Singapore Journal of Legal Studies
[2011] 553–563

REVISITING THE SIMILAR FACT RULE IN SINGAPORE

Public Prosecutor v. Mas Swan bin Adnan and another[1]

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The similar fact rule in Singapore—as with the law on any evidence law doctrine that can be found in both our *Evidence Act* and the common law—has required clarification for some time. This note, which discusses the latest local decision on the similar fact rule, considers if that decision is compatible with the *Evidence Act* and the various conceptualisations underlying the doctrine.

I. INTRODUCTION: DIFFICULTIES SURROUNDING THE SIMILAR FACT RULE

The similar fact rule (or the similar fact evidence rule, depending on choice of terminology) essentially limits the admissibility of evidence that goes not towards proving directly that an accused has committed the crime he has been charged with but towards his past conduct, and that may form a basis for inferring that the accused has committed the said crime.[2] However, the similar fact rule in Singapore is not free of controversy, and was once described as being faced with "intractable difficulties".[3] These difficulties, which remain today, can probably be attributed to at least three factors.

The first and logically prior factor is the perennial tension between our *Evidence Act*[4] and the common law. Section 2(2) of the *Evidence Act* states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed." Taken literally, s. 2(2) precludes a court from adopting wholesale common law developments in evidence law, and instead directs it to give precedence to the provisions in the statute. Notwithstanding this, our courts have not always been consistent in interpreting and following s. 2(2).[5]

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1 [2011] SGHC 107 [*Mas Swan*].

2 Character evidence (which, on one view, deals more with reputation), while conceptually contiguous to similar fact evidence, will not form the focal point of this piece; moreover, the *Evidence Act* has different sets of provisions for each of them.

3 Ho Hock Lai, "An Introduction to Similar Fact Evidence" (1998) 19 Sing. L. Rev. 166 at 195. See also Chin Tet Yung, "Remaking the Evidence Code" (2009) 21 Sing. Ac. L.J. 52 at 54.

4 Cap. 97, 1997 Rev. Ed. Sing.

5 See Jeffrey Pinsler, "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 Sing. Ac. L.J. 365.

This is certainly true in the specific context of the similar fact rule, where over-valiant attempts by our courts to harmonise statute and common law have come at the price of stretching the similar fact provisions in the *Evidence Act* beyond recognition.[6] While this problem is now largely ameliorated by the 2008 decision of *Law Society of Singapore v. Tan Guat Neo Phyllis*—which stated that "new [common law] rules of evidence can be given effect to only *if they are not inconsistent with the provisions of the* [*Evidence Act*] *or their underlying rationale*"[7]—there still remains a whole host of cases that have blurred the exact contours of the similar fact rule, including a Court of Appeal decision.[8]

The second factor, though parasitic upon the first, is arguably the more important one. It is the dilemma surrounding the normative conceptualisation of the similar fact rule: under what circumstances should the accused's acts on other occasions (*i.e.*, separate from the crime he is charged with) be considered relevant (and therefore admissible to prove his guilt)?[9] Granted, there is the "institutional" consideration in admitting only good evidence so that the trial is not unnecessarily protracted, fact-finders are not distracted/confused, and sloppy criminal investigation is not encouraged.[10] But the primary objection to similar fact evidence has to be prejudice.[11] Indeed, it has been said that while an accused's prior misconduct may seem intuitively and even logically relevant (and therefore aids in the court's search for the truth), such evidence "is generally more prejudicial than probative".[12] This is because such evidence is unconnected to the offence, catches the accused by surprise in court, and may unduly influence the trier of fact by painting the accused as a criminal from the outset.[13] There are, of course, other possible dimensions to the idea of prejudice, and they are aptly summed up as follows:

> '[P]rejudice' does not refer simply to the tendency of the evidence to incriminate the accused in respect of the crime charged. Used in that sense, all evidence adduced by the prosecution must almost invariably be prejudicial… [T]he word must obviously mean something else. It consists of a number of ideas.
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> One is the risk of cognitive error. Our instinctive assessment of the evidence of past conviction may be off the mark… [T]he public tends to over-estimate recidivism rates… [T]hat criminals tend to recommit the same sorts of crime—is not wholly supported by empirical data… [P]eople have a tendency to draw stronger inferences from evidence of past acts than is rational…
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> Another aspect of prejudice is based on the idea that we cannot run away from the emotional aspect of our existence. Evidence of the accused's past conviction has the power to sway us unduly against him. We may be tempted to convict

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6 Both the specific *Evidence Act* provisions and the cases in question will be discussed later in this piece.

7 [2008] 2 S.L.R.(R.) 239 at para. 117 (emphasis in original) [*Phyllis Tan*]. In the main, this case dealt with whether the court has the discretion to exclude entrapment evidence that is otherwise relevant under the *Evidence Act*.

8 *Tan Meng Jee v. Public Prosecutor* [1996] 2 S.L.R.(R.) 178 [*Tan Meng Jee*]. This case will be discussed later in this piece.

9 See Jeffrey Pinsler, *Evidence and the Litigation Process*, 3rd ed. (Singapore: LexisNexis, 2010) at 3.01.

10 Ho, *supra* note 3 at 167.

11 *Ibid*. at 166.

12 Pinsler, *supra* note 9 at 3.02.

13 *Ibid*.

> the accused not because the evidence, construed objectively and dispassionately, supports the charge but because we find the person repulsive…
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> There is [also] the fear that [the accused] may be deprived of [the benefit of the presumption of innocence] because of the strong antipathy that the fact-finder may feel towards him when his hideous past is revealed. The fact-finder may give the evidence more weight than it objectively deserves…
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> A person should be allowed to start his life afresh; he should not bear, for the rest of his life, the burden of his past… '[O]nce a criminal has "paid his debt to society" he should not be additionally penalised for that behaviour'.[14]

The third factor is related to the second and may be considered a subset. As will be seen, the number one counterpoint and antithesis to prejudice is probative value (which, by basic logical definition, goes towards relevance—and relevance *per se* lends itself to various definitions and conceptualisations).[15] The essence of conventional similar fact rule discourse usually boils down to this: if the probative value of a piece of similar fact evidence outweighs the prejudicial effect, that evidence is admissible. Objection has been raised to such a weighing exercise, however. In particular, the objection takes aim at how it is not easy to ascertain probative value (which in turn affects our understanding of prejudice and relevance), and as a result, politics enter into the court's calculus:

> 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… 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… [T]he 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.[16]

It is submitted that the similar fact rule in Singapore has been in an uncertain state for some time, in part because there has not been much judicial discourse in resolving the difficulties sketched out above. *Mas Swan* is a post-*Phyllis Tan* decision and also

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[14] Ho, *supra* note 3 at 167–170. See also Michael Hor, "Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics" [1999] Sing. J.L.S. 48 at 51: "Anglo-American scholars dissect prejudice into two. First is 'inferential prejudice'—courts are likely to overestimate the probative value of character and similar fact evidence… [C]ourts are likely to make mistakes in the inferential steps between past misbehaviour and present misconduct… 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".

[15] See *e.g.*, Robert Margolis, "The Concept of Relevance: in the Evidence Act and the Modern View" (1990) 11 Sing. L. Rev. 24.

[16] Hor, *supra* note 14 at 50.

the latest authority on the similar fact rule in Singapore. This piece considers if *Mas Swan* has made any inroads in resolving any of the aforesaid difficulties.

II. Facts of *Mas Swan*

The accused were Malaysians. The first was Mas Swan, a 27-year-old male. The second was Roshamima, a 24-year-old female. They were a couple and had planned to marry. However, their marriage plans halted when they were arrested at Woodlands checkpoint upon entering Singapore in a Malaysian-registered car. 21.48 grams of diamorphine, contained in three bundles and 123 packets, were found in the car.[17] They were charged under s. 7 of the *Misuse of Drugs Act*,[18] read with s. 34 of the *Penal Code*.[19] Their accounts as to what happened differed in material aspects.

Mas Swan claimed that while he knew that there were bundles concealed in his car, he thought they were ecstasy pills because that was what Roshamima had told him.[20] Roshamima, on the other hand, claimed that she did not even know of the existence of any bundles.[21] She said that Mas Swan and her had entered Singapore that day only to obtain gifts for their engagement and wedding.[22]

As it were, the court found that Mas Swan was delivering the bundles on behalf of one Mickey, and had previously (together with Roshamima) made four successful drug deliveries for him.[23] Furthermore, Mas Swan became involved in delivering drugs only after Roshamima had recruited him and introduced him to Mickey, for Roshamima herself was already delivering drugs for Mickey before that.[24] Indeed, between Mas Swan and Roshamima, it was always the latter who took the lead in all the deliveries; Mas Swan was never told of the destinations, never involved in the packing of the bundles, never in the thick of the *modus operandi*, and never the direct recipient of the bundles.[25] Only Roshamima was aware of the detailed *modus operandi* (involving, among other things, exchanges of cars) in which Mickey ran the drug delivery operations. Moreover, when the couple was detained at Woodlands checkpoint, all the frantic calls from Mickey (and Murie, another of Mickey's associates) went only to Roshamima's mobile phone.[26]

So while the court accepted that Mas Swan believed Roshamima when she told him they were delivering ecstasy pills before they got caught, it did not accept that Roshamima did not know that the purpose of the visit to Singapore was to deliver

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17 *Mas Swan*, *supra* note 1 at para. 1.

18 Cap. 185, 2008 Rev. Ed. Sing. [*MDA*]. Section 7 reads: "Except as authorised by this Act, it shall be an offence for a person to import into or export from Singapore a controlled drug."

19 Cap. 224, 2008 Rev. Ed. Sing. Section 34 reads: "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

20 *Mas Swan*, *supra* note 1 at paras. 45, 58.

21 *Ibid.* at para. 46.

22 *Ibid*. at para. 88.

23 *Ibid*. at para. 58.

24 *Ibid*. at paras. 64, 77, 127.

25 *Ibid.* at para. 77.

26 *Ibid*.

the bundles of controlled drugs that were concealed in the car.[27] As a result, Mas Swan was acquitted and Roshamima was given the mandatory death penalty (albeit under a judicially modified charge due to Mas Swan's acquittal).[28]

III. Judgment in *Mas Swan*

While a significant portion of the judgment in *Mas Swan* focused on the issues of statements and the presumptions under the *MDA* (and indeed the resolution of those issues were sufficient for the court to reach its verdict),[29] the comments in this note will, for present purposes, be confined to the similar fact rule. Specifically, the question was whether evidence of the previous drug deliveries could be used to make the finding that Roshamima knew that the bundles in the car contained controlled drugs. Chong J. noted the following:

(1) The relevant provisions of the *Evidence Act* that govern the admissibility of similar fact evidence are ss. 14 and 15. Section 14 states that 'Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.' Section 15 states that 'When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.'

(2) In *Tan Meng Jee*, the Court of Appeal explained that similar fact evidence was generally excluded because "to allow it in every instance is to risk the conviction of an accused not on the evidence relating to the facts but because of past behaviour or disposition towards crime. Such evidence without doubt has a prejudicial effect against the accused. However, at times, similar facts can be so probative of guilt that to ignore it via the imposition of a blanket prohibition would unduly impair the interests of justice."[30]

(3) In *Tan Meng Jee*, the Court of Appeal held that ss. 14 and 15 of the *Evidence Act* contained the test set out in the House of Lords decision in *Director of Public Prosecutions v. Boardman*,[31] *i.e.* the admissibility of similar fact evidence is determined by balancing its probative value against its prejudicial effect.[32] This was despite the fact that ss. 14 and 15 literally adopted a categorisation approach (*i.e.* admissibility of similar fact evidence was determined solely by the categories of relevance under ss. 14 and 15). It pointed out that illustration (o) of s. 14 was instructive: '*A* is tried for the murder of *B* by intentionally shooting him dead. The fact that *A* on other occasions shot at *B* is relevant as showing his intention to shoot *B*.' It also pointed out the term 'similar occurrence' in s. 15 implied the balancing test.

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27 *Ibid*. at paras. 77, 99.
28 *Ibid.* at para. 131.
29 *Ibid*. at para. 100.
30 *Tan Meng Jee*, *supra* note 8 at para. 41.
31 [1975] A.C. 421 [*Boardman*].
32 *Tan Meng Jee*, *supra* note 8 at paras. 48–50.

At any rate, courts have the general discretion to exclude any kind of evidence prejudicial to the accused, depending on whether it would be just or unjust to do so.[33]

(4) But in view of *Phyllis Tan*, the admissibility of similar fact evidence has to be determined according to the categories of relevance under ss. 14 and 15 of the *Evidence Act*; therefore, *Tan Meng Jee* is inconsistent with the *Evidence Act* insofar as it allows for the exclusion of similar fact evidence that is otherwise deemed relevant under ss. 14 and 15. Nevertheless, cases that have interpreted *Tan Meng Jee* to mean that the more 'similar' the evidence, the more probative it is, are consistent with ss. 14 and 15.[34]

(5) Both ss. 14 and 15 of the *Evidence Act* permit the admission of similar fact evidence to show the state of mind of the accused. Based on Indian authorities,[35] s. 14 'deals with the relevancy of facts showing intention, knowledge… when the existence of any state of mind or body or bodily feeling is in issue', and for s. 15, 'when the act in question forms a series of similar occurrences, evidence of similar facts is admissible to prove intention or knowledge of the person and to rebut the defence of accident, mistake, etc.'[36]

(6) Section 14 of the *Evidence Act*, however, is subject to the qualification that 'the state of mind must be a condition of thought and feeling having distinct and immediate reference to the particular matter in question and cannot simply be evidence of general disposition, habit and tendency to do the act in question'.[37]

Accordingly, given Roshamima's defence, the prosecution had rightly sought to rely on s. 15 of the *Evidence Act* to admit evidence of her previous deliveries of bundles for Mickey to show that her latest delivery (the one resulting in her arrest) was just another instance of a series of deliveries of bundles for Mickey.[38] After sifting through the evidence, the court held:

> [I]t was clear that… just like on the previous occasions, Roshamima knew that there had been an exchange of cars with one of Mickey's men prior to their entering Singapore…
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> [T]he circumstances surrounding the exchange of cars, such as the involvement of Mas Swan and Murie, the similar wait [for the car] to be returned to them after the exchange of cars, and the direct route into Singapore after taking back possession [of the car], were *virtually identical* to the previous times Roshamima delivered bundles for Mickey.
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> The highly similar circumstances show that it was very likely Roshamima was aware that they were delivering bundles of controlled drugs into Singapore… [E]vidence in Mas Swan's and Roshamima's statements [is therefore] relevant and

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33 *Ibid*. at paras. 51–52.

34 *Mas Swan*, *supra* note 1 at para. 107.

35 Singapore has essentially the same *Evidence Act* as India.

36 Sudipto Sarkar and V.R. Manohar, eds., *Sarkar's Law of Evidence: in India, Pakistan, Bangladesh, Burma & Ceylon*, 16th ed. (Nagpur: Wadhwa & Co, 2007) at p. 385.

37 *Mas Swan*, *supra* note 1 at para. 109.

38 *Ibid*. at para. 111.

> admissible under s 15 of the [*Evidence Act*]… [T]he 'striking' similarity between the similar fact evidence and the events on [the day Mas Swan and Roshamima were arrested] gives the evidence an explanatory force that is highly probative of the level of Roshamima's knowledge [on the day of her arrest]… [T]he evidence was also admissible under the probative effect/prejudicial effect balancing test.[39]

IV. Some Comments on *Mas Swan*

As will be demonstrated, while *Mas Swan* achieves some mileage in addressing the three factors contributing to the "intractable difficulties" of the similar fact rule, it was not given the impetus to resolve most of them, and it even raises some new questions at the same time.

Perhaps what is most immediately noticeable from the judgment in *Mas Swan* is that it categorically states that *Tan Meng Jee*, while a Court of Appeal decision, is incorrect in at least one aspect, *viz*., similar fact evidence can be excluded by the court even if it is relevant under ss. 14 and 15 of the *Evidence Act*. What this means as well is that *Mas Swan* accepts that the balancing test in *Boardman* is still good law, and indeed it seems to have applied *Boardman* in its judgment.[40] The part about the court not having the discretion to exclude similar fact evidence once it is relevant under the *Evidence Act* has to be correct, in view of *Phyllis Tan*.[41] The court should be lauded for taking proper cognisance of s. 2(2) of the *Evidence Act*. But the part endorsing *Boardman* is questionable in at least one respect. On one hand, *Mas Swan* points out that there is one difference between *Boardman* and ss. 14 and 15, *viz*., the former does not adopt a categorisation approach.[42] This echoes academic sentiment.[43] But there is another important difference not pointed out: "whereas the consideration of the prejudicial effect of the evidence is a vital aspect of the *Boardman* approach, it plays no part in the determination of admissibility under [ss. 14 and 15]; it merely has a second stage role if the court should exercise its discretion."[44] Furthermore, the "recent retreat from applying the purposive approach to interpret [the *Evidence Act*] has left doubtful a string of authorities that used that approach to adopt 20th century common law rules, such as that for similar fact evidence in *Boardman*".[45] Indeed, it is not clear from *Mas Swan* if one has to apply the balancing test in *Boardman in conjunction with* ss. 14 and 15, or *as an alternative* to it. Compounding the confusion is the absence of reference to *Director of Public Prosecutions v. P*.[46] In *Boardman*,

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39 *Ibid.* at paras. 126–129.

40 *Ibid*. But then see para. 105.

41 *Cf.* Pinsler, *supra* note 9 at 10.42, where Professor Pinsler makes the compelling counter-argument that the courts having the inherent powers to exclude evidence of an extremely prejudicial nature is actually consistent with the *Evidence Act*.

42 *Supra* note 34.

43 See *e.g.*, Pinsler, *supra* note 9 at 3.32: "whereas *Boardman* lays emphasis on the degree of probity of evidence irrespective of the purposes for which that evidence is adduced, ss 14 and 15 assume that evidence will only be sufficiently probative if it comes within one or other of the fixed categories… whereas evidence of propensity to prove the commission of the crime would be admissible [under *Boardman*], if sufficiently probative, such evidence is not so regarded by ss 14 and 15 because the purpose for which it is adduced is outside the scope of those sections."

44 *Ibid*.

45 Ho, *supra* note 3 at 69.

46 [1991] 2 A.C. 447 [*DPP v. P*].

it was said that if the evidence is "so very relevant" or "strikingly similar" that to exclude it would affront "common sense", then it should be admitted.[47] However, in *DPP v. P*, the House of Lords said that the striking similarity test was too narrow to be a general rule of admissibility.[48] Given that *DPP v. P* has been cited by our courts,[49] and given that *Mas Swan* now says that "decisions that have applied the 'striking similarity' test are… entirely consistent with ss. 14 and 15", this is one unresolved contradiction.

Even if *Mas Swan* is somehow suggesting that the *Boardman* balancing test does not contradict s. 2(2) of the *Evidence Act*, it has been said that "the process of balancing probative value against prejudicial effect can be applied generally to any situation in which admissible evidence may result in injustice at trial."[50] Such a sentiment reflects the unhelpful reach and breadth of the test; and as has been pointed out at the introduction of this piece, there remains definitional uncertainties surrounding "prejudice" and "probative value". For instance, if a piece of evidence has the attribute of "prejudice", does it mean it has "a prejudicial influence on the minds [of the fact-finders] out of proportion to its true evidential value",[51] or that it simply has no relevance (and therefore no evidential value whatsoever), serving only to unfairly colour the minds of the fact-finders to the extent of causing injustice? The balancing test presupposes that probative value and prejudice overlap, but such a presupposition is not necessarily correct, not in all instances anyway.[52]

Indeed if we re-examine *Mas Swan*, it seems the court was looking for a specific *modus operandi* (connecting the previous deliveries to the one Roshamima was charged for), rather than a general pattern of behaviour or disposition. The facts pertaining to the previous deliveries could have been admitted, arguably without much obstacle, via other provisions in the Evidence Act—such as s. 9 (facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, are relevant), and perhaps to a lesser extent ss. 8 (facts which show a motive or preparation for any fact in issue or relevant fact are relevant) and 6 (facts that are so connected with a fact in issue as to form part of the same transaction are relevant, even if they occurred at different times and places).[53] Doing this would have obviated the unnecessary prejudice-probative value conundrum, but there are two possible counter-arguments to this. One, evidence admitted under Part I of the *Evidence Act* has to satisfy *both* the provisions in ss. 6 to 11, and the remaining provisions that deal with "specific categories of relevant facts" (such as similar fact).[54] Two, it remains unclear if ss. 6 to 11 operate once a piece of evidence is found prejudicial; after all, Stephen—chiefly responsible for the contents of the *Evidence Act*—distinguished between relevant facts which arise directly from the circumstances of the case, and relevant facts arising from previous

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47 *Boardman*, *supra* note 31 at 455–456.

48 *DPP v. P*, *supra* note 46 at 460–461.

49 See *e.g.*, *Public Prosecutor v. Teo Ai Nee and another* [1995] 1 S.L.R.(R.) 450 at para. 79.

50 Pinsler, *supra* note 9 at 10.22.

51 *Perkins v. Jeffery* [1915] 2 K.B. 702 at 707–708.

52 See also *Pfennig v. The Queen* (1995) 127 A.L.R. 99 at para. 39, where the court noted that probative value and prejudicial effect are two "incommensurables".

53 See also Ho, *supra* note 3 at 195.

54 Pinsler, *supra* note 9 at 2.55.

incidents or transactions.[55] These two counter-arguments remain to be judicially addressed.

Another point about *modus operandi* is that can it not be said that all similar fact evidence *in the context of ascertaining the modus operandi* (which in turn is used to establish the *mens rea* of the offence charged), once found to be relevant, will always be *by definition* probative and that prejudicial effect simply does not feature?[56] Accordingly, if a piece of evidence tendered to establish *modus operandi* does not pass muster under the similar fact rule, it simply is irrelevant and inadmissible, and is most likely to be considered as pure propensity evidence used to establish disposition. But something stands in the way of this, because there are provisions in the *Evidence Act* governing character evidence[57]—in other words, evidence tendered to show disposition and reputation can be considered relevant under certain circumstances. There are two ways to resolve this ostensible paradox. First, under the *Evidence Act*, evidence to establish that the accused is a person of bad disposition or reputation can only be adduced if the accused gives evidence to establish that he is of good disposition or reputation.[58] Secondly, we can distinguish between general similar fact evidence and similar fact evidence tendered to prove *modus operandi*, since general similar fact evidence may overlap with character evidence, but similar fact evidence tendered to prove *modus operandi* will not.[59] A parenthetical point about character evidence may be made at this juncture: it has been repeated *ad nauseam* in various cases that pure propensity reasoning is prohibited. Given that the genesis of this rule is probably *John Makin and Sarah Makin, his Wife v. The Attorney-General for New South Wales*,[60] it might have been helpful if *Mas Swan* had commented on whether this aspect of *Makin* was compatible with the *Evidence Act*.

Returning back to the difficulty of the balancing test, however, the balancing test must be considered a close relative of another generalised approach that has emerged from judicial practice—that of admitting all evidence at the outset, and according different weight or no weight at all to the different pieces of evidence thereafter. This approach makes sense (even if the *Evidence Act* is silent on it, thereby causing a s. 2(2) issue to arise)[61] because the court may want to take into account as many facts as possible to be apprised of the full picture. It is too cumbersome to consider the relevance of each tendered piece of evidence one at a time. Perhaps yet another alternative to the confounding balancing test is to say that once the court has the full picture, it decides which aspects of the narrative are relevant; those given no weight are simply irrelevant, and those that are given little weight should be considered to be tangentially relevant, as opposed to being almost outweighed

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55 Ho, *supra* note 3 at 195–198.

56 This is compatible with the other broad notion behind our *Evidence Act*, that of asking the direct question "what evidence is relevant" rather than the common law approach of "what evidence is not relevant": see Pinsler, *supra* note 9 at 2.16.

57 *Evidence Act*, ss. 54–57.

58 *Ibid*., s. 56.

59 Another view is that pure propensity evidence is not declared relevant at all in the *Evidence Act*: see Robert Margolis, "Evidence of Similar Facts, the Evidence Act, and the Judge of Law as Trier-of-fact" (1988) 9 Sing. L. Rev. 103 at 118–122.

60 [1894] A.C. 57 [*Makin*].

61 It is uncertain if weight as a concept has a tangible foundation in the *Evidence Act*: see Pinsler, *supra* note 9 at 2.57–2.59.

by its prejudicial effect (so prejudice in effect is subsumed into relevance). After all, in Singapore's system where there is only judge and no jury, there is not much point in worrying that (irrelevant) similar fact evidence is prejudicial because it may "taint" the judge's judgment in some way—the judge will already have considered the evidence[62] (although of course the counter-argument is that judges have better immunities against prejudicial evidence than juries).[63] At any rate, that Singapore has no jury system has also led the former Attorney-General, now current Chief Justice, to comment at one point that the balancing test "should have little or no relevance in bench trials as the judge can simply give whatever weight is appropriate to the evidence. There is no need for a judge to go through the formal process of declaring the evidence inadmissible."[64] Perhaps then the best safeguard is to have the judge explain in the judgment why more questionable pieces of similar fact evidence were deemed relevant, particularly if the case turns entirely on similar fact evidence. Such explanations should also preferably be supported by the appropriate *Evidence Act* provisions.

A final word on the balancing test for present purposes: ironically, the test is probably more compatible with s. 11(b) of the *Evidence Act* than ss. 14 or 15. Section 11(b) states that "Facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable". I say it is ironic because there is much resistance to classifying s. 11(b) as a provision pertaining to similar fact evidence in the first place:

> Stephen intended [s. 11(b)] to be a residuary category for the preceding five sections (ss 6 to 10) so as to cover facts which might not be caught by those provisions. Accordingly, s 11(b), like ss 6 to 10, is limited to facts which are specifically connected to the facts in issue, and similar facts which are unconnected with the facts in issue can only be admitted under ss 14 and 15… This… is also evident in the two Illustrations to s 11…[65]

This leads us then to an interesting thought:

> If *Boardman* is not reconcilable with ss 14 and 15, is it reconcilable with s 11(b)? This section admits facts which have the effect of making facts in issue or relevant facts 'highly probable or improbable'. It admits facts on the basis of probative force—the criterion of *Boardman*. Although there is no mention of the element of prejudice in s 11(b) as there is in *Boardman*, this factor might perhaps be regarded as being subsumed by the section on the basis that if a fact makes the fact in issue 'highly probable', the prejudicial effect of that fact will be correspondingly lowered…[66]

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62 See also Ho, *supra* note 3 at 198.

63 *Ibid*. at 193. Even if this is true, the fact remains that in a jury system, the jury simply does not have the chance to see the inadmissible evidence—it is already filtered out beforehand. There is no risk, as opposed to a low risk of prejudice. See also Margolis, *supra* note 59 at 104: "With the abolition of the jury in Singapore… the rationale for the similar fact rule no longer exists, but the rule subsists".

64 Chan Sek Keong, "The Criminal Process—the Singapore Model" (1996) 13 Sing. L. Rev. 433 at 456.

65 Pinsler, *supra* note 9 at 3.25.

66 *Ibid.* at 3.33.

Insofar as s. 11(b) of the *Evidence Act* is more closely aligned with the balancing test than ss. 14 and 15, perhaps the court in *Mas Swan* could have made a comment about it. Unfortunately, perhaps mainly because it was not pleaded (as was probably the case with ss. 9, 8, and 6 of the *Evidence Act*), it was not discussed. It should also be added that s. 11(b) has now become more synonymous with admitting similar fact evidence to prove *actus reus*, and the authority chiefly responsible for this is *Lee Kwang Peng v. Public Prosecutor and another appeal*.[67] This new synonymy has also been met with resistance.[68] This new synonymy, however, is nevertheless made on the aforementioned basis that the phrase "highly probable or improbable" in s. 11(b) embodied the *Boardman* balancing test.[69] Given that the court there reasoned on this basis despite being aware that this was contrary to the scheme of the *Evidence Act* as conceived by Stephen,[70] it would be fascinating to see how the next decision on the similar fact rule connects more dots between the various *Evidence Act* provisions and cases.

V. Conclusion

There are various ingredients to the current discourse on the similar fact rule: probative value, prejudice, and relevance. It remains unclear how they interplay with one another simply because there are unresolved conceptual and definitional issues with each of the ingredients, and this note has only highlighted bits of that. While *Mas Swan* helped clarify the law a little, dispelling the remaining ambiguities will have to be undertaken in another decision.

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67 [1997] 2 S.L.R.(R.) 569 [*Lee Kwang Peng*].
68 Pinsler, *supra* note 9 at 3.41.
69 *Lee Kwang Peng*, *supra* note 63 at paras. 44–46.
70 *Ibid.*