Compensation as a means to justice? Sexual violence survivors' views on the tort law option in Iceland

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Abstract

Limited attention has been paid to the potential of tort law to address the harm of sexual violence. Based on interviews with 35 victim-survivors of sexual violence in Iceland, this study asks: How do victim-survivors understand monetary compensation? How can tort law meet victim-survivors' justice interests? The findings suggest that in addition to the financial risk involved, most participants had ambivalent views towards pursuing and receiving monetary compensation. Many thought that, given their often extensive pecuniary and non-pecuniary losses, it was only fair to receive compensation; but at the same time, they did not want to accept 'dirty money' they considered that pursuing monetary compensation could undermine their credibility, and monetary compensation only partially aligned with their ideas about justice. The findings are interpreted in the context of tort law theory, taboo trade-offs and survivor-centred justice. It is suggested that state intervention is needed to better meet victim-survivors' justice interests.

Keywords Compensation · Taboo trade-offs · Sexual violence · Justice

Introduction

While Iceland enjoys the highest levels of gender equality according to the Global Gender Gap Index (World Economic Forum 2019), sexual violence remains as a form of gender inequality. According to a recent victim survey, 4% of women and 1% of men were subjected to sexual violence in 2016. The prevalence was significantly higher (11%) in the 18–25 age group than in other age groups (National Commissioner of the Icelandic Police 2018). Few cases are reported to the police; according to Stígamót, a leading NGO in Iceland offering support and counselling to survivors of sexual violence, only 12% of their clients reported cases to the police in 2019 (Stígamót 2019). As is the case in most other countries, conviction rates

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remain low, particularly in cases of rape. The most recent study conducted in Iceland tracking attrition and conviction rates in rape cases included all rape cases reported over a two-year period in 2008 and 2009 (Antonsdóttir and Gunnlaugsdóttir 2013).¹ The study found that police investigations were discontinued in 53% of the cases. Of the cases sent to the prosecutor, 65% of cases were dropped, largely due to deficient evidence or lack of evidence. The overall conviction rate for reported cases was 13%, or 23 out of 181 cases (Antonsdóttir and Gunnlaugsdóttir 2013).²

Given the limited ability of criminal law to deliver justice in cases of sexual violence, survivors and feminist scholars are increasingly exploring non-traditional ways of seeking justice (e.g. Ptacek 2010; Powell et al. 2015; Zinsstag and Keenan 2017). While civil claims cannot be considered a non-traditional legal option, limited attention has been paid to the potential of tort law to secure some form of justice for the harm of sexual violence. In particular, little is known about if and how tort law aligns with victim-survivors understanding of justice.

In recent years, there has been a dramatic rise in tort claims filed in the United States by victims of rape and sexual assault, although mostly against third parties such as employers, businesses and institutions (Bublick 2006; Swan 2013, 2015). A number of such cases have been identified in Canada (Feldthusen 1993; Feldthusen et al. 2000) and in the United Kingdom (Godden 2013), including recent notable cases in Scotland (Ross 2017; Carrell 2018). In Iceland, as well as in the other Nordic countries, stand-alone civil lawsuits in cases of serious sexual violence, such as rape, are seemingly very rare (Antonsdóttir 2014).

Some of the main barriers commonly identified to pursuing tort lawsuits include financial risk and the risk of impecunious defendants (Godden 2012). Some policy discussions have taken place in Iceland on this topic, including a cross-party parliamentary resolution tasking the Minister of Justice to prepare a bill on statutory right to legal aid for victims of violence in close relationships and sexual violence. This measure would allow them to pursue a civil case outside the criminal court if their claims have not been addressed in the criminal case (parliamentary document no. 153, 2018–2019). In addition, the Ministry of Justice has currently under review a commissioned policy paper on ways to strengthen the legal rights and status of victims of sexual violence. This includes a recommendation on affording victim-survivors the right to legal aid to pursue civil claims and for the state to partially guarantee the amounts awarded (Antonsdóttir 2019).

Based on interviews with 35 victim-survivors of sexual violence in Iceland, this study asks: How do victim-survivors understand monetary compensation? How can tort law meet victim-survivors' justice interests? The findings indicate that survivors of sexual violence can have profoundly ambivalent views towards the tort law option and monetary compensation. This has to do with incommensurability between

¹ In Iceland, crime statistics are published annually by the Office of the National Police Commissioner, on the one hand, and the Public Prosecution Authorities, on the other. Outcome statistics based on the tracking of individual cases are, therefore, not readily available.

² This overall conviction rate does not include cases where the statute of limitation had run out (two cases) and where the offender was too young to face charges (six cases).

monetary compensation and the harms of sexual violence, where pursuing and accepting monetary compensation from the offender can be understood as a taboo trade-off (Fiske and Tetlock 1997), which risks social sanctions to the detriment of survivors' credibility and their moral standing. While participants' understandings of justice can be said to be in alignment with theories of distributive justice within tort law, monetary compensation does not align with many survivors' understanding of justice, which includes a strong emphasis on offender responsibility, transformation, and the prevention of further violence. In conclusion, I suggest how state intervention is needed to better meet victim-survivors' justice interests.

Survivor-centred justice

Research on how victim-survivors of sexual violence understand and experience justice is limited, although there are important exceptions (Herman 2005; Jülich 2006; Holder 2015; Clark 2015; McGlynn et al. 2017; Jülich and Landon 2017; Antonsdóttir 2018; McGlynn and Westmarland 2019).

The literature suggests that the meaning of justice for survivors of sexual violence has several components, such as: having a voice, being treated with dignity, being informed, and being able to participate in the justice process (Daly 2017; McGlynn and Westmarland 2019); experiencing validation and vindication (Daly 2017) and having the experience fully recognised as having taken place and being true (McGlynn and Westmarland 2019); (re)gaining a sense of connectedness and belonging in society, which is related to being treated with dignity and respect, and about being psychologically, financially and socially supported; and for there to be meaningful consequences for the offender, which includes offender responsibility but is not necessarily tied to punishment (McGlynn and Westmarland 2019). Justice is not only about calling wrongdoers to account, but also having them take responsibility for their actions (Daly 2017). Finally, the prevention of sexual violence is of fundamental importance to survivors' sense of justice. It entails the transformation of society into one that understands and recognises the harms of sexual violence and that actively makes efforts to reduce its prevalence, and therefore goes beyond (though still includes) the rehabilitation of individual offenders (McGlynn and Westmarland 2019).

A few studies have explored whether victim-survivors' ideas about justice fit within either the paradigm of conventional retributive justice, with a focus on a prison sentence, or that of restorative justice, with a focus on the reparation of harm. There are indications that survivors' visions of justice do not fit well into either retributive or restorative ideas of justice (Herman 2005), while containing elements of both (McGlynn et al. 2017). In this study, I will explore how victim-survivors understand monetary compensation and how tort law can potentially meet their justice interests.

Legal pathways for compensation in Iceland

The main legal pathways for compensation for victims of crime in Iceland include: filing a compensation claim in conjunction with the criminal case, applying to the Criminal Injuries Compensation Authority (CICA), and initiating a civil lawsuit against the offender.

In Iceland, as in the other Nordic jurisdictions, the adhesion model is used whereby the injured person in criminal cases has the opportunity to present a civil claim for damages against the offender in conjunction with the criminal proceedings. The criminal court then decides both the criminal and the civil liability of the offender (Brienen and Hoegen 2000).³ According to Article 41 of the Laws on Criminal Procedure (no. 88/2008), plaintiffs in cases of sexual violence, and other serious offences, have the right to have an independent legal counsel (ILC) appointed, who is a lawyer paid for by the state. According to Article 45, the role of the ILC is to guard the interests of their client and support them in the case, which includes the filing of civil claims. Such claims are then usually filed in conjunction with the criminal proceedings. If the accused is found guilty, the victim is usually awarded compensation from the offender. According to Article 176, the judge shall, however, not consider the civil claim if the accused is not found guilty.

Icelandic tort law is broadly similar to that of the other Nordic countries, and the Icelandic Tort Liability Act (no. 50/1993) was modelled on the Danish Damages Liability Act of 1984 (Björnsson 1999). In sexual offence cases, claims are usually made on the basis of Article 26 (Compensation for Harm) of the Icelandic Tort Liability Act, which states that a person who (a) deliberately or through gross negligence causes physical injury; or (b) is responsible for an unlawful injury against the freedom, peace, honour or person of another party, may be ordered to pay non-pecuniary damages to the injured party.

Between June 2018 and June 2019, Iceland's Court of Appeals (Landsréttur) published 10 cases online where an accused had been found guilty of rape on the basis of Article 194(1) in the Penal Code (no. 19/1940). A total of 12 complainants were awarded payments for non-pecuniary damages, which ranged from 1,000,000 to 3,500,000 ISK (7253–25,386 EUR). The average amount was 2,083,333 ISK (15,111 EUR).⁴ Based on a review of Supreme Court verdicts in sexual offence cases between 2007 and 2011, Jónsson (2012) finds that none include an assessment of pecuniary and/or non-pecuniary loss as a result of permanent consequences of the violation, even though in at least some of the cases there is reason to believe that plaintiffs might have a right to considerably higher damages on those grounds.

³ The adhesion model is widespread in Europe and is found in the Germanic, Romanistic, and Nordic jurisdictions (Brienen and Hoegen 2000).

⁴ The judgment generally contain only limited legal reasoning for how the amounts awarded are calculated but they generally refer to Article 26 of the Icelandic Tort Liability Act. Six of these verdicts refer to section b; one to section a and b; two refer generally to Article 26; and one doesn't mention the article at all even though compensation was awarded.

Jónsson (2012) concludes that in cases of sexual violence, tort law is underutilised in Iceland.

Having been awarded compensation as a part of the outcome of a criminal trial, victims do not have to pursue the offender for the payment, but can turn to the Criminal Injuries Compensation Authority which guarantees the compensation awarded up to 5,000,000 ISK (36,259 EUR) for bodily injuries (including permanent non-pecuniary damages and permanent disability); up to 3,000,000 ISK (21,755 EUR) for non-pecuniary damages; and up to 250,000 ISK (1813 EUR) for material loss or damage.⁵ According to the law on State Compensation to Victims of Crime (no. 69/1995), the CICA shall, as a general rule, pay out the amount awarded as stipulated in the verdict, or up to the statutory cap. Thereby the state takes over the claim against the offender for that amount. The state's Collection Centre for Fines and Legal Costs then has various measures at its disposal to collect the debt from the offender.⁶ According to the Law on State Compensation to Victims of Crime (no. 69/1995), victims can apply directly for compensation if the offender is unknown, is not responsible in law, or is not found.

Civil compensation claims for sexual violence outside the criminal court are extremely rare in Iceland. However, an example of such a case is Supreme Court verdict no. 49/2005, where a woman filed a civil claim for non-pecuniary damages against three men for having “violated her sexual freedom by having sex with her against her will”. The claim was filed on the basis of Article 26 (1b) of the Icelandic Tort Liability Act (No. 50/1993), which states that a “person who is responsible for an unlawful injury against the freedom, peace, honour or person of another party may be ordered to pay non-pecuniary damages to the injured party”, and requested in solidum 2,500,000 ISK (30,135 EUR at the time). The court found that the men had “violated her freedom and person” and the woman was awarded in solidum 1,100,000 ISK (12,054 EUR at the time) from the three defendants. The verdict states that no information had been submitted to the court indicating that the plaintiff had suffered direct physical harm at the hands of the defendants. It is further stated that the plaintiff had suffered from depression before the violation, although that does not change the fact that she suffered psychological trauma from the violation as confirmed in an assessment by the psychologist, which was not challenged. Before filing the civil claim, the woman had reported the case to the police. However, the State Prosecutor decided not to issue charges in the case.

Discussions have taken place in Iceland on how to strengthen victim-survivors' access to compensation in cases of sexual violence in the face of high attrition rates and low conviction rates in the criminal justice system. A study conducted in collaboration with the Ministry of the Interior includes recommendations on increased access to legal aid for victim-survivors to enable them to pursue damages in civil court (Antonsdóttir 2014).

⁵ In addition, the state also guarantees up to 2,500,000 ISK (18,130 EUR) for loss of provider, and up to 1,500,000 ISK (10,878 EUR) for funeral expenses.

⁶ These measures include collection letters, the tax system, levies of execution, distress sales, and surrogate punishments.

In 2017, the Ministry of Justice published an Action Plan 2018–2022 on measures to improve the processing of sexual offences within the criminal justice system where the issue of legal aid for victims of sexual violence to pursue civil claims is mentioned. The working group suggested that the issue should be carefully considered, but deemed such a proposal to fall outside their mandate (Ministry of Justice 2017).

In September 2017, the Icelandic coalition government collapsed following a scandal involving the Prime Minister's father writing a letter recommending that a convicted child sex offender have his civil standing restored.⁷ Following a snap election in October 2017, the leader of the Left-Green Movement, an eco-socialist and feminist political party, received the mandate to form a new coalition government. Against the backdrop of the #MeToo Movement in Iceland, the new government's coalition agreement was introduced in November 2017 and contains a significant emphasis on actions against sexual violence including the strengthening of victims' rights within the criminal justice system (Government Coalition Agreement 2017).

In the 2018–2019 parliamentary session, a cross-party parliamentary resolution was proposed whereby the Minister of Justice was tasked with preparing a bill on a statutory right to legal aid for victims of violence in close relationships and sexual violence to pursue a civil case if their claims have not been addressed in a criminal case. In appendices to the resolution, there are references to two separate news reports of women who had been subjected to violence by their partners but were denied legal aid to pursue civil damages from the offenders, as well as an open letter to the Minister of Justice from a third woman who explains how pursuing a private lawsuit against a violent former partner is all but impossible for most women due to the high legal costs. The resolution has not, as yet, received a first reading (parliamentary document no. 153, 2018–2019).

However, in May 2019, a commissioned policy paper, by the author of this article, on ways to strengthen the legal status and rights of victim-survivors of sexual violence within the criminal justice system was submitted to the Prime Minister's Steering Committee on Comprehensive Responses to Sexual Violence in Iceland (Antonsdóttir 2019). The proposals were presented at several consultative meetings with key stakeholders including victim-survivors of sexual violence, feminist organisations, judges, prosecutors and victim lawyers as well as experts within the Ministry of Justice. The proposals mainly focus on strengthening the procedural rights of victim-survivors throughout the criminal justice process, but also include that victims should be afforded the right to legal aid to pursue civil claims and that the state should guarantee the amounts awarded in the same way as compensation is awarded in criminal cases. These suggestions are based on the acknowledgement that in light of a low conviction rate and low number of stand-alone civil tort suits, few survivors are awarded compensation for the wrong and harm of sexual violence (Antonsdóttir 2019).⁸ In December 2019, the Standing Committee on Procedural Justice at the

⁷ For further information about the events that brought down the government, see Henley (2017).

⁸ The proposals are partly based on the initial findings of this study.

Ministry of Justice had conducted an initial favourable review of the proposals and was subsequently charged with preparing legislative proposals on that basis.

In light of these proposals it is important to explore the potential of tort law to meet the justice interests of victim-survivors of sexual violence.

The potential and pitfalls of tort law in cases of sexual violence

Many criminal wrongs, such as rape, are also civil wrongs for which a claim for compensation can be brought in tort law. When applied to tort law, the law of civil wrongs gives the individual the right to sue to protect their rights. While tort law is ostensibly neutral, feminist scholars have pointed to evidence of structural biases in legal practice which function to the detriment of women and minorities (e.g. Bender 1993; MacKinnon 1979; Chamallas 1998; Conaghan 2003; Adjin-Tettey 2004; Chamallas and Wriggins 2010; Richardson and Rackley 2012). Scholars have problematised the gendered conceptualisation of the culpa rule in tort law. Under this rule, a person can be held liable for causing harm either intentionally or negligently. The criterion of negligence is often described as “the traditional standard of care expected of a reasonable man (a bonus pater familias)” (Björnsson 1999, 296). i.e. how a reasonable man would behave under the same or similar circumstances. While the “reasonable man” has been replaced by the “reasonable person” in many jurisdictions, the notion has historical roots in legal systems and intellectual culture that did not recognise women as capable of reason (Bender 1993). Feminist scholars have also shown how standards of care are gendered (Bender 1988) and have asked how a reasonable woman would behave under those circumstances (Finley 1989). In addition, Chamallas (1998) has shown how the “deep cognitive structures in tort law are not neutral” but rather reflect biases, such as when it comes to hierarchies of value where physical injury and damage to property are valued more highly than emotional injury or relational harm (468).

However, in the context of sexual violence and in comparison to criminal law, scholars have pointed out that there are a number of advantages to bringing a civil claim. Firstly, the standard of proof in private law/civil law is lower than in criminal law. Secondly, the plaintiff takes the role of full legal subject, having more control over the action, which can have an empowering effect for the harmed person. Thirdly, although private/civil suits are intended for private wrongs and criminal law for public wrongs, both can function as a deterrent in practice. In addition, a growing number of successful claims can motivate others to take legal action and hence have a public impact (Perry 2009; Godden 2013; Swan 2013).

On the other hand, the main drawbacks include the lack of limitations on the admissibility of sexual history evidence, financial risk for plaintiffs and impecunious defendants (Godden 2012). MacKinnon (1979) has further emphasised how sexual violence is not only wrong and a personal injury, but “a social wrong and a social injury that occurs on a personal level”, and should therefore not simply be treated as a tort (173). Similarly, Godden (2012) points out that “framing rape as a civil as opposed to a criminal wrong, and placing the

responsibility of pursuing a case on the survivor, could trivialise and privatise the wrong and harm of rape” (164). The civil law option is therefore not without its set of challenges.

While the rationales and purposes of injury law are varied, influential theories on how to understand tort liability encompass the notions of deterrence and corrective justice. The goal of deterrence is often explained within the framework of economics. Here, people’s rational motivations are understood along the lines of profit or welfare maximisation, where justice is conceived of in terms of efficiency. The idea is that the economic rational tortfeasor is deterred from behaving in a way that causes injury to others (Schwartz 1996). The idea behind corrective justice can be traced back to Aristotle, and holds that injustice occurs when one party realises a gain and the other a corresponding loss. The role of the law is to correct this injustice by depriving one party of the gain and restoring it to the other party (Weinrib 2002). In that sense, the purpose of compensation is to restore injured persons to the same state that they formerly enjoyed before the harmful event (Miers 2014).

Other theoretical developments within tort law include considerations of distributive justice. Some argue that corrective justice refers to legal relationships between individuals; is categorically different from public law and that the norms of distributive justice have no place within the law of torts (Weinrib 1995/2012). Others, however, have shown how tort law not only incorporates corrective justice but also distributive norms (e.g. Cane 2001; Keren-Paz 2007; Gardner 2013). The allocation of rights and the act of adjudication are, for example, always a matter of distributive justice. And while plaintiffs and defendants bear most of the legal costs of the tort case, the courts do not recoup its full running costs from its users and is therefore partly dependent on public funding (Gardner 2013).

While it is the subject of everyday legal practice, assigning monetary value to personal injury can make people deeply uncomfortable, as we are confronted with questions such as: What is the value of a life? What is the value of a lost limb? And what is the value of the harms of sexual violence? This dilemma is well known among legal scholars, given that harm and economic loss are ontologically of a different kind. This has been characterised as a problem of incommensurability, i.e. when different values lack a common measure (Sunstein 1993; Radin 1993; Abel 2006). If we do not want to do away with non-pecuniary compensation, we must assign symbolic meaning to it. Radin (1993) suggests reconceptualising corrective justice so that compensation is understood as a form of redress which affirms “public respect for the existence of rights and public recognition of the transgressor’s fault with regard to disrespecting rights” (57). I would, however, suggest that Radin’s emphasis on public respect and public recognition indicates that her formulation of corrective justice is perhaps rather informed by the norms of distributive justice, which, as has been shown, are also at work within tort law.

However, if monetary compensation for non-pecuniary losses poses a conundrum in legal thought, it thus begs the question of how people who have been subjected to sexual violence understand monetary compensation.

Views on compensation in cases of sexual violence

In the Nordic countries, there is scant research on the meaning of monetary compensation to victims of crime in general, let alone specifically in cases of sexual violence. In Sweden, Dahlstrand (2012) conducted a survey on views towards compensation both among the general public and among victims of different types of crime, including sexual violence, who had applied for compensation from the state-based compensation scheme. For around 38% of victims, the compensation was perceived to be very meaningful, but for 62%, it had limited or no meaning. Of the latter group, 74% also reported that they were still experiencing the negative effects of the crime. However, 85% of victims thought that compensation for non-pecuniary damages was of considerable or great importance, even if the harm cannot be compensated with money, and 76% of the general public felt the same way. Furthermore, 85% of victims thought it important or very important that the offender should pay the compensation and not the state, and 90% of the general population felt the same (Dahlstrand 2012).

In Norway, a study was conducted on the effects of compensation for victims of crime, largely based on interviews with 39 people who had received compensation from the Norwegian Criminal Injuries Compensation Authority (Viblemo et al. 2019). Importantly for victim-survivors of sexual violence, the findings indicate that being awarded compensation is particularly important for victims in cases that have not ended with a guilty verdict, since it affords them a sense of being believed or acknowledged as victims. In addition, compensation tends to have greater significance for those who have been subjected to serious crimes (such as sexual violence) than less serious crimes (Viblemo et al. 2019).⁹

In the context of Western countries, there is limited research on how victim-survivors of sexual violence experience pursuing individual civil suits against their offenders. A Canadian study from the year 2000 includes interviews with survivors of sexual violence who had pursued three different avenues for compensation: i.e. state compensation (n=48), negotiated settlement of a class action claim against a state-run custodial institution for girls for historical sexual abuse (n=26), and civil litigation (n=13) (Feldthusen et al. 2000; see also Des Rosiers et al. 1998). The findings indicate that a common motivation for survivors for pursuing compensation is to seek public affirmation of the wrong and to have their experiences acknowledged as harmful. Some, however, also reported that they had experienced the financial awards as “dirty money”, “hush money” or “blood money” (Feldthusen et al. 2000, 98).

Other studies have explored the meaning of money to victim-survivors of sexual violence who have applied for state-based compensation schemes. Holder and Daly (2018) interviewed 20 survivors who applied for financial compensation to a state-based scheme in Australia. For half of the participants, this payment primarily

⁹ For Nordic studies on the meaning of compensation, see also Nilsen et al. (2016) on the meaning of state compensation to the young survivors of the Utøya shooting, which were a part of the 2011 terror attacks by Anders Behring Breivik in Norway.

represented acknowledgement for the harm they had suffered or a form of justice; for six participants, it primarily meant practical assistance; and the remaining four did not have a positive view of the payment. In terms of their motivations for applying for compensation, survivors described being initially ambivalent. One said, for example: “I didn’t want anyone to think that I was going for the money,” and another said: “I felt like I was being paid for being sexually assaulted” (Holder and Daly 2018, 33). Most said that ideally, they would have wanted the offender to pay instead of the state or the taxpayer (Holder and Daly 2018).

Smith and Galey (2018) conducted a study in England and Wales where they interviewed 22 Independent Sexual Violence Advisors (ISVAs) who assisted rape survivors and who regularly supported survivors to claim compensation. The results indicate that survivors’ decisions about whether to apply for compensation were characterised by “tension between wanting validation and fear of being stigmatized” (Smith and Galey 2018, 1095). One survivor, for example, had been warned by the police not to file for compensation until after the trial so that she would not be accused of lying for money. Furthermore, survivors often viewed the compensation as “dirty” or “tainted”, and that it wasn’t appropriate for this type of crime (Smith and Galey 2018, 1096). Some survivors were under the impression that the money would be paid by the offender, and were put off applying because they didn’t want to accept anything from the offender. The main driving factors for applying for compensation were “financial burdens and a sense of reparation” (Smith and Galey 2018, 1096). Those survivors who received compensation tended to be satisfied. ISVAs said that some survivors were “just grateful to get any compensation!” and that “the amount of money is something they can use for something positive” (Smith and Galey 2018, 1101). However, in claims for “less serious” sexual offences, which result in lower awards, survivors can sometimes perceive the amount “as trivializing their experiences” (Smith and Galey 2018, 1101).

Research on how victim-survivors of sexual violence understand and experience monetary compensation for the harms of sexual violence is seemingly limited, particularly in the Nordic context. However, the studies above suggest that compensation can have important practical and symbolic meaning for people who have been subjected to sexual violence in the form of acknowledgement of the harm they had suffered and the relief of financial burdens. At the same time, survivors may attach negative connotations to monetary compensation, perceiving it as ‘dirty money’ and as being paid for having been subjected to sexual violence. In addition, some survivors are reported to be hesitant to pursue compensation due to social stigma around myths about women lying about rape for monetary gain.

Taboo trade-offs

As Zelizer (1994) has shown, people do not necessarily treat money as fungible, and the social meaning of money is varied and can change over time in different transactional contexts. Scholars in different disciplines have shown how trade-offs between non-monetary goods and money can be considered problematic, and even taboo. This includes scholars in sociology (Durkheim 1912/1995; Fiske

1991; Simmel 1900/2011; Zelizer 1994), law (Calabresi and Bobbit 1978; Sunstein 1993; Radin 1993) and psychology (Fiske and Tetlock 1997; Tetlock et al. 2000). Scholars have recognised that “human societies denote certain things, relationships, and actions as special/sacred and distinct from the merely secular/profane” (Shen 2013, 1015). In particular, Tetlock et al. (2000) argue that the exchange of profane material goods for sacred values such as honour, love and justice is considered to be taboo.

Taboo trade-offs differ from the more familiar problem of cognitive incommensurability, i.e. where people reject certain trade-offs because the requisite mental process involved is unfamiliar or difficult. Taboo trade-offs draw on the notion of constitutive incommensurability, which has moral implications. This is when people believe that a certain value trade-off subverts or undermines the traded value (Fiske and Tetlock 1997). Fiske and Tetlock (1997) understand taboo trade-offs as “any explicit mental comparison or social transaction that violates deeply-held normative intuitions about the integrity, even sanctity, of certain forms of relationship and of the moral-political values that derive from those relationships” (256). They also contend that merely making explicit the possibility of certain trade-offs undercuts one’s self-image and degrades one’s moral standing. Moreover, to transgress this normative boundary is to disqualify oneself from certain social roles (Fiske and Tetlock 1997). It has been suggested that for victims of crime, in particular victims of sexual violence and violence in close relationships, the problem of trade-off can be particularly poignant when it comes to assigning a monetary value to the harm they have suffered and to non-pecuniary losses (Pemberton 2009).

In a web-based experiment, Shen (2013) tested the taboo trade-off theory in the context of monetary compensation for the harm of sexual assault. Participants ($n=743$) were first randomly assigned to rate the harm described in multiple vignettes using either a dollar metric, a seven-point harm scale metric, or a years-in-jail metric. Then, participants were given the opportunity, but were not required, to provide a comment when making their assessment. The findings showed that participants who were assigned to assess vignettes using the dollar metric were significantly more likely to refuse to answer and significantly more likely to provide comments related to constitutive incommensurability than the participants who were assigned the seven-point harm scale metric or the years-in-jail metric. The relationship was even stronger when the level of sexual assault in the vignette increased. However, in spite of these significant differences, 80% of participants completed the evaluation of the dollar metric vignettes, despite any reservations they might have had (Shen 2013).

In this context, however, the symbolic framing of the compensatory act has been shown to be important (McGraw and Tetlock 2005). For example, the pairing of compensation with an expression of concern or an apology can result in more favourable reactions in victims compared to compensation alone or only an apology (Schmitt et al. 2004; Okimoto 2008). Furthermore, it has been suggested that taboo trade-offs can be more easily accepted if the money is used for other important intrinsic goods rather than for instrumental purposes (Sunstein 1993). There is therefore reason to believe that monetary compensation for the harms of sexual violence is not fully compatible with victim-survivors’ justice interests.

Data and methods

This paper is based on interviews with 35 white Icelandic individuals who had been subjected to sexual violence—32 women and three men.¹⁰ The criteria for participation were that participants: (1) were aged 18 years or over and (2) self-identified as having been subjected to sexual violence. Participants were recruited through lawyers of victim-survivors; trauma psychologists; NGOs that offer counselling for survivors of sexual violence; NGOs that advocate for minority rights such as those of women with disabilities, women of foreign origin living in Iceland, and LGBTQIA people; and select Facebook groups. The age of the participants ranged between 19 and 67 years, and the average age was 37. The age of the participants at the time of the violence ranged from early childhood to 42 years of age, and some had been subjected to violence more than once and/or by more than one offender. The type of violence described by the participants included rape (21), attempted rape (3), child sexual abuse (14), sexual harassment (2), technology-related sexual violence (3) and prostitution (1).¹¹ The offenders responsible for the violence were men and boys, with the exception of one girl and one woman. They included family members (11), partners/boyfriends (7), friends/acquaintances (14), professionals (4)¹² and strangers (4). Of the 35 participants, 17 had reported a total of 21 cases to the police. The status of these 21 cases was as follows: no charges issued (7), accused acquitted (3), accused found guilty (4) and cases still pending (7). In the seven cases still pending, the status was as follows: investigation stage (3) and awaiting an appeal following a guilty verdict in the district court (4).

Four participants had received compensation following a guilty verdict and four participants had been awarded compensation following a guilty verdict but were awaiting a final decision as the case had been appealed. Apart from one participant, those who had reported the case to the police had filed a compensation claim in conjunction with the criminal case. One participant had filed a compensation claim against a third party following an acquittal in the criminal case. In one case, the offender was unknown, and the participant had applied for compensation to the Criminal Injuries Compensation Authority (CICA), but the application was denied.

A semi-structured interview guide was constructed around several themes, one of which focused on how participants understood and experienced monetary compensation, what they thought about pursuing a tort lawsuit and how they understood justice in this context. I conducted the interviews between January and March 2015 and in January 2017.¹³ I then transcribed the interviews and conducted a thematic

¹⁰ This research was conducted at Lund University in Sweden, and therefore ethical approval was sought and granted from the Swedish Ethical Review Board.

¹¹ One participant talked about her experiences of prostitution, which she understood as having been subjected to sexual violence. According to Article 206 of the Icelandic Penal Code (19/1940), it is illegal to buy sexual services. The law was enacted in 2009.

¹² The term ‘professionals’ refers to individuals who occupy positions of authority in relation to the victim-survivors, such as police officers or teachers.

¹³ Most of the interviews took place in a private office at Stígamót, an education and counselling centre for survivors of sexual abuse and violence in Iceland; one took place at a participant’s workplace office and two were conducted via Skype.

analysis (Braun and Clarke 2006; Clarke et al. 2016) in which I familiarised myself with the interviews by reading and re-reading them, after which I generated initial codes and then developed the following themes: 'dirty money but only fair', 'risking credibility', and 'a different kind of justice'. I then translated the quotes presented in this paper from Icelandic to English.

Results

Dirty money but only fair

The participants in this study described how the often extensive consequences of the violence had affected their lives. This included loss of salaries and wages due to time off work, interruption or discontinuation of their studies, extensive psychological counselling, physiotherapy, and in some cases the need to register for rehabilitation and/or disability benefits. Participants also talked about experiencing severely diminished quality of life due to anxiety, depression, flashbacks, nightmares, eating disorders, thoughts of suicide and suicide attempts, which had a profoundly adverse impact on their sense of self and their relationships with their loved ones. As a woman in her early thirties said:

This impacts the relationship with my family, my partner, and just my self-image, my relationship with myself. This has had extensive effects on my career, I've suffered major financial losses by not being in the labour market. [...] and of course, I dropped out of school twice.

In spite of the fact that many participants described extensive pecuniary and non-pecuniary losses, most did not see a civil tort suit as a real option given the financial risk involved in pursuing a private lawsuit. Moreover, their views on monetary compensation were characterised by a high degree of ambivalence. Most, if not all participants felt that "money doesn't compensate for this" and that sexual violence is "non-compensatable", or as one participant said: "It's difficult for me to put a price on what was done to me—it just doesn't make any sense." Many expressed the view that putting a price tag on what had been done to them was ridiculous at best and offensive at worst. Some referred to monetary compensation as "disgusting money" or "dirty money"; however, they also thought it only fair that the offender should pay for the damages they had suffered due to the violence, particularly pecuniary losses. As one woman in her late twenties said:

Personally, I would never accept any money because it's just dirty money and disgusting [...] I don't think it's necessary. Okay, yes, perhaps some think it's good that they have to pay, but money doesn't matter [...] I have been in a car accident and received money, but it didn't do anything for me. Okay, yes, I could maybe pay my physiotherapist, but I'll never get my health back.[...] okay, perhaps you can use it to pay for psychologists or work on yourself and try to get over it.

Another woman in her early thirties also raised the issue of compensation as a monetary transaction which could potentially take on the meaning of a relational bond with the offender.

A lot of people don't even want this money, you know, the feeling is like people are being paid off, but then I think about all the costs that victims have to bear: psychological counselling, having to be away from work, even out of the labour market for a few years because some people develop such a serious post-traumatic stress disorder.[...] In a way I think that offenders should pay for the psychological costs of victims for the rest of their lives [...] but there is a risk of experiencing this as a kind of blood money or band-aid or a reminder of some form of a connection with the offender.

One participant, a man in his late forties, had experienced being offered money by his offender. His mother had subjected him to sexual abuse as a child and, after confronting her about it many years later, she sent his sister to meet with him with an envelope full of money and the message that more money was coming his way. He refused to accept the money and stated: "I will not be bought." Finally, one participant in her late twenties directly compared receiving compensation for sexual violence to prostitution. She said:

This is just disgusting, that someone is paying me money. Perhaps it's a bit like: I raped you, aren't you just a whore, don't you just want money—it's fine, I paid her for it.

While many participants in this study thought it only fair that the financial loss incurred due to the consequences of the violence should be compensated by the offender, as is also supported by other studies (Dahlstrand 2012; Holder and Daly 2018), participants generally understood the harms of sexual violence and monetary compensation as incommensurable (cf. Radin 1993; Sunstein 1993). Moreover, many participants understood compensation in this context as 'dirty money' or 'blood money' or as being paid off, which is also supported by previous studies (Feldthusen et al. 2000; Holder and Daly 2018; Smith and Galey 2018). This indicates that participants not only understood the harms of sexual violence and monetary compensation as cognitively incommensurable, but many also understood them as constitutively incommensurable. Here, monetary compensation functions to devalue the harm done, and can be understood as a taboo trade-off (Fiske and Tetlock 1997). Moreover, this type of taboo trade-off can acquire new social meaning. By comparing it to prostitution, one participant indicated that monetary compensation transforms sexual violence into, pro forma, consensual sex.

Risking credibility

Of those participants who had reported their case to the police, most reported that in the beginning, they had not thought about their right to file a compensation claim in conjunction with the criminal case. When the compensation claim was raised by their lawyers, many said that they did not want any money, or as one participant

said: "Money can't compensate for this—I wanted justice." Their lawyers would then explain to them that filing a compensation claim was standard practice and a natural part of the process. Many participants described how they had then left the compensation claim in the hands of their lawyers, often viewing it as something that was none of their concern and not wanting to know anything about it. As one woman in her early twenties said:

I never wanted to file a compensation claim like [my lawyer] was going to do, I didn't want it to be known or (.) I wasn't doing this for the money. I was always against charging him for something but then [my lawyer] said that was just a normal part of the process.[...] So I said okay, but you have to do that, I'm not going to be any part of it.

In some cases, participants even felt that they did not have a choice in the matter, but were later glad that their lawyer had proceeded to file the claim. As one woman in her early thirties said: "If I'd had a choice, I wouldn't have filed a compensation claim [...]. Today I'm terribly relieved."

One of the reasons for participants' discomfort in relation to the compensation claim was that they felt they were playing into the myth of women pressing charges for sexual violence for monetary gain. A woman in her mid-forties talked about having been hesitant in filing a compensation claim in conjunction with the criminal case:

One reason is that people have for a long time alleged that women report rape for the money and I thought I was somehow confirming that myth [...] but it wasn't about me getting some money, it was about me wanting justice, that was the only thing I wanted, but based on all it cost me I would have needed a great deal of compensation.

Another participant in her mid-twenties talked about how she did not file a compensation claim as she thought it would undermine her credibility in the criminal case:

For me it was never a question of money, I didn't even file a compensation claim with the criminal case [...] I felt like that would undermine what I was saying [...] as it would be understood as I was only doing this for some money or, you know, that it would be more likely that I wasn't telling the truth.

A woman in her early thirties explained why it is a social risk for survivors of sexual violence to pursue compensation:

I don't want their money, but I think it's really stupid that you can't even mention the financial loss [...] because then you are just greedy, then you are materialistic, and probably lying.

A fourth participant, a woman in her early twenties, who was one of several victims in a case which had received some newspaper coverage, described how she had been at a children's birthday party at the house of a family member where two of her male cousins were talking about the case without knowing that she

was one of the victims. She then heard them saying that the accusers in the case were only “liars who were after money”.

These results coincide with Smith and Galey’s (2018) findings that some survivors worry about pursuing state compensation for fear of being stigmatised and accused of lying about rape for monetary gain. Moreover, viewed through the prism of taboo trade-off theory (Fiske and Tetlock 1997), merely making explicit the possibility of accepting monetary compensation in cases of sexual violence risks undercutting one’s self-image and degrades one’s moral standing. To transgress this normative boundary risks disqualifying oneself from certain social roles (Fiske and Tetlock 1997), that is to say, one cannot have been subjected to sexual violence if one accepts monetary compensation. This risk of moral judgement should also be understood in the wider context of social myths about what constitutes ‘real’ sexual violence and how ‘real’ victims behave, which largely function to undermine survivors’ credibility (e.g. Ehrlich 2001; Temkin and Krahé 2008; Edwards et al. 2011; Deming et al. 2013; Dinos et al. 2015).

A different kind of justice

Irrespective of the outcome of the case, participants generally did not equate monetary compensation with justice. However, several participants thought that having the person who offended against them found liable for their actions would be ‘correctifying’ and an important acknowledgement of the wrong and harm of the offender’s actions. One participant in her late twenties said that it would be important

to get confirmation that you know, yes, perhaps there was something there that wasn’t okay instead of just getting: No, he didn’t do it and is simply innocent [...] just to get a kind of acknowledgement.

A participant in her early twenties said:

I can imagine that victim-survivors would experience, at least to some degree, some kind of victory to get something. That someone would at least admit that something terrible has happened to you. That would be better than nothing.

This was echoed by another participant in her early thirties, who said that “if the person has at least to pay, even if the money doesn’t really matter, then that is also some kind of an acknowledgement that it happened”. The only participant who had experienced pursuing a tort case did, however, use the term ‘justice’ when describing her experiences. This woman, who was in her early twenties, had successfully pursued a civil lawsuit against a third party. When explaining the motivations behind the action, which she took with the support of her family, she said:

After the not-guilty verdict in the Supreme Court then it was more like: I was still violated. It was a stubbornness to get this acknowledgement [...] and probably some anger. It was like: We are not done here; we want to be heard [...] It was stubbornness and we wanted justice.

Therefore, while participants generally did not equate compensation with justice, many understood a favourable verdict in a civil case as an acknowledgement—a confirmation that they had been subjected to something terrible and that the offender was not simply innocent of any wrongdoing. In particular, those whose cases had not concluded with a guilty verdict found that such an outcome could constitute a type of validation, vindication, or recognition of what had been done to them, which has been identified as a component of justice for survivors of sexual violence (Daly 2017; McGlynn and Westmarland 2019). Another important element of justice for survivors of sexual violence is for there to be meaningful consequences for the offender, which includes offender responsibility but is not necessarily tied to punishment (McGlynn and Westmarland 2019). Based on the results of this study, it is safe to say that participants did not understand monetary compensation as a form of meaningful consequences for the offender.

Participants were asked if and how it would be possible for offenders to compensate for their actions. Most participants said that the violence could not be compensated, but that the offender could admit to the offence, apologise and take responsibility for their actions. While participants generally talked about justice in the context of the criminal justice system, when asked about their understanding of justice, most did not equate justice with punishment. Moreover, many expressed doubts about the ability of the criminal justice system to deliver justice. As one participant in her early thirties said:

I can't speak for others, but I can't imagine that punishment or compensation has resulted in anyone experiencing a sense of justice, but perhaps a sincere apology and an understanding of the violation and the consequences could. And also to know that no one else will be violated. That is something that could give you the feeling that it was worth going through this.

Many participants emphasised the importance of knowing that offenders would seek psychological help, or were made to seek psychological help, as they saw this as a way for offenders to build their capacity to take responsibility for the violence they had committed. One participant in her mid-twenties said: "What I would have wanted to see rather than some money was that they would be sent to a psychiatrist or psychologist or would just get help." A woman in her early thirties said:

It would have been better to make them get some help, that's what I would have wanted instead of monetary compensation. I think that prison wouldn't have helped these boys at all, would only have made them worse.

Some participants also emphasised the importance of rehabilitation for offenders. A woman in her late twenties said:

I don't know if rehabilitation works in these cases, but I hope so. I think it would be a better alternative than prison. I think *Karlar til ábyrgðar*¹⁴ is great based on what I've heard, and it would be good if they were made to enrol in programmes like these. That's what I would be most comfortable with.

Similarly, another woman in her late twenties said:

I wouldn't want the money. If it would be compensated in another way [...] you need to go to a course on this, you need to sit there and just, you know, learn about human interactions or gender relations or how to behave in certain circumstances, or something to improve yourself to try to prevent this from happening again.

A meaningful justice outcome for most participants was therefore not associated with monetary compensation, but rather with a sincere apology from the offender, offender rehabilitation, having the offender take responsibility for their actions and ultimately the prevention of further violence. In this context, prison was associated with violence prevention rather than punishment in cases where participants believed that the offender lacked all capacity to take responsibility for their actions and therefore needed to be imprisoned. Having wrongdoers held to account and having them take responsibility has been identified as an important element of justice for survivors of sexual violence (Daly 2017), which is not necessarily tied to punishment (McGlynn and Westmarland 2019). Offender rehabilitation and the prevention of further violence have also been identified as important components of justice for survivors (McGlynn and Westmarland 2019).

Concluding discussion

The findings of this study suggest that it is of great importance for survivors to receive recognition of the wrong and harm done to them and many thought that they should receive compensation for the financial loss incurred in relation to the often extensive consequences of sexual violence. It is safe to say, however, that participants generally did not subscribe to notions of justice in terms of financial deterrence and efficiency or in terms of corrective justice. Instead, a key component of justice, for participants, was understood to be a public recognition of the wrong that was done to them and is, therefore, primarily aligned with the norms of distributive justice. In that sense, participants' understanding of justice is in alignment with Radin's (1993) reconceptualisation of the symbolic meaning of compensation, i.e. as

¹⁴ *Karlar til ábyrgðar* (Men Take Responsibility), now called *Heimilisfriður* (Domestic Peace), is primarily a programme for men who commit violence in close relationships. The programme model is based on a Norwegian programme called *Alternativ til Vold* (An Alternative to Violence). The programme is run by psychologists and men are offered individual and group counselling sessions, where men are supported to take responsibility for their violence and develop ways to tackle relational issues in a constructive way (Heimilisfriður n.d.).

form of redress which affirms “public respect for the existence of rights and public recognition of the transgressor’s fault with regard to disrespecting rights” (57).

However, according to participants, the idea of putting a price on what had been done to them and the harm it had caused was often considered ridiculous at best and offensive at worst. This indicates that monetary compensation and the harm of sexual violence are not only cognitively incommensurable, but are also constitutively incommensurable. Many participants associated monetary compensation with being paid off, viewing it as dirty money or blood money, as has also been reported in previous studies (Feldthusen et al. 2000; Holder and Daly 2018; Smith and Galey 2018). Monetary compensation can, therefore, be understood as a taboo trade-off (Fiske and Tetlock 1997) as it can serve to devalue the harm of sexual violence. Monetary compensation in this context can be understood as changing the meaning of what took place and the offender-victim relationship. Moreover, it has the potential to transform the violence into a transaction comparable with prostitution, where sex for money is understood as, *pro forma*, consensual.

Some participants also worried about pursuing compensation for fear of being stigmatised and accused of lying about the sexual violence for monetary gain, which echoes Smith and Galey’s (2018) findings. Moreover, for many participants, pursuing monetary compensation was associated with risking their credibility, which, if we look to legal practice in criminal cases of sexual violence, is the most valuable asset of a ‘real’ victim. There is therefore an understanding among survivors of sexual violence that pursuing monetary compensation can risk social and legal judgement, degrading their moral standing, which feeds into social myths about how ‘real’ victims behave (Ehrlich 2001; Temkin and Krahé 2008; Edwards et al. 2011; Deming et al. 2013; Dinos et al. 2015). Compensation as a taboo trade-off, coupled with social myths about women reporting rape for monetary gain, therefore serves to undermine survivors’ *de facto* access to compensation for their often extensive pecuniary and non-pecuniary losses.

As noted above, the Icelandic Minister of Justice has currently under review proposals suggesting that survivors should be afforded the right to legal aid to pursue civil claims outside the criminal justice system, and that the state should guarantee the amounts awarded in the same way as for compensation awarded in criminal cases (Antonsdóttir 2019). The idea is to further use the state’s mechanism of distributive justice to greatly improve victim-survivors’ access to (legal) justice and compensation irrespective of their socio-economic status. The policy is to be understood as an acknowledgement of the society’s responsibility for the wrong and harm of sexual violence. Coupled with an understanding of tort law as partly embedded in the norms of distributive justice, such a state-funded tort law option can no longer be understood as privatising the harm of sexual violence (MacKinnon 1979; Godden 2012) but is better conceptualised as a public/private hybrid option. Moreover, such a policy could also ease the tension described by participants between finding it only fair to have the offender pay compensation but not wanting to receive money from the offender. In addition, the policy would send a normative signal about the appropriateness of this legal option and give greater recognition to the harms of sexual violence, which can have profound and wide-ranging consequences on victim-survivors’ health and socio-economic status. The question is, however, whether such

normative signalling can counteract social myths about women reporting sexual violence for monetary gain, or whether it would simply exacerbate them. This could, to an extent, rely on the political framing of such a policy and the advocacy by victim-survivor support groups, feminist organisations and victim lawyers.

Based on the findings of this study, however, such a public/private tort law option could only meet survivors' justice interests in a limited way. While an official legal recognition of having been subjected to wrongdoing would meet some of survivors' justice interests, monetary compensation is unlikely to be understood in terms of meaningful consequences for the offender/wrongdoer. As previous studies indicate, an important component of justice for survivors centres on offender accountability, responsibility and ultimately the prevention of further sexual violence (Daly 2017; McGlynn and Westmarland 2019). In that sense, survivor-centred justice has a strong transformative aspect to it. This study further supports these findings. One way of addressing this would be court ordered psychological treatment or accountability programmes for wrongdoers, however, this creates the problem of enforceability and could mean that survivors might need to go back to court to enforce the order. This is far from ideal given that for many survivors it is important not to be tied to the offender in any way.

Given that the legal system neither incentivises nor assists wrongdoers to take responsibility for their actions, another way of addressing this problem is for the state to step in and incentivise wrongdoers. If the above mentioned proposals were enacted, the state would guarantee awarded damages, at least up to a certain amount, in such civil tort suits. This would mean that the wrongdoer is indebted to the state. In order to further meet survivors' justice interests, the state could then proceed to offer the wrongdoer a debt discount if the person successfully completes a specially designed offender accountability programme. Moreover, as already noted, taboo trade-offs can become more acceptable if the money is used for other important intrinsic goods (Sunstein 1993). Such a policy could give this taboo trade-off an alternative meaning, as it would be used as leverage to incentivise accountability.

Given the serious justice deficit in cases of sexual violence, particularly in cases of rape, it is of great importance to also look beyond criminal justice in our efforts to meet the justice interests of victim-survivors and develop alternative ways to hold the state and offenders to account. While the tort law option, as it stands, only meets victim-survivors' justice interests in a limited way, the findings of the study and the suggested policy proposals show how it might be possible to further employ the mechanisms of social justice to the tort law option and thereby better meet survivors' justice interests. It remains to be seen, however, whether these proposals will be enacted and further developed.

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