

THE FUTURE OF THE SIMILAR FACT RULE IN AN INDIAN EVIDENCE ACT JURISDICTION: SINGAPORE

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In yet another attempt to bridge the gap between the rules of an antiquated statute and the modern realities of practice, Singapore's Evidence Act was amended in 2012. Certain relevancy provisions were amended to allow greater admissibility of evidence. While new provisions were introduced to act as a check against abuse, oddly some similar fact provisions were left intact. This paper explains why the 2012 amendments have rendered the future of these enactments very uncertain. This paper also suggests a number of tentative recommendations as regards future legislative change or judicial interpretation. To the extent that Singapore's Evidence Act was largely modelled after Stephen's Indian Evidence Act of 1872, this paper may be of comparative interest to readers in India, as well as to readers in other Commonwealth jurisdictions that had also adopted the iconic statute.

I. INTRODUCTION

Sir James Fitzjames Stephen's seminal Indian Evidence Act of 1872 has had an enduring legacy. Many Commonwealth jurisdictions which had modelled their evidence legislation after this seminal work in the late 1800s continue to retain the legislation. Singapore, which originally enacted its Evidence Act ('EA')¹ in 1893, is one of them. In yet another attempt to modernise the EA,² the statute was amended in 2012. Amongst the amendments were changes made to the provisions on hearsay and expert opinion evidence.³ Specifically, the scope for the admissibility of such evidence was broadened to take into account the practices and realities of modern litigation, but the concept of judicial exclusionary discretion was also expressly introduced to curtail admissibility if needed.⁴ In other words, the courts can now exclude certain types of hearsay and expert opinion evidence even if they are found relevant under the EA. Strangely however, the provisions on similar fact evidence were left completely intact.

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¹ Cap 97, 1997 Rev Ed.

² The two other major amendments took place in 1976 and 1996.

³ These two types of evidence, of course, are conceptually intertwined.

⁴ See Evidence (Amendment) Bill, 2/2012.

This omission is a surprise, since the EA provisions on similar fact evidence, like those on hearsay and expert opinion evidence, also represent codified exceptions to the so-called exclusionary rules provided in Part I of the EA.⁵ Thus, to statutorily limit the judicial discretion to exclude relevant evidence to hearsay and expert opinion evidence creates an immediate incongruity. Moreover, the local jurisprudence interpreting the provisions on the similar fact rule has long been riddled with extreme doubt and inconsistency, and the 2012 amendments could have helped resolve this, but this was not done or even contemplated.⁶ This paper, as its title suggests, considers the future of the similar fact rule in Singapore and the key obstacles standing in the way of meaningful reform.

A. NATURE AND PURPOSE OF THE RULE

Before proceeding further, it is necessary to briefly understand what the similar fact rule entails and why it exists. In many common law jurisdictions, the similar fact rule is traditionally part of a broader subject known as character evidence.⁷ In the criminal law context,⁸ the rule “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”.⁹ The default prohibition of admitting similar fact evidence is essentially premised on two main considerations.

The *first* consideration is institutional in nature and applies generally to most exclusionary rules, in that only the most relevant evidence should be admitted to prevent or reduce: (i) the introduction of collateral and tangentially relevant issues; (ii) unnecessary protraction of the length and cost of the trial; (iii) distraction or confusion of the fact-finder; and (iv) implicit judicial endorsement of sloppy criminal investigation.¹⁰

⁵ PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 99 (2010) (Under the common law, other exclusionary rules include confessions and the privilege against self-incrimination).

⁶ See also Chin Tet Yung, *Remaking the Evidence Code: Search for Values*, 21 (1) SAclJ 54,70-72 (2009).

⁷ ROBERTS & ZUCKERMAN, *supra* note 5, 581; COLIN TAPPER, CROSS & TAPPER ON EVIDENCE 371–376 (2010). The other components are the common law rules on character evidence of all witnesses and the statutory rules governing the cross-examination of accused persons. It should be noted, however, that in England, § 99(1) of the Criminal Justice Act, 2003 abolished the common law rules governing the admissibility of evidence of bad character in criminal proceedings.

⁸ The similar fact rule (as does the EA) also applies in the civil context, but has a far greater impact in criminal cases – such as the ones discussed in this paper.

⁹ Chen Siyuan, *Revisiting the Similar Fact Rule in Singapore*, SING. J.L.S. 553 (2011).

¹⁰ *Id.*, 554; Ho Hock Lai, *An Introduction to Similar Fact Evidence*, 19 SING. L. REV. 167 (1998); JEFFREY PINSLER, EVIDENCE AND THE LITIGATION PROCESS 63 (2010).

The *second* main consideration is perhaps more specific to similar fact evidence and relates to the concept of prejudice, in that while an accused's past conduct may seem intuitively and logically relevant and therefore aid in the court's search for the truth, such evidence may be more prejudicial than probative because: (i) it is generally unconnected to the offence but may unduly influence the fact-finder by painting the accused as a criminal from the outset; (ii) it may catch an accused by surprise in court when he is confronted with evidence from his past; (iii) there is a risk of cognitive error *vis-à-vis* the inference of recidivism; and (iv) ultimately, it may be given undue weight as to its relevance.¹¹

B. BASIS OF THE RULE IN SINGAPORE

It is also necessary to briefly understand how the EA has conceptualised the admission of similar fact evidence. The EA was an endeavour to codify the common law rules of evidence as it stood in the late 1800s.¹² This is reflected as well in § 2(2), which states that “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”. This means that as long as § 2(2) is still in force, which it is, the EA – and not the common law – must always be considered as a starting point of analysis when a question of evidence law is raised, and if there is a conflict between the EA and the common law position, the EA must prevail without exception.¹³

In this connection, it is widely assumed that the similar fact rule is captured by §§ 14 and 15 of the EA – however, it is also widely assumed that these sections, at best, only extend to the *mens rea* aspect of the rule.¹⁴ A perusal of the two sections demonstrates this quite readily:¹⁵

14. “Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of

¹¹ Siyuan, *supra* note 9, 554–555; Hock Lai, *id.*, 167–170. See also Michael Hor, *Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics*, SING. J.L.S. 48 (1999).

¹² PINSLER, *supra* note 10, 18–19.

¹³ Law Society of Singapore v. Tan Guat Neo Phyllis, (2008) 2 SLR(R) 239 at [116]–[129]; Lee Chez Kee v. Public Prosecutor, (2008) 3 SLR(R) 447 at [72]–[75]. See also Chen Siyuan, *The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction*, 16(4) INT'L J. EVIDENCE & PROOF 400–402 (2012).

¹⁴ Siyuan, *supra* note 9, 557–561; Chen Siyuan, *The 2012 Amendments to Singapore's Evidence Act: More Questions than Answers as Regards Expert Opinion Evidence?*, 34(3) STATUTE L. REV. 271 (2013); VR MANOHAR, RATANLAL & DHIRAJLAL, *THE LAW OF EVIDENCE* 150–159 (2011).

¹⁵ For completeness, one should also be aware of § 55 (previous good character of an accused person is relevant evidence in criminal proceedings) and §56 (prosecution may dispute such evidence if adduced) of the EA. However, these provisions do not impact the current discussion. Then there are also related common law concepts of collusion and corroboration, but to elaborate on those will take us well outside the confines of this paper.

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.¹⁶

15. When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant”.¹⁷

As for the *actus reus* aspect of the rule, precedent states that it is found in § 11(b), which 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”.¹⁸ This is, however, a controversial claim¹⁹ that will be revisited shortly. The immediate question that confronts us is: should the 2012 amendments to the EA be characterized as a missed opportunity, and how will the interpretation of the similar fact rule provisions be affected?

II. WHY THE SIMILAR FACT RULE IN SINGAPORE REQUIRES REFORM

A. FUNDAMENTAL FEATURES OF THE EA

To begin answering this question, one must have a keen understanding of the fundamental features of the EA, particularly as to how it determines the admissibility of evidence.²⁰ The two principal touchstones (if not the only two touchstones) for admitting evidence under the EA are: relevancy and reliability.²¹ The most recent jurisprudence of Singapore’s courts has also hinted strongly at this.²² With respect to relevance, the EA makes this abundantly clear: Part I is entitled “Relevancy of Facts” and its “more than 50” sections constitute almost a third of the statute. Part I essentially reflects the bold attempt by Stephen to categorically list and define all types of admissible

¹⁶ See also illustration (o): “A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that A was in the habit of shooting at people with intent to murder them is irrelevant”.

¹⁷ See also illustration (a): “A is accused of burning down his house in order to obtain money for which it is insured. The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant as tending to show that the fire was not accidental”.

¹⁸ Lee Kwang Peng v. Public Prosecutor, (1997) 2 SLR(R) 569, 41–47; Public Prosecutor v. Radhakrishna Gnanasegaran, 1999 SGHC 107, 124. See also Letts Charles v. Soh Kim Wat, 2007 SGHC 202, 48; Re Teoh Beng Hock, (2010) 1 MLJ 715, 56.

¹⁹ See, e.g., Siyuan, *supra* note 9, 562–563; PINSLER, *supra* note 10, 86–87.

²⁰ One of these features – § 2(2) has already been touched upon.

²¹ Siyuan, *supra* note 13, 416–420; Siyuan, *supra* note 14, 15–16; Chen Siyuan & Nicholas Poon, *Reliability and Relevance as the Touchstones for Admissibility of Evidence in Criminal Proceedings*, 24(2) SAclJ 545–551 (2012).

²² *Id.*

evidence, as he had found the common law rules in the 1800s to be confusing.²³ However, while the EA's conceptualisation of relevance has been greatly lauded even by contemporary scholars,²⁴ it differs from the modern common law position in jurisdictions such as England in no less than two material respects: *first*, the EA does not distinguish between relevance and admissibility (it only considers the question of legal and not logical relevance); and *second*, it establishes relevance in the form of inclusionary, rather than exclusionary rules (thus, admissibility is determined solely by relevance and reliability rather than the consideration of exceptions to common law exclusionary rules or other statutory requirements).²⁵

The consequence of this is that the modern common law and the EA have – quantitatively and qualitatively – different filters when determining questions of admissibility, notwithstanding the possibility that the same results may be yielded from time to time for certain pieces of evidence. Specifically, under the modern common law approach, admissibility is determined by the following set of questions: is the evidence (logically) relevant; is the evidence subject to any applicable (legal) exclusionary rule; does the evidence fall within a recognised (legal) exception to the applicable exclusionary rule; and is there nonetheless judicial discretion to exclude the evidence?²⁶

Under the EA, up until the 2012 amendments (which, it should be borne in mind, only seems to have changed the admissibility paradigm for hearsay and expert opinion evidence and not similar fact evidence), there was only one question to be asked in determining admissibility: is the evidence relevant as defined by the EA and also reliable (reliability being the principle that guides the rules of relevance)?²⁷ If the answer is in the affirmative, then the evidence is admissible; there is no discretion to exclude the evidence (or the issue simply does not arise). This is consistent with Stephen's intention to greatly simplify the admissibility process. However, as a protective measure that was and still is often carried out in practice, less or virtually no weight can

²³ PINSLER, *supra* note 10, 28–29; Robert Margolis, *The Concept of Relevance: In the Evidence Act and the Modern View*, 11 SING L. REV. 24–27 (1990).

²⁴ See, e.g., ROBERTS & ZUCKERMAN, *supra* note 5, 100–101; TAPPER, *supra* note 7, 65–66. C.f. ADRIAN KEANE, JAMES GRIFFITHS AND PAUL MCKEOWN, *THE MODERN LAW OF EVIDENCE* 20–21 (2010).

²⁵ TAPPER, *supra* note 7, 65–66; Siyuan, *supra* note 14, 6–9; Vinodh Choomaraswamy, *Report of the Law Reform Committee on Opinion Evidence (October 2011)* 7–9, available at <http://www.sal.org.sg/digitalibrary/Lists/Law%20Reform%20Reports/Attachments/34/01%20LRC%20on%20Opinion%20Evidence%20%28FINAL%29.pdf> (Last visited on February 14, 2014). See also Margolis, *supra* note 23, 28–40.

²⁶ Siyuan, *supra* note 14, 7, 12–13; ROBERTS & ZUCKERMAN, *supra* note 5, 99. See also Australia's Evidence Act, 1995, Introductory Note of Chapter 3.

²⁷ Siyuan, *supra* note 14, 15–16; Siyuan, *supra* note 13, 416–420; Siyuan & Poon, *supra* note 21, 545–551. Hock Lai, *supra* note 10, 368–370; Philip Jeyaretnam et al, *Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings*, May 2007, 8–9, available at [https://app.agc.gov.sg/DATA/0/Docs/PublicationFiles/LRC_Report_\(May_2007\).pdf](https://app.agc.gov.sg/DATA/0/Docs/PublicationFiles/LRC_Report_(May_2007).pdf) (Last visited on February 14, 2014).

be attached to the admitted evidence if there is some eventual suspicion as to its reliability; this exercise is usually done after the fact-finder – trial judges, and not juries, in the case of Singapore – have had the opportunity to examine the evidentiary record as a whole.²⁸

These differences between the approaches of the modern common law and the EA in and of themselves would necessarily have had a significant trickle-down effect as to how the similar fact rule should have been formulated and interpreted by the Singapore courts. This will be considered soon enough – but suffice to say for now these differences are further accentuated by the EA’s bifurcation of its relevancy provisions into general categories (§§ 6–11) and specific categories (§§ 12–57).²⁹ Whereas the specific relevancy provisions were meant to be codifications of exceptions to common law exclusionary rules, the purpose – and therefore usage – of the general relevancy provisions has never been all that clear.

To illustrate, the aforementioned § 11 is an example of a general relevancy provision, while §§ 14 and 15 are examples of specific relevancy provisions. The conundrum that emerges is whether a piece of evidence needs to satisfy both the general and specific relevancy provisions to be admissible: if the answer is in the affirmative, there is nothing on the face of the EA to suggest this is actually necessary;³⁰ yet if the answer is in the negative, then one potential result is that the specific relevancy provisions would be completely otiose as the general relevancy provisions are arguably worded broadly enough to fully encompass the specific relevancy provisions and to have them subsumed.³¹ Indeed, even if one argues that evidence caught by traditional exclusionary rules must satisfy at least the corresponding specific relevancy provision(s) in the EA, this is still an unsatisfactory compromise as the ever-evolving common law has demonstrated that the basis on which evidence can be excluded is never static (but the specific relevancy provisions are).³²

²⁸ *Id.*; *Singapore Parliamentary Debates Official Report*, Volume 88, February 14, 2012, available at http://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00076883-WA¤tPubID=00076904-WA&topicKey=00076904-WA.00076883-WA_3%2Bid-6e0461e8-8588-49d0-b05e-fc6c2d596955%2B (Last visited on February 14, 2014). *C.f.* Jeffrey Pinsler, *Admissibility and the Discretion to Exclude Evidence: In Search of a Systematic Approach*, 25(1) *SAcLJ* 223–224 (2013); SIR JAMES FITZJAMES STEPHEN, *AN INTRODUCTION ON THE PRINCIPLES OF JUDICIAL EVIDENCE* 53–54 (1872):

“The rule, therefore, that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in the relation of effect to the fact to which they are said to be relevant, may be accepted as true, subject to the caution that, when an inference is to be founded upon the existence of such a connection, every step by which the connection is made out must either be proved, or be so probable under the circumstances of the case that it may be presumed without proof.”

²⁹ PINSLER, *supra* note 10, 35–43.

³⁰ *C.f. id.*, 40–41.

³¹ Siyuan, *supra* note 14, 9–10. *See also* Hock Lai, *supra* note 10, 195.

³² Siyuan, *supra* note 13, 404–405.

The judicial decisions in Singapore on this issue have unfortunately been inconsistent,³³ and in the context of the similar fact rule, the boundary between the two categories of relevance in the EA has effectively been eroded by cases that have decided that the *actus reus* aspect of the rule is captured by § 11 (a general relevancy provision), but the *mens rea* aspect is captured by §§ 14 and 15 (specific relevancy provisions).³⁴ We turn then to examine one of the most important, and indeed, representative similar fact rule cases that demonstrate the courts' reluctance to interpret the EA in its proper terms.

B. UNSATISFACTORY STATE OF JURISPRUDENCE EXEMPLIFIED

Lee Kwang Peng v. Public Prosecutor ('Lee Kwang Peng') is often cited as the leading case for, *inter alia*, using § 11 for the purposes of the similar fact rule. This case was a High Court decision that involved allegations of a taekwondo instructor outraging the modesty of two teenage male students. The instructor was accused of fondling the students' genitals on separate occasions when he was alone with them. A question arose as to whether witness testimonies that alluded to the appellant's alleged acts of molestation on another student (who did not form the subject of the charges) would pass muster under the similar fact rule. In this regard, the court, in admitting the evidence, stated:

“[B]efore a judge may consider a similar fact relevant by virtue of § 14 or § 15, that fact must first satisfy the test for the admissibility of similar fact evidence ... namely, that the probative value of the evidence must exceed its prejudicial effect ... [however] the similar facts recounted by [the witnesses] did not establish the appellant's *mens rea* but only the *actus reus* of the offences charged. The similar facts thus did not qualify for inclusion under §§ 14 and 15 ... As §§ 14 and 15 contemplate the inclusion of certain similar facts, other similar facts must also be admitted under a provision of the [EA]. If similar facts were admitted other than under one of the relevancy provisions, it would make a mockery of the [EA] and extend the ambit of the similar fact rule beyond the extent intended by the Legislature. A ... solution would be to declare that such facts would be relevant by virtue of § 11(b) ... The principal difficulty with this approach is that to

³³ Siyuan, *supra* note 14, 9; PINSLER, *supra* note 10, 41–43 and 75–77. For instance, it is often thought (and supported by case law) that §6 reflects the *res gestae* exception to the hearsay rule, but § 6 is a general relevancy provision. Accordingly, the argument that evidence captured by a common law exclusionary rule must fulfil at least a specific relevancy provision for it to be admissible is weakened.

³⁴ Siyuan, *supra* note 14, 10; Jeffrey Pinsler, *Approaches to the Evidence Act: The Judicial Development of a Code*, 14(2) SAclJ 382–384 (2012).

construe § 11(b) in such a manner is at odds with the draftsman's commentary ... However ... I do not think it appropriate to sustain an artificial distinction between similar facts which are probative of intention (or other states of mind) and similar facts which are probative of acts done by the accused, nor do I consider such a distinction to have been intended by Parliament".³⁵

Lee Kwang Peng has since attracted a number of academic responses, all of which doubt the correctness of this aspect of the decision, albeit for various reasons.³⁶ As already mentioned, the use of a general relevancy provision to admit evidence that traditionally falls under an exclusionary rule (exceptions to which are caught by the specific relevancy provisions) is not without problems.³⁷ In addition, whereas §§ 14 and 15 trigger the operation of § 122 of the EA, § 11(b) does not, thus suggesting that § 11(b) is not meant to be used in conjunction with §§ 14 and 15, at least not for the purposes of admitting similar fact evidence. To these ends, the 2012 amendments should have done something about this contradiction as it affects not only the similar fact rule but evidence admissible under the EA generally. But perhaps the greater and more important difficulty with Lee Kwang Peng is its additional claim that § 11(b) of the EA, like §§ 14 and 15, is completely compatible with the modern common law concept of balancing probative value and prejudicial effect, and § 2(2) poses no barrier whatsoever.³⁸ More precisely, according to Lee Kwang Peng, a judge is supposed to apply this balancing test before considering §§ 11(b), 14, or 15 of the EA when it comes to ascertaining the admissibility of similar fact evidence.

In this regard, one would recall that under the modern common law paradigm of admissibility of evidence, there are essentially four questions to be asked – the concept of balancing probative value and prejudicial effect is the test used to answer the fourth question of whether a court has discretion to exclude relevant evidence.³⁹ The genesis of the application of this balancing test specifically to similar fact evidence can popularly be traced to the House of Lords decision of *Boardman v. Director of Public Prosecutions* ('Boardman'),⁴⁰

³⁵ Lee Kwang Peng v. Public Prosecutor, (1997) 2 SLR(R) 569, 38, 41–46. Notably, just prior to Lee Kwang Peng, the Court of Appeal had pondered about whether the similar fact rule was captured by other provisions in the EA, but chose not to elaborate on it as it was not in issue before that case, *See Tan Meng Jee v. Public Prosecutor*, (1996) 2 SLR(R) 178, 36–40.

³⁶ *See, e.g.,* Siyuan, *supra* note 9, 562–563; PINSLER, *supra* note 10, 75–87; Hock Lai, *supra* note 10, 190–192; 195–198. The case has been cited in subsequent jurisprudence, but not for the part pertaining to § 11(b).

³⁷ Singapore also appears to be the only known Indian Evidence Act jurisdiction that has interpreted § 11(b) in the way Lee Kwang Peng v. Public Prosecutor has.

³⁸ Lee Kwang Peng v. Public Prosecutor, (1997) 2 SLR(R) 569, 43.

³⁹ ROBERTS & ZUCKERMAN, *supra* note 5, 99; TAPPER, *supra* note 7, 191–192; KEANE, GRIFFITHS AND MCKEOWN, *supra* note 24, 44–46.

⁴⁰ 1975 AC 421.

a case involving a boarding school headmaster accused of committing buggery with young students. At issue was whether evidence on one charge to corroborate evidence in respect of the other charge was correctly admitted at trial.

Lord Wilberforce opined that “there is no general or automatic answer to be given to the question whether evidence of facts similar to those the subject of a particular charge ought to be admitted. In each case it is necessary to estimate ... whether ... the evidence as to other facts tends to support [and] whether such evidence, if given, is likely to be prejudicial to the accused”.⁴¹ Boardman in effect superseded the Privy Council decision of *Makin v. Attorney-General for New South Wales* (‘Makin’),⁴² a case involving a couple accused of murdering a child. At issue was whether evidence of other babies buried in backyards of their previous residences was admissible. Lord Herschell had opined that similar fact evidence is inadmissible if adduced merely to show propensity to commit a crime, but may be admissible if it is relevant to disproving intent or to rebut a defence otherwise open to the accused.⁴³

But is either *Makin* or *Boardman* consistent with §§ 14 and 15 of the EA? The following view is particularly instructive:

“[W]hereas in a number of English cases propensity evidence was admitted via the second limb of the *Makin* rule, this approach is not possible under §§ 14 and 15 because of the scope of these provisions does not extend to the rebuttal of “any defence” raised by the accused. The result is that even extremely probative evidence which virtually confirms that the accused committed the offence charged will not be admissible because *actus reus* is excluded from the ambit of those sections ... whereas *Boardman* lays emphasis on the degree of probity of evidence irrespective of the purposes for which that evidence is adduced, §§ 14 and 15 assume that evidence will only be sufficiently probative if it comes within one or other of the fixed categories. Thus, whereas evidence of propensity to prove the commission of the crime would be admissible under the *Boardman* formulation, if sufficiently probative, such evidence is not so regarded by §§ 14 and 15 because the purpose for which it is adduced is outside the scope of those sections. Secondly, whereas the consideration of the prejudicial effect of the evidence is a vital aspect of the

⁴¹ *Id.*, 442. It should be noted that while it is true that the subsequent House of Lords decision in *Director of Public Prosecutions v. P.* (1991) 2 AC 447 clarified that there need not be any striking similarity in the facts before the evidence can be considered admissible, it did not change Lord Wilberforce’s formulation of the balancing test. The balancing test also famously reared its head again in *R v. Sang*, 1980 AC 402, a case involving entrapment.

⁴² 1894 AC 64.

⁴³ *Id.*, 65.

Boardman approach, it plays no part in the determination of admissibility under the sections ...”⁴⁴

This view is arguably fortified by a High Court decision in 2011 that remarked, in *obiter*, that the admissibility of similar fact evidence has to be determined according to the categories of relevance under §§ 14 and 15 of the EA and there can be no exclusion of similar fact evidence that is otherwise deemed relevant under those provisions.⁴⁵ However, these remarks have yet to be endorsed by the Court of Appeal, and while *Lee Kwang Peng* was also a High Court decision, it had followed a Court of Appeal decision (*Tan Meng Jee*) with regard to the claim that the balancing test is consistent with §§ 14 and 15.⁴⁶ In short, *Lee Kwang Peng* remains good law, and nothing in the 2012 amendments to the EA has changed that.

Having suggested that the balancing test cannot be said to be compatible with §§ 14 and 15 of the EA⁴⁷ (and therefore *Lee Kwang Peng* should not be considered correct in view of § 2(2)), what about § 11(b), notwithstanding its classification as a general relevancy provision? Although it may be argued that the phrase “highly probable or improbable” is similar to (and therefore

⁴⁴ PINSLER, *supra* note 10, 79 and 81.

⁴⁵ *Public Prosecutor v. Mas Swan bin Adnan*, 2011 SGHC 107, 107. It should be noted that even though *Boardman* has arguably been superseded by legislation (Criminal Justice Act, 2003) in England for some time already, the Court did not discuss such legislation in its decision.

⁴⁶ *Lee Kwang Peng v. Public Prosecutor*, (1997) 2 SLR(R) 569, 37–40; *Tan Meng Jee v. Public Prosecutor*, (1996) 2 SLR(R) 178, 48–49:

“[T]he admission of similar fact evidence, at least for the purposes identified in ss 14 and 15 ... should be governed by the balancing test adopted by [*Boardman*]. Such an approach is warranted both in principle as well as on the wording of the legislation itself ... the rationale of the rule excluding similar fact evidence is so that every person charged with an offence may only be convicted upon being proved to have committed the acts within the charge. It would be subverting established jurisprudence to allow conviction based on the particular disposition of the accused ... On the other hand, there may be cases where the interest of justice clearly outweigh any prejudicial dangers inherent in the evidence. No doubt, in this jurisdiction, the trial judge being the trier of fact will have to be familiar with the similar facts in order to rule as to its relevance. However, we think ingenious the argument that a strict enforcement of the similar fact rule is futile if the evidence has already been allowed to infiltrate the mind of the trial judge. All we say in response is that we are far more confident in the ability of judges to disregard prejudicial evidence when the need arises ... While the plain wording of the Evidence Act does seem to adopt a categorisation approach to similar fact evidence ... at least where the similar facts are being adduced to prove one of the matters identified in ss 14 and 15, a balancing process must take place”.

⁴⁷ While it is true that Malaysia – which has a highly identical EA to Singapore – has adopted the position in *Tan Meng Jee* as regards the balancing test (*see, e.g., Al Bakhtiar bin Ab Samat v. Public Prosecutor*, (2012) 4 MLJ 713, 30), they do not have the equivalent of § 2(2) and therefore have greater flexibility in developing their common law. Moreover, there appears to be nothing in Indian commentaries that suggests the balancing test is part of, or consistent with, the Indian equivalents of §§ 14 and 15. *See, e.g., VR MANOHAR, supra* note 14, 148–159.

consistent with) the idea of probative value, there is no phrase in § 11(b) that is similar to the idea of prejudicial effect. It may be plausible, of course, to argue that the concept of prejudicial effect is implied in § 11(b), in that “if a fact makes the fact in issue ‘highly probable’, the prejudicial effect of that fact will correspondingly be lowered”.⁴⁸ However, this line of reasoning has been disputed before, given that probative value and prejudicial effect are not necessarily always on opposite ends of a scale; the requirement of ‘highly’ is not found in the Boardman test; § 11(b) has not been applied in the context of other exclusionary rules;⁴⁹ § 11(b) is expressed in inclusionary and not exclusionary terms; and if § 11(b) were to be resorted to, what objection is there against it to be used for the *mens rea* aspect of the similar fact rule as well (thereby rendering the specific relevancy provisions otiose)?⁵⁰ In any event, there is a bigger reason why the similar fact rule in Singapore cannot remain as it is: the 2012 amendments to the EA and the misguided introduction of the concept of exclusionary discretion.

C. MISGUIDED INTRODUCTION OF DISCRETION TO EXCLUDE IN THE 2012 AMENDMENTS

1. Internal Inconsistencies

Before the 2012 amendments to the EA, there was nothing in the statute that conferred on the courts, discretion to exclude evidence once it had been found admissible under the EA, though as seen above this did not stop the Singapore courts from interpreting that this discretion could be exercised for similar fact evidence.⁵¹ The 2012 amendments changed this – but, as one would recall, supposedly only with respect to two provisions relating to hearsay and expert opinion evidence.

⁴⁸ PINSLER, *supra* note 10, 81.

⁴⁹ See *infra* note 60.

⁵⁰ Hock Lai, *supra* note 10, 167; Hor, *supra* note 11, 49–52; Siyuan, *supra* note 13, 408–409. In fact, one could make a case for using § 8(1) (another general relevancy provision) as well: “Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.”

⁵¹ See also Muhammad bin Kadar v. Public Prosecutor, (2011) 3 SLR 1205, 42–67, where the Court of Appeal held that it had discretion to exclude an accused’s procedurally irregular statements on the basis of the balancing test. Although statements generally do not fall under the EA, as will be explained, the application of the balancing test in Singapore needs to be more properly considered. *C.f.* SIR JAMES FITZJAMES STEPHEN, A DIGEST ON THE LAW OF EVIDENCE (1881), Art. 2: “Evidence may be given in any proceeding of any fact in issue, and of any fact relevant to any fact in issue unless it is hereinafter declared to be deemed irrelevant, and of any fact hereinafter declared to be deemed to be relevant to the issue whether it is or is not relevant thereto. Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all circumstances of the case.”

First, § 32(3) was introduced, and it states that while a statement by a person who is dead or cannot be found (thus a hearsay statement) may be relevant, it “shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant”. *Second*, § 47 was expanded to include a new sub-section (4), and it states in the same terms that while an expert opinion that may render assistance to a court is a relevant fact, it “shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant”.⁵²

There is a litany of problems with these two seemingly simple amendments that were meant to narrow the admissibility of hearsay and expert opinion evidence (having expanded their scope of admissibility through other aspects of the amendments).⁵³ The most obvious problem for present purposes is that *first*, this exclusionary discretion has not been extended to the similar fact rule provisions found in §§ 14 and 15 of the EA. The simple explanation (but by no means legitimate justification) for this is that the Ministry of Law – the body that had spearheaded the consultation processes leading up to the 2012 amendments – had not contemplated amending the provisions on similar fact as it had only proposed to amend the provisions on legal professional privilege, expert opinion, computer output, hearsay, and impeachment of rape victims.⁵⁴

Regardless of the acceptability of this reason, limiting the exclusionary discretion to the hearsay and expert opinion evidence provisions would, on basic statutory interpretation principles,⁵⁵ suggest that such discretion is not available when it comes to similar fact evidence and/or other relevancy provisions in the EA.⁵⁶ Oddly, Parliament was fully aware of this as a problem (a Member of Parliament had raised this during the second reading of

⁵² Parenthetically, one would notice that these two particular amendments confirm that the EA indeed does not distinguish between relevance and admissibility. *See also* Siyuan, *supra* note 14, 8–9; Pinsler, *supra* note 28, 235.

⁵³ Specifically, the number of hearsay exceptions increased, while the categories of admissibility of expert opinion evidence were considerably broadened.

⁵⁴ Ministry of Law, “*Proposed Amendments to the Evidence Act*”, January 16, 2012, available at <http://www.mlaw.gov.sg/news/press-releases/proposed-amendments-to-the-evidence-act.html> (Last visited on February 14, 2014).

⁵⁵ *See, e.g.*, *Highway Video Pte Ltd v. Public Prosecutor*, (2001) 3 SLR (R) 830, 26; *Mohamed Hisham bin Sapandi v. Public Prosecutor*, (2011) 4 SLR 868, 8.

⁵⁶ *See also* Pinsler, *supra* note 28, 216–217:

“The question arises as to whether the limitation of the discretion to exclude evidence within the scope of § 32(3) and 47(4) ignores the need for a discretion to exclude evidence admissible under other provisions of the EA. Should there be a general discretion to exclude in the EA, one that is anchored by broad criteria so that the courts are provided with the flexibility to respond appropriately to the particular circumstances of *every* case? This leads to the further consideration of how a discretionary mechanism can effectively operate in conjunction with the rules of admissibility and thereby enhance the integrity of the trial process”.

the bill amending the EA), but decided to leave the amendments as it were.⁵⁷ To be clear, however, the point here is not that the exclusionary discretion should have been extended to all exceptions to the exclusionary rules captured by their corresponding specific relevancy provisions in the EA, but rather, the EA has now become even more internally inconsistent and structurally fractured after the amendments.

The second problem with the introduction of exclusionary discretion is that the Parliament had pressed ahead with the amendments despite various fundamental self-contradictions being expressed when the bill was debated. To cite one example, on the one hand, the Minister for Law stated that under the EA, if a piece of evidence “is irrelevant, as a matter of law, it is inadmissible. If it is unreliable, then it should not be admitted. By definition, the judge applies the law, irrelevant and unreliable evidence should not be in the first place”.⁵⁸ These words would suggest that under the EA and in a system like Singapore which uses judges as fact-finders, the question of exclusion simply does not and cannot arise. If a piece of evidence is irrelevant and/or unreliable, it will not be admitted; if it is admitted, its weight can be varied accordingly if necessary. Yet in the very same debate, the Minister for Law also said the amendments simply confirm that the courts have always had a “residual discretion” to exclude (hearsay and expert opinion) evidence all along; the purported justification for this was that the scope of admissibility for hearsay and expert opinion evidence would broaden after the amendments, so there needed to be a check against abuse.⁵⁹

But if the courts already had this exclusionary discretion even before the amendments, why would providing for it in the EA now act as a check against abuse? If it was acknowledged by Parliament that the EA does not actually contemplate the exclusion of any evidence, how would the introduction of a (albeit supposedly pre-existing) residuary discretion be consistent with the EA? Moreover, in most, if not all other common law jurisdictions, the exclusionary discretion (where it exists) can be used in all instances of exclusionary rules (and even beyond that) and is not confined to hearsay and expert opinion evidence.⁶⁰ This was probably what the objecting Member of Parliament was alluding to. But even if it is assumed that the exclusionary discretion found in §§ 32(3) and 47(4) was impliedly intended by Parliament⁶¹ to also apply to similar fact evidence, there are other problems.

⁵⁷ Singapore Parliamentary Debates Official Report, *supra* note 28.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Siyuan, *supra* note 13, 405; Siyuan & Poon, *supra* note 21, 537; Report of the Law Reform Committee on Opinion Evidence, *supra* note 25, 4–5; R v. Sang, 1980 AC, 402, 452.

⁶¹ It should be noted in this regard that under § 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed), courts are obligated to interpret all statutory provisions purposively.

2. Strange Choice of Words for New Test

To begin with, the phrase “in the interests of justice”, which is common to §§ 32(3) and 47(4), is in the context of what has been outlined thus far, a strange choice of words. As mentioned, the conventional language used in some common law jurisdictions – and indeed as adopted in local cases such as *Lee Kwang Peng* – for the discretion to exclude (relevant) evidence involves weighing probative value and prejudicial effect.⁶² It is not at all clear if this new test of “in the interests of justice” is meant to be the same as the weighing exercise or to be used in conjunction with it (or, as *Lee Kwang Peng* has suggested, before the application of the relevant provisions in the EA), not to mention that the phrase is so broad that it does not add anything to what a court is supposed to do in any given case anyway.⁶³ As a commentator recently noted:

“The terminology ... does raise conceptual and practical concerns ... One must assume that the provisions of the EA (indeed, the content of every statute) were drafted with a view to the interests of justice. Therefore, as a matter of principle, how is it that the court should be entitled to decide that the admissibility of facts within the scope of [§§ 32 and 47] would not be in the interests of justice ... While unreliability may well be a pertinent factor to be considered pursuant to §§ 32(3) and 47(4), it is obviously not the only concern given the broad context of the terminology “interests of justice” ...”⁶⁴

Unfortunately, the parliamentary debates are also not particularly illuminating, although phrases such as “inherent jurisdiction to exclude prejudicial evidence” and “probative value of the evidence versus the prejudicial value of the evidence” were used by the Minister for Law when discussing this aspect of the bill.⁶⁵ In addition, the Law Reform Committee that had prepared

⁶² See also *Tan Guat Neo Phyllis*, *supra* note 13, 126; *Muhammad bin Kadar v. Public Prosecutor*, (2011) 3 SLR 1205, 42–67, 140–147; *Pinsler*, *supra* note 28, 225.

⁶³ *Siyuan*, *supra* note 14, 13–14.

⁶⁴ *Pinsler*, *supra* note 28, 235–236.

⁶⁵ Singapore Parliamentary Debates Official Report, *supra* note 28. See also Jeffrey Pinsler, *Whether a Singapore Court has a Discretion to Exclude Evidence Admissible in Criminal Proceedings*, 22(2) SAclJ 360–361 (2010):

“The doctrine of inherent power exists in Singapore ... Indeed, the Singapore courts have acknowledged their entitlement to exercise their inherent power in criminal cases. As the law of evidence is adjectival in nature, and has a fundamental role in the court’s process by governing the scope and presentation of information which a court is to rely upon, the court is justified in exercising its inherent power to exclude evidence which, if admitted, would cause injustice and consequently compromise its process. There is nothing in the EA which excludes the application of this doctrine. Section 2(2) [does] not affect the court’s inherent power, which is derived independently from the court’s status. Furthermore, s 5 of the EA, the governing provision on admissibility, does not compel the court to admit relevant evidence ... the court would only exercise

a report on reforming the expert opinion evidence provisions in the EA for Parliament's consideration was also equivocal as how the court's exclusionary discretion should be formulated and defined.⁶⁶ Perhaps this should not be surprising, given the different statutory approaches taken in different jurisdictions as regards a court's general power to exclude evidence.

For instance, in England and Wales, § 78(1) of the Police and Criminal Evidence Act 1984 states:

“In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”.

In Australia, § 137 of the Evidence Act 1995 states: “In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant”.⁶⁷ In New Zealand, § 8(1) of the Evidence Act 2006 states: “In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will ... have an unfairly prejudicial effect on the proceeding; or ... needlessly prolong the proceeding”.⁶⁸ And in the United States, § 403 of the Federal Rules of Evidence states: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”.

There are thus various ways in which a court's exclusionary discretion can be formulated and justified, and it is not clear if the test of “in the

its inherent power to uphold the aims of the EA by ensuring that its rules do not undermine the ultimate purpose of the statute, which is to secure a fair trial”.

⁶⁶ Report of the Law Reform Committee on Opinion Evidence, *supra* note 25, 4–5. The Committee did come close to suggest using prejudice and confusion as bases of exclusion, however.

⁶⁷ In addition, § 135 states: “The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might: (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time.” Further, § 136 states: “The Court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might: (a) be unfairly prejudicial to a party; or (b) be misleading or confusing”.

⁶⁸ In addition, § 8(2) states: “In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence”.

interests of justice” is meant to closely emulate any jurisdiction in particular and whether it supersedes or operates in conjunction with any existing common law test. To add to the confusion, the Minister for Law said during the parliamentary debates that a judge, in deciding whether to admit hearsay or expert opinion evidence under the amended EA provisions, “must ask himself whether the interests of justice require the admissibility of the evidence in the first place. And if it does, what weight will he ascribe to it”. At first blush, this seems consistent with the language of §§ 32(3) and 47(4) of the EA, which may give the impression that the provisions are not talking about what evidence can be excluded after it is deemed admissible but rather what can be admissible in the first place. This will be contended below, but to be sure, there is more than a semantic but a practical consequence of distinguishing between what is admissible/admitted and what is excludable/excluded. Specifically, if a piece of evidence is not part of the evidentiary record at all, the option of weight-assignment is completely foreclosed. Further, an appellate court has much less, if not virtually no room to interfere with what is not part of the evidentiary record, as fact-finding is not its province.⁶⁹ It is therefore imperative to determine if there is actually such a concept as exclusion (under the EA), and if a piece of evidence is even going to be part of the record in the first place (for it will not be if it is inadmissible *ab initio*).

It is unlikely that §§ 32(3) and 47(4) were not meant to introduce an exclusionary discretion. As mentioned and confirmed by Parliament, the admissibility of evidence under the EA is determined purely by relevancy and reliability; the existing controlling mechanism is weight. Parliament must have intended §§ 32(3) and 47(4) as an additional exclusionary discretion independent of the question of admissibility, unless it intended the phrase “in the interests of justice” to be a mere reiteration of the admissibility criteria of relevance and reliability. This is unlikely, and it should not be assumed that Parliament intended to add words to a statutory provision without meaning to alter its content. Moreover, Parliament acknowledged that the criteria of relevance and reliability apply to all relevancy provisions in the EA,⁷⁰ so this is another reason why it could not have meant the phrase “in the interests of justice” to be a reiteration of those touchstones – “in the interests of justice” only appears in and applies to §§ 32(3) and 47(4), and nowhere else.

Proceeding on the basis that Parliament had intended instead to equate the test of “in the interests of justice” purely with Boardman’s test of balancing probative value and prejudicial effect to exclude (all manner of) admissible evidence, questions have nevertheless been raised as to what these

⁶⁹ *Susilawati v. American Express Bank Ltd.*, (2009) 2 SLR(R) 737, 51; *Lim Koon Park v. Yap Jia Meng Bryan*, 2013 SGCA 4, 37.

⁷⁰ Singapore Parliamentary Debates Official Report, *supra* note 28.

terms mean, how the test operates, and whether there is a coherent normative justification for the test.⁷¹

3. Problems with the Balancing Test

The definitional question of what probative value and prejudicial effect mean has never been addressed by the Singapore courts despite their consistent use of the Boardman test. The balancing test, being a common law construct, defines probative value as rationally or logically probative, but the EA defines relevance as legally probative (and therefore in narrower) terms. This disconnect immediately poses a problem. As for prejudicial effect, the point has already been made that its meaning is clearly not confined to a lack of probative value or relevance; if that is the case, this affects the operation of the test as well, since a balancing exercise presupposes antithetical attributes on opposing ends of the same scale.⁷² Moreover, ‘prejudice’ clearly assumes different meanings in different contexts: for instance, for hearsay evidence, it could refer to intrinsic unreliability generally conceived, but for similar fact evidence, it could refer to distorting bias. A call to ‘refresh’ the balancing test has thus been made in the following terms:

“The probative value/prejudicial effect balancing test evolved in response to the danger that the jury might overestimate the probative value of the evidence (as in the case of an unrelated previous conviction or other evidence of bad character), or that it might react with a moral bias against the accused (because of the nature of the offence or the evidence). In this specific context, prejudicial effect involves an emotional or irrational response on the part of the trier of fact, unjustified by logical reasoning ... [However] [s]ituations often arise in which the court is not concerned with the effect of evidence and resulting prejudice in its orthodox sense, but with other countervailing factors that demand the exclusion of the evidence ... The probative value/prejudicial effect balancing test did not emerge from a developed legal principle but from a longstanding practice of the courts to prevent injustice resulting from admissible evidence to which the jury might accord a degree of weight out of all proportion to its actual probative value ... the optimal approach would be to balance the significance of the evidence (its probative value or importance to one or more of the issues) against any factors that militate

⁷¹ As these questions have already been explored in greater detail in three recent commentaries, (see Siyuan, *supra* note 13; Siyuan, *supra* note 14; Siyuan and Poon, *supra* note 21) they will only be explored summarily here.

⁷² See also Siyuan, *supra* note 13, 407–409; Siyuan & Poon, *supra* note 21, 538–541; Ho Hock LAI, A PHILOSOPHY OF EVIDENCE: JUSTICE IN SEARCH FOR TRUTH 307 (2008).

against its admission ... admissible evidence may be excluded if it does not justify the disadvantages that would result from its admission. These would include additional costs ... delay in the proceedings ... the distraction of the court and/or the parties ... its tendency to confuse or its misleading effect ... lack of reliability ... and prejudice (in the sense of evidence that would have the effect of being substantively unjust or procedurally oppressive). Clearly, the less significant or probative the statement, the less forceful the countervailing factors would need to be to justify exclusion”.⁷³

But there are still problems with this modified approach. For instance, there will be occasions where the probative value of a piece of evidence can only be ascertained after it is seen in proper light and context of the entire evidentiary record; what may initially be characterised as tangential or irrelevant may turn out to be relevant and crucial evidence. Thus, similar fact evidence, in spite of their apparent prejudicial effect, has been admitted in certain cases for the purpose of establishing background and context.⁷⁴ Indeed, as Singapore has long abolished the jury system, this has led the Court of Appeal to opine (perhaps not coincidentally, in a similar fact decision) that “the wrongful admission of evidence of bad character or disposition of the accused does not necessarily mean that the judge or judges have been adversely influenced by such evidence. We must bear in mind that judges are trained to assess evidence objectively and to sift the wheat from the chaff”.⁷⁵

In other words, without a jury to shield and with trial judges who are purportedly professionally trained to be immune to the effects of so-called prejudicial evidence, there is lesser need in the Singapore criminal justice system for the fact-finder to individually consider the probative value or prejudicial effect of each piece of evidence at the admissibility stage – after all, the trial judge has the option to assign the appropriate weight to the evidence in question before making his judgment (and where written judgments are rendered, this is usually explained). However, there will be occasions where a piece of evidence may not be amenable to weight-assignment but has to be rejected completely for consideration of admissibility for epistemic reasons. In the passage cited above, it was suggested that substantive injustice or procedural oppression may be a possible ground to do so. Indeed, the Court of Appeal recently suggested (in a non-EA context) that where the procedural requirements in the recording

⁷³ Pinsler, *supra* note 28, 225–226 and 236–237.

⁷⁴ PINSLER, *supra* note 10, 89–91.

⁷⁵ Wong Kim Poh v. Public Prosecutor, (1992) 1 SLR(R) 13, 14. *See also* Chan Sek Keong, *The Criminal Process – The Singapore Model*, 17 SING. L. REV. 456 (1996); VR MANOHAR, *supra* note 14, 2; Attorney-General of Hong Kong v. Siu Yuk-Shing, (1989) 1 WLR 236, 241. It should be noted that while the EA was based on late-19th-century English rules of evidence – or rules that would have made more sense for jury trials – Stephen preferred the Indian Evidence Act to be used for bench trials.

of statements have been flagrantly violated, the court ought to exercise its inherent jurisdiction to exclude the (relevant) evidence so as to, *inter alia*, prevent injustice at trial.⁷⁶

These references to inherent jurisdiction and prevention of injustice at trial should immediately bring to mind the test of “in the interests of justice” introduced in §§ 32(3) and 47(4) of the EA: one would recall that the term “inherent jurisdiction” was used by the Minister for Law to describe the basis of the test when the bill amending the EA was debated, while it would also be reasonable to assume that “in the interests of justice” is similar to the concept of prevention of injustice. In this connection, whereas the Singapore courts have seen fit to tap into their inherent powers⁷⁷ in the civil realm (or simply to discuss them without invocation) from time to time, they have hardly done so in the criminal realm.⁷⁸ Notably, the justification for invoking inherent powers in the civil realm is a consistent one: the court is the master of its own process, and therefore it can make certain orders pursuant to its residual inherent powers (that is, powers that are independent of any statutory conferral) to prevent an abuse of its process and to preserve its moral legitimacy as a tribunal.⁷⁹ Is this concept of a court exercising its inherent powers to regulate the civil process transposable to the criminal realm?

In principle, there should be no serious objection, since generally speaking greater rights and liberties are at stake in prosecutions, and the court is meant to be (within limits) a guardian of such rights and liberties.⁸⁰ Be that as it may, the very nature of inherent powers means that they can only be invoked in exceptional and narrowly defined circumstances, even in the criminal realm. These circumstances may not lend themselves readily to statutory elaboration, but the broad phrase “in the interests of justice” in §§ 32(3) and 47(4) of the EA seems immediately at odds with the idea of exceptional and narrowly defined

⁷⁶ *Muhammad bin Kadar v. Public Prosecutor*, (2011) 3 SLR 1205, 42–67, 52–53. In a somewhat related vein, the Court of Appeal in *Teo Wai Cheong v. Crédit Industriel et Commercial*, 2013 SGCA 33 also suggested that evidence given in a prior trial that was not cross-examined under fair circumstances would be excluded from the evidentiary record if sought to be re-admitted as hearsay evidence (via § 33 of the EA).

⁷⁷ The Court of Appeal in *Re Nalpon Zero Geraldo Mario*, 2013 SGCA 28, 27–42 has ruled that a court invoking its “inherent jurisdiction” is equivalent to it invoking its “inherent powers”. *C.f.* Chen Siyuan, *Is the Invocation of Inherent Jurisdiction the Same as Exercise of Inherent Powers?*, INT’L J. EVIDENCE & PROOF (forthcoming).

⁷⁸ See generally Goh Yihan, *The Jurisdiction to Reopen Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal*, SING. J.L.S. 395 (2008); Goh Yihan, *The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of their Exercise*, SING. J.L.S. 178 (2011).

⁷⁹ See, e.g., *Wellmix Organics (International) Pte Ltd. v. Lau Yu Man*, (2006) 2 SLR(R) 117, 81–102; *UMCI Ltd. v. Tokio Marine & Fire Insurance Co. (Singapore) Pte Ltd.*, (2006) 4 SLR(R) 95, 89–96; *Management Corporation Strata Title Plan No 301 v. Lee Tat Development Pte Ltd.*, (2011) 1 SLR 998, 55–57; *Aurol Anthony Sabastian v. Sembcorp Marine Ltd.*, (2013) 2 SLR 246, 67–68.

⁸⁰ THIO LI-ANN, *A TREATISE OF SINGAPORE CONSTITUTIONAL LAW* 451–452 (2012).

inherent powers.⁸¹ If so, the prevention of injustice – assumed here to mean the same as “in the interests of justice” – is also conceptually wider than the exercise of inherent powers. Moreover, while it may appear that the prevention of injustice has been used as a justification to exclude evidence in other jurisdictions,⁸² there are two important nuances to note.

First, the actual justification identified in these cases is more specific than prevention of injustice – it is that of prevention of abuse of process. The semantic difference is not insignificant, as the concept of injustice has more than a procedural dimension to it. It has a potential substantive dimension to it as well. *Second* and more importantly, such a justification has been applied, *inter alia*, in the context of so-called entrapment evidence. However, in Singapore, such evidence has been ruled to be admissible – ironically, on the basis that the probative value of entrapment evidence will always exceed its prejudicial effect – and neither will its admissibility amount to an abuse of process.⁸³ If the balancing test is normatively rationalised on the basis of prevention of abuse of process, then by parity of reasoning the local cases on entrapment must be considered wrong. All things considered, it seems that neither the balancing test nor the concept of invoking inherent powers is helpful in understanding what “in the interests of justice” means.

III. LOOKING AT THE FUTURE AND CONCLUDING REMARKS

A. INTRINSIC DIFFICULTIES PRESENTED BY THE EA

It should be clear by now that the EA is a complex and nuanced statute, and any attempt to amend it in an *ad hoc* fashion will always be fraught with difficulty. As a commentator once presciently forewarned:

“A number of the 19th century rules [of evidence] were shown to be based on falsifiable psychological assumptions, dubious epistemic premises or outdated political or social mores: these were modified, overruled or repealed not just by judicial decision alone but also by legislation in other jurisdictions. However, the changes in the law of evidence here have been few and far between, and through judicial decision rather than legislation, though civil procedure law has undergone several important institutional changes. With whatever

⁸¹ See also Yung, *supra* note 6, 95–96, where it was noted that the EA (pre-2012 amendments) was relatively deficient in reflecting values of fair trial, procedural fairness, fairness as equality, and integrity.

⁸² See, e.g., R v. Looseley and Attorney General’s Reference (No 3 of 2000), (2001) 1 WLR 2060.

⁸³ Law Society of Singapore v. Tan Guat Neo Phyllis, (2008) 2 SLR(R) 239, 116–139. See also Wong Keng Leong Rayney v. Law Society of Singapore, (2007) 4 SLR(R) 377, 27.

few changes that were made, the code resembles very much an historic artefact preserving much of its structure, but with new additions by different artisans showing little concern for connectivity to the design and purpose of the original legislation. A holistic view of the whole enterprise is missing, making the task of judges and lawyers in understanding and interpreting it and raising the question whether the [EA] – this statutory icon – should remain standing or be deconstructed and remade. Both internal and external incoherence exists in the current code, which requires attention”.⁸⁴

Indeed, the 2012 amendments to the EA amply demonstrate Parliament’s piecemeal approach towards modernising the EA, with little or maybe even no appreciation of the statute’s unique conceptualisation of relevance. It would also not be fanciful to suggest that the amendments could have been largely (but certainly not exclusively) motivated by the use of hearsay and expert opinion evidence in civil and commercial, rather than criminal matters.⁸⁵ To a limited extent this mirrors developments elsewhere in the world as regards civil and commercial matters: the traditional prohibitions against hearsay evidence have largely been relaxed or even abolished, and while there have been attempts to better regulate its admissibility (with the main aim of

⁸⁴ Yung, *supra* note 6, 53–54.

⁸⁵ See Singapore Parliamentary Debates Official Report, *supra* note 28:

“Ms Sylvia Lim raised her fundamental point ... that by harmonising civil and criminal cases for the hearsay exception rules to both civil and criminal cases, are we taking it too far, would evidence which is prejudicial to the accused now be admissible, and would that weaken supposedly the administration of justice and lead to ... convictions which should not have been made in the interests of justice ... I have made the point that there are contrasting arguments around the world as to whether we should have the hearsay rules or, in fact, abolish them altogether ... There is a strong argument to say that all relevant evidence should be presented to a court ... the hearsay rules and other such exclusionary rules really developed in the context of jury trials ... it is really an assessment of the probative value of the evidence versus the prejudicial value of the evidence ... The black-and-white approach that should be taken is to the fundamental principle that the judge must at the end of the day be satisfied beyond reasonable doubt on the guilt of the accused, and we should set out clearly what the law disapproves of, which is evidence obtained by coercion and various categories which the law has set out. But when it comes to issues like hearsay, then there is the question of a judgment call. The structure we have put up is that we have set up some safeguards. We also give the overriding jurisdiction to the courts to exclude evidence, both in civil and criminal cases ... And do not forget that, even if the evidence is allowed in, there is the question of weight”.

It is probably no coincidence that the other amendment that received great attention was that of legal professional privilege – which has a far greater synonymy with the commercial context. And perhaps another reason why the similar fact rule provisions were left intact is that the rule has a much greater synonymy with criminal, rather than civil matters. See also Pinsler, *supra* note 28, 216–217 and 242.

saving costs), expert opinion evidence is increasingly thought to be valuable to the court, especially in certain scientific and esoteric fields.⁸⁶

Such developments have been possible, in no small part due to the recognition that in civil and commercial litigation, greater inter-party autonomy can be afforded as equality between private parties is (often rightly) assumed. This is, however, less possible (and desirable) in criminal matters, where the state often stands in a far superior position *vis-à-vis* the accused person in terms of resources and possession of evidence. Further, whereas some jurisdictions have created separate evidence legislation for civil and criminal matters, in Singapore, the EA applies to both types of proceedings. Combined with the unique features of the EA (its use of legal rather than logical relevance; the distinction between general and specific relevance; and § 2(2)),⁸⁷ any attempt to amend the EA, particularly with regard to its relevancy provisions, is an extremely difficult task.

In light of the aforementioned challenges, what are the possible ways forward for the EA in general and the similar fact rule in particular? In this paper, the following problems were identified. *First*, the 2012 amendments, in upending the admissibility paradigm of the EA, did not reflect any understanding of the three most fundamental features of the statute: the restriction in importing common law developments by virtue of § 2(2); the use of legal rather than logical relevance; and the distinction drawn between specific and general relevancy. The interpretation of all relevancy provisions in the EA, including those on similar fact, has been thrown into disarray. *Second*, no reason was given as to why only the hearsay and expert opinion evidence provisions were amended, but not the provisions on the similar fact rule. A possible explanation is that Parliament was mainly concerned about evidence frequently used in civil and commercial matters, though it was aware that the EA applied to criminal matters as well. *Third*, the jurisprudence interpreting the similar fact rule provisions in the EA was riddled with doubt and inconsistency, and the amendments represent a missed opportunity to rectify this. Instead, §§ 32(3) and 47(4) may have changed the admissibility paradigm for the similar evidence without the Parliament knowing it. *Fourth*, the statutory introduction of the judicial discretion to exclude relevant evidence, regardless of whether it is assumed to apply to other relevancy provisions as well, has not been well thought-out, particularly with respect to the overly broad test of “in the interests of justice”. Ironically, this test may well be the same as the one in *Boardman* – a case involving similar fact.

⁸⁶ ROBERTS & ZUCKERMAN, *supra* note 5, 364–365, 502; TAPPER, *supra* note 7, 542–547, 586; KEANE, GRIFFITHS & MCKEOWN, *supra* note 24, 322–323, 525–526.

⁸⁷ See also Siyuan, *supra* note 14, 8–11, as to how the amendments to the expert opinion provisions have introduced logical relevancy and further blurred the line between general and specific relevance.

B. POSSIBLE WAYS FORWARD

Given the battered shape that it is in now, it is tempting to advocate for the complete repeal of the EA. Iconic as it is for a piece of legislation, it has not kept pace with modern common law developments even after several rounds of amendments staggered over the decades – the most recent of which has even made it more incoherent than before. However, pragmatically speaking, it will probably be deemed politically counterproductive to repeal the EA so soon after it was amended (which was also done after the solicitation of a wide range of views over more than a decade).⁸⁸ It is also unlikely that a new EA will be created anytime soon, if the recently reintroduced Criminal Procedure Code⁸⁹ is anything to go by.⁹⁰ Indeed, the parting words from the Minister for Law before the bill was passed in Parliament were to take a wait-and-see approach to see how the courts deal with the amended provisions, so it seems one should not hope for the Criminal Procedure Code to be expanded to become the sole regulator of the admissibility of criminal evidence either.⁹¹ In the circumstances one is minded to conclude that since the EA is only likely to be amenable to (more) piecemeal changes in the near future, that is all that one should hope and strive for. At the same time, however, the EA is in desperate need of proper reform, given the yawning disconnects between its conceptualisation of relevance and modern judicial and statutory responses to evidential issues. In light of this, perhaps the following recommendations, which would apply as the EA currently does to both civil and criminal proceedings, can be briefly considered (that is, assuming that neither the EA is repealed nor a new criminal evidence statute is created).

First, § 2(2) has outstayed its welcome and should be removed. Other Indian Evidence Act jurisdictions which had similar provisions have not kept them,⁹² and it is not difficult to see why: it no longer serves its original purpose, and in getting around it courts have distorted the provisions and structure of the EA beyond recognition so as to accommodate modern developments in evidence law. There may be a fear that repealing § 2(2) will give courts *carte blanche* to cite and apply foreign sources of law in an unprincipled manner, but this has never been a real problem in other statutory contexts devoid of § 2(2)-type provisions, not least because statutory law is already by definition a superior source of law to case law. As Singapore continues to develop its autochthonous legal system in all facets of the law, the arbitrary invocation and reliance on foreign law has become less of a concern as well.⁹³ The courts

⁸⁸ Singapore Parliamentary Debates Official Report, *supra* note 28.

⁸⁹ Cap 68, 2012 Rev Ed.

⁹⁰ JENNIFER MARIE, THE JOURNEY FROM CONCEPTION TO FRUITION TOOK TWO DECADES: THE CRIMINAL PROCEDURE CODE OF SINGAPORE ix (2012).

⁹¹ Singapore Parliamentary Debates Official Report, *supra* note 28.

⁹² Siyuan, *supra* note 13, 400.

⁹³ See generally Goh Yihan & Paul Tan, *An Empirical Study on the Development of Singapore Law*, 23(1) SAclJ 176 (2011).

should at least be given freer rein to consider foreign developments in evidence law without being unduly hampered by an analysis of whether such developments are strictly consistent or not with the EA.

Second, a decision should be made as to whether the general relevancy provisions or the specific relevancy provisions should be retained/ repealed, as their continued co-existence is fundamentally problematic. As long as the EA maintains an inclusionary rather than exclusionary approach towards admissibility of evidence, it may make more sense to repeal the general relevancy provisions as they are overly broad and potentially render the specific relevancy provisions otiose. The specific relevancy provisions should then be expanded and further enumerated as is necessary; general relevancy provisions that have been properly used to admit *de facto* exceptions to exclusionary rules may be ported over as well (such as § 6, the basis of *res gestae* evidence).⁹⁴ What about § 11 then – should it be ported over as a basis to admit *actus reus* similar fact evidence? Insofar as it was never meant to be used to admit similar fact evidence, and insofar as its language is too broad for the similar fact rule, it should not be ported over.

This leads us to the *third* recommendation. How then should the similar fact rule be expressed statutorily? The preliminary issue that arises is whether §§ 14 and 15 should be retained. Insofar as they only cover the *mens rea* aspect of the similar fact rule, they should be repealed and replaced with a provision that covers both the *actus reus* and *mens rea* aspects of the rule – this also solves the problem of § 11. The recommended replacement provision, inspired in part by current Australian legislation,⁹⁵ would comprise two parts most commonly associated with similar fact scenarios: one pertaining to tendency (or propensity) and the other pertaining to coincidence (which would include extreme similar facts like *modus operandi*).⁹⁶ The touchstones of relevance and reliability will be built into the replacement provision, and it could tentatively look something like this:

1. Evidence of the past conduct of a person or a tendency that a person has or had is admissible to prove that a person has or had a tendency to act in a particular way or to have a particular state of mind if the court thinks the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value and is reliable.

⁹⁴ Siyuan, *supra* note 14, 9; PINSLER, *supra* note 10, 41–43 and 75–77.

⁹⁵ Evidence Act 1995, §§ 97–98. Although § 101 of this statute goes on to state that the balancing test may be applied to exclude admissible tendency or coincidence evidence, this section will not be adopted for the reasons that have been set out in this paper as to why the balancing test has no place in the EA. Moreover, §§ 97, 98 have been reworded significantly in the proposed replacement provision.

⁹⁶ See also JEREMY GANS AND ANDREW PALMER, UNIFORM EVIDENCE 185–186 (2010).

2. Evidence that two or more events occurred is admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally if the court thinks the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value and is reliable.
3. The party seeking to adduce either of the above evidence must give reasonable notice in writing to each other party of the party's intention to adduce the evidence.

To be clear, the option of assigning less weight to admissible but suspect evidence will remain open, and if the general relevancy provisions are retained, the operation of these new provisions will not affect the admissibility of circumstantial evidence (provided that the relevant general relevancy provisions are satisfied). In addition, some guidance as to what constitutes “significant probative value” may be gleaned from Australian cases that have interpreted the legislation that has inspired this reformative proposal. There are three factors: the cogency of the evidence relating to the conduct of the relevant person (thus, the evidence should not be inherently vague or non-contextual); the strength of the inference that can be drawn from the evidence as to the tendency to act in a particular way (thus, the evidence cannot only weakly indicate that the alleged tendency exists); and the extent to which the tendency or absence of coincidence increases the likelihood that the fact in issue occurred (thus, the proof of the alleged pattern must contribute to resolving the particular factual dispute in question).⁹⁷

Fourth and finally, the balancing test and the test of “in the interests of justice” (whether or not they refer to the same test) should be abolished (hence §§ 32(3) and 47(4) of the EA should be repealed).⁹⁸ The test is too broad and vague, and it also conflicts with the EA's conceptualisation of relevance and admissibility. The safeguard of weight, particularly in a non-jury system like Singapore, suffices. Concomitantly, the current case law that supports the

⁹⁷ *Id.*, 190–191. See also HOCK LAI, *supra* note 72, 304:

“the probative value of the accused's disposition depends on the availability of evidence, not only of its existence and precise nature, but also of the presence of conditions in the circumstances of the case that would activate the first-order desire to act in the alleged manner. It also depends on the existence of other relevant traits that might be elicited by the situational features and of the effect they have on each other”.

⁹⁸ To repeal a newly introduced provision – as opposed to the entire statute – is not unprecedented in Singapore. Certain sections of the Criminal Procedure Code were repealed just months after their introduction.

Boardman approach in any form should be considered bad law, though this need not be expressed statutorily. Before we depart, there is still the matter of the prevention of abuse of process as a normative prism to analyse the EA. While it may seem logical to have a provision that states that the court can do anything within its power to prevent any abuse of its process,⁹⁹ it remains unclear what practical consequence this would yield. Certainly the result that should be avoided is the exclusion of evidence, but beyond that this issue warrants much further thought – in another endeavour.

⁹⁹ See, e.g., Australia's Evidence Act 1995, § 11.