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THE USE OF SIMILAR FACT IN CRIMINAL PROCEEDINGS: AN UPDATED FRAMEWORK

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I. Introduction

1 When confronted with the question of whether to admit similar fact for criminal cases, courts in Singapore are often faced with balancing potentially competing norms in the form of evidential expediency and fairness to the accused. Specifically, although similar fact may help establish the ingredients of an offence, there exists a real risk that any resulting conviction will be based heavily on the past behaviour or disposition of the accused and this potential weakness in inferential reasoning through indirect proof will – to use the word in its broadest sense – prejudice the accused.[1]

2 The 1996 Court of Appeal decision in *Tan Meng Jee v Public Prosecutor*[2] ("*Tan Meng Jee*") tried to address these concerns in detail. But even after almost 25 years, this case remains the only modern apex court decision on how the similar fact rule is to be

1 Taking a step back, one must bear in mind too features of the Singapore criminal justice process. As a matter of criminal procedure, the Criminal Procedure Code (Cap 68, 2012 Rev Ed) is generally considered to tilt more in favour of crime control. As a matter of substantive criminal law, potentially severe sanctions could follow upon conviction. As a matter of standard of proof, a strict insistence on corroboration is generally not required, and any proving of a defence must be done on a balance of probabilities, which is a higher standard than casting reasonable doubt.

2 [1996] 2 SLR(R) 178.

treated and applied. This is so despite recent shifts in the evidence law landscape which has sown considerable uncertainty over how the similar fact rule should be applied in Singapore. For instance, amendments have been made to the relevancy provisions of the Evidence Act,[3] and the law on whether there exists a judicial discretion or even inherent power to exclude relevant evidence has also undergone various changes jurisprudentially.

3 The key aim of this article is thus to apprise both prosecutors and defence counsel of how the similar fact rule in Singapore would operate today in criminal proceedings by essentially providing a checklist of considerations. In so doing, it will also set out the background to the rule and the basic (but peculiar) features of the Evidence Act, so that the rule can be properly understood in the context it operates in.

II. Understanding the similar fact rule in Singapore

A. Definition

4 What exactly constitutes similar fact, and when is it meant to be used? In the criminal law context,[4] the similar fact rule is an exclusionary rule of evidence that "limits the admissibility of evidence that goes not towards proving directly that an accused has committed the crime he has been charged with but towards his past conduct, and that may form a basis for inferring that the accused has committed the said crime".[5] In *Tan Meng Jee* for instance, evidence relating to the accused's other drug trafficking activities (that were not part of the charge) was found to be inadmissible to support a finding of his mental state when he engaged in the physical act of transporting drugs.[6] The Court of Appeal opined that the accused's history of trafficking drugs to his friends did not mean he was going to traffic drugs

3 Cap 97, 1997 Rev Ed.

4 Although the similar fact rule applies in the civil context (see for instance *Rockline Ltd v Anil Thadani* [2009] SGHC 209), this article will focus on its application in the criminal context.

5 Chen Siyuan, "Revisiting the Similar Fact Rule in Singapore" (2011) Sing JLS 553 at 553.

6 *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [56].

to the specific individual in question.[7] On an epistemic level, the evidence was simply not compelling enough.

B. Features of the Evidence Act

5 Before exploring the similar fact rule in greater detail, one must grapple with the Evidence Act's unique paradigm for establishing relevance and admitting evidence. The starting point for any given question of evidence law in Singapore must be the Evidence Act. As will be explained, the common law rules of evidence can potentially be trumped by what is stated in the Evidence Act if they are inconsistent with the statute.

(1) Inclusionary, and not exclusionary, approach

6 Under the Evidence Act, the touchstones for admissibility are relevancy and reliability.[8] Relevance is established by the relevancy provisions of the Evidence Act that provide the criteria for admissibility (ss 6 to 57), while reliability can be considered as the overarching principle of these provisions. Unlike the common law approach, the Evidence Act does not distinguish between relevance and admissibility. Section 5 sets the tone by allowing only the admission of evidence of facts in issue (elements of an offence or defence), and other facts deemed relevant under the Evidence Act (or less direct, more circumstantial means of proving the facts in issue).[9] Strictly speaking, any given piece

7 *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [56].

8 Chen Siyuan, "The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction" (2012) 16(4) Intl J Evidence & Proof 398 at 416–420; Chen Siyuan & Nicholas Poon, "Reliability and Relevance as the Touchstones for Admissibility of Evidence in Criminal Proceedings" (2012) 24(2) SAcLJ 535 at 545–551. To be clear, there are certain provisions, such as s 23, which pertain to settlement negotiations, and those which pertain to good character, that reflect less of an indicator of logical relevance but more of a policy position – the facilitation of uninhibited discussions of liability for s 23, and the freedom to litigate for the good character provisions.

9 See too s 138(1) of the Evidence Act (Cap 97, 1997 Rev Ed) (notwithstanding that it is not a relevancy provision): "When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise."

of evidence must pass muster under the Evidence Act, but in practice, this is only enforced for clearly problematic pieces of evidence or evidence which is strenuously objected to. There is generally a judicial preference for as much evidence as possible to be admitted, so that the fact-finder can better piece together the factual matrix.

7 Secondly, relevance is established in the form of so-called inclusionary, rather than exclusionary, rules.[10] The original drafter of the Evidence Act, Sir James Fitzjames Stephen, had deliberately adopted this unique approach as he considered the long-standing common law approach of jumping through multiple hoops to determine admissibility – what is logically relevant, what is legally excluded, what is legally excepted, and what may nonetheless be left out as a matter of discretion – to be confusing and cumbersome for the fact-finder. Ambitious as he was to attempt defining logical relevance exhaustively, this peculiar aspect of the Evidence Act has remained with us after 150 years. Crucially, there was no indication that the relevancy provisions of the Evidence Act were ever designed with non-epistemic criteria in mind.

(2) Protective mechanisms of weight and discretion

8 As a protective mechanism against over-admitting evidence, the courts may, at an appropriate stage of the proceedings, attach less or no weight to admitted evidence.[11] Singapore has long abolished the jury system – arguably for whom the rules of admissibility of evidence were originally designed – and judges are trained to assess evidence objectively

10 Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Opinion Evidence* (October 2011) at para 30.

11 *Parliamentary Debates, Official Report* (14 February 2012), vol 88 at 1140 (K Shanmugam, Minister for Law); ss 32 and 147 of the Evidence Act (Cap 97, 1997 Rev Ed). On this note, one should not lightly conflate evidence that is given no weight and evidence that has been "excluded". There are at least three differences: first, evidence that is not even admitted is not part of the factual record, and this has implications on appeal; second, evidence that is not admitted on the basis of a legal rule as opposed to a discretion may, also on appeal, be treated differently; and finally, matters of discretion are generally less amenable to particularised reasoning in judgments.

and sift wheat from the chaff.[12] On the part of counsel, there is also the expectation evidence with questionable relevance or reliability should not be adduced.[13]

9 Another protective mechanism is the court's discretion to consider as inadmissible evidence that has been found relevant. While there may be a widely held view by lawyers that such a discretion exists and has always existed,[14] Singapore's case law actually remains rather divided on this – for instance, whether the discretion is residual or mandatory, when it is to be applied, whether it is justified on inherent powers or otherwise, and what is to be balanced when exercising the discretion.[15] In the context of similar fact, the answer is even less obvious due to the paucity of specific case law. The only thing that is clear is that following the 2012 amendments to the Evidence Act, evidence may be found inadmissible if it is "in the interests of justice" to do so under ss 32(3) and 47(4). The problem is that these provisions only pertain to a particular class of hearsay evidence and a particular class of opinion evidence.

(3) General relevancy provisions vis-à-vis *specific relevancy provisions*

10 Further, though not reflected explicitly in the statute, the Evidence Act's relevancy provisions were split by Stephen into two categories: general relevancy provisions (ss 6 to 11) and specific relevancy provisions (ss 12 to 57). While specific relevancy provisions were meant to codify exceptions to common law exclusionary rules as they stood in the 1800s, the purpose and usage of general relevancy provisions are unclear, and

12 Chan Sek Keong, "The Criminal Process – The Singapore Model" (1996) 17 Sing L Rev 433 at 456.
13 See generally *Parliamentary Debates, Official Report* (14 February 2012), vol 88.
14 See generally *Parliamentary Debates, Official Report* (14 February 2012), vol 88.
15 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239; *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447; *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107; *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205; *Wan Lai Ting v Kea Kah Kim* [2014] 4 SLR 795; *ANB v ANC* [2015] 5 SLR 522.

their ambit of admissibility is also far wider than the specific relevancy provisions.[16]

11 There is no judicial pronouncement yet as to whether both general and specific relevancy provisions must be satisfied before evidence can be admitted, but the weight of case law points towards a less strict approach – as long as a relevancy provision is satisfied, that is enough.[17] This may have consequences, however, as to whether the evidence can be subject to a discretion to render relevant evidence inadmissible, and whether the evidence may be given less weight since the relevancy criteria in the specific relevancy provisions are clearly more stringent.

(4) Relationship between the Evidence Act and common law

12 Lastly, as alluded to earlier, the High Court in *Law Society of Singapore v Tan Guat Neo Phyllis* ("*Phyllis Tan*") has interpreted s 2(2) of the Evidence Act as allowing common law rules of evidence to be applied only if they are consistent with the provisions of the Evidence Act; one such rule would be the court having the discretion to exclude relevant evidence.[18] This primacy accorded to the Evidence Act can be contrasted with the approach taken in cases such as *Public Prosecutor v Teo Ai Nee* ("*Teo Ai Nee*"), which declined to follow the Evidence Act at all and ruled that the court had inherent power to exclude (similar fact) evidence even if it was relevant under the Evidence Act.[19] To the extent that the cases that clearly disregarded the relevancy provisions of the Evidence Act are older than the ones that do not, the safer assumption is that the Evidence Act must still be adhered to.

16 Chen Siyuan, "The Future of the Similar Fact Rule in an Indian Evidence Act Jurisdiction: Singapore" (2013) 6 NUJS L Rev 361 at 366.

17 See *Public Prosecutor v Ranjit Singh Gill Menjeet Singh* [2017] 3 SLR 66; *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748.

18 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [124]–[126].

19 *Public Prosecutor v Teo Ai Nee* [1995] 1 SLR(R) 450 at [76]–[79].

III. Framework for admitting similar fact

A. *Proving* mens rea

13 When Stephen drafted the Evidence Act, he had envisioned that similar fact could only be adduced via s 14 or s 15 to prove the *mens rea* of an offence. Section 14 states:

> Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

14 Although the provision does not explicitly refer to similar fact, Explanation 1 requires evidence to show the existence of a relevant state of mind in reference to "the particular matter in question". This is made clearer in illustration (*o*), where an accused person is tried for murdering a person by shooting him. The fact that he had previously shot the same person is admissible similar fact, but the fact that he had previously shot other people, even with the intent to murder, is not.[20] One may also be guided by *Ler Wee Teang Anthony v Public Prosecutor*, where the accused's numerous utterances about getting someone to kill his wife evinced his ill will towards her.[21] This evidence was admitted because of its relevance to the offence of instigating a murder.[22] There is therefore no doubt that a high degree of specificity of state of mind is required under s 14. A general disposition to commit crime will not satisfy the high threshold.

15 As for s 15 of the Evidence Act, it states:

> When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the

20 See also illustration (*p*):
> *A* is tried for a crime.
> The fact that he said something indicating an intention to commit that particular crime is relevant.
> The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

21 [2002] 1 SLR(R) 770 at [59].

22 *Ler Wee Teang Anthony v Public Prosecutor* [2002] 1 SLR(R) 770 at [59].

> fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

16 Like s 14, s 15 only addresses questions about state of mind, though its reference to similar fact is more direct, as evinced in the requirement for "a series of similar occurrences". This threshold is also a high one, as reflected for instance in illustration (*a*), in which a person is accused of burning down his house to obtain money for which it is insured. The fact that he had lived in several houses successively, each of which he had insured, in each of which a fire had occurred, and after each of these fires he had received payment from a different insurance office, could be relevant as tending to show that the fire was not accidental.

17 There is no requirement for ss 14 and 15 to be read and used together, as the provisions cater to different ways for similar fact to be used. But doubts linger as to how they are to be applied when the common law rules come into the picture. On the one hand, the traditional common law categorisation approach in *Makin v Attorney-General for New South Wales*[23] ("*Makin*") – similar fact may not be admitted merely to show general propensity, but may be admitted to rebut a claim of lack of *mens rea* or any other defence open to the accused – is broadly compatible with ss 14 and 15. Section 2(2) of the Evidence Act is probably not contravened, and indeed, Singapore courts still continue to cite *Makin*.[24]

18 On the other hand, the more modern, albeit statutorily displaced test of balancing probative value and prejudicial effect as set out in *Director of Public Prosecutions v Boardman*[25] ("*Boardman*") is probably not compatible with the Evidence Act.

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23 [1894] AC 57.

24 See for instance *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748; *Public Prosecutor v Ranjit Singh Menjeet Singh* [2017] 3 SLR 66. At minimum, the aspect about propensity evidence is compatible with the Evidence Act (Cap 97, 1997 Rev Ed), but the aspect about using similar fact to rebut any given defence is not. If an accused person simply denies the charge, similar fact cannot be admitted via s 14 or s 15, but may be via *Makin v Attorney-General for New South Wales* [1894] AC 57.

25 [1975] AC 421. In the UK, similar fact is now governed by ss 98–113 of the Criminal Justice Act 2003 (c 44).

The Court of Appeal in *Tan Meng Jee* recognised this, but went ahead to superimpose the balancing test onto ss 14 and 15.[26] The court claimed that this was "warranted both in principle as well as on the wording of the legislation itself": the aforesaid illustration (*o*) to s 14 demonstrates how the balance should be struck, and "similar" in s 15 hints at the probative value of evidence.[27] Additionally, the court suggested applying three factors to ascertain probative value: cogency, relevance and strength of inference.[28] It did not elaborate on what prejudice meant, suggesting that it had a more limited, epistemic definition of lack of probative value.

19 The reason why *Boardman* is incompatible with the Evidence Act is that its gateway for admitting similar fact is much wider than ss 14 and 15. Under *Boardman*, propensity evidence can be admitted if it is probative enough – there is no requirement that the state of mind must be specific or any similarity must be striking.[29] A series of similar occurrences is also not required, and similar fact used to prove *actus reus* is not barred.

20 Yet another reason for incompatibility is uncertainty over when the *Boardman* balancing test is to be applied. Despite superimposing the balancing test, *Tan Meng Jee* probably intended the test to act as a residual discretion. However, cases like *Lee Kwang Peng v Public Prosecutor*[30] ("*Lee Kwang Peng*") and *Teo Ai Nee* suggest that the balancing test completely supersedes ss 14 and 15 of the Evidence Act – a clear contravention of s 2(2) – and also operates as the mandatory admissibility test as opposed to a residual discretion. This uncertainty is compounded by the persistent lack of clarification as to whether prejudicial effect under the *Boardman* balancing test entails non-epistemic considerations (such as moral prejudice and dignity).[31] If it does, the gateway of admissibility of similar fact will be narrowed.

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26 *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [48].
27 *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [49]–[50].
28 *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [52].
29 This was clarified in a subsequent House of Lords decision, *Director of Public Prosecutions v P* [1991] 2 AC 447.
30 [1997] 2 SLR(R) 569.
31 *Cf* ss 40–43 of the New Zealand Evidence Act 2006 (No 69).

B. *Proving* actus reus

21 *Actus reus* may be disputed if, for instance, the charge is flatly denied by the accused, the identity of the alleged perpetrator is unconfirmed, or an alibi is pleaded.[32] Even though the Evidence Act was meant to only allow similar fact to prove *mens rea*, the High Court in *Lee Kwang Peng* applied s 11(*b*) of the Evidence Act to admit similar fact to prove *actus reus*.[33] Section 11(*b*) states:

> Facts not otherwise relevant are relevant —
>
> …
>
> (*b*) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

22 *Lee Kwang Peng* held that the words "highly probable or improbable" in s 11(*b*) reflect the balancing test in *Boardman* (and also *Director of Public Prosecutions v P*),[34] and could therefore be used to admit *actus reus* evidence.[35] In acknowledging that this would contradict Stephen's intention of limiting the similar fact rule to ss 14 and 15, the court said that academic texts like *Stephen's Digest* should not be used to construe Parliament's intention.[36] Additionally, there was no reason to be shackled by the strict codification of Stephen's statement on the law of evidence.[37]

23 *Lee Kwang Peng* has remained unchallenged authority in expanding the scope of the similar fact rule to include admission of *actus reus* evidence. However, commentators have argued that *Stephen's Digest* is not a mere academic text but instead constitutes legislative work.[38] Indeed, s 122 of the Evidence Act, which is one of the provisions that circumscribes the type of questions that can be asked in cross-examination, only refers

32 For alibi, see s 105, illustration (*b*) of the Evidence Act (Cap 97, 1997 Rev Ed), as well as s 278 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).
33 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [43]–[47]. See also *Public Prosecutor v Radhakrishna Gnanasegaran* [1999] SGHC 107.
34 [1991] 2 AC 447.
35 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [43].
36 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [46].
37 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [46].
38 See for instance Michael Hor, "Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics" [1999] Sing JLS 48 at 58.

to ss 14 and 15 when discussing the similar fact rule. Moreover, admitting similar fact to prove *actus reus* requires the court to make an additional inference on top of the one it makes to prove *mens rea*.[39] The inferential chain of reasoning is likely to be weak. It is therefore unsurprising that Singapore is the only known Indian Evidence Act jurisdiction to use s 11(*b*) like how *Lee Kwang Peng* did.[40]

C. Recharacterisation of evidence

24 When similar fact could not be admitted under ss 11(*b*), 14, or 15, the Court of Appeal in *Ng Beng Siang v Public Prosecutor* ("*Ng Beng Siang*") allowed the admission of similar fact to provide a "complete account of the facts",[41] otherwise known as "background" evidence. In *Ng Beng Siang*, evidence relating to five bundles of drugs found in the accused's boot of his car was admitted "as a matter of completeness".[42] This approach of recharacterising evidence that would otherwise have engaged an exclusionary rule was later adopted on at least two separate occasions.[43]

25 First, the High Court in *Public Prosecutor v Ranjit Singh Gill Menjeet Singh* ("*Ranjit Singh*") admitted evidence of previous drug trafficking transactions under ss 6 and 9 as such evidence was held to be cogent and relevant evidence pertinent to the accused's mental state.[44] Subsequently, in *Micheal Anak Garing*

39 Michael Hor, "Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics" [1999] Sing JLS 48 at 59.

40 See Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2018) ch 5.

41 *Ng Beng Siang v Public Prosecutor* [2003] SGCA 17 at [41]–[42].

42 *Ng Beng Siang v Public Prosecutor* [2003] SGCA 17 at [42].

43 Comparisons may also be drawn with how evidence involving another exclusionary rule, hearsay, has been treated in recent cases. For example, in *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 ("*Gimpex*"), the Court of Appeal applied s 32 of the Evidence Act (Cap 97, 1997 Rev Ed) when hearsay evidence was sought to be admitted. Although the court was not categorically tasked to address the question of whether the evidence could be recharacterised to escape the clutches of the exclusionary rule (hearsay), the fact that the general relevancy provisions could have been used but were not implies that much would depend on how material the evidence is. See also *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573.

44 [2017] 3 SLR 66 at [19].

v Public Prosecutor ("*Micheal Anak Garing*"), the Court of Appeal admitted, pursuant to s 6, evidence of three earlier attacks on unrelated individuals prior to the fourth attack that resulted in a murder, as all the attacks formed part of one transaction.[45] Rejecting the evidence would provide the court with a "truncated version of the material events which might not shed true light on the attack".[46]

26 These decisions suggest that similar fact may be admitted under other provisions beyond ss 11(*b*), 14, and 15; in *Ng Beng Siang*, reference to the Evidence Act was not even needed. While one could argue that courts may only recharacterise evidence for the purpose of being apprised of the full factual matrix (instead of using the evidence to specifically prove *actus reus* and/or *mens rea*), it appears that Stephen had intended for relevant facts which are connected to the facts in issue to be distinct from relevant facts which are unrelated to the facts in issue.[47] If so, ss 6 and 9 should not be used to admit facts which are mere "background" evidence unrelated to the present offence.

27 A related question that arises is the relationship between general and specific relevancy provisions in the context of similar fact. As demonstrated in *Lee Kwang Peng*, *Ranjit Singh*, and *Micheal Anak Garing*, similar fact may be admitted by fulfilling either a general or specific relevancy provision, not both. However, according to Stephen, evidence that is excluded by specific relevancy provisions cannot be admitted under general relevancy provisions on the mere basis that it is probative.[48] The general relevancy provisions admit facts purely on the basis of probative value, while the specific relevancy provisions admit facts on the premise that the evidence is best available and reliable. If so, existing case law admitting similar fact under general relevancy provisions like ss 6, 9, and 11(*b*) would fall afoul of Stephen's intention when he drafted the Evidence Act, unless it can be shown that those cases did not truly involve similar fact evidence.

45 [2017] 1 SLR 748 at [9].
46 *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [10].
47 James Fitzjames Stephen, *Introduction to the Indian Evidence Act* (MacMillan and Co, 1872) at p 55.
48 James Fitzjames Stephen, *Stephen's Digest* (MacMillan and Co, 1911) at p 155.

D. Judicial discretion to exclude evidence

28 As mentioned earlier, the High Court in *Phyllis Tan* held that s 2(2) of the Evidence Act prevents the use of common law rules of evidence that are inconsistent with the Evidence Act.[49] In *Public Prosecutor v Mas Swan bin Adnan* ("*Mas Swan*"), the High Court affirmed *Phyllis Tan*, and noted that using the *Boardman* test to exclude similar fact otherwise admissible under the *Makin* categorisation approach would be inconsistent with the Evidence Act.[50] However, *Mas Swan* did clarify that Explanation 1 to s 14 and the phrase "similar occurrence" in s 15 corresponded to the *Boardman* test, and should remain good law.[51]

29 If *Phyllis Tan* remains good law, two matters must be resolved. First, if the *Boardman* test is inconsistent in so far as it excludes evidence otherwise admissible under the statutory provisions, how can this tension be resolved? Second, should the *Phyllis Tan* approach in declaring that there is no residual discretion to exclude evidence which is otherwise rendered legally relevant under the Evidence Act be adopted?

30 As mentioned earlier, the 2012 amendments to the Evidence Act introduced a discretion under ss 32(3) and 47(4) for hearsay and opinion evidence, respectively. These provisions use the "interests of justice" test. During the Parliamentary debates, Minister for Law K Shanmugam noted that this was in addition to the court's inherent jurisdiction to reject prejudicial evidence.[52] However, the deliberate omission to extend this discretion to the similar fact provisions cannot be ignored. *Phyllis Tan* is no anomaly as subsequent cases such as *Lee Chez Kee v Public Prosecutor* have confirmed that courts have no residual discretion to exclude evidence deemed legally relevant under the Evidence Act.[53]

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49 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [124]–[126].
50 [2011] SGHC 107 at [103]–[107].
51 *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107 at [107].
52 *Parliamentary Debates, Official Report* (14 February 2012), vol 88 at cols 45 and 46 (K Shanmugam, Minister for Law) (Second Reading of the Evidence (Amendment) Bill).
53 *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [106].

31 Even if a judicial discretion to exclude similar fact evidence exists, conceptual difficulties arise: how should prejudice be defined, how should it be balanced against probative value, and is the balancing test synonymous with "interests of justice"? First, prejudice cannot be conclusively defined – and has not been by the Singapore courts. It encapsulates multiple concepts, such as the risk of cognitive error, infringing the principle of "individualised justice", and undermining the presumption of innocence.[54] Prejudice also has different meanings in different contexts: for instance, prejudice in similar fact in criminal proceedings will differ from hearsay in civil proceedings. Second, the balancing of probative value against prejudicial effect has been observed to be impossible, since the two are not necessarily antithetical to each other and may even be positively correlated.[55]

32 Lastly, the courts have had differing interpretations of "interests of justice" under ss 32(3) and 47(4). The Court of Appeal in *Gimpex Ltd v Unity Holdings Business Ltd*[56] has interpreted "interests of justice" as requiring factors to be balanced against probative value.[57] These factors include: danger of unreliability, delay in the proceedings, distraction of the court or parties, tendency to confuse or misleading effect, and prejudice.[58] In comparison, the High Court in *ANB v ANC*[59] and *Wan Lai Ting v Kea Kah Kim*[60] had previously equated "interests of justice" to the balancing test of probative value against prejudicial effect.

33 In sum, if there exists judicial discretion to exclude prejudicial evidence, one should be less concerned with the

54 Ho Hock Lai, "An Introduction to Similar Fact Evidence" (1998) 19 Sing L Rev 166 at 167–169.

55 Michael Hor, "Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics" [1999] Sing JLS 48 at 50; Chen Siyuan, "Revisiting the Similar Fact Rule in Singapore: *Public Prosecutor v Mas Swan bin Adnan and Another*" [2011] Sing JLS 553 at 555; Eunice Chua, "Recent Developments Concerning Similar Fact Evidence in Singapore – Pushing Boundaries of Admissibility: *Public Prosecutor v Ranjit Singh Gill Menjeet Singh* [2017] 3 SLR 66; *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748" (2018) 30 SAcLJ 367 at para 46.

56 [2015] 2 SLR 686.

57 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [105].

58 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [105].

59 [2014] 4 SLR 747 at [31]–[49].

60 [2014] 4 SLR 795 at [18]–[19].

expanding scope of the similar fact rule to include *actus reus* evidence and "background" evidence, though it remains unclear on what basis judges can decide to exclude evidence. Further, the 2012 amendments may have codified an exclusionary discretion that does not extend to similar fact evidence. Regardless, there remains an additional safeguard of weight, where judges can place little to no weight on evidence revealed to be unreliable.

IV. Conclusion

34 With all of the above considerations in mind, the authors thought it would be useful to conclude by comparing and contrasting the conceptual extremes of how to facilitate the admissibility of similar fact on one end, and how to object to the admissibility of similar fact on the other – so this means some of the extremes may not necessarily be the best or most plausible argument to make. Nonetheless, the table below complements the checklist exercise just undergone, and provides a visual of how opposing positions may be adopted and justified:

	Admit the evidence	**Object to admissibility**
Prove *mens rea*	· Use the general relevancy provisions as they are wide and may not be subject to any exclusionary discretion (*Ranjit Singh*, *Micheal Anak Garing*) · Alternatively, apply s 14 or s 15 based on the interpretation by *Tan Meng Jee* (*ie*, *Boardman*), focusing on sheer probative value	· Evidence that is caught by an exclusionary rule must satisfy both a general and a specific relevancy provision · Alternatively, insist on applying the text/ illustrations of s 14 or s 15 due to the high thresholds of specificity and series of occurrences; point too to *Makin* that prohibits mere propensity reasoning

	Admit the evidence	Object to admissibility
Prove *actus reus*	· Apply s 11(*b*) based on *Lee Kwang Peng*, as it is a general relevancy provision and may not be subject to exclusionary discretion · Alternatively, recharacterise the evidence (see below)	· Using similar fact to prove *actus reus* was not contemplated by Stephen, and recharacterisation of evidence should not be freely allowed · Alternatively, s 11(*b*) can only be used to rebut in a narrow sense
Exclusionary discretion and the meaning of prejudice	· The Evidence Act does not contemplate any such discretion, with the exception of ss 32(3) and 47(4), which are not similar fact provisions. Weight is a sufficient safeguard · Alternatively, any discretion is only concerned with prejudicial effect in the narrow sense, which is lack of probative value (*Phyllis Tan*). The weighing of incommensurables would be difficult	· An exclusionary discretion exists (*Muhammad bin Kadar v Public Prosecutor*,[61] *ANB v ANC*, *Gimpex*, 2012 Parliamentary debates), whether by virtue of the common law or inherent power · Prejudice is not just about lack of relevance, but includes non-epistemic considerations such as moral prejudice and dignity · Alternatively, consider factors discussed in *Gimpex*, and reframe the test not as a balancing exercise but as a judgment based on a global assessment of factors

61 [2011] 3 SLR 1205.

	Admit the evidence	Object to admissibility
Recharacterising evidence	• Use general relevancy provisions as they are wide and may not be subject to exclusionary discretion • Alternatively, use background evidence *per Ng Beng Siang*	• Recharacterising evidence goes against the spirit of the Evidence Act; some recharacterisation cases may not have clearly involved exclusionary rules either • Alternatively, both general and specific relevancy provisions should be satisfied