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THE SUBSUMATION OF MAINTENANCE AND CHAMPERTY UNDER THIRD PARTY ORDERS

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Maintenance and champerty were historically torts and crimes under English law, and the case can be made that they technically remain so under Singapore law. It would, however, be better to deal with third party litigation funding within the rubric of third party orders — at the interlocutory stage, for the third party to provide security for costs, and at the close of proceedings, for the third party funder to be liable for costs. This would jettison archaic and technical English case law relating to maintenance and champerty, and enable the Singapore courts to transparently facilitate access to justice whilst reigning in unwarranted forms of third party funding.

I. INTRODUCTION

Third-party litigation funding has received surprisingly little attention in Singapore, and the current state of maintenance and champerty is far from clear. Maintenance comprises the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings without lawful justification.[1] Champerty consists of maintaining a civil action in consideration of a promise in the share in the proceeds, if successful.[2] Champerty is thus a subset of maintenance.

Historically, maintenance and champerty were criminal offences, torts, and unlawful arrangements. Maintenance and champerty ceased to be criminal offences and torts in England after the *Criminal Law Act 1967*[3] was passed, but contracts for maintenance and champerty continued to be void as against public policy. The *Application of English Law Act*[4] does not import the *Criminal Law Act 1967* into Singapore law, and this poses the question of whether maintenance and champerty are still, and ought to be, part of Singapore law, and whether there are other means of dealing with third party litigation funding. This essay suggests that third party orders, namely orders for a third party funder to provide security for costs or bear costs, are more than adequate to deal with third party litigation funding and ought to subsume the hitherto independent torts of maintenance and champerty.

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1 UK, Law Commission, *Proposals for Reform of the Law Relating to Maintenance and Champerty* (London: Her Majesty's Stationery Office, 1966) at para 9.

2 *Ibid*.

3 (UK), 1967, c 58.

4 Cap 7A, 1994 Rev Ed Sing.

This essay is split into three parts. Part II discusses the law as it currently stands and concludes that maintenance and champerty are technically still crimes and torts in Singapore. Part III outlines the history of maintenance and champerty in England, culminating in their *de jure* abolishment, but with the law seemingly taking a volte-face by ordering third party litigation funders to bear costs. I proceed to point out some crucial distinctions between English law as it stood (*ie* the independent torts of maintenance and champerty) and English law as it currently stands (*ie* third party cost orders). I conclude that, as a matter of Singapore law, maintenance and champerty should no longer be independent causes of action. Part IV discusses the law as it ought to be and suggests that the main remedies available are security for costs and third party cost orders. In respect of the former, I argue that a Singapore court may, apart from the *Rules of Court*[5] and pursuant to its inherent powers, order a maintainer to provide security for costs. This is because, amongst other things, the power to order security for costs stems from the inherent powers of the court, and not the *Rules of Court*, which cannot be power-conferring. I then proceed to analyse some factors which a court may take into account in determining if a third party order for security for costs or costs should be made; I also make the point that a litigant would have to make a far more compelling case pre-trial for the grant of a third party security for costs order, compared to the same litigant seeking a third party costs order at the close of trial.

II. The Current Position in Singapore[6]

A. *As a Crime*

There have been no reported criminal cases of maintenance and champerty in Singapore.

There is no doubt that maintenance was an offence at common law. The Star Chamber, in *Leigh v Helyar*,[7] spoke of maintenance at common law. Lord Loughborough, in *Wallis v The Duke of Portland*,[8] held that maintenance was not an offence upon the statutes but was *malum in se*. There were at least nineteen acts criminalising maintenance and champerty, but *Pechell v Watson*[9] held that these were declaratory of the common law and merely enhanced the applicable penalties.

The common law was received into Singapore by the *Second Charter of Justice* in 1826.[10] Consequently the common law offences of maintenance and champerty

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5 Cap 322, R 5, 2014 Rev Ed Sing.

6 Quite apart from whether maintenance and champerty are torts and crimes, it is well-settled that contracts for maintenance and champerty are unenforceable in Singapore: see *Lim Lie Hoa v Ong Jane Rebecca* [1997] 1 SLR(R) 775 (CA) [*Rebecca Ong*]; *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR(R) 989 (CA) [*Otech*]. It is also well-settled that lawyers, as a matter of professional ethics, are statutorily prohibited from engaging in champerty: see *Legal Profession Act* (Cap 161, 2009 Rev Ed Sing), s 107; *Legal Profession (Professional Conduct) Rules* (Cap 161, R 1, 2010 Rev Ed Sing), r 37.

7 Moo KB 751, 72 ER 882.

8 (1797) 3 Ves Jr 494 at 502, 30 ER 1123 at 1127 [*Wallis*].

9 (1841) 8 M & W 691 at 700, 151 ER 1217 at 1221.

10 *R v Willans* (1858) 3 Ky 16 at 37.

were also imported. There was little doubt that "common law crimes were recognised as such in the Straits Settlements".[11]

The next watershed event was in 1871, when the *Indian Penal Code*[12] was enacted in the Straits Settlements. Conspicuously, the *Indian Penal Code* did not contain any provisions criminalising third party litigation funding. This poses the question as to whether the Penal Code exhaustively supplanted common law offences. One preliminary observation is in order: it is irrelevant that the Penal Code today (or at any other time in the past) does not exhaustively define all criminal offences. The enquiry is into whether the Penal Code exhaustively supplanted the common law at the time of passage.

There is some indication that the *Indian Penal Code* was not a mere codification of English common law. Lord Macaulay, the drafter of the *Indian Penal Code*, described the code as something that was more than a mere digest of existing laws, and that "nothing that is not in the code ought to be law".[13] An Indian Law Commission letter stated that the *Indian Penal Code* "is not a digest of any existing system; and... no existing system had furnished us even with a ground-work".[14] However, early commentators disagreed and sought to downplay the break from the common law; Fitzjames Stephen described the *Indian Penal Code* "as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India".[15] Setalvad opined that Macaulay, despite striving to break from the common law, "travelled unconsciously but inevitably along the track of principles in which they had been trained and to which they were accustomed".[16]

Commentators were divided on the issue of exhaustiveness. Stanley Yeo,[17] and Koh Kheng Lian and Myint Soe[18] were of the opinion that the Penal Code is exhaustive. They chiefly pointed to the long title of the Penal Code, *viz*, "An Act to consolidate the law relating to criminal offences", and s 2 of the same, which provides that "every person shall be liable to punishment under this Code and not otherwise". Calvert took the view that the Code only repealed pre-existing law if it provided for the point in question and said that s 2 could plausibly refer to procedure.[19] Calvert however acknowledged that the overwhelming practice was to interpret s 2 as being concerned with liability, and not procedure; there had not been a single case of common law criminal liability save for under s 5 of the Penal Code.[20]

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11 H G Calvert, "Criminal Law and Procedure" in L A Sheridan, ed, *Malaya and Singapore*: *The Borneo Territories* (London: Stevens & Sons Ltd, 1961) 191 at 191.

12 Act No 45 of 1860.

13 T B Macaulay, *The Complete Works of Lord Macaulay* (London: Longman, Green & Co, 1898) vol 11 at 436-438.

14 Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959) at 227.

15 J F Stephen, *A History of the Criminal Law of England* (London: Macmillan & Co, 1883) vol 3 at 300.

16 M C Setalvad, *The Common Law in India* (London: Stevens & Sons Ltd, 1960) at 127, 128.

17 Stanley Yeo Meng Heong, "The Application of Common Law Defences to the Penal Code in Singapore and Malaysia" in A J Harding, ed, *The Common Law in Singapore and Malaysia* (Singapore: Butterworths, 1985) 143 at 144.

18 Koh Kheng Lian & Myint Soe, *The Penal Codes of Singapore and States of Malaya*: *Cases*, *Materials and Comments*, vol 1 (Singapore: Law Book Co of Singapore & Malaysia, 1974) at 1.

19 Calvert, *supra* note 11 at 192.

20 *Ibid* at 193.

Case law was also firm in holding that the Penal Code excluded the common law. Terrell J, in the Straits Settlements Supreme Court case of *R v Lee Siong Kiat*,[21] held that the Penal Code provided for criminal matters to the exclusion of English common law (and statutes). Schwake CJ, in the Bombay High Court decision of *Gopal Naidu v King-Emperor*,[22] held that the court was not entitled to invoke English common law where the *Indian Penal Code* deals specifically with the matter.

Be that as it may, the picture is not as clear-cut as the cases and commentary make it out to seem. The most prominent counter-example is contempt of court, which is derived purely from the common law and remains uncodified in Singapore. Certain types of contempt are criminal offences.[23] *Wellesley v The Duke of Beaufort*,[24] an English case decided in 1831 before the passage of the Penal Code in the Straits Settlements, concerned a member of the House of Commons, Wellesley, who carried off his infant daughter despite her being a ward of the court. Wellesley's counsel argued that nothing could be found in prior cases to justify a distinction between civil and criminal contempt. Lord Brougham, the Lord Chancellor at that time, disagreed and distinguished between civil and criminal contempt on the basis of whether the order for committal is in the nature of punishment or to compel performance.[25] The distinction *de jure* stands in English law even today: *Arlidge, Eady & Smith on Contempt* states that contempt is classified as criminal where the act "so threatens the administration of justice that it requires punishment from the public point of view".[26] There have been numerous cases of contempt in the Singapore courts over the years for scandalising the judiciary, and this is surely criminal contempt *par excellence* because the *raison d'etre* of scandalising contempt is to ensure that public confidence in the administration of justice is not undermined.[27] The Singapore White Book is also of the opinion that scandalising contempt is criminal in nature.[28]

Another aspect of the criminal law which is not covered by the Penal Code is the defence of non-insane automatism. Automatism is a defence that was not known to the law at the time the Penal Code was promulgated.[29] Section 84 of the *Malaysian Penal Code*,[30] which is identical to s 84 of the *Singapore Penal Code*,[31] provides

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21 [1935] MLJ 53 at 56 (Straits Settlement SC).

22 (1922) Indian Law Report 46 Madras 605 at 615 (Bombay HC).

23 The distinction between criminal and civil contempt and the implications this would have in the light of O 1 r 2(2) of the *Rules of Court* shall be explored in a subsequent article.

24 (1831) 2 Russ & M 639, 39 ER 538.

25 (1831) 2 Russ & M 639 at 666, 39 ER 538 at 548.

26 D Eady & A T H Smith, *Arlidge, Eady & Smith on Contempt*, 4th ed (London: Sweet & Maxwell, 2011) at para 3-1.

27 *Shadrake Alan v AG* [2011] 3 SLR 778 at para 22 (CA) [*Shadrake Alan*].

28 G P Selvam, ed, *Singapore Civil Procedure 2013* (Singapore: Sweet & Maxwell Asia, 2013) vol 1 at para 52/1/2. *Cf Shadrake Alan*, *supra* note 27 at para 80, where the Court of Appeal stated that scandalising contempt is quasi-criminal in nature. This comment was *obiter dictum*: the issue of whether contempt of court is divided into criminal and civil contempt was not squarely before the court and would not have been outcome-determinative. In any case, even if scandalising contempt is merely quasi-criminal in nature, the essential point still stands that there remain quasi-crimes which are not encapsulated in the Penal Code.

29 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2d ed (Singapore: LexisNexis, 2012) at para 26.3.

30 Act 574, Malaysia.

31 Cap 224, 2008 Rev Ed Sing.

for the defence of unsoundness of mind and has been read to cover insane automatism. Non-insane automatism has no basis whatsoever in the Penal Code, but two Malaysian cases have accepted that non-insane automatism is part of Malaysian law;[32] in contrast with the Penal Code defences, the onus is on the prosecution to disprove non-insane automatism beyond a reasonable doubt. A truly comprehensive code would exclude the development of the law in this fashion.

It is submitted that the better view is that the Penal Code only displaced the common law if, at the time of promulgation, it covered the point or sub-area of law in question. The Penal Code did not cover offences aimed at securing the administration of justice; champerty and maintenance are technically still criminal offences under the common law of Singapore. There is, of course, a distinction between the question of existence and the issue of whether the crimes of champerty and maintenance should be enforced (or repealed).

B. *As a Tort*

The law on tort was never systematically codified both in England and in the colonies, and absent legislative or judicial pronouncements, the torts of champerty and maintenance are technically still part of the law in Singapore.

For a period of time, the Indian Courts grappled with the issue of whether the torts of maintenance and champerty were part of the Indian common law. This was eventually definitively settled in the Privy Council decision of *Ram Coomar Coondoo v Chunder Canto Mookerjee*.[33] Sir Montague E Smith analysed several Indian cases taking various irreconcilable views on the matter and concluded that champerty and maintenance *per se* were not in force as specific laws in India. This was because they were laws of a special character, directed against abuses prevalent in early England, had fallen into comparative desuetude, and it was not shown that they were plainly appropriate to the condition of things in India.[34] But contracts of the character of champerty and maintenance would still be held to be invalid if they are extortionate and unconscionable, or if the contracts are made for improper objects, such as gambling in litigation, or injuring and oppressing others by abetting and encouraging unrighteous suits.[35]

It is open to a Singapore court to go down the same route and hold that the torts of champerty and maintenance *per se* were not received into Singapore law because of differing conditions in the Straits Settlements. Another possible position to take would be to hold that the torts of champerty and maintenance were imported into Singapore, but due to modern conditions would henceforth not be part of the law. The Singapore High Court took the latter position with respect to the tort of enticement in *TPY v DZI*.[36] MPH Rubin J held that the tort of enticement did not serve any useful purpose as society no longer subscribed to the view that women were chattels

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[32] See *Public Prosecutor v Kenneth Fook Mun Lee (No 1)* [2002] 2 MLJ 563 (Kuala Lumpur HC), where the proposition that non-insane automatism is part of Malaysian law was upheld on appeal [2007] 1 MLJ 334 (Putrajaya CA); *Abdul Razak bin Dalek v Public Prosecutor* [2010] 4 MLJ 725 (FC).

[33] (1876) 2 App Cas 186 (PC) [*Ram Coomar*].

[34] *Ibid* at 209.

[35] *Ibid* at 210.

[36] [1997] 1 SLR(R) 843 (HC).

whose existence was only to be in the service of their husbands, and he struck out the plaintiff's claim.[37]

While there is a dearth of authority on whether champerty and maintenance exist as torts, there are two Singapore cases which state that agreements involving maintenance and champerty are contrary to public policy and void. *Rebecca Ong*[38] concerned the question of whether the assignment of a right to sue and the subsequent financing of litigation by a third party were champertous and void. The court proceeded on the basis that champertous agreements *simpliciter* would be struck down, but the case at hand fell within two exceptions: *apropos* the assignment, the right to sue was ancillary to a property right; *apropos* the third party funding, the funder had a pre-existing interest in funding litigation because success would mean the repayment of loans earlier made out to the recipient. *Otech*[39] involved an agreement under which a company was engaged to assist in concluding a negotiated settlement with a third party. The assisting company argued that champerty did not apply to arbitration proceedings. Judith Prakash J, speaking for the Court of Appeal, extended champerty to arbitration proceedings. Champerty stems from public policy considerations that apply to all types of legal disputes and claims; the concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation.

It is readily apparent that *Rebecca Ong* and *Otech* are inconsistent with *Ram Coomar*, at the very least with respect to contracts involving maintenance or champerty. *Otech* in particular relied on public policy considerations that the Privy Council in *Ram Coomar* had rejected almost 130 years earlier as being peculiar to England. Thus, as the law currently stands in Singapore, maintenance or champerty *simpliciter* is sufficient to invalidate contracts, while in India the added element of unconscionability is required. This poses the larger question of whether Singapore law ought to follow the lead of *Ram Coomar* in denying the existence of the torts of maintenance and champerty. *Otech*'s acceptance of the same public policy considerations that *Ram Coomar* rejected, by parity of reasoning, seems to suggest that maintenance and champerty have all along been, and continue to be, actionable as torts in Singapore.

Singapore has, of course, not gone down the route of England in abolishing maintenance and champerty as crimes and torts. The English Law Commission recommended the abolishment of maintenance and champerty as crimes and torts in 1965.[40] This was implemented shortly thereafter by the *Criminal Law Act 1967*. The report stated that maintenance and champerty should no longer be indictable misdemeanours because they are a dead letter in English law, with no records of any prosecution for many years past.[41] The report also stated that maintenance and champerty should be abolished as torts on two grounds:

(a) It was difficult to reconcile the decided cases as to what constituted lawful justification, but the courts had progressively expanded this exception.

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37 *Ibid* at para 14.
38 *Supra* note 6.
39 *Ibid*.
40 *Supra* note 1.
41 *Ibid* at para 7.

Actual damage had to be shown for both successful and unsuccessful actions, and this was almost impossible of proof. The action for damages for maintenance was therefore no more than an empty shell;[42]

(b) Third party funding of litigation is today widespread, with examples including trade unions, third party liability insurance and legal aid. Society regards these examples as being fully justified.[43]

III. Subsuming Maintenance and Champerty within the Rubric of Third Party Cost Orders

The prohibitions on maintenance and champerty emerged in a society vastly different from ours and reflect policies that may no longer obtain today. Radin wrote an account on the historical origins of maintenance and champerty and concluded that it was intended to stamp out the last vestiges of feudalism.[44] Maintenance was directed at "the support given by a feudal magnate to his retainers in all their suits"; this type of support was "one of the means by which powerful men aggrandized their estates".[45] Dennis confirmed that there was an urgent need to keep feudal lords in check, with the chief danger being "corruption, intimidation, or other perversion of the courts of law".[46] The nobles were deprived of the power of judging and taxing vassals and turned instead to armed retinues to "impress the judges".[47] The Privy Council, in *Ram Coomar*, opined that maintenance and champerty was meant to "prohibit high judicial officers and officers of state from oppressing the King's subjects by maintaining suits or purchasing rights in litigation".[48]

England had, of course, transitioned fully to capitalism by the onset of the 19th century.[49] Bentham criticised maintenance and champerty as being obsolete:

> A mischief, in those times it seems but too common, though a mischief not to be cured by such laws, was, that a man could buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a hundred barons?[50]

As has already been mentioned, *Ram Coomar* likewise took the position that maintenance and champerty were "laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into, at least, comparative desuetude".[51]

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42 *Ibid* at paras 10, 11.
43 *Ibid* at paras 12-15.
44 M Radin, "Maintenance By Champerty" (1935) 24 Cal L Rev 48.
45 *Ibid* at 64.
46 A H Dennis, "The Law of Maintenance and Champerty" (1890) 6 Law Q Rev 169 at 173.
47 *Ibid*.
48 *Supra* note 33 at 208.
49 Historians place the beginning of the capitalist period in Europe in the second half of the 16th century at the earliest: see P M Sweezy and M Dobb, "The Transition from Feudalism to Capitalism" (1950) 14(2) Science & Society 134 at 147.
50 J Bentham, *Defence of Usury* (New York: Theodore Foster, 1837) at 36.
51 *Supra* note 33 at 209.

Undoubtedly these considerations were what led the English Law Commission to recommend the abolishment of maintenance and champerty as torts and crimes. However, despite their abolition as torts and crimes, maintenance and champerty remain relevant in another context. The House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd*[52] interpreted s 51(1) of the *Supreme Court Act 1981*[53] to mean that cost orders could be made against non-parties. In the subsequent case of *Singh v Observer Ltd*,[54] it was held that a non-party maintainer could be ordered to pay costs, and that the abolition of maintenance and champerty as torts was no obstacle to this. The Court of Appeal decision of *Symphony Group Plc v Hodgson*[55] approved of *Singh v Observer* and said that maintenance was one category where a cost order may be made against a non-party.

English law seems to have taken a volte-face; what has *de jure* been abolished seems to have been resurrected under the rubric of third party cost orders.

But that is too sweeping a statement and there are nevertheless some crucial distinctions between third party cost orders and an independent tortious cause of action:

(a) An independent cause of action either is or is not made out. The court does not have a discretion to disallow a tortious claim if the elements of the tort are made out. Third party cost orders are entirely discretionary, and a court may decline to make a third party cost order even if the elements of the (former) tort of maintenance are, strictly speaking, made out.

(b) Third party cost orders are not compensatory in nature. Party and party costs, awarded on a standard basis, do not fully cover the costs incurred during litigation. A tortious claim in maintenance would place the successful party in the position she would have been in had the litigation not occurred and allow her to fully claim for the costs incurred during litigation.[56]

(c) Third party cost orders can only be made if the party seeking the cost order was successful in the litigation. A claim in maintenance could theoretically be made even if the party was unsuccessful in the litigation.

(d) A third party cost order must be sought at the conclusion of substantive proceedings, and *Symphony v Hodgson* has imposed the requirement that the third party be warned as early as possible about the possibility that costs may be sought against him. A tortious cause of action does not require such a warning, and a putative plaintiff can initiate proceedings at any time, subject to the usual limitation period.

The distinctions show that the pendulum has swung somewhat in favour of third party litigation funding; maintenance *per se* is no longer objectionable. Indeed, between 1967 and 1986, the pendulum had swung all the way and there was no remedy

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52 [1986] AC 965 (HL) [*Aiden Shipping*].

53 (UK), 1981, c 54; see Part IV-B, below, for the pertinent extract.

54 [1989] 2 All ER 751 (QB) [*Singh v Observer*].

55 [1994] QB 179 (CA) [*Symphony v Hodgson*].

56 An illustration of this would be the recent case of *Maryani Sadeli v Arjun Permanand Samtani* [2014] SGCA 55 [*Maryani*], where the appellants tried but failed to claim for the entirety of their costs in equitable compensation for breach of fiduciary duties.

for third party funding, unless one could show abuse of process[57] or malicious prosecution. *Aiden Shipping*, *Singh v Observer* and *Symphony v Hodgson* have however recognised that some forms of third party funding remain objectionable and warrant the imposition of third party cost orders.

The English Law Commission, in its report recommending abolition, noted that one of the most important sources of litigation funding was actually the state, with a progressive increase of the number of cases supported by legal aid. Facilitating access to justice is not a new refrain. Bentham gave the example of a minor whose guardian had concealed the value of an inherited estate and got a conveyance of the estate for a trifle.[58] The minor was advised that he had a strong claim, but he did not have the means to pursue it. Two gentlemen came forward to defray his legal costs in return for half the estate, but withdrew when they found out that champerty was illegal. More recently, Sundaresh Menon CJ, in successive *Opening of Legal Year* speeches, had stressed the important role that lawyers and *pro bono* initiatives play in ensuring access to justice.[59]

The current state of English law demonstrates the tension between two competing policy considerations: the need to rein in third party funding of litigation on the one hand, and the social imperative of facilitating access to justice on the other. Even before the formal abolition of champerty and maintenance, successive cases had expanded the circumstances in which litigation funding was held to be justified.[60] The tension between the two competing policy considerations could not be adequately accounted for under traditional principles of tort law because the law of champerty and maintenance was ancient in origin and had ossified around certain principles. There were two artificial ways of taking into account modern conditions: expanding the exceptions where maintenance was justified[61] and requiring strict proof of causation.[62] By situating the problem within the rubric of third party cost orders, a court can transparently weigh the competing policy imperatives and come to a landing on the particular facts without the need for grappling with the intricacies of contrived doctrine.

Thus, while maintenance and champerty technically remain crimes in the absence of judicial pronouncement to the contrary, they should not be enforced. To reiterate, there have been no reported cases of both being enforced in Singapore. Criminalising maintenance and champerty *per se* would have a drastic chilling effect. Persons would not know when they have fallen afoul of the law, especially because the ambits of the categories where maintenance is justified are unclear, unduly technical, and antiquated. This would ultimately hamper access to justice.

It also follows that maintenance and champerty *per se* ought not to be independent causes of action. There would be undue satellite litigation over whether a maintainer is justified in providing financial assistance and whether causation has been made

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57 But see Part IV-C, below, where it is pointed out that cases after 1986 denied that a general tort of abuse of process exists and restricted prior precedents to their facts.

58 Bentham, *supra* note 50.

59 *Opening of the Legal Year 2013 and Welcome Reference for the Chief Justice* (4 January 2013); *Opening of the Legal Year 2014* (3 January 2014).

60 *Martell v Consett Iron Co Ld* [1955] 1 Ch 363 exhaustively analyses these cases at 399-416.

61 *Ibid*.

62 See *eg Neville v London "Express" Newspaper Ltd* [1919] AC 368 (HL) [*Neville*]; *William Hill (Park Lane) v Sunday Pictorial Newspapers (1920) Ltd* The Times (15 April 1961) [*William Hill*].

out. Arguments would take on an air of artificiality and legal analysis would involve copious amounts of authorities from a bygone era. But what is at stake is not, and ought not to be, merely black-letter doctrine; the scope of the situations where maintenance is justified should ultimately be judged by the extent to which the pendulum has swung in favour of access to justice. If that be the case, it would be better to jettison the archaic torts of maintenance and champerty, and to instead characterise the issue as involving the circumstances upon which a third party cost order would be made.

IV. The Possible Remedies Moving Forward

This is not to say that there are no civil means of redress against third party litigation funding. There are two main remedies available: at the interlocutory stage, security for costs, and at the close of proceedings, third party cost orders.

A. *Interlocutory Stage: Security for Costs and Stay of Proceedings*

At first glance there seems to be a distinction between seeking security for costs and seeking a stay of proceedings. This is illusory; both are two sides to the same coin. Where a court orders security for costs to be given by a non-party, the order may provide that proceedings shall be stayed until the security is given, or for the action to be dismissed if the security is not provided by a stipulated date.[63] Where a stay of proceedings is sought, the stay may be forestalled by the non-party undertaking to pay costs or providing security for costs.[64]

1. *O 23 r 1(3)*

O 23 r 1(3) of the *Rules of Court* states that a defendant may apply for a non-party to provide security for costs where the non-party had assigned the right to the claim to the plaintiff with a view to avoiding his liability for costs, or where a non-party had contributed or agreed to contribute to the plaintiff's costs in return for a share of any money or property which the plaintiff may recover. O 23 r 1(3) thus covers champerty or champertous agreements, but not maintenance.

In this regard, the court retains a discretion not to order security for costs even if the plaintiff is suing for the benefit of another — the court must have regard to all the circumstances of the case and think it just to do so. But it is difficult to conceive of circumstances where it would not be just to order security for costs against a non-party funder if the plaintiff is only able to move forward with his suit because of champerty and would not be able to bear the defendant's costs if he loses. If the non-party funder stands to benefit from the plaintiff's success, it is probably fair for her to bear the concomitant risk of being liable for the defendant's costs.

Needless to say, O 23 r 1(b) does not extend to defendants, and for good reason: a defendant is not in control of the litigation and cannot help the fact that he is being

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63 Selvam, *supra* note 28 at para 23/3/24.

64 *Abraham v Thompson* [1997] 4 All ER 362, especially at 374j (CA).

sued. A plaintiff has the element of choice, and having chosen to sue a particular defendant, he cannot be heard to say that he requires security for his costs and must take the risk that the defendant would ultimately not make good on the plaintiff's costs. If the plaintiff feels that his claim is clear-cut, he can always reduce the cost outlay by applying for summary judgment or a striking out of the defence. More fundamentally, and as a matter of justice, a defendant, having been dragged to court by the plaintiff, should not be deprived of his right to defend himself simply because he is unable to provide security for the plaintiff's costs.[65]

2. *Inherent Powers*?[66]

The power to order security for costs originally arose from the inherent powers that the Superior Courts of the common law had over their own procedure. As long ago as 1786, the court in the exercise of its inherent powers required a plaintiff resident in Georgia to give security for costs.[67] In 1907, the King's Bench decision of *J H Billington, Ltd v Billington*[68] ordered security for costs to be given despite the absence of a statute or rule authorising the High Court to order security for costs of an appeal from an official referee.

Several recent English cases have however taken the opposite position and proclaimed that O 23 of the *English Rules of Supreme Court*[69] is exhaustive, and that the courts do not have the inherent powers to order security for costs. In *C T Bowring*,[70] the plaintiffs claimed certain sums due to it in respect of insurance and reinsurance business. The plaintiff obtained a *Mareva* injunction and gave the usual cross-undertaking in damages; this was discharged by consent after two months. The defendant claimed under the cross-undertaking and applied for damages to be assessed. In response, the plaintiff applied for an order for security for costs in relation to the defendant's application for damages to be assessed. The Court of Appeal held that O 23 was exhaustive. If new categories called for security for costs, this was a matter that must be dealt with by Parliament or the Rules Committee, and not the courts.[71] This was in spite of the fact that the courts originally ordered security for costs under their inherent powers.[72] In *Condliffe v Hislop*,[73] libel proceedings were financed by the plaintiff's mother. The Court of Appeal, in declining to grant an

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65 See *C T Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* [1994] 2 Lloyd's LR 567 at 573, 574 (CA) [*C T Bowring*].

66 In *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 (CA), the Court of Appeal distinguished between the inherent jurisdiction and inherent powers of the court (especially at para 41). The former refers to the inherent authority of a court to hear a matter, while the latter refers to the inherent capacity of a court to give effect to its determination by making or granting the orders or reliefs sought by the successful party: *ibid* at para 33. But English jurisprudence and commentary continue to refer to "inherent jurisdiction" as encompassing both jurisdiction and powers, and for ease of exposition all English references to "inherent jurisdiction" shall be replaced with "inherent powers" where the latter is the more technically precise term.

67 *Pray v Edie* (1786) 1 TR 267, 99 ER 1087.

68 [1907] 2 KB 106.

69 SI 2009/1603 [*RSC*].

70 *Supra* note 65.

71 *Ibid* at 571, 575, 580.

72 *Ibid* at 574.

73 [1996] 1 WLR 753 (CA) [*Condliffe*].

order for security for costs, followed its earlier decision in *C T Bowring* and said that O 23 was exhaustive. But this is only one half of the coin, and the cases pertaining to staying proceedings must also be considered.

A number of pre-abolition English decisions are relevant to a stay of proceedings. *Skelton v Baxter* held that maintenance of the plaintiff is no defence to the action.[74] In *Martell v Consett Iron Co Ld*,[75] the defendants sought a stay of proceedings on the ground that the plaintiffs' action was being maintained by a third party. The Court of Appeal held that a stay would not be granted.[76] Where a maintained plaintiff is concerned, a stay of a temporary character would not purge the illegal maintenance, which can only be purged by discontinuing proceedings and starting a fresh action. However, this would be tantamount to maintenance being a defence to a plaintiff's action, which it is not (on the authority of *Skelton v Baxter*). Where a maintained defendant is concerned, a stay would inappropriately benefit the defendant, while striking out the defence would entitle the plaintiff to judgment.

In the post-abolition period, the Court of Appeal, in *Abraham v Thompson*,[77] squarely considered the issue of staying maintained proceedings. The plaintiffs sued a number of defendants for breaches of various joint venture agreements in relation to the development of golf and leisure complexes in Portugal. The defendants suspected that the action was being funded by offshore trusts related to the plaintiffs.

Abraham v Thompson followed *C T Bowring* and accepted that RSC O 23 provided a complete and exhaustive code and excluded the possibility of relying on inherent powers to order security for costs.[78] That ought to have been the end of the matter, for a court should not be able to stay an action on the grounds that a party is not assured of recovering his costs. Such a stay would easily be obviated by providing an undertaking or security for costs, and this would achieve by the back-door what is impermissible by the front. The Court of Appeal nevertheless went on to lay down the following propositions of law:

(a) An individual is entitled to untrammelled access to a court of first instance in respect of a bona fide claim, subject only to the sanction that he is in peril of an adverse costs order if he is unsuccessful.[79]

(b) This is subject to the proviso that, if the court is satisfied that the action is not properly constituted or pleaded, or is not brought bona fide in the sense of being vexatious, oppressive or otherwise an abuse of process then the court may dismiss the action or impose a stay whether under the rules of court or the inherent powers of the court.[80]

(c) Therefore, a stay of proceedings would only be granted if it could be clearly demonstrated that there was an abuse of process.[81]

Abraham v Thompson is technically reconcilable with *C T Bowring*. O 23 is concerned with the provision of security, and *Abraham v Thompson* does not, strictly

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74 [1916] 1 KB 321 at 326.
75 *Supra* note 60.
76 *Ibid* at 421, 422.
77 *Supra* note 64.
78 *Ibid* at 369a-g, 379b-c.
79 *Ibid* at 374e-f.
80 *Ibid* at 374f-g.
81 *Ibid* at 376e-f.

speaking, pertain to security for costs but merely clarifies that the inherent powers of the courts may be invoked to stay a third party funded action if the circumstances disclose an abuse of process. But this technical reconciliation raises the deeper issue of why the inherent powers of the courts can only be invoked if an abuse of process, apart from third party funding *simpliciter*, is disclosed. It is not to the point that the Rules of Court are exhaustive. The inherent powers of the courts were invoked in *Abraham v Thompson* precisely because the Rules of Court did not spell out when proceedings ought to be stayed. If a court can stay proceedings where there has been an abuse of process, surely it can impose the less draconian order of staying proceedings subject to the third party funder providing an undertaking as to costs or security for costs. If this lesser form of relief is granted, then the court would, in effect, be supplementing O 23. It is thus arbitrary to, in name, restrict the ambit of a court's inherent powers to stay proceedings only to cases where an abuse of process apart from third party funding *simpliciter* is made out.

Quite apart from arbitrariness, it is submitted that *C T Bowring* and *Abraham v Thompson* ought not to be followed because the Rules of Court do not purport to be exhaustive: O 92 r 4 states that nothing in the Rules "shall be deemed to limit or affect the inherent powers of the Court".[82] It is also instructive that s 80(1) of the *Supreme Court of Judicature Act*[83] stipulates that the Rules regulate and prescribe the procedure and the practice to be followed. *Au Wai Pang v AG*[84] took s 80(1) to mean that the Rules were subordinate to the SCJA, were procedural in nature, and could not confer power on the Court of Appeal.[85] In much the same vein, the Rules cannot confer substantive powers on the court; they only regulate and prescribe the procedure and practice to be followed for those substantive powers to be exercised. More specifically, O 23 does not confer the power to grant security for costs. Where the High Court is concerned, the SCJA does not explicitly provide for the power to grant security for costs;[86] it inexorably follows that this power must lie within the inherent powers of the High Court.[87] Where the Court of Appeal is concerned, s 36(1) of the SCJA explicitly grants the Court of Appeal the power to make an order for security for costs.

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82 *Supra* note 5.

83 Cap 322, 2007 Rev Ed Sing [*SCJA*].

84 [2014] 3 SLR 357 (CA) [*Au Wai Pang*].

85 I H Jacob, in his classic essay, "The Inherent Jurisdiction of the Court" (1970) 23 Curr Legal Probs 23 at 25, took the position that the inherent powers of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of the case. The Rules of Court are additional to, and not in substitution of, the powers arising out of the inherent powers of the court. The two heads of powers are cumulative and not mutually exclusive, such that in any given case, the court is able to proceed under either or both. This presupposes that the Rules of Court are themselves power-conferring — something that *Au Wai Pang*, *supra* note 84, has debunked.

86 Neither s 18 nor the First Schedule of the SCJA, *supra* note 83, refers to security for costs.

87 There is technically another possibility that remains: O 23 could simply be *ultra vires* and the High Court does not have the power to grant security for costs. But this is a *reductio ad absurdum*. It is well-settled that the High Court, being a superior court of record exercising original jurisdiction (s 3 of the SCJA, *supra* note 83), has the inherent jurisdiction and power to "uphold, protect and fulfil the judicial function of administering justice according to law": *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at para 30 (HC), and this is surely wide enough to encompass the granting of security for costs. It would also be odd for the Court of Appeal to be able to grant security for costs (for an appeal), but for the High Court not to be able to do so (for an original suit).

The strongest counter-argument against the availability of security for costs would be the legitimate expectation that the courts would not grant security outside of O 23. But this is a weak argument at best because *C T Bowring* has never been endorsed by a Singapore court, and in any event such legitimate expectations can be upheld if need be via the doctrine of prospective overruling[88] rather than an outright refusal to grant security pursuant to inherent power.

Summing up, a defendant would be able to seek security for costs (as confirmed by O 23) where the plaintiff is being champertously supported by a non-party, and should be able to seek security for costs where the plaintiff is being maintained by a non-party (under the inherent powers of the court). The factors that a court could potentially take into account are canvassed in the next section on third party cost orders.

B. *At the Close of Proceedings*: *Third Party Cost Orders*

Section 51(1) of the *Supreme Court Act 1981* states that ". . . the court shall have full power to determine by whom and to what extent the costs are to be paid".[89] This is identical to O 59 r 2 of the *Singapore Rules of Court*.[90] *Aiden Shipping* was followed by the Singapore High Court in *Karting Club of Singapore v Mak David (Wee Soon Kim Anthony, intervener)*[91] and by the Singapore Court of Appeal in *Godfrey Gerald QC v UBS AG*.[92] Both decisions culminated in a cost order made against a third party, but both did not involve maintenance. The former was made against the chairman of an unincorporated association who had initiated proceedings in the association's name, while the latter related to an unsuccessful application for the *ad hoc* admission of Queen's Counsel, with the order being made against the putative client.

I have argued that maintenance and champerty *per se* ought not to be independent causes of action, and in this respect *Ram Coomar* should be followed. At the same time, there remain hefty public policy considerations against third party litigation funding which have most recently been affirmed by *Otech*.

The way is thus open for the Singapore courts to consider maintenance and champerty within the rubric of third party cost orders, which, as has been mentioned, would allow the courts to transparently weigh the twin policy objectives of facilitating access to justice and reigning in unwarranted third party funding. Pre-abolition English law, which drew arbitrary and opaque distinctions between permissible and non-permissible cases of maintenance and champerty, should not generally be followed.

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88 Prospective overruling has been accepted by a specially convened three-Judge High Court to be a part of Singapore law: *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at paras 123-125 (HC) [*Hue An Li*].

89 *Supra* note 53.

90 *Supra* note 5. The general power to order costs is contained in para 13 of the First Schedule to the SCJA, *supra* note 83, and in this respect O 59 r 2 is merely a clarificatory and not a power-conferring provision.

91 [1992] 1 SLR(R) 786 (HC).

92 [2003] 2 SLR(R) 306 (CA).

It is submitted that the following factors can be taken into account in balancing the policy objectives and determining if a third party cost order (and an order against a third party for security for costs) should be made:

(a) The extent of the funding provided. The greater the extent of the funding provided, the more assistance is rendered, and the greater the justification for ordering the third party to bear costs. This was a significant factor in *Arkin v Borchard Lines Ltd*,[93] where the Court of Appeal suggested that professional funders were liable only to the extent of the funding provided.

(b) The extent of the benefit obtained by the third party. The greater the benefit redounding to the third party, the greater the justification for ordering the third party to bear costs. Where there is outright champerty — that is, where the third party funder stands to gain a portion of, or the entirety of, the spoils of the funded litigation — it is only fair for the third party to take the concomitant burden of being liable for the costs incurred by the winning party.[94] Where the third party derives no benefit whatsoever, this is a fact that should militate against a third party cost order.[95]

(c) The extent to which the third party controls litigation. The greater the extent of control exerted by the third party funder over litigation, the more readily the inference can be made that the third party is litigating for his own purposes. English law has treated funders intimately involved in litigation as the "real parties" interested in the outcome of the suit, against whom cost orders can be made.[96] The plaintiff could potentially also fall afoul of O 23 r 1(b) of the *Singapore Rules of Court*, which allows for a security for costs order to be made against the plaintiff if he is merely a nominal plaintiff.

(d) The relationship between the third party and the funded litigant. If the funder is the litigant's solicitor, this would constitute a serious breach of professional ethics.[97] Ordering such a solicitor to bear the costs of the winning party would not only reign in unwarranted third party funding, but also prophylactically uphold professional ethical norms. On the other hand if the funder is consanguine with the litigant, the courts ought to be slow in imposing a third party cost order.[98]

(e) Whether the funded litigant is a plaintiff or defendant.[99] A defendant cannot help the fact that he is being sued; in contrast a plaintiff chooses when and whom to sue. Thus, all things being equal, the courts should be more ready to impose a third party cost order where a funded plaintiff is concerned and be more hesitant in the case of a funded defendant.

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93 [2005] 1 WLR 3055 at para 41 (CA).

94 *Ibid* at para 40.

95 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 at para 25 (PC).

96 *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 at 1620B (CA). For the Australian equivalent, see *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406 at para 37 (HCA), which also referred to *a* real party rather than *the* real party.

97 See *supra* note 6.

98 *Bradlaugh v Newdegate* (1883) 11 QBD 1 at 11.

99 This factor is however conclusive for security for costs because plaintiffs should not be able to obtain security for costs *vis-à-vis* defendants: see Part IV-A-1, above.

(f) Whether litigation has been commenced for an extraneous improper purpose or is otherwise an abuse of process. A court should impose a third party cost order if it can be shown that the purpose of the funded litigation is to achieve an improper end.[100] It would surely constitute an abuse of process for a litigant to deliberately structure his affairs (for instance, by channelling his resources to an offshore trust and then using the trust to fund litigation)[101] such that he would be immune to an adverse cost order and is only able to bring his claim because of third party funding.

(g) The merits of the claim or defence. One of the important purposes of a cost order is the deterrence of groundless actions.[102] As such, if a funded claim or defence is clearly groundless, this would certainly call for the imposition of a third party cost order. But this should be looked at without the benefit of hindsight; the third party ought to bear costs only if it was clear from the outset that the claim or defence is devoid of merit and the third party was aware of this.

(h) Whether the litigant, apart from the third party funding, had sufficient resources to pursue his claim or defence. If the litigant actually had more than sufficient resources to pursue his claim or defence, then the considerations in favour of facilitating access to justice are not relevant and the policy objective of deterring unwarranted third party funding predominates; indeed if the third party had actual subjective knowledge of this and nevertheless funded the litigant, the third party would arguably be an officious meddler who ought to bear costs.

(i) If a company is funded, the extent to which funded proceedings are bona fide in the interest of the company. Where the funded litigant is a company, special considerations come into play. A company is a separate legal entity;[103] but at the same time a company is a legal construct that can only act through natural persons. Very often the interests of a company are aligned with that of its directors or shareholders, and it is commonplace for directors or shareholders to sink their own money into their companies. Imposing third party cost orders on directors or shareholders who fund litigation bona fide in the interest of the company would destroy the legal distinction between a company and its shareholders and directors. But third party cost orders should nevertheless be made if it would be unjust for the funder to rely on the separate legal personality of the company,[104] the funder prefers his own interests to that of the company,[105] or where the company is financially insecure such that the interests of the creditors of the company start to take precedence[106] and it would be unfair to penalise the creditors for failed litigation. On the other end of the spectrum, it is arguable that at

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100 *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 489C-490H (CA).

101 This was alleged in *Abraham v Thompson*, *supra* note 64.

102 *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 429G (HL).

103 *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL).

104 *Alan Phillips Associates Ltd v Dowling (t/a Joseph Dowling Partnership)* [2007] EWCA Civ 64.

105 *Suisse Security Bank & Trust Ltd v Francis* [2007] 2 Costs Law Reports 222 at para 8 (PC).

106 *Winkworth v Edward Baron Development Co Ltd* [1987] 1 All ER 114 at 118 (HL).

> least some dispensation must be shown to liquidators and receivers who are under a duty to maximise the value of an insolvent company.[107]

Even after abolition, English law took causation to be an essential pre-requisite for a third party costs order.[108] A subsequent case said that causation is not a necessary pre-condition, but would often be a vital factor.[109] It is submitted that, where it comes to third party funding, causation *per se* should not be relevant to the enquiry. This is because the central concern is about weighing the twin policy imperatives of facilitating access to justice and deterring unwarranted third party funding. In the first place causation is neither here nor there. If the third party funding was warranted because it had the effect of facilitating access to justice, causation would by definition be satisfied because the funded litigant would not have been able to engage in the litigation process without funding. If the third party funding was unwarranted, for instance where the third party was controlling litigation for his own extraneous purposes, then the third party ought to bear costs regardless of whether causation is made out. The lack of causation does not tilt the calculus and render the act of funding acceptable. It also does not lie in the mouth of the third party to assert that the opposing party would have incurred litigation costs anyway irrespective of the third party's involvement. In this regard it is telling that Lord Loughborough regarded maintenance as being *malum in se* — that is, a wrong in and of itself.[110]

Secondly, and more fundamentally, causation is a proxy for legal policy. Lord Hoffmann has said that questions of liability cannot be separated from questions of causation; there are varying causal requirements in tort depending on the basis and purpose of liability.[111] Strict causation requirements were belatedly imposed in the early twentieth century as a device to limit the reach of the torts of maintenance and champerty.[112] Under the modern approach of subsuming maintenance and champerty within the rubric of third party cost orders, there is no longer a need to grapple with the intricacies of ancient doctrine, and it would be strange for causation — which is a quintessential principle of tort law — to continue to haunt the courts from beyond the grave.

1. *The Relation Between Security for Costs and Cost Orders*

In deciding whether security for costs should be granted, a court must transparently weigh the twin imperatives of facilitating access to justice and the need to reign in third party litigation funding. Needless to say there is a close relation between security for costs, which is granted prior to the commencement of substantive proceedings, and third party cost orders, which are granted at the conclusion of substantive proceedings. If a court is willing to order a third party to provide security for costs, then barring exceptional circumstances the court should, *a fortiori*, order that third party

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[107] But see *Ho Wing On Christopher v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 (CA), which holds that liquidators ought to seek an indemnity from the creditors if the insolvent company's assets are insufficient to cover the legal costs of the winning opponent.

[108] See *eg Hamilton v Al Fayed (No 2)* [2003] QB 1175 at para 54 (CA).

[109] *Total Spares & Supplies Ltd v Antares SRL* [2006] EWHC 1537 at para 54.

[110] *Supra* note 8.

[111] *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at paras 127, 128 (HL).

[112] *Neville*, *supra* note 62; *William Hill*, *ibid*.

to bear the cost consequences of the funded party not succeeding in his action or defence. The balancing enquiry is, in a sense, shifted forward to the pre-substantive stage.

But the converse does not necessarily follow. A defendant who fails to obtain security for costs at the pre-substantive stage should not be barred from seeking a third party cost order at the close of substantive proceedings. This is because the weight that is to be attributed to facilitating access to justice differs. In the former, this should be accorded more weight because the plaintiff would potentially be deprived of his day in court if the third party funder is unwilling or unable to provide security for costs. In the latter, the plaintiff would have already had his day in court, and the concern with facilitating access to justice is not so much directed at the plaintiff but at future litigants similarly situated to the plaintiff.

In this respect, Kennedy LJ is surely right in saying that normally the better course would be to let the action proceed to trial and then, if need be, consider the grant of a third party cost order.[113] The factors that are germane to the grant of a third party cost order are also germane to the question of whether the third party ought to provide security for costs because both are buttressed by the same competing policy considerations of access to justice and reigning in unwarranted third party funding. But a litigant would have to make a far more compelling case pre-trial for the grant of a third party security for costs order, compared to the same litigant seeking a third party costs order at the close of trial.

C. *Post Proceedings: The Tort of Abuse of Process?*

It seems to be clear that, under English law, there is no general tort of abuse of process. *Metall Und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* held that it is "at least well arguable" that the tort of abuse of process exists,[114] but this pertained to an interlocutory application for *ex juris* service out of the jurisdiction, where the applicant only needed to establish a good arguable claim on the merits that the tort existed.[115] In *Land Securities plc v Fladgate Fielder (a firm)*, Etherton LJ said that there was no general tort of abuse of process, preferring to restrict the old cases to their facts.[116] Moore-Bick LJ appeared to accept that there was a general tort of abuse of process, but held that it only covered injury to the person, damage to property and damage to reputation.[117] Quite apart from the above, one of the elements of the tort is the attainment of a collateral advantage beyond the proper scope of proceedings,[118] and Etherton LJ noted that there was no clearly accepted approach for identifying what is sufficiently collateral. The author submits that, short of the clearest of cases, there are grave difficulties involved in proving an alleged collateral purpose.

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113 *Condliffe*, *supra* note 73 at 762E-F.

114 [1990] 1 QB 391 at 469B (CA) [*Metall*].

115 *Ibid* at 434G. The Singapore position on *ex juris* service is subtly different: see *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156 (CA).

116 [2010] 2 WLR 1265 at para 67 (CA) [*Land Securities*].

117 *Ibid* at para 98.

118 *Metall*, *supra* note 114 at 469F; *Land Securities*, *supra* note 116 at paras 59, 93.

There is also no general civil analogue for the tort of malicious prosecution, with *Gregory v Portsmouth City Council* suggesting that this tort would only be actionable in civil cases in certain well-defined categories.[119]

It is beyond the ambit of this paper to analyse the tort of abuse of process or the tort of malicious prosecution in any great detail. Suffice to say, a party seeking reimbursement from a third party for his legal costs is well advised to seek an order for security for costs before the commencement of substantive proceedings, or a third party cost order at the close of substantive proceedings, and not to leave this to the vagaries of an independent tort claim after proceedings have ended.[120]

V. Conclusion

Maintenance and champerty have never been and should not be enforced as crimes; nor should they be independent torts. Archaic doctrine drew invidious and arbitrary distinctions as to when third party litigation funding was justified. Situating the problem within the rubric of third party orders would enable the courts to transparently balance competing policy imperatives: facilitating access to justice and deterring unwarranted forms of third party funding. A third party may be ordered to provide security for costs or to bear costs. There is absolutely no doubt that a Singapore court has the express power to order a third party who engages in maintenance and/or champerty to bear costs, and a champertous third party to provide security for costs. It is also argued that a court also has the inherent power to order a third party who engages in maintenance *simpliciter* to provide security for costs. In this regard it is suggested that a court may take several factors into account in deciding whether to grant a third party order: the extent of the funding provided; the extent of the benefit obtained by the third party; the extent to which the third party controls litigation; the relationship between the third party and the funded litigant; whether the funded litigant is a plaintiff or defendant; whether litigation has been commenced for an extraneous purpose; the merits of the claim or defence; whether the litigant had sufficient resources apart from third party funding; and if a company is funded, the extent to which the funded litigation is bona fide in the interest of the company. Causation, a quintessential principle of tort, should no longer be a prerequisite, or even a factor in the calculus of whether to grant a third party order. While the same factors can be taken into account for both security for costs and costs, a litigant would have to make a far more compelling case pre-trial for the grant of security of costs, compared to the same litigant seeking costs at the close of trial.

The proposed subsumation of maintenance and champerty within the rubric of third party orders and the concomitant adoption of a factor-based, rather than a rule-based, approach cohere with trends in other areas of Singapore law. The Court of Appeal has, in recent times, abolished technical defences shielding employers from liability for personal safety, instead subsuming breach of duty under the

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[119] *Supra* note 102 at 432F-H.

[120] Or, for that matter, claiming costs in the form of damages for an independent breach of an unrelated duty. *Maryani*, *supra* note 56, makes it clear that, in the context of a breach of fiduciary duty, a court shall, in general, not award damages for unrecovered costs in previous proceedings; however, the door was left open for exceptionally rare instances, "if they in fact exist at all": *ibid* at para 53.

all-encompassing rubric of reasonable care;[121] abolished the static-dynamic and invitee-licensee-trespasser divisions within occupiers' liability, instead subsuming occupiers' liability within the all-encompassing rubric of negligence;[122] subsumed the officious bystander and business efficacy tests within a new three-step framework for the implication of contractual terms;[123] and the High Court has adopted a factor-based approach to determine if judicial pronouncements should be given prospective effect, a sharp break from earlier cases which considered this on the rule-based approach of whether the *nullum crimen sine lege* maxim was violated.[124] The law on third party litigation funding ought to be no different.

[121] *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786 (CA).
[122] *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 (CA).
[123] *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 (CA).
[124] *Hue An Li*, *supra* note 88.