

TOPIC: UNDERSTANDING ELECTRONIC EVIDENCE IN MALAYSIA COURT

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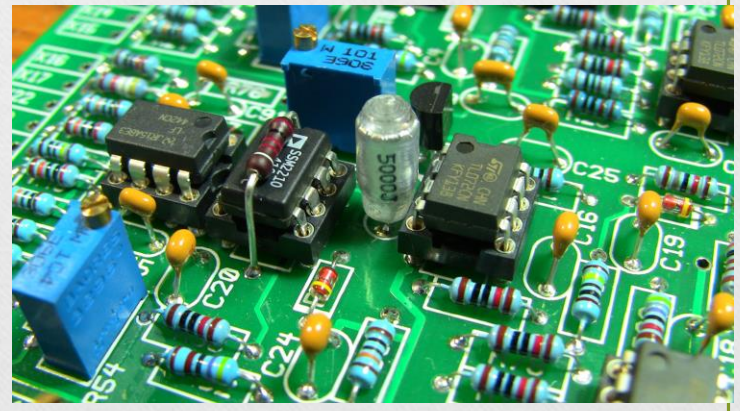
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ELECTRONIC EVIDENCE



ELECTRONIC EVIDENCE (Documentary Evidence)

Section 3 Evidence Act 1950 defines:

❖ **Definition of “Computer”:** 'an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, storage and display functions and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, but does not include an automated typewriter or typesetter, or a portable hand held calculator or other similar device which is non-programmable or which does not contain any data storage facility;

❖ **Definition of Document (S3):**

“document” means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound-track or other device whatsoever, by means of

(a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;

(b) any visual recording (whether of still or moving images); (photo/video)

(c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever; (audio)

(d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or ©.

Computer evidence has been referred to by various names:

- Computer printout
- Computer output
- Computer evidence

ISSUE: Admissibility of Computer Generated Documents?

From case law, example of computer generated documents are documents printed from a machine/computer, parking tickets, bus tickets, ATM machine slips, account statements, emails, documents of telecommunications, itemised bills, CCTV recording/video tape recording and snapshot or still photos from CCTV.

SECTION 90A – How to determine authenticity?

Condition that need to be satisfied before applying s.90A: Admissible if it was produced in the course of its ordinary use.

1. By tendering a certificate under **section 90A(2)** read with **section 90A(3)** & once the certificate is tendered the presumption in section 90A(4) is activated
2. By adducing oral evidence to establish the requirements of section 90A(1)

REQUIREMENT TO TENDER COMPUTER EVIDENCE UNDER SECTION 90A:

1. The document was produced by computer
2. It was produced in the course of its ordinary use
3. A certificate must be produce by someone in charge of the computer-presumption under section 90A(4) is activated.
4. If no certificate was produced, presumption under section 90A(6) may be invoked.
5. The computer must be in good working order.
6. It was operating properly in all respects throughout the material part of the period during which the document was produced.

CASES WHICH ILLUSTRATE S.90A

Gnanasegaran a/
Pararajasingam v
PP (1997) 3 AMR
2841; [1997] 3 MLJ 1

Prabakaran a/
Peraisamy v PP
[2012] AMEJ 0165;
[2013] 1 MLJ 304

PP v Ong Cheng
Heong [1998] AMEJ
0300

Ahmad Najib bin
Aris v PP [2009] 2
MLJ 613

Gnanasegaran a/1 Pararajasingam v
PP (1997) 3 AMR 2841; [1997] 3 MLJ 1
- locus classicus -

Principle: “Section 90A [EA] makes computerised records made in the course of its ordinary use admissible if the following is proven, ie that: (i) the documents were produced by a computer; and (ii) the computer records are produced in the course of its ordinary use. Proof can either be by a certificate signed by someone solely in charge of the computer which produced the printout as required by section 90A(2), or by an officer of the bank.

Fact: *In this case, Zainal was able to testify with regard to the documents because he was in charge of the operations of current accounts.”*

Prabakaran a/l Peraisamy v PP [2012]
AMEJ 0165; [2013] 1 MLJ 304

Fact: the officer from the investigation unit of Digi Telecommunications Sdn Bhd gave evidence for the prosecution pursuant to **s.90A** that the document was recorded in the course of its ordinary use.

Principle: If a witness is called to give evidence to prove that the document is produced by the computer in the ordinary use under section 90A(2), such witness must be verified as a person who is able to adduce such evidence. It is sufficient that the person responsible states that to the best knowledge and belief, the statement was produced by a computer in the course of its ordinary use.

PP v Ong Cheng Heong [1998] AMEJ

0300

Fact: The accused was charged with trafficking in dangerous drugs where the drugs were found in the boot of a car owned and driven by the accused.

Issue: The ownership of the car

Court ruled: Inadmissible two computer-generated documents as the person who tendered the documents only introduced himself as the supervisor of the registration department of vehicles and did not claim any responsibility for the conduct of the activities in which the relevant computer was used. The witness also claimed that designation does not necessarily put him in management of-or in the conduct of activities pertaining to- the operation of the computer the accused was charged with

Held: The two computer printouts were not admissible for failure to comply with s.90A.

PRESUMPTION IN S.90A(4) & S.90A(6)

Hanafi Mat Hassan's Case

Ahmad Najib Aris's Case

Ahmad Najib bin Aris v PP [2009]

2 MLJ 613 (Kenny Ong)

Fact: The chemist who used the DNA analyzer to obtain the DNA analysis report was not regarded as person who can give evidence under section 90A(2). Nevertheless, the deeming provision of section 90A (6) was applied.

**ADMISSIBILITY OF
SPECIFIC TYPE OF
DOCUMENTS**

Electronic Evidence

A. Electronic Evidence in Text Forms:

Emails

WhatsApp

Instant Message

B. Websites/ Blogs/ Social Media Networks (SNS)

Section 114A

C. Audio tape/ Voice Recordings

D. Video Recordings / CCTV

E. Photograph

Film/ negative based cameras

Digital camera

A. Electronic Evidence in Text Forms

- ❖ General position: Admissible as evidence
- ❖ Usually authenticity is not challenged in Malaysian cases
- ❖ Governed under **Electronic Commerce Act 2006**

- SS 6-9 (Legal Recognition)
- SS 16 (Service and Delivery)
- SS 17 (Attribution)
- SS 20-24 (Dispatch and Receipt)

Electronic Commerce Act 2006

Section 6. Legal recognition of electronic message

(1) Any information shall not be denied legal effect, validity or enforceability on the ground that it is wholly or partly in an electronic form.

(2) Any information shall not be denied legal effect, validity or enforceability on the ground that the information is not contained in the electronic message that gives rise to such legal effect, but is merely referred to in that electronic message, provided that the information being referred to is accessible to the person against whom the referred information might be used.

Section 7 Formation and validity of contract

(1) In the formation of a contract, the communication of proposals, acceptance of proposals, and revocation of proposals and acceptances or any related communication may be expressed by an electronic message.

(2) A contract shall not be denied legal effect, validity or enforceability on the ground that an electronic message is used in its formation

Section 8 Writing

Where any law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in an electronic message that is accessible and intelligible so as to be usable for subsequent reference.

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Section 9 Signature

(1) Where any law requires a signature of a person on a document, the requirement of the law is fulfilled, if the document is in the form of an electronic message, by an electronic signature which—

(a) is attached to or is logically associated with the electronic message;

(b) adequately identifies the person and adequately indicates the person's approval of the information to which the signature relates; and

(c) is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required.

A. Emails

Authentication by testimony of author of email or witness who saw him authoring it and circumstantial evidence (usually the latter method is used)

Case: Petronas v Khoo Nee Kheong

“The plaintiffs had shown that the name in the e-mail address was that of the defendant and that the defendant was the sole proprietor of Araneum Consulting Services and that both the websites were operated by Araneum Consulting Services. The searches conducted by the plaintiffs on the said domain names showed that the registrants were the defendant, Araneum Consulting Services and 'Araneum@email.com for sales'. Further, the offensive email also carried the hand phone number of the defendant. In the circumstances of this case, the court was more than satisfied that it was most probably the defendant who had sent the e-mail and who had set up the webpage and it followed, therefore, that the plaintiffs had sufficiently identified the defendant for the purposes of the injunctive relief sought by the plaintiffs in this application”

B. Whatsapp – Bluetick as proof of receipt ?

Regularly tendered as evidence in Malaysian Courts since its popular usage. No established legal position yet, except for the case below:

Case: Megat Adzwan Shah bin Shamsul Anuar v Malaysia Professional Accountancy Centre (Industrial Court)

- One of the grounds of termination of the appellant was his lack of response to WhatsApp messages from his superiors enquiring on his whereabouts when he was absent from office without reason
- App claimed that he never read those messages as he misplaced his phone for several days
- However, the Court relied on the read receipts (blue tick) as proof that he had read those messages and rejected the App's Defence

**B. Websites/ Blogs/
Social Media

Networks**

Presumption in Section 114A

- (1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.
- (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.
- (3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved

1) **Datuk Husam Musa v Mohd Faizal bin Rohban Ahmad (2015 3 MLJ 364) - Blog Entries**

- The Plaintiff sued the Def for defamatory statements made in his blog. The Defendant's defence was that the blog did not belong to him.
- The COA held that the Def failed to rebut presumption raised under S114A that he was the author of the statements – since his identity has been established on a balance of probabilities by photographs, telephone number and his letter to fellow bloggers– defence of mere denial is not enough .

**Tony Pua Kiam Wee v DS Najib Razak
&
Ahmad Dusuki bin Abd Rani v Rozaimiee
bin Ramli (Facebook Post in Civil cases)**

In Defamation cases where Social media posts are the subject matters, the Malaysian Courts readily admit them as evidence without raising the issue of authenticity, usually because the names and identity of the parties are readily ascertained from the Social media sites (usually well known businessmen or politicians) and the postings can be viewed by the public are spread to a large number of people as in the above two cases

Criminal Cases: PP v Aszroy bin Achoy (2018)

Since a higher degree of proof is required, certain methods are used by the Prosecution to verify the authenticity of the FB account belonging to accused persons e.g. in Terrorism Offences tried under SOSMA.

"Thus, in summary, the prosecution had tendered the following pieces of evidence to connect the accused to the "Yohyo Illa'nun AISaba Malizia" Facebook account:

- ***(a)The mobile number belonging to the accused was used to register the "Yohyo Illa'nun AISaba Malizia" Facebook account because it can be used to reset the Facebook account;***
- ***(b)His previous mobile number appears in a photograph on "Yohyo Illa'nun AISaba Malizia" Facebook page;***
- ***(c)His picture with the said mobile number is posted on the Facebook page;***
- ***(d)His mother told the court that his family nickname is "Yohyo";***
- ***(e)The accused supplied the password and mobile numbers in question to the investigating officer and the Facebook account "Yohyo Illa'nun AISaba Malizia" could be accessed using the said password.***
- ***(f)The accused admitted being the owner of the "Yohyo Illa'nun AISaba Malizia" Facebook account in his statement to the police."***

C. Audio Tape/ Voice Recordings

Criminal cases: Mohd Ali Bin Jaafar v PP [1998] 4 MLJ 210:

Fact: The appellant was found guilty by the Session Court for soliciting sexual favours (the first charge) and for attempting to obtain sexual favours (the 2nd charge) from the complainant. He was convicted on both the charges.

Appeal: The appellant appealed on the grounds that the tape recordings and the transcripts adduced at the trial should not be admissible.

COA Held: quashed the conviction on the 2nd charge. The authenticity of the recordings had not been proved beyond reasonable doubt. Therefore, the tape recordings were wrongly admitted in evidence by the judge

Matter must be established when introducing evidence of a tape recording are as follows:

1. The tape are run through and found to be clean before the recording was made;
2. The machine is in proper working condition;
3. The tape was not tampered with or altered in any way and it should be established in whose possession the tape was at all times;
4. The witnesses played the tape over after making the recording and heard voices which they can identify.

PP v Dato' Seri Anwar Ibrahim (No.3)
[1999] 2 AMR 2017; [1999] 2 MLJ 1 :

Fact: In this case, the evidence indicated that the tapes had been tampered with on the instructions of the accused. The conversations in a total of 7 tapes had been edited and reduced to a total of 4 tapes.

Held: Since there is no evidence to show that the taped conversation was an accurate account of a conversation that occurred, the court ruled the audio tape as inadmissible.

Civil cases: Lim Guang Eng v Ganesan a/l Narayanan (Defamation)

The fact in issue was the admissibility of the CD of audio recording of the Press Conference where the defamatory statements was made and its written transcript. Lim Chong Fong J admitted the them as exhibits and placed a heavy weight on them based on the following considerations:

1. The person who recorded the PC, a reporter, was called to testify.
2. He transferred the recording to his computer which was in good working order and burned it to CDs
3. He confirmed there was no tampering after listening to it.

Datuk Nur Jazlan v T Gopala Krishnan (Overturned on Appeal)

Fact: A recording of a telephone conversation between the Plaintiff and the first Defendant was adduced. The HC Judge admitted the recording and the transcript as exhibit and held that it was the best evidence to prove the existence of an oral contract between the parties

However, on Appeal, it was held that the learned HCJ was in error to admit the audio recording because:

- There was no admission from the P that he was one of the parties to the conversation - parties can't be identified
- recording was undated and no time was mentioned, and its also unclear if it contains the entire conversation between parties or only part of it.
- no explicit reference was made to an agreement between parties, merely vague references.

Tengku Dato Ibrahim Petra v Petra
Perdana Bhd

Held: Audio Recording of a Board meeting was admitted as exhibit as a supporting evidence for minutes of meetings.

D. Video Tape Recording/ CCTV

D. Video Recordings / CCTV

- Is regarded as a primary evidence of the event recorded on the tape and is part of the real evidence.
- Normally, in criminal proceedings, video tape are used to identify the accused as the perpetrator of the offence.
- It may act as circumstantial evidence to show that the accused was within the vicinity of the offence.

Criminal cases: Ahmad Najib bin Aris v PP [2009] 4 AMR 473:

Fact: The photograph produced from various CCTVs identifying the accused was rejected as no certificate under section 90A was produced.

Held:

1. The recorded tape has to be relevant;
2. The recorded tape is authentic and has not been tampered with expert evidence may be adduced to prove that the tape is authentic and has not been tampered with;
3. The production of the tape must be in accordance with section 90A of the Evidence Act 1950;
4. The device used to record the event or the CCTV is in the good working order and it is working properly throughout the material period.

Mohd Khayry bin Ismail v PP

[2014] AMEJ 0594; [2014] 4 MLJ 317

Principle: The court ruled admissible 2 CCTV evidences that were used in 2 different places.

Fact: PW24 had made a copy of the recording by downloading to a thumb drive with the aid of a CPU and later transferred the recording into a CD which was marked as P13. The accused contention was there has been no certificate tendered under section 90A of the Evidence Act and there was also no oral evidence by PW24 that P13 was produced in accordance with the said provision.

Held: The court however admitted the evidence as res gestae and followed the decision in R v Masquid Ali

Civil case : Sit Chee Kheong v Goh Han Hong

Based on the Federal Court case of **PP v Azilah bin Hadri** (Altantuya's Case), Wong Kian Kheong J reversed the Sessions Court Judge's decision and admitted a video recording under **Section 90A(1)** due to the following:

1. It is a document within the meaning of Section 3 Evidence Act produced by an iPad, which is a computer under Section 3
2. It is produced in the course of its ordinary use
3. the maker was called to testify
4. There is no evidence to prove the recording had been tampered with
5. It is a contemporaneous record of the events that transpired
6. The fact that it had no date and time does not detract from its reliability as above.

E. Photograph

E. Photograph

Malaysia has accepted the use of photograph as evidence for various reason including identification as well as demonstrative evidence to illustrate the testimony of a witness.

The evidence of photograph can be captured by 2 categories of camera which are:

1. Film/negative based cameras
2. Digital cameras

1. Film/negative based cameras

The film/negative is a chemical emulsion on a plastic substrate that is sensitive to light and when exposed, an analogous image of the scene is created within the chemical layer of the material. The film is then processed using a chemical to produce a photograph. Thus, technically, the film/negative is the primary evidence and processed photograph is the secondary evidence.

2. Digital cameras

Digital cameras records images in digital forms. It record discrete numbers for storage in a memory card or optical disc. Once image are captured, they may be transferred to the computer with a USB cable, a memory card or even wireless.

PPv Then Tet Khien [2010] MLJU

2100

Fact: The photographs were taken by a digital camera which uses a memory card. The images were later taken by a digital camera which uses a memory card. The images were later burnt into one compact disc (CD) and the photographs that were tendered were those processed through computer printouts. Both the photographs and the CD were marked as exhibits.

Held: The photograph taken by digital camera is admissible as long as the proper procedure to admit it is followed.

Lee Eye Poh v Dr Lim Teik Man & Anor [2011]1 MLJ 825

Fact: The plaintiff sued for tort (invasion of privacy) when the defendant took photographs of the plaintiff's private parts using a digital camera when she underwent a procedure with the defendant, a doctor. The defendant had been alleged to take 2 photographs of plaintiff's private parts which were taken before and after the procedure.

Held: The court held in favour of the plaintiff on the ground that there was no prior consent from the plaintiff. The court ordered that the photographs and the memory card to be destroyed in the presence of both plaintiff and defendant.

PP v Ayub Khan bin Ismail [2012] MLJU 1185

Held: The court rejected the evidence of photographs that were taken by a digital camera because the memory card which stored the images was not adduced before the court. There was also evidence to show that the camera which was used to capture the images was also used by another photographer and some of the pictures taken earlier had been deleted.



Current Issues:

**SPRM Voice
Recording ?**

SPRM Voice Recording ?

Admissible under Section 90A if all the requirements from the decided cases are fulfilled e.g.

- the maker is called to testify
- a certificate under Section 90A is produced
- there are complete details of the recording such as date and time
- the voices of the parties are identifiable
- the device used to record is in good working order
- no evidence of tampering
- the recording mentions explicitly the fact in issue and not merely vague statements