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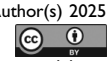
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Hearing all That is Expressed: A Feminist Listening to the Silencing of Rape Complainants While Giving Evidence

Paulette Benton-Greig
University of Canterbury, Christchurch, New Zealand.

Abstract

In this article, I bring a feminist ear to 30 Aotearoa/New Zealand rape trials to explore what they reveal about courtroom listening to adult female complainants. Listening for all complainant expression exposes myriad instantiations of complainants being silenced and misheard, and their words refused, dismissed and reframed. From these, I identify three practices of silencing that demonstrate not only a failure to hear and listen, but also the double abandonment of 'ethical loneliness' in which institutions that are meant to hear and care, force speech under the guise of listening, but then fail to respond and to protect. This feminist listening draws attention to the ethical and social dimensions of why many rape complainants experience giving evidence at trial as re-victimising. I argue that it suggests the potential benefits of in-court observation programmes and that the practices of rape trial questioning need close examination and reform.

Keywords

rape victims, rape complainants, feminist listening, practices of silencing, criminal trials, viva voce evidence

Corresponding author:
Paulette Benton-Greig, Law School, Auckland University of Technology, 55 Wellesley Street, Auckland, New Zealand.
Email: paulette.benton-greig@aut.ac.nz

Introduction

In 1996, the Australian *Heroines of Fortitude* study reported on listening to 150 sexual assault hearings, including 111 trials (Department for Women, 1996). The report painted a 'bleak picture' of the treatment of women complainants despite legislative reforms 15 years earlier that had been intended to protect their rights (Department for Women, 1996: iii, v). Being questioned at trial caused complainants to have breathing difficulties, cry, scream, dry-retch, be unable to speak and the abandonment of trials due to complainant distress (Department for Women, 1996: 101). Their distress was correlated to insensitive attitudes from court personnel, giving details about sexual organs and acts, demeaning comments to and about them, a lack of voice amplification, and inconsistent use of alternative ways of giving evidence (Department for Women, 1996: 127–137). Since that research, Australia and most other common law jurisdictions have made extensive reforms to trial procedure to ameliorate procedural harms to complainants and restrict the influence of some rape myths in questioning and trial outcomes. Nonetheless, many rape victims continue to decry the dehumanising and distressing experience of giving evidence, especially cross-examination (e.g. Boyer et al., 2018; Konradi, 2007; Parkes, 2017).

The research discussed in this article is the first since the *Heroines of Fortitude* report to involve listening to audio recordings of rape complainants giving their evidence to interrogate how the process of questioning impacts them. The recordings allow us to hear the usually unheard in rape trials: the in-the-moment affect and attitude of complainants as they give their evidence, how complainants are spoken to and treated, and off-the-record courtroom discourse. Unfortunately, they demonstrate that despite decades of feminist-inspired law reform intended to make it easier for rape complainants to give voice to their evidence, it remains difficult for women victims to be heard in the courtroom. This article engages with complainant expression – the words spoken during questioning and the silences, tone, speed and patterns of speech that elaborate them – while giving evidence to report on what was learnt about how complainants are silenced, unheard and not listened to in the courtroom.

Listening is present as both method and as the subject of analysis in this article. I engage in reflection on the process of close listening to adult female complainants giving their evidence in 30 Aotearoa/New Zealand rape trials. In doing so I aim to be a 'feminist ear' (Ahmed, 2021: 3–8), illuminating how complainants both go unheard and are actively silenced in the courtroom: 'To hear with a feminist ear is to hear who is not heard, how we are not heard' (Ahmed, 2021: 4). I pay attention to the material and discursive micro-practices taking place in the courtroom and to my affective responses to both those micro-practices and their impact on complainants. I listen for the operations of power and draw upon my critical feminist listening to analyse the 'practices of silencing' (Dotson, 2011) that constitute a systemic non-listening to testimony of rape in the adversarial criminal trial.

This article is structured in three parts. The first part of the article briefly canvasses the experiences of female rape victims as complainants in criminal trials, focussing on what is known about why so many experience the process of giving evidence as akin to a second rape. It highlights the role of rape myths and gendered stereotypes and the

operation of societal and courtroom silencing of narratives of rape. It then describes the research study and role of listening, both as method in the research and as the pedagogic framework for this article. In the second part of the article, I identify and demonstrate the operation of three practices of silencing taking place in the courtroom. Firstly, the material environment functioning to deprioritise complainants' speech and make it impossible for them to be heard. Secondly, the coercive silencing of complainants through questioning practice. Thirdly, the use of speech practices by defence counsel to delegitimise the social realities of young women and impugn their credibility and evidence.

In the third part of the article, I reflect on those dynamics and my experience of listening to situate the experience of rape complainants within Jill Stauffer's (2015) theoretical framework of 'ethical loneliness'. Ethical loneliness, Stauffer argues, is a phenomenological harm caused by the social violation of being abandoned by the institutions that are meant to hear and care after harm. It is the 'double abandonment' of having been violated and then to 'emerge from that injustice only to find that the surrounding world will not listen or cannot properly hear [victims'] testimony…on their own terms' (Stauffer, 2015: 1). I argue that the silencing practices illuminated by my feminist listening demonstrate this abandonment and the experience of 'existential solitude' (Stauffer, 2015: 26) that is forced upon human beings when they are refused the social relation of being seen and heard after harm. I contend that this perspective on the second rape of complainants' in the courtroom draws our attention to the ethical and social dimensions of their experience and demonstrates the need for further regulation or reform of trial procedure, particularly cross-examination, in sexual offence trials.

The Experience of Being a Rape Complainant at Trial

For decades, rape trials have been a central focus of feminist legal critique and reform efforts (Bohmer and Blumberg 1974; Jordan, 2022; Larcombe, 2002). Despite this focus and subsequent legal reforms, research often reports little improvement in the experiences of rape victims in the criminal justice system (Craig, 2016; Daly and Bouhours, 2010; Larcombe, 2011). Such research cites the continued existence of rape myths, the incompatibility of trauma and trial procedure, the sceptical attitudes of criminal justice system personnel, and a broader social silencing of women who experience rape as barriers to rape victims accessing justice through court processes (Craig, 2016; Jordan, 2004; Temkin and Krahé, 2008). The notion that victims of rape may be re-traumatised or experience secondary victimisation as a consequence of the trial process is well established in research and culture (Craig, 2016; Hogan, 2022; Wheatcroft et al., 2009) and many victims of rape avoid or do not complete the criminal trial process as a consequence (Daly and Bouhours, 2010; Kelly et al., 2005; Triggs 2009). Those who do engage with the court process have little positive to say about the experience of trial and it is from their voices that the idea of re-victimisation as the 'second rape' at trial is derived (Bohmer and Blumberg, 1974; Madigan and Gamble, 1991; Wheatcroft et al., 2009). These effects are often exacerbated for women who experience further social marginalisation from colonisation, racism, ableism or classism, or otherwise exist outside the 'rigid characterisations of the ideal rape victim' (Bakht, 2012: 1; Cossins, 2003; Hamon et al., 2018; Nagel et al., 2005; Phipps, 2009).

There are many explanations for the process by which this re-victimisation occurs. The literature describes a court process reliant on long-held, gendered and misogynistic assumptions of women as vindictive liars (Edwards et al., 2011; Gotell, 2008). Trials require the victim to recount minute details of the incident, be subject to a search for minor inconsistencies to diminish the believability of their narrative (Craig, 2018; McDonald, 2020, 2023) and undergo accusatory cross-examination intended to undermine their credibility and composure (Kebbell et al., 2007; Randall, 2010; Zydervelt et al., 2017). The deployment of 'rape myths' is a well-documented and highly gendered means by which to dismiss the credibility and experience of women rape victims (Craig, 2018; McDonald, 2020, 2023; Smith and Skinner, 2017). Aotearoa/New Zealand research confirms that cross-examination of rape complainants continues to leverage gender norms and rape mythology (McDonald, 2020; 2023), remaining largely consistent with trial strategy used in the 1950s (Westera et al., 2017; Zydervelt et al., 2017). Recent trial observation studies in the United Kingdom demonstrate how rape mythology is imbricated with cross-examination tactics – such as tightly controlling the evidence heard or constructing dichotomies through question structure – to undermine complainant credibility by measuring her evidence against a 'rational ideal' (Smith and Skinner, 2017: 457). Olivia Smith and Tina Skinner (2017) argue that this strategy is not only effective at undermining the credibility and reliability of individual complainants, but it also undermines policy initiatives intended to equalise the historic gender imbalance haunting rape trials.

The ability of women to produce the story of their own rape is limited even before entry into the courtroom as a complainant. The available narratives are restricted by hegemonic and patriarchal scripts that both 'individualise and depoliticise' experiences of rape (McKenzie-Mohr and LaFrance, 2011: 49). To enter a courtroom (and transform from victim to complainant), with its hierarchical rituals and institutionalised formality, is to experience not only such societal silencing, but to also be silenced and diminished by a justice system that asserts its authority even as it draws on rape myths and gender stereotypes (Jordan, 2022; Temkin and Krahé, 2008). The formality and Western professionalism of the court setting alienates victims of rape – especially those whose youth, gender, race and social understandings can be othered by the ritualistic setting. There is thus a complex silencing of the experiences and words of victims, built into a system that forces a rigid relationality between the professional court setting and 'common-sense' understandings that reinforce hegemonic culture rather than a perspective void of bias or stereotypes (McDonald, 2020). These underlying assumptions are nefarious not only because of the gendered expectations – and thus discursive and material silencing – of victims of rape, but also because they manage to stay invisible, hidden behind norms of social legitimacy and falsely neutral 'common-sense' that relies on rape myths. As the court system has the power to define and interpret the language, terms and tone of interactions (even, and especially, those which happened outside of the 'neutral' space of the court), the process of silencing begins before a victim is even told to speak.

In the courtroom, feminist-inspired reforms of trial procedure have made it easier for rape complainants to give 'voice' to their experience. For instance, protective measures such as alternative ways of giving evidence or preventing the accused from personally

cross-examining the complainant encourage complainants to speak more freely. Yet much less critique and reform has centred on how those voices are 'elicited, received and listened to' (Ailwood et al., 2023: 217). In that context, the research upon which this article is based focusses on the 'reform-resistant' (McDonald, 2020: 3) questioning process, particularly cross-examination, that elicits evidence from complainants and is so central to complainant experience and trial outcomes. In what ways, or to what degree, is the evidence elicited in questioning given the open, receptive, attentive and responsive listening that Sarah Ailwood et al. (2023) argue is necessary to improve legal processes involving violence against women? Feminist listening demonstrates that not only is it difficult for a victim to give voice and have her words received in the courtroom (literally and metaphorically) but that it is the goal, at least, of cross-examination; to actively prevent rape complainants from being heard and listened to. Practices of silencing imbue the process of eliciting evidence, operationalising non-listening and enacting a systemic, intentional refusal to listen.

The Research Study and the Listening Process

The research on which this article is based examines 30 Aotearoa/New Zealand jury trials that took place between 2010 and 2015 and involved a factual scenario that equated to either acquaintance or stranger rape (see McDonald, 2020). A distinctive feature of these 30 trials is the high proportion of young women complainants: the median age was 22 years old (McDonald, 2020: 30). These 30 trials are a subset of a larger study that considers the deployment and effect of rape myth on trial process, and, acknowledging that rape complainant experience has changed little despite decades of reform to trial procedure, has a focus on the specificity of how questioning process, especially cross-examination, impacts complainants (McDonald, 2020). Due to the focus on rape myth, all 71 cases in the full study were selected to involve an adult (over 16 years) female complainant and an adult male defendant and at least one charge of rape (Crimes Act (NZ) 1961, s.128(2)). The issue at trial in every case was consent.

For all trials in the study, the researchers had access to case files, the audio recordings and notes of evidence (akin to transcripts) of complainant testimony, related interlocutory rulings, transcripts of counsel closing submissions (where given) and either the judge's summing-up or reasons for verdict (where given). The study resulted in three analyses: the first compared the 30 adult rape jury trials subset discussed in this article, to 10 jury trials heard in a specialist sexual violence court (McDonald, 2020), the second compared the 30 adult rape jury trials to eight judge-alone trials (McDonald, 2022), and the third compared them to 15 intimate partner rape jury trials (McDonald, 2023). Ethics approval was granted by the University of Canterbury Human Ethics Committee.

The court is closed to the public during complainant evidence in sex crimes trials in Aotearoa/New Zealand and complainant name suppression is automatic. Both measures are intended to protect the privacy and safety of complainants and are generally viewed as important safeguards. The study is the first instance in Aotearoa/New Zealand in which access to the audio recordings of sex crimes trials was possible subsequent to the nationwide implementation of recording software and offsite transcription services. Granting access to the recordings to researchers thus enabled a metaphorical 'opening of the

courtroom door' to rape trials. They allowed us to listen to and hear what took place in the courtroom while the complainant was giving her evidence. The author of this article undertook the listening and annotation of the 30 adult rape jury trials analysed in McDonald (2020) and it is that experience that she draws upon in this article.

Listening involved annotating the notes of evidence to include all audible, non-audible and paralinguistic expression from the complainant, including notable pauses and silences, changes in tone or volume or sounds like crying or laughing. Annotations were descriptive rather than interpretative, so that, for instance, the annotation term 'sobbing' was used in preference to the terms 'upset' or 'distressed'. This approach avoids making assumptions about the correlation between the complainant's expression and their emotional experience. This was an aspect of adopting an intersectional approach to the study. We knew relatively little demographically about the complainants, in many cases only their gender and age. This means that we are unable to analyse for, and make comment about, the impact of the complainants' cultural and identity characteristics on how they were treated in court or their experience of giving evidence. In this context, we aimed to avoid universalising assumptions about emotion and experience, while still being able to analyse for patterns within and across the annotated transcripts. In addition to complainant expression, we annotated the unrecorded verbal communications from the judge, prosecution and defence counsel to the complainant and, where relevant, between them, as well as notable paralinguistic features – such as tone and speed – of counsel speech during questioning. This information enabled us to track the impact of questioning content and style on complainant experience by observing patterned episodes of heightened emotionality across the transcripts. We were also able to examine patterns and variation in how complainants are spoken to and treated in the courtroom, as well as the style and tone in which questioning is conducted.

The research study was conducted with a feminist research ethic (Ackerly and True, 2010), in that it was undertaken with a concern for the welfare of the women complainants, a desire to interrogate the systemic deployment of rape mythology to discredit complainants, and for the purpose of recommending reforms that could improve those dynamics (Reinharz, 1992). The feminist ear of this analysis is attuned to the institutional tactics that act as barriers to complainants being heard; in which listening is feminist pedagogy as well as research method (Ahmed, 2021: 6, 8). In doing so, I situate rape trials within the phenomena of 'Complaint!' as defined by Sara Ahmed (2021), in which complaints are always already suspicious, 'trouble' and imbued with oppressive power dynamics. As a research method, the listening process sharpens this perspective because listening for the silences, tone, speed and patterns of speech that elaborate words, requires active listening (Brown et al., 2023; DeVault and Gross, 2012) that produces an intimacy with the affects, experiences and meanings being expressed. In this research, listening was also intensive: on average, complainants gave evidence for four hours and I spent about 2.5 times that annotating the transcripts, resulting in approximately 300 hours of listening.

Analysis

Honouring the unique opportunity to listen to complainants testify, the analysis that follows focuses on the usually unheard dimensions of giving evidence as a complainant

in a rape trial. In it, I identify three different kinds of silencing practices operating in the courtroom. Firstly, the material environment of the courtroom functioning to deprioritise complainants' speech and making it impossible for them to be heard. Secondly, moments when complainants are coercively silenced through questioning practice. Thirdly, the use of speech practices by cross-examining counsel to emphasise the legitimacy of the professionalised courtroom and contrast it with the social realities of young women to impugn their credibility, and thus, their evidence. Though presented separately, these – and other – silencing practices operated in concert and with repetition, generating myriad instantiations of non-listening as the institutional and systemic norm of the courtroom, despite the compulsion on complainants to speak.[1]

'Speak Up!': The Material Impossibility of Being Heard

The most literal example of complainants being exhorted to speak but going unheard is created by the courtroom environment. Many complainants were not able to be heard when they spoke and over a third of them were directed to 'speak up!' by the judge. In some trials, this occurs more than once and in one trial it happens 10 times. While listening to these exhortations, the effect on these – mostly young – women of 'speak up!' felt to me like a form of chastisement. In some instances, the speak up instruction is spoken in a patronising or impatient tone and/or delivered during periods of cross-examination in which complainants are already demonstrating high levels of emotionality, such as sobbing or heavy breathing. In other cases, complainants have a distinctly flat affect, speaking in a low volume monotone with little other expression, suggesting that they are engaged in a high degree of emotion containment (Konradi, 1999; Littleton and Breitkopf, 2006). In both contexts, being required to speak more loudly seems to intensify the emotional difficulty of dealing with challenging questioning. Paradoxical to the instruction, for most complainants the instruction to 'speak up' seems to have a quietening effect on their demeanour and disrupts their ability to answer questions based on recollection.

Courtrooms are large inside spaces and relatively few people are accustomed to projecting their voice to a spread-out audience, especially indoors, and most especially when reporting the details of an alleged sexual violation. In this context, it is difficult to understand why Aotearoa/New Zealand courtrooms have microphones in the witness stand that do not amplify the speaker's voice. Instead, they are a device for audio recording witness evidence for transcription. The irony is striking to me as the listener; that of implementing technology to capture the words of complainants without apparent consideration for who might be speaking and under what conditions. This lack of concern for the people who provide evidence manifests in other ways, too: in one trial the repeated use of a photocopying machine close to the witness stand makes it difficult for me to discern the complainant's voice. In other trials, the poor quality of technical equipment – DVD players, CCTV cameras, video screens – results in disruptions to complainants' evidence or the need to repeat tracts of difficult questioning.

These 'technical difficulties' could be cast as unfortunate rather than diminishing of complainants, and some judges were apologetic to complainants, but their effects are profound. They operate, I suggest, as a form of 'testimonial smothering' (Dotson, 2011), an

oppressive practice of silencing in which givers of testimony truncate or limit their testimony to what can be heard by an audience. Kristie Dotson argues that this kind of coercive self-silencing occurs in response to a failure of communicative reciprocity, founded on 'pernicious ignorance' (2011: 238–239) from an audience. In the context of these rape trials, pernicious ignorance manifests as the material operations of the courtroom that prioritise its imperatives and deprioritise complainants as subjects, a relation of inequality made plain to complainants in the chastising instruction to 'speak up!' or the requirement to speak again. Coerced self-silencing is apparent in the flattened delivery, truncated answers and heightened emotionality that frequently ensues.

'You Need to Give an Oral Answer': Questioning as Forced Speech and Non-Listening

The questioning of witnesses is intended to elicit, or draw out, their evidence. Yet that term hides the compulsion, and associated sanctions, that lie behind it. As in like jurisdictions, witnesses in Aotearoa/New Zealand are legally required to appear in court and answer questions put to them. To refuse to answer questions is to risk being imprisoned or held in contempt of court. What might be an act of personal agency in any other context is punishable in court. Viva voce evidence, then, is forced speech. Yet the question-and-answer structure of evidence elicitation imposes content-defining restraints on that speech, with the additional intention of cross-examination being to challenge, confuse and subjugate witnesses. Its purpose is to constrain the witness's answer to such a degree that they are forced to contradict themselves. Unsurprisingly, then, the highly oppressive process of questioning results in countless instances of complainants not being able to speak in response to being questioned. Below I present examples of three patterned manifestations of complainants being coercively silenced through questioning practice.

One example operates through the use – or rather, the absence – of words to describe women's genitalia and sex acts. A repeated pattern of heightened emotionality and loss of voice occurred during evidence-in-chief when complainants were required to give a detailed description of the incident itself and struggled to use the vocabulary required to do so. The example below is taken from the case of *R v Depak* in which the complainant, Rachel Cowan, is being questioned (McDonald, 2020: 91):

> JUDGE: Right. So, what was he doing with his fingers?
>
> A: Um –
>
> Q: Finger or fingers?
>
> A: Fingers, he was touching my – trying, yeah, touching my vagina and attempt – attempting to poke me as well, get me in the mood so I would sleep with him. *(wet sniffs, long silence)*
>
> CROWN: So, whereabouts on your genitals was he touching you?

A: The front ha – I d – I don't wanna say something in case I get the name wrong.

JUDGE: Well you use the words that you would use to describe the parts, don't worry about the technical terms

A: *(wet sniff, crying, tissues sound)* Sorry.

Q: All right, would you like a break? All right.

In McDonald (2020), we make the point that distress to complainants in like situations can be avoided by improved preparation for giving evidence or the use of pictorial representations in the courtroom. The further point can be made that the procedural rule against leading questions prevents prosecutors, and, as in this example, judges, from offering example language to assist complainants once they are in the courtroom. An effect of this restriction is that only complainants speak with specificity about genitalia and sex acts during their questioning. This associates them with the cultural shame that attaches to women's sexuality and sexualised body parts (Braun and Wilkinson, 2001; Ensler, 1998; Greer, 1971). A similar association operates in relation to evidence about menstruation and tampons (McDonald, 2020). The connection between feminine sexuality and cultural shame is exacerbated in the formal environment of the courtroom and additionally operates to infantilise these mostly young women complainants. This effect is amplified when judges, as in the example above, offer breaks, or suggest that complainants 'calm down' or 'take a moment' to compose themselves. Although potentially well-meant, this instruction conveys a paternalism that contributes to a sequence of events that compounds associations with shame and childishness, creating an impression of complainants as silly and humiliated or potentially out-of-control (Hlavka and Mulla, 2021). Ultimately, despite the invocations of counsel and judges to speak the detail of the assault, complainants are burdened with the struggle of saying the unspeakable in the courtroom.

There are many other instances in which complainants do not answer questions put to them. Often this occurs because they are crying or sobbing, and therefore unable to speak. There are also many examples of silence after questions, especially during cross-examination. Silence is intimately connected with sexual violence (Jordan, 2022). Across the many domains of experience that may ensue from sexual violence – during and after the attack, disclosing to others, reporting to police, help-seeking, the criminal justice response, recovery – speech is required, but the narrative strictures are tight (Jordan, 2004, 2022; McKenzie-Mohr and LaFrance, 2011; Rowe and Macauley, 2019). Silencing practices police those strictures. For instance, in the courtroom, the question-and-answer process actively prevents complainants from narrating their stories and inhabiting their autonomy by silencing their volitional words, expression and meaning (Brown et al., 2023). Only words will suffice as evidence, precisely because they can most easily have their meaning refused, dismissed and reframed. Silence, though, can also be an act of dissent or refusal, especially where master narratives fail storytellers (McKenzie-Mohr and LaFrance, 2011).

Instances of silences in the audio recordings of complainant evidence are often connected to other expressions of emotion, such as crying or an angry tone of voice before or after the silence. These silences as a phenomenon are thus shaped by the experience of being subject to the exercise of oppressive social power, which is inherent to cross-examination (DeVault, 1990). Similarly, there are numerous occurrences of complainants replying that they could not remember in response to questions during cross-examination. Given the unreasonable demands made on complainant's memories (McDonald, 2020: 329–339; Quilter et al., 2023) these responses can be taken as statements of fact. However, like silences, they are also frequently associated with periods of heightened emotionality brought on by challenging passages of questioning. For instance, consistent with the findings in Smith and Skinner's (2017) research on rape trials, and cross-examination strategy more generally, many questions put to complainants in cross-examination offered all or nothing dichotomies or equally untenable options. Responding to questions often meant complainants were forced to adopt the rape myths underlying those questions or concur with victim-blaming accusations. In this context, a lack of recall can also be read as an unwillingness to comply with the terms of the questions, perhaps resorting to silence in the face of an untenable, yet compelled, 'choice'.

The extracts below demonstrate a variety of moments in which the 18-year-old complainant, Yasmin Paulin, struggles to, or does not, speak, either in articulation of her experience or in response to the requirement that she do so. The extracts are taken from the cross-examination in the trial of *R v Jackson.* Yasmin has been put to bed by a friend during a house party because she is heavily intoxicated. The defendant, who Yasmin does not know, is already in the bed. Yasmin's evidence is that she fell into an alcohol-induced stupor from which she became conscious as the defendant penetrated her vaginally and then anally. The defendant's case is that Yasmin initiated the sexual activity, and on that basis, he had reasonable grounds to believe it was consensual.

In the first extract, defence counsel poses a series of questions that cast Yasmin as sexually promiscuous generally *and* sexually active in the specific moment. Both contentions contradict Yasmin's evidence. Initially, she responds by ridiculing the suggestions, but as each contention becomes increasingly divorced from the evidence she has given, she struggles to articulate answers, and sobbing and silence fill the space (McDonald, 2020: 354):

> Q And during your having sexual intercourse with Mr Jackson you talked to him about a threesome didn't you?
>
> A No. *(incredulous laugh)*
>
> Q Also talked to him about anal sex didn't you Ms Paulin?
>
> A (no audible reply) *(sobbing)*
>
> Q You talked to him about anal sex and you told him to spit on your arse and put his penis in, correct?
>
> A *(pause, crying)* No.

Q And as my learned friend read out to you,[2] you told him you were going to come and you asked him if he liked it, correct?

A *(crying, sobbing).*

JUDGE: Witness is shaking her head. You need to give an oral answer when you're ready.

A (long pause – crying, nose blowing)

The questioning in this extract seems intended to trigger emotion-driven responses. Yasmin is cast as a 'dirty slut' and challenged to defend her sexual reputation. She rejects most of the contentions, and her laughing, sobbing and silences in response suggest to me hopelessness and grief, as well as fury and refusal. The Court already knows what Yasmin's evidence is on this point and it is evident that the emotions triggered by defence questioning have overwhelmed her ability to speak. Yet, she is compelled to give a verbal answer: but is anyone listening?

In this second extract, Yasmin is challenged about an apparent inconsistency between her evidence-in-chief, in which she said that she had been lying on her side during the incident, and the characterisation of this detail in her statement to the police. Yasmin tries to assert her reality; that the difference is neither real nor relevant, but her efforts are ignored, and she is left with little to say (McDonald, 2020: 331):

Q: Do you recall that you told the police officer when you were talking to her, "The male then rolled her over –" this is what she's recorded you telling her, "– the male then rolled her over and began to have anal sex with her." You said that to the police officer a few hours after this incident, too, didn't you?

A: (*sniffing, sighing, nose blowing*) I can't remember.

Q: You might not be able to remember but it's a different description to the one you gave earlier today isn't it? Isn't it, Ms Paulin?

A: (no audible answer) (*sniffing, sighing, nose blowing*)

Q: Please answer the question?

A: It's not different there's just extra things in there.

Q: You were examined by the doctor later that day as you've told us, or accept it happened around midday, do you recall telling the doctor that you touched Mr Jackson's genital area with your hand?

A: I can't remember. (*crying, sniffing, coughing*)

Across the trials, much is made of minor differences in explanations given over significant time gaps and accusatory questions made on this basis are often associated with episodes of heightened emotionality in complainants. Similarly, 'can you recall' questions are heavily used by some defence counsel, particularly in cases where the complainant has already given evidence of an absence of memory for part or all of the incident due to being asleep or intoxicated. A frequent outcome of such questioning, as in this example, is complainant emotionality and non-response or non-recall, creating an impression of complainants as unreliable narrators of their own story. This effect is exacerbated in cases in which the complainants are young and either broadly compliant or uncooperative in demeanour. This impression can then be leveraged by defence counsel to follow such questioning with a contention that is not effectively refuted – as can be observed in the question to Yasmin about touching the defendant's genital area. Such interchanges created the opportunity for the defence to suggest the defendant could have reasonable grounds for a belief in consent in their closing statement to the jury.

'I Always Send Smiley Faces and 'X's': The Unhearableness of Young Women's Realities

A third silencing practice operates through defence counsel use of speech practices to depict young women's social realities as incompatible with the legitimate formality of the courtroom and thereby impugn their credibility. This dynamic deeply affects me as I listen to the trials and is a somewhat unexpected finding of the research. Though it has been identified that young women are disproportionately vulnerable to rape (Daly and Bouhours, 2010; Kelly et al., 2005) and more likely to have contact with the criminal justice system (Walker et al., 2021), relatively little attention has been paid to how they specifically fare as complainants in rape trials. However, some researchers suggest that they are unlikely to be perceived as law's 'ideal victim' because they are associated with 'risky' behaviours such as excessive use of alcohol and casual sexual encounters (Gotell et al., 2007; Kelly et al., 2005; McMillan and White, 2015).

Many of the complainants described experiencing youth-related social vulnerabilities such as a lack of access to money, the means to escape where they experienced offending, or places of safety to go to. Many lived in shared or temporary accommodation, were in precarious employment or did not have an independent income. Mostly, they did not describe protective familial relationships and a significant proportion of cases involved defendants who were in positions of authority over them. Many of the complainants disclosed experiencing mood disorders and mental health difficulties; some also had intellectual or physical impairments. In 21 of the 30 cases, the complainant had consumed alcohol prior to the alleged offending.

Wendy Larcombe (2002) has argued that, while these types of factors mark complainants as not ideal victims or as 'risky women' (Gotell, 2008), they are not straightforwardly predictive of outcomes. Therefore, cross-examination in every rape trial is the attempt to disqualify the complainant as a credible witness and authentic victim through the deployment of discursive devices. Drawing on the close analysis of transcripts by Young, Puren and Matoesian, Larcombe (2002) demonstrates how the

content and form of cross-examination questioning is used to establish dominance over complainants and make them appear indecisive, ineffectual, and unreliable. Listening to these trials elucidates the role of speech practices in this task. Defence counsel make use of their voice tone, speed and emphasis to shame, ridicule and infantilise complainants. As the examples below demonstrate, this ridiculing is most effective when it leverages youth-related social context to construct complainants as other to, beneath, and unworthy of the Court's status as 'sole designator of truth' (Smith, 2018: 1) and power to confer legitimacy.

In the case of *R v Masters,* defence counsel uses imperious language and an arrogant tone of voice while questioning the complainant, Nadine Gregory. For instance, he uses a chastising, parental tone to try to bully her into agreement with a defence contention: 'Well I'm just going to suggest to you, young lady, that…' (McDonald, 2020: 371). When asked a question about her 'brassiere', Nadine asks: 'Do you mean a bra?'. In response, defence counsel uses a haughty tone to reply: 'I will call it a brassiere if you do not mind' (McDonald, 2020: 371). In this case, defence counsel also creates the alliterative nickname 'Darryl the dick' for the defendant based on Nadine's response to how she perceived the defendant: 'I thought he was a bit of a dick' (McDonald, 2020: 378). Counsel uses that nickname in an exaggerated tone of voice to repeatedly refer to the defendant across an extended period of questioning, mocking Nadine. This nicknaming is a particularly effective strategy for undermining Nadine because she is a quietly spoken complainant with a somewhat compliant demeanour. So, by contrasting that with her use of the word 'dick' – and perhaps her earlier use of the colloquial 'bra' – the suggestion arises that outside of the courtroom environment she might be more uncouth, possibly even sexually precocious.

In *R v Walters,* the defence theory of the case is that Chantal Tiaiti, the 17-year-old complainant, fabricated her complaint to placate her parent. Cross-examination involves accusing Chantal of being 'naughty' for disobeying her mother and leaving the house at night, and suggesting to her that had she not left, she would not have caused 'trouble' and needed to accuse the defendant of rape. In this infantilising line of questioning, defence counsel also speaks over Chantal, raises his voice at her and uses the pace of his questions to pressure her to answer compliantly. For example (McDonald, 2020: 372):

> Q: "And then you say [referring to a text message], "Ditto, smiley face" (*complainant sobbing*). Right? All good, didn't you? (*no pause – counsel fast, pressuring*) We need an answer for the machine, for the dictating machine."

In the same passage of questioning, defence counsel trice references Chantal's use of the word 'cunt' in a text message, alternates between a nasty tone of voice for her and a light casual tone for the defendant:

> Q: …And your answer is, "Cain's a cunt". That's what you say, don't you?
>
> A: I guess. (*breathing heavily*)

> Q: Not he's [the defendant], not he's a c[unt], Cain is. And then Heath [the defendant] says, "I know, what's he done?" *(using a light tone when referring to the defendant and nasty tone for the reference to her)* And then **you** say something about, "He was stoned as fuck and he's a complete fuckin c[unt]-brain" is what **you** say.

This belittling passage of questioning leads to Chantal becoming so distressed that she sobs, pleads, yells and hyperventilates. The judge does not intervene despite this passage of questioning following shortly after Chantal has requested a break and been ignored. This lack of protective action, or any response at all, to either the sustained mocking from defence counsel or Chantal's high levels of distress compounds the sense of the court being stone-deaf to Chantal's social reality, as well as her evidence and needs. Like a quarter of the trials (see McDonald, 2020: 62), there was barely any interaction with the complainant by the judge. Indeed, listening to *R v Walters* is a palpable experience of system and social abandonment. In the context of the defence theory of the case, the judge's avoidance of communication with Chantal feels to me like punishment – 'just deserts' – for failing to obey the rules of patriarchy.

In the same passage of questioning in *R v Walters*, defence counsel derisively denotes Chantal's youth by associating her with the 'social media generation', saying: '**You** could have just blocked him, **you** know, all **you** young ones know all about this Facebook stuff, you could have just blocked him…but **you** didn't' (McDonald, 2020: 213). Across the trials, social media—all that 'Facebook stuff' – is connected to the youth of complainants and used to other them through contrast with the formality and legitimacy of the courtroom setting. Social media use functions as a gendered and generational stereotype that patronises complainants and discredits them as deserving of the court's respect. For instance, some complainants are asked to interpret common social media acronyms such as LMAO, OMG or WTF (McDonald, 2020: 85) or explain the meaning of emoticons or emojis. Some defence counsel ask them to do so repeatedly, forcing them to repeat the obscenities and sexual innuendo contained within them. As with the use of words to describe genitalia and sex acts, this associates complainants with the slang and obscenities of social media, marking them out as other to the formal adult world of the courtroom.

This impugning practice is often combined in cross-examination with ridiculing speech practices to further suggest the unbelievability of complainant evidence. For instance, defence counsel in *R v Carter* uses a tone of incredulity and disbelief to discredit Theresa Bush's attempt to refute the meanings defence draw from her social media interactions with the defendant. Theresa is thus othered, her own understandings of social media use and interactions warped by the defence's narrative of conventional gender norms and hegemonic heterosexual scripts (McDonald, 2020: 86):

> Q: And the first text has a kiss at the end of it from you doesn't it?
>
> A: Yes, it does.
>
> …

Q: Okay so you don't agree that throughout the texts this is someone who wants to go out with you?

A: I didn't know.

Q: Okay, you're just blind to it?

A: Well I always send smiley faces and "X"s to all my friends.

Discussion

Listening to the sounds, sobs and silences expressed by these complainants – as well as the malicious style of some defence counsel – was an exceptionally gruelling experience. All researchers on the study were familiar with the experiences of victims of violence, yet we all found it extremely challenging. It was desolate. It was, as Pia van de Zandt said of listening in the *Heroines of Fortitude* study, an experience of witnessing 'ritualised degradation' (van der Zandt, 1998). I was particularly affected by the oppressiveness of cross-examination. While I knew what to expect of cross-examination in form, the felt experience of the coercion and phenomenological violation of complainants being forced to speak only to have their words refused, dismissed and reframed, was deeply confronting. Although it is possible to discern some of how silencing practices operate in the courtroom by reading transcripts, listening for expression illuminates the additional emotional, relational and structural dynamics that contribute to the experience of degradation and dehumanisation that many rape complainants describe. Feminist listening, and thus explicitly seeking to hear what is deemed irrelevant to the functions of adversarial criminal trials, renders it unsurprising that despite years of reform to evidence and procedure, complainants still describe their experience as 'pure evil' (Boyer et al., 2018: 80).

I suggest that these experiences remain destructive because rape complainants are subject to 'ethical loneliness' (Stauffer, 2015). Ethical loneliness is, Stauffer argues, the 'double abandonment' of firstly having been unjustly treated or violated and then having those who have the power to help – including by listening and bearing witness – refuse to do so. This produces a loneliness more profound than the sense of isolation that might be inferred from complainant reports of being bewildered by their lack of representation or feeling like 'just a witness' at trial. Stauffer argues that the condition of ethical loneliness is a *social* abandonment. Our selves are formed intersubjectively, she contends, for without the other we are 'riveted to [our] own existential solitude' (Stauffer, 2015: 26) and desiring escape through the presence of others. Listening after violence is then a relational task that can address the social violation of a double abandonment; but, in its failure, selves and social worlds can be destroyed (Brison, 2023; Stauffer, 2015: 25).

Rape is both a personal violation and a fundamental breach of social belonging (Brison, 2023) – the 'first' abandonment. Being silenced, going unheard and having one's social reality mocked and dismissed in a justice process doubles the abandonment that rape begets. The societal refusal to help compounds the harm. But this harm is not, in Stauffer's conceptualisation, a re-ignition of trauma in the psychological sense. Rather it

is phenomenological; a harm that can destroy the subject because it profoundly demonstrates that the sovereignty of the self depends upon social institutions to ensure that others observe its boundaries (Stauffer, 2015: 27). Many of the complainants in this study demonstrated levels of distress that necessitated a response that dignified their sovereignty. Few received it. Stauffer's conceptualisation of ethical loneliness articulates the oppressive conditions and desolation that I heard and felt in these moments and practices, in a way, I suggest, that conceptualisations of 're-traumatisation' at trial do not. This is not to suggest that the psychological distress triggered by events and feelings in court that replicate the trauma of rape is not occurring; both experiences may co-exist (Swemmer, 2019: 302). Rather, ethical loneliness articulates the phenomenological experience of conscious self-awareness of social abandonment 'as a harm that comes close to destroying the self in so far as it disfigures and destroys the image of the world that has functioned as an internal vector for action throughout a person's lifetime' (Swemmer, 2019; Urquiza-Haas, 2018: 116). It matters, I suggest, because it forces us to confront the ethicality of cross-examination technique in rape trials in which credibility challenges to complainants are so pivotal, and the social, collective responsibility to safeguard victims against the phenomenological violation of coerced silencing.

What are we to do? Many aspects of evidence and trial procedure have been reformed since the 1996 *Heroines of Fortitude* study. Evidential rules founded on stereotyped beliefs about the credibility of rape victims – such as corroboration, recent complaint and sexual history – have been improved in most common law jurisdictions. In the courtroom, supports such as alternative ways of giving evidence are now generally accessible to complainants. There is some evidence these initiatives are improving the experience of complainants (Allison and Boyer, 2019; Boyer et al., 2018) and are important measures to reduce harm to complainants. Nonetheless, it is disturbing that several problems identified in the *Heroines of Fortitude* report (Department for Women, 1996), including a lack of voice amplification for witnesses and reduction of questioning that requires the naming of genitalia and sex acts, remain unremedied.

The larger study on which this article is based has provided research evidence to support further reform of trial procedure in Aotearoa/New Zealand. Psycho-social court support services for victims of sexual violence have recently been formalised and made available nationwide (Benton-Greig et al., 2024). The Sexual Violence Legislation Act (NZ) 2021 has expanded alternative modes of evidence for complainants to include video pre-recording of a complainant's full evidence before trial for playing at trial, and the expansion of restrictions on sexual history evidence. The Act requires that judges intervene in questioning they consider to be unacceptable and give juries directions to address common misconceptions about rape relevant to the case – such as false complaints, the types of relationships in which sexual offending occurs, the use of force, the meaning of victim dress or signs of distress (Te Kura Kaiwhakawa, 2023). These reforms have been accompanied by better practice initiatives across police, judiciary and counsel, including educational fora with defence counsel encouraging reduced reliance on rape myth in cross-examination. The impact of these changes is not yet known, but the intention is that they reduce trauma to complainants and the likelihood of illegitimate reasoning by fact-finders.

Yet even if these initiatives are as effective as hoped, will that be enough to counter the oppression and degradation of being forced to speak and then subject to the highly cultivated multi-layered practices of silencing that instantiate a systematic refusal to hear rape complainants? Taking account of the 'ethical loneliness' that complainants are suffering suggests that a collective, social listening is also necessary. Perhaps appropriately modified versions of court observation programmes that exist in some jurisdictions could address that phenomenological harm and increase transparency of rape trial practice (see Durham et al., 2017; Kennedy 2021). For example, the WISE programme in New Hampshire supports community members to attend court to bear witness and offer solidarity in proceedings involving victims of domestic violence (WISEuv.org). The US National Family Court Watch Project participates as a 'quiet observer' in family court proceedings and publicly reports on practical, procedural and due process matters and barriers to participation for witnesses and parties such as language, vision, and hearing problems (nationalfamilycourtwatchproject.org). In a format appropriately modified for rape trials, informed lay observers could offer social listening and witnessing that is not predicated on an adversarial battle of truths, and which, through public scrutiny and reporting could 'nudge' practice and encourage accountability.

This may go some way toward reducing the double abandonment of being a rape complainant. Yet at the heart of the problem is questioning practice, especially cross-examination, an aspect of trial procedure that has had relatively little reform. While always intended to challenge the credibility and reliability of witness evidence, as this article illuminates, in sexual offence trials cross-examination is used to impugn, belittle, ridicule, shame and other complainants. The research study demonstrates that despite much reform over decades to a wide range of procedural aspects of rape trials, giving evidence as a complainant remains as described by High Court Justice Thomas in 1994: 'There can be no justice in a practice which brutalises the victim of a crime in a way which is repugnant to all civilised persons. It is inexplicable that the practice can be tolerated with such equanimity' (Thomas, 1994). Elaine Craig (2018) has demonstrated how cross-examination in rape trials can be made more ethical and less harmful within the adversarial trial system and without jeopardising the rights of the accused. She argues that reform begins with a reconfiguration of the ethics associated with criminal defence lawyering (see also McDonald (2020) on further procedural reform). I suggest that bringing Stauffer's theory of ethical loneliness to an examination of the silencing practices deployed in these rape trials brings a focus to the ethical and social dimensions of complainant re-victimisation at trial illuminating the need to make an ethical account of questioning practice in rape trials.

Conclusion

In this article, I have endeavoured to listen to rape complainants. Narratives of rape are increasingly visible in Western culture, though they remain heavily policed (McKenzie-Mohr and LaFrance, 2011; Daly 2022; Smith 2018). However, they are rarely heard in the form of evidence as elicited in the (non-fictional) courtroom. Unprecedented access to audio recordings of complainants giving their evidence allowed us to listen to and analyse 30 such instances and produce a wide range of

recommendations for reform of trial process (McDonald, 2020). In this article, I have turned my feminist ear to them to examine the incompatibility between viva voce evidence and listening in the courtroom, the deployment of rape myths and gendered stereotypes to smother the testimony of rape victims, and the tension between the ritualistic formality of the courtroom and the social realities of young women.

Drawing upon the sounds and silences expressed by complainants, I have marshalled a range of instantiations of complainants being silenced and misheard, and their words refused, dismissed and reframed to identify three patterned practices of silencing in the courtroom. Firstly, I explored the material impossibilities of being heard – 'speak up!' – when testifying about being raped, including the deprioritisation of complainant comfort over the collection of evidence. Secondly, I presented manifestations of complainants being coercively silenced during questioning and drew attention to the paradox of being subject to conditions of forced speech and yet being prevented from being heard and listened to. Thirdly, I showed how young women's realities are made unhearable in the courtroom through defence counsel use of insolent and imperious speech practices. Read together in this way, it is clear that not only is it difficult for women victims to give voice and be heard in the courtroom, but that it is the goal.

I argue that this results in not just procedural and personal harms to complainants but also the phenomenological, ethical and social harm of 'ethical loneliness' (Stauffer, 2015); a double abandonment in which the institution that is meant to hear and care in response to harm, forces speech under the guise of listening, and then fails to respond and to protect. Listening has been present as both method and subject of analysis in this article. It is also a necessary response to the social violation of rape and the courtroom harm of ethical loneliness. I have suggested that in-court observation programmes that bear witness and scrutinise practice be considered as a way to offer social listening and validation to rape complainants, reducing the secondary harms imposed upon them. I have also suggested that the practices of rape trial cross-examination and their ethical premises need close examination and reform.

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Author's note

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ORCID iD


Paulette Benton-Greig https://orcid.org/0000-0001-9758-1750

Notes

1. All apparently identifying information in quoted content is fictional. Annotations added from the audio recording to the transcript are in italics inside parentheses. Bolded words indicate speaker emphasis. Non-italicised words inside parentheses are original. Words in brackets are author-added explanatory comment.
2. The prosecutor has previously asked Yasmin to comment on the defendant's statement to the police on this point.

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