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Case Note

COMPENSATION FOR ABUSED FOREIGN DOMESTIC WORKERS

A Problem of Enforcement

Tay Wee Kiat v Public Prosecutor
[2018] 5 SLR 438; [2019] 5 SLR 1033

In *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438; [2019] 5 SLR 1033, two offenders who had abused a foreign domestic worker had been ordered to pay her compensation, on pain of a default term of imprisonment. When they failed to pay, the Prosecution applied for the compensation order to be enforced by way of attachment of the offenders' property or garnishment of debts due to the offenders ("garnishment/attachment orders"). The High Court refused to make garnishment/attachment orders on the grounds that (a) the Prosecution had applied for such orders belatedly; and (b) such orders would lead to "undue protraction" of proceedings. This note argues that the High Court erred in so refusing. Compared to relying on default imprisonment terms as the means of enforcing compensation orders, making garnishment/attachment orders would better comport with the statutory compensation scheme for the High Court, be more economically efficient, and better promote the welfare of abused foreign domestic workers.

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I. Introduction

1 *Tay Wee Kiat v Public Prosecutor*[2] involved a married couple who repeatedly abused a foreign domestic worker named Fitriyah. Tay Wee Kiat's treatment of Fitriyah between 2011 and 2012 was "plainly cruel and almost sadistic" and amounted to a "serious affront to her dignity".[3] His wife Chia Yun Ling, while not as culpable, caused physical harm to Fitriyah in a manner that "bordered on the abusive".[4] (This is to say nothing about their similar crimes during the same period against another foreign domestic worker, Moe Moe Than).[5]

2 For their offences against Fitriyah, Tay and Chia were sentenced to 43 months' and two months' imprisonment respectively. In addition, using its powers under s 359 of the Criminal Procedure Code[6] ("CPC"), the High Court ordered the offenders to compensate Fitriyah for her pain and suffering and loss of prospective earnings: Tay and Chia were ordered to pay Fitriyah $5,900 and $1,900 respectively.[7]

3 But Tay and Chia did not pay up for over a year. Eventually, despite the Prosecution's efforts, the High Court declared that the offenders were to serve default terms of imprisonment instead of paying the compensation, and that nothing more could be done to make them pay.[8] This state of affairs was brought about by what this note argues was an incorrect application of the statutory compensation scheme by the High Court. The High Court refused to make further orders under s 360 of the CPC, such as ordering that the offenders' property be seized and sold and the proceeds used to pay Fitriyah. This note will argue that the High Court erred in so refusing, and ought to have made such orders.

II. The purpose of compensation orders

4 Under s 359 of the CPC, when a person is convicted of an offence, the court must "consider whether or not to make an order for

2 [2018] 4 SLR 1315; [2019] 5 SLR 1033.
3 *Tay Wee Kiat v Public Prosecutor* [2018] 4 SLR 1315 at [79].
4 *Public Prosecutor v Tay Wee Kiat* [2017] SGDC 184 at [91].
5 *Public Prosecutor v Chia Yun Ling* [2019] SGMC 13. After the Prosecution's appeals (MA 9063/2019/01 and MA 9057/2019/01), Tay Wee Kiat was sentenced to a total of 30 months' imprisonment and Chia Yun Ling to 47 months' imprisonment in respect of offences against Moe Moe Than. The sentences of imprisonment in respect of offences against Fitriyah were ordered to commence after the end of these sentences: *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [1].
6 Cap 68, 2012 Rev Ed.
7 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [22].
8 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033.

the payment by that person of a sum to be fixed by the court by way of compensation to the person injured, or his representative, in respect of his person, character or property". The compensation is in respect of losses arising from (a) offences of which the offender has been convicted; or (b) offences to which the offender has admitted and consented to be "taken into consideration for the purposes of sentencing".[9] If the court is of the view that it would be "appropriate" to order compensation, then the court must do so.[10]

5 The purpose of the compensation provisions is to serve as a "shortcut to the remedy that the victim could obtain in a civil suit against the offender".[11] Consider the following example: If an offender is convicted of voluntarily causing hurt to the victim, and has caused the victim to incur $100 in consulting and obtaining treatment from a doctor, the victim would be entitled to sue the offender for the tort of trespass to the person and be awarded $100 in damages. What the compensation regime does is to allow the court which convicted the offender to order that the offender pay $100 to the victim, without the victim having to incur the effort and expense of commencing a separate civil suit to recover the $100 as damages. This is particularly useful when the victim is "disadvantaged or poor" and therefore lacks the financial means to commence a civil suit.[12] In particular, the High Court has previously recognised that "domestic maids are often, if not invariably, impecunious".[13]

6 One might next ask: What if the offender fails to pay the $100? That is why s 360 of the CPC exists. If the victim had brought civil proceedings against the offender, and the offender had been held liable to pay the victim $100 in damages, then the victim can seek to enforce the judgment debt by way of a writ of seizure and sale, the appointment of a receiver, or garnishee proceedings, or a combination of any of these.[14] In addition, if the offender-defendant has the means to pay the debt but flat out refuses to do so, then the victim-plaintiff can apply for him to be committed for contempt of court and fined or imprisoned.[15]

9 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 359(1) read with s 148.
10 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 359(2).
11 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [56].
12 *Public Prosecutor v AOB* [2011] 2 SLR 793 at [23], elaborating on *Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 at [19].
13 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [56].
14 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 45 r 1(1).
15 *Mok Kah Hong v Zheng Zhuan Yao* [2016] 3 SLR 1 at [92]. Note that the defendant's committal and imprisonment for contempt of court do not preclude the plaintiff from taking other enforcement measures.

Likewise, s 360 of the CPC provides for various similar techniques for the enforcement of compensation orders, such as the following:

(a) The court may stipulate a timeline for the payment of the compensation sum, which may involve payment by instalments.[16]

(b) The court may order that the offender's property be seized and sold (possibly by a receiver), and that the proceeds be applied toward payment of the compensation sum.[17]

(c) The court may order that debts due to the offender be garnished and paid to the court instead, which the court will in turn apply toward payment of the compensation sum.[18]

(d) The court may order that the offender be imprisoned in default of payment of the compensation sum.[19]

(e) The court may order that the offender be searched, and any money found on him be applied toward payment of the compensation sum.[20]

7 In short, the statutory compensation scheme shares two features in compensation with civil actions for damages:

(a) *First*, both make it possible to order an offender (tortfeasor) to compensate the victim for harm arising from the crime (tort).

(b) *Second*, both provide means to compel the payment of compensation by procedures such as seizure and sale of property and garnishment of debts.

III. Summary of case

8 This note seeks to discuss two judgments relating to Tay and Chia's offences against Fitriyah which the High Court handed down after the convictions. In the first[21] ("*Tay Wee Kiat (Compensation Order)*"), the High Court rightly recognised and gave effect to the *first* feature of the compensation regime. The High Court calculated the amount of compensation in the same way that a court would calculate the sum of damages in tort. For example, the High Court used the *Guidelines for the*

16 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 360(*a*)–360(*b*).
17 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 360(*c*).
18 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 360(*ca*).
19 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 360(*d*).
20 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 360(*e*).
21 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438.

Assessment of General Damages in Personal Injury Cases[22] as a guide to compensation for pain and suffering,[23] and applied a principle akin to the doctrine of mitigation in compensating the victim for loss of income only for the period during which it would not have been practical for her to find alternative employment.[24] These approaches are perfectly right, and are perfectly in line with the purpose of compensation as serving as a "shortcut" to granting the victim what the victim could obtain in a suit in tort.

9 However, the High Court's second judgment[25] ("*Tay Wee Kiat (Enforcement Decision)*") had the effect of frustrating the *second* feature of the compensation regime, by rendering the compensation order effectively unenforceable in cases where the offenders chose to serve a default jail term instead. What happened was this: When the High Court made the compensation order on 8 May 2018, it ordered that Tay and Chia be imprisoned in default of payment of compensation.[26] For over a year, Tay and Chia failed to pay the compensation due to Fitriyah. On 20 September 2019, the Prosecution sought an order that debts owed to them be garnished and/or their property be attached ("garnishment/attachment orders"). The High Court refused to make such orders, and the offenders chose to serve the default imprisonment terms instead of paying compensation.[27] As a result, the victim could recover nothing by way of the statutory compensation scheme; she would only have been able to recover compensation from the offenders by commencing a separate action against them.[28]

IV. Discussion

10 There were two reasons for the High Court's refusal to make garnishment/attachment orders.

A. Delay in application for compensation order

11 The first reason was that it was too late for such orders to be sought: "if the Prosecution had wanted to seek orders for examination and garnishment, the necessary directions ought to have been sought

22 The Subordinate Courts of Singapore, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Academy Publishing, 2010).
23 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [19].
24 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [13] and [20]–[21].
25 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033.
26 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [22].
27 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [8].
28 That is, an action for the tort of trespass to the person.

at the last hearing before us".[29] Instead, "in cases where the Prosecution is seeking a compensation order, the Prosecution should also consider which of the default mechanisms prescribed in s 360(1) CPC it wishes to seek".[30]

12 This is questionable. As the High Court recognised, "s 360(1) of the CPC does not limit the court to one mode of enforcing payment of compensation".[31] Why, then, ought the court to decline to make a garnishment/attachment order by reason only of the Prosecution's delay in seeking one?

13 The High Court did not clearly elaborate on the answer to this question. One possible answer is the risk of prejudice to the offender. But there is no such risk. As has been seen,[32] it would have been open to the victim to (successfully) sue the offenders in tort and then enforce the judgment debt by various means, and these means are similar to those set out in s 360(1) of the CPC. In other words, whether or not the court makes an order under s 360(1) of the CPC, it would still be possible for these procedures to be invoked against the offenders. So it cannot be said that the use of multiple modes of enforcement under s 360(1) occasions any prejudice to the offenders. To the contrary, the proceedings would end faster, and the offenders would sooner be able to move on with their lives, than if separate civil proceedings were to be instituted against them.

B. "Undue protraction" of proceedings

14 The High Court's second reason for refusing to grant the Prosecution's application for garnishment/attachment orders was that:[33]

> … [this] would result in precisely what the compensation regime under the CPC should seek to avoid – undue protraction of proceedings by converting a concluded criminal matter into 'quasi-civil' enforcement proceedings over which extended judicial oversight has to be exercised.

15 In support of this view, the High Court stated that it had "cautioned against such a prospect" in its previous judgment in *Tay Wee Kiat (Compensation Order)*. The relevant extract from *Tay Wee Kiat (Compensation Order)* is as follows:[34]

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29 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [4].
30 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [5].
31 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [4].
32 See para 6 above.
33 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [5].
34 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [8], cited in *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [5].

> … compensation ought only to be ordered in clear cases where the fact and extent of damage are either agreed or readily and easily ascertainable on the evidence. This is because compensation is an ancillary power of a criminal court and should not usurp its core functions of trying and sentencing accused persons. Though the court must consider the issue of compensation, this should not assume the proportions of a full-blown inquiry or take on a life of its own. It should not excessively protract the ultimate disposal of the case. Equally, the offender should not be disadvantaged by having the victim's claim for compensation determined in a criminal forum instead of under the more formal and structured procedure in the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

16 It will now be argued the High Court in *Tay Wee Kiat (Enforcement Decision)* had cited its own decision in *Tay Wee Kiat (Compensation Order)* out of context. When *Tay Wee Kiat (Compensation Order)* spoke of the need to prevent "excessively protract[ing]" proceedings, the court's concern was that the *quantum* of compensation must not be calculated in a *manner* to which the rules of procedure in compensation proceedings are not suited. However, in *Tay Wee Kiat (Enforcement Decision)*, the High Court misconstrued this as a concern that the *enforcement* of a compensation order must not take too much time and resources. It will now be shown that this was incorrect, and that, consequently, the High Court erred in refusing to make garnishment/attachment orders.

(1) The High Court's concerns in Tay Wee Kiat (Enforcement Decision) *about protraction of proceedings*

17 In *Tay Wee Kiat (Enforcement Decision)*, the High Court held that preventing "undue protraction of proceedings" meant avoiding "converting a concluded criminal matter into 'quasi-civil' enforcement proceedings over which extended judicial oversight has to be exercised".[35] According to the High Court, such enforcement proceedings would mean that:[36]

> … [t]he court would have to direct further inquiries into the offenders' means and assets, and thereafter consider the further exercise of its powers under s 360(1) of the CPC. This places undue strain on limited judicial resources and investigative resources …

This is problematic for several reasons.

35 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [5].
36 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [5].

(a) Congruence with statutory scheme

18 First, the statutory scheme clearly *does* envisage that compensation orders be enforced through means similar to the means of enforcement of civil judgment debts. That is the very point of s 360 of the CPC, which, like the Rules of Court, provides for enforcement through garnishment, seizure and sale, or the appointment of a receiver. The High Court's reasoning, taken to its logical conclusion, would render most of s 360 redundant by making it impossible for these means of enforcement to be used despite the fact that the Legislature has envisaged that they be used.

19 It is true that this would use some state resources. But why would this be "undue"? If we accept the High Court's statement in *Public Prosecutor v Donohue Enilia*[37] that "the court must be satisfied that the accused either has the means available, or will have the means, to pay the compensation within a reasonable time",[38] then we must accept that there must be a mechanism for evidence as to the offender's means to be gathered and placed before the court – and surely the Prosecution must be the one who adduces evidence that the offender has means, and the one who takes the lead in testing evidence to the contrary. Anyway, the issue of the State having to bear the costs of this can hardly be a concern when, as in *Tay Wee Kiat*, the State itself *is willing* and, moreover, *desires* to bear these costs.

(b) Economic efficiency

20 Second, it would be more economically efficient for enforcement to take place through the criminal compensation procedure rather than through separate civil proceedings.

21 The concern that applications for garnishment/attachment orders would take up judicial resources is neither here nor there. This is because there would be the *same* use of judicial resources if the victim were, in the course of civil proceedings, to apply for the judgment debtor to be examined to determine what his assets were.

22 Moreover, there would be *additional* strain on judicial resources if the victim were expected to initiate separate civil proceedings instead of enforcement taking place through the compensation process. By the time an accused person has been convicted and sentenced, the trial judge will be intimately acquainted with the facts of the case. This includes

37 [2005] 1 SLR(R) 220 at [26].
38 *Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 at [26].

facts pertaining to the harm suffered by the victim (for such facts are relevant in sentencing).[39] This being so, it would consume less judicial resources for *that* trial judge to hear and determine the application for compensation, as opposed to separate civil proceedings in which a *second* judge would have to re-acquaint himself with the facts and evidence.[40]

23 The same can be said about investigative resources. As the High Court itself recognised in *Tay Wee Kiat (Compensation Order)*, police investigation officers ("IOs") are "vested with investigative powers and will be familiar with both parties".[41] One would think, given these powers and pre-existing familiarity with the case, that it would be more resource-efficient to have the police to gather evidence relevant to the compensation sum than for the victim (as plaintiff in a separate civil action) to do so.

24 Therefore, the starting point is that it would be more economically efficient for the enforcement process to be handled by the State rather than a private lawyer representing the victim in separate proceedings. This is all the more so when the State has *already* invested resources in ascertaining the sum of compensation payable, which would be needlessly reduplicated were separate civil proceedings to be held.

(c) Promoting victims' welfare

25 This being so, the real concern is not one of *saving* resources, but rather one of *who should bear the cost* of those resources. Perhaps the CPC ought to be amended to make the offender pay the costs incurred by the State in conducting investigations to determine the appropriate compensation sum.[42] After all, if separate civil proceedings would be

39 This is particularly so if the Prosecution tenders a victim impact statement as part of its submissions on sentencing: see s 228 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

40 During debates in Parliament, at least one Member of Parliament raised this very issue (see *Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 441 (Michael Palmer)):

> Section 359 of the revised CPC Bill will require the Court to actively consider ordering compensation after every conviction. This is indeed a very sensible change because the Judge presiding over the criminal trial is fully apprised of the facts and is in the best position to decide on the appropriate compensation for the victim. Making the victim bring separate civil proceedings simply means excessive costs and delay for the victim as well as a waste of the Court's time because all the evidence will have to be revisited.

However, there was no further discussion of this point.

41 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [14].

42 Currently, the offender can only be ordered to pay costs if his defence was "conducted in an extravagant and unnecessary manner": Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 355(1).

held, the offender-defendant would have to pay such costs anyway.[43] But – and this is the third point – even if it is not legally possible for the offender to be held liable for the costs of compensation proceedings against him, there is a compelling case for the State to bear these costs. In declaring "'quasi-civil' enforcement proceedings" an "undue strain" on state resources, the High Court paid insufficient attention to the very point of compensation orders, namely, to help victims who lack their own resources to seek compensation by themselves. As the High Court itself put it in *Tay Wee Kiat (Compensation Order)*, the police ought to see their work "not as a chore or imposition but as a fundamental facet of their role as enforcers of the law".[44] The same, it is submitted, ought to be said of the Prosecution. The High Court continued:[45]

> In a well-functioning criminal justice system, thorough investigative work should ensure that factually guilty persons are convicted and sentenced, but this may afford little comfort in practical terms to the victim, who may be left to suffer the consequences of abuse. This is especially true in the case of domestic helpers who have come to Singapore for work, but instead find themselves jobless pending criminal investigations against their employers. An effective mechanism for collection and payment of compensation serves to achieve a more just outcome for such persons and there is no better person than the IO to see this through.

26 This represents a burden which the State has to bear; but it is a burden that the Legislature, through s 360 of the CPC, has *required* the State to bear. This being so, it would be wrong to prioritise conserving state resources and keeping proceedings as short as possible: that is not – and should not be – the only aim of the law.

(2) The true problem of protraction of proceedings, as recognised in Tay Wee Kiat (Compensation Order)

27 What, then, was the High Court in *Tay Wee Kiat (Compensation Order)* truly concerned about when it spoke of preventing "undue protraction of proceedings"?

28 The author will begin with the High Court's statement that "compensation is an ancillary power of a criminal court and should not usurp its core functions of trying and sentencing accused persons".[46] The use of the phrase "criminal court" is potentially misleading in so far as it suggests an *institutional* division between "criminal" and civil

43 The general rule is that costs follow the event.
44 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [14].
45 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [14].
46 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [8].

courts. Nothing in the law forbids judges who hear criminal cases from also hearing civil cases. The judges who hear criminal cases are perfectly capable of applying the law of torts and of assessing compensation sums. Even if such an institutional distinction existed, ss 359 and 360 of the CPC clearly envisage that it *is* the function of a criminal court to consider making a compensation order,[47] and therefore to consider the principles of the civil law of torts according to which the compensation sum is to be calculated.

29 Instead, it appears that the true difference which the High Court sought to draw in *Tay Wee Kiat (Compensation Order)* is not between a "criminal court" and a civil court, but rather between criminal and civil *procedure*. The High Court's elaboration in *Compensation Order* on its concern about "excessive[e] protract[ion]" was as follows: the court should not find itself "enmeshed in refined questions of causation which may arise in claims for damages under contract law or tort law"[48] and should not attempt to "determin[e] … complex issues of apportionment of liability and precise quantification of multiple specific heads of losses".[49]

30 For these propositions, *Tay Wee Kiat (Compensation Order)* cited the 1995 High Court case of *Public Prosecutor v Donohue Enilia*, which cited a series of English cases for various propositions relating to "deciding whether a compensation order should be granted".[50] An examination of these cases, as explained by the High Court in *Soh Meiyun v Public Prosecutor*[51] ("*Soh Meiyun*"), reveals one principle: the court will not make a compensation order to the extent that determining the quantum of compensation would require *extensive evidence which is not, and cannot easily be brought, before the court*. Examples include:

47 See also Wing-Cheong Chan, "Compensation Orders in Singapore, Malaysia and India: A Call for Rejuvenation" in *Support for Victims of Crime in Asia* (Wing-Cheong Chan ed) (Routledge, 2008) ch 18 at p 375: even if there has been a "divide in the minds of those who are legally trained between criminal law (which is to punish offenders …) and civil law (which is to resolve private disputes …)" according to which "the civil remedies … can have no place in the criminal justice system", this "divide" has now been "unmistakably breached" by the very introduction of a compensation regime.

48 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [9], quoting *Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 at [22].

49 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [9], citing *Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 at [23]–[24] and *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [58].

50 *Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 at [20]. The High Court cited the English cases at [21]–[24].

51 [2014] 3 SLR 299.

(a) Compensation for the loss of use of property. An example is *R v Kenneth Donovan*[52] *("Kenneth Donovan")*, in which the offender committed the offence of taking a conveyance without consent by renting a car for two days but failing to return it for several months.[53] The problem was that "the quantum of damages for loss of use was notoriously open to argument, and this case [was] therefore not one of the kind for which a compensation order is designed".[54]

(b) Compensation for the loss of light. An example is *R v Reginald Briscoe*[55] *("Reginald Briscoe")*, in which the offender had built extensions to his house, so as to create a second storey over parts of the house. His offence was failing to comply with a planning enforcement notice ordering him to tear down the extensions.[56] As the Court of Appeal of England and Wales pointed out (and the Singapore High Court recognised in *Soh Meiyun*),[57] there was no evidence that the neighbours had thereby suffered any loss[58] and, besides, it would be impossible to quantify the neighbours' "suffering of loss of light … in the absence of expert evidence".[59]

(c) Cases where the presence or absence of a causal link between a criminal act and a person's injuries is in doubt. In *R v Claire Deary*[60] *("Claire Deary")*, the offender pleaded guilty to affray in a pub. A bystander was injured, but it was not clear whether the injury was caused by the offender. Therefore, a compensation order was not to be made, because "there was no proven causal link between [the offender's] criminal conduct in affray and the injury actually suffered by [the alleged victim]".[61]

31 In other words, a careful examination of the English cases shows that the courts' true concern is not a desire to shorten criminal proceedings, but rather concern over the suitability of criminal proceedings to receive such evidence. This makes eminent sense:

52 (1981) 3 Cr App R (S) 192.
53 *R v Kenneth Donovan* (1981) 3 Cr App R (S) 192.
54 *R v Kenneth Donovan* (1981) 3 Cr App R (S) 192 at 193; the High Court quoted these words in *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [58].
55 (1994) 15 Cr App R (S) 699.
56 *R v Reginald Briscoe* (1994) 15 Cr App R (S) 699.
57 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [58].
58 *R v Reginald Briscoe* (1994) 15 Cr App R (S) 699 at 700.
59 *R v Reginald Briscoe* (1994) 15 Cr App R (S) 699 at 701.
60 (1993) 14 Cr App R (S) 648.
61 *R v Claire Deary* (1993) 14 Cr App R (S) 648 at 649.

(a) Unlike civil proceedings, criminal proceedings do not have a mechanism by which such evidence (especially expert evidence) might be received, such as discovery, the exchange of affidavits of evidence-in-chief, and the cross-examination of witnesses to test the evidence contained in those affidavits. These would have been necessary to resolve the questions of quantum of compensation in *Kenneth Donovan* and *Reginald Briscoe* (in which *expert* evidence was required). In situations involving complex factual enquiries, there is a greater risk that evidence that has not been through such procedures may be insufficient or unreliable.

(b) When the evidence before the court (or, if the offender pleads guilty, the charges and admitted statement of facts) does not disclose a tort against the alleged victim, the fact of conviction does not itself furnish an evidential basis for holding that compensation is owed. This explains *Claire Deary*: in that case, while the offender had pleaded guilty to affray, the evidence did not show that violence had been used toward the *particular* alleged victim, who was therefore not entitled to compensation.

32 Let us illustrate this point using the following hypothetical example. Suppose the offender commits the offence of voluntarily causing grievous hurt[62] by breaking the victim's arm, causing the victim to have to undergo surgery followed by a long-term course of physiotherapy. The victim has just undergone surgery but has not yet commenced physiotherapy. In that case:

(a) In the course of convicting the accused, the court will receive evidence showing that the accused has caused the victim to suffer the injury (for causation is an element of the offence). Further, the court will either receive evidence, or take judicial notice, of the fact that surgery is necessary in order to treat the injury. Taken together, all this will be sufficient to show that the victim can recover compensation for the surgery. Further, a medical bill will ordinarily suffice to quantify this head of compensation.

(b) In the course of convicting and sentencing the accused, the court is likely to receive evidence revealing the extent of pain and suffering which the victim has suffered. That evidence will be sufficient for the court to arrive at a figure of compensation to be paid in respect of pain and suffering.

62 Penal Code (Cap 224, 2008 Rev Ed) s 322 read with s 320.

(c) However, the court is unlikely to have evidence revealing the nature or extent of physiotherapy required. There may be various factors which have a bearing on the required duration and costs of physiotherapy, such as the presence or absence of surgical complications which may take some time to manifest, or factors intrinsic to the victim's body that affect how quickly he/she recovers. That is not to say that the cost of physiotherapy is unquantifiable, but quantifying it may require expert evidence,[63] which cannot reliably be received by the court through the criminal process (as compared to the civil process).[64]

33 In such a situation, the court ought to order compensation in respect of pain and suffering and the costs of surgery, but not the costs of physiotherapy.[65] It is true that this will have the effect of shortening the proceedings. But this is only a *side effect* of limiting compensation to that which can be proven through reliable evidence in so far as may be obtained under the rules of criminal procedure; shortening the proceedings is not the court's *aim*.

34 It is in *this* sense that the phrase "undue protraction of proceedings" ought to be understood. That phrase has *nothing* at all to do with the question of enforcement. Therefore, in *Tay Wee Kiat (Enforcement Decision)*, it was not correct for the High Court to cite a fear of "undue

63 For an example of a Singapore case in which the court declined to order compensation in respect of medical treatment where the nature of the necessary treatment and its costs were uncertain, see *Low Song Chye v Public Prosecutor* [2019] 5 SLR 526. In that case, the Prosecution had requested a compensation order to cover the costs of a hearing aid for the victim. However, the High Court refused to allow compensation on *this* basis, because:

(a) "the type of hearing aid suitable for the victim can only be determined with a hearing aid evaluation appointment with an audiologist";

(b) the costs of the hearing aid would depend on the type of hearing aid; and

(c) "there is no suggestion that a hearing aid was strictly necessary, or even desired by the victim" ([114]).

While the High Court allowed the compensation order made by the lower court to stand, that was on the basis that it could be rationalised as compensation for pain and suffering instead of compensation to cover the costs of a hearing aid.

64 In civil proceedings, various procedures relating to expert evidence set out in the Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 40 and O 40A are available. These include the court's power to appoint an independent expert (O 40 rr 1–2); requirements as to the contents of experts' reports (O 40A r 3); the possibility of putting questions in writing to experts (O 40A r 4); and court-directed discussions between experts (O 40A r 5). By contrast, the Rules of Court do not apply to criminal proceedings: O 1 r 2(2)(5).

65 The victim will still be able to commence a separate civil action for the costs of physiotherapy only: Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 359(4).

protraction of proceedings" as a reason to refuse to make garnishment/attachment orders.

V. Default terms of imprisonment as means of enforcement?

35 It is true that the High Court's approach of relying on default imprisonment terms to encourage offenders to pay compensation may sometimes work: "[i]n most cases, offenders with sufficient means are likely to pay (and do pay) the compensation amount to avoid serving the default term".[66]

36 But in the case of an offender who has been sentenced to a relatively long term of imprisonment, the *marginal* impact of the default term of imprisonment may be so small that the offender might well prefer to serve the default term instead of paying compensation. The CPC provides that the default term of imprisonment may be for a period of up to six months.[67] Therefore, if an offender who is sentenced to a term of imprisonment so long that an additional six months' default term is small in comparison, he might well choose to serve the default term instead of paying compensation.

37 Besides, it would appear that the courts are minded to order a default term which is far shorter than the statutory maximum of six months. The CPC provides that the maximum length of the default term of imprisonment varies according to the sum of compensation payable: two months if the compensation sum is $50 or less; four months if the sum is between $50 and $100; six months if the compensation sum is more than $100.[68] In *Tay Wee Kiat*, the High Court ordered Tay to pay $5,900 in compensation, yet imposed a default jail term of just four weeks.

38 It is in this light that we need to consider the High Court's statement that "[w]hile there may be others who might choose not to pay compensation or remain adamant on not paying in any event, these persons constitute the minority".[69] With respect, this statement is hardly of any comfort at all to the "minority" of victims: does criminal law not aim to protect them too?

66 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [6].
67 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 360(4)(*c*).
68 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 360(4).
69 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [6].

VI. Victim Assistance Scheme

39 In *Enforcement Decision*,[70] the High Court suggested that a person in Fitriyah's position may turn to the Community Justice Centre's[71] ("CJC's") Victim Assistance Scheme[72] ("VAS"). This can be a useful source of help for victims: the VAS, at the CJC's discretion, can reimburse a victim of violent crimes for medical and other expenses (including expenses related to trauma caused by pain and suffering) if the victim cannot obtain compensation from the offender.[73] At the same time, however, it is necessary to bear in mind that the VAS is limited, in that one can only claim up to $1,000 from the VAS. By comparison, Fitriyah had suffered losses to the tune of almost eight times that.[74] This is no criticism of the VAS, which is indeed laudable (as are various other social support agencies that can support victims of crime); it merely reflects that the VAS is a safety net (in the CJC's words, a source of "interim [fi]nancial support")[75] but cannot (and does not purport to) replace the need for compensation orders to be effectively enforceable.[76]

VII. Conclusion

40 This note has argued that:

(a) The court should not decline to make an order under s 360 of the CPC to enforce the payment of compensation by reason only that the Prosecution did not ask for that order as early as possible.

(b) The court should not, in the name of not protracting criminal proceedings, limit itself to imposing a default imprisonment term under s 360(1)(*d*) of the CPC and decline to

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70 *Tay Wee Kiat v Public Prosecutor* [2019] 5 SLR 1033 at [7].

71 The Community Justice Centre is a registered charity and institution of a public character which aims, *inter alia*, to "ensure that the justice system remains accessible to all, regardless of status or race": Criminal Justice Centre, "Who We Are" https://cjc.org.sg/about/who-we-are/ (accessed 24 March 2020).

72 Criminal Justice Centre, "Victim Assistance Scheme" https://www.cjc.org.sg/services/social-support/victim-assistance-scheme/ (accessed 18 March 2020).

73 Criminal Justice Centre, "Victim Assistance Scheme" https://www.cjc.org.sg/services/social-support/victim-assistance-scheme/ (accessed 18 March 2020).

74 The total sum of compensation which Fitriyah was owed is $7,800: *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [22].

75 Community Justice Centre, *Annual Report 2018* at p 6 https://cjc.org.sg/wp-content/uploads/2019/08/CJC-annual-report-2018.pdf (accessed 24 March 2020).

76 Besides the issue of the amount of financial support, a broader point is that any victim of crime does not necessarily have a legal right to support from charities and social support agencies, whereas he or she does have a legal right to compensation from the offender.

make some other type of order under s 360 of the CPC, including garnishment/attachment orders. This is despite the fact that some judicial supervision over the carrying out of those orders would be required.

(c) The courts' concerns relating to the "protraction" of proceedings for compensation ought to be limited to concerns regarding the sufficiency of evidence which is relevant to the quantum of compensation, and not concerns regarding the time it will take for a compensation order to be enforced.

(d) The following points do not completely make up for a refusal to enforce compensation orders by way of garnishment/attachment orders:

(i) the victim may seek to be compensated through the Community Justice Centre's Victim Assistance Scheme;

(ii) a default imprisonment term can be imposed under s 360(1)(*d*) of the CPC so as to incentivise the offender to pay compensation.

41 This note has not discussed the question of whether the court ought to refrain from making a compensation order on the ground of the offender's impecuniosity. That is perhaps a topic for another note.[77] But that point did not arise in *Tay Wee Kiat*: there is no way of knowing whether or not the offenders had the means to pay compensation to Fitriyah, because the High Court declined to order even that they be examined.

42 What is clear is that the intended beneficiaries of criminal compensation are those who cannot afford to commence separate civil proceedings, including foreign domestic workers, who "are often, if not

77 Note that, when s 98 of the Criminal Justice Reform Act 2018 (Act 16 of 2018) comes into force, s 359(2B) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) will require the court to "have regard to the offender's means so far as those means appear or are known to the court". However, it is submitted that the offender's impecuniosity should not lead the court to refuse to order him to pay compensation, just as a civil court will not refuse to order a tortfeasor to pay damages merely because the tortfeasor is impecunious. At most, the offender's impecuniosity ought to be relevant only to the means in which the compensation is to be paid, *eg*, whether the court will allow the compensation sum to be paid in instalments. That said, consider the arguments of Stanley Yeo, "Compensating Victims of Crime in Singapore" (1984) 26 MLR 219 at 225–226 on the possibility of allowing offenders who are in prison to work to earn wages, part of which can be used to satisfy the compensation order.

invariably, impecunious".[78] Fitriyah had been paid $450 per month.[79] By contrast, to make a claim in the Magistrate's Court for damages, the fee for commencing proceedings is $100,[80] the fee to set down the matter for trial is another $150,[81] and the fee to issue a writ of seizure and sale to enforce the judgment is $155[82] – and this is to say nothing of other costs (which are likely to eclipse the court fees), such as lawyers' fees. Moreover, foreign domestic workers are not eligible for legal aid.[83] Surely one ought to be concerned that a foreign domestic worker who is potentially in a financially precarious situation may have to pay such a large proportion of her salary in order to obtain compensation. (Though she may be able to recover some of her costs – indeed, even if she were to be able to recover *all* of her costs – she would still have to make payment upfront first. Moreover, while the Registrar has the power to waive the payment of court fees,[84] she is not bound to do so.)

43 It is against this backdrop that this note has called for an increased judicial use of s 360 of the CPC to enforce compensation orders. That may increase the burden on the State, and put more "strain on limited judicial resources and investigative resources"; but we ought to think seriously about whether this burden is not one that the State ought to bear, and for which the State ought to allocate more resources. The alternative would be to run the risk that a domestic worker who has been abused will find herself legally entitled to compensation which she is practically unable to claim.

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78 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [56].

79 *Tay Wee Kiat v Public Prosecutor* [2018] 5 SLR 438 at [20]. The offences against Fitriyah took place between 2011 and 2012. For completeness, it should be noted that in 2015, the Indonesian Embassy stated that the minimum salary for an Indonesian domestic worker (such as Fitriyah) ought to be $550: Amelia Teng, "Higher Pay for Indonesian Maids from Next Year" *The Straits Times* (11 November 2015); Embassy of the Republic of Indonesia in Singapore, "Indonesian Embassy's Respond to Strait Times Article 09 May 2018" (10 May 2018) <https://fdw.indonesianlabour.sg/Home/NewsDetail/1> (accessed 18 March 2020).

80 Rules of Court (Cap 322, R 5, 2014 Rev Ed) Appendix B, row 1. It would not have been possible for the victim to commence a claim in the small claims tribunals. This is because the small claims tribunals only have jurisdiction to hear and determine "specified claim[s]", and a claim in respect of personal injury caused by an intentional tort is not a "specified claim": Small Claims Tribunals Act (Cap 308, 1998 Rev Ed) s 5(1)(*a*) read with the Schedule.

81 Rules of Court (Cap 322, R 5, 2014 Rev Ed) Appendix B, row 14.

82 Rules of Court (Cap 322, R 5, 2014 Rev Ed) Appendix B, row 17(*b*).

83 Legal aid is only available to citizens or permanent residents of Singapore: Legal Aid and Advice Act (Cap 160, 2014 Rev Ed) s 5(1).

84 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 91 r 5(*a*).

44 When s 98 of the Criminal Justice Reform Act[85] comes into force, the court will be empowered to make a "financial circumstances order", which will require the offender to provide "any statement and evidence of the offender's financial circumstances that the court may require".[86] While it will not be compulsory for the court to make such an order, it is hoped that this note has made the case for the court being far more willing to make one – and to make subsequent orders for enforcement – than the High Court was in *Tay Wee Kiat*.

85 Act 16 of 2018.

86 This definition will be set out in the new s 359(6) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). The new s 359(2C) will provide: "Before making an order under subsection (1) against an offender, the court may make a financial circumstances order in relation to the offender." Section 359(6) will provide that, if the offender is aged under 18, then the financial circumstances order may require a parent of the offender to give a statement of the parent's financial circumstances.