

Accessing Court Files as a Feminist Endeavour: Reflections on 'Feminist Judgments of Aotearoa - Te Rino: A Two-Stranded Rope'

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Abstract

In this piece, we reflect on the significance of accessing court records for feminist endeavours. We discuss two examples that illustrate the value of accessing and critiquing court processes. Feminist judgment writing, as a feminist endeavour, demonstrates the significance of hearing women's stories as well as the importance of nuanced factual analysis that takes account of the lived experiences of women. Access to the court file in one of the rewritten judgments exposed missing relevant facts in the appellate decision, and demonstrates how the appellant's story was never fully reflected in the judgment or verdict. In our rape trial research, access to court records makes visible the complainant's evidence and the response of the judge to her as a person. It also allows inquiry as to how the rules of evidence enacted for the protection of the complainant, such as non-disclosure of their occupation, are actually working in practice.

Key words

Feminist methodology; feminist judgments; rape trial process; access to court records; rape mythology

Resumen

En este artículo, reflexionamos sobre el significado de acceder a archivos judiciales para objetivos feministas. Comentamos dos ejemplos que ilustran el valor de acceder a esos archivos y de criticar procesos judiciales. La redacción feminista de decisiones judiciales demuestra la importancia de escuchar los relatos de las mujeres, así como del análisis matizado de hechos que toma en consideración el relato de la experiencia

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vivida por las mujeres. En uno de los fallos reescritos, el acceso al archivo judicial puso de manifiesto hechos relevantes ausentes en la decisión en apelación, y cómo el relato de la recurrente nunca llegó a reflejarse del todo en la sentencia. En nuestra investigación sobre juicios por violación, el acceso a los archivos hace visibles las pruebas de la denunciante y la respuesta que, como persona, le dio el juez. También permite cuestionar cómo se lleva a la práctica el reglamento probatorio dictado para proteger a la denunciante, como la no revelación de su profesión.

Palabras clave

Metodología feminista; sentencias feministas; proceso judicial por violación; acceso a archivos judiciales; mitología de la violación

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1. Introduction

Undertaking a feminist analysis of case law, whether of one case or a series, has been an oft-used method of exposing and questioning the premises on which decisions are based (see recently Fernando and Rundle 2016, Lammasniemi 2016, Capers 2017, D'Aoust 2017, Maxwell 2017, Mukhtar 2017). Such an endeavour can demonstrate gender bias as well as provide proposals for reform of law and practice. The task of reimagining a judgment from a feminist perspective, as done in the global feminist judgments project movement, is a more recent and similarly powerful method of demonstrating how judicial decision-making process may overlook, down-play or unfairly dismiss the legitimate interests of women – whether in the particular decision or as a matter of precedent (Majury 2006, Hunter *et al.* 2010, Douglas *et al.* 2014, Stanichi *et al.* 2016, Enright *et al.* 2017, McDonald *et al.* 2017).

Most feminist case analysis is based on reported decisions or those available on legal or publically accessible websites, including sentencing notes and the judgments of appellate courts (see Hunter and Tyson 2017). Less work has been done through a systematic accessing of court files (but see Cunliffe 2007, Bell *et al.* 2013) in part because of the difficulty of identifying the relevant cases or because of the strictures in place regarding disclosure of court records to members of the public or researchers. Judicial control over court records, certainly in Aotearoa New Zealand, is seen as necessary given the amount of material on file that is of a confidential or privileged nature – much of which is either irrelevant to the (public) trial process or would be inadmissible in that forum.

In this piece, we reflect on the significance of accessing court records for feminist endeavours – in particular, because of the ability to observe how decisions are made out of the public gaze. For example, pre-trial admissibility decisions (unless appealed) are often unreported and are not uploaded to legal databases. Material which provides the context for decisions about admissibility or the content of jury directions is also not usually available to researchers, and is only made visible by the extent to which it is referred to in what is published or otherwise in the public arena.

Our interest in this research methodology, and our increased awareness of the richness of material contained in court records for feminist critical work, is due to our involvement in the feminist judgments project, but also because of our work on research into trial process in acquaintance rape cases. We begin this piece by discussing an example of the significance of accessing court records which occurred during the work on *ko ngā muka o te rino* (the threads of the two-stranded rope, McDonald *et al.* 2017), in the context of an appellate decision on the availability of self-defence to a woman who killed her abusive husband. We then outline the process of accessing the court files, including complainant evidence, in 30 New Zealand acquaintance rape trials, and make some observations about what this kind of access allows feminist researchers to notice and critique.

2. Reimagining judgments and the significance of facts

In Aotearoa New Zealand, as elsewhere, there is uncertainty about whether increasing the number of female judges makes any difference to the practice and substance of judicial decision making – in particular whether women judges make a difference to women's experience of the law (see Schultz and Shaw 2013, Chan 2014). Not all women are feminists and arguably a male judge could equally approach their task in a manner which is alive to potential gender issues, in the way they portray the story behind the case, the way they resolve a case and their awareness of the gendered impact of their decisions. The words of Reg Graycar are still disturbingly relevant nearly 20 years after she wrote them:

I certainly believe it is essential we have more women judges, indeed that we have a more representative judiciary in all the respects that divide members of our community (*e.g.* racialisation, sexuality, physical ability, class). But in order for our perceptions of these core values of representativeness and impartiality to move with

the personnel, rather than remain fixed in the framework of a time when only a small part of the community was represented on courts, and legal doctrines and rules were framed from that partial perspective, we need to pay careful attention to judicial method and in particular to concepts such as judicial notice and 'common sense'. *In doing so, we need to focus just as much on the facts as we do on the law ... [we need] to question and reformulate the rules of the game, rather than focus all our attention on the people being 'let in' to play.* (Graycar 1998, pp. 20-21, emphasis added)

To date, feminist engagement in Aotearoa aimed at *reformulating the rules of the game* has had mixed success. A number of the women lawyers associations have been influential – for example, acting as amicus in the benefit fraud case of *Ruka v Department of Social Welfare* [1997] (and see Stephens 2017), assisting the court to understand the impact of family violence on a relationship (Auckland Women Lawyers Association) and making a submission which convinced the Justice and Electoral Select Committee to introduce a total bar on offering evidence of a rape complainant's reputation in sexual matters (Wellington Women Lawyers Association) (see McDonald 2007). However, most of the Law Commission's proposals from the project on *Women's Access to Legal Services* (Law Commission 1999b) and *Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (Law Commission 1999a) or those from the work on *Some Criminal Defences with Particular Reference to Battered Defendants* (Law Commission 2001b), all projects undertaken in response to calls from the public, have not been implemented. The Law Commission has recently had to repeat their recommendations concerning the necessary reform of self-defence in *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (Law Commission 2016), which have yet to be met with any substantive government response.

One of the re-imagined judgments in the *Te Rino* volume is the Court of Appeal decision in *R v Wang* [1990] (Midson 2017, see also Kirkconnell-Kawana and Sharratt 2017), a case which was the focus of both those Law Commission reports. The Court of Appeal upheld the trial judge's decision that self-defence should not have been put to the jury. His decision included this somewhat infamous reasoning:

The only view of the evidence open is that the accused was in no immediate danger. I accept that imminence of danger is a question of fact and degree and not a requirement of law. And further that a pre-emptive strike, even with a knife, may in particular circumstances qualify for consideration as self-defence. ... Here there is no suggestion that the victim had a weapon, nor had made any move to suggest the intended use of any object as such. The contention on behalf of the defence has to go the length of asserting that a jury could reasonably find that an accused under no immediate threat or danger, however elastic an interpretation is given to that concept, who had alternative courses open none of which she had tried or seemingly considered, was or at least might reasonably be justified in deliberately killing the other party with a knife. *To accede to that proposition in these circumstances would I think be close to a return to the law of the jungle.* Giving the jury every latitude as to taking the most favourable view of the accused's honest even if mistaken view of the circumstances, no jury could properly regard such a reaction by the accused to be a reasonable one. *It is one of those cases, no doubt relatively rare, where I believe it would be impossible for the jury to entertain a reasonable doubt on the point.* (*R v Wang* [1990], p. 535, emphases added)

A number of feminist lawyers criticised the decision, on the basis that the Court showed no understanding of the position of victims of domestic abuse (Beri 1997, Seuffert 1997, Wright 1998). As one of those who entered this public debate (McDonald 1997a, 1997c), Elisabeth received a letter from (then) Eichelbaum CJ who wrote that it was not a case about battered woman's syndrome, and said he had re-looked at the file (indeed, including with the letter a copy of three of the pages of the trial transcript, highlighted, to support his position that the defendant suffered (only) from a depressive illness). It is certainly true that *Wang* [1990] has long been taught, and discussed, as a case of woman who was subjected to abuse by her husband, and killed him while he was intoxicated following threats to her and her family, who were

based in Hong Kong and vulnerable because of their political beliefs, that he promised to act on.

The feminist judge and the commentators working on the case approached it in their first drafts as a case that did involve a *battered woman*, and one in which the trial judge and the Court of Appeal had demonstrated a lack of understanding about the dynamics of family violence, and the particular cultural context (the defendant was a Chinese immigrant woman). Cognisant of the different view held by the trial judge, during the first workshop (February 2016), Elisabeth suggested to those reimagining the decision and writing the commentary that it would be a valuable exercise to request access to the court file to see the notes of evidence first hand.

As a powerful reminder of the importance of projects such as this, the notes of evidence disclosed much more violence than was reflected in the Court of Appeal's judgment – the Court had referred to Mrs Wang's experience of violence at the hands of Mr Li in one sentence: that it was a "loveless, coercive marriage" (*R v Wang* [1990], p. 540). The Court did not record the extent of the physical and psychological abuse meted out by the deceased over many years, which the commentators, after examining the case file, describe in this way:

At trial, Mrs Wang described being married under duress: Mr Li stalked her, physically assaulted her and threatened to kill her family if she did not marry him. Their marriage in China was also characterised by physical and emotional abuse; numerous injuries left her hospitalised. When she left him and moved to Japan, he followed her, continued to threaten her, and forced her to remarry him. The abuse continued after they moved to New Zealand and their son was born. This abuse was rarely witnessed by others, including her sister, who had moved to New Zealand to help Mrs Wang at home. Some friends and associates testified that Mr Wang was dominating and insulted Mrs Wang in their presence, while others suggested that they did not take an interest in the nature of the couple's relationship. On the rare occasions that Mrs Wang did disclose experiences of abuse and feelings of helplessness, friends testified that they had told Mrs Wang to endure it. Others witnessed Mr Wang make threats and imply, in Mrs Wang's presence, that he could easily kill and dispose of a body in New Zealand (Kirkconnell-Kawana and Sharratt 2017)

Nor did the appellate decision disclose that the deceased was scheduled to fly to Hong Kong, which is where the family members he threatened to blackmail and kill resided. As explained by the commentary, the notes of evidence also showed that on occasion Wang Xiao Jing (Mrs Wang) did indeed tell others about the abuse, and some friends had witnessed the threats as well as her husband's claims that he would be able to carry out these threats and escape sanction. The Court of Appeal, however, discussed her situation in these ways:

[I]t was not reasonable for the applicant in the circumstances as she believed them to be to kill her husband when alternative courses were open to her. Her sister and her friend Susan were both in the house. She could have woken them and sought their help and advice. She could have left the house taking her sister with her in the car which was available. She could have gone to acquaintances in Christchurch or to the police ...

In this case there was no immediacy to the threat to kill, it was part of blackmail to extort money, and, while the husband was in a drunken sleep, the immediate killing of the husband by his wife was not justified as she was not held hostage and was free to seek protection in other ways. (*R v Wang* [1990], pp. 535 and 539)

The case file material provided a much fuller background of what was happening in the relationship and the extent to which Mrs Wang really had other realistic possibilities to prevent the harm that she perceived, including telling her friends. The Court was indeed satisfied that a jury could find that she honestly believed she had no other option but to kill him:

Turning now to consider the circumstances as the applicant believed them to be, it is not in dispute, as found by the trial Judge, that there was material from which the jury could infer that the accused's view of the circumstances was that she, or

members of her family, were under threat of being harmed by her husband whether physically or otherwise. Furthermore there was the evidence of the psychiatrist that the applicant would have believed that the threats of her husband would be carried through. There was also his evidence that in the state she was in, the only course she could think of was to kill her husband. (*R v Wang* [1990], p. 534)

The facts *missing* from the Court of Appeal's account of the evidence goes directly to the issue of whether she believed that her husband would carry out the threats to kill and what reasonable options she had to avoid those threats. This information, which can be seen as altering the framing of the objective limb of section 48 of the Crimes Act 1961 (NZ), remained, until now, hidden from public view and therefore could not add weight to the many calls for reform. It has been left to the feminist judge writing in 2017 to draw a different conclusion from that reached 28 years previously:

On the evidence, it would not be impossible for a jury to entertain a reasonable doubt as to whether Mrs Wang was acting in self-defence. Mrs Wang honestly believed that her husband would carry out his threats to kill or cause serious injury to herself and her family. She was a Chinese immigrant to New Zealand, she was suffering from a major depressive illness, she lived within a coercive relationship, was socially isolated and did not believe she had any other avenues to escape her husband. She gave evidence that he made all the decisions and she was not even to use the phone without his permission. She said she knew she could not leave him as he would never let her go, and he made threats against her life on a daily basis. As was observed by both the trial Judge and the majority, Mrs Wang was socially isolated and not aware of avenues for help. It is paradoxical, at the least, to then suggest she did have options available to her. Furthermore, she lived with Mr Li – she knew better than anyone what Mr Li was capable of and whether he could carry through with his threats. Although he was asleep when he was killed, Mrs Wang honestly believed he could have woken at any time and carried out his threats. In those circumstances, it was necessary and proportionate to tie him up and kill him, before he followed through on his threats to kill her or her family.

Applying the law in this way is not a return to the law of the jungle, as Eichelbaum J put it. Rather it is giving due weight to the subjective element of s 48 which requires that the accused honestly believes there is a threat of serious harm. If Mrs Wang had not taken those steps to defend herself and others, it is highly plausible that they would have been on the receiving end of serious violence. (Midson 2017)

Accessing the court file in *Wang* allowed the feminist judge to add greater factual context to her decision, context which was minimised by the trial Judge and the Court of Appeal. The additional facts allowed for a fuller, more visible, story to be told about the experiences of Wang Xiao Jing, and also exposed the limitations of the statutory interpretation exercise undertaken by both courts. As Rosemary Hunter observes in relation to the task of feminist judging:

[O]ne of the persistent obstacles to the success of feminist law reforms has been the fact that once enacted, legislation must be implemented by judges and officials who are often uninformed about or actively unsympathetic to its objectives. A feminist judge is in a position to implement feminist-inspired law reform in the way it was intended to operate...

[T]he facts are at least as important as the law. 'Facts' are not given but constructed, and very often the feminist judge begins by telling the story differently from the way it has been told by the other judges—emphasising different aspects of the narrative, paying greater attention to voices and experiences which have been traditionally silenced or side-lined, acknowledging the harm and trauma suffered by protagonists, or, indeed, restoring dignity and privacy to a party by not retelling their traumatic experience in exhaustive detail. Sometimes the different story provides the basis for a different analysis and application of the law. Sometimes it is simply important in itself that a different account is given. (Hunter *et al.* 2017, citations omitted)

Presenting and emphasising facts in a different way may well lead to a different outcome, but may also simply acknowledge and validate a woman's version of events or her lived reality. As Rhonda Powell discusses, feminist methodology is also about listening to, hearing and reflecting on women's stories:

The way in which a judge tells the story that led to a court case has the effect of solidifying the particular narrative adopted by the judge. If the judge ignores certain details deemed to be legally irrelevant, those details are lost from the story. The way in which a judge constructs and interprets the facts of a case becomes a legal 'truth'. One of the ways in which a judge can be 'feminist' is by listening to women's stories, hearing the perspectives of woman litigants and recognising women's experiences in the way that they recount the facts of cases, so that these experiences also become legal truths.

This technique could be seen to relate to the process of judgment-writing rather than the outcome of the case. However, the way in which the facts are framed may also influence the reasoning and thereby the outcome. The way in which a judge tells the story of the case also plays a potentially therapeutic role for the parties, even if the outcome is disappointing. Sensitive use of language has the potential to enhance the mana of people involved in the proceedings, which is especially important for those who have been treated inhumanely already. (Hunter *et al.* 2017, citations omitted)

In the context of sexual offending, complainants often only hear the verdict at the end of the trial, which, for many, is a harrowing, foreign and deeply distressing experience. In judge-alone trials, rare in the context of offending against adults, a complainant will be given the reasons for the verdict, and consequently may know that the judge did believe them that they did not consent, even while finding the defendant not guilty. What remains invisible in jury trials is the fact-finding process, as well as the grounds for admissibility decisions, unless they are the subject of appeal. Although research into jury decision-making is uncommon (but see Law Commission 2001a), access to court files allows greater scrutiny of unreported factual and legal analysis as well as information about support given to complainants during the trial process. Our current rape trial research therefore allows us to make more visible the decisions and the decision-making process in that context, which are also based on factual analysis and assessments of the complainant's story (evidence). In the next part of this piece, we briefly outline our methodology and then give two examples of what access to court files tells us.

3. Hearing and protecting the complainant: Court file access methodology

Despite forty years of legislative and procedural change in rape trials in New Zealand (McDonald 2014)¹, adult complainants still report high levels of dissatisfaction with the court process, in particular cross-examination, the type of questioning which has been most resistant to reform initiatives [Gender Bias and the Law Project 1996, McDonald 1997b, Bacik *et al.* 1998, Konradi 2007, Doak 2008, ACT Government 2009, Kingi and Jordan 2009, Payne 2009, Parkes 2017, but see Kebbell *et al.* 2007]. Complainant description of their experiences show little change between the Rape Study in 1983 (Young 1983) and the Ministry of Women's Affairs (as it then was) funded research published in 2009 (Kingi and Jordan 2009). There is limited analysis of whether the thoughtful and innovative reforms recommended by the New Zealand Law Commission in their 1999 draft Evidence Code, largely in force from 1 August 2007 in the form of the Evidence Act 2006 (NZ), have been applied as intended.

The internationally accepted impact of cultural constructions of gendered sexuality² on trial process and outcomes has resulted in local conversations about alternatives to criminal prosecution (Law Commission 2015), but very little challenge to the adversarial process, and the nature of cross-examination in particular. Only one

¹ In New Zealand section 128 Crimes Act 1961 defines sexual violation and differentiates between sexual violation by rape, being the penetration of a person's genitalia by a penis, and sexual violation by unlawful sexual connection which includes penetration by body part or object of, or oral connection with, a person's genitalia or anus.

² Or in the alternative called *rape myths*. We understand both phrases to refer to the false beliefs about rape and rape victims that are pervasive in society. Martha Burt first described rape myths as "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists" (Burt 1980, p. 217). More recently they have been described as "descriptive or prescriptive beliefs about sexual aggression (i.e., about its scope, causes, context, and consequences) that serve to deny, downplay or justify sexually aggressive behavior that men commit against women" (Gerger *et al.* 2007, p. 423).

recommendation from the evidence law analysis in *From "Real Rape" to Real Justice* (McDonald and Tinsley 2011) has been implemented.³ Despite the flurry of research and policy work over the last ten years, following the criticism of the handling of a number of historical rape allegations (Nicholas 2007, Tolmie 2012), there has been very little real change to the way adult rape complainants experience going to court (Bazley 2007, Law Commission 2008, Ministry of Justice 2008, Kingi and Jordan 2009, Mossman *et al.* 2009a, 2009b, Triggs *et al.*, 2009, Taskforce for Action on Sexual Violence 2009, McDonald and Tinsley 2011, Parkes 2017).

The overall aim of our research project, with the working title *Rape myths as barriers to fair trial process*,⁴ is to find better ways of testing the evidence of rape complainants by producing new knowledge of rape trial process and the extent to which current law and practice impede fair process and just outcomes. We believe that research grounded in an analysis of what actually happens in court provides the strongest foundation for change proposals. By investigating language, discourse and interaction in the courtroom, our research aims to produce original insights into the subtle ways that rape myths operate at trial. The questioning of the complainant during cross-examination is a focus because it is the aspect of court proceedings that has been most widely criticised, and has been largely immune from the decades of law reform. We aim to describe and critique how rape myth and questioning structure function to undermine a complainant's credibility, attribute blame to her and construe the sexual activity as consensual. The work will also provide a contemporary overview of what is happening regarding the admission and use of complainant evidence in rape cases – especially the application of the current rules of evidence. Such work will be of assistance for judicial training and future reform initiatives, including the Law Commission's second review of the Evidence Act 2006 (NZ), due for completion in March 2019.

There are several parts to this research, all which required access to court records. Our funding allows analysis of 30 jury trials which involved an allegation by a woman of rape by a single male defendant held between 1 January 2010 and 30 September 2015. The cases involve adult complainants who had some kind of social contact – but were not in an intimate or kin relationship – with the defendant and the defence at trial centres on consent. Research shows that complainants experience the most difficult time at trial when the issues are consent or belief in consent, which typically occurs in "acquaintance rape" scenarios (McDonald 1997b).

In each case, we obtained audio records and transcripts of the complainant's evidence, the closing arguments and the jury directions pursuant to the access rules in place at the time: Rule 6.9 of the Criminal Procedure Rules 2012 (NZ). Other parts of the court file were also accessed on site to gather information from the case that might impact on the content and form of the complainant's evidence – for example, pre-trial rulings which may have impacted on the complainant's evidence (regarding mode of evidence), any relevant admissibility decisions, other information about the defence that is offered pre-trial or at trial, and any agreed statements of fact.

Access to the audio recordings of the complainant's evidence is the significant and unique aspect of this research. We sought the audio recordings of complainant evidence in order to be able to capture in-court interactions with the complainant, which are not transcribed as it is not *evidence*. We wanted to know how complainants are treated and responded to during their time in the courtroom and if that could be improved in any way. We also wanted to listen to the complainant's testimony in order to gather information about tone, emotionality and *trouble* during questioning.

³ Section 44A came into force on 8 January 2017 and requires that a written application be made to seek leave of the Judge to offer evidence or ask a question about the sexual experience of the complainant with a person other than the defendant; previously the permission of the Judge was required (See *Tautu v R* [2017] and McDonald and Tinsley 2013, p. 769, Law Commission 2015).

⁴ The research is supported by the Marsden Fund Council from Government funding, managed by Royal Society Te Apārangi, and by the University of Canterbury.

What can changes in the vocal tone or emotional register of the complainant tell us about which aspects of questioning are the most difficult for complainants? We wanted to be able to hear response and affect to understand more about how complainants themselves responded to the nature, style and progression of questioning, rather than make assumptions based on our reading of text. Lastly, the audio recording can also be used to augment the notes of evidence which do not include various evidential and procedural submissions made during trial that may be relevant to the use of evidence and complainant experience.

Another primary focus of our work is the characterisation of rape and rape victims by counsel and judiciary. Some of these characterisations occur during questioning of the complainant, but they also occur during statements to the jury, particularly when the parties are summarising their case immediately prior to jury deliberations. We therefore also sought access to the closing statements of the prosecution and defence, and to the jury directions which allow analysis of the way consent is defined.

Access to these court records, not normally available, has clearly demonstrated how the day-to-day workings of the courtroom impact on complainants' experiences of seeking justice. Below we offer two examples. In the first, analysis of the notes of the complainant's evidence revealed the extent to which evidence about the complainant's occupation was being admitted, contrary to section 88 of the Evidence Act 2006 (NZ) which requires that such evidence must pass a heightened relevance test. Section 88 is intended to protect the privacy of complainants in sex crimes trials and should help protect their psychological safety, but is being commonly disregarded. In the second, the audio recordings of the complainants' evidence allowed us to hear all the verbal interactions that happened at trial but were not recorded in the notes of evidence. We used this material to gather information about how complainants were communicated with and responded to by judges during their time in the courtroom. Our analysis shows significant variation in the tone and amount of judicial communication with the complainant and demonstrates why some complainants still – despite increasing education for judges and changing courtroom culture – feel like exhibits in the trial of their rape.

3.1. Disclosing the complainant's occupation: Application of the law

A comprehensive study of the law and practice in rape trials, which included interviews with adult complainants and case file analysis, led to significant reforms which came into effect 1 February 1986 (Young 1983). One of the aims of the package of reforms was to ameliorate some of the distressing impacts of giving evidence and to control the use and admission of irrelevant and character-blackening material. In addressing concerns about the privacy of the complainants, the 1986 reforms introduced the requirement that the court be closed while the complainant gives evidence and that “[n]o oral evidence shall be given, and no question shall be put to a witness, relating to the address or occupation of the complainant except by leave of the Judge” (section 23AA(2)(c) of the Evidence Act 1908 (NZ)). In order for evidence of address and occupation to be admitted, the judge must be “satisfied that the evidence to be given or the question to be put is of such direct relevance to facts in issue that to exclude it would be contrary to the interests of justice” (section 23AA(3)). Section 87 of the Evidence Act 2006 (NZ) (coming into effect 1 August 2007) extended the control of information about a person's address to all proceedings, and section 88 re-enacted the admissibility rule regarding evidence of the occupation of a complainant in a sexual case. Its current form is:

88 Restriction on disclosure of complainant's occupation in sexual cases

(1) In a sexual case, except with the permission of the Judge,—

(a) no question may be put to the complainant or any other witness, and no evidence may be given, concerning the complainant's occupation; and

(b) no statement or remark may be made in court by a witness, lawyer, officer of the court, or any other person involved in the proceeding concerning the complainant's occupation.

(2) The Judge must not grant permission under subsection (1) unless satisfied that the question to be put, the evidence to be given, or the statement or remark to be made, is of sufficient direct relevance to the facts in issue that to exclude it would be contrary to the interests of justice.

(3) An application for permission under subsection (1) may be made before or after the commencement of any hearing, and is, where practicable, to be made and dealt with in chambers.

Despite the rule controlling disclosure of complainant occupation having been in force for 24 years prior to the first cases in our study, our analysis of the court file transcripts demonstrates that the well-intentioned reform is having little effect in adult acquaintance rape cases. In 17 of the 30 cases the complainant was asked about her occupation, or whether she was in employment or studying. In only one of these cases did this question occur in cross-examination – in all other cases the complainant was asked about her occupation by the prosecutor as one of the first of the questions in the complainant's examination-in-chief.

Based on our reading of the complainant's evidence and our understanding of the defence arguments, evidence of occupation may have met the threshold for admissibility in five of the 17 cases. These were cases in which the complainant and the defendant either worked together or the complainant met the defendant through a work colleague. However, with the exception of one case in which the offending took place on a work site and involved other co-workers as witnesses, the actual details of the nature of the complainant's occupation need not have been disclosed in order for the full narrative of the alleged offending to be presented and understood.

In a number of cases the complainant was unemployed at the time of the trial, which may transpire to be a relevant factor in terms of her ability to call a taxi to get home or avoid the defendant, but in our view it is not a necessary question to ask so early in the complainant's evidence. Being required to give such an answer at a stage when the complainant is no doubt feeling anxious in an unfamiliar courtroom environment, and may well be embarrassed about her employment status, will not assist her comfort levels, and is contrary to the law.

In a recent High Court case, not in our sample, the judge was asked to consider whether evidence about the complainant using money from her welfare benefit to buy methamphetamine was admissible, with the prosecution specifically referring to section 88 (as well as to the rules concerning self-incrimination). In *R v Morgan* [2016] Palmer J held that being a beneficiary is not an "occupation" for the purposes of section 88. However, he stated, "there is a privacy interest in that status". In this case the source of the complainant's money (with which she allegedly purchased methamphetamine) was irrelevant. The fact that the complainant was a beneficiary was therefore inadmissible. We agree with this analysis.

There is one case in our research in which it is clear that the judge was asked to rule on the admissibility of evidence of the complainant's occupation. This was at the request of the defence, who sought to ask the complainant her occupation during cross-examination and the prosecutor objected. After an in-chambers discussion, in which the judge expressed some surprise at the scope of section 88, the judge ruled that the complainant may be asked about her occupation as it is has relevance to consent and the defendant's belief in consent (the issues in the trial). The defence argument, accepted by the judge, was that as the complainant was in a management position at the time, she would be able to clearly communicate to others, including to the defendant if she were not consenting to sexual activity. In our view, the evidence of her occupation did not meet the heightened relevance test in section 88 and should not have been admitted.

Our preliminary analysis of the current operation of the rules of evidence in acquaintance rape trials has exposed that a long-standing rule introduced for the purpose of complainant protection is being ignored in practice. Prosecutors asked the complainant about their occupation in more than half of the 30 cases in our sample, and in nearly all those cases the evidence should not have been admitted. Judges did not comment on the irrelevancy of that information or ask the jury to disregard it, even when the complainant appeared to be in some distress after having to disclose they were not working or were a 18 year old “stay at home mum” on a benefit. Not only is this personal information not relevant, in the New Zealand cultural context these are also stigmatised societal identifiers that might evoke shame in complainants and stereotyped bias in jurors. Prosecutors may be using these types of questions to ease the complainant into the questioning process, but they ignore the lived realities of complainants and the power relations of the courtroom, potentially exacerbating complainant’s experiences of “being the one on trial” (Kingi and Jordan 2009, Parkes 2017).

The notes of evidence (trial transcripts) showed up this aspect of problematic courtroom practice, but as we discovered, the audio recordings of the complainant evidence brought to light other aspects. We discuss below one such example: judicial communication with the complainant.

3.2. Judicial communication with the complainant

In order to analyse the information that the audio recordings provided, we produced verbatim transcripts of what was spoken in court, including notable paralinguistic features and sounds that indicated heightened emotionality. The spoken material that was added to the transcripts comprised all speech that was spoken to be heard by the judge, counsel or the complainant which related to the complainant’s evidence and which was not already on the transcript or which had been abbreviated for the transcript. This included judicial communication for the purposes of managing the courtroom or the trial process; judicial communication with the complainant or counsel in relation to the complainant; counsel communication with the complainant; interjection during questioning; evidential argument and rulings while the court is in chambers; and, speech that gave us information about mode of evidence or relevant trial procedure aspects of complainant testimony.

This annotation of the official trial notes of evidence with the complete verbal and paralinguistic in-court and in-chambers interactions from the audio recording has produced anonymised editable transcripts of the complainant’s evidence. This was a very time consuming, but essential, task that illuminates much about day-to-day trial practice and complainant experience of giving evidence in acquaintance rape trials. At this point in the research we are able to make some initial observations about judicial interaction with the complainant, which is only possible due to the availability of the audio records, and the annotation of the transcripts which exposes when, why and how the judge talks directly to the complainant.

The annotated transcripts revealed significant variation in the amount and manner of communication from the judge to the complainant. That variation fell along a spectrum from very little communication—less than 0.3% of talk—to quite active engagement in complainant testimony, at 10% of words spoken. Within that spectrum we observed three broad groups. In some trials, approximately a quarter, judges communicated with the complainant in the third person: ‘I allow the witness to stand down’ or only to give brief instruction on required process. That might include requests to speak up for the audio recording, overnight warnings, or standing down the witness. As the following example demonstrates, in these cases, even when judicial communication with the complainant occurred, it was nonetheless minimal in content and distancing in effect: “[Prosecutor]: I ask that the witness be allowed to go free. Judge: Alright. Thank you. You are now free to go”. In this group of trials, much of what the complainant needed to know was communicated through other

people, and this often happened in hushed and hurried tones, as if talking to the complainant was improper or forbidden.

In the largest group, comprised of a little under half of the trials, judges spoke more fulsomely to the complainant as part of managing trial conduct, including instructions about what to do and when, such as reading from interview transcripts or arrangements during adjournments. These judges made some effort to explain what was happening, or might have spoken to the complainant by asking clarifying questions during testimony, but their communication with the complainant was nonetheless mostly limited to instruction and information giving.

In the remaining quarter of trials, judges did more to communicate with complainants in ways that in our view would have supported their well-being while in court, and may well have assisted them to give their best evidence. In this group of trials, judges communicated with complainants so as to increase their comfort, humanise the courtroom experience, provide information about what would happen in advance, and give reassurance to distressed or emotionally impacted complainants.

Research with people who have been complainants in sex crimes trials has consistently documented their experience of giving evidence in court as one of isolation and spectacle; disempowerment and irrelevancy (Gender Bias and the Law Project 1996, McDonald 1997, Bacik *et al.* 1998, Konradi 2007, ACT Government 2009, Kingi and Jordan 2009, Payne 2009). Fuller, respectful communication from the judge does not of course fundamentally alter the experience of cross-examination, but it might convey that the safeguards and limits set by practice and legislation will be enforced and go some way toward assuring the complainant that her evidence was of value to the court.

We were struck by the ability of court records to illuminate why some complainants describe feeling like objects on display while giving evidence in rape trials. Despite some cultural change and improvement in process to assist complainants to feel more comfortable and valuable at trial, the more traditional practices are still in use and more could be done in most trials. But much more will become apparent from this research – a unique and timely feminist contribution – and one that we hope will result in real change to the experience of complainants in rape trials.

4. Conclusion

Feminist judgment writing, as a feminist endeavour, demonstrates the significance of hearing women's stories. Feminist judges reimagining decisions may also undertake a factual analysis that results in an outcome consistent with legislative intent (see e.g. Benton-Greig 2017) or, as importantly, acknowledges that a woman's reality needs to be portrayed in a way that is consistent with her experience and the evidence that is offered in court.

During the Feminist Judgments Project Aotearoa, access to the court file in *Wang* [1990] exposed absence or missing relevant facts in the appellate decision. These facts supported the evidence of Mrs Wang that she honestly, and reasonably, believed she had no alternative but to kill her husband at that time. While the Court of Appeal agreed with the trial judge, who withheld self-defence from the jury, that she had alternatives, failing to understand the significance of the context and history of threats and abuse meant that Mrs Wang was not heard. Her story was never fully reflected in the decision or in the verdict.

Similar absences of women's stories within the criminal justice system occur regularly in the context of rape trials, where, in the absence of an appeal, the decisions and the verdict are invisible, despite the significant impact on the complainant. In our rape trial research, access to court records, including to the complainant's evidence and the response of the judge to her as a person, are made visible. We are also able to document the extent to which advocate-led evidence law reforms, enacted to offer increased protection for complainants, are actually working in practice. With regard

to the bar on the disclosure of information about the complainant's occupation, a rule now of 32 years standing, it is clear that counsel and the judiciary need to apply it in all cases. In this research, therefore, and in the feminist judgments global work, we continue to see the significance of accessing and critiquing the decision-making process.

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