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SIMILAR FACT EVIDENCE IN SINGAPORE: PROBATIVE VALUE, PREJUDICE AND POLITICS

This discussion explores how the inability of the law of evidence to decide how to deal decisively with character evidence in general and similar fact evidence in particular has spawned the deliberately ambiguous formula of weighing probative value and prejudice. It also suggests that this weakness gives extraneous "political" factors the opportunity to insinuate themselves into actual decision-making. Because of this, decisions from other jurisdictions cannot be taken at face value, as may have been done in the most recent case in Singapore, *Lee Kwang Peng*.

I. The Politics of Fact-Finding

IT would be excusable for the observer of the criminal process to think that there is little left to be said about the law which governs the treatment of similar fact evidence.[1] He or she would be familiar with the standard theme of the need to weigh probative value and prejudice, and would have probably concluded that the process is fact-dependent and subjective, defying any attempt to show that the legislation and the decided cases are consistent to any significant degree.[2] To some extent, it is possible to attribute the differing results in the cases to the inherent uncertainties of the fact-finding process. Probative value and prejudice cannot be measured in discrete, comparable units. In these matters, I have little to add to the available literature. That which does merit further discussion is the way in which unspoken factors, extrinsic to the primary forensic aims of the criminal process, impinge upon, and occasionally dictate the result in particular cases, and the shape of certain odd-looking legislation. As a clumsy but convenient shorthand, I label these subterranean forces "political". Because they are seldom articulated as such, any attempt to describe and analyse them is

1 See the very able discussions of the law in Pinsler, "Similar Fact Evidence: The Principles of Admissibility" [1989] 2 MLJ lxxxi; Margolis, "Evidence of Similar Facts, The Evidence Act, and the Judge as Trier of Fact" (1988) 9 Sing LR 103; Ho, "An Introduction to Similar Fact Evidence, [1998] Sing LR, forthcoming; Chin, *Evidence* (1988), pp 91-119.

2 See, *eg*, Lord Herschell's piece of pithy judicial understatement in *Makin* v *AG for NSW* [1894] AC 57 at 65: "the principles which must govern ... are clear, though the application of them is by no means free from difficulty".

bound to be to some extent speculative. Yet it is my belief that in many important instances, that which finally determines the admissibility and use of similar fact and character evidence has little to do with the legal formula of weighing probative value and prejudice, but has everything to do with powerful political forces urging the criminal process not to "go soft" on crimes in general, or to deal sternly with particularly heinous or troublesome social problems.

II. The Porosity of Probative Value and Prejudice

Much ink has been poured over the nature of probative value and prejudicial effect of similar fact and character evidence. My purpose in going over this ground is not to repeat what has been said, but to show (to those who are not yet convinced) how porous and indeterminate these concepts are.[3] When the law employs terms like "probative value" and "prejudice" as the foundation of its treatment of similar fact and character evidence, the uncertainties are imported. In the large spaces which these uncertainties create, the political forces find their playground.

A day seldom passes in which we do not use character or similar fact evidence to predict whether someone is likely to do something or to judge whether he or she has done something. Character is probative of the existence of a state of mind and of conduct. That is common sense. However, conviction for a crime is a very serious matter and the conventions suitable for everyday decision-making may not be sufficiently rigorous for the criminal process. We need to look more closely at the probative value of similar fact or character evidence and try to unpack common sense. To what extent is past behaviour or disposition helpful in predicting future behaviour? We can start by saying that the more specific the disposition is, the more probative it is likely to be.[4] Yet the variables are as diverse as life itself – the victim, the specific crime, the method of operation, the time, the place, just to name a few. Then again, we are never told how specific the disposition needs to be before it can be a useful predictor. That would depend on how rare or commonplace we think such behaviour or disposition is in our society. The rarer the kind of conduct, the more likely it is that the particular disposition is specific enough. Yet we are not told how rare the conduct must be, and there is often little or no hard statistics to help us. We rely on hunches and instincts, matters upon which people often disagree, and which could, of course, be prejudiced and very wrong.

[3] See, *eg*, the observations of Weissenberger, "Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)" (1985) 70 Iowa LR 579.

[4] This is the philosophy of the Evidence Act (Cap 97); see explanation 1 to section 14.

Psychologists have been working on this problem as well.[5] They identify these inferential steps in the reasoning process. First, specific instances of past behaviour are offered to the court. The court must then decide that the track record justifies the conclusion that the accused possesses a trait, disposition or propensity to act in a certain way. Finally, the court must believe that, under the circumstances which the accused is charged, that particular trait translated itself into action. Each of these steps is fraught with danger. Establishing a particular disposition is no easy matter – showing that someone was late, or has lied on even a number of occasions does not normally justify us in labelling him or her as habitually unpunctual or as a liar. We need to know much more about the character and makeup of the individual and the precise factual context in which the past behaviour was manifested. A court of law normally has neither the time nor the patience to engage in these details.[6] The big psychological debate in this area has been between trait theorists (who think that behaviour is normally governed by identifiable character traits) and situationists (who believe that behaviour is seldom determined by character traits, but by the factual situation in which a person finds himself or herself in). I hope I do not oversimplify the matter by saying that this has, for the time being, been fought to a draw. The experts seem agreed on the rather common-sensical view that motivation for behaviour is not an "either or" thing, but a dynamic interplay between trait and situational factors. Persons with a specific character makeup tend to behave in a certain way, given that certain particular situational factors are present. Although character is not entirely useless as a predictor of behaviour, the reasoning process requires the court to make involved decisions as to whether the accused has the particular trait, and whether the specific situational trigger was present. This can only be satisfactorily done if the courts are willing to delve into the precise psychological makeup of the accused. This the courts are unlikely to do. We are left with slippery

5 See, *eg*, Leonard, "The Use of Character Evidence to Prove Conduct: Rationality and Catharsis in the Law of Evidence" (1986-87) 58 Colorado LR 1; Mendez, "The Law of Evidence and the Search for a Stable Personality" (1996) 45 Emory LJ 221.

6 The question of whether the law ought to spend more time on the mechanics of disposition evidence brings us to another universe of contention – the appropriate place for expert evidence. The rule governing the use of expert evidence is itself tiresomely vague. I hope I am not too conclusory in saying that the prevailing standard for the admissibility of expert evidence, which draws the distinction between normal mental processes (for which expert evidence is inadmissible) and abnormal behaviour (for which expert evidence may, and indeed must, be offered), is unlikely to permit this kind of expert evidence. See generally, Pinsler *et al, Butterworth's Annotated Statutes of Singapore: Vol 5 Evidence Act* (1997), pp 142-146.

companions like gut-feelings and conclusions drawn from highly personalised experiences – in other words, hunches and instincts.

From the gloomy world of probative value, we move to deep, dark recesses of prejudice, the reason why we need a special legal regime for similar fact and character evidence. Anglo-American scholars[7] dissect prejudice into two. First is "inferential prejudice" – courts are likely to overestimate the probative value of character and similar fact evidence. Or to tie up with what we learn from psychologists, courts are likely to make mistakes in the inferential steps between past misbehaviour and present misconduct. The extent to which the law is willing to recognise the risk of inferential prejudice is dependent upon the degree to which the law is willing to appreciate the complexity of predicting human behaviour. At the moment, we have seen that the law is in no mood for complicated motivational analysis, something which may well require the use of expert witnesses. Thus, if probative value is left to gut-feelings and instincts, so also the risk of inferential prejudice is left to a similar fate.

The other, more intriguing, kind of prejudice is "moral prejudice". Faced with knowledge that the accused has behaved very badly in the past, the court might be tempted to subconsciously revoke the principle that reasonable doubt must be resolved in favour of the accused, or more virulently to ignore the facts of the charge at hand and to punish him or her for her past behaviour. That this is possible is not in doubt, but how likely is it that the average trier-of-fact will allow himself or herself to yield to the temptation? The faith which we have in the trier-of-fact is another imponderable. Just as there are optimists and pessimists in any aspect of human endeavour, so will we disagree on the ability of human beings to set its face against moral prejudice. In Singapore, it is often glibly asserted that professional, legally-trained judges can better deal with prejudice, presumably of either kind.[8] I marvel at the ostensible conviction with which such a notion is held. Lawyers are, in their training, conceivably, alerted to the dangers of inferential prejudice, but that insight is by no means the exclusive preserve of lawyers. People of almost every profession deal with assumptions and inferences. As to preparation for dealing with moral prejudice, I search the 4 year law curriculum in vain to discover where the student is taught about prejudice and how to deal with it.

And if all this uncertainty revealed by looking at probative value and prejudice is not enough, the law tells us to weigh one against the other.

7 See, *eg*, Zuckerman, *The Principles of Criminal Evidence* (1989), pp 222-234.

8 See, *eg, Wong Kim Poh* [1992] 1 SLR 289. This claim is not restricted to local judgments: see, *eg*, the pronouncements of the Privy Council in *Siu Yuk-Shing* v *AG of Hong Kong* [1989] 1 WLR 236.

First, the easy cases. There is little difficulty where probative value is high and prejudice prejudicial effect small (assuming we do get past the ambiguity of both concepts) – the evidence should be admissible, and even relied upon. Similarly, where probative value is low and prejudicial effect great, the evidence should be excluded, or if it is to be admitted, it should not be relied upon. That leaves the troublesome situation of dealing with evidence which potentially has high probative value, but also carry with it a great risk of prejudice. Predictably, this is the situation with almost all the difficult cases. Probative value and prejudice cannot be assigned commensurable units of, say, 1 – 10. Where both are high, the court is asked to weigh the importance of convicting the guilty (*via* the admission of highly probative evidence), and of acquitting the innocent (by excluding evidence with great prejudicial effect). It is here that the political forces insinuate themselves into criminal evidence. Where the alleged crime is particularly heinous, the temptation is great for the court to think that the law must not be obstructive to law enforcement or be seen to be soft on criminals (by excluding probative evidence); that social protection has priority over individual justice. The political pressure to yield to populist "law and order" sentiments is strong. When factors such as these impinge on the question of admissibility of similar fact and character evidence, the result can no longer be explained by a raw analysis of probative value and prejudice.

III. The Futility of Common Law Discourse

In the English common law, the great conceptual development of the 20th century has been the shift from an approach centred on different kinds of relevance to a scheme based on different degrees of relevance. This is the *Makin – Boardman* debate. *Makin*,[9] the major 19th century decision, set up a two proposition rule. First, evidence of prior misconduct is inadmissible if it is tendered to show that the accused is thereby likely to be guilty of the crime charged. Secondly, such evidence is nevertheless admissible if it is relevant to some other issue which is before the court, for example, to rebut a line of defence, to prove identity, or to disprove accident. Briefly, similar fact evidence is inadmissible if it is relevant only to disposition, but is admissible if it is otherwise relevant to some other legitimate issue.[10] *Boardman*,[11] the primary 20th century case, or rather two judges therein,[12]

9 *Supra*, note 2.

10 This is expressed most clearly in the judgment of Lord Hailsham in *Boardman, infra,* note 11.

11 [1975] AC 421.

12 The decision to abandon *Makin, supra,* note 2, is clear only in the speeches of Lords Wilberforce and Cross, *ibid.*

propounded a simpler approach – similar fact evidence is admissible if its probative value outweighed its prejudicial effect. It does not matter if the evidence is relevant only to disposition, so long as it is sufficiently probative of guilt. In England, the matter appears settled in favour of *Boardman*.[13] Under the US Federal Rules of Evidence, *Makin* still prevails and academic proposals to convert it have met with resistance.[14] In Canada a long-standing debate has gone on in the Supreme Court with the pendulum swinging at one time in favour of *Boardman*, but now decidedly back in the direction of *Makin*.[15] In Singapore and Malaysia courts (frequently ignoring the Evidence Act) faithfully track the developments in England, and rather intriguingly are in a habit of citing both *Makin* and *Boardman* with approval at the same time.[16]

There is little doubt that, conceptually, *Boardman* is more appealing. Lord Hoffmann's critique of *Makin* is difficult to improve upon.[17] The supposed prohibition on disposition reasoning has never been followed in the cases. And the difference between admissible and inadmissible similar fact evidence cannot be explained by a different kind of relevance, but by different degrees of probative value. Simply, similar fact evidence which, under *Makin*, is admissible because it is relevant to, say, rebut a defence or to establish identity is so relevant only *via* disposition reasoning. In the classic sexual abuse of children situation, where evidence of prior sexual abuse of children under his charge is offered to rebut a defence of innocent association, clearly, it tends to rebut such a defence only because we can draw the inference that the accused has a disposition to behave that way towards children under his care. Adherents of the *Makin* approach have strained to develop a theory of relevance apart from disposition – the most

[13] *DPP* v *P* [1991] 2 AC 447.

[14] See Weissenberger, *supra,* note 3, who opposes the *Boardman* route suggested in two earlier works: Kuhns, "The Propensity to Misunderstand the Character of Specific Acts Evidence" (1981) 66 Iowa LR 777; Uviller, "Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom (1982) 130 UPenn LR 845.

[15] See Stuesser, "Similar Fact Evidence in Sexual Offence Cases" [1996] 39 Crim LQ 160, who applauds the shift in favour of *Makin*.

[16] See Pinsler *et al, supra,* note 6, pp 60-63, 65-73.

[17] "Similar Facts After *Boardman*" (1975) 91 LQR 193.

sophisticated one is the doctrine of statistical improbability or chance.[18] Disposition reasoning, it is said, can be avoided if we proceed *via* the statistical improbability of two or more children making similar false allegations against the same accused. The focus appears to be on the behaviour of the children, not the accused. The problem is that every piece of evidence of prior misconduct can be recast into a relevance *via* statistical improbability mould, making nonsense of the general prohibition of prior misconduct evidence. Ultimately, the distinction will often be too fine for comfort. To answer the question whether it is likely that both accusers are telling the truth, one naturally asks at the same time whether the accused is lying, because their testimony will be such that if one party is telling the truth, the other must be lying. One might first ask whether the allegation of prior misconduct is true, and if so, that would blow a large hole into the denial of guilt in the present charge – this is classic disposition reasoning.

In practice, however, *Boardman*'s elegant piece of conceptual housekeeping did little to improve matters.[19] It merely made explicit what the courts have been doing under the rubric of *Makin*. As far as assessment of probative value is concerned, it does appear that the courts have always taken that into account. When they found sufficient probative value, they labelled it as "relevant to an issue". When they found it insufficiently probative, it was labelled "relevant only to disposition". As for assessment of prejudicial effect, although *Makin* makes no mention of it, the courts very soon thereafter tacked on a discretion to exclude unduly prejudicial evidence which was "technically admissible" under *Makin*.[20] The striking

[18] See, *eg,* the writings of Imwinkelried: "The Use of an Accused's Uncharged Misconduct to prove *Mens Rea:* The Doctrines which Threaten to Engulf the Character Evidence Prohibition" (1990) 51 Ohio State LJ 575; "The Evolution of the Doctrine of Chances as Theory of Admissibility for Similar Fact Evidence" (1993) 22 Anglo-American LR 73. I exclude from consideration those instances where past misconduct is clearly introduced incidentally for some non-dispositional reason; for example, where the the accused is charged with trafficking in a particular illicit drug in a particular form and he argues that he is innocent because he does not even know what it looks like, the prosecution may, in rebuttal, introduce evidence that he has used that particular drug in that particular form in the past.

[19] Indeed scholars such as Stuesser, *supra,* note 15, and Weissenberger, *supra,* note 3 fear that a *Boardman*-type approach will expose the accused to more prejudicial evidence. Evidence of this might be found in the Canadian Supreme Court Decision of *R* v *B* (1990) 55 CCC (3d) 1, a split decision in which the judges who would admit similar fact evidence adopted a *Boardman*-type test, and the judges in dissent employed the *Makin* approach. I myself doubt if the choice in approaches dictated the contradicting results – although the Canadians now seem firmly set on *Makin*, the judges continue to be fractured as to how the test is to be applied: see, *eg, Lepage* (1995) 95 CCC (3d) 385.

[20] *Noor Mohamed* [1949] AC 182; So alluring is this discretion that it appears to have survived *Boardman* (*Teo Ai Nee* [1995] 2 SLR 69), although it does seem redundant.

thing is that the House of Lords did not find any of its previous decisions, which were based on *Makin*, to have been wrongly decided.[21] The inference is strong that, in the end, nothing turns on the *Makin – Boardman* difference. It is no wonder that our own cases can cite both decisions with approval, without batting an eye. You can call it what you want to, but we know what to do.

It should now be clear that the fundamental uncertainties of assessing and weighing probative value and prejudice is not even touched by the *Makin-Boardman* development. Is *Makin* or *Boardman* more generous to the admissibility of similar fact evidence? We cannot tell. *Makin* tells us nothing about the point where similar fact evidence leaps from being "relevant to disposition" to being "relevant to an issue". *Boardman* tell us nothing about when probative value outweighs prejudice. Although 3 judges in *Boardman* seemed to be more comfortable with *Makin*, and 2 judges wanted to break with it, all of them thought that the particular piece of similar fact evidence was a close call, and all of them ruled it admissible.

IV. Coming to Terms with the Evidence Act

Singapore and Malaysia is governed by the Evidence Act, a piece of legislation predating even *Makin*.[22] It should perhaps thrill the historian that the Act crystallised the common law, as it was understood before the Privy Council's pronouncements in that great case. But to the present day practitioner it can be troublesome, for its sheer vintage should alert us to the likelihood that the Act may not comport completely with either *Makin* or *Boardman*.

First, the points of similarity. Like *Makin*, the Act speaks in terms of relevance rather than probative value. The two governing sections are 14 and 15. If I may paraphrase and remove some of the archaic language, section 14 renders admissible similar fact evidence where it is relevant to

[21] The only case which seemed to have troubled their Lordships was *Thompson* [1918] AC 221, in which evidence of a general homosexual disposition was held admissible. Yet, Lord Wilberforce described that case as "obsolete", not wrong. In other words, even if the Lords in *Thompson* had applied the *Boardman* formulation in 1918, it would still have ruled it admissible. It was thus not the *Boardman-Makin* debate which determined the result. Indeed, *Boardman* itself may have become "obsolete" in view of *DPP* v *P* (see the more detailed discussion, *infra*) which has come uncomfortably close to saying that evidence of a general disposition to commit sexual offences is admissible. Again, both courts were purporting to apply the probative value-prejudice test.

[22] The Evidence Act was enacted in Singapore in 1893, in the same year that *Makin* was decided, but its provisions were, of course, drafted much earlier, and had been enacted in India in 1872: see Stephen, *An Introduction on the Principles of Judicial Evidence* to The Indian Evidence Act (1 of 1872).

a state of mind which is in issue. Section 15 makes admissible similar fact evidence (which is part of a series of similar occurrences) where it is relevant to the question of whether an act was done accidentally or with a certain intention or knowledge, when that is in issue. It is clear from the intent of the draftsman and the structure of the Act that all other kinds of similar fact evidence is inadmissible.[23] Yet it would be a mistake to assume that *Boardman*-type calculations of probative value were not envisaged.[24] Explanation 1 to section 14 requires that admissible similar fact evidence be relevant to a particular and not only to a general state of mind. What is this but a reference to probative value couched in a different language? Illustration (o) says that where the accused is charged with shooting with intent to kill, the fact that he previously shot at other people is inadmissible, but the fact that he previously shot at the victim is admissible. That result can only be explained by a difference in probative value. Section 15 predicates admissible on the similar fact evidence being part of a series of similar occurrences. This presupposes a decision as to whether the occurrences are similar or dissimilar, a remarkable presaging of the *Boardman* shorthand of "striking similarity".[25] Prejudicial effect is not so easily disposed of. There is indeed nothing in the Evidence Act to direct the court to assess prejudicial effect. But this is not a significant omission. In the difficult cases, prejudicial effect is always high, and thus always a constant. Even so, like the *Makin* line of cases, our courts have grafted on to the Act a floating discretion to exclude unduly prejudicial evidence.[26] The result is that, though the language be different, the tools which the Act uses to deal with similar fact evidence are the same. Local cases have adopted a variety of postures with respect to the Evidence Act. Some have faithfully adhered to the Act,

[23] Evidence exposing the character of the accused, but which is "specifically connected with the facts in issue", was not considered by Stephen to be presumptively inadmissible and could well be admissible under any of the relevancy ss 6 to 11 (*ibid*, pp 122, 125). See, *eg,* such evidence being admitted as *res gestae* under s 6 in *Tan Geok Kwang* [1949] MLJ 203, or as evidence of motive under s 8 in *Wong Foh Hin* [1964] MLJ 149. Presumably evidence technically admissible under these provisions are still subject to the over-riding discretion of the court to exclude unduly prejudicial evidence – see *Veeran Kutty* [1990] 3 MLJ 498, although the judge seemed to have been rather confused about the meaning of *Boardman.* Stephen considered only similar fact evidence unconnected with the facts in issue to be covered by the exclusionary rule, but that lapse seems to have been cured by the grafting of this exclusionary discretion. The modern result is simply that whether evidence is connected or unconnected with the facts in issue, it is to be assessed on the probative value-prejudice balance.

[24] See *Teo Ai Nee*, *supra,* note 20, p 93.

[25] The very high degree of probative value, or "striking similarity" is demonstrated by the illustrations to s 15.

[26] See *Teo Ai Nee, supra,* note 20.

taking care not to mention the common law. Others have followed the twists and turns of the common law, almost as if pretending that the Act does not exist. Still others eclectically quote the Act, *Makin* and *Boardman*, all with approval. Yet the primary tool of assessing the probative usefulness of similar fact evidence has not, in my opinion, changed.[27] The Evidence Act, notwithstanding its age, is no worse (and, of course, no better) than either *Makin* or *Boardman*.

There is one remaining difference; and this, I feel, cannot be legitimately erased without legislative amendment; nor am I sure that this ought to be done. *Makin*, and more so *Boardman*, clearly establishes that similar fact evidence is admissible if it is sufficiently probative of any live issue, be it, in criminal cases, *actus reus* or *mens rea*.[28] The Evidence Act is more circumspect. Similar fact evidence can only be prayed in aid to prove *mens rea*, and not *actus reus*.[29] This has always been the way the Indian courts have construed the Act – *actus reus* must be admitted or proved by some other means.[30] The Chief Justice, in a recent case, *Lee Kwang Peng*,[31] has decided otherwise, shedding the inhibitions which seemed to underlay two previous decisions.[32] Section 11(b) was the hook upon which this conclusion

[27] It is true that many of the early cases do not "seem" to assess probative value or prejudice, and speak only of relevance (see *Tan Meng Jee* [1996] 2 SLR 422, 433). Yet I very much doubt that these decisions were made with no assessment of probative value or prejudice. As we have seen, the pre-*Boardman* cases often masked calculations of probative value behind the language of relevance.

[28] Hence the well recognised grounds of "rebutting a defence" or "establishing identity" under the *Makin* approach. *Boardman* was, of course, a case were similar fact evidence was used to establish *actus reus*.

[29] S 14 specifies states that similar fact evidence can only be used prove a relevant "state of mind" and gives these examples: "intention, knowledge, good faith, negligence, rashness, ill-will or goodwill". S 15 conditions admissibility on the existence of a "question whether an act was accidental or intentional or done with a particular knowledge or intention". As long ago as in *ST James* [1936] MLJ Rep 7, it was said that "[i]t is clear that the prosecution cannot produce evidence of parallel extortions to prove the fact: it can produce the evidence to prove the mind. The fact must be proved independently".

[30] See *Sarkar's Law of Evidence* (13th Ed, 1990), pp 167-169, at 168 the learned editors write: "S14 does not apply to cases when the question of guilt or innocence depends upon the actual facts and not upon the state of a man's mind or feeling". The Privy Council in *Noor Mohamed*, [1949] AIR PC 161, 164 interpreting the Evidence Act of British Guiana rejected similar fact evidence of poisoning where the act of poisoning was not proved, observed: "If the appellant were proved to have administered the poison to Ayesha (the victim in the charge) in circumstances consistent with accident, then proof that he had previously administered poison to Gooriah (the victim in the similar fact situation) might well have been admissible".

[31] [1997] 3 SLR 278, 291.

[32] See *Teo Ai Nee, supra,* note 20, p 94; and *Tan Meng Jee, supra*, note 27, p 432.

hung.[33] This use of section 11(b) is unconvincing. Professor Pinsler's eloquent expression of the structural implausibility of such an interpretation is untarnished.[34] Briefly, 11(b) was expressly intended not to cover facts arising from previous misconduct, unconnected with the facts in issue. Section 11(b) uses only the criterion of high probative value for admissibility. If indeed the section says what the Chief Justice thinks it does, then what conceivable reason could there be for Stephen, the draftsman, to take time off his busy schedule to craft sections 14 and 15?[35] Those sections would be otiose. Historically, this reading of the Evidence Act would have been impossible. As Professor Stone's analysis shows, for better or for worse, the common law contemporaneous with the drafting of the Evidence Act was clearly under the impression that previous misconduct was not admissible to prove the *actus reus*.[36] Should the law then be changed?[37] I must confess that

[33] This is not the first time the section has been hauled in to serve this purpose: see Pinsler, *supra,* note 1, p lxxxv.

[34] *Ibid.*

[35] We have it from the horse's mouth in Stephen, *supra,* note 22, at 122-3: "It may possibly be argued that the effect of the second paragraph of s 11 would admit proof of facts such as these (including similar fact evidence)...This was not the intention of the section, as is shown by the elaborate provisions contained in the following part of the Chapter II (ss 12-39)". Later editions of Stephen's *A Digest of the Law of Evidence* (12th Ed, 1936), p 20, had to add the words "if, on the trial of a criminal charge against such person, it tends to rebut a defence otherwise open to him" to accommodate the subsequent understanding which is quite alien to Stephen. *Lee Kwang Peng* denigrated the use of earlier editions of the *Digest* to interpret the Evidence Act, describing it as a mere "academic text", either conveniently ignoring, or unaware of Stephen's *Introduction*, a work which must be more legislative than academic.

[36] "The Rule of Exclusion of Similar Fact: England" (1932) 46 Harv LR 954, p 972. So strong was this belief that even contemporaneous statutory exceptions to the exclusionary rule (imported into Singapore as ss 373 and 374 of the Criminal Procedure Code, see discussion, *infra*) did not permit similar fact evidence to prove *actus reus*.

[37] One might have thought that it is for the Legislature to do the changing in the face of so clear a statutory direction. Not so, says *Lee Kwang Peng,* because the restriction could not have been "intended by Parliament". The problem is that it was not "Parliament" which enacted the Act, nor has that august body (once it came into being) ever since considered the matter, to my knowledge. Even if we could call the relevant colonial authority "Parliament", we have every reason to believe that it certainly was intended. Prof Pinsler aptly points out that when Parliament amended s 122(5) (the mirror of admissible similar fact evidence in the context of cross-examination of the accused) in 1976, only ss 14 and 15, and not s 11(b), was mentioned – a clear indication that Parliament did not think s 11(b) to be relevant to similar fact evidence. The court found merit in viewing the Act as a "facilitative statute" as opposed to a "mere codification". The meaning of this is not easy to discern until we find out what we are trying to facilitate, and what the difference is between a mere codification and one which is not "mere". If the court is implying that we have moved from the more literalist to a more purposive or teleological style of interpreting statutes, evidence of this is sadly lacking elsewhere.

my original view was that making a distinction between *actus reus* and *mens rea* was illogical.[38] If similar fact evidence is admissible (notwithstanding its prejudicial effect) because of the strength of its probative value, then it can be equally probative with respect to *actus reus*, as it is to *mens rea*. Although I have not abandoned this view completely, I am beginning to see there might be some sense in maintaining that distinction. The reason is that using similar fact evidence to prove *actus reus* requires the court to make an inference additional to the inference which it must make to prove *mens rea*. The process of reasoning is thus: the previous misconduct of the accused suggests the inference that evil is on his mind now, which suggests the inference that he carried out his evil intentions. This latter inference is not necessary where similar fact evidence is used to prove *mens rea*. As we have seen both links in the chain of inference are hazardous. The Act tries to eliminate one of these hazards and makes a policy decision on the generalisation that the *mens rea* inference is more reliable (or less unreliable) than the *actus reus* inference. In view of the little we know of the true weight of propensity evidence, I am not in a position to say that this is the wrong policy choice to make. If this provisional view of mine is tenable, the decision to simply read into oblivion the provisions of the Evidence Act cannot be convincingly explained by calculations of probative value or prejudice, and we left to speculate if the more covert political forces (described before) which are always at work beneath the rules are at least partly responsible.

V. The Debate over Exclusionary Rules and Bench Trials

Considerable pressure has been put on the exclusionary aspect of the similar fact evidence rule. This assault on the rules of evidence is as old as Bentham – rules which exclude probative evidence are to viewed with great suspicion, and are rarely, if ever, justifiable.[39] Zuckerman's conclusion is that the exclusionary technique of the common law has failed.[40] Experience has shown that similar fact evidence of significant probative value which also

[38] Professor Stone described Stephen's embrace of the difference between intent and conduct as "misleading" (*supra,* note 36). See also Imwinkelried, "The Use of Evidence...", *supra,* note 18. *Lee Kwang Peng* calls it an "artificial distinction". Yet the court was willing to embrace what in my view is an even more artificial distinction between use of similar fact evidence to prove identity (which requires striking similarity), and the use of such evidence to prove anything else (which does not require striking similarity) – see *infra,* note 87.

[39] Bentham's *Rationale of Judicial Evidence* (1827) is recognised as the first rationalistic study of the law of evidence. He did not have much to say about similar fact evidence, of course, as the exclusionary rule developed subsequent to his study.

[40] *Supra,* note 7, p 244-6.

possess considerable potential for prejudice is invariably admitted into evidence – otherwise, the cost to the accuracy of the fact-finding process is seen as too great. Having focused all its resources on an exclusionary rule, the common law has little to say about what to do when similar fact evidence is admitted. The fact-finder needs the tools to assess the precise probative value and to guard against the pitfalls of prejudice. The solution is to abandon the exclusionary rule for all similar fact evidence with any significant probative value, admit it and develop the means to enable the fact-finder to filter out the prejudice. This kind of critique is strengthened by a renewed interest in Continental criminal process where the criminal past of the accused is filed in a *dossier* for anyone who cares to look at it.[41] I know too little about the Continental systems to draw any firm conclusions, but more knowledgeable observers caution against yielding too easily to the impulse of following suite.[42] The Continental model appears to have emerged as a reaction to a history of over-rigid evidential rules – perhaps the present system may have gone too far. Continental observers have been known to be unhappy with the criminal record of the accused being so readily available to the judge. A thought which I have is that the Continental judge has far greater control of the way the criminal process develops. Perhaps he or she has more opportunities than the common law judge to probe and test potentially prejudicial evidence in a way which is meaningful to the judge.[43]

Calls to abandon the exclusionary technique have been echoed by commentators of the local scene. Margolis articulates the arguments for doing away with the exclusionary rule.[44] He argues that the demise of jury trials in Singapore should logically lead to the end of the similar fact evidence rule of exclusion. There are usually two prongs to the bench trial critique. First, it is said that judges are better able to deal with prejudicial evidence than jurors. It smacks too much of professional conceit. I have already expressed my view that I do not believe this to be the case. Secondly, it is said that the judge who tries the facts, and the judge who decides the admissibility issue is one and the same – so whatever prejudice we fear would already have infected the judge. My question is, if we are indeed

41 See Munday, "Comparative Law and English Law's Character Evidence Rules" [1993] 13 OJLS 589.

42 *Ibid.*

43 Although s 167 of the Evidence Act which allows the court "in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant" has the potential of transforming the role of a judge from a passive arbiter to an active inquisitor more akin to continental systems, it is generally acknowledged that that potential has yet to be realised.

44 *Supra,* note 1. See also, Chan, *infra,* note 52, for a more recent example.

serious about making trials fair, why is it that we must have the same judge hearing the issue of admissibility? It is surely not impossible to construct a pre-trial process in which another judge hears all the admissibility issues. I am also concerned about the message such a suggestion would send to the police, the prosecution and the judge. With a rule of exclusion in place, all these parties think twice about relying on similar fact evidence. Abolishing it might well give the impression that it is now open season as far as similar fact evidence is concerned.[45] True, probative value and prejudice can be dealt with at the end of the day when all the evidence is in and the judge is considering the case as a whole. But there is much to do at the end of the day, and without an exclusionary phase to underline the need for caution, there is greater opportunity for prejudice to seep into the subconscious undetected. My colleague Ho Hock Lai, not happy with either the exclusionary rule or with a situation where rules are simply abolished, has suggested a corroboration-type regime for similar fact evidence.[46] The topic of corroboration is still incredibly (and needlessly) complicated and way beyond the scope of this discussion,[47] but the sentiment is spot-on – we simply cannot treat similar fact or disposition evidence the same way as we treat other kinds of evidence.

Although I am heartened in that no jurisdiction has yet abolished the similar fact evidence rule for bench trials, there are signs from some quarters that that move is but a short step to take. Cases such as *Wong Kim Poh* seem to have decided that where evidence which is more prejudicial than probative is wrongly admitted into evidence, the verdict will not normally

[45] In the text, I argue against "free proof" of similar fact evidence in terms of the accuracy of the fact-finding process. I am aware that there are possible non-instrumental reasons for the exclusionary process. Thus it may be urged that, just as the voluntariness rule for confessions is supported by reasons beyond reliability, the similar fact evidence rule expresses the value that everyone is entitled to start again on a clean slate. See Ho, *supra,* note 1. Taking previous misconduct into account is too much like punishing the offender twice for the same offence. I am not certain of the strength of this value, for we routinely take previous convictions into account to determine sentence; and it is not really a case of punishing the offender twice he or she is being punished solely for the offence charged – previous misconduct is properly used only to determine if he or she did it again.

[46] *Ibid.*

[47] See Pinsler *et al, supra,* note 1, pp 412-420. *Lee Kwang Peng* has things to say about this area of the law which are not easy to digest, but I limit my comments, *infra,* to the particular point of using similar fact evidence to corroborate.

be disturbed where it is a bench trial.[48] Since it makes no earthly difference whether unduly prejudicial evidence is excluded or not, it no longer makes any sense for the exclusionary rule to be preserved.

I do not think that there is sufficient justification for the simple abolition of the similar fact evidence rule. Similar fact or disposition evidence is different and generally more tricky than most other kinds of evidence. I am open to the possibility that a corroboration or caution-type regime may serve just as well, but unless and until such scheme is in place,[49] it would be a mistake to tamper with the exclusionary rule for similar fact evidence. I fear, however, that the ubiquitous political forces which swirl around much of the law of similar fact evidence will be far less circumspect.

VI. Politics – The Third Variable

The time has come to confront the invisible guest at the table of similar fact evidence. One does come across very learned discourses on the subject which leave the impression that the assessment of probative value and prejudice just about covers the entire field.[50] I have argued that these concepts are much too uncertain to be determinative of admissibility in themselves, except in the clearest of cases. How do judges decide when the law has nothing more to say? We need to identify more precisely the forces that are at work. The impulse to exclude character or similar fact evidence comes from the realisation of the danger that inferential and moral prejudice could well result in the conviction of a person innocent of the charges against him or her. Exclusion of evidence has a price tag – it is bought in exchange for an increased likelihood in acquitting the guilty. The countervailing force then is the perceived need to ensure that the guilty person is convicted.

[48] *Supra,* note 8. The Privy Council in *Siu Yuk-Shing* went so far as to declare that the weight of prejudice is to be significantly discounted for bench trials, *supra,* note 8; but this view does not seem to have found much support back home in England. However, see the possibly contradictory sentiments in *Tan Meng Jee, supra,* note 27, p 434: "we think ingenuous that argument that a strict enforcement of the similar fact evidence rule is futile if the evidence has already been allowed to infiltrate the mind of the trial judge. ...[W]e are far more confident in the ability of judges to disregard prejudicial evidence when the need arises". Why does our confidence depend on whether the "need arises"?

[49] The present mood of the law is decidedly against corroboration-type regimes. England, *eg,* statutorily abolished the rules of corroboration *via* The Criminal Justice and Order Act 1994. The position in Singapore is less clear, but it appears to be going in the same direction through judicial means: *Tang Kin Seng* [1997] 1 SLR 47; *Lee Kwang Peng* [1997] 3 SLR 278.

[50] A refreshing exception is Mirfield, Similar Fact Evidence of Child Sexual Abuse in English, United States and Florida Law: "A Comparative Study" (1996) 6 J Transnational L & Policy, http://www.law.fsu.edu/transnational/.

This tension is not unique to similar fact evidence. It shapes the law regulating the burden of proof in criminal cases.[51] The desire to protect the innocent finds expression in the requirement that guilt be proved beyond reasonable doubt. The perceived need to bring the guilty to book has, in turn, resulted in a proliferation of *ad hoc* presumptions which overturn the normal rule.

We explore the pressure to admit and use similar fact evidence. It would be impossible to identify all the ingredients which go into this, but I can describe two major considerations. First, the need for similar fact evidence. This depends on the availability of other kinds of (admissible) evidence. If we can nail the chap without courting prejudice, then it costs nothing to exclude the evidence. Secondly, the gravity and prevalence of the crime. Letting a person potentially guilty of a petty offence go free might be a small price to pay, but not so a person who may be guilty of more horrendous crimes. One can expect the pressure to admit similar fact evidence to be far stronger in more serious crimes.

On the other side of the equation, it is not difficult to see that the very factors which push for admissibility create the diametrically opposed need to strengthen the rule of exclusion. Where there is little else but similar fact evidence, the danger of a conviction based on inferential prejudice correspondingly increases. Similarly where crime charged is particularly heinous, the similar evidence normally sought to be used is equally damning. If it is admitted, the risk of moral prejudice soars.

How this is to be resolved hinges not on the law, but on the moral and political persuasion of the decision maker. Again the analogy with burden of proof questions is appropriate. A societal value that it is better to allow 10 guilty persons to go free than to convict 1 innocent person is apt to produce the "beyond reasonable doubt" rule. The contrasting conviction that it is better to convict 10 innocent persons than to allow 1 guilty person to go free will result in the rule being turned on its head. There is a spectrum of intermediate values producing the possible rule that guilt need be proved only on a balance of probabilities (as has been suggested by the Attorney-General)[52] or that guilt must be disproved on a balance of probabilities (as is the case where statutory presumptions apply). Similarly, one may hold the value that it is worth the risk of prejudice if there is little else to prove a particularly grave offence. One can, of course, have the opposite view that, lack of evidence and heinous crime notwithstanding, there cannot be a fair trial because of the substantial risk of prejudice.

[51] I attempt to examine this in "The Presumption of Innocence: A Constitutional Discourse for Singapore" [1995] SJLS 365.

[52] Chan, "The Criminal Process – The Singapore Model" (1996) 17 Sing LR 433.

These are big and deep issues for every society to tackle. It would be unduly naïve for anyone to think that there is an easy solution.[53] I am not sure that a lawyer is the best person to do it.[54] Yet the lawyer can usefully offer some insight into the sort of considerations those who have the power to decide[55] ought to take into account. In Singapore, the view that the guilty must be convicted, even at high costs, needs no advocate. It is no secret that the "law and order" philosophy is the ascendant one here. My plea is that those in power realise also that there are equally, if not more, powerful reasons to ascribe greater value to the right of the individual not to be convicted, if he or she is in fact innocent. We must reclaim the vocabulary of human rights, human dignity and individual liberties from the realm of the embarrassed titter and sour cynicism. A society which does not treat its members with dignity will never command true loyalty and affection. The degree to which a society can tolerate unconvicted criminals is, of course, relative. Respect for human dignity cannot be allowed to destroy society itself. Yet a strategy suitable for a fractured and impoverished Singapore of the 1960s[56] needs to be re-thought for the Singapore of the 21st century.

Descending to a rather more mundane, but more comfortable, level, we need to see the rules of similar fact evidence, as with all other rules of criminal justice, in the context of the entire criminal process. The move in Western-liberal democracies to be more generous towards the admissibility of similar fact evidence, like initiatives to whittle away the privilege against self-incrimination, arise in the context of what is perceived to be a strengthening of protection for the innocent accused.[57] In Singapore, the situation is quite the reverse – almost every legislative innovation, and much judicial development since Independence has weakened protection for the innocent

[53] As Senior Minister Lee Kuan Yew says of the solution to the present economic crisis in Asia – if there were easy solutions, they would already have been found.

[54] Such is the tragedy of modern compartmentalised specialisations that the lawyer no longer, as a matter within his discipline, knows much about moral and political philosophy; nor are the philosophers, in Singapore at least, normally interested in the law.

[55] This includes legislators, judges and anyone who has any degree of influence in the workings of government.

[56] This may be gleaned from Lee, *The Singapore Story: Memoirs of Lee Kuan Yew* (1998), a book indispensable for anyone trying to understand the criminal justice policies in Singapore.

[57] I describe this in the context of police interrogation in "The Confessions Regime in Singapore" [1991] 3 MLJ lvii.

accused.[58] To blindly follow the recent developments in the West would draw legitimate concerns about the overall fairness of the criminal process in Singapore.

VII. DISHONESTY

The clearest examples of admissibility decisions being made on factors other than probative value and prejudice come from legislation purporting to make exceptions for similar fact evidence in particular contexts. First is the curious situation of previous convictions being generally admissible to prove knowing delivery of counterfeit coins. It masquerades as "illustration" (b) to section 14 of the Evidence Act. This situation is no different from any other offence requiring knowledge, yet there is no general exception for all offences requiring knowledge. There is nothing special about counterfeit coins in itself – the illustration has no prescription about the age of the previous convictions, or of any requirement that the coins were counterfeited in a particular manner. It is difficult to resist the conclusion that probative value cannot account for this "illustration". What does account for it is not so easy to uncover, for it is a very old exception. Professor Stone's historical analysis suggests that the common law cases on counterfeit coins pre-dated the development of a general rule excluding evidence of disposition, and were preserved when the common law strengthen its exclusionary aspect.[59] It could have been that it was preserved out of sheer respect to authority, but that may be underestimating the astuteness of the common law judges. It is beyond the scope of this discussion (and the ability of the author) to examine the socio-political climate of 19th century England with respect to offences of counterfeiting, but I will not be surprised if future research reveals that there was serious public concern about counterfeiting offences, and that there was a perception that other means of proof were not forthcoming.

A set of two very interesting exceptions are to be found in the Criminal Procedure Code. Both target the offence of knowingly receiving stolen property. Section 373 makes evidence of possession of other stolen items

[58] *Eg,* the Evidence (Amendment) Act 11 of 1976, a package of changes to the rules of evidence which can only be described as tragic for the accused; *Chin Seow Noi* [1994] 1 SLR 135, permitting the use of co-accused confessions, standing alone, to convict; *Jasbir Singh* [1994] 2 SLR 18, putting into serious doubt whether the accused in custody has any right to counsel before admissions are extracted from him; *Mazlan bin Maidun* [1993] 1 SLR 512, holding that the privilege against self-incrimination does not and has never been part of constitutional due process.

[59] *Supra,* note 36.

within 12 months generally admissible to prove guilty knowledge. How far this has departed from the original position under the Evidence Act can be seen by comparison with illustration (a) to section 14, under which such evidence is admissible only if there are *many* stolen articles found in possession *at the same time* as the alleged offence in the charge. Again, similar fact evidence which is not particularly probative is made admissible by statutory fiat. Indeed, if such evidence passed muster under the usual test, there would have been no need to enact it. Something else is at work here. Section 374 is more amazing – any previous conviction entailing fraud or dishonesty within 5 years is admissible to prove guilty knowledge. To see how far we have strayed from calculations of probative value and prejudice, consider that a previous conviction 4 years ago for knowingly under-declaring income for tax purposes is admissible. It is just barely relevant[60] as the most general kind of propensity reasoning. These provisions were copied from English equivalents many years ago[61] and the precise reasons for them is not entirely clear, but one can reasonably surmise that the perception at the time was that receiving stolen property was a very persistent crime for which there is normally little evidence of knowledge. Not much more can be said about these old exceptions – I have not been able to uncover any reported local case which has applied or interpreted these provisions. Perhaps the passage of years has rendered the original rationale for the exception irrelevant – it could be that these offences turned out to be less of a bother than the framers thought, or it could have been that police and prosecutors found ways and means to use other evidence.

More interesting are the judicial decisions which seem to have created *ad hoc* exceptions to the criteria of probative value and prejudice. The older cases are rather less clear, but are possibly explained by the sporadic intervention of considerations apart from probative value and prejudice. First, there is a set of inconsistent cases concerning the use of similar fact evidence for the offence of extortion in a corruption context.[62] It is not so easy to pin down why the judges disagreed.[63] It could have been because of a difference in the assessment of probative value, or it could have been

[60] I use this word here and elsewhere in the modern sense of logical relevance, not Stephen's sense of admissibility.

[61] See Stone, *supra,* note 36.

[62] *ST James* [1936] MLJ Rep 7, favouring general admissibility; and *Teo Koon Seng* [1936] MLJ Rep 9, rejecting that view.

[63] The expressed point of difference was in the language of *Makin: ST James, ibid,* held that similar fact evidence was generally admissible as the existence of *mens rea* was always an issue; *Teo Koon Seng, ibid,* was alarmed about how "dangerous" this position was, and held that similar fact evidence is admissible only if it was reasonably necessary to anticipate a line of defence.

that the judge favouring admissibility allowed himself to be influenced by factors extraneous to probative value – corruption was a serious and prevalent problem, and the surreptitiousness of this kind of offence means that other evidence is unlikely (or so it was perceived). Although we might be forgiven for expecting much more similar fact evidence to be raised in corruption cases, that has not been the case. In Singapore, the Prevention of Corruption Act[64] introduced a barrage of changes to the criminal process making it much easier to convict someone accused of corruption[65] – that must have taken the heat off the need to use similar fact evidence. Then there are the charming cases on illegal taxis.[66] The debate was over the use of evidence of the accused picking up all kinds of passengers over the course of a few days to support a charge of operating an unlicensed taxi on a particular occasion. The judge who refused admissibility probably went strictly on an assessment of probative value – this was nothing but an attempt to use alleged previous misconduct to prove a present charge.[67] It could have been that the judges who disagreed with him did so purely on a different assessment of the probative value of the evidence of prior misconduct.[68] But it could have also been that these judges felt that it would have been impossible to convict illegal taxi operators without the similar fact evidence. It is difficult to draw any firm conclusions from these early cases. The passions and concerns of the times have long since subsided, perhaps too long ago for the modern observer to detect without considerable effort.

VIII. Drugs

We come to some modern cases. Few crimes arouse more public concern here in Singapore than trafficking in illicit drugs. It is fascinating to compare the different positions adopted by the courts here and in Malaysia regarding

64 Cap 241.

65 *Ibid. Eg,* statutory reversal of burden of proving *mens rea,* on proof of *actus reus,* suspension of the privilege against self-incrimination during official questioning, suspension of the rules of corroboration (when the accomplice rule was in force).

66 The seemingly triviality of the offence did not prevent 5 reported cases spanning 6 years from taking part in the debate. Although only one of these cases opposed the admissibility of similar fact evidence, *Ali bin Hassan* [1967] 2 MLJ 76, the fact that it needed 3 other cases (including the Federal Court in *Ong Kok Tan* [1969] 1 MLJ 118) to establish otherwise, attest to the persistence of that view.

67 *Ali bin Hassan, ibid.*

68 See the description of these cases in *Ang An An* [1970] 1 MLJ 217. Again the disagreement was cast in the mould of *Makin*/Evidence Act-type categories of admissibility.

the admissibility of similar fact evidence. The 1970s decision in *Poon Soh Har* stood firm for many years.[69] The court set its face against any attempt to introduce similar fact evidence in drug cases. The plain reading of the judgment is categorical indeed and the position seemed to be that regardless of probative value, it is simply too risky to allow similar fact evidence in drug cases.[70] Although the exclusionary rule for similar fact evidence has seldom acquired such strength, the stance is not all that eccentric. The need to deal with a serious and prevalent crime was perhaps seen to be outweighed by the very grave penalties following conviction,[71] and by the provision in the Misuse of Drugs Act of special evidential advantages for the prosecution, especially in the form of presumptions.[72] This aspect of the decision has probably been overturned by the latest Court of Appeal pronouncement on the matter – *Tan Meng Jee*.[73] The position has now returned to the mainstream view that similar fact evidence is admissible if it is sufficiently probative. That it still has some bite is demonstrated in that the particular piece of similar fact evidence in that case was found to be insufficiently probative to be admissible.[74] It is not easy to speculate why this shift has taken place. Surely, doctrinal correctness must have played a part; but I am not sure if it can be dismissed out of hand that it is part of a program of making it increasingly difficult for the accused (both innocent and guilty) to mount a successful defence. Intriguingly, the Malaysian courts shortly before *Tan Meng Jee* seems to have gone to the other extreme and

69 [1977] 2 MLJ 126. See also the more recent decision of *Chan Hock Wai* [1995] 1 SLR 728, 733, where simultaneous possession of another batch of drugs (not covered by the charge) was held to be irrelevant.

70 The Court of Appeal said, *ibid,* p 127: "Evidence of trafficking of heroin in the past merely raised the suspicion that they were having the heroin for purposes of trafficking and did not prove that they "did traffic" on the day in question". Again, the *Makin* language of relevance was used.

71 No one need be reminded of the generous availability of the death penalty in our drugs legislation.

72 Cap 185, especially s 17.

73 [1996] 2 SLR 422. The Court of Appeal now thinks that *Poon Soh Har* adopted a "strict categorisation" approach, and "be that as it may", the court will now adopt the *Boardman* balancing formula.

74 Though the conviction was nonetheless upheld on other evidence, particularly a custodial confession and an unrebutted statutory presumption.

declared that similar fact evidence is generally admissible, apparently without regard to probative value, or presumably, prejudice.[75] Doctrinal heresy did not seem to have deterred the Malaysian courts. One can only surmise that the courts in Malaysia perceive the drug problem to be even more serious than it is in Singapore, and that the very similar evidential advantages in the equivalent drugs legislation are not enough. They have created an exception to the normal rules of similar fact evidence, and have done so explicitly. Lest we think that this position is quirkish, it has been rather convincingly argued that the House of Lords has done just that for sex crimes, and without having the decency of admitting it. We shall return to that very shortly, but it is significant to notice that throughout, it is not probative value or prejudice which has changed, but the courts view of what is needed to deal with a serious crime situation.

IX. Sex

It is not an overstatement to say that the law of similar fact evidence in the Western Commonwealth jurisdictions has been, and continue to be, obsessed with sex, or rather sex crimes. Almost every major decision in recent years have arisen in the context of sex crime, and in almost all these decisions similar fact evidence was admitted, often in badly fractured opinions.[76] Although all these decisions mouth the probative value-prejudice mantra,[77] it is difficult to resist Professor Mirfield's conclusion that the courts have

[75] *Wong Yew Ming* [1991] 1 MLJ 31. This decision provoked some academic concern, Pushpa Nair, "Similar Facts in the Supreme Court" [1991] JMCL 171. It probably still holds sway in Malaysia: see *Roslim bin Harun* [1993] 3 CLJ 505, *Md Halim bin Samad* [1998] 1 MLJ 260, but there are signs that some judges are already unwilling to apply such a sweeping rule – see *Mohamad Fairus bin Omar* [1998] 5 MLJ which held that similar fact evidence is admissible to prove knowledge only where there is evidence of control or custody of drugs.

[76] In England, there is *Boardman, supra*, note 11, and *DPP* v *P*, *supra,* note 13. In Australia, *Pfenig* (1995) 127 ALR 99, and *Gipp,* HC 16 June 1998, http://www.austlii.edu.au, which itself is a fascinating example of the protean quality of similar fact evidence rules – two judges thought it inadmissible because probative value did not outweigh prejudice; two others held it admissible as "background" evidence to show the relationship between the accused and the victim (but not as direct proof of guilt); the tie-breaker judge disagreed with both camps and held it admissible as primary evidence if guilt because probative value outweighed prejudice. In Canada, *R* v *B* (1990) 55 CCC (3d) 1, where the court split 5:2; and *R* v *B* (1993) 79 CCC (3d) 112, where the split was 3:2. An interesting recent decision is *R* v *G* [1997] 2 SCR 716 where the Canadian Supreme Court, splitting 5:2, held that where similar fact is admissible because it is relevant to a specific issue, it becomes relevant also to the general credibility of the accused. It does not take a Sherlock Holmes, or in Singapore, an Inspector Sean Han, to see where all this is leading.

[77] Or, as we have seen, the *Makin* formula in Canada.

created a *de facto* exception to permit the general admissibility of similar fact evidence for sex crimes.[78] The conditions for the creation of a covert exception are there. First, the perception is easily formed that there is an especial need for similar fact evidence in sex crimes. Sex crimes characteristically occur in situations where there is normally little hard evidence, especially in acquaintance or family contexts where the accused has every legitimate reason to associate with the alleged victim. It is normally a case of the victim swearing one thing and the accused swearing the opposite. Most Commonwealth jurisdictions impose the requirement of corroboration to break the evidential deadlock – similar fact evidence, where available, conveniently fits the bill.[79] Then again we have to remember that Western criminal procedure has considerably more stringent protection of the interests of the accused, with the corresponding effect of making it more difficult to obtain other kinds of evidence, especially custodial confessions.[80] Secondly, there is no doubt that prevalence of sex crimes is extremely serious in the West, probably much more so than it is here.[81] Certainly, there seems to be a much greater fear of being a victim of sex crime. Public awareness to sex crimes have heightened very much in recent years, the product of women's and child rights movements representing the major groups of potential victims of sex crime.[82] The social clamour for something to be done is strong. Indeed, in the United States, the sex exception is no longer covert in federal law. The Federal Rules of Evidence was recently amended

78 *Supra,* note 50, although he did not use Australian or Canadian material in his study.

79 See discussion, *supra.*

80 See discussion, *supra*.

81 See "Violent Crime Quite Low in Singapore", *Straits Times* 28 Nov 1997, which reports that the rate of violent crime in Singapore is less than 10% of the rate in the United States. Crime statistics in Singapore are by no means easy to find, and it has not to my knowledge been published regularly for some years now.

82 See Baker, "Once a Rapist? Motivational Evidence and Relevancy in Rape Law" (1997) 110 Harv LR 563. The phenomenon of the law changing to suite the politics of sex crime is also illustrated in the development of "rape shield" laws in the West. Whereas evidence of the "immoral character" of the victim was once routinely admissible (and it still is in Singapore – s 157(d) of the Evidence Act), many Western jurisdictions have now enacted laws to prohibit evidence of the victim's sexual immorality: see Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) 70 Minn LR 763; see also McColgan, "Common Law and the Relevance of Sexual History Evidence" (1996) 16 OJLS 275, who complains that equivalent legislation in the UK has not been effective enough. Indeed in Canada, equivalent legislation was held to have gone too far and unduly prejudiced the right to a fair trial: *Seaboyer* [1991] 66 CCC (3d) 321. Similarly, it is difficult to believe that this change was fuelled entirely by different valuations of probative value and prejudice.

to make similar fact evidence generally admissible in sexual assault cases, over a storm of academic and judicial protest.[83] Again it is neither the probative value nor the prejudicial effect of previous sexual misconduct which has changed. It is a stark example of political forces overcoming legal principle.

The English way of achieving the same effect was *DPP* v *P*.[84] There was no legislation, but there was the potentially amorphous common law formula of weighing probative value against prejudice. Indeed the famous case of *Boardman* had explicitly ruled any special rule for sex offences, establishing instead that probative value outweighs prejudice only when the similar fact evidence bears striking similarity with the conduct charged.[85] The requirement of striking similarity stood in the way of the House of Lords in *P*, so that had to go. The charge was the typical child sexual abuse by a parent. The similar fact evidence was an allegation that the accused had also sexually abused a sibling of the victim. The victim was different, and it was agreed on all sides that there was nothing strikingly similar about the way in which the two alleged sexual abuses were carried out. The House of Lords nevertheless held that the similar fact evidence was sufficiently probative. There being no strikingly similar features, it had to be that, to be consistent with *Boardman*, sexual abuse of a child under one's care must be of itself striking. This is regrettably not borne out in reality – child sexual abuse in the context of the family is not a rarity. Indeed its prevalence is the reason why there is public alarm in the West. One can only conclude that, whatever is said by the House of Lords in its suspiciously short, single judgment in which more pages are spent on quoting previous cases than on justifying the significant departure the judges were making from the

[83] See Baker, *ibid,* who argues that although there is something to be said for a careful and discriminate policy of adducing previous sexual misconduct, the crude strategy of Federal Rule 413 is misguided if we measure it with the yardsticks of probative value and prejudice. Rule 413, simply, makes admissible evidence of uncharged sexual assault. The amendment also contains a similar provision (Rule 414) for child molestation offences. The text (and a commentary) of the Federal Rules is available at http://www.law.cornell.edu/rules/fre/ .

[84] *Supra,* note 13.

[85] The judgments in *Boardman* also reveals the shifting of the law in the context of general homosexual propensity evidence (from general admissibility to inadmissibility), in tandem with prevailing social mores. See Zuckerman, *supra,* note 7, pp 241-244, which contains this observation: "What accounts for the difference is a change in the moral attitude to

existing law, it was creating an exception to the normal similar fact evidence regime of *Boardman*.[86] It was the classic English way of conducting a revolution in the guise of tradition (though Lord McKay is undoubtedly a Scotsman). It remains to be seen whether *P* signals a change for similar fact evidence beyond sex crimes.[87] I doubt that it will, for the confluence of forces on sex crimes exists for few other crimes, but if it does, the courts will have to admit quite a lot of similar fact evidence indeed, which might well displease that other deity – efficiency. The language of striking similarity, at least, had the virtue of saying that probative value had to higher than usual to be admissible. With that gone,[88] any similar fact evidence which is merely probative is potentially admissible.

It is not my intention to sit in judgment of *DPP* v *P*. Professor Mirfield, a major commentator on English law, is extremely unhappy with it.[89] He seems to imply that the House of Lords were swept by populist sentiments and had failed to give adequate consideration, or indeed any consideration at all to the prejudicial effect of admitting such evidence. My concern is that our courts seem to have adopted it, quite oblivious of the unspoken political genesis of *P*. Although other decisions have quoted it before, it was applied for the first time in a sex crime situation in *Lee Kwang Peng*.[90] A taekwondo master was accused of outraging the modesty of two of his young students. The question was whether the trial judge was justified in using the testimony of one of the alleged victims to buttress the case against

homosexuality and not a revision of the probabilistic calculation".

86 Perhaps the advantage of doing it the English way is that it can be undone without the need for Legislative intervention; perhaps also that the trial courts can "disobey" the House of Lords without appearing to do so. Indeed the English Law Commission Consultation Paper 141 on *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (1996) seemed to have glossed over the heretical potential of *P* altogether, choosing the path of politely rejecting suggestions for a special regime for sex crimes.

87 Interestingly, in Singapore, although all three of our recent decisions on similar fact evidence purport to use *P*, the two non-sex cases (*Tan Meng Jee, supra,* note 27, drug offence; *Teo Ai Nee, supra,* note 20, copyright offence) applied the test in a remarkably different way from *Lee Kwang Peng, infra*.

88 Curiously, *P* does make an exception for similar fact evidence to prove identity – admissibility for this purpose, the Lords said, require striking similarity. Pattenden, "Similar Fact Evidence and Proof of Identity" (1996) 112 LQR 446, is quite right in that it strains logic to treat identity issues differently (although she argues that striking similarity should not be required for identity or any other issue).

89 *Supra,* note 50. In particular, he laments the "three strikes" at the character evidence prohibition, *ie,* the dropping of striking similarity, the removal of collusion from the admissibility stage, and the refusal to order separate trials for cases where similar fact evidence from another charge is not admissible. Ho, *supra*, note 1, thinks that the decision is "disturbing".

the accused with respect to the other victim. The court admitted that the circumstances reveal no striking similarity. Again, outraging the modesty of children is regrettably not so rare as to be of itself very striking. Yet the court ruled that one set of allegations may be used to prove the other on the authority of *P*. The comparison between *Lee Kwang Peng* and the two other cases which seem to have cited *P* with approval is striking. In both *Teo Ai Nee*,[91] a copyright infringement case, and *Tan Meng Jee*,[92] a drug trafficking case, the court meticulously examined the similarities between the similar fact evidence and the charge at hand. In both these cases the similar fact evidence offered was rejected because they were insufficiently similar to the charge. These cases paid lip service to *P*, but applied *Boardman*. *Lee Kwang Peng* took *P* at its word. That *P* was accepted as gospel truth is indeed sad. There is no reason why we had to follow *P*. There is *Boardman*, and the Evidence Act which point to a very high level of probative value to qualify for admissibility. That the judgment demonstrated no realisation of the political forces which motivated *P* is sadder still. Public alarm and concern over the prevalence of sex offences is by no means anywhere near that which exists in the West.[93] The concern that no other evidence is normally available is considerably diluted by the shape of the criminal process here which gives much more room for the police to obtain other kinds of evidence, notably confessions. Needless to say, the judgment seems blissfully unaware of the cogent criticisms levelled against *P* by the English themselves. In one respect however the result in *P, ie,* easier admissibility of similar fact evidence, dovetails with a very local phenomenon – the need to make it as difficult as possible for the accused to escape conviction.

My discussion of *Lee Kwang Peng* is unfortunately not exhausted. It contains a number of other propositions touching on similar fact evidence which ought not to be left undiscussed. First is the treatment it gives to another House of Lords decision, *R* v *H*.[94] There are two points here. *H* held that where the similar fact evidence offered is a parallel allegation of a similar offence, in circumstances where there is a possibility of collusion or contamination between the two victims, that possibility ought to be ignored

90 [1997] 3 SLR 278.

91 *Supra,* note 20

92 *Supra,* note 27

93 I do not by any means intend to trivialise the harm done to any victim of any sexual offence. My wish is only to point out that in an area of law as politically motivated as that of similar fact evidence in sexual cases, the decision to transplant a foreign judgment to a significantly different political climate must be done with more care.

94 [1995] 2 AC 596.

95 Unless, of course, the facts are such that no reasonable trier of fact could conclude that

at the admissibility stage.[95] The court should simply pretend that there is no such possibility when deciding whether or not to admit the similar fact evidence. Collusion and contamination are issues to be assessed at the end of the day when all the evidence is in. This immediately strikes the observer as being a little odd – surely the possibility of collusion or "innocent infection" bears directly on the potential probative value of similar fact evidence. If probative value is a criterion for admissibility, any factor which tends to diminish its value ought to be considered at the admissibility stage. It is unfortunate that our court chose to approve of *H* in two short sentences.[96] This is not an open and shut matter, indeed the Australian High Court opted for the more logical view that collusion or innocent infection goes into the probative value – prejudice calculation at the admissibility stage.[97] Even a cursory reading of *H* will reveal that the primary reason for taking the assessment of collusion and innocent infection from the judge flows from the dynamics of jury trial. The jury, the Lords said, must decide questions of fact, and collusion is a question of fact. Needless to say, this rationale for the decision cuts no ice in Singapore. *Lee Kwang Peng*, in this respect, is doubly surprising because the same judge in *Tan Meng Jee*,[98] in endeavouring to give guidance as to the meaning of probative value, and citing with approval the very passage in *Cross on Evidence* rejected in *H*, held that one of the components of probative value is "cogency", *ie,* whether or not the similar fact actually occurred. This phenomenon, in itself, gives reason to doubt the reliability of disposition evidence. The second point about *H* is that the Singapore court saw it fit to extrapolate from an innocuous distinction made by Lord Mustill between collusion and innocent infection.[99] Although Lord Mustill himself apparently did not think that any consequence of substance flowed from that classification, *Lee Kwang Peng* appears to have come to the inexplicable conclusion that, at the end of the day, while collusion has to be disproved beyond reasonable doubt, innocent infection need not. The judge need only be "alive" to the possibility of innocent infection. The vocabulary of life and death used in the context of describing

there was anything but collusion or contamination.

96 Mirfield, commenting on *H* in "Proof and Prejudice in the House of Lords" (1996) 112 LQR 1, suggests: "One is tempted to conclude that the House believes that prejudice to the accused beyond that mandated by proper evidential reasons is a price worth paying in the fight against sexual abuse.

97 *Hoch* (1988) 165 CLR 292. But see the position under the US Federal Rules, which coincidentally resembles *H: Huddleston* v *United States* (1988) 485 US 681, although the result was based on the particular words of Rule 104(b) which says that where admissibility depends on the fulfilment of a condition, it is enough if "evidence sufficient to support a finding" of the condition exists. The position under *H* is probably the same.

98 *Supra,* note 73, pp 435-6.

the state of mind of a judge is new to the evidence scholar, who must by now be asking this – if reasonable doubt exists as to innocent infection, can the court rely on the similar fact evidence? The answer must be a resounding "no". Any suggestion to the contrary is simply wrong. The only sliver of justification for the court's apparent view[100] is that it would be "oppressive" to require the prosecution to remove reasonable doubt as to innocent infection. I am unable to understand why it would not at the same time be oppressive in the context of collusion. All that remains to be done may be to offer one's deepest apologies to the prosecution, but that is (and should be) the law.

If these pronouncements were surprising, then the next one is shocking. Even if the testimony of a witness is inadmissible as similar evidence because it fails the *Boardman* test, the court declares, "it may nonetheless be admissible as corroborating evidence".[101] If what this means is that although that part of the testimony concerning the similar fact may be inadmissible, *other parts* of the testimony (independent of the similar fact) may be admissible to corroborate circumstantial elements of the testimony of the principal complainant, then it is unexceptionable.[102] But there is language that something more ominous is meant – "the exclusion of evidence as similar fact evidence does not necessarily rob it of its corroborative quality". The implication seems to be that testimony of similar fact evidence, although inadmissible as similar fact evidence (to prove guilt), may be admissible to corroborate. One would have thought that the question of admissibility is necessarily prior to the question of corroboration – only if evidence is admissible can it corroborate. The consequences of any other position is incalculably disastrous. It would mean that evidence considered to be more prejudicial than probative and which therefore is likely to distort the fact-finding process, is nonetheless admissible as corroboration. That would be like bolting the front door with titanium locks, but leaving the backdoor wide open. It would also mean that other kinds of inadmissible evidence

[99] Supra, note 90, pp 301-2.

[100] The court does also say that the "final question" is whether the similar fact evidence together with the other evidence satisfies "the standard of proof required of the prosecution", *ibid.* If "other evidence" is not enough to prove guilt beyond a reasonable doubt, it defies logic to say that similar fact evidence, the reliability of which is subject to reasonable doubt, may be sufficient to tip the balance.

[101] *Ibid,* pp 299-301. This suggestion has similarities with the heretical "background exception" rejected by the Australian High Court in *Gipp, supra,* note 76.

[102] Evidence that this was all that was meant can be found in the court's approval of *Kilbourne* [1973] AC 729 which held that similar fact evidence must be admissible in order to corroborate, on the ground that "the similar fact evidence and corroborative evidence were one and the same". The implication seems to be that the court's strange pronouncements

must, logically, be given the same dispensation, for example involuntary confessions and inadmissible hearsay. The court finds confirmation for its view in section 158(1) of the Evidence Act, which is puzzling indeed. The section merely says that a witness testifying as to any relevant fact may be asked questions as to "any other circumstances which he observed at or near to the time or place at which such relevant fact occurred" if the existence of these circumstances would corroborate the testimony of the relevant fact. This section deals expressly and only with the witness who is to be corroborated, not the witness who is offered to corroborate him. There are, of course, situations where evidence is not admissible in itself, but only to corroborate. Such is the case with section 159 where previous consistent statements are not admissible in themselves (for that would be hearsay), but if the maker testifies, it may be used to corroborate his testimony. Previous consistent statements are inadmissible in the first instance because of the hearsay rule, but section 159 is an exception to that exclusionary rule. Inadmissible similar fact evidence can find no such home anywhere in the Evidence Act. There is no "corroboration exception" to the general rule excluding similar fact evidence. If these cryptic passages mean otherwise, they are wrong.

The final point raised in *Lee Kwang Peng* which I wish to discuss is of considerably more substance. It concerns the issue of joinder of different offences in a single trial. The law is found in the Criminal Procedure Code.[103] Charges may be joined if they form part of a series of offences of a similar character. But the judge has the discretion to sever the charges if joinder would prejudice the accused. One might be forgiven for thinking that where the court has decided that the evidence for one charge is too prejudicial and insufficiently probative to be admissible for the other charge, severance should be ordered on the ground that joinder would prejudice the accused. Not so, says *Lee Kwang Peng*,[104] for the judge, unlike the jury, is "endowed with the judicial ability to preserve and apply the rule against similar facts". Nevertheless, the court concludes, the judge must ask itself whether he would be so influenced that he would be unable to "preserve the sanctity" of the rule against similar fact evidence. I have already expressed my views concerning the comparative ability of judges to deal with prejudice. It remains to be said that although separate trials are still theoretically possible, I must confess that, if I were the trial judge, I would feel quite silly concluding in a particular case that I will be unable to "preserve the sanctity" of the exclusionary rule – for that would be tantamount to admitting that I do

apply only where they are two and not the same.

[103] Cap 68, ss 169, 170(1), 171.

not have the "endowed" judicial ability. To put it bluntly, it would be admitting that I do not have what it takes to be a judge. I wait to see if any judge will indeed ever say it.

The topic of joint trials is a complicated and troublesome one.[105] It cannot be doubted that, where evidence regarding one charge is thought too prejudicial to be admissible with respect to another charge, the dictates of fairness demand that the charges be severed and heard by two different judges. Even if judges are thought to have above average ability in dealing with prejudice, no one has ever claimed that judges are invariably immune to it. Prejudicial evidence should be avoided where it can be, not courted when there is no necessity to be exposed to it. The real reason why severance is resisted so strenuously by both the prosecution and the court is the belief that joint trials are particularly efficient.[106] Similar evidence is likely to be produced for both charges, so joint trials will reduce man hours all round by about half. But this will not invariably be the case. There may not be much more evidence apart from the testimony of the victim and perhaps the police statement of the accused. I would urge courts to make more careful assessments of the amount of time actually saved by joint trials – if the degree of duplication is not so much as to be intolerable, then there is no reason to trifle with prejudice by holding joint trials. Even if it is thought that considerable time will be saved, I am not sure that we should, without clear demonstration of intolerability, exalt efficiency over fairness. This is troubled territory. No one can disregard efficiency. Trade-offs there must be – but just as we hold to the ideal of a heavy presumption of innocence, we must also confer on the value of fairness a weighted advantage over efficiency. Pride in efficiency must never take precedence over the need to avoid

[104] *Supra,* note 90, p 294-5.

[105] Contrary to the assertion in *Lee Kwang Peng* that "English law and Singapore law diverge", the rules in the two jurisdictions have (I think unfortunately) converged. Even for jury trials in England, severance will not normally be ordered on the grounds of exposure to inadmissible similar fact evidence: see Zuckerman, *supra,* note 7, p 237-9; *Christou* [1996] 2 All ER 927, the recent House of Lords decision confirming this; see also Mirfield, *supra,* note 50. *Lee Kwang Peng* is quite wrong to say that inadmissible similar fact evidence "almost invariably justifies separate trials" in England, although that position has the support of Lord Cross in *Boardman*. It appears that the English jury, like the Singapore judge, has been similarly "endowed".

[106] See Zuckerman, *ibid,* who suggests that "social considerations" apart from economy also play a part – a joint trial better serves the function of social disapproval, and society is unwilling to risk inconsistent verdicts. I do not doubt that this may well be what is genuinely perceived in some quarters, but I simply do not think that it justifies the exposure of the accused to highly prejudicial (and inadmissible) evidence: society has no business disapproving of anyone unless it is certain of guilt beyond reasonable doubt (unaffected by prejudice), nor are "inconsistent" verdicts necessarily wrong – the accused could be guilty of one but

prejudice.

So we total up the score for *Lee Kwang Peng*, our most recent decision on similar fact evidence. A frighteningly consistent theme emerges. Similar fact evidence is admissible to prove conduct, notwithstanding very clear statutory instruction that it cannot be so used. With the demise of "striking similarity" the exclusionary rule is reduced from one which required high probative value to one which requires merely some probative value. In assessing similar fact evidence to see if it satisfies this reduced probative threshold, we are not to take into account the possibility of collusion or innocent contamination, no matter how cogent it may be. In considering the possibility of innocent contamination at the end of the day, something less than proof beyond reasonable doubt is enough. If similar fact evidence fails to satisfy the reduced standard and is not admissible, it may nevertheless be corroborative evidence; nor does this prevent charges from being tried together, with inadmissible highly prejudicial evidence being paraded before the judge in full glory. Add to that the emerging position that in bench trials the wrongful admission of inadmissible similar fact evidence will not be likely to render the verdict bad. Little is left of the "cardinal rule" that "the court is not allowed to infer from a person's past crimes that he has a propensity or tendency to commit similar crimes".[107] Cardinal rules have gone the way of cardinal sins – there are no longer taken very seriously. It is hard to resist the suspicion that there may be some unspoken political agenda to increase the rate of convictions (for the guilty, yes, but also for the innocent). One only hopes that the disposition and tendency demonstrated in *Lee Kwang Peng* itself is not predictive of future conduct. Instead, I can only urge that the more careful and better considered treatment of similar fact evidence in earlier cases like *Tan Meng Jee* and *Teo Ai Nee* should prevail. At the very least, the case should never be extended beyond sex crimes.

X. Probative Value, Prejudice and Politics

Which of us has not on occasion felt like Dirty Harry itching for the villain to make our day so that the rascal can be dispatched efficiently without the bother and uncertainties of a trial? Yet on more sober reflection we expect our judges to stand between the sometimes irrational and ephemeral sentiments of society. We want the law to tell the Dirty Harrys of the world that however much they are convinced about the guilt of the accused, there must be a meaningful right to a fair trial. We hope that our courts will

not the other.

set its face against prejudicial evidence, not to welcome it with open arms. Perhaps the law as it stands is partly to blame. Not being able to quite make up its mind about character evidence in general and similar fact evidence in particular, the law settles for the hopelessly ambiguous test of weighing probative value against prejudice, which, with apologies to St Paul, is "all things to all men". The amazing set of rules which govern the "cross-examination exception" to the similar fact evidence rule bear witness to the equivocation of the law.[108] Here is an exception which permits evidence which is more prejudicial than probative. How this can ever be conducive to a fair trial is difficult to understand. The bad character of the accused is inadmissible, but his or her good character is.[109] If the good character of the accused is considered to be probative of innocence, it is difficult to understand why bad character is not probative of guilt.[110] But

[107] *Lee Kwang Peng, supra,* note 90, pp 289-90.

[108] See Zuckerman, *supra,* note 7, pp 234-7. For Singapore, see Chin, *supra,* note 1, pp 107-119. Singapore law is remarkably undeveloped in this area. The law was amended according to the recommendations of the English Criminal Law Revision Committee's 11th Report in the 1970s (see an analysis in *The Law Commission Consultation Paper, supra,* note 86, pp 194-249. Little else has happened since. Perhaps the abolition of the jury trial is partly the answer – criminal law practitioners make an implicit calculation that wanton mud-slinging is more likely to create, in the mind of a professional judge, a bad impression of the prosecution, or the co-accused rather than the accused. *Tan Chuan Ten,* HC, 6 December 1996, illustrates the pointlessness of this exception in the context of a bench trial. The accused was held to have given evidence against a co-accused. The shield was accordingly lowered. Previous convictions were adduced; only to be considered of no probative value, with the judge declaring that he would not take them into consideration in assessing guilt. See also the very similar result in the context of the accused attacking a prosecution witness in *Garmaz s/o Pakhar* [1995] 3 SLR 701, pp 717-8, where the Court of Appeal declared the general bad character evidence to be of "minimal" probative value.

[109] The inadmissibility of general bad character evidence of the accused flows, of course, from the general exclusion of "similar fact evidence", and where the accused takes the stand, s 122(4) which forbids questions regarding his bad character. The admissibility of good character evidence is expressly allowed by s 55 of the Evidence Act. Comparison with the position of evidence of bad character of other witnesses uncovers further peculiarities: question may be asked to "shake his credit by injuring his character" (s 148(c)), but the court has a discretion to allow the witness not to answer such questions (s 150), and where the witness does answer, evidence cannot be given to contradict him unless he has lied about a previous conviction or about his partiality (s 155). There are two points here: first, if bad character is so significant to determine the credibility of a witness, it should also be so for the accused, as his or her credibility is often the most crucial issue in a prosecution; secondly, if bad character evidence is thought sufficiently important to be admissible (with respect to credibility, albeit), then there is no reason to attach exceptions and limits.

[110] The rules are in s 56 of the Evidence Act. The US Supreme Court once described the law concerning good character of the accused as such: "much of the law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage is offset by

if the accused does indeed adduce evidence of good character, his or her shield is lost, and bad character evidence is now fair game for the prosecution. If good character is probative of innocence, then it makes no sense to put a price tag on it. Similarly, the shield is also lost if the accused raises the bad character of a prosecution witness.[111] If bad character is probative of the falsehood of prosecution witness's story, there is no reason to make the accused (with a history) pay so dearly for raising the matter; if such evidence is not probative of credibility, it should not be admissible at all. Finally, if the accused so much as gives evidence against a co-accused, his bad character becomes admissible.[112] If his bad character is so important to show that he is telling the truth, why must the co-accused or the prosecution wait to see if the accused gives evidence against the co-accused. Something quite apart from cold, rational calculation of probative value and prejudice is going on here.[113] The law seems to give the option to the accused to choose between two very different conceptions of trial.[114] Where the accused chooses not to lower the shield, he or she opts for the more familiar trial which is limited strictly to the matters raised in the charge. The law, in this guise, denies that character evidence is sufficiently probative to be admissible. If, however, the accused chooses to lower his shield by any of these 3 means, he or she is taken to have elected a trial, not only of facts strictly relevant to the charge, but also of his entire character. The law now adopts the contrary assumption that character is very relevant to

a poorly reasoned counterprivilege to the other", *Michelson* v *US* (1948) 335 US 469, 486.

111 S 122(4), (7). The 1976 amendments did make some feeble attempts to restrict the introduction of bad character evidence of the accused: the shield is lowered only if the main purpose of the attack on the prosecution witness was to "raise an issue as to the witness's credibility"; and where the shield is lowered, only questions "relevant to his credibility" may be asked. All this begs the question of the extent to which bad character is probative of credibility, the very thing the law cannot decide.

112 S 122(4), (8).

113 Leonard, *supra,* note 5, proposes an explanation (albeit in the context of similar fact evidence) by way of a "paradigm of catharsis" – legitimacy is enhanced by the emotional satisfaction derived from having everything before the court. Uviller, "Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale" (1993) 42 Duke LJ 776, attributes the perceived need for character evidence to the artificiality of having to decide the credibility of "two-dimensional" witnesses. I cannot explore these theories here, but I do not rule out the possibility that they contribute to the irrationality (or rather, different rationality) of the existing law.

114 A full treatment of the shield lowering rules are beyond the scope of this discussion, but if my "option" theory is correct, and the law insists on preserving the option, the only thing left for the law to do is to ensure that the shield is lowered only were the accused clearly opts for a no holds barred trial. Verbal formulae such as the "main purpose" of raising "an issue as to the witnesses credibility" and "given evidence against" (s 122(7), (8)), cloud

guilt and innocence. The incredible thing is that the law is unable to decide which view to take of character evidence, so it leaves it up to the accused to make an *ad hoc* election. Simply, in one conception of trial, character evidence is prejudicial; in the other it is probative. A thorough discussion of the "cross-examination exception" is another story which will take too long to tell here. I hope the point has been made that the law cannot make up its mind about the usefulness or fairness of using character evidence in general. So it would be unduly hopeful for us to expect the law to be any more certain for similar fact evidence, a sub-set of character evidence in general. Just as the "cross-examination" exception allows the accused the choice of deciding whether character evidence is probative or prejudicial, the malleable rules of similar fact evidence leaves that choice to the judge deciding its admissibility. It is here that extraneous and unspoken political forces enter the rules of evidence. There can be no satisfactory solution until and unless the law decides once and for all what it thinks about character evidence.[115]

MICHAEL YM HOR*

the nature of the choice to be made.

[115] I thank my colleagues, Associate Professors Jeffrey Pinsler and Tan Yock Lin, and several generations of Evidence students at the National University of Singapore for inspiring and sharpening my views.

* Associate Professor, Faculty of Law, National University of Singapore.