

From ‘Jim Crow’ to ‘John Doe’: Reparations, Corporate Liability and the Limits of Private Law

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Introduction

A pattern of litigation is developing in the United States in which insurers, banks and other ‘deep pocket’ defendants are being sued for their role in facilitating the slave trade and other human rights abuses. This is not merely an issue for American lawyers, as British insurers and insurance markets are included for their part in the transportation of slaves from Africa.¹ Moreover, litigation in the United Kingdom remains a possibility, albeit an unlikely one.² This represents the latest generation of claims for black reparations, following attempts at the end of the American Civil War and again during the civil rights movement in the 1960s.³ This gives the paper its title. The initial struggle against segregation (the so-called Jim Crow laws) has been largely completed, but the political and legal battle for compensation continues. This is commonly pursued by the use of anonymised ‘John Doe’ claimants as representatives of the African-American community.⁴

The claim for reparations is instinctively attractive: ‘A great harm has been done’; ‘Someone must pay’. However, the translation of these ideals into the everyday systems of private law is not straightforward. This piece will consider a sample of the recent legislation to demonstrate some of the legal impediments to black reparations against insurers and other corporate bodies.

A Natural History of Reparations Litigation

The claims for reparations to compensate the African-American community are part of a continuum, which includes Holocaust and other Second and First World War claims.⁵ The defendants in such actions have ranged from commercial entities operating inside Axis territory⁶ to

the United States government itself.⁷ This paper restricts itself to litigation in which one or more of the defendants were private corporations, rather than state entities.

The claims can be broadly categorized into two forms. The first approach sought the enforcement of some proprietary or contractual right that was expropriated or denied without compensation. These are generally founded on principles of property or contract law and are dealt with in part (a) below. The second form demands compensation for some tortious act, such as enforced labour. These are often presented as tort or unjust enrichment claims and are considered in part (b). Both types have been directed against the financial services industry. Either such companies are accused of having refused to honour banking and insurance agreements, or that they facilitated the exploitation of oppressed persons, by providing related financial services to the perpetrators.

(a) Deferred Enforcement: The Restoration of Property and Contractual Claims

The majority of claims settled to date related to Jewish assets held in occupied or Axis States during the Second World War. The settled claims listed in the survey by Bazylar and Everitt⁸ now reach a total of approximately \$1,447 million. The vast majority represented financial assets held by Swiss banks (some \$1,250m) but European insurers have also contributed for unpaid insurance policies to a sum of \$131m.⁹ This latter fund, distributed under the auspices of The International Commission for Holocaust Era Insurance Claims, has been funded by major European insurance groups.¹⁰ This claims process is to end in December 2005.¹¹

It is notable that these varied settlements represent the belated enforcement of established contractual and proprietary rights. They do not represent reparations for any separate tortious or criminal act, in which corporations were active or passive participants.

The reclamation of property and contractual rights perhaps presents less of a problem for private law. As there are clear economic values for each, it is not difficult to see how past wrongs have affected current claimants. We are happy to see property rights as capable of easy transfer from generation to generation and can identify with a clear sense of unjustified enrichment of the Swiss banks and the account holders.¹² This is so even though the modern bankers and insurers did not

themselves assist in such acts, although their companies did. Moreover, the defences raised by the defendants can appear as unnecessarily technical before the 'court of public opinion'. The existence of the Swiss banking secrecy laws was an unconvincing reason not to return looted and stolen property. Similarly, to refuse to pay on an insurance policy because of the inability of the relatives of murdered Jewish policyholders to provide death certificates (when the death camps did not provide any) is churlish. Just as public reaction demanded a relaxation of legal formality following the deaths in the 2005 Indian Ocean Tsunami,¹³ so legal technicalities feel 'wrong' when dealing with the broken promises of World War II. In law, the limitation periods for the pursuit of a contract and a tort claim are normally identical, but there does appear to be a difference in application to cases of historic importance, such as the Holocaust and slavery.

This is evidenced by the relative success of reparations litigation in restoring lost assets. However, this is in stark contrast to claims based in tort or unjust enrichment. There, the distance of time appears to weaken the desire to ensure full justice. This will be of concern to those seeking slavery reparations. The claims will not be for looted assets but for stolen lives. Can private law handle these claims as effectively as it made good stolen art and unpaid insurance policies? The indications from earlier cases are not promising. First, it is much more difficult to be precise in assessing the amount of loss. Second, the magnitude of compensation needed has made some suggest that it cannot be repaid. Estimates vary, but have reached \$24 trillion.¹⁴ Finally, there is evidence of a concern of over-compensation. This is not because the harm was not great, but because it was not suffered by those to whom the money is to be paid. The notion of a transgenerational tort claim appears to distort the systems of private law in a manner in which returning stolen property does not.

b) Inherited Pain and Inherited Gain: Tort and Unjust Enrichment Claims

The settlement of litigation for the recovery of assets can be contrasted to the arrangements regulating compensation for the mass forced and slave labour conducted under German governance in Central and Eastern Europe. Such matters have largely been resolved by international convention

and in particular by the payment of DM 10,000 million (\$4,800 million at the time) by the German government in 2001. This was not recognition merely of State complicity, but also settled all past and future claims against private corporations involved in the exploitation of forced and slave labour. The international agreements by which compensation was paid to Holocaust era forced and slave workers are significant to those interested in slavery reparations. It is not only that they provided an initial payment of compensation (\$7,500 for slave workers and \$2,500 for forced labourers) but also that the effect was also to bar claims in the US courts against the corporations involved.¹⁵ This is not therefore an interim payment, but an imposed final settlement. Given that this applied to those who were actually enslaved in the Holocaust era, it is difficult to see a more generous scheme applied in favour of the *descendants* of African-American slaves.

Even if we see black reparations as a new political paradigm, for which full tortious compensation should be awarded, there are legal obstacles. Attempts to sue private corporations for their role in the slave trade face at least three hurdles to overcome.¹⁶ First, it must be shown that the claimants have standing to raise this issue before a court. Second, it will need to be demonstrated that these claimants are not barred by limitation periods. Finally, they will need to be recognised as a certifiable class, in order to bring a class action. It is the first element, of *locus standi*, that raises the most contentious points for the pursuit of reparations by court action.

The standing issue was considered expressly by Judge Norgle in the most recent suit in this area, *In Re African-American Slave Descendants Litigation*.¹⁷ Though framed as a technical rule of law, it provided, in his view, the division between the proper legislative and judicial functions of the State.

As he explained:

“without the doctrine of standing, the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions...”¹⁸

On Norgle's analysis, the modern conception of standing is based upon three interrelated principles. First, that the claimant suffered an actual injury, which is "concrete and particularised" and not "conjectural or hypothetical".¹⁹ Secondly, there must be a causal link between the harm suffered and the actions of the defendant. Finally, the remedy sought must be likely to redress the wrong. These principles provide the limits of private law, as beyond this the matters are to be resolved by political and / or legislative means. The real battle before the court was showing that this was a matter for judicial rather than legislative resolution.

In such transgenerational actions, there is therefore a need for the current claimants to identify a loss that they have suffered personally. In the *African-American Slave Descendants* case, the claimants argued that they suffered as a result of their reduced economic opportunities as members of the African-American community. They also suggested continuing 'psychological damage from the loss of their history, language and culture' and the loss of their true family names.²⁰

Unsurprisingly, this was not successful. The claimants had failed to show that they had themselves suffered an injury that was justiciable. As Judge Norgle concluded:

"Plaintiffs cannot establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-Americans held in slavery over one-hundred, two-hundred, or three-hundred years ago".

Moreover, they were unable to show that any harm was caused directly by the actions of the particular defendants:

"In attempting to litigate the unopposed issue of slavery rather than their personal injuries, Plaintiffs also cannot satisfy the second requirement of constitutional standing -- injury that is fairly traceable to the conduct of the defendants".

Given that these barriers to private law actions were predicted in advance, why were they still tested by the claimants in the *African-American Slave Descendants* case? On one view, this is merely 'sparring' as counsel raise arguments before the lower federal courts in order to gain access to the Supreme Court, where the novel nature of the issue might force a change in judicial attitudes to the

doctrine of standing. A more convincing explanation is provided by Fogarty.²¹ She identifies a common strategy of pursuing the reparations agenda by both judicial and legislative means. The litigation is a form of ‘quasi-public’ litigation in that it seeks redress on remedial terms, rather than seeking to correct an individual harm.²² The existence of this litigation is likely to affect the shape of the legislative process. Whilst the nature of the litigation remains adversarial, it creates a community of interest in seeing the matter resolved legislatively. The claimants are able to use the increased public attention generated by the litigation to educate the public about the nature of their grievance. Moreover, the insurers and banks are able to forestall likely litigation, judgment and settlement costs by lobbying for a political, legislative resolution. The likely result is some form of institutional reform, a remedy beyond the scope of the courts to order. The role of the litigant is therefore, in part, to raise awareness of the issues beyond the confines of the courtroom, in wider social, legal and political fora.

It may be useful at this point to stop and consider what this tells us about the type of justice that is being sought in reparations litigation. This may help us to understand better the shifting nature of the limits of private law.

Reparations and the Limits of Private Law

There are a number of perspectives from which we can consider the proper limits of private law, and whether they should encompass slavery reparations. If we take the utilitarian model of enterprise liability proposed by Calabresi,²³ there is a prima facie case for allowing recovery. Put simply, liability will be efficient if the costs of production of an item are properly reflected in the market price. If costs are externalised, then the product will be subsidised, and is likely to be over-consumed. This is likely to lead to an inefficient allocation of resources across society. During the slave era, part of the true costs of the production of sugar cane and other raw materials were excluded from the market price due to the forced nature of the labour. It would appear that this should be rectified. However, this provides us with a considerable difficulty. We are unable to

affect the historic market price of sugar cane even by the imposition of liability on modern industry. We can make it more expensive today, but the question arises as to whether we should. If we consider that sugar cane was a subsidised product in the slavery era, we could adopt a long term approach to pricing and impose costs so as to ensure that the industry bears the costs that it created, even if the subsidy and the corresponding liability are separated in time. A counter argument is that today's consumers and shareholders will ultimately bear the brunt of twenty-first century liability. They had no control over the actions of the past, and ought not to be penalised for the actions of their predecessors.²⁴ We may talk of imposing liability on corporations, but the true effect will be felt more widely. We could therefore argue that the slavery era actions are too remote to be the proper domain of enterprise liability. However, this always raises the question of where to draw the line. It is not uncommon for industrial injuries to be undetectable until many years after cessation of the employment that caused it. If the inhalation of asbestos dust in a factory in the 1960s is not too remote to impose liability on the modern corporate entity,²⁵ why should slave actions of the 1760s be too distant? Does it matter if the insurer or bank in question had failed to make public its involvement in slavery?

One solution to this quandary is to consider not only the need for liability to influence the behaviour of the corporation, but to protect the injured party. Perhaps it is the inability of those injured persons to bring the claims in person that is the distinguishing factor. We can no longer compensate them, only their descendants. This leads naturally to the considerations of Aristotle's concepts of justice as discussed by Weinrib.²⁶ If we accept that corrective justice lies at the heart of tort and unjust enrichment, then we need an identifiable claimant and an identifiable defendant. Moreover, we need convincing proof of a causal link between the two. It is not normally enough to demonstrate that the defendant was engaged in the kind of activity that is culpable or deserving of the imposition of liability. Nor is it sufficient to show this claimant was harmed by similar acts. We need to demonstrate that this defendant harmed this claimant. In respect of the slavery era activities, even if we are convinced that banks, insurance companies and railroads supported slavery, that does not

show that they harmed particular individuals. Even if we can show, for example, that insurance policies were issued over named slaves that does not demonstrate that harm was caused to the particular modern descendant.

The use of John Doe claimants as representatives of the African-American community is significant. It is possible to state that slaves and the descendants of slaves were disadvantaged by actions carried out by latter day insurers and banks. If we are to provide a form of justice, it would appear that distributive justice,²⁷ of the kind used to compensate for Holocaust era slave labour, is more appropriate. A levy could be raised on those sectors of industry that benefited from slavery. The proceeds of this fund can be directed to individual claimants and to the wider community without the need to establish which 'defendant' was liable to which 'claimant'.²⁸ The breaking of the link between perpetrator and injured party may lead us to the conclusion that this is a matter to be resolved outside the domain of private law, by the imposition of liability directly from the State on a distributive basis.

The likely reason for claimants to prefer the individualised tort and unjust enrichment claim, at least in the reparations arena, is that the levels of compensation under such schemes have been extraordinarily low. It will be recalled that a slave worker was given a one-off settlement of \$7,500 under the agreement between the US and German governments in 2001. The chief negotiator for the Clinton administration, Ambassador Stuart Eizenstat, recognised that the figure was a mere solatium, and not compensatory.²⁹ However, he rejected suggestions that this reduced the significance of the agreement. He identified three positive consequences of the agreement that went beyond the monetary sum. First, by gaining a public recognition of culpability from the German State and others.³⁰ Second, by creating the novel legal proposition that private corporations could be responsible for facilitating human rights abuses at home or overseas. Finally, by altering the nature of the negotiations in public international law agreements. This was not merely a process involving the States or their governments, but also included the corporations and other stakeholders. This is described as 'open' or 'democratised' foreign policy making.

In essence, the private litigation provided the backdrop, and much of the pressure, for the governmental resolution of the dispute. It may be that the recent slavery reparations cases will fulfil a similar function within national legislatures.

Conclusion

The quest for reparations for slavery is on-going. The most likely mechanism for the legal resolution of this claim is legislative, as we have seen in many of the Holocaust cases to date. However, that will only provide a limited fund, and is likely to be rejected by many members of the African-American community as insufficient compensation. If ‘legal peace’ and immunity from action was purchased from the actual victims of Holocaust era slavery for \$2,500 per head,³¹ it is difficult to imagine a greater sum being offered to those who are the descendants of those enslaved. The fundamental difficulty for those who envisage a private law resolution is that, these disputes are too large and yet too diffuse for private law actions to resolve. Proving the causal link: that this defendant harmed this claimant is unachievable across such a wide community and time scale, and yet it is at the heart of our bi-polar private law system. The answer perhaps lies in Bazylar & Everitt’s statement of what was achieved by legislative settlement of the Holocaust era cases.³² They did not provide compensation, but they did impose ‘legal peace’. Perhaps, ultimately, that is what can be provided by the current slavery claimants, and we should try and measure how much that is worth to the insurers, banks and other institutions at risk of litigation.

* Cardiff Law School. For a detailed consideration of the wider impact of insurance on the slave trade, see Davey “Black Cargo, White Judges: Marine Insurance and the Regulation of the Slave Trade” (forthcoming). I am grateful to Ken Oliphant, Richard Lewis and Annette Morris for their guidance on matters of tort law. The errors remain mine.

¹ The Lloyds insurance market was recently sued (unsuccessfully) for its role in the provision of marine insurance for the ‘middle passage’ voyage from Africa to the West Indies.

² See Shelton “Reparations for Human Rights Violations: How Far Back” (2002) 44 *Amicus Curiae* 3.

³ See Brophy “Reparations Talk: Reparations for Slavery and the Tort Law Analogy” (2004) 24 *Boston College Third World Journal* 81, 81-82.

⁴ See e.g. *In Re African-American Slave Descendants Litigation* (2005) 375 F. Supp. 2d 721.

⁵ One can imagine further developments, such as feminist reparations for recompense for the legal environment that denied women equal rights.

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- ⁶ See Bazylar and Everitt “Holocaust Restitution Litigation in the United States: An Update” at 4-5 in *2004 ACLU International Civil Liberties Report* (2004, ACLU). Available at <<<http://www.aclu.org/iclr/bazylar.pdf>>>.
- ⁷ It has been suggested that a train loaded with Jewish valuables, sent out of Hungary ahead of the advancing Russian forces, was expropriated by US forces. See Bazylar and Everitt, above, note 6, at 8.
- ⁸ Idem. The author has sought to update figures to September 2005 values, where available, and has converted all active currencies to US dollars at Reuters rates as of 27/10/2005. The Deutschmark conversion above is that reported by Bazylar & Everitt at 1999 rates.
- ⁹ See << <http://www.icheic.org> >>.
- ¹⁰ These include the Generali Group, Allianz, AXA, Wintherthur and Zurich.
- ¹¹ There has been criticism of the administration of the scheme. See Sidney Zabudoff, “ICHEIC: Excellent Concept But Inept Implementation,” 17 *Jewish Political Studies Review* (Spring 2005).
- ¹² This is not meant in its technical legal sense.
- ¹³ See “Legal review for tsunami families in limbo” in *The Guardian* (London), p.2, (17/01/2005).
- ¹⁴ The figures are often beyond comprehension, but \$24 trillion is \$24,000,000 million. See Fogarty “Speculating a Strategy: Suing Insurance Companies to Obtain Legislative Reparations for Slavery” (2002-03) 9 *Conn Ins LJ* 211, 212 in fn 2.
- ¹⁵ See *Deutsch v Turner Corp* (2003) 317 F.3d 1005.
- ¹⁶ For a detailed analysis of these difficulties, see Fogarty, above n 14, at 231-240.
- ¹⁷ 375 F. Supp. 2d 721 (2005).
- ¹⁸ Ibid, at 745, quoting *Elk Grove Unified Sch Dist v Newdow* 542 U.S. 1 (2004).
- ¹⁹ Idem.
- ²⁰ Ibid, at 746.
- ²¹ See above, n 14, at 247-251.
- ²² This concept is derived, in part, from Chayes “The Role of the Judge in Public Law Litigation” 89 *Harv L Rev* 1281 (1976).
- ²³ Calabresi “Some Thoughts on Risk Distribution and the Law of Torts” (1961) 70 *Yale LJ* 499.
- ²⁴ See Brophy “The Cultural War over Reparations for Slavery” (2003-04) 53 *DePaul L Rev* 1181, 1203.
- ²⁵ We now prevent similar temporal anomalies by the imposition of compulsory insurance for employers, thereby imposing costs today in order to meet future liabilities.
- ²⁶ Weinrib “Corrective Justice” 77 *Iowa L. Rev.* 403 (1991-1992).
- ²⁷ “An exercise of distributive justice consist of three elements: the benefit or burden being distributed, the persons among whom it is distributed and the criterion according to which it is distributed”. See Weinrib, *ibid*, at 408.
- ²⁸ See Westley “Many Billions Gone: Is it Time to Consider the Case for Black Reparations” 40 *BCL Rev* 429, 470 who suggested a trust fund created out of general taxation.
- ²⁹ Eizenstat “Imperfect Justice: Looted Assets, Slave Labour, and the Unfinished Business of World War II” (2004) 37 *Vanderbilt Journal of Transnational Law* 333, 342.
- ³⁰ “Was it worth the effort? Survivors tell me it was, regardless of the numbers of zeros on their check, because at least at the end of the day, someone had been held accountable for their suffering”. Idem.
- ³¹ See text to n 15 above.
- ³² See above note 6.