

A CONSIDERATION OF THE PRESUMPTION OF DEATH ACT 2019 AND ITS APPLICATION TO MISSING PERSON CASES

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11 February 2020

Dear Editor,

In light of the recent enactment of the Civil Law (Presumption of Death) Act 2019,¹ I wish to consider the application of the provisions of this act to a number of missing person cases, both current and historical. The cases selected for application comprise of the tragic disappearance of a fisherman in West Cork in October 2019,² the 2017 Irish Coast Guard Rescue 116 crash³, and the mysterious disappearances of Lord Lucan⁴ and Agatha Christie⁵. The main issue that will be addressed is when, in the eyes of the court, a missing person legally is dead.

Section 5(5) of the 2019 Act provides:

(a) Without prejudice to the rebuttable presumption in paragraph (b), and subject to the requirements of this section, an application for a presumption of death order may be made- (i) where the application is to the effect that death is virtually certain, at any time after a person has gone missing, such application not to be subject to a minimum waiting period, and (ii) where the application is to the effect that death is highly probable, no earlier than 1 year after the person has gone missing.

(b) Where, by reason of absence from the State or otherwise, it remains uncertain for a period of at least 7 years as to whether a missing person is alive, it shall continue to be presumed that the person is dead.

If the search for the missing fisherman's body in Cork proved unsuccessful the 2019 Act would have applied. Under Section 4 of the 2019 Act, a large array of people could apply for a

¹ Hereinafter '2019 Act'.

² Eoin English, 'Divers to focus on areas of interest in search for missing Kodie Healy' *Irish Examiner* (11 October 2019).

³ Lorna Siggins, 'Rescue 116: Timeline of a tragedy' *The Irish Times* (16 March 2018).

⁴ *The Telegraph*, 'What happened to Lord Lucan, and is he still alive? The most likely theories' (5 June 2017).

⁵ Tina Jordan, 'When the world's most writer vanished' *The New York Times* (11 June 2019).

presumption of death order in respect of the missing person, ranging from a spouse to any dependant of the person.⁶ However, the timeframe in which this application can be made varies in circumstances, as per Section 5 of the 2019 Act.⁷ The Courts need to consider whether the death is virtually certain, highly probable, or uncertain. If the body in the fisherman case had regrettably not been found, I believe a family member could have applied for a presumption of death order immediately. If no body had been found, given the circumstances and location of the disappearance, as per section 5(4) of the 2019 Act⁸, I believe the Courts would unfortunately find the death virtually certain and grant the presumption of death order immediately.

Furthermore, I wish to examine how the recent enactment of the 2019 Act has changed the process of granting presumption of death orders. Before the enactment, it was open to a Coroner to grant a presumption of death in lost at sea situations,⁹ as was the case following the calamitous deaths of four individuals following a helicopter crash in Mayo in 2017.¹⁰ When the search was called off, only one of the four bodies had been found, yet the Coroner declared all four individuals deceased as missing at sea. Were this accident to occur today following the enactment of the 2019 Act, I believe an immediate application for presumption of death orders could be made, as the High Court would also find their deaths virtually certain based on circumstances.

An infamous case regarding a missing person and presumption of death is the case of Lord Lucan. In 1974, Lucan disappeared after his children's nanny was found murdered in the basement of his home.¹¹ A warrant was issued for Lucan's arrest following the murder. Applying Lucan's disappearance to the 2019 Act and to section 5 of such, I believe that an application for a presumption of death order would not be possible for 7 years, as Lucan's plight is clearly uncertain. The courts would be far from virtually certain of his death, given the circumstances of his disappearance and the strong chance that he fled after potentially committing the murder. Furthermore, I believe that the courts would not be satisfied that Lucan's death was highly probable, and would wait the maximum 7 years before issuing the

⁶ 2019 Act (n 1) s 4.

⁷ *ibid* s 5.

⁸ *ibid* ss 5–4.

⁹ Coroners Act 1962 s 23.

¹⁰ Olivia Ryan, 'R116 inquests hear that charges are possible' *Irish Independent* (21 April 2018).

¹¹ Jan Colley, 'It's time to move on, says son of missing British peer Lord Lucan' *Irish Examiner* (4 February 2016).

order. A Presumption of Death Act was introduced in the UK in 2014.¹² Only after this Act was passed was Lucan issued a death certificate in 2016, some 42 years after his disappearance.¹³ This astonishingly long length of time consolidates my belief that the Irish Courts would not issue a presumption of death order in a Lord Lucan type situation until a period of 7 years of uncertainty regarding the missing persons plight has passed.

A further aspect of the 2019 Act concerns what occurs in the event that missing persons are found after a presumption of death order has been made. In 1926, the most infamous writer of her generation, Agatha Christie, went missing for a period of ten days, but was found following an extensive public manhunt.¹⁴ Section 8 of the Act provides that an order may be dissolved by an applicant. The returning person can resume their status as a spouse or civil partner, with no effect on their property or income gained since the period of the issuing of their death order.¹⁵ In a situation like Christies, I believe that the courts would not have been virtually certain that she was dead, nor found it highly probable, and would need to have waited seven years before issuing the presumption of death order, pursuant to section five of the 2019 Act. However, were her disappearance to span seven years instead of ten days, on her return, her presumption of death order would be overturned, and she could resume her position as a spouse. Henceforth, it is possible for one to die and come back to life, it would appear, in the eyes of the Irish courts n.

Overall, by examining how the new 2019 Act applies to such renowned and present missing person cases, it is obvious to me what a beneficial piece of legislation it is. As the Minister for Justice Charlie Flanagan stated, it helps to take families left behind out of 'limbo' in what is a very difficult period of their lives and allows them to 'bring a finality to tragedy'.¹⁶ Once a death cert is ordered, it facilitates dealing with the deceased's property and life insurance. However, the fact the applicants must apply to the High Court can be costly and time consuming. In general, by applying the new Act to these cases, it has offered an insight of the new process and change, which generally, seems to be beneficial.

¹² Presumption of Death Act 2013.

¹³ Colley (n 11).

¹⁴ Camilla Turner, 'Mystery of Agatha Christie's disappearance is 'solved' as author suggests she considered suicide over husband's affair' *The Telegraph* (8 May 2017).

¹⁵ 2019 Act (n 1) s 8.

¹⁶ Marie O'Halloran, 'The missing: Bill ends seven-year wait for declaration of death' *The Irish Times* (3 July 2019).

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