adds a caveat to Section 107, stating that if a person has been missing for seven years and no one has seen or heard from him, he may be presumed dead, and the burden of proof to show otherwise shall be placed on the person who alleges that he is still alive. After seven years have passed since the subject was last heard from, the assumption of continued existence under Section 107 is no longer in effect.
3	Re Application of Tay Soon Pong; Ex P [2009] 9 CLJ 778	In his ruling, Mohd Zawawi Salleh J interpreted Section 108 to mean that no presumption can emerge as to when a person died, and such a presumption arises for consideration only where there is a disagreement in a court or procedures as to whether a person is alive or dead.
4	Lau Suet Wan v. Hong Leong	Zakaria Sam J. is of the view that section 108 is a proviso to

	Assurance Bhd [2015] 2 CLJ 681	section 107 and codifies the rule on the counter-presumption of death from inactivity after seven years. A man's presumption of continuity of life ends and the burden of proof shifts to the person who claims he is not dead under section 108 if it is proven that he was away from home for seven years in a row and no news had been heard of him by those interested in him.
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According to a strict interpretation of subsection 108, the burden of evidence must be placed on the individual who claims the missing person is still alive. It is not enough that seven years have passed without mention of this person; nobody who would have known about him if he were still alive has heard anything about him in that time, either. In *Re Wong Sook Mun Christina* [2005] 3 SLR(R) 329, the court stated that "those who would naturally have heard of" the dead if he was still alive would typically include people linked to the deceased by blood or marriage connections or closed relatives or neighbours. However, the court in *Re Soo Ngak Hee* [2010] SGHC 256 reasoned that the alleged decedent's family would not be considered among those who would "naturally have heard of" him in a case where the alleged decedent had an estranged relationship with his family to the point where he would want nothing to do with them.

People who fall under the aforementioned categories are considered to be interested parties. In this scenario, the individual should be someone who is impacted by the order of presumption of death, or who would be affected by it if it were issued by the court. A person who is the next of kin of the person in respect of whom an order is applied for or made, or a person who owns property of the person in respect of whom an order is applied for or made, may be considered a party to the proceeding. In this particular scenario, any person with an interest must convince the court that a person is presumed dead if

- (a) the applicant has not seen or spoken to them since a certain date, and
- (b) the applicant has no reason to assume that they are still alive, and
- (c) there are reasonable reasons for presuming that they are no longer alive.

In situations like these, the person who wishes to apply for presumption of death order would have to convince the court that the evidence surrounding the disappearance of a person was more consistent with death than any other reasonable explanation for the individual's absence. This would be done on the basis of the balance of probability. In accordance with the provisions of section 50 of the Malaysian Evidence Act 1950, the court has the authority to consider any opinion on a relationship where it is pertinent. According to the provisions of subsection (1), it states that "When the court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct as to the existence of such relationship of any person who as a member of the family or otherwise has special means of knowledge on the subject, is a relevant fact."

The application for the presumption of death in the matter of *Re Ex Parte Application of Tay Soon Pang @ Yeo Hak Seng* [2008] MLJU 928 was submitted in 2008 by the son of the person who is believed to have passed away. His paternal grandfather was a Chinese immigrant who arrived in Malaysia in 1914; he was born in China in 1899. His grandfather was a lifelong resident of Kota Tinggi. His father made the long trip back to China in 1970 to spend time with the relatives who had settled there. The applicant's late mother and the decedent corresponded mostly through written correspondence. However, since 1982, neither the applicant nor his late mother have had any new information on the deceased. The deceased's mother was seen to be a person who would expect to hear from him in the event that he was still alive, and the court agreed. Due in part to this, the court approved the applicant's application. Thus, the court decided that a person must be presumed dead if they had not been seen or heard from since 1982, notwithstanding the fact that they had been regularly communicating with their spouse prior to that year. The petitioner has not shown any evidence suggesting that his father is alive since 1982.

Accordingly, the court in *Lau Suet Wan v. Hong Leong Assurance Bhd* [2015] 2 CLJ 681 held that the presumption of law, by means of the High Court order, was that deceased had died and that the presumption had not since been rebutted by the defendant when the proceeding was heard before the court because at that time, no proof and no sign of him had been imminent. This was because at that time, there had been no proof and no sign of him being imminent. If the defendant claimed that deceased was still living, it was their responsibility to produce evidence to demonstrate that deceased was not dead. According to the facts of this case, the deceased was last seen at their residence on December 12th, 2002. Since no one who should have heard of him if he were still alive had heard of him since 2002, the plaintiff had to get a High Court order pronouncing his alleged dead. Also, people who would have known him if he were still living confirmed that they had not heard anything about it since 2002.

The court will not infer that a person has passed away if the circumstances surrounding their absence are such that it is improbable that his or her family would have heard of him regardless of the situation. In the case of *R Muthu Thambi v. K Janagi* [1955] MLJ 47, a woman married a man in 1929 and lived with him for two years. When the man was freed from prison after serving a month for financial embezzlement, his wife's father offered

him some money to help him get away to India. This all happened after the couple had already tied the knot. His wife hasn't heard from him since then. Given that the wife would not have heard from her husband regardless of whether the presumption was invoked or not, the court ruled that the wife's desire to do so could not be granted in this case. Despite the fact that there are circumstances in which it is quite likely that his family would never hear from him again, his death cannot be assumed only on the basis that they have not heard from him in some time. The burden of proof is on the party asserting the relevance of decedents to the case at hand. If a man has been missing for an extended period of time and his family has not heard from him, the court will not conclude that he has died.

According to the argument, the section 108 Evidence Act of 1950 only had two of the necessary components, and it omitted the third component, which was the presumption of death that was established by the common law theory. However, this oversight has been corrected by case law. The third factor that the court looked at in *Re Gun Soon Thin* [1997] 2 MLJ 351 was whether or not the petitioner could demonstrate that adequate efforts had been made to determine whether or not the individual in question was still alive. This condition does not appear in the text of section 108; rather, it is a common law principle that was read into the provision in order to prevent the section from being exploited as a "device of convenience" in situations when there is proof of a person's death caused by another method. To put it another way, the third component recognises that the functioning of section 108 Malaysian Evidence Act of 1950 does not take a unilateral approach. It is not permissible for family members of missing persons to utilise section 108 of the Malaysian Evidence Act of 1950 as a device of convenience in a situation in which they have another technique at their disposal for establishing the death of a particular individual. In the case of *Lim Ah Khee v. Legal Representative of the Estate of Ong Koh Tee*, deceased [1994] 2 SLR 769, the court held that any permission to use section 108 of the Malaysian Evidence Act 1950 as a device of convenience without justification may result in an abuse of legal proceeding.

Conclusion

It is important to note that the presumption of death in Malaysia is in fact constructed on two different foundations of presumptions, which are sections 107 and 108 of the Malaysian Evidence Act 1950. In reality, the provision in section 108 that allows for the assumption of death is a proviso to the provision in section 107 that allows for the presumption of the continuation of life. This article comes to the conclusion that the presumptions outlined in sections 107 and 108 of the Malaysian Evidence Act of 1950 are mutually supportive of one another. The idea of presumption of death, which originated in the common law, was adopted into Malaysian legal precedent. The court is required to take into consideration three tenets of common law, which are as follows: the missing person must not have been heard of for seven years; There must not have been any news of the missing individual during that period among the people who would have heard about him.; and finally, appropriate investigations must be made to confirm the disappearance of the missing person. All of these tenets must be met in order for the court to rule that the missing person is indeed absent. The first and second components were incorporated into Section 108 of the Malaysian Evidence Act of 1950. The omission has been addressed by court decision even though section 108 is silent on the third element of the common law principle on the duty to undertake proper inquiries in demonstrating the absence of the missing person.

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