
Civil litigation on behalf of trafficking survivors: a new approach to accountability?

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Criminal prosecutions of trafficking offences are limited in scope. Civil litigation may provide an avenue for justice and accountability within a victim-centred, trauma-informed framework.

Compared with the estimated number of trafficked persons, the number of criminal prosecutions of trafficking offences is exceedingly low. Globally, there were just over 11,000 prosecutions in 2018, of which just 4% related to labour trafficking.¹ Despite a well-ratified legal framework relating to trafficking, the criminal justice approach in many parts of the world has not been equal to the dual task of preventing trafficking and protecting victims. When criminal

prosecution is not an option, civil lawsuits can uphold the rights of victims and hold traffickers accountable. Rather than being merely a substitute for criminal prosecution, strategic civil litigation on behalf of survivors is a radically different approach.

Structural differences between civil and criminal action

Civil litigation allows trafficked persons to recover compensatory damages for loss,

injury or harm suffered. In some jurisdictions, courts may also award punitive damages to hold traffickers financially accountable and deter similar acts. The most important difference between civil and criminal cases, however, is that justice in the civil context is survivor-led. Civil action proceeds within a framework that is more responsive than the criminal prosecution framework to the goals and interests of trafficking survivors. The primary goal of trafficking prosecution is often to obtain convictions accompanied by lengthy prison terms but the process by which prosecutors obtain convictions may come at a cost to victims. For example, authorities have temporarily detained trafficked persons in order to compel them to testify.² Survivors may have various reasons for not cooperating with authorities but even when they are willing to testify appearing in court may be a stressful and traumatic ordeal. And it is not always the case that retributive justice outcomes like lengthy prison terms align with what survivors understand as 'justice'. Survivors, who may themselves face criminalisation or deportation due to involvement in sex work or having irregular migration status, may not view the criminal justice system as aligned with their interests. For example, survivors may seek substantive outcomes – such as stable housing and employment – that are not achieved through criminal prosecution because remedial measures like restitution are often not ordered in the criminal context.³ Finally, because civil cases often require a lower standard of proof, trafficked persons may be more likely to be successful in a civil proceeding.

A trauma-informed and victim-centred approach

Labour trafficking survivor Kendra Ross filed a civil case in the US District Court for the District of Kansas, alleging that her trafficker, a leader of a nationwide cult, forced her to work more than 40,000 uncompensated hours, starting when she was just 12 years old.⁴ Ross was awarded more than US\$8 million in restitution and damages, the largest single victim judgement in a US civil trafficking case. It is important

to note, however, that large sums are not an indication that a survivor has actually received any financial compensation. Traffickers often have hidden or inaccessible assets, making it very difficult to collect the monies that are due from the convicted trafficker. And focusing on monetary judgements can belittle the lengthy process of litigation and the courage exhibited by survivors.

This case also shows how civil cases can be part of a trauma-informed, victim-centred approach. Betsy Hutson, an attorney who led the pro bono team representing Ross, has described a gradual process of building trust.⁵ Because of her past trauma, Ross was reticent in initial meetings. Her attorneys did not start drafting her complaint until six months after meeting her, and her case was not filed until a year and a half after the first meeting. As the case proceeded, Hutson facilitated a trauma-informed approach by asking open-ended questions, creating a space for empathy and continually checking in with Ross about her goals and needs. The fact that a civil case proceeds only when a survivor is ready to pursue it is a crucial feature that is unique to the civil context. And because a trafficking survivor has an active role in the case, the very process of seeking civil damages is a recognition of their autonomy, and can support their evolving needs and their journey to recovery.

Civil litigation in an international context

Although the vast majority of civil trafficking cases have been filed in US courts, there have also been cases in a number of other countries including Australia, Uganda, Belgium and Israel.⁶ In contrast to criminal cases, civil cases mostly involve labour rather than sexual exploitation. Civil litigation is well-suited to labour trafficking cases for a number of reasons. First, criminal statutes are often limited with regards to labour trafficking and it may therefore be difficult for prosecutors to bring labour trafficking cases through criminal prosecution. In the civil context, attorneys may use a wide variety of existing, alternative legal frameworks, such as tort law or labour law. Second, courts may be unwilling to view certain instances of labour exploitation as

applicable under labour trafficking or modern slavery statutes. In the civil context, courts may be more familiar with traditional causes of action like claims relating to breach of contract.

Civil litigation can also be an especially promising approach when traffickers subvert the proper administration of justice. For example, a civil case was filed in the High Court of Uganda in 2012 in which the plaintiff, a Lebanese national, had initially been recruited to work as a manager. Instead, defendants confiscated his passport and forced him to work without pay in cruel and inhumane conditions. When the plaintiff sought help from local authorities, the defendants used various security services to harass him.⁷ Despite contacting the Uganda Human Rights Commission and a variety of government agencies, the plaintiff was unable to hold his traffickers accountable. In 2015, the court ruled in favour of the plaintiff in his civil suit and awarded him additional punitive damages for the stated purpose of deterring exploitative labour recruitment and labour exploitation.

A model for increasing access to justice

The Human Trafficking Legal Center (HTLC), a non-profit organisation based in the US, serves as a useful model of how to advance civil litigation on behalf of trafficking survivors.⁸ The HTLC has trained thousands of attorneys at international law firms. Most importantly, the HTLC serves as a bridge organisation – one that connects trafficking survivors to highly skilled attorneys in the private sector. The HTLC receives referrals from local NGO partners and other direct assistance organisations. HTLC attorneys may first interview survivors to determine if the case is eligible and the HTLC then refers survivors to private attorneys who take on cases on a pro bono basis. Attorneys from the HTLC provide technical assistance and may also serve as co-counsel.

This structure has several advantages. First, civil cases can take up to several years, depending on the nature of the case. As a result, litigating a civil case to completion can be incredibly costly. By engaging private attorneys working on a pro bono basis, the

HTLC ensures high-quality representation at no cost to survivors. Depending on the country, attorneys in private practice may be required to provide a minimum number of hours of pro bono service – a professional obligation that can be fulfilled through this kind of representation. This structure also means the HTLC can facilitate civil trafficking cases while keeping its overheads low, and can operate with a small permanent staff. The HTLC also provides attorneys with access to its database of over 400 civil cases filed in US federal courts.

Certain key aspects of the HTLC model highlight steps that could be replicated elsewhere to increase access to civil litigation for trafficking survivors:

- support for bridge organisations, which play an intermediary role between direct service providers and lawyers
- training for attorneys from the private bar, meaning impact can be scaled without requiring considerable additional funding
- facilitation of access to information resources, such as a global database of civil trafficking cases filings, as a first step in increasing the practical knowledge required to litigate these civil cases.

The replicability of the model depends on the involvement of a number of civil society stakeholders. This includes effective collaboration with NGOs and anti-trafficking organisations, which creates a steady flow of cases; the engagement of human rights lawyers and civil litigators in their willingness to represent survivors; and the support of donors for bridge organisations like the HTLC and for establishing similar organisations around the world. There are, however, practical and legislative challenges for expanding civil litigation efforts. In other countries there may not be an established culture of pro bono service by private attorneys such as exists in the US, and other countries' laws may not permit victims to sue their traffickers for damages.

Finally, civil litigation is not without risks. Improperly trained attorneys may subject a survivor to additional trauma through the detailed fact-finding process that is involved in civil litigation. Alternative

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fee arrangements, including contingency fee arrangements where lawyers receive a percentage of the final amount paid to the client, may be exploitatively costly. Finally, testifying in a civil context may be stressful for survivors. However, these disadvantages are not necessarily unique to civil cases, and may be more severe in the criminal context. Despite these risks, civil litigation deserves a place within a comprehensive, global anti-trafficking strategy.

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