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REVISITING SIMILAR FACT EVIDENCE IN CRIMINAL AND CIVIL CASES AND PROPOSALS FOR REFORM

The statutory provisions in the Evidence Act (Cap 97, 1997 Rev Ed) governing the admissibility of similar fact evidence remain in the same state as when they were originally enacted in the 19th century. As a result of this stasis, the Singapore courts have had to act creatively to ensure the justness of their decisions in both criminal and civil cases. This endeavour has necessitated the importation of late 20th- and 21st-century common law principles which lack symbiosis with the original sections because of the antiquated approach of the latter. This article proposes the reform of these sections to achieve consistency with the Singapore case law in the interest of clarity, certainty and statutory integrity.

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I. Introduction

1 In 2012, amendments were introduced to reform the rules governing hearsay evidence, opinion evidence and legal professional privilege in the Evidence Act ("EA"). The rules of similar fact evidence (which concern the conduct of an accused person in criminal proceedings or of a party in a civil case on an occasion unrelated to the facts in issue before the court) were left intact. Presumably, this was because the need for reform was not regarded as pressing in this area given the relatively low incidence of similar fact cases before the courts in the preceding years. In contradistinction, there has been a flurry of judgments concerning the admissibility of the accused person's conduct and a party's conduct in criminal and civil cases respectively during the period 2017–2020[2] which

1 I would like to thank my colleagues Ho Hock Lai, Chin Tet Yung and Matthew Seet for their views on an earlier draft of this article.

2 Criminal cases in which similar fact evidence was considered by the High Court or Court of Appeal between 2017 and 2020 include: *Public Prosecutor v Sritharan K Raja Rjan* [2020] SGHC 121; *Public Prosecutor v Beh Chew Boo* [2020] SGHC 33; *Bong Sim Swan Suzanna v Public Prosecutor* [2020] SGHC 15; *Public Prosecutor v Khoo Kwee Hock Leslie* [2019] SGHC 215; *Public Prosecutor v Saridewi Bte Djamani* [2018] SGHC 204; *Public Prosecutor v Zainudin bin Mohamed* [2017] 3 SLR 317; *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748; *Public Prosecutor v Ranjit*

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bring this subject to the forefront, and justify a consideration of statutory reform in the interest of consistency with the case law and the integrity and clarity of the EA.

2 The purpose of this article is to address the issues raised by similar fact evidence and to propose a new set of sections in the EA that reflect the current law as applied by the courts. It is hoped that these proposals will resolve the difficulties that judges, lawyers and students often face when engaging statutory provisions (in particular, ss 11, 14 and 15 of the EA) that have not been amended since they were introduced to India by the Indian Evidence Act of 1872[3] ("IEA 1872"), and to Singapore by the Evidence Ordinance of 1893[4] (which became the EA). In the absence of legislative intervention, the courts have had to take on the task of modernising the law governing similar fact evidence through creative interpretation of the EA aided by the common law. It is critical that the EA, as the primary source of the law of evidence in Singapore, catches up with the case law. Part II[5] of the article will address the difficulties raised by relevant provisions of the EA and how they have been addressed by the courts. The proposals for statutory reform will be considered in Part III[6] of the article.

II. Current difficulties in the law

A. Sections 14 and 15 of the Evidence Act and the common law

3 While it is not the intention of this article to state the law governing similar fact evidence in its entirety, it is necessary to discuss the principles to an appropriate extent to understand the need for statutory reform. Similar fact evidence is admissible under ss 14 and 15 of the EA to prove *mens rea* or state of mind:

> 14 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.

Singh Gill Menjeet Singh [2017] 3 SLR 66; *Rosman bin Abdullah v Public Prosecutor* [2017] 1 SLR 10. Civil cases in which similar fact evidence was considered by the High Court between 2017 and 2020 include: *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2020] SGHC 1; *Tan Swee Wan v Johnny Lian Tian Yong* [2018] SGHC 169; and *Liu Tsu Kun v Tan Eu Jin* [2017] SGHC 241.

3 Act 1 of 1872 (India).

4 Ordinance 3 of 1893.

5 See paras 3–33 below.

6 See paras 34–43 below.

> 15 When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the 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.

4 Section 14 is a broad provision (as attested to by its multiple illustrations) that admits evidence of any fact that is relevant to state of mind where that state of mind is relevant to the court's consideration. Explanation 1 to s 14, which sets the standard of admissibility for the section, states: "A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists not generally but in reference to the particular matter in question." In the context of the accused's previous misconduct on another occasion, such evidence is only admissible if it is relevant to his intention, knowledge, ill-will or other mental attitude in respect of the offence with which he is charged. Hence, Illustration (*o*) to s 14 states: "A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that A was in the habit of shooting at people with intent to murder them is irrelevant."[7] Therefore, if a previous act or series of acts establishes a specific state of mind on the part of the accused towards the victim (such as a parent's act(s) of violence towards a child), evidence of the act(s) would be admissible to prove that state of mind in relation to the charge involving similar conduct towards the victim.[8]

5 Unlike s 14, which controls admissibility through the relationship between prior facts and a particular issue in the case, s 15 is exclusively concerned with similar fact evidence arising from a series of similar circumstances which are not related to the case in the sense demanded by s 14. The basis of admissibility under s 15 is the similarity between the accused's conduct on other occasions and the facts constituting the offence that establishes knowledge or intention. Section 15 raises certain difficulties. First, it does not provide for the degree of similarity required. While the Illustrations to s 15 show a strong nexus between the similar fact evidence and the issue before the court, they do not define or represent the section.[9] Second, s 15 appears to only admit evidence of a system:[10] the accused's act must have "formed part of a series of similar circumstances". The rationale of requiring a system of acts is that as the

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7 Also see Evidence Act (Act 97, 1997 Rev Ed) s 14, Illustrations (*i*) and (*p*).

8 See *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [10].

9 The effect of the Illustrations and their relationship to the section are considered at para 7 below.

10 In James Stephen's *Digest of the Law of Evidence* (Macmillan & Co, 5th Ed, 1887), Art 12, which is the equivalent of s 15 of the Evidence Act (Cap 97, 1997 Rev Ed), is entitled "System".

instances of same or similar acts committed by the accused increases, the probative force of the evidence is enhanced. However, there may be circumstances in which a single previous act may be sufficiently probative to validate admissibility. As Sir Rupert Cross put it: "an isolated act may suffice to support an argument based on the rarity of coincidences".[11]

6 When the IEA and the Singapore Evidence Ordinance were introduced in 1872 and 1893 respectively, the primary ground for excluding similar fact evidence was its irrelevance to any issue in the case rather than its prejudicial effect.[12] This is evident from both ss 14 and 15 of the EA which express categories of relevant facts or purposes and omit specific reference to prejudice.[13] Lord Herschell stated in *John Makin v Attorney-General for New South Wales*[14] ("*Makin*") (22 years after the IEA was enacted), that while evidence of the accused's prior misconduct is not admissible to show that he was the type of person who was likely to have committed the offence charged (the first part of the *Makin* test: that is, propensity evidence is prohibited), it would be admissible if it is relevant to an issue in the case such as whether the accused acted intentionally or to rebut a defence (the second part of the *Makin* test). English judges avoided the rule against propensity evidence by developing categories of circumstances (mostly concerning state of mind as reflected by ss 14 and 15) in which similar fact evidence could be adduced as an exception to the general rule. This practice was regarded by Lord Wilberforce in *Boardman v Director of Public Prosecutions*[15] ("*Boardman*") as a "specious manner of outflanking the exclusionary rule".[16]

7 Although prejudice was a concern of the courts even in Sir James Fitzjames Stephen's time,[17] it was thought to be sufficiently addressed by the rule against propensity evidence[18] and the requirement of relevance as formulated in ss 14 and 15. While these provisions express a standard of relevancy (in the form of specific connection pursuant to Explanation 1 to s 14 and similarity of facts under s 15),[19] they do not address the *degree*

11 Sir Rupert Cross, *Cross on Evidence* (Butterworths, 4th Ed, 1974) at p 328.
12 Gerald D Nokes, *An Introduction to Evidence* (Sweet & Maxwell, 4th Ed, 1966) at pp 113–115. Also see *Makin v Attorney-General for New South Wales* [1894] AC 57 at [65].
13 Stephen stated that these sections were modelled on the cases that had created exceptions to the general rule that evidence of propensity was prohibited. See James Stephen, *Digest of the Law of Evidence* (Macmillan & Co, 5th Ed, 1887) Note VI.
14 [1894] AC 57 at [65].
15 [1975] AC 421.
16 *Boardman v Director of Public Prosecutions* [1975] AC 421 at 443.
17 See James Stephen, *Digest of the Law of Evidence* (Macmillan & Co, 5th Ed, 1887) Note VI.
18 As provided in the first part of the *Makin* test.
19 See para 5 above.

of probity required; nor do they contemplate a balancing process for weighing probative value against prejudicial effect. And although the Illustrations to both sections do exemplify the level of probity in specific situations, they are not part of, and are not intended to affect, the statutory authority of, and principles underlying, those provisions.[20] Therefore, if the evidence is relevant to a particular state of mind or body or bodily feeling under s 14 or intention or knowledge under s 15, it would be admissible as a matter of law regardless of its probative force. As the use of similar fact evidence to prove *actus reus* involves the propensity of the accused, the common law at that time did not permit its admission.[21] This is abundantly clear from the EA itself which does not include a provision for the admission of similar fact evidence to prove *actus reus*.[22] This is also evident from the first part of the *Makin* test, which formulates the rule against propensity evidence.[23]

8 Even after *Makin*, the emphasis was put on certain types of evidence as opposed to the degree of relevancy of evidence in general, the approach being justified on the basis of the second part of the *Makin* test[24] which was interpreted to allow evidence for the purpose of rebutting various types of defences.[25] The element of prejudice did not feature prominently in the test for admissibility until the 20th century when the courts introduced a discretion to exclude technically admissible similar fact evidence on the basis that its relevance was outweighed by its prejudicial effect. Thus, in the Privy Council case of *Noor Mohamed v R*,[26] Lord Du Parcq confirmed the general practice of the courts:[27] "cases must occur in which it would be unjust to admit evidence of a character

20 See *Mahomed Syedol bin Arifin v Yeoh Ooi Gark* (1916) 2 AC 575 at 581; *Public Prosecutor v Muhammad Rahmatullah Maniam bin Abdullah* [1999] SGHC 252 at [35].

21 Later cases established that evidence of disposition could be relied upon as proof of *actus reus* if the evidence was strongly probative of guilt. See *R v Ball* [1911] AC 47 and *R v Straffen* [1952] 2 QB 911.

22 Although s 11(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") has been relied on for admitting similar fact evidence to prove *actus reus*, it will be shown that this approach is conceptually flawed in the context of the scheme of the EA. See paras 13–22 below.

23 In *John Makin v Attorney-General for New South Wales* [1894] AC 57 itself (which involved a charge of murdering a baby), evidence of previous identical circumstances involving the death of babies in the care of the accused was admitted to rebut the suggestion that the death was accidental or coincidental. The evidence showed a systematic course of conduct by the accused to prove that the baby was deliberately killed.

24 See para 7 above.

25 See Julius Stone, "The Rule of Exclusion of Similar Fact Evidence: England" (1932) 46 HLR 954 at 975 for a discussion of this trend.

26 [1949] AC 182.

27 *Noor Mohamed v R* [1949] AC 182 at 192.

gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge."[28] This was not an ideal approach as judges were free to exercise this supplemental discretion according to their subjective inclinations. As appellate courts have rarely interfered with the exercise of a judge's discretion, the judge's improper failure to exclude evidence could result in injustice.[29]

9 In the seminal case of *Boardman*, the House of Lords redefined the law governing similar fact evidence. Prejudice became a critical element of the test for the admissibility of similar fact evidence. The two parts of the *Makin* test were reformulated as a general principle that would apply to the admission of similar fact evidence to prove *mens rea* and *actus reus*. According to *Boardman*, such evidence would be admissible if it had a particularly strong degree of probative force which outweighed any prejudicial effect ("the balancing test").[30] Lord Wilberforce explained: "The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence." Lords Cross and Hailsham proposed that if the evidence is "so very relevant" or "strikingly similar" that to exclude it would be an "affront to common sense",[31] then it should be admitted. Lord Salmon stated: "The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence."[32]

10 *Boardman* was not the end of the story. Sixteen years later, the House of Lords had the opportunity to revisit the balancing test. In *Director of Public Prosecutions v P*[33] ("*DPP v P*"), Lord Mackay of Clashfern, in delivering the judgment of the House of Lords, did not think it was appropriate to single out "striking similarity" as an essential element in the general test for admitting similar fact evidence. Rather, it

28 Also see *Harris v Director of Public Prosecutions* [1952] AC 694 at 707 (citing *R v Christie* [1914] 24 Cox CC 249 at 257). This discretion to exclude prejudicial evidence was affirmed by Spenser Wilkinson J in *Raju v R* [1953] MLJ 21 at 22 (also see *Rauf bin Haji Ahmad v Public Prosecutor* [1950] 1 MLJ 190 at 192–193).

29 *Boardman v Director of Public Prosecutions* [1975] AC 412 at 463.

30 *Boardman v Director of Public Prosecutions* [1975] AC 412 at 456.

31 *Boardman v Director of Public Prosecutions* [1975] AC 412 at 455–456.

32 *Boardman v Director of Public Prosecutions* [1975] AC 412 at 462. Lord Morris agreed that the standard is one of striking similarity (at 441).

33 [1991] 2 AC 447.

would be sufficient if the probative force of the evidence "is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime".[34] As the degree of probative force and prejudicial effect of the evidence may vary in different circumstances, restricting the test to "striking similarity" alone would not be justified. Whether the evidence has sufficient probative value to outweigh its prejudicial effect has to be determined according to the facts of the case.[35] However, where similar fact evidence is presented to prove the *identity* of the accused, "evidence of a character sufficiently special reasonably to identify the perpetrator is required"[36] and "obviously something in the nature of … a signature or other special feature will be necessary".[37] Put another way, the evidence must have a striking feature which clearly identifies the accused. In *Lee Kwang Peng v Public Prosecutor*[38] ("*Lee Kwang Peng*"), which concerned proof of *actus reus*, Yong Pung How CJ agreed (*obiter dicta*) with Lord Mackay's own *dicta* on the test for identity.[39]

11 Lord Mackay's pronouncements in *DPP v P* on the principles governing similar fact evidence were quickly endorsed by the Singapore Court of Appeal in *Tan Meng Jee v Public Prosecutor*[40] ("*Tan Meng Jee*") and the High Court in *Public Prosecutor v Teo Ai Nee*[41] ("*Teo Ai Nee*") and *Lee Kwang Peng*[42]. Yong Pung How CJ, who delivered the judgment of the Court of Appeal in *Tan Meng Jee* and decided the appeals in *Teo Ai Nee* and *Lee Kwang Peng*, believed that the Singapore courts "should not be constrained by any such self-imposed strictures of [the] Evidence Act"[43] and that the statute should be interpreted in a manner that would facilitate the application of the common law.[44] Controversially, the learned former Chief Justice ruled that s 11 of the EA could be deployed for the purpose of admitting similar fact evidence to prove *actus reus*. This development is considered later in the article.[45] Yong CJ's approach to the EA did not find favour with Chan Sek Keong CJ in *Law Society of Singapore v Tan Guat Neo Phyllis*[46] ("*Phyllis Tan*"), who observed that "new rules of evidence

34 *Director of Public Prosecutions v P* [1991] 2 AC 447 at 460–461.
35 *Director of Public Prosecutions v P* [1991] 2 AC 447 at 460–461.
36 *Director of Public Prosecutions v P* [1991] 2 AC 447 at 460.
37 *Director of Public Prosecutions v P* [1991] 2 AC 447 at 462.
38 [1997] 2 SLR(R) 569.
39 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [51].
40 *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [53].
41 *Public Prosecutor v Teo Ai Nee* [1995] 1 SLR(R) 450 at [79].
42 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [48].
43 *Public Prosecutor v Teo Ai Nee* [1995] 1 SLR(R) 450 at [79].
44 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [46]. Also see *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 at [58].
45 See paras 16–22 below.
46 [2008] 2 SLR(R) 239.

can be given effect to only *if they are not inconsistent with the provisions of the EA or their underlying rationale*" [emphasis in original]. Furthermore, the facilitative approach was not endorsed by the Court of Appeal in *ARX v Comptroller of Income Tax*[47] ("*ARX*"), where it concluded that a common law rule may supplement the EA only if it is "consistent with the underlying rationale and spirit of an existing doctrine of the EA".[48]

12 It was mentioned earlier that that the two parts of the *Makin* test were reformulated in *Boardman* as a general principle permitting similar fact evidence to be adduced on the basis of its "striking similarity" with the facts before the court (the evidence had to be strikingly similar to outweigh its prejudicial effect).[49] *DPP v P* modified this principle by re-orientating the balancing test so that such evidence would be admissible to prove *mens rea* or *actus reus* if its probative value outweighed its prejudicial effect even in the absence of striking similarity. This development radically changed the common law's approach to the admissibility of similar fact evidence. When the IEA and the Singapore Evidence Ordinance were introduced in the 19th century, the common law did not permit the use of propensity evidence to prove *actus reus* (as reflected in the first part of the *Makin* test). Similar fact evidence was only admissible if it was relevant within the context of one of the established categories relating to the accused's state of mind (represented at that time by ss 14 and 15 of the EA and later by the second part of the *Makin* test).[50] The effect of the common law principle is that propensity evidence is now admissible if its probative value outweighs its prejudicial effect. For reasons already mentioned, this approach is certainly not reflected by ss 14 and 15 of the EA. Statutory reform is necessary and is proposed below.[51]

*B. Section 11(*b*) of the Evidence Act and the common law*

13 Section 11 of the EA states:

> Facts not otherwise relevant become relevant —
>
> (*a*) if they are inconsistent with any fact in issue or relevant fact;

47 [2016] 5 SLR 590.

48 *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [27]. *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 was cited in support of this approach.

49 See para 9 above.

50 Arguably, the law had developed by the time of *John Makin v Attorney-General for New South Wales* [1894] AC 57 and the second part of the test included the admissibility of evidence to rebut any defence that was available to the accused. See para 6 above for the second part of the test.

51 See the proposed s 14, which is considered at para 38 below.

> (*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"

14 The phrase "Facts not otherwise relevant" suggests that s 11 is a residuary provision linked to the preceding ss 6–10. Indeed, this was the intention of the draftsman, Stephen, who observed that although most facts encompassed by s 11(*b*) would be within the ambit of the earlier sections, it ensures that no logically probative facts are excluded.[52] Stephen considered ss 6–11 to be sections that "enumerate specifically the different instances of connection between cause and effect which occur most frequently in judicial proceedings".[53] However, the expression "highly probable or improbable" in s 11(*b*) is problematic because it imposes a degree of probity which is not the concern of logical relevancy. Indeed, ss 6–10 bear this out by admitting relevant facts pursuant to their connection with the facts in issue or other relevant facts. To be logically relevant, the evidence merely needs to have "some tendency in logic and common sense to advance the proposition in issue".[54] Or, as stated elsewhere, "[t]o be relevant, the evidence must have a potential significance either by itself or in conjunction with other evidence in the sense that it is capable of rendering some (even minimal) assistance to the court in determining how to decide the issues".[55] It has been rightly said that the test of probability confuses relevance and the sufficiency of evidence.[56]

15 Stephen acknowledged this error in his later writings in which he observed that the words "highly probable or improbable" in s 11(2) of the IEA 1872 (which is *in para materia* to s 11(*b*) of the EA) were not intended to admit evidence that is addressed by the subsequent provisions of Pt 1 of the EA, such as similar facts, hearsay and opinion.[57] He remonstrated: "None of these [types of evidence] are relevant within the definition of relevancy given in sections 6–11."[58] Rather, "[t]he sort of facts which [s 11(*b*)] was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought

52 James Stephen, *The Indian Evidence Act with an Introduction on the Principles of Judicial Evidence* (Macmillan & Co, 1872) at p 55.

53 James Stephen, *The Indian Evidence Act with an Introduction on the Principles of Judicial Evidence* (Macmillan & Co, 1872) at p 55.

54 *R v A (No 2)* [2001] UKHL 25; [2001] 2 WLR 1546 at [31].

55 See Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) at paras 1.067 and 2.054–2.059.

56 See Ian H Dennis, *The Law of Evidence* (Sweet & Maxwell, 5th Ed, 2013) ch 3.

57 James Stephen, *The Indian Evidence Act with an Introduction on the Principles of Judicial Evidence* (Macmillan & Co, 1872) at p 122.

58 James Stephen, *The Indian Evidence Act with an Introduction on the Principles of Judicial Evidence* (Macmillan & Co, 1872) at p 122.

to be proved".[59] Subsequently, in the fifth edition of his *Digest of the Law of Evidence* (1887), Stephen abandoned the phraseology "highly probable or improbable" in favour of a different definition of relevancy for the purpose of s 11: "… [a fact] either taken by itself or in connection with other facts proves or renders probable the past, present or future existence of the other [fact]".[60] It is also significant that Stephen agreed with West J's ruling in the Indian case of *R v Parbhudas Ambaram*[61] that s 11 had to be interpreted in a manner that would not admit evidence that is subject to specific rules in the subsequent sections of the EA.[62] Stephen declared that ss 14 and 15 of the EA constituted the only exceptions to the rule prohibiting similar fact evidence of the accused's conduct.[63] This is also clearly evinced by s 122(5) of the EA, which permits cross-examination of the accused on similar fact evidence admissible under either s 14 or 15 (no mention is made of s 11).

16 In *Lee Kwang Peng*, Yong CJ rejected Stephen's admonition against using s 11(*b*) to admit facts within the specific categories of relevant facts in ss 14–57 of the EA. Yong CJ held that similar fact evidence could be adduced to prove *actus reus* pursuant to s 11(*b*) on the principle of the probative value and prejudicial effect balancing test,[64] stating: "I do not think it appropriate to sustain an artificial distinction between similar facts which are probative of intention (or other states of mind) and similar facts which are probative of acts done by the accused, nor do I consider such a distinction to have been intended by Parliament."[65]

17 The former Chief Justice's opinion was misconceived because it ignored the common law position (at the time that the IEA was introduced) that similar fact evidence was limited to proof of *mens rea* or state of mind. Evidence of the accused's prior misconduct was not admissible to prove *actus reus* as the accused's propensity to commit a crime was considered to be irrelevant and raised the spectre of prejudice.[66] As for the intention of Parliament, there is no indication

59 James Stephen, *The Indian Evidence Act with an Introduction on the Principles of Judicial Evidence* (Macmillan & Co, 1872) at p 123.

60 James Stephen, *Digest of the Law of Evidence* (Macmillan & Co, 5th Ed, 1887) at p 2. For his commentary on this matter, see Note 1 in the Appendix of Notes.

61 (1874) 11 Bom HCR 90.

62 James Stephen, *Digest of the Law of Evidence* (Macmillan & Co, 5th Ed, 1887) at p 155.

63 James Stephen, *Digest of the Law of Evidence* (Macmillan & Co, 5th Ed, 1887) Note VI (relating to Arts 10, 11 and 12).

64 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [48]–[52].

65 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [46].

66 James Stephen, *Digest of the Law of Evidence* (Macmillan & Co, 5th Ed, 1887) at pp 159–161. See also *James v R* [1936] MLJ 7 at 9 and *R v Raju* [1953] MLJ 21 at 22–23. Also see paras 3–12 above.

that the Legislative Assembly that passed the EA, or any subsequent parliamentary body, expressed any disquiet about the position in the EA on the scope of admissibility of similar fact evidence. Interestingly, in *The Bunga Melati 5*,[67] Judith Prakash J (as she then was) expressed "uncertainty over whether s 11(*b*) of the [EA] allows for the admission of similar fact evidence to prove *actus reus*".

18 Finally, taking into account Chan CJ's statement in *Phyllis Tan* that "new rules of evidence can be given effect to only *if they are not inconsistent with the provisions of the EA or their underlying rationale*" [emphasis in original], and the Court of Appeal's affirmation of this position and its own pronouncement in *ARX* that a common law rule may supplement the EA if it is "consistent with the underlying rationale and spirit of an existing doctrine of the EA",[68] the facilitative approach advocated in *Lee Kwang Peng*[69] no longer holds sway.

19 There are multiple dangers in using s 11(*b*) as an admissibility provision for similar fact evidence. First, it contradicts the scheme of the EA, which imposes safeguards for certain types of evidence such as similar facts (as provided in ss 14 and 15), hearsay (as provided in ss 17–41), judgments (as provided in ss 42–46), opinion (as provided in ss 47–53), and character (as provided in ss 53–57). If similar fact evidence is admissible under s 11(*b*), why should all other evidence not be admissible under this section, which is so general that it literally encompasses all evidence that "make[s] the existence or non-existence of any fact in issue or relevant fact highly probable or improbable"? Such an approach would render the remaining sections of Pt 1 of the EA redundant.

20 Second, s 11(*b*) is inconsistent with the common law balancing test because it does not expressly address prejudice and does not contemplate a balancing process. That a fact itself makes a fact in issue or relevant fact "highly probable" does not ineluctably lead to the conclusion that its prejudicial effect is overridden. The absence of any reference to prejudice assumes that the court may focus solely on the strength of inference of the similar fact evidence without considering other factors. For example, if the accused is charged with causing grievous bodily harm to his wife, evidence of previous similar acts of violence towards his wife might show that it was "highly probable" that the accused committed the offence. However, the prejudicial effect of this evidence

67 [2015] SGHC 190 at [100].

68 *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [27].

69 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [46]. Also see *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 at [58].

may be considerable if disproportionate weight is placed on it (whether consciously or unconsciously) because the husband is already a proven and cruel wife-beater (particularly if he was not charged for his previous crimes against his wife). Although the common law balancing test would address these issues, the terminology of s 11(*b*) is insufficiently precise for this purpose.[70] Unlike the position under s 11(*b*) but according to the common law probative value and prejudicial effect balancing test, a fact may admissible as similar fact evidence if it is merely probable (rather than "highly probable") but nevertheless outweighs its prejudicial effect.

21 Third, if s 11(*b*) is treated as an admissibility provision for similar fact evidence, its general terms would enable all similar fact evidence (including evidence proving intention and state of mind) to be admitted under this section thereby rendering ss 14 and 15 otiose. And, as the language of s 11(*b*) is entirely different to ss 14 and 15, the imposition of the common law balancing test on these three provisions would compromise statutory consistency. This position is exacerbated when it is sought to rely on similar fact evidence to prove identity because a stricter test requiring a "signature or other special feature" is applicable.[71] If, as the High Court in *Lee Kwang Peng* held, the terminology "highly probable" in s 11(*b*) encapsulates the probative value and prejudicial effect balancing test, that section cannot be extended to include the more demanding requirement that the evidence sought to be admitted must have a striking feature which clearly identifies the accused. Although the court in *Lee Kwang Peng* affirmed the observation of Lord Mackay that "a signature or other special feature" is necessary for the admissibility of similar fact evidence to prove identity (which was not in issue in either case), no section in the EA addresses this situation.

22 Fourth, the absence of clear criteria for admissibility in s 11(*b*) may result in the misapplication of the law. In *Public Prosecutor v Gurbajant Singh s/o Najar Singh*,[72] which concerned the trafficking of heroine based on possession, the court permitted the Prosecution to adduce a medical report showing that the accused was experiencing "mild heroin withdrawal syndrome" the day after his arrest.[73] The court justified the admission of this evidence under s 11(*b*) of the EA on the Prosecution's submission that the accused's consumption was relevant to his possession of the drug. The court did not apply the probative value

70 The position would be different if the husband claims that he hurt his wife accidentally because his previous conduct of hurting his wife would be admissible under s 14 (read with Illustration (*o*)) to rebut his contention that he acted unintentionally. In these circumstances, propensity evidence would not be in issue.

71 See para 10 above.

72 [1998] SGHC 285.

73 *Public Prosecutor v Gurbajant Singh s/o Najar Singh* [1998] SGHC 285 at [80].

and prejudicial effect balancing test for proof of *actus reus* mandated in *Lee Kwang Peng*.[74] If it had done so, it may have concluded that the inferential value of the medical report was limited given the possibility that the accused may have consumed a drug other than the drug in the accused's possession. Furthermore, as the accused was charged with trafficking rather than mere possession, the court may have considered that evidence of consumption did not make it "highly probable" (the standard in s 11(*b*)) that the accused was trafficking. At the very least, these issues ought to have been considered to determine whether the probative value of the evidence justified its admissibility despite its prejudicial effect. The answer to the concerns over the wording of s 11(*b*) lies in statutory reform, which is proposed below.[75]

C. Similar fact evidence in civil proceedings

23 At common law, similar fact evidence is admissible in civil proceedings to prove the state of mind of a party or the commission (or non-commission) of an act. The danger of prejudice is a less significant factor in civil proceedings because of the absence of penal consequences and the opprobrium linked to a criminal prosecution.[76] The test for admissibility is whether the evidence is logically probative of an issue and would not be unduly oppressive to the party concerned. In *Mood Music Publishing v De Wolfe*[77] ("*Mood Music*"), Denning LJ stated:[78] "In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it." In *Mood Music*, which concerned an action for breach of copyright in a work of music, the plaintiff was permitted to adduce evidence of similar infringements of copyright by the defendant in other works of music to show the unlikelihood of coincidence.

24 As ss 14 and 15 of the EA do not distinguish between criminal and civil cases, it could be reasonably assumed that that the principles of admissibility are common to both types of proceedings. This was the view of the High Court in *Hin Hup Bus Service v Tay Chwee Hiang*[79] ("*Hin*

74 See para 16 above.

75 See the proposed s 15, which is considered at para 39 below. A new s 15A is also proposed for the purpose of proving identity (see para 40 below).

76 Although a grave civil wrong (such as large commercial frauds or incidents leading to the death of many people) may carry its own stigma.

77 [1976] Ch 119.

78 *Mood Music Publishing v De Wolfe* [1976] Ch 119 at 127. Orr and Brown LJJ concurred.

79 [2006] 4 SLR(R) 723.

Hup"), which concerned an accident between a concrete mixer and a bus. The issue was whether evidence that the bus driver had been involved in seven previous similar accidents involving a bus or lorry driven by him was admissible to show a system of conduct on the part of the bus driver (that he deliberately caused the accidents) for the purpose of making false insurance claims.[80] Citing *Tan Meng Jee* and *Boardman*, and referring to s 14 and 15 of the EA, the court in *Hin Hup* applied the probative value and prejudicial effect balancing test applicable in criminal proceedings.[81] Puzzlingly, the court cited Lord Denning's pronouncement in *Mood Music* (that the evidence must be logically relevant in determining the matter in issue and it is not unfair to admit it) for the proposition that "[t]he principles relating to similar fact evidence in criminal cases are equally applicable to civil cases".[82] With respect, it is abundantly clear that Lord Denning had formulated a quite distinct test for civil proceedings. While the decision in *Hin Hup* is undoubtedly correct, the wrong principles were applied.

25 *Hin Hup* was not considered in *Rockline Ltd v Anil Thadani*[83] ("*Rockline*"), in which the High Court briefly addressed similar fact evidence in civil proceedings. This case involved an application to expunge multiple passages in affidavits of the evidence in chief of two witnesses. One of the three grounds underlying this application was that the pertinent passages referred to inadmissible similar fact evidence. Having observed that ss 14 and 15 apply to both civil and criminal cases, the court stated that a stricter approach is taken in criminal cases. It went on to affirm Denning LJ's pronouncement in *Mood Music*.[84] That pronouncement was subsequently re-confirmed by the High Court in *Liu Tsu Kun v Tan Eu Jin*[85] ("*Liu Tsu Kun*").

26 Although *Rockline* and *Liu Tsu Kun* favour the application of Lord Denning's pronouncement in civil proceedings, the courts in both cases (as well as in *Hin Hup*) considered the principles in the context of ss 14 and 15 of the EA. As the court put it in *Liu Tsu Kun*:[86] "this is similar fact evidence that is relevant and admissible under ss 14 and 15 of the Evidence Act". Similarly, in *Tan Swee Wan v Johnny Lian Tian*

80 All eight incidents occurred during a period of 11 months (despite an accident-free record over the preceding 20 years).
81 *Hin Hup Bus Service v Tay Chwee Hiang* [2006] 4 SLR(R) 723 at [38]–[39].
82 *Hin Hup Bus Service v Tay Chwee Hiang* [2006] 4 SLR(R) 723 at [40].
83 [2009] SGHC 209.
84 *Rockline Ltd v Anil Thadani* [2009] SGHC 209 at [2]. Lord Denning's pronouncement is set out at para 23 above.
85 [2017] SGHC 241 at [70].
86 *Liu Tsu Kun v Tan Eu Jin* [2017] SGHC 241 at [69].

Yong[87] ("*Tan Swee Wan*"), although the High Court stated that it was not in a position to definitively consider the principles governing the admissibility of similar fact evidence in the absence of submissions by the parties, it observed that "the court will naturally examine with care the degree of similarity and the nature of the issues in question before reaching any conclusion".[88] It added that "the admissibility of similar fact evidence has to be determined according to the categories of relevance under ss 14 and 15 of the Evidence Act".[89]

27 As already shown, the common law balancing test of probative value and prejudicial effect was superimposed on ss 14 and 15 by *Teo Ai Nee*, *Tan Meng Jee* and subsequent criminal cases concerning similar fact evidence.[90] Although Lord Denning's pronouncement in *Mood Music* was cited as authority by the courts in *Rockline*, *Liu Tsu Kun* and *Tan Swee Wan*, the pronouncement clearly does not contemplate the balancing test in civil cases. A further challenge to the reasoning in *Rockline* and *Liu Tsu Kun* is that the courts in those cases did not consider the purposes for which the similar fact evidence would be admitted. If the evidence was to be adduced to prove *actus reus*, ss 14 and 15 could not have applied.[91] This is because, on the authority of *Lee Kwang Peng*, the provision that admits similar fact evidence to prove *actus reus* is s 11(*b*). Yet, the phrase "highly probable" in s 11(*b*) and the operation of the probative value/prejudicial effect balancing test affirmed in *Lee Kwang Peng* pitches the test of admissibility significantly higher than contemplated by Lord Denning's pronouncement in *Mood Music*. Therefore, if Lord Denning's pronouncement concerning the admissibility of similar fact evidence in civil cases is the law in Singapore (*Rockline* and *Liu Tsu Kun* strongly indicate that it is, and *Hin Hup* and *Tan Swee Wan* cite it as an authority), it would be appropriate to introduce a new provision that is solely concerned with similar fact evidence in civil cases. A new section is proposed below.[92]

87 [2018] SGHC 169.

88 *Tan Swee Wan v Johnny Lian Tian Yong* [2018] SGHC 169 ("*Tan Swee Wan*") at [276]. Also see *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2020] SGHC 1 at [201], where the High Court (citing *Tan Swee Wan*) observed: "the court must take a careful and cautious approach in utilising similar fact evidence with regard to establishing fraud and dishonesty".

89 *Tan Swee Wan v Johnny Lian Tian Yong* [2018] SGHC 169 at [276].

90 See para 11 above.

91 See paras 7–11 above.

92 See the proposed s 15B, which is considered at para 41 below.

D. Background evidence

28 It is not controversial that a court may rely on "background evidence" in criminal cases when it is necessary to gain a proper, complete and clear understanding of the facts that are the basis of the proceedings. Such evidence may be directly connected to the issues in the case ("connected background evidence") or may arise from previous unconnected incidents ("unconnected background evidence"). Sections 6–11 of the EA admit evidence of connected background facts on the basis that they are logically relevant to the issues before the court. For example, in *Micheal Anak Garing v Public Prosecutor*[93] ("*Micheal Anak Garing*"), the accused were charged with murder in furtherance of a common intention. They had attacked four victims in series of incidents which occurred within a short period of time late at night and in the early morning. The murder was committed in the course of the final incident. The court held that evidence of the prior three incidents was admissible under s 6 of the EA because "[i]f this evidence were rejected, the court would only have a truncated version of the material events which might not shed true light on the attack carried out on the deceased, especially because all four attacks occurred within a short span of time".[94] Section 6 was satisfied because all four incidents constituted a "transaction" within the meaning of that section.[95]

29 As for unconnected background evidence, the position is more difficult because the court has to distinguish between similar fact evidence of misconduct on an unrelated occasion showing statement of mind, intention or knowledge that is admissible to prove guilt (pursuant to ss 14 and 15 of the EA), and evidence of misconduct on an unrelated occasion which is relied on for the sole purpose of providing the court with a proper and complete understanding of the facts that are the basis of the proceedings.[96] As it has been held that the probative value and prejudicial effect balancing test applies to similar fact evidence admissible under ss 14 and 15, it is not appropriate to rely on these provisions for the purpose of admitting unconnected background evidence.

30 Therefore, in *Public Prosecutor v Ranjit Singh Gill Menjeet Singh*,[97] the High Court distinguished between similar fact evidence which was

93 [2017] 1 SLR 748.

94 *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [10].

95 The court also admitted these facts as evidence of the state of mind of the accused pursuant to s 14 of the Evidence Act (Cap 97, 1997 Rev Ed). This part of the decision is considered at para 32 below.

96 *Ng Beng Siang v Public Prosecutor* [2003] SGCA 17 at [42]. This principle is recognised by the common law, as shown in *Re M* [2000] 1 All ER 148.

97 [2017] 3 SLR 66.

admitted to establish state of mind pursuant to ss 14 and 15 of the EA and the unconnected background evidence[98] which was relied on (upon the authority of the Court of Appeal's judgment in *Ng Beng Siang v Public Prosecutor*)[99] for the limited purpose of providing the court "with a complete account of the facts".[100] Although the Prosecution argued that background evidence could be admitted under ss 6 and 9 of the EA, the court rightly did not justify the admissibility of the unconnected background evidence on any provision of the EA.[101] In a contrasting case, *Public Prosecutor v Khoo Kwee Hock Leslie*,[102] the evidence of certain witnesses was admitted to contradict the accused's testimony (pursuant to s 11(*a*) of the EA) and to reveal his motive to murder the deceased (pursuant to s 8(1) of the EA) in response to her threats to report him "to his bosses".[103] The evidence did not constitute similar fact evidence and was admissible under these provisions because it concerned relevant facts connected to the facts in issue.

31 Similarly, in *Public Prosecutor v Sritharan K Raja Rjan*[104] (which concerned a drug trafficking charge in respect of a delivery of drugs at Woodlands Checkpoint), the court permitted Immigration and Checkpoints Authority ("ICA") records to be admitted to show the dates and times of the accused's movements in and out of Singapore on certain dates concerning drug-related activities before his arrest. The court held that the ICA records did not constitute similar fact evidence[105] because they were not admitted for the purpose of proving the accused's guilt. Rather, they "furnished the proper context in which the toll records and SIM card records could be correctly analysed".[106] The court distinguished between similar fact evidence which is subject to the probative value and prejudicial effect balancing test[107] and contextual (background) evidence which was admitted. The purpose of one of the visits (two days before the

98 *Public Prosecutor v Ranjit Singh Gill Menjeet Singh* [2017] 3 SLR 66 at [12]–[22].

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

100 *Public Prosecutor v Ranjit Singh Gill Menjeet Singh* [2017] 3 SLR 66 at [16]. Also see *Public Prosecutor v Saridewi Bte Djamani* [2018] SGHC 204 at [35], where the High Court held that evidence of the accused's former drug trafficking activities "was relevant to her state of mind and probative of the factual context at the material time of her arrest".

101 Nor did the Court of Appeal in *Ng Beng Siang v Public Prosecutor* [2003] SGCA 17. Also see *Public Prosecutor v Beh Chew Boo* [2020] SGHC 33 at [10]–[16], where both cases were considered.

102 [2019] SGHC 215.

103 *Public Prosecutor v Khoo Kwee Hock Leslie* [2019] SGHC 215 at [7]–[10].

104 [2020] SGHC 121.

105 *Public Prosecutor v Sritharan K Raja Rjan* [2020] SGHC 121 at [26].

106 *Public Prosecutor v Sritharan K Raja Rjan* [2020] SGHC 121 at [26]. The SIM cards were seized from the accused when he was arrested.

107 The court cited the following cases in *Public Prosecutor v Sritharan K Raja Rjan* [2020] SGHC 121at [25]: *Ng Beng Siang v Public Prosecutor* [2003] SGCA 17

(cont'd on the next page)

date of his arrest) was preparatory work for the delivery of the drugs.[108] However, it needs to be said that evidence of this visit could have been admitted as evidence of preparation connected to the facts in issue pursuant to s 8(1) of the EA[109] (rather than as unconnected background evidence). Section 8(1) is an important provision for the prosecution of drug offences as it admits prior drug-related activity showing preparation even if that conduct reveals propensity evidence (although the fact of preparation cannot be relied on for the purpose of showing propensity).[110]

32 On occasion reliance has been placed on ss 14 of the EA to admit unconnected background evidence for the purpose of showing the accused's state of mind. *Micheal Anak Garing* has been considered in the context of previous misconduct of the accused that is admitted because it is connected to the facts in issue (in this case pursuant to s 6 of the EA) rather than as similar fact evidence.[111] The accused persons were tried for murder which occurred in the course of a series of robberies in the night and early morning. They had attacked four victims, the last of which was the deceased. Apart from its admissibility under s 6 of the EA, evidence of the attacks prior to the murder was also held to be admissible under s 14 of the EA to show the state of mind of the accused which was relevant to the charge of murder in furtherance of a common intention. The Court of Appeal agreed with the High Court that this evidence was not admitted to show the violent tendencies of the accused (their propensity) bearing in mind the probative value and prejudicial effect balancing test laid down in *Tan Meng Jee*.[112] While the admissibility of this evidence of the previous attacks to show state of mind in *Micheal Anak Garing* cannot faulted, it is respectfully submitted that once that evidence was admitted under s 6 of the EA (all the attacks occurred within a short period of time so as to constitute a "transaction"), the court could have drawn all the appropriate inferences (including state of mind) which arose from those attacks without needing to rely on s 14.

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at [40]–[42]; *Public Prosecutor v Ranjit Singh Gill Menjeet Singh* [2017] 3 SLR 66 at [17]–[19].

108 *Public Prosecutor v Sritharan K Raja Rjan* [2020] SGHC 121 at [26].

109 Section 8(1) of the Evidence Act (Cap 97, 1997 Rev Ed) states that a fact showing preparation is a relevant fact.

110 Also see *Rosman bin Abdullah v Public Prosecutor* [2017] 1 SLR 10 ("*Rosman bin Abdullah*"), in which evidence of a prior drug transaction may have been admissible under s 8(1) of the Evidence Act (Cap 97, 1997 Rev Ed) as it involved preparation for the later transaction that constituted the offence with which the accused was charged. However, this section was not referred to. See *Rosman bin Abdullah* at [32].

111 See para 28 above.

112 *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [8].

33 As similar fact evidence admitted under s 14 is subject to the probative value and prejudicial effect balancing test,[113] and that section includes Illustrations which expressly and impliedly prohibit the admissibility of previous acts against persons other than the accused,[114] in the interest of clarity, it should be limited to the admissibility of similar fact evidence to prove guilt. The complication is that s 14 does contemplate the admissibility of evidence other than similar facts including facts which are connected to the facts in issue and therefore admissible under ss 6–11 of the EA. For example, Illustrations (*a*), (*b*) and (*k*), (*l*) and (*m*) to s 14 concern facts that are admissible under s 6 of the EA on the basis that they are so connected with the facts in issue that they form part of the same transaction.[115] The facts in those Illustrations would also be admissible to explain or support or rebut inferences raised by the facts in issue pursuant to s 9 of the EA. Facts connected to the facts in issue should not be included in s 14 which, as Stephen emphasised, is concerned with unconnected facts.[116] The probative value and prejudicial balancing test has no part to play in their admissibility. Furthermore, s 14 extends beyond conduct. Illustration (*l*) points to statements by a person concerning his symptoms in a case of poisoning. A statement of intention would also be admissible under the broad terminology of s 14 as evidence of that intention. For example, where an accused person states his intention to meet someone at a place where the crime was committed. As the statement of intention is a relevant fact connected to the issues in the case it would be admissible under s 9 of the EA to explain or support the facts in issue (that he had the intention to go to the place where the crime was committed and, therefore, could have committed the offence).[117] Given the antiquated state of the Evidence Act, its conceptual difficulties and its uneasy relationship with the common law, s 14 needs to be amended and

113 See paras 3–12 above.

114 In particular, see Illustration (*o*), which states: "A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that A was in the habit of shooting at people with intent to murder them is irrelevant."

115 See *Tan Geok Kwang v Public Prosecutor* [1949] MLJ 203; *Jaafar bin Hussein v Public Prosecutor* [1950] MLJ 154. The facts mentioned in the main text would also be admissible under s 9 of the Evidence Act (Cap 97, 1997 Rev Ed) to explain or support or rebut the facts in issue. As they are not unconnected facts, they do not need to be admitted under s 14.

116 See James Stephen, *Digest of the Law of Evidence* (Macmillan & Co, 5th Ed, 1887) Note VI.

117 The statement of intention alone would not be sufficient to prove that he actually went to the place where the crime was committed. If the statement is admitted to prove that he went to the place, this would be hearsay evidence and its admissibility would be governed by s 32 of the Evidence Act (Cap 97, 1997 Rev Ed).

a new section concerning unconnected background evidence should be introduced. The proposed reform is discussed below.[118]

III. Proposed reforms

A. Introduction

34 The following reforms are proposed in response to the issues that have been raised above.[119] The approach here will be to state the proposed amendment or section after a brief explanation that cross-refers to the relevant observations in Part II of the article. In proposing the reforms, the author considered the present scheme of admissibility in Pt 1 of the EA, which refers to the admissibility of relevant facts rather than evidence of relevant facts. This is because Stephen's approach is to state what facts may be proved in terms of relevancy. Therefore, Pt 1 of the EA admits facts on the basis of that they are relevant and impliedly excludes facts on the basis that they are irrelevant.[120] The reforms introduced by the Evidence (Amendment) Act 2012[121] also took this approach in relation to hearsay and opinion evidence. The author has included the probative value and prejudicial effect balancing test for the admissibility of similar fact evidence to prove *mens rea*, state of mind and *actus reus* in criminal cases (see the proposed ss 14 and 15 below), as this is now a firmly established test for this type of evidence[122] and has been applied or operates in other areas of Singapore evidence law.[123] The author has

118 See the proposed s 15C, which is considered at para 42 below.

119 See paras 3–33 above.

120 For a fuller consideration of this approach, see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) ch 2.

121 Act 4 of 2012.

122 See paras 11–22 above.

123 For other areas of evidence law where this balancing test applies, see *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [52]–[53]; *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [73]–[76] (both cases concern the court's discretion to exclude unreliable statements obtained from the accused in the course of investigation); *Wan Lai Ting v Kee Kah Kim* [2014] 4 SLR 795; *Public Prosecutor v Sutherson, Sujay Solomon* [2016] 1 SLR 632 at [23]–[24]; *Public Prosecutor v Xu Feng Jia* [2016] SGDC 160 at [40] (concerning the discretion to exclude unreliable hearsay evidence pursuant to s 32(3) of the Evidence Act (Cap 97, 1997 Rev Ed)). As s 47(4), which concerns the discretion to exclude opinion evidence, includes the same terminology as s 32(3), a court would be entitled to apply the balancing test under s 47(4) as well. Also see *The Dream Star* [2018] 4 SLR 473 at [37], where the discretion to excluded opinion evidence is considered. Section 258(5A) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) incorporates the probative value and prejudicial effect balancing test in respect of the discretion to exclude a confession that implicates a co-accused under s 258(5).

also distinguished between civil and criminal cases as distinct principles apply to these two spheres.

35 All the rules developed by the case law in relation to similar fact evidence would continue to operate as they are consistent with the proposed reforms. Therefore, the similar fact evidence must be relevant, must have the requisite strength of inference (its probative value must attain the appropriate standard in the circumstances of the case so that it is just to admit it despite its prejudicial effect), and must be cogent (the source and manner of presentation of the similar fact evidence must be sufficiently reliable).[124] Where two or more witnesses give evidence of similar facts, the rules and procedure concerning potential collusion (conspiracy between witnesses) or "innocent infection" (unconscious mutual influence) must be observed.[125] Furthermore, there is case law which establishes the entitlement of the Prosecution to rely on similar fact evidence for its incriminating effect when the accused has adduced such evidence for his own purpose.[126]

36 The proposed reforms advocate the amendment of s 11(*b*) and the repeal of the current ss 14 and 15. The proposed new sections are: s 14 (similar fact evidence admissible in criminal proceedings to prove state of mind and *mens rea*); s 15 (similar fact evidence admissible in criminal proceedings to prove *actus reus*); s 15A (similar fact evidence admissible in criminal proceedings to prove identity); s 15B (similar fact evidence admissible in civil proceedings to prove a party's state of mind or his wrongful act or omission); and s 15C (background evidence in criminal cases).

B. Proposed reforms

*(1) Amended section 11(*b*)*

37 The purpose of the amendment to s 11(*b*) is to synchronise it with the earlier sections (ss 6–10). As s 11 is a general relevancy section, it should not impose a degree of proof through the phrase "highly probable or improbable",[127] and is not a gateway for the admissibility of similar fact evidence to prove *actus reus*. A new provision (a remodelled

124 See Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) at paras 3.039–3.042.

125 See Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) at para 3.046.

126 See Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) at paras 3.050–3.054.

127 See paras 13–17 above for a consideration of the issues.

s 15)[128] is proposed for the admissibility of similar fact evidence to prove *actus reus*:[129]

Section 11 (amended)

Facts not otherwise relevant become relevant –

(*a*) if they are inconsistent with any fact in issue or relevant fact;

(*b*) if by themselves or in connection with other facts they support ~~make~~ the existence or non-existence of any fact in issue or relevant fact ~~highly probable or improbable~~.

(2) Proposed section 14

38 The proposed s 14, which concerns criminal proceedings, introduces the probative value and prejudicial effect balancing test that is established by the case law. As mentioned earlier in this article,[130] the scope of the current s 14 encompasses not just similar fact evidence but evidence of any fact that is relevant to state of mind. For example, a statement by a person that he intended to go to a place would be evidence of his intention. Similarly, the fact that a person was on antidepressant medication would be indicative of his state of mind. If these facts are relevant to the issues, they would be admissible under the current s 14. As such facts (which are facts connected to the issues and, therefore, not unconnected similar facts) may also be admissible under ss 6, 7, 8(2), 9 or 11 depending on the circumstances of the case, there is no need to conflate similar fact evidence and non-similar fact evidence concerning state of mind, intention or knowledge in a single section (as is the current position under s 14). Indeed, such non-similar fact evidence is not subject to the probative value and prejudicial effect balancing test which only applies to similar fact evidence. Therefore, the proposed s 14 is limited to the admissibility of similar fact evidence. As the test for the admissibility of similar fact evidence in civil cases is different,[131] a separate section (s 15B) is proposed for this purpose.

Section 14 (new)

In criminal proceedings, when the accused person's state of mind is in issue such as intention, knowledge, negligence, recklessness or ill-will towards any particular person, the conduct of the accused person on an occasion or occasions unrelated to the facts in issue is a relevant fact if its probative value outweighs its prejudicial effect.

128 The proposed s 15 is set out at para 39 below.
129 The amendments involve the deletion of the words as shown.
130 See para 4 above.
131 See paras 23–27 above.

(3) Proposed section 15

39 The proposed s 15 concerns criminal proceedings. It will be recalled that s 11(*b*) was regarded by the High Court in *Lee Kwang Peng* as a provision for admitting similar fact evidence to prove *actus reus*.[132] The proposed s 15 replaces s 11(*b*) as the provision for admitting such evidence. The proposed s 15 introduces the probative value and prejudicial effect balancing test that is established by the case law.[133] As the test for the admissibility of similar fact evidence in civil cases is different,[134] a separate section (s 15C) is proposed.

Section 15 (new)

> In criminal proceedings, when the issue is whether the accused committed the act or acts constituting the offence, the conduct of the accused person on an occasion or occasions unrelated to the facts in issue is a relevant fact if its probative value outweighs its prejudicial effect.

(4) Proposed section 15A

40 The proposed s 15A also concerns criminal proceedings. No section in the EA specifically addresses the admissibility of similar fact evidence to prove identity. Although s 9 of the EA concerns identity, it is limited to facts that are connected to the facts in issue (for example, eye-witness testimony of the offence or DNA or fingerprint evidence). Section 9 does not admit similar fact evidence. The critical question is whether the similar fact evidence clearly identifies the accused in the circumstances of the case. As has been mentioned,[135] in *Lee Kwang Peng*,[136] Yong CJ agreed[137] with Lord Mackay's observations in *DPP v P* on the test for the admissibility of similar fact evidence to prove identity: "evidence of a character sufficiently special reasonably to identify the perpetrator is required"[138] and "obviously something in the nature of … a signature or other special feature will be necessary".[139] As this language was used by the House of Lords in *Boardman* for the purpose of explaining "striking similarity",[140] and that phrase was acknowledged (*obiter dicta*)

132 See paras 16–22 above.
133 See paras 11–22 above.
134 See paras 23–27 above and para 42 below.
135 See para 10 above.
136 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [51].
137 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 concerned the use of similar fact evidence to prove *actus reus*. See paras 10–12 and 16–17 above.
138 *Director of Public Prosecutions v P* [1991] 2 AC 447 at 460.
139 *Director of Public Prosecutions v P* [1991] 2 AC 447 at 462.
140 The phrase "striking similarity" was the general test for the admissibility of similar fact evidence applied in *Boardman v Director of Public Prosecutions* [1975] AC 421. See paras 9–12 above.

in *DPP v P* and *Lee Kwang Peng* for the more limited purpose of proving identity,[141] the terminology will continue to be helpful to the courts. Therefore, the author has incorporated an "Explanation" to the proposed s 15A to signify the degree of probative force that is necessary to meet the requirements of this section. On a different point, the current s 15 premises admissibility on a series of other acts by the accused (not just a single act). The author has argued that this is not logical as a single act may be sufficiently probative to identify the accused as the person who committed the offence.[142] Therefore, the proposed s 15A includes evidence of a single act to prove identity if its probative force is sufficient to clearly identify the accused.

Section 15A (new)

> In criminal proceedings, when the issue is whether the accused person is properly identified as the person who committed the act or acts constituting the offence, the conduct of the accused person on an occasion or occasions unrelated to the facts in issue is a relevant fact if it clearly identifies the accused as the person who committed the act or acts constituting the offence.

Explanation to section 15A (new)

> The conduct of the accused person on an occasion or occasions unrelated to the facts in issue is a relevant fact if it is strikingly similar to the act or acts constituting the offence in the sense that it shows a signature or other special feature that singles out the accused as the person who committed the offence.

(5) Proposed section 15B

41 The proposed s 15B is concerned with the admissibility of similar fact evidence in civil proceedings. It applies the test of logical relevance and fairness which was endorsed in *Liu Tsu Kun*, *Rockline* and *Hin Hup*.[143] The proposed s 15B applies whether the similar fact evidence is relied on to prove a party's state of mind or that he committed a wrongful act or wrongly omitted to act.

Section 15B (new)

> In civil proceedings, when the issue is whether a party had the necessary intention or knowledge or any other particular state of mind or committed an act or omitted to act, the conduct of the party on an occasion or occasions unrelated to the facts in issue is a relevant fact if it is probative of any such issue and its reception by the court would not cause injustice.

141 See paras 10 and 21 above; *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [48]–[49] and [51].
142 See para 5 above.
143 See paras 23–27 above.

(6) Proposed section 15C

42 The proposed s 15C consists of two subsections. Section 15C concerns background evidence of facts that are not connected to the facts in issue (and, therefore, not within the scope of ss 6–11).[144] For example, if the accused is charged with rape, and there is evidence that the victim consented to intercourse, the Prosecution may wish to adduce previous unconnected incidents in the course of their relationship as background evidence to show that the victim consented because of her fear that she would be physically harmed if she refused him. Such background evidence would be admissible under the proposed s 15C(1) because it is vital to the court's determination of whether the victim's apparent consent was genuine.[145] As the evidence of the prior incidents is potentially prejudicial to the accused, it cannot be simply admitted under ss 6–11 but under a specific set of provisions containing safeguards (as provided in the proposed s 15C). The test for admissibility under s 15C is based on the principles developed by the case law.[146] Section 15C(2) ensures that such background evidence is relied upon for contextual purposes and not treated as similar fact evidence proving guilt.

Section 15C (new)

(1) In criminal proceedings, the conduct of the accused person on an occasion or occasions unrelated to the facts in issue is a relevant fact if it is vital to the court's understanding of the facts constituting the offence charged or of any particular issue which the court is required to determine.

(2) If the conduct of the accused person on an occasion or occasions unrelated to the facts in issue is a relevant fact under paragraph (1), that fact must not be considered for the purpose of determining the accused person's guilt.

(7) Conclusion

43 The purpose of these amendments is not to change the law but to give effect to the principles that have been established by Singapore case law. The author has argued that these principles are no longer properly represented by the current ss 11, 14 and 15 of the EA, which are 148 years old.[147] In the introduction to this article, the author mentioned the difficulties that judges, lawyers and students often face when engaging

144 See paras 28–33 above.
145 If the issue before the court was whether the accused bore any ill-will towards the victim, the evidence of the previous acts might be admissible as similar fact evidence under the proposed s 14 (see para 38 above).
146 See paras 28–33 above.
147 See para 2 above.

these provisions.[148] The author's hope is that the proposed amendment to s 11(*b*) and the proposed ss 14, 15 and 15A–15C will achieve clarity and restore statutory integrity. This will enable the courts to continue to develop the law to its full potential.

148 See para 2 above.