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Case Note

RECENT DEVELOPMENTS CONCERNING SIMILAR FACT EVIDENCE IN SINGAPORE

Pushing Boundaries of Admissibility

Public Prosecutor v Ranjit Singh Gill Menjeet Singh
[2017] 3 SLR 66

Micheal Anak Garing v Public Prosecutor
[2017] 1 SLR 748

This piece addresses two recent local decisions on similar fact evidence that demonstrate the court's difficulties with reconciling the provisions of the Evidence Act with a more flexible approach that can be developed through the common law. These two cases extend the basis for admitting similar fact evidence beyond ss 11(*b*), 14 and 15 of the Evidence Act. The application of the common law balancing test comparing prejudicial effect and probative value has also been broadened to consider factors such as the timing of the objection to the evidence and whether a co-accused wishes to rely on the similar fact evidence. Yet, the cases do not discuss the conceptual and normative justification for so doing, taking us further down the path of pragmatism over principle.

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I. Introduction

1 Over the past few decades, the state of the rules surrounding the admissibility of similar fact evidence[1] in Singapore has been consistently

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1 "The rules governing similar fact evidence concern the exceptional circumstances in which the accused's acts on other occasions (ie, occasions other than the one

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described in rather dire terms, such as facing "intractable difficulties",[2] being difficult to "make sense of",[3] and "tricky" to formulate.[4]

2 For the purposes of the discussion in this case note, the current Singapore approach to similar fact evidence may be said to be embodied in three decisions. The first is the Court of Appeal decision of *Tan Meng Jee v Public Prosecutor*[5] ("*Tan Meng Jee*"). In that decision, the court superimposed the common law balancing test of *Director of Public Prosecutions v Boardman*[6] ("*Boardman*"), where probative force of a piece of evidence is weighed against its prejudicial effect, onto ss 14 and 15 of the Evidence Act,[7] which relate to using past similar acts to prove a state of mind. The words of ss 14 and 15 do not reference any balancing of prejudicial effect and probative value although they do embody the concept of probative value through their requirements.[8] Nevertheless, the Court of Appeal proceeded to apply the *Boardman* test and suggested the framework of examining the cogency, relevance and strength of inference of a piece of evidence to assist in the balancing exercise.[9] In effect, however, these three factors were applied in lieu of ss 14 and 15.

3 Secondly, in *Lee Kwang Peng v Public Prosecutor*[10] ("*Lee Kwang Peng*"), the High Court hearing a magistrate's appeal defended the approach in *Tan Meng Jee* as conceptually sound because the *Boardman* test had been "encapsulated in the wording" of ss 14 and 15 of the Evidence Act.[11] Accordingly, this approach did not undercut the inclusionary scheme of the Evidence Act that where a fact is admissible under (at least) one of the specific relevancy provisions,[12] it would be

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which gave rise to the offence) are admissible to prove his guilt (by reason of their similarity to, or connection with, the circumstances of the offence": Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Lexis Nexis, 6th Ed, 2017) at para 3.001.

2 Ho Hock Lai, "An Introduction to Similar Fact Evidence" (1998) 19 Sing LR 166 at 195.

3 Chin Tet Yung, "Remaking the Evidence Code: Search for Values" (2009) 21 SAcLJ 52 at para 1.

4 Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2016) at para 5.187.

5 [1996] 2 SLR(R) 178.

6 [1975] AC 421.

7 Cap 97, 1997 Rev Ed.

8 Michael Hor, "Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics" [1999] Sing JLS 48 at 56.

9 *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [52].

10 [1997] 2 SLR(R) 569.

11 See *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [40].

12 Specific relevancy provisions refer to ss 14–57 of the Evidence Act (Cap 97, 1997 Rev Ed), which correspond, in effect, to the exceptions to the common law exclusionary rules. They are to be contrasted with the general relevancy provisions,

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admissible. The High Court further interpreted s 11(*b*) of the Evidence Act as a provision by which similar fact evidence could be admitted to prove *actus reus*. As with ss 14 and 15, the High Court read the *Boardman* test into s 11(*b*). The court recognised that this use of s 11(*b*) ran contrary to the intention of Sir James Fitzjames Stephen (the original drafter of the Indian Evidence Act on which Singapore's Evidence Act is based), which was for similar fact evidence to be admissible via the specific relevancy provisions of ss 14 and 15 and which "did not accommodate the possibility that similar facts might be probative of the *actus* of a crime in addition to its mental element".[13] However, the High Court thought that it was justified in disregarding this intention to "pave the way for future treatment of the Evidence Act as a facilitative statute as opposed to a mere codification of Stephen's statement of the law of evidence".[14]

4 Finally, in *Ng Beng Siang v Public Prosecutor*[15] ("*Ng Beng Siang*"), the Court of Appeal, without specifying any provision of the Evidence Act or the test to be applied, seemed to approve the admission of similar fact evidence "as a matter of completeness" for the "limited purpose of providing the court with a complete account of the facts".[16] Commentators have described the approach taken in this case as invoking the concept of "background" evidence, whereby the court prefers to be apprised of as much evidence as possible (the maximisation of discretion) without being overly impeded by overly technical points of evidence (the minimisation of rules).[17] Although the discussion on similar fact evidence was peripheral in *Ng Beng Siang* and did not obviously contribute to the development of the law as did the decisions of *Tan Meng Jee* and *Lee Kwang Peng*, it is still a decision worth reflecting on because the cursory treatment of the similar fact evidence point reflects a certain attitude that is worth comparing with the two recent cases and that forms the subject of this note.

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ss 6–11, of the Evidence Act, which enumerate the general ground on which facts are relevant on the basis of their probative value. The relationship between these two categories of provisions pose difficulty because they may overlap and it is not clear whether a fact that does not pass muster under the requirements of the specific relevancy provisions can be admitted via the very broad general relevancy provisions: see Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2016) at para 2.025 and Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Lexis Nexis, 6th Ed, 2017) at para 2.025.

13 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [45].

14 *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [46]. For a critique of this case, see Michael Hor, "Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics" [1999] Sing JLS 48.

15 [2003] SGCA 17.

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

17 See Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2016) at para 5.132.

5 All three cases, with varying degrees, demonstrate the court's difficulties with reconciling the Evidence Act with a more flexible approach that can be developed through the common law. The source of this difficulty lies not only in the inclusionary framework of the Evidence Act, where evidence must fall under one of the relevancy provisions to be admissible, but also s 2(2) of the Evidence Act, which repeals all rules of evidence not contained in any written law so far as they are "inconsistent" with the Evidence Act.[18] Unfortunately, despite an opportunity in 2012 when the statute was amended, Parliament has not intervened and the provisions relating to similar fact evidence have not been changed from when Stephen drafted them in 1872.

6 Later courts have had to live with the uneasy compromises made by precedent and find their own solutions to admitting similar fact evidence. The cases of *Public Prosecutor v Ranjit Singh Gill Menjeet Singh*[19] ("*Ranjit Singh*") and *Micheal Anak Garing v Public Prosecutor*[20] ("*Micheal Anak Garing*") are instances of this pragmatic approach and the sacrifice that has been made of fidelity to the Evidence Act and the principles it embodies.

II. Summary of cases

7 In *Ranjit Singh*, under the surveillance of officers from the Central Narcotics Bureau, the first accused ("Ranjit") handed the second accused ("Farid") a plastic bag containing heroin and then collected a package from Farid containing methamphetamine. Ranjit and Farid were charged with trafficking heroin under different provisions of the Misuse of Drugs Act.[21]

8 The issue was whether evidence concerning: (a) previous transactions involving heroin or other illegal items referenced in statements made by Farid and Ranjit; and (b) a series of dealings involving the quantity of methamphetamine that Ranjit received from Farid and that Ranjit subsequently delivered to another party, were inadmissible because they concerned the accused's acts on previous or unrelated occasions, and constituted similar fact evidence of which the prejudicial value outweighed its probative force.

18 See generally Ho Hock Lai, "An Introduction to Similar Fact Evidence" (1998) 19 Sing LR 166 at 186–187 and Jeffrey Pinsler, "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 SAcLJ 365.

19 [2017] 3 SLR 66.

20 [2017] 1 SLR 748.

21 Cap 185, 2008 Rev Ed.

9 The Prosecution relied on ss 14 and 15 of the Evidence Act to admit the evidence on previous transactions involving heroin or other illegal items to show the accused's knowledge[22] at the time of the offence and regarding the drugs or, in relation to the series of dealings involving the methamphetamine, to provide the court with a complete account of the facts under ss 6 and 9 of the Evidence Act.

10 Ranjit's counsel applied to exclude from evidence: (a) the portions of Ranjit and Farid's statements concerning the two areas mentioned above ("the disputed portions"); (b) two Health Sciences Authority ("HSA") certificates relating to the methamphetamine in the package Ranjit received from Farid; and (c) three photographs of the package and the methamphetamine.

11 The High Court admitted the evidence of the disputed portions, citing *Tan Meng Jee* and *Ng Beng Siang* and applying the common law balancing test of weighing the probative force of a piece of evidence against its prejudicial effect derived from *Boardman*. The High Court found that the evidence was cogent as they were contained in voluntarily given statements, relevant to the mental state of Ranjit at the time of the offence and sufficiently weighty to be considered in relation to the merits of any potential defence that Ranjit did not know what the white plastic bag contained apart from "something illegal".[23]

12 Two further points were noted by the High Court as militating in favour of admitting the evidence.[24] First, in relation to Farid's statements, Farid's counsel did not object to any part of them being admitted and stated that he would, for the purposes of Farid's defence, be relying on them in their entirety. Secondly, the objection had been brought at a fairly early stage of the trial when it remained unclear what Ranjit's defence would be. Accordingly, the High Court thought it would have been premature to exclude the evidence at that stage. As Ranjit's defence turned out to be that he had either no knowledge of the contents of the plastic bag he gave to Farid or no knowledge of the contents beyond their illegality, this confirmed the relevance of the evidence.

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22 Although the Prosecution could rely on the presumption of knowledge within s 18(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) – that a person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug – there was an issue of whether Ranjit was able to rebut the presumption by showing that he only knew that he was delivering something illegal or even drugs generally, but not that he was delivering heroin.

23 *Public Prosecutor v Ranjit Singh Gill Menjeet Singh* [2017] 3 SLR 66 at [19].

24 See *Public Prosecutor v Ranjit Singh Gill Menjeet Singh* [2017] 3 SLR 66 at [20].

13 The High Court excluded the evidence of the HSA certificates on the basis that it related to the quality and quantity of methamphetamine in the package and this was not relevant to Ranjit's state of mind or any other element of the offence, or to the case against Farid. As for the photographs of the package and the methamphetamine, the High Court admitted these "as a matter of completeness only".

14 In *Micheal Anak Garing*, the first accused, Micheal Anak Garing ("Micheal"), who was armed with a *parang*, the second accused, Tony Anak Imba ("Tony"), and two other friends set out one night to commit robbery. They attacked four victims, one after another, over the course of that night and into the wee hours of the following day. Their last victim was the deceased, who succumbed to his injuries. The question was whether evidence of the three earlier attacks was admissible and for what purpose.

15 Defence counsel argued that evidence of the three earlier attacks should be inadmissible because they were prejudicial to Micheal and Tony, but the High Court admitted the evidence on the basis that the three earlier attacks formed part of the "crucial narrative" leading up to the commission of the offence and that they formed "an integral act pursuant to a common intention to assault and rob".[25] The prejudicial effect of the evidence thus did not outweigh its probative value.

16 The Court of Appeal agreed with the High Court on the basis that the evidence was not admitted to prove Micheal and Tony's violent tendencies, which would be forbidden.[26] Rather, referencing s 6 of the Evidence Act, the evidence was important as part of a connected series of events that could be considered as one transaction. "If this evidence were rejected, the court would have only a truncated version of the material events which might not shed true light on the attack carried out on the deceased, especially because all four attacks occurred within a short span of time".[27] Additionally, the Court of Appeal relied on s 14 of the Evidence Act to admit the evidence for the purpose of showing Micheal and Tony's state of mind at the time of the attack on the deceased.

17 A few observations can be made about these decisions. Firstly, both courts in *Ranjit Singh* and *Micheal Anak Garing* used ss 6 and 9 of the Evidence Act to admit similar fact evidence, raising the question whether similar fact evidence can be admitted via these provisions in addition to the provisions of ss 11(*b*), 14 and 15, which have previously

25 *Public Prosecutor v Micheal Anak Garing* [2014] SGHC 13 at [2].
26 *Makin v Attorney-General for New South Wales* [1894] AC 57.
27 *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 at [10].

been identified by case law. Secondly, in so doing, both courts do not directly address the issue of the relationship of the general and specific relevancy provisions under the Evidence Act but may be inferred to have taken the position that satisfying either would be sufficient to admit similar fact evidence. Thirdly, referring specifically to s 14 of the Evidence Act, both courts applied it in different ways. *Ranjit Singh* applied the framework – of examining cogency, relevance and strength of inference of a piece of evidence – from *Tan Meng Jee* to discuss the probative value of the evidence. *Micheal Anak Garing* did not do so and only referenced the requirement in Explanation 1 to s 14 that requires the facts in question to show that a state of mind exists "not generally but in reference to the particular matter in question". These issues will be discussed in turn.

III. Admitting similar fact evidence through ss 6 and 9 of Evidence Act

18 Sections 6 and 9 of the Evidence Act may be regarded as general relevancy provisions in that they were conceived by Stephen to be an expression of logical relevance rather than to address recognised common law exclusionary rules.[28] Leaving aside the issue of how the general relevancy provisions are meant to be applied in view of the specific relevancy provisions, which will be discussed later,[29] it has been widely accepted that Stephen's intention with respect to similar fact evidence was for it to be admissible chiefly via ss 14 and 15 of the Evidence Act.[30]

19 The primary objection to a broad reliance on similar fact evidence is prejudice.[31] As described by Ho Hock Lai, prejudice goes beyond the tendency of evidence to incriminate the accused, but consists of a number of ideas, including: (a) risk of cognitive error as people have a tendency to draw stronger inferences from evidence of past acts than is rational; (b) risk of the fact-finder being tempted to convict out of emotionalism rather than based on an objective and dispassionate assessment of the evidence; (c) fear that the accused may be deprived of the benefit of the presumption of innocence because the fact-finder may give the other evidence more weight than it objectively

28 See Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2016) at paras 2.025–2.027.

29 See paras 27–41 below.

30 See Chen Siyuan, "The Future of the Similar Fact Rule in an Indian Evidence Act Jurisdiction: Singapore" (2013) 6(3) *National University of Juridical Sciences Law Review* 361 at 363–364.

31 See Ho Hock Lai, "An Introduction to Similar Fact Evidence" (1998) 19 Sing LR 166 at 166.

deserves; and (d) that it may not be acceptable to take a person's criminal past against him although it may be logical to do so.[32]

20 Accordingly, ss 14 and 15 contain requirements to limit the admissibility of similar fact evidence. In s 14, there is a requirement that the evidence show that a relevant state of mind "exists not generally but in reference to the particular matter in question" contained in Explanation 1 to that section and, in s 15, "[the act in question] formed part of a series of similar occurrences". One difference between these two sections and the common law concept of prejudice, however, is that these sections are predicated solely on epistemic considerations. The primary common law objection to similar fact may be a non-epistemic one, in the form of moral prejudice. Nowhere is this expressed in the Evidence Act.

21 Nevertheless, can an argument be made to justify the admission of similar fact evidence through other provisions of the Evidence Act? *Lee Kwang Peng* has done so using s 11(*b*) of the Evidence Act to allow similar fact evidence to prove the *actus reus* of an offence by disregarding the intentions of the draftsman and arguing that as a matter of principle, there was no reason to distinguish admitting similar fact evidence to prove *mens rea* but not *actus reus*.

22 Leaving aside that at the time of the drafting of the Evidence Act, there was simply no contemplation that similar fact evidence could be admissible to prove the *actus reus* of an offence,[33] it may be argued that Stephen had not envisioned the use of similar fact evidence beyond proving the *mens rea* of an offence.

23 In Stephen's *A Digest of the Law of Evidence*,[34] the similar fact rule was formulated as being generally one of exclusion with three exceptions: (a) similar facts may be generally relevant, "that is, as facts so related to a fact in issue that according to the common course of events either taken by themselves or in connection with other facts prove or render probable the past, present or future existence or non-existence of the other"; (b) prior acts which showed mental states as intention,

32 See Ho Hock Lai, "An Introduction to Similar Fact Evidence" (1998) 19 Sing LR 166 at 167–170.

33 Julius Stone, "The Rule of Exclusion of Similar Fact: England" (1933) 46 Harv L Rev 954 at 972; see also Michael Hor, "Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics" [1999] Sing JLS 48.

34 James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887). The first edition of this digest was written in 1876.

knowledge or malice; and (c) acts which form a part of a series of similar occurrences to rebut a supposition of accident.[35]

24 The second and third exceptions correspond with ss 14 and 15 of the Evidence Act, respectively, and the first could be said to be a reference to the general relevancy provisions, including ss 6 and 9 of the Evidence Act. In other words, Stephen's intent can be interpreted as being to exclude only evidence of prior acts which were relevant merely as propensity evidence.[36] This interpretation would broaden the use of similar fact evidence beyond showing state of mind but would still be consistent with the objection of prejudice outlined earlier due to the limited purpose for the use of the similar fact evidence.

25 This could perhaps be the justification for the Court of Appeal in *Ng Beng Siang* admitting similar fact evidence as a matter of completeness. Unfortunately, this was not expressed in that case, neither was it discussed by *Ranjit Singh* or *Micheal Anak Garing*. It appears that the courts simply take it as given that similar fact evidence can be admitted apart from the provisions of ss 11(*b*), 14 and 15 of the Evidence Act.

26 Nevertheless, one could object that even by limiting the use of similar fact evidence admitted under ss 6 and 9 of the Evidence Act, the risk of the prejudice identified by Ho may still operate on the mind of the fact-finder. The response by the courts to this type of concern has essentially been to give reassurances that judges are trained fact-finders with the ability to disregard prejudicial evidence when the need arises.[37] Apart from that, judges in criminal cases, are duty-bound, through the operation of the standard of proof of beyond reasonable doubt, to reason through the evidence and ground their decisions in fact and logic and to state precisely how the evidence supports the prosecution's theory of guilt.[38] This ensures that accused persons are protected to some degree from the effects of prejudice.

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35 See Robert Margolis, "Evidence of Similar Facts, the Evidence Act, and the Judge of Law as Trier-of-Fact" (1988) 9 Sing LR 103 at 117, citing James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, 4th Ed, 1887) at pp 15, 153-156 and 161.

36 See Robert Margolis, "Evidence of Similar Facts, the Evidence Act, and the Judge of Law as Trier-of-Fact" (1988) 9 Sing LR 103 at 117–119; see also Ho Hock Lai, "An Introduction to Similar Fact Evidence" (1998) 19 Sing LR 166 at 195.

37 See, *eg*, *Wong Kim Poh v Public Prosecutor* [1992] 1 SLR(R) 13 at [14]; *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [48], citing *Tan Chee Kieng v Public Prosecutor* [1994] 2 SLR(R) 577. This is not unique to Singapore courts: see, *eg*, *Attorney-General of Hong Kong v Siu Yuk-Shing* [1989] 1 WLR 236 at 241.

38 See *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR 45 at [56] and *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [15]–[25] and [28]–[45].

IV. Relationship between general and specific relevancy provisions in admitting similar fact evidence

27 Coming back now to the issue of whether in relation to similar fact evidence, it must be necessary to fulfil a general relevancy provision (ss 6–11 of the Evidence Act) *and* a specific relevancy provision (ss 14 and 15 of the Evidence Act) or whether fulfilling either is sufficient, the courts in *Ranjit Singh* and *Micheal Anak Garing* do not directly address this matter. However, the approaches taken in those cases suggest that fulfilling *either* a general or specific relevancy provision would be sufficient to admit similar fact evidence, such that even if a piece of evidence does not pass muster under a specific relevancy provision, a general relevancy provision can be used to admit it.

28 In *Ranjit Singh*, the court's treatment of the disputed portions of Ranjit and Farid's statements seemed to rely on both ss 14 and 15 as well as ss 6 and 9 being met. However, in relation to the photographs, the High Court admitted those only as a matter of completeness. This suggests that it would be sufficient to fulfil a general relevancy provision, such as ss 6 or 9, to admit similar fact evidence, with the qualifier that the purpose of admitting such evidence is merely to give the court a complete account of the events and the evidence cannot be used to establish guilt of the accused.

29 The Court of Appeal in *Micheal Anak Garing* also took a position consistent with this by agreeing with the High Court's admission of the three earlier attacks under s 6 of the Evidence Act not to prove Michael and Tony's violent tendencies, but only so that the court did not have a truncated version of the material events.

30 It is far from settled whether a general relevancy provision is sufficient to admit evidence even when it fails the requirements of a specific relevancy provision or whether both a general and specific relevancy provision must be satisfied. We know that Stephen distinguished between relevant facts which arise directly from the circumstances of the case, and relevant facts arising from previous incidents or transactions;[39] however, we do not know the purpose of his drawing such a distinction.

31 It could be argued that this distinction should point to the conclusion that once a piece of evidence is potentially prejudicial, the

39 Ho Hock Lai, "An Introduction to Similar Fact Evidence" (1998) 19 Sing LR 166 at 195–198.

general relevancy provisions do not apply at all.[40] Otherwise, this would render the specific relevancy provisions otiose, especially when they embody the exceptions to the common law exclusionary rules. Another way of addressing this concern is to require both a general relevancy provision and a specific relevancy provision to be satisfied before evidence is admitted under Pt I of the Evidence Act.[41]

32 However, it could also be argued that absent any express indication that general relevancy provisions could not be used to admit evidence otherwise inadmissible under the specific relevancy provisions, satisfying either would be sufficient for the purposes of relevancy and admissibility. Otherwise, what would be the function of the general relevancy provisions?[42] Additionally, this approach may be justified by a literal interpretation of s 5 of the Evidence Act, which allows any fact to be proved as long as it fulfils any relevancy provision, whether general or specific.

33 Based on the decisions of *Ng Beng Siang*, *Ranjit Singh* and *Micheal Anak Garing*, it seems that the courts would prefer the latter approach as it would allow them to receive as much evidence as possible to assist them in decision-making. Nevertheless, it would be important for the court to address this issue and articulate reasons for choosing one framework over the other in order to guide a clear and structured understanding of how Pt I of the Evidence Act is to be applied.

34 This would additionally benefit the understanding of s 6 of the Evidence Act, as that section could also be treated as an embodiment of the common law *res gestae* doctrine, which is an exception to the rule against hearsay. Under the *res gestae* doctrine, "a fact or a statement of fact or opinion which is so closely associated in time, place, and circumstances with some act, event, or state of affairs which is in issue that it can be said to form a part of the same transaction as the act or event in issue, is itself admissible in evidence".[43] One would expect the exceptions to exclusionary rules to be contained amongst ss 14–57, yet s 6 seems an outlier as it contains language that brings to mind the *res gestae* doctrine.

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40 Ho Hock Lai, "An Introduction to Similar Fact Evidence" (1998) 19 Sing LR 166 at 195–198.

41 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Lexis Nexis, 6th Ed, 2017) at para 2.55.

42 See Siyuan Chen, "Redefining Relevancy and Exclusionary Discretion in Sir James Fitzjames Stephen's Indian Evidence Act of 1872: The Singapore Experiment and Lessons for Other Indian Evidence Act Jurisdictions" (2014) 10(1) *International Commentary on Evidence* 1 at 1–10.

43 Adrian Keane & Paul McKeown, *The Modern Law of Evidence* (Oxford University Press, 9th Ed, 2012) at p 355.

35 The relationship between the *res gestae* doctrine and the rule against similar fact evidence is also a matter worthy of consideration that has not received attention. In *Micheal Anak Garing*, before commenting that the evidence of the previous attacks on other individuals was relevant under s 14 of the Evidence Act in relation to the state of mind of Micheal and Tony, the court relied on s 6 to admit the same evidence citing the case of *O'Leary v R*.[44] In that case, the High Court of Australia held that evidence of assaults committed by the appellant on different persons prior to his killing of one Ballard, for which the appellant was charged with murder, was admissible at the appellant's trial for murder as it disclosed a connected series of events which should be considered as one transaction, which needed to be understood as a whole.[45] Using s 6 to admit similar fact evidence in this manner presents the risk that the forbidden line of propensity reasoning may influence the fact-finder and prejudice the accused, especially when it is possible to interpret s 6 broadly to include events taking place months before the alleged offence.[46] Reference may be made to Illus (*o*) to s 14 to demonstrate the risk of prejudice. Illustration (*o*) provides that where 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, but the fact that A was in the habit of shooting at people with intent to murder them is irrelevant. If one were to rely on s 6 to admit the fact that A was in the habit of shooting at people with intent to murder them on the basis that these other shootings formed part of the same transaction, this would enable prejudicial evidence that would otherwise be inadmissible under s 14 to be admitted via s 6.[47]

36 Nevertheless, assuming similar fact evidence can be admitted via a general relevancy provision without more, another issue that arises from *Ranjit Singh* and *Micheal Anak Garing* is the basis for superimposing *Boardman* onto ss 6 and 9 of the Evidence Act although

44 (1946) 73 CLR 566.

45 See *O'Leary v R* (1946) 73 CLR 566 at 577.

46 See *Don Promphinit v Public Prosecutor* [1994] 2 SLR(R) 1030, where the three appellants were charged with selling cannabis to an undercover narcotics officer, whose evidence pertaining to negotiations and abortive sales that took place between him and two of the appellants over a period of three months was admitted under s 6 and also ss 14 and 15 of the Evidence Act (Cap 97, 1997 Rev Ed). This decision has been criticised for permitting evidence to be admitted no matter how prejudicial, if it leads to the commission of the offence even though s 6 contemplates admitting evidence that is crucial to the understanding of the facts in issue in the interest of proper adjudication; see also Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Lexis Nexis, 6th Ed, 2017) at p 291.

47 It may be noted that the court in *Micheal Anak Garing v Public Prosecutor* [2017] 1 SLR 748 did not refer to Illus (*o*) although it alluded to Explanation 1 to s 14. This illustration would seem to apply to the case as the three earlier attacks were against persons other than the deceased.

one can perhaps understand the motivation for so doing. Nothing was said about this in *Micheal Anak Garing*. In *Ranjit Singh*, it seems that the High Court treated it as given that before similar fact evidence is admitted under any provision of the Evidence Act, the *Boardman* test must be satisfied. By limiting the purpose of using similar fact evidence, the courts can justify that the prejudicial effect of the evidence does not outweigh its probative value simply because the evidence will not be used to actually prove the facts in issue or relevant facts.

37 However, given that *Law Society of Singapore v Tan Guat Neo Phyllis*[48] ("*Phyllis Tan*") has persuasively ruled that the starting point before common law rules may be applied in Singapore is to consider whether such rules are consistent with the provisions of the Evidence Act under s 2(2) and that the High Court decision of *Public Prosecutor v Mas Swan bin Adnan*[49] ("*Mas Swan*") observed that relying on *Boardman* to exclude similar fact evidence that would otherwise be deemed relevant by the categorisation approach under the Evidence Act provisions is inconsistent with the Evidence Act,[50] silence on the basis for superimposing *Boardman* on ss 6 and 9 of the Evidence Act is surprising.

38 Reliance on *Ng Beng Siang* is also insufficient as that decision predated *Phyllis Tan* and similarly did not deal with s 2(2) of the Evidence Act. In fact, the decision in *Ng Beng Siang* did not even reference any section of the Evidence Act as a basis for admitting similar fact evidence as background or for the sake of completeness.

39 It is doubtful if the *Boardman* test could be properly superimposed on ss 6 and 9 of the Evidence Act, which were the provisions cited by *Ranjit Singh* and *Micheal Anak Garing*. Section 6 deems facts as relevant by virtue of them being "so connected with a fact in issue as to form part of the same transaction". Section 9 is much broader and treats as relevant "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, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which

48 [2008] 2 SLR(R) 239 at [124]–[126]. This has since been affirmed in a number of Court of Appeal decisions as well.

49 [2011] SGHC 107.

50 This observation in *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107 specifically concerned *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178's reliance on *Director of Public Prosecutions v Boardman* [1975] AC 421 and excluding similar fact evidence that is otherwise deemed relevant under ss 14 and 15 of the Evidence Act (Cap 97, 1997 Rev Ed). However, the principle behind this observation has broader application beyond ss 14 and 15.

show the relation of parties by whom any such fact was transacted". The requirements in these provisions are categorical ones that relate to the probative value of the evidence; they do not require any balancing against prejudicial effect.[51]

40 Further, in the light of the developments in the law recognising that the courts have an inherent power to exclude evidence where its prejudicial effect outweighs its probative value,[52] it may well be timely to revisit the question of whether the approach of superimposing the *Boardman* test onto the provisions of the Evidence Act is appropriate, even for ss 11(*b*), 14 and 15 of the Evidence Act as described in *Tan Meng Jee* and *Lee Kwang Peng*. Putting aside *Boardman*'s consistency with the Evidence Act and its usefulness, which will be discussed later,[53] and focusing on the value of conceptual clarity, rather than have the balancing exercise being done twice – once as part of applying the provisions of the Evidence Act, and twice as a matter of the court exercising its inherent discretionary power to exclude evidence – similar fact evidence could be admitted as long as the requirements of any general or specific relevancy provision are fulfilled and the courts can then address the issue of prejudice while exercising their discretion to exclude.

41 This approach would not fall foul of s 2(2) of the Evidence Act since evidence otherwise admissible under the relevancy provisions would not be excluded by virtue of a common law rule of evidence, but only in exceptional situations where the inherent powers of the court to exclude evidence are exercised.[54] We now turn to discussing the appropriateness of applying the *Boardman* test in the context of s 14 of the Evidence Act as well as the usefulness of the test.

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51 This criticism has been made by academics of *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 superimposing *Director of Public Prosecutions v Boardman* [1975] AC 421 on ss 14 and 15 of the Evidence Act (Cap 97, 1997 Rev Ed): see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Lexis Nexis, 6th Ed, 2017) at para 3.32 and Chen Siyuan, "Revisiting the Similar Fact Rule in Singapore: *Public Prosecutor v Mas Swan bin Adnan and Another*" [2011] Sing JLS 553.

52 See *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205. Although the Court of Appeal in *ANB v ANC* [2015] 5 SLR 522 hinted that this test may not be suitable in civil proceedings, no alternative has yet been offered by the court. Jeffrey Pinsler has, however, suggested that there can be a broader basis to exclude evidence when the manner in which it has been obtained compromises the integrity of the administration of justice: see Jeffrey Pinsler SC, "The Court's Discretion to Exclude Evidence in Civil Cases and Emerging Implications in the Criminal Sphere: The Violet Thread of Justice" (2016) 28 SAcLJ 89.

53 See paras 42–51 below.

54 See Jeffrey Pinsler SC, "Admissibility and the Discretion to Exclude Evidence: In Search of a Systematic Approach" (2013) 25 SAcLJ 215 at 223.

V. *Boardman* balancing and s 14 of Evidence Act

42 The first difficulty with superimposing *Boardman* onto s 14 of the Evidence Act is that it is unclear whether it is to be assumed that as long as a piece of evidence comes within the ambit of s 14, the *Boardman* test should be taken as satisfied, or *vice versa*, or whether *Boardman* is to be applied as a separate and distinct requirement.

43 *Tan Meng Jee* had stated that *Boardman* was "implicit" in ss 14 and 15 based on the argument that the language of those provisions contemplated some balancing.[55] However, *Lee Kwang Peng* then stated that before a judge may consider evidence as relevant under ss 14 or 15, that fact "must first satisfy" the *Boardman* test.[56]

44 *Ranjit Singh*'s application of *Boardman* seemed to follow the latter, where it separately examined the cogency, relevance and strength of inference of the evidence after determining that it fell within s 14, whereas *Micheal Anak Garing* seemed to follow the former where it did not specifically address the *Boardman* test but found that the evidence came within the requirements of s 14.

45 This difference in approach shows the problem with trying to justify the importation of *Boardman* by arguing that it is implicit within the language of s 14. If so, it seems illogical that applying the *Boardman* test should lead to a result that is different from relying on the requirements of the provisions. Yet, this may be so, particularly in the situation highlighted by *Mas Swan*, where the evidence satisfies the requirements of the provision but where its prejudicial effect outweighs its probative value. It should further be emphasised that s 14 does not contain any concept of balancing or reference to prejudicial effect.

46 The second difficulty with the *Boardman* test is that the exercise of balancing probative value against prejudicial effect can be an impossible one. As has been observed from various quarters, probative value and prejudicial effect are not antithetical to each other and may even be positively correlated, making the exercise of balancing one against the other impossible.[57] There is also the further question of the

55 See *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 at [49]. As alluded to earlier, despite stating this, this case seemed to apply the *Boardman* test in lieu of ss 14 and 15 of the Evidence Act (Cap 97, 1997 Rev Ed).

56 See *Lee Kwang Peng v Public Prosecutor* [1997] 2 SLR(R) 569 at [38].

57 See Michael Hor, "Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics" [1999] Sing JLS 48 at 50 and Chen Siyuan, "Revisiting the Similar Fact Rule in Singapore: *Public Prosecutor v Mas Swan bin Adnan and Another*" [2011] Sing JLS 553 at 555.

applicability of these concepts to civil proceedings highlighted by the Court of Appeal in *ANB v ANC*.[58]

47 The reasons given by the court in *Ranjit Singh* for admitting the similar fact evidence demonstrate this difficulty – the court highlighted the probative value of the evidence in terms of its cogency, relevance and the strength of the inference that may be drawn from it and then seemed to conclude that the prejudicial effect of the evidence was outweighed by its probative value without any real balancing being done.

48 Finally, the *Boardman* test is vague in terms of breadth and reach. As Jeffrey Pinsler SC put it, "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".[59] It is far from clear what the limits of the concepts of "prejudicial effect" and "probative value" are.

49 It has been observed how the concept of prejudice encompasses many ideas.[60] Prejudice may also embody the concept of unfairness, which could include unfairness in the process of obtaining evidence in addition to unfairness of the trial proceedings.[61] For example, in *Muhammad bin Kadar v Public Prosecutor*,[62] the prejudice to the accused was identified as arising from flagrant procedural breaches in the taking of statements by the police.

50 *Ranjit Singh* shows how "probative value" may be stretched beyond considering how the evidence supports a fact in issue or relevant fact to include consideration of a co-accused wishing to rely on similar fact evidence contained in his own statements, as well as possible defences that the accused had because the objection to the evidence came at an early stage of the trial when it remained unclear what his defence would be. The High Court in *Ranjit Singh* suggested that these two factors militated against excluding the similar fact evidence.

51 This manner of applying the *Boardman* test is unusual and shows the court's need for a more flexible tool that can better take into account the interests of justice in each case. Even if the court was considering these two additional factors separately from the *Boardman*

58 [2015] 5 SLR 522 at [30].

59 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Lexis Nexis, 6th Ed, 2017) at para 3.32.

60 Ho Hock Lai, "An Introduction to Similar Fact Evidence" (1998) 19 Sing LR 166 at 167–170.

61 See Tan Yock Lin, "Sing a Song of *Sang*, a Pocketful of Woes?" [1992] Sing JLS 365 at 373–374 for a discussion on the difficulties with the concept of "unfairness".

62 [2011] 3 SLR 1205.

test, the point about the insufficiency of the *Boardman* test would remain.

VI. Conclusion

52 The cases of *Ranjit Singh* and *Micheal Anak Garing* exemplify an approach where the courts do not discuss the conceptual and normative justification for admitting or excluding evidence, taking us further down the path of pragmatism over principle.

53 However, perhaps this is inevitable given the state of the law of evidence in Singapore. There have been precious little substantive amendments to the Evidence Act that consider developments in the common law as well as the legislative revisions undertaken in other jurisdictions. What we have are *ad hoc* changes to particular areas of evidence law without an appreciation for how this could affect the entire scheme of the Evidence Act. The latest round of proposed amendments that have been released for public consultation continue down this path. The courts do what they can, sometimes ignoring the Evidence Act and stretching the words of the Evidence Act in ways ordinary users of the English language would find incredible. Perhaps the Legislature, seeing that the courts can find their own ways to deal with the problem, do not see any need to intervene. But this is mere speculation.

54 Many commentators have called for amendments to the Evidence Act over the years. It may well be time to begin a thorough revision now that the development of the law by the courts has resulted in irreconcilable and confusing positions being taken. These changes should consider how the general relevancy provisions operate in relation to the specific relevancy provisions, whether the discretion to exclude evidence in the interests of justice should be a generally applicable one rather than being limited in expression to the areas of hearsay and opinion evidence in ss 32(3) and 47(4) of the Evidence Act, and whether the factors that the court should consider in deciding whether to exclude evidence in the interests of justice should replace the *Boardman* test.