COURSE: **LAW OF EVIDENCE I**

TOPIC: **SIMILAR FACTS EVIDENCE**

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General Introduction

There are facts which are generally irrelevant, but which may be proved in exceptional cases. Grouped together under this are the four topics viz: **similar facts evidence, character evidence, opinion evidence and hearsay**. These topics are sometimes described as the **Four Rules of Exclusion in the Law of Evidence,** evidence of such matters is generally irrelevant and inadmissible, however, there are exceptions in each case where this type of evidence is admissible. Such exceptions are either provided for in the Evidence Act or are principles of the common law, hence are applicable under sections 4 & 5 of the Evidence Act.

Gentlemen, I humbly refer you to **Part IV of the Evidence Act 2011, particularly section 37-66 for hearsay evidence, section 67-76 for opinion evidence, and section 77- 82 for character evidence**. However, for purposes of this lecture, we shall focus strictly on similar facts evidence.

Definition of Similar

The word "similar" is an adjective, which means "alike," or sharing some qualities, but not identical.[1] Thus, similar facts evidence does not necessarily mean "same facts" or "identical facts" evidence; it does mean evidence sharing some qualities with the evidence sought to be proved in the current charge. In legal parlance, the degree of 'similarity' of two or more bodies of evidence depends on the facts of each case.[2]

General Rule

The general rule on evidence of similar facts and a terse statement on its exceptions was aptly captured by **Lord Herschell** in the classical case of ***Makin Vs. Attorney General for New South Wales***.[3] His lordship had this to say:

It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

Similarly, in ***Emeka Vs. State,***[4] **Oguntade, J.C.A**., as he then was, while delivering the lead

[1] See Encarta Concise Dictionary, Students Edition, 2001, page 1350.

[2] Please see the following cases: *DPP Vs. Boardman* (1975) AC 421 at 462, *R Vs. Scarrot* (1978) QB 1016 at 1022, *R Vs. Collins* (2013) QCA 389 at para. 43.

[3] (1894) AC 57 at 67.

judgment of the Court of Appeal, held as follows:

I need to observe that the evidence before the lower court amply revealed that the 2nd and 3 rd appellants were desperados who wanted to make money by any means. In their approach, they were ruthless. The evidence suggested they were bad boys…. They might have lied before the lower court on some matters. But all these would not make them guilty of the offences as laid.

Although, the rule as expounded by Lord Herschell in ***Makin Vs. Attorney General for New South Wales*****,** supra applied to criminal cases, nothing stops it from being applied in civil proceedings as well.[5]

A similar fact in this context is a fact similar to a fact in issue. Evidence of similar facts seeks to establish the fact in issue by proving the existence or occurrence of one or other similar facts.
Thus, the issue whether an accused committed a certain offence is sought to be proved by showing that he had previously committed similar offences.

The main reason for the inadmissibility of such similar facts evidence is that it is generally irrelevant to the fact in issue, as the only connection between this evidence and the fact in issue is the general similarity between them which may even be superficial. There is therefore no logical link between the fact to be proved and that offered in proof of it.

In ***Akanimwo Vs. Nsirim*****,**[6] the Supreme Court held, relying on its previous decision In ***Yusuf Vs. Adegoke***,[7] that similar facts evidence, although cogent, moral and weighty, or logically relevant, is rejected as legal evidence on the grounds of policy and fairness – since it tends to waste time, embarrass the enquiry with collateral issues, prejudice the parties in the eyes of the court and even encourage attacks without notice. Further, that this principle is well enshrined in the Latin maxim *res inter alios acta alteri nocere non debet*, which when translated means 'a man ought not to be prejudiced by what has taken place between others.'

Furthermore, another reason for excluding evidence of a defendant's previous disposition or other malfeasance is that such evidence, if admitted, would unnecessarily be prejudicial to him in the actual trial he is currently facing.[8]

As a general rule, this type of evidence is inadmissible to prove a fact in issue, however, there are exceptions to this general rule, these exceptions are the focal points of this lecture and I invite you gentlemen to put on your legal seat belt as we embark on this exceptional voyage.

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[4] (1998) 7 NWLR (Pt. 559) 556 at 586.
[5] Fidelis Nwadialo, 'Similar Facts Evidence,' in Afe Babalola (ed.), Law and Practice of Evidence in Nigeria, 2001, page 102.
[6] (2008) All FWLR (Pt. 410) 610 S.C.
[7] (2007) All FWLR (Pt. 385) 384 S.C.
[8] DPP Vs. Kilbourne (1973) AC 729 at 758, per Lord Simon.

EXCEPTIONS TO THE GENERAL RULE

Statutory Exceptions
There are several provisions of the Evidence Act that constitute solid exceptions to the general rule enunciated by Lord Herschell, in **Makin's case**. Most of these exceptions can be found in **Part II of the Act,[9] specifically in sections 4, 5, 6(2) – (4), 7, 9(b), 12 and 66** thereof.

A consideration of few Nigerian and other decisions will be imperative here.
In **Ishola Vs. The State**,[10] on a murder charge, evidence was adduced by the prosecution witnesses, of the appellant's previous similar conducts towards the deceased – like previous assaults, previous stabbing of the deceased by the appellant and previous destruction of economic trees belonging to the witnesses and the deceased by the appellant. It was argued at the Supreme Court that evidence of such previous acts of the appellant was prejudicial to the appellant and therefore ought to have been rejected by the learned trial Judge, in view especially of the alibi raised by the appellant. In rejecting this argument, the Supreme Court held that such evidence of previous similar facts was admissible both under section 9 of the repealed Evidence Act[11] and under the general rule enunciated in Makin's case.

Also, in ***Akerele Vs. The King***,[12] the appellant, a medical doctor, was convicted of manslaughter of a child, in that he had knowingly administered over-dose or poisoned injection on the child. The defence contended that the drug administered on the child was not over-dose, and that the child had died because of his peculiar health conditions. To negate this defence, however, the prosecution tendered similar evidence concerning the symptoms, ill health and death of other children attended to by the appellant, using the same drug. It was held by the Privy Council that this similar negative evidence adduced by the prosecution was properly received in evidence.[13]

Exceptions under English Law
As seen above in the dictum of Lord Herschell in Makin's case, supra, "the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue[14] before the jury; and it may be so relevant if it bears upon question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental,[15] or to rebut a defence which would otherwise be open to the accused."[16]

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[9] Dealing with Relevancy
[10] (1978) 2 LRN 111.
[11] Now slightly amended (but not affecting this decision) and standing as section 6 of the Evidence Act, 2011.
[12] (1943) 1 All ER 367.
[13] See also, Thomas Vs. C.O.P. (1949) 12 WACA 490 and R. Vs. Adeniji (1937) 3 WACA 185.
[14] The use of the phrase 'relevant to an issue' clearly brings English decisions within the purview of Part II of the Nigerian Evidence Act.
[15] This squarely brings this exception within section 12 of the Nigerian Evidence Act.
[16] For which see Akerele Vs. King supra.

The facts of **Makin case** will shed more light on these exceptions.
In that case, the Makin's were in the habit of taking unwanted babies into their care, upon being paid some amount of money. They were, however, accused of murdering a child and burying it in their garden. Evidence was adduced by the prosecution that several other bodies of children were found in that particular garden and inside grounds of yards previously occupied by the couple. It was accepted, therefore, that evidence of similar occurrences was admissible to prove their guilt in the current charge of murder.

In the latter case of **R. Vs. Ball,**[17] a brother and a sister had been sharing a bed and had born a child together. But this was before the passing into law of a legislation outlawing incest in the United Kingdom. The 'couple' was still sharing the bed after the law had been passed. Upon being charged for incest, therefore, evidence was adduced and properly held to be so, of their 'similar' acts of incest that resulted in the child being born before the coming into force of the anti-incest legislation.

Exceptions under Canadian law
In the Canadian case of **R. VS. OLAH,**[18] the Saskatchewan Court of Appeal, placing reliance on the English case of **Maxwell vs. D.P.P.**,[19] held generally, it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the defendant has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that he is the person likely from his criminal conduct or character, to have committed the offence for which he is being tried. According to the court, this rule "must be regarded as fundamental in the law of evidence and is probably one of the most deeply rooted principles of the criminal law."

EXCEPTIONS UNDER SOUTH AFRICAN LAW
The Supreme Court of Appeal of South Africa, in the case of **Nduna vs. The State**,[20] also briefly stated some of the exceptions to the exclusionary rule against similar fact evidence. It held in **para. 17** that while similar fact evidence is admissible to prove identity of an accused person as the perpetrator of an offence, it cannot be used to prove commission of the crime itself.

Gentlemen, the above decisions are of very strong persuasion in Nigeria and may be accordingly applied when necessary, however,**can anyone attempt a persuasive dissenting opinion on the above case (R. vs. Ball) assuming it happened in Nigeria?**

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[17] (1952) 2 All ER 657.
[18] (1979) 7 C.R. (3d) 273 at 290 - 292
[19] (1935) AC 309 at 317 and 320 H.L.
[20] (2010) ZASCA 120.